

IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott C.J.M., Twaddle and Steel J.J.A.

B E T W E E N:

THE ST. VITAL SCHOOL DIVISION)	E. B. Eva
NO. 6)	<i>for the Appellant</i>
<i>(Applicant) Appellant</i>)	
)	M. G. Finlayson
)	<i>for the Respondent</i>
- and -)	
)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
)	October 12, 2001
JEFFREY OLIVER TRNKA)	
)	<i>Written reasons:</i>
<i>(Respondent) Respondent</i>)	October 18, 2001

STEEL J.A.

1 This is an appeal from an order of Justice Darichuk where he set aside his own previous order extending time under Part II of *The Limitation of Actions Act*, R.S.M. 1987, c. L150.

2 The previous order had been obtained by the applicant without notice. Applying for an order without notice places upon an applicant a heavy onus for full, frank and complete disclosure of all material facts. Failure to do so is in itself sufficient ground for the setting aside of any order so obtained regardless of the merits of the matter (Q.B. Rule 39.01(6)).

3 This principle has been applied many times by our court. See, for example, *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers et al.* (1977), 80 D.L.R. (3d) 634, and *Pulse Microsystems Ltd. et al. v. Safesoft Systems Inc. et al.* (1996), 110 Man.R. (2d) 163.

4 Upon production of the adjuster's file, it appeared that, in the motions judge's opinion, a material fact was not disclosed by the applicant on the original application. He found that there was merit to the argument of the respondent that given the document subsequently produced, it appeared that the evidence contained in the adjuster's original affidavit was either "deliberately or recklessly untruthful." Consequently, the motions judge set aside his own order. In so doing, he exercised his discretion and we see no grounds to interfere with the proper exercise of that discretion.

5 As well, he awarded solicitor-client costs. The award of such costs is an unusual occurrence. However, it is important to emphasize the need for complete disclosure of material facts on a without-notice application. As noted by Justice Philp in the case of *Pulse Microsystems Ltd.*, among other purposes served, an award of solicitor-client costs will act "as a reminder to other plaintiffs of the complete candour which must accompany such an application" (at para. 41).

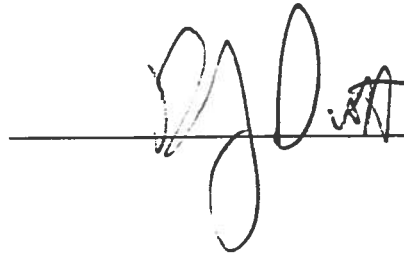
6 Clearly, the judge who made and set aside the original order is in the best position to assess the proper scale of costs applicable with respect to the efforts to set aside that order. His decision to award solicitor-client

costs was within his discretion and we see no justification for interference. Indeed, in the circumstances, we are of the opinion that our order of costs should follow those of the motions judge and be awarded on a solicitor-client basis as well.

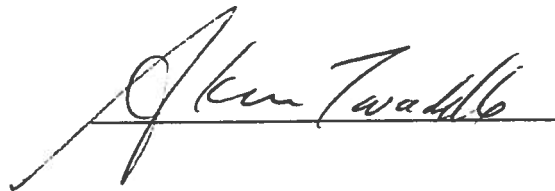
7 The appeal is dismissed.

 _____ J.A.

I Agree:

 _____ C.J.M.

I Agree:

 _____ J.A.