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Case Name:  
**Lalite v. Jin**

**Between**  
**Lalite et al. (Plaintiff), and**  
**Kahng Won Jin et al. (Defendant)**

[2008] O.J. No. 3495

Court File No. 04-CV-270034CM2

Ontario Superior Court of Justice

**C.L. Campbell J.**

Heard: July 24, 2008.  
Judgment: August 27, 2008.

(11 paras.)

**Counsel:**

*Peter Clyne* for the Plaintiff Lalite.

*Laura Wright*, for Boateng.

*Kevin Adams, Marie Hynes* for the Third Party Aviva.

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**ENDORSEMENT**

**1 C.L. CAMPBELL J.:**-- The motion before the Court is brought by the statutory third party to dismiss the action because there is no genuine issue for trial. The motion is resisted on behalf of the Plaintiffs on the basis that as a result of a determination by the Workplace Safety & Insurance Appeals Tribunal ("WSIAT" or "the Tribunal"), there is at the very least doubt as to whether or not the right has been taken away and that the decision that has been made by the Tribunal would point to the right to sue existing.

**2** During the course of submissions, it became apparent that there is an issue that is or should have been resolved before the Tribunal.

**3** Counsel are agreed on the following issues:

1. The determination as to whether or not a right to sue has been taken away is a matter within the exclusive jurisdiction of the Tribunal.
2. There has been a final determination by the Tribunal that the dependents of the two deceased are not entitled to pursue benefits under the statute.
3. The claims of the dependents in this action are derivative of any rights the deceased would have *had* to sue as a result of the operation of the *Family Law Act*.

**4** When the Tribunal issued its decision that the deceased were workers employed for the purposes of the *Workplace Safety Act*, it also held that the family members were not dependents of the deceased for purposes that would support their right to benefits under the Act. As a result, their rights of action are not taken away.

**5** Counsel for Aviva sought Reconsideration/Clarification by the Tribunal, in particular as to whether or not the rights of action of the deceased are taken away. By letter dated July 8, 2008 the WSIAT refused to address the issues raised by Aviva, finding that the request was late for what was in substance a reconsideration request.

**6** The dilemma in which the parties find themselves is this: they do not have a clear and definitive determination from WSIAT as to whether or not the right to sue by the deceased has been taken away and both sides agree that the Tribunal is the appropriate forum for that determination.

**7** Both sides also agree that this Court is not the appropriate forum for determination of that right. In *Daiver v. United Lumber & Building Supplies Co.*, [2008] O.J. No. 1618 (S.C.), Madam Justice Allen dismissed a motion for summary judgment on the basis that it would not be appropriate for the Court to determine such a substantive issue of law and procedure on motion. I agree.

**8** A determination by way of summary judgment motion in this case does not really assist either side, given that the root of the problem is the non-determination by the Tribunal.

**9** I appreciate the need on the part of the Tribunal for procedural efficiency. However, this should not trump the rights of the parties to know where they stand.

**10** This Court on this motion is not in a position to direct the Tribunal to do what perhaps should have been done before. If there is such a right in the nature of *mandamus*, this can only be granted by the Divisional Court on a motion for judicial review of the Tribunal's decision.

**11** Counsel were agreed that a judicial review might be the most expeditious method of moving this matter forward. As a result, the motion for summary judgment is adjourned to a

date to be fixed at a 9:00 a.m. appointment, if necessary, to permit either side as advised to pursue judicial review on the nature of *mandamus*.

C.L. CAMPBELL J.

cp/e/qlaxs/qlkb