NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT
OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER
CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW
CREEK COAL CORP., NEW WOLVERINE COAL CORP., AND CAMBRIAN
ENERGYBUILD HOLDINGS ULC

PETITIONERS

BRIEF OF AUTHORITIES OF THE PETITIONERS

(RE: WALTER CANADA GROUP'S SUMMARY HEARING - REPLY)

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PETITIONERS

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2014 BCSC 1155
British Columbia Supreme Court

603262 B.C. Ltd. v. Eiyom Properties Ltd.

2014 CarswellBC 1835, 2014 BCSC 1155, [2014] B.C.W.L.D. 5603, 241 A.C.W.S. (3d) 317

603262 B.C. Ltd., Gordon Glen Felske and Clara Maxine Felske, Plaintiffs and Eiyom Properties Ltd., Defendant and Barry M. Potter and B.M. Potter Consultants Ltd., Third Parties

G.R.J. Gaul J.

Heard: July 27, 2011; July 28, 2011
Judgment: June 24, 2014
Docket: Cranbrook 14592

Counsel: A.N. MacKay, for Plaintiffs
L.G. Schafer, for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XVI Disposition without trial
XVI.4 Dismissal for delay
XVI.4.g Application

Headnote

Civil practice and procedure --- Disposition without trial — Dismissal for delay — Application — Evidence

Plaintiffs sued defendant for, amongst other things, breach of contract in relation to development of parcel of waterfront property — Defendant brought application to dismiss for want of prosecution — After submissions on dismissal application had concluded, one of defendant's authorized representatives was cross-examined on affidavit he had filed in separate but related action between parties — During cross-examination, representative confirmed that audio recordings had been made of various meetings where members of defendant's board of directors or executive committee as well as certain plaintiff had been present — Efforts to locate audio recordings yielded no positive results — Plaintiffs brought application to adduce fresh evidence on dismissal application — Application granted — Decision in dismissal application had yet to be made — Although submissions had been completed, matter had not been formally concluded — Fact that audio recordings once existed of conversations between parties and fact that those recordings were not disclosed to plaintiffs at outset of litigation were appropriate facts to consider when deciding defendant's dismissal application — Fresh evidence could not have been introduced during original submissions on dismissal application because it was not known until after those submissions had been concluded — While no unfairness was seen to defendant or its case in allowing fresh evidence to be introduced on dismissal application, excluding evidence from consideration would be unfair to plaintiffs and risk creating avoidable injustice.

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Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 22-2(12) — considered

R. 22-2(13) — considered

R. 22-4(5) — referred to

APPLICATION by plaintiffs to adduce fresh evidence on certain application.

***G.R.J. Gaul J.*:**

Introduction

1 In May 2004, the plaintiffs sued the defendant ("Eiyom") for, amongst other things, breach of contract in relation to the development of a 30-acre parcel of waterfront property near Cranbrook, B.C.

2 In August 2010, Eiyom sought an order pursuant to 22-4(5) of the *Supreme Court Civil Rules*, dismissing for want of prosecution the plaintiffs' action (the "Dismissal Application"). The hearing of the Dismissal Application took place over the course of five months, from December 2010 to April 2011.

3 In late April 2011, and after submissions on the Dismissal Application had concluded, one of Eiyom's authorized representatives, Mr. Spenser Mellor, was cross-examined on an affidavit he had filed in a separate but related action between the parties. During the cross-examination, Mr. Mellor confirmed that audio recordings had been made of various meetings where members of Eiyom's Board of Directors or executive committee as well as the plaintiff Mr. Felske had been present.

4 Since April 2011, efforts have been made to locate the audio recordings; however, those efforts have yielded no positive results.

5 In June 2011, the plaintiffs filed the present application seeking leave to adduce fresh evidence and to make additional argument on the Dismissal Application. Counsel for the plaintiffs specified during her oral submissions that the additional evidence the plaintiffs wished the court to consider was the existence of undisclosed audio recordings of "core conversations" between the parties in this litigation (the "Fresh Evidence").

Issues

6 In these reasons I will address the following two issues:

a) the admissibility of certain impugned portions of an affidavit the defendant seeks to rely upon; and

b) whether I should admit and consider the Fresh Evidence on the Dismissal Application and if so, then are submissions necessary.

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Discussion

Objections to Eiyom's Affidavit Evidence

7 Affidavit #6 of Mr. Mellor, sworn 10 May 2011, was filed by Eiyom in opposition to this application (the "Mellor Affidavit #6"). The plaintiffs have raised 31 objections to the affidavit, arguing it contains portions that are:

a) Argumentative;

b) Hearsay / unattributed hearsay;

c) Impermissible character attack;

d) Improper summary; and or

e) Improper attempts to bolster the affiant's credibility.

8 Rule 22-2(12) and (13) govern the content of affidavits:

(12) Subject to subrule (13), an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial.

(13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if

(a) the source of the information and belief is given, and

(b) the affidavit is made

(i) in respect of an application that does not seek a final order, or

(ii) by leave of the court under Rule 12-5(71)(a) or 22-1(4)(e).

9 I agree with plaintiffs' counsel that paragraphs 5 and 6 of the Mellor Affidavit #6 are argumentative and add nothing of value to the resolution of the present application. Those paragraphs are therefore inadmissible.

10 Moreover, I accept that paragraph 12 of the affidavit contains hearsay and is therefore inadmissible. The remainder of the paragraphs that are said to contain hearsay and or unattributed hearsay are, in my view, admissible on account of Mr. Mellor being the authorized representative of a corporate defendant who is giving evidence on its behalf. I also note that where Mr. Mellor's evidence is said to be on information and belief, supplementary affidavits by those who informed him have been filed. In my view, any unattributed hearsay deficiencies that may have existed were rectified by these additional affidavits.

11 I find no impermissible character attacks or improper attempts to bolster the affiant's credibility within the Mellor Affidavit #6; nor do I find the summaries of the evidence he gave on cross-examination to be objectionable, given that Mr. Mellor is providing evidence on behalf of a corporate defendant. The objections based upon these two grounds are overruled.

12 Aside from paragraphs 5, 6 and 12, the balance of the Mellor Affidavit #6 is admissible on this application.

Adducing the Fresh Evidence

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13 Counsel for the plaintiffs has argued the Fresh Evidence issue and counsel for the defendant has responded to it as if it were analogous to an application to re-open a trial after judgment. In doing so counsel have referred to two case authorities that touch upon such an application.

14 In *Zhu v. Li*, 2007 BCSC 1467 (B.C. S.C.), Ehrcke J. rendered judgment after a four-week family law trial. Prior to a formal order being entered, the plaintiff applied to re-open the trial so that he could adduce additional evidence and make further submissions. Justice Ehrcke denied the application and in doing so he reviewed the relevant jurisprudence and concluded:

> [20] From the cases, I conclude that the following principles apply to an application to re-open a trial to adduce fresh evidence:
>
> > 1. Prior to the entry of the formal order, a trial judge has a wide discretion to re-open the trial to hear new evidence.
> >
> > 2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and abuse of the court's process.
> >
> > 3. The onus is on the applicant to show first that a miscarriage of justice would probably occur if the trial is not re-opened and second that the new evidence would probably change the result.
> >
> > 4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.
> >
> > 5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.

15 In *Sauer v. Scales*, 2010 BCSC 983 (B.C. S.C.), Cohen J. granted judgment in a personal injury case. Prior to the formal order of the court being entered the plaintiff sought to re-open the trial and introduce further evidence. In allowing the application in part, Justice Cohen synthesized the applicable test as follows

> [13] Where a plaintiff can prove, on a balance of probabilities, that a miscarriage of justice would probably occur without the hearing of new evidence and that the evidence would probably have an important influence on the result, a judge may exercise their discretion to admit the evidence: *Vance v. Vance* (1981), 34 B.C.L.R. 209, [1982] 2 W.W.R. 472 (S.C.); *Blue Meadows Estates Ltd. v. Zipursky* (1978), 7 C.P.C. 51 (B.C.S.C.). The fundamental consideration is whether a miscarriage of justice would occur if the new evidence was not heard: see *Bell v. Bell*, 2001 BCCA 148, 153 B.C.A.C. 10, and *Stevens v. Plachta*, 2006 BCCA 479, 58 B.C.L.R. (4th) 69.

16 While the principles articulated in *Zhu* and *Sauer* are of assistance on this application, the present situation has one particular feature that distinguishes it from these two cases: a decision in the Dismissal Application has yet to be made. In other words, although submissions have been completed, the matter has not been formally concluded. In that light, I see the plaintiffs' application not as one to "re-open" the hearing of the Dismissal Application, but one permitting it to submit supplemental evidence and argument on the unresolved application.

17 In my view, the present situation is less onerous on the plaintiffs than it would be if a decision had already been delivered on the Dismissal Application. While on the one hand there continues to be the need to guard against protracted hearing and to avoid having issues re-argued, on the other hand there is also the need to ensure fairness and to avoid a miscarriage of justice.

18 The plaintiffs say the Fresh Evidence was evidence that could not have been presented earlier, when submissions on the Dismissal Application were first made, for the plaintiffs did not know of it at the time. Moreover, the plaintiffs

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assert the new evidence is relevant and necessary to the Dismissal Application for it is evidence the court can consider when deciding whether the defendant has been prejudiced by any delay in having the plaintiffs' claim prosecuted and whether the balance of justice requires the action to be dismissed.

19 The defendant argues the persuasive evidence on this application points to the fact that the audio recordings are no longer extant. Moreover the defendant asserts the fact that the recordings existed at one time and the fact that they were not disclosed or listed on either of its list of documents in the litigation is irrelevant and non-material to the issues before the court on the Dismissal Application.

20 I do not find it necessary to determine on this application what has happened to the audio recordings or why they were not listed on the defendant's list of documents. Those may be issues to be determined at a later date, but for now I am persuaded by the arguments of the plaintiffs that the simple fact that audio recordings once existed of conversations between the parties and the fact that those recordings were not disclosed to the plaintiffs at the outset of the litigation are appropriate facts to consider when deciding the defendant's Dismissal Application.

21 In summary, the Fresh Evidence could not have been introduced during the original submissions on the Dismissal Application because it was not known until after those submissions had been concluded. Had the evidence been known at the time of the original submissions, then the plaintiffs would have been well within their rights to lead it on the Dismissal Application. While I see no unfairness to the defendant or its case in allowing the Fresh Evidence to be introduced on the Dismissal Application, excluding the evidence from consideration would in my view be unfair to the plaintiffs and risk creating an avoidable injustice.

Order

22 The plaintiffs' application to adduce the Fresh Evidence on the Dismissal Application is granted. As there have been comprehensive written and oral submissions made with respect to the Fresh Evidence, I do not need further submissions from either counsel.

Application granted.

End of Document

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Most Negative Treatment: Distinguished
Most Recent Distinguished: R. (S.E.) v. Calgary (City) Police Service | 2010 ABQB 406, 2010 CarswellAlta 1315, 498 N.R. 217, 498 A.R. 217, 191 A.C.W.S. (3d) 274, 35 Alta. L.R. (5th) 315, [2010] A.W.L.D. 5059, [2010] A.W.L.D. 5064, [2010] A.W.L.D. 5066 | (Alta. Master, Jun 16, 2010)

1999 ABQB 185
Alberta Court of Queen's Bench

Aberta Treasury Branches

1999 CarswellAlta 212, 1999 ABQB 185, [1999] A.J. No. 258, 234 A.R. 201

Alberta Treasury Branches, Plaintiff and Elmer Leahy, Defendant and Nader Ghermezian, Raphael Ghermezian, Bahman Ghermezian, Eskander Ghermezian, 273905 Alberta Ltd., Howard Anson, Mavis Halliday, 218703 Alberta Ltd., 579511 Alberta Ltd., 298936 Alberta Ltd., West Edmonton Mall Property Inc., WEM Holdings Inc., WEM Management Inc., Avista Financial Corporation, 298926 Alberta Ltd., ABNR Equities Corp. and Devcor Investment Corporation, Defendants by Order

Mason J.

Judgment: March 12, 1999
Docket: Calgary 9701-03767

Counsel: *C.D. O'Brien, Q.C.*, *E.B. Mellet* and *C. Simard*, for WEM Applicants.
J.T. Prowse, *T.F. Mayson* and *H.L. Treacy*, for Plaintiff.
F.D. Cook, for Defendant.

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XIV Practice on interlocutory motions and applications
XIV.7 Evidence on motions and applications
XIV.7.a Use of affidavit evidence
XIV.7.a.ii Miscellaneous

Civil practice and procedure

XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.a Res judicata
XXII.23.a.iv Finality of judgment or order
XXII.23.a.iv.B Interlocutory judgments or orders

Headnote

Practice --- Practice on interlocutory motions and applications — Evidence on motions and applications — Use of affidavit evidence — General

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Plaintiff brought action against defendant L for damages for breach of fiduciary duty — Plaintiff brought further action against L, defendant applicants and two corporations allegedly controlled by L for damages on ground that applicants caused bribes to be paid to L in order to influence him to cause plaintiff to make improvident loans relating to applicants — Defendants brought application to set aside series of ex parte orders directing several financial institutions in U.S., Canada and Israel to provide copies of documents to plaintiff — Plaintiff filed cross-application for declaration that ex parte orders were properly granted — Defendants applied for order striking out all or portions of affidavit filed by plaintiff in support of cross-application on ground that affidavit was based on hearsay and that it contained inappropriate opinion and argument — Application granted in part — Majority of limited portions of affidavit that were based on information and belief were necessary and reliable and therefore admissible — Portions of affidavit which contained inadmissible opinion and argument were struck — Although deponent joined plaintiff after transactions in question occurred, deponent carefully reviewed documents to make her sworn statement — Deponent had necessary background experience and employment responsibilities which allowed her to review and describe plaintiff's documents with sufficient scope in which to set out plaintiff's position based on those documents — Rule 305 of Alberta Rules of Court governing affidavits of officer of corporation is subject to common law hearsay exceptions — Impractical and inconvenient to require plaintiff to have each employee and former employee involved in subject transactions take affidavits — Exhibits to affidavit provided necessary direct evidence — Not improper for assertions of fact in affidavit to be placed in explanatory or narrative context in order to assist court in understanding relevance of particular fact and relationship between facts — Some of deponent's opinions were largely not in regard to matters within realm of common experience — Deponent's opinions regarding commercial reasonableness, normal or typical commercial terms and prudent lending practices must involve knowledge from properly qualified expert — Alberta Rules of Court, Alta. Reg. 390/68, R. 305.

Practice --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Finality of judgment or order — Interlocutory judgments or orders

Plaintiff brought action against defendant L for damages for breach of fiduciary duty — Plaintiff brought further action against L, defendant applicants and two corporations allegedly controlled by L for damages on ground that applicants caused bribes to be paid to L in order to influence him to cause plaintiff to make improvident loans relating to applicants — Defendants brought application to set aside series of ex parte orders directing several financial institutions in U.S., Canada and Israel to provide copies of documents to plaintiff — Plaintiff filed cross-application for declaration that ex parte orders were properly granted — Defendants applied for order striking out all or portions of affidavit filed by plaintiff in support of cross-application on ground that affidavit was based on hearsay and that it contained inappropriate opinion and argument — Application granted in part — Setting aside and cross applications were final orders insofar as they involved non-party financial institutions — Ex parte orders finally disposed of issue of production of documents between plaintiff and non-parties — Plaintiff's right of production of evidence from non-parties was clearly matter of final nature because orders determined finally rights of plaintiff in seeking production and rights of non-parties.

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Statutes considered:

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s. 8 — considered

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R. 305(1) — considered

R. 305(2) — considered

R. 305(3) — considered

R. 307 — considered

APPLICATION by defendants for order striking out all or portions of affidavit filed by plaintiff.

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***The Honourable Mr. Justice D.B. Mason*:**

Introduction

1 This is an application on behalf of Nader Ghermezian, Raphael Ghermezian, Bahman Ghermezian, Eskander Ghermezian, 273905 Alberta Ltd., Howard Anson, Mavis Halliday, 218703 Alberta Ltd., 579511 Alberta Ltd., 298936 Alberta Ltd., West Edmonton Mall Property Inc., WEM Holdings Inc., WEM Management Inc., Avista Financial Corporation, 298926 Alberta Ltd., ABNR Equities Corp., and Devcor Investment Corporation (collectively, the "WEM Applicants") pursuant to Rule 305 and the inherent jurisdiction of the court, to strike out all or portions of the affidavit of Paulina Hiebert ("Hiebert") sworn December 9, 1998 and filed December 10, 1998 (the "Hiebert Affidavit"). In the alternative, the WEM Applicants seek a direction from the court as to the appropriate use and consideration of the Hiebert Affidavit on the pending motion of the WEM Applicants to, *inter alia*, set aside the *ex parte* orders granted in this action from March 11, 1997 to May 12, 1998 (the "Setting Aside Application").

2 The WEM Applicants had also applied to strike out all or portions of the Hiebert Affidavit pursuant to Rule 307, which permits the court to strike out of any affidavit "any matter which is scandalous, irrelevant or otherwise oppressive". Alberta Treasury Branches ("ATB") submitted that application be heard with the Setting Aside Application and I made that direction after hearing argument from counsel to each of the WEM Applicants and ATB.

3 In this application the WEM Applicants object to the Hiebert Affidavit on the following grounds:

1. The applications for which the Hiebert Affidavit is tendered in support are final, yet it is based on hearsay, contrary to Rule 305(1); and

2. The Hiebert Affidavit contains inappropriate opinion and argument.

4 ATB's position is that:

1. The Setting Aside and Cross Applications are interlocutory, not final and in any case Hiebert has personal knowledge of the matters she deposes to;

2. Even if Hiebert does not have personal knowledge, the documents exhibited to the Hiebert Affidavit and other material before the court provide admissible evidence;

3. The opinions given in the Hiebert Affidavit are permissible and the affidavit is not "argumentative".

5 The defendant Leahy filed a similar motion to the WEM Applicants but did not file written submissions. Counsel for Leahy attended at the motion and advised the court that Leahy supported the WEM Applicants' position.

Authorities

For the WEM Applicants:

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4. ***R. v. A & A Jewellers Ltd.*** (1977), [1978] 1 F.C. 479 (Fed. T.D.)

5. ***Air Canada v. Maley*** (1976), 69 D.L.R. (3d) 180 (Fed. T.D.)

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8. ***Diamond v. Western Realty Co.***, [1924] S.C.R. 308 (S.C.C.)

9. ***Halbert v. Netherlands Investment Co. of Canada Ltd.***, [1945] S.C.R. 329 (S.C.C.)

10. ***Gilbert v. Endean*** (1878), 9 Ch. D. 259 (Eng. C.A.)

11. ***Smerchanski v. Lewis*** (1980), 30 O.R. (2d) 370 (Ont. C.A.)

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19. ***Bell Canada v. Canada (Human Rights Commission)*** (1990), 39 F.T.R. 97 (Fed. T.D.)

20. ***ExpressVu Inc. v. Nll Norsat International Inc.*** (March 10, 1997), Doc. T-1639-96 (Fed. T.D.)

21. ***Assn. of Registered Nurses (Alberta) v. Keizer*** (1994), 22 Alta. L.R. (3d) 440 (Alta. Q.B.)

22. ***College of Dental Surgeons (British Columbia) v. Cleland*** (1968), 66 W.W.R. 499 (B.C. C.A.)

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24. ***B.C.G.E.U., Re*** (1998), 53 D.L.R. (4th) 1 (S.C.C.)

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26. ***May & Baker (Canada) Ltd. v. "Oak" (The)*** (1978), 89 D.L.R. (3d) 692 (Fed. C.A.)

27. ***Goodman v. Rossi*** (1995), 12 C.C.E.L. (2d) 105 (Ont. C.A.)

28. ***R. v. Stillman*** (1997), 113 C.C.C. (3d) 321 (S.C.C.)

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36. ***Griffin Steel Foundries Ltd. v. C.A.I.M.A.W.*** (1977), [1978] 1 W.W.R. 35 (Man. C.A.)

37. ***South Trail Mobile Ltd. v. Acme Towing & Trailer Hauling Ltd.*** (1972), [1973] 6 W.W.R. 193 (Alta. C.A.)

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39. ***Pulse Microsystems Ltd. v. Safesoft Systems Inc.***, [1996] 6 W.W.R. 1 (Man. C.A.)

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4. ***Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft GmbH & Co. K.G.***, [1983] 1 W.L.R. 1412 (Eng. C.A.)

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11. ***Dunkeld Ranching Ltd. v. Banco Ambrosiano Holdings S.A.*** (1987), 85 A.R. 278 (Alta. C.A.)

12. ***Midcon Oil & Gas Co. v. New British Dominion Oil Co.***, [1958] S.C.R. 314 (S.C.C.)

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14. ***A v. C***, [1980] 2 All E.R. 347 (Eng. Q.B.)

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23. ***Advance Rumley Thresher Co. v. Laclair*** (1916), [1917] 1 W.W.R. 875 (Alta. C.A.)

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40. ***Hockin v. Bank of British Columbia*** (1989), 37 B.C.L.R. (2d) 139 (B.C. C.A.)

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42. ***Ontario Medical Assn. v. Miller*** (1976), 14 O.R. (2d) 468 (Ont. C.A.)

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44. ***Boston Law Book Co. v. Canada Law Book Co.*** (1918), 43 O.L.R. 233 (Ont. C.A.)

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49. ***R. v. Graat***, [1982] 2 S.C.R. 819 (S.C.C.)

50. ***Royal Bank v. W. Got & Associates-Electric Ltd.*** (1993), 10 Alta. L.R. (3d) 440 (Alta. Q.B.)

51. ***Red Deer College v. Nishioka*** (1985), 65 A.R. 190 (Alta Surr. Ct.)

52. ***Bank of British Columbia v. Turbo Resources Ltd.*** (1983), 27 Alta. L.R. (2d) 17 (Alta. C.A.)

53. ***Alpine Resources Ltd. v. Bowtex Resources Ltd.*** (1989), 66 Alta. L.R. (2d) 144 (Alta. Q.B.)

54. ***Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.*** (1991), 79 Alta. L.R. (2d) 1 (Alta. C.A.)

55. ***Roeske v. Senerius***, [1922] 2 W.W.R. 977 (Alta. C.A.)

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I. Background

6 This action was commenced by ATB on March 11, 1997 by Statement of Claim and subsequently amended on March 10 and May 12, 1998. The claim alleges, *inter alia*, that:

1. Until his retirement in June of 1994, the defendant Leahy occupied the most senior managerial position within ATB and as such owed fiduciary duties to ATB; and

2. That in breach of the fiduciary duties Leahy accepted bribes, the exact amounts of which are known only to Leahy, in order to use his influence to cause ATB to make loans to borrowers and enter into contracts and arrangements with borrowers.

In its prayer for relief, ATB requests, *inter alia*:

1. An accounting for the amount of the bribes which Leahy accepted;

2. Judgment against Leahy for the amount of the bribes; and

3. An order allowing ATB to trace and recover the bribes.

7 As noted above, the pending Setting Aside Application relates to a series of *ex parte* orders I granted between March 11, 1997 and May 12, 1998 (collectively, the "Ex Parte Orders") which, *inter alia*, directed several financial institutions in Canada, the United States and Israel to provide copies of documents to the solicitors for ATB and prohibited Leahy from dealing with monies or property which he received directly or indirectly from ATB customers, including, without limitation, automobiles and a $100,000 bank draft purchased from certain accounts. Appendix "A" to these reasons is a summary of the Ex Parte Orders.

8 On August 25, 1998, ATB commenced an action by Statement of Claim naming the WEM Applicants as defendants, along with Leahy and 2 corporations alleged to be controlled by Leahy (the "WEM Action"). That action alleges, *inter alia*, that one or more of the WEM Applicants caused bribes or secret commissions to be paid to Leahy in order to influence him to cause ATB to make improvident loans and arrangements relating to the WEM Applicants. ATB seeks to rescind the loan agreements relating to the WEM Applicants on the basis of the alleged bribery and alternatively seeks the appointment of a receiver-manager of West Edmonton Mall.

9 On November 17, 1998, the parties consented to an order directing the addition of the WEM Applicants as defendants in this action for the limited purpose of bringing the Setting Aside Application, which was also filed November 17, 1998.

10 On December 1, 1998, ATB filed a cross application for, *inter alia*, a declaration that the Ex Parte Orders were properly granted (the "Cross Application"). The Hiebert Affidavit was filed in response to the Setting Aside Application and in support of the Cross Application.

11 On December 23, 1998, the WEM Applicants filed this application to strike all or a portion of the Hiebert Affidavit. It is this application that is the subject of these reasons.

II. Issues

12 The issues on this motion are as follows:

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1. Are the Setting Aside and Cross Applications final or interlocutory within the meaning of Rule 305 of the Alberta Rules of Court?

2. Is the Hiebert Affidavit based on personal knowledge or alternatively, does it or other materials before the court otherwise contain admissible evidence?

3. Does the Hiebert Affidavit contain inappropriate opinion and argument?

13 Each of these issues are addressed in turn below. Attached as Appendix" B" to these reasons is a chart containing the text of the Hiebert Affidavit, which is referenced frequently below, together with the positions of the WEM Applicants and ATB on the impugned paragraphs.

III. Analysis

1. Nature of Setting Aside and Cross Applications - *Final or Interlocutory*

a. Positions of the parties

14 The WEM Applicants submit that the issues on the Setting Aside and Cross Applications are issues of a final rather than an interlocutory nature. The WEM Applicants therefore submit that Rule 305(3) does not apply and to the extent that the Hiebert Affidavit contains material not based on personal knowledge, it is improper and inadmissible. Rule 305(3) only permits affidavits containing statements of information and belief on interlocutory motions, provided the source and grounds of the belief are given. Applications resulting in final orders require compliance with Rule 305(1), which confines a deponent to the statement of facts within his or her knowledge.

15 Two grounds are given by the WEM Applicants to support their position. First, they submit that the relief sought by the Setting Aside and Cross Applications will finally determine substantive rights between ATB and themselves. Second, they submit that an order which finally determines the rights between a party to an action and a non-party is a final order. The WEM Applicants submit that their limited status in these proceedings for the purpose of challenging the Ex Parte Orders qualifies them as non-parties. Further, they submit that in any event the Ex Parte Orders were between ATB and non-parties, i.e., the various financial institutions who were ordered to produce documents and who did not resist compliance with the Ex Parte Orders.

16 With respect to the first ground, the Setting Aside Application not only seeks to set aside and vacate the Ex Parte Orders, but raises the following issues which the WEM Applicants submit are issues of a final nature between them and ATB:

(i) a declaration that the use of the information obtained pursuant to the Ex Parte Orders and its use to prosecute the WEM action was in breach of ATB's implied undertaking;

(ii) a direction that ATB be prohibited the use of material obtained pursuant to the Ex Parte Orders in any action other than the within action; and

(iii) a declaration that the rights of some of the WEM Applicants under Section 8 of the *Canadian Charter of Rights and Freedoms* have been infringed.

17 According to the WEM Applicants, these issues deal with substantive rights, and therefore require a final ruling subject to appeal. The WEM Applicants concede that as between ATB and Leahy, the matters may not be determined, but submit that the issues between ATB and WEM, as well as ATB and the various financial institutions who responded to the Ex Parte Orders will be finally resolved, subject to appeal.

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18 ATB submits that the Setting Aside and Cross Applications deal with the procedural machinery for the gathering and use of evidence and therefore the issues are interlocutory only. ATB submits that after these applications are decided, the merits of the action will remain to be determined and cannot be "final". ATB further submits that an order determining the rights of a non-party does not necessarily make such an order "final".

19 It is true that applications that are interlocutory in form may well be final in substance, depending upon the issues raised by the application and the parties involved.

20 It is therefore necessary to consider what the issues are, the nature of the application and order sought [1], the context in which the issues are raised and between whom those issues are raised, i.e. whether the issues arise between parties or between parties and non-parties, in order to define whether or not an application is interlocutory or final.

b. The Law

(i) Rights Finally Determined

21 The test to distinguish an interlocutory from a final matter was stated by Lord Alverstone, C.J. in the case of *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547 (Eng. C.A.) as follows:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order. (page 549)

This statement describes a simple straightforward test, yet its application in many instances is not nearly as simple. After reviewing all of the cited authorities presented by both sides on this application, I believe Morden A.C.J.O. got it right when he said:

> The application of the final/interlocutory distinction continues to bedevil counsel and the courts. (***Laurention Plaza Corp. v. Martin, et al.*** supra, at 116)

22 In *Halbert v. Netherlands Investment Co.*, [1945] S.C.R. 329 (S.C.C.), the Supreme Court of Canada adopted that statement of the test by Lord Alverstone. It was an appeal from the Appellate Division of the Supreme Court of Alberta. Mr. Justice Estey noted in his decision in that case that the Appellate Division of Alberta had previously adopted Lord Alverstone's test as early as 1922 in the decision of *Roeske v. Senerius*, [1922] 2 W.W.R. 977 (Alta. C.A.). In this latter case, the issue was whether an order dismissing a plaintiff's application to add as a defendant, a person alleged to be jointly or alternatively liable to the plaintiff in respect of matters in question in the action was, in its nature, interlocutory and not final, for purposes of the available appeal procedure. After quoting the test of Lord Alverstone, Mr. Justice Clarke, for the Court, found as follows:

> Adopting this test I cannot see that the order in any way disposes of the plaintiff's rights against the defendant or against the party sought to be added.
>
> (emphasis added)

23 It will be necessary to refer back to this decision later in these reasons.

24 Accordingly, Lord Alverstone's test to determine whether an order is final or interlocutory has been adopted by the Supreme Court of Canada and the Alberta Court of Appeal.

25 The WEM Applicants, arguing their first ground that their application raises substantive issues between them and ATB, including *Charter* violations, concede that these issues arise in the context of a larger action and are therefore interlocutory in that sense. However, they contend that these are issues giving rise to a final order. In support of this

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submission, the WEM Applicants cited a number of authorities that confirm that although the proceeding may be interlocutory in form, the order may be final in nature because the rights of the parties involved are decided. The first case is the decision of the English Court of Appeal in *Gilbert v. Endean* (1878), 9 Ch. D. 259 (Eng. C.A.). The headnote of that case states:

> Upon a proceeding which, though interlocutory in form, finally decides the rights of the parties, evidence on information and belief is not admissible, and the party against whom it is adduced is not bound to contradict it;...

26 In *Gilbert* , a judgment had been settled on different terms by means of a compromise on more favourable terms. The issue was whether or not the compromise had been induced on the basis of a misrepresentation. The issue was brought before the court on a motion to enforce the original judgment and was therefore, in form, an interlocutory matter (a procedure which the court questioned). The court decided that because the rights of parties were being determined, it had no right to act upon evidence given by way of affidavit on information and belief. [2]

27 Mr. Justice Duff, as he then was, applied Lord Alverstone's test in a similar fashion in *Diamond v. Western Realty Co.*, [1924] S.C.R. 308 (S.C.C.):

> It is true in a sense the decision was interlocutory; that is to say, the proceeding in which it was given was an interlocutory proceeding; but it was nevertheless a final decision in the sense that in the absence of appeal it became binding upon all parties to it. (pages 315-316, emphasis added)

28 So for this submission, the WEM Applicants take the position that they are a party to the Setting Aside Application and that it will determine substantive rights as between them and ATB and therefore the order will be in the nature of a final order, subject only to appeal. It is not necessary to decide whether the Setting Aside Application determines substantive rights as I find, for the reasons stated below, that the involvement of non-parties to the litigation makes the Setting Aside and Cross Applications final.

(ii) Orders Against a Non-Party are Final

29 As noted above, the WEM Applicants also take the position that because they are parties only for the purpose of the Setting Aside Application, they are non-parties in the sense that their appearance here is qualified and limited to making submissions on that application.

30 This raises an inconsistency. If the WEM Applicants are here in order to argue the motion but then gone, I question what rights are truly being decided in this action as between the WEM Applicants and ATB. They are not parties to this action in the sense that the reason and purpose for the proceedings in this action arise out of an altogether different transaction between ATB and Alberta Bakery, not ATB and the WEM Applicants. The problem for the WEM Applicants is that certain of the Ex Parte Orders revealed an alleged involvement of one of the WEM Applicants, who is integrally involved in the WEM Action personally and as a principal in a number of the corporations which make up the WEM Applicants.

31 Although this inconsistency causes me concern, I need not address it further because, as noted above, I find the WEM Applicants' second ground has validity.

32 The key proposition raised by the WEM Applicants under this ground is that when an order finally determines the rights between a party to an action and a non-party, the order is final. The Setting Aside and Cross Applications will result in orders either setting aside or confirming the orders which compelled non-party financial institutions to produce to the plaintiff ATB the documentary evidence the WEM Applicants seek to exclude.

33 The defendant Leahy also seeks an order to set aside and vacate the Ex Parte Orders, along with the other specific relief set out in his Amended Notice of Motion, based upon the same principle that the orders will be final, orders because they will determine the issues between ATB and the financial institutions.

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34 The defendant Leahy and the WEM Applicants also seek to prevent the evidence gathered from these financial institutions as a result of the Ex Parte Orders from being admissible in these proceedings and in the WEM Action, which appears to be based in part on this evidence.

35 Generally, setting aside an ex parte order is an interlocutory step in the legal proceedings. It has been likened to a setting aside of a default judgment which has been categorized as an interlocutory motion. See *Laurentian Plaza Corp. v. Martin*, supra, discussing *Roblin v. Drake*, [1938] O.R. 711 (Ont. C.A.) and *Smerchanski v. Lewis* (1980), 30 O.R. (2d) 370 (Ont. C.A.), at 374.

36 However, the Ex Parte Orders under scrutiny here are largely orders which dealt with non-party financial institutions. The WEM Applicants submit that these orders can only be categorized as final based on the principles set out in *Smerchanski* , supra. In that case, the Ontario Court of Appeal dealt with non-party attendance to give evidence. Arnup, J.A. stated as follows at page 374:

> This Court has held that an order made in a contest between a party to an action and someone who is not a party is a final order, appealable without leave, if the order finally disposes of the rights of the parties *in the issue raised between them*. (emphasis in original)

37 Ample authority is referred to by Arnup, J.A., including the test of Lord Alverstone in the *Bozson v. Altrincham Urban District Council*, supra, case. Further, the learned Justice referred to *Frederick v. Aviation & General Insurance Co.*, [1966] 2 O.R. 356 (Ont. C.A.). In that case, there was an appeal from the order of the trial division, which set aside an order of the Master adding an insured as a party to the dispute. On motion to quash the order, it was argued that it was an interlocutory order as opposed to a final order. In commenting on the case, Arnup, J.A. stated as follows:

> This Court dismissed the motion, holding that while it was no doubt correct in one sense to say that as between the plaintiff and the appellant the order refusing to add the proposed defendant was interlocutory, because none of the issues in the action between those parties was thereby determined, the central issue raised on the motion was between the appellant and its insured, the party sought to be added. The Court held that the order of Wilson J. deprived the appellant of a substantive right and finally determined that issue subject to any right of appeal... (page 375)

38 The ruling in *Smerchanski* is in direct contrast with the decision of Clarke, J.A. in the case of *Roeske v. Senerius*, supra. The facts in *Roeske v. Senerius* were not set out in detail, but if considered from the view point of the non-party, who was not defendant or plaintiff, clearly, the ruling in that case involved an issue between the plaintiff and the non-party sought to be joined. The issue on which it was sought to add the non-party would have been a final issue, subject to appeal, as between the plaintiff and the non-party. However, the Alberta Supreme Court, Appellate Division found that the order was interlocutory, not final. Unfortunately the decision is brief and contains limited analysis. Further, unlike in *Smerchanski* , it does not appear that the matter of an order determining rights as between a party and a non-party was put into issue by the litigants.

39 The WEM Applicants also relied on *Morse Shoe (Canada) Ltd. v. Zellers Inc.* (16 April 1997), Toronto C25974/DRS 97-16167 (Ont. C.A.) [reported (1997), 100 O.A.C. 116 (Ont. C.A.)] I quote from the headnote, to set out the facts in that case:

> This was an appeal by Zellers from an order that dismissed its application for an order for the production of documents held by a non-party, first National Bank of Boston. First National was the plaintiff's bank. Morse Canada was a supplier of shoes. It supplied shoes to Towers Department Stores from 1980 to 1991. Zellers purchased Towers in November, 1990 and the two companies amalgamated in February 1991. Morse claimed that after the amalgamation Zellers unilaterally terminated the contracts with Morse. In October 1991 Morse commenced an action for damages for breach of its contracts. Examinations for discovery and productions revealed that Morse went out of business after the termination. The discovery also revealed that Morse US, the parent of Morse Canada, defaulted to First National in June 1990 and filed a bankruptcy petition in January 1991. It emerged from

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> bankruptcy protection and was sold to a different company in January 1993. No one currently employed at Morse US or at the purchaser was familiar with the financial situation of Morse US in the fall of 1990. The documentation that was produced was voluminous but was also piecemeal and contained many gaps. The purpose of obtaining the documents from First National was to fill in these gaps.

40 The court there ruled that as the order appealed from disposed of the one issue between Zellers and the non-party First National Bank, the order was final in nature, even though the only opposition to the application came from the plaintiff Morse Shoe (Canada), concluding at paragraph 6 of the judgment:

> It is clear that the order below would be final as against FNB and as between FNB and Zellers; the order finally disposes of the issue between them. I am therefore satisfied that this court has jurisdiction to hear the appeal notwithstanding that the only opposition to the application and to the appeal comes from the plaintiff rather than from FNB.

41 The circumstances of *Morse Shoe (Canada) Ltd.* and *Smerchanski* are analogous to those here; all but one of the Ex Parte Orders involve the obtaining of evidence from non-parties who have made no appearance in these proceedings. I find the ratios in *Morse Shoe (Canada) Ltd.* and *Smerchanski* compelling and conclude that the Setting Aside and Cross Applications will be final in nature insofar as they will finally dispose of the issue of production of documents between ATB and the various non-party financial institutions. The May 12, 1998 order (see Appendix "A") is in the nature, *inter alia*, of a Mareva injunction and an Anton Piller order. The parties did not specifically address these portions of the order. I find that the Mareva injunction is clearly interlocutory. The Anton Piller order is not in issue in this application as ATB has applied in the Cross Application to return all documents obtained pursuant to it to the defendant Leahy.

42 Allen J.A. of the Alberta Supreme Court, Appellate Division reviewed the meaning of "interlocutory" in *Western Caissons (Alta.) Ltd. v. Bower* (1969), 71 W.W.R. 604 (Alta. C.A.):

> In *Earl Jowitt's Dictionary of English Law* at p. 995 it is stated that:
>
> > A proceeding in an action is said to be interlocutory when it is incidental to the principal object of the action, namely the judgment. Thus, interlocutory applications in an action include all steps taken for the purpose of assisting either party in the prosecution of his case, whether before or after final judgment; or of protecting or otherwise dealing with the subject matter of the action before the rights of the parties are finally determined; or of executing the judgment when obtained.
>
> The learned author cites as examples of interlocutory applications such things as applications for time to take a step in the action, for discovery, for an interim injunction, for the appointment of a receiver, for obtaining a garnishee order, etc.
>
> There are a number of cases cited in *Words and Phrases - Legal Maxims*, 2nd ed., vol. 3, pp. 207 to 211, which make it clear that an interlocutory order is one which does not dispose finally of the issue in action or of any right of any party to it.

43 In this case, we are dealing with ATB's right of production of evidence from the non-parties which may circumscribe the ambit of the action. This is clearly a matter of a final nature. The order will determine finally the rights of ATB in seeking the production as well as the rights of non-parties.

44 Under those circumstances, the Hiebert Affidavit must conform to the requirements of Rule 305(1) of the *Alberta Rules of Court*, insofar as it is to be relied upon in responding to the portions of the Setting Aside and Cross Applications that relate to the orders involving the non-party financial institutions.

2. Personal Knowledge

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a. Positions of the parties

45 The WEM Applicants submit that the Hiebert Affidavit contains virtually no personal knowledge and that it fails to specify the source and grounds of many of the assertions made concerning the West Edmonton Mall financing as at January, 1993 (paragraphs 8-14), the Gentra refinancing (paragraphs 18-31) or any of the matters relating to the Side Agreements (paragraphs 32-46). The WEM Applicants point out that these transactions occurred prior to Hiebert joining ATB in April, 1997. This portion of the submission of the WEM Applicants raises the issue of how a corporation may speak with personal knowledge in court. The bottom line for the admissibility of evidence on this application is what evidence would be allowed in open court on a material issue.

46 ATB submits that Hiebert does in fact have personal knowledge of these matters, by virtue of her review of ATB records in her capacity as senior credit manager. ATB further submits that in any event, the documents exhibited to the Hiebert Affidavit and other documents before the court provide admissible evidence and that to the extent that information and belief is relied upon, the grounds and the belief have been provided.

b. The Law

(i) Personal Knowledge Based on Review of Corporate Records

47 Rule 305(2) of the *Alberta Rules of Court* provides that:

> In an action or proceeding to which a corporation is a party any affidavit required by these Rules to be made by a party may be made by an officer, servant or agent of the corporation having knowledge of the facts required to be deposed to, who shall state therein that he has that knowledge.

48 Paragraphs 1 and 4-7 of the Hiebert Affidavit provide the foundation for Hiebert's knowledge of the matters deposed to as follows:

> a. Hiebert states that she is associate counsel with ATB and is also acting as its senior credit manager in relation to ATB's dealings with the WEM Applicants.
>
> b. Hiebert states that since April 1, 1997 she has been principally responsible for the management of the loans relating to the WEM Applicants (the "WEM Loans").
>
> c. Hiebert states that upon assuming responsibility for the WEM Loans, she reviewed ATB's documents in this regard. These documents included the particular loan documents relating to the October, 1994 refinancing of the WEM Loans which are exhibited as "B" - "T" to the Hiebert Affidavit (the" Loan Documents"). The Loan Documents were located in closing books at the offices of solicitors who acted for ATB on the refinancing.
>
> d. Hiebert states that her knowledge of the facts relating to the WEM Loans was obtained from reviewing the files and documents provided by ATB's solicitors who acted on the October 1994 refinancing, from the files maintained by or on behalf of ATB, from discussions with employees and former employees of ATB and from information obtained as a result of an investigation conduced by Bryan McBean of ATB's security department.

49 It is important to note at the outset that the circumstances of the creation and storage of the Loan Documents disclose that they are reliable as being an accurate account of the transactions referred to. There has been no evidence presented by the WEM Applicants to impugn the accuracy of the Loan Documents or any other documents within the books and records of ATB. Further, counsel for the WEM Applicants conceded that the WEM Applicants do not dispute that these documents are in fact accurate reflections of the transactions.

50 However, as noted above, the WEM Applicants assert that the Hiebert Affidavit is comprised of hearsay because Hiebert was not personally involved in the transactions reflected in the ATB books and records exhibited to

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and referenced in her affidavit. This assertion cannot stand in light of the line of Alberta authorities commencing with *Advance Rumely Thresher Co. v. Laclair* (1916), [1917] 1 W.W.R. 875 (Alta. C.A.).

51 In *Advance Rumely Thresher Co.* , the manager of a company swore an affidavit in support of a summary judgment on a debt. The defendant objected to this evidence on the basis that the manager had no personal knowledge of the matters deposed to. The Alberta Court of Appeal rejected the defendant's argument, finding that as manager of the company, the deponent had access to all the relevant business records and that it was not necessary that the manager be personally involved in the transactions in question in order to give evidence of them [3] .

52 Similarly, as the person principally responsible for the WEM Loans, Hiebert has had access to the relevant books and records of ATB (and has specifically deposed she has had such access). This is sufficient to show her means of knowledge and justifies her taking the affidavit. I find that Hiebert's position at ATB and her review of ATB's books and records makes her knowledge of the transactions relating to the WEM Applicants "personal knowledge" within the contemplation of Rule 305(1).

53 A similar result was reached by Master Funduk in *Alberta Treasury Branches v. Wenley Enterprises & Sales Ltd.* (1985), 66 A.R. 232 (Alta. Master). In that case, a branch manager of the Treasury Branches named O'Farrell gave evidence of loans and guarantees that were put in place before he became the branch manager. Master Funduk rejected an argument that O'Farrell's evidence was hearsay, relying on *Advance Rumely Thresher Co.* . He found that statements based on the business records of the company amounted to personal knowledge. [4]

54 In *Bank of Montreal v. Beacon Industrial Development Corp.* (1986), 70 A.R. 218 (Alta. Q.B.) the Plaintiff sought summary judgment on a promissory note and a debt. An employee of the plaintiff's division office who dealt with the defendant's accounts swore the supporting affidavit. Master Funduk rejected the defendant's argument that the deponent had no personal knowledge, stating at page 221:

> ...the question is - what exactly is meant by personal knowledge? - to use the terminology of Stuart, J.A. in *Advance Rumely Thresher v. Laclair*, [1971] 1 W.W.R. 875 (Alta. C.A.). For the reasons given by me in *Alberta v. Wenley Enterprises & Sales Ltd.* (1985), 66 A.R. 232, I would consider the evidence satisfactory. The witness is with the plaintiff; he handles defaulted loans and he obviously has access to the records of the plaintiff and can depose to what is in the records.

55 Finally, a similar objection was made in respect to evidence given by the liquidator of a trust company in *Principal Savings & Trust Co. (Liquidator of) v. Bowlen* (1991), 1 C.P.C. (3d) 206 (Alta. Master) Master Quinn stated at pages 210 and 211:

> Counsel for the defendants does not take the position that anything said in these affidavits is not true. His objection is that the affidavits are not admissible in evidence because the deponent cannot really swear that he has personal knowledge. That is the same argument that was made by the defendant in *Advance Rumely Thresher Co. v. Laclair* (1916), [1917] 1 W.W.R. 875...(Alta. C.A.), but it was rejected by the Court of Appeal.
>
> . . . . .
>
> In the present case, the affidavits were made by Mr. Frazier, who is something more than a *mere employee* of the liquidator B.I. Robertson & Associates Ltd. In my opinion, his affidavits should be accepted as valid evidence in support of the plaintiff's application. Although he does not purport to have direct first-hand knowledge of the matters he deposes to, he had personal knowledge in the qualified sense that he obtained that knowledge from obtaining and perusing the records of the company in liquidation (the plaintiff company). In my opinion, his affidavits are within the scope of the *Advance Rumely Thresher* case.

56 The WEM Applicants submit that the above line of authorities establish only that an authorized person may obtain sufficient knowledge from review of corporate records to demonstrate the existence of a debt. I disagree that these

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cases should be given that restricted interpretation. To the extent that activities of a corporation are recorded in reliable documents, an authorized person may obtain the requisite personal knowledge by reviewing these and then speak to those activities, subject to compliance with the other rules of evidence. The deponent need not be the most senior officer of the corporation, but someone whose background experience and employment responsibilities allows him or her to review and describe the corporation's documents with sufficient scope in which to set out the corporation's position based on those documents. As Master Quinn stated in *Federal Business Development Bank v. Caskey* (1992), 1 Alta. L.R. (3d) 58 (Alta. Master) 58:

> ...R. 305(2) of the *Rules of Court* does not mandate that the authority of the deponent must be shown. Rather, it says that any affidavit required by the rules to be made by a corporate party "may be made by an officer, servant or agent of the corporation having knowledge of the facts required to be deposed to, who shall state therein that he has that knowledge." (page 70)

57 As noted above, Hiebert has deposed that she is principally responsible for the management of the WEM Loans. She states that she has reviewed ATB's files relating to the WEM Loans. She does not purport to have been personally involved in the transactions relating to the WEM Applicants; she deposes that she did not join ATB until April 1997, which post-dates the transactions in question. In many paragraphs of the Hiebert Affidavit, Hiebert specifically identifies the ATB file documents she has reviewed to make her sworn statement. In other paragraphs, it is obvious that her statements have been gleaned from ATB records and paragraph 7 of the Hiebert Affidavit establishes that one of the sources of her knowledge is those records. I am satisfied that such evidence is admissible as "personal knowledge" on a final application.

58 I question how else a corporation can give evidence under these circumstances, other than through a representative such as Hiebert who has the requisite position and authority and who has reviewed the records of the corporation; a corporation is incapable of personally comprehending facts. Further, prior to obtaining her law degree, Hiebert worked for several years in the financial industry in various positions including loans officer, account manager, senior account manager and investment manager. IN carrying out these positions, Hiebert gained considerable experience in reviewing, analysing and managing large, complex commercial loans and their restructuring. Hiebert is in a suitable position to put ATB's records of these transactions before the court and provide descriptions of those records to assist the court, provided this is done to provide a narrative as to the position of the corporation based on its records and does not go further into opinion and argument. ATB's selection of its deponent is not unreasonable and I do not see it as an attempt to put forward a "straw man" who cannot be effectively cross-examined as the WEM Applicants suggest.

59 I would point out that ATB is putting *the fact of* several commercial transactions and agreements before the court in order to give some context for its allegations of bribery. ATB has selected a deponent who is" principally responsible" for the WEM Loans and who has had access to ATB's records in this regard. Aside from inadmissible opinion and argument, discussed further below under the heading "*Opinion and Argument*", Hiebert is simply reporting upon, describing and summarizing what she has personally reviewed in ATB's business records regarding these transactions. In general, Hiebert is not purporting to speak to matters that are not based on business records. As *Advance Rumely Thresher Co.* and following authorities suggest, it is not necessary to have the person(s) who presided over the preparation and execution of the documents take the affidavit.

60 The WEM Applicants complain that while Hiebert specifies other ATB employees who were personally involved in the transactions she describes, she does not say she consulted with these employees to obtain knowledge of the transactions. In my view, Hiebert did not need to; she obtained her knowledge by virtue of her access to and review of ATB's records of the transactions. Further, counsel to the WEM Applicants conceded that the WEM Applicants do not dispute that the records are reflective of the transactions. Their complaint, rather, is that senior employees with authority over and personally involved in the transactions were not selected as deponents. This does not appear to be necessary because, as noted above, it is the fact of the transactions that ATB is presenting to the court in the Hiebert Affidavit. The WEM Applicants also complain that Hiebert has gone beyond description of commercial transactions to provide conclusions, opinions and argument on their effect. This is a substantive complaint and one which has qualified merit

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in this case. It is addressed below under the headings" *Opinion and Argument*" and "*Paragraph by Paragraph Review of the Hiebert Affidavit*".

(ii) Documents are prima facie evidence

61 ATB submitted in the alternative that if Hiebert did not have "personal knowledge" of the transactions based on the *Advance Rumely Thresher Co.* line of cases, the documents exhibited to her affidavit and other admissible material before the court "cured" the hearsay and provided the necessary direct evidence. ATB argued that Hiebert could rely on these documents as prima facie evidence of the truth of their contents.

62 ATB relied on *R. v. Monkhouse* (1987), 56 Alta. L.R. (2d) 97 (Alta. C.A.) in support of this submission. [5] The issue in that case was the admissibility of payroll records relating to the accused's earnings. The witness was the payroll manager of the accused's employer and had extracted from more extensive payroll records those which related to the accused for the period in question and read this extract into the record. He had no personal knowledge of the information contained in the records and did not produce the original records themselves. He stated that he had been the payroll manager for 2 years and had 15 years of experience in the field. Laycraft C.J.A. stated at page 101:

> The extract prepared by the witness is, in one sense, not hearsay at all. He is not saying that the original time records prepared by the appellant are true nor is he saying that the transcription of those records by some unknown person is correct. What he says to the court is: "I read this document and my extract correctly summarizes it." He is able to say that because he personally read the document which he summarized and he can be cross-examined about that.

63 Similarly, in this case, Hiebert is saying to the court "I have reviewed the books and records of ATB and this is what they disclose." Hiebert can be cross-examined on that evidence and as noted above, the Hiebert Affidavit largely discusses exhibited documents easily available for use during cross-examination.

64 Laycraft C.J.A. went on to review a number of cases including *Omand v. Alberta Milling Co.* (1922), 18 Alta. L.R. 383 (Alta. C.A.); *J.H. Ashdown Hardware Co. v. Singer* (1951), [1952] 1 D.L.R. 33 (Alta. C.A.) and *Ares v. Venner*, [1970] S.C.R. 608 (S.C.C.), noting at page 104:

> It is clear in these cases that the witness gave testimony supporting a document about which he had no personal knowledge though the original documents containing the information recorded in the ledgers were undoubtedly prepared by persons with personal knowledge.
>
> An even earlier modification of the common law rules may be seen in a decision of the Supreme Court of Canada in *Can. Atl. Ry. Co. v. Moxley* (1888), 15 S.C.R. 145. That case held that the person originally recording the event need not himself have direct personal knowledge of the event recorded. It was held to be sufficient if the person who has a duty to do so and record the act "causes" a record to be made by an agent. This case too, was cited by Mr. Justice Hall in *Ares v. Venner*.

65 Laycraft C.J.A. concluded at page 106 that "records reliably kept in the ordinary way of business ... should be admitted as prima facie evidence."

66 There is evidence of the reliability of the documents surrounding the October, 1994 refinancing as accurately reflecting the transactions they record. The documents appear to be duly executed and were stored in closing books with ATB's counsel. A number of the other exhibited documents have been drawn from ATB's files and reviewed by Hiebert, associate counsel and senior credit manager at ATB. The balance of the exhibited documents were supplied to ATB by the WEM Applicants. It is significant that no challenge has been made to the authenticity of any referenced document, that no evidence has been supplied by the WEM Applicants suggesting that the documents are not reliable and that Hiebert has not been cross-examined

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67 ATB argues that to the extent that documents discussed in the Hiebert Affidavit are not exhibited, other material before the court repeats and confirms Hiebert's evidence;

a. Bryan McBean of ATB has taken an affidavit which exhibits documents he obtained in the course of his investigation.

b. The WEM Applicants have filed affidavits in the WEM Action and have taken the position that affidavits filed in one action can be referred to in another. The affidavit of Martin Walrath and the "Second Affidavit" of Howard Anson filed by the WEM Applicants in the WEM Action repeat and confirm evidence given at paragraphs 8-17 of the Hiebert Affidavit. The WEM Applicants do not object to the court referring to the affidavits of Walrath and Anson, but argued that these were the senior, personally involved representatives that are the sort of deponents that are required for applications such as these, unlike Hiebert.

68 ATB argues that since the documents which are the original source of the evidence are before the court, there is no reason to strike any alleged hearsay that may be contained in the paragraphs which refer to and summarize these documents.

69 The Alberta Court of Appeal took that approach In *Kin Franchising Ltd. v. Donco Ltd.* (1993), 7 Alta. L.R. (3d) 313 (Alta. C.A.) and declined to strike portions of an affidavit containing hearsay, in part because the same information was available from other sources before the court. A similar approach is seen in *Royal Bank v. McLean* (21 May 1998), Calgary 97-17516/17521 [reported (1998), 216 A.R. 172 (Alta. C.A.)] and *Syntex Ophtalmics Inc. v. Corneal Contact Lens Co.* (1982), 49 A.R. 223 (Alta. Q.B.) and is particularly applicable where there has been no evidence led to the contrary nor any cross-examination on the substance and effect of the documents, as in this case.

70 The Alberta Court of Appeal decisions in *Monkhouse* and *Ashdown* hold that Hiebert would, at trial, be entitled to give evidence relying on the business records of ATB. ATB argued, and I agree, that it would be anomalous to interpret Rule 305(1) to render inadmissible on a chambers application evidence which would be admitted at trial.

71 In *Litterst v. Horrey* (1995), 37 Alta. L.R. (3d) 74 (Alta. C.A.), the Alberta Court of Appeal suggests that Rule 305 may incorporate the common law exceptions to the hearsay rule so as to allow the admission of documents and reliance on them by a party who was not their author. The federal court expressly adopted this approach in, among other cases, *Labatt Brewing Co. v. Molson Breweries, A Partnership* (1996), 113 F.T.R. 39 (Fed. T.D.). In *Labatt Brewing Co.*, hearsay in the form of information and belief was held to be admissible even though the application was final and not interlocutory. Heald D.J. stated at page 47:

> An affidavit may now contain statements of the deponent that are based on information and belief, if this prima facie inadmissible hearsay evidence falls within the common law exceptions to the hearsay rule. The question to be asked is whether the evidence sought to be admitted meets the common law exceptions to hearsay, which are now governed by the criteria of necessity and reliability....

72 The references to reliability and necessity are taken from the Supreme Court of Canada decisions in *R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.) and *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.), which clarified and simplified the law of hearsay in Canada. Lamer, C.J. stated in *Smith* that these 2 cases:

> ...signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity. (page 933)

73 In this case, I find that the principles of reliability and necessity have been met and that Rule 305 is subject to the common law hearsay exceptions. The same evidence would be permitted at trial and that must be the baseline for determining whether affidavit evidence is admissible on a final order proceeding.

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74 I have already commented on the reliability of the documents.

75 As discussed by McDonald J. in *Sherritt Gordon Ltd. v. Dresser Canada Inc.* (1994), 20 Alta. L.R. (3d) 407 (Alta. Q.B.), the necessity factor emerged from a need to address matters of practicality and convenience. I also note that Lamer, C.J. held in *Smith* that the necessity criterion" must be given a flexible definition, capable of encompassing diverse situations" and that "clearly the categories of necessity are not closed". (pages 933-934)

76 In this case, it would be neither practical nor convenient to require ATB to have each employee and former employee personally involved in the transactions take affidavits as the WEM Applicants suggest should have been done. As noted above, Hiebert is a sensible choice for a deponent given her responsibility for the WEM Loans and access to the relevant records. Further, as ATB pointed out, Leahy appears to have been the only ATB representative who knew of certain of the documents and was in control of the October, 1994 refinancing. For obvious reasons, Leahy is not in a position to give evidence on behalf of ATB on these matters.

77 Accordingly, if I am wrong in finding that Hiebert's evidence is largely" personal knowledge" within the meaning of *Advance Rumely Thresher Co.* , I find that the exhibits to the Hiebert Affidavit themselves provide the necessary direct evidence. On the Setting Aside and Cross Applications I can look to any admissible documents, such as the documents exhibited to the Hiebert Affidavit and other admissible material to confirm some or all of the assertions made in the Hiebert Affidavit. There is no need to strike out paragraphs in the affidavit which purport to report upon and describe these documents, except to the extent described below under the heading entitled "*Opinion and Argument*" and as detailed in Appendix "C" referenced under the heading entitled "Paragraph by Paragraph Review of Hiebert Affidavit".

(iii) Fraud Allegations Require First-Hand Evidence

78 Finally, the WEM Applicants submit that since ATB is making allegations akin to fraud, Hiebert must have "first hand" evidence, relying on *Romeo's Place Victoria Ltd, Re* (1981), 128 D.L.R. (3d) 279 (Fed. T.D.). However, in that case, unlike the case before me, there were no documents put forward to support the impugned assertions. A case in which documents were put forward to support fraud allegations is *Cotroneo v. Canada (Deputy Attorney General)*, [1982] C.T.C. 67 (Fed. T.D.). Mahoney J. stated at page 67:

> The attack on the sufficiency of the respondent's proof is founded on the decision in *Re Romeo's Place Victoria Ltd. et al.*, [1981] C.T.C. 380, 81 D.T.C. 5295. There Mr. Justice Collier held that, this sort of proceeding being final in nature, the affidavits filed had to meet the requirements of Rule 332(1).
>
> > RULE 332.(1) Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted.
>
> He found inadmissible those portions of the affidavit supporting the allegation of fraud, sworn by an officer of the Department of National Revenue, "which indicate his information is based not on personal knowledge, but from enquiries or information and belief".
>
> I have perused the affidavit filed in that proceeding. There were no exhibits. The officer merely deposed to what he had learned or been told in the course of his investigation and as to the conclusions he had drawn from that information. The counterpart affidavit of Wlademir W. Liachomsky filed herein is a very different document. In support of the conclusions of fact to which he deposes, Liachomsky identifies 50 exhibits, including photocopies of income tax returns, bank statements, land registry documents and correspondence, running to several hundred pages. (emphasis added)

79 I find that I can distinguish *Romeo's Place Victoria Ltd., Re* on the same basis as the court in *Cotroneo* . The Hiebert Affidavit exhibits a large number of documents which can be referenced by the court and there is other admissible material before the court against which Hiebert's assertions can be tested. In any event, I have already found that the

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Hiebert Affidavit is largely comprised of personal knowledge within the meaning of *Advance Rumely Thresher Co.* and that Hiebert could not be precluded from giving evidence based on the exhibited documents at trial.

3. Opinion and Argument

a. Positions of the parties

80 The WEM Applicants submit that Rule 305(1) requires that affidavits be confined to facts and does not contemplate the inclusion of opinion and argument. They suggest that, contrary to the Rule, the Hiebert Affidavit is largely comprised of Hiebert's opinion and argument concerning the interpretation and impact of the various documents relating to the financing of West Edmonton Mall and should be struck. As noted above, the particular paragraphs of the Hiebert Affidavit which the WEM Applicants submit are offensive in this regard are identified in Appendix "B" to these reasons.

81 ATB submits that Hiebert's opinions are admissible as matters within her personal knowledge and that in any case, the courts have recognized that the line between evidence of a "fact" and evidence of an "opinion" or a "conclusion" is often difficult to draw. ATB submits that the basis for the opinions expressed in the impugned paragraphs are the documents Hiebert reviewed and that the opinions expressed assist Hiebert in summarizing the effect of the documents and are thereby admissible under *R. v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.) and *Royal Bank v. W. Got & Associates Electric Ltd.* (1993), 10 Alta. L.R. (3d) 440 (Alta. Q.B.). ATB also points out that affidavits submitted by the WEM Applicants in connection with the Setting Aside and Cross Applications are replete with opinions and seeks consistency in approach by the parties; the opinions of all deponents should all be considered admissible and may be tested on cross-examination.

82 ATB further submits that the paragraphs which the WEM Applicants argue are argumentative (see Appendix "B") are simply Hiebert providing the court with the "commercial context" and the "matrix of facts" in respect of the various corporate activities of ATB. It argues that such evidence would include the practical, but not legal effect of the documents and relies on *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 27 Alta. L.R. (2d) 17 (Alta. C.A.) and *Alpine Resources Ltd. v. Bowtex Resources Ltd.* (1989), 66 Alta. L.R. (2d) 144 (Alta. Q.B.).

83 Finally, ATB submits that to the extent the Hiebert Affidavit is argumentative, the same arguments will be made by counsel to the court, regardless of their mode of expression. It submits the proper remedy is to give little or no weight to the offending paragraphs.

b. The Law

84 The purpose of affidavit evidence is to place the necessary facts before the court and should not contain argument, opinions or conclusions: *Alberta (Human Rights Commission) v. Alberta Blue Cross Plan* (1983), 48 A.R. 192 (Alta. C.A.). Affidavits which contain such material have little, if any, probative value and are generally accorded the weight they deserve by the trier of fact. However, when a party has brought an application to strike an affidavit on these grounds, the court may go beyond simple disregard for the objectionable material and strike it out if it agrees that it goes beyond fact. I find support for this view in "Advocacy Considerations Respecting Affidavit Evidence in Chambers Applications" *Papers Presented at Mid-Winter Meeting of the Canadian Bar Association, Alberta Branch 1995*, Revised Ed. 282, authored by Kenny J. prior to her appointment. I would emphasize, however, that assertions of fact may well need to be placed in an explanatory or narrative context in order to assist the court in understanding the relevance of a particular fact and the relationship between facts. This is not improper in my view.

85 While I appreciate that there is often a fine line between fact and opinions and conclusions, the nature of several of the opinions and conclusions in the Hiebert Affidavit are not of this ilk, as is detailed below in Appendix "C" referenced under the heading "*Paragraph by Paragraph Review of the Hiebert Affidavit*". In addition, Hiebert's opinions are largely not in regard to matters within the realm of common experience with respect to which the courts have permitted opinions from lay witnesses: *Royal Bank v. W. Got& Associates Electric Ltd.* , supra. Rather, Hiebert speaks to matters regarding commercial reasonableness, normal or typical commercial terms and prudent lending practices, all of which must involve specialized knowledge from a properly qualified expert.

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86 I am also not satisfied that the argumentative material in the Heibert Affidavit can be saved by resort to the *Bank of British Columbia* and *Alpine Resources Ltd.* cases. Those cases dealt with "commercial context" evidence in the context of the application of the parol evidence rule. They do not address the inclusion of argument in affidavits. The law is clear that affidavits should not contain argument: *Alberta (Human Rights Commission)* .

87 I turn now to the text of the Hiebert Affidavit and the various paragraphs objected to by the WEM Applicants.

4. Paragraph by Paragraph Review of Hiebert Affidavit

88 Appendix "C" contains the text of the Hiebert affidavit, with a brief summary of the WEM Applicants' objections, followed by my findings on each. I emphasize that all of my findings were necessarily made without the benefit of cross-examination by or responding evidence from the WEM Applicants and accordingly have to be qualified to that extent.

IV. Conclusion

89 The Setting Aside and Cross Applications are final, insofar as they involve non-party financial institutions. However, the Hiebert Affidavit is largely based on personal knowledge and the majority of the limited portions that are based on information and belief are both reliable and necessary and therefore admissible on a final application. Rule 305(1) of the *Alberta Rules of Court* is to be read as incorporating the common law exceptions to the hearsay rule. Portions of the Hiebert Affidavit containing inadmissible opinion and argument shall be struck.

Order accordingly.

APPENDIX "A"

	DATE OF ORDER	BRIEF DESCRIPTION OF ORDER
1.	March 11, 1997	Confidentiality Order
2.	March 11, 1997	Order for inspection of third party documents
3.	April 10, 1997	Order for inspection of third party documents
4.	May 14, 1997	Order for production of documents
5.	June 6, 1997	Request for assistance from Israel
6.	November 3, 1997	Order for inspection of third party documents
7.	March 10, 1998	Order for inspection of third party documents
8.	March 10, 1998	Order for inspection of third party documents
9.	April 8, 1998	Order for inspection of third party documents
10.	May 12, 1998	Order for injunctive relief, amendments to Statement of Claim

APPENDIX "B"

TEXT OF HIEBERT AFFIDAVIT	WEM APPLICANTS' POSITION	ATB's POSITION	WEM APPLICANTS' REPLY TO ATB's POSITION
[1] I am an associate counsel with the Plaintiff, Alberta Treasury Branches (referred to as "ATB") and as such have a personal knowledge of the matters hereinafter deposed to except where otherwise stated. I have been assigned the responsibility of acting as the senior credit manager		(a) Paragraph 1-5 No objection raised by the WEM Applicants	a) In respect of paragraphs 16, 21, 22, 28, 42 and 43, the WEM Applicants submit that the "belief" contemplated by Rule 305(3) is not to be equated with the tendering of clear evidence of opinion. The "belief" referred

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in relation to the ATB's dealings with the lands and premises known as West Edmonton Mall ("Mall").

to in Rule 305(3) is belief in a fact about which the deponent does not have first hand knowledge. In other words, Rule 305(3) provides a discretion to permit the introduction of "hearsay" evidence on interlocutory proceedings, where the source and grounds of the belief are stated. The interpretation the ATB would place on Rule 305 would allow the tendering of opinion evidence on an interlocutory motion which would not be admissible on a final application, as "belief". It is submitted that there is no basis in principle or practice for such an interpretation. Rule 305(3) refers to "belief" in the sense of hearsay evidence, not opinion.

[2] The Mall is a super-regional shopping centre complex situate on a 107.22 acre site in Edmonton, Alberta, comprising 2,319,677 square feet of retail space including a 354-room hotel ("Fantasyland Hotel"), an amusement park ("Galaxyland"), an ice arena, a waterpark, and a sea world.

Educational Background and Experience

[3] I hold a Bachelors of Commerce Degree and a Bachelor of Laws Degree (with distinction) obtained from the University of Saskatchewan and am a member of the Law Society of Alberta. Marked as Exhibit "A" to this Affidavit is my curriculum vitae.

b) The allowance of such belief is to provide a measure of flexibility to parties tendering evidence on an interlocutory motion in circumstances of urgency, or to deal with generally non-contentious matters. There is

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			no basis to suggest Rule 305(3) allows for opinion evidence in interlocutory proceedings which would not be admissible on a final matter. Accordingly the opinion should be struck as non-complaint with Rule 305.
[4] I commenced my employment with ATB on April 1, 1997. Previously, during the period 1984 to 1991, I was employed in the financial services industry in various positions including loans officer, account manager, senior account manager and investment manager. During the course of my employment in the financial services industry, I had considerable experience in reviewing, analysing and managing large, complex commercial loans and their restructuring.			c) In reply to ATB's suggestions regarding paragraphs 8-14, 17, 18, 19, 23, 31 and elsewhere, the WEM Applicants reiterate that without more, mere reference to "ATB files" is not sufficient to make the material reviewed personal knowledge of the deponent or a business record. The files must be specifically identified and the criteria for the business records exception demonstrated. This has not been done in the Hiebert Affidavit.
Initial Review of Files [5] Since I commenced my employment with ATB, I have been principally responsible for the management of the loans referred to in this Affidavit on behalf of ATB. My involvement has included all aspects of the loan administration relating to the Mall, including but not limited to reviewing and approving Major Leases, the Annual Budget for the Mall, the distribution of the Excess Cash Flow, and capital expenditures for the Mall.			
[6] Upon assuming responsibility for the management and administration of the Mall account, I attempted to	Paragraph 6 The sentence asserting what Mr. Stollery was advised with respect to the closing books should be struck. The sentence	(b) Paragraph 6 The paragraph describes Hiebert's efforts in reviewing and locating files. The information and belief	

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locate all relevant files relating to the Mall. I found that ATB's closing books ("Closing Books") in relation to the October 31, 1994 re-financing (referred to in paragraphs 26 to 30 hereof), were located at the offices of Douglas Stollery ("Stollery") of Reynolds, Mirth, Richards & Farmer who, along with William Kenny ("Kenny") of Cook Duke Cox, had represented ATB with respect to negotiating and preparing the Loan Documents. I am advised by Stollery and do verily believe that he was instructed to store the Closing Books at his offices, as ATB's employees responsible for the account in 1994 did not want the Closing Books to be at ATB's offices. Further, I found that the files maintained at ATB were incomplete and did not contain the documents one would normally find on any commercial loan file, let alone a file relating to a loan of this magnitude (for example: a credit application/risk assessment). Therefore, upon my assuming responsibility for the management and administration of the accounts relating to the Mall, it was difficult to determine precisely the transaction entered into between ATB and the Defendant West Edmonton Mall Property Inc. ("Mallco") and what had transpired in relation to these accounts since the fall of 1994.	involves double hearsay based upon the allegations of unspecified employees.	provided by Stollery is not "double hearsay" since Stollery could speak from personal knowledge as to the instructions he received.
[7] My knowledge of the facts relating to the Mall accounts was obtained from reviewing the files and documents provided by Stollery, from the	(b) Paragraph 7 This paragraph sets out the basis of Hiebert's knowledge of the facts in her Affidavit. The lack of specifics with respect to what files and	(c) Paragraph 7 This paragraph provides Hieberts' personal knowledge as to the scope of her review of the files ATB including the Loan

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files maintained by or on behalf of ATB, from discussions with employees and former employees of ATB, and from information obtained as a result of an investigation conducted by Bryan McBean ("McBean") of ATB's Security Department. Existing Financing on the Mall in January of 1993	documents were reviewed and what employees or former employees were inquired of sets the tone for the unreliability of the remainder of her Affidavit.	Documents (as described in paragraph 29) obtained from Stollery and the files maintained by or on behalf of ATB.
[8] At all material times prior to November 2, 1994, the Mall was owned by the Defendant 218703 Alberta Ltd. (prior to October 24, 1994 known as West Edmonton Mall Ltd.) and the Defendant hearsay without reference to the October 24, 1994 known as West Edmonton Mall Shopping Centre Ltd.). These corporate Defendants were owned indirectly by the Defendants Nader Ghermezian, Raphael Ghermezian, Bahman Ghermezian and Eskander Ghermezian (collectively referred to as the "Ghermezians"). [9] The corporations referred to in the preceding paragraph, and the other corporations shown as "Applicants" in the style of cause of this affidavit, were owned directly or indirectly by the Ghermezians and are referred to herein as the "Ghermezian Companies". Marked as Exhibit "B" to this Affidavit is a schedule outlining the ownership of the Ghermezian Companies at all material times. [10] As at January 1, 1993, Gentra Canada Investments Inc. ("Gentra") was the lead lender for a group of bondholders holding the first-ranking security against the Mall.	(c) Paragraphs 8-17 These paragraphs purport to provide personal knowledge of the Gentra situation and proposal all of which occurred more than three years prior to the commencement of her employment with ATB. It is submitted that they are clearly hearsay without reference to the grounds for or a statement of belief in their truth, and contain substantial opinion and argument. Note in particular the language in paragraph 16 concluding as to the "commercially reasonable solution". The entirety of paragraphs 8 through 17 should be struck.	(d) Paragraphs 8-14 The paragraph provides Hiebert's personal knowledge based on her review of ATB's files. The facts in these paragraphs are also confirmed in the Affidavit of Mr. Walrath [Tab M. paras 3-10]

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[11] As at January 1, 1993 the loans described in the following paragraph were in default.

[12] ATB had provided financing to some of the Ghermezian Companies for a number of years, and by March 10, 1994, the long term principal debt owing in respect of the Mall financing consisted of:

(a) (loans ("Tranche I Loans") of a total face amount of approximately $346 million, of which $296 million was advanced by Senior Bondholders, for whom the lead lender was Gentra Canada Investments Inc. ("Gentra"), and Junior Bondholders, whose advances totalled $50 million, and for whom the lead lender was Citibank Canada Inc.;

(b) loans totalling $50 million ("Tranche II Loans") of which $10 million was advanced by ATB and the remaining $40 million was advanced by other financial institutions;

(c) loans totalling $50 million ("Tranche III Loans") advanced by ATB;

(d) demand loans from ATB in the amount of $15.7 million.

[13] As at March 10, 1994, the total principal indebtedness owing to ATB in respect of the Mall was approximately $75.7 million, consisting of a Tranche II Loan of $10 million, a Tranche III Loan of $50 million and demand loans of $15.7 million. In addition, unpaid interest on these loans totalled approximately $6.3 million. The foregoing loans are

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referred to in this Affidavit as the "Mall loans" or "loans with respect to the Mall". In addition, ATB was owed another approximately $47 million under various other loans made to various of the Ghermezian Companies, and with respect to these other loans (the "Non-Mall Loans") ATB held security against assets other than the Mall (the "Non-Mall Assets").	
[14] By March 10, 1994, the Mall financing remained in default by reason of non-payment of municipal taxes and with respect to payments due and not paid. Gentra had appointed a monitor on behalf of the holders of the Tranche I Loans and was threatening to undertake realization proceedings against the Mall.	
Refinancing Proposal - March 10, 1994	
[15] On or about March 10, 1994, a proposal for refinancing the Mall (the "Gentra Proposal") was executed by Gentra, ATB, and 2948834 Canada Inc. ("Newco"). Copies of the Gentra Proposal and a confirming letter are marked as Exhibit "C" to this Affidavit. Douglas Goebel ("Goebel"), the Executive General Manager of the Edmonton General Office of ATB, was ATB's representative in the negotiations which resulted in the Gentra Proposal, under the direction of Alan Bray ("Bray"), the Superintendent of ATB. The Gentra Proposal provided: (a) by agreement or enforcement proceedings by Gentra, title to the Mall would	(e) Paragraph 15 In this paragraph Hiebert Summarize the Gentra Proposal as disclosed in Exhibit "C"; a document from the files of ATB. The paragraph is based on Hiebert's personal knowledge obtained from a review of the files of ATB.

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be transferred to Newco;

(b) Gentra would be issued first mortgage bonds by Newco for approximately $300 million;

(c) Gentra would be issued second mortgage bonds by Newco for approximately $50 million;

(d) ATB would be issued second mortgage bonds by Newco for approximately $50 million;

(e) ATB would be issued preferred shares by Newco for approximately $35 million, which would not yield a dividend and would be retractable at the earlier of 15 years from the date of issuance or the date Newco or its assets were sold or refinancing occurred;

(f) ATB would provide to Newco an operating line of credit of approximately $20 million;

(g) ATB would own 40% (subject to the Ghermezians' rights set out in sub- paragraph (h)) and Gentra would own 60% of the issued and outstanding common shares of Newco;

(h) the Ghermezians, the principals of the corporate owners of the Mall, would be given a management agreement, together with the right to receive 3/4 of the common shares issued to ATB in Newco, but these shares would not be transferred to the Ghermezians until such time as the second

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mortgage bonds and preferred shares were retired or when Newco or its assets were sold; (i) ATB and Gentra would each appoint 2 members of the Board of Directors of Newco, and there would be 5 independent Alberta directors; (j) In the event that Newco should seek re-financing of the first mortgage bonds ATB would commit to provide a guarantee of the first mortgage bonds for $50 million.		
[16] While the effect of the Gentra Proposal would have been to increase ATB's exposure with respect to the Mall from $75.7 million to approximately $105 million, with the possibility of some further exposure on the guarantee of the first mortgage bonds, the Tranche III Loans and demand loans of ATB, totalling approximately $65.7 million would be converted to common shares, preferred shares and a secured operating line of credit. From my review of the files, the Gentra Proposal appears to have been a commercially reasonable solution for ATB at that time.		(f) Paragraph 16 In this paragraph Hiebert summarizes the commercial effect of the Gentra Proposal as disclosed in Exhibit "C" based on the personal knowledge she obtained from reviewing the document. The last sentence states Hiebert's belief that the Gentra proposal was "commercially reasonable", with the sources of that belief (i.e. Exhibit" C" and ATB's files) being disclosed.
[17] On April 19, 1994 the Tranche II Loans, with a value of $50 million, were purchased by 599040 Alberta Ltd. and 599041 Alberta Ltd. for approximately $12.5 million or 25% of their face value.		(g) Paragraph 17 In this paragraph Hiebert summarizes ATB's files relating to the sale of the Tranche II Loans. These facts are based on the personal knowledge she obtained through a review of ATB's files.
Leahy Appointed Acting Superintendent-June 1, 1994		
[18] On or about June 1, 1994, the Defendant Elmer Leahy ("Leahy") was appointed Acting	(d) Paragraphs 18-19 These paragraphs are presented as if Hiebert had personal knowledge of the matters	(h) Paragraph 18 This paragraph summarizes Hiebert's personal knowledge obtained from

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Superintendent of ATB in place of Bray. The position of Acting Superintendent was at that time the top management position at ATB. Leahy immediately removed Goebel and substituted Russ Douglas for Goebel as the lead negotiator relating to the loans involving the Ghermezians. On or about June 2, 1994 Leahy also replaced the law firm of McLennan Ross, which had been representing ATB, with Kenny as ATB's solicitor. Stollery advised me and I do verily believe that on June 6, 1994, he was retained by Kenny to assist Kenny as ATB's counsel, to ensure independence and avoid any conflict of interest, as Mr. Jack N. Agrios ("Agrios"), who was counsel at Kenny's firm, was acting for the Ghermezians.	therein. With the exception of the last sentence of paragraph 18 the deponent states neither the grounds nor her belief in the truth of the matters asserted in paragraphs 18 and 19, and thus the paragraphs should be struck.	a review of ATB's files. In addition, evidence based on information and belief is properly introduced in the last sentence.
[19] From my review of ATB's file, it appears that immediately following his appointment as Acting Superintendent, Leahy directed that ATB should not participate in the refinancing of the Mall debt as contemplated by the Gentra Proposal, and should take the position that the Gentra Proposal signed by Gentra and ATB was not binding on ATB.		(i) Paragraph 19 This paragraph summarizes personal knowledge obtained from reviewing ATB's files.
[20] As Acting Superintendent, Leahy had, in effect, full authority and discretion with respect to the making of loans by ATB, including the making or restructuring of loans involving the Mall, so that ATB was vulnerable to any misuse of this authority and discretion. Leahy issued Directive No. 26, dated July 18, 1994, marked as Exhibit "D" to this Affidavit. By Exhibit "D"	(e) Paragraph 20 This paragraph argues the impact of Leahy's directive. With the exception of the second sentence marking Directive No. 26 as an Exhibit, the remainder is essentially argument without statement of grounds or belief in same, and should be struck.	(j) Paragraph 20 This paragraph summarizes Hiebert's personal knowledge obtained from a review of Exhibit "D".

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Leahy authorized himself to grant credit in his own discretion and without any limitations thereon.		
Purchase of Tranche II Loans by 606881 Alberta Ltd.		
[21] On or about July 26, 1994, the Tranche II Loans with a face value of $50 million, which had been purchased by 599040 Alberta Ltd. and 599041 Alberta Ltd. for $12.5 million (see para. 17), were sold by the holders thereof to 606881 Alberta Ltd. for approximately $15,250,000. The funds to purchase the Tranche II Loans were obtained by 606881 Alberta Ltd. from ATB on or about July 26, 1994. The sole shareholder and director of 606881 Alberta Ltd., which purchased these loans at a premium of approximately $3 million over the price at which they had been acquired by the 2 vendor companies, was Agrios. No valid business or commercial reason existed for ATB to increase its exposure in relation to the Mall by advancing monies for the purpose of this purchase.	(f) Paragraphs 21 and 22 These paragraphs are presented as if the deponent had personal knowledge of matters significantly pre-dating her involvement at ATB. They do not state the source of her review or her belief in the truth of what is stated. Note also the blatant opinion in the last sentence of paragraph 21. Both paragraphs, it is submitted, should be struck.	(k) Paragraphs 21 and 22 These paragraphs summarize Hiebert's personal knowledge about the content of ATB's files. The last sentence in paragraph 21 contains her belief. The source of her belief is disclosed as being her review of the ATB files relating to Tranche II Loans.
Purchase of Tranche I Loans by 1059502 Ontario Ltd.		
[22] On September 1, 1994 ATB lent $3.3 million to 1059502 Ontario Ltd. ("1059502") to purchase one of the Tranche I Bonds with a face value of $5 million. Agrios was the sole shareholder of 1059502. On September 14, ATB lent $1 million to 1059502 to pay an investment banking fee to Nomura Securities Inc. 1059502 pledged the Tranche I Bond to ATB as security for both loans. On or about September 27, 1994, the Tranche I		

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Bond was sold to Gentra for $5 million. 1059502 paid ATB $4,274,886.68, the balance outstanding on the two loans. The difference between that amount and the $5 million paid for the bond was apparently retained by 1059502.		
September 26, 1994 Settlement Agreement		
[23] On September 26, 1994, an agreement was entered into by the Ghermezian Companies, ATB and Nomura Asset Capital Corporation ("NACC") for refinancing WEM. This agreement provided that: (a) ATB would discharge its first mortgage, with a balance outstanding of approximately $310,000, as against the residence of Nader Ghermezian, which was valued at an amount substantially higher than the loan balance; (b) ATB would discharge its first mortgage as against one of the non-Mall Assets known as Club Fit, and would discharge its mortgage as against another Non-Mall Asset known as the Palisades, notwithstanding that ATB's files showed that the value of the	(g) Paragraph 23 This paragraph with respect to the so-called Settlement Agreement contains prejudicial material and blatant opinion. In particular the assertions with respect to the value of the Non-Mall Assets is entirely without specification of grounds or belief, and there is no evidence to suggest the deponent is in any way qualified to provide an opinion with respect to the valuation of such assets. The WEM Applicants submit this paragraph should be struck.	(l) Paragraph 23 The paragraph summarizes the contents of the Agreement contained in Exhibit "DD". The statement that the "Non Mall" assets were worth less than $53 million summarizes her personal knowledge based on ATB files. As set out in paragraph 23(b) ATB's files showed that the value of these assets was less than $53 million. The same statement is made in paragraph 31(c). The loss of $35 million referenced in the second last sentence of paragraph is personal knowledge derived from the actual sale proceeds as shown on ATB's files (see paragraph 31(d)).

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Non-Mall Assets was far less than the amount of the Non-Mall Loans;		
(c) certain Ghermezian Companies would transfer to ATB the Non-Mall Assets (other than referred to in paragraph (b) hereof), at the value set out in appraisals obtained by the Ghermezians and such amounts would be applied first against the Non-Mall loans, and secondly, on amounts owing on ATB's loans to the Mall; and		
(d) ATB could not sell its position to Gentra.		
The Non-Mall Assets were transferred effective October 15, 1994 to ATB at a net value after adjustments of $53,171,688.05, of which $47,830,365.71 was applied to pay off the indebtedness secured by the Non-Mall Assets and the balance of $5,341,322.34 was credited to ATB's loans to the Mall. The Non-Mall Assets were worth much less than the amounts credited for them, resulting in a loss to ATB of approximately $35 million. A copy of the agreement is marked as Exhibit "DD" to this Affidavit.		
Withdrawal of NACC		
[24] In or about mid-October, 1994, the TD Bank agreed to participate in the refinancing in place of NACC, on the strength of a full guarantee from ATB.	(h) Paragraph 24 This paragraph purports to speak to the mind and intentions of the TD Bank without any basis specified therefor, or belief in same asserted. This paragraph is clearly contrary to Rule 305(3) and should be struck.	(m) Paragraph 24 The paragraph states a fact disclosed from ATB's files.
Foreclosure of Mall		
[25] On October 26, 1994 an application was brought by 606881 Alberta Ltd. a company controlled by	(i) Paragraph 25 This paragraph concerning the October 1994 judicial proceedings is something	(n) Paragraph 25 This paragraph summarizes facts which are Hiebert's personal knowledge

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the Ghermezians, for an Order permitting judicial sale of the Mall to another company controlled by the Ghermezians, 626110 Alberta Ltd. This Order, marked as Exhibit "E" to this Affidavit, was granted by Mr. Justice Lefsrud who agreed that this Order could be held until October 31, 1994 pending completion of the refinancing of the Mall. The Order provided that the price to be paid by 626110 Alberta Ltd. was $419,630,000, to be paid by the assumption by 626110 Alberta Ltd. of the Tranche I and II Loans, and a portion of the Tranche III Loan consisting of the difference between the total amount due on the Tranche I and II Loans and the purchase price.	of which the deponent can have no personal knowledge. The paragraph fails to state the source of the matters asserted or her belief therein and also fails to comply with Rule 305(3) and should be struck.	obtained from a review of ATB's file. The Order of Justice Lefsrud which is the source of that knowledge is attached as Exhibit "E". The Court may take judicial notice of its own records.
Essential Terms of October 31, 1994 Refinancing		
[26] In summary, the terms of the October 31, 1994 refinancing (the documents setting out the terms thereof collectively called the "Loan Documents") were that the Defendant Mallco became the owner of the Mall, and the Defendant WEM Management Inc. ("Manager") became the manager of the Mall. The Defendants Mallco and Manager were beneficially owned by the Ghermezians as set out in Exhibit "B". Under this refinancing, the TD Bank would provide funding of $353.5 million ("TD Credit Facility"), for a 10 year term. ATB would loan $65 million ("ATB Loan") to Mallco for a 30 year term, at no interest. ATB would guarantee to the TD Bank the payment of all amounts due to TD Bank under the TD Credit Facility and would be responsible to pay out	(j) Paragraph 26 and paragraph 27 These paragraphs purport to interpret and provide conclusions on the impact of the 1994 refinancing documents. As such it is submitted they are contrary to the direction provided by the Court of Appeal in the Alberta Human Rights Commission case, supra, and should be struck. The deponent had no involvement in the negotiation of the documents and can have no personal knowledge thereof. Further there is no statement of grounds for her belief or indeed a belief in what she has stated.	(o) Paragraphs 26 and 27 These paragraphs summarize the contents of the Loan Document (defined in paragraph 29 as including Exhibits "F" through "T" to the Affidavit). Such summary is based on the personal knowledge obtained by Hiebert from a review of the files of ATB.

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the outstanding balance of the TD Credit Facility at maturity (the "ATB Guarantee"). The effect of these transactions was to increase ATB's credit exposure with respect to the Mall from approximately $75.7 million as of June 1, 1994 to approximately $420 million as of October 31, 1994.

[27] The Loan Documents further provided that:

(a) TD Trust, as Servicer, would hold a first mortgage debenture to secure the TD Credit Facility and a second charge debenture to secure the ATB Loan as nominee and trustee for the Defendant TD Bank and ATB respectively;

(b) ATB would be appointed the Directing Party with the right to waive, or alternatively, to take such steps and to exercise such rights and remedies in respect of an Event of Default under the Loan Documents as it deemed appropriate without the consent of the other Secured Parties;

(c) The TD Bank could not exercise any power, right or discretion provided for in the Loan Documents without the prior written consent of ATB;

(d) Pursuant to the Cash Flow Control Agreement, Excess Cash Flow would be distributed as to the first $3 million to reduce the TD Credit Facility; in any year where the Excess Cash Flow was less than $3

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million, the amount of the shortfall was to be added to the first $3 million for the following year and any subsequent year; of the next $3 million, 80% would be payable to the Defendant Mallco, or as it directed, and the remaining 20% would be applied on the ATB Loan; and as to any amount in excess of $6 million, 50% would be applied to reduce the TD Credit Facility, 40% would be paid to the Defendant Mallco, or as it directed, and the remaining 10% would be applied on the ATB Loan (provided no distribution of Excess Cash Flow would reduce the Working Capital of the Defendant Mallco to less than $3.5 million).		
[28] The terms and conditions of the Loan Documents were not typical of what would be expected in a normal and reasonable distressed loan work out transaction, as indicated by the following:	(k) Paragraph 28 This paragraph is riddled with the deponent's opinion the nature of the loan documents. Among other things she notes that their terms "were not typical of what would be expected in a normal and reasonable distressed loan workout transaction" and contrasts the provisions with what she considers "normal commercial terms". The paragraph does not contain matters of fact, but rather interpretation and opinion. Moreover there is no statement of belief in what is asserted. Accordingly the material is improper and should be struck.	p) Paragraph 28 This paragraph contains an expression of the deponents belief that the terms and conditions of the loan documents "were not typical of what would be expected in a normal reasonable distress loan work out transaction". The source of that belief is set out in detail in subparagraphs (a)(i) through (a)(vi) and subparagraph (b). The sources include the fact that ATB provided West Edmonton Mall property ("Malico") with $65 million dollars in credit for 30 years at no interest, (as stated in paragraph 28 (a)(i)), and further detailed in paragraph 26), and that ATB would guarantee the TD Bank's Credit Facility of $353 million for 10 years

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(as stated in 28(a)(ii), and detailed in paragraph 26).

(a) as to ATB's position:
  (i) the ATB loan bears no interest for its full term of 30 years;
  (ii) ATB fully guarantees the TD Credit Facility for its full 10 year term, and then is required to pay it out on its maturity, but receives compensation of only $3 million per year for assuming the entire risk representing less than 1% of the amount guaranteed, far below what would be commercially normal and reasonable for providing such a guarantee and administering the TD Credit Facility;
  (iii) as a result of the provisions for the distribution of Excess Cash Flow, the payments to TD Bank to reduce principal would be minimal - for example, if Excess Cash Flow was $3 million per year, it would take 118 years to pay out the TD Credit Facility, and based on the actual principal reductions of the TD Credit Facility during the first 4 years since October 31, 1994 (an average of $1,857,281 per year) it would take 190 years - in the result, the TD Credit Facility

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was virtually an interest-only loan, so that ATB took the full risk with respect to the TD Credit Facility and the ATB Loan but received no interest;

(iv) the provision that if the Excess Cash Flow in any year is less than $3 million, the deficiency is carried over to the following year and any subsequent year, combined with the term of the ATB Guarantee that ATB guarantees the interest payments on the TD Credit Facility, has the practical effect there can be no monetary default on the TD Credit Facility, and the full risk of any shortfall in cash flow rests with ATB;

(v) the terms for distribution of the Excess Cash Flow over $3 million permit a large share to be paid to Mallco and used for purposes of Mallco's choosing, including dividends to shareholders, whereas normal commercial terms would allocate all Excess Cash Flow to the lenders until the borrower achieved more satisfactory debt/equity ratios and debt servicing ratios;

(vi) the Ghermezians were permitted to keep full

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ownership of the Mall, whereas normal commercial terms in such a restructuring would provide for all or a significant proportion of ownership to be turned over to the lenders, with the borrowers having the opportunity to earn back some equity.		
(b) as to the TD Bank's position - a loan of this size and type would not normally be made on essentially an interest-only basis - the loan represented a reasonable credit risk for TD Bank because it was fully guaranteed by the Government of Alberta.		
[29] The Loan Documents include:	(1) Paragraph 29 This paragraph purports to mark as Exhibits several of the documents related to the 1994 refinancing. The deponent has not advised as to her specific involvement with these documents, their location within the ATB files, nor that she even has care and control of same. Given her commencement date of employment at ATB, Hiebert cannot otherwise identify the documents as exhibits.	(q) Paragraph 29 The paragraph describes the Exhibits to the Affidavit drawn from ATB's files which form part of the personal knowledge of Hiebert based on her review of the files.
(a) a loan agreement between the Defendant Mallco, the TD Bank, ATB and others ("Loan Agreement"), marked as Exhibit "F" to this Affidavit, setting out the terms and conditions of the TD Credit Facility;		
(b) a second loan agreement (the "Second Loan Agreement"), marked		

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as Exhibit "G" to this Affidavit, setting out the terms and conditions of the ATB Loan;

(c) the ATB Guarantee, marked as Exhibit "H" to this Affidavit;

(d) a property management agreement ("Property Management Agreement"), marked as Exhibit "I" to this Affidavit;

(e) a cash flow control agreement ("Cash Flow Control Agreement"), marked as Exhibit "J" to this Affidavit;

(f) mortgage documents securing the TD Loan ("First Mortgage Debenture", "Supplemental First Mortgage Debenture", "First Mortgage Pledge Agreement") and securing the ATB Loan ("Second Mortgage Debenture", "Second Mortgage Pledge Agreement"), marked respectively as Exhibits "K", "L"," M", "N", and "O" to this Affidavit;

(g) an agreement ("First Mortgage Servicing Agreement"), marked as Exhibit "P" to this Affidavit;

(h) an agreement ("Second Mortgage Servicing Agreement"), marked as Exhibit "Q" to this Affidavit;

(i) agreements ("Guarantees") under which the Defendant Triple Five Properties Inc., the Manager, and the Defendant WEM Holdings Inc. guaranteed the due payment of the TD Credit Facility and the

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ATB Loan, marked respectively as Exhibits "R", "S", and "T" to this Affidavit.		
All capitalized words not defined in this Affidavit shall have the meaning ascribed to such words as contained in the Loan Documents.		
[30] The refinancing proceeds were advanced on November 3, 1994.	(m) Paragraph 30 This paragraph fails to comply with Rule 305(3) in that the source of the information and the deponent's belief therein is not stated it should be struck.	(r) Paragraph 30 This paragraph states a fact based on Hiebert's personal knowledge obtained from the ATB files.
Increase in ATB's Exposure from March 10, 1994 to November 3, 1994		
[31] It is illuminating to look at the changes to ATB's exposure on its loans to the Ghermezian Companies between the date of the Gentra Proposal of March 10, 1994 and November 3, 1994 the date the refinancing was funded. The changes in ATB's exposure over that time period were as follows:	(n) Paragraph 31 The argumentative nature of this paragraph is highlighted by the language "it is illuminating to look at the changes to ATB's exposure". The paragraph deals with matters of which the deponent can have no personal knowledge and does not state the source of her information or her belief therein. The paragraph is nothing more than a review and opinion on matters and does not state fact. The WEM Applicants request that it be struck.	(s) Paragraph 31 This paragraph sets out ATB's position at two points in time being firstly March 10{th}, 1994 and secondly November 3{rd}, 1994. Hiebert presents three comparisons which are set out in subparagraphs a and b, subparagraphs c and d, and subparagraphs e and f. These comparisons are a summary of ATB's position, as contained in the records of ATB, at those particular points in time. The paragraph is based on the personal knowledge of Hiebert obtained from her review of ATB's files. There are no editorial comments or "opinions" in the paragraph.
(a) on March 10, 1994, ATB had no potential liability to the first mortgage holder (Gentra et al) if the amount recovered on a realization by the first mortgage holder was less than $346 million; (b) by November 3, 1994, ATB had full liability to the first mortgage holder; (c) on March 10, 1994, ATB was owed		

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approximately $47 million by various Ghermezian Companies on Non-Mall Loans. ATB subsequently took back these assets and gave the Ghermezian companies a credit of $53 million based upon appraisals provided by the Ghermezians. When ATB agreed to this, ATB's files showed that the value of the Non-Mall Assets was far less than $53 million;

(d) in fact, realization on the Non-Mall Assets is virtually complete and the total realized will be approximately $18 million, resulting in a loss of approximately $35 million on this aspect of the transaction;

(e) on March 10, 1994, ATB was owed approximately $82 million ($75.7 million in principal and approximately $6.3 million in interest) secured by charges against the Mall. (This indebtedness is over and above the $47 million dealt with in (c) above);

(f) on November 3, 1994, ATB received a second mortgage with a face value of $65 million but with an actual present value of $4.9 million (in that it was non-interest bearing and payable in 2024) resulting in a loss with respect to the Mall Loans of approximately $80.7 million ($75.7 million in principal + $9.9 million in interest to

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November 3, 1994 - $4.9 million); November 15, 1994 "Side Agreement"		
[32] Certain documents, previously unknown to me or to the best of my knowledge to anyone else presently employed at ATB, recently came to ATB's attention. "Y" and "CC", These "side agreements" are dealt with in paragraph 33, 39, 42 and 46 of this Affidavit (the "Side Agreements"). The existence of certain Side Agreements was suggested by the Defendants Raphael Ghermezian and Howard Anson to Robert Kallir, General Counsel of ATB, and myself at a meeting on March 17, 1998. Mr. Kallir and I requested that we be provided with copies of any such documents, but Mr. Ghermezian refused to produce them.	(o) Paragraph 32 The first sentence of this paragraph fails to specify what inquiries or review was made to determine the knowledge of anyone else at ATB. As such it is speculative and should be deleted.	(t) Paragraph 32 This paragraph discusses the efforts made by Hiebert to gather those documents contained in Exhibits "U", "W", "X" and is a matter of personal knowledge of Hiebert.
[33] On or about June 18, 1998, I received from Milner Fenerty, Solicitors for ATB, a copy of a letter agreement purporting to be executed or agreed to as between the Defendant Mallco and ATB as at November 15, 1994, of which a copy is marked as Exhibit "U" this Affidavit. This document was purportedly signed on behalf of ATB by Leahy. I am informed by Milner Fenerty and do verily believe that this document was sent to them with a letter dated June 18, 1998 from the firm of McLennan Ross, purporting to represent the Defendant Mallco.	(p) Paragraph 33 The last sentence of this paragraph fails to identify the specific person from whom Hiebert received information at Milner Fenerty and should be deleted for that reason.	(u) Paragraph 33 The paragraph sets out the facts within the personal knowledge of Hiebert as to correspondence received, including Exhibit "U". The specifics of the source of certain evidence based on information and belief is set out in the last sentence and is sufficiently described.
[34] The purported letter agreement of November 15, 1994, purports to retroactively amend the TD Credit Facility, the Cash Flow Control Agreement,	(q) Paragraph 34 This paragraph is entirely argument on the effect of the purported letter agreement of November 15, 1994. On the Alberta	(v) Paragraph 34 This paragraph is based on Hiebert's personal knowledge and summarizes Exhibit "U" to the Affidavit, which is a

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the ATB Loan and the other Loan Documents by, inter alia, (a) requiring ATB to pay interest on all payments received on the TD Credit Facility and the ATB Loan until applied against the loans; (b) to change the application of the payments received so as to be applied first on the principal of the ATB Loan after discounting it to its present value, until the discounted amount of the ATB Loan is repaid in full, then to be applied on the TD Credit Facility; (c) restricting the principal payments on the TD Credit Facility to 50% of Excess Cash Flow; (d) requiring that the Manager remain manager of the Mall until October 31, 2014; (e) revising the order of priority of payments out of Mall Revenues; (f) extending the TD Credit Facility for 10 years to October 31, 2014; (g) requiring ATB to fund any shortfall in cash flow; (h) deeming certain Potential Default or Events of Default under the Loan Documents not to have occurred; (i) requiring ATB to obtain the consent of the Defendant TD Bank to these purported wholesale amendments; and (j) purporting to permit Mallco to prepare other agreements reflecting some or all of the contents	Human Rights Commission authority it should be struck.	document executed by Leahy on behalf of the ATB.

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of this document on new and different terms. This document further provides that the parties will keep it confidential and "not surface same at least until the next province-wide Alberta provincial election is completed".		
[35] Prior to my receipt of the November 15, 1994 document from Milner Fenerty on or about June 18, 1998, this document was unknown to me, no copy was on ATB's file, and to the best of my knowledge and belief, it was unknown to anyone else presently employed by ATB or the TD Bank.	(r) Paragraph 35 This paragraph should be struck to the extent it deals with the knowledge of anyone other than the deponent at ATB or TD Bank. Nowhere has the deponent indicated what inquiries were made to arrive at this conclusion.	(w) Paragraph 35 This paragraph deals with Hiebert's personal knowledge based on her own review of ATB's file. To the extent it speaks to the knowledge of other persons it is a manner approved by the Alberta Court of Appeal in Kin Franchising [Tab 32, page 315, para. 4].
September 13, 1995 Agreement		
[36] By an agreement in writing made as of September 13, 1995, marked as Exhibit "V" to this Affidavit, the Defendant Mallco, the TD Bank and ATB, agreed to amend the Loan Agreement by, inter alia, permitting the Defendant Mallco to divide the TD Credit Facility into ten separate segments for various terms at various interest rates as more particularly described in the agreement. This agreement gave no indication of the existence of a November 15, 1994 "Side Agreement". Stollery acted for ATB in documenting this agreement.	(s) Paragraph 36 The middle sentence of this paragraph is argumentative and should be deleted.	(x) Paragraph 36 All of the statement in the paragraph are statements of fact based on personal knowledge of Hiebert based on her review of Exhibit "V".
Ninety-nine year Management Commitment		
[37] In April, 1998 I learned that a long-term lease dated February 23, 1996 had been entered into between the Defendant, Mallco and Sunningdale, Investments ("Sunningdale"), who would construct a second hotel at the Mall. This came	(t) Paragraph 37 The last sentence dealing with the awareness of others employed at ATB should be deleted.	(y) Paragraph 37 The paragraph is a statement of Hiebert's own personal knowledge at a point in time. The last sentence, dealing with the nonexistence of knowledge on the part of others employed at the ATB is set

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to ATB's attention on or about April 3, 1998 when Jonathan Levin, a lawyer in Toronto representing the Ghermezian Companies ("Levin") advised ATB's solicitors of this lease. Prior to Levin's letter of April 3, 1998, I was unaware of this document and, to the best of my knowledge and belief, no one presently employed by ATB was aware of the Sunningdale lease.		out in a manner approved by the Alberta Court of Appeal
[38] As I did not have a copy of the Sunningdale lease, I instructed Milner Fenerty to obtain a copy from Levin. [39] I am advised by Richard Cotter and do verily believe that on April 21, 1998, Milner Fenerty received a copy of the Sunningdale lease from Levin. A copy is marked as Exhibit "W" to this Affidavit. Attached to the lease was a further document, purportedly dated February 23, 1996. A copy of this document is marked as Exhibit "X" to this Affidavit. Both Exhibits "W" and "X" were once again purportedly signed on behalf of ATB by Leahy.		(z) Paragraphs 38 and 39 No objection was raised by WEM Applicants to these paragraphs.
[40] The Sunningdale lease provides inter alia for a term of 99 years commencing on the date the hotel opens for business and purports to grant exclusive right to manage the Mall to the Ghermezians, members of their families or a company controlled by the Ghermezians, for the full 99 year term of the lease. The occupancy costs would be limited to $50,000 annually, increased on the basis of increases in the CPI, capped at a maximum of 2% per annum. Sunningdale would pay $92,500 per	(u) Paragraph 40 This paragraph is an argument on the terms of the Lease and is not fact. It should be struck from the Affidavit.	(aa) Paragraph 40 The paragraph sets out Hiebert's personal knowledge and summarizes Exhibits "W" and "X", which are documents signed by Leahy on behalf of the ATB.

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year for utilities, for the entire 99-year term, without any provision for any increase, based on CPI escalation or otherwise, and the Defendant Mallco was to provide security for the hotel at no expense to Sunningdale, a company controlled by the Ghermezians.		
[41] The document accompanying the Sunningdale lease purports to contain an acknowledgement by ATB of the exclusive right of the Ghermezians to manage the Mall for the full 99 year term of the lease, plus any renewal term, and that only the Ghermezians shall have the rights as Manager under the Property Management Agreement. It further purports to remove the right of ATB to terminate the management rights of the Manager under the Property Management Agreement, and to provide that the Management Fee shall not be less than 90% of the fee for the first year of the Property Management Agreement plus a provision for CPI escalation, shall not be subject to any deductions, set-offs, charge backs, etc., and shall have priority over any debts secured against the Mall. It thus purports to radically amend the Property Management Agreement and other Loan Documents.	(v) Paragraph 41 This is also further argument on the terms of the document in question, with an inflammatory conclusion in the last sentence thereof, and should be struck.	(bb) Paragraph 41 The paragraph sets out Hiebert's personal knowledge and summarizes Exhibit "X", which is a document signed by Leahy on behalf of the ATB. It contains no "inflammatory" statements and simply summarizes the effect of the agreement as disclosed by its contents.
[42] As Exhibit "Y" to his Affidavit sworn on November 6, 1998, Martin Walrath of WEM attached a copy of a further document purporting to be dated August 13, 1996 and purporting to be signed by Sunningdale, Mallco and ATB, the latter by a signature which,	(w) Paragraph 42 With the exception of the first sentence of this paragraph, its contents are argumentative, speculative and fail to comply with Rule 305(3). It should be struck.	(cc) Paragraph 42 This paragraph describes the circumstances under which Ms. Hiebert gained knowledge of Exhibit "I" to the Hiebert Affidavit and, except for the last sentence, it is a statement of fact based on Heibert's personal knowledge. The last sentence is based on

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in the copy exhibited, is illegible. This document, according to Mr. Walrath's Affidavit, purportedly corrected the term of the Property Management Agreement (Exhibit "I" to this Affidavit) which by "pure inadvertence" had been extended to 99 years. A copy of that Exhibit is marked as Exhibit "Y" to this Affidavit. This document was not provided by Mallco's counsel to our counsel when the other post- October 31, 1994 documents were provided, and did not appear in any way until after I had sworn and filed my Affidavit in the Edmonton WEM action and had been cross-examined on that Affidavit. I was unaware of the document, and, to the best of my knowledge and belief, no one presently employed by ATB was aware of this document. I am advised by Richard Cotter, and do verily believe, that Mr. Levin did not make any reference to this further document in his telephone discussions and correspondence with Mr. Cotter in April, 1998.		information and belief the source of which is disclosed
[43] To the best of my knowledge and belief no valid consideration was given to ATB with respect to the Side Agreements, or any of them, and each of the Side Agreements is "CC". As the improvident, contrary to prudent lending principles and practice, wholly and utterly devoid of any valid commercial purpose or justification, and contains terms and conditions which no commercial lender, acting rationally or prudently, would agree to or entertain. Each of the Side	(x) Paragraph 43 This paragraph is blatant pleading and argument in terms that are highly prejudicial to the WEM Applicants and the Defendant. It must clearly, it is submitted, be struck from the Affidavit.	(dd) Paragraph 43 This paragraph contains a statement of Ms. Hiebert's belief. The source of her belief are the "Side Agreements" being Exhibits "U", "W", "X", "Y", source of here belief is disclosed the paragraph complies with rule 305(3).

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[44] I am advised by Richard Cotter of Milner Fenerty, and do verily believe, that he asked both Stollery and Kenny, whether either of them had ever seen or heard of the Side Agreements, or been consulted about them in any way, and each advised that he had not, notwithstanding that both Stollery's firm and Kenny's firm continued for many months following October 31, 1994 to complete the documentation and implementation October 31, 1994 refinancing as reflected in the Loan Documents.	(y) Paragraph 44 This paragraph constitutes blatant double hearsay and fails to indicate in any event that the deponent believes what her solicitor was advised. There is no way that such a double hearsay assertion can be properly tested particularly where ATB counsel are the sources thereof, and no doubt privilege will be asserted in response to any cross-examination question. The paragraph is improper and should be struck.	(ee) Paragraph 44 The paragraph describes what was told to her by Richard Cotter and her belief in those statements. The paragraph is therefore in compliance with rule 305(3).
[45] The financial statements for the Defendant Mallco for its years ending July 31, 1995, July 31, 1996, and July 31, 1997, as audited by Mallco's auditors Doane Raymond (marked as Exhibits "Z", "AA" "AA" and "BB" to this Affidavit), and the monthly financial statements for the Defendant Mallco prepared by the Defendant Manager and provided to ATB for the year ending July 31, 1998, all reflect the terms of the Loan Documents as amended by Exhibit "V". They make no reference to and do not take into account in any way the provisions of the Side Agreements. It is obvious that the Side Agreements, if they existed at all, were not brought to the attention of the Ghermezians' auditors. All parties to the Loan Documents to date have acted in accordance with the provisions of the Loan Documents, as amended by Exhibit "V", without in any way complying with the purported amendments set out in the Side Agreements.	(z) Paragraph 45 With the exception of the first sentence this paragraph is entirely improper. The speculation about what the Ghermezian's auditors were aware of is highly improper and prejudicial. The assertion as to whether parties have acted in accordance with the agreement is a matter for the Court based on facts which have not been placed before the Court. The paragraph should be struck out.	(ff) Paragraph 45 This paragraph contains statements of fact based on Hiebert's personal knowledge obtained from a review of ATB's files. The paragraph summarizes Exhibits "X", and "BB" which are financial statements that were provided to ATB and which form part of ATB's files.

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March 26, 1996 Right of First Refusal		
[46] On or about March 26, 1996 Leahy apparently signed a right of first refusal in favour of Mallco. A copy of that right of first refusal is attached hereto as Exhibit "CC". Exhibit "CC" came to ATB's attention through a McLennan Ross letter of June 18, 1998, which also referred to a "right of first refusal agreement". As no copy of any such document could be located on any of ATB's files, Milner Fenerty requested a copy from McLennan Ross, who then sent a copy of Exhibit "CC" to Milner Fenerty. Prior to my receiving Exhibit "CC" from Milner Fenerty on or about June 22, 1998, its existence was unknown to me and, to the best of my knowledge and belief, it was unknown to anyone else presently employed by ATB or the TD Bank. Once again, this document was purportedly signed on behalf of ATB by Leahy. If this document had any effect, it would restrict ATB's flexibility with respect to any permitted re-sale of its position and would potentially diminish its recovery (for example, a potential purchaser would likely demand compensation if Mallco exercised its right of first refusal after the purchaser had carried out the extensive due diligence required for a transaction of this magnitude).	(aa) Paragraph 46 This paragraph should be struck as it provides hearsay without the source or statement and belief thereof, as well as the previously stated concern about the basis for the deponent's understanding of the knowledge of others employed at ATB or TD Bank. The last sentence is entirely argument about the impact of the document.	(gg) Paragraph 46 This paragraph describes circumstances under which ATB became of the existence of Exhibit "CC" as revealed by ATB records The description of the nonexistence of knowledge by ATB employees is set out in a manner approved by the Alberta Court of Appeal. The document is then summarized based on Hiebert's personal knowledge obtained from a review of the document, which document was executed on behalf of ATB by Leahy.
Termination of Leahy Employment		
[47] By agreement between ATB and Leahy, Leahy's employment with ATB terminated at the end of August, 1996.	(bb) Paragraph 47 This is hearsay without the grounds or belief stated, and should be struck out.	(hh) Paragraph 47 This paragraph is based on personal knowledge of Heibert by reviewing the files of ATB.

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Overall Effect of the Leahy-approved Transactions

[48] One cannot comment on the overall effect of the Leahy-approved transactions without first noting that the present value of the second mortgage obtained by ATB as at November 1, 1994 was actually approximately $4.9 million. The second mortgage put in place has a face value of $65 million but it is payable without interest in 30 years. A $65 million mortgage bearing interest at 9 per cent per annum would yield approximately $121 million in interest over 30 years. I am advised by Clark Sullivan of Deloitte & Touche and verily believe to be true that accounting practice is to record a long-term loan bearing no interest by recognizing "implicit" interest and discounting the principal to an amount which more appropriately reflects the true value of the loan at the time, in effect the present worth. Using an implicit interest rate of 9 per cent, the value of the second mortgage was approximately $4.9 million as at November 1, 1994.

(cc) Paragraphs 48-53 These paragraphs are the most offensive and objectionable in the Hiebert Affidavit. They consist of rank legal argument and opinion couched in the most prejudicial terms. They are clearly improper and devoid of factual basis and should be struck from the Affidavit.

(ii) Paragraph 48 This paragraph contains a statement of the fact based on Heibert's personal knowledge of ATB's records, to the effect that $65 million in credit was extended by ATB in relation to the Mall for a thirty year term with no interest being charged. The balance of the paragraph provides a factual description of the value of the ATB loan assuming a 9% interest rate. Hiebert states her belief that the calculation is correct and that such belief is based on information and belief obtained from Deloitte & Touche. There is no argument or opinion given in the paragraph.

SUMMARY:

As in the cases such as Foodcorp., Waverley (Village), and Bell Canada, all supra, a paragraph by paragraph analysis of the Hiebert Affidavit demonstrates that it is so overwhelmingly defective as to be essentially unsalvageable. In the circumstances it is respectfully submitted that the entire Affidavit should be struck from the court file. Alternatively, the objectionable paragraphs

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	detailed above should be struck out of the Affidavit.	
[49] Documenting the transactions in question with the $65 million face value second mortgage conceals the fact that ATB in effect lost approximately $80.7 million on the Mall loans (see paragraph 31 of this Affidavit).		(jj) Paragraph 49 This paragraph makes a statement of fact based on Hiebert's personal knowledge of ATB's records as detailed in paragraph 31.
[50] The situation before the Leahy-approved transactions took place was that: (a) the amounts owing against the Mall exceeded the Mall's value assuming that the Mall was worth approximately $425 million, which was the evidence placed before Justice Lefsrud on October 26, 1994; (b) it was therefore clear that the Ghermezian Companies had no equity in the Mall; and (c) all loans outstanding against the Mall were in default, and the first mortgage holder (Gentra) was threatening to foreclose;		(kk) Paragraph 50 This paragraph summarizes the facts existing at a point in time based on Heiberts' personal knowledge obtained from her review of the records of the ATB. The paragraph contains no opinion or argument.
[51] Faced with this situation, ATB: (a) essentially agreed to forgive a substantial portion of what it was owed and, by reason of its full guarantee of the TD Bank's first mortgage, ATB in effect financed 100% of the debt. By entering into the transaction as documented, ATB left the impression-that-it-had-not taken the full exposure with respect to the Mall;		(ll) Paragraph 51 This paragraph summarizes steps taken by the ATB based on Hieberts' personal knowledge obtained from her review of the records of ATB. The paragraph contains no element of opinion or argument; the statements can be proven to be either true or false based on purely objective evidence contained in the documents.

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(b) allowed the Ghermezian Companies to retain 100% ownership interest in the Mall;

(c) ATB released $80.7 million in Mall loans when there was apparent equity to cover most of those loans, based on the Mall value accepted by Justice Lefsrud, thereby gifting that amount of apparent equity to the Ghermezian Companies;

(d) the Ghermezian Companies get a significant portion of the Excess Cash Flow from the Mall but have no obligation to ever repay any of the $80.7 million which was released, or to provide ATB with any equity upside, no matter how profitable the Mall might become. For example, in the fiscal year ending July 31, 1996, the Ghermezians obtained approximately $2.5 million in Excess Cash Flow from the Mall, in addition to management fees of approximately $5.6 million, without ATB being entitled to any repayment of any portion of the said $80.7 million. (Contrast this with the Gentra Proposal where ATB obtained 40% ownership of the Mall, which ownership interest could only be regained by the Ghermezian Companies making significant payments toward ATB's foregone debt);

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(e) the Ghermezian Companies can remove millions in profits while leaving the principal under the first mortgage, and ATB's exposure for it, largely outstanding. In fact, unless there is adequate cash flow, there is no requirement to make any principal payments under the first mortgage;

(f) if the Mall performs poorly, so that interest payments cannot be made under the first mortgage, ATB is obliged to advance the funds to make those first mortgage interest payments;

(g) for its 100% guarantee of the TD Loan ATB receives a guarantee fee of less than 1% per year of the amount at risk while WEM's interest rate on $353.5 million of the Mall debt was lowered by approximately 5% and, with respect to the portion of the Mall debt represented by the ATB loan, by approximately 11% annually; and

(h) the $65 million loan bore no interest, whereas a normal interest-bearing loan would have paid ATB approximately $121 million in interest over 30 years.

[52] In my opinion, the work-out summarized in the preceding paragraph is so far removed from being commercially reasonable and fair to ATB as to be shocking. There are countless types of commercially reasonable work-outs that could have been achieved, such as:

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(a) ATB could have foreclosed the Mall, taking 100% ownership, and either hired outside management to run the Mall or offered the Ghermezians short term contracts to manage the Mall (perhaps including the right to earn back ownership in return for achieving profitable performance);
(b) ATB could have entered into a variety of arrangements, leaving full ownership of the Mall with the Ghermezian Companies, but providing for all or a substantial portion of net cash flow to go towards the forgiven $80.7 million;
(c) the Gentra Proposal is just one example of a work-out which appeared to offer a fair and reasonable solution to ATB at that time.

(mm) Paragraph 52 The first sentence of the paragraph contains a statement of Ms. Hiebert's belief. The sources of her belief are detailed in subparagraphs (a) through (c) which sets out alternative strategies for dealing with the situation relating to the Mall which, based on the records of ATB, were available to the ATB.

Aggravating Circumstances

[53] The following additional factors should be noted:

(a) ATB advanced $3.3 million for the purchase of a $5.0 million Tranche I Bond (see paragraph 21 of this Affidavit) and ATB lent another $1 million against the security of that Bond. This Bond was apparently redeemed for $5.0 million and ATB is unaware why the apparent $700,000 in profit, referred to in paragraph 21 of this Affidavit, was not applied to its outstanding loans;

(nn) Paragraph 53 This paragraph makes certain statements of fact based on Heibert's personal knowledge of ATB's records. The paragraph contains no element of argument or opinion.

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(b) ATB funded the purchase of Tranche II Bonds for $15.25 million. These Bonds had been acquired about 3 months earlier for $12.5 million (see paragraphs 17 and 21 of this Affidavit). ATB is unaware who made the apparent $2.75 million profit;

(c) ATB released its $310,000 first mortgage against Nader Ghermezian's house and its mortgages against Club Fit and the Palisades (see paragraph 23 of this Affidavit) notwithstanding that it was already agreeing to incur the huge losses I have previously described.

[54] I make this Affidavit in support of the relief sought in the Notice of Motion filed on behalf of ATB on December 1, 1998 and returnable on January 25, 1999.

APPENDIX "C"

In the Court of Queen's Bench of Alberta Judicial District of Calgary

BETWEEN: *ALBERTA TREASURY BRANCHES PLAINTIFF* - *and* - *ELMER LEAHY DEFENDANT* - *and* - *NADER GHERMEZIANS, RAPHAEL GHERAMEZIAN, BAHMAN GHERMEZIANS, ESKANDER GHERMEZIANS, 273905 ALBERTA LTD., HOWARD ANSON, MAVIS HALLIDAY, 218703 ALBERTA LTD., 579511 ALBERTA LTD., 298936 ALBERTA LTD., WEST EDMONTON MALL PROPERTY INC., WEM HOLDINGS INC., WEM MANAGEMENT INC., AVISTA FINANCIAL CORPORATION, 298926 ALBERTA LID., ABNR EQUITIES CORP., and DEVCOR INVESTMENT CORPORATION APPLICANTS*

Affidavit

I, Paulina Hiebert, of the City of Edmonton, in the Province of Alberta, Barrister and Solicitor, MAKE OATH AND SAY AS FOLLOWS:

1. I am an associate counsel with the Plaintiff, Alberta Treasury Branches (referred to as "ATB") and as such have a personal knowledge of the matters hereinafter deposed to except where otherwise stated. I have been assigned the

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responsibility of acting as the senior credit manager in relation to the ATB's dealings with the lands and premises known as West Edmonton Mall ("Mall").

2. The Mall is a super-regional shopping centre complex situate on a 107.22 acre site in Edmonton, Alberta, comprising 2,319,677 square feet of retail space including a 354-room hotel ("Fantasyland Hotel"), an amusement park ("Galaxyland"), an ice arena, a waterpark, and a sea world.

Educational Background and Experience

3. I hold a Bachelor of Commerce Degree and a Bachelor of Laws Degree (with distinction) obtained from the University of Saskatchewan and am a member of the Law Society of Alberta. Marked as Exhibit "A" to this Affidavit is my curriculum vitae.

4. I commenced my employment with ATB on April 1, 1997. Previously, during the period 1984 to 1991, I was employed in the financial services industry in various positions including loans officer, account manager, senior account manager and investment manager. During the course of my employment in the financial services industry, I had considerable experience in reviewing, analysing and managing large, complex commercial loans and their restructuring.

Initial Review of Files

5. Since I commenced my employment with ATB, I have been principally responsible for the management of the loans referred to in this Affidavit on behalf of ATB. My involvement has included all aspects of the loan administration relating to the Mall, including but not limited to reviewing and approving Major Leases, the Annual Budget for the Mall, the distribution of the Excess Cash Flow, and capital expenditures for the Mall.

6. Upon assuming responsibility for the management and administration of the Mall account, I attempted to locate all relevant files relating to the Mall. I found that ATB's closing books ("Closing Books") in relation to the October 31, 1994 re-financing (referred to in paragraphs 26 to 30 hereof), were located at the offices of Douglas Stollery ("Stollery") of Reynolds, Mirth, Richards & Farmer who, along with William Kenny ("Kenny") of Cook Duke Cox, had represented ATB with respect to negotiating and preparing the Loan Documents. I am advised by Stollery and do verily believe that he was instructed to store the Closing Books at his offices, as ATB's employees responsible for the account in 1994 did not want the Closing Books to be at ATB's offices. Further, I found that the files maintained at ATB were incomplete and did not contain the documents one would normally find on any commercial loan file, let alone a file relating to a loan of this magnitude (for example: a credit application/risk assessment). Therefore, upon my assuming responsibility for the management and administration of the accounts relating to the Mall, it was difficult to determine precisely the transaction entered into between ATB and the Defendant West Edmonton Mall Property Inc. ("Mallco") and what had transpired in relation to these accounts since the fall of 1994. THE WEM APPLICANTS ARGUE THAT THE HIGHLIGHTED TEXT IS HEARSAY AND SHOULD BE STRUCK. I FIND THAT ALTHOUGH THIS IS CLEARLY A STATEMENT MADE ON INFORMATION AND BELIEF, IT IS BOTH RELIABLE (BEING A STATEMENT FROM COUNSEL WITH NO MOTIVATION TO LIE) AND NECESSARY (AS IT WOULD BE IMPRACTICAL AND INCONVENIENT TO HAVE COUNSEL TAKE AN AFFIDAVIT ON THIS POINT). IT SHALL NOT BE STRUCK.

7. My knowledge of the facts relating to the Mall accounts was obtained from reviewing the files and documents provided by Stollery, from the files maintained by or on behalf of ATB, from discussions with employees and former employees of ATB, and from information obtained as a result of an investigation conducted by Bryan McBean ("McBean") of ATB's Security Department. THE WEM APPLICANTS ARGUE THAT HIEBERT'S LACK OF SPECIFICITY OF THE FILES REVIEWED AND EMPLOYEES SPOKEN WITH "SETS THE TONE FOR THE UNRELIABILITY FOR THE REMAINDER OF THE AFFIDAVIT". I FIND THAT IT IS NOT NECESSARY FOR HIEBERT TO BE AS SPECIFIC AS THE WEM APPLICANTS WOULD REQUIRE. IN ANY CASE, HIEBERT CAN BE CROSS-EXAMINED TO PARTICULARIZE HER REVIEW AND THE SPECIFIC FILES AND DOCUMENTS

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REVIEWED SHALL PRESUMABLY FORM PART OF ATB'S PRODUCTION OF DOCUMENTS IN THIS MATTER.

Existing Financing on the Mall in January of 1993

8. At all material times prior to November 2, 1994, the Mall was owned by the Defendant 218703 Alberta Ltd. (prior to October 24, 1994 known as West Edmonton Mall Ltd.) and the Defendant 298936 Alberta Ltd. (prior to October 24, 1994 known as West Edmonton Mall Shopping Centre Ltd.). These corporate Defendants were owned indirectly by the Defendants Nader Ghermezian, Raphael Ghermezian, Bahman Ghermezian and Eskander Ghermezian (collectively referred to as the "Ghermezians"). THE WEM APPLICANTS ARGUE THAT HIEBERT PURPORTS TO HAVE PERSONAL KNOWLEDGE OF TRANSACTIONS THAT OCCURRED BEFORE SHE JOINED ATB IN APRIL, 1997. I FIND I CAN REASONABLY INFER THAT HIEBERT OBTAINED THIS KNOWLEDGE BY REVIEW OF ATB RECORDS. TO THIS POINT, THERE HAS BEEN NO CONTRADICTORY EVIDENCE PUT FORWARD BY THE WEM APPLICANTS NOR HAS HIEBERT BEEN CROSS-EXAMINED. UNDER THOSE CIRCUMSTANCES, I AM ENTITLED TO MAKE THIS INFERENCE. HIEBERT'S POSITION AND DUTIES AT ATB CLEARLY PROVIDE HER ACCESS TO THE RELEVANT ATB RECORDS (AND SHE HAS DEPOSED SHE HAS HAD SUCH ACCESS AND HAS REVIEWED THESE RECORDS) AND SHE IS ENTITLED TO GIVE EVIDENCE ABOUT THOSE RECORDS. SUCH EVIDENCE IS CONSIDERED PERSONAL KNOWLEDGE AND NOT HEARSAY, IN ACCORDANCE WITH THE LINE OF ALBERTA AUTHORITIES COMMENCING WITH *ADVANCE RUMELY THRESHER CO.*, SUPRA.

9. The corporations referred to in the preceding paragraph, and the other corporations shown as "Applicants" in the style of cause of this affidavit, were owned directly or indirectly by the Ghermezians and are referred to herein as the "Ghermezian Companies". Marked as Exhibit" B" to this Affidavit is a schedule outlining the ownership of the Ghermezian Companies at all material times. SEE FINDING IN PARAGRAPH 8 ABOVE.

10. As at January 1, 1993, Gentra Canada Investments Inc. ("Gentra") was the lead lender for a group of bondholders holding the first-ranking security against the Mall. THE WEM APPLICANTS ARGUE THAT HIEBERT PURPORTS IN PARAGRAPHS 10-17 TO HAVE PERSONAL KNOWLEDGE WHEN IN FACT THE EVENTS DESCRIBED IN THESE PARAGRAPHS OCCURRED 3 YEARS BEFORE SHE JOINED ATB. AGAIN, I CAN REASONABLY INFER THAT THE EVIDENCE IN PARAGRAPHS 10-17 IS DERIVED FROM ATB'S RECORDS. HIEBERT HAS DEPOSED THAT SHE HAS THE REQUISITE POSITION AND ACCESS TO ATB RECORDS REGARDING THESE MATTERS AND THAT HER INFORMATION IS DERIVED FROM ATB RECORDS IN THE ABSENCE OF CONTRADICTORY EVIDENCE OR CROSS-EXAMINATION, I AM PREPARED TO DEAL WITH THESE FACTS AS BASED ON PERSONAL KNOWLEDGE BASED ON *ADVANCE RUMELY*.

11. As at January 1, 1993 the loans described in the following paragraph were in default.

12. ATB had provided financing to some of the Ghermezian Companies for a number of years, and by March 10, 1994, the long term principal debt owing in respect of the Mall financing consisted of:

(a) loans ("Tranche I Loans") of a total face amount of approximately $346 million, of which $296 million was advanced by Senior Bondholders, for whom the lead lender was Gentra Canada Investments Inc. ("Gentra"), and Junior Bondholders, whose advances totalled $50 million, and for whom the lead lender was Citibank Canada Inc.;

(b) loans totalling $50 million ("Tranche II Loans") of which $10 million was advanced by ATB and the remaining $40 million was advanced by other financial institutions;

(c) loans totalling $50 million ("Tranche III Loans") advanced by ATB;

(d) demand loans from ATB in the amount of $15.7 million.

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13. As at March 10, 1994, the total principal indebtedness owing to ATB in respect of the Mall was approximately $75.7 million, consisting of a Tranche II Loan of $10 million, a Tranche III Loan of $50 million and demand loans of $15.7 million. In addition, ATB was owed another approximately $47 million under various other loans made to various of the Ghermezian Companies, and with respect to these other loans (the "Non-Mall Loans") ATB held security against assets other than the Mall (the "Non-Mall Assets").

14. By March 10, 1994, the Mall financing remained in default by reason of non-payment of municipal taxes and with respect to payments due and not paid. Gentra had appointed a monitor on behalf of the holders of the Tranche I Loans and was threatening to undertake realization proceedings against the Mall.

Refinancing Proposal - *March 10, 1994*

15. On or about March 10, 1994, a proposal for refinancing the Mall (the" Gentra Proposal") was executed by Gentra, ATB, and 2948834 Canada Inc. ("Newco"). Copies of the Gentra Proposal and a confirming letter are marked as Exhibit "C" to this Affidavit. Douglas Goebel ("Goebel"), the Executive General Manager of the Edmonton General Office of ATB, was ATB's representative in the negotiations which resulted in the Gentra Proposal, under the direction of Alan Bray ("Bray"), the Superintendent of ATB. The Gentra Proposal provided:

(a) by agreement or enforcement proceedings by Gentra, title to the Mall would be transferred to Newco;

(b) Gentra would be issued first mortgage bonds by Newco for approximately $300 million;

(c) Gentra would be issued second mortgage bonds by Newco for approximately $50 million;

(d) ATB would be issued second mortgage bonds by Newco for approximately $50 million;

(e) ATB would be issued preferred shares by Newco for approximately $35 million, which would not yield a dividend and would be retractable at the earlier of 15 years from the date of issuance or the date Newco or its assets were sold or refinancing occurred;

(f) ATB would provide to Newco an operating line of credit of approximately $20 million;

(g) ATB would own 40% (subject to the Ghermezians' rights set out in sub-paragraph (h)) and Gentra would own 60% of the issued and outstanding common shares of Newco;

(h) the Ghermezians, the principals of the corporate owners of the Mall, would be given a management agreement, together with the right to receive $^3/_4$ of the common shares issued to ATB in Newco, but these shares would not be transferred to the Ghermezians until such time as the second mortgage bonds and preferred shares were retired or when Newco or its assets were sold;

(i) ATB and Gentra would each appoint 2 members of the Board of Directors of Newco, and there would be 5 independent Alberta directors;

(j) In the event that Newco should seek re-financing of the first mortgage bonds ATB would commit to provide a guarantee of the first mortgage bonds for $50 million.

IN ADDITION TO THE COMMENTS MADE IN PARAGRAPH 10 ABOVE, THE DOCUMENT IN QUESTION IS EXHIBITED AND AVAILABLE FOR REVIEW BY THE TRIER OF FACT TO TEST THE ACCURACY OF HIEBERT'S DESCRIPTION OF ITS CONTENTS.

16. While the effect of the Gentra Proposal would have been to increase ATB's exposure with respect to the Mall from $75.7 million to approximately $105 million, with the possibility of some further exposure on the guarantee of

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the first mortgage bonds, the Tranche III Loans and demand loans of ATB, totalling approximately $65.7 million would be converted to common shares, preferred shares and a secured operating line of credit. ~~From my review of the files, the Gentra Proposal appears to have been a commercially reasonable solution for ATB at that time~~ . IN ADDITION TO THE ARGUMENTS NOTED IN PARAGRAPH 10 ABOVE, THE WEM APPLICANTS ARGUE THE HIGHLIGHTED SENTENCE CONSTITUTES OPINION AND ARGUMENT. I FIND THAT THE LAST SENTENCE SHOULD BE STRUCK ON THE BASIS THAT HIEBERT IS EXPRESSING A PERSONAL OPINION AND HAS DRAWN A CONCLUSION THAT IS A MATTER FOR JUDICIAL CONSIDERATION BASED ON ALL THE EVIDENCE.

17. On April 19, 1994 the Tranche II Loans, with a value of $50 million, were purchased by 599040 Alberta Ltd. and 599041 Alberta Ltd. for approximately $12.5 million or 25% of their face value.

Leahy Appointed Acting Superintendent - *June 1, 1994*

18. On or about June 1, 1994, the Defendant Elmer Leahy ("Leahy") was appointed Acting Superintendent of ATB in place of Bray. The position of Acting Superintendent was at that time the top management position at ATB. Leahy immediately removed Goebel and substituted Russ Douglas for Goebel as the lead negotiator relating to the loans involving the Ghermezians. On or about June 2, 1994 Leahy also replaced the law firm of McLennan Ross, which had been representing ATB, with Kenny as ATB's solicitor. Stollery advised me and I do verily believe that on June 6, 1994, he was retained by Kenny to assist Kenny as ATB's counsel, to ensure independence and avoid any conflict of interest, as Mr. Jack N. Agrios ("Agrios"), who was counsel at Kenny's firm, was acting for the Ghermezians. THE WEM APPLICANTS ARGUE THAT IN PARAGRAPHS 18 AND 19 HIEBERT PURPORTS TO HAVE PERSONAL KNOWLEDGE OF EVENTS THAT OCCURRED PRIOR TO HER JOINING ATB AND SINCE SHE HAS NOT STATED HER SOURCE OF INFORMATION AND BELIEF IN THAT SOURCE, THE PARAGRAPHS MUST BE STRUCK. I FIND THAT IN BOTH PARAGRAPHS HIEBERT IS SUMMARIZING HER PERSONAL KNOWLEDGE OBTAINED FROM A REVIEW OF ATB RECORDS, WITHIN THE MEANING OF *ADVANCE RUMELY THRESHER CO.*. FOR THE REASONS NOTED IN PARAGRAPH 6, I FIND THAT THE INFORMATION AND BELIEF PORTION OF PARAGRAPH 18 IS BOTH NECESSARY AND RELIABLE AND WILL NOT BE STRUCK.

19. From my review of ATB's file, it appears that immediately following his appointment as Acting Superintendent, Leahy directed that ATB should not participate in the refinancing of the Mall debt as contemplated by the Gentra Proposal, and should take the position that the Gentra Proposal signed by Gentra and ATB was not binding on ATB.

20. As Acting Superintendent, Leahy had, in effect, full authority and discretion with respect to the making of loans by ATB, including the making or restructuring of loans involving the Mall, so that ATB was vulnerable to any misuse of this authority and discretion. Leahy issued Directive No. 26, dated July 18, 1994, marked as Exhibit "D" to this Affidavit. By Exhibit" D" Leahy authorized himself to grant credit in his own discretion and without any limitations thereon. THE WEM APPLICANTS ARGUE THAT THIS PARAGRAPH ARGUES THE IMPACT OF THE DIRECTIVE AND EXCEPT FOR THE SECOND SENTENCE, THE REST OF THE PARAGRAPH IS ALSO ESSENTIALLY ARGUMENT. I FIND THAT THIS PARAGRAPH IS A STATEMENT OF ATB'S POSITION AND CAN BE ACCEPTED AS PART OF THE NARRATIVE, WHICH IS NOT BINDING ON THE TRIER OF FACT, AT LEAST WITH RESPECT TO THE ISSUES OF ATB'S VULNERABILITY AND THE EFFECT OF DIRECTIVE NO. 26. THAT LEAHY HAD FULL AUTHORITY AND DISCRETION TO MAKE AND RESTRUCTURE THE WEM LOANS IS A STATEMENT OF FACT BY ATB BASED ON HIS POSITION, HIS EMPLOYMENT TERMS AND THE AUTHORITY HE EXERCISED ON BEHALF OF ATB. LEAHY'S EMPLOYMENT AND AUTHORITY WILL PRESUMABLY BE THE SUBJECT OF FURTHER EVIDENCE SUBMITTED BY LEAHY AND OTHER WITNESSES.

Purchase of Tranche II Loans by 606881 Alberta Ltd.

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21. On or about July 26, 1994, the Tranche II Loans with a face value of $50 million, which had been purchased by 599040 Alberta Ltd. and 599041 Alberta Ltd. for $12.5 million (see para. 17), were sold by the holders thereof to 606881 Alberta Ltd. for approximately $15,250,000. The funds to purchase the Tranche II Loans were obtained by 606881 Alberta Ltd. from ATB on or about July 26, 1994. The sole shareholder and director of 606881 Alberta Ltd., which purchased these loans at a premium of approximately $3 million over the price at which they had been acquired by the 2 vendor companies, was Agrios. ~~No valid business or commercial reason existed for ATB to increase its exposure in relation to the Mall by advancing monies for the purpose of this purchase~~ . THE WEM APPLICANTS SUGGEST HIEBERT HAS NO PERSONAL KNOWLEDGE OF THE MATTERS DISCUSSED IN THIS PARAGRAPH AND PARAGRAPH 22 AND DOES NOT STATE THE SOURCE OF HER INFORMATION OR HER BELIEF IN THE TRUTH OF THE STATEMENTS. I FIND THAT HIEBERT DOES HAVE PERSONAL KNOWLEDGE OF THE MATTERS IN BOTH OF THESE PARAGRAPHS BASED ON REVIEW OF ATB RECORDS WITHIN THE MEANING OF *ADVANCE RUMELY THRESHER CO.*. I CAN REASONABLY INFER THAT THE INFORMATION IS DERIVED FROM ATB'S RECORDS. THE WEM APPLICANTS ALSO ARGUE THAT THE LAST SENTENCE IS BLATANT OPINION. I FIND THAT IT IS A CONCLUSION AND SHALL BE STRUCK. THE MATTER CAN BE OTHERWISE ADDRESSED IF NECESSARY BY AN EXPLANATION OF WHAT, IF ANY, SUPPORTING DOCUMENTS WERE FOUND BY ATB TO SUPPORT THE LOAN ON THIS BASIS.

Purchase of Tranche I Loans by 1059502 Ontario Ltd.

22. On September 1, 1994 ATB lent $3.3 million to 1059502 Ontario Ltd. ("1059502") to purchase one of the Tranche I Bonds with a face value of $5 million. Agrios was the sole shareholder of 1059502. On September 14, ATB lent $1 million to 1059502 to pay an investment banking fee to Nomura Securities Inc. 1059502 pledged the Tranche I Bond to ATB as security for both loans. On or about September 27, 1994, the Tranche I Bond was sold to Gentra for $5 million. 1059502 paid ATB $4,274,886.68, the balance outstanding on the two loans. The difference between that amount and the $5 million paid for the bond was apparently retained by 1059502.

September 26, 1994 Settlement Agreement

23. On September 26, 1994, an agreement was entered into by the Ghermezian Companies, ATB and Nomura Asset Capital Corporation ("NACC") for refinancing WEM. This agreement provided that:

(a) ATB would discharge its first mortgage, with a balance outstanding of approximately $310,000, as against the residence of Nader Ghermezian, which was valued at an amount substantially higher than the loan balance;

(b) ATB would discharge its first mortgage as against one of the non-Mall Assets known as Club Fit, and would discharge its mortgage as against another Non-Mall Asset known as the Palisades, notwithstanding that ATB's files showed that the value of the Non-Mall Assets was far less than the amount of the Non-Mall Loans;

(c) certain Ghermezian Companies would transfer to ATB the Non-Mall Assets (other than referred to in paragraph (b) hereof), at the value set out in appraisals obtained by the Ghermezians and such amounts would be applied first against the Non-Mall loans, and secondly, on amounts owing on ATB's loans to the Mall; and

(d) ATB could not sell its position to Gentra.

The Non-Mall Assets were transferred effective October 15, 1994 to ATB at a net value after adjustments of $53,171,688.05, of which $47,830,365.71 was applied to pay off the indebtedness secured by the Non-Mall Assets and the balance of $5,341,322.34 was credited to ATB's loans to the Mall. The Non-Mall Assets were worth much less than the amounts credited for them, resulting in a loss to ATB of approximately $35 million. A copy of the agreement is marked as Exhibit "DD" to this Affidavit. THE WEM APPLICANTS ARGUE THAT THIS PARAGRAPH CONTAINS PREJUDICIAL MATERIAL AND BLATANT OPINION - IN PARTICULAR, THEY SAY THAT HIEBERT MAKES ASSERTIONS ABOUT THE VALUE OF THE NON-MALL ASSETS WITHOUT ANY

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SPECIFICATION OF GROUNDS AND BELIEF AND THAT ONLY AN EXPERT CAN MAKE. I FIND THAT THE PARAGRAPH IS LARGELY A SUMMARY OF AN EXHIBITED DOCUMENT DRAWN FROM ATB RECORDS AND AVAILABLE FOR REVIEW BY THE TRIER OF FACT. WHILE IT IS CORRECT THAT HIEBERT SPEAKS TO THE VALUE OF THE NON-MALL ASSETS, SHE HAS STATED IN 23(b) ABOVE THAT THE VALUES WERE SHOWN IN ATB'S FILES - HIEBERT IS NOT SAYING IT IS HER OPINION THAT THE VALUE WAS LESS, BUT THAT IT WAS LESS ACCORDING TO THE FIGURES ON ATB'S RECORDS. FURTHER, THE LOSS OF 35 MILLION IS BASED ON ATB FILES - SEE SUB-PARAGRAPH 31(d). I FOUND THAT TO THE EXTENT THAT THE PARAGRAPH GIVES EVIDENCE OF OTHER MATTERS OUTSIDE OF THE REFERENCED EXHIBIT, SUCH STATEMENTS ARE BASED ON REVIEW OF ATB RECORDS AND PERSONAL KNOWLEDGE WITHIN THE MEANING OF *ADVANCE RUMELY THRESHER CO.*, IN THE ABSENCE OF CROSS EXAMINATION OR OTHER EVIDENCE TO THE CONTRARY.

Withdrawal of NACC

24. In or about mid-October, 1994, the TD Bank agreed to participate in the refinancing in place of NACC, on the strength of a full guarantee from ATB. THE WEM APPLICANTS ARGUE THIS PARAGRAPH PURPORTS TO SPEAK TO THE MIND AND INTENTIONS OF THE TD BANK, WITHOUT ANY STATEMENT OF SOURCE OR BELIEF AND THEREFORE MUST BE STRUCK. I FIND THAT IN THE ABSENCE OF CONTRADICTORY EVIDENCE OR CROSS EXAMINATION, IT IS REASONABLE TO INFER THAT THE ASSERTION IS A MATTER OF ATB RECORDS AND THEREFORE HIEBERT IS SPEAKING FROM PERSONAL KNOWLEDGE WITHIN THE MEANING OF *ADVANCE RUMELY THRESHER CO.*.

Foreclosure of Mall

25. On October 26, 1994 an application was brought by 606881 Alberta Ltd. a company controlled by the Ghermezians, for an Order permitting judicial sale of the Mall to another company controlled by the Ghermezians, 626110 Alberta Ltd. This Order, marked as Exhibit "E" to this Affidavit, was granted by Mr. Justice Lefsrud who agreed that this Order could be held until October 31, 1994 pending completion of the refinancing of the Mall. The Order provided that the price to be paid by 626110 Alberta Ltd. was $419,630,000, to be paid by the assumption by 626110 Alberta Ltd. of the Tranche I and II Loans, and a portion of the Tranche III Loan consisting of the difference between the total amount due on the Tranche I and II Loans and the purchase price. THE WEM APPLICANTS ARGUE THAT HIEBERT COULD HAVE NO PERSONAL KNOWLEDGE OF THE OCTOBER 1994 JUDICIAL PROCEEDINGS AND SINCE THERE IS NO STATEMENT OF SOURCE OF INFORMATION AND BELIEF, THE PARAGRAPH MUST BE STRUCK. SEE FINDING IN PARAGRAPH 24 ABOVE. IN ADDITION, A COPY OF THE ORDER IS EXHIBITED TO THE AFFIDAVIT AND AS SUCH CAN BE EASILY REVIEWED TO CONFIRM OR REJECT THE ASSERTIONS MADE AND IN ANY CASE IS A MATTER OF COURT RECORD OF WHICH JUDICIAL NOTICE CAN BE TAKEN.

Essential Terms of October 31, 1994 Refinancing

26. In summary, the terms of the October 31, 1994 refinancing (the documents setting out the terms thereof collectively called the "Loan Documents") were that the Defendant Mallco became the owner of the Mall, and the Defendant WEM Management Inc. ("Manager") became the manager of the Mall. The Defendants Mallco and Manager were beneficially owned by the Ghermezians as set out in Exhibit "B". Under this refinancing, the TD Bank would provide funding of $353.5 million ("TD Credit Facility"), for a 10 year term. ATB would loan $65 million ("ATB Loan") to Mallco for a 30 year term, at no interest. ATB would guarantee to the TD Bank the payment of all amounts due to TD Bank under the TD Credit Facility and would be responsible to pay out the outstanding balance of the TD Credit Facility at maturity (the" ATB Guarantee"). The effect of these transactions was to increase ATB's credit exposure with respect to the Mall from approximately $75.7 million as of June 1, 1994 to approximately $420 million as of October 31, 1994. THE WEM APPLICANTS ARGUE THAT PARAGRAPHS 26 AND 27 PURPORT TO INTERPRET AND PROVIDE CONCLUSIONS ON THE IMPACT OF THE 1994 REFINANCING

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DOCUMENTS. THE WEM APPLICANTS ALSO ARGUE THAT HIEBERT COULD HAVE NO PERSONAL KNOWLEDGE OF THE TRANSACTIONS, YET SHE PURPORTS TO SPEAK AS IF SHE DID. I FIND THAT THESE PARAGRAPHS ARE SIMPLY A SUMMARY OF ATB RECORDS AND ACCORDINGLY THE STATEMENTS ARE PERSONAL KNOWLEDGE BASED ON *ADVANCE RUMELY THRESHER CO.*. FURTHER, THE DOCUMENTS SUMMARIZED ARE EXHIBITED AND READILY AVAILABLE TO THE TRIER OF FACT TO REVIEW TO CONFIRM THE STATEMENTS MADE.

27. The Loan Documents further provided that:

(a) TD Trust, as Servicer, would hold a first mortgage debenture to secure the TD Credit Facility and a second charge debenture to secure the ATB Loan as nominee and trustee for the Defendant TD Bank and ATB respectively;

(b) ATB would be appointed the Directing Party with the right to waive, or alternatively, to take such steps and to exercise such rights and remedies in respect of an Event of Default under the Loan Documents as it deemed appropriate without the consent of the other Secured Parties;

(c) The TD Bank could not exercise any power, right or discretion provided for in the Loan Documents without the prior written consent of ATB;

(d) Pursuant to the Cash Flow Control Agreement, Excess Cash Flow would be distributed as to the first $3 million to reduce the TD Credit Facility; in any year where the Excess Cash Flow was less than $3 million, the amount of the shortfall was to be added to the first $3 million for the following year and any subsequent year; of the next $3 million, 80% would be payable to the Defendant Mallco, or as it directed, and the remaining 20% would be applied on the ATB Loan; and as to any amount in excess of $6 million, 50% would be applied to reduce the TD Credit Facility, 40% would be paid to the Defendant Mallco, or as it directed, and the remaining 10% would be applied on the ATB Loan (provided no distribution of Excess Cash Flow would reduce the Working Capital of the Defendant Mallco to less than $3.5 million).

28. ~~The terms and conditions of the Loan Documents were not typical of what would be expected in a normal and reasonable distressed loan work out transaction, as indicated by the following~~ : I FIND THAT THIS FIRST PORTION OF THE PARAGRAPH IS OPINION OR CONCLUSION AND ARGUMENTATIVE AND SHALL BE STRUCK.

(a) as to ATB's position:

(i) the ATB loan bears no interest for its full term of 30 years; I FIND THAT HIEBERT IS SPEAKING FROM PERSONAL KNOWLEDGE BASED ON *ADVANCE RUMELY* AND THIS STATEMENT FORMS PART OF ATB'S NARRATIVE.

(ii) ATB fully guarantees the TD Credit Facility for its full 10 year term, and then is required to pay it out on its maturity, but receives compensation of only $3 million per year for assuming the entire risk representing less than 1% of the amount guaranteed, ~~far below what would be commercially normal and reasonable for providing such a guarantee and administering the TD Credit Facility~~ ; I FIND THAT THE LAST PORTION SHALL BE STRUCK AS IT IS OPINION OR ALTERNATIVELY A CONCLUSION FOR THE TRIER OF FACT TO DRAW.

(iii) as a result of the provisions for the distribution of Excess Cash Flow, the payments to TD Bank to reduce principal would be minimal - for example, if Excess Cash Flow was $3 million per year, it would take 118 years to pay out the TD Credit Facility, and based on the actual principal reductions of the TD Credit Facility was virtually an interest-only loan, so that ATB took the full risk with respect to the TD Credit Facility and the ATB Loan but received no interest; HIEBERT IS EXPLAINING EXHIBITED DOCUMENTS WHICH FORM PART OF ATB'S RECORDS.

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(iv) the provision that if the Excess Cash Flow in any year is less than $3 million, the deficiency is carried over to the following year and any subsequent year, combined with the term of the ATB Guarantee that ATB guarantees the interest payments on the TD Credit Facility, has the practical effect there can be no monetary default on the TD Credit Facility, and the full risk of any shortfall in cash flow rests with ATB; SEE FINDING IN SUBPARAGRAPH (iii) ABOVE.

(v) the terms for distribution of the Excess Cash Flow over $3 million permit a large share to be paid to Mallco and used for purposes of Mallco's choosing, including dividends to shareholders, ~~whereas normal commercial terms would allocate all Excess Cash Flow to the lenders until the borrower achieved more satisfactory debt/equity ratios and debt servicing ratios~~ ; I FIND THAT THE LATTER PART OF THIS SUB-PARAGRAPH IS A MATTER OF OPINION WHICH HIEBERT IS NOT QUALIFIED TO GIVE IN THESE PROCEEDINGS.

(vi) the Ghermezians were permitted to keep full ownership of the Mall, ~~whereas normal commercial terms in such a restructuring would provide for all or a significant proportion of ownership to be turned over to the lenders, with the borrowers having the opportunity to earn back some equity~~ . SEE FINDING IN SUB-PARAGRAPH (v) ABOVE.

(b) ~~as to the TD Bank's position - a loan of this size and type would not normally be made on essentially an interest-only basis - the loan represented a reasonable credit risk for TD Bank because it was fully guaranteed by the Government of Alberta~~ . I FIND THAT SUB-PARAGRAPH (b) CANNOT STAND AS IT PURPORTS TO PUT FORWARD HIEBERT'S PERSONAL OPINION AND THE OPINION OF A THIRD PARTY WITH NO INDICATION OF THE ABILITY TO DO SO.

THE WEM APPLICANTS ARGUE THAT THE PARAGRAPH IN ITS ENTIRETY IS RIDDLED WITH HIEBERT'S OPINION ON THE LOAN DOCUMENTS - SEE PARTICULAR FINDINGS AS NOTED ABOVE WITHIN THE PARAGRAPH.

29. The Loan Documents include:

(a) a loan agreement between the Defendant Mallco, the TD Bank, ATB and others ("Loan Agreement"), marked as Exhibit "F" to this Affidavit, setting out the terms and conditions of the TD Credit Facility;

(b) a second loan agreement (the "Second Loan Agreement"), marked as Exhibit "G" to this Affidavit, setting out the terms and conditions of the ATB Loan;

(c) the ATB Guarantee, marked as Exhibit "H" to this Affidavit;

(d) a property management agreement ("Property Management Agreement"), marked as Exhibit "I" to this Affidavit;

(e) a cash flow control agreement ("First Mortgage Debenture"), marked as Exhibit "J" to this Affidavit;

(f) mortgage documents securing the TD Loan ("First Mortgage Debenture"," Supplemental First Mortgage Debenture", "First Mortgage Pledge Agreement") and securing the ATB Loan ("Second Mortgage Debenture", "Second Mortgage Pledge Agreement"), marked respectively as Exhibits "K", "L", "M"," N", and "O" to this Affidavit;

(g) an agreement ("First Mortgage Servicing Agreement"), marked as Exhibit "P" to this Affidavit;

(h) an agreement ("Second Mortgage Servicing Agreement"), marked as Exhibit "Q" to this Affidavit;

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(i) agreements ("Guarantees") under which the Defendant Triple Five Properties Inc., the Manager, and the Defendant WEM Holdings Inc. guaranteed the due payment of the TD Credit Facility and the ATB Loan, marked respectively as Exhibits "R", "S", and "T" to this Affidavit.

All capitalized words not defined in this Affidavit shall have the meaning ascribed to such words as contained in the Loan Documents. THE WEM APPLICANTS NOTE THAT THIS PARAGRAPH PURPORTS TO MARK AS EXHIBITS SEVERAL OF THE 1994 REFINANCING DOCUMENTS AND THAT HIEBERT HAS NOT ADVISED AS TO HER SPECIFIC INVOLVEMENT WITH THOSE DOCUMENTS, THEIR LOCATION WITHIN ATB FILES, NOR THAT SHE HAS HAD CARE AND CONTROL OF SAME. THE WEM APPLICANTS ARGUE THAT GIVEN HIEBERT JOINED ATB AFTER THIS REFINANCING, THERE IS NO OTHER WAY TO IDENTIFY THE DOCUMENTS AS EXHIBITS I FIND THAT THE MATTERS IN THIS PARAGRAPH ARE CLEARLY WITHIN HIEBERT'S PERSONAL KNOWLEDGE AS BASED ON ATB RECORDS, WITHIN THE MEANING OF *ADVANCE RUMELY THRESHER CO.*. FURTHER, THE DOCUMENTS THEMSELVES ARE EXHIBITED. THE WEM APPLICANTS' FURTHER COMPLAINTS NOTED ABOVE MAY BE ADDRESSED IN CROSS-EXAMINATION, BUT I WOULD NOTE THAT HIEBERT DEPOSES IN PARAGRAPH 6 THAT THE LOAN DOCUMENTS WERE LOCATED AT ATB'S COUNSEL'S OFFICE.

30. The refinancing proceeds were advanced on November 3, 1994. THE WEM APPLICANTS ARGUE THIS PARAGRAPH FAILS TO STATE THE SOURCE OF HIEBERT'S INFORMATION AND HER BELIEF AND MUST BE STRUCK. I FIND THAT I CAN REASONABLY INFER THAT THE STATEMENT IS A MATTER OF PERSONAL KNOWLEDGE OBTAINED FROM ATB RECORDS, WITHIN THE MEANING OF *ADVANCE RUMELY THRESHER CO.*.

Increase in ATB's Exposure from March 10, 1994 to November 3, 1994

31. It is illuminating to look at the changes to ATB's exposure on its loans to the Ghermezian Companies between the date of the Gentra Proposal of March 10, 1994 and November 3, 1994 the date the refinancing was funded. The changes in ATB's exposure over that time period were as follows:

(a) on March 10, 1994, ATB had no potential liability to the first mortgage holder (Gentra et al) if the amount recovered on a realization by the first mortgage holder was less than $346 million;

(b) by November 3, 1994,-ATB had-full liability to the first mortgage holder;

(c) on March 10, 1994, ATB was owed approximately $47 million by various Ghermezian Companies on Non-Mall Loans. ATB subsequently took back these assets and gave the Ghermezian companies a credit of $53 million based upon appraisals provided by the Ghermezians. When ATB agreed to this, ATB's files showed that the value of the Non-Mall Assets was far less than $53 million;

(d) in fact, realization on the Non-Mall Assets is virtually complete and the total realized will be approximately $18 million, resulting in a loss of approximately $35 million on this aspect of the transaction;

(e) on March 10, 1994, ATB was owed approximately $82 million ($75.7 million in principal and approximately $6.3 million in interest) secured by charges against the Mall. (This indebtedness is over and above the $47 million dealt with in (c) above);

(f) on November 3, 1994, ATB received a second mortgage with a face value of $65 million but with an actual present value of $4.9 million (in that it was non-interest bearing and payable in 2024) resulting in a loss with respect to the Mall Loans of approximately $80.7 million ($75.7 million in principal + $9.9 million in interest to November 3, 1994 - $4.9 million);

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THE WEM APPLICANTS ARGUE THAT THE ARGUMENTATIVE NATURE OF THIS PARAGRAPH IS HIGHLIGHTED BY THE OPENING SENTENCE AND THAT THE PARAGRAPH IS SIMPLY HIEBERT'S REVIEW AND OPINION ON MATTERS AND LACKING IN FACT. THEY ALSO ARGUE HIEBERT CAN HAVE NO PERSONAL KNOWLEDGE YET SHE DOES NOT STATE THE SOURCE OF HER INFORMATION OR HER BELIEF. I FIND THAT ALTHOUGH THE OPENING STATEMENT IS SOMEWHAT EDITORIAL, THE PARAGRAPH IS A STATEMENT OF ATB'S POSITION WHICH IS ALL GROUNDED IN DOCUMENTS AVAILABLE FOR THE TRIER OF FACT TO REVIEW IN CONSIDERING WHETHER TO ACCEPT OR REJECT THAT POSITION.

November 15, 1994 "*Side Agreement*"

32. Certain documents, previously unknown to me or to the best of my knowledge to anyone else presently employed at ATB, recently came to ATB's attention. These "side agreements" are dealt with in paragraphs 33, 39, 42 and 46 of this Affidavit (the "Side Agreements"). The existence of certain Side Agreements was suggested by the Defendants Raphael Ghermezian and Howard Anson to Robert Kallir, General Counsel of ATB, and myself at a meeting on March 17, 1998. Mr. Kallir and I requested that we be provided with copies of any such documents, but Mr. Ghermezian refused to produce them. THE WEM APPLICANTS ARGUE THAT THE OPENING STATEMENT OF THE PARAGRAPH IS SPECULATIVE BECAUSE HIEBERT DOES NOT SAY WHAT INQUIRIES SHE MADE. I FIND THAT THE FORM OF THE OPENING STATEMENT IS IN A FORM WHICH THE ALBERTA COURT OF APPEAL IN *KIN FRANCHISING LTD. v. DONCO LTD.* (1993), 7 Alta. L.R. (3d) 313 (ALTA. C.A.) HAS APPROVED AS ACCEPTABLE UNDER THESE CIRCUMSTANCES. THE PARAGRAPH IS COMPRISED OF HIEBERT'S PERSONAL KNOWLEDGE AND THE KNOWLEDGE OF ATB BASED ON HIEBERT'S INQUIRIES.

33. On or about June 18, 1998, I received from Milner Fenerty, Solicitors for ATB, a copy of a letter agreement purporting to be executed or agreed to as between the Defendant Mallco and ATB as at November 15, 1994, of which a copy is marked as Exhibit "U" to this Affidavit. This document was purportedly signed on behalf of ATB by Leahy. I am informed by Milner Fenerty and do verily believe that this document was sent to them with a letter dated June 18, 1998 from the firm of McLennan Ross, purporting to represent the Defendant Mallco. THE WEM APPLICANTS ARGUE THAT THE LAST SENTENCE FAILS TO IDENTIFY THE PERSON AT MILNER FENERTY WHO PROVIDED THE INFORMATION AND SHOULD BE DELETED. I FIND THAT THE SOURCE HAS BEEN SUFFICIENTLY DESCRIBED. ACTUAL IDENTIFICATION OF THE PARTICULAR LAWYER IS NOT NECESSARY AT THIS POINT, WHEN ALL ATB IS DOING IS PROVIDING THE SOURCE TO INTRODUCE DOCUMENTS WHICH HAVE BEEN EXHIBITED. IF THE WEM APPLICANTS HAVE CONCERNS REGARDING THE SOURCE OF HIEBERT'S INFORMATION THEY CAN EXPLORE THAT ON CROSS-EXAMINATION. FOR THE SAME REASONS DESCRIBED IN PARAGRAPH 6 ABOVE, THE STATEMENT OF INFORMATION AND BELIEF IS ADMISSIBLE ON THE PENDING APPLICATIONS.

34. The purported letter agreement of November 15, 1994, purports to retroactively amend the TD Credit Facility, the Cash Flow Control Agreement, the ATB Loan and the other Loan Documents by, *inter alia*,

(a) requiring ATB to pay interest on all payments received on the TD Credit Facility and the ATB Loan until applied against the loans;

(b) to change the application of the payments received so as to be applied first on the principal of the ATB Loan after discounting it to its present value, until the discounted amount of the ATB Loan is repaid in full, then to be applied on the TD Credit Facility;

(c) restricting the principal payments on the TD Credit Facility to 50% of Excess Cash Flow;

(d) requiring that the Manager remain manager of the Mall until October 31, 2014;

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(e) revising the order of priority of payments out of Mall Revenues;

(f) extending the TD Credit Facility for 10 years to October 31, 2014;

(g) requiring ATB to fund any shortfall in cash flow;

(h) deeming certain Potential Default or Events of Default under the Loan Documents not to have occurred;

(i) requiring ATB to obtain the consent of the Defendant TD Bank to these purported wholesale amendments; and

(j) purporting to permit Mallco to prepare other agreements reflecting some or all of the contents of this document on new and different terms. This document further provides that the parties will keep it confidential and "not surface same at least until the next province-wide Alberta provincial election is completed".

THE WEM APPLICANTS ARGUE THAT THIS PARAGRAPH IS ENTIRELY ARGUMENT ON THE EFFECT OF THE EXHIBITED DOCUMENT. I FIND THAT IT IS ESSENTIALLY A DESCRIPTION OF EXHIBITED DOCUMENTS WHICH THE TRIER OF FACT CAN REVIEW TO VERIFY WHAT HAS BEEN ASSERTED.

35. Prior to my receipt of the November 15, 1994 document from Milner Fenerty on or about June 18, 1998, this document was unknown to me, no copy was on ATB's file, and to the best of my knowledge and belief, it was unknown to anyone else presently employed by ATB or the TD Bank. THE WEM APPLICANTS ARGUE THAT THIS PARAGRAPH SHOULD BE STRUCK TO THE EXTENT THAT IT DEALS WITH THE KNOWLEDGE OF ANYONE OTHER THAN THE DEPONENT AS HIEBER DOES NOT SAY WHAT INQUIRIES SHE MADE TO ARRIVE AT HER CONCLUSION. I FIND THAT TO THE EXTENT THE STATEMENT ASSERTS THE KNOWLEDGE OF OTHERS IT IS IN THE FORM APPROVED OF IN *KIN FRANCHISING LTD.*, SUPRA. IF THE WEM APPLICANTS HAVE CONCERNS ABOUT THE INQUIRIES MADE, THEY CAN EXPLORE THOSE ON CROSS-EXAMINATION.

September 13, 1995 Agreement

36. By an agreement in writing made as of September 13, 1995, marked as Exhibit "V" to this Affidavit, the Defendant Mallco, the TD Bank and ATB, agreed to amend the Loan Agreement by, *inter alia*, permitting the Defendant Mallco to divide the TD Credit Facility into ten separate segments for various terms at various interest rates as more particularly described in the agreement. This agreement gave no indication of the existence of a November 15, 1994 "Side Agreement". Stollery acted for ATB in documenting this agreement. THE WEM APPLICANT OBJECT TO THE MIDDLE SENTENCE OF THIS PARAGRAPH AS ARGUMENTATIVE. AGAIN, I FIND THAT HIEBERT IS ESSENTIALLY DESCRIBING A DOCUMENT WHICH HAS BEEN PROVIDED FOR REVIEW BY THE TRIER OF FACT.

Ninety-nine year Management Commitment

37. In April, 1998 I learned that a long-term lease dated February 23, 1996 had been entered into between the Defendant, Mallco and Sunningdale Investments ("Sunningdale"), who would construct a second hotel at the Mall. This came to ATB's attention on or about April 3, 1998 when Jonathan Levin, a lawyer in Toronto representing the Ghermezian companies ("Levin") advised ATB's solicitors of this lease. Prior to Levin's letter of April 3, 1998, I was unaware of this document and, to the best of my knowledge and belief, no one presently employed by ATB was aware of the Sunningdale lease. THE WEM APPLICANTS ARGUE THAT THE LAST SENTENCE DEALING WITH OTHERS AT ATB SHOULD BE DELETED. I FIND THAT *KIN FRANCHISING* APPLIES TO PERMIT THE STATEMENT, WHICH CAN BE EXPLORED ON CROSS-EXAMINATION.

38. As I did not have a copy of the Sunningdale lease, I instructed Milner Fenerty to obtain a copy from Levin.

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39. I am advised by Richard Cotter and do verily believe that on April 21, 1998, Milner Fenerty received a copy of the Sunningdale lease from Levin. A copy is marked as Exhibit "W" to this Affidavit. Attached to the lease was a further document, purportedly dated February 23, 1996. A copy of this document is marked as Exhibit "X" to this Affidavit. Both Exhibits" W" and "X" were once again purportedly signed on behalf of ATB by Leahy.

40. The Sunningdale lease provides *inter alia* for a term of 99 years commencing on the date the hotel opens for business and purports to grant exclusive right to manage the Mall to the Ghermezians, members of their families or a company controlled by the Ghermezians, for the full 99 year term of the lease. The occupancy costs would be limited to $50,000 annually, increased on the basis of increases in the CPI, capped at a maximum of 2% per annum. Sunningdale would pay $92,500 per year for utilities, for the entire 99-year term, without any provision for any increase, based on CPI escalation or otherwise, and the Defendant Mallco was to provide security for the hotel at no expense to Sunningdale, a company controlled by the Ghermezians. THE WEM APPLICANTS ARGUE THAT THIS PARAGRAPH IS ENTIRELY ARGUMENT ON THE TERMS OF THE LEASE. I FIND THAT IT IS A DESCRIPTION OF AN EXHIBITED DOCUMENT SUBJECT TO ACCEPTANCE BY THE TRIER OF FACT IN THE FINAL ANALYSIS, BASED ON ALL OF THE EVIDENCE.

41. The document accompanying the Sunningdale lease purports to contain an acknowledgement by ATB of the exclusive right of the Ghermezians to manage the Mall for the full 99 year term of the lease, plus any renewal term, and that only the Ghermezians shall have the rights as Manager under the Property Management Agreement. It further purports to remove the right of ATB to terminate the management rights of the Manager under the Property Management Agreement, and to provide that the Management Fee shall not be less than 90% of the fee for the first year of the Property Management Agreement plus a provision for CPI escalation, shall not be subject to any deductions, set-offs, charge backs, etc., and shall have priority over any debts secured against the Mall. ~~It thus purports to radically amend the Property Management Agreement and other Loan Documents~~ . THE WEM APPLICANTS ARGUE THIS PARAGRAPH IS FURTHER ARGUMENT ON THE TERMS OF THE DOCUMENT IN QUESTION AND ALSO ARGUES THAT THE LAST SENTENCE CONTAINS AN INFLAMMATORY CONCLUSION. MY FINDING ON PARAGRAPH 40 APPLIES EQUALLY TO THIS PARAGRAPH, WITH THE EXCEPTION THAT I FIND THAT THE LAST SENTENCE OF THIS PARAGRAPH, WHILE I FIND IT IS NOT INFLAMMATORY, IT DOES GO BEYOND MERE DESCRIPTION AND PURPORTS TO INTERPRET THE DOCUMENT. IT SHALL BE STRUCK.

42. As Exhibit "Y" to his Affidavit sworn on November 6, 1998, Martin Walrath of WEM attached a copy of a further document purporting to be dated August 13, 1996, and purporting to be signed by Sunningdale, Mallco and ATB, the latter by a signature which, in the copy exhibited, is illegible. This document, according to Mr. Walrath's Affidavit, purportedly corrected the term of the Property Management Agreement (Exhibit "I" to this Affidavit) which by "pure inadvertence" had been extended to 99 years. A copy of that Exhibit is marked as Exhibit "Y" to this Affidavit. This document was not provided by Mallco's counsel to our counsel when the other post-October 31, 1994 documents were provided, and did not appear in any way until after I had sworn and filed my Affidavit in the Edmonton WEM action and had been cross-examined on that Affidavit. I was unaware of the document, and, to the best of my knowledge and belief, no one presently employed by ATB was aware of this document. I am advised by Richard Cotter, and do verily believe, that Mr. Levin did not make any reference to this further document in his telephone discussions and correspondence with Mr. Cotter in April, 1998. THE WEM APPLICANTS ARGUE THAT EXCEPT FOR THE FIRST SENTENCE, THIS PARAGRAPH IS ARGUMENTATIVE AND SPECULATIVE AND DOES NOT COMPLY WITH RULE 305(3). I FIND IT IS NEITHER ARGUMENTATIVE NOR SPECULATIVE. IT IS LARGELY HIEBERT'S PERSONAL KNOWLEDGE WITH THE NEGATIVE EXPRESSED IN THE MANNER APPROVED IN *KIN FRANCHISING LTD.*, SUPRA. THE LAST SENTENCE IS CLEARLY A STATEMENT BASED ON INFORMATION AND BELIEF AND COMPLIES WITH RULE 305(3). FOR THE REASONS GIVEN IN PARAGRAPH 6 ABOVE, I FIND THE STATEMENT IS RELIABLE AND NECESSARY AND THEREFORE ADMISSIBLE.

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43. To the best of my knowledge and belief no valid consideration was given to ATB with respect to the Side Agreements, or any of them, ~~and each of the Side Agreements is improvident, contrary to prudent lending principles and practice, wholly and utterly devoid of any valid commercial purpose or justification, and contains terms and conditions which no commercial lender, acting rationally or prudently, would agree to or entertain. Each of the Side Agreements, if given effect to, would be manifestly disadvantageous to ATB, highly detrimental to ATB's position with respect to the Mall and calculated to cause serious and irreparable damage to ATB~~ . THE WEM APPLICANTS ARGUE THIS PARAGRAPH IS PLEADING AND ARGUMENT. ATB ARGUES IT IS MERELY A STATEMENT OF HIEBERT'S BELIEF WHICH IS PERMISSIBLE UNDER RULE 305(3). I FIND THAT EXCEPT FOR THE UNMARKED PORTION OF THE FIRST SENTENCE, THE PARAGRAPH IS IMPROPERLY COMPRISED OF ASSERTIONS WHICH ARE FOR COUNSEL TO SUBMIT IN ARGUMENT.

44. I am advised by Richard Cotter of Milner Fenerty, and do verily believe, that he asked both Stollery and Kenny, whether either of them had ever seen or heard of the Side Agreements, or been consulted about them in any way, and each advised that he had not, notwithstanding that both Stollery's firm and Kenny's firm continued for many months following October 31, 1994 to complete the documentation and implementation October 31, 1994 refinancing as reflected in the Loan Documents. THE WEM APPLICANTS ARGUE THIS PARAGRAPH CONTAINS DOUBLE HEARSAY WHICH CANNOT BE TESTED BECAUSE COUNSEL ARE THE SOURCE AND WILL LIKELY ASSERT PRIVILEGE. I FURTHER FIND THAT IT IS A PROPER STATEMENT OF INFORMATION AND BELIEF. I FURTHER FIND IT IS ADMISSIBLE ON THE PENDING APPLICATIONS AS IT IS RELIABLE AND NECESSARY, FOR THE REASONS GIVEN IN PARAGRAPH 6 ABOVE.

45. The financial statements for the Defendant Mallco for its years ending July 31, 1995, July 31, 1996, and July 31, 1997, as audited by Mallco's auditors Doane Raymond (marked as Exhibits "Z", "AA" and "BB" to this Affidavit), and the monthly financial statements for the Defendant Mallco prepared by the Defendant Manager and provided to ATB for the year ending July 31, 1998, all reflect the terms of the Loan Documents as amended by Exhibit" V". They make no reference to and do not take into account in any way the provisions of the Side Agreements. ~~It is obvious that the Side Agreements, if they existed at all, were not brought to the attention of the Ghermezians' auditors~~ . All parties to the Loan Documents to date have acted in accordance with the provisions of the Loan Documents, as amended by Exhibit "V", without in any way complying with the purported amendments set out in the Side Agreements. THE WEM APPLICANTS ARGUE THAT ALL BUT THE FIRST SENTENCE OF THIS PARAGRAPH IS IMPROPER AS SPECULATIVE OR BASED ON EVIDENCE WHICH IS NOT BEFORE THE COURT. I FIND THE SECOND SENTENCE SIMPLY DESCRIBES DOCUMENTS BEFORE THE TRIER OF FACT WHO CAN ACCEPT OR REJECT THE STATEMENT. THE THIRD SENTENCE IS SPECULATION AND ARGUMENT AND SHALL BE STRUCK. I CAN REASONABLY INFER THAT COMPLIANCE WITH THE LOAN DOCUMENTS IS A MATTER BASED ON HIEBERT'S REVIEW OF ATB RECORDS AND IS THEREFORE PERSONAL KNOWLEDGE BASED ON *ADVANCE RUMELY THRESHER CO.*.

March 26, 1996 Right of First Refusal

46. On or about March 26, 1996 Leahy apparently signed a right of first refusal in favour of Mallco. A copy of that right of first refusal is attached hereto as Exhibit "CC". Exhibit "CC" came to ATB's attention through a McLennan Ross letter of June 18, 1998, which also referred to a "right of first refusal agreement". As no copy of any such document could be located on any of ATB's files, Milner Fenerty requested a copy from McLennan Ross, who then sent a copy of Exhibit "CC" to Milner Fenerty. Prior to my receiving Exhibit "CC" from Milner Fenerty on or about June 22, 1998, its existence was unknown to me and, to the best of my knowledge and belief, it was unknown to anyone else presently employed by ATB or the TD Bank. Once again, this document was purportedly signed on behalf of ATB by Leahy. ~~If this document had any effect, it would restrict ATB's flexibility with respect to any permitted re-sale of its position and would potentially diminish its recovery (for example, a potential purchaser would likely demand compensation if Mallco exercised its right of first refusal after the purchaser had carried out the extensive due diligence required for a transaction of this magnitude)~~ . THE WEM APPLICANTS ARGUE THAT THIS PARAGRAPH IS HEARSAY

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PURPORTING TO BE PERSONAL KNOWLEDGE AND THAT HIEBERT DID NOT DESCRIBE HOW SHE CAME TO OBTAIN THE KNOWLEDGE OF OTHERS AT ATB AND AT THE TD BANK. I FIND THAT HIEBERT IS DESCRIBING AN EXHIBITED DOCUMENT AVAILABLE FOR REVIEW BY THE TRIER OF FACT. HOWEVER, THE LAST SENTENCE IS IN THE NATURE OF A SUBMISSION BY COUNSEL AND SHALL BE STRUCK. *KIN FRANCHISING* AGAIN APPLIES TO THE EXPRESSION OF THE NEGATIVE AND THE INQUIRIES CAN BE TESTED ON CROSS-EXAMINATION.

Termination of Leahy Employment

47. By agreement between ATB and Leahy, Leahy's employment with ATB terminated at the end of August, 1996. THE WEM APPLICANTS ARGUE THIS PARAGRAPH IS HEARSAY WITHOUT A STATEMENT OF SOURCE OF INFORMATION AND BELIEF. I FIND I CAN REASONABLY INFER THAT IT IS PERSONAL KNOWLEDGE OBTAINED FROM REVIEW OF ATB RECORDS BASED ON *ADVANCE RUMELY THRESHER CO.*.

Overall Effect of the Leahy-approved Transactions

48. ~~One cannot comment on the overall effect of the Leahy-approved transactions without first noting that the present value of the second mortgage obtained by ATB as at November 1, 1994 was actually approximately $4.9 million. The second mortgage put in place has a face value of $65 million but it is payable without interest in 30 years. A $65 million mortgage bearing interest at 9 per cent per annum would yield approximately $121 million in interest over 30 years. I am advised by Clark Sullivan of Deloitte & Touche and verily believe to be true that accounting practice is to record a long-term loan bearing no interest by recognizing "implicit" interest and discounting the principal to an amount which more appropriately reflects the true value of the loan at the time, in effect the present worth. Using an implicit interest rate of 9 per cent, the value of the second mortgage was approximately $4.9 million as at November 1, 1994~~ . THE WEM APPLICANTS ARGUE THAT PARAGRAPHS 48-53 ARE "RANK LEGAL ARGUMENT AND OPINION". IN THIS PARAGRAPH I FIND THAT HIEBERT IS PURPORTING TO PUT FORWARD EXPERT EVIDENCE WHEN THAT SHOULD BE COMING FROM MR. SULLIVAN ON THESE PENDING APPLICATIONS. THE WHOLE PARAGRAPH SHALL BE STRUCK.

49. ~~Documenting the transactions in question with the $65 million face value second mortgage conceals the fact that ATB in effect lost approximately $80.7 million on the Mall loans (see paragraph 31 of this Affidavit)~~ . I FIND THAT HIEBERT IS MAKING ARGUMENT AND THE ENTIRE PARAGRAPH SHALL BE STRUCK.

50. The situation before the Leahy-approved transactions took place was that:

(a) the amounts owing against the Mall exceeded the Mall's value, assuming that the Mall was worth approximately $425 million, which was the evidence placed before Justice Lefsrud on October 26, 1994;

(b) it was therefore clear that the Ghermezian Companies had no equity in the Mall; and

(c) all loans outstanding against the Mall were in default, and the first mortgage holder (Gentra) was threatening to foreclose;

I FIND THAT HIEBERT IS SPEAKING FROM PERSONAL KNOWLEDGE OBTAINED FROM REVIEW OF ATB RECORDS BASED ON *ADVANCE RUMELY THRESHER CO.*.

51. Faced with this situation, ATB:

(a) essentially agreed to forgive a substantial portion of what it was owed and, by reason of its full guarantee of the TD Bank's first mortgage, ATB in effect financed 100% of the debt. ~~By entering into the transaction as documented, ATB left the impression that it had not taken the full exposure with respect to the Mall~~ ; I FIND THE LAST SENTENCE OF THIS SUB-PARAGRAPH CROSSES OVER FROM REPORTING ON A DOCUMENT TO ARGUMENT AND SHALL BE STRUCK.

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(b) allowed the Ghermezian Companies to retain 100% ownership interest in the Mall; I FIND THIS IS PERSONAL KNOWLEDGE OBTAINED FROM REVIEW OF ATB RECORDS BASED ON *ADVANCE RUMELY THRESHER CO.*.

(c) ~~ATB released $80.7 million in Mall loans when there was apparent equity to cover most of those loans, based on the Mall value accepted by Justice Lefsrud, thereby gifting that amount of apparent equity to the Ghermezian Companies~~ ; I FIND THAT THIS IS A LEGAL CONCLUSION WHICH SHALL BE STRUCK.

(d) ~~the Ghermezian Companies get a significant portion of the Excess Cash Flow from the Mall but have no obligation to ever repay any of the $80.7 million which was released, or to provide ATB with any equity upside, no matter how profitable the Mall might become. For example, in the fiscal year ending July 31, 1996, the Ghermezians obtained approximately $2.5 million in Excess Cash Flow from the Mall, in addition to management fees of approximately $5.6 million, without ATB being entitled to any repayment of any portion of the said $80.7 million. (Contrast this with the Gentra Proposal where ATB obtained 40% ownership of the Mall, which ownership interest could only be regained by the Ghermezian Companies making significant payments toward ATB's foregone debt)~~ ; I FIND THAT THE REPORT ON DOCUMENTS IN THIS SUB-PARAGRAPH IS ARGUMENTATIVE AND PROPERLY BELONGS IN WRITTEN/ORAL SUBMISSIONS FROM COUNSEL. ACCORDINGLY, IT SHALL BE STRUCK. IT IS OF SOME ASSISTANCE TO THE COURT WHEN A WITNESS OBJECTIVELY REPORTS ON THE CONTENTS OF EXHIBITED DOCUMENTS, KEEPING IN MIND THAT THE REPORT WILL BE CONSIDERED IN LIGHT OF THE COURT'S OWN REVIEW OF THE DOCUMENTS. THIS COMMENT APPLIES TO THE BALANCE OF THE SUB-PARAGRAPHS IN 51, SOME OF WHICH ALSO CONTAIN FURTHER PARTICULAR FINDINGS.

(e) ~~the Ghermezian Companies can remove millions in profits while leaving the principal under the first mortgage, and ATB's exposure for it, largely outstanding~~ . In fact, unless there is adequate cash flow, there is no requirement to make any principal payments under the first mortgage; I FIND THAT THE FIRST SENTENCE IS ARGUMENT FOR COUNSEL TO PRESENT. IT SHALL BE STRUCK.

(f) if the Mall performs poorly, so that interest payments cannot be made under the first mortgage, ATB is obliged to advance the funds to make those first mortgage interest payments;

(g) for its 100% guarantee of the TD Loan ATB receives a guarantee fee of less than 1% per year of the amount at risk while WEM's interest rate on $353.5 million of the Mall debt was lowered by approximately 5% and, with respect to the portion of the Mall debt represented by the ATB loan, by approximately 11% annually; and

(h) the $65 million loan bore no interest, ~~whereas a normal interest-bearing loan would have paid ATB approximately $121 million in interest over 30 years~~ . THE SECOND STATEMENT IS PRESENTED AS PERSONAL OPINION WHICH THE WITNESS IS NOT QUALIFIED TO GIVE AND AS SUCH SHALL BE STRUCK.

52. ~~In my opinion, the work-out summarized in the preceding paragraph is so far removed from being commercially reasonable and fair to ATB as to be shocking. There are countless types of commercially reasonable work-outs that could have been achieved, such as~~ :

(a) ~~ATB could have foreclosed the Mall, taking 100% ownership, and either hired outside management to run the Mall or offered the Ghermezians short term contracts to manage the Mall (perhaps including the right to earn back ownership in return for achieving profitable performance)~~ ;

(b) ~~ATB could have entered into a variety of arrangements, leaving full ownership of the Mall with the Ghermezian Companies, but providing for all or a substantial portion of net cash flow to go towards the forgiven $80.7 million~~ ;

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(c) ~~the Gentra Proposal is just one example of a work-out which appeared to offer a fair and reasonable solution to ATB at that time~~ .

I FIND THAT THIS PARAGRAPH IS ARGUMENT THAT COUNSEL SHOULD BE MAKING, PERHAPS WITH THE ASSISTANCE OF EXPERT EVIDENCE. ATB ARGUES IT IS SIMPLY HIEBERT'S "BELIEF" WHICH IS BASED ON THE ALTERNATIVE STRATEGIES SHE DESCRIBES IN (a)-(c), WHICH, BASED ON ATB'S RECORDS, WERE AVAILABLE TO ATB AT THE TIME. OPINION CAN NOT BE PRESENTED TO THE COURT UNDER THE GUISE OF "BELIEF" IF, AS ATB SUGGESTS, THEIR RECORDS COULD SUPPORT THE AVAILABILITY OF THESE ALTERNATIVE STRATEGIES, THAT SHOULD HAVE BEEN STATED AND PARTICULARIZED. IT SHALL BE STRUCK.

Aggravating Circumstances

53. The following additional factors should be noted:

(a) ATB advanced $3.3 million for the purchase of a $5.0 million Tranche I Bond (see paragraph 21 of this Affidavit) and ATB lent another $1 million against the security of that Bond. This Bond was apparently redeemed for $5.0 million and ATB is unaware why the apparent $700,000 in profit, referred to in paragraph 21 of this Affidavit, was not applied to its outstanding loans;

(b) ATB funded the purchase of Tranche II Bonds for $15.25 million. These Bonds had been acquired about 3 months earlier for $12.5 million (see paragraphs 17 and 21 of this Affidavit). ATB is unaware who made the apparent $2.75 million profit;

(c) ATB released its $310,000 first mortgage against Nader Ghermezian's house and its mortgages against Club Fit and the Palisades (see paragraph 23 of this Affidavit) notwithstanding that it was already agreeing to incur the huge losses I have previously described.

I CAN REASONABLY INFER HIEBERT IS SPEAKING FROM PERSONAL KNOWLEDGE BY REVIEW OF ATB RECORDS BASED ON *ADVANCE RUMELY THRESHER CO.* AND THE TRIER OF FACT CAN ALSO REVIEW EXHIBIT "DD" IN DETERMINING WHETHER THE STATEMENTS RELATED TO THAT EXHIBIT SHALL BE ACCEPTED OR REJECTED.

54. I make this Affidavit in support of the relief sought in the Notice of Motion filed on behalf of ATB on December 1, 1998 and returnable on January 25, 1999.

SWORN BEFORE ME at the City of Edmonton, in the Province of Alberta, this 9th day of December, 1998.	)	
	)	
	)	
	)	
	)	
	)	PAULINA HIEBERT
	)	
A Commissioner for Oaths in and for the Province of Alberta	)	
	)	

Footnotes

1 See also *Laurentian Plaza Corp. v. Martin* (1992), 7 O.R. (3d) 111 (Ont. C.A.) at 116.

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2 The court stated:

• Here I must say that in my opinion a charge of misrepresentation or concealment ought not to be supported by affidavits on information and belief. No doubt in the case of interlocutory applications the Court as a matter of necessity is compelled to act upon such evidence when not met by denial on the other side. In applications of that kind the Court must act upon such evidence, because no other evidence is obtainable at so short a notice, and intolerable mischief would ensure if the Court were not to do so. The object of these applications is either to keep matters as they are or to prevent the happening of serious or irremediable mischief, and for those purposes the Court has been in that habit of acting upon this imperfect evidence. But the Court has no right to act upon it in finally adjudicating upon the rights of parties. This point was in fact decided motions for the purpose of evidence, because they were decisions on the ultimate rights of parties.

...Now many of the cases which are brought before the Court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the Court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause. (pp. 267-269)

3 The Alberta Court of Appeal stated at pages 879-880:

The deponent Benedict stated that he was manager for Alberta of the plaintiff company. I think that fact itself is sufficient to give him authority to make the affidavit. It was contended however that he had no personal knowledge of the matters deposed to. That depends of course on what exactly is meant by personal knowledge. I do not think that means that he must have been an actual witness of the execution of all the documents he refers to in his affidavit. He does produce the agreements and the notes with what purport to be the defendants' signature on them... Upon such an application I think that is sufficient. Neither do I think it necessary that the deponent should have personally conducted all collections and bookkeeping of the company in order to sufficiently verify the debt. He, as manager of the company, has access to all the books of account. That is surely sufficient to show his means of knowledge and justifies his making such an affidavit.

4 Master Funduk stated that:

It is correct that the guarantees and the hypothecation agreement were given before O'Farrell became manager of the branch. It is correct that O'Farrell's predecessor had handled the transactions. However, that does not make O'Farrell's evidence hearsay.

. . . . .

In fact, as counsel for the plaintiff points out, the plaintiff makes out its case against the guarantors based on the documents. The common law approach to business records of a business as evidence is appropriate here. It is a necessary conclusion that O'Farrell, as a branch manager, will be familiar with the business records and the system used by the branch.

. . . . .

In my view, what O'Farrell deposes to in his affidavit is "personal knowledge" within the context of *Advance Rumely Thresher Co.*.(**pages 240-241**)

5 Laycraft C.J.A. stated at page 102 that:

It is one of the curiosities of court procedure that, centuries after the adoption of an adversarial trial process in which documentary evidence is tendered and received every day, so much uncertainty and ambiguity remains in the rules relating to the admission of documents.

I note with interest that the English have simplified the admission of business records in the *Civil Evidence Act* (U.K.), 1995, c. 38, which, *inter alia*, provides that documents which are shown to form part of the records of a business may be received in evidence in civil proceedings without further proof. Federal and provincial *Evidence Acts* (*but not Alberta*'s) also contain provisions that assist in the admission of business records under certain conditions, which vary somewhat among the statutes.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Ontario v. Rothmans Inc. | 2011 ONSC 5356, 2011 CarswellOnt 10013, [2011] O.J. No. 4163, 207 A.C.W.S. (3d) 485 | (Ont. S.C.J., Sep 20, 2011)

2011 SCC 18
Supreme Court of Canada

British Columbia (Attorney General) v. Malik

2011 CarswellBC 923, 2011 CarswellBC 924, 2011 SCC 18, [2011] 1 S.C.R. 657, [2011] 6 W.W.R. 383, [2011] B.C.W.L.D. 3169, [2011] A.C.S. No. 18, [2011] S.C.J. No. 18, 17 B.C.L.R. (5th) 1, 199 A.C.W.S. (3d) 1284, 1 C.P.C. (7th) 374, 303 B.C.A.C. 1, 330 D.L.R. (4th) 577, 414 N.R. 332, 512 W.A.C. 1, 76 C.B.R. (5th) 56, J.E. 2011-714

Her Majesty The Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia (Appellant) and Ripudaman Singh Malik, Raminder Malik and Jaspreet Singh Malik (Respondents)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: October 15, 2010
Judgment: April 21, 2011
Docket: 33266

Proceedings: reversing *British Columbia (Attorney General) v. Malik* (2009), 2009 CarswellBC 1193, 53 C.B.R. (5th) 1, 69 C.P.C. (6th) 205, 92 B.C.L.R. (4th) 78, [2009] 7 W.W.R. 61, 2009 BCCA 201, 454 W.A.C. 178, 270 B.C.A.C. 178 (B.C. C.A.); reversed in part *British Columbia (Attorney General) v. Malik* (2008), 2008 CarswellBC 1621, 2008 BCSC 1027, 46 C.B.R. (5th) 41 (B.C. S.C.)

Counsel: Jonathan Noel Eades, Matthew S. Taylor, Robert N. Hamilton, for Appellant
Bruce E. McLeod, for Respondents, Ripudaman Singh Malik and Raminder Malik
Jaspreet Singh Malik, for himself

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XXII Judgments and orders
XXII.12 Ex parte orders
XXII.12.d Setting aside
XXII.12.d.iii Miscellaneous

Headnote

Civil practice and procedure --- Judgments and orders — Ex parte orders — Setting aside — General principles

Crown brought action against three defendants, and three other members of their family and four corporations owned by them to recover monies it advanced to fund defence costs known as Air India trial — Crown obtained two ex parte orders for Mareva injunction and Anton Piller orders — Mareva injunction restrained each of defendants from selling, mortgaging or otherwise disposing of any of their respective assets — It also restrained defendants

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from causing any of corporate defendants to sell, mortgage or otherwise dispose of any of their assets — Anton Piller order authorized independent lawyers to enter three premises to search for and take away any documents or computers relating to assets and liability of defendants, including numerous specified documents — Defendants' application to have Mareva injunction and Anton Piller order set aside or varied was dismissed with exception of variation of Mareva injunction increasing amount of funds available to defendants for purpose of paying legal fees — Defendants appealed and appeal was allowed in part — Mareva injunction against defendants other than accused was set aside — Anton Piller order was set aside in its entirety — Mareva injunction was found to be supportable against accused — Injunction was found to be reasonably necessary to preserve accused's assets pending determination of Crown's claims — Court found that there was not strong prima facie case of fraud or real risk of dissipation of assets by defendants — Court also found that refusing to restrain accused from transferring or encumbering his assets could cause irreparable harm to Crown, while there was little or no potential harm to accused — Court concluded that Anton Piller order should not have been granted on basis of admissible evidence before court — Court found that evidence before chambers judge established strong prima facie case for claim against accused for reimbursement of advances made by Crown under agreement, but evidence did not establish strong prima facie case of fraud or show real possibility defendants would destroy incriminating documents that may be in their possession — Crown appealed — Appeal allowed — Anton Piller order was properly granted as it was open to chambers judge on whole of interlocutory record to issue order — Chambers judge was entitled to take into account lack of any contest in affirming his ex parte orders and dismissing defendants' review application — Objection to Anton Piller order based on solicitor-client confidences also rejected.

Procédure civile --- Jugements et ordonnances — Ordonnances ex parte — Annulation — Principes généraux

Province a déposé une action à l'encontre des trois défendeurs, trois membres de leur famille et quatre de leurs sociétés afin de récupérer la somme d'argent qu'elle avait avancée afin de couvrir les frais de défense encourus dans le cadre du procès relatif à l'affaire Air India — Province a obtenu des ordonnances ex parte accordant une injonction de type Mareva ainsi que des ordonnances Anton Piller — Injonction de type Mareva enjoignait chacun des défendeurs à ne pas vendre, hypothéquer ou disposer d'aucune autre manière une partie ou l'ensemble de leurs actifs respectifs — Elle enjoignait également les défendeurs à ne pas faire en sorte que les sociétés défenderesses vendent, hypothèquent ou disposent d'aucune autre manière une partie ou l'ensemble de leurs actifs — Ordonnance Anton Piller autorisait des avocats indépendants à pénétrer dans trois locaux pour y chercher et y saisir tous documents ou ordinateurs liés aux actifs et aux dettes des défendeurs, y compris de nombreux documents désignés — Sauf en ce qui concernait une modification à l'injonction de type Mareva permettant une hausse des montants disponibles aux défendeurs pour payer les frais légaux, la requête des défendeurs visant à faire annuler ou modifier l'injonction de type Mareva et l'ordonnance Anton Piller a été rejetée — Défendeurs ont interjeté appel et l'appel a été accueilli en partie — Injonction de type Mareva a été annulée à l'encontre de tous les défendeurs sauf l'accusé — Ordonnance Anton Piller a été annulée dans son intégralité — On a jugé que l'injonction de type Mareva était justifiée en ce qui concernait l'accusé — On a jugé que l'injonction était nécessaire, d'un point de vue rationnel, afin de préserver les actifs de l'accusé en attendant qu'une décision soit rendue à l'égard des prétentions de la province — Cour a conclu qu'il n'y avait pas, à première vue, de preuve solide de fraude ou de risque réel de dilapidation des actifs par les défendeurs — Cour a également conclu que de refuser d'enjoindre l'accusé à ne pas transférer ou grever ses actifs risquait de causer un tort irréparable à la province, alors que l'accusé ne souffrait que peu ou pas d'inconvénients potentiels — Cour a conclu que l'ordonnance Anton Piller n'aurait pas dû être accordée au vu des éléments de preuve admissibles devant elle — Cour a conclu que la preuve déposée devant le juge siégeant en cabinet faisait ressortir clairement le bien fondé de la réclamation déposée à l'encontre de l'accusé visant à obtenir le remboursement des montants avancés par la province en vertu de l'entente, mais ne démontrait pas clairement qu'il y avait eu fraude ou que les défendeurs risquaient vraisemblablement de détruire des documents incriminants pouvant se trouver en leur possession — Province a formé un pourvoi — Pourvoi accueilli — Ordonnance Anton Piller a été accordée légitimement puisqu'il était loisible au juge siégeant en cabinet, en se fondant sur l'ensemble du dossier interlocutoire, de rendre l'ordonnance — Juge siégeant en cabinet était en droit de tenir compte de la totale absence de contestation pour confirmer ses ordonnances ex parte et rejeter la demande de réexamen présentée par

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les défendeurs — Il y avait également lieu de rejeter l'objection fondée sur le secret professionnel de l'avocat qui a été soulevée à l'égard de l'ordonnance Anton Piller.

The Crown brought an action against three defendants, and three other members of their family and four corporations owned by them to recover monies advanced to fund defence costs for a case known as the Air India trial. The Crown obtained two ex parte orders for a Mareva injunction and Anton Piller orders. The Mareva injunction restrained each of the defendants from selling, mortgaging or otherwise disposing of any of their respective assets. It also restrained the defendants from causing any of the corporate defendants to sell, mortgage or otherwise dispose of any of their assets. The Anton Piller order authorized independent lawyers to enter three premises to search for and take away any documents or computers relating to the assets and liability of the defendants, including numerous specified documents. The defendants' application to have the Mareva injunction and the Anton Piller order set aside or varied was dismissed with the exception of a variation of the Mareva injunction increasing the amount of funds available to the defendants for the purpose of paying legal fees. The defendants appealed and the appeal was allowed in part. The Mareva injunction against the defendants other than the accused was set aside. The Anton Piller order was set aside in its entirety. The Mareva injunction was found to be supportable against the accused. The injunction was found to be reasonably necessary to preserve the accused's assets pending the determination of the Crown's claims. The court found that there was not a strong prima facie case of fraud or a real risk of dissipation of assets by the defendants. The court also found that refusing to restrain the accused from transferring or encumbering his assets could cause irreparable harm to the Crown, while there was little or no potential harm to the accused. The court concluded that the Anton Piller order should not have been granted on the basis of the admissible evidence before the court. The court found that the evidence before the chambers judge established a strong prima facie case for a claim against the accused for reimbursement of advances made by the Crown under the agreement, but the evidence did not establish a strong prima facie case of fraud or show a real possibility that the defendants would destroy incriminating documents that may be in their possession. The Crown appealed.

Held: The appeal was allowed.

Per Binnie J. (McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ. concurring): The Anton Piller order was properly granted as it was open to the chambers judge on the whole of the interlocutory record to issue the order. The chambers judge was entitled to take into account the lack of any contest in affirming his ex parte orders and in dismissing the defendants' review application. The objection to the Anton Piller order based on solicitor-client confidences was also rejected.

La province a déposé une action à l'encontre des trois défendeurs, trois membres de leur famille et quatre de leurs sociétés afin de récupérer la somme d'argent qu'elle avait avancée afin de couvrir les frais de défense encourus dans le cadre du procès relatif à l'affaire Air India. La province a obtenu des ordonnances ex parte accordant une injonction de type Mareva ainsi que des ordonnances Anton Piller. L'injonction de type Mareva enjoignait chacun des défendeurs à ne pas vendre, hypothéquer ou disposer d'aucune autre manière une partie ou l'ensemble de leurs actifs respectifs. Elle enjoignait également les sociétés défenderesses à ne pas vendre, hypothéquer ou disposer d'aucune autre manière une partie ou l'ensemble de leurs actifs. L'ordonnance Anton Piller autorisait des avocats indépendants à pénétrer dans trois locaux pour y chercher et y saisir tous documents ou ordinateurs liés aux actifs et aux dettes des défendeurs, y compris de nombreux documents désignés. Sauf en ce qui concernait une modification à l'injonction de type Mareva permettant une hausse des montants disponibles aux défendeurs pour payer les frais légaux, la requête des défendeurs visant à faire annuler ou modifier l'injonction de type Mareva et l'ordonnance Anton Piller a été rejetée. Les défendeurs ont interjeté appel et l'appel a été accueilli en partie. L'injonction de type Mareva a été annulée à l'encontre de tous les défendeurs sauf l'accusé. L'ordonnance Anton Piller a été annulée dans son intégralité. On a jugé que l'injonction de type Mareva était justifiée en ce qui concernait l'accusé. On a jugé que l'injonction était nécessaire, d'un point de vue rationnel, afin de préserver les actifs de l'accusé en attendant

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qu'une décision soit rendue à l'égard des prétentions de la province. La cour a conclu qu'il n'y avait pas, à première vue, de preuve solide de fraude ou de risque réel de dilapidation des actifs par les défendeurs. La cour a également conclu que de refuser d'enjoindre l'accusé à ne pas transférer ou grever ses actifs risquait de causer un tort irréparable à la province, alors que l'accusé ne souffrait que peu ou pas d'inconvénients potentiels. La cour a conclu que l'ordonnance Anton Piller n'aurait pas dû être accordée au vu des éléments de preuve admissibles devant elle. La cour a conclu que la preuve déposée devant le juge siégeant en cabinet faisait ressortir clairement le bien fondé de la réclamation déposée à l'encontre de l'accusé visant à obtenir le remboursement des montants avancés par la province en vertu de l'entente, mais ne démontrait pas clairement qu'il y avait eu fraude ou que les défendeurs risquaient vraisemblablement de détruire des documents incriminants pouvant se trouver en leur possession. La province a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Binnie, J. (McLachlin, J.C.C., LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : L'ordonnance Anton Piller a été accordée légitimement puisqu'il était loisible au juge siégeant en cabinet, en se fondant sur l'ensemble du dossier interlocutoire, de rendre l'ordonnance. Le juge siégeant en cabinet était en droit de tenir compte de la totale absence de contestation pour confirmer ses ordonnances ex parte et rejeter la demande de réexamen présentée par les défendeurs. Il y avait également lieu de rejeter l'objection fondée sur le secret professionnel de l'avocat qui a été soulevée à l'égard de l'ordonnance Anton Piller.

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***Binnie J.*:**

I. Introduction

1 The issue on this appeal is whether the Supreme Court of British Columbia erred in issuing an *Anton Piller* order to permit the Province to conduct a "private search" of the respondents' premises on the basis of an "information and belief" affidavit. The Province sought this interlocutory order in connection with its action against the respondents alleging debt, breach of contract, conspiracy, and fraud. It is seeking reimbursement of more than $5.2 million it paid to fund the respondent Ripudaman Singh Malik's defence in the Air India bombing trial, in which Mr. Malik and a co-accused were acquitted. The other respondents are Mr. Malik's wife Raminder, and their son Jaspreet, a Vancouver lawyer.

2 In granting the *Anton Piller* order to search the business and residential properties of the respondents for evidence that they helped conceal Mr. Malik's assets, and a *Mareva* injunction to freeze their existing assets, the chambers judge relied in part on facts found against the Malik family in prior judicial proceedings brought by Mr. Malik to obtain non-repayable provincial funding for his defence. Mr. Malik's *Rowbotham* application had been rejected on the basis that "Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero" (2003 BCSC 1439, 111 C.R.R. (2d) 40 (B.C. S.C. [In Chambers]), at para. 71).

3 The current proceedings are still at the interlocutory stage. The seizure of documents has occurred but the documents are in the control of the independent solicitor and have not been seen by the Province. The British Columbia Court of Appeal set aside the *Anton Piller* order and limited the *Mareva* injunction to Mr. Malik himself (2009 BCCA 201, 92 B.C.L.R. (4th) 78 (B.C. C.A.)). The Province appeals only the refusal of the *Anton Piller* order to this Court.

4 The procedural question that divided the courts below is whether a Superior Court judge hearing an *ex parte* application for an interlocutory order may admit into evidence the findings and conclusions of a prior judicial decision (here the *Rowbotham* proceeding between Mr. Malik and the Province) or whether, as the Court of Appeal held, the prior decision was *not* admissible to prove the truth of its contents *unless* the Province could establish that the respondents were precluded by issue estoppel or abuse of process from relitigating the facts thus adduced. On that basis the Court of Appeal permitted only three "facts" to be extracted from the *Rowbotham* judgment, namely "that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution

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towards, his defence costs" (para. 63). On the record thus truncated the Court of Appeal held that there was insufficient admissible evidence to justify the *Anton Piller* order.

5 An *Anton Piller* order is an exceptional remedy and should only be granted on clear and convincing evidence. It is a highly intrusive measure that, unless sparingly granted and closely controlled, is capable of causing great prejudice and potentially irremediable loss. The fact the Province was the applicant here conferred no special Crown privilege or priority. The Province comes before the Court as an ordinary civil litigant and its application should be judged by the same rules as any other litigant, as should be the merits of the position taken by the Malik family respondents.

6 Nevertheless, I believe that the Court of Appeal was wrong to insist that the same series of financial transactions as had been exhaustively reviewed on the *Rowbotham* application had to be, in effect, tried *de novo* and *ex parte* by the chambers judge as if the *Rowbotham* proceedings had never taken place, apart from the three "facts". These facts, as the Court of Appeal held, shed little light on what the chambers judge had to decide here.

7 In my view, for the reasons that follow, a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrines of *res judicata*, issue estoppel or abuse of process).

8 On the interlocutory record thus considered admissible, the *Anton Piller* order was properly granted, in my view. The chambers judge was entitled to evaluate, as with any affidavit based on information and belief, the reliability and probative value of the sources relied on by the affiant. The chambers judge was entitled to have regard to the judgment of Stromberg-Stein J. in the *Rowbotham* proceedings brought by Mr. Malik himself — a contested hearing in which he and members of his family gave evidence and examined witnesses. This was permissible provided of course that the chambers judge himself, taking into account the whole of the interlocutory record, made the factual and legal determinations necessary to issue or to decline to issue the order. It is evident in this case from his reasons that the chambers judge made up his own mind and, in my view, it was open to him on the whole of the interlocutory record to issue the *Anton Piller* order *ex parte*.

9 It was also of course open to Mr. Malik or his wife and Jaspreet to challenge any of the "*Rowbotham* facts" when they brought before the chambers judge their application to set aside the *Mareva* injunction and the *Anton Piller* orders. They did lead some evidence, but their evidence did not relate to the financial transactions said to demonstrate the manipulation of family assets that lay at the heart of the *ex parte* orders. The chambers judge was entitled to take into account this lack of any contest in affirming his *ex parte* orders and dismissing the respondents' review application. I would therefore allow the appeal.

II. Facts

10 On October 27, 2000, Mr. Malik and a co-accused were charged with multiple counts of murder arising out of bomb explosions on Air India flight 182, which was blown out of the air off the coast of Ireland on June 23, 1985, and a second bomb that exploded on the same date at Narita Airport, Japan, which killed two baggage handlers. Mr. Malik's criminal trial commenced April 28, 2003 and continued for almost two years. In December 2000, Mr. Malik applied for bail. At the time it was in his interest to show that he was a man of substance. He filed evidence that he and his wife had a net worth of over $11 million. Less than a year later, claiming to be without resources to pay for his own defence, Mr. Malik sought government funding.

A. The Provincial Funding Agreements

11 Public money was made available to Mr. Malik under a series of funding agreements with the Province. The "Indemnity Agreement", dated March 21, 2002, contained an acknowledgment that Mr. Malik was not entitled to

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funding unless he committed all of his resources to his defence, and covenanted not to encumber his assets. The Indemnity Agreement was replaced a few months later by the "Defence Counsel Agreement", dated August 6, 2002, which contained similar provisions but provided as well that Mr. Malik would transfer all his assets to the Province and for that purpose would assist in the identification of those assets. The Province's claim for approximately $5.2 million relates to funds paid out under the August 6, 2002 agreement.

12 In January 2003, being of the view that Mr. Malik was not living up to his undertakings, the Province notified him that it would terminate his defence funding unless he executed an indemnity. Mr. Malik refused to do so unless he could obtain a *Rowbotham* funding order under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

13 On May 14-15, 2003, Tysoe J., then of the Supreme Court of British Columbia, ordered Mr. Malik to provide financial disclosure. Some disclosure was made, but not to the Province's satisfaction.

B. The Rowbotham Application

14 In August 2003, Mr. Malik brought an application seeking relief pursuant to the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), seeking to compel the Province to provide funding or to stay the criminal proceedings. The other respondents provided supportive testimony.

15 On September 19, 2003, the applications judge, Stromberg-Stein J., held that Mr. Malik had not demonstrated that he was financially eligible for funding and dismissed his application. As stated, she found that "Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero" (para. 71). In particular, she held:

> The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise. Title is meaningless. [para. 25]
>
> [Further], Mr. Malik was, and still remains the patriarch of the Malik family which operated as a single financial entity. Mr. Malik jointly owns with his wife two businesses that gross millions each year. He and his wife jointly own millions in real estate, although there is little equity because it is heavily mortgaged. [para. 31]
>
> The legitimacy of Mr. Malik's claims that he owes more than $1 million to family members is questionable. The claims are imprecise, none were documented until after Mr. Malik's arrest, and there is no proper proof of legitimacy. [para. 72]

16 In summary, Stromberg-Stein J. concluded, "[t]he evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely" (para. 82).

17 In support of these conclusions Stromberg-Stein J. made a number of findings of fact regarding the Malik family finances (the "*Rowbotham* facts"). It is the attempted use in the *Anton Piller* proceedings of the *Rowbotham* findings and conclusions that lies at the heart of this appeal.

C. The "Rowbotham facts"

18 The findings of Stromberg-Stein J. that informed the belief of Mr. Gordon Houston, who filed the Province's principal affidavit on the interlocutory motions, were summarized by the chambers judge as follows:

> At his bail hearing in December, 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85 [p. 3, para. 5];
>
> In November, 2001, Mr. Malik approached the AG to fund his defence and asserted that he had assets but those assets were not in cash form and liquidating them would require time [p. 4, para. 6];

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In February, 2002, negotiations between Mr. Malik's counsel and the AG led to an interim funding agreement [p. 4, para. 6];

The funding agreement was entered into so funding could commence immediately and the AG advanced funds in good faith based on Mr. Malik's representations [p. 4, para. 7];

Subsequently, Mr. Malik claimed he was insolvent because his assets were insufficient to discharge his liabilities, including debt owed to unsecured creditors who were all family member [p. 5, para. 10];

The evidence establishes a collective effort by Mr. Malik and the Malik family members to diminish the value of his estate [p. 10, para. 21];

The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise [p. 16, para. 25];

Title to the Marguerite Street home is in Mrs. Malik's name alone. The land was purchased and the home constructed from joint funds. The Maliks shared all expenses [p. 19, para. 35];

It appears that since Mr. Malik's arrest, Papillon's annual earnings dropped from $4 million to $2.5 million per year [p. 22, para. 42];

Regarding property in India, the Maliks provided numerous contradictory explanations concerning both the value and the ownership of this property [p. 23, para. 45];

Regarding the allegation that Gurdip Malik loaned Mr. Malik $330,000 US, the evidence shows these funds were received from Gurdip Malik's company, Papillon Eastern Importes Ltd. in Los Angeles, and used to pay business and personal expenses, and to reduce the line of credit [p. 24, para. 48];

Jaspreet Malik was instrumental in obtaining and arranging the registration of a security agreement against Mr. Malik's shares in the hotel [p. 25, para. 49];

There is evidence of collusion to secure Gurdip Malik's loan before [the *Rowbotham*] hearing and to reduce Mr. Malik's equity in the hotel [p. 25, para. 50];

There is no record of outstanding wages now claimed [by the Malik children] dating as far back as 1994 up to 1997. No formal records were kept regarding the hours worked by the children [p. 25, para. 51];

Although confusing, the evidence establishes the Maliks never intended to pay their children and the children never contemplated they would be paid [p. 26, para. 53];

Following Mr. Malik's arrest his family continued to transfer, give away and buy luxury vehicles. A 1999 $108,000 Mercedes, purchased by Mr. Malik with joint funds, was transferred to Mrs. Malik while he was incarcerated. Mrs. Malik elected to repay the car loan before it was due [p. 27, para. 56];

Mrs. Malik gave away her 1998 Land Rover of unknown value [p. 28, para. 57];

Evidence about the purchase of the Lexus is inconsistent and confusing. In March 2001 Hardeep purchased a $35,000 Lexus with joint funds. He then borrowed that amount and lent it to Khalsa Developments Ltd. The loan was paid off by Khalsa Developments Ltd. [p. 28, para. 58];

Darsham purchased a $22,000 Chevy Blazer with joint funds in 2003 [p. 28, para. 59];

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> The Maliks reported charitable donations for the years 1994 to 2000 of $564,729.97. Of that amount, $512,612.97 was donated to either Satman Education Society or Satnam Trust, which were headed by Mr. Malik ... [p. 28, para. 60];
>
> In violation of a court order not to dispose of any assets, $72,000 from Mr. Malik's income tax refund was placed in a joint account and used to pay business debt. This money was repaid to the Province during this application [p. 29, para. 63];
>
> About the end of December 2000, the Maliks voluntarily elected to pay a franchise cancellation penalty of $100,000 when the hotel changed its affiliation from the Quality Inn to the Executive Inn [p. 29, para. 64];
>
> Mr. Malik's agreement to contribute to the cost of his defence, as outlined in the Defence Counsel Agreement is a compelling consideration. Malik failed to liquidate his assets [p. 30, paras. 69-70];
>
> Mr. Malik and Mrs. Malik have manipulated facts to suit their particular needs as evidenced by the representations at the bail hearing about the value of the Malik's assets [p. 31, para. 75];
>
> The evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely [p. 34, para. 82];
>
> Any perceived cash shortage is artificial and contrived [p. 34, para. 83].
>
> (2008 BCSC 1027, 46 C.B.R. (5th) 41 (B.C. S.C.), at para. 43)

19 In respect of the value and ownership of certain properties in India Stromberg-Stein J. noted that

> [a]t the bail hearing Mr. and Mrs. Malik provided affidavits claiming to own property in India valued at $200,000. Two years later their in-house accountant, Mr. Singh, provided a letter indicating the property was burdened with a tenant who had failed to pay rent. Mr. Malik maintains he does not know whether he owned it, whether he made lease payments, or whether it earned rental income. This is inconsistent, and unlikely behaviour for an astute business person, particularly one looking for a potential source of income. [para. 45]

D. The Payment Agreement

20 Following the dismissal of the *R. v. Rowbotham* application, the Province and Mr. Malik entered into the "Payment Agreement", dated October 17, 2003, which set out terms for the provision of future fees and required Mr. Malik to provide security for these fees and to acknowledge his indebtedness to the Province for the sums advanced under the previous agreements.

21 The Province paid Mr. Malik a total of $5,200,131 under the Defence Counsel Agreement and $1,681,526 under the Payment Agreement. The latter has been repaid. However the Province claims that Mr. Malik has not transferred the assets (alleged to be his at least beneficially) to the Province. The debt of $5,200,131 under the Defence Counsel Agreement is still outstanding. The Province demanded repayment on December 13, 2005.

22 In March 2007, Mr. Malik issued a writ against the Province for malicious prosecution. At the time of the Province's application for the *Mareva* injunction and *Anton Piller* order that writ had not been served.

23 On October 23, 2007, the Province commenced the present action in debt, breach of contract, conspiracy, and fraud against six members of the Malik family and four corporations owned by them. It claims that all these individuals made false statements (mainly concerning debts said to be owed by Mr. Malik to other members of the family) and conspired to conceal Mr. Malik's assets. On the same day the Province applied *ex parte* to obtain an *Anton Piller* order authorizing

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independent lawyers to enter three business and residential premises to search for and take away any documents or computer files relating to the assets and liabilities of the respondents, including numerous specified documents. The three premises were the home of Mr. Malik and his wife; the law office at which their son Jaspreet Singh Malik ("Jaspreet") practices law; and the office of Papillon Eastern Imports Ltd. (where Jaspreet also previously carried on the practice of law).

III. Relevant Enactments

24 *Supreme Court Rules*, B.C. Reg. 221/90, r. 51

> **Rule 51 — Affidavits**
>
> (10) **Contents of affidavit** An affidavit may state only what a deponent would be permitted to state in evidence at a trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made
>
> > (a) in respect of an application for an interlocutory order, or
> >
> > (b) by leave of the court under Rule 40(52)(a) or 52(8)(e).

IV. Judicial History

A. Supreme Court of British Columbia (McEwan J.), 2008 BCSC 1027, 46 C.B.R. (5th) 41 (B.C. S.C.)

25 On the respondents' motion to set aside the *Anton Piller* order and *Mareva* injunction, the Maliks claimed "witness immunity" in respect of their earlier testimony in the *Rowbotham* proceedings. The chambers judge distinguished between the factual findings in the *Rowbotham* proceedings, which he held were admissible to establish a *prima facie* case, and the legal arguments that the Province sought to base on these facts, including issue estoppel and abuse of process. In his view, the latter issues did not need to be decided on the interlocutory application in light of the respondents' decision not to lead evidence to contradict the *R. v. Rowbotham* findings:

> The facts which the Province outlined in its original [*ex parte*] submissions have not been shown to be materially misleading.
>
> From the perspective of a court assessing the evidence with a view to ensuring that the positions of the parties are protected until the facts can be determined at trial, arguments about the legal limits of *res judicata* and witness immunity will not defeat a strong fact based *prima facie* case that the defendants have acted in ways that are inconsistent with their contractual and other legal obligations. The allegations that aspects of the defendants' dealings or behaviour have been the subject of a series of adverse rulings in another proceeding, will not, in the absence of material facts demonstrating that the rulings were effectively unfounded or irrelevant, be negated by abstract arguments unattached to actual findings of fact. [paras. 60-61]

26 Accordingly, the chambers judge affirmed the *Anton Piller* order and the *Mareva* injunction.

B. Court of Appeal (Finch C.J.B.C. and Frankel and Tysoe JJ.A.), 2009 BCCA 201, 92 B.C.L.R. (4th) 78 (B.C. C.A.)

27 Tysoe J.A., writing for a unanimous court, set aside the *Anton Piller* order in its entirety and the *Mareva* injunction against all respondents but Mr. Malik. In that court's view, the chambers judge should not have relied on the *Rowbotham* proceedings apart from the three findings already mentioned, namely "that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs" (para. 63). However, Tysoe J.A. held

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> The remaining *Rowbotham* findings were not admissible because the doctrines of issue estoppel and abuse of process do not prevent the defendants from relitigating those facts. [Emphasis added; para. 38.]

28 In the court's view, the limited admissible *Rowbotham* findings, together with the supplemental facts contained in the affidavits filed by the Province, did not establish a strong *prima facie* case of fraud or a real risk of dissipation of assets by the Malik family. The appeals were therefore allowed. As stated, only the *Anton Piller* order is in issue before this Court.

V. Analysis

29 An *Anton Piller* order is, as our Court emphasized in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189 (S.C.C.), a thoroughly "draconian" measure equivalent to a private search warrant reserved for "exceptional circumstances" (para. 30) where "unscrupulous defendants" may if forewarned make "relevant evidence disappear" (para. 32). Accordingly:

> There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work. ... [para. 35]

It bears repeating that the Province enjoys no special status in this application. It appears as a civil litigant and is to be treated no differently than any other applicant for an *Anton Piller* order.

30 The Province's argument is that this is a case of "exceptional circumstances" because Mr. Malik and other members of his family have, over a period of 8 years, misrepresented his net worth and conspired to move assets around within the family to create the appearance that Mr. Malik is without financial resources. It alleges that Mr. Malik breached his undertakings in the Indemnity Agreement of March 21, 2002 not to encumber his assets. Nor, according to the Province, did Mr. Malik respect the undertaking in the Defence Counsel Agreement of August 6, 2002 to identify and transfer assets to the Province. Although at his bail hearing in December 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85, Mr. Malik took the position at his *Rowbotham* application in August 2003 that he was unable to contribute anything to his own defence. Stromberg-Stein J. rejected this claim on the basis of detailed factual findings in respect of intra-family transactions. The Province alleges that the *Rowbotham* application itself was an act in furtherance of the family conspiracy. The Province claims the Malik respondents, given their track record, cannot be trusted to produce relevant documents in the ordinary way. In the absence of an *Anton Piller* order "there is a real possibility that the defendant[s] may destroy such material before the discovery process can do its work" (*Celanese Canada*, at para. 35).

31 An issue was raised in the court below whether *Anton Piller* orders were available in British Columbia to preserve evidence relevant to a dispute as opposed to preserving property that is the subject matter of the dispute. *Celanese Canada* was an appeal from Ontario, and a difference was noted in wording between r. 46(1) of the British Columbia *Supreme Court Rules*, which deals with preservation of "property that is the subject matter of a proceeding or as to which a question may arise", and r. 45.01 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which deals somewhat more broadly with the preservation of "property in question in a proceeding or relevant to an issue in a proceeding". I agree with Tysoe J.A. that *Anton Piller* orders for the preservation of evidence are available in British Columbia under the inherent jurisdiction of the Superior Court, which indeed is the source identified by Lord Denning in the eponymous case of *Anton Piller KG v. Manufacturing Process Ltd.* (1975), [1976] 1 Ch. 55 (Eng. C.A.), and endorsed in *Yousif v. Salama*, [1980] 3 All E.R. 405 (Eng. C.A.). Accordingly, the particular wording of British Columbia's r. 46(1) does not assist the respondents.

A. The Evidentiary Record

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32 The issue on this appeal is whether the plaintiff (the Province) adduced sufficient admissible evidence on which the chambers judge could make the necessary findings on a balance of probabilities. The Province was required to show that it had a strong *prima facie* case and that absent such an order, there was a real possibility that relevant evidence would be destroyed or made to disappear: *Celanese Canada*, at para. 1. I agree with the respondents that if the Province failed to adduce sufficient admissible evidence at the *ex parte* hearing to justify the orders there was no obligation on them to adduce any evidence at all at the hearing before the chambers judge to set aside the *ex parte* orders.

33 The Province's principal affiant in the *Anton Piller* application, Mr. Gordon Houston, based his information and belief respecting the material facts largely (though not entirely) on the findings of Stromberg-Stein J. in the *Rowbotham* proceedings. However, Mr. Houston also included additional evidence concerning property dealings subsequent to the *Rowbotham* application with the Malik family home (6475 Marguerite Street), commercial properties in Vancouver belonging to the Maliks, and further details of a summary judgment motion for $330,000 allegedly orchestrated by Jaspreet against his father at the suit of Mr. Malik's brother, Gurdip Malik intended (the Province alleges) to reduce artificially Mr. Malik's net worth just prior to the *Rowbotham* application. In the result, based on Mr. Houston's "review of the file, the Malik family's actions leading up to the Rowbotham hearing, the Reasons for Judgment of Stromberg-Stein J., and the Malik family's property dealings subsequent to the execution of the Payment Agreement", he testified as to his belief that "the financial disclosure made by Mr. Malik was neither complete nor accurate" and that "there is a significant risk that evidence relevant to the Province's claims in this action may disappear if an Anton Piller Order is not obtained".

34 I agree with Tysoe J.A. that if the *Rowbotham* judgment is admissible only in respect of the three "facts" previously noted, the *Anton Piller* order cannot stand.

35 One of the problems that confronted the courts below was that the Province initially put forward the extravagant position that the "*Rowbotham* facts" not only constituted *prima facie* evidence that informed its deponents' information and belief, but were conclusive and binding, not only on Mr. Malik — the applicant in the *Rowbotham* application — but on all the other members of the Malik family and their related corporations named as defendants in the present action — by reason of the doctrines of issue estoppel and abuse of process. In my view, the issue of admissibility is separate and distinct from whether, once admitted, the *Rowbotham* findings were conclusive and binding.

36 The chambers judge accepted the *Rowbotham* findings as *prima facie* proof of their content, and noted that while Mr. and Mrs. Malik and Jaspreet led evidence at the hearing to set aside the *ex parte* orders, none of this evidence disputed the transactions relied on by the Province to make the factual case against them. The question of whether the *Rowbotham* findings were conclusive and binding on the Maliks in this case (which would only have arisen had they made the attempt to adduce evidence to contradict those findings), was not something the chambers judge believed he was required to decide. I agree with the chambers judge that the admissibility of the *Rowbotham* facts was not dependent on the respondents being foreclosed from challenging them because of issue estoppel or abuse of process.

B. The Concern about a Multiplicity of Proceedings

37 The admissibility of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the broader context of the need to promote efficiency in litigation and reduce its overall costs to the parties. The doctrines of *res judicata*, issue estoppel and abuse of process are all part of this larger judicial policy but they do not exhaust its potential.

38 It seems clear the *Rowbotham* judgment was properly put before the chambers judge. He was entitled to take judicial notice of prior decisions of the court. Then there is the public documents (or official written statement) exception to the hearsay rule: *McCormick on Evidence* (5th ed. 1999), vol. 2, at § 295. Moreover, it was incumbent on the Province to make "full and frank disclosure of all material facts" to the chambers judge (*Celanese Canada*, at para. 37). This requirement included drawing the court's attention to the *Rowbotham* decision. Further, as the Province points out, the *Rowbotham*

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proceeding was itself pleaded as a step in the alleged Malik family conspiracy to defraud the Province. In this aspect, the judgment was tendered for the purpose of proving the *fact* that the proceedings were taken by Mr. Malik, and supported by testimony from his family. In this latter respect, the fact the proceeding itself was taken is *not* hearsay: *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.), at pp. 924-25.

39 All of this, of course, does not carry the Province very far. The mere fact the *Rowbotham* decision was properly before the chambers judge does not determine what use may properly be made of it. In my view the chambers judge was *not* required to proceed as if the *Rowbotham* judgment was of merely historical interest and of no probative value to the *Anton Piller* application (apart from the Court of Appeal's "three facts").

40 In a number of decisions our Court had emphasized a public interest in the avoidance of "[d]uplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings" (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), at para. 18). Inefficient procedures not only increase costs unnecessarily, but result in added delay, and can operate as an avoidable barrier to effective justice:

> Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue.
>
> (*Toronto (City) v. C.U.P.E., Local 79* (2001), 55 O.R. (3d) 541 (Ont. C.A.), *per* Doherty J.A., at para. 74, aff'd, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) (*sub num. Toronto (City) v. C.U.P.E., Local 79*), at para. 44)

When *Toronto (City) v. C.U.P.E., Local 79* reached this Court, Arbour J. pointed out that the judicial concern about duplicative litigation operates equally against a plaintiff or a defendant: "I cannot see what difference it makes" (para. 47). At issue in those cases were the doctrines of *res judicata*, issue estoppel and abuse of process.

41 *Danyluk* concerned a civil action by a disgruntled employee whose claim under the *Employment Standards Act*, R.S.O. 1990, c. E-14, had already been dismissed by a government adjudicator. The employer asked for dismissal on the basis of issue estoppel. The Court held that the doctrine of issue estoppel must be applied flexibly, and that from a fairness perspective the employee should be permitted to relitigate the claims arising out of her employment because "[i]t is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims" (para. 78). On the other hand, *Toronto (City) v. C.U.P.E., Local 79*, applied the doctrine of abuse of process, notwithstanding different parties, to prevent the relitigation of a criminal conviction of a municipal employee for sexual abuse of a child in his care. The issue resurfaced in a subsequent grievance arbitration by the employee, who had been fired following his conviction. The respondent City filed before the arbitrator not only a certificate of conviction but a transcript of the boy's evidence at the criminal trial. (The child did not testify at the arbitration.) In holding the arbitrator bound by the earlier criminal proceedings, Arbour J. offered three observations on why relitigation is generally undesirable:

> First, there can be no assumption that relitigation will yield a more accurate result than the original proceedings. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly and additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

42 Of course the weight of the prior judgment will depend on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil. As the Sopinka text points out: "The fact that it is a civil judgment only would be significant in terms of weight. The party against whom the judgment was rendered would have a greater opportunity to explain it or suggest mitigating

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circumstances" (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at § 19.177).

43 Here it is objected that the *Rowbotham* issues are different from the fraud and conspiracy case, but Arbour J. in *Toronto (City) v. C.U.P.E., Local 79*, cited the decision of the Ontario Court of Appeal in *Del Core v. College of Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (Ont. C.A.), where Houlden J.A. (dissenting on a different point) observed in the context of an appeal from a decision of a professional disciplinary body, that "lack of identity of issue goes to weight, not to admissibility" (p. 17). Arbour J. also referred to *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C. S.C.). In that case, it was held that it was an abuse of process for the defendants to deny that a certain transfer was fraudulent where that issue had been determined against them after a full and fair trial in a previous proceeding between different parties.

44 The Province suggests that the Court of Appeal was influenced — although not expressly referring to it — by the so-called rule in *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587 (Eng. C.A.). In that case, in which damages were claimed arising out of a motor vehicle accident, the English Court of Appeal ruled inadmissible in the subsequent civil action a certificate of conviction of the defendant driver for careless driving because "on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant" (p. 595). In its country of origin this rule is "generally thought to have taken the technicalities of the matter much too far" (*Arthur J.S. Hall & Co. v. Simons*, [2000] UKHL 38, [2002] 1 A.C. 615 (Eng. H.L.), at p. 702, *per* Lord Hoffman). The editor of *Cross and Tapper on Evidence* (12th ed. 2010), agrees. After dismissing *Hollington v. F. Hewthorn & Co.* as a bundle of "indefensible technicalities" (p. 109), he comments that the "House of Lords might at some stage reconsider the matter in the light of the modern emphasis on fairness and the abuse of process, especially where the prejudiced party had a full opportunity to contest the finding against him in the earlier proceedings" (p. 110). The editors of the Sopinka text appear to share the same view (§ 19.158). To similar effect, see *Jorgensen v. News Media (Auckland) Ltd.*, [1969] N.Z.L.R. 961 (New Zealand C.A.), at p. 980, citing at p. 971 *Harvey v. King*, [1901] A.C. 601 (England P.C.), and at p. 974 *McCormick on Evidence*:

> Probably the trend of evolution will be toward the admission generally against a present party of any judgment or finding in a former civil or criminal case if the party had an opportunity to defend. The principles on which is founded the hearsay exception for official written statements would justify this extension.

In this appeal we are concerned only with the effect, if any, to be given to *Hollington v. F. Hewthorn & Co.* in *interlocutory* proceedings. In my view the "rule" simply has no application at this stage of proceedings in British Columbia. In addition to the general considerations already referred to, r. 51(10)(a) of the British Columbia *Supreme Court Rules* expressly permits the admission of hearsay on an interlocutory application (as does replacement r. 22-2(13), which came into force on July 1, 2010 (*Supreme Court Civil Rules*, B.C. Reg. 168/2009)).

45 I do not see how the "indefensible technicalities" of *Hollington v. F. Hewthorn & Co.*, or their extension to interlocutory proceedings in a civil case are consistent with the concerns expressed by this Court in *Toronto (City) v. C.U.P.E., Local 79*, about the need to avoid an unnecessary multiplicity of proceedings.

46 Whether or not a prior civil or criminal decision is admissible in trials on the merits — including administrative or disciplinary proceedings — will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions. On this point I agree with *Del Core* (which was *not* an interlocutory proceeding) that it "would be highly undesirable to replace this arbitrary rule (in *Hollington v. F. Hewthorn & Co.*) by prescribing equally rigid rules to replace it" (p. 22).

47 I agree, as well, with the Ontario Court of Appeal in *Del Core* that the prior proceedings may be admissible but the "weight and significance" to be given to them "will depend on the circumstances of each case" (p. 21).

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> The law of Ontario is only now emerging from the long shadow cast over it by the decision in *Hollington v. Hewthorn*, *supra*. It would be highly undesirable to replace this arbitrary rule by prescribing equally rigid rules to replace it. The law should remain flexible to permit its application to the varying circumstances of particular cases. [p. 22]

48 Once admitted, the weight to be given to the earlier decision in subsequent interlocutory proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all "the varying circumstances of particular cases" (*Del Core*, at p. 22).

C. The Rowbotham Decision Was Admissible in This Case

49 In my view the chambers judge did not err in treating as admissible the *Rowbotham* decision on the interlocutory applications. The earlier proceeding had been initiated by Mr. Malik and involved the other respondents. The same series of family transactions, and allegations of asset manipulation, had earlier been examined by a judge of the Supreme Court of British Columbia. The underlying issue in the *Rowbotham* case, as it is here, is whether the Malik family was playing games with the Province (and the B.C. courts) with respect to their financial affairs. The question in that case was whether Mr. Malik was without financial resources to fund his defence. The issue in this case is whether Mr. Malik is without funds to pay his debt to the Province as a result of asset manipulation and fraudulent dealings within the Malik family as initially explored in the *Rowbotham* application, and according to the Houston affidavit, has continued ever since. These issues cannot be answered at an eventual trial without access to the underlying documents. The history of dealings between the Province and the Malik family justifies serious concern whether such evidence would be made available by the Malik family in the ordinary course of discovery.

50 On the other hand, the chambers judge (quite properly in my view) did *not* foreclose the Malik family from leading evidence on the return of the motion to explain away or put a different light on their financial transactions.

51 Undoubtedly, a chambers judge should proceed cautiously with hearsay evidence, particularly where the *ex parte* remedies sought are as prejudicial to the absent defendants as in the case of an *Anton Piller* order or a summary judgment (*Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193 (B.C. C.A.), at pp. 194-95), or an injunction (*Litchfield v. Darwin* (1997), 29 B.C.L.R. (3d) 203 (B.C. S.C.), at para. 5). However, the need to proceed with caution does not render hearsay as such inadmissible under r. 51(10)(a) on an interlocutory motion.

52 More significantly in this case, for the reasons already discussed, I do not regard a prior judicial decision between the same or related parties or participants on the same or related issues as merely another controversy over hearsay or opinion evidence. The court's earlier decision was a judicial pronouncement after the contending parties had been heard. It had substantial effect on their legal rights. It would have been wasteful of litigation resources and potentially productive of mischief and inconsistent findings (as discussed in *Toronto (City) v. C.U.P.E., Local 79*), to have required the chambers judge to put aside Stromberg-Stein J.'s judgment and require the Province to litigate the *Rowbotham* facts *de novo* on an interlocutory motion. Of course the *Hollington v. F. Hewthorn & Co.* doctrine and its civil offshoots are not just about hearsay. They are also about inadmissible opinion evidence — opinion piled on hearsay. But for the reasons already discussed I would decline to give effect to the arguments made in *Hollington v. F. Hewthorn & Co.* They give rise to unnecessary inefficiencies and any alleged unfairness can be addressed on a case-by-case basis according to the circumstances.

D. Did the Chambers judge Defer Improperly to the Decision of the Rowbotham Judge, Delivered Five Years Earlier?

53 The reasons of the chambers judge for granting the *Anton Piller* order and *Mareva* injunction are quite brief. He stated that the Province had a "strong *prima facie* case that goes back to the reasons for judgment in 2003 of Madam Justice Stromberg-Stein in this matter" (para. 2), and then didn't refer to the *Rowbotham* case again. He said that his decision to grant the *Mareva* injunction was based on the material and written arguments before him. With respect to the *Anton Piller* order, he stated:

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> Similarly, with respect to the Anton Piller order, I am satisfied on the basis of the material placed before me and the written argument that the order as sought ... is appropriate. ... [T]he material placed before me suggests, again on a strong *prima facie* basis, that that person may be involved in making arrangements to collude with the other defendants to frustrate the obligation that the defendant [Mr. Malik] has on the face of it with the plaintiff. That is all I will say, inasmuch as I do not think on an *ex parte* motion of this kind the court should discuss or suggest that it's made any finding on the merits except to say that what is before it suggests a very strong case.
>
> (*British Columbia (Attorney General) v. R.S.M.*, B.C.S.C. (in chambers), No. S077088, October 23, 2007, at para. 5.)

I therefore turn to the four "essential conditions" set out in *Celanese Canada* that must be met to justify an *Anton Piller* order.

(1) The Plaintiff Must Demonstrate a Strong Prima Facie Case

54 What the chambers judge termed a very strong "case" included evidence that (1) Mr. Malik owed the Province over $5.2 million; (2) Mr. Malik's net worth had gone from a joint interest (with his wife) in $11,648,439.85 in December 2000 to alleged insolvency in August 2003 with no explanation other than intra-family transfers of assets; (3) Mr. Malik had neither identified nor transferred assets to the Province as he had undertaken to do; (4) the Malik family has made numerous transfers of assets including luxury vehicles and Mr. Malik's $72,000 income tax refund, in violation of a court order not to dispose of any assets (this amount was belatedly repaid to the Province); (5) the particular transfers of property within the family up to the time of the *Rowbotham* hearing had been examined judicially in the course of that proceeding; (6) the pattern of shuffling assets within the family and loading the remaining assets with debt continued after the *Rowbotham* application in respect of Mr. Malik's home at 6475 Marguerite Street and the commercial property on Hamilton Street, where some of the mortgages ranking in priority to the Province's claim had been shuffled back to a Malik family company, 0772735 B.C. Ltd., in an effort to obtain priority over the Province's claim. These mortgages had a combined value of about $1.9 million; (7) the circumstances of the transfers raised a legitimate concern that their purpose was to facilitate Mr. Malik escaping his financial obligations under the agreements for defence funding that he had entered into with the Province; (8) Jaspreet played an active role in attempting to obtain a default judgment against his father at the suit of his uncle Gurdip Malik on a $330,000 loan that was not due for another year; (9) the intra-family transactions included a security interest registered by Jaspreet in favour of Gurdip Malik against Mr. Malik's shares in Khalsa, a company that owned a $3 million hotel, one year before the $330,000 loan was due and one month after Tysoe J. ordered Mr. Malik not to dispose of or encumber any of his assets; and (10) the Malik children claimed unpaid wages in the amount of $260,000 that had never been recorded or claimed before Mr. Malik's legal troubles.

55 In my view it was open to the chambers judge on the basis of the whole of the interlocutory record to conclude that the Province had made out a strong *prima facie* case to establish Mr. Malik's debt and the respondents' conspiracy to defraud the Province and to assist Mr. Malik to avoid his obligations under the Defence Counsel Agreement.

(2) The Damage to the Plaintiff of the Defendant's Alleged Misconduct, Potential or Actual, Must Be Very Serious

56 A claim of over $5.2 million against a debtor who, *prima facie*, exhibits a continuing history of evading payment by fraud and conspiracy with other members of his family to cover their financial tracks is, in my view, very serious.

(3) There Must Be Convincing Evidence That the Defendant Has in Its Possession Incriminating Documents or Things

57 In my opinion it was open to the chambers judge to conclude on the *ex parte* application that incriminating documentation behind the registered and unregistered property transfers was in the possession of the respondents, especially Jaspreet who held himself out as his father's "legal counsel in relation to financial affairs" (chambers judgment, at para. 11). Jaspreet acted for his parents, either personally or in connection with other members of his firm, in at least 18 mortgage transactions since 1996, the majority of which post-date the court order against Mr. Malik not to dispose of his assets. It is alleged, based on the evidence, that Jaspreet is functioning not as an independent lawyer, but as a

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co-conspirator. I think it was reasonable for the chambers judge to conclude that Jaspreet was "involved in making arrangements to collude with the other defendants to frustrate the obligation that the defendant [Mr. Malik] has on the face of it with the plaintiff" and that, in the circumstances, a good deal of relevant and incriminating evidence would likely be found at the places sought to be searched, namely the Malik family home and Jaspreet's various places of work.

(4) It Must Be Shown That There Is a Real Possibility That the Defendant May Destroy Such Material Before the Discovery Process Can Do Its Work

58 The Province argued that this is a case of "exceptional circumstances" because Mr. Malik and other members of his family have, over a period of 8 years, misrepresented his net worth and conspired to move assets around within the family to create the appearance that Mr. Malik is without financial resources. The evidence suggests, again on a *prima facie* basis, that Mr. Malik has failed to respect court orders before, and that there is a "real possibility" that he and members of his family will do so again if they think it is to their financial advantage.

59 It will often be difficult or perhaps impossible for a plaintiff to show that a defendant *will* actually destroy evidence, but it is always open to the court to draw inferences reasonably compelled by the surrounding circumstances. As Paperny J. (as she then was) observed in *Capitanescu v. Universal Weld Overlays Inc.* (1996), 46 Alta. L.R. (3d) 203 (Alta. Q.B.):

> Generally, courts have inferred a risk of destruction when it is shown that the defendant has been acting dishonestly, for example where matter has been acquired in suspicious circumstances, or where the defendant has knowingly violated the applicant's rights. [para. 22]

This passage was cited with approval by the Alberta Court of Appeal in *Catalyst Partners Inc. v. Meridian Packaging Ltd.*, 2007 ABCA 201, 76 Alta. L.R. (4th) 264 (Alta. C.A.), at para. 13.

60 Given a history of refusal to provide proper disclosure of financial information despite Mr. Malik's agreement (and a court order) to do so, in my opinion it was open to the chambers judge to conclude that the respondents might if forewarned continue the pattern of refusal and obfuscation by destroying relevant material "before the discovery process can do its work" (*Celanese Canada*, at para. 35).

61 It is evident that the chambers judge made his own decision on the matters he was required to determine in relation to the *Anton Piller* application and did not abdicate his judgment to the *Rowbotham* judge. On the respondents' application to set aside the *ex parte* orders Mr. and Mrs. Malik filed evidence (Jaspreet did not) but their evidence did not seek to contradict the facts relating to their financial affairs on which the *ex parte* orders were based. In these circumstances, it was open to the chambers judge, in my opinion, to affirm his previous orders.

62 Whether and to what extent the *Rowbotham* issues can properly be relitigated at the eventual trial of this action is a decision for the trial judge to make.

E. The Solicitor-Client Issue

63 Jaspreet Malik appeared in person before this Court to object to the seizure at his law offices on the grounds of solicitor-client privilege. This is an important issue in *Anton Piller* cases, as the judgment in *Celanese Canada* made clear. However, in this case, unlike *Celanese Canada*, the allegation is that Jaspreet is a party to the alleged fraud and conspiracy, and therefore that no privilege attached to the relevant documents.

64 Moreover, unlike the situation in *Celanese Canada*, the independent solicitors have not made any of the seized documents available to the plaintiff Province. The parties appeared before the chambers judge on October 25th, 2007, two days after the *Anton Piller* order was granted. Counsel raised the issue of solicitor-client privilege, and the parties reached what McEwan J. described as "operating understandings" as to the safeguards that would govern the files seized from the law offices until such time as the Maliks' substantive challenge to the orders was resolved.

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65 In the end Jaspreet was only able to identify three files captured by the search that were subject to proper objections on the ground of solicitor-client privilege. One of those was a file that did in fact belong to one of the Malik family members who was subject to the search but the file was unrelated to the case. The other two files belonged to clients who had the same names as targets of the search. In all three cases the documents were not taken from the premises, and (as stated) none of the documents have been viewed by the Province. In the circumstances, the objection to the *Anton Piller* order based on solicitor-client confidences should also be rejected.

VI. Disposition

66 I would therefore allow the appeal with costs.

Appeal allowed.

Pourvoi accueilli.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Cavanaugh v. Grenville Christian College | 2012 ONSC 2995, 2012 CarswellOnt 6373, [2012] O.J. No. 2293, 27 C.P.C. (7th) 271, 216 A.C.W.S. (3d) 833 | (Ont. S.C.J., May 23, 2012)

2002 ABQB 667
Alberta Court of Queen's Bench

Indian Residential Schools, Re

2002 CarswellAlta 1296, 2002 ABQB 667, [2002] A.J. No. 1265, [2003] 3 W.W.R. 521, [2003] A.W.L.D. 80, 117 A.C.W.S. (3d) 550, 222 D.L.R. (4th) 124, 9 Alta. L.R. (4th) 84

IN THE MATTER OF CERTAIN CLAIMS ARISING FROM INDIAN RESIDENTIAL SCHOOLS

AND IN THE MATTER OF CASE MANAGEMENT OF THE RESIDENTIAL SCHOOL CLAIMS

McMahon J.

Heard: May 27, 2002
Judgment: October 24, 2002
Docket: Calgary 9901-15362

Counsel: *F.G. Vaughn Marshall*, for Plaintiffs
William Paul, *Susan Ayala*, *B.K. Rattan*, *Garth Dymond*, *Paul Clark*, *Glen Poelman*, *Gene J. Bodnar*, for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Churches and Religious Institutions

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Business associations

I Nature of business associations
I.3 Nature of corporation
I.3.b Distinct existence
I.3.b.ii From related corporations

Religious institutions

I Status of religious bodies
I.3 Church of England (Anglican Church of Canada)

Religious institutions

VI Property rights of religious institutions
VI.6 Miscellaneous

Headnote

Churches and religious institutions --- Organization and government of churches — Miscellaneous issues

In Alberta residential school actions, plaintiffs brought claims against Diocese of Calgary and Diocese of Athabasca — Dioceses were separate legal entities from Anglican church and were incorporated in 1891 and 1914 — Missionary

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Society of Anglican Church of Canada (MSCC) was distinct corporate body — In 1919, MSCC took over responsibility for schools in territory of Diocese of Calgary — In 1923, MSCC took over responsibility for schools in territory of Diocese of Athabasca — Involvement of MSCC in schools ceased in 1969 when federal Crown took over operation of schools, after which some church officials continued to have limited involvement in schools — Dioceses brought motion to have claims against them dismissed — Motions granted in part — Dioceses and MSCC were distinct bodies with different management, executives, objectives, authority and responsibility — Dioceses and MSCC served different constituencies — Dioceses and MSCC were not mere agent or puppet of each other, or mere instrumentality of each other — No evidence of fraud or bad faith and neither Dioceses nor MSCC was used as sham or pretence to avoid liability.

Churches and religious institutions --- General Principles — Status of religious bodies — Of Church of England (Anglican Church of Canada)

In Alberta residential school actions, plaintiffs brought claims against General Synod of Anglican Church of Canada — Missionary Society of Anglican Church of Canada (MSCC) was distinct corporate body established by general synod — In 1919, MSCC took over responsibility for schools in territory of Diocese of Calgary — In 1923, MSCC took over responsibility for schools in territory of Diocese of Athabasca — Prior to those dates, dioceses were responsible for schools within their geographical boundaries — General synod brought motion to have claims against them dismissed — Motion granted — Evidence that general synod was not directly involved in management or operation of schools prior to transfer of responsibility to MSCC — No genuine issue for trial in relation to claim against general synod pre-dating 1919 and 1923 — No evidence that general synod had any direct role in operation or administration of school during involvement of MSCC — Most that could be said was that general synod and MSCC had common members and their corporate affairs were intertwined financially as they were both corporate members of church.

Corporations --- Nature of corporation — Distinct existence — From related corporations

In Alberta residential school actions, plaintiffs brought claims against Diocese of Calgary and Diocese of Athabasca — In Alberta residential school actions, plaintiffs brought claims against General Synod of Anglican Church of Canada — Missionary Society of Anglican Church of Canada (MSCC) was distinct corporate body established by general synod — In 1919, MSCC took over responsibility for schools in territory of Diocese of Calgary — In 1923, MSCC took over responsibility for schools in territory of Diocese of Athabasca — Prior to those dates, dioceses were responsible for schools within their geographical boundaries — General synod brought motion to have claims against them dismissed — Motion granted — General synod existed as independent corporate body — Potentially unjust result was insufficient basis upon which to ignore otherwise legitimate corporate structures — Cooperation that might have existed between MSCC and general synod was insufficient to create agency relationship — No evidence that MSCC and general synod consented to agency relationship or that one arose through estoppel or operation of law — Shared interest in advancement of Anglican faith was insufficient basis upon which to ignore distinct corporate legal structures of bodies — No evidence that general synod was head and brain of MSCC — Nothing suggested that general synod exercised constant and effectual control over MSCC — Common membership in MSCC and general synod was insufficient to ground finding of control — No suggestion that general synod incorporated MSCC for improper motives.

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MOTIONS by Diocese of Calgary, Diocese of Athabasca and General Synod of Anglican Church of Canada for summary judgment dismissing claims in residential school actions.

***McMahon J.*:**

INTRODUCTION

1 This judgment concerns three motions brought by the Synod of the Diocese of Calgary ("the Diocese of Calgary") the Synod of the Diocese of Athabasca ("the Diocese of Athabasca") and the General Synod of the Anglican Church of Canada ("the General Synod") for summary judgment. The Applicants are seeking to have all of the Plaintiffs' claims and the Third Party Notices by Her Majesty The Queen in Right of Canada ("Canada") against them dismissed in all of the Alberta Indian Residential School actions. The applications are brought pursuant to Rules 159(2) and 159(3) of the Alberta Rules of Court.

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2 There are more than 4000 claimants in, at last count, 1479 Indian Residential School actions in Alberta. Over 500 of those claimants relate to the seven Anglican Church schools and residences that were operated in Alberta and the Northwest Territories ("the Schools"). The claims allege that the Plaintiffs attended one or more of the Schools and, while in attendance, suffered a variety of abuses.

3 Generally, the Plaintiffs allege that the Applicants:

(a) were responsible for the operation and administration of the Schools;

(b) are directly liable to the Plaintiffs for breach of trust, negligence, breach of fiduciary duty and breach of Treaty 7;

(c) are vicariously liable to the Plaintiffs for torts such as physical and sexual abuse, committed by employees and others at the Schools; and

(d) are part of a single religious unit which should share responsibility.

4 Canada's Third Party Notices claim contribution and indemnity from the Applicants on the basis of contract and contributory negligence.

5 The Applicants bring these motions on the basis that they had no involvement with the Schools that would ground any legal liability in relation to the Plaintiffs' claims and the Crown's indemnity claims. Specifically, they state that the management, operation and control of the Schools was the responsibility of the Missionary Society of the Anglican Church of Canada ("the MSCC"), a distinct corporate body.

6 Additionally, the Diocese of Athabasca states that any claims against it concerning St. Paul's Residential School, which is not within its territorial boundaries, or "Desmarie Residential School", which may never have existed, ought to be dismissed on the basis that it was never involved with those schools.

7 Given the total number of claims involved in the Indian Residential School litigation and in the expectation of facilitating the resolution of other claims, approximately 50 test cases concerning individual plaintiffs have been selected and are being expedited through the litigation process. Aside from those test cases, the Applicants have not been required to file any statements of defence (though some have) and have not proceeded to examinations for discovery or completed document production. However, the nature of the claims are such that the document production and the discoveries will be largely applicable to the non test cases as well. Also, Calgary advises that it filed its affidavit of records on February 1, 2001and that its information is that Canada's document production is substantially complete; all of the documents in Athabasca's possession were destroyed in a fire at White Fish and a flood at Peace River; and the General Synod advises that its document production relates to all of the Alberta and NWT Schools, test and non-test cases.

SUMMARY

8 I conclude that from January 1, 1919 to March 31, 1969, in the case of Calgary, and from January 1, 1923 to March 31, 1969, in the case of Athabasca, the management, operation, supervision and staffing of the Schools was, from among the Anglican entities, the responsibility of the MSCC. There is no genuine issue to be tried that either bodies corporate, namely the Dioceses of Calgary or Athabasca were involved. During those years they were the geographic locations for the Schools, but nothing more. The MSCC is named as a defendant and third party in most, if not all, of the actions.

9 There are, however, genuine issues for trial concerning any claims that arose prior to those periods. Accordingly, any claims arising against the Diocese of Calgary before January 1, 1919 and those against Athabasca before January 1, 1923 will proceed. There is also evidence that those two bodies had some involvement in the Schools after Canada took over their operation in 1969. As to the Diocese of Calgary it is unclear to which of the Schools they may have provided chaplaincy services. Accordingly, all of the claims arising against that Diocese after 1969 will be allowed to proceed. The

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only triable issues concerning the Diocese of Athabasca after 1969 relates to a claim concerning the residence at Fort Simpson. As a result, that claim will also be allowed to continue.

10 I conclude as well that the General Synod had no such responsibility or involvement in the Schools at any time and all of the claims against it that are the subject of this motion are dismissed.

FACTS

A. The Structure of the Applicants and the MSCC

11 The Anglican Church of Canada ("the Church") is an ecclesiastical, as opposed to a legal, entity comprising the collective body of Christian people in Canada who ascribe to the Anglican faith (*Indian Residential Schools, Re*, (2001), [2002] 1 W.W.R. 272 (Alta. C.A.), although that case dealt specifically with the Roman Catholic Church; and *M. (B.) v. Mumford* (2000), 84 B.C.L.R. (3d) 146 (B.C. S.C. [In Chambers])). The 800,000 Anglicans in Canada worship in 30 dioceses which are regional groupings of Churches, each containing a number of parishes. At the religious head of each diocese is a Bishop.

12 The dioceses are separate legal entities. The Diocese of Calgary was incorporated in 1891 pursuant to *An Ordinance to Incorporate the Synod of the Diocese of Calgary and the Parishes of the said Diocese*, O.N.W.T. 1891-1892, No. 33. In addition to its incorporating statute, the Diocese of Calgary was constituted and at all material times has been governed by its Constitution and Canons.

13 The Diocese of Athabasca was similarly incorporated by *An Act to Incorporate the Synod of the Diocese of Athabasca and the Parishes of the said Diocese*, S.A. 1914, c. 49 in 1914.

14 The General Synod was formed in 1893 and incorporated by private, federal statute in 1921. It consists of delegates from dioceses across Canada, including the Bishops from all of the dioceses, and elected members of the clergy and the laity. It meets every three years and has jurisdiction in all matters relating to the general interest and well being of the whole Church. Its Executive Council's powers, as outlined in *Handbook of the General Synod of the Anglican Church of Canada* (13th ed.), July, 2002 at 25, include "overall strategic planning and visioning within the mandate of the General Synod". The presiding officer is the executive head of the Anglican Church in Canada and bears the title "Primate of all Canada".

15 Thus, as summarized by Macaulay, J. in *Mumford*, at paragraphs 15 and 16:

> The Anglican Church operates as a confederation. The powers of the General Synod are expressly defined and the Dioceses, or more properly their Synods, exercise all residual powers. Primarily by contributions, the Dioceses fund the work of the General Synod. Each Diocese is represented on the General Synod according to a formula involving the number of clergy in each Diocese. Each Diocese also has a representative on the council of the General Synod. As might be expected, the General Synod concerns itself generally with matters that affect the whole Church.
>
> In each case, the Bishops of the Church are elected by the Synod of their particular Diocese.

16 The MSCC was established by the General Synod as a society in 1902 and was incorporated by federal statute in 1903. It consists of all members of the Anglican Church of Canada and its work is governed and controlled by its Board of Management as provided for currently in Canon VII (and prior comparable Canons when it was known as the "Board of Missions") and in the MSCC's incorporating statute. The Board of Management is made up of Bishops, clergy and laity. The MSCC is the corporate vehicle through which the general missionary work of the Church was undertaken from 1903 to 1969.

B. Transfer to the MSCC

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17 On or about January 1, 1919, the MSCC took over responsibility from the Diocese of Calgary for the Schools operating within its territorial boundaries, namely: the Peigan School (later replaced by St. Cyprian School) near Brocket; the Old Sun Residential School near Gleichen; and St. Paul's Residential School near Cardston.

18 Similarly, on or about January 1, 1923, the MSCC took over responsibility for the Schools within the boundaries of the Diocese of Athabasca, namely: St. John's Residential School at Wabasca; and St. Andrew's Residential School at Whitefish Lake.

19 In 1936, the MSCC also assumed responsibility for the Aklavik Anglican Residential School (also known as All Saints' Residential School) at Aklavik, Northwest Territories in the Diocese of the Arctic. The evidence also indicates that the MSCC operated and managed a hostel for non-resident children attending school in Fort Simpson, Northwest Territories from 1960 to 1969.

20 These Applications do not address any of the actions commenced in Alberta that relate to residential schools located in Saskatchewan.

21 At the time that the MSCC took over the Schools within the Diocese of Calgary it created a temporary department known as "The Indian Commission for Indian Boarding Schools" to administer the Schools. In anticipation of the assumption of responsibility for all of the Indian Residential Schools in Canada, a more permanent department called "The Indian Residential Schools Commission MSCC" was formed. That department later became known as the "The Indian and Eskimo Commission MSCC" and, in 1946, was renamed "The Indian School Administration MSCC" ("the ISA"). In 1962, it was again renamed "The Residential Schools and Hostels Division MSCC". From 1919 to 1969 this department, variously named, was the department through which the MSCC administered the Schools.

22 It appears that some Dioceses signed agreements with the MSCC effecting the transfer of the Schools. No such agreement is in evidence before me between the Diocese of Calgary and the MSCC. Nonetheless, the minutes of the Board of Management of the MSCC establish that the Diocese of Calgary agreed to the MSCC taking over the operation of the Schools in its jurisdiction as of January 1, 1919.

23 There is an agreement executed by the Diocese of Athabasca regarding the take over of the Schools within its boundaries in 1923 by the MSCC.

24 There was no such transfer between the General Synod and the MSCC, as the General Synod was never directly responsible for the management, administration or operation of any of the Schools.

25 The role of the MSCC in the Schools began to diminish in 1957 as Canada became more involved in the administration of the Schools. The involvement of both the MSCC and the General Synod in the Schools ceased on March 31, 1969, when Canada took over the operation of the Schools. Thereafter, the evidence indicates that some Church officials continued to have a limited involvement in the Schools. Specifically, chaplain services were provided by some dioceses or parishes to the residences.

26 What occurred in or around 1969 concerning the operation of the Schools is discussed in more detail below in relation to each of the respective motions.

PRELIMINARY ISSUES

A. Admissibility of Evidence

1. Parties' Positions

27 In support of their application for summary judgment, the Applicants rely on affidavits sworn by Archdeacon J. Barry Foster, Bishop John R. Clark and Archdeacon James Bruce Boyles. Archdeacon Foster, is the Archdeacon

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and Executive Officer of the Diocese of Calgary and has general knowledge of its administration, operations, business and financial affairs and properties. He has been appointed by the Diocese of Calgary to act as its corporate officer in relation to the Indian Residential School claims in Alberta. Bishop Clark is the Bishop of the Diocese of Athabasca. Archdeacon Boyles is the General Secretary and Chief Operating Officer to the General Synod and, as such, has general knowledge of the operations of the General Synod. He is also the appointed corporate officer of the General Synod and the MSCC. None of these individuals have firsthand knowledge of the events in issue. They rely upon historical documents, as in fact do all the parties.

28 The Respondents object that the deponents have no personal knowledge of the events surrounding the Schools and, accordingly, that their affidavits do not comply with Rule 305.

29 The Applicants submit that there are no officers or employees who have first hand knowledge of the evidence. They argue, however, that these deponents have informed themselves from the documents and, as a result, have the best knowledge of the matters deposed to. On that basis, the Applicants argue that their knowledge concerning the Applicants' respective roles in the Schools is "personal knowledge" for the purposes of Rule 305. They rely on *Alberta Treasury Branches v. Leahy* (1999), 234 A.R. 201 (Alta. Q.B.).

30 The Applicants also rely on a number of documents that have been exhibited to the various affidavits. They submit that these documents are admissible on the bases of Rule 192 (admissions regarding affidavits of records as to authenticity and that the originals were sent and received as indicated); various sections of the *Alberta Evidence Act* R.S.A. 2000 c.A-18; and a number of common law exceptions to the hearsay rule, including those governed by the criteria of reliability and necessity (*Ares v. Venner*, [1970] S.C.R. 608 (S.C.C.); and *Leahy*).

31 Finally, the Applicants submit that an adverse inference should be drawn on the basis that the Respondents failed to file any evidence in relation to these applications. They rely on *Jager Industries Inc. v. Canadian Occidental Petroleum Ltd.* (2000), 84 Alta. L.R. (3d) 353 (Alta. Q.B.) at 364 - 365.

32 The Respondents cite *Royal Bank v. Facto Homes Ltd.* (1983), 54 A.R. 228 (Alta. Master), as authority for the proposition that an affidavit need not be filed in opposition to a summary judgment application.

2. Analysis

33 I decline to draw an adverse inference in connection with the Respondents' failure to file any evidence in relation to this application. Although it may be open to the Court to draw an inference, I do not interpret *Jager* as standing for the proposition that respondents to a summary judgment application are obliged to provide their own sworn evidence in every case. Rather, what is required is some evidence, from any source, to support the respondent's pleadings. This principle was stated by Master Funduk in *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Alta. Master), at 47 and quoted with approval in *Jager* at paragraph 25:

> If a [respondent] could rely on the allegations of fact in his [pleading] to meet the burden imposed by the Rule, it would make the Rule sterile. All that would be requires [sic] is that the draftsman be astute enough to draft a [pleading] which raises issues of fact by making appropriate allegations of fact.
>
> In some cases the evidence necessary to meet the burden might come from the [respondent] himself. In some cases it might be found within the evidence of the [applicant]. In some cases it might be found in a cross examination on affidavit. By whatever means the evidence comes before the court, there must be evidence which lends some support to the defences raised.

34 Here, the Respondents rely on the affidavit evidence of the Applicants and their cross-examinations.

35 The deponents who provided affidavits in support of the within applications had access to the available, relevant documents. Further, all three occupy positions of authority within the Church and are suitable deponents. On that basis

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and on the authority of *Leahy* and *Advance Rumely Thresher Co. v. Laclair* (1916), [1917] 1 W.W.R. 875 (Alta. C.A.)), I find that the deponents' knowledge relating to the history of the involvement of the various corporate entities of the Church in the Schools is "personal knowledge" for the purposes of Rule 305. Accordingly, I find that the affidavits are admissible to the extent that they do not offer opinion evidence.

36 I find further that the documents exhibited to the affidavits are admissible on the principled basis of reliability and necessity. As set out in *Leahy* and *Litterst v. Horrey* (1995), 37 Alta. L.R. (3d) 74 (Alta. C.A.), common law exceptions to the hearsay rule survive Rule 305. The historic nature of this litigation and the lack of available witnesses with first hand knowledge satisfy the necessity requirement. As to reliability, the documents were taken from their natural custody, there has been no challenge made to their authenticity, the Respondents do not suggest that the documents are not reliable (in fact they rely upon them themselves) and the deponents have been extensively cross-examined.

37 The Respondents state that the deponents lack sufficient knowledge upon which to address a number of the issues raised in these applications and that it would be beneficial to decide these matters at some future date.

38 In my view it is unrealistic to expect that the evidence relating to the organization of the various Anglican entities and their respective involvement in the Schools will improve over time. There is no suggestion that there is anyone still alive who can provide first hand evidence regarding the role and responsibility of the Applicants in the operation and management of the Schools. The Plaintiffs can, presumably, speak to their own experiences as children at the Schools but there is no indication that any of them have any relevant knowledge as to which entity or entities played a part in operating the schools. The result is that such issues will be determined by documentary evidence. In that regard, the chief repository of documents is Canada. It advised in June, 2001, at a case management conference, that it had between 16 and 20 full time researchers dedicated to the Alberta Indian Residential Schools litigation. Canada has produced in excess of 130,000 documents to date in relation to this litigation. Further, this litigation has been underway for more than three years. There have been 11 days of cross-examination on affidavits for these motions alone. This is not a case where a Plaintiff can anticipate that further Examination for Discovery or trial will improve his or her prospects with respect to the issues raised herein.

39 In this regard, I would also note the Alberta Court of Appeal's decision in *Madill v. Alexander Consulting Group Ltd.* (1999), 71 Alta. L.R. (3d) 50 (Alta. C.A.), wherein it stated at paragraph 27:

> When a court is in the position to decide the matters before it, particularly when the decision will promote the streamlining of the litigation and increase the efficient utilization of the courts' resources, such a decision ought to be made.

40 Finally, the Respondents object that the affidavits provided are based on the deponents' own interpretation of the documentary evidence. I agree that the interpretation of the documentary evidence is the responsibility of the Court. Accordingly, the findings made herein are based on my review and analysis of the evidence presented.

B. Availability of Summary Judgment Rules

41 These Applications are brought pursuant to Rules 159(2) and 159(3) of the Alberta Rules of Court. Those Rules state:

> 159(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.
>
> 159(3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

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42 The Applicants also rely on Rule 68, which reads:

> A third party may at any time before he defends and the plaintiff may at any time after service of the notice move to set the notice aside.

43 The test to be applied on an application for summary judgment by a defendant was variously stated in *Boudreault v. Barrett* (1998), 219 A.R. 67 (Alta. C.A.), at para. 9:

> The test to be applied in an application for summary judgment by a defendant was stated by Kerans J.A., in *German v. Major* (1985), 62 A.R. 2; 30 Alta L.R. (2d) 270 at p. 276, as whether "it is plain and obvious that the action cannot succeed". In *Zebroski v. Jehovah's Witnesses* (1998), 87 A.R. 229, this court dismissed an action on the motion of the defendants pursuant to rules 159 and 162. At p. 232 the court said that "summary judgment is available to a defendant where the material clearly demonstrates that the action is bound to fail". Later in the same judgment, the court said with reference to the matter before it, that "the action has no prospect of success". The test was elaborated by O'Leary J. (as he then was), in *Allied- Signal Inc. v. Dome Petroleum Ltd. et al.* (1991), 122 A.R. 321; 81 Alta L.R. (2d) 307 at p. 319:
>
>> Summary judgment may be granted to a defendant under Rule 159 if the court is satisfied that there is no merit to the claim, that is, it does not raise a genuine issue for trial. The court must look at the merits of the claim and the defence and determine whether there is an issue requiring a trial. A defendant must show more than a strong likelihood that he will succeed. To justify deciding the matter without a trial the pleadings and evidence on the motion must show that the claim has no reasonable prospect of success. Where the court is satisfied that there are no genuine issues of fact to be tried but that a question of law exists, it may decide the issue or direct its determination in a summary way.

44 The onus is high. The Applicants must establish there are no triable issues and no reasonable prospect of success by the plaintiffs (*H. (V.A.) v. Lynch*, 184 D.L.R. (4th) 658 (Alta. C.A.)).

45 The cases establish a number of principals to guide the determination of a summary judgment application:

> (a) the Respondent cannot simply argue that the matter is complex and is not amenable to being decided on a chambers application if there is no dispute on the relevant evidence and the issues are capable of only one resolution (*Suncor Inc. v. Canada Wire & Cable Ltd.* (1993), 7 Alta. L.R. (3d) 182 (Alta. Q.B.));
>
> (b) it is not enough for a respondent merely to argue that a discovery and a trial may produce evidence in support of its position (*Suncor Inc.*);
>
> (c) where the evidence adduced by the Applicant establishes that there is no genuine issue for trial, the onus shifts to the Respondent to demonstrate that it has a reasonable chance of success at trial; the respondent cannot rely on bare allegations of fact (*Jager*);
>
> (d) neither pleadings nor the submissions of counsel constitute evidence (*Trosin v. Sikora*, [2002] A.J. No. 164 (Alta. Q.B.); and
>
> (e) an application for summary judgment need not wait until after discoveries (*Compcorp Life Insurance Co. v. Harvard Developments Ltd.* (1996), 195 A.R. 133 (Alta. Q.B.)).

46 The Respondents argue that Rule 159 is not available for third party claims.

47 Rule 4 provides:

> As to all matters not provided for in these Rules the practice as far as may be shall be regulated by analogy thereto.

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48 Thus, Rule 159 is available for third party claims by analogy (*Canada Deposit Insurance Corp. v. Prisco*, 181 A.R. 161 (Alta. C.A.)). The test is the same for third party claims as it is for plaintiff claims (*Jager*; and *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 208 A.R. 179 (Alta. Q.B.)).

49 The Respondents argue that special circumstances are a prerequisite to a grant of summary judgment against third parties. They rely on *Western Canadian Place* and *Canadian Deposit Insurance Corp.* I find that there is no requirement for special circumstances where summary judgment is sought against a third party (*Jager*).

50 It is also argued by the Plaintiffs that Rule 159 is only available to a defendant "after delivering a statement of defence".

51 In respect of the General Synod, the motion relates to at least 37 actions in which it is named as a defendant and at least an additional 116 actions in which it is named as a third party by the Defendant Canada, all according to the Notice of Motion of the General Synod. In respect of the Diocese of Calgary, it is named as a defendant or third party in at least 68 actions.

52 The motion by the Diocese of Athabasca relates to seven actions in which it is a defendant and an additional 10 actions in which it is a third party named by the Defendant Canada.

53 As set out above and described in earlier reasons, 50 of the approximate 4000 claimants have been selected as test cases to proceed on an expedited basis. The focus has been on those test cases for discovery and pleading purposes and an Order has been made that no party may be noted in default in the other cases without leave. But for that Order, defences may well have been filed in the actions to which these motions relate in order to dispatch this objection.

54 With respect to the current Applications, some of the actions are test cases and some are not. For those that are test cases, statements of defence have been filed. Statements of defence have also been filed in some of the non test cases but not in others because of case management orders. I observe, as well, that there is a striking similarity in the defences filed to date, as well as in the claims and third party notices. It is unlikely that there are any surprises to be disclosed in future pleadings.

55 Given the discretion that I have pursuant to the case management Rules and Practice Note, I conclude that these motions should proceed notwithstanding that some of the defences in some of the actions concerned have yet to be filed.

CASE LAW

A. The Applicants

56 The Applicants cite a number of cases in support of their application wherein similar issues involving similar parties have been determined.

57 In *Mumford* the British Columbia Supreme Court granted a summary dismissal of claims against the General Synod and the Anglican Church of Canada in a lawsuit alleging physical and sexual assaults by two Anglican priests, Mumford and Berry. Berry was also a Bishop. The plaintiff had sued four Anglican entities and pleaded that the Anglican Church collectively was responsible for hiring, assigning, reviewing and disciplining Mumford and Berry. On that basis, the plaintiff alleged that the Church was vicariously liable for the assaults against the plaintiff; that it was negligent in its hiring practices; that it breached a fiduciary duty owed to the plaintiff; and that it was liable as principal for the acts of its agents.

58 In determining the issue, the Court considered the relationship of the Anglican Church and the General Synod to Mumford and Berry. It found that there was no master-servant relationship between Mumford and Berry on the one hand and the Church or the General Synod on the other hand and that the plaintiffs had not pleaded any other facts

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upon which to base a finding of a fiduciary or trust duty owed to them by the applicants. It found further that there was no realistic likelihood that different facts would emerge at trial.

59 The Applicants also cite *Lariviere v. Hilton* (2001), 207 D.L.R. (4th) 765 (Ont. S.C.J.). In that case the Ontario Superior Court of Justice in a brief, oral judgment applied *Mumford* and granted a motion for summary judgment in favour of the General Synod. The Court concluded that there was no master-servant relationship between the General Synod and the priest and no fiduciary or trust duty imposed on the General Synod in the plaintiff's favour.

60 The significance of these two decisions is that each Court gave recognition to the legal reality that the abuser was employed by a different body corporate than the applicants. The mere fact of the shared faith between the members of the various corporate bodies did not permit that legal reality to be ignored.

B. The Respondents

61 The Plaintiffs and Canada rely on *M. (F.S.) v. Clarke*, [1999] 11 W.W.R. 301 (B.C. S.C.). In *M (F.S.)* the plaintiff sued the Anglican Church of Canada, the General Synod of the Anglican Church of Canada, the Anglican Diocese of Cariboo, the Synod of the Diocese of Cariboo and Canada. The plaintiff had been sexually assaulted by Clarke while in attendance at an Indian Residential School in Lytton, British Columbia. Clarke was employed at the school as a dormitory supervisor. Two of the Anglican defendants unsuccessfully applied for summary dismissal, saying the school was operated by Canada. When the matter went to trial, Dillon J. found that Clarke was employed by both Canada and the Church and judgment was given against all four Anglican entities as well as Canada. The Court did not attempt to distinguish between the Anglican entities because they did not distinguish between themselves. At page 334 Dillon J. explained:

> It is important to know that neither the Anglican Church of Canada nor the Diocese of Cariboo nor their respective synods distinguish themselves from the other for purposes of this case. They were all represented by one counsel at trial. In other words, there was no issue taken with the identity of the religious defendants. Although there was separation made between the legal entity of the New England Company and both the Anglican Church and the Diocese of Cariboo, it was neither plead nor argued before me that if it was found that the Anglican Church generally was liable, that I should then go about dissecting the relationships between the various Anglican institutions to determine which, among them, was liable.

62 The Court in *Mumford* distinguished *M (F.S.)* for those reasons. In this litigation, the General Synod and the Dioceses have separate counsel and have distinguished themselves from each other and, more importantly, from the MSCC.

63 It is therefore, necessary to distinguish between the Anglican entities to determine against which ones the Plaintiffs have any prospect of success. As a result, *M (F.S.)* is of little assistance here.

64 I turn now to the specific motions.

THE MOTIONS

65 The evidence discloses three distinct periods of control over the operation and management of the Schools: prior to the transfers to the MSCC (1919 in the case of Calgary and 1923 in the case of Athabasca); during the MSCC's involvement until March 31, 1969; and following the MSCC's involvement in the Schools, after April 1, 1969.

66 Archdeacon Boyles deposes that the claims that are the subject of the within applications concern allegations of attendance at the Schools from 1916 to 1983. Accordingly, it is necessary to consider the applications in the context of each of the three periods of operation.

A. The Motion of the Diocese of Calgary

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1. Introduction

67 Three of the Schools were located within the geographical boundaries of the Diocese of Calgary, namely, St. Cyprian, St. Paul's and Old Sun. Those Plaintiffs who have named the Diocese of Calgary as a party attended one or more of those Schools.

68 In support of its application for summary judgment the Diocese of Calgary relies on the affidavits of Archdeacon Boyles and Archdeacon Foster, the exhibits thereto and their cross-examinations.

69 During the course of the cross examinations, Boyles and Foster were referred to a number of documents from sources outside the custody and control of the Diocese of Calgary, the MSCC or the General Synod. Those documents were marked for identification purposes only and were never otherwise identified. On that basis the Diocese of Calgary objects to their admissibility on this motion.

70 I am prepared to admit these documents in the particular circumstances of this historically based litigation. In reaching this conclusion I am cognizant of my decision in *Murphy Oil Co. v. Predator Corp.* (Alta. Q.B.). However, given that this is an application for summary judgment, I cannot ignore relevant information that has come to my attention in determining whether there is a genuine issue for trial. This is so despite the fact that this material was not identified through a witness or attached to an affidavit. Accordingly, I have, in the course of this Judgment, considered those documents to which the Diocese of Calgary has taken objection.

2. Evidence and Arguments

71 The Diocese of Calgary submits that the evidence establishes that its role in relation to the Schools ceased following the transfer of responsibility to the MSCC in or about 1919. This evidence includes correspondence, minutes, transfers of land, and certificates of title. The evidence also establishes that Canada dealt almost exclusively with the MSCC as its agent with respect to the Schools following the transfer. It submits that the evidence fails to disclose any genuine issues for trial against the Diocese and, accordingly, its motion for summary judgment should be granted.

72 The Respondents argue that there is sufficient evidence of the involvement, direct or indirect, of the Diocese of Calgary in the operation of the Schools to warrant the Diocese remaining a party. Specifically, they seek to show that there are "links and ties" between the MSCC and the Diocese of Calgary based on the following evidence:

1. That the Bishop of the Diocese of Calgary was involved in the approval of the clerical principals and assistant principals hired by the MSCC for the Schools. In this regard the Respondents rely primarily upon a quarterly report of the Superintendent of Indian School Administration to the Executive Committee of the MSCC, dated May 11, 1948. It states three favourable recommendations were required, together with the approval of the Bishop, followed by the MSCC sanctioning the nomination.

   There is also a letter of February 17, 1967 to a Bishop in which the Director of Residential Schools and Hostels for the MSCC acknowledges apologizing for not consulting with a Bishop before considering a transfer of three priests to other dioceses to act as principals.

   Canada also points to a letter from the Indian Residential School Commission of the MSCC of September 5, 1930 to the Bishop of Calgary. The Bishop is told that a certain clergyman will be arriving to take up duties as a principal at Old Sun School and that "I fear that an earlier communication to your lordship seeking approval of the appointment was overlooked."

   The Diocese of Calgary argues, and I agree, that this evidence establishes that the Bishop's role in approving the appointments of School employees was non-authoritative and in the nature of a courtesy. In any event, the Bishops were members of the Board of Management of the MSCC.

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Canada also argues that the Bishop licenced all clergy serving in the Diocese of Calgary and that the Bishop was responsible for the religious life and teachings at the Schools. It notes that there are 41 claims of physical and sexual abuse against members of the clergy, over which Canada alleges the Bishop had authority.

The Applicant acknowledges that the Bishop licenced the clergy, but states that this falls far short of establishing an employment relationship with the clergy working at the Schools, or any other basis upon which liability may be grounded against the Diocese. Further, it submits that any authority the Bishop exercised over the clergy within the Diocese was episcopal only.

Finally, Canada argues, relying on correspondence from the Bishop in 1969, that the Bishop continued to nominate chaplains after the MSCC's role in the Schools ended. The Diocese of Calgary takes the position that it was the parishes that entered into the chaplaincy contracts with Canada and provided those services.

2. That the Bishop had authority to deal with certain personnel issues.

Canada points out that, pursuant to Canon 24, the Bishop has the authority to appoint a commission to investigate "any charge or scandal or evil report" and pronounce sentence.

There is some evidence that the Bishop was personally involved in administrative and disciplinary matters at the Schools. Specifically, Canada states that the Bishop of the day was involved in the removal and transfer of Reverend Pitts from his position as the principal of St. Paul's School in 1952; that he was involved in problems relating to Archdeacon Middleton, a clergy principal, in 1950; that he was called in to deal with the principal of Old Sun School, Reverend Crocker, in 1956, when he was not attending to paperwork required by the MSCC; and that, in 1957, the Bishop requested a rural Dean in the Church to visit St. Cyprian School and investigate problems that had been reported to him regarding a teacher named Miss Higgins. Pitts and Higgins are named in a number of claims as the perpetrators of various forms of abuse.

The documentary evidence relating to the Pitts' matter indicates that the Bishop acknowledged that the Superintendent of the Indian School Administration, a body of the MSCC, had authority over Pitts as the principal at St. Paul's School. In a letter to Pitts dated August 15, 1952, the Bishop writes:

> I know of course in the last analysis Canon Cook [of the MSCC] is the man to whom you are responsible, but I am greatly concerned because of the fact that you and the school are in the Diocese of Calgary.

Ultimately, it appears that the Bishop "suggested" that Mr. Pitts take another position.

As to the investigation regarding Archdeacon Middleton, there is a letter from the Bishop of the day to Superintendent Cook of the MSCC, dated March 2, 1950, indicating that any inquiries made by the Bishop were being made "on behalf of the MSCC".

In relation to the Crocker matter the Bishop appears to have been called in as an influential, rather than an authoritative, figure to encourage Crocker to keep up with his administrative duties.

The documentary evidence indicates that the Bishop did become involved in the investigation of the Higgins complaint. Specifically, he sent an official from another parish to investigate the situation at the St. Cyprian School. However, in a letter written by Superintendent Cook of the MSCC to the Bishop, the Superintendent states:

> As Principal Stanger is responsible to this office for the operation of the School and the handling of Staff, I would have been pleased to have received from you word that you found it necessary to send a junior official of the Diocese into the School to make an enquiry.

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The Applicant acknowledges that the Bishop became involved in particular cases of discord, but submits that this evidence does not establish an employment relationship or any other ground upon which it could be held liable for the tortious conduct alleged to have occurred at the Schools.

In my view, the evidence presented by the Respondents in this regard does not demonstrate that the Diocese had any authoritative role regarding the School staff. It does indicate that the Bishop became involved from time to time, but it also shows that it was the MSCC, not the Bishop, to whom the staff was responsible.

3. That some correspondence from the MSCC in 1957 seeks the Bishop's opinion regarding the closure of the Peigan and St. Cyprian Schools.

In my view this evidence is not relevant to the issues here.

4. That education was a component of the Anglican Church's missionary work in western Canada. The Respondents state further that the residential school principals were often priests and had dual responsibilities as principals of the schools and missionaries. The principals thus, served two masters, the MSCC and the Bishop of the Diocese.

The Applicant states that the clergy who worked at the Schools were not employees of the Diocese and neither the Diocese nor the Bishop were accountable for their work at the School. It states that, in cases where the clergy are employed by an organization other than the Diocese, the Bishop has no supervisory function or control over the priests' performance of his functions.

The employment of the clergy at the Schools in the Diocese of Calgary is discussed later in these reasons.

5. That there were Diocesan committees that dealt with aboriginal and residential school matters. There were also links between the MSCC and the Bishop, however, the Bishop was also a member of the Executive Committee of the MSCC.

In my view, none of the evidence in this regard establishes any direct involvement by the Diocese of Calgary in the operation of the Schools. Nor, does it indicate any basis upon which the Diocese of Calgary could be found liable in the context of the pleadings.

6. The Schools paid an apportionment to the Diocese of Calgary.

This evidence is, in my view, irrelevant to the issues here.

7. That certain documents reflect some ongoing involvement of the Diocese in the Schools following the formal transfer of responsibility to the MSCC in 1919.

In a letter dated March 15, 1919, the MSCC requested that the Archdeacon of the Diocese and his staff remain on and there is a suggestion that they may be made permanent agents of the MSCC. Nonetheless, the first paragraph of the letter states:

> On behalf of the Executive Committee MSCC I beg to inform you that the MSCC has assumed full responsibility for the control, administration and upkeep of the Indian Boarding Schools and Missions in the Diocese of Calgary.

Two other letters dated October 16th and 24th, 1919 are relied upon in this regard. The first of these is from the Board of Management of the MSCC, thanking the members of the Indian Commission for the Diocese of Calgary for the work they had done since "the MSCC assumed direct responsibility" for the Schools. The letter states further:

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> Without the kind and efficient help of the Members of the Commission I do not know how we should have managed the administration of the Schools and Missions in question, during the very difficult period of transition from the old form of control to the new order under which we trust in due course the MSCC will prove itself adequately, as well as wholly, responsible for all the work in the Dominion among the Indians and Eskimos.

In his reply, dated October 24 th , 1919, the Secretary to the Synod wrote that he was glad that "the Board is quite satisfied with what the Commission has done so far".

In my view these letters indicate only that there was a brief transitional period following the transfer.

In the context of the above evidence, I will deal with the causes of action pleaded.

3. Prior to the MSCC's Involvement

73 The evidence demonstrates that, prior to January 1, 1919, the Diocese of Calgary was responsible for the management and operation of the Schools within its jurisdiction. That being the case, there is a genuine issue for trial concerning any claims against that Diocese which predate 1919.

4. During the MSCC's Involvement

a. Direct Liability

74 The Respondents' claims against the Diocese of Calgary on the basis of direct liability include: negligence relating to the operation, management or control of the Schools; negligence in relation to the hiring, employment, control, or supervision of the staff or teachers at the Schools; wrongful or inadequate education; breach of contract with Canada relating to the operation, management and inspection of the Schools; breach of Treaty 7; breach of fiduciary duty or a duty *in loco parentis*; wrongful confinement of the Plaintiffs at the Schools; physical, sexual, emotional abuse and loss of language, culture and religion.

(i) Negligence

75 The evidence demonstrates that, following the transfer in 1919 to the MSCC, the Diocese of Calgary did not retain any direct role in the operation or management of the Schools or the employees, other than some limited, residual involvement during the transition period.

76 There is evidence that the Bishop remained involved in the roles set out above, however, none of those roles could create a risk of liability in negligence. The licensing or consultative nomination of the clergy hired by the MSCC and/or Canada to work in the Schools does not by itself create the risk of liability. Even if it is arguable that the risk of negligence in the licencing of a clergy member could arise - for example, where the Diocese had knowledge of past, wrongful conduct on the part of the clergy member, such an argument is not made here nor is there any evidence to support such a contention.

77 Regarding the Bishop's role in approving the appointments by the MSCC of teaching clerics, the evidence establishes that his approval was sought as a courtesy only and, on occasion, overlooked entirely. In any event, the Bishop was an official of the MSCC as well. There is no evidence that he purported to act expressly for the Diocese of Calgary on any relevant occasion. I conclude there is no reasonable prospect of success by the Plaintiffs in negligence against the Diocese of Calgary.

(ii) Breach of Treaty 7

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78 The Diocese of Calgary and the MSCC made an earlier application under Rule 129 to strike out parts of various statements of claim alleging that the Church is liable for breaching Treaty 7 (*Indian Residential Schools, Re* (Alta. Q.B.)). That application was dismissed on the basis that:

> The Church's relationship with the signatories to the Treaty and its intended involvement in the performance of the treaty obligations is a matter which must be determined on the evidence.

79 That decision was rendered almost two and half years ago. At that time it was common ground that the Church was not a party to the Treaty. Since then there has been no evidence uncovered which indicates that the Diocese of Calgary assumed any obligations, duties or liabilities in any manner under the Treaty. Accordingly, I find that there is no triable issue in this regard.

(iii) Fiduciary Duty

80 In order to establish a breach of fiduciary duty the Plaintiffs must demonstrate that the Plaintiffs and the Diocese of Calgary shared a fiduciary relationship and that the Diocese failed in that relationship.

81 The issue of fiduciary duty was considered in similar circumstances in *M. (F.S.)*. In that case the plaintiff had been sexually assaulted over an extended period of time by a dormitory supervisor, while he was a student at an Indian Residential School. In determining whether the Anglican defendants owed the plaintiff a fiduciary duty, Dillon J. applied the analysis prescribed by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.).

82 The application of that analysis in the present case requires a consideration of:

> (i) whether the Diocese of Calgary had the scope to exercise some discretion or power;
>
> (ii) whether the Diocese of Calgary could unilaterally exercise that power or discretion so as to affect the Plaintiffs' legal or practical interests; and
>
> (iii) whether the Plaintiffs were particularly vulnerable.

83 On the basis of that analysis it is perhaps arguable that the Diocese of Calgary owed a fiduciary duty to the plaintiffs for example, in the context of the Bishop's licensing authority. There is, however, no evidence that the Diocese of Calgary acted in breach of any such duty. It was not and could not be argued that the Diocese was a guarantor of the good conduct of all Anglican clergy within its borders.

84 Finally, there is no evidence to support the allegation that the Diocese of Calgary stood *in loco parentis* to the Plaintiffs.

(iv) Other Claims

85 If the Diocese, as I conclude, had no role in the operation and management of the schools during this period, then the Diocese owed no duties to the persons attending the Schools, unless there is some basis upon which to disregard the separate corporate status of the Diocese. That submission is addressed below.

(v) Breach of Contract

86 Regarding the allegations of breach of contract with Canada, the only contracts which the Respondents cite are from Canada's production and predate 1916. Accordingly, they are of no relevance to these proceedings as none of the Plaintiffs allege that they attended the Schools before that date.

b. Piercing the Corporate Veil

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87 Although this argument will be discussed more fully in the context of the General Synod, I will briefly address the Respondents submissions in relation to the Diocese of Calgary here.

(i) Generally

88 Canada cites *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2 (S.C.C.) and *Sun Sudan Oil Co. v. Methanex Corp.* (1992), 5 Alta. L.R. (3d) 292 (Alta. Q.B.) in support of its position that the MSCC and the Diocese of Calgary should be treated as one entity for the purposes of liability in the within actions. Specifically, it cites Wilson, J.'s remarks at 10 to 11 of *Kosmopoulos*:

> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interest of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co. v. Southern Missionary College, supra*, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.
>
> There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice": Gower, *supra*, at p. 138.

89 The Applicants cite K.P. McGuiness, *The Law and Practice of Canadian Business Corporations*, (Markham: Butterworths, 1999) at p. 30, as authority for the proposition that it would be improper for the corporate veil to be lifted in these circumstances:

> Thus the courts are generally unwilling to pierce the corporate veil and will normally do so only where required to do so by statute or where extraordinary circumstances exist. Cases falling within the latter category are confined within a narrow compass.[Footnotes omitted].

And again, at p. 44:

> . . . the overwhelming tendency within the law is to respect the separate existence of corporate enterprises.

90 The Diocese of Calgary and the MSCC are two distinct bodies with different management, executives, objectives, authority and responsibility. They serve different constituencies, one local, one Canada wide. It cannot be said that one is a mere agent or puppet of the other, nor that either is a mere instrumentality of the other. There is no evidence of fraud or bad faith. Neither entity is or was used as a sham or as a pretence to avoid liability. Both were *bona fide* entities.

91 Canada argues that "corporate law has no place in the context of the residential school cases". It is said that the Church should not be able to invoke the legal fiction of incorporation. It submits that the Anglican Church, in all of its forms, exists not to do commerce but to maintain and promote its faith. That may be so in its spiritual context but this Church, like all others, must also do business in this world and it is in that context that its liability in these proceedings will first be judged. I am satisfied that this argument to pierce the corporate veil has no prospect of success.

(ii) Agency

92 There is no evidence that the Diocese of Calgary and the MSCC or the General Synod consented to an agency relationship. An agency relationship may occur, however, without the consent of the parties through estoppel. The requirements for agency by estoppel are: (i) a representation by the principal that the agent has the authority to act on its behalf in the way the agent is acting; (ii) a reliance on the representation; and (iii) an alteration of a party's position

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resulting from such reliance: G.H.L. Fridman, *The Law of Agency*, 7th ed. (Butterworths: Toronto, 1996) at 114. There is no evidence before me which satisfies any of these requirements in the present case.

93 Nor is there any evidence of an agency relationship arising through the operation of law.

94 Accordingly, there is no triable issue of an agency relationship existing between the Diocese of Calgary and the MSCC or the Crown.

(iii) Common Enterprise

95 The Respondents argue that the operation of the Schools was a common or joint enterprise of the MSCC, the Dioceses and the General Synod. The Respondents submit that, although Anglican involvement in the Residential Schools may have been primarily carried out in a civil sense by the MSCC after 1919, the involvement of the MSCC was on behalf of the entire Church, including the Diocese of Calgary. It states that, as the work was national in scope, it came under the jurisdiction of the General Synod and it enjoyed diocesan financial support. Additionally, they point out that the Bishop was a member of the MSCC.

96 The Diocese of Calgary does not deny that the MSCC was operated with funds donated by parishes and dioceses, but it argues that charitable financial support does not lead to legal liability. Nor, it argues, does the membership of the Bishop in the MSCC lead to any liability on the part of the Diocese of Calgary

97 It is not enough, of course, merely to make the argument, there must be some evidence identified in support. Here, there is none. The MSCC carried out the missionary work of the Anglican Church and was governed by its own incorporating *Act* of Parliament. Its purpose was to carry on the general missionary work of the Church. The Bishop is a member of both the MSCC and the Diocese of Calgary, but that alone cannot create a joint enterprise. The evidence of the involvement of the Diocese of Calgary in the operation of the Schools is limited to the role of the Bishop as set out earlier. Nor can the fact that the Diocese made contributions in support of the MSCC establish a common enterprise in relation to the Schools. On all of the evidence I conclude that there is no prospect of the Plaintiffs or Canada succeeding on this argument in respect of the Diocese of Calgary.

c. Vicarious Liability

98 The Respondents allege that the Diocese of Calgary is vicariously liable for the actions of the School employees as their employer. Accordingly, they submit that, in order to finally determine the Diocese of Calgary's liability in this regard it will be necessary to apply the analysis set out in *B. (P.A.) v. Curry*, [1999] 2 S.C.R. 534 (S.C.C.). This would involve a consideration of, among other things, whether the alleged wrongful acts are sufficiently related to the conduct authorized by the employer so as to justify the imposition of liability.

99 The test for the imposition of strict liability was settled by the decision of the Supreme Court of Canada in *Bazley* and the companion decision in *T. (G.) v. Griffiths*, [1999] 2 S.C.R. 570 (S.C.C.). The question here though is not whether the employer of the alleged abusers should be vicariously liable; but whether this Diocese was the employer of those persons or was in such other relationship with them so as to attract vicarious liability.

100 The specific indicia of an employer were summarized in *Mumford* at paragraph 23, as follows:

(i) exercises direction and control over the employees;

(ii) bears the burden of remuneration;

(iii) imposes discipline;

(iv) hires the employees;

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(v) has the authority to dismiss the employees; and

(vi) is perceived to be the employer of the employees.

101 In *Clarke*, Dillon J. also looked at the issue of who, as between Canada and the Anglican Church Defendants, employed the perpetrator at the school. In that case Dillon J. reviewed a number of relevant tests and determined at paragraph 143:

There is a need to look at the whole plan of the undertaking, at the particular facts of each case.

102 Having regard to those considerations, the evidence compels the conclusion that the Diocese of Calgary did not employ any of those persons involved in the operation of the Schools and had no temporal relationship with such persons so as to attract any risk of liability. The Diocese did not in fact and did not appear to exercise control over the employees. There is no evidence that the Diocese paid the employees, imposed discipline, hired or dismissed the employees.

103 The only common denominator was the Bishop who was a member of the MSCC, a separate body corporate, as well as the Bishop of the Diocese. Because he was a Bishop as opposed, say, to a lay person, his opinion may have been valued and his wishes influential but none of that puts the Diocese, another body corporate, at any risk at law.

104 Further, there is no evidence that the Bishop did anything in the name of the Synod of the Diocese of Calgary that could create any issue of vicarious liability. It is true that he had the religious authority to licence and because the MSCC hired only licenced clergy as principals his cooperation was necessary in obtaining a principal. But conferring a religious status, which is necessary for a potential principal to obtain employment with the MSCC (and/or the Department of Indian Affairs - I need not yet make that decision) creates no issue and gives no prospect of success against the Diocese of Calgary on the basis of vicarious liability.

105 There is evidence that the Bishop was consulted as to the appointment of School clergy, but this was more in the nature of a courtesy. The evidence is conclusive that it was the MSCC or Canada that hired and controlled the School employees.

106 There is also evidence that the Bishop involved himself in some personnel issues arising at the Schools. However, the evidence does not indicate that the Diocese of Calgary, through the Bishop, had any authority over the principals or the staff at the Schools. Rather, the evidence confirms that the MSCC was the body to whom the School employees were responsible.

107 Finally, the Bishop's involvement from time to time in various aspects of the Schools, even in his capacity as a member of the Diocese of Calgary, would hardly be surprising given that the Schools were physically located within the boundaries of the Diocese. Such expressions of concern and occasional recommendations are insufficient to bind the Diocese of Calgary to the MSCC for the purposes of assigning vicarious liability for the alleged tortious actions of the school officials.

108 In summary, the evidence before me discloses that the Diocese of Calgary's role in the operation and control of the Schools was transferred to the MSCC in 1919. Beyond that it establishes nothing more than non-authoritative, sporadic involvement in the Schools by the Bishop of the day. Accordingly, I find that there is no genuine issue for trial concerning the claims of vicarious liability against the Diocese of Calgary during this period.

5. After April 1, 1969

109 After April 1, 1969, the MSCC was no longer involved in the Schools or, what were by then, student residences. Thus, the issue is whether there is any evidence that discloses that the Diocese of Calgary became involved in the Schools after that time.

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110 There is information that the Diocese of Calgary may have entered into contracts with Canada for the provision of chaplains to the student residences after April 1, 1969. Specifically, there is a letter dated October 6, 1969, from the Director of the Education Branch to the Bishop of Calgary, which explains:

> I would like to point out that a different procedure exists in the selection of a chaplain as compared with the appointment of a residence administrator. In the former instance we enter into a service contract with the Diocese for the provision of chaplaincy service and it is entirely up to the Diocese to nominate whoever they wish to provide these services and changes can be made from time to time without approval of the Department.

111 The Diocese of Calgary, in its written brief, acknowledges that there is "brief evidence" to the effect that Canada entered into contracts for chaplaincy services after March 31, 1969, when the residences became wholly operated by Canada. It states further, that these contracts were made with the parishes "with a possible exception of a brief period". In this regard, the Diocese relies on: a contract between Canada and St. Thomas parish, dated December 11, 1970, for the provision of chaplaincy services effective September 1, 1970 to August 31, 1971; minutes of a meeting of the Roman Catholic and Anglican Indian Education Committee, held February 23, 1971, that indicate that the chaplaincy contracts were being drawn up with the parishes; and a letter dated March 16, 1971 from an administrator at St. Pauls's Student Residence to the Bishop of Calgary stating that all "new" chaplaincy contracts were being signed by the parishes concerned. The parishes are separate corporate entities.

112 There are no contracts in evidence between Canada and the Diocese of Calgary for chaplaincy services. However, the letter dated October 6, 1969, from the Director of the Education Branch to the Bishop of Calgary does indicate that such contracts may have been executed and that the Diocese may have been providing chaplains for some period after 1969. I am not in a position to determine that some of the claims - such as physical assault or loss of religion, might not be brought home to the chaplains. That being the case, I cannot conclude that there is no genuine issue for trial on those claims against the Diocese of Calgary which arose after April 1, 1969. Accordingly, I find that it would premature to award summary judgment in those actions.

6. Conclusion as to this Motion

113 The claims against the Diocese of Calgary for its involvement in the Schools prior to 1919 and after April 1, 1969 will be allowed to continue. None of the claims between January 1, 1919 and March 31, 1969 present any genuine issues for trial and summary judgment is granted in respect of those claims.

A. Motion by the Diocese of Athabasca

1. Introduction

114 The affidavit of Bishop Clark was filed in support of this motion. No contrary affidavits were filed.

115 There were only two residential schools within the geographic boundaries of this Diocese, namely St. John's at Wabasca, Alberta and St. Andrew's at Whitefish Lake, Alberta. Neither the Plaintiffs nor Canada argue that this Diocese had any involvement with residential schools outside its geographic boundaries (although there is some evidence indicating its involvement in the residence at Fort Simpson which I will deal with later in these Reasons). Thus, in Actions numbered 0103 05764 and 9903 03809M, which relate to a school near Cardston, Alberta, the Diocese of Athabasca shall have summary judgment against the Plaintiffs therein dismissing those actions against this Diocese.

116 The Diocese of Athabasca is also named as a defendant in Actions numbered 9903 19618 and 9903 03874 as being responsible for "Desmarie Residential School" at Wabasca, Alberta. The only evidence before me is that of Bishop Clark who deposes:

> 12. I am aware of no documents or records whatsoever regarding "Desmarie Residential School" at Wabasca, Alberta. This diocese has never been involved with a school by that name.

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117 Accordingly, this Applicant will have summary judgment against the Plaintiffs in those two actions.

118 That leaves two actions regarding St. John's School in which the Diocese of Athabasca is a defendant and five in which it is a third party; as well as one action regarding St. Andrew's School in which it is a defendant and five in which it is a third party; all according to the affidavit of Bishop Clark.

2. Evidence and Arguments

119 The evidence discloses that the Diocese of Athabasca operated the Schools within its geographical borders prior to January 1, 1923. Effective that date the evidence demonstrates that the MSCC was responsible for the administration, management and operation of those Schools.

120 Canada makes four arguments in support of its contention that there is a genuine issue for trial for the period after 1923:

> 1. The Diocesan Bishop of the day had "a say" in the movement of clergy and was consulted regarding school principals. That appears to be the case. A letter of May 10, 1933 from the Field Secretary for the MSCC which was then operating the Anglican Schools has been produced. There was a potential vacancy in the principal's position at Wabasca. The MSCC wrote to the local Bishop of Athabasca asking him to "nominate" a clergyman to fill the position. However, the writer reminds the Bishop of the recent change in authority:
>
> > While writing on this particular subject, I may state, for your Lordship's information, that while our Commission have the power to appoint an Acting Principal, any appointment thus made is subject to the approval of the Executive Committee M.S.C.C., and of the Indian Department at Ottawa. When the schools were transferred from Diocesan control to the control of our Society, all authority in connection with the appointment, transfer, dismissal, etc., of staff agents, was vested in the Society. The only exception to this rule is in connection with the Principals, and in their case the appointment to an Acting Principalship is subject to the approval of the Indian Department, while promotion from the position of Acting Principal to Principal is made by the Indian Department through an Order-in-Council.
> >
> > After the Commission had been administering the schools for some time, they felt that as an Ordained Principal would expect to receive a license from the Bishop of the Diocese in which the school over which he was presiding was located, the Bishop should be consulted with regard to the appointment of a Principal, and the Executive Committee M.S.C.C., agreed to this arrangement. So far, the arrangement has worked very satisfactorily, and I see no reason why it should not continue to do so. As the Commission have no way of securing Ordained agents, except through the Bishop of a Diocese, our Commission will be most grateful for any help you may be able to give in securing a suitable man to take charge of the Wabasca School should this position fall vacant in the way mentioned.

121 It seems clear that the MSCC and the Indian Department had, and in fact, exercised complete authority in hiring and replacing the principals. However, because the principals were clergy, requiring a licence, the local Bishop was "consulted".

> 2. Some evidence shows that the Bishop of Athabasca was consulted in 1945 about whether to rebuild the Wabasca school after a fire and whether to seek government aid to do so. The actual decision to proceed was made by the MSCC. The Bishop "warmly approved" the plans.
>
> 3. Minutes of the MSCC Sub-executive Committee of December 19, 1950 show that the Committee approved the sale of a small piece of land in Wabasca, Alberta which was owned by the MSCC. The Bishop of Athabasca "approved the disposal of this property".

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4. The executive work of the MSCC was given to a Board of Management which included the Bishops, some clergy and certain lay persons. It was the Bishops who had the religious authority to licence the clergy who became the principals for the schools.

122 Based upon that evidence, is there a genuine issue to be tried that the Diocese of Athabasca may be liable?

3. Prior to the MSCC's Involvement

123 The evidence indicates that, prior to the transfer to the MSCC in 1923, the Diocese of Athabasca was responsible for the management and operation of the Schools within its geographical boundaries. Accordingly, there is a genuine issue for trial in relation to those claims and summary judgment will not be granted for those claims, if there are any such claims. None have been brought to my attention during the course of argument on these Motions.

4. During the Involvement of the MSCC

a. Vicarious Liability

124 As there is no evidence indicating that the Diocese of Athabasca had any role in the administration, management and operation of the Schools during this period, there is no basis upon which to establish vicarious liability. Thus, for the same reasons set out in the Diocese of Calgary's motion I find that there is no genuine issue for trial in this regard.

b. Direct Liability

(i) Negligence

125 The evidence demonstrates that there was no direct involvement in the operation, management or administration of the Schools by the Diocese of Athabasca, after January 1, 1923. The evidence discloses only that the Bishop of Athabasca was consulted in relation to the movement of clergy and generally regarding School principals. However, as I concluded in relation the Diocese of Calgary, that fact alone does not attract liability and there is no evidence in any event that any consultation he undertook was negligent.

126 Finally, the Plaintiffs argue that other Bishops in other dioceses exercised greater control over the schools. Even if that is so, those facts cannot be used to place liability on this Diocese.

127 As I stated in relation to the Diocese of Calgary's motion, if the Diocese of Athabasca had no role in the operation and management of the Schools, then, failing any legitimate basis upon which to lift the corporate veil, any duties owed by the Church in that regard were owed by the MSCC.

(ii) Breach of Contract

128 There is no evidence of any contract between Canada and the Diocese of Athabasca during this period.

(iii) Breach of Treaty 7

129 For the reasons set out above relating to the Diocese of Calgary, claims for breach of Treaty *vis a vis* the Diocese of Athabasca have no prospect of success.

(iv) Breach of Fiduciary Duty

130 Even if one were to concede that the Diocese of Athabasca owed the Plaintiffs a fiduciary duty, there is no evidence of any breach. Accordingly, I find that there is no genuine issue for trial in this regard.

(v) Other Claims

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131 There is no evidence that the Diocese of Athabasca had direct involvement in the Schools that would ground liability for: unlawful confinement; educational malpractice; or cultural, linguistic, religious and/or spiritual deprivation. Therefore, unless there is some reason to pierce the corporate veil, the Diocese of Athabasca cannot be liable for these claims.

c. Piercing the Corporate Veil

(i) Generally

132 The Applicants argue that this Court should allow the corporate veil to be lifted in order to permit several or all of the Anglican corporate entities to be considered as one for the purposes of liability.

133 For the reasons given regarding the Diocese of Calgary, I conclude that this argument also fails in relation to the Diocese of Athabasca.

(ii) Agency and Joint Enterprise

134 For the reasons set out in the portion of this judgment dealing with the motion of the Diocese of Calgary, I find that there are no genuine issues for trial against the Diocese of Athabasca on these grounds.

135 In the result, there are no genuine issues for trial against the Diocese of Athabasca for this period of time.

5. After April 1, 1969

136 Exhibited to Archdeacon Boyles affidavit was a Memorandum of Agreement, dated April 1, 1969 between the Commissioner of the Northwest Territories and the Diocese of Athabasca for the operation and management of the "pupil residence" at Fort Simpson. One claimant, Jeannie Gargan, has alleged attendance at Lapointe Hall located at Fort Simpson, NWT, from 1967 to 1968 and again between 1969 and 1972. Accordingly, there is a genuine issue for trial regarding the Diocese of Athabasca's role in that residence after 1969 and summary judgment is denied in relation to that claim.

6. Conclusion as to this Motion

137 I conclude that there are no triable issues and no reasonable prospects of success by the Plaintiffs or Canada against the Diocese of Athabasca for the period between January 1, 1923 and March 31, 1969. There are, however, genuine issues for trial concerning those claims predating 1923 and those concerning the Fort Simpson residence after April 1,1969. Those claims will not be subject to summary judgment.

A. Motion by the General Synod

1. Introduction

138 In support of its application, the General Synod relies on the affidavit of Archdeacon Boyles. The Respondents have not filed any opposing affidavits.

2. Evidence and Arguments

139 The voluminous documentary evidence exhibited to Archdeacon Boyles affidavit discloses that the Schools were the responsibility of the MSCC after 1919, in the case of the Diocese of Calgary, and after 1923 in the Diocese of Athabasca, until 1969. Prior to those dates, the respective Dioceses were responsible for the Schools within their geographical boundaries. That being the case, the General Synod submits that it was, at no relevant time, responsible for the management, administration or operation of any of the Schools.

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140 In opposing the General Synod's application for summary judgment, the Respondents highlight various portions of the evidence and raise a number of evidentiary arguments in an attempt to show at least a triable issue:

1. That Archdeacon Boyles did not review the documents of the Diocese of Athabasca or Calgary prior to swearing his affidavit and his cross-examination. He was also unaware of the circumstances regarding the transfers of lands held by Calgary and transferred to the MSCC.

All of the relevant documents from all of the parties produced on these motions are now before the Court for my consideration. Accordingly, I am in a position to draw my own conclusions based on the documentary evidence and am in a position to assign the appropriate weight to Archdeacon Boyles' affidavit evidence.

2. That in its Brief to the Royal Commission on Aboriginal People ("the RCAP Brief"), the Anglican Church detailed its involvement in the Schools and did not state that it was the MSCC specifically that was involved. Canada also makes reference to a number of portions of Archdeacon Boyles' affidavit in an effort to demonstrate that the "Anglican Church" was the body that operated the Schools, and that the General Synod was the national voice for that body.

In response, the General Synod states that the RCAP Brief was submitted in November of 1993, more than 24 years following the MSCC's involvement in the Schools. Further, the General Synod states that the Brief confirms that it was the MSCC that was the body that administered the Schools and it does not indicate that the MSCC did so on behalf of the General Synod.

I do not attach any weight to the fact that the RCAP Brief refers to the Church's involvement in the Schools generally, rather than the involvement of the MSCC specifically. Unlike the present application, the focus of the RCAP Brief was not to sort out the involvement of the various Anglican corporate structures in the Schools. Further, the "Anglican Church", is an ecclesiastical, not a legal, entity. Whatever moral, spiritual or theological responsibility was accepted by the Anglican Church in that sense does not answer the issues in these legal proceedings.

3. That Canon XXI of the General Synod, which relates to the transfer of clergy, provides that the clergy are subject to the episcopal jurisdiction of the Bishop on whose register his name had been entered. The General Synod submits that this evidence is irrelevant to this application as it adds nothing to the issue of which Anglican body operated and administered the Schools. That appears to be the case.

4. That "the Anglican Church of Canada" provided liaison services respecting Anglican student residences, to recruit employees for the student residences and act as an advisory council in relation to Indian education. In that regard it relies on a service contract between the Diocese of Moosonee in Ontario and Canada which was executed in 1969. Canada notes that the contract was signed by the Bishop of Moosonee on behalf of the "Anglican Church of Canada".

The Respondents also questioned Bishop Clark, the Bishop of the Diocese of Athabasca, about these contracts. Bishop Clark's evidence was that, although he could not be certain, he believed that the chaplains were provided under the auspices of the MSCC and that the Bishop of Moosonee had signed the contract in his capacity as a member of the MSCC executive.

The General Synod takes the position that it was not advised prior to Bishop Clark's cross-examination that Canada intended to use his evidence in opposing the General Synod's application. On that basis, it argued that Bishop Clark's evidence ought not to be admitted in relation to its application or, alternatively, that Clark's entire affidavit and cross-examination should be admitted. Ultimately, however, the General Synod stated that the admission of the affidavit and cross-examination was of no consequence.

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In my view Bishop Clark's entire affidavit and cross-examination are available to all of the parties in this litigation. In the result, however, I agree with the General Synod that Bishop Clark's evidence in this regard is immaterial as it is entirely speculative.

In relation to the contracts themselves, I would add that they do not indicate that the General Synod was involved in any manner with the contracting of the chaplaincy services to the student residences in Alberta.

5. That the Affidavit of Records of the General Synod provides an historical overview of the Indian and Eskimo residential schools and that the Primate, in a letter dated February 28, 1969, thanked the residential schools principals for their work in relation to the contract between Canada and "the Anglican Church of Canada (MSCC)".

The General Synod states that this letter supports its position that it was the MSCC that was the Anglican body responsible for the administration of the Schools. Given that the letter states that the contract was with the "the Anglican Church of Canada (MSCC)", I agree.

6. That there were financial connections between the MSCC and the General Synod. Specifically: the General Synod established a pension fund for the lay and clergy employees at the Schools; that the General Treasurer of the General Synod was also the treasurer for the MSCC; that there was a Financial Management and Development Committee which worked closely with the treasurer in the management of the financial affairs of the General Synod and the MSCC; that 90% of the General Synod's funds were from contributions from the dioceses; and that monies of the General Synod and the MSCC were held, managed and invested as one general trust fund.

In response, the General Synod states: that the pension fund was sanctioned by legislation and, in any event, it does not make the General Synod the employer of the staff at the Schools; that the General Treasurer of the General Synod and the General Treasurer of the MSCC were two distinct positions; that the Schools were primarily funded by financial grants from Canada; and that the joint management of the General Synod and MSCC trust funds was provided for by legislation and does not jeopardize the corporate independence of the General Synod.

In my view none of these financial arrangements meld these two corporate bodies together for the purposes of legal liability. Accordingly, none of the evidence presented regarding the financial structure of the General Synod assists the Respondents in this application.

7. That the General Synod has, pursuant to Canon IV of its Constitution, established a Supreme Court, which has broad jurisdiction including appellate authority over the decisions of any of the Bishops or diocesan courts.

The General Synod submits, and I agree, that this evidence is irrelevant to the issue of who operated or was responsible for the Schools.

8. That the Bishops were involved in both the General Synod and the Schools. Specifically, Canada notes that the Bishops were members of the General Synod as well as members of the Board of Missions. Further, those who had a School within their Diocese were also members of the Indian and Eskimo Residential School Commission. Additionally, Canada relies on evidence that: the Bishops ordained ministers and that the majority of the principals at the Schools were ministers; that the policy after 1956 was that the Bishops should be responsible for the spiritual life at the Schools within their respective dioceses; that the Bishops were consulted in the appointment of principals; that in a letter dated February, 1969, the Primate wrote to the Department of Indian Affairs requesting that the lines of communication for policy matters affecting Indian and Eskimo education and child care be between the regional government offices and the Bishops within those regions; that the various Bishops were to speak for "the Anglican Church of Canada" in matters concerning Indian education and child care in their respective regions; and that in a letter dated April 15, 1969, Canada took the position that the Bishops were responsible for nominating administrators of Anglican residences.

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I conclude that, whatever the role of the individual Bishops was from time to time, there is no evidence demonstrating that the Bishops were acting on behalf of the General Synod or that the General Synod was involved in the operation or management of the Schools.

9. That the principals were responsible for the provision of religious services at the Schools and for assisting with Indian missions. Canada states further, on the basis of Archdeacon Boyles' cross examination and various documents, that the MSCC was responsible for both the support of the residential schools and for the Indian missions in the Diocese of Calgary. It appears that this submission is made in an effort to show that the Church was a single economic unit.

Again, I find that this evidence is irrelevant to the within application. Specifically, it does not establish any connection between the General Synod and the Schools.

10. That, in 1955, the General Synod voted to send a resolution to the Board of Finance of the MSCC for consideration. The resolution called for the appointment of a recruiting officer to engage in the deputation work on behalf of all missionary dioceses and of the ISA.

Canada also points to a letter dated February, 1967, on the letterhead of the Diocese of Athabasca to a Reverend Woeller which relates to a nationally integrated personnel selection policy.

The General Synod states that the evidence indicates that it did not impose a national personnel policy, but rather resolved that the suggestion of the appointment of a personnel recruiting officer be sent to the MSCC for consideration only. On that basis the General Synod argues that this evidence supports its position that the General Synod and the MSCC were separate and independent bodies. Additionally, in his cross examination Archdeacon Boyles stated that he was not aware of any such appointment ever being made.

In my view, this evidence does not demonstrate that the General Synod had any involvement in the Schools which would ground liability on any of the bases plead.

11. That the General Synod was involved in deliberations regarding the Indian Investigation Commission. In support of this proposition Canada cites a document titled "Comments Re: The Recommendations of General Synod 1946, as they Bear on the Indian School Administration". This document reports on the progress of a number of resolutions and makes further recommendations concerning a number of issues, including the conditions at the Schools. Canada also refers to the "Report of the Board of Management MSCC to the General Synod" and more particularly to the "Report of Indian Investigation Commission to General Synod".

The General Synod states that, as these documents make it clear that the ISA did not implement a number of recommendations made by the General Synod, it clearly illustrates the independence of the MSCC.

This evidence fails to establish that the General Synod was involved in the operation or management of the Schools in any way that would ground liability.

12. That Archdeacon Boyles was unclear as to the involvement of the General Synod in the administration of the Schools after the role of the MSCC diminished. Specifically, Boyles stated that the period between 1962 and 1969 was "cloudy".

13. In addition to the evidence canvassed above, the Plaintiffs point to the Yearbooks and the Handbooks of the Anglican Church, published by the General Synod, which set out the structure of the Church nationally and chronicle significant events and policies within the Church. They also submit that *The Hendry Report* ought to be considered for the purposes of the present application. This report was commissioned in 1967 by the Church to assess the work of the Church with Canada's Aboriginal peoples. In this same vein the Plaintiffs submit that the

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Residential Schools Website of the Anglican Church of Canada and the Residential School Backgrounder should also be considered.

The Plaintiffs also refer to the Apology of the Primate, which was given by the Primate in 1993 to those who attended the Schools, in support of their position.

The General Synod submits that the Apology of the Primate was issued in August 1993, more than 24 years following the MSCC's involvement with the Schools. Further, it states that the Apology did not address the issue of which Anglican legal entity operated or managed the Schools and is, accordingly, irrelevant to the within application. It submits further that *The Hendry Report* and the Residential Schools Working Group are also unhelpful to the determination of who operated the Schools.

None of the review work done by other Church entities - such as *The Hendry Report*, nor the Church's expression of general regret for past acts, can assist the Respondents in this litigation.

141 Based on the above evidence, the Respondents submit that there are a number of genuine issues for trial and that the General Synod should not be granted summary judgment.

3. Prior to the Involvement of the MSCC

142 The evidence indicates that the General Synod was not directly involved in the management or operation of the Schools prior to the transfer of their responsibility to the MSCC. That being the case, there is no genuine issue for trial in relation to these claims and summary judgment is granted for any claims against the General Synod pre-dating 1919, for those claims which allege attendance at one of the Schools within the Diocese of Calgary, and before 1923, for those concerning the Diocese of Athabasca.

143 The submission that the corporate veil should be lifted so as to attach liability to the General Synod is addressed below and is equally applicable and determinative in relation to the period prior to the transfers to the MSCC.

4. During the Involvement of the MSCC

144 There is no evidence that the General Synod had any direct role in the operation or administration of the Schools during this period. Nor is there any evidence of any contractual obligations between the General Synod and Canada. There is no triable issue in negligence, contract, fiduciary duty, vicarious liability, or otherwise against the General Synod.

145 The most that can be said about the evidence is that it demonstrates that the MSCC and the General Synod had common members and that their corporate affairs were intertwined financially and in the sense that they were both corporate members of the Church. On that basis, the Respondents argue, that the MSCC and the General Synod should be treated as one legal entity for the purposes of assigning liability. They rely on a number of legal theories in this regard which I will address in turn.

a. Piercing the Corporate Veil

(i) Generally

146 Canada argues that this is an appropriate circumstance within which to lift the corporate veil. It argues that it would otherwise create an injustice as it would allow the General Synod to escape liability on the basis of a legal fiction. It states that the General Synod was the body that established MSCC to operate the Schools and, accordingly, it should bear some degree of liability. It also repeats that corporate law principles are inapplicable in the context of the Schools as they did not exist for profit. I have addressed the latter argument above.

147 The General Synod submits that it is a distinct and separate legal entity. It submits further that a corporation is separate from its members (McGuiness at para. 1.26), that a parent corporation is not automatically liable for any

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wrongdoings of its subsidiaries (*Cunningham v. Hamilton* (1995), 29 Alta. L.R. (3d) 380 (Alta. C.A.) and *Bank of Montreal v. Canadian Westgrowth Ltd.* (1992), 135 A.R. 49 (Alta. C.A.)) that shareholders are not liable for the debts of the corporation (s.21(1)(d) *Interpretation Act* R.S.C., 1985, c. I-21); and that the owner and controller of a corporation does not lose the benefit of the corporate veil (*Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.)). Accordingly, it submits that the fact that members of the Board of Management of the MSCC may also have been members of the General Synod is irrelevant.

148 The General Synod states that generally the only exceptions to the rule of limited liability are those set out by Lord Halsbury in *Salomon* at 33:

> If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.

149 It also concedes that it will be appropriate to lift the corporate veil in otherwise "exceptional circumstances" (*Amdue Holdings Ltd. v. Calgary (City)* (1980), 24 A.R. 541 (Alta. C.A.)).

150 As to the suggestion that the corporate veil should be lifted in order to avoid an injustice, the General Synod cites the comments of Spence J., of the Ontario Court of Justice (General Division), in his article *Lifting the Corporate Veil*, (Autumn 1998) 17 Advocates' Soc. J. No. 4, 19-20, to the effect that, despite Wilson J's judgment in *Kosmopolous* (as quoted above), the law "does not seem to be evolving in that direction at any appreciable speed." It also cites *Adams v. Cape Industries Plc* (1989), [1990] 1 Ch. 433 (Eng. C.A.), McGuiness at para. 1.46; and *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 60 D.L.R. (4th) 30 (B.C. C.A.) for the proposition that ignoring limited corporate liability on the basis that it effects a more just result, is inappropriate.

151 Finally, the General Synod submits that because Parliament legislated the corporate and constitutional structure of the MSCC and the General Synod and provided for the common management of the two structures and administrative cooperation, it would be highly inappropriate to ignore the separate corporate personalities.

152 I find that the General Synod did exist as an independent corporate body. I find further, that the consideration of a potentially unjust result (such as being left with a claim against a defendant with empty pockets) is an insufficient basis upon which to ignore otherwise legitimate corporate structures. In any event, I would note that the present case, like that in *W.D. Latimer Co. v. Dijon Investments Ltd.* (1992), 12 O.R. (3d) 415 (Ont. Gen. Div.), is distinguishable from *Kosmopolous* on the basis that the latter was concerned with the insurable interests in the assets of the company.

153 As the Respondents do not allege fraud, I will proceed to consider whether the agency exception applies or whether there are any other exceptional circumstances in the within case which would warrant lifting the corporate veil.

(ii) Agency or Joint Venture

154 The Plaintiffs acknowledge that the Schools may have been operated primarily by the MSCC, however, they take the position that there was an agency relationship between the MSCC and the General Synod in the operation and administration of the Schools and that this is a proper issue for trial.

155 They argue further that the Anglican involvement in the Schools was a joint enterprise of all of the Anglican entities in furtherance of the national missionary policy towards Canada's Aboriginal population. As this work was national in scope, the Plaintiffs submit that it came under the jurisdiction of the General Synod and that the MSCC operated and administered the Schools on behalf of the various levels of the Church.

156 The General Synod argues that there is a presumption that a corporation is acting on its own behalf and not as an agent for its owner unless there is clear evidence to the contrary (McGuiness at paras. 1.32 and 1.53). The General Synod states that the Respondents have not provided any evidence with which to rebut this presumption. It submits that

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sharing directors and officers and cooperation on administrative matters, such as pension funds, are insufficient grounds upon which to circumvent legitimate legal structures.

157 Finally, the General Synod states that, as Canada dealt almost exclusively with the MSCC regarding the Schools and funded the MSCC, it is estopped from and cannot credibly argue that it was dealing with the MSCC only as an agent of the General Synod.

158 The cooperation that may have existed between the MSCC and the General Synod is insufficient to create an agency relationship. What is required to create an agency relationship was discussed in the previous section dealing with the application brought by the Diocese of Calgary. There is no evidence that the MSCC and the General Synod consented to an agency relationship or that one arose through estoppel or the operation of law.

159 Nor has there been any evidence presented which would rebut the presumption that the MSCC was acting on its own behalf as a separate corporate entity in relation to the Schools.

160 Finally, although the MSCC, the Dioceses and the General Synod shared an interest in the advancement of the Anglican Faith and the Church's relationship with Aboriginal peoples, this is an insufficient basis upon which to ignore the distinct corporate legal structures of these bodies.

161 Accordingly, I find that there is no genuine issue for trial regarding the agency exception or the joint venture theory.

(iii) Alter Ego or Fiction

162 The General Synod acknowledges that the relationship between the MSCC and the General Synod resembles a parent-subsidiary relationship. However, it submits that in order to apply this exception in the context of a parent-subsidiary relationship the subsidiary must be totally controlled by the parent and the failure to lift the corporate veil must yield a result "flagrantly opposed to justice" (*W.D. Latimer* and *Lifting the Corporate Veil*). It submits further, that this exception to limit corporate liability is generally applied in circumstances where a corporation is being used to perpetrate deliberate wrongdoings.

163 In determining whether the parent exercises control over the subsidiary, the General Synod cites *Sun Sudan v. Methanex* at paragraph 44, wherein Hunt J., as she then was, set out six criteria that warrant consideration. They include:

(a) were the persons conducting the business appointed by the parent company?

(b) was the parent company the head and brain of the trading venture?

(c) was the parent company in constant and effectual control?

164 The General Synod submits that none of those criteria can be met on the evidence presented herein.

165 As noted by McGuiness, at para. 1.54:

> . . . it is no easy task to decide when to lift the corporate veil on the grounds that the corporation is such a facade. This is with good reason: for as the corporation is by definition an artificial entity - that is, a legal fiction- it is necessarily a sham, alter ego, simulacrum of facade for its shareholders. . .

166 The task is made easier in the present case by the fact that there is no evidence to support the three criteria set out above. Specifically, as to appointments the evidence demonstrates that the members of the ISA (and the various other commissions that preceded it) were appointed by the executive committee of the MSCC and the staff at the Schools was appointed by the officers of the ISA. Nor is there any evidence to the effect that the General Synod was the head and brain of the MSCC. Finally, there is nothing to suggest that the General Synod exercised "constant and effectual control" over the MSCC. The evidence establishes that the General Synod reviewed the situation at the Schools from time to time

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and made various recommendations, which were not always followed, but this does not demonstrate control. Further, the Board of Management was comprised of Bishops, clergy and laity elected by the diocesan synods.

167 Although there was common membership in both the MSCC and the General Synod, that is insufficient to ground a finding of control. In that regard I would heed McGuiness' caution at para. 1.59:

> Considerable caution would seem to be justified before ignoring the corporate veil on the basis of the relationship between the board and officers of the parent and subsidiary, for in this area of intra corporate affairs, the legislature itself has been quite active.

168 Finally, I would note that the Respondents do not allege that the General Synod incorporated the MSCC for any improper motives.

169 Accordingly, I find that there is no triable issue regarding the allegation that the MSCC was acting as the alter ego of the General Synod.

(iv) Single Economic Unit

170 The General Synod states that two legally separate entities will not be treated as one simply because they act as an integrated unit (*Cunningham v. Hamilton*). In order to lift the corporate veil there must be a compelling reason to do so. It points out that the single economic unit argument was rejected by the English Court of Appeal in *Adams v. Cape* at page 532:

> There is no general principal that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that 'each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities': *The Albazero*, [1977] A.C. 774, 807, per Ross L.J.

171 In my view there is little if any difference between this argument and the alter ego theory discussed above. In this regard I would simply repeat my earlier findings - that some overlap or integration between the MSCC and the General Synod, together with a common corporate and theological interest, does not constitute grounds upon which to ignore the separate corporate identities of those two bodies. Accordingly, I find that there is no triable issue in this regard.

172 To conclude, there are no genuine issues for trial against the General Synod during the period that the MSCC was responsible for the Schools.

5. After April 1, 1969

173 I note there is some reference in Archdeacon Boyles' cross-examination to the possibility that, in the late 1960's, some of the work of the MSCC may have been transferred to the General Synod as the MSCC's involvement in the Schools wound down and Canada assumed greater control. However, Archdeacon Boyles later in his cross-examination, denies that the General Synod assumed any role in respect of the Schools during that time. As indicated earlier it is not enough for the Respondents to merely allege involvement, they must point to some supporting evidence. This evidence alone is insufficient to indicate that there is a genuine issue for trial against the General Synod for any claims arising after April 1, 1969.

6. Conclusion as to this Motion

174 There is no evidence of direct involvement in the Schools by the General Synod at any time.

175 As noted above, neither the fraud nor agency exceptions apply so as to warrant lifting the corporate veil of the General Synod in the present case. Nor, does the evidence suggest any other "exceptional circumstance" which would justify a departure from the rule in *Salomon*.

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176 That being the case, there is no basis upon which to impose liability on the General Synod for any of the breaches alleged in the pleadings.

CONCLUSION

177 Summary judgment will be allowed in relation to the Dioceses for the period during which the MSCC was responsible for the operation and management of the Schools. In relation to the Diocese of Calgary this will include all of those claims arising between January 1, 1919 and March 31, 1969. For the Diocese of Athabasca the claims arising between January 1, 1923 and March 31, 1969 will similarly be dismissed. In relation to the Diocese of Athabasca all of the claims after 1969, except the one dealing with Fort Simpson, will also be dismissed. The General Synod will be granted summary judgment for all claims against it that are the subject of its motion.

178 In conclusion I would observe that the within applications differ substantially from an earlier application in this litigation, brought by the Roman Catholic Bishop of the Diocese of Calgary for summary trial (*Indian Residential Schools, Re* (Alta. Q.B.)). The primary difference is the degree to which the relevant evidence is available. In the application brought by the Roman Catholic Bishop of the Diocese of Calgary there were a number of factors suggesting that relevant evidence bearing on the Roman Catholic Diocese's involvement in the Residential Schools was not yet available. Among those factors was that the Roman Catholic Diocese had not yet responded to interrogatories; the fact that much of the disclosure it had provided was relatively recent; and that it had not yet provided particulars, including the names of alleged perpetrators.

179 Given those considerations it was my view that the cases that were the subject of that earlier application had not advanced sufficiently so as to provide a trial judge with the necessary "factual matrix" within which to decide the issues raised. Accordingly, the application for summary trial was dismissed. In the present case, however, the Respondents cannot realistically anticipate any further evidence arising that will improve their prospects of success during the period that the MSCC was responsible for the management and operation of the Schools. This is particularly unlikely in the face of the evidence presented which indicates that the Applicant corporations had no involvement in the Schools which would ground liability during that time, and in the case of the General Synod, at any time.

180 In due course counsel should provide me with the names and action numbers of those parties whose claims are hereby dismissed, consistent with these reasons.

181 Costs may be spoken to.

Motions granted in part.

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1992 CarswellBC 2454
British Columbia Supreme Court

Jacobsen v. Nike Canada Ltd.

1992 CarswellBC 2454, 19 B.C.L.R. (3d) 63, [1993] B.C.W.L.D. 146, 36 A.C.W.S. (3d) 1235

Michael Jacobsen, Plaintiff and Nike Canada Ltd., Defendant

Blair J.

Heard: November 19, 1992
Judgment: November 25, 1992
Docket: Vancouver C918359

Proceedings: Additional reasons 1993 CarswellBC 1306 (B.C. S.C.)

Counsel: *James M. Coady, Esq.*, for Plaintiff
J.E. Gouge, Esq., for Defendant

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

VI Actions
VI.2 Cause of action
VI.2.f Ex turpi causa non oritur actio (denial of right of action for illegality or immorality)

***Honourable Mr. Justice Blair*:**

1 This action arises out of a single vehicle motor car accident which occurred on September 7, 1991 when the Plaintiff was driving his vehicle eastbound on the Trans Canada Highway No. 1 at approximately 2:15 a.m.

2 The Plaintiff's vehicle which was travelling in the left lane of the two eastbound lanes went out of control, swerved across the right lane and crashed into the ditch on the right side of the highway.

3 The Plaintiff, the driver and lone occupant of the vehicle, was seriously injured and rendered quadriplegic as a consequence of his injuries. The Plaintiff brings action against his employer, the Defendant Nike Canada Ltd., alleging that the injuries suffered resulted from negligent conduct of the Defendant in breach of its duty of care to the Plaintiff.

4 On the day prior to the accident, the Plaintiff had worked some 16 hours for the Defendant with part of that time being spent at B.C. Place Stadium in Vancouver where he and other employees were assigned to erect a trade show display for the Defendant. Between 8:30 p.m. and 11:30 p.m. when he finished work, the Defendant was supplied with dinner which consisted of fried chicken and salad and a choice of beverages including beer and soft drinks.

5 The affidavit material before me indicates that the Plaintiff consumed two bottles of beer and four cans of beer which had been supplied by the Defendant.

6 After he terminated work, he accompanied a co-worker to two nearby drinking establishments where he deposes that he consumed another bottle of beer, part of a half pint of draft beer and lastly, a full pint of draft beer. He terminated

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his alcohol consumption at approximately 1:45 a.m., walked back to B.C. Place Stadium to retrieve his vehicle and was proceeding to his home in Port Moody when the accident occurred.

7 The Defendant brings application pursuant to Rule 18A of the Rules of Court for judgment on the following issue:

> Is the Plaintiff barred from the recovery of any remedy in this action by the application of the principle ex turpi cause non oritur actio?

8 For the purposes of this application only and by agreement with the Plaintiff, the Defendant admits to the following version of the events relating to this matter prior to 11:30 p.m. on September 6, 1991:

1. The Defendant employer supplied alcohol to the Plaintiff, an employee, during working hours;

2. The Defendant employer knew the Plaintiff was only 19 years of age and an inexperienced drinker;

3. The Defendant provided alcohol to the Plaintiff as an incentive or reward to work overtime;

4. The Defendant knew or ought to have known the Plaintiff was intoxicated yet allowed him to continue to consume alcohol on the premises;

5. The Defendant knew or ought to have known the Plaintiff was unable to drive his vehicle due to fatigue and alcohol consumption;

6. The Defendant knew or ought to have known the Plaintiff would be driving his vehicle from his place of work to his residence and paid him a road allowance to drive his vehicle to and from B.C. Place Stadium;

7. The Defendant knew that the Plaintiff had been working over 13 hours at the time alcohol was provided to him;

8. The Defendant knew the Plaintiff had been working 16 hours at the time he finished work;

9. The Defendant had the ability to restrict the consumption of alcohol by its employees during working hours;

10. The Defendant had the ability to require that the Plaintiff take alternative transportation other than driving; and

11. The Defendant failed to take any steps to persuade or prevent the Plaintiff from driving when his work was completed.

9 Blood samples were taken from the Plaintiff at Royal Columbian Hospital in New Westminster following the accident and these were interpreted by Zenon Samila, a forensic alcohol consultant, on behalf of the Defendant and by Mel Yip, a forensic alcohol consultant, on behalf of the Plaintiff.

10 Mr. Samila, in his affidavit sworn April 3, 1992 and filed on June 5, 1992, deposed that at the time of the accident, in his opinion, the Plaintiff's blood alcohol content at the time of the accident was 200 milligrams of alcohol per 100 millilitres of blood, or a breathalyser reading of .20 percent. He deposed that the motor functions, mental alertness and reflexes of any individual with a blood alcohol content of 200 milligrams of alcohol per 100 millilitres of blood, would be grossly impaired. He further found that with such a reading, every individual would suffer a significant impairment of mental, physical and sensory functions and their ability to operate a motor vehicle would be significantly impaired. Mr. Yip, on reviewing Mr. Samila's affidavit and based on his own knowledge, concluded that the Plaintiff's blood alcohol content at the time of the accident would be 178 milligrams of alcohol per 100 millilitres of blood, or a breathalyser reading of .178. I find as a fact that at the time of the accident, the Plaintiff's blood alcohol content would produce a breathalyser reading of between .178 and .20 percent, both figures being substantially over the .08 limit permitted under the Canadian Criminal Code.

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11 The accident involving the Plaintiff's vehicle was observed by one James Gandolpho, a fireman, who provided two affidavits, one to the defence on February 28, 1992 and another to the Plaintiff on November 18, 1992.

12 In the first affidavit, Mr. Gandolpho stated that he was proceeding eastbound on the Trans Canada Highway when passed by a vehicle similar to that driven by the Plaintiff at the time of the accident. Mr. Gandolpho stated as follows:

> The Datsun passed me as if I was standing still. I remember thinking to myself 'Man, that guy is flying'. I estimate its speed to have been around 140 km/hour.

13 Mr. Gandolpho then said that when the Datsun was about one half mile ahead of him:

> It looked as if the vehicle caught the gravel on the left side of the lane. It looked like the driver overcorrected and swerved into the right hand lane then back to the left lane and then I saw it swerve into the right hand lane and down the steep embankment.

Mr. Gandolpho remained at the scene until the driver, the Plaintiff in this accident, was removed by ambulance.

14 In his second affidavit dated November 18, 1992, Mr. Gandolpho stated that "the red Datsun passed him travelling eastbound going approximately 15 to 20 miles per hour greater than my speed". No explanation is available as to the discrepancies between the speeds noted by Mr. Gandolpho in his two affidavits.

15 I am satisfied on the whole of the evidence before me and including the blood alcohol readings, the speed and the circumstances of the accident that the Plaintiff was impaired at the time of the motor vehicle accident and was therefore driving whilst impaired contrary to the provisions of s. 253 of the Criminal Code of Canada.

16 The Defendant relies on the decision of *Hall v. Hebert* (1991), 6 C.C.L.T. (2d) 294 (B.C.C.A.) in support of his argument that the maxim ex turpi cause non oritur actio ought to apply in the instant case to wholly foreclose the action by the Plaintiff Jacobsen.

17 In the *Hall v. Hebert* case, the Defendant owner was riding in his motor vehicle as a passenger and the Plaintiff was driving. The trial judge found both Plaintiff and Defendant were drunk at the time. The two were attempting to roll start the vehicle when they lost control of the car and it rolled into a gravel pit. The Plaintiff driver was injured in the accident and sued the Defendant owner for negligence for having delivered control of the motor vehicle to the Plaintiff at a time then his ability to drive was impaired by alcohol. The Defendant appealed the decision of the trial judge who found that the Defendant was liable, while ascribing 25 percent contributory negligence to the Plaintiff himself. The trial judge held that the Defendant owner having charge of the motor vehicle had an overriding duty to maintain at all times, a level of sobriety sufficient to judge the capacity to drive of anyone to whom he might allow the privilege of driving that vehicle.

18 The Defendant appealed on the basis that there was in law no such overriding duty and that the maxim ex turpi cause non oritur actio should also have been sufficient to wholly foreclose the action. The appeal came before a five member division of the Court of Appeal, Appellant Counsel taking the position that in order for the appeal to succeed on the defence of ex turpi cause non oritur actio, the Court of Appeal would be obliged to overrule, at least in part, two earlier 3-member decisions of the Court.

19 The appeal was allowed by Gibbs, J.A. (with Hinkson, Legg & Hinds, JJ.A. concurring). Southin, J.A. filed her own reasons for judgment in which she concurred with the result and allowed the appeal.

20 In his judgment, Gibbs, J.A. reviewed extensively the law with regard to the defence of ex turpi cause non oritur actio and concluded that the defence was not limited to circumstances where the injuries were sustained during the course of a joint criminal enterprise. He stated at p. 302:

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> The compass of the defence of (ex turpi cause non oritur actio) is much broader. It will be available wherever the conduct of the Plaintiff giving rise to the claim is so tainted with criminality or culpable immorality, that as a matter of public policy, the court will not assist him to recover.

21 Gibbs J.A. further reviewed the application of the doctrine in the legal system. He cited with approval comments by Taylor J. (as he then was) in the case of *Nack v. Enns* (1981) 30 B.C.L.R. 337:

> It is in the trial judgment by Taylor J. (as he then was) in ***Mack v. Enns***, that one finds one of the better modern justifications for the existence of the doctrine. At p. 344 of the judgment (reported in (1981), 30 B.C.L.R. 337, 17 C.C.L.T. 291 (S.C.) Taylor J. said [B.C.L.R.]:
>
>> The basis on which the doctrine rests, and the circumstances in which it may successfully be invoked, are not very clearly defined in the text books, and perhaps for this reason, the doctrine has been the subject of some critical observations by commentators: see, for instance, Professor Gibson's comment (1969), 47 Can. Bar Rev. 89. It is obviously necessary to discover the real purpose of the rule, as applied today, before it is possible to determine in a particular case whether it should be applied.
>>
>> I do not understand the purpose of the doctrine to be punitive, nor, I think, can its legitimate function today be to enforce archaic principles of moral law or concepts rooted in legal formalism. The purpose of the rule today must be to defend the integrity of the legal system, and the repute in which the courts ought to be held by law-aiding members of the community. It is properly applied in those circumstances in which it would be manifestly unacceptable to fair-minded, or right-thinking, people that a court should lend assistance to a plaintiff who has defied the law.

22 Gibbs, J.A., having found that the defence of ex turpi causa non oritur actio remained the law in British Columbia, posed the question of whether the Plaintiff Hall ought to be denied recovery. He stated at p. 305:

> Whether one adopts the felicitous language of Taylor J. by asking if 'it would be manifestly unacceptable to fair-minded, or right-thinking people that a Court should lend assistance to a plaintiff who has defied the law', or applies the reasoning of Clements, J.A. in ***Tallow v. Tailfeathers***, supra, to determine how "anti-social" the conduct of the plaintiff was, the answer here must be yes, that recovery ought to have been denied.
>
> The plaintiff engaged in the kind of conduct which daily wreaks havoc upon the streets and highways of the nation and devastates the lives and futures of innocent victims. He sought and took control of a potentially lethal weapon when he was "quite...drunk", "incapable of sober decision", and so far gone in drink that he spoke "gibberish". He had sole control of the vehicle when the accident occurred. There was uncontested evidence that his blood alcohol level must have been in excess of 200 mg per 100 ml of blood. The trial Judge concluded that he was impaired. His defective driving was the cause of the accident. Fair-minded, right-thinking people would be outraged if the Court lent its assistance to this drunk driver to recover damages from his drunk passenger.

23 The conduct of the Plaintiff in the instant case is little different from that of the Plaintiff in *Hall v. Hebert*. Both Plaintiffs were young men, age 19 at the time of their respective accidents. Both men voluntarily took control of potentially lethal weapons when they put themselves in the drivers' seats of their respective motor vehicles at a time when they were impaired by alcohol.

24 The Plaintiff Jacobsen consumed alcohol first at work and later in two drinking establishments to such an extent that his blood alcohol level was between 178 and 200 milligrams per 100 millilitres of blood at the time he lost control of his vehicle. The lower of these two levels, is more than double that permitted by law. At the time of the accident, the Plaintiff Jacobsen was travelling in excess of the 90 km/hour speed limit which is in place on that major and heavily travelled thoroughfare, the Trans Canada Highway.

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25 This conduct by the Plaintiff is of the type which society is trying to eradicate. The dangers of driving whilst impaired are great and devastating, particularly to the innocent users of the highway who have the misfortune to become involved in traffic accidents caused by persons who are driving whilst impaired.

26 For this court to allow the Plaintiff's claim to proceed would be to condone the actions of the Plaintiff who was clearly defying the law in driving whilst his ability to do so was impaired by alcohol. I conclude that the Plaintiff is barred from the recovery of any remedy in this action by the application of the principle ex turpi causa non oritur actio.

27 Counsel have not addressed me with regard to the issue of costs but I am inclined to give the Defendant its costs on Scale 3. However Counsel, if required, will have liberty to address me on this matter if they so wish.

***Honourable Mr. Justice Blair*:**

28 Reasons for Judgment in this matter were filed November 26, 1992. Counsel for the plaintiff and the defendant requested that I issue Supplementary Reasons confirming that the parties agreed, for the purposes of the Rule 18A application only, the following facts which were not included in my Reasons for Judgment:

1. The plaintiff would not have attended the Unicorn Pub or 86th Street Music Hall after work, but for the consumption of six beers while at work between 8:30 p.m. and 11:30 p.m. on September 6th, 1991;

2. That the employer/defendant owed a duty of care to its employee, the plaintiff, not to place the employee in a position, where it is foreseeable that the employee could suffer injury.

29 The aforementioned factors were admitted by the defendant only for the purposes of the Rule 18A application.

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2000 BCSC 312
British Columbia Supreme Court

JTI-Macdonald Corp. v. British Columbia (Attorney General)

2000 CarswellBC 375, 2000 BCSC 312, [2000] 6 W.W.R. 227, [2000] B.C.W.L.D. 546, [2000] B.C.J. No. 349, [2000] B.C.T.C. 178, 184 D.L.R. (4th) 335, 73 C.R.R. (2d) 110, 74 B.C.L.R. (3d) 149, 94 A.C.W.S. (3d) 891

JTI-MacDonald Corp., Plaintiff and Attorney General of British Columbia, Defendant

Imperial Tobacco Limited, a Division of Imasco Limited, Plaintiff and Attorney General of British Columbia, Defendant

Rothmans, Benson & Hedges Inc., Plaintiff and Attorney General of British Columbia, Defendant

Her Majesty the Queen in Right of British Columbia, Plaintiff and Imperial Tobacco Limited, Imasco Limited, British American Tobacco (Investments) Ltd., B.A.T. Industries p.l.c., British American Tobacco p.l.c., Brown & Williamson Tobacco Corporation, American Tobacco Company, B.A.T. #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, Rothmans, Benson & Hedges Inc., Rothmans Inc., Rothmans International Limited, Rothmans International p.l.c., Rothmans International N.V., Rothmans #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, Philip Morris Companies Inc., Philip Morris Incorporated, Philip Morris International Inc., Philip Morris #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, RJR-MacDonald Inc., R.J. Reynolds Tobacco Company, RJR Nabisco Inc., R.J. Reynolds Tobacco International Inc., RJR #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, Liggett Group Inc., Canadian Tobacco Manufacturers' Council, the Council for Tobacco Research — U.S.A. Inc., the Tobacco Institute Inc., Defendants

Holmes J.

Heard: October 5-8, 12-15, and 18-22, 1999
Judgment: February 21, 2000 *
Docket: Vancouver C985777, C985780, C985781, C985776

Counsel: *Jack Giles, Q.C.*, *Jeffrey J. Kay* and *Ludmila B. Herbst*, for Plaintiff JTI-Macdonald Corp. in Action No. C985777 and for Defendants R.J. Reynolds Tobacco Company, RJR Nabisco Inc. in Action No. C985776.
W.S. Berardino, Q.C., *David C. Harris* and *Lyndon A.J. Barnes*, for Plaintiff Imperial Tobacco, a division of Imasco Limited in Action No. C985780.
James A. Macaulay, Q.C., *Kenneth N. Affleck* and *Stephen A. Kurelek*, for Plaintiff Rothmans, Benson & Hedges Inc. in Action No. C985781 and Defendants Rothmans Inc., Rothmans International Limited, Rothmans International p.l.c. & Rothmans International N.V. in Action No. C985776.
Thomas R. Berger, Q.C., *Daniel A. Webster, Q.C.*, *Craig Jones* and *Robin Elliott*, for Plaintiff Her Majesty the Queen in Right of British Columbia in Action No. C985776 and Defendant Attorney General of British Columbia in Action Nos. C985777, C985780 & C985781.
Richard R. Sugden, Q.C., and *Craig P. Dennis*, for Defendants British American Tobacco (Investments) Ltd., B.A.T. Industries p.l.c., British American Tobacco p.l.c., in Action No. C985776.
Paul D.K. Fraser, Q.C., and *Bruce MacDougall*, for Defendants Brown & Williamson Tobacco Corporation, American Tobacco Company in Action No. C985776.
D. Ross Clark and *Cynthia A. Millar*, for Defendants Philip Morris Companies Inc., Philip Morris Incorporated & Philip Morris International Inc. in Action No. C985776.
Richard B.T. Goepel, Q.C., and *Kathryn Seely*, for Defendants Council for Tobacco Research — U.S.A. Inc., Tobacco Institute Inc. in Action No. C985776.

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Subject: Constitutional; Public

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Constitutional law

VII Distribution of legislative powers
VII.3 Nature of general provincial powers
VII.3.c Rights outside province

Constitutional law

VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.l Judicature
VII.4.l.iv Miscellaneous

Constitutional law

IX Determining constitutionality
IX.2 Presumption of validity (reading down)

Judges and courts

I Constitutional issues
I.2 Jurisdiction of courts under Constitution Act, 1867 (s. 96)
I.2.d Miscellaneous

Headnote

Constitutional law --- Distribution of legislative powers — Nature of general provincial powers — Rights outside province

Provincial legislature enacted Tobacco Damages and Health Care Costs Recovery Act — Act created new civil cause of action which permitted government to directly recover health-care costs incurred by persons insured under provincial health insurance program from tobacco manufacturers — Tobacco manufacturers were mostly foreign or federally incorporated companies registered as extra-provincial companies under British Columbia law — Government brought action against tobacco manufacturers for recovery of health-care costs pursuant to Act — Tobacco manufacturers brought action challenging constitutional validity of Act — Action by tobacco manufacturers allowed — Government action dismissed — Provincial legislature has no power to impose its own laws on extra-territorial status, contracts, conduct or property pursuant to s. 92 of Constitution Act — Act contained broad definition of "manufacturer" and "enterprise liability" provisions which had effect of imposing liability for health-care costs on all members of defined group for conduct by single member with respect to sale of tobacco products in British Columbia — Act exceeded extra-territorial limitations by establishing liability for acts or omissions outside British Columbia — Act purported to affect status, structure and shareholder rights of foreign corporations, and also had effect of overriding substantive laws of other Canadian or foreign jurisdictions in respect of contracts relating to purchase, lease or acquisition of any part of tobacco-related business — Act attempted to legislate use of tobacco-related trade-marks outside of province — Cumulative effect of provisions gave provincial government power to recover health-care costs from tobacco manufacturers on global basis, such that no action of international tobacco industry or location of assets would be beyond reach of province's attempt to recover health-care costs under Act — Act was ultra vires Constitution Act and as such was invalid — Claims founded upon statutory cause of action under invalidated legislation dismissed — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5, s. 92 — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 1997, c. 41.

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Constitutional law --- Determining constitutionality — Presumption of validity (reading down)

Provincial legislature enacted Tobacco Damages and Health Care Costs Recovery Act — Act created new civil cause of action which permitted government to directly recover health-care costs incurred by persons insured under provincial health insurance program from tobacco manufacturers — Government brought action against tobacco manufacturers for recovery of health-care costs pursuant to Act — Tobacco manufacturers brought action challenging constitutional validity of Act — Action by tobacco manufacturers allowed — Government action dismissed — Provincial legislature has no power to impose its own laws on extra-territorial status, contracts, conduct or property pursuant to s. 92 of Constitution Act — Reading down doctrine is not to be employed if effect is to alter essence of legislation — Act was carefully integrated legislative scheme having central purpose of ability to recover health-care benefits related to tobacco disease from national and international tobacco manufacturers — Enterprise liability provisions were inextricably bound up with remaining features — Provisions could not be read down or severed without effecting original intent of legislature — Act as whole was ultra vires Constitution Act and as such was invalid — Claims founded upon statutory cause of action under invalidated legislation dismissed — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5, s. 92 — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 1997, c. 41.

Judges and courts --- Constitutional issues — Jurisdiction of courts in 1867 (s. 96) — General

Provincial legislature enacted Tobacco Damages and Health Care Costs Recovery Act — Act created new civil cause of action which permitted government to directly recover health-care costs incurred by persons insured under provincial health insurance program from tobacco manufacturers — Provisions of Act allowed government to bring action on behalf of individual or on aggregate basis — Government brought action against tobacco manufacturers for recovery of health-care costs pursuant to Act — Tobacco manufacturers brought action challenging constitutional validity of Act — Action by tobacco manufacturers allowed on other grounds — Government action dismissed — Act did not manipulate or interfere with adjudicative process or independence of judiciary by preventing court from receiving evidence necessary to perform fact-finding function — Aggregate action was intended to provide for relief where traditional tort actions did not realistically meet need of large-scale loss-recovery where large numbers of individuals were exposed to toxic substances that allegedly had adverse health effects through non-observable means of causation — Inability to identify individual insured persons or to have unlimited access to records did not unfairly prevent manufacturers from presenting evidence to rebut presumption that breach of duty caused persons to be exposed to tobacco products — Provisions of Act creating aggregate cause of action by government for recovery of costs of health-care benefits were within constitutional competence of province — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 1997, c. 41.

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Upper Churchill Water Rights Reversion Act, 1980, Re, [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1, 53 N.R. 268, (sub nom. *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)*) 47 Nfld. & P.E.I.R. 125, (sub nom. *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)*) 139 A.P.R. 125 (S.C.C.) — applied

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Wells v. Newfoundland, [1999] 3 S.C.R. 199, 177 D.L.R. (4th) 73, 245 N.R. 275, 99 C.L.L.C. 210-047, 180 Nfld. & P.E.I.R. 269, 548 A.P.R. 269, 46 C.C.E.L. (2d) 165, 15 Admin. L.R. (3d) 268 (S.C.C.) — considered

Statutes considered:

Architects Act, R.S.B.C. 1996, c. 17
s. 66 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — considered

Pt. XV — considered

s. 15(1) — considered

Canada Evidence Act, R.S.C. 1985, c. C-5
Generally — referred to

Canada Shipping Act, R.S.C. 1985, c. S-9
ss. 284-286 — considered

Canadian Bill of Rights, S.C. 1960, c. 44, Pt. I, reprinted R.S.C. 1985, App. III
s. 1(b) — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 7 — referred to

s. 11(d) — referred to

s. 11(g) — considered

s. 15 — considered

s. 26 — considered

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
Generally — considered

Preamble — considered

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s. 91 ¶ 2 — considered

s. 92 — considered

s. 92 ¶ 13 — considered

s. 92 ¶ 14 — considered

s. 92 ¶ 16 — considered

s. 96 — considered

s. 100 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 52(2) — considered

Criminal Code, R.S.C. 1985, c. C-46
ss. 278.1-278.91 [en. 1997, c. 30, s. 1] — referred to

Evidence Act, R.S.B.C. 1996, c. 124
Generally — referred to

Hospital Insurance Act, R.S.B.C. 1996, c. 204
Generally — referred to

Interpretation Act, R.S.C. 1985, c. I-21
Generally — considered

Livestock Act, R.S.B.C. 1996, c. 270
s. 11 — referred to

Medicaid Third-Party Liability Act (United States)
Generally — considered

Medicare Protection Act, R.S.B.C. 1996, c. 286
Generally — referred to

Mines Act, R.S.B.C. 1996, c. 293
s. 17 — referred to

Miscellaneous Statutes Amendment Act (No.3), 1999, S.B.C. 1999, c. 39
ss. 61-65 — referred to

Pipeline Act, R.S.B.C. 1996, c. 364
Generally — referred to

Securities Act, R.S.B.C. 1996, c. 418

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s. 131 — considered

Statute of Westminster, 1931 (U.K.), 22 Geo. 5, c. 4, reprinted R.S.C. 1985, App. II, No. 27
Generally — considered

Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 1997, c. 41
Generally — unconstitutional

s. 1 [am. 1998, c. 45, s. 2] — referred to

s. 1(1) "cost of health care benefits" [renumbered 1998, c. 45, s. 2(l)] — considered

s. 1(1) "insured person" [renumbered 1998, c. 45, s. 2(l)] — considered

s. 1(1) "manufacturer" [rep. & sub. 1998, c. 45, s. 2(g)] — considered

s. 1(1) "person" [en. 1998, c. 45, s. 2(h)] — considered

s. 1(1) "tobacco related wrong" [rep. & sub. 1998, c. 45, s. 2(k)] — considered

s. 1(2) [en. 1998, c. 45, s. 2(l)] — considered

s. 1(3) [en. 1998, c. 45, s. 2(l)] — considered

s. 1(3)(a) [en. 1998, c. 45, s. 2(l)] — considered

s. 1(3)(b) [en. 1998, c. 45, s. 2(l)] — considered

s. 1(4) [en. 1998, c. 45, s. 2(l)] — considered

s. 1(5) [en. 1998, c. 45, s. 2(l)] — considered

s. 13 [rep. & sub. 1998, c. 45, s. 3] — considered

ss. 13-19 [am. 1998, c. 45, s. 9] — referred to

s. 13(1) [rep. & sub. 1998, c. 45, s. 3] — considered

s. 13(2) [rep. & sub. 1998, c. 45, s. 3] — considered

s. 13(5) [en. 1998, c. 45, s. 3] — considered

s. 13(5)(b) [en. 1998, c. 45, s. 3] — considered

s. 13(6) [en. 1998, c. 45, s. 3] — considered

s. 13(6)(a) [en. 1998, c. 45, s. 3] — considered

s. 13(6)(a)(i) [en. 1998, c. 45, s. 3] — considered

s. 13(6)(a)(ii) [en. 1998, c. 45, s. 3] — considered

s. 13(6)(a)(iii) [en. 1998, c. 45, s. 3] — considered

s. 13(6)(b) [en. 1998, c. 45, s. 3] — considered

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s. 13(6)(c) [en. 1998, c. 45, s. 3] — considered

s. 13(6)(d) [en. 1998, c. 45, s. 3] — considered

s. 13(6)(e) [en. 1998, c. 45, s. 3] — considered

s. 13.1 [en. 1998, c. 45, s. 3] — considered

s. 13.1(1)(a) [en. 1998, c. 45, s. 3] — considered

s. 13.1(1)(b) [en. 1998, c. 45, s. 3] — considered

s. 13.1(1)(c) [en. 1998, c. 45, s. 3] — considered

s. 13.1(2) [en. 1998, c. 45, s. 3] — considered

s. 13.1(3) [en. 1998, c. 45, s. 3] — considered

s. 13.1(4) [en. 1998, c. 45, s. 3] — considered

s. 13.2 [en. 1998, c. 45, s. 3] — considered

s. 17 [am. 1998, c. 45, s. 6] — considered

s. 17(2) [rep. & sub. 1998, c. 45, s. 6] — considered

s. 17.1 [en. 1998, c. 45, s. 7] — considered

s. 17.1(1)(a) [en. 1998, c. 45, s. 7] — considered

s. 17.1(2) [en. 1998, c. 45, s. 7] — considered

s. 20 [am. 1998, c. 45, s. 10] — referred to

s. 20(2) [en. 1998, c. 45, s. 10] — considered

Trade-marks Act, R.S.C. 1985, c. T-13
Generally — considered

Trade Practice Act, R.S.B.C. 1996, c. 457
Generally — referred to

United States Constitution
Article I, s. 9 — considered

Young Offenders Act, R.S.C. 1985, c. Y-1
s. 47(2) — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
Generally — referred to

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R. 13 — referred to

R. 13(10) — referred to

ACTION by provincial government for tobacco-illness related damages; ACTION by tobacco manufacturers for declaratory judgment that *Tobacco Damages and Health Care Costs Act* is ultra vires *Constitution Act*.

***Holmes J.*:**

Tobacco Action

1 The three actions for trial concern the constitutional validity of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997, c. 41 [the " *Act*"]. The plaintiffs in the three actions are named defendants ["manufacturers"] in the Supreme Court of British Columbia, Vancouver Registry Action No. C985776 commenced by Her Majesty the Queen in Right of British Columbia (the "government action") pursuant to the statutory cause of action conferred by Section 13 of the Act. They are the Canadian manufacturers of tobacco products whose products have been marketed in British Columbia.

2 The plaintiffs seek declaratory judgments that the *Act* is ultra vires the Constitution of Canada and consequently of no force and effect.

3 The Council for Tobacco Research-U.S.A. Inc. and Tobacco Institute, Inc. ["Tobacco Institute"]; British America Tobacco p.l.c, British American Tobacco Investments, British American Tobacco Industries ["B.A.T."]; Brown & Williamson Tobacco Corporation ["Brown & Williamson"], American Tobacco Company; and Phillip Morris Companies Inc., Phillip Morris Incorporated and Phillip Morris International Inc.; collectively termed the " *ex juris* defendants", are defendants named in the government action who have been served *ex juris*.

4 The *ex juris* defendants have motions pending pursuant to Rule 13(10) of the *Rules of Court* to set aside service of the Writs of Summons and Statements of Claim but by agreement they appear in these proceedings to argue in support of the constitutional invalidity of the *Act*. The balance of their Rule 13 motions are to be heard at a later date.

5 The manufacturers' and the *ex juris* defendants' attack upon the *Act* is broadly based and essentially tripartite. They allege the *Act* exceeds the territorial jurisdiction of the Province; that it is an unconstitutional interference with judicial independence; and that it violates the rule of law protection of equality under the law and against retroactive penal legislation.

Legislative History of the Act

6 The *Tobacco Damages Recovery Act*, S.B.C. 1997, c. 41 received Royal Assent July 28, 1997. It was to be brought into force by regulation. By virtue of the Interpretation Act, R.S.C. 1985, c. I-21, only the title of the *Act* and the commencement section came into force July 28, 1997 and the balance of the *Act* remained unproclaimed.

7 For convenience, I refer hereafter to the manufacturers and the *ex juris* defendants collectively as "the manufacturers".

8 The *Act* remained dormant for approximately a year. On July 30, 1998 the *Tobacco Damages Recovery Amendment Act*, S.B.C. 1998, c. 45, which provided for extensive amendments to the original Act, received Royal Assent. The original *Act* and the Amendments were brought into force by Regulation, November 12, 1998 [Order in Council No. 1357]. The three manufacturers' actions now being tried were commenced immediately thereafter.

9 The status of the *Act* following the amendment was that Section 1 and Sections 13 to 19 were added to the title and the commencement section (s.20) previously in force. Sections 2 to 12 of the original *Act* remained unproclaimed.

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10 The *Act* was further amended by Sections 61 to 65 of the *Miscellaneous Statutes Amendment Act* (No.3), 1999. On July 16, 1999, Royal Assent was given and on July 19, 1999, Order in Council No. 870 brought Sections 61 to 65 into force. The unproclaimed Sections 2 to 12 of the original *Act* were repealed.

11 It is not contentious that the Province has an exclusive right to make laws in respect of Property and Civil Rights in the Province; in respect of the Administration of Justice in the Province including matters of Civil Procedure in the Courts; and generally all matters of a merely local or private nature in the Province. [Sections 92(13), (14), and (16) of the *Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c. 3, rep R.S.C. 1985, App. II, No. 5].

12 The *Act* creates a new civil cause of action in British Columbia permitting the government to directly recoup a cost incurred on behalf of another and in addition deals substantively with rights and obligations. It is therefor legislation that deals with "Civil Rights in the Province" under s.92(13). [*City National Leasing Ltd. v. General Motors of Canada Ltd.* (1989), 58 D.L.R. (4th) 255 (S.C.C.); *Ontario (Attorney General) v. Scott* (1955), 1 D.L.R. (2d) 433 (S.C.C.)].

13 There are several provisions of the *Act* directed to "Procedure in Civil Matters" coming under s.92(14). [*Reference re Status of the Supreme Court of British Columbia* (1882), 1 B.C.R. 243 (S.C.C.); *Joseph Jacob Holdings Ltd. v. Prince George (City)* (1980), 118 D.L.R. (3d) 243 (B.C. S.C.); *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.), at 320, 109 D.L.R. (4th) 16 at 37].

14 The *Act* may also be said to relate to an aspect of the organization and delivery of health care within a Province which comes within s.92(16).

15 One illustration of prior Canadian legislation that provides government a direct cause of action to recoup from a third party costs incurred on behalf of another is found in the *Canada Shipping Act*, R.S.C. 1985, c. S-9, at ss.284-286. The federal government is accorded a right of action to recover from a ship owner, regardless of fault, the medical expenses paid to treat an illness of a seaman.

16 In fact, industry specific liability laws have long existed in the area of worker compensation legislation in England, U.S.A., and Canada.

17 A number of British Columbia statutes currently have liability provisions relating to specific industries, including:

Mines Act, R.S.B.C. 1996, c. 293, s.17

Pipeline Act, R.S.B.C. 1996, c. 364

Securities Act, R.S.B.C. 1996, c. 418, at s.131

Livestock Act, R.S.B.C. 1996, c. 270, at s.11

Architects Act, R.S.B.C. 1996, c. 17, at s.66

18 The *Act* is modelled in significant degree on the State of Florida's *Medicaid Third-Party Liability Act*, 409.910 Fla.Stat. (1995). On challenge in the Supreme Court of Florida, in *Agency for Health Care Admin. v. Associated Industries of Florida Inc.*, 678 So. 2d 1239 (U.S. Fla. 1996), at 1257, the Court upheld the statutory cause of action conferred on the state to recover health care costs on the basis that the state "... must have the freedom to craft causes of action to meet society's changing needs".

19 The arguments of the manufacturers here are predicated upon alleged constitutional inconsistencies that require the *Act* be invalidated entirely rather than remedied by severance or reading down. The Attorney-General without conceding that *Act* is unconstitutional in any way takes the position that reading down or severance could be appropriate in the event certain aspects of the *Act* are found to be unconstitutional.

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20 The provisions of the *Act* have application to actions brought by the government and provide for a direct action for recovery of the cost of health care benefits incurred on behalf of an individual insured person, a number of individual insured persons or "on an aggregate basis".

21 It is the statutory cause of action under s.13(5)(b) in respect of the " aggregate action" that is the focus of the present declaratory actions. That is essentially because the provisions of the *Act* that formulate an aggregate cause of action are a radical departure from traditional common law damage actions requiring proof of individual causation and damages.

22 All arguments advanced cannot necessarily be segregated to the three main headings of constitutional analysis. There is some overlap and a flow of reasoning and analysis in common.

Interference with Independence of the Judiciary

23 The manufacturers claim that the *Act* constitutes an impermissible interference by the government with the judicial independence of the Court. The manufacturers argue that the effect of the scheme allowing the government an aggregate action for recovery of health care costs interferes with the Court's right to hear from relevant witnesses and receive the evidence necessary and appropriate to a determination of the facts. The manufacturers perceive the *Act* to involve the Court in a process that gives the appearance of partiality to the government's case and is, in reality, inherently unfair.

24 The argument of the manufacturers is grounded upon interference with judicial function and though centered upon the principle of judicial independence also raises issues as to separation of powers, the rule of law, and inviolability of the core judicial function of fact-finding, which in combination renders the *Act* constitutionally invalid.

25 The principle of independence of the functions of the judiciary is grounded in the preamble to the *Constitution Act* and Section 96. Chief Justice Lamer traced the origins of judicial independence in *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) at 76, 150 D.L.R. (4th) 577:

> The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. And as we said in *Valente, supra*, that *Act* was the "historical inspiration" for the judicature provisions of the *Constitution Act*, 1867. Admittedly, the *Act* only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms have grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act*, 1982, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

26 And concluded at pp. 77-78 that:

> ... the express provisions of the *Constitution Act, 1867*, and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. ...

27 The *Act* is specific legislation for the benefit of the government who is plaintiff in the recovery action commenced. A new and unusual statutory cause of action is created that incorporates specific evidentiary rules and procedures and targets only the tobacco industry.

28 The *Act* gives the government:

> ... a direct and distinct action against a manufacturer to recover the cost of health care benefits ...
>
> [Section 13(1)].

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29 The action is neither a subrogated action of individual claims, nor is it a class action. [Section 13(2)]. It permits two separate and divergent routes by which the government may recover health care benefits:

> In an action under subsection (1), the government may recover the cost of health care benefits
>
>> (a) that have been provided or will be provided to particular individual insured persons, or
>>
>> (b) on an aggregate basis, that have been provided or will be provided to that portion of the population of insured persons who have suffered disease as a result of exposure to a type of tobacco product
>
> [Section 13(5)(a) and (b)].

30 The *Act* provides that if the government in an aggregate action proves, on a balance of probabilities, in respect of a type of tobacco product:

>> (a) the defendant manufacturer breached a common law, equitable or statutory duty or obligation owed to persons who have been exposed or might become exposed to the type of tobacco product,
>>
>> (b) exposure to the type of tobacco product can cause or contribute to disease, and
>>
>> (c) during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, was offered for sale in British Columbia
>
> [Section 13.1(1)(a), (b) and (c)].

31 The Court must presume:

>> 13.1(2) Subject to subsections (1) and (4) ... that
>>
>>> (a) the population of insured persons who were exposed to a tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1)(a), and
>>>
>>> (b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

32 The manufacturers argue this shifts the onus to them to disprove the presumptions, while s.13(6) denies them access to the evidence necessary to rebut the inference:

>> 13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,
>>
>>> (a) it is not necessary
>>>
>>>> (i) to identify particular individual insured persons,
>>>>
>>>> (ii) to prove the cause of disease in any particular individual insured person, or
>>>>
>>>> (iii) to prove the cost of health care benefits that have been provided or will be provided to any particular individual insured person,
>>>
>>> (b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable

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except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons

33 The manufacturers therefore allege that these legislative provisions allow the government, a party before the Court as plaintiff in the recovery action, to manipulate and interfere with the adjudicative process. More specifically, the manufacturers allege the inter-relationship of the sections of the *Act* structuring the aggregate form of action creates an interference striking at the core judicial fact-finding function, thus impairing the Court's ability to fairly determine the action. They rely upon judicial independence to safeguard against what they consider as legislative abuse.

34 The manufacturers, as an ancillary argument, point to the lack of separation between the legislative and executive branches of government in the present circumstance. They allege the effect is that the government as a party to the action has conscripted the legislature to interfere with the independence of the trier of fact.

35 The manufacturers' view the *Act* as the executive seeking a method to recover health care costs from the tobacco manufacturers by employing their controlling legislative capacity to create an entirely new cause of action. Clear and explicit language is required to extinguish rights that have been previously conferred. [*Wells v. Newfoundland* (September 15, 1999), No. 26362, [reported [1999] 3 S.C.R. 199 (S.C.C.)] p.41-42].

36 There is however no strict separation of powers doctrine in Canada. In any event, I do not accept that the *Act* does violate the separation of powers doctrine:

> There is no general "separation of powers" in the *Constitution Act*, 1867. The *Act* does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only " its own" function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the *Act* does not call for any separation. As between the judicial and the two political branches, there is likewise no general separation of powers.
>
> [Peter W. Hogg, Constitutional Law of Canada (4 th ed.) (Toronto: Carswell, 1997), p.190].

37 In *Reference re Secession of Québéc*, [1998] 2 S.C.R. 217 (S.C.C.), at 233, 161 D.L.R. (4th) 185 the Court noted:

> ... the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s.96 courts.

38 I accept that research by counsel for the Attorney-General disclosed only four cases attempting a challenge to the validity of legislation in Canada based on separation of powers and none succeeded on that ground. The most notable was *Singh v. Canada (Attorney General)* (1999), 170 F.T.R. 215 (Fed. T.D.) affirmed on appeal January 14, 2000, Doc. A-426-99 [reported(2000), (sub nom. *Westergard-Thorpe v. Canada (Attorney General)*) 183 D.L.R. (4th) 458 (Fed. C.A.)].

39 I do not accept as tenable the manufacturers' argument that the right to a fair trial is a component of the rule of law. Comparison to s.7 or 11(d) *Charter* rights, although not directly relied upon, is a poor analogy as the *Charter* does not guarantee property rights.

40 In regard to economic interests within the context of a civil action:

> The omission of property rights from s.7 greatly reduces its scope. It means that s.7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s.7 affords no guarantee of fair treatment by courts, tribunals or officials with power over the purely economic interests of

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> individuals or corporations. It also requires ... that [liberty and security of the person] be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.
>
> [Hogg, *supra*, at p.1074; ***Wells v. Newfoundland***, *supra*].

41 Madam Justice McLachlin, in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688 (S.C.C.), noted a distinction between independence of the judiciary and impartiality of the judiciary:

> It should be noted that the independence of the judiciary must not be confused with impartiality of the judiciary. As Le Dain J. points out in *Valente v. The Queen*, impartiality relates to the mental state possessed by the judge; judicial independence, in contrast, denotes the underlying relationship between the judiciary and other branches of government which serves to ensure that the court will function and be perceived to function impartially. Thus the question in a case such as this is not whether the government action in question would in fact affect a judge's impartiality, but rather whether it threatens the independence which is the underlying condition of judicial impartiality in the particular case.
>
> [***Reference Re: Public Sector Pay Reduction Act***, *supra*; ***R. v. Beauregard***, [1986] 2 S.C.R. 56 at 84, 30 D.L.R. (4th) 481 (S.C.C.)].

42 Chief Justice Lamer noted in *Lippé c. Charest*, [1991] 2 S.C.R. 114 (S.C.C.) at p.139: "... the overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality."

43 Chief Justice Dickson in *R. v. Beauregard*, *supra*, described the principle of judicial independence as:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.
>
> [***R. v. Beauregard***, p.420, para.71].

44 A test to determine judicial independence emphasizing that the legislation must be viewed objectively from the standpoint of an informed reasonable person was proposed by Chief Justice Lamer in *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, 145 D.L.R. (3d) 452 (Ont. C.A.), [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161 (S.C.C.) that:

> ... a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically [would conclude that the tribunal or court was independent].
>
> [***R. v. Valente (No. 2)***, *supra*, at p.684].

45 The Court in *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.), after considering these prior comments on how to determine whether the appearance of judicial independence has been maintained, formulated as a simple objective test:

> ... whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges.
>
> [***Canada (Minister of Citizenship & Immigration) v. Tobiass***, *supra*, para.72].

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46 The manufacturers' central contention is that, where the government purports to go beyond creating a cause of action and enacts legislation which interferes with the fact-finding process required of the judge to determine the action, the judicial independence of the Court is compromised. The manufacturers' view is that the "blocking" provisions of s.13(6), restricting the admissibility of evidence, creates this impermissible effect.

47 The manufacturers argue the legislature having dealt with the creation of a cause of action and necessary procedural matters then engages the judicial fact-finding function. Having done so it may not immediately interfere and frustrate the independence of the judge in a core adjudicative function by keeping from him or her the evidence necessary to a fair decision.

48 The manufacturers see the government's cause of action as founded upon a breach of duty to an individual or a group of individuals. The definition of the " cost of health care benefits" in s.1(1) of the *Act* relates to the treatment of an individual person. The definition of an "insured person" in the *Act* is "a person ... provided with [or entitled to] health care benefits" [Section 1(1)].

49 The plaintiffs analyze the government's aggregate cause of action as giving rise to four major issues of fact to be determined by the Court; regardless of the party upon whom the onus of proof lies:

> 1. What was the knowledge of the person or persons to whom the duty was owed as to the facts related to the acts or omissions, which are the basis of the alleged breach of duty?
>
> 2. Did any of the acts or omissions of the defendants cause individuals to start smoking, or fail to quit smoking?
>
> 3. Did smoking cause disease to individuals and did smoking cause the government to incur the health care costs claimed?
>
> 4. Were the health care costs incurred properly in all respects?

50 The manufacturers, stressing the need in their view for proof in regard to " individual persons", argue that the pool of evidence available for the Court to determine these necessary factual issues consists of:

> 1. Direct evidence of the individuals who received health care;
>
> 2. Direct evidence of doctors and others involved in delivering the health care;
>
> 3. Other relevant direct evidence from persons relating to 1 & 2;
>
> 4. Health care records of the government and others;
>
> 5. Statistical evidence that correlates the direct and the documentary evidence.

51 Section 13(6)(a)(i),(ii), and (iii) together provide that the government is not required to identify any particular individual insured person, to prove the cause of disease in any particular insured person, or to prove the cost of health care benefits provided to any individual insured person.

52 Section 13(6)(b),(c),(d), and (e) together effectively bar access to records and evidence relating to individual insured persons.

53 First the production of individual health care records is restricted:

> 13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

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...

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

54 Secondly:

13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

...

(c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons[.]

55 However the Court has a discretion and may on application of a defendant:

13(6)(d)

despite paragraphs (b) and (c), ... order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed[.]

56 Additionally, in any statistical sample ordered:

13(6)(e)

if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents that are disclosed.

57 In sum, the manufacturers characterize s.13(6) as a "blocking" provision, effectively eliminating the defendants' access to direct evidence of the individuals the cost of whose health care benefits have been aggregated in the action. They view this as ensuring their inability to defend themselves in rebutting the onus shifted upon them. They urge these provisions demonstrate legislative interference, by preventing the Court receiving the evidence necessary to fairly perform its core adjudicative fact-finding function.

58 They urge the effect of the provisions of the *Act* compels the Court to determine the facts on a fictional, statistical basis because the *Act* effectively bans any inquiry into the medical history of the actual individuals whose costs of health care benefits are aggregated. The manufacturers argue the Court is left without the ability to test the statistical evidence of experts against the direct evidence of the persons who comprise the cohort from which samples are taken.

59 The manufacturers argue the process mandated by the *Act* prevents and interferes with the ability to hear, test and weigh evidence on the issues to be decided and forces the trier of fact to rely on secondary hypothetical evidence of questionable accuracy.

60 The concept of a constitutionally protected core judicial function was recognized by the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.). At issue was s.47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted to the youth court exclusive jurisdiction in respect of *ex facie* contempt by a youth of any Court. A Superior Court was thus deprived of jurisdiction to deal with an *ex facie* contempt of its own Court.

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61 The Court held that the grant of jurisdiction to the youth court of the power to deal with contempt of a Superior Court was within the test for s.96 of the *Constitution Act, 1867*, in *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554 (S.C.C.). The Court however was divided on the issue of whether it was constitutionally permissible to remove the contempt jurisdiction from the Superior Court.

62 The majority of the Court, led by Chief Justice Lamer, held that where a non-section 96 body received a grant of exclusive jurisdiction which formed part of the core jurisdiction of a Superior Court it was constitutionally invalid.

63 In *MacMillan Bloedel Ltd. v. Simpson*, *supra*, a specific jurisdiction of the Court was entirely removed. By contrast, an interference with jurisdiction by a concurrent grant to the youth court was insufficient to constitutionally invalidate the grant.

64 In relation to the case at bar the Province clearly has power to legislate in the field of civil procedure. The facts of this case do not trigger s.96. There is no core jurisdiction of Court that is removed when it is directed by legislation in regard to evidentiary or procedural matters ancillary to a civil cause of action. The *Rules of Court* and *B.C. Evidence Act* are examples.

65 I do not accept that the principle of judicial independence can be extended to a trier of fact in a civil action having an unfettered right to determine what evidence may be adduced.

66 The provisions of the *Act* do not remove from the Court its function of finding the facts necessary to reach a decision. The fact-finding process may at most be said to suffer some interference or constraint as a result of procedural provisions, but I do not consider that inference impairment of a core judicial function.

67 The manufacturers draw an analogy to the decision in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.) striking down the Rape Shield Law. Madam Justice McLachlin said at p.609:

> It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence.
>
> ...
>
> In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

68 The issue concerned a criminal law of general application. There was no reverse onus, and the application of the *Act* was specific not general. The restrictions in the case at bar apply only to the government's ability to bring an aggregate action and do not apply to an individual action.

69 The manufacturers also rely upon the recent decision of the Supreme Court of Canada in *R. v. Mills* (1999), 28 C.R. (5th) 207, 248 N.R. 101 (S.C.C.) , concerning the constitutionality of ss.278.1 to 278.91 of the *Criminal Code* and the production of records in sexual offence proceedings. McLachlin and Iacobucci JJ. write at para.89:

> From our discussion of the [accused's] right to make full answer and defence, it is clear that the accused will have no right to the records in question so far as they contain information that is either irrelevant or would serve to distort the search for truth, as access to such information is not included with the ambit of the accused's right ... However, the accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. This is because our justice system has always held that the threat of

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convicting an innocent individual strikes at the heart of the principles of fundamental justice. However, between these extremes lies a spectrum of possibilities regarding where to strike a balance between these competing rights in any particular context.

70 Certainly, the case at bar invokes the right of the manufacturers to make " full answer and defence", but the right applies to a set of facts significantly different from the position of an individual defending against an accusation of sexual misconduct in the criminal context. Moreover, as both *R. v. Seaboyer*, *supra*, and *R. v. Mills*, *supra*, clearly indicate, the threshold requirement that triggers any analysis of the content of the right to make full answer and defence is that the information sought must be relevant to the inquiry. But the relevance of the evidence is precisely what is disputed when access to individual health records is sought for the purposes of defending against an aggregate cause of action.

71 I do not agree that the analysis of the manufacturers which focuses on evidence of insured individuals and the application of traditional rules regarding tort-based actions and conventional civil procedures may be fairly transferred to the statutory aggregate cause of action created under the *Act*.

72 The aggregate action is intended to provide for relief where the traditional, individually oriented tort action does not realistically meet the need of a large-scale loss-recovery action, where very substantial numbers of people have been exposed to toxic substances said to have resulted in adverse health effects through non-observable means of causation.

Fleming, "*Probabilistic Causation in Tort Law*" (1989), 68 Can. Bar. Rev. 661.

Fleming, "*Probabilistic Causation in Tort Law: A Postcript*" (1991), 70 Can. Bar. Rev. 136.

73 The legislature has accepted that the conduct of tobacco companies and the related effect of tobacco smoking on health has become a tort of a dimension which, to approach on an individual basis, is entirely uneconomic, an unreasonable strain on judicial resources, but may be fairly dealt with on an aggregate basis utilizing evidence based on statistical, epidemiological and sociological studies.

74 The basic tenet that causation within a population may be more accurately identified statistically than by means of attribution of individual causation in a multiplicity of conventional tort-based actions appears sound.

75 The use of statistical and epidemiological evidence is an essential aspect of an aggregate action. The question in issue becomes causation in the group rather than of any individual group member.

76 It is important to note the *Act* provides only for the admission of the evidence. The credibility and weight remain for the trier of fact.

77 The central focus of the argument of the manufacturers, that the *Act* is "unfair" and that the independence of the judge charged with deciding the facts becomes compromised, is that s.13(6) severely restricts access to and use of particular evidence of individual group members.

78 The argument of the manufacturers tends to mischaracterize the *Act* and fails to accord recognition of the main feature of an aggregate action. The group is not simply a collection of individual claimants such that proof is the product of the evidence supplied by each constituent member.

79 The aggregated claims are at once a collection and a mixture in which individual identity is lost.

80 The evidence, histories, and medical and health records of individuals within the population lose their individual relevance but assume a statistical relevance as part of the cohort of the larger group from which statistical conclusions are drawn.

81 The most reliable and relevant evidence in an aggregated claim becomes statistical and epidemiological, and access to those forms of evidence is of import.

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82 As the individual records of members of the aggregate group have only statistical relevance the shielding of the identification of individuals prevents the action reverting to an individualized action permitting individual forms of discovery. The information in respect of the individuals subsumed in the aggregate group has statistical relevance; their personal identification does not. In this case, there is sufficient reason for names being protected from disclosure.

83 Recognizing however the statistical relevance and importance of the individual records, the *Act* provides the Court with the power to order a "meaningful sample" of the population and to control the detail required to be disclosed [Section 13(6)(d)].

84 A "meaningful sample" is not defined in the *Act* and might therefore, in appropriate circumstances, approach the whole of the population.

85 A similar direct and aggregate action to that contemplated by the *Act* was upheld in *State of Florida et al v. The American Tobacco Company et al* (October 18, 1996) (District Court Case No. CL 95-1466 AH). The enabling statute was there held defective because it prohibited disclosure of the identification of Medicaid recipients without providing a mechanism that would permit the manufacturers to challenge improper payments made to persons as the result of fraud, misdiagnosis or unnecessary treatment; the resulting prohibition thus amounted to an irrebuttable presumption regarding such payments. The provisions were struck down on the basis of protection of "life, liberty and property" pursuant to due process under Florida law.

86 This defect in the Florida statute however was later remedied by a mechanism for disclosure of records, subject to a restriction on the identification of individuals.

87 That concept appears analogous in effect to the controlled disclosure allowed in section 13(6)(d) of the *Act*.

88 The *Act* contains two rebuttable presumptions in regard to causation. When the government proves a breach of duty by a tobacco manufacturer it is presumed:

> 13.1(2) Subject to subsections (1) and (4) ... that
>
> > (a) the population of insured persons who were exposed to a tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1)(a), and
> >
> > (b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

89 The first presumption is necessary to remove the need in an aggregate action to provide proof of individual causation. There is a rational connection between the facts that are required to prove a breach of duty and the fact of exposure the presumption mandates.

90 The reversal of onus in respect of a causation issue is an accepted remedial procedure. As Sopinka J. wrote in *Snell v. Farrell*, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 (S.C.C.) at 299:

> ... If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. ...

91 In *Kripps v. Touche Ross & Co.* (1997), 33 B.C.L.R. (3d) 254 (B.C. C.A.) the court held that a plaintiff alleging a negligent misrepresentation need not prove their decision or action would not have been made but for the misrepresentation. This is where there may have been a number of reasons of which the misrepresentation was only one.

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92 Another example where the general rule that a plaintiff must establish the reasonableness of a variation in proof of causation is found in *Hollis v. Birch*, [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 (S.C.C.). The Supreme Court of Canada held that a patient who suffered injury because of a manufacturer's failure to warn her doctor about the medical risks of a product did not have to prove causation by showing the doctor would have communicated the warning to her.

93 Section 131 of the *Securities Act*, R.S.B.C. 1996, c. 418 is an example of a statutory assumption of detrimental reliance once a misrepresentation is shown. The Court of Appeal in *Sidhu Estate v. Bains* (1996), 25 B.C.L.R. (3d) 41 (B.C. C.A.) held that upon establishing a misrepresentation which might reasonably lead to a claimed loss the onus shifts to the defendant to prove the misrepresentation was not in fact relied upon.

94 It is the Attorney-General's position that the constitutional challenge is premature as there is no proper factual basis to test whether the challenged " blocking" provisions of s.13(6), after exercise of the Court's discretion as to a "meaningful sample", prevents access to any information relevant to a required factual decision. I agree that it would be preferable.

95 The Court in *R. v. Mills*, at paragraph 105, supports the view that constitutional complaint should not precede utilization of procedures the legislation may provide to access disputed records.

96 I do not accept on present evidence that the inability to identify individual insured persons or to have unlimited access to the records of all insured persons unfairly prevents manufacturers from presenting evidence to rebut the presumption that their breach of duty caused persons to be exposed to tobacco products.

97 The manufacturers may present evidence as outlined by the Attorney-General in argument including:

> ... direct and particularistic evidence of health officials, medical professionals and smokers themselves regarding what causes persons to smoke. They may bring expert medical, behavioural and psychological evidence, based on studies and surveys to support their claims about smoking behaviour — for example, to show that a portion, or all, of their customers would have smoked and would have incurred disease in any event, even if the Manufacturers had not breached any duty to them.
>
> [Attorney-General Brief, p.62]

98 The second presumption, namely that exposure to tobacco causes disease, provides that if the government is able to establish a breach of duty by a manufacturer, and that exposure to a tobacco product causes disease it should be presumed the exposure to the product caused or contributed to disease in a portion of the population who were exposed to the product.

99 The presumption provides that if exposure to a generic tobacco product causes or contributes to disease, it will be presumed that exposure to a specific type of that tobacco product also caused or contributed to disease in a portion of the population.

100 The presumption eliminates the necessity of proof on a brand by brand basis. The presumption appears neither illogical nor unfair. Section 13.1(4) provides that the manufacturer may offer evidence in rebuttal. It may be assumed a manufacturer would be most familiar with the effects of his own product and have access to the necessary evidence to demonstrate a brand differential. [*Snell v. Farrell*, *supra*, Sopinka J., at p.300]:

> In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. ...

101 I do not accept that the impugned legislation here predetermines the result. The presumptions involved have a logical connection to the factual issues.

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102 The aggregate action, after resolution of issues of breach of duty, causation and disease, requires the government to introduce evidence as to cost of health care benefits in respect of those diseases.

103 The *Act* requires the Court to determine the aggregate cost of health care benefits that have been provided after the date of breach and the defendants then become liable on the basis of proportionality in market share. [Section 13.1(3)].

104 An award is a matter of assessment by the Court. There is no award upon certification by the government as to the amount of the health care costs it has or will incur. The amount of any award is to be by assessment based upon the evidence. As in many tort actions the assessment would not be without difficulty or amenable to precise measurement. However, as Cory J.A. observed:

> The court, I believe, would be shirking its duty if it were to say that no damages should flow because of the difficulty of calculating and assessing such damages and that they are therefore too remote. An assessment of future loss of profits must, of necessity, be an estimate. ... The task will always be difficult but not insurmountable. It poses no greater obstacle to a court than the assessment of general damages in a serious personal injury claim.
>
> [*Canlin v. Thiokol Fibres Canada Ltd.* (1983), 40 O.R. (2d) 687 (Ont. C.A.) at 691].

105 Equally, the "market" share theory appears a logical and fair method in an aggregate action to ensure that a defendant manufacturer is held responsible only for that portion of injury that represents their product's contribution to the market place.

106 The provisions of the *Act* preclude a combination of market share and joint and several liability, the two being inconsistent concepts. Joint and several liability is permitted only where it is established that all of the manufacturers either committed a wrong in concert [Section 13.2] or where they committed the same tobacco related wrong [Section 17(2)].

107 I conclude the provisions of the *Act* permitting the government an aggregate cause of action for the recovery of the costs of health care benefits it has incurred is within the constitutional competence of the Province. The procedural and evidentiary components of the legislation are necessary features ancillary to the new cause of action created.

108 At this time, adopting a broad view of the legislation, I do not find on the basis of the test suggested by Chief Justice Lamer in *R. v. Valente (No. 2)*, that the independence of a trier of fact is compromised or interfered with. A reasonable person, informed as to the tenets of an aggregate action together with all the evidentiary and procedural provisions enacted in respect of the new cause of action, would not, viewing the matter realistically and practically, believe the trier of fact was unfairly kept from evidence required to adjudicate the issues raised.

109 In my view the *Act* does not offend against the independence of the judiciary by interfering with the Court's fact-finding power and is not constitutionally invalid on that ground.

The Rule of Law

110 The manufacturers argue that the *Act* breaches the equality rights and principles enshrined within the rule of law. They argue that the *Act* offends against both equality between subjects and between subject and Crown.

111 It is also the manufacturers' position that if the *Act* is not compensatory in nature it is retroactive and penal, a designation rendering even legislation of a civil nature unconstitutional under the rule of law.

112 The manufacturers complain the *Act* singles out tobacco manufacturers from all others and applies a different standard of product liability law in respect of them.

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113 They argue that inequality arises because the effect of the legislation permits a defendant manufacturer to be found liable without having committed any actionable wrong against anyone and to be required to pay large sums of money to the government which may have suffered no loss.

114 In the result, a retrospective penalty occurs because the *Act* targets a specific group of politically vulnerable manufacturers based on past acts related to the manufacture, sale and use of tobacco products that have passed beyond their control and are now associated with the payment of health care benefits.

115 Section 11(g) of the *Charter* deals specifically with retroactive criminal offences and s.15 with aspects of equality rights under law. The manufacturers argue that protection to similar effect exists based on the rule of law. The manufacturers therefore do not rely directly on provisions of the *Charter*, rather they rely upon the rule of law as an integral aspect of the Constitution to invalidate the *Act*.

116 The manufacturers argue that the rule of law, which is constitutionally entrenched, is a source of the prohibition on retroactive penal legislation and of equality rights. It is part of the foundation of the *Charter* and specifically referenced in its preamble.

117 The rule of law is an unwritten component of the Canadian Constitution and without need for specific provision; it is taken to be "... a fundamental principle of the Canadian constitutional order." [*Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 at 724, 19 D.L.R. (4th) 1, [1985] 4 W.W.R. 385 (S.C.C.)].

118 That unwritten constitutional principles form part of the fabric of the Canadian Constitution is clear. As expressed by Chief Justice Lamer, the provisions of the preamble to the *Constitution Act, 1867* provide " organizing principles" that may be used to "fill out gaps in the express terms of the constitutional scheme." [*Reference Re: Public Sector Pay Reduction Act*, at paras. 83 and 95].

119 Section 52(2) of the *Constitution Act, 1982* does not purport to provide an exhaustive list of instruments defining the ambit of the Canadian constitution.

120 Section 26 of the *Charter of Rights and Freedoms* expressly excludes the fact of express *Charter* rights "... denying the existence of any other rights or freedoms that exist in Canada".

121 *Reference re Secession of Québéc*, *supra*, affirms that there are unwritten rules that are considered an integral part of our Constitution.

122 *R. v. Beauregard* recognized that judicial independence was passed to Canada as a constitutional principle by the language of the preamble to the *Constitution Act, 1867*.

123 Our system of government has evolved to a system of constitutional supremacy rather than just parliamentary supremacy [*Reference re Secession of Québéc*].

124 The manufacturers' position is that retroactive legislation obviously violates the rule of law, on which the Constitution rests, as it changes the law in respect of past events making discovery of law unascertainable until after the event.

125 The rule against Bills of Attainder is suggested by the manufacturers to represent one of the component parts of an implied bill of rights. The manufacturers equate any non-compensatory view of s.13 of the *Act* as targeting tobacco manufacturers for punishment for acts that attracted no penalty at the suit of government at the time they occurred.

126 Bills of Attainder are expressly prohibited under the *American Constitution Article 1*, s.9, CL.3. Although there is no equivalent written *Charter* or constitutional prohibition in Canada:

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> ... it would surely be unthinkable today that Parliament could enact a Bill of Attainder or a Bill of Pains and Penalties ...
>
> ...
>
> In England and in Canada, such methods of Parliamentary trial and punishment have passed into desuetude. As I have said, it may be assumed that, even apart from the Charter, such a method of finding guilt and imposing punishment would be generally regarded as beyond the power of Parliament in a country like Canada which has "a Constitution similar in Principle to that of the United Kingdom"...
>
> [*R. v. Bowen*, [1989] 2 W.W.R. 213 (Alta. Q.B.) at 259-60, aff'd at [1991] 1 W.W.R. 466 (Alta. C.A.); p.32 *Ex Juris* Brief]

127 The experience in American law has been that governments should not be permitted to manipulate the form of proceeding and Courts have recognized that criminal prohibition in the guise of a civil statute will not succeed. [*Cummings v. Missouri*, 71 U.S. 277 (U.S. Mo. 1866); and *United States v. Lovett*, 328 U.S. 303 (U.S. Cl. Ct. 1946) at 315-16)].

128 I do not consider that any party has raised a serious issue as to the *Act* being interpreted as other than compensatory legislation intended to recoup health care costs incurred by the government. In my view, no reasonable interpretation of the *Act* would make it penal legislation. It imposes neither prohibitions nor penalties. [*United States v. Ivey* (1995), 26 O.R. (3d) 533 (ont. Gen. Div.) at 544, aff'd (1996), 139 D.L.R. (4th) 570 (Ont. C.A.)]:

> The scope of the category "penal" laws was defined by the Privy Council in *Huntington v. Attrill*, [1893] A.C. 150 at p.157, 20 O.A.R. App. 1, as (quoting Gray J. in *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265):
>
> > ... all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.
>
> In my view, the C.E.R.C.L.A. provisions imposing liability against the defendants cannot be classified as penal in nature. In *United States v. Monsanto*, 878 F.2d 160 (4th Cir., 1988) at pp.174-75, C.E.R.C.L.A. was characterized as follows:
>
> > C.E.R.C.L.A. does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent.
>
> The measure of recovery is directly tied to the cost of the required environmental clean-up. The court must be satisfied that the amounts it seeks to recover were actually expended in response to the environmental threat, and that those costs were incurred in the manner prescribed by C.E.R.C.L.A. and the National Recovery Plan. While the nature of liability imposed may be unexpected, it is restitutionary in nature and is not imposed with a view to punishment of the party responsible.

129 The manufacturers urge that the *Act* offends against four basic tenets of the rule of law.

> 1. It is presumed the legislature did not intend one law for one class and a different law for others.
>
> 2. It is presumed there is no departure from an existing system of law except by words of irresistible clearness.
>
> 3. It is presumed no vested rights are abolished, such as defenses or immunity to suit prospectively or retrospectively unless plainly expressed.

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> 4. It is presumed there is no retrospectivity or retroactivity except to the extent made unavoidable by 1 or 2 or any reasonable construction to the contrary.

130 The *Act* is clearly intended to apply only to the tobacco industry but it treats all within that industry equally. The intent is that there be departures from the existing product liability and tort law is patently manifest.

131 The manufacturers argue that the *Act* should be interpreted according to the statutory language. Extra-statutory material such as the Minister's speeches in the Legislature or the views of the executive are of assistance only in understanding a problem calling for a legislative solution and are not to be considered in interpretation of the solution adopted.

132 The gist of the Attorney-General's position is that the *Act* does not offend against any principle of the rule of law, and, in any event, the rule of law is not capable of being used to strike down legislation in the manner the manufacturers advocate.

133 The manufacturers' view is that by any reasonable interpretation the *Act* singles out the tobacco industry for special treatment. They stress the *Act* creates a new wrong but fails to provide a customary fundamental protection requiring there be proof of damage to someone. It abolishes vested rights on limitation of claims for compensation and, in light of the Reply pleading of the Attorney-General in the government action, has removed or abolished all defences traditionally available to a person defending a damage action.

134 I agree with the submissions on behalf of the Attorney-General that it is premature to rule in the abstract on the limitation provisions in the *Act*. I do not consider it a constitutional issue to be determined at this time. It should be decided in the progress of the action when clothed with factual context.

135 I also make no determination as to the status of affirmative defences raised and pleaded in the action commenced. The *Act* does not appear to specifically abolish any particular defence although in respect of aggregate actions the nature of some defences may by necessary implication become inapplicable or change in form. I do not take either the fact, in the recovery action commenced, that the manufacturers have plead a particular defence, or that the Attorney-General has denied the existence of the defence, as a definitive interpretation of the *Act*.

136 It is alleged the words of the *Act* have not conveyed with the " irresistible clearness" required the intention of the legislature to override the application of the principle of the rule of law.

> ... The principle of the sovereignty of Parliament requires judicial obedience to the strict terms of the statute. In the process of applying a statute, however, uncertainties concerning its scope or effect in particular circumstances are bound to arise. The rule of law requires that these uncertainties be resolved, so far as possible, in a manner which would most conform to the reasonable understanding of the subject to whom the statute is primarily addressed. Implicit in this understanding is the expectation that Parliament will conform to the generally accepted notions of fairness and justice — that punishment will not be authorized for acts which were not known to be unlawful when committed, that vested rights will not be destroyed without reasonable compensation, that the powers of officials are to be limited by proper respect for the liberty of the citizen. "If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken in account".
>
> [T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985), 44 C.L.J. 111 at 121].

137 The manufacturers argue that when legislation creates a wrong without damage to an individual or the government, for example, a departure from the principles in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239 (S.C.C.), it is necessarily arbitrary and penal.

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138 The manufacturers say the cumulative effect of the wide and encompassing breaches of the principle of the rule of law should therefore lead to invalidation of the legislation.

139 It is of some significance, as the Attorney-General has noted, that the cases upon which the manufacturers rely to demonstrate a constitutional entrenchment of the rule of law and its application to invalidate the legislation arose only in circumstances where the legislation was also found unconstitutional on the basis of specific provisions of the *Charter* or a specific written provision of the *Constitution Act, 1867*.

140 Examples include *R. v. Valente*; *Lippé c. Charest*, *supra*; *Reference Re: Public Sector Pay Reduction Act*; *R. v. Seaboyer*, all these cases were decided on the basis of s.11(d) of the *Charter*; *R. v. Beauregard*, was decided on the basis of s.100 of the *Constitution Act, 1867* and s.1(b) of the *Canadian Bill of Rights*; *MacMillan Bloedel v. Simpson*, was decided on the basis of s.96 of the *Constitution Act, 1867*.

141 The ability to use the rule of law in sword-like fashion to strike down legislation was directly considered in *Singh v. Canada (Attorney General)* (1999), 170 F.T.R. 215 (Fed. T.D.). The issue in that case concerned provisions of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that prohibited the production of cabinet documents. There is factual similarity to the issue raised in this proceeding, specifically the provisions of s.13(6) of the *Act* which deny access to the records and information on individual insured persons. The applicants in *Singh v. Canada (Attorney General), supra*, at para.18, relied upon the constitutional supremacy view expressed in *Reference re Secession of Quebec*:

> The applicant argues that, given the supremacy of the Constitution, Section 39 should be declared invalid.

142 In the analysis, the following was at issue (at para.28):

> The applicants submit that the decision in the Quebec Human Rights case, ... is not determinative of this application since the Supreme Court of Canada "has now made it clear that Canada is a constitutional democracy". To support their position that the Constitution and not Parliament is now supreme, the applicants rely on the *Quebec Secession* case ... at p.258:
>
> > The constitutional principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s.52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. ... The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions; indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

143 The position argued, founded on the *Reference re Secession of Québéc*, is the essence of the manufacturers' argument here.

144 Mr. Justice McKeown held at para.39:

> The Supreme Court of Canada has concluded that unwritten constitutional norms may be used to fill a gap in the express terms of the constitutional text or used as interpretive tools where a section of the Constitution is not clear. However, as noted by La Forest J., dissenting in *Provincial Court Judges Reference*, the principles of judicial review do not enable a Court to strike down legislation in the absence of an express provision of the Constitution which is contravened by the legislation in question.

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145 Mr. Justice Edwards in *Babcock v. Canada (Attorney General)* (28 July 1999), Vancouver Registry No. C963189 [reported(1999), 70 B.C.L.R. (3d) 128 (B.C. S.C.)], followed *Singh v. Canada (Attorney General)*.

146 The decision of McKeown J. in *Singh v. Canada (Attorney General)* was upheld in *sub nom. Westergard-Thorpe v. Canada (Attorney General)*, *supra*.

147 Justice of Appeal Wakeling writing for the Saskatchewan Court of Appeal in *Bacon v. Saskatchewan Crop Insurance Corp.* (14 May 1999) [reported, [1999] 11 W.W.R. 51 (Sask.C.A.)], [1997] 9 W.W.R. 258 (Sask. Q.B.) provides an insightful analysis of the "... one law for all" concept based on the rule of law providing the law be supreme over both the acts of government and private persons:

> The observation of the Supreme Court (para.78) that the rule of the law and the constitution are not in conflict is a compelling statement. It is a statement made in 1998 with full knowledge that on many occasions over the preceding years Parliament has passed and relied upon legislation restricting or eliminating contractual and property rights which would otherwise have been available. Since the Supreme Court does not find this historical background to constitute a conflict with the rule of law, it must of necessity indicate they accept that legislation constitutes an important source of the laws which rule us and the sole restriction on that right to legislate is contained in the relevant Constitution.
>
> I am unable to accept that these justices of the Supreme Court, whilst providing an analysis of our federal system, were at the same time engaged in changing that system. That is particularly so when we are not talking of a subtle or marginal change, but one which would reduce the supremacy of Parliament by subjecting it to the scrutiny of superior court judges to be sure it did not offend the rule of law and if it did, to determine whether it was an arbitrary action. If the Supreme Court of Canada meant to embrace such a doctrine, I would expect it would see the need to say so very clearly in a case where that was the issue before them. This is particularly so when they are not only cognizant of the many cases in various jurisdictions acknowledging the supremacy of Parliament, but must also be aware of their own previous judgments which have endorsed that principle such as: *PSAC v. Canada*, [1987] 1 S.C.R. 424, *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525, *Attorney General for British Columbia v. Esquimalt & Nanaimo Railway*, [1950] A.C. 87 (P.C.). Furthermore, I am unable to accept that when the justices were laying a foundation for their decisions in the *Secession* case by reviewing the historical and legal development of federalism in this country, that they were also engaged in changing that foundation. If that were so, it would surely not be done in such a subtle manner as to be questionable whether it had happened at all.
>
> [*Bacon v. Saskatchewan Crop Insurance Corp.*, *supra*, at paras. 28 - 29].

148 In *Bacon v. Saskatchewan Crop Insurance Corp.*, the Court held that *Reference re Secession of Québéc* does not provide authority that allows the Courts on the basis of the preamble to the *Constitution Act, 1867* to strike down legislation as offending the rule of law.

149 I find the manufacturers have not shown that the provisions of the *Act* offend against specific principles of the rule of law in constitutional context.

150 I also accept the reasoning and the result in *Singh v. Canada (Attorney General)*, and *Bacon v. Saskatchewan Crop Insurance Corp.*, and by Edwards J. in *Babcock v. Canada (Attorney General)*, *supra*, that in any event the rule of law of itself is not a basis for setting aside legislation as unconstitutional.

Extra-Territorality

151 Analysis of the purpose and effect of the *Act* demonstrates its dominant characteristic or pith and substance. The purpose of the *Act* is the recovery by the Province of the tobacco related health care costs it has incurred from the tobacco industry nationally and internationally.

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152 The effect of the *Act* is to impose a new form of liability on the mostly extra-territorial defendants founded on shareholdings and other types of property ownership, wherever those rights may be situate, for the acts or omissions attributable to some of them. This result follows regardless of whether the locus of the acts or omissions was within British Columbia, Canada, or elsewhere in the world.

153 The purpose and effect of the *Act* at this stage is to be discerned from the history of the legislation and analysis of the *Act*'s provisions, as assisted by what may be gleaned from the Statement of Claim and Reply to Defences in the government action commenced pursuant to the statutory cause of action.

154 Sections 1(5) and 17.1(1)(a) impose a Group liability on the defendants. Foreign and federally incorporated defendant companies are divided into four major Groups: namely, Imperial Tobacco Limited, a division of Imasco Limited; Rothmans, Benson & Hedges Inc.; British American Tobacco ("B.A.T."); and JTI-Macdonald Corp.

155 The conduct of a member of a Group in any country with adverse consequences in that country or in any other country can result in liability to all the members of the Group if any one member of that Group has offered a tobacco product for sale in British Columbia. [Section 1(1), "tobacco related wrong"; Section 13.1 and Section 17.1].

156 Group membership is determined by the comprehensive definition of "manufacturer" in s.1(1) and ss.1(2), (3), and (4), the relation and affiliation provisions.

157 Affiliation between companies is based on shareholdings that entitle election of a director, or have a market value equal to 50% of the total shares [Section 1(3)(a)]; a partnership, trust or joint venture having an entitlement to 50% of the profits or assets on dissolution [Section 1(3)(b)]; control by direct or indirect influence [Section 1(4)].

158 In Section 1(1), manufacturers, by definition, include owners of tobacco trademarks or persons who generate 10% of their worldwide income from the manufacture or promotion of tobacco products.

159 The effect of the *Act* is that the conduct of foreign manufacturers in foreign countries is to be judged by a British Columbia Court. [Section 13.1(1)(a)]. The result is that the cost of health care benefits is imposed on all members of the Group to which the foreign manufacturer belongs. [Section 13.1(3)].

160 If a Group member acquires a tobacco related part of the business of another manufacturer by any means, the Group is liable for any past wrongful conduct of the acquired business regardless of the contractual terms of acquisition or the law of the Province or country that governs the terms of the purchase contract. [Section 17.1(2)].

161 The locus of the acquired business or of the wrongful conduct does not affect or modify the determination of liability. The vendor need not be a member of the Group to effect this result.

162 Each Group has one British Columbia resident corporation. An immediate effect of the *Act* therefore is to impose an artificial "real and substantial" connection to British Columbia on all Group members since the members of a Group must be considered "one manufacturer" for purposes of determining liability arising from a tobacco related wrong.

163 Four of the defendants in the government action commenced are federally incorporated and manufacture cigarettes sold in British Columbia. They are registered as extra-provincial companies under British Columbia law. The balance of the defendants are foreign companies, incorporated under foreign law, with registered offices or places of business in foreign countries.

164 None of the companies were incorporated in British Columbia. The Statement of Claim describes the Groups as "four worldwide multinational tobacco enterprises".

165 Section 17.1 and sections 1(2), (3) and (4) of the *Act*, which encompass what the Attorney-General terms the "theory of enterprise liability", were not part of the original *Act*. They were added by amendment in 1998. The Attorney-

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General argues an amendment to an *Act* could not have the effect of transforming its essential character. I disagree. The addition of the enterprise liability provisions given the wide meaning of manufacturer indicates a deliberate shift in the territorial reach and is designed to give the *Act* global application.

166 That is not an incidental effect of the legislation. It becomes a central feature and an integral part of the aim and focus of the amended *Act*.

167 The Minister's speech relating to the amendments lends substance to the view that the *Act* attacks national and international companies and makes them accountable for tobacco related health care benefit costs in British Columbia:

> Another important set of changes involves the corporate structure of the tobacco industry. The nature of these changes is to broaden the definition of what constitutes a tobacco "manufacturer", and to widen the linkages to related companies. The effect of these changes is to establish a more accurate and realistic description of what constitutes a tobacco manufacturer. Provisions have been added to ensure that various corporate entities which effectively own, control, are related to or have a substantial interest in the manufacture, promotion or sale of tobacco products, will be subject to this legislation.
>
> Any legal entity, whether in the form of an affiliate, a joint venture, a trust, a partnership or some other arrangement which has a beneficial interest in a corporation which produced, promoted or sold tobacco products that may give rise to a claim under the legislation will not be able to avoid liability behind some kind of corporate veil.
>
> [British Columbia, *Debates of the Legislative Assembly*, Vol.12, No. 11 (July 29, 1988) at 10713].

168 It is difficult to characterize such sophisticated and specifically crafted amendments to the *Act* as intending to produce only an incidental effect on the territorial reach of the legislation. The provisions demonstrate, as a dominant aspect, the targeting of extra-territorial entities, ensnaring a variety of legal personalities including shareholders, control persons, foreign purchasers and lessors, trademark holders, and substantial investors. These consequences are too purposeful and far-reaching to qualify as an incidental aspect of seeking recovery from manufacturers directly marketing or selling tobacco products in British Columbia.

169 The Attorney-General submits that the manufacturers ought not to "lump together a series of qualitatively different extra-provincial rights that are or might be adversely affected by the legislation and ask the Court to deal with all those rights concurrently". I am of the view that the cumulative effect of the provisions evinces a legislative intention to craft the *Act* in a form that ensures in a global basis that no action of the international tobacco industry or location of their assets would be beyond the reach of the Province's attempt to recover health care costs under the *Act*.

170 The legislative power of a Province is to be found under Section 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. The section contains words of clear territorial limitation.

171 The federal parliament, in the *Statute of Westminster 1931* (U.K.), 22 & 23 Geo. 5, c.4, reprinted in R.S.C. 1985, App. II, No. 27, gained extra-territorial legislative competence, but the Provinces did not. [*Reference re Seabed & Subsoil of Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86 (S.C.C.) at pp. 102-103, 5 D.L.R. (4th) 385 at pp.400-401; *Interprovincial Co-operatives Ltd. v. R.* (1975), [1976] 1 S.C.R. 477 (S.C.C.) at 512, 53 D.L.R. (3d) 321 at p.356; *Reference re Offshore Mineral Rights*, [1967] S.C.R. 792 (S.C.C.); See Edinger, E., "*Territorial Limitations on Provincial Powers*" (1982), 14 Ottawa L. Rev. 57 at pp.60-61; *Sullivan: Interpreting the Territorial Limitations on the Provinces* (1985), Supreme Court L. Rev. 511 at pp.525-527].

172 The combined effect of Sections 1, 13, 13.1, 17 and 17.1 purport to affect the status, structure and corporate personality of foreign corporations and the rights of their shareholders.

173 The *Act* has the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia.

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174 A company's registered office establishes its domicile. [*Gasque v. Inland Revenue Commissioners*, [1940] 2 K.B. 80 (Eng. K.B.) *Fraser & Stewart*, op. cit. at p.144; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, [1954] 3 D.L.R. 326 (Ont. H.C.); *Voyage Co. Industries v. Craster* (August 11, 1998), Doc. Vancouver C976871 (B.C. S.C. [In Chambers])].

175 A corporation's domicile determines the law respecting its creation and continuation (corporate personality), matters of internal management, share capital structure, and shareholder rights. [Castel, J.G., *Canadian Conflict of Laws 4th ed.*, (Toronto: Butterworths, 1997) pp.574-575; *Voyage Co. Industries v. Craster*, *supra*; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, *supra*; *Fraser & Stewart*, op. cit. p.144; *Palmer's Company Law* (looseleaf ed.) Vol. I, (London: Sweet & Maxwell, 1997) pp.2105-2106]:

> Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders.
>
> [Castel, *supra*, at p.574-575].

176 It is a fundamental principle of company law that a corporation is a legal entity distinct from its shareholders. [*Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22 (U.K. H.L.); *Palmer's Company Law 24th ed.*, Schmitthoff, C.M. Ed., (London: Stevens & Sons, 1987) pp.200-201; *Fraser & Stewart Company Law of Canada 6th ed.*, (Carswell, 1993) at p.17; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, S.15(1)].

177 This distinction is operative in a parent and subsidiary relationship and applies to related corporations owned by a common shareholder. [*Fraser & Stewart*, op. cit. at p.21, Davies, P.L., *Gower's Principles of Modern Company Law 6th ed.* (London: Sweet & Maxwell, 1997) at pp.80, 159-163; *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 60 D.L.R. (4th) 30 (B.C. C.A.)].

178 There is a distinction in Canadian constitutional law between the power to incorporate and the power to regulate the activities of a company. The power to incorporate a company is the ability to bestow legal personality on an association of persons, regulate a corporate structure and define the rights of shareholders.

179 A company once incorporated however will be responsible to the laws of jurisdictions in which it operates. A federally incorporated company is, for example, accountable under provincial security laws.

180 The provisions of the *Act*: Sections 1(1), 1(2), 1(3), 1(5), 13 and 17.1 attempt to alter or derogate from the rights of shareholders of federal and foreign companies.

181 The *Act* makes shareholders liable, where they hold a sufficient number of shares, for the conduct of the company itself.

182 A company domiciled anywhere in the world that owns the majority of shares of any company, which by the terms of the *Act* is a member of a Group and obtains 10% of its revenue from tobacco, becomes a member of the Group and is liable for the conduct of the other members.

183 In such a manner may a completely passive foreign investor be made liable under the *Act*.

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184 An example of the destruction of immunity from liability of a federally-incorporated company by the operation of the provisions of the *Act* is the claim the government makes in its action against the defendant *Rothmans Inc.*

185 The government alleges in its Statement of Claim that *Rothmans Inc.* owns the majority of the shares of the defendant *Rothmans, Benson & Hedges Inc.* It is alleged *Rothmans Inc.* sold the tobacco related part of its business in 1985 and this business is now that of *Rothmans, Benson & Hedges Inc.* The effect of the provisions of the *Act* make *Rothmans Inc.*, solely on proof of its shareholdings, liable for any tobacco related wrong on the part of *Rothmans, Benson & Hedges Inc.* since it commenced business and will be assessed for recovery of health care benefit costs based on the market share of *Rothmans, Benson & Hedges Inc.*

186 All the *ex juris* defendants appear, on the extremely limited evidence before the Court, to have been made parties because of the *Act*'s extended definitions relating to manufacturers. Those definitions include the associated, related, and grouping of company provisions in the *Act* that make all related manufacturers one and each jointly and severally liable for the acts of any other in their group.

187 It does not appear from the recovery action commenced by the government that any of these defendants are alleged to actually have manufactured or to have sold tobacco products in British Columbia.

188 Several of the *ex juris* companies are not operating companies but are joined because of their shareholdings, derivation of income, control positions, by virtue of past acquisition, or because they are a trade association.

189 The *Act* therefore attempts to alter and derogate from what are clearly domiciliary rights under the law of foreign jurisdictions, a legislative manoeuvre that is impermissible and against the rule in *Upper Churchill Water Rights Reversion Act, 1980, Re*, *supra*.

190 The *Act* extends to and attaches legal consequences to the conduct of a defendant manufacturer outside of British Columbia. The definition of a tobacco related wrong envisages a breach of duty owed by a manufacturer to a person who has or might become exposed to a tobacco product.

191 The manufacturer referenced is a Group and its members [Section 17.1(1)(a)]. The conduct of any member of the Group becomes the conduct of all, without territorial limitation.

192 The *Act* defines both "persons" and "insured persons". Section 13.1(1)(a) refers to persons to whom a duty is owed. The definition of tobacco related wrong imposes the duty in respect of "persons who have been exposed or might be exposed to a tobacco related wrong". There appears to be no territorial boundary to the use of "persons" and it could have global reach.

193 In contrast, Section 13.1(1)(c) contains a territorial limitation, namely, " ... the type of tobacco product [that] ... was offered for sale in B.C."

194 The wide and territorially unrestricted use of the word "persons" in Section 13.1(1)(a) is to be contrasted with the precisely defined term " insured persons", which by definition of "health care benefits" is territorially restricted to British Columbia, and was not used. Those who qualify as "insured persons" are British Columbia residents who qualify as beneficiaries under the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 or the *Hospital Insurance Act*, R.S.B.C. 1996, c. 204 that comprise under the Provincial universal medicare system nearly the entire population of British Columbia.

195 The *Act* therefore provides that the duty on which liability is based is not necessarily a duty owed in British Columbia; the person affected may be domiciled outside British Columbia and the alleged breach may occur elsewhere.

196 In *Interprovincial Co-operatives v. R., supra*, at 516 (per Pigeon J.) a Provincial statute conferring a statutory cause of action on government against parties in the Province, but applied to conduct outside the Province giving rise to liability, was held to be *ultra vires*:

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> ... [I]n respect of injury caused by acts performed outside its territory, I cannot accede to the view that this can be treated as a matter within its legislative authority when those acts are done in another province any more than when they are accomplished in another country. In my view, although the injurious acts cannot be justified by or under legislation adopted in the province or state where the plants are operated, by the same token, Manitoba is restricted to such remedies as are available at common law or under federal legislation.

197 In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 20 D.L.R. (4th) 289 (S.C.C.), La Forest J. notes that the *lex loci delecti* rule relating to the jurisdiction of a claim in tort is based partly on constitutional considerations. The effect of the rule is that a Province cannot, by attaching new consequences to extra-territorial acts or omissions, impose its law on a tort which occurs beyond its borders.

198 A Province may not pass legislation that has the effect of imposing obligations outside the Province or has other extra-provincial consequences unless the effect is merely collateral or incidental to legislation otherwise within its power. [*Upper Churchill Water Rights Reversion Act, 1980, Re*, [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1 (S.C.C.); Hogg, *Constitutional Law of Canada* (looseleaf ed.) pp.13-14].

199 In particular, section 17.1(2) purports to alter and affect the contractual terms of the acquisition of part of a tobacco related business by imposing upon the purchasers or lessee the assumption of liability for any wrongful conduct on the part of the vendor or lessor that would qualify as a tobacco related wrong.

200 Additionally, retroactive consequences arise pursuant to Sections 17.1(2) and 20(2) in any commercial transaction of this type. Where the transaction involves an extra-territorial purchaser or lessor, the legislation affects adversely the extra-territorial contractual rights of the parties and therefore offends the rule in *Upper Churchill Water Rights Reversion Act, 1980, Re*.

201 The *Act* also attaches consequences to the ownership of a tobacco trademark or a right to the use of a trademark. Each of these rights is caught by the extended definition of "manufacturer".

202 Trademark ownership is governed in Canada by the *Trade-marks Act*, 1985, c. T-13 and jurisdiction under section 91(2) of the *Constitution Act, 1867* is with the Parliament of Canada.

203 But the *Act* does not restrict the application of its provisions to trade mark use in British Columbia, and the legislation consequently has an extra-territorial effect, thus derogating from extra-provincial property rights and offending against the rule in *Upper Churchill Water Rights Reversion Act, 1980, Re*.

204 The *Act* by its manifold effects imposes the law of British Columbia on the extra-territorial status, contracts, property, and conduct of parties.

205 The *Act* overrides the substantive laws of extra-territorial Canadian or foreign jurisdictions in four major areas:

> (a) in respect of the status and corporate personalities of corporate tobacco manufacturers with domiciles outside British Columbia;
>
> (b) in respect of legal consequences of acts or omissions outside British Columbia, characterized as tobacco related wrongs;
>
> (c) in respect of contracts relating to the purchase, lease or acquisition by any means whatsoever of any part of a tobacco related business wherever situate and whatever the proper law of contract applicable; and
>
> (d) in respect of shareholder's rights and liabilities regarding shares of federal or foreign corporations.

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206 The Supreme Court of Canada has held that a tortious act committed in another Province involving extra-Provincial parties makes the applicable law the substantive law of that Province and must be applied by the Courts of the Province where the action is tried:

> ... [A]n attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns.
>
> [***Tolofson v. Jensen***, *supra*, at 1066]
>
> ...
>
> ... because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.
>
> [***Tolofson v. Jensen***, at 1054]

207 The *Act* does not require a connection between "a tobacco related wrong" and the health care benefits claimed. The connection is artificial, a presumption, and contrary to *Tolofson v. Jensen*.

208 The rationale of the choice of law rule requires the Court to connect the alleged wrongful conduct to the place of its occurrence. The parties will be judged under the law governing them where they took the action in question.

209 A "tobacco related wrong" includes a breach of "statutory duty". There are statutory duties imposed under British Columbia statutes like the *Trade Practice Act*, R.S.B.C. 1996, c. 457. These can lead to foreign corporations with no presence in British Columbia, conducting their affairs in conformity with their domestic law, being judged under Section 13.1(1)(a) according to standards of conduct under British Columbia statutes for acts or omissions that occur in their own country.

210 A provincial legislature has no power to impose its own laws on extra-territorial status, contracts, conduct or property.

211 Choice of law rules are part of the Provinces' common law and subject to the same constitutional limits as are all legislative endeavors. [Hogg, op. cit. At pp.13-23].

212 There are four federally-incorporated defendants in the government action. Parliament has an exclusive legislative power to incorporate companies with other than provincial objects under the residual power of the peace, order and good government provisions of Section 91 of the *Constitution Act, 1867*.

213 Sections 1, 13, 13.1, 17, and 17.1, when they purport to govern the status, structure and corporate personality of a federally-incorporated company under the *Canada Business Corporations Act* are not only extra-territorial in effect they trench upon the exclusive jurisdiction of the Parliament of Canada.

214 There is much force to the argument that a practical cumulative effect of these provisions of the *Act* is to "amalgamate" or "merge" defendant tobacco companies such that those "amalgamated" by the operation of the provisions of the *Act* incur liability for civil claims against others in the involuntary merger. That is a fundamental interference with a federal jurisdiction reserved under Part XV of the *Canada Business Corporations Act*.

215 The combined effect of Sections 1(2), (3), (4), (5) and 17.1(1)(a) of the *Act* ignores the separate identities of federally-incorporated companies for the purpose of establishing a tobacco related wrong committed by a related company and for the purpose of calculating amounts assessed against them.

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216 The separate legal personality conferred under s.15(1) of the *Canada Business Corporations Act* is removed and the corporation loses its legal status as distinct from its shareholders.

217 The reach of the *Act* encompasses the conduct of the national and international tobacco industry worldwide to found liability for costs incurred by the government on behalf of tobacco users in British Columbia.

218 The provisions of the *Act* appear not so much designed to "pierce the corporate veil" as they are to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the *Act* is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence.

219 The plaintiff manufacturers in these proceedings have shown a strong case that the *Act* in pith and substance, according to its purpose and effect, is extra-territorial and beyond the powers of the Province under the *Constitution Act, 1867* and the *Statute of Westminster, 1931*.

220 I have not found it necessary as a result of my finding to address the paramountcy argument which assume both valid, but conflicting, federal and provincial legislation.

Constitutional Invalidity, Severance or Reading Down

221 I have found the dominant characteristic, or pith and substance of the *Act*, to be the pursuit nationally and internationally of the tobacco industry for the cost of health care benefits incurred by the government of B.C relating to residents of the Province who suffered from a tobacco related disease.

222 The extra-territorial reach of the *Act* places it beyond the constitutional competence of the Province.

223 The Attorney-General argues if the enterprise liability provisions of the *Act* give rise to constitutional concern, as I find they do, they may be easily severed or read down as appropriate and the balance of the *Act* would remain viable and conform to the original legislative intent.

224 The course suggested is that the *Act* could be read down as required so it applies only to tobacco related wrongs with the requisite real and substantial connection to British Columbia; a *Moran v. Pyle*, *supra*, type of analysis.

225 The Attorney-General reasons that as the impugned provisions were added to an existing *Act* by amendment in 1998 they could be as easily removed. The basic intent of the legislature would then still be fulfilled relying on a *Moran v. Pyle* view of liability. This would treat the impugned provisions of the present *Act* as embellishments that did not change its essential character.

226 The manufacturers urge that the *Act* is a carefully integrated legislative scheme, the central purpose of which is the ability to recover the very substantial costs of health care benefits related to tobacco disease from the national and international tobacco industry following upon a unique streamlined civil proceeding. The *Act* cannot be unraveled in piecemeal fashion and is rendered *ultra vires* in its entirety.

227 Reading down is a doctrine of constitutional remedy that may be employed as an interpretive technique to preserve the validity of statutory provisions. When alternative constructions exist the Court should select a construction that is consistent with the legislative intent and constitutionally valid.

228 However, the reading down doctrine is not to be employed if the effect is to alter the essence of the legislation:

> ... In this respect, I agree with the following comment made by Carol Rogerson in her article ...
>
> While the courts continue to describe reading down as a technique of interpretation rather than of invalidation, as a practical matter reading down is difficult to distinguish from a remedy which would operate to declare particular

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applications of a law unconstitutional. Reading down does require an initial determination by the court that particular applications of the statute would be unconstitutional.

The process of interpreting a statutory provision that is susceptible of more than one meaning was traditionally governed by the basic precept that the Court's function is to discover the intention of the legislature. In a case in which the ordinary rules of construction yield two equally plausible meanings, policy considerations are a factor in resolving the conflict. In constitutional cases before the *Charter* this was reflected in the practice of interpreting statutes by applying a presumption that a legislative body does not intend to exceed its powers under the Constitution.

...

In the final analysis, a law that is invalid in so many of its applications will, as a result of wholesale reading down, bear little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole.

[*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 (S.C.C.), Sopinka J., at pp.103-105].

229 The use of severance as a technique to preserve the constitutional validity of legislation is described by Hogg in the following terms:

Occasionally, however, it is possible to say that part only of a statute is invalid, and the balance of the statute would be valid if it stood alone. Of course, the balance does not stand alone; and the question arises whether the court should "sever" the bad part, thereby preserving the good part, or whether the court should declare the entire statute to be bad. The rule which the courts have developed is that severance is inappropriate when the remaining good part "is so inextricably bound up with the part declared invalid that what remains cannot independently survive"; in that event, it may be assumed that the legislative body would not have enacted the remaining part by itself. On the other hand, where the two parts can exist independently of each other, so that it is plausible to regard them as two laws with two different "matters", then severance is appropriate, because it may be assumed that the legislative body would have enacted one even if it had been advised that it could not enact the other.

[Hogg, at 15-21, 15-22, Tab 4].

230 In *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.) at 697, Chief Justice Lamer refers to a classic test for severance:

Where the offending portion of a statute can be defined in a limited manner, it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are.

231 It is an essential feature of severance that in deleting some legislative provisions the Court must be satisfied the legislature: "... would have enacted what survives without enacting the part that is *ultra vires* at all." [*Reference re Alberta Bill of Rights Act*, [1947] A.C. 503 at 518 (Alberta P.C.)].

232 The impugned *Act* does not impose liability in the *Moran v. Pyle* context where a tobacco manufacturer breaches a duty that causes disease in a person in British Columbia resulting in a health care cost to the government.

233 The design of the *Act* imposes liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act.

234 The constituent provisions of the theory of enterprise liability resulting in the *Act*'s extra-territorial effect are inextricably bound up with the remaining features of the *Act*. I do not have confidence they may be read down or severed in a manner that would leave remaining an *Act* clearly identifiable with the original intent of the legislature.

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235 There are several provisions of the *Act* necessary to the consideration of a reading down or severance. They include the s.1(1) definition of "manufacturer" with its several subsections; s.1(2), (3) and (4), the "related" and "affiliate" provisions; s.1(5), the definition of market share on a related company basis; s.13, concerning whether it imposes a duty upon a person not in British Columbia; and s.17.1.

236 I am of the view that any attempt to craft change through severance or reading down would inevitably result in a form of legislative redrafting.

237 In the result, the plaintiff manufacturers have shown entitlement on the basis of the extra-territorial reach of the *Act* to the declaration they seek. I find the *Tobacco Damages and Health Care Costs Recovery Act* to be inconsistent with the provisions of the Constitution of Canada as *ultra vires* the Legislative Assembly of British Columbia.

238 It follows that action C985776, *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, that is founded entirely upon a statutory cause of action under the invalidated *Tobacco Damages and Health Care Costs Recovery Act*, is dismissed.

Order accordingly.

Footnotes

* A corrigendum adding counsel's name in action C985780 has been incorporated herein.

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2015 NLCA 12
Newfoundland and Labrador Court of Appeal

Metal World Inc. v. Pennecon Energy Ltd.

2015 CarswellNfld 68, 2015 NLCA 12, 1136 A.P.R. 249, 250 A.C.W.S. (3d) 557, 364 Nfld. & P.E.I.R. 249, 43 C.L.R. (4th) 1

Metal World Inc., Appellant and Pennecon Energy Ltd., First, Respondent and Vale Newfoundland and Labrador Limited, Second Respondent

B.G. Welsh, J.D. Green, C.W. White JJ.A.

Heard: February 6, 2015
Judgment: March 13, 2015
Docket: 14/86

Proceedings: affirming *Pennecon Energy Ltd. v. Metal World Inc.* (2014), 2014 NLTD(G) 119, 2014 CarswellNfld 298, 1108 A.P.R. 170, 356 Nfld. & P.E.I.R. 170 (N.L. T.D.)

Counsel: Stephen Fitzgerald, for Appellant
Peter A. O'Flaherty, for First Respondent
No Appearance, for Second Respondent

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Construction law

IV Construction and builders' liens
IV.11 Loss or discharge of lien
IV.11.i Compliance with requirements

Evidence

VIII Affidavits
VIII.8 Cross-examination
VIII.8.a Scope
VIII.8.a.ii Miscellaneous

Headnote

Construction law --- Construction and builders' liens — Loss or discharge of lien — Compliance with requirements

Plaintiff placed lien on real property owned by second defendant, V, which was supported by affidavit of W, plaintiff's chief financial officer — Plaintiff filed certificate of action pursuant to its claim for lien — Claim for lien had effect of stopping payments by second defendant, V, to first defendant, M — M brought interlocutory application pursuant to s. 26(2)(a) of Mechanics' Lien Act (Act) for order vacating registration of lien claim upon payment of $1,850,000 into court — Order was granted, money was paid into court and registration of claim for lien and certificate of action were vacated — M's interlocutory application pursuant to s. 26(2)(c) of Act seeking dismissal of plaintiff's action to enforce its lien claim on grounds lien was invalid as affidavit filed in support did not comply with Act was dismissed — M appealed — Court of Appeal ordered matter to be returned to court for reconsideration

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and include cross-examination of W on affidavit — Applications judge concluded that affidavit was in compliance or substantial compliance with Act — Application judge found that, based on affidavit evidence, it could not be concluded that amount set forth in claim for lien was exaggerated — Applications judge concluded that there was no basis to vacate lien — M appealed — Appeal dismissed — It was for applications judge to determine extent to which cross-examination on affidavits would assist in assessing M's application to vacate lien — Applications judge did not err in limiting cross-examination on affidavits to extent he did — There was ample evidence to establish due diligence of W in verifying claim as true — Any errors in amount of claim required detailed review of individual invoices, which was exercise properly dealt with at trial — Errors identified that amounted to approximately $66,000, without more detail from M, were not sufficient to constitute appropriate ground for vacating lien.

Evidence --- Affidavits — Cross-examination — Scope — Miscellaneous

Plaintiff placed lien on real property owned by second defendant, V, which was supported by affidavit of W, plaintiff's chief financial officer — Plaintiff filed certificate of action pursuant to its claim for lien — Claim for lien had effect of stopping payments by second defendant, V, to first defendant, M — M brought interlocutory application pursuant to s. 26(2)(a) of Mechanics' Lien Act (Act) for order vacating registration of lien claim upon payment of $1,850,000 into court — Order was granted, money was paid into court and registration of claim for lien and certificate of action were vacated — M's interlocutory application pursuant to s. 26(2)(c) of Act seeking dismissal of plaintiff's action to enforce its lien claim on grounds lien was invalid as affidavit filed in support did not comply with Act was dismissed — M appealed — Court of Appeal ordered matter to be returned to court for reconsideration and include cross-examination of W on affidavit — Applications judge concluded that affidavit was in compliance or substantial compliance with Act — Application judge found that, based on affidavit evidence, it could not be concluded that amount set forth in claim for lien was exaggerated — Applications judge concluded that there was no basis to vacate lien — M appealed — Appeal dismissed — It was for applications judge to determine extent to which cross-examination on affidavits would assist in assessing M's application to vacate lien — Applications judge did not err in limiting cross-examination on affidavits to extent he did — There was ample evidence to establish due diligence of W in verifying claim as true — Any errors in amount of claim required detailed review of individual invoices, which was exercise properly dealt with at trial — Errors identified that amounted to approximately $66,000, without more detail from M, were not sufficient to constitute appropriate ground for vacating lien.

Table of Authorities

Cases considered by *B.G. Welsh J.A.*:

Balasingham v. Dolphin Steel Systems Inc. (2008), 334 N.B.R. (2d) 71, 858 A.P.R. 71, 2008 CarswellNB 643, 80 C.L.R. (3d) 158, 2008 NBQB 100 (N.B. Q.B.) — considered

Ken Gordon Excavating Ltd. v. Edstan Construction Ltd. (1984), [1984] 2 S.C.R. 280, 12 D.L.R. (4th) 481, 53 N.R. 352, 5 O.A.C. 208, 9 C.L.R. 12, 1984 CarswellOnt 734, 1984 CarswellOnt 806 (S.C.C.) — considered

Kleenaire Equipment Ltd. v. Dennis Commercial Properties Ltd. (1970), [1970] 3 O.R. 776, 14 D.L.R. (3d) 160, 1970 CarswellOnt 697 (Ont. H.C.) — considered

Pennecon Energy Ltd. v. Metal World Inc. (2013), 2013 NLCA 67, 2013 CarswellNfld 429, 1068 A.P.R. 32, 344 Nfld. & P.E.I.R. 32 (N.L. C.A.) — referred to

Steininger v. Woodland Home & Building Products (2003), 2003 SKQB 464, 2003 CarswellSask 734, 32 C.L.R. (3d) 252 (Sask. Q.B.) — considered

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Tucker v. Unknown Person (2014), 2014 NLCA 36, 2014 CarswellNfld 284, (sub nom. *Tucker v. AXA General Insurance)* [2014] I.L.R. I-5662, 1106 A.P.R. 354, 355 Nfld. & P.E.I.R. 354, 37 C.C.L.I. (5th) 169 (N.L. C.A.) — followed

Statutes considered:

Mechanics' Lien Act, R.S.N. 1990, c. M-3
Generally — referred to

s. 17 — considered

s. 17(1) — considered

s. 17(2) — considered

s. 19 — considered

s. 19(1) — considered

s. 26(2)(b) — considered

s. 43 — considered

s. 43(1) — considered

Rules considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D
R. 57.02(4)(c) — considered

R. 57.02(4)(e) — considered

Tariffs considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D
R. 55, App., Pt. A, column 3 — referred to

APPEAL by defendant M, from judgment reported at *Pennecon Energy Ltd. v. Metal World Inc.* (2014), 2014 NLTD(G) 119, 2014 CarswellNfld 298, 1108 A.P.R. 170, 356 Nfld. & P.E.I.R. 170 (N.L. T.D.), dismissing its application for payment out of money it had paid into court in order to release mechanics' lien against property of third party.

***B.G. Welsh J.A.*:**

1 Metal World appeals the dismissal of its application for the payment out of money it had paid into court in order to release a mechanics' lien against property of a third party. In an earlier decision of this Court, the same matter between these parties was remitted to the Trial Division for reconsideration. At issue in this appeal is the extent of cross-examination on affidavits and the effect of errors as to the amount of the lien claim.

2 Leave to appeal was granted on December 2, 2014, with reasons to be included in this decision.

Background

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3 This is an appeal involving the same parties and the same issue after the matter had been remitted to the Trial Division for reconsideration. The foundation of the dispute is set out in the earlier decision of this Court (*Pennecon Energy Ltd. v. Metal World Inc.*, 2013 NLCA 67, 344 Nfld. & P.E.I.R. 32 (N.L. C.A.) (the "2013 Appeal Decision"):

> [2] Pennecon Energy Ltd., claiming it was owed money from Metal World Inc., filed a mechanics' lien against property of Vale Newfoundland and Labrador Limited. This caused Vale to cease making payments to Metal World. The lien was vacated when Metal World paid the amount of the lien claim, $1,850,000, into court. While the lien against Vale's property was vacated, the claim of lien remained in effect with the money being held in court.

4 In the 2013 Appeal Decision, the Court determined that the applications judge had erred in the manner in which he had analyzed Metal World's allegation that the lien claim was grossly exaggerated. Accordingly, the matter was remitted to the Trial Division for reconsideration, to include cross-examination on Jerry White's affidavit which had been filed by Pennecon to support registration of the lien claim.

5 Upon reconsideration, the applications judge, who was not the same judge as previously, dismissed Metal World's application for payment out of the money held in court. He concluded that Mr. White's affidavit was in compliance with the requirement of the *Act* that the claim be verified as true. Alternatively, at a minimum, he determined, the affidavit was in substantial compliance with the *Act*, and because Metal World had not established that it was prejudiced by the claim, there was no basis on which to vacate the claim for lien.

Issues

6 Leave to appeal having been granted, the question is whether the applications judge erred in the manner in which he dealt with, first, cross-examination on the affidavits and, second, errors in the amount of the lien claim.

Analysis

Leave to Appeal

7 This is an interlocutory appeal for which leave to appeal is required (2013 Appeal Decision, at paragraphs 5 to 11). In this instance, I would rely on two factors set out in rule 57.02(4) of the *Rules of the Supreme Court, 1986*:

> (c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,
>
> . . .
>
> (e) the Court is of the view that the interests of justice require that leave be granted.

8 A review of the applications judge's decision, together with the written and oral submissions of the parties, leads to the conclusion that there is some uncertainty as to the applicable law in this area. Clarification of the law is an important component of this Court's mandate. Accordingly, leave to appeal was granted.

Issues Arising from the Affidavits

Characterization of Mr. White's Affidavit

9 Section 17(1) of the *Mechanics' Lien Act*, RSNL 1990, c. M-3, provides for the registration of a claim for lien in respect of a "sum claimed as due". A supporting affidavit is required by section 17(2), which provides:

> The claim shall be verified in duplicate by the affidavit of the person claiming the lien, or of his or her agent or assignee who has a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he or she has that knowledge.

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10 Because they were filed to support the claim for lien, the affidavits of Mr. White, filed by Pennecon, are the same as the affidavits considered in the 2013 Appeal Decision. In that decision, the contents of the affidavits are set out:

> [15] Pennecon provided two affidavits from Jerry White. The first contains only one paragraph which states:
>
> > That I am the Chief Financial Officer of Pennecon Energy Ltd. and have full knowledge of the facts set forth in the Claim attached hereto and that the said Claim is true to the best of my knowledge, information and belief.
>
> In a subsequent two-paragraph affidavit, Mr. White states:
>
> > That I, Jerry White, was a director of Pennecon Energy Ltd. on December 6, 2011;
> >
> > 2. That I continue to be a director of Pennecon Energy Ltd.

11 In the 2013 Appeal Decision, the Court proceeded on the assumption, based on the language of the affidavits, that Mr. White was acting as an agent of Pennecon, and that the affidavits were, on their face, adequate to satisfy section 17(2) of the *Act*. The following paragraphs are apposite:

> [18] Metal World appealed the applications judge's decision that Mr. White was not signing his affidavit as Pennecon's agent, but as the person claiming the lien. It is unnecessary to decide this issue for purposes of the appeal. Mr. White's affidavit uses the additional language that applies when the affiant is an agent as opposed to the lien claimant. That is, Mr. White swears not only that the claim is true (the language applicable where the affidavit is endorsed by the lien claimant), but also, that he has full knowledge of the facts set forth in the claim (the additional information required for an agent's affidavit).
>
> . . .
>
> [20] Before addressing that issue, some comment on the interpretation of s. 17(2) of the **Act** and Form 4 is apposite. First, on a plain reading of s. 17(2), it is clear from the punctuation that references to requiring an affiant to have personal knowledge of the matters to be verified and a statement to that effect in the affidavit apply only where it is the affidavit of an agent or assignee. The legislation presumes that the lien claimant has the requisite knowledge to verify the claim. The purpose of the additional clauses is to ensure that, in verifying the claim, the agent or assignee has the necessary knowledge. ...
>
> [21] ... [Regarding a difference in language between the **Act** and the Form], it must be assumed that the two terms [full knowledge and personal knowledge] are synonymous in this context and that a person swearing that he has full knowledge means that he has personal knowledge of the matters required to be verified. ...
>
> [22] Finally, s. 17(2) of the **Act** states that the claim "shall be verified" by affidavit. Form 4, mandated by the regulations, requires the affiant to state that "the claim is true". Reading these together, the conclusion follows that "verified" means verification of the claim as true. ...
>
> . . .
>
> [24] Ordinarily, the phrase, "to the best of my knowledge, information and belief", is used where the affiant may be lacking direct or complete knowledge and, therefore, cannot attest unequivocally to the contents of the affidavit. ... In the instant case, Mr. White swore that he had full knowledge of the facts underpinning the claim. Accordingly, the additional words, "to the best of my knowledge, information and belief", may be characterized as superfluous. That is, assuming Mr. White had, as he attested, full knowledge regarding the claim and was verifying it as true on that basis, I would, in the circumstances, accept the affidavit, on its face, as adequate to satisfy s. 17(2) of the **Act**. ...
>
> (Emphasis added.)

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12 In the reconsideration of the matter, the applications judge proceeded to analyze whether Mr. White's affidavit could be supported on the basis that it was an affidavit of the corporation rather than that of an agent. This was not necessary as this Court had already validated the affidavit as that of an agent which was, on its face, in compliance with the *Act*. The real question is whether there is any other ground, based on the evidence elicited from Mr. White on cross-examination, or from other sources, for concluding that the affidavit is nonetheless non-compliant.

Cross-examination on the Affidavits

13 Section 26(2)(b) of the *Act* provides that the court may, upon application, vacate a lien on an "appropriate ground". The ground on which Metal World relied in this case was gross exaggeration of the claim by Pennecon. In light of this and the 2013 Appeal Decision, a central issue before the applications judge was the extent of cross-examination to be permitted on the affidavits.

14 After the 2013 Appeal Decision in which Mr. White's affidavit was under review, Pennecon submitted an additional affidavit, that of Stephen Penney. The purpose was to respond to the affidavit of Mr. Butler, which Metal World had submitted prior to its first application in order to support its position that the lien claim was exaggerated. Mr. Penney stated that he "was personally involved with the project management" of the relevant contract and was "the main field representative of Pennecon". His affidavit responds to individual paragraphs in Mr. Butler's affidavit. The responses fall into three categories: first, credits were, in fact, payable to Metal World; second, no amount should be credited to Metal World; and, third, without further information it was not possible to determine whether a credit was due to Metal World. Based on the first category from Mr. Penney's affidavit, the applications judge found a credit of $66,576.42 payable to Metal World.

15 The applications judge permitted cross-examination of Mr. White in respect of events prior to December 6, 2011, the date the lien claim was filed. He refused cross-examination on Mr. Penney's affidavit which dealt with Metal World's allegation that the claim was exaggerated. He allowed cross-examination of Mr. Butler relating to how Metal World responded to Pennecon's filing the lien, the basis for the allegation that the lien was exaggerated but not details regarding that allegation, and the issue of prejudice to Metal World.

16 The extent of cross-examination permitted by the applications judge was determined by taking into account evidence appropriate in an application to vacate a claim for lien under section 26(2)(b) of the *Act* in contrast to the evidence appropriate in a trial of the claim. As noted in the 2013 Appeal Decision:

> [43] In the instant case, the details in Mr. Butler's affidavit, with no affidavit in response by Pennecon, challenged the validity of the lien particularly as to the amount claimed which, according to Metal World, was grossly exaggerated. While on its face Mr. White's affidavit complied with s. 17(2) of the **Act**, cross-examination would have provided an opportunity for the Court to consider the validity of Metal World's allegations and for Mr. White to explain the manner in which the amount of the lien claim was determined by Pennecon. It was open to the applications judge to restrict the scope of the cross-examination if necessary to prevent the application turning into a trial of Pennecon's claim against Metal World. ...

17 Based on these considerations, in the 2013 Appeal Decision, the question of vacating the lien was remitted to the Trial Division to permit cross-examination on Mr. White's affidavit, together with any additional cross-examination or evidence considered appropriate by the applications judge (2013 Appeal Decision, at paragraphs 28 to 33).

18 Determining the extent of appropriate cross-examination begins with reference to the objective of mechanics' lien legislation. Section 43(1) of the *Act* provides:

> The object of this Act being to enforce liens at the least expense, the procedure shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.

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Further, the legislation has a two-fold purpose: to protect the party doing work or providing services on the one hand, and to protect the party for whom the work was done or the services provided on the other hand. The requirement that the claimant verify the claim as true is directed to the second of these (2013 Appeal Decision, at paragraph 35).

19 Accordingly, where the party against whom the claim is registered provides sufficient information to question verification of the claim as true, the lien claimant risks having the lien vacated if clarification or adequate explanation is not provided. In this case, as noted in the 2013 Appeal Decision, the issue as to the validity of the lien claim arose because Mr. White's affidavits were skeletal and Mr. Butler had filed an affidavit setting out information requiring some response from Pennecon. At the reconsideration hearing, additional information was provided by means of the cross-examination of Mr. White and the affidavit of Mr. Penney.

20 Mr. White testified as to his position and responsibilities in the company, the system used to produce invoices, and the need for and his reliance on employees to provide financial information to be used for purposes such as registering the mechanics' lien in this case.

21 Metal World submitted that Mr. White did not have full knowledge of the facts because he "had no personal knowledge of any of the details such as number of hours, amount of materials, equipment rental charges or subcontractor charges which made up the various invoices" (decision of the applications judge, 2014 NLTD(G) 119 (N.L. T.D.), at paragraph 53). The applications judge rejected the proposition that this level of information was required.

22 Rather, the judge relied on the following relevant factors: Mr. White was a director and chief financial officer of Pennecon; only in rare circumstances would one person "have personal knowledge of exactly what amounts are properly chargeable" under a contract of the type here; invoices and accounts receivable on which Mr. White relied were prepared by the relevant comptroller of Pennecon with the assistance of staff; invoices were "based on the information provided by the people on site at Long Harbour where the actual work was being performed"; the invoices provided to Mr. White "were entered into the accounting system of Pennecon known as a Jonas system"; "backup or supporting documentation" was included with the invoices; in determining the amount of the claim for purposes of his affidavit, Mr. White relied on an accounts receivable listing obtained from the Jonas system; the list was printed on December 5, 2011, the day before completing his affidavit in support of the lien claim; Mr. White testified that he "was relying on the existence of systems and support staff which [Pennecon] had in place as part of its business operations" (applications judge's decision, at paragraphs 56 to 59).

23 The applications judge therefore concluded:

> [60] In circumstances, such as this, where you have a large corporation with staff and systems in place for keeping track of the details required for the preparation and issuance of invoices, I am of the view that an individual who is the Chief Financial Officer and a director of the lien claimant, with access to such staff and systems, and who checks with those staff and systems, can certainly be said to have "full" or "personal knowledge" of the "sum claimed as due". ...

24 I agree. However, I would emphasize that considerations such as these and a similar analysis would apply regardless of whether the affiant was the person registering the claim or the agent of that person. In either case, where the affidavit is challenged, the affiant must be in a position to verify the claim as true. What is required for that verification will depend on the particular circumstances. Due diligence, appropriate to the nature of the work or services and type of contract, is a short-hand way of describing what is required of the affiant.

25 In this case, the extent of detail suggested by Metal World would not be appropriate in light of the above considerations and given the purpose of the *Act*, which is to provide protection for both parties to a contract. As discussed in the 2013 Appeal Decision, the legislation provides for vacating a lien claim on an appropriate ground such as where the amount claimed is based on a gross estimate or a false or misleading affidavit. However, I would distinguish, as engaging different considerations, the situation, as in this case, where the person against whom the lien is registered

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applies to have the lien vacated based on details not apparent on the face of invoices or accounts receivable that were relied upon by the lien claimant's chief financial officer.

26 It was for the applications judge to determine the extent to which cross-examination on the three affidavits would assist in assessing Metal World's application to vacate the lien. Clearly, in view of the challenge to Pennecon's claim resulting from Mr. Butler's affidavit, cross-examination on Mr. White's affidavit was necessary (2013 Appeal Decision, at paragraph 45). Given the nature of Mr. White's evidence, which did not involve detailed analysis of individual invoices, but information regarding the generation of invoices and the accounts receivable listings, the fact that the judge limited cross-examination to the period prior to registration of the lien was both practical and consistent with the legislative objective.

27 The applications judge also permitted cross-examination on Mr. Butler's affidavit to facilitate the Court's understanding of the foundation for Metal World's application. Again, limiting cross-examination to issues such as how Metal World responded to Pennecon's filing the lien, the basis for the allegation that the lien was exaggerated, and the issue of prejudice to Metal World, but precluding examination directed to details of individual invoices, was consistent with an appropriate approach to assessing the application to vacate the lien.

28 Similarly, the applications judge's refusal to permit cross-examination on Mr. Penney's affidavit is consistent with the appropriate analytical approach. While the affidavit provided evidence that assisted in giving context to the other two affidavits, the judge was satisfied that cross-examination would result in addressing a level of detail regarding individual invoices that would be necessary for a trial, but not appropriate for purposes of the application.

29 Guidance as to when cross-examination generally is appropriate is set out in *Tucker v. Unknown Person*, 2014 NLCA 36, 355 Nfld. & P.E.I.R. 354 (N.L. C.A.). White J.A., in an application to reinstate an appeal under rule 57.20(8), identified three factors relevant in assessing whether cross-examination on an affidavit may be appropriate:

> [27] In determining whether to allow cross-examination, there is some judicial guidance as to what a court should consider:
>
> a. Whether the facts in the affidavit are in issue ...;
>
> b. Whether cross-examination is necessary to challenge the facts deposed to in the affidavit ...; and/or
>
> c. Whether the affidavit is contentious or the statements deposed to are in dispute ... .

The disjunctive "or" indicates that any one of the listed factors is sufficient. In addition, the list is meant as guidance rather than a closed list beyond which cross-examination will not be permitted.

30 In this case, while the applications judge did not refer to these factors, he did set parameters for the cross-examination of Mr. Butler and gave reasons for refusing to permit cross-examination on both Mr. Butler's and Mr. Penney's affidavits in respect of the issue of exaggeration of the claim. The judge was satisfied that Mr. Penney's affidavit dealt only with that issue and that the detail in respect of exaggeration would properly be considered at trial. In reaching that conclusion, the applications judge was, in fact, applying the first of the above factors. That is, he determined that detailed review of individual invoices was not in issue for purposes of the application.

31 In the result, I conclude that the applications judge did not err in limiting cross-examination on the affidavits to the extent that he did. There was ample evidence to establish due diligence by Mr. White in verifying the claim as true. This standard is consistent with the objective of the *Act* to "enforce liens at the least expense" using a procedure, "as far as possible of a summary character, having regard to the amount and nature of the liens in question" (section 43 of the *Act*). The relevance of the errors conceded in Mr. Penney's affidavit is discussed below.

Effect of Credit Payable to Metal World

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32 A new issue arising since the 2013 Appeal Decision relates to the effect, if any, of the $66,576.42 credit admitted by Pennecon as a result of Mr. Penney's affidavit. Further, there may be additional credits due given Mr. Penney's position that, without further information, it was not possible to assess some of the allegations in Mr. Butler's affidavit. The issue of credits, identified or to be identified, engages the question of whether this would be an appropriate ground for vacating the lien under section 26(2)(b) of the *Act*.

33 I begin by noting that section 19, which deals with substantial compliance in particular situations, would not be engaged here. Section 19(1) provides:

> Substantial compliance with sections 17, 18 and 30 is sufficient, and a claim for lien is not invalidated because of failure to comply with the requirements of those sections unless, in the opinion of the judge, the owner, contractor or subcontractor, mortgagee or other person is prejudiced by that claim, and then only to the extent to which he or she is prejudiced.

34 That provision was discussed in the 2013 Appeal Decision:

> [37] A review of ss. 17, 18 and 30 of the **Act** leads to the conclusion that s. 19(1) is directed to prejudice that may arise in the particular context of strict compliance with the procedural aspects of registering a lien. Section 17 sets out the facts to be specified in a lien claim and the requirement for a verifying affidavit; s. 18 provides for a lien claim against multiple properties or persons; and s. 30 sets out the particular procedure for enforcing a lien claim through the Trial Division.
>
> [38] Clearly, s. 19 is concerned with ensuring that, subject to prejudice to another person, failure to comply strictly with the procedural requirements of the **Act** will not defeat a lien claim. However, applying the **Noranda Explorations** decision [[1976] 1 S.C.R. 296], this does not lead to the conclusion that prejudice cannot be considered in other contexts.

35 The facts in a particular situation will determine whether the analysis should be conducted under section 19 of the *Act*, which would be engaged when the issue relates to substantial compliance in respect of the lien claimant's affidavit, or under section 26(2)(b) of the *Act*, which would be engaged when reliance is properly placed, without reference to section 19, on the "appropriate ground" basis for vacating a lien.

36 Where the court is satisfied that the affidavit supporting registration of the lien meets the standard of due diligence, appropriate to the nature of the work or services and type of contract, errors should be considered under section 26(2)(b). The fact that the affidavit passes muster may be insufficient where errors in the amount of the claim are such as to provide an appropriate ground for vacating the lien.

37 On the facts of this case, the analysis under section 26(2)(b) is the appropriate approach given that the due diligence requirement in respect of the affidavit was met. It is for this reason that I conclude that section 19 of the *Act* is not engaged. For the same reason, the decision referenced by counsel in *Ken Gordon Excavating Ltd. v. Edstan Construction Ltd.*, [1984] 2 S.C.R. 280 (S.C.C.), is not of assistance. In *Ken Gordon*, no affidavit was provided, a situation that, in this jurisdiction, would engage section 19, based on the connection to the section 17 requirement for a supporting affidavit.

38 In the 2013 Appeal Decision, the Court reviewed examples of situations when a lien has been vacated based on a challenge to the amount of the claim. In *Balasingham v. Dolphin Steel Systems Inc.*, 2008 NBQB 100, 334 N.B.R. (2d) 71 (N.B. Q.B.), Baird J. wrote:

> [16] The court agrees that defective, false, misleading or incomplete affidavits will invalidate a claim and will lead to dismissal.

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> [17] As counsel for the Applicant pointed out, the Respondent has a right to pursue his claim by proceeding with an action. That right will not be affected by this order. If there are facts in dispute, which both counsel have acknowledged there are, that evidence and those facts can be more properly decided at a hearing.

> [18] The court accepts the Applicant's submission that the Respondent's affidavit contained misleading or false statements of fact. The court finds that the affidavit is defective. It is the affidavit which forms the foundation of the lien.

39 In *Steininger v. Woodland Home & Building Products*, 2003 SKQB 464, 32 C.L.R. (3d) 252 (Sask. Q.B.), Barclay J. vacated the liens on the basis that the claim was "grossly exaggerated" or "based on estimation only", and that the affiant failed to identify her relationship with Woodland, or how she was able to verify the amounts owing.

40 In *Kleenaire Equipment Ltd. v. Dennis Commercial Properties Ltd.*, [1970] 3 O.R. 776 (Ont. H.C.), at paragraph 5, Osler J. refers to "an inflated amount" claimed in the affidavit as a possible reason for vacating a lien.

41 Those cases stand in contrast to the situation where the lien claimant has relied on appropriate systems for generating invoices and accounts receivable which may, nonetheless, result in some errors requiring adjustment. Detailed review of specific invoices, particularly in a large or complex contract, would ordinarily be a matter properly dealt with by the trial process.

42 In this case, taking into account that some additional credits may be identified upon a detailed review of the invoices, an error of approximately $66,000, must be considered in light of the nature and value of the contract. The contract involved significant work and equipment. The accounts receivable indicated an amount of approximately $1,850,000 as due. In his cross-examination, Mr. Butler conceded that the problem was not that the amounts in the invoices were inconsistent with the amount of the lien claim, but rather, the problem was "within the invoices", such as the number of hours that should have been charged for equipment.

43 To divest a claimant of the right to maintain a lien claim may have a potentially significant detrimental effect. While the claimant retains the right to pursue its claim by proceeding with an action, the security afforded by a lien is lost. The value to the lien claimant of maintaining the lien must be balanced against the potential negative effect on the person against whom the lien claim is registered. Insofar as negative consequences may flow from the summary character of the lien proceedings, such as in this case where it was inappropriate to investigate individual invoices, the *Act* requires that the court deal expeditiously with the matter, avoiding any unnecessary delay (2013 Appeal Decision, at paragraphs 54 and 55). As noted in that decision:

> [54] ... Where an application is made under s. 36(1) [to set a date for the hearing], it is incumbent on the judge to make any orders necessary and appropriate to ensure that the matter is dealt with expeditiously.

44 As applied to this case, errors in the amount of the claim must be determined by detailed analysis of individual invoices. That exercise is properly accomplished by means of the trial process. Given the amount of credit payable to Metal World identified through Mr. Penney's affidavit, considered in the context of the nature and value of the contract between the parties, Metal World has not shown an appropriate ground on which to vacate the lien under section 26(2)(b) of the *Act*.

45 While the applications judge did not apply this analytical approach, he came to the same conclusion. Accordingly, he dismissed Metal World's application for payment out of the money held in court.

Summary and Disposition

46 In summary, Mr. White's affidavit and further explanation by means of cross-examination establish the due diligence, appropriate to the nature of the work and type of contract, necessary to satisfy the requirement that the lien claim be verified as true. The applications judge did not err in limiting cross-examination on the affidavits to the extent

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that he did. Errors in the amount of the claim, identified or to be identified, will require detailed review of individual invoices, an exercise properly dealt with at trial, but not for purposes of an application to vacate the lien claim. Finally, the errors amounting to approximately $66,000 identified in Mr. Penney's affidavit, without more detail from Metal World, are not sufficient to constitute an appropriate ground for vacating the lien.

47 Accordingly, leave having been granted, I would dismiss the appeal. Pennecon is entitled to its costs on column 3 of the Scale of Costs.

***J. D. Green J.A.*:**

I Concur.

***C. W. White J.A.*:**

I Concur.

Appeal dismissed.

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Most Negative Treatment: Reversed
Most Recent Reversed: Papaschase Indian Band No. 136 v. Canada (Attorney General) | 2006 ABCA 392, 2006 CarswellAlta 1686, 154 A.C.W.S. (3d) 1001, [2006] A.J. No. 1603, 66 Alta. L.R. (4th) 243, [2007] A.W.L.D. 263, [2007] A.W.L.D. 264, [2007] A.W.L.D. 265, [2007] A.W.L.D. 268, [2007] A.W.L.D. 275, [2007] A.W.L.D. 276, [2007] A.W.L.D. 279, [2007] A.W.L.D. 280, [2007] A.W.L.D. 281, [2007] A.W.L.D. 282, [2007] 2 C.N.L.R. 283, [2007] A.W.L.D. 303, 404 A.R. 349, 394 W.A.C. 349, [2007] 2 W.W.R. 440 | (Alta. C.A., Dec 19, 2006)

2004 ABQB 655
Alberta Court of Queen's Bench

Papaschase Indian Band No. 136 v. Canada (Attorney General)

2004 CarswellAlta 1170, 2004 ABQB 655, [2004] 4 C.N.L.R. 110, [2004] A.J. No. 999, [2005] 8 W.W.R. 442, [2005] A.W.L.D. 2, [2005] A.W.L.D. 3, [2005] A.W.L.D. 4, 133 A.C.W.S. (3d) 905, 365 A.R. 1, 43 Alta. L.R. (4th) 41

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on Their own Behalf and on Behalf of All Descendants of the Papaschase Indian Band No. 136 (Plaintiffs) and Attorney General of Canada (Defendant) and Her Majesty the Queen in Right of Alberta (Third Party)

Slatter J.

Heard: May 11, 2004
Judgment: September 13, 2004
Docket: Edmonton 0103-03088

Counsel: R.S. Maurice, S.C.M. Folkins for Plaintiffs
M.E. Annich, S.C. Latimer for Defendant
K. Sandstrom, T. Rothwell for Third Party (watching brief)

Subject: Public; Property; Civil Practice and Procedure; Constitutional

Headnote

Aboriginal law --- Reserves and real property — Rights and title — General principles

Indian band was granted reserve after adhering to treaty — Large number of band members withdrew from treaty in exchange for scrip — Other band members left reserve or joined other bands — Reserve was surrendered and eventually sold — Descendants of original band members brought action for damages — Action dismissed on basis that there was no genuine issue for trial or limitation period for action had expired.

Aboriginal law --- Reserves and real property — Transfer or disposition — Land surrendered to Crown

Indian band was granted reserve after adhering to treaty — Large number of band members withdrew from treaty in exchange for scrip — Other band members left reserve or joined other bands — Reserve was surrendered and eventually sold — Descendants of original band members brought action for damages — Action dismissed on basis that there was no genuine issue for trial or limitation period for action had expired.

Aboriginal law --- Practice and procedure — Parties — Representative or class actions

Indian band was granted reserve after adhering to treaty — Large number of band members withdrew from treaty in exchange for scrip — Other band members left reserve or joined other bands — Reserve was surrendered and

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eventually sold — Descendants of original band members brought action for damages — Only person who could potentially claim to have right to go on band list was claimant who was descendant of original band member and that original member did not take scrip and did not join another band — Claimant would have had to be on Indian register — Descendants were not aware of any individuals who met that description.

In 1876, Canada entered into Treaty No. 6 with a number of Cree Indians in Alberta and Saskatchewan. There was a group of Cree people in that area organized around Chief P and his brothers. The P band adhered to the treaty in 1877. Chief P's family accounted for approximately a third of the band's population. The other members of the band did not share a common place of origin with the P family or with each other. A survey was conducted and a reserve of 40 square miles was laid out based on a membership of 189 people.

Chief P and his family applied to withdraw from the treaty and accepted Metis scrip. The taking of scrip by Chief P and his family left the band with 82 members. After the withdrawal of its core membership, the P band disintegrated. Many members applied for Metis scrip and some relocated to other areas. Those remaining on the reserve agreed to leave and joined the E band.

Pressure grew to obtain a surrender of the reserve and open the lands for settlement. In 1888, the Crown obtained a surrender of the reserve. The surrender was signed by three men who were reported as the only men of the P band now remaining and located on the E reserve. The original terms of the surrender were that the proceeds of sale of the reserve would be held in trust for the P band. The surrendered lands were sold for an average sale price of $3.87 per acre. In 1894, an agreement was signed by "principal men" on behalf of owners of the P reserve which provided that they would join the E band and obtain an interest in all land and privileges held by the E band. In return, the E band was given an interest in all benefits from the sale of the P reserve.

The descendants of the P band brought an action regarding rights arising out of the allegedly wrongful surrender of the P reserve. They claimed that P band did not receive all the land it was entitled to when the reserve was laid out. They claimed that the surrender of the reserve was invalid. The descendants claimed the Crown was in breach of its fiduciary duty by permitting the improvident surrender of the reserve. They claimed they were entitled to title to any part of the reserve still held by the Crown and that the Crown mismanaged the proceeds from the sale of the reserve. In an amended statement of claim, the descendants included claims that the Crown was in breach of its treaty obligations.

The Crown applied for summary judgment dismissing the action. The plaintiffs applied to have the proceedings declared to be a representative action.

Held: The summary judgment application was granted.

There was a triable issue regarding the proper size of the P reserve. There was some uncertainty as to exactly how many members of the P band there were and what size the reserve should have been under the terms of the treaty. There was also an issue as to the use of the date of adhesion, the date of the first survey, or the date of the completion of the survey to determine the size of the band.

There was no genuine factual issue for trial regarding the validity of the surrender of the P reserve. The surrender of the reserve was governed by the 1886 Indian Act. The 1886 Indian Act required that a surrender be approved by a majority of the male members of the band over the age of 21 who habitually resided on or near the reserve. While the plaintiffs could demonstrate that there were more than three male members of the band over the age of 21 at the time of the surrender, there was no evidence that any were habitually resident on the reserve. There was no evidence of any habitual residents on the reserve at the time of the surrender. The 1886 Indian Act was silent on what to do in the absence of voting members. Where there were no habitual residents on the reserve, the federal Crown had a

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residual discretion to deal with the surrender of the reserve arising from the prerogative nature of Crown control over Indian lands. Three interested persons were asked and consented to the surrender on behalf of the remnants of the P band. There was no indication that they were unauthorized to do so, that their act did not represent the consensus of the members of the P band or that any other interested party later objected. There was nothing in the record to indicate that there was no consent to the surrender. The surrender was recognized as legally valid.

There was no genuine issue for trial regarding a breach of the Crown's fiduciary duty. Once the core leadership group of the P band withdrew from the treaty, the department and the remnants of the P band were all of the view that the only prudent course was to merge with the E band. Evidence showed that there were no longer sufficient adult members of the P band to work the reserve. By 1887, all the band members had moved and the reserve was vacant. There was no evidence to suggest that it was viable, sensible or practical for the band to retain the reserve and remain on it. The potential prospects of the land would have been reflected in its market value at the time. There was no evidence to suggest that the Crown should have realized that the land had intrinsic value not recognized by the marketplace. There was no evidence that that the sale of the reserve, combined with the admission of the P band remnants into the E band, was exploitative in any sense. There was no evidence that the department was influenced by the lobbying of the Edmonton settlement to open the reserve up for sale. There was no genuine issue for trial on this point.

In regard to land still held by the Crown, the plaintiffs brought no evidence to raise a genuine issue for trial. There was no evidence that the Crown currently held title to any portions of the reserve. Uncontradicted evidence was that the last of the land was conveyed by 1930.

There was no evidence that the reserve was sold at an under value. There was no evidence that the lands could have been leased given that large areas of land were being opened for homesteading. There was no evidence that the mineral titles had any separate value. There was no evidence the department mismanaged the collection of the sale proceeds of the land.

There was no indication that the E band or the P band was unjustly enriched by the arrangement of sharing the E band's property in exchange for the P band sharing its communal property. Given that many members of the P band had effectively joined the E band and some leaders of the former P band had agreed, there was no obvious reason why the Crown could not apply the proceeds of sale of the reserve as it did whether or not there was a valid merger of the bands.

The general challenge by the plaintiffs to the issuance of Metis scrip as bad public policy could not succeed because of the doctrine of supremacy of Parliament. Whatever the merits of the policy, it was authorized by Parliament. There was no ability to examine legislation in the pre-Charter era to see if it was good or bad policy. As the merits of the policy were not justiciable, it raised no genuine issue for trial.

Chief P had an absolute right under the 1880 Indian Act to withdraw from treaty. There was no evidence that Chief P was incapable of making informed decisions on those issues. The P band members were told by Indian agents not to take scrip but they persisted. Speculation about possible motivations for taking scrip without some evidence was not sufficient. No triable issue was shown.

There was no evidence to support the plaintiffs' theory that the Crown deliberately set out to dissolve the P band. The evidence was overwhelming that the withdrawal of the core leadership group from treaty led to the demise of the P band and the merger with the E band was seen as a viable solution to that problem. Whether in law the P band continued to exist could be determined without the necessity of a trial.

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Evidence supporting the plaintiffs' allegation, that hardships were caused or contributed to by the Crown's failure to discharge its obligations under the treaty, was weak. Overall, there was probably enough uncertainty on the historical record to justify the trial of an issue.

No comprehensive limitations statute was in force in the area prior to the passage of the Limitation of Actions Act in 1935. Virtually all of the claims advanced by the plaintiff could be encompassed in ss. 4(1)(c), 4(1)(e) or 4(1)(g) of the 1935 Limitation of Actions Act. Subject to the issue of discoverability, most of the causes of action advanced by the Plaintiffs became statue barred in 1941. The process of surrendering reserve lands gave rise to fiduciary obligations. The subsequent dealings with the proceeds of sale could have created a formal trust. Trustees were generally given less protection from statutes of limitation than other defendants.

Between 1870 and 1903, as a general rule, trustees could not take the benefit of statutes of limitations to defeat claims made by their beneficiaries. From 1903 to 1999, trustees were entitled to take the benefit of limitation periods with the exception that there was no limitation on fraudulent breaches of trust and there was no limitation on any claim to recover trust property or proceeds from trust property still in possession of the trustee.

When the reserve was sold, there was an express provision that the proceeds would be held in trust. In that respect, the Crown was an express trustee and there would be no limitation period against the claim by the plaintiffs for an accounting for the proceeds of the sale so long as the Crown was still in possession of such property. If the Crown disposed of all of the proceeds of the trust more than six years before the action was started, the claim was barred. Subject to the issue of discoverability, all other equitable claims would have been barred in 1909.

The doctrine of laces and acquiescence was engaged even if the validity of all the claims was accepted. A number of P band members joined the E band and they and their descendant lived as members of E band for over a century. They enjoyed an interest in the E band's reserve. Proceeds of sale of P band's reserve were applied for the benefit of E band. By not making a claim for over 100 years, the plaintiffs allowed a status quo to develop against the Crown and the E band.

The claim that reserve was smaller than the treaty provided for was discoverable immediately.

The claim that the reserve had been improperly surrendered was discoverable at the time it happened. Any band members who were habitually resident on the reserve and were not advised of the surrender meeting would have returned to the reserve within a few months and discovered that the reserve had been surrendered by the time of the first auction of reserve lands in 1891.

If the surrender of the reserve was improvident and exploitative, and subjected the descendants of the P band to a life of destitution, that must have been known within a few years of the events.

There was no limitation on the claim for any part of the reserve still held by the Crown. On the evidence, there was no such land remaining.

By 1894, the P band had actual knowledge that funds from the sale of the reserve were being applied for the benefit of the E band. The claim that the trust funds from the sale of the reserve were not properly accounted for was known as soon as the first semi-annual payment was missed.

All the facts surrounding the claims regarding the taking of Metis scrip were known immediately upon the applications for scrip having been accepted.

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The facts regarding the claim that the Crown took steps to artificially reduce the size of the P band leading to its dissolution would have been known by 1894 when the P band merged with the E band.

Any breaches of the treaty must have been known immediately.

All of the claims of the plaintiffs, except one, were barred by the passage of time. The exception was the claim that the Crown account for the proceeds of sale of the reserve to the extent that the Crown was still in possession of some of those proceeds.

The plaintiffs claimed to be descendants of members of the original P band and claimed to be entitled to pursue rights asserted in the amended claim. Mere ancestry did not entitle the plaintiffs to pursue purely private rights owned by original P band members. The plaintiffs were not entitled to P band's collective aboriginal rights because only a collective entity could pursue those rights.

Because of the rule against derivative claims, the P band was the only entity that could sue to enforce true P band claims. Band claims were the claim that not all the benefits in the treaty were provided to the band, the claim that the reserve was undersized, the claim of a breach of the Crown's fiduciary duty in allowing the surrender of the reserve and causing the band to dissolve, and the claim that the Crown wrongly dealt with reserve land without a legally valid surrender and mismanaged the sale process.

Claims based on a wrong to an original band member and claims based on a wrong to a present day descendant of an original band member were claims based on private rights. To the extent that the plaintiffs sought to prosecute claims based on private rights, they were suing on behalf of the class of individual P descendants.

The preconditions of the existence of the P band were missing. The P community became a band when they adhered to the treaty. They remained a band until the last proceeds of the sale of the reserve were distributed. By 1894, when the E band formally admitted the remnants of the P band, there were no members of the P band and there for no longer any P band. There was no mechanism by which a body of Indians could self-identify as a band and become a band at law.

The only person who could potentially claim to have a right to go on the P band list was a claimant who was a descendant of an original P band member and that original P band member did not take scrip and did not join another band. That claimant would have had to be on the Indian register. The plaintiffs were not aware of any individuals who met that description.

The proposed representative plaintiffs were members of other bands. Section 13 of the Indian Act made it clear that they were not entitled to be a member of any other band precluding them from claiming a right to be a member of the P band. Neither of the proposed representative plaintiffs could establish an unbroken line of descent from a P band member. The plaintiffs lacked sufficient status to prosecute the claims.

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Generally — considered

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Generally — referred to

s. 5(1)(c) — considered

Crown Liability Act, S.C. 1952-53, c. 30
Generally — referred to

s. 19 — referred to

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50
Generally — referred to

s. 32 [rep. & sub. 1990, c. 8, s. 31] — considered

Dominion Lands Act, R.S.C. 1886, c. 54
Generally — referred to

s. 90(f) — considered

Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.)
Generally — referred to

s. 38(2) — referred to

Indian Act, 1876, S.C. 1876, c. 18
s. 3(1) "band" — considered

s. 3(2) "irregular band" — considered

s. 3(3) "Indian" — considered

s. 3(4) "non-treaty Indian" — considered

Indian Act, 1880, S.C. 1880, c. 28
Generally — referred to

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s. 14 [1884, c. 27, s. 4] — considered

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Generally — referred to

Indian Act, R.S.C. 1886, c. 43
Generally — considered

s. 4 — considered

s. 6 — considered

s. 13 — referred to

s. 39 — considered

Indian Act, S.C. 1951, c. 29
Generally — referred to

s. 2(1)(g) "Indian" — considered

s. 6 — considered

s. 8 — considered

s. 9 — considered

s. 11 — considered

s. 12 — considered

s. 13 — considered

Indian Act, R.S.C. 1970, c. I-6
Generally — referred to

Indian Act, R.S.C. 1985, c. I-5
Generally — referred to

s. 2(1) "band" — considered

s. 2(1) "Indian" — considered

s. 13 — considered

s. 14.1 [en. R.S.C. 1985, c. 32 (1st Supp.), s. 4] — referred to

s. 16(2) — considered

ss. 59-60 — referred to

Indian Act, Act further to amend the, S.C. 1895, c. 35
s. 70 — considered

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s. 140 — considered

Indian Act, Act further to amend the, R.S.C. 1985, c. 32 (1st Supp.)
Generally — referred to

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s. 1 — referred to

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s. 35(1)(c) — referred to

Judicature Act, 1873 (36 & 37 Vict.), c. 66
Generally — considered

s. 25(2) — considered

Judicature Act, S.A. 1919, c. 3
s. 37(1) — considered

Judicature Act, R.S.A. 1980, c. J-1
Generally — considered

s. 14 — considered

Judicature Ordinance, R.S.N.W.T. 1888, c. 58
Generally — considered

s. 9(1) — considered

Limitation of Actions Act, 1935, S.A. 1935, c. 8
Generally — considered

Limitation of Actions Act, R.S.A. 1980, c. L-15
Generally — considered

Pt. 7 — considered

s. 4(1)(c) — considered

s. 4(1)(e) — considered

s. 4(1)(g) — considered

s. 17 — referred to

s. 40 — considered

s. 41 — considered

s. 41(1) — considered

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s. 41(2) — considered

s. 41(2)(a) — considered

s. 41(2)(b) — considered

s. 42(2)(a) — referred to

Limitation of Actions Relating to Real Property, Ordinance respecting the, O.N.W.T. 1893, c. 28
s. 1 — referred to

Limitations Act, S.A. 1996, c. L-15.1
Generally — considered

s. 10 — referred to

s. 13 — considered

Northwest Territories Act, R.S.C. 1886, c. 50
Generally — referred to

Petition of Right Act, R.S.C. 1886, c. 136
s. 8 — referred to

Real Property Limitation Act, 1833 (3 & 4 Will. 4), c. 27
Generally — considered

Pt. XXIV — considered

Pt. XXV — considered

Pt. XXVI — considered

Pt. XXVII — considered

s. 27 — referred to

Real Property Limitation Act, 1874 (37 & 38 Vict.), c. 57
Generally — considered

Trustee Act, 1888 (51 & 52 Vict.), c. 59
Generally — referred to

Trustee Ordinance, O.N.W.T. 1903, c. 11 (2nd Sess.)
Generally — referred to

s. 55 — referred to

s. 55(1) — referred to

Rules considered:

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Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 42 — considered

R. 129 — referred to

R. 159 — referred to

R. 159(2) — considered

R. 192 — considered

R. 192(1) — considered

R. 192(3) — referred to

R. 266 — referred to

R. 305 — considered

R. 305(1) — considered

R. 305(3) — referred to

R. 742 — referred to

R. 753.05 [en. Alta. Reg. 457/87] — considered

Treaties considered:

Adhesion to Treaty No. 6, Treaty No. 157e
Generally — referred to

Treaty No. 6, 1876 (Between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River), 1876
Generally — referred to

APPLICATION by Crown for summary judgment dismissing claim; APPLICATION by plaintiffs to have proceedings declared representative action.

***Slatter J.*:**

1 This action asserts Aboriginal rights on behalf of the descendants of the Papaschase Indian Band. The main rights in question arise out of the allegedly wrongful surrender of the Papaschase Reserve in 1888. There are presently three applications before the Court:

(a) An application by the Plaintiffs to have this proceeding declared to be a representative action, brought on behalf of all of the descendants of the Papaschase Indian Band;

(b) An application by the Defendant to strike all or a portion of the Statement of Claim as disclosing no cause of action; and

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(c) An application by the Defendant for summary judgment on various grounds, including the expiry of limitation periods.

The Record

2 Since the events underlying this litigation occurred more than 100 years ago, it is not surprising that the application proceeded almost entirely on a paper record. None of the persons involved in the events in question is still alive. The affidavits relied on by both parties mostly do no more than attach historical documents extracted from various archives.

3 The Plaintiffs rely on:

(a) an affidavit of the Plaintiff Rose Lameman, in which she sets out her personal identity as a Papaschase Descendant, explains the origins of the Papaschase Descendants Council, and undertakes to prosecute this representative action.

(b) an affidavit of the proposed representative Plaintiff Calvin Bruneau, parallelling the Lameman Affidavit.

(c) an affidavit of Camie Augustus, a historical researcher with a particular interest in aboriginal history and archival records. This affidavit attached numerous historical documents as exhibits. Included as Exhibit 8 is an extract from an expert report of Dr. Carl Beal (filed in unrelated litigation) outlining the hardships faced by the Plains Indians as a result of the disappearance of the buffalo in the late 1870's. The text of the affidavit very concisely draws and supports inferences said to arise from the exhibits.

(d) three affidavits of Geraldine Harris, also a historian and records analyst. Attached to the first Harris Affidavit as Exhibit B is a detailed genealogical study entitled "Lineage Analysis of Rose Lameman and Calvin Bruneau". Ms. Harris concludes that both Rose Lameman and Calvin Bruneau are descendants of Chief Papaschase.

4 The Defendant as well relies on a number of affidavits, including three affidavits of Stephen Kohan, an employee of the Department of Indian Affairs and Northern Development. Mr. Kohan deposes that he believes there is no merit to the claim and that he knows of no facts that would support it, to comply with Rule 159(2). These affidavits also attach a large number of historical and other documents. The affidavits identify the documents, and describe where they were found, but by and large do not draw any inferences from the documents. Mr. Kohan was examined on his first affidavit.

5 Of particular importance is Exhibit B to the first Kohan affidavit, which is entitled "Report on the Origin and Dissolution of the Papaschase Band" ("the Evans Report"). This document was prepared by Dr. Clint Evans, a historical consultant retained by the Defendant to assist in this matter. The Evans Report consists of a detailed narrative history of the Papaschase Band, and other facts that are relevant to this application. Dr. Evans identifies and discusses the contents of the various historical documents that have been located, and suggests inferences that should be drawn from them. Dr. Evans also prepared a second report entitled "Commentary on the Affidavit of Geraldine Harris" (Exhibit A to the third Kohan affidavit), and a third report entitled "Commentary on the Affidavit of Camie Augustus" (Exhibit B to the third Kohan Affidavit). While he did not swear an affidavit, Dr. Evans was produced for cross-examination on his reports, and accordingly they are sworn evidence even though they were initially only attached as exhibits to other affidavits.

6 Attached to the first Kohan affidavit is a Master's thesis (the "Tyler Thesis") entitled *A Tax Eating Proposition: The History of the Papaschase Indian Reserve* (Kohan Affidavit, Exhibit X), written by Kenneth James Tyler in 1979. The truth of the contents of the Tyler Thesis has not been sworn to in these proceedings, and it is introduced by the Defendant only to show the discoverability of the claim for limitations purposes. While it is not sworn to, I have referred to it to see if it contains information which, if sworn to, might raise a genuine issue for trial: *Indian Residential Schools, Re* (2002), 9 Alta. L.R. (4th) 84 (Alta. Q.B.), at para. 70. Where it confirms the Evans Report, and primarily just quotes

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from historical documents, I have included cross-references to it, while recognizing that it is not evidence. To reiterate, the conclusions in the Evans Report are sworn to and are evidence, in many cases uncontradicted evidence.

7 The Defendant also relies on an affidavit of Jamie Neeves, a paralegal at the Department of Justice. This affidavit lists and attaches (in seven large volumes) all of the historical documents referred to in the Evans Report. Finally, the Defendant relies on the affidavit of Pierrette Galley, a public servant, who deposes that she searched the government files and was unable to find a 1951 Papaschase Band membership list (see *infra*, paras. 199-200).

The Plaintiffs

8 The Plaintiffs allege they are, and appear to be, descendants of the original members of the Papaschase Indian Band. For example, the Plaintiff Rose Lameman is the great-great granddaughter of Chief Papaschase. The individual Plaintiffs are also status Indians, and they are members of the following Bands:

(a) Rose Lameman and Samuel Waskewitch are members of the Onion Lake Band.

(b) Francis Saulteaux is a member of the Ermineskin Band;

(c) Nora Alook is a member of the Big Stone/Wabasca Band; and

(d) Elsie Gladue is a member of the Big Stone Band.

The proposed representative Plaintiff Calvin Bruneau is not a registered Indian, and is described as a non-status individual associated with the Kehewin Band.

9 The Papaschase Indian Band was known and recognized in the 1880's, but it has long since become moribund. It does not appear to have existed in any organized sense since about 1887. The Plaintiffs plead that they were elected by about 500 descendants of the Papaschase Indian Band to be the Chief and Councillors of the Papaschase Descendants Council, a recently formed unincorporated organization. The Plaintiffs plead that the Council has authorized them to commence this action.

10 The name of the Papaschase Band is variously spelled on the record: Pah-pas-tay-o ("Big Woodpecker" in Cree), Pas-pas-chase ("Little Woodpecker"), Passpasschase, and other variations (Evans Report, pg. 6). This judgment uses the spelling selected by the Plaintiffs.

Outline of the Facts

11 On July 15, 1870 the Hudson's Bay Company surrendered the Prairies to Canada. In August and September of 1876 Canada entered into Treaty No. 6 with a number of Plain and Wood Cree Indians in what is now Alberta and Saskatchewan (Augustus Affidavit, Exhibit 21). The Treaty provided for the surrender of the land traditionally occupied by the Indians, in return for which the Indians would receive certain benefits. The benefits included the creation of Reserves for the various Bands, which Reserves were not to exceed in size one square mile for each family of five.

12 There were Cree people in the Edmonton area at the time, including a community that was organized around Chief Papaschase and his brothers. The Papaschase Band did not sign the original Treaty No. 6, but did adhere to the treaty on August 21, 1877. Both Chief Papaschase and his brother Tahkoots placed their marks on the adhesion (Augustus Affidavit, Exhibit 21).

13 The Evans Report (pp. 44-46) indicates that in the late 1870s and early 1880s Chief Papaschase's extended family accounted for about one-third of the Band's population. The Papaschase family was a tightly-knit social group that had been living in the Edmonton area since at least 1870. As Hudson's Bay Company Chief Factor Richard Hardisty wrote in 1885 in a summary description of the Bands in the area (Neeves Affidavit, Exhibit B, Tab 14, pg. 192):

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> The Edmonton Crees at Edmonton under one Chief, for same reasons as above were only partially dependent on the Buffalo. Until about 1855 they lived at Lesser Slave Lake, whence they were engaged as tripmen to man the boats in Summer between Edmonton and York Factory. Gradually they settled near Edmonton and have settled down, building houses and cultivating farms. Several of them still require aid of ammunitions and twine for their winter hunts.

The other members of the Band did not share a common place of origin, either with the Papaschase family or each other, and had congregated in the Edmonton area from all over the Northwest Territories. When they came to the Edmonton area they aligned themselves with the Papaschase family (Evans Report, pp. 78-81; Tyler Thesis, pp. 31-33). Dr. Evans agrees with the assessment of Chief Factor Hardisty in 1885 (Neeves Affidavit, Exhibit B, Tab 14, pg. 196; Evans Report, pg. 9) that:

> the main tie...which binds the Cree band [in the Edmonton District] is residential juxtaposition of individuals at the time the band was formed. Most of its members might with equal propriety belong to any band other than that with which they are actually connected. They form a heterogeneous assemblage.

Outside the Papaschase family there was a high rate of turnover in Band membership (Evans Report, pp. 45-47).

14 The survey of the Papaschase Indian Reserve called for by Treaty 6 was conducted in 1880 and 1884. After some uncertainty about the size of the Band, a Reserve of 40 square miles was laid out, based on a membership of 189 persons. This issue is discussed in further detail, *infra*, paras. 17-22. The Reserve was subsequently designated as Indian Reserve No. 136 ("I.R. 136"). It was located in what is now southeast Edmonton.

15 In July of 1886, Chief Papaschase, his brothers, and their families, all applied to withdraw from the Treaty and accept Metis scrip. With the withdrawal of its core membership, the Papaschase Band disintegrated. Many other members also applied for Metis scrip. Some appear to have relocated to other areas, and some joined the Enoch Band just west of Edmonton. These events are discussed in further detail, *infra*, paras. 23-31.

16 In 1888 the Defendant obtained a surrender of I.R. 136 from the remaining members of the Papaschase Band. This issue is discussed further, *infra*, paras. 32-40. The surrendered Reserve lands were to be sold, and the proceeds were to be placed in trust. In their Amended Statement of Claim the Plaintiffs allege that the Defendant failed to realize the full fair value of the Reserve lands when they were sold, and failed to properly deal with the proceeds that were obtained. At the time of the surrender it was contemplated that the remaining members of the Papaschase Band would join the Enoch Band, and a number of Papaschase Band members did so. The proceeds of the sale of I.R. 136 were eventually applied for the benefit of the Enoch Band (see paras. 41-47, *infra*).

Reserve Size

17 One of the allegations in the Amended Statement of Claim is that the Papaschase Band did not receive its full allocation of Reserve land. Treaty 6 called for Reserves which "shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families".

18 On the date of the Adhesion to Treaty 6 in 1877, the Papaschase Band had about 204 members, forty-two (or 20%) of whom were members of the Papaschase family. The rest included twenty-two other families, single men and women (some with families) and twenty-five "orphans from St. Albert's Mission". This would have given a reserve entitlement of 40.8 square miles. (Evans Report, pp. 38-9)

19 Between 1878 and 1885 the core membership of the Papaschase Band (i.e., the families of Chief Papaschase and other headmen) was relatively stable, and represented about 20% to 33% of the membership. During this time the total Band membership increased slightly, due largely to the inclusion on the Papaschase list of the "Edmonton Stragglers", a group described in an 1880 Treaty pay list as "Stragglers being around Edmonton having no recognized Chief" (Augustus

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Affidavit, Exhibit 8, pg. 109). However, a number of families on the original 1877 list withdrew. Some joined the Enoch, or other Bands (see *infra*, paras. 36-7). By 1880 the St. Albert orphans were no longer on the list. Although overall numbers increased, there was limited continuity of membership outside the Papaschase family itself. (Evans Report, pp. 44-47)

20 In 1880 the survey of I.R. 136 began. Chief Papaschase asked for sixty square miles, but was told by the surveyor that the Band would only be entitled to forty-eight square miles under the formula in Treaty 6. This area was based on the Band having 241 members in 1879. However in 1880 only 189 members were shown on the pay list, in part because of the removal of the Edmonton Stragglers. As a result the Indian Inspector directed that the Reserve contain forty square miles, the area corresponding to a membership of 200. (Evans Report, pp. 51-2; Amended Statement of Claim, paras. 10-12)

21 When Chief Papaschase found out that the Reserve was being reduced from 48 to 40 square miles he protested, and stopped the survey (Evans Report, pp. 52-3; Amended Statement of Claim, para. 13). The protest delayed the completion of the survey by four years, to 1884. In the end the government refused to change its original decision and I.R. 136 was only 40 square miles in size.

22 By 1886 an issue arose as to whether a Band's entitlement under a Treaty would be reduced if some members took scrip: Augustus Affidavit, Exhibit 26. However, since I.R. 136 had been surveyed by 1884 this debate had no effect on the Papaschase Band, or the size of its Reserve.

The Taking of Metis Scrip

23 As previously mentioned, Chief Papaschase, many members of his family, and a number of other members of the Band took Metis scrip in 1886 and withdrew from Treaty. This process was authorized by the *Indian Act*, 1880, S.C. 1880, c. 28, sec. 14 as amended by the *Indian Act Amendment Act*, S.C. 1884, c. 27, sec. 4 (carried forward as s. 13 of the *Indian Act*, R.S.C. 1886, c. 43):

> No half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and no half-breed head of a family, except the widow of an Indian, or a half-breed who has already been admitted into a treaty, shall, unless under very special circumstances, which shall be determined by the Superintendent General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty, *and any half-breed who has been admitted into a treaty shall be allowed to withdraw therefrom on signifying in writing his desire so to do*, — which signification in writing shall be signed by him in the presence of two witnesses, who shall certify the same on oath before some person authorized by law to administer the same.

In 1888, after Chief Papaschase and his family had withdrawn from Treaty, the statute was amended to require the consent of the Indian Commissioner to withdraw from Treaty: *An Act to Further Amend the Indian Act*, S.C. 1888, c. 22, s. 1.

24 While the statute gave an unconditional right to withdraw from Treaty, in fact most persons withdrew in return for scrip. There were two kinds: money scrip and land scrip. Land scrip was authorized by s. 90(f) of the *Dominion Lands Act*, R.S.C. 1886, c. 54, which permitted the granting of lands:

> . . . in satisfaction of any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories, outside of the limits of Manitoba, previous to the fifteenth day of July, one thousand eight hundred and seventy, to such persons, to such extent, and on such terms and conditions as are deemed expedient.

The exact terms "deemed expedient" were set out in various Orders in Council, such as P.C. #688 of March 30, 1885 (Kohan Affidavit #2, Exhibit F). This Order in Council confirmed the appointment of Scrip Commissioners, and recited that the Minister of the Interior "is of the opinion that it is expedient" to grant scrip to those entitled, including that:

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> . . . in the case of each half breed head of a family residing in the North-West Territories, previous to the 15 th day of July, one thousand eight hundred and seventy, who is not at present in *bona fide* occupation of any land, scrip be issued, redeemable in land, to the extent of one hundred and sixty dollars.

A head of family was thus entitled to land scrip for 160 acres, or money scrip for $160.00, if he met the conditions of the Order in Council. These were essentially that he be a half-breed, and was resident in the Northwest Territories on the date the Hudson's Bay Company surrendered its lands to Canada. Initially it appears that land scrip and money scrip were of equal value, but because of the increase in the value of land, by 1885 land scrip was apparently worth double that of money scrip (Tyler Thesis, pg. 80). While the Order in Council did not expressly say so, it was also a condition that a half-breed who had entered a Treaty, withdraw from the Treaty, as one could not take both Treaty benefits and scrip. Special efforts were made to warn those taking scrip that they would have to leave the Reserve (*infra*, paras. 28, 99; Evans Transcript, pp. 63-4; Tyler Thesis, pp. 86, 88-89).

25 The North West Half-Breed Commission first visited Edmonton in 1885, but only a very few members of the Papaschase Band took scrip (seven heads of families, representing eleven people in total). But when the Commissioners returned the next year (1886) about 100 Papaschase Band members applied for scrip and were discharged from Treaty. Dr. Evans concludes (Evans Report, pg 63):

> This number represents a loss of well over half of the band since the last annuity payments in 1885, and more importantly, it included Chief Papaschase, all four of the band's headmen, and their families. No less than sixty-eight of the withdrawals belonged to this core leadership group, a loss that would cripple any community let alone a band marked by a high degree of turnover within its membership.

(See also Tyler Thesis, pp. 101-2). This taking of scrip in 1886 marked the beginning of the end of the Papaschase Band: Evans Transcript, pg. 72, l. 24 to pg. 73, l. 9.

26 The Scrip Commissioners were faced with this flood of requests to withdraw from Treaty in 1886 partly because of the promotion of the idea by scrip buyers. According to Dr. Evans (Evans Report, pg. 64, note 213):

> Scrip buyers were merchants and bankers and other people of that ilk who followed the Half-Breed Commissions on their rounds and offered cash for money scrip (land scrip could only be transferred through a notarized conveyance) at a percentage of its face value. Two articles in the *Edmonton Bulletin* indicate that scrip was selling for 70 to 80 cents on the dollar around the time that Papaschase and his brothers received scrip.

The speculators promoted money scrip because it was easier to transfer, even though it was of lower value to the Metis (Tyler Thesis, pg. 83). The Indian Commissioner was so concerned about the large number of applications for scrip in 1886 that a temporary halt was put on the granting of scrip. The application of Chief Papaschase to take scrip was initially refused (Neeves Affidavit, Exhibit B, Tab 212).

27 On July 7, 1886, Indian Agency Inspector Wadsworth wrote to Indian Commissioner Dewdney (Augustus Affidavit, Exhibit 64, pg. 2):

> Papaschase Band, as a band wish to withdraw, their object is to homestead their present holdings on the reserve, now Sir you are well aware how largely this band is made up of widows, old people, and children, they cannot possibly make their own living: the Chief and his brothers are undoubtedly half breeds and might scratch along, but even they have each two wives and numbers of children.
>
> . . . if more (Indians) are forced to remain in Treaty by the action of the Agent it will not increase his influence or popularity among them, we know that it will be for their ultimate good, but the Indians look at it from a ready money stand point.

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That same day Edmonton Indian Agent Anderson sent a telegram to Wadsworth (Neeves Affidavit, Exhibit B, Tab 216):

> Pass Chase Band make application for Discharge from treaty alleging themselves to be half-breeds — Enoch's contemplate the same what action am I to take. Answer quick.

The particular concern was with persons who were (or claimed to be) of mixed blood, but who followed a more or less traditional Indian lifestyle. Apart from the effect that wholesale withdrawals would have on the Bands, the Indian agents were concerned that these persons would not be able to support themselves if they withdrew from Treaty. (Evans Report, pp. 64-67; Letters to the Superintendent General of Indian Affairs, April 3, 1886 and July 7, 1886, Augustus Affidavit, Exhibits 22, 31, 64 and 65).

28 Chief Papaschase was not pleased that his application for scrip had been refused, or at least put on hold. On July 9th, 1886 Hudson's Bay Company Chief Factor Richard Hardisty telegrammed Commissioner Dewdney (Neeves Affidavit, Exhibit B, Tab 20):

> Pass-pass-chase of Edmonton with his five brothers most anxious to get discharge from treaty[.] Known to all that they are half breeds would recommend the Government to grant them their Discharge.

Dr. Evans draws the logical inference that this telegram was sent at the instigation of Chief Papaschase himself. Six days later, on July 15, 1886, Chief Papaschase himself sent a telegram to the Prime Minister, Sir John A. Macdonald (Neeves Affidavit, Exhibit B, Tab 223):

> Why cant we get same as Peace Hills half breeds taking treaty we want our Scrip.

On July 26, 1886, Deputy Commissioner Read wrote to Sir John A. Macdonald, the Superintendent General of Indian Affairs, summarizing the correspondence on the issue:

> . . . On the matter being laid before the Superintendent General here, he directed that the following telegram be sent Mr. Goulet:
>
>> Superintendent General instructs me to say that Treaty Half Breeds who clearly show that they are Half Breeds and who do not lead the same mode of life as Indians should be allowed to withdraw from Treaty. Others should not be allowed. Every person accepting discharge should be informed at the time that he forfeits all Indian rights, that he must leave the Reserve and give up house and all other improvements without compensation and also cattle and implements given to him as belonging to the Band . . . .
>
> The following telegram was then received from Mr. Wadsworth:
>
>> Your telegram to Goulet reads Half Breeds who do not live the same mode of life as Indians. Please define this. All Indians are engaged more or less in Agriculture. Are Chief Pass-pass-chase and brothers to be granted discharges, they farm, some live in lodges in summer, houses in winter . . . .
>
> in answer to which the Commissioner telegraphed:
>
>> I think Pass-pass-chase and brothers might be granted discharges
>
> . . . . .

(Neeves Affidavit, Exhibit B, Tab 220; Augustus Affidavit, Exhibit 66; Tyler Thesis, pp. 93-96). Shortly thereafter Papaschase and his brothers did take scrip and withdrew from Treaty.

29 The description given of Chief Papaschase's lifestyle in this correspondence can be contrasted with the description of the Band some two years earlier, when Dewdney reported (Augustus Affidavit, Exhibit 63):

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> At Edmonton I met Pas-pas-chases's band . . . they were all painted up in regular Indian style and were more Indian in action and appearance than any I have seen for some time.

Dewdney did note in contrast that Bateau (or Batteaux), one of Chief Papaschase's brothers, did not attend the meeting, and that he "has a very good farm, a comfortable house and good building".

30 Discharges from Treaty were effected by the swearing of a standard form document. The discharge for Chief Papaschase was signed on July 31, 1886, in the name of John Quinne Gladu, a name he sometimes used. It recites that "John Quinne Gladu, a Half-Breed, has proven to my satisfaction that he was residing in the North West Territories previous to the 15th day of July, 1870, now ceded by the Indians . . . is entitled at this date to Scrip to the amount of $160." The document has attached some genealogical data, together with a statutory declaration sworn by Chief Papaschase stating that the information in the document is true, and stating it had been translated into Cree before he placed his mark on it. In other documents he acknowledged he "hereby forfeits all Indian rights", and he was discharged from Treaty. (Neeves Affidavit, Exhibit B, Tab 23). Dr. Evans concludes (Evans Report, pg. 68) that Chief Papaschase's family would have been entitled to a total of about $4,000 in scrip. By way of comparison, the salaries of ordinary Indian Agency employees at the time were between $600 - 750 per year.

31 Despite having surrendered his Treaty rights, it appears that Chief Papaschase did not leave the Reserve: Augustus Affidavit, Exhibits 33, 34 and 60; Tyler Thesis, pp. 103-4. He at first denied having signed the surrender, but when confronted with the document he instead claimed compensation for the buildings he had constructed on the Reserve. The government resolved to enforce the terms under which scrip was given, and Chief Papaschase eventually did leave. There is no evidence on what happened to him thereafter, but the Plaintiffs suggest the scrip money was spent quickly, leaving him and his family destitute and landless.

The Surrender of I.R. 136

32 At the relevant time the surrender of Indian Reserve lands was governed by the provisions of the *Indian Act*, R.S.C. 1886, Chapter 43:

> 39. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions: -
>
>> (a) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council *unless he habitually resides on or near and is interested in the reserve in question*;
>>
>> (b) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present there at and entitled to vote; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal. (emphasis added)

Shortly put, the Act required that a surrender be approved by a majority of the male members of the Band over the age of 21 years who "habitually resided" on or near the Reserve. The surrender was to be approved at a meeting of the eligible voters, although the required quorum is unclear.

33 When Chief Papaschase and his family took Metis scrip, and the Papaschase Band dispersed, pressure grew to obtain a surrender of I.R. 136, and to open the lands for settlement. The record supports the Plaintiffs' contention that

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the European settlers in the Edmonton area were never happy with the location of I.R. 136, as the lands in question were regarded as being prime settlement lands, close to the Edmonton settlement. The government had earlier rejected a petition to have the Reserve moved 20 miles away, saying this would be a "breach of faith" with the Band. There was a significant amount of political lobbying to have the Reserve surrendered once the Papaschase Band disbanded. (Augustus Affidavit, Exhibits 35 to 42 and 57, 59 and 61; Evans Report, pp. 54-58; Tyler Thesis, pp. 41-3, 51-5).

34 On September 20, 1887 the Indian Commissioner in Regina wrote to the Indian Agent at Edmonton (Augustus Affidavit, Exhibit 43):

> In reference to the proposed surrender of their Reserve by the portion of Pahpastao's Band who have not left Treaty, and their amalgamation with that of Enoch, I beg to enclose two forms of surrender and to specially authorize you to summon a council of the first named Band and bring the matter before them, and, if they consent by a vote of the majority of the voting male members of 21 years and over to have a surrender of their lands, to obtain their signatures duly witnessed among others by a competent interpreter.
>
> . . . It should be explained to the Band that the government will take over the land and either sell or lease as may appear in the best interests of the Indians. They will then become part of Enoch's Band . . .

In November 1887 William de Balinhard, the Indian Agent at Edmonton, wrote that

> . . . there is at present only one Indian man of Pahpastayos Band now on Stoney Plain Agency and one out hunting this with three or four who have joined the Peace Hills Agency [ie. Hobbema] are all that remain of the Band . . .

(Neeves Affidavit, Exhibit B, Tab 243). On March 30, 1888 William de Balinhard reported:

> . . . I beg to state that I find it impossible to get a council of these men together. I have only three men on this reserve. There are three more at Peace Hills, two at Beaver Lake and two no one knows anything about making 10 altogether. As we cannot get a council of more than three would it be as well to get the signatures of each man separately and then taking Manitowais as the head man get the deed executed before the stipendiary magistrate . . .?

(Augustus Affidavit, Exhibits 43 and 44.) The tone of this last letter, and the passage of seven months since he got his instructions, suggest that de Balinhard had been trying to call a meeting but had been unsuccessful.

35 There is no reply to this correspondence on the record. On November 19, 1888 a deed of surrender was signed by Napasis, James Stoney, and Antoine (Augustus Affidavit, Exhibit 45). De Balinhard reported they were the "only men of the Band now remaining and located on Enoch's Reserve." (Neeves Affidavit, Exhibit B, Tab 246). The recital to the deed states that they are the "principal men of Passpasschase Band of Indians No. 136"; they are conspicuously not described as chiefs or headmen, the word "Chief" on the standard form having been crossed out. The deed provided that the lands would be sold or leased, with the net proceeds to be "placed at interest, and that the interest money accruing from such investment shall be paid annually or semiannually to us and our descendants forever." On May 22, 1889 de Balinhard and Napasis appeared before the Honourable Mr. Justice Rouleau (as required by the *Act*), and jointly swore that the release was assented to by a majority of the male members of the Band over the age of 21 who were entitled to vote. They deposed that the surrender was agreed to at a meeting called for that purpose, and that they were present at the meeting. It appears that the three signatories were the only ones present at the meeting, but other than on the issue of voting eligibility there is no evidence that the declaration sworn before Justice Rouleau was in any respect untrue.

36 The Plaintiffs plead that the surrender was not approved by a majority of the male members of the Band over the age of 21. The Plaintiffs plead that although de Balinhard stated that there were only two adult males of the Papaschase Band on the Enoch Reserve in November of 1888, in August of that year he had paid Treaty annuities to at least 10 such men. The Plaintiffs argue that de Balinhard should have known that there were other Papaschase men living within 50 miles of Edmonton, and that a proper meeting should have been held. De Balinhard's own letter identifies ten members of the Band, but the Plaintiffs allege that there were perhaps 12 or 13. The Plaintiffs however provide no evidence that

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the additional men "habitually resided" at or near the Reserve, as required by the *Act* if they were to vote. The report of Dr. Beal (Augustus Affidavit, Exhibit 8, pp. 115, 116) shows some Papaschase families and stragglers transferring to the Samson and Muddy Bull Bands. Others had moved to Enoch's Reserve. In 1888 de Balinhard reported "only three men on this reserve", a reference to the Enoch Reserve. The Tyler Thesis concludes (pg. 126) that after 1887 "there was no one living on the [Papaschase] reserve".

37 The last Papaschase Band Treaty pay list is for 1886. Exhibit G to the second Harris affidavit shows that all Papaschase members were on other Band pay lists by 1888. Many of them appeared on those other Band lists even before the taking of scrip by Chief Papaschase in 1886. Ms. Harris identified 22 possible Papaschase voting members after 1886. Ten males over 21 were paid on the last Papaschase list in 1886, and they mostly collected annuities with the Enoch Band in 1887. In 1888 one collected annuities with the Samson Band, six with the Enoch Band, one with the Ermineskin Band, and two with the Alexander Band.

No.	Name	Paid in 1888	Duration
11	James Stoney	Enoch	1887-1900
51	Omachisis	Samson	1888-92
65	Thomas	Alexander	1887-91
74	Red Deer	Enoch	1887-91
83	Napasis	Enoch	1887-92
84	Manitonasis	Alexander	1888-91
88	Squanick	Ermineskin	1888-89
89	Antoine	Enoch	1887-1900
95	Whitehead	Enoch	1887-89
98	Pierre	Enoch	1887-1902

(Reference: Harris Affidavit, Exhibit G; Evans Transcript, pp. 78-84. All these members except Thomas were paid on the Enoch list in 1887. There is some question whether No. 98 "Pierre" was over 21.)

Even the signatories of the surrender are on other lists: James Stoney is shown on the Enoch list from 1887 to 1900, Antoine is shown on the Enoch list from 1887 to 1900, and Napasis is shown on the Enoch list from 1887 to 1892.

38 During the cross-examination counsel for the Plaintiffs suggested, and Dr. Evans agreed with some reservations, that it was reasonable to infer that a person was habitually resident where he or she received his or her annuity payments, although there might well be exceptions (Evans Transcript, pg. 89, l. 6-14; pg. 92, l. 12-26). The inference is stronger if the person is paid with a particular Band over a number of years, as opposed to if the person is paid with a Band in a single year. For example, Thomas was paid with the Alexander Band from 1887 to 1891, which raises a strong inference that he was habitually resident at Alexander during those five years. There is nothing on the record to rebut this logical inference. Dr. Evans testified (Evans Transcript, pp. 40-44) that while the Plains Cree were highly nomadic, they did have territories, and also home bases, particularly after the buffalo disappeared. All of the various Reserves mentioned are within 65 kilometres of the Papaschase Reserve, but in 1888 that would have represented a significant trip taking several days (Evans Transcript, pg. 42). There are numerous references on the historical record to members of the Papaschase Band travelling to the Edmonton Settlement to meet with the Indian Agent, so clearly the members of the Band were able to travel around. However, there is a difference between being able to travel to a place, and being "habitually resident" in that place. At the time the Enoch Reserve and the Papaschase Reserve were distinct places, and to be habitually resident on the former, precluded being also habitually resident "on or near" the latter. There is no direct evidence on the record that any Papaschase Band member was habitually resident on I.R. 136 at the time of the surrender, and no evidence from which a reasonable inference to that effect could be drawn. The Plaintiffs argue that there is evidence that there were 10 or 11 eligible voters at the time of the surrender, and that this raises a genuine issue for trial, but the evidence does not support that conclusion. The evidence is that there was nobody habitually resident on I.R. 136, and in the technical sense no one was eligible to vote for the surrender.

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39 The surrender was approved by the Governor General in Council on October 12, 1889. Steps were then taken to sell the land. It appears that some of the lands were sold at auction on April 18, 1891. The Agent in charge wrote that despite a late snowfall "I consider that we got fair prices for the land sold" in comparison to C.P.R. lands for sale in the area. There was some concern that the lands would fall into the hands of speculators, and steps were taken to ensure that the buyers had a *bona fide* intention of living on the lands:

> . . . as soon as any sign of speculating appeared, feeling that if it would pay speculators to hold, it would be equally advisable for the Department to do so, and knowing that to let lands into their hands would be prejudicial to the value of other on the Reserve, and the town here, I stopped the sale and postponed it indefinitely.

(Augustus Affidavit, Exhibit 49). Further sales of the lands continued up to the 1930s. (Tyler states all the land was sold by 1902, that most patents were issued by 1908, but that a few sales were not completed until 1930: Tyler Thesis, pg. 143). The proceeds were initially held in trust for the Band.

40 The Plaintiffs allege that the land was sold at an undervalue. Apart from the expressed opinion of the Agent that full value was realized, there is evidence that buyers paid $4.10 per acre for 154 acres, when C.P.R. lands were offered at $3.00 per acre (Augustus Affidavit, Exhibits 49 and 52). The Tyler Thesis concludes (at pg. 144) that the average sale price was $3.87 per acre. When further land was sold in 1894 the prices were set:

> . . . by the addition of 25 cts. to the upset prices determined on for the auction sale last held, and after comparison between them and those actually obtained . . . [and] a consideration of all the circumstances, including the fact that the maximum price at which the Calgary and Edmonton Railway lands in the vicinity are held, is Three Dollars per acre, dictates the recommendation now made.

(Augustus Affidavit, Exhibit 50). Apart from the evidence that the weather kept some buyers away from the first auction, there is simply no evidence provided that the lands were worth more than what they were sold for. For example, there is no evidence that the lands were immediately resold at a higher value. Proof of sale at an undervalue would appear to be central to the Plaintiffs' claim. If the Plaintiffs succeed the damages would presumably be the fair market value of the lands when sold, minus the proceeds actually received, plus interest on the difference. If I.R. 136 was sold for fair value, there would appear to be no loss even if the surrender was invalid.

The Merger with the Enoch Band

41 The taking of scrip by Chief Papaschase and his family left the Band with just 82 members: 10 adult men, 25 women, 45 children, and two other relatives. By 1887 the Papaschase Band annual Treaty pay list shows that no members of the Band were paid, because they had all been "transferred to Enoch's". The Enoch Band pay list for 1887 shows many of the former Papaschase members as having been transferred in, and in that year they were paid with Enoch's Band (Evans Report, pp. 69-70; Harris Affidavit, Exhibit G).

42 The Enoch Band had been formed when Indian Commissioner Dewdney promised Tommy Lapotach "that should he collect a large number of Indians, at that time living about Edmonton claiming no chief, I would recommend that he be placed in charge of them and given a Reserve" (Augustus Affidavit, Exhibit 6). The identification of "stragglers" with a headman for the purposes of allocation of a Reserve or making Treaty payments seems to have been relatively common: see the report of Dr. Beal, Augustus Affidavit, Exhibit 8, pg. 107. Tommy Lapotach did gather together a group of what were known as the "Edmonton Stragglers". Since there had been a lot of movement between Enoch's Band, the Papaschase Band, and the Edmonton Stragglers, and because of the geographical proximity of Enoch's Reserve and the Papaschase Reserve (about 20 kilometres), it is not surprising that the two Bands eventually came together.

43 In 1886 Indian Agent Anderson wrote to Commissioner Dewdney indicating that the balance of the Papaschase Band wished to join Enoch's Band, because "there are too few men left on the Reserve to work to advantage." This state of affairs is acknowledged in paragraph 22 of the Amended Statement of Claim. He also reported that Enoch's Band

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were requesting that the Papaschase Band be allowed to join. (Neeves Affidavit, Exhibit B, Tab 236). The Tyler Thesis (pp. 119-20) casts doubt on the real source of the desire to amalgamate, but acknowledges the factual premise on which it was based. It appears from the record that Indian Affairs policy at the time was that a Band should not be removed from their Reserve except with their full consent. On April 9, 1887 Dewdney wrote (Augustus Affidavit, Exhibit 55):

> . . . with reference to the proposed amalgamation of Passpasschase's and Enoch's Bands, Passpasschase's Band should not be removed from their Reserve, except with their consent, and until they have agreed to make a surrender of the same, to be sold for their benefit . . . and since it is absolutely necessary that only such promises as will be literally fulfilled should be made to them, I will be glad to learn from the Department that [they] may be given to understand that, whatever may be realized from the sale . . . will be applied to the benefit of them and their heirs exclusively; and in requesting this information, I would ask the Department to bear in mind that, should the proposal be carried into effect the remainder of Passpasschase's Band will receive their share in another Reserve, at the expense of Enoch's Band.

The handwritten notation on the letter, apparently placed by the Superintendent at Ottawa, reads:

> . . . the proceeds of the sale of the land surrendered will belong to Passpasschase's Band but if they and the members of Enoch's Band [merge] that the latter shall share in the same . . .

This arrangement would somewhat vary the provisions of the surrender document that the proceeds would "be placed at interest, and that the interest money . . . shall be paid . . . to us and our descendants forever" (*supra*, para. 35). The formal merger agreement of 1894 (*infra*, para. 47) did follow the recommended arrangement.

44 On August 22, 1887 Assistant Commissioner Hayter Reed wrote "While at Edmonton the Indians of Pahpastao's band, that is, those who were living on the Reserve — agreed with me to leave the Reserve and join Enoch's band, where the Headquarters of the Agency would hereafterwards be": Augustus Affidavit, Exhibit 34, pg. 3. While the historical record is not definitive, Dr. Evans concludes that the remnants of the Papaschase Band, recognizing that they were not a viable unit anymore, joined the Enoch Band voluntarily (Evans Report, pp. 71-72). In my view this is the logical inference to draw from this record.

45 On September 7, 1887 Inspector Wadsworth visited the Edmonton Agency and sent a long report to Commissioner Dewdney (Augustus Affidavit, Exhibit 16). The letter is an "audit report", and the bulk of it is taken up with a report on the books and records of the Agency, and particularly whether the inventory of stores corresponded with the books. The letter does however comment briefly on some of the Bands, and it states on pp. 23-4:

> **Passpasschase Band**
>
> The Chief Headmen and most of the members of this band having taken their discharge from treaty and received scrip, the band has been wiped out by removing the few remaining members to the reserve of Enoch's band at Stoney Plain. As before mentioned their cattle were also sent there.

The Plaintiffs argue that the words "wiped out by removing" justify an inference that the Defendant was engaged in a deliberate plan to undermine the Papaschase Band, motivated by lobbying of the Edmonton settlement. In the context of the whole record, the better inference is that the taking of scrip by the core membership (reluctantly agreed to by the Department) was the main source of the Band's demise (Evans Transcript, pp. 67-69). While Wadsworth was perhaps unsympathetic to the Band, he did not have authority to move a Band (Evans Transcript, pp. 68-9), and the record does not contain any correspondence confirming such a decision by the senior officers of the Department. To the contrary, the record shows that such moves required the consent of the band.

46 In 1891 it was again being suggested that the funds derived from the sale of I.R. 136 be used for the benefit of Enoch's Band, and that the two Bands "be regarded as amalgamated in all respects and interests." It seems clear that in part the Department was motivated by a desire to have both Bands become self-supporting, but the correspondence discloses

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no resistance to the concept by either Band. The Department appears to have believed the merger was in their interests "provided the Remnant of Passpasschase's Band are given a joint interest in Enoch's Reserve" (Augustus Affidavit, Exhibit 48).

47 In an agreement dated January 4, 1894, James Stoney and Antoine signed an agreement as "Principal men" (Napasis having died since the surrender) on behalf of "the owners of the Pass-Pass-Chase Indian Reserve No. 136 . . . in the non-existence of Chief or headmen" which provided in part that they would join the Enoch Band and as members thereof:

> . . . to have hold and possess forever, an undivided interest in all Land and other privileges now possessed and enjoyed, or which may at any time hereafter be possessed or enjoyed, by the said Band . . .

In return, the Enoch Band was given:

> . . . a joint and undivided interest in all benefits which have accrued or may at any time hereafter accrue from the sale of the lands of the Passpasschase Indian Reserve, No. 136, as aforesaid, which has been surrendered . . .

Following the execution of this agreement, the Defendant applied the proceeds of the surrender of I.R. 136 to the benefit of the Enoch Band.

Summary of the Claim

48 The Amended Statement of Claim is lengthy and detailed, but the following is a summary of the relief now claimed on behalf of all of the present descendants of the Papaschase Band:

(a) The Papaschase Band did not receive all the land it was entitled to when I.R. 136 was laid out, and the Papaschase Band is entitled to 9.9 more square miles of land.

(b) The surrender of I.R. 136 was invalid because the proper surrender procedures were not followed.

(c) The Defendant was in breach of its fiduciary and other responsibilities in permitting the improvident surrender of the land, specifically by allowing itself to be influenced by the lobbying of the Edmonton settlement, and by pressuring the Band to surrender the Reserve.

(d) The Plaintiffs are entitled to title to any part of the Papaschase Reserve still held by the Defendant.

(e) The Defendant mismanaged the sale of I.R. 136, and did not properly manage the proceeds that were received from the sale.

(f) The Defendant has not properly accounted for the proceeds of the sale of I.R. 136, and specifically should not have applied those proceeds for the benefit of the Enoch Band.

(g) The Defendant should

i) not have permitted Chief Papaschase and the other members of the Band to accept Metis scrip, or

ii) not have permitted Papaschase Band members to join other Bands, or

iii) have better advised the Papaschase Band members of the consequences of taking scrip,

and the descendants of all these departing Band members are entitled to be readmitted to the Papaschase Band.

(h) Representatives of the Defendant artificially reduced the membership in the Papaschase Band, and through various breaches of duty caused the dissolution of the Papaschase Band, and enticed the members of the Papaschase Band to join the Enoch Band.

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(i) A declaration that the Papaschase Band never ceased to exist and should now be reinstated or recognized by the Defendant.

The Amended Statement of Claim includes other recitations of mistreatment or hardships faced by the Papaschase Band:

(j) The Defendant was in breach of its Treaty obligations in

i) failing to establish the Reserve in a timely way,

ii) failing to provide relief in times of famine,

iii) failure to provide farming implements and farming instruction to enable the Band to make the transition to a farming life.

(k) The Defendant was in breach of duty by failing to protect the Reserve from trespassers.

While no relief is claimed directly for these incidents, they are included in the proposed list of common issues to be tried.

49 The Defendant's response is that some of the Plaintiffs' claims do not disclose a cause of action, and the Defendant seeks to strike them out under Rule 129. In the alternative, the Defendant asserts that the Plaintiffs' claims are bound to fail, and that there is no genuine issue for trial, and accordingly the Defendant seeks summary judgment under Rule 159. In particular, the Defendant argues that the applicable limitation periods for advancing these claims have long since expired. In the further alternative, the Defendant argues that even if some of the claims do disclose a genuine issue for trial, this is not an appropriate proceeding for a class or representative action.

50 All the events underlying this action occurred well before 1982, and no constitutional or *Charter* issues are raised. No notices of constitutional questions have been delivered, and there are no statutes whose constitutionality has been challenged in these proceedings. Specifically, there is no constitutional challenge to any limitation statute. The Plaintiffs from time to time noted that Aboriginal rights and treaty rights are now protected by the Constitution, but those protections cannot be used to invalidate actions of government officials that occurred in the 19th century. The *Charter of Rights and Freedoms* does not have retroactive operation, or revive rights that were extinguished before 1982: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), at para. 23. At the time of these events, the concept of Parliamentary supremacy was firmly in place, and Parliament was able to vary Aboriginal or Treaty rights if it chose.

Summary Judgment

51 The Defendant applies for summary dismissal of the claim, alleging that there is no genuine issue for trial. The Defendant argues that there is no merit to the claim on the facts, but that in any event the claim is blocked by the passage of the limitation periods.

Test for Summary Dismissal

52 The test to be applied when a Defendant applies for summary judgment has been stated in various ways in the cases:

(a) Is it plain and obvious that the action cannot succeed? *German v. Major* (1985), 39 Alta. L.R. (2d) 270 (Alta. C.A.), at 276, (1985), 20 D.L.R. (4th) 703, 62 A.R. 2 (Alta. C.A.);

(b) Does the material clearly demonstrate that the action is bound to fail or is it clear that the action has no prospect of success? *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229, 30 C.P.C. (2d) 197 (Alta. C.A.);

(c) Is it established that there is no merit to the claim, in the sense that it does not raise a genuine issue for trial? *Allied-Signal Inc. v. Dome Petroleum Ltd.* (1991), 81 Alta. L.R. (2d) 307 (Alta. Q.B.), at 319, rev'd other

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grounds (1992), 3 Alta. L.R. (3d) 155 (Alta. C.A.); Is there a genuine issue of material fact requiring a trial?: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at para. 27.

Once the defendant establishes that there is a real doubt about the claim, the onus shifts to the plaintiff to show there is a genuine issue for trial: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 15. The test is a strict one, and if the record raises any genuine issue for trial, then summary judgment cannot be granted. It is not appropriate to attempt to resolve conflicting allegations in the affidavits unless it is clear that the claim is truly hopeless.

53 Trials are usually held to resolve issues of fact. If the facts are well known, but raise legal issues, that is an appropriate situation for summary determination of the legal issues. Occasionally a legal issue is so unsettled or complex and nuanced that it should not be decided on a paper record, and a trial may be required to provide a proper foundation for the decision: *Wilson v. Medicine Hat (City)* (2000), 87 Alta. L.R. (3d) 25 (Alta. C.A.); *Farm Credit Corp. v. Miller* (1992), 126 A.R. 335 (Alta. Q.B.) at paras. 43-44; *Northland Bank (Liquidator of) v. Hongkong Bank of Canada* (1991), 120 A.R. 296 (Alta. C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 111 O.A.C. 201 (Ont. C.A.) at paras. 13-20. In this case, most of the facts are undisputed; many of the key facts are actually recited in the Amended Statement of Claim. Both parties essentially rely on the same archival record, and both seek to draw inferences from it on these applications. The dispute of the parties was more with respect to the inferences that might be drawn from the record, as well as the legal consequences of the facts found on the record. Where there is a dispute about inferences that might be drawn from a paper record, a trial is sometimes helpful, and caution should be exercised in granting summary judgment. If a plaintiff can show that a competing inference on a material point might be drawn from a document, that might well raise a genuine issue for trial. However, as I have indicated, in this case all of the witnesses who might testify as to the meaning of or the context surrounding the paper record are long since deceased. It seems pointless to direct a trial of an issue when it is unlikely that anything will be advanced by that lengthy and expensive process. This is something that can be considered in deciding if the claim "is bound to fail".

54 The Amended Statement of Claim pleads that many of the acts and decisions of the Crown employees were done or made wilfully and maliciously. Words such as "bad faith", "equitable fraud", "maliciously and arbitrarily", "intended to . . . undermine the influence and authority of Chief Papaschase", "made false statements", "without relevant information", "yielded to pressure", "fraudulent misrepresentations", "undue influence, coercion and duress" and the like are used. The Plaintiffs offer no evidence in support of these allegations, not even the modest amount required to raise a genuine issue for trial. In most instances there is nothing in the historical paper record to support the allegations of impropriety. An inference of misconduct is not warranted by this record, and the application for summary judgment must be decided on the basis that these allegations amount to no more than bare speculation.

55 While the test for summary dismissal is strict, it is still based on the evidence and the record. A plaintiff responding to a summary dismissal application cannot simply rely on its pleadings and bare allegations of a cause of action, or argue that evidence might turn up later: *Jager Industries Inc. v. Canadian Occidental Petroleum Ltd.* (2000), 84 Alta. L.R. (3d) 353 (Alta. Q.B.) at paras. 21-23; *Wilson v. Medicine Hat (City)* (2000), 87 Alta. L.R. (3d) 25 (Alta. C.A.) at para. 15; *Brown v. Northey* (1991), 115 A.R. 321 (Alta. C.A.) at para. 11; *Suncor Inc. v. Canada Wire & Cable Ltd.* (1993), 7 Alta. L.R. (3d) 182 (Alta. Q.B.); *Ghermezian v. Corey Developments Inc.* (2001), 10 Alta. L.R. (4th) 231 (Alta. Q.B.), at para. 66. Specifically, it is no response to an application for summary dismissal that traditional oral evidence might be found. Some evidence must be brought to court to show that a "genuine issue" exists that justifies a trial: *Grossman Holdings Ltd. v. York Condominium Corp. No. 75* (1999), 124 O.A.C. 318 (Ont. C.A.) at para. 7; *Dawson v. Rexcraft Storage & Warehouse Inc.*, *supra*, at para. 17; *Alberta Treasury Branches v. Wenley Enterprises & Sales Ltd.* (1985), 66 A.R. 232 (Alta. Master) (M.) at para. 51; *Watts v. Wakerich* (2000), 261 A.R. 66 (Alta. C.A.) at para. 86. The motions judge is entitled to assume that all the evidence that will be produced at trial is on the record: *Dawson v. Rexcraft*, *supra*, at para. 17.

56 In this action no one directly swears that there is merit to the Plaintiffs' claims. The Augustus Affidavit says only that there are or are not "indications in the documents" that things happened, and suggests that inference should be drawn from the historical documents. Such evidence was held inadequate even to support amending a pleading in

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Mikisew Cree First Nation v. Canada (2002), 2 Alta. L.R. (4th) 1 (Alta. C.A.) at paras. 7-10. This affidavit goes on to conclude that "it is my opinion that there are numerous factual issues in dispute that require determination by the Court at trial". Such conclusory statements are not sufficient to raise a genuine issue for trial: *Advance Rumely Thresher Co. v. Laclair* (1916), [1917] 1 W.W.R. 875 (Alta. C.A.). Some of the supporting exhibits have no relation to the issues, or are not probative (see paras. 86, 106, *infra*, for examples). The Plaintiffs' evidence overall is weak. Their response to the summary dismissal application depends on the identification of a document that supports a realistic inference that a particular claim has merit.

57 The Plaintiffs argue that it is "manifestly unfair" to "force the Plaintiffs to prove their claim" before examinations for discovery and full document discovery. Such a result might well be unfair, but that is not the effect of a summary judgment application. A respondent to a summary judgment application need not "prove its case". It need only raise a "genuine issue for trial", which is a significantly lower standard. If a respondent cannot even produce enough evidence to show a genuine issue, there is no unfairness in granting summary judgment. The respondent is not without weapons, as it is allowed to cross-examine on the applicant's affidavit, and file a conflicting affidavit. That is often enough to raise a genuine issue for trial. There may be cases where the applicant is in such complete control of the records that it would be unfair not to have it discover documents before the application is heard, but that is not the case here, particularly on the limitations issue. There is no basis for postponing a summary judgment application until after discoveries are complete: *Jager Industries Inc. v. Canadian Occidental Petroleum Ltd.*, *supra*, at para. 26; *Indian Residential Schools, Re* (2002), 9 Alta. L.R. (4th) 84 (Alta. Q.B.) at para. 45.

58 If the Plaintiffs can show a "genuine issue for trial", they are of course entitled to their trial. Usually trials are held so that more extensive evidence can be led, and so that witnesses can be examined viva voce to assess their credibility. The successful defence of a summary judgment application also usually leads to examinations for discovery. In this case one must wonder whether a trial judge will be any better positioned to decide the issues presented. As in *Indian Residential Schools, Re*, *supra*, at para. 38, it is clear that no witnesses to the events can be called. The experts could perhaps expand on their reports, and could be cross-examined on the inferences and conclusions they draw from the historical record. It is possible that the parties might uncover more documents, but given the extensive record already compiled, it seems unlikely that a document of critical importance remains to be uncovered. Counsel for the Plaintiffs did suggest that traditional oral evidence might be available, but he frankly conceded that no attempt had yet been made to see if such evidence exists. Given the dispersal of the Papaschase Band for over a century, it would be surprising if any oral history of the Band has survived. In any event, as previously noted, a plaintiff cannot resist a summary judgment application by arguing that "evidence might turn up later". All of these factors can be considered in deciding if the case is "hopeless", or if there is a "genuine" issue for trial.

The Quality of the Evidence

59 The Plaintiffs point out that the Defendant has brought an application for summary judgment, which is not an "interlocutory motion" within the meaning of Rule 305(3). Accordingly, affidavits containing statements as to information and belief are not admissible; in accordance with Rule 305(1) "affidavits shall be confined to the statement of facts within the knowledge of the deponent." Rule 159(2) similarly entitles a Defendant to apply for summary dismissal based on "an affidavit sworn by him or some other person who can swear positively to the facts". The Plaintiffs argue that some of the Defendant's evidence is not "within the knowledge" of the various deponents.

60 Rule 305, if read literally, could prevent an application for summary judgment in some types of case. For example, in large organizations there is often no one person who has sufficient knowledge of all of the facts to swear an affidavit in support of summary judgment based on personal knowledge. In some cases a multitude of affidavits from different representatives of the organization would be required. In other cases even this would not suffice, because it is necessary to extract the required information from the business records of the organization. Read literally, Rule 305 would prevent the use for summary judgment of information contained in records kept in the ordinary course of business, but such evidence is allowed on summary judgment applications: *J.H. Ashdown Hardware Co. v. Singer* (1951), 3 W.W.R. (N.S.) 145 (Alta. C.A.), at pp. 148-9, affirmed on other grounds [1953] 1 S.C.R. 252 (S.C.C.); *Bank of Montreal v. Beacon*

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Industrial Development Corp. (1986), 70 A.R. 218 (Alta. Q.B.) (M.) at para. 18; *Pathe Freres Cinema, Ltd. v. United Electric Theatres, Ltd.*, [1914] 3 K.B. 1253 (Eng. C.A.).

61 The rules have been interpreted to avoid unnecessarily restricting the evidence that can be used on applications for summary judgment. For example, affidavits that merely attach and place on the court record relevant documents have been held to be admissible; *Kin Franchising Ltd. v. Donco Ltd.* (1993), 7 Alta. L.R. (3d) 313 (Alta. C.A.), at para. 6; *Alberta Treasury Branches v. Leahy* (1999), 234 A.R. 201 (Alta. Q.B.) at paras. 51-66; *Indian Residential Schools, Re* (2002), 9 Alta. L.R. (4th) 84 (Alta. Q.B.) at para. 36. This is so even though the deponent did not create the particular documents, and can sometimes offer little more information than the place in which the document was found. The court can determine the inherent reliability of the documents from the way they were made and kept. The court is then left to draw its own inferences from the contents of the documents.

62 The Defendant filed a lengthy Affidavit of Records listing all of the historical documents relied on in this application. That brings into play Rule 192:

> 192.(1) A party on whose behalf an affidavit of records is made under this Division, and a party on whom an affidavit of records is served under this Division, are both deemed to admit that
>
> > (a) the records specified or referred to in the affidavit are authentic, and
> >
> > (b) if a copy of a letter, memorandum or other message purports or appears to have been sent, the original was sent and received by the addressee.

No objection to the authenticity of the documents was served under R. 192(3), and they are deemed to be authentic, although Rule 192 does not deem the contents of the documents to be true: *Mikisew Cree First Nation v. Canada*, *supra*, at. para. 22. The contents only become evidence under the business records rule previously mentioned, or if otherwise sworn to. Where an affidavit of records is filed, it provides another reason for a court considering summary judgment to rely to some extent on affidavits that merely attach documents.

63 Some of the affidavits tendered, particularly the Neeves Affidavit and the Augustus Affidavit, would fall into the exception for affidavits that merely place documents on the record before the Court. The Evans Report and the Harris Affidavits to some extent also merely identify documents, although they do offer interpretations of some of those documents, and suggest ways that the various documents should be linked together. The Augustus Affidavit likewise draws some inferences from the records, although to a lesser extent.

64 Another problem area on summary judgment applications is swearing to negatives. For example, the Galley Affidavit deposes that a search was done and concludes that no band membership list for the Papaschase Band was posted in 1951. The first Kohan affidavit deposes that employees and researchers have searched diligently and that there is not "any current record of the Government of Canada that . . . acknowledges that there is an existing Papaschase band." In the literal sense no one can "swear positively" based on "personal knowledge" that something does not exist. It is also obvious that Mr. Kohan did not (and no one person could) examine every document held by the Government of Canada. There is however nothing objectionable to this type of affidavit being used on a summary dismissal application: *Kin Franchising Ltd. v. Donco Ltd.*, *supra*, at paras. 4 and 13. The deponent sets out what is known, and draws an inference of non-existence that the Court can accept or reject. This approach is actually invited by Rule 159(2) which requires an affidavit that "the deponent knows of no facts that would substantiate the claim."

65 Rule 305 has the potential to place another limitation on summary judgment applications. Read literally it could prevent the use of expert evidence in many cases. While some classes of expert witnesses, such as doctors, do rely on their personal observations, this is not always the case. Many experts simply provide opinions, which are inferences they draw from facts which they are told to assume, or which they extract from the paper record.

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66 In my view the rule should not be interpreted so as to prevent the use of expert evidence on summary judgment applications. This case provides a good example. Dr. Evans has prepared a lengthy report in which he relies almost exclusively on historical documents that he has found in various archives, and that are on the record. He played no role whatsoever in the creation of those documents, nor in the events that form the basis of this litigation. Neither he nor anyone else has personal knowledge that the documents were prepared and sent when and by the persons who purported to sign them, although this is deemed admitted under Rule 192(1). In some cases he merely identifies the content of the various documents. In other cases he suggests inferences that the Court might draw from individual documents, or from several documents read together. In yet other instances he draws on his expertise as a historian, and offers opinions and context for the Court. The general process is discussed in detail in the Evans Transcript, pp. 93-100. In my view there is nothing objectionable to this evidence; a sworn expert's opinion of this kind is "within the knowledge of the deponent".

67 If the matter went to trial, and Dr. Evans testified, he would be entitled to give all of this evidence, which is one test for admissibility: *Westhill Leasing Corp. v. McMillan*, [1980] A.J. No. 498 (Alta. Q.B. [In Chambers]) (M.). To the extent that he just draws the attention of the Court to various documents, he adds little to the record other than efficiency. Where he suggests that inferences can be drawn from various documents, the Court can examine the document in question and decide whether the inference should or should not be drawn, or whether there is a genuine issue for trial. From his expert knowledge he can also speak to the likely truth of the contents of the document. To the extent that he offers expert opinions, he can be cross-examined on those opinions, or the Respondent to the summary judgment application could introduce competing opinions. All of this evidence can be used to decide if there is a genuine issue for trial.

68 The Plaintiffs argued that it was unsafe to rely on the Evans Report, because Dr. Evans admitted that he did not review every document contained in the Defendant's affidavit of records. Since Dr. Evans had not reviewed all of the records, the Plaintiffs argued that it would be unsafe to conclude at this point that there is no genuine issue for trial. I do not accept this argument. Dr. Evans testified (Evans Transcript, pp. 10-12) about how he conducted his research. He did not start with the documents produced in the litigation, because in his view someone else had screened those documents for relevance. Rather Dr. Evans chose to go back to the primary archival sources, review the original documents himself, and make his own decisions about relevance. While Dr. Evans conceded that research is never "final", because one could continue researching forever, he was nevertheless satisfied that he had reviewed enough of the primary historical documents to form the opinions set out in the Evans Report. That is sufficient to cast an evidentiary burden on the Plaintiffs to show that there remain genuine issues for trial. The Plaintiffs in fact brought forward a number of historical documents which they argued raised genuine issues for trial, and they were entitled to go into the Defendants' affidavit of records to find more such documents. It is not however a sufficient response to an application for summary dismissal to say that the Defendant's affiants might have done more work, or that more evidence may turn up. The Defendant is only required to place on the record sufficient evidence to demonstrate that the claim has no reasonable prospect of success. It is then up to the Plaintiffs to bring forward at least some small amount of evidence to show that there is a genuine issue for trial.

69 In his report Dr. Evans drew certain inferences from the historical record. During his cross-examination he conceded on several occasions that it was "possible" that someone else might draw a different inference. It is trite that "possibilities" are not "probabilities". It is easy to speculate, and Dr. Evans' concession does not turn speculation into evidence. These portions of the Evans Transcript do not generate genuine issues for trial unless there is some evidence on the record to support the competing inferences.

70 As previously noted the burden of proof on a summary dismissal application is high: the applicant must prove that there is no genuine issue for trial. On the other side, the respondent need not at this stage "prove its case". It is only necessary for the respondent to show that there is a genuine issue for trial, which is a much lower burden than proving the case on a balance of probabilities. As a result there is no inherent unfairness in relying on expert evidence on a summary judgment application. As long as the respondent can raise a genuine issue for trial, the matter will not be decided summarily. In this case the Plaintiffs have simply left large parts of the Evans Report uncontradicted.

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71 There is a different aspect to this evidentiary issue when summary dismissal is applied for based on the expiry of a limitation period. In those cases it is necessary to determine when the claim was "discovered" or "discoverable" (*infra*, paras. 135-6). To make that determination it is not necessary to decide if past declarations or assertions of a claim were true or not, and such statements are not admitted for the truth of their contents. If a party declared that it had a right, or that it had been wronged, that shows discovery of the claim. It is not necessary for a deponent to have personal knowledge that the facts alleged in support of the claim are true, just that the claim was asserted. Where an affidavit in support of a summary dismissal application merely attaches documents that show that a claim was asserted at some point in the past, that does not violate the rule against hearsay affidavits: *Kin Franchising Ltd. v. Donco Ltd.*, *supra*, at para. 6.

72 The purpose of Rule 305 is obvious. Since the summary judgment rules are a shortcut to judgment, the rule is designed to force the applicant to bring the "best evidence" to the Court: *J.H. Ashdown Hardware Co. v. Singer*, *supra*, at pg. 149. Hearsay evidence is to be avoided, and the applicant is required to bring forward the affiant with the most direct knowledge of the situation. The purpose of the rule must be kept in mind in deciding what evidence can be admitted. In a case like this, which relies primarily on historical materials, there is less opportunity for unfairness. No one who actually participated in the events which are the subject of this litigation is available to testify; they have all been dead for many years. The trial judge is going to have to draw inferences from the documents, and will probably be in no better position than a chambers judge on a summary judgment application. The quality and reliability of expert evidence in a case like this will not be materially different at trial, as compared to a chambers application. In my view, considering these factors, the Defendant has not tendered evidence that violates Rule 305 or Rule 159.

Genuine Issues for Trial

73 After a careful review of the material placed on the record, I have come to the conclusion that the Plaintiffs can show a genuine issue for trial on some issues, albeit that the evidence presently in support of some of those issues is quite weak. Whether these issues can survive the limitation defence is dealt with in the next section of this judgment. On other issues, the Plaintiffs have not brought forth enough evidence to show a genuine issue for trial, not even the modicum of evidence that is required to show a genuine issue for trial under the Rules. Some of the issues have been discussed already, and a summary of the disposition of each claim (listed *supra*, para. 48) is as follows.

The Size of the Reserve

74 There appears to have been some uncertainty as to exactly how many members of the Papaschase Band there were, and accordingly what size the Reserve should have been under the terms of the Treaty. There is also an issue as to whether one should use the number of members as at the date of adhesion in 1877, or as of the date of the first survey in 1880, or as of the date of the completion of the survey in 1884. There is a triable issue on this point.

The Validity of the Surrender of the Papaschase Reserve

75 The Plaintiffs argue that the surrender of the Reserve raises many triable issues. First of all, they say that a meeting was not called "according to the rules of a band". There is however no evidence that the Band had any such rules, or even that the Band traditionally made decisions in a meeting of the whole. What evidence there is on the record suggests that Chief Papaschase felt free to make decisions on his own, perhaps in consultation with the other headmen. In the absence of any Band rules, the Departmental officials were entitled to call and conduct the meeting in any fair way. Absent any evidence whatsoever that there were such Band rules, this argument does not raise a genuine issue for trial.

76 The statute clearly contemplates the approval of a surrender of a Reserve by a majority of the voting members of the Band. The policy behind this provision is to prevent the exploitation of Indians in dealing with Reserve lands, and can be traced back even before the Royal Proclamation of 1763, which was described in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.) at pg. 383:

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> The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling*, *supra*, at p. 54, this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions in the present Act being ss. 37-41.

See also, *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] O.J. No. 1406 (Ont. S.C.J.) at paras. 344-365, rev'd on other grounds (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at paras. 186-201. While the Plaintiffs can demonstrate on this record that in 1888 there were more than three male members of the Band over the age of 21, there is absolutely no evidence on the record that any were "habitually resident" on the Reserve at the time of the surrender (*supra*, paras. 37-8). The record discloses that the other members of the Band were residing in other places, particularly Enoch's Reserve and at Peace Hills (Hobbema). Having examined the record carefully, I can find no evidence of "habitual residents" on I.R. 136 to raise a genuine material factual issue for trial. The *Act* is silent on what to do in the absence of voting members; there is a gap in the statutory provision. There are a number of possible ways of dealing with that gap. One possible interpretation is that in these circumstances no surrender of a Reserve is possible, no matter how prudent and consistent with the interests of the Band that may be.

77 There are other possible interpretations. In *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (S.C.C.), a portion of the Reserve was surrendered, but no one certified on oath that a proper meeting had been held. This was held at paras. 41-43 not to be fatal to the validity of the surrender. The true object of the provisions is to ensure that the Band had consented to the sale, and it was clear that a valid consent had been given. In the present case the opposite problem presents itself: there is a certification under oath that a proper meeting was held, but it appears that in fact there were no eligible voters in existence. In *Apsassin*, the Court pointed out the inconvenience that would arise if surrenders could be challenged long after they had occurred. One possible interpretation of the *Act* to avoid this result is that where the certification is made before a superior court judge, the surrender is thereafter incontrovertible. One can assume that the superior court judge would have made suitable inquiries as to the circumstances, and given the importance of bringing finality to the surrender process, the certification should be accepted at face value.

78 The better interpretation of the *Act* however appears to be that its provisions apply when there are some persons still habitually resident on the Reserve, and therefore some eligible voters. When there are no habitual residents the federal Crown has a residual discretion to deal with the surrender of the Reserve, arising from the prerogative nature of Crown control over Indian lands: *Chippewas of Sarnia Band*, *supra*, at paras. 379-80, 389, 391-2. That residual discretion can be traced back to the historic policy reflected in the Royal Proclamation of 1763, discussed *supra*, para. 76, which is carried forward in the general empowering provisions in the *Act*, discussed *infra*, para. 90. Here, as in *Apsassin*, it appears that consent in substance was obtained. Three interested persons were asked to and did consent to the surrender on behalf of the remnants of the Papaschase Band. There is no indication that they were unauthorized to do so, that their act did not represent the consensus of the members, or that any other interested party later objected to what had been done. While the three members who signed the surrender deed were not eligible to vote, neither were any of the other seven Papaschase members who might have objected. There is nothing on the record to indicate that there was no consent in fact. In those circumstances it is not a significant extension of the reasoning in *Apsassin* to conclude that the surrender of I.R. 136 should be recognized as legally valid. Since I have concluded that the limitation statutes prevent a challenge to the surrender at this late date in any event, I need not explore these issues further. It is not necessary, in any event, to have a trial in order to determine the legal consequences of what appear to be the undisputed facts. It seems clear

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that there were no Papaschase members habitually resident on the Reserve, and that three members residing at Enoch approved the surrender. The legal consequences are determinable without a trial.

79 The Plaintiffs also note that de Balinhard was instructed to obtain the surrender of I.R. 136 in September of 1887 but that he did not complete the task until November of 1888. This does not appear to be of any legal significance. The basic premise of the Plaintiffs' claim is that the Reserve should never have been sold at all, so it is inconsequential if it was sold slightly later than it might have been. There is no evidence that land prices were falling, so that the Band would have realized a higher return if de Balinhard had acted more quickly, and indeed the opposite is true. The bulk of the land was not sold until about 1902 in any event, and any delay in getting the surrender does not seem to have caused any loss to the Band. Even if de Balinhard had acted promptly, by the fall of 1887 most of the Papaschase Band members were being paid on the Enoch pay list, and were resident at Enoch, and so the delay would not have affected the number of potential voters.

80 The Plaintiffs also argue that there was no quorum present at the meeting: there were ten possible voting members, and only three signed the deed of surrender. Since I have concluded that there were no eligible voting members at all, this argument is somewhat moot. The words "a majority . . . at a meeting . . ." found in the statute could mean a majority of Band members at the meeting, or a majority of all the Band members. In *Cardinal v. R.*, [1982] 1 S.C.R. 508 (S.C.C.) the Court concluded that the proper interpretation is that there must be a quorum present of a majority of the members, and that a majority of those present must approve the surrender. The real problem is that no notice of a meeting was given, thereby giving voters a chance to attend and be counted. However, this is also a moot point given the absence of any eligible voters.

81 In summary, there are some legal issues outstanding on the consequences of how the surrender was obtained. However what happened is clear so there is no genuine factual issue for trial.

Breach of Fiduciary and Other Duties in Permitting the Surrender of the Reserve

82 Apart from the validity of the surrender process, the Supreme Court of Canada has held that the Defendant has an overriding obligation not to permit an improvident surrender of Reserve lands. This obligation arises from Section 39 of the *Indian Act* of 1886, which requires that the Governor General in Council approve any surrenders. The records from the time indicate that once the core leadership group withdrew from Treaty, the Department and the remnants of the Papaschase Band were all of the view that the only prudent course was to merge with the Enoch Band. The evidence is that there were no longer sufficient adult members of the Papaschase Band to work the Reserve. By 1887 all of the Band members had moved to the Enoch Band, and the Reserve was vacant. As a similar situation was described in the *Apsassin* case, *supra*, at para. 9, the Reserve was virtually useless to the Band at the time. There is simply no evidence on this record to suggest that it was viable, sensible, or practical for the Band to retain I.R. 136 and remain on it. The Plaintiffs' main argument is that the Defendant should have foreseen that the lands would become very valuable in the future as part of the larger City of Edmonton. However, the potential prospects of the land would have been reflected in its market value at the time, and there is no evidence to suggest that the Defendant should somehow have realized that the land had intrinsic value not recognized by the marketplace. The Defendant's fiduciary duty is to prevent any exploitative bargains with respect to the Reserve, and there is no evidence that the sale of the Reserve, combined with the subsequent admission of the Papaschase remnants into the Enoch Band, was exploitative in any sense. The Plaintiffs have failed to provide sufficient evidence to raise a triable issue on this point.

83 That the Reserve may not have been surrendered strictly in accordance with the provisions of the *Indian Act* does not necessarily mean there was a breach of fiduciary duty. Breach of fiduciary duty is fault based: *B. (K.L.) v. British Columbia*, [2003] 2 S.C.R. 403 (S.C.C.) at para. 45. The surrender may have been the most reasonable thing to do, and may have clearly been in the best interests of the Band. It may also possibly have been a breach of statute, but there is no civil cause of action arising directly from a breach of statute: *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.); *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 31; *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.) at paras. 14 and 17; *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.) at pg. 385. As the Court held in *Roberts v. R.*

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at para. 43 "in dealing with the Indian interest in reserves, 'we must ensure that form not trump substance' . . .", and at para. 86 ". . . the Crown's fiduciary duty . . . does not provide a general indemnity." To succeed with the claim for breach of fiduciary duty the Plaintiffs must show that the Defendant acted in an unconscionable or unreasonable way inconsistent with the interests of the Band: *Guerin v. R.*, *supra*, at pp. 349, 383; *Roberts v. R.*, *supra*, at paras. 86, 100. Merely showing a breach of statute, or even negligence, is not enough to show a breach of fiduciary duty. There is no evidence on this record to show a triable issue on this point.

84 The Amended Statement of Claim (para. 14) and the record contain several references to the lobbying by the Edmonton settlement to have the Papaschase Reserve located further away from the town. The Department was entitled to consider their views. As the Court held in *Roberts v. R.*, *supra*, at para. 96:

> In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. (emphasis in original).

Prior to reserve creation, there was nothing wrong with the lobbying. After the Band dispersed, the Edmonton Settlement lobbied to have the Reserve sold. At this point the Department was obliged to place the interests of the Papaschase Band first, but there is no indication it did otherwise. There is no evidence on the record that the Department was influenced by the lobbying of the Edmonton settlement to open I.R. 136 up for sale. Even Tyler, who is sympathetic to the Band's claims, concludes (Tyler Thesis, at pp. 54, 147) that "there is nothing in the stand maintained by the officials of the Department of Indian Affairs which encouraged the Edmontonians.". In order to show a genuine issue for trial the Plaintiffs must bring some evidence into court. The mere fact the Reserve was sold is not enough. There is no evidence the Department was improperly influenced by the Edmonton settlement, and no genuine issue for trial.

Land Still Held by the Defendant

85 There is no evidence on the record that the Defendant still holds title to any portions of I.R. 136. The uncontradicted evidence is that the last of the land was conveyed by 1930. Given the long passage of time, and the fact that I.R. 136 has now been completely developed, it would not be safe to infer that there are still parts of I.R. 136 in the name of the Defendant. Land Titles records in Alberta are public and the Plaintiffs could easily show if any portions of I.R. 136 are still in the name of the Defendant or the Third Party. The Plaintiffs have brought no evidence to raise a genuine issue for trial.

The Sale of the Lands at an Undervalue

86 There is simply no evidence on the record that the Papaschase Reserve was sold at an undervalue. This issue is discussed *supra*, at para. 40. The only evidence on this point is found in the affidavit of Cammie Augustus:

> 14. The archival documents regarding the sale and administration of surrendered Papaschase lands indicate that the Department of Indian Affairs *may have* conducted the sale in a haphazard fashion which *may have* resulted in the sale of these lands at less than fair market value. Attached hereto as Exhibits 46, 47, 48, 49, and 50 to this my Affidavit are the supporting documents.
>
> 15. *Questions arise* as to the administration of the land sales proceeds following the 1888 Surrender. Archival documents *suggest* a mismanagement of accounting and delays in collecting payments on sold lands. Attached here to as Exhibits 51, 52, 53, and 54 to this my Affidavit are the supporting documents.
>
> (emphasis added).

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This type of equivocal evidence is not sufficient to raise a genuine issue for trial. Ms. Augustus is not qualified to give opinion evidence on fair market value, or the commercial reasonableness of the transactions. The "supporting documents" document the sales, but they disclose no patent mismanagement. One document (Exhibit 47) is an extract from a debate in the House of Commons questioning the extent of the advertising of the lands, but the point is answered by Mr. Dewdney. In any event the speaker expects the land is worth "a dollar an acre" when in fact it sold for more. The concerns expressed by this speaker about speculators and the immediate sale of the whole block were, so far as this record goes, dealt with. In addition, debates in the House must be taken for what they are, and this document raises no genuine issues. The balance of the Exhibits are quite innocuous.

87 The Plaintiffs further claim that the lands should not have been sold at all, but should have been leased out. They also allege that the mineral titles should not have been sold at all. They allege that the Defendant was negligent in collecting the sale price of the lands from some of the purchasers who defaulted on their obligations. No evidence is provided on the record to prove these allegations or raise a genuine issue for trial. These claims do not rise above mere speculation. There is no evidence that the lands could have been leased; given that large areas of land were being opened for homesteading it is not obvious that anyone would want to lease and improve someone else's unbroken land. There is no evidence that the mineral titles had or have any separate value.

88 There is no evidence on the record that the Department mismanaged the collection of the sale proceeds of the lands. While some buyers did not pay cash for the land, there is no evidence that they were all in default. The records do show "arrears" but the Department charged interest, and the records also show the dates of "installments due" (Augustus Affidavit, Exhibits 51 and 53), which implies that arrangements were made for payments over time. There are some references to specific defaults (Augustus Affidavit, Exhibit 51), but no evidence that the Department did not deal with them in a commercially reasonable manner. The Crown's fiduciary duty does not create a general indemnity for the Band: *Roberts v. R.*, *supra*, at para. 86(1). The Department cannot be expected to have guaranteed the payment of the purchase price by the purchasers, and there is no evidence that the Department did not make reasonable efforts to collect all sums owing.

The Validity of the Agreement to Share the Proceeds of the Sale of I.R. 136 with the Enoch Band.

89 The original terms of the surrender were that the proceeds of the sale of I.R. 136 would be held in trust for the Papaschase Band. When the Papaschase Band merged with Enoch's Band, the trust was essentially amended. The bargain was that in return for sharing the communal property of the Enoch Band, the Papaschase Band would share its communal property as well. There is no indication that either the Enoch Band or the Papaschase Band were unjustly enriched by this arrangement, or that the merger was in any sense an "exploitative bargain" (see *Roberts v. R.*, *supra*, at paras. 98-100). There is no issue for trial of the facts that led to the amalgamation of the two bands; what happened is set out in the record and is not seriously contested by either party. There are some legal issues arising from those facts.

90 The Plaintiffs argue that because there was no statutory authority in 1894 to amalgamate bands, that the merger of the Enoch and Papaschase Bands is "void". In my view that is not the correct legal conclusion. The federal Crown has an overriding constitutional and fiduciary jurisdiction over Indians and Indian lands. There must be many things (of greater or lesser import) that are not specifically dealt with in the statutes, yet decisions must be made on them. If the statute is silent on a particular point, then the matter falls under the Crown prerogative, and the federal Crown can make such decisions as it feels are consistent with its duties to the aboriginal peoples. The *Indian Act*, R.S.C. 1886, c. 43, contained the following provisions that confirm the residual plenary powers of the Defendant:

> 4. The Minister of the Interior, or the head of any other department appointed for that purpose by the Governor in Council, shall be the Superintendent General of Indian Affairs, and shall, as such, have the control and management of the lands and property of the Indians in Canada.
>
> 6. The Department of Indian Affairs shall have the management, charge and direction of Indian Affairs.

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I reject the concept that the Crown cannot act without a specific statutory power authorizing the act: *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (S.C.C.) at para. 4.

91 The Plaintiffs argue there was no authority to use the proceeds for the benefit of the Enoch Band. As just noted, the Minister at the time had broad general powers to deal with Indian property. The *Act to Further Amend the Indian Act*, S.C. 1895, c. 35 (which modified similar wording in the 1886 statute) gave more specific powers as well:

> 70. The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom, the moneys arising from the disposal of Indian lands, or of property held or to be held in trust for Indians . . . shall be invested, from time to time, and how *the payments or assistance to which the Indians are entitled shall be made or given*; and may provide for the general management of such moneys. . . . (Emphasis added)

Given that many members of the Papaschase Band had effectively joined the Enoch Band, and given that at least some leaders of the former had agreed, there is no obvious reason why the Defendant could not have applied the proceeds of the sale of I.R. 136 as it did, whether or not there was any legally valid "merger" of the Bands. Absent some evidence the transaction was unconscionable or exploitative, there is no reason to set it aside. As noted, the Papaschase Band got as good as they gave in the transaction. It would be an unusual result if the Papaschase descendants could claim back the money from the sale of I.R. 136 without bringing into account the benefits received from the occupation of the Enoch Reserve.

92 A related issue is whether the federal Crown could recognize the merged Band without a meeting, or a vote, or the agreement of one or both Bands. While such a meeting might have been advisable, it was not a legal necessity. There was no statute requiring a meeting or consent, as there was for example if reserve land was to be surrendered (*supra*, para. 32). Decisions made by the leaders of First Nations can be binding on the Band without any general meeting, as happened in *Roberts v. R.*, [2002] 4 S.C.R. 245 (S.C.C.) at para. 33. The definition of "Band" in the *Act* is not dependent on a meeting, a vote, or a consensus. Therefore the absence of a meeting or vote does not render invalid the *de facto* merger of the two Bands in about 1887, and their legal merger in 1894.

93 The agreement between the Enoch Band and the Papaschase Remnants was an agreement between two First Nations. Of such an agreement the Court said in *Roberts v. R.*, at para. 102:

> The Cape Mudge forbears, whose conduct is now complained of, were autonomous actors, apparently fully informed, who intended in good faith to resolve a "difference of opinion" with a sister band. They were not dealing with non-Indian third parties (*Guerin*, at p. 382). It is patronizing to suggest, on the basis of the evidentiary record, that they did not know what they were doing, or to reject their evaluation of a fair outcome. Taken in context, and looking at the substance rather than the form of what was intended, the 1907 Resolution was not in the least exploitative.

By 1894 the Papaschase remnants would have been well aware of the Enoch Band and the Enoch Reserve, having lived there for seven years. They would also have been well aware of their own membership, resources, and viability as a band. There is nothing obviously exploitative about the agreement to join the Enoch Band, and thereby gain a common interest in the Enoch Reserve, in exchange for sharing their own resources.

94 There is an issue as to the eventual fate of the proceeds of the sale of the Papaschase Reserve. At the hearing counsel were unable to state whether there remains a capital sum arising from the sale of the Papaschase Reserve, or whether the entire sum was disbursed to the Enoch Band at some time in the past. This raises a triable issue that might be dealt with summarily if a better record was produced, but at the moment it is an outstanding issue.

The Taking of Metis Scrip

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95 The allegations in the Amended Statement of Claim about Metis scrip present two themes. The first theme is that Metis scrip was a bad idea generally, and that the government should never have implemented such a scheme. As the Amended Statement of Claim alleges in para. 23(i) "The issuing of scrip to Treaty Métis served no legitimate public purpose." The second theme is that the taking of Metis scrip by members of the Papaschase Band was a bad idea for them personally, and that the Defendant owed a fiduciary duty to dissuade them from that course of action. In my view the record does not show a genuine issue for trial with respect to either issue.

96 The general challenge to the issuance of Metis scrip as bad public policy cannot succeed because of the doctrine of the supremacy of Parliament. Whatever the merits of the policy, it was authorized by Parliament. The courts have no ability to examine legislation in the pre-*Charter* era to see if it is good policy or bad. Such issues are simply not justiciable: L. M. Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada:* Toronto, Carswell, 1999, at pp. 164-67. As previously noted, the *Dominion Lands Act* authorized the issue of scrip. The *Indian Act* before 1888 gave any half-breed an absolute right to withdraw from Treaty. The policies implicit in these statutes were implemented by the appointment of Scrip Commissioners, and there is no basis for attacking the validity of Order in Council P.C. #688 (*supra*, para. 39). Even if the scrip policy was, as the Plaintiffs argue, contrary to Treaty, Parliament had the power to override treaty rights. The merits of this policy not being justiciable, it raises no genuine issue for trial.

97 The allegation that Chief Papaschase and the other members of the Band should have been dissuaded from taking scrip is met by related arguments. Chief Papaschase had an absolute right under the *Indian Act* to withdraw from Treaty. Under the terms of P.C. #688 he had an absolute right to take scrip for 160 acres. The correspondence previously quoted makes it clear that the Indian Agents in the Northwest Territories were concerned about the implication of this policy and were attempting to persuade Metis not to take scrip, but the Metis did not accept this advice (see Tyler Thesis, pg. 100; Neeves Affidavit, Exhibit B, Tab 212). The Agents at the time recognized that, given the wording of the statute and the Order in Council, they had no discretion to refuse applications for scrip (Augustus Affidavit, Exhibit 64; Tyler Thesis, pg. 97). Chief Papaschase actively lobbied to have scrip issued to him; he correctly sensed that he had a right to scrip, and that it could not be denied to him. If he had (hypothetically) commenced an action for *mandamus* to compel the issuance of scrip to him, the Department would have had some difficulty in answering his claim. In all of these circumstances Chief Papaschase was entitled to scrip, he demanded it, and there is no genuine issue for trial on the subject. I agree with the inference drawn by Dr. Evans (Evans Report, pp. 55, 68, 80, 81) that on this record there is no evidence that Chief Papaschase was incapable of making informed decisions on these issues. As the Court held in Roberts v. R., *supra*, at para. 102 "it is patronizing to suggest . . . that they did not know what they were doing . . .". After 1888, when the statute was amended to give the Department the discretion over the withdrawal from Treaty, there may have been some responsibility on the Defendant, but that was not the case in 1886.

98 The Plaintiffs argued that Chief Papaschase was not really living a Metis lifestyle (*supra*, paras. 28-9), and was more properly considered an Indian, and so should not have been allowed to take scrip. It is true that the Department officials tried to dissuade those who lived a traditional Indian life from taking scrip, and in some cases they even refused such persons scrip (Evans transcript, pp. 32-36). At this time "living an Indian mode of life" partly defined who was entitled to be recognized as a "non-treaty Indian" (see *infra*, para. 167), so it would have been a term of art to the Department officials. But the "lifestyle" of the applicant was not one of the legal preconditions of the right to take scrip, or to withdraw from Treaty. Whether Chief Papaschase and his family led such life is not legally relevant. They were clearly of mixed blood, and entitled to withdraw from Treaty. As Dr. Evans points out (Evans Transcript, pp. 36-37) the Aboriginal people were allowed to self-identify as Indians or Metis when it came to entering Treaty, and the statutes in force at the relevant time gave them the same right to self-identify when it came time to withdraw from Treaty. The Plaintiffs suggest that some Papaschase members of pure Indian blood were allowed to take scrip, but there is no evidence to support that contention.

99 The Plaintiffs complain that the Papaschase members were not given independent legal advice before they accepted scrip. They argue that the Papaschase members should have been advised of all of the consequences before they were allowed to withdraw from treaty. To talk about anyone getting "independent legal advice" in the Edmonton area of the

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Northwest Territories in the 1880's is a completely artificial concept. This is an attempt to apply 21 st Century standards to 19 th Century transactions, and it is one of the reasons we have limitation statutes to prevent the prosecution of stale claims: see *Roberts v. R.*, [2002] 4 S.C.R. 245 (S.C.C.), at para. 121. In any event the record is clear that the Band members did receive some advice; in fact the Indian Agents at first refused to process the scrip applications of the Band. Chief Papaschase was not pleased with this (supra, para. 28), and the only inference that can be drawn is that there would have been discussions at the time in which the Agents indicated their concerns about the effect the taking of scrip would have on the Band and the Indians (see Evans Transcript, pp. 63-65). The only possible inference is that the Band members were told not to take scrip, but they persisted. Further, the standard set of scrip documents contained the following waiver:

> I hereby forfeit all Indian rights. I agree to leave the reserve, to give up my house and all other improvements which I may have on the reserve without compensation, also any cattle or implements received by me as an individual or as a member of the Band.

(Neeves Affidavit, Exhibits 13, 23-28, 29). The documents all state that they were explained to the Band member signing the document, and there is no evidence on the record to suggest that they were not. There is no evidence to suggest that if the Band members had received "independent legal advice" they would have acted differently. In short, the Papaschase members did receive advice about taking scrip; they just chose not to follow it.

100 The Plaintiffs also point out that the exact motivation behind the taking of scrip is unknown. The correspondence of the time suggests that the Papaschase Band members were motivated by the prospect of receiving a sum of money immediately, and they did not fully consider the long-term implications of their actions. The Plaintiffs suggest that there might have been other motivations. They argue that the Defendant failed to provide the farming implements and other benefits called for by the Treaty, thereby causing the Papaschase Band to fail to establish itself as a farming community. The Plaintiffs argue that the Defendant did not properly help the Papaschase Band to make the transition from a hunting to a farming economy. It is suggested that the disappearance of the buffalo and the resulting hardships and starvation left the Papaschase Band with little choice. Another contributing factor is said to be the failure to survey the Reserve. The Plaintiffs argue that the Defendant should have given or explained other options available to the Papaschase Band, before allowing them to accept scrip. The Plaintiffs argue that all of these factors combined together represent a breach of the fiduciary obligation of the Defendant towards the Papaschase Band. (See Evans Transcript, pp. 56-65). The Plaintiffs argue that the fact that the Papaschase members who took scrip appear to have been broke by 1887 is convincing evidence of this breach of fiduciary duty. These arguments are subject to the same response. To the extent they argue that the scrip policy was misconceived the issue is not justiciable. Otherwise, there was an absolute right to withdraw from Treaty, regardless of the motivation. There is no evidence on this record of misrepresentation, duress or other misconduct that would vitiate the decisions to take scrip. Speculation about possible motivations for taking scrip, without some evidence, is not sufficient. No triable issue has been shown.

The Claim that the Defendant Deliberately Set Out to Dissolve the Papaschase Band

101 The Plaintiffs suggest there was a scheme by the Department of Indian Affairs, motivated by the lobbying of the Edmonton Settlement, to undermine the Papaschase Band so that the Reserve would be sold off for settlement. There is no direct evidence of this, but the Plaintiffs suggest the record raises a triable issue on the point. The Plaintiffs point to the reference to the Band being "wiped out" by moving them to Enoch (*supra*, para. 45), but as I have previously stated, taken in context this single reference over a year after Chief Papaschase took scrip does not support an inference there was a plan to take over the Reserve. They note that the Papaschase Reserve was surveyed into quarter sections even though it was to be a reserve, implying that this was done to facilitate its sale; Dr. Evans testified (Evans transcript, pp. 14-19) that this was a common and innocent occurrence, and there is no evidence on the record to contradict that. The Plaintiffs note that the Papaschase members suffered great hardships when the buffalo did not return, and allege that the Defendant did not give them all the benefits promised by the Treaty, thereby preventing the Papaschase Band from becoming self supporting. This, it is argued, was one cause of the Papaschase members taking scrip. Undoubtedly the changing environment on the prairies at that time had something to do with the signing of the Treaties by the Indians in

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the first place, and also with their subsequent desire to withdraw from Treaty, but there is no evidence that there was any sort of plan to evict the Papaschase Band by withholding supplies. While their record was not perfect, the local Agents tried to distribute supplies when they could, often receiving criticism from their superiors for being too generous. On occasion food may have been refused to Indians who would not work (*infra*, para. 106) but there is little evidence this was even done to the Papaschase Band, much less that it was done to undermine the Band. Any issue raised by these facts does not raise any "genuine" issue for trial; the Plaintiffs have not produced any evidence to raise the matter above a bare allegation.

102 The Defendant has produced important pieces of evidence that suggest that there was no such scheme. Although all communications at the time were in writing, and a surprising number of documents have survived, there is no written reference to such a plan. There are several places on the record when the Department simply stood up to the Edmonton settlement (and the Dominion Lands Office) and supported the claims of the Band. If there was such a plan to undermine the Band, it must have been formulated after 1880, because if the plan was in existence before that there is no explanation why the Reserve was sited where it was in 1880. The Edmonton settlement was already lobbying against the location of the Reserve then, and if the Department was motivated by that pressure, one would have expected the Department would simply have put the Reserve somewhere else. Further, the Papaschase Band was valued and rewarded by the government because it did not join the Northwest Rebellion (Evans Report, pp. 58-60; Tyler Thesis, pg. 73), and it therefore seems unlikely that the government would have conspired to disband it. Most importantly, if there was a plan to undermine the Papaschase Band the Department missed its best opportunity. When the Papaschase Band members applied en mass to take scrip, the easiest thing to do would have been to accept all the applications. The initial refusal of the local Agents to do so despite the pressure from the Band members is completely inconsistent with a secret agenda to make the Reserve available for European settlement. In short, there is nothing on the record to suggest that there is a genuine issue for trial on the theory that there was a deliberate plan or agenda to deprive the Papaschase Band of its Reserve.

103 In summary there is no evidence on the record to support the Plaintiffs' theory. The sole comment in the September 7, 1887 report to the Band being "wiped out by removing" is not sufficient to raise a genuine issue for trial. This letter was written over a year after Chief Papaschase took scrip and withdrew from Treaty. The evidence is overwhelming that the withdrawal of the core leadership group from Treaty is what led to the demise of the Band, and that the merger with Enoch's Band was seen as a viable solution to that problem. The merger with Enoch's Band was the effect of taking scrip, and not the implementation of a grand plan to undermine the Papaschase Band.

Existence of the Papaschase Band

104 In my view there is no genuine issue for trial on the continued existence of the Papaschase Band. What happened to the Band, its Reserve, and its members is well established on this record. Whether in law the Band continues to exist can be determined without the necessity of a trial (see *infra*, paras. 188-92).

Breaches of Treaty

105 The record clearly shows that in the 1880s the Plains Cree were exposed to particular hardships arising from the disappearance of the buffalo and the adjustment to the new reality of Reserve life. The Plaintiffs allege that the Papaschase Band was exposed to starvation at this time, although Dr. Evans questioned whether this was a fair description of the level of hardship (Amended Statement of Claim, paras. 17, 20, 23(a); Evans Transcript, pg. 60). The Plaintiffs allege that the hardships, however they be characterized, were caused or contributed to by the failure of the Defendant to discharge its obligations under Treaty No. 6. Specifically, it is alleged that the Defendant did not provide the necessary farming implements and farm training. It is also alleged that the Defendant failed to provide provisions to the Band in times of famine, as specifically promised in Treaty No. 6.

106 The Plaintiffs' evidence in support of these allegations is particularly weak and unsatisfactory. For example, the affidavit of Cammie Augustus reads as follows:

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> 6. The historical documents relating to the issuing and administration of rations for the purposes of providing relief to Indians in destitute conditions in the Edmonton agency, particularly during the 1880's, suggest that such rations did not reach the Papaschase Band, and that these shortages were not accounted for nor explained in a satisfactory manner.

Ms. Augustus attaches a number of exhibits which she deposes are "the supporting documents". A number of these documents would correctly be categorized as "audit letters". They have to do with the ability (or inability) of the clerks to keep proper records of their inventory. Many of them seem to have little bearing at all on whether appropriate supplies were given to the Papaschase Band. Some of the other exhibits are newspaper clippings and extracts from the debates in the House of Commons, neither of which can be taken to be strong evidence of the truth of their contents. The Augustus Affidavit goes on to say:

> 7. There are indications in the historical records that government officials may have withheld the provision of rations to Indians in the Edmonton agency either as a cost cutting measure or as a means of punishment and control.

Again, exhibits are attached. Exhibit 18 is an extract from the supply debates in the House of Commons in 1882, six years before the surrender of I.R. 136. The debate laments the large amount of money being spent on Treaty annuities, discusses the possibility of fraudulent claims for Treaty annuities, and discusses whether Canadian-made ploughs are as good as American-made ploughs. In response to a suggestion that the Indians were becoming overly dependent on the government, Sir John A. MacDonald is quoted as saying: "I have reason to believe that the Agents as a whole, and I am sure it is the case with the Commissioner, are doing all they can, by refusing food until the Indians are on the verge of starvation, to reduce the expense . . .", but he also stated: "It will occasionally happen that the agents will issue food too liberally . . .". There is no mention whatsoever of the Papaschase Band or the Edmonton area. This document provides scant evidence in support of the claim. Exhibit 19 is an 1883 letter from the Commissioner in Regina to Sir John A. MacDonald in Ottawa. It contains the statement: "At present the only means of compelling labour in most cases is by withholding food supplies and even where it is given to the hard workers the lazy ones must suffer and consequently beg from their more energetic friends." Again, there is no reference to the Papaschase Band. Exhibit 20 appears to be an 1884 letter from the Department of Indian Affairs in Ottawa to the Comptroller of the Northwest Mounted Police in Ottawa. It asks that police officers be sent to certain reserves, and there is a reference to "their rations are stopped on their leaving their reserves, or on their refusing to work." The letter mentions a number of reserves, but not the Papaschase Reserve or the Edmonton area. In short, the evidence in support of these allegations is particularly flimsy, general in nature, and barely probative of the claim. There are occasional references to the Papaschase Band, and overall there is probably enough uncertainty on the historical record to justify the trial of an issue. As I have determined that this claim is barred by the limitations statute and the non-existence of the Papaschase Band, I need not consider this matter further.

Prevention of Trespass

107 The Plaintiffs allege that the Defendant failed to prevent trespasses on the Reserve. There is no evidence on the record to support these allegations that would raise a genuine issue for trial. The historical record does demonstrate that before the Reserve was finally surveyed in 1884, the Dominion Lands Office granted some neighbouring settlers the right to cut firewood and timber on what was to become I.R. 136. The Department of Indian Affairs took this matter up, and a small amount of money was eventually transferred from the one Department to the other to resolve this dispute. There is no evidence to suggest that this minor point was anything more than a difference of opinion, or that it was not resolved in a satisfactory manner. There is no genuine issue for trial.

Summary

108 In summary, the Plaintiffs have brought forward sufficient evidence to raise a genuine issue for trial at a factual level on a few of the claims: Reserve size, the disposition of the proceeds of sale of I.R. 136, and withholding of food supplies from the Indians. On the other claims the Defendant has produced sufficient evidence to support its application

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for summary dismissal, and the Plaintiffs have failed to meet the evidentiary burden that falls on them. Although at a factual level a genuine issue for trial exists with respect to the issues just mentioned, that is not the end of the analysis. It is still necessary to determine whether the claims are barred by the passage of time, and if not whether the Plaintiffs have standing to pursue the claims.

Statutes of Limitation

109 The Defendants argue that even if there are some genuine issues for trial at a factual level, all possible claims have long since been barred by the passage of time. Indeed, given that the events in question took place over 100 years ago, it would be somewhat surprising for the claims to survive the statutes of limitations. In order to test this submission it is necessary to determine what statutes of limitation were in force at the time, their applicability to the federal Crown, and finally their applicability to the particular causes of action alleged.

110 There are sound policy reasons for statutes of limitations. *Roberts v. R.*, [2002] 4 S.C.R. 245 (S.C.C.), at para. 121, discusses the problems with prosecuting stale claims:

> . . . Witnesses are no longer available, historical documents are lost and difficult to contexturalize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

This decision also confirms the applicability of statutes of limitations to aboriginal claims, and specifically (at paras. 119-20) to claims arising from the surrender of Reserve lands. On this point it overrules cases like *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] O.J. No. 1406 (Ont. S.C.J.). The Plaintiffs' argument that aboriginal claims are immune from limitation defences must fail.

111 As explained later, there were no limitations statutes in force in the 1880s that would cover all of the claims presented in this action. However, limitations statutes were enacted later on. When a new limitations statute is enacted without any specific transitional provisions, it can have one of two possible effects on causes of action existing as of the effective date of the statute. On the one hand, the new limitation statute could be interpreted as applying to all existing causes of action, with the result that the new statute might bar some older causes of action on the very date of enactment: *Roberts v. R.*, *supra*, at paras. 125-27, 131 (new limitations statute; effect of transitional provisions); *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co.* (1993), [1994] 1 A.C. 486 (U.K. H.L.) (new limitation period has retrospective effect); *McGrath v. Scriven* (1920), [1921] 1 W.W.R. 1075 (S.C.C.) (limitation shortened to three months from six months); *Pegler v. Railway Executive*, [1948] A.C. 332 (Eng. H.L.) (new limitation barred action the day it came into effect); *Demas v. Manitoba (Labour Board)*, [1977] 3 W.W.R. 716 (Man. Q.B.) (new limitation, action out of time); *Beattie v. Dorosz*, [1932] 2 W.W.R. 289 (Sask. C.A.) (new limitation). On the other hand, the new limitations statute might be interpreted so that time only begins to run against existing causes of action as of the date the new enactment comes into effect: see *Petersen v. Kupnicki* (1996), 44 Alta. L.R. (3d) 68 (Alta. C.A.). In this particular case it does not matter which interpretation one places on the new limitation statutes; so much time has passed that the causes of action brought forward by the Plaintiffs would be barred under either interpretation.

112 The *Northwest Territories Act*, R.S.C. 1886, c. 50, deemed the laws of England existing on July 15, 1870 to be in force in the Northwest Territories. The effective date is of course the same date that the Hudson's Bay Company surrendered those territories to Canada. Thereafter, new statutes of limitation were enacted from time to time.

Statutes of Limitation for Certiorari

113 The laws of England had long had a six month limitation period for an application for *certiorari*. The original English statutes only applied to *certiorari* against the decisions of Justices of the Peace, and they have no application to these proceedings, even if they did become a part of the law of the Northwest Territories: *Ostrowski v. Saskatchewan (Beef Stabilization Board)* (1993), 109 Sask. R. 40, 101 D.L.R. (4th) 511 (Sask. C.A.). By 1968 (at the latest) Alberta Rule 742 applied the six-month limitation period to all applications for *certiorari*, regardless of the decision-maker being

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impugned. Accordingly, by 1968 at the latest, time would have run with respect to any of the decisions in question. The provisions of the new *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), transferring the jurisdiction to review the decisions of federal decision-makers to the Federal Court, did not come into effect until 1970, at which time the limitation period under the provincial Rules of Court (which previously applied to the review of federal decisions) would already have expired.

114 The Applicants in this case have not applied for *certiorari*, although they have applied for declarations that the various decisions they challenge are void. Some case law holds that the six-month limitation period for *certiorari* cannot be evaded by simply asking for a declaration of invalidity instead: *Krawec v. Alberta (Workers' Compensation Appeals Commission)* (1998), 233 A.R. 110 (Alta. Q.B.); *Simlote v. Alberta*, [1989] A.U.D. 673, 69 Alta. L.R. (2d) 401 (Alta. C.A.); *Babiuk v. Calgary (City)* (1992), 133 A.R. 21, 4 Alta. L.R. (3d) 390 (Alta. Q.B.); *Boyd v. Alberta (Public Service Commissioner)* (2000), 278 A.R. 341 (Alta. Q.B.), aff'd (2002), 299 A.R. 198 (Alta. C.A.). Other cases suggest that time limitations do not apply to decisions that are characterized as "void", or that the time limitation on a motion to quash does not apply to a declaration that the decision is void: see *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)* (2002), 3 Alta. L.R. (4th) 211 (Alta. C.A.) at para. 162, reversed on other grounds (2004), 236 D.L.R. (4th) 385, 2004 SCC 19 (S.C.C.). *A.U.P.E. v. Alberta* (2002), 310 A.R. 240 (Alta. Q.B.) at paras. 39-40; *Urban Development Institute v. Rocky View (Municipal District No. 44)* (2002), 8 Alta. L.R. (4th) 273 (Alta. Q.B.) at para. 12. In my view the better interpretation is that the limitation period prevents all challenges to the decision, including the ability to challenge the alleged voidness of the decision. In the end, this is largely a matter of statutory interpretation: when the Legislature enacted the limitation period, did it intend to apply it only to errors of law on the face of the record, or also to jurisdictional errors? The purpose of the limitation period is to bring certainty to administrative decisions, and there is no obvious reason why the Legislature would exempt a large body of decisions from the rule. In Alberta the issue is in my view answered by Rule 753.05 which reads:

> 753.05 Subject to Rule 753.11, where the applicant on an application for judicial review is entitled to a declaration that a decision or act is unauthorized or invalid, the court may, instead of making a declaration, set aside the decision or act.

While not expressly addressing the issue, this rule clearly contemplates that no distinction is to be drawn between a motion to quash and a declaration. It specifically states that it is "subject to Rule 753.11" which is the six-month limitation period. I accordingly conclude that seeking a declaration is not an effective strategy to avoid the six-month limitation period for quashing a decision. I note also that public law remedies are discretionary and can be denied for delay in prosecution: *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.) at paras. 262 *ff*. They can also be denied when they provide no effective remedy. Declaring a decision to be invalid when there is no way to avoid its consequences is pointless.

115 The limitation period for obtaining a writ of *certiorari* would potentially block any direct challenge to a number of the key decisions made in this case:

(a) The Order in Council of October 12, 1889 approving the surrender of I.R. 136.

(b) The Order in Council of March 30, 1885 setting the terms for the issuance of Scrip.

(c) The decision of the Department to allow Chief Papaschase to take scrip.

(d) The decision to amalgamate the Papaschase and Enoch Bands.

(e) The decision to apply the proceeds of the sale of I.R. 136 for the benefit of the combined Enoch Band.

Some of these decisions may be legislative in nature, or may in any event for other reasons not be amenable to *certiorari*. However, on the assumption that they are amenable to *certiorari*, the time to challenge them has expired.

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General Statutes of Limitation

116 There was no comprehensive limitations statute in force in the Northwest Territories prior to the creation of Alberta and Saskatchewan in 1905, and subsequently there was no comprehensive limitation statute in effect in Alberta until the passage of the *Limitation of Actions Act*, 1935, S.A. 1935, c. 8. The 1935 statute was the result of the work of the Uniformity Commissioners, and it was intended to provide a comprehensive, modern and consistent approach to the subject. The 1935 provisions were carried forward to the *Limitation of Actions Act*, R.S.A. 1980, c. L-15 which contained the following provisions of interest in this action:

> 4(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
>
> (c) actions
>
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or
>
> (ii) for an account or for not accounting,
>
> within 6 years after the cause of action arose;
>
> (e) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;
>
> (g) any other action not in this Act or any other Act specifically provided for, within six years after the cause of action therein arose.

Virtually all of the claims advanced by the Plaintiffs can be encompassed in one of these three provisions. Accordingly, subject to the issue of discoverability, discussed *infra*, paras. 135 *ff*, most of the causes of action advanced by the Plaintiffs became statute barred six years after these provisions were first enacted, that is in 1941.

Limitations Protecting Fiduciaries

117 The process of surrendering Reserve lands does not create a trust, although it does give rise to fiduciary obligations: *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at pp. 349, 355, 386; *Roberts v. R.*, *supra*, at paras. 99-100. The subsequent dealings with the proceeds of sale may create a formal trust; the deed of surrender of I.R. 136 does use the word "trust": see *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (S.C.C.) at para. 13. Trustees were traditionally given less protection from statutes of limitation than other defendants. Many of the relevant statutes were held to extend beyond express trustees and to cover other equitable actors: *Soar v. Ashwell*, [1893] 2 Q.B. 390 (Eng. C.A.); *Sharpe, Re*, [1892] 1 Ch. 154 (Eng. Ch. Div.); *Taylor v. Davies* (1919), [1920] A.C. 636 (Ontario P.C.). Accordingly, the Plaintiffs' best position in this litigation would arise if the Defendant's obligations are equitable in origin.

118 Equity generally followed the common law when it came to limitation periods: a person could not sue in equity just to avoid a limitation period that would block a common law claim. However, this did not apply to claims between a trustee and the beneficiary of a trust, because equity took the view that there was a unity of interest between the trustee and the beneficiary. As a result, the courts of equity did not recognize any common law time limitation on the ability of a beneficiary to sue a trustee for breach of trust: D.W.M. Waters, *Law of Trusts in Canada*, (2d. ed., 1984) at pp. 1014-1021; *Darby and Bosanquet on the Statute of Limitations*, (2d. ed., 1893) at pp. 234-38, 245-47, 263-5; H. Godefroi, *The Law Relating to Trusts and Trustees* (3d. ed., 1907) at pp. 847-49, 859-60, 868-870. Equity however had separate rules on delay and laches that could be used to bar stale claims (see *infra*, paras. 131-3). That was the state of the law when English law was received into the Northwest Territories. When the common law courts and the courts of equity

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were merged in England (after English law was received in the Northwest Territories), this principle was carried forward in the *Judicature Act, 1873*, 36 & 37 Vict., c. 66, s. 25(2):

> No claim of a cestui que trust against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any statute of limitations.

Similar provisions were subsequently enacted in the Northwest Territories and Alberta, specifically in the *Judicature Ordinance*, R.O. N.W.T. 1888, c. 58, s. 9(1), which was carried forward to the *Judicature Act*, S.A. 1919, c. 3, s. 37(1), eventually R.S.A. 1980, c. J-1, s. 14, and which remained in force until it was repealed by the *Limitations Act*, S.A. 1996, c. L-15.1 effective March 1, 1999.

119 On July 15, 1870 when English law was received into the Northwest Territories, the general presumption was thus that no limitation period applied to breaches of trust. There were however exceptions, specifically the *Real Property Limitation Act* of 1833:

> XXIV. And be it further enacted, That after the said Thirty-first Day of December One thousand eight hundred and thirty-three no Person claiming any Land or Rent *in Equity* shall bring any Suit to recover the same but within the Period [*twenty years*] during which by virtue of the Provisions herein-before contained he might have made an Entry or distress or brought an Action to recover the same respectively if he had been entitled at Law to such Estate, Interest, or Right in or to the same as he shall claim therein in Equity.
>
> XXV. Provided always, and be it further enacted, That *when any Land or Rent shall be vested in a Trustee upon any express Trust*, the Right of the Cestuique Trust, or any Person claiming through him, to bring a Suit against the Trustee, or any Person claiming through him, to recover such Land or Rent, shall be deemed to have first accrued, according to the Meaning of this Act, at and not before the Time at which such Land or Rent shall have been conveyed to a Purchaser for a valuable Consideration, and *shall then be deemed to have accrued only as against such Purchaser* and any Person claiming through him.
>
> XXVI. [Exception for concealed fraud]
>
> XXVII. Provided always, and be it further enacted, That nothing in this Act contained shall be deemed to interfere with any Rule or Jurisdiction of Courts of Equity in refusing Relief on the Ground of Acquiescence or otherwise to any Person whose Right to bring a Suit may not be barred by virtue of this Act.

(emphasis added)

Since this statute of general application was in force in England in 1870, it became a part of the law of the Northwest Territories. The English *Real Property Limitation Act*, *1874*, 37 & 38 Vict., c. 57 was specifically adopted in the Northwest Territories by *An Ordinance Respecting the Limitation of Actions Relating to Real Property*, O.N.W.T. 1893, c. 28, s. 1. It amended the 1833 *Act* by reducing the limitation period to twelve years, and effectively confirmed that the 1833 *Act* was a part of the law of the Northwest Territories.

120 The *Act* of 1833 did not operate in favour of the trustee. It only operated in favour of the purchaser, because the section specified that time commenced to run "only as against such purchaser". The effect of the statute was therefore to quiet titles of purchasers for value who had obtained the title from a trustee. Prior to the *Act* of 1833, such titles were vulnerable if it turned out the trustee had acted in breach of trust. After the expiration of the limitation period in the *Act* of 1833, the beneficiaries would only have a remedy against the trustee, and not against the land or the subsequent purchasers. Section 17 of the *Limitation of Actions Act* carried this concept forward in Alberta in a limited form until it was repealed in 1999. The effect in this case would be that purchasers of the lands formerly a part of I.R. 136 would have an unassailable title once the limitation period expired, even if I.R. 136 was surrendered in breach of trust. If the last of I.R. 136 was sold in 1930, the last limitation would have expired against a subsequent purchaser in the 1940s.

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121 In 1888 a new *Trustee Act, 1888*, 51 & 52 Vict., c. 59, was passed in England, and it provided some general protection for trustees. The text of the 1888 statute is virtually identical to the provisions of the Alberta *Limitation of Actions Act*, and is obviously the source of Alberta law as it stood up to 1999. The text, as continued by R.S.A. 1980, is:

> **PART 7 — Trusts and Trustees**
>
> 40 *Subject to the other provisions of this Part*, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of a breach of the trust, shall be held to be barred by this Act.
>
> 41(1) In this section, "trustee" includes an executor, an administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee.
>
> (2) In an action against a trustee or a person claiming through him,
>
> > (a) rights and privileges conferred by this Act shall be enjoyed *in the like manner and to the like extent* as they would have been enjoyed in the action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee, and
> >
> > (b) if the action is brought to recover money or other property and is one to which no limitation provision of this Act applies, the trustee or person claiming through him is entitled to the benefit of and is at liberty to plead the lapse of time as a bar to the action in the like manner and to the same extent as if the claim had been against him in an action for money had and received,
>
> except when the claim is founded on a fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use.
>
> (emphasis added)

Section 41 of the statute was first contained in *The Trustee Ordinance*, O.N.W.T. 1903 (2d. Sess.), c. 11, s. 55, and was moved to the *Limitation of Actions Act* in 1935. When the English *Trustee Act* of 1888 was replicated in Alberta, the general principle that limitations did not benefit trustees (already found in the *Judicature Ordinance*; see *supra*, para. 118) was repeated as subsection 55(1) of the new *Trustee Ordinance* of 1903, and eventually found its way to s. 40 of the *Limitation of Actions Act*. The general principle now contained the proviso that it was subject to the specific provisions in favour of trustees then being enacted.

122 The parallel existence of s. 40 of the *Limitation of Actions Act* and s. 14 of the *Judicature Act* on their face produce unusual results for express trustees. The provision in the *Judicature Act* is unconditional, and states that express trustees do not benefit from limitation statutes, whereas the provision in the *Limitation of Actions Act* is said to be "subject to the other provisions of this Part". Literally read, s. 14 of the *Judicature Act* takes away from express trustees any benefits that might have been found in s. 41 of the *Limitation of Actions Act*, even though s. 41(1) specifically includes express trustees. The original answer to the problem was possibly found in the words of the statutes themselves. The *Judicature Act* provision specifically refers to "statutes of limitations". The *Trustee Ordinance* of 1903 was no such thing; it was in fact a "Trustee Act", not a statute of limitations. On this strict reading the two statutes could exist concurrently. The better argument though is that the *Judicature Ordinance* was intended only to be a general statement of principles, subject to specific exceptions found in more specific statutes. This was entirely consistent with the purposes of the *Judicature Act*, which was to state the principles on which the new merged superior court, with both common law and equitable jurisdiction, would operate. The general principle after the merger was that in cases of conflict the principles of equity would prevail over those of the common law, and the *Judicature Act* contains many general statements of principle designed to accomplish that end: *Hartson v. Tenison* (1881), 20 Ch. D. 109 (Eng. Ch. Div.) at pg. 121. The original provision on the non-application of limitations to trustees in the 1888 *Judicature Ordinance* was included in a section

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that listed a number of such general principles. The *Judicature Ordinance* also generally preserved the equitable defences such as laches. On the better interpretation, the general statement of principle in the *Judicature Ordinance* would yield to the provisions of more specific statutes, like the *Act* of 1833 and the *Trustee Ordinance* of 1903.

123 To summarize, the English law was generally carried forward into Alberta. The general proviso on the non-application of limitations to express trustees in the English *Judicature Act* of 1873 was carried forward into the *Judicature Ordinance* of 1888. The provisions of the English *Trustee Act of 1888* were carried forward into the *Trustee Ordinance* of 1903. There were no obvious conflicts between the two statutes until 1935, as long as the *Judicature Act* is held to apply to "statutes of limitation" strictly speaking. This state of affairs broke down in 1935 when the provisions previously in the *Trustee Act* were moved to the new *Limitation of Actions Act.* It was perhaps not noticed that the new 1935 *Limitation of Actions Act* was clearly a "statute of limitations" within the words of the *Judicature Act*. If s. 14 of the *Judicature Act* of Alberta is read literally, it essentially makes meaningless Part 7 of the *Limitation of Actions Act*. The English equivalent would have made meaningless the *Trustee Act, 1888*. That is not a sensible interpretation. In my view s. 14 of the *Judicature Act* should continue to be read as a general statement of the principles that guided the courts of equity in applying statutes of limitation. It must yield to more specific enactments, particularly Part 7 of the *Limitation of Actions Act*. Accordingly, from and after 1903 the provisions eventually found in Part 7 of the *Limitation of Actions Act* of 1980 have essentially governed actions against trustees in the province.

124 Even if the general provision in the *Judicature Act* is read literally the same result will obtain in this case. Firstly, s. 14 of the *Judicature Act* was repealed in 1999, two years before this action was started. Secondly, a bare fiduciary is not an "express trustee", so the contradiction in the wording does not affect all aspects of this claim. Thirdly, so long as the *Judicature Act* is limited to "statutes of limitation" strictly speaking there would be no conflict until 1935. By the time the limitation provisions respecting trustees were moved from the *Trustee Act* to the *Limitation of Actions Act* in 1935, the limitations governing the actions in this case would all have expired. Almost all the key events occurred before 1900, and they would have been statute-barred well before the amendments in 1935. Unless the statute specifically provides for revival, changes to limitation statutes do not revive actions that have previously been barred: *Interpretation* Act, R.S.A. 2000, c. I-8, s. 35(1)(c); *Alberta (Director, Parentage & Maintenance Act) v. H. (R.)* (1993), 10 Alta. L.R. (3d) 225 (Alta. C.A.).

125 It follows that the law respecting limitation periods to which trustees could historically resort was as follows:

(a) Between 1870 and 1903 the law in the Northwest Territories was the equitable law of England, namely that as a general rule trustees could not take the benefits of statutes of limitation to defeat claims made by their beneficiaries. After 1888 this principle was specifically stated in the *Judicature Ordinance*. The *Real Property Limitations Act* of 1833 was also a part of the law of the Northwest Territories, but it did not protect trustees.

(b) From 1903 until 1999 the law was as eventually stated in s. 41 of the *Limitation of Actions Act*. Between 1903 and 1935 the relevant provision was contained in the *Trustee Ordinance* or *Act*, but the text of the provision did not change when it was moved in 1935 to the *Limitation of Actions Act*.

(c) In a related rule, the purchaser from a trustee was protected by limitation defences starting with the *Act* of 1833, eventually carried forward in one aspect into s. 17 of the *Limitation of Actions Act*.

(d) After 1999 actions against trustees are governed by the general rules found in the *Limitations Act*. There are no longer special rules for limitations on actions against trustees and other equitable actors.

126 The overall effect of the statutes protecting trustees between 1903 and 1999 is the following:

(a) Under a combined reading of ss. 40 and 42(2)(a), trustees are entitled to take the benefit of limitation periods, subject to certain exceptions.

(b) The particular exceptions are that:

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(i) under the proviso in s. 41(2), there is no limitation on fraudulent breaches of trust by any kind of trustee, and

(ii) under the proviso to s. 41(2), there is no limitation on any claim to recover trust property or the proceeds thereof still in the possession of the trustee, or converted to his own use by the trustee. By its terms, this proviso can only apply to those types of fiduciaries who hold property.

(c) Section 41(2)(b) enacts a default limitation of 6 years, essentially confirming that ss. 4(1)(c) and (g) apply to trustees: see *Roberts v. R.*, *supra*, at para. 131; *Fairford First Nation v. Canada (Attorney General)* (1998), [1999] 2 C.N.L.R. 60 (Fed. T.D.), at para. 287.

These provisions applied equally to true trustees and many fiduciaries: s. 41(1); *Roberts v. R.*, *supra*.

127 The specific provisions for the limited non-application of limitation periods to trustees have an application in this action. When I.R. 136 was sold, there was an express provision that the proceeds would be held in trust. In that respect the Defendant was likely an "express trustee" (*supra*, para. 117) and there would appear to be no limitation period against the claim by the Plaintiffs for an accounting for the proceeds of the sale of I.R. 136, so long as the Defendant is still in possession of some of those proceeds. If the Defendant is no longer in possession of any of the proceeds of the trust property, then the time would have run six years after the Defendant last had possession of such property. It is not clear from the record whether the Defendant still holds any funds in trust as a result of the sale of the Papaschase Reserve. Counsel for the Defendant appeared to be under the impression that there is no such trust fund in existence, although counsel could give no absolute assurances to that end. Accordingly, if the Plaintiffs can establish that the Defendant still holds any proceeds of the trust, then the limitation period has not expired with respect to those proceeds. If however the Defendant disposed of the last of the proceeds of the trust more than six years before the action was started, then this claim would be barred.

128 Subject to the issue of discoverability, all other equitable claims in this action would have been barred in 1909, that is six years after s. 41 was first enacted.

The Limitations Act

129 The *Limitation of Actions Act* was repealed by the *Limitations Act*, S.A. 1996, c. L-15.1, effective as of March 1, 1999. The *Limitations Act* also repealed s. 14 of the *Judicature Act*. It would therefore follow that from and after March 1, 1999 a trustee would be entitled to claim the benefits of any statute of limitation, like any other ordinary litigant. The present action was commenced on February 9, 2001, within the transitional two-year period found in the new *Limitations Act*. The claims were all discoverable before March 1, 1999, and accordingly this case generally must be decided under the old *Limitation of Actions Act*, and the new *Act* is not of importance.

130 The provision in the new *Limitations Act* that claims discoverable before March 1, 1999 are subject to the former *Act* is stated to be "subject to ss. 11 and 13". The latter section reads as follows:

13. An action brought on or after March 1, 1999 by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the Limitations of Actions Act, R.S.A. 1980, c. L-15 had not been repealed and this Act were not in force.

This section also refers back to the former *Act*, giving the same result in this litigation. Section 13 does not say that there is no limitation period on aboriginal claims, it just preserves the old law for those claims indefinitely. There is an interesting question whether s. 13 is a limitation provision "between subject and subject" (see *infra*, para. 134) so that it would apply to the federal Crown at all. The philosophy of the *Crown Liability and Proceedings Act* seems to be that the federal Crown does not expect to be treated any better than ordinary subjects when it comes to limitations, but it does not expect to be treated any worse either. It is one thing for Parliament to adopt provincial limitations legislation

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of general application, but quite another to allow the provinces to enact limitation provisions that bind the Crown only. However, since the provisions of the former *Act* apply to this litigation in any event, I need not explore this issue further.

Laches and Acquiescence

131 While equity did not recognize any limitation periods in a claim by a beneficiary against a trustee, equity had its own rules to prevent the prosecution of stale claims. A trustee, and any other defendant in an equitable suit, could raise the defences of laches and acquiescence. Although the various *Judicature Acts* and *Ordinances* preserved the equitable rule that trustees could not benefit from statutes of limitation, they also preserved all of the equitable defences. When specific statutes of limitation were enacted, similar provisions were often included, an example being s. 27 of the *Act* of 1833, *supra*. The *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 3, specifically preserved the equitable defences of laches and acquiescence. So too does the *Limitations Act*, S.A. 1996, c. L-15.1, s. 10.

132 In *Roberts v. R.*, *supra*, at paras. 107-112, the Supreme Court specifically confirmed that the equitable defences of laches and acquiescence apply to Aboriginal claims. The Court stated at para. 108:

> Equity has developed a number of defences that are available to a defendant facing an equitable claim such as a claim for breach of fiduciary duty. One of them, the doctrine of laches and acquiescence, is particularly applicable here. This equitable doctrine applies even if a claim is not barred by statute. . . .

The Court held that the mere passage of time is not sufficient to make out the defence. The conduct of the claimant must be such that it "constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable". In the circumstances in *Roberts v. R.*, the Court held that the prosecution of the claims several decades after the underlying events occurred was unreasonable.

133 In my view this doctrine is engaged by the facts of this case, even if one accepts the validity of all of the claims of the Plaintiffs. It is clear that a number of Papaschase Band members joined the Enoch Band in 1887, and they and their descendants have lived as members of the Enoch Band for over a century. They have enjoyed the interest in the Enoch Band's Reserve given to them by the merger agreement of 1894. The Defendant sold off I.R. 136, and subsequently applied the proceeds of that sale to the benefit of the newly merged Enoch Band. By not making a claim for over 100 years, the Plaintiffs have allowed a *status quo* to develop both as against the Defendant, and as against the Enoch Band. Further, none of the witnesses to the various events and challenged decisions survive. In my view it would clearly be unreasonable to allow this action to proceed at this time, even assuming the Plaintiffs can make out their claim on the facts.

Limitations of Actions Against the Federal Crown

134 Generally speaking the federal Crown can raise any limitation period available to any other litigant. The present provisions are contained in the *Crown Liability and Proceedings Act*, as amended, R.S.C. 1985, c. C-50, s. 32:

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province *between subject and subject* apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within 6 years after the cause of action arose.

This particular provision has been in force since 1992, but provisions to the same effect have been in force for various types of claims since the *Petitions of Right Act*, R.S.C. 1886, c. 136, s. 8, the *Federal Court Act*, R.S.C. 1970 (2nd supp.) c. 10, s. 38(2), and the *Crown Liability Act*, S.C. 1952-53, c. 30, s. 19. These provisions make provincial limitation statutes effective federal law in claims against the federal Crown: *Roberts v. R.*, *supra*, at paras. 115-120.

Discoverability of the Claims

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135 The common law presumes that limitation periods begin to run when the claim might reasonably have been discovered. This is a rule of statutory interpretation that must yield to the exact wording of the statute: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), at para. 37. Some statutes (like the *Limitations Act*) adopt the same standard. However, some other statutes adopt the test of "actual discovery" of the cause of action (see for example s. 4(e) of the *Limitation of Actions Act*). It is accordingly necessary to examine the causes of action advanced by the Plaintiffs both with respect to actual discovery, and with respect to the reasonable prospect of discoverability.

136 The principle of discoverability is that time under a limitation statute does not begin to run until the claimant knew, or with reasonable diligence should have discovered the material facts on which the cause of action is based: *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at para. 77; *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.); *Peixeiro v. Haberman*, *supra*. What must be discoverable is the facts underlying the claim; ignorance of the law or subsequent discovery that a cause of action exists at law does not extend the limitation: *Cunningham v. Irvine-Adams* (2001), 88 Alta. L.R. (3d) 1 (Alta. C.A.); *Roberts v. R.*, *supra*, at para. 124. Subsequent clarification or evolution of the law does not postpone the discovery of the material facts so as to extend the limitation period. Asserting a claim is conclusive proof of discovery and discoverability: *B. (K.L.) v. British Columbia*, [2003] 2 S.C.R. 403 (S.C.C.) at paras. 55-57; *Sioui c. Conseil de la Nation Huronne Wendat*, [2003] 2 C.N.L.R. 364 (C.S. Que.) at para. 47. The onus of disproving discovery rests on the plaintiff when the defendant raises a limitation period: *Luscar Ltd. v. Pembina Resources Ltd.* (1994), 24 Alta. L.R. (3d) 305 (Alta. C.A.) at para. 133; *Mikisew Cree First Nation v. Canada* (2002), 2 Alta. L.R. (4th) 1 (Alta. C.A.) at para. 83; *Stell v. Obedkoff* (1999), 45 O.R. (3d) 120 (Ont. S.C.J.).

137 When an action is commenced very shortly after a limitation period has expired, it is often necessary to examine the issue of actual discovery, or reasonable discoverability, with considerable precision. In some cases a difference of a few days or weeks is crucial. In those cases it is often necessary to have a trial of an issue to determine exactly when the cause of action was discovered or could have been discovered. The same does not hold true in actions like the present one where the events underlying the cause of action occurred over a century ago. Here the record either demonstrates when the cause of action was discovered, or sufficiently precise inferences can be drawn from the record to be sure that time has long since run out. Even if the actual discovery or discoverability of a claim can be ascertained within a few years or even a few decades, that is sufficiently precise to determine the issue. In a very old case, determining whether the action is sufficiently "hopeless" to grant an application for summary dismissal does not require the same degree of precision, and the inferences that the court can draw about discovery or discoverability without resorting to a trial are much wider. This is particularly so when it is remembered that the burden of proving lack of discovery and a genuine issue for trial is on the Plaintiffs.

138 There are advantages to deciding limitation issues before trial when the facts are clear: *Mikisew Cree First Nation v. Canada*, *supra*, at paras. 83-88; *Madill v. Alexander Consulting Group Ltd.* (1999), 71 Alta. L.R. (3d) 50 (Alta. C.A.) at paras. 47-50. Where reasonable inferences from the record show that a limitation period has expired, summary dismissal of the claim is appropriate: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at paras. 28-35. In this case the record discloses, or raises strong inferences, that the causes of action were discovered many decades ago. As mentioned, the burden of proving lack of discovery is on the Plaintiffs, and they have filed no evidence on that point. There is no burden on the Defendant, as the Plaintiffs argued, to prove when the Plaintiffs discovered the material facts.

139 There is some evidence on the record of the actual discovery of the claims. In 1974 and 1975 James C. Robb, a lawyer practising in Edmonton, wrote to the Defendant indicating that he had been retained "to explore the possibility of a land claim on behalf of certain descendants of the Papaschase Band". In a letter dated July 4, 1974, the Defendant's Office of Claims Negotiation replied to Mr. Robb (Kohan affidavit, Exhibit S):

> As you may know, Enoch's Band of Winterburn, Alberta, has already submitted a claim with respect to the 1888 surrender of Passpasschase's Reserve #136. You may wish to explore with the Band the possibility of making a joint claim.

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The letter included some documentation relating to the 1888 surrender, and provided information on where other documents could be located. The letter noted that the Enoch Band had "done extensive archival research". The letter went on to state:

> In your letter you say you represent "certain descendants" of the Passpasschase Band. The question of who would have been entitled in 1888 to share in the proceeds of the sale of the Reserve is presently undergoing review in this office. It would materially aid our assessment if you could identify your clients and provide us with any information you may have which demonstrates their descent from the original Passpasschase Band members as well as the individuals to whom they were related.

Mr. Robb replied that a joint claim with the Enoch Band would not be possible, and that "we will in the near future then be submitting a claim on behalf of the descendants of the Papaschase Band alone." There was clearly actual knowledge of some of the claims being advanced as early as this time. There is no indication that the matter was taken further by Mr. Robb. I note that Mr. Robb still practices in Edmonton and he could have been examined by the Plaintiffs under Rule 266.

140 In 1979 Kenneth James Tyler wrote the Tyler Thesis (Kohan Affidavit, Exhibit X). Significantly, Mr. Tyler acknowledges that his research was financed by the Enoch Band, and he acknowledges the invaluable contribution made by a number of members and elders of that Band (pp. vi-vii). Footnote 5 on pg. 149 of the Tyler Thesis reads:

> In 1973, the Enoch's Band made a presentation to the Indian Claims Commissioner, Dr. Lloyd Barber, arguing that the Passpasschase surrender was invalid. The claim has not, as of 1978, been pursued in the courts, however.

Mr. Tyler discussed a number of the issues that arise in this litigation, including the intense lobbying by the European settlers in Edmonton to have the Papaschase Reserve located further away from the Settlement, as well as their subsequent satisfaction when the Reserve was surrendered and sold off. He reported in detail the circumstances under which I.R. 136 came to contain only 40 square miles (pp. 47-48). He discussed in detail the issues surrounding Indians taking Metis scrip and withdrawing from treaty (Chapter III). He specifically discussed the taking of scrip by the core of the Papaschase Band (pp. 90-5). The surrender of I.R. 136 is discussed in detail, as is the amalgamation of the Papaschase and Enoch Bands (Chapter IV). The Tyler Thesis points out (pp. 137-41) many of the aspects of the surrender that are challenged in this litigation, and concludes (at p. 149) that "they have cast doubt upon the validity of the entire procedure". The Plaintiffs argue that it is not clear that the Tyler Thesis became a public document immediately upon its creation, but that is not really the point. The point is that if Tyler could discover the facts he discusses, and thereby become aware of the potential claims now advanced, then any other interested party who was reasonably diligent could do the same. This Thesis shows that by 1979, at the latest, most of the claims were discoverable. In addition, since the Thesis was funded in part by the Enoch Band, and since one of the primary sources of the Thesis was interviews with Enoch Band Elders, one must infer that members of the Enoch Band (at least) would have been actually aware of Tyler's conclusions. Certainly Mr. Robb appears to have been aware of the same information from some source. Significantly, no Plaintiff has sworn an affidavit that the claim was not known at this time.

141 Other researchers have examined the issue over the years. Wayne Osmond prepared papers entitled "Pappaschase Band" and "Pappaschase Claim" (Exhibits V and W to the first Kohan Affidavit). These papers discuss some of the issues forming the basis of the present claim, but they are undated and so not that helpful. Osmond does indicate that he is corresponding with Mr. Robb, which supports an inference that the research was done in the early 1970s.

142 On September 9, 1995 the Confederacy of Treaty 6 First Nations passed a resolution in support of the descendants of the Papaschase First Nation. The resolution recites that as a result of extensive research, numerous irregularities have been discovered in the surrender of the Reserve. The purpose of the resolution was to support a claim for funding to allow the research to be completed. The resolution was passed less than six years before the Statement of Claim was

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issued on February 9, 2001, so it is not conclusive to a finding of actual discovery of the claim. It does however show a general awareness of issues at a critical point in time.

143 The problems created by the issue of Metis scrip, the effect it had on the Aboriginal peoples, the role of scrip speculators, and other similar issues have been a matter of public discussion for some years. In 1981 the Metis Association of Alberta published a document entitled *Metis Land Rights in Alberta: A Political History*. From this time at least many of the complaints presently advanced about Metis scrip were well known. This work documents the economic and social conditions faced by the Metis when they took scrip, the role of the scrip speculators, and the general factual and legal background of the scrip system.

144 I note again that where a defendant raises a limitation period, the burden of proof of showing a late discovery of the claim is on the plaintiff (*supra*, para. 136). In the face of this clear evidence that many people knew of these claims more than twenty years before this action was commenced, the Plaintiffs have provided no evidence at all that they did not discover the material facts until more recently.

145 With that background, an analysis of when each of the claims summarized in para. 48, *supra*, was discovered or discoverable is as follows.

146 The claim that I.R. 136 was smaller than the Treaty provided for was discovered immediately. When Chief Papaschase discovered in 1880 that the Reserve was only going to be 40 square miles, he objected and immediately stopped the survey, and it was not completed until 1884 as a result. Accordingly, this cause of action was known as soon as it arose.

147 The claim that I.R. 136 had been improperly surrendered was also discoverable at the time it happened. Assuming that there were members of the Band "habitually resident" on the Reserve who were not advised of the surrender meeting, they must have returned to the Reserve within a few months. They would undoubtedly have discovered that the Reserve had been surrendered, and that they had not been given notice of any surrender meeting. They certainly would have discovered that by the time the first auction of the Reserve lands took place in 1891, when settlers started to move onto the lands. In any event all the material facts were known by the time of the Tyler Thesis in 1979 and the Robb letters in 1974-5.

148 It is a little more difficult to pin down precisely when it would have been discovered that the Defendant was potentially in breach of its fiduciary obligation in permitting the surrender of the Reserve. If the surrender was improvident and exploitative, and did subject the descendants of the Papaschase Band to a life of destitution, that must have been known within a few years of the events. The lobbying by the Edmonton settlement was a matter of public record, and was extensively discussed in the local newspaper. There is some evidence on the record that some persons who withdrew from Treaty discovered that they had made a mistake; by the late 1880s some of them had applied to be readmitted to Treaty: Augustus Affidavit, Exhibit 61. There is no evidence on this record that any members of the Papaschase Band made any actual complaint about having withdrawn from Treaty; perhaps they were content with their decision. However, if they were dissatisfied it seems likely that the dissatisfaction would have become apparent within a few years. Again, all of the material facts were known by the time of the Tyler Thesis and the Osmond research in the 1970s.

149 As previously discussed (*supra*, para. 127), there is no limitation on the claim for any part of the Papaschase Reserve still held by the Defendant. However, on the evidence there is no such land remaining.

150 The claims about the improvident sale of the Reserve lands would have been discoverable immediately. The terms under which the lands were sold were carefully recorded, and are a matter of public record at the Land Titles Office. Some of the lands were sold at public auction. Others were publicly listed at the Dominion Lands Office. The fact that the lands had been sold and not leased would have been apparent. Sale of the mineral titles was a matter of public record.

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Again this claim was discoverable immediately after the events. By the time of the Tyler Thesis at the latest, the claims were actually discovered.

151 The same can be said of the claim that the trust funds that arose from the sale of the lands were not properly accounted for, or were mismanaged. Certainly by 1894 the Papaschase Band had actual knowledge that the funds were being applied for the benefit of Enoch's Band. Since they had signed the agreement themselves, they must have known of the facts underlying the cause of action. Since the record is not clear as to the eventual fate of these funds, it is difficult to pin down a time when the Papaschase Band should have been aware that they had not received a proper accounting of the funds. However it seems clear that no member of the Papaschase Band has received any interest for over a century. The cause of action was known as soon as the first semi-annual payment was missed.

152 With respect to the complaints about the taking of Metis scrip, all of the facts surrounding this claim were known immediately upon the applications for scrip having been accepted. If the applicants for scrip were not really half-breeds, or were living an Indian mode of life, or were otherwise arguably not eligible for scrip, the material facts would have been known to them at once. If the taking of scrip was improvident, such that all the scrip money was gone within a year or two, that would have been known by the late 1880's. Assuming those taking scrip were left with the mistaken impression that they could remain on the Reserve, they would have discovered the error by about 1887 when they were forced to leave. Further, all of the general facts surrounding the taking of scrip were actually known by the time of the publication of the study by the Metis Association of Alberta. The specific circumstances surrounding the taking of scrip by the Papaschase Band were known at the very latest by the time of the Tyler Thesis in 1979.

153 With respect to the claim that the Defendant took steps to artificially reduce the size of the Papaschase Band, thereby leading to its dissolution, again these facts must have been well known by 1894 when the Papaschase Band merged with the Enoch Band. The hardships from the demise of the buffalo, the failure to provide farming implements and assistance, and the failure to provide food in times of famine would have been immediately known. Again, the lobbying of the Edmonton Settlement was a matter of public record. The removal of some members, such as the Edmonton Stragglers, from the Papaschase pay list was also well known. If the Defendant did in fact improperly pressure the remnants of the Papaschase Band to join the Enoch Band, that too would have been known to those being pressured. The limitation period with respect to this claim has long since passed.

154 The Plaintiffs seek a declaration that the Papaschase Band still exists. It is an interesting question whether a statute of limitations can ever block a declaration of status; s. 1(i)(i) of the *Limitations Act* excludes such declarations from its operation. In many cases a declaration of status will be an empty remedy, because the time for getting any affirmative remedy will have passed. For example, a declaration today that a proper surrender meeting for I.R. 136 was not held is an empty remedy absent some way of getting the land back, or getting damages in lieu. The statute may not prevent the declaration of a right or duty, but it does prevent the enforcement of that right or duty: Alberta Law Reform Institute *Limitations*, Report For Discussion No. 4, paras. 3.16-3.18. It should be noted however that arguments about matters of status being a continuing cause of action on which a limitation never operates can render a limitation statute meaningless: see *Roberts v. R.*, *supra*, at paras. 134-137. Since I have concluded (*infra*, paras. 188 *ff*) that this claim should be summarily dismissed without resort to the limitation defence, no further discussion is necessary at this point.

155 The Plaintiffs' claims that there were breaches of Treaty 6 must have been known immediately at the time of the breach: at the time they knew of the covenant, and they knew of the material facts that amounted to a breach (*Luscar Ltd. v. Pembina Resources Ltd.*, *supra*, at para. 131). While a treaty is not in all respects like a contract, breaches of their provisions are arguably covered by the limitation periods on contracts, to which the principle of discoverability does not apply: *Luscar Ltd. v. Pembina Resources Ltd.*, *supra*. Time would therefore run from the moment of breach. In any event, if the Defendant failed to establish the Reserve in a timely way, failed to provide relief in times of famine, failed to provide farming implements required under the Treaty, and was otherwise in breach of the Treaty, the Papaschase Band must have known of those breaches immediately. Again the limitation period has long since expired.

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156 The final claim is that the Defendant failed to protect the Reserve from trespassers. The only evidence of trespassers on this record is potentially of those settlers who received permission to cut wood on I.R. 136, and also those settlers who purchased and then occupied I.R. 136 (assuming the surrender was invalid). The presence of these trespassers and the failure of the Defendant to prevent the trespasses would have been known or discoverable immediately. The limitation has long since run.

157 In summary, with one exception, all of the claims of the Plaintiffs are barred by the passage of time. The one exception is the claim that the Defendant account for the proceeds of the sale of I.R. 136. That claim is not barred by statute to the extent that the Defendant is still in possession of some of those proceeds. Otherwise the claims are bound to fail and should be summarily dismissed. It is undoubtedly true that if a full trial were held greater precision could be brought to the exact moment when each cause of action arose, and when it became barred by statute. In some cases it might be possible to narrow down the commencement of the cause of action to a particular month, or perhaps to a particular day. But since the limitation periods have expired many decades ago, this sort of precision is unnecessary to dispose of the application for summary dismissal. Even if the inferences I have drawn from the record are out by a decade or two, the result will be the same. To use the language of the cases, the claim is bound to fail, has no prospect of success, and does not raise any genuine issue for trial. If an excessively cautious approach were taken to an application for summary dismissal, one could undoubtedly send the limitations issue to trial. However, a review of this record confirms that an expenditure of extensive resources on such a trial would inevitably lead to the same result, namely a dismissal of the action. While there may be theoretical issues for trial, there is no "genuine" issue for trial left.

Voidness

158 The Plaintiffs allege that if a proper vote was not held, then the surrender of I.R. 136 was not properly authorized, and is "*void ab initio*" and of no legal effect. The Plaintiffs argue that the passage of time cannot give the surrender validity. "Voidness" is a legal concept which just means that a particular act was not authorized, was beyond the power of the party doing it, or was done without all the legal preconditions being met. It does not mean, as the Plaintiffs' argument might imply, that the act never happened. For example, it is common knowledge and notorious that the former Papaschase Reserve is now in southeast Edmonton, that it is fully built up, and that it is occupied by thousands of residences and businesses. The surrender clearly worked on the ground. The Plaintiffs advise that they do not wish to displace all these people or disturb their titles, and that they simply want damages from the Defendant. The question is whether this is any concession by the Plaintiffs, or whether they are in any position to displace the present owners of the lands. As previously discussed, the *Limitation of Actions Act* protected the title of a bona fide purchaser, even where that title was obtained from a trustee in breach of trust, and this protection can be traced back as far as 1833 (*supra*, paras. 119-20 is of no consequence that somewhere in the root of title the Plaintiffs can point to some act that was legally "void". Once the limitation runs, the Plaintiffs lose the very right to claim that it is void. So whatever voidness means, it ceases to have that meaning once any effective legal remedy is blocked. The acknowledgment by the Plaintiffs that they will not challenge the titles of the existing owners is no concession by them.

159 The concept of voidness is a sometimes useful legal tool for the analysis of the effectiveness of transactions and decisions, but it must not be taken too far. As Professor Wade notes (*Administrative Law*, 8 th ed., 2000) at pp. 307-8:

> . . . A common case where an order, however void, becomes valid for practical purposes is where a statutory time limit expires after which its validity cannot be questioned. The statute does not say that the void order shall be valid; but by cutting off legal remedies it produces that result. . . . The truth is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. . . .

While these comments are specifically made with respect to "orders", they are even more applicable to challenged decisions and transactions. A transaction that is invalid because a precondition was not met is less offensive to the rule of law than an order made by an official with no authority to make it. In *Children's Aid Society of Metropolitan Toronto v. Lyttle*, [1973] S.C.R. 568 (S.C.C.) Laskin, J. for the majority wrote at pp. 576-7:

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> Of course, to say that an order is a nullity has no effect *per se* unless proceedings are taken, by a person with standing, to have it so declared or quashed or set aside or otherwise superseded by relief against its operation. As has been aptly said, "it makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy": [citing Wade]. . . . I do not refer to timely appeal or review when I speak of lateness because, in my opinion, a nullity gains no validity merely because time has run in respect of procedures prescribed for challenging it. By lateness here I have in mind supervening events which may reasonable be taken to preclude a direct or collateral attack.

In discussing the "mere passage of time" being insufficient, Laskin, J. gave as an example an order that had been fully implemented, precluding any attack on its validity. The analogy here would be to an irregular surrender fully implemented over a century ago. In any event the comment that the mere passage of time would not block the remedy probably does not survive the movement of administrative law to a functional and pragmatic paradigm. Collateral attack no longer depends on concepts of "jurisdiction" and " voidness": *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.) at paras. 41, 47-50. An argument that the surrender of I.R. 136 was "void" does not allow the Plaintiffs to escape the effect of the statutes of limitation.

160 In *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.) reserve land was surrendered without proper procedures being followed. In a decision involving third-party purchasers of the land (and not the Crown) the Court held that under Ontario law no limitations statute blocked the claim for the land. The Court however refused to grant a discretionary remedy quashing the surrender, preferring to take a purposive approach:

> 270 While we do not doubt the importance of a proper formal surrender, as appears from our review of the facts, from a purposive perspective, many elements of a formal surrender were in fact accomplished. Although there was no formal meeting to consider a surrender, the transaction was discussed on more than one occasion at Band meetings. . . .
>
> 272 There is every indication that the Crown officials intended to follow the usual practice and obtain a formal surrender. As the motions judge found, the failure to obtain a proper surrender did not result from any fraud or advantage taken of the Chippewas or from any attempt to deny or override their rights: "It appears that the officials of the day thought the price was fair, thought they were getting a good enough deal from the Chippewas, and simply neglected to secure a surrender because it fell through the cracks in a dysfunctional bureaucracy" (para. 752). In our view, the courts have a discretion to refuse a remedy with respect to the inadvertent error of a dysfunctional bureaucracy that has been relied on for 150 years by innocent third parties. . . .
>
> 274 The failure to obtain a formal surrender renders the Cameron patent subject to judicial review, but the fact that it appears not to have been the perceived source of any mischief or prejudice at the time the Chippewas gave up their land in exchange for a monetary payment and was not the source of complaint for over 150 years is relevant to the question of remedy. For almost 150 years, third party purchasers have relied on the Cameron patent as a valid source of title to the lands. Property has been bought and sold and millions of dollars have been spent on improvements. It is difficult to imagine a stronger case of innocent third parties reliance than that presented by the landowners.

The Court declined to take the formalistic view that the surrender was "void" notwithstanding its defects. The problems with the Papaschase surrender can fairly be described as being in the nature of bureaucratic error, and logistical difficulties in calling a meeting in the Northwest Territories in the 1880s. There was consultation with the apparent leadership of the Band, there was no apparent opposition, and there was no exploitative element to the transaction. As in the *Chippewas of Sarnia* case, there is no reason to deprive the Papaschase surrender of any legal effect at all.

161 *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (S.C.C.) also concerned defects in the surrender process. The majority held at para. 7:

> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this

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> reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void.

This reasoning is inconsistent with the argument that defective surrenders are "nullities" with no legal effect.

162 What of the claim for damages from the Defendant? Can the surrender be effective in regard to some persons (the third-party purchasers), but a legal nullity against another (the Crown)? The claim is that the Defendant is liable because it took and resold surrendered land that was not properly surrendered. The surrender was "void", and having dealt with the land the Defendant must pay damages. But again the real question is whether there remains any effective legal remedy. Against an ordinary person the remedy would be in tort, but the Crown was not even liable for torts until the *Crown Liability Act*, S.C. 1952-3, c. 30, was passed in 1953. The remedy must accordingly be for breach of trust or breach of fiduciary duty, but as previously discussed (*supra*, para. 83) not every breach of statute is a breach of fiduciary duty, and even a fiduciary is entitled to the protection of the limitations statutes, subject to some exceptions (*supra*, para. 126). It makes no difference if the act of the fiduciary is described as "void" because it was unauthorized; the voidness argument must itself be made within the time limited. Even if one relies on an independent cause of action of dealing with surrendered land in breach of statute, that would be caught by the residual six year limitation period in s. 4(1)(g). Any claim for damages arising from dealing with the land or its proceeds subsequent to a "void" surrender is also barred.

163 However theoretically pure the voidness argument may be, it does not mean that the Plaintiffs have a present enforceable claim to the land. This is similar to the argument presented in *Roberts v. R.* (at paras. 134-7) that the Band was still dispossessed, and so a new cause of action accrued every day. As the Court pointed out, that would make the statute of limitations meaningless. Here the titles of the purchasers for value of the former I.R. 136 are clearly unassailable. The Plaintiffs have no further remedy against the land. Their relief in damages against the Defendant is barred by the *Limitation of Actions Act* once the Defendant is no longer in possession of any proceeds of the sale of I.R. 136. The claim has effectively been extinguished by the passage of time.

The Status and Standing of the Plaintiffs

164 The Plaintiffs apply to be recognized as representative plaintiffs in this action. They allege they:

> . . . were elected by descendants of the Papaschase Indian Band as the Chief and Councillors of the Papaschase Descendants Council and authorized to commence this action on their own behalf and on behalf of all status and non-status Indians who are descendants of the Papaschase Band.

This puts in issue their status and authority to represent the Papaschase descendants, and to advance the claims set out in the Amended Statement of Claim. The Defendant has applied to strike the claims, partly on the basis that the Plaintiffs have insufficient status or authority to assert them. The overlapping arguments raise issues about the nature of Aboriginal communities, Aboriginal rights and Aboriginal status.

The Legal Status of Aboriginal Communities

165 It is self-evident that the Aboriginal peoples of Western Canada lived in communities well before the arrival of the European settlers, and that those communities continued to exist after settlement. These Aboriginal communities have been described by various names from time to time: Bands, Tribes, Confederacies, Clans, First Nations, etc. Some of these Aboriginal communities were probably more structured than others, and some had more fluid membership than others. However, they all to some extent lived off the land in common; they exercised "rights" over the land, and those rights were "collective rights". Eventually the *Indian Act* recognized a particular kind of Aboriginal community described as a "Band", which term was given a statutory definition.

166 There remains some doubt as to whether a Band has the capacity to sue in its own name: *Pasco v. Canadian National Railway* (1989), 56 D.L.R. (4th) 404 (B.C. C.A.), at pp. 409-10; *Blueberry River Indian Band v. Canada (Department*

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of Indian Affairs & Northern Development), [2001] 4 F.C. 451 (Fed. C.A.) at para. 15; *Sawridge Band v. R.*, [2003] 3 C.N.L.R. 358 (Fed. T.D.) at paras. 9-10. Given that uncertainty, it is customary for the Chief and Councillors to sue in a representative capacity on behalf of a Band. They usually plead that they are "representatives of all of the members of the Band", advancing a representative or class proceeding. This is something of a misnomer, as the claim is really "on behalf of the Band" not its individual members. The law has now evolved to the point where it is increasingly recognized that a Band does have the capacity to sue and be sued, at least with respect to aboriginal rights: *Roberts v. R.*, [1991] 3 F.C. 420 (Fed. T.D.); *Montana Band v. R.* (1997), [1998] 2 F.C. 3 (Fed. T.D.). If a band has a sufficient existence to sign a treaty, why can it not sue to enforce the treaty? Nevertheless, old habits die hard, and it is still the custom to describe the Band in litigation by naming the Chief and Councillors, and indicating that they sue on behalf of the Band and all of its members; *Montana Band v. R.*, *supra*. This is something of an anachronism, and in my view the better practice is now just to name the Band as the plaintiff. It should now be accepted that Bands have a sufficient statutory existence to sue to protect the rights that are clearly Band rights. In this case both parties proceeded on the assumption that a band cannot sue in its own name, and I will do likewise, although in this case the result would be the same either way.

"Bands"

167 The term "Band" has long been defined by statute. The relevant definitions in the *Indian Act, 1876*, S.C. 1876, c. 18, s. 3 were:

> 1. The term "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; the term "the band" means the band to which the context relates; and the term "band," when action is being taken by the band as such, means the band in council.
>
> 2. The term "irregular band" means any tribe, band or body of persons of Indian blood who own no interest in any reserve or lands of which the legal title is vested in the Crown, who possess no common fund managed by the Government of Canada, or who have not had any treaty relations with the Crown.
>
> 3. The term "Indian" means
>
> *First*. Any male person of Indian blood reputed to belong to a particular band;
>
> *Secondly*. Any child of such person;
>
> *Thirdly*. Any woman who is or was lawfully married to such person: . . .
>
> 4. The term "non-treaty Indian" means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even though such person be only a temporary resident in Canada.

These definitions remained largely unchanged into the first half of the 20th Century. The equivalent provisions today, in the *Indian Act*, R.S.C. 1985, c. I-5, s. 2 are:

> "band" means a body of Indians
>
> > (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
> >
> > (b) for whose use and benefit in common, moneys are held by Her Majesty, or
> >
> > (c) declared by the Governor in Council to be a band for the purposes of this Act;
>
> "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

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While the wording has changed, the substantive definition of a band is the same, except for the inclusion after 1951 of the power to "declare" a band to exist, and the abolition of the concept of an "irregular band". Changes to the definition of an "Indian" are discussed *infra*, paras. 197 *ff*.

168 An examination of the provisions in force in the 1880s shows that the identification of a "band" was factually based. This identification required the existence of one of two things: land vested in the Crown, or annuities or interest money for which the Crown was responsible. If either of these factual preconditions was met, it was also necessary to have a "body of Indians" with a common interest in either the lands or the annuities. If all the conditions were met, then there was a band for the purposes of the *Act*. Specifically, there was no process of incorporation, or registration, or issuance of letters patent, or the happening of any other act of official recognition that did or could constitute a band. If the statutory conditions were not met, there was no band, and the Crown could not simply declare a body of Indians to be a band whenever it chose to do so. There was also no process by which a group of Indians could come together and self-identify as a band. Thus the Papaschase Band was potentially a band so long as it had a Reserve, and after the Reserve was sold it was potentially a band so long as there was a sum of money for which the Defendant was responsible. Once those two preconditions ceased to exist, the Papaschase Band was not legally a band. The Plaintiffs speak in terms of the Papaschase community being "recognized" by the Defendant as a band, but whether the Defendant recognized the Papaschase Band or not was of no significance (before 1951) to whether the Band existed in law.

169 There is an important consequence of this definition of a Band. Most Bands will exist because they are associated with a Reserve. Thus the identity of a Band is very closely linked to its Reserve, and a Reserve is very closely linked to a Band. On many subjects it is not possible to talk about the one without the other. Thus, in a legal sense and in a very real sense, when a Reserve is lost, it is likely that a Band will be lost as well, and the opposite is true. The Papaschase Band is a good example, because once the Band itself dissipated, and the Reserve became vacant, it was probably only a matter of time before the Reserve was converted to other uses.

170 The Plaintiffs argue that there are collective or communal aboriginal rights that vest in aboriginal communities other than Bands, citing *Ontario (Attorney General) v. Bear Island Foundation* (1984), 15 D.L.R. (4th) 321 (Ont. H.C.) at pg. 332. I need not express an opinion on that point, for no such rights are involved here. All the claims arise from Treaty 6, the Papaschase Band and its Reserve No. 136. While there may be other types of aboriginal communities, it is "Bands" that have interests in "Reserves".

171 The fact-based definition of a Band has other implications for the arguments of the Plaintiffs. Given the definition, there is nothing that the federal Crown can directly do to cause a band to disappear. As long as there is a Reserve or property, and a body of Indians with a common interest in that land or property, then there is a band, and there is nothing that the Defendant can do about it. The only way that a band can cease to exist is (i) if the commonly held lands or property ceases to exist, or (ii) if there is no longer a "body of Indians", which might happen if all the members of a band joined other bands, or if the band simply died out. The Plaintiffs' argument that the Defendant somehow contrived to bring about the non-existence of the Papaschase Band must be analyzed in that context.

172 The present *Act* differs significantly from the *Act* in force up to 1951 in that it now includes a general power to declare a body of Indians to be a band. The power to declare bands to be in existence was used in 1973 to declare a large number of Aboriginal communities to be bands (P.C. 1973-3571, Kohan Affidavit, Exhibit E). Many of these bands were probably "bands" under the normal definition, and were included in the list for convenience. The list appears to name every band in Canada, and significantly does not include the Papaschase Band. There have also been other isolated declarations of band status. While the statute gives the Governor in Council a power to issue a declaration of band status, the *Act* does not impose any duty on it to do so in any particular circumstances. The exercise of this power is merely a matter of administrative or political convenience. No body of Indians has any right to be declared a band, no matter how cohesive and durable the body might be. While the Plaintiffs seek an order requiring the Defendant to exercise the power to declare the Papaschase Descendants to be a band, this is not relief available in law to any body of Indians.

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Collective and Individual Rights

173 The aboriginal communities and their collective rights did not fit neatly into the Anglo-Canadian law that was introduced into the West. The aboriginal communities could not be readily identified with any class of "person" that was recognized as a legal person capable of suing and being sued. Likewise, the collective rights shared by the aboriginal communities did not fit neatly into the categories of private law rights that the law was used to dealing with. As a result, there was some uncertainty when aboriginal communities first pursued their rights in the courts. "Aboriginal rights" are not the same kind of rights as private law rights. Private law rights, such as the right to property, or the right to a chose in action, including a cause of action, vest in individuals. When those individuals die, the private law rights devolve to their personal representatives, and they are then distributed under the deceased's will or on intestacy. The persons who receive these private law rights from the estate are thereafter the "owners" of the rights.

174 Aboriginal law rights are different in some important respects. First of all, many Aboriginal rights are not owned by individuals at all, but are collectively owned by the community as a whole. Since they do not vest in any particular individual, they cannot be sold or transferred, and they do not devolve on descendants under wills or by intestacy. They are owned by and enjoyed by the community as it exists from time to time. Entitlement to collective rights that are given by statute (i.e. those that relate to "Bands" or "Reserves") accrue to those who are current members of the Band, and not simply to those who are descendants or heirs of previous members. If members leave the community, they do not take these rights with them, and if non-members join the community, they are entitled to enjoy those rights in common with the other members of the community.

175 There are personal or private rights of an aboriginal nature. For example, the right to be a member of a particular First Nation is such a personal right, and it could be enforced by an individual claiming membership. This type of Aboriginal right would pass by ancestry, in the sense that if a person gained or lost band membership, that would have an effect on the membership status of his or her descendants. This type of right could not be transferred or sold, and it could not be distributed in a will. A second type of personal aboriginal right is exemplified by the right to receive annual payments under a Treaty. If this sum was not paid, the individual band member could sue for it, and the right to collect it would pass to his or her heirs. Other personal aboriginal rights, such as the right to occupy a particular part of a Reserve, could be left by will, subject to some statutory restrictions: *Indian Act*, ss. 59-60. A third type of personal right is the right to hunt, which is collectively held, but which could be raised as a defence by an individual charged with illegal hunting.

Derivative, Collective and Combined Claims

176 In discussing the enforcement of aboriginal claims, a distinction can also usefully be drawn between derivative claims, collective claims, and combined claims. A derivative claim arises when one member of a collective organization tries to assert a right that belongs to the collective. The classic case is the decision in *Foss v. Harbottle* (1843), 2 Hare 461 (Eng. V.-C.) where a shareholder tried to enforce a right belonging to the corporation. Other examples would be if a Band member tried to enforce a claim belonging to the Band, or if one member tried to enforce a right belonging to an unincorporated organization. There is a general prohibition against derivative claims (*Prudential Assurance Co. v Newman Industries Ltd. (No. 2)* (1981), [1982] Ch. 204 (Eng. C.A.) at pg. 210), but there are exceptions, for example where the collective is for some reason itself incapable of suing. The most common reason a collective entity is incapable of suing is because it is not a legal person, but this may occur as well if the entity lacks a controlling mind, or the proposed defendant is that controlling mind. Purported representative actions by members of a band seeking to enforce collective rights owned by the band are a form of derivative claim not allowed unless one of the exceptions to the rule against such claims is engaged. If the band exists in a viable form, the band itself should sue through its representative leaders. It is for this reason that actions by "the Chief and Councillors on behalf of all the members of the band" are a misnomer, as they are really derivative claims on behalf of the band, not on behalf of the individual members.

177 Collective claims arise out of collective rights. Band rights are classic collective rights. There are two broad categories of "collectives": those that have the right to sue in their own names and those that do not. The best example of

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the former group is the corporation, a type of collective entity recognized as a legal person. The best example of the latter group is an unincorporated organization, whose rights belong to the group as a whole and not to any one member, or even severally to all the members. Such rights can only be enforced by the group as a whole. Where the collective entity does not itself have the legal capacity to sue in its own name (as with a Band), then collective claims must be asserted by some individual members suing in a representative capacity. This is a type of derivative claim brought by some members of the collective entity, but on behalf of the entity: *Pasco v. Canadian National Railway* (1989), 56 D.L.R. (4th) 404 (B.C. C.A.) at pg. 408 (which uses the term "derivative" in the strict sense of a claim on behalf of another legal entity) affirmed on other grounds [1989] 2 S.C.R. 1069 (S.C.C.). Any remedies obtained belong to the collective entity, not the representative plaintiffs. If the collective entity has the legal capacity to sue (as with a corporation), then collective claims do not raise the same issues, because the entity as a legal person can enforce those rights itself.

178 Combined claims are claims that belong to one person only, and can be fully enforced by that person alone, but are joined together for procedural reasons. Several claims joined together in one action are an example. The better example is a class action where many persons with similar claims join together to sue through the mechanism of representative plaintiffs.

179 From this analysis it can be seen that there are two quite different types of class or representative actions: *Pasco v. Canadian National Railway*, *supra*, at para. 408. The first arises when there is a collective claim by an organization that does not have legal standing to sue, such as an unincorporated organization. Such a claim must be advanced by representative plaintiffs, and is derivative in nature, because the collective cannot directly sue on the claim and neither can any individual member of the collective. The second type is the modern class action where, for procedural reasons only, representative plaintiffs sue on behalf of numerous claimants. The underlying rights are not collective rights, and any member of the class could sue alone, because each member is a person with legal status to sue and the rights belong to the individuals severally, and not the class.

180 The new *Class Proceedings Act*, R.S.A. 2000, c. C-16.5, (which does not apply to this litigation) allows one member of a class to commence proceeding on behalf of all members of the class. Section 5(1)(c) requires that the "claims of the prospective class members raise a common issue". This wording contemplates individual claims vested in each class member, which are being prosecuted in common. It does not readily accommodate the type of derivative claim where some members of a group are pursuing a collective cause of action on behalf of the group. This action was commenced prior to the proclamation of the *Class Proceedings Act*, and it is governed by Rule 42 which reads:

> 42. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the court to defend on behalf of or for the benefit of all.

This wording is more general. It can accommodate the situation where numerous plaintiffs have individual but similar causes of action. It can also accommodate the pursuit of a collective claim by representative members of the collective, where "numerous persons have a common interest" in the subject of the action.

181 Claims by Indian Bands are usually collective claims; they generally assert rights that belong to the Band as a whole, and not to any individual member: *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)* (1999), 171 F.T.R. 91 (Fed. T.D.) aff'd [2001] 4 F.C. 451 (Fed. C.A.) at para. 26 (T.D.) and paras. 16-18, 22 (C.A.). Sometimes they assert claims that belong to an Aboriginal community that is not a band: *Pasco v. Canadian National Railway*, *supra*. Specifically, they are not combined claims, that is they are not a number of individual claims joined together for procedural reasons. How true Band claims can be asserted is entirely a function of the legal status of the Band. If a Band is a recognized legal entity, like a corporation, then the Band (and only the Band) can sue to enforce the rights in its own name. In exceptional circumstances a derivative claim might be permitted to advance a Band right. If the Band is not a legal entity, like an unincorporated association, then the Band (and not any individual member) can sue to enforce those rights, but only by a derivative action by representative plaintiffs. Of course if the right in question is not a Band right at all, but rather a right of an individual member of the Band, then the individual member could sue alone, or could combine with other members to form a class and sue in a class action. Where the members of

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such a class include the whole of the Band, this type of class action might look very similar to a representative action to enforce a collective Band right, but the two types of action are fundamentally different. The present action by the Papaschase Descendants includes in it both types of claims.

182 In this particular case the Plaintiffs claim to be descendants of members of the original Papaschase Band, and therefore claim to be entitled to pursue the rights they assert in the Amended Statement of Claim. However, mere ancestry does not entitle them to prosecute the purely private rights owned by original Papaschase members, because private law rights are transferred from generation to generation by the law of succession, and not merely through ancestry: *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)* (*supra*) at para. 25 (T.D.). Likewise, they are not entitled to pursue the Band's collective aboriginal rights, because those rights belong to the Band in Council, and only that collective entity can pursue those rights. Those rights do not belong to individual members of the Papaschase Band, nor do they belong to individual descendants of the Papaschase Band. They are collective rights that vest in the Aboriginal community once known as the Papaschase Band. They arise either from original Aboriginal rights, or collective Treaty rights, or rights given by the *Indian Act* to "Bands". The issue is therefore what type of Aboriginal rights the present Amended Statement of Claim asserts, and whether the present Plaintiffs can pursue those rights.

183 To summarize, the issue is which of the following claims the present Plaintiffs are advancing, and are entitled to advance:

(a) Band Claims: claims on behalf of the Papaschase Band, which would be representative derivative claims to enforce collective Band rights.

(b) Papaschase Descendants' Claims: claims on behalf of the Papaschase Descendants. This group is an "unincorporated association" formed in 1999, but it is clear that the rights asserted are not collective rights acquired in common by that association. The rights in question arose over 100 years earlier. There are no collective rights owned by the "Papaschase Descendants" organization.

(c) Private Claims: private claims prosecuted by means of a class action by a number of individuals owning claims that raise common issues of fact and law. In this category the Plaintiffs may only prosecute claims "owned" by the class members. Some of these, like the right to membership in the Band, may accrue to the class by ancestry. Others they may have acquired by inheritance or purchase.

The Claims in This Action

184 Because of the rule against derivative claims, the Papaschase Band is the only entity that can sue to enforce true Papaschase Band claims. Assuming the Band lacks capacity to sue in its own name, such claims would be advanced by representative plaintiffs authorized by the Band, usually the Chief and Council, but on behalf of the band. Such Papaschase Band claims present in this action are:

(a) The claim that the Defendant did not provide all the benefits to the Band called for by the Treaty;

(b) The claim that the Reserve is undersize;

(c) The claim of breach of fiduciary duty in allowing the surrender of the Reserve to go forward;

(d) The claim of breach of fiduciary duty in causing the Band to dissolve;

(e) The claim that the Defendant wrongly dealt with the Reserve lands without a legally valid surrender, and mismanaged the sale process.

In the above respects the present claim is a derivative claim by the Papaschase Descendants, who attempt to assert Band claims. They have no express authority to advance those claims, but since the Papaschase Band no longer exists in any functional sense, this type of derivative claim is probably within the exceptions to the general prohibition against

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derivative claims. An analogy could be made to a corporation with no directors or management, or a corporation whose existence is the very subject of the suit. In such cases, suitable representatives would be allowed to assert the derivative claim. However, they would not be suing "on behalf of all Papaschase Descendants" but rather on behalf of "the Papaschase Band itself". If the action was allowed to proceed, this misdescription of the nature of the action would have to be corrected. The present Plaintiffs in this respect are seeking the Court's approval to be derivative representative plaintiffs for the collective claims advanced in this action. I am satisfied that Rule 42 is wide enough to grant this relief, but the availability of that relief depends on the continued existence of the Papaschase Band, discussed *infra*, paras. 188 *ff*.

185 As for the proceeds of the sale of I.R. 136, the surrender document directed that the income from these proceeds be paid to "us and our descendants forever". In my view this was an intention to confer the benefits of the trust on the Papaschase Band collectively, and not severally. So long as there was a "body of Indians", this sum of money would have kept that body of Indians within the definition of a Band. The reference to "us and our descendants" is a reference to that "body of Indians". No individual descendant of the Papaschase Band can claim any severable interest in the trust or the income: *Sabattis v. Oromocto Indian Band* (1988), [1989] 2 C.N.L.R. 158 (N.B. Q.B.) at pg. 163. It creates collective rights, which only the Papaschase Band can enforce. The benefits belong to the members of the Band from time to time. Therefore the claim for an accounting of these funds is also a derivative claim to enforce a Band right.

186 Other claims in this action arise from individual rights. These are rights that do not belong to the Band as a collective, but rather to individual members of the Band. For such claims an individual member can sue alone to enforce his or her rights, and the present action would therefore be a true class action. It would be in that respect an action in which numerous claimants assert individual several claims that raise common issues of fact or law. For procedural reasons they wish to be joined together as a class, and be represented by representative plaintiffs. There are two subcategories of claims based on private rights:

(a) Claims based on a wrong to an original band member, for example the claim that an ancestor was allowed to take scrip in breach of a duty to that ancestor; or that misrepresentations induced him to take Scrip;

(b) Claims based on a wrong to a present day descendant of an original Band member, for example the claim that a present day descendant is entitled to be a member of the Papaschase Band.

Obviously the two types of claims are linked. If, for example, Chief Papaschase had decided in the 1890s to challenge his withdrawal from Treaty, that would have been a claim personal to him. He could have personally sued for breach of fiduciary duty or misrepresentation. If he had died, his personal representatives could possibly have pursued his claim. Success for Chief Papaschase would have had implications for his descendants: if he could establish his status as a Papaschase Band member, then all of his descendants would benefit from that status. This is no different from any other common law action to establish "status". For example, if a litigant successfully establishes paternity or a right to a hereditary title or honour, then the descendants of that litigant benefit from the success. This leads into the second subcategory of claim, namely the claim to present membership in the Band. This is a personal claim to the Plaintiffs themselves, although it depends to some extent on the status of their ancestors. In part the success of their claim depends on their being able to establish the entitlement of their ancestors to membership. However, the claim itself is personal to the present Plaintiffs, and only they can assert it, not the Band and not the Papaschase Descendants as an organization. To the extent that the Plaintiffs seek to prosecute these claims in a class action, they are suing "on behalf of the class of individual Papaschase Descendants". They are not however entitled to directly advance the claim of their ancestors (i.e. subcategory (a) above) merely because of ancestry; to assert those claims they would have to demonstrate that they are the personal representatives of their ancestors.

187 As previously mentioned (*supra*, para. 183(b)), none of the present claims is based on collective rights belonging to the group or organization described as the "Papaschase Descendants". Unlike in *Pasco v. Canadian National Railway*, *supra*, the rights asserted are Band rights, not pre-existing Aboriginal rights. In this respect the Defendant's challenge to the status of the Plaintiffs is well founded.

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Does the Papaschase Band Exist?

188 The parties to this action presented arguments on whether the Papaschase Band does or does not exist today. From a legal point of view the answer is quite simple: the preconditions for the existence of a Band are missing. The Papaschase community became a "Band" when they adhered to Treaty 6 and were entitled to receive annuities from the Crown. They remained a Band, at least potentially, until the last of the proceeds of the sale of I.R. 136 were distributed. However, at some time in the late 19th century there were no members of the Papaschase Band, and accordingly no "body of Indians" that would meet the definition in the statute (see *infra*, paras. 206-9). This may have occurred as early as 1887 when all of the Papaschase members joined other bands, principally the Enoch Band. Alternatively, it may have happened in 1894 when the Enoch Band formally admitted the Papaschase remnants to its Band. When there was no longer any person who was a member of the Papaschase Band, or entitled to claim membership, then there would no longer have been a "body of Indians", and accordingly there would not have been any Papaschase Band. The Governor in Council has not made any declaration that the Papaschase Band is a band, which would be the only other method of constituting a band.

189 In a community or sociological sense, the record is also quite clear that the Band does not exist. Dr. Evans is of the view that the Band ceased to exist in any sort of recognizable form in 1886, when Chief Papaschase and his family took scrip, and the rest of the members became aligned with the Enoch Band (Evans Report, pg. 5, note 8). Certainly by the time of the formal merger of the two Bands in 1894, the Papaschase Band was no longer identifiable as a community.

190 In August of 1999 a number of descendants of the Papaschase Band held a meeting at which they elected a Chief and Council. They ratified a Custom Council Election Code (Lameman Affidavit, Exhibit B). In order to belong to this unincorporated organization, a person must show that he or she is a direct lineal descendant of someone who was a member of the Papaschase Indian Band between 1877 and 1888. The Plaintiff Rose Lameman was elected Chief of the Papaschase Descendants Council, and she was re-elected Chief in 2001. The Chief and Council have been instructed and authorized to commence these proceedings.

191 I have concluded that the formation of the Papaschase Descendants Council does not enhance the legal position of the Plaintiffs or the group of Papaschase descendants. They are not a "band", much less the Papaschase Band. As I have previously indicated, there is no mechanism by which a body of Indians can self-identify as a band, and became a band at law. The only way to become a band is to satisfy the preconditions previously discussed, and the Papaschase Descendants Council does not qualify. A body of Indians that lives together in community, and shares a language and other cultural ties, might well be described as a First Nation or as an Aboriginal community, but they would not be a "band": *Blueberry River Indian Band*, *supra*, at para. 27 (F.C.T.D.). Such a band might have been an "irregular band" under the 19th century definitions, but that concept no longer exists. As a matter of fact, it is also clear that the Papaschase Descendants do not exist as a community. They do not live in common, and there is nothing about the Papaschase Descendants Council which sets them apart from the balance of the community. While they all share common ancestors, they do not live "in community". They are not a sufficiently cohesive "body of Indians" to be capable of being a "band".

192 I accordingly conclude that, in fact and in law, the Papaschase Band does not exist. In fact, it ceased to exist at some time between 1887 and 1894 when the members of the Papaschase Band moved away to live with other Bands, particularly the Enoch Band. In law it most likely ceased to exist when there was no longer a body of Indians with a common interest in the proceeds of the Reserve lands. Assuming there was still a body of Indians in recognizable form, the Band would have ceased to exist when the last of the proceeds of the sale of I.R. 136 were distributed, which may have been as late as 1930.

Dual Membership

193 The Plaintiffs claim a right to be members of the Papaschase Band, and claim that the Defendant has a duty to recognize the Papaschase Band. I have previously concluded (*supra*, para. 172) that such relief is not available, as the Defendant has no obligation to declare any body of Indians to be a Band. In the absence of such a declaration the

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Papaschase Descendants do not meet the criteria to constitute a band. There is however another aspect to this issue. While the Papaschase Descendants claim to be members or potential members of the Papaschase Band, a great many of them are already members of another Band. This raises the issue of whether a person can be a member of two Bands at once, or in other words whether an Indian can have "dual citizenship" in two Bands.

194 The most obvious potential source of dual membership would arise in the case of a member of one Band marrying a member of another. But as early as the *Indian Act, 1876*, S.C. 1876, c. 18, the *Act* read:

> (d) Provided that any Indian woman marrying an Indian of any other band, or a non-treaty Indian shall cease to be a member of the band to which she formerly belonged, and become a member of the band or irregular band of which her husband is a member.

Under the general definition in the *Act*, a child of that marriage would become a member of his or her father's band. Inter-band marriage was therefore not a source of dual citizenship.

195 Apart from inter-band marriage, it is difficult to think of situations under which a person could found a claim for membership in two bands at the same time. It is possible that someone was a member of two bands before Treaty. The only other possibility would appear to be if a member of one band was voluntarily admitted to a second band, and both bands allowed that person to retain membership in the original band. That person would have an interest in the collective property of both bands, which seems to be inconsistent with the scheme of the *Act*.

196 Before 1985 the *Indian Act* did not contain a clear prohibition against a person being a member of two Bands at the same time; there was no express prohibition on "dual membership". However, there were a number of provisions that contemplated that a person could be a member of only one Band at a time. The *Act Further to Amend the Indian Act*, S.C. 1895, c. 35 added the following provision:

> 140. When by a majority vote of a band, or the council of a band, an Indian of one band is admitted into membership in another band, and his admission thereinto is assented to by the superintendent general, *such Indian shall cease to have any interest in the lands or moneys of the band of which he was formerly a member*, and shall be entitled to share in the lands and moneys of the band to which he is so admitted; but the superintendent general may cause to be deducted from the capital of the band of which such Indian was formerly a member his *per capita* share of such capital and place the same to the credit of the capital of the band into membership in which he had been admitted in the manner aforesaid.
>
> (Emphasis added)

This section contemplated the movement of persons from one band to another, but it also clearly provided that the person ceased to be a member of his original band. Dual membership was not contemplated. The present version of this provision is found in s. 16(2) which reads:

> (2) A person who ceases to be a member of one band by reason of becoming a member of another band is not entitled to any interest in the lands or monies held by Her Majesty on behalf of the former band, but is entitled to the same interest in common in lands and monies held by Her Majesty on behalf of the latter band as other members of that band.

To the extent the Plaintiffs are descendants of Papaschase members who joined the Enoch or other bands after 1895 they would be covered by these provisions. Therefore, even if those Plaintiffs can claim to be members of the Papaschase First Nation, they cannot claim any interest in the monies or Reserve lands of the Papaschase Band.

197 The method of defining who was an Indian (see *supra*, para. 167) was significantly revised by the *Indian Act*, S.C. 1951, c. 29. For the first time the Department would keep official lists of Indians, and henceforth an "Indian" was defined as a person on one of the lists. Sections 2(1)(g) and 6 of the 1951 *Act* read:

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> 2(1)(g) "Indian" means a person who persuant [sic] to this Act is registered as an Indian or is entitled to be registered as an Indian;
>
> 6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.

The concept of irregular Bands was abolished, and a non-treaty Indian now became a person named on the General List. Section 11 of the *Act* of 1951 defined who was entitled to be entered on a list, and s. 12 defined who was not so entitled. Significantly, s. 12 excluded from entitlement any descendant of a person who received half-breed scrip. Section 16(2) of the *Act* (see *supra*, para. 196) dealt with the financial consequences of movement from one Band to another. While the statute did not specifically state that no one could be named on more than one list, that seems to be the only interpretation consistent with the scheme. Section 6 clearly implied that a person could not be included on a Band list, and also on the General List. The use of the phrases "that Band" and "a Band" are strongly suggestive of an interpretation that a person could not be a member of more than one Band, although that is not expressly stated.

198 Section 13 dealt with the movement from one list to another:

> 13(1) Subject to the approval of the Minister, a person whose name appears on a General List may be admitted in membership of a band with the consent of the band or the council of the band.
>
> (2) Subject to the approval of the Minister, a member of band may be admitted into membership of another band with the consent of the latter band or the council of that band.

The next section went on to confirm that a woman who married a member of another Band ceased to be a member of her original Band, and became a member of her husband's Band. Again, while there is no express prohibition against dual membership, that seems to be the implication.

199 Prior to the amendments in 1951, the Department had kept informal lists of Band members. Section 8 of the 1951 statute required that these lists be posted in conspicuous places. Section 9 provided that within six months of this posting, certain interested persons could object to the inclusion or omission of any name from the lists. Section 9 also provided for an appeal to the Registrar, and thereafter to a judge of the superior court, at the end of which the decision was "final and conclusive". Thus within six months of the posting of the lists in 1951, the membership in the various Bands became incontrovertible. This has several implications for this action. First of all, since no list was posted for the Papaschase Band (Galley Affidavit), the legal position is that there were no members of the Papaschase Band in 1951. Any potential candidates were either on the General List, on another Band list, or not on any list at all, and not having been included on a Papaschase Band list, they have no further claim to membership. Secondly, since membership in bands after 1951 is primarily by descent from those who were members in 1951, it follows that there are no potential Papaschase members in existence today.

200 The Plaintiffs argue that since no list of members for the Papaschase Band was published in 1951, then the provisions of the statute simply do not apply and have no effect. That however cannot be the proper interpretation of the *Act*. The statute was clearly designed to bring some finality to the question of who was an Indian, and who belonged to which Band. The publication of a list for a Band was clear evidence that the Band existed, and the failure to publish a list for a Band must likewise have been taken to be a declaration that no such Band existed. Absent any members, there is no "body of Indians" to constitute a Band. Furthermore, any potential Papaschase Band member who was on the General List, or on another Band list, or on no list, had an opportunity to protest that he or she was on the wrong list or not on any list. I am satisfied that the proper interpretation of the *Act* of 1951 is that the failure to publish a list of members meant that there were no members recognized in law.

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201 It is of course theoretically possible that one of the Plaintiffs or their ancestors was actually misled by the failure to produce a Papaschase Band list. For example, there might theoretically have been someone who was still a member of the Papaschase Band. If that person's name was placed on the list of another Band, and posted in a location where that theoretical member would not be expected to see it, or possibly was placed on the General List, then that person might have cause for complaint. An inquiry would have to be made into the circumstances, as for example why that person did not notice that his or her name was not on an appropriate list. One would have to examine when that theoretical member obtained actual knowledge that he or she was on any particular list, or when he or she might reasonably have discovered that. However, there is no evidence on this record that any such person existed, or that any such person was actively misled. No evidence exists of any Plaintiff who could claim to be on a Papaschase list, or who was wrongly placed on the list of another Band. Accordingly this theoretical possibility is not enough to resist an application for summary dismissal of the claim.

202 These same issues were discussed in *Chief Chipeewayan Band v. R.* (2001), 209 F.T.R. 211 (Fed. T.D.), affirmed (2002), 291 N.R. 314 (Fed. C.A.). That action concerned the surrender of Stony Knoll Indian Reserve No. 107, also a Reserve set aside under Treaty 6. The Chief Chipeewayan Band never settled on its Reserve, and many members left to join other Bands. By 1889 there were only two families identified with the Band, and neither of them actually lived on the Reserve. In 1897 an Order in Council was passed surrendering the Reserve, without any meeting of the Band or other consultation with the Band. No compensation was paid to any member of the Band as a result. A group of descendants of Chief Chipeewayan commenced an action to recover the Reserve or damages for its value.

203 The Court in the *Chief Chipeewayan* case examined whether the plaintiffs could prove that they were descendants in an unbroken line from the original members of the Band. Some of them could not do so at a factual level; they simply could not prove who their ancestors were. Others could prove a factual genealogical link, but the link was interrupted in some way. For example, some of the plaintiffs could establish a genealogical link through the maternal line, but one of their maternal ancestors had married a member of another Band, and by the law in force at the time had become a member of her husband's Band. This was held to interrupt the line of descent from the original Band. Other maternal ancestors had married non-Indians and withdrawn from Treaty, to the same effect. None of the proposed plaintiffs appeared to have claimed to be descended from Band members who had taken scrip, so the Court did not have to discuss that issue. In the end the Court concluded that none of the plaintiffs could continue to claim to be a member of the Chief Chipeewayan Band. The Federal Court of Appeal, in brief reasons, confirmed the approach and the conclusion of the trial judge. As will be apparent, I have come to the same conclusion on the law as the *Chief Chipeewayan* decision.

204 The learned trial judge in the *Chief Chipeewayan* case went on to consider whether the 1951 list posting process would have had any effect on the status of the plaintiffs. (It is not clear from the decision whether a list for the Chief Chipeewayan Band was posted in 1951.) He concluded (at paras. 98-9) that even if one of the plaintiffs had been able to show that he or she was a descendant from an original member of the Band, the 1951 list posting process would have disentitled them to any claim that they were still a part of the Chief Chipeewayan Band. My interpretation of the statute is to the same effect, but in any event the 1985 amendments (discussed next) render the issue moot.

205 The 1951 scheme stayed in effect in the *Indian Act*, R.S.C. 1970, c. I-6 and the *Indian Act*, R.S.C. 1985, c. I-5. However, no provision was made for the republication of the Band lists; Band membership continued to be based on the lists as they existed in 1951. Major changes were brought about by an *Act to Amend the Indian Act*, R.S.C. 1985 (1st Supp.), c. 32. The primary purpose of this statute was to reverse the historical rule that an Indian woman who married a non-Indian lost her status. The *Act* however made other changes. Firstly, the *Act* now provided that the Indian Registers in force on April 17, 1985 would form the basis of Band membership. No provision was made to republish these lists, and thereby open them up to protest at large. However, s. 14.1 did allow a protest of an "omission" from the list if made within three years, that is before April 17, 1988 in the case of these Plaintiffs, a time which is now passed. Any person who was entitled to be on the list immediately prior to April 17, 1985, was entitled to remain on the list, which essentially preserved the 1951 lists as the basis for Indian status. The *Act* went on to provide that a Band could take control of its

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own list, and set up its own membership rules. However, in the event that the Department continued to be responsible for the Band List, s. 13 provided:

> 13. Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department.

The inference is that a Band could set up its own private membership rules which would allow dual membership, but that no dual membership would be allowed on the Departmental lists. Since the Department would have been in control of all lists as of April 17, 1985, it follows that no person on that date was entitled to be a member of more than one Band. Therefore, even if the Papaschase list should have existed as a matter of law in 1985, no person on another Band List could claim a right to be on it. Thereafter, if a Band took control of its own list, some person might theoretically become entitled to dual membership. However since the Papaschase Band has not existed after 1985, it is not possible for it to have created membership rules that would allow the Plaintiffs to have dual membership in the Papaschase Band and another band.

206 Based on my analysis of the statutes, the only person who could potentially claim to have a right to go on the Papaschase Band list (if it existed) would be a claimant who meets each of the following criteria:

(a) that claimant is a descendant of an original Papaschase band member, and

(b) that original Papaschase band member and his or her descendants in the direct line

(i) did not take scrip, and

(ii) did not join another band, and

(c) the claimant was on, or is a descendant of a person who was on the General List in 1951 and 1985, and accordingly would be on the Indian Register today.

Counsel for the Plaintiffs candidly acknowledged to the Court that he was not aware of any individual who would meet this description.

207 The combined effect of all of these provisions is of great importance to the status of the Plaintiffs in this action. The Plaintiff Rose Lameman, for example, is clearly not on any Papaschase Band list, because no such list exists. Furthermore, it is undisputed that she is a member of the Onion Lake Band. Section 13 of the 1985 *Act* makes it quite clear that she is not entitled to be a member of any other Band, thereby precluding her from claiming a right to be a member of the Papaschase Band, even if a list for that Band should exist. Furthermore, she bases her status to bring this claim from the fact that she is a direct descendant of Chief Papaschase. However, Chief Papaschase was a half-breed who took scrip, and by virtue of s. 12 of the 1951 *Act* his descendants were not entitled to be included in any Band list, be it the Papaschase Band list or any other list. Accordingly, Ms. Lameman has no basis to claim to be a member or potential member of the Papaschase Band.

208 The other proposed Representative Plaintiff, Calvin Bruneau, is in a similar position. He is said to be "a non-status individual associated with the Kehewin Band", which I assume means he is not on the Indian Register, formerly known as the General Register, or any Band List. He is not therefore caught by s. 13 of the *Act*. If there was a Papaschase Band list, he theoretically could apply to be added to that list. However, besides not having Indian status, he cannot show that one of his ancestors was on the Papaschase Band list in 1951, and accordingly he has no basis to claim to be added to any such list. Furthermore, he too claims his status as a descendant of Chief Papaschase, and accordingly he too is precluded from Band membership by s. 12 of the 1951 *Act* by reason of being the descendant of a half-breed who took scrip.

209 The Plaintiffs did not necessarily challenge the proposition that one could not be a member of two Bands at the same time. They however expressed a right to assert a contingent membership in the Papaschase Band. If and when the Papaschase Band is reconstituted by order of the Court or otherwise, the Plaintiffs asserted the right to then elect whether

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to remain with their existing Band, or to join the Papaschase Band. This decision would presumably be influenced by the level of success the Plaintiffs achieved in having the surrendered I.R. 136 restored to the Papaschase Band. In my view the *Act* simply does not contemplate any such contingent membership. If nothing else, this argument flies in the face of s. 13. I note that the definition of "Indian" includes not only those who are registered, but those "entitled to be registered." The prohibition in s. 13 on dual membership must therefore extend to contingent dual membership as well. However, even apart from that it would not appear that any existing member of another Band would qualify for entry on the Papaschase Band list, should it ever be restored. Any such person would have to show that immediately prior to April 17, 1985 they were entitled to be on the Papaschase list. That in turn would require that they show an ancestor who was entitled to be on the Papaschase list in 1951. There do not appear to be any persons in that category. Therefore, none of the existing Plaintiffs can validly assert a contingent right to go on the Papaschase list.

Summary on Status of the Plaintiffs

210 Most of the claims in the Amended Statement of Claim belong to the Papaschase Band. The Plaintiffs do not purport to sue on behalf of the Band; they sue on behalf of the Papaschase Descendants, who cannot claim for themselves the Band's rights and who have no collective rights themselves. Since the Papaschase Band no longer exists in a functional form a derivative claim by individual Band members (if there were any) on behalf of the Band might be permitted; the Amended Statement of Claim would have to be amended accordingly. A derivative claim to confirm the status of the Band might be permitted, but there is no genuine issue for trial on that point; the Band ceased to exist many years ago. Further, there are no members or potential members of the Papaschase Band. It is therefore inappropriate to allow the other potential derivative claims to proceed.

211 Some of the claims, particularly the claim to present membership in the Papaschase Band are personal in nature. They could be pursued by the Plaintiffs, individually or in a class proceeding. However, no person has shown any genuine basis on which he or she could claim membership. The Amended Statement of Claim names five potential representative Plaintiffs. At the hearing, the named Plaintiff Rose Lameman was put forward as a representative Plaintiff, to be joined (presumably by amendment) by Calvin Bruneau. For the reasons given, I have concluded that neither of these proposed representative Plaintiffs has any claim to be a member of the Papaschase Band today. They cannot establish an unbroken line of descent from a Papaschase member. The other four named representative Plaintiffs did not press their claims, but since they are all members of other bands, they too cannot claim membership in the Papaschase Band. No other potential member has been identified.

212 The Plaintiffs lack sufficient status to prosecute these claims, and the claims in the Amended Statement of Claim should be dismissed.

No Cause of Action

213 In addition to the application for summary judgment, the Defendant brought an application to strike out certain portions of the Amended Statement of Claim on the basis that those portions disclose no cause of action. A pleading should not be struck out for failing to disclose a cause of action unless it is clear and beyond doubt that there is no cause of action: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.). On such an application the Court assumes that the facts as pleaded are true.

214 The main basis upon which the Defendant sought to strike the pleading was that the Plaintiffs have no status or standing to pursue this action. This topic has been separately discussed, *supra*, paras. 164 *ff*. In addition, the Defendant challenged other specific portions of the pleading that might more accurately be termed "particulars" than a full cause of action. Since most of them are subsumed by the application for summary judgment, only a brief discussion is called for.

215 I have determined that the following portions of the Amended Statement of Claim do not disclose a cause of action or are legally irrelevant:

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(a) there is no legal entitlement to an order compelling the Defendant to declare the Papaschase Band to be a "band" under the *Indian Act* (*supra*, para. 172).

(b) whether Chief Papaschase lived an "Indian mode of life" is not legally relevant (*supra*, para.98).

(c) whether the issuance of Metis scrip was bad public policy is not justiciable (*supra*, para. 96).

(d) the delay by the Indian Agent in obtaining the surrender is not of legal significance (*supra*, para. 79).

(e) the Plaintiffs note that Commissioner Dewdney had directed (*supra*, para. 43) that the Papaschase Band not be moved to Enoch until they had surrendered their Reserve, but that his instructions were not followed. There was no legal requirement for this administrative direction, and the failure to follow it is not *per se* of any legal significance. The order in which things were done in effect meant that there were no voting members left at the time of the surrender, as previously discussed, but there was no legally enforceable duty to keep the band on the Reserve until it was surrendered.

(f) the Plaintiffs have no capacity to prosecute private claims that would have devolved on the personal representatives of their ancestors, as opposed to claims that descended to them merely by ancestry (*supra*, para. 182).

(g) there is no cause of action against the Crown for a tort that occurred prior to 1953: *Crown Liability Act*, 1953, S.C. 1953, c. 60; *Mikisew Cree First Nation v. Canada* (2002), 303 A.R. 43 (Alta. C.A.) at para. 80.

(h) a mere breach of statute does not create a cause of action, and is not necessarily a tort or a breach of fiduciary duty (*supra*, para. 83).

The Defendant also applied to strike out some of the pleadings on the basis that they were scandalous, frivolous, or vexatious. The arguments overlapped with others already dealt with, and no further discussion is necessary.

The Representative Action

216 Having concluded that the action should be dismissed summarily, it is not strictly necessary to address the Plaintiffs' application to be appointed representative Plaintiffs. Since the matter was fully argued, I will deal with it briefly. A number of the issues that arise have already been discussed in other contexts.

217 The test for a representative action is found in Rule 42:

> 42. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), the Court set out a five-part test:

1. The class must be capable of clear definition.

2. There must be issues of fact or law common to all class members.

3. With regard to the common issues, success for one class member must mean success for all. In other words, there should be no conflicts of interests between the members of a class.

4. The class representatives must adequately represent the class.

5. Even when the above four presumptive factors are present, there must be no countervailing factors that make a class proceeding inappropriate.

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These five factors obviously contemplate a combined action of individual claims, not a derivative representative collective claim.

218 To the extent that this is a true class action, I am satisfied that the proposed class would be capable of clear definition. The appropriate class would encompass by some suitable description those descendants of the Papaschase Band who remain eligible for membership in the Band. However, as I have previously indicated (*supra*, paras. 206-8), there appear to be no potential members of the class in existence. In many respects the action is really a derivative action on behalf of the Papaschase Band itself, and for the reasons given (*supra*, para. 184) it would have been appropriate to allow the derivative portions of the action to proceed, (upon the necessary amendments being made), but for the fact the Papaschase Band no longer exists.

219 It is also clear that there are numerous common issues of fact or law raised by these proceedings. The questions surrounding the surrender of I.R. 136, the subsequent amalgamation with the Enoch Band, and the taking of Metis scrip, would all raise common issues of fact and law which would appropriately be determined in representative proceedings.

220 Generally speaking, success for one class member would mean success for all. As I discussed in *Metera v. Financial Planning Group* (2003), 12 Alta. L.R. (4th) 120, 332 A.R. 244, 2003 ABQB 326 (Alta. Q.B.), at paras. 52-59, the real issue here is whether there are any conflicts of interest between the members of the class. In my view there would be a potential conflict between those members of the class who claim from an original Papaschase member who took Metis scrip, and those members of the class who claim through another line of descent. There might be another sub-class of descendants of those who left the Band voluntarily. However, if the matter were to proceed this problem could be dealt with by identifying sub-classes, and appointing separate counsel as necessary.

221 The fourth requirement is that the class representatives must adequately represent the class. In this respect there are concerns, because the two proposed representative Plaintiffs are not members of the class (*supra*, paras. 207-8). It might occasionally be appropriate to allow non-members of the class to be representative Plaintiffs, but this would be an unusual situation. If members of the class exist, it is appropriate for them to be the representative Plaintiffs, or otherwise specific evidence should be brought forward to show why those persons are not capable of being representative Plaintiffs.

222 The final question is whether there are countervailing factors that make a class proceeding inappropriate. The most important countervailing factor in this case is that the action has no reasonable prospect of success. As discussed at length, most of the claim cannot survive the application for summary dismissal, and there is no point in allowing it to proceed. Further, it has not been shown that any member of the class exists. In addition, the Enoch Band is not at present a party to this action. Given that the merger of the Papaschase Band with the Enoch Band is being challenged, and given that the proceeds of I.R. 136 were apparently turned over to the Enoch Band at some time in the past, and that the remaining Papaschase members joined the Enoch Band, it would be inappropriate for this action to proceed any further without the Enoch Band being added as a plaintiff or a defendant. This, however, is a matter that could be cured by amendment.

223 In summary, it is not appropriate to appoint the Plaintiffs as representative Plaintiffs because they are not members of the class, there do not appear to be any members of the class existing, and because the action cannot survive the application for summary dismissal.

Conclusion

224 In this action the Plaintiffs have come forward, in good faith, raising questions about transactions that happened over 100 years ago. They seek relief from the Court arising out of decisions that were made in the distant past. Some of those decisions were made by their ancestors, such as the decision by Chief Papaschase to take Metis scrip, and the decision by the remaining leaders of the Papaschase Band to join the Enoch Band. Others of the decisions were made by the Department of Indian Affairs, such as the decision to accept the surrender of I.R. 136 based on the consent of the three remaining headmen of the Papaschase Band, and the subsequent decision to turn the proceeds of the sale of

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the Reserve over to the Enoch Band. With hindsight it is easy to second-guess these decisions, to suggest that they were not prudent, and to speculate about what might have happened if those decisions had not been taken. However, over a century later, everyone has moved on. Most of the Plaintiffs' ancestors joined other Bands, and moved off to other places. A number of those ancestors joined the Enoch Band, and have benefitted from that membership. It appears that no one alive today can claim entitlement to belong to the Papaschase Band, and the Papaschase Band no longer exists in fact or in law. I.R. 136 was bought by third parties in good faith, and they have occupied, developed and resold the lands ever since. The Defendant has proceeded on the basis that the Papaschase Band no longer exists, and has dealt with the Plaintiffs as members of other Bands. It is for these reasons that the law requires that claims be pursued in a timely manner; it is simply not possible or appropriate to try and unravel transactions so long after they occurred. For the reasons I have given, the application for summary dismissal of the claim must be allowed. On many of the points the Plaintiffs have failed to show a genuine issue for trial. However, even if a genuine issue for trial could be shown, almost all the claims have long since been barred by the statutes of limitation. No plaintiff with the necessary standing has come forward. In the circumstances, there is no reason to permit the Plaintiffs to commence a representative action as proposed.

225 There is one exception which relates to the possible continued possession by the Defendant of some of the proceeds of the sale of I.R. 136. The *Limitation of Actions Act* does not bar a claim to any such proceeds (*supra*, para. 127). The Defendant did not bring forward any evidence to show that there is no genuine issue for trial on this claim (*supra*, para. 94). If a plaintiff came forward who is a descendant of the Papaschase Band, other than through a former member who took scrip, he or she might be entitled to pursue this claim. The Defendant could then argue the equitable defence of laches. The parties may apply for further relief on this point.

226 I acknowledge the excellent briefs prepared by counsel, and the professional way the case was presented.

Order accordingly.

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1996 CarswellBC 240
British Columbia Court of Appeal

R. v. Tyhurst

1996 CarswellBC 240, [1996] B.C.W.L.D. 663, 117 W.A.C. 28, 30 W.C.B. (2d) 56, 71 B.C.A.C. 28

Regina, Appellant v. James Stewart Tyhurst, Respondent

Hinkson, Rowles, Donald, JJ.A.

Judgment: February 7, 1996
Docket: Doc. CA018211

Counsel: *A. Budlovsky*, Counsel for the Appellant.
D.W. Gibbons, Q.C. and *R.S. Fowler*, Counsel for the Respondent.

Subject: Evidence; Criminal

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Criminal law

VIII Trial procedure
VIII.8 Charging jury or self-instruction
VIII.8.k Direction on onus and reasonable doubt
VIII.8.k.iii Miscellaneous

Evidence

XI Examination of witnesses
XI.9 Rebuttal
XI.9.b By prosecution

Evidence

XV Character
XV.2 Admissibility for purpose other than to show character

Evidence

XV Character
XV.6 Similar fact evidence
XV.6.l Miscellaneous

Evidence

XVI Opinion
XVI.4 Experts
XVI.4.c Admissibility
XVI.4.c.ii Miscellaneous

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Headnote

Evidence --- Exclusionary rules — Admissibility of character evidence — In criminal matters — For purpose other than to show character

Evidence --- Exclusionary rules — Admissibility of character evidence — In criminal matters — Similar fact evidence

Evidence --- Opinion evidence — Expert evidence — Admissibility

Evidence --- Examination of witnesses — Rebuttal evidence — By prosecution

Criminal Law --- Trial by indictment — Charging jury — Direction on onus and reasonable doubt

Appeals — New trial.

The accused psychiatrist was charged with two counts of indecent assault and one count of sexual assault against former patients. Two of the complainants alleged that during the course of their treatment by the accused, they were hypnotized, told to remove parts of their clothing and subjected to a master/slave relationship. In addition, they went to the accused's home, or he came to theirs, and they were whipped while partially clothed. One of the complainants alleged that she had sexual intercourse and oral sex with the accused. The accused claimed that the incidents never happened and advanced defences of innocent association and disposition. The main issue at trial was credibility. At the accused's first trial, there were four complainants. The accused was convicted, but a new trial was later ordered. At the second trial, there were only two complainants. The evidence of the other two complainants was admitted as similar fact evidence. The accused was acquitted by a jury. The Crown alleged that the trial judge erred in several respects. Firstly, in refusing to permit a psychiatrist called by the Crown, to express an opinion as to whether the complainants' memories were affected by psychotic illness, hallucinations or delusions, to testify as to the details of his interviews with the complainants. Secondly, in not limiting the scope of the accused's evidence when testifying as an expert in psychiatry. Thirdly, in instructing the jury that the Crown bore the burden of proving the similar fact evidence beyond a reasonable doubt. Fourthly, in permitting the accused's wife, children, former secretaries and cleaning ladies to give evidence that they had never observed the accused acting abusively toward his patients or hiding anything, as evidence of good character. Fifthly, in charging the jury that corroboration was required for one of the offences that occurred before 1976. Sixthly, in refusing to permit the Crown to call rebuttal evidence as to the accused's allegation that one complainant was motivated by erotomania and as to a defence psychiatrist's opinion that the accused was not a sexual sadist. The Crown appealed.

Held:

Appeal dismissed. The trial judge erred in refusing to allow the Crown psychiatrist to testify as to the details of his interviews with the complainants for the purpose of providing a foundation for his opinions. There was, however, other evidence upon which the psychiatrist based his opinions and the error would not have affected the weight given to those opinions by the jury. The accused was qualified as an expert at the request of the Crown. The Crown invited the accused's opinions and could not now complain. There were no adoptive admissions by the accused with respect to the allegedly similar fact evidence and it should not have been admitted. Therefore, the question of burden of proof was irrelevant. The evidence of the accused's family members and employees was not called as evidence of the accused's general reputation in the community, but to show disposition and opportunity. Although the judge erred on the issue of corroboration, he had a discretion to warn the jury as to the weight to be attached to the complainants' evidence. The Crown should have been permitted to lead rebuttal expert opinion evidence as to sexual sadism. It could not have anticipated the opinion of the defence psychiatrist. The error was not, however, significant in the circumstances. An accused who has been acquitted should not be sent back to be tried again unless it appears that the trial errors were such that there was a reasonable degree of certainty that the outcome may well

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have been affected. Here, while there were errors of law by the trial judge, none of them was so significant that they would lead to the conclusion that a reasonable jury properly charged would have reached a different verdict.

REASONS FOR JUDGMENT

***The Honourable Mr. Justice Hinkson*:**

1 The respondent was charged with two counts of indecent assault, the first spanning January 1, 1966 to March 1, 1976 against A.D. (Ms. C.) the second against J.G., covered a period from September 1, 1979 to January 5, 1983. The third count was of sexual assault against Ms. G. alleged to have occurred between January 5, 1983 and November 1, 1988.

2 The respondent was acquitted at trial by the jury.

3 The Crown appeals on five alleged errors of law committed by the trial judge.

The Facts

4 Both Ms. C. and Ms. G. were patients of the respondent. Ms. C. testified that part of her treatment included hypnosis. During the hypnosis, among other things, Ms. C. was told to put her hands above her head to elevate her breasts. On one or two occasions she heard sounds as if the respondent was masturbating. She had stopped seeing the respondent in 1968, but she returned to be attended by him in about 1970. At that time the respondent told her that she was a slave to a doctor/patient relationship. She began seeing him again and on her visits to his office she would be hypnotized. He kept telling her she was his slave, she had to call him "Master". Eventually she had to strip to the waist. She had to kneel, and the respondent would fondle her nipples. Subsequently the respondent invited himself to lunch in her apartment. She had to dress in a short Grecian tunic, with no underwear. She also had on a metal belt, a metal collar and a bracelet. She had to stand, facing the wall, with chained ankles and wrists, naked, while the respondent whipped her. Later, she attended the respondent's summer residence at Gabriola Island. During her visits the respondent reinforced her status as his slave and his status as her master. She had to wear the Grecian tunic, she had to stay in "slave quarters", she had to work in the field, she had to serve the respondent, and she was whipped. At nights, for about an hour, she had to stay, naked, with the respondent in his bed. Later, Ms. C. moved to Nanaimo. Until about 1976 the respondent would visit her in her house from Fridays to Saturdays. During the visits the master/slave relationship was reinforced. Ms. C., in her Grecian tunic, had to serve the respondent. She had sexual intercourse with him, and, about twice, she had to fellate him. She recounted that once, while hypnotized, she had an experience which she described as an "agape", "divine co-creational sexual experience with God".

5 Ms. G. began to see the respondent in 1979, first at his office at the University of British Columbia and then at an office in his house. She testified the respondent used hypnosis in the course of his treatment. Ms. G. had to stand up, she had to strip to her waist, and she had to push her chest forward. She also had to kneel and crawl to the respondent, kiss his hand, be called his slave and she had to call him "Master". She had to keep a "log" of her activities for the respondent to review. He also directed her about her sex life. He also whipped her regularly, either when she stood facing a wall, or when she was kneeling. During one of those whippings she heard the respondent masturbate. Ms. G. had to write "contracts" about being the respondent's slave. One was introduced as an exhibit at trial. Once the respondent visited her apartment. She had to kneel and he talked about the master/slave relationship.

6 At trial, the respondent testified and called a number of witnesses to testify on his behalf. The position of the defence at trial was that the incidents about which the complainants testified did not occur.

The Issues

7 The Crown advanced five issues which it said involved errors of law committed by the trial judge, as follows:

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> 1. The learned trial judge erred in refusing to permit Dr. Semrau to testify about the contents of conversations he had with each of the complainants prior to trial;
>
> 2. The learned trial judge erred in not limiting the scope of the evidence of the respondent when testifying as an expert in psychiatry;
>
> 3. The learned trial judge erred in his ruling as to the burden of proof resting upon the Crown on the similar fact evidence;
>
> 4. The learned trial judge erred in permitting the defence to call evidence as to good character which did not meet the legal requirement for admission of character evidence.
>
> 5. The learned trial judge erred in refusing to permit the Crown to call evidence in rebuttal.

8 The main issue at trial was the credibility of the complainants and the respondent.

Dr. Semrau's Evidence

9 Turning to a consideration of the first issue, the Crown called Dr. Semrau, a psychiatrist, to express an opinion on whether the complainants' memories were affected by psychotic illness, hallucinations or delusions. Dr. Semrau testified that he had been present in court for the testimony of A.C. and J.G. during this trial as well as the first trial. He had also reviewed the medical records of J.G. In addition, he had interviewed both A.C. and J.G. prior to the trial. The defence objected to Dr. Semrau testifying as to the details of his interviews with each of the complainants. The defence contended that to permit Dr. Semrau to tell the jury what the complainants said to him during the course of his interviews would amount to oath helping. The learned trial judge ruled that Dr. Semrau could not give the details of his pre-trial interviews with the complainants. Before the jury Dr. Semrau then expressed his opinion that in the case of J.G. he had not been able to find any indication that her memory was affected by psychotic illness, hallucinations or delusions. With respect to Ms. C., Dr. Semrau expressed the opinion that again he had not been able to find any indication that her memory was affected by psychotic illness, hallucinations or delusions except with respect to her "agape" experience, and said that he had some reservations about her description of that particular incident.

10 On this appeal the Crown contended that the learned trial judge erred in law in refusing to permit Dr. Semrau to explain to the jury the whole basis for his opinions including the details of his interviews with the complainants before trial. Reference was made to the decision in *R. v. Burns*, [1994] 1 S.C.R. 656, 89 C.C.C. (3d) 193. McLachlin J. speaking for the Court, dealt with the rule against oath helping. She said, at pp. 667-68 (S.C.R.), p. 202 (C.C.C.):

> The rule against oath-helping holds that evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible: *R. v. Marquard, supra*. The rule finds its origins in the medieval practice of oath-helping; the accused in a criminal case or the defendant in a civil case could prove his innocence providing a certain number of compurgators to swear to the truth of his oath: . . . .
>
> Dr. Maddess' evidence does not violate the rule because it was directed to legitimate purposes having nothing to do with whether the complainant was credible or not. The fact that evidence may be inadmissible for one purpose (i.e., showing the truthfulness of a witness) does not prevent it being received for another, legitimate purpose. The evidence of Dr. Maddess in the impugned passage was admissible for the purpose of supporting the opinions Dr. Maddess expressed in other matters, such as his diagnosis of the complainant's condition and his explanation of her behaviour. His conclusions were based in large part on what she had told him.

11 I conclude that the learned trial judge erred in refusing to permit Dr. Semrau to disclose the details of his interviews with the complainants for the purpose of providing a foundation for Dr. Semrau's opinions. Viewed in that way the evidence did not offend the rule against oath-helping.

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12 The Crown contends that the evidence that was rejected would affect the weight of the opinions expressed by Dr. Semrau. Unlike *Burns*, where the opinion of Dr. Maddess was based in large part on his interview with the patient, here there was much other evidence upon which Dr. Semrau based his opinions.

13 In those circumstances I am not persuaded that the jury would have attached much greater weight to the opinions expressed by Dr. Semrau, if they were also informed of the details at the complainants' interviews. I conclude that the error committed by the learned trial judge was not significant in the context of this trial.

The Respondent as an Expert Witness

14 The second issue raised by the Crown deals with the extent to which the respondent was qualified to give expert evidence. At the outset of his evidence, the respondent was qualified as an expert in psychiatry. The defence did so at the request of the Crown. The following exchange took place:

> MR. GIBBONS: Those are my questions in regards to qualifications, my lord.
>
> MR. REINER: No questions.
>
> THE COURT: Thank you.
>
> MR. GIBBONS: I would ask you qualify him, my lord, as an expert in psychiatry.
>
> THE COURT: Yes. For what purpose?
>
> MR. GIBBONS: He'll be --. He'll be, of necessity, having to give proper opinions in regards to various treatment that he engaged in regards to these complainants. I spoke to my friend about that before I qualified him, and at my friend's urging I did qualify him, my lord.
>
> THE COURT: Yes. I just want to find out the purpose so we don't get into the arguments that usually come along.
>
> MR. GIBBONS: I don't believe we will, my lord.
>
> THE COURT: All right.

15 The Crown complains now that the learned trial judge failed to impose any limits on the scope of the expert evidence of the respondent, and as a result he was permitted to testify much too broadly and to express opinions before the jury which ought not to have been permitted. The Crown contends that as the respondent was a party to the proceedings and by no means an independent witness it would have been preferable - if he was allowed to give expert evidence - to determine the scope of that evidence and thus its admissibility on a *voir dire*. The Crown contends a *voir dire* would have helped to distinguish the evidence the respondent was entitled to give as if he was a lay witness and that evidence which he could give in support of an opinion on an admissible issue. It could also be determined on a *voir dire* which of the evidence on which the respondent relied was hearsay so that should it remain unproven, the jury could be properly warned about it and its use.

16 It was not an error in law to fail to hold a *voir dire* on this issue. Indeed it was at the urging of the Crown that the respondent was qualified as an expert in the way that occurred and therefore it is not now open to the Crown to complain.

17 While a complaint was made about many aspects of the respondent's evidence in general terms, little detail was provided, and when it was, it turned out that it was on a matter on which the Crown took no objection nor sought any specific direction from the trial judge in the course of his charge. One of the specific objections raised by the Crown involved the following exchange between Crown counsel and the respondent:

> Q . . . Now, Miss [G.] also testified about being subjected to regimen of master and slave --

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A Right

Q -- and this sort of thing, and you suggest in her case that isn't the truth either; is that correct?

A I am saying that.

Q It never happened?

A It did not happen.

Q Yeah. Are you suggesting that in Miss [G.'s] case this is, like with [C.], some kind of psychotic fantasy or reconstructed memory or something of that nature?

A No. I don't think that it is simply that. I think that she is lying.

18 Crown counsel was not content with the answers obtained that what Ms. G. testified was not the truth and pushed the witness until he rejected the suggested psychiatric basis for her evidence and expressed his opinion that she was lying.

19 In my opinion the Crown invited that response and cannot now complain about it.

20 Turning to the testimony of Dr. McBride, the Crown contends that the respondent ought not to have been permitted to testify about the testimonial reliability of Dr. McBride. In this context, in my opinion, the respondent was entitled to give the testimony he did in respect of Dr. McBride. He testified that in response to the statements made by Dr. McBride to him about her patient, Ms. L., he did not challenge her because he believed that Dr. McBride always accepted as true the statements of her patients and therefore he did not attempt to persuade her that Ms. L.'s statements should not be accepted. That evidence of the respondent was admissible to show his state of mind and to explain why he did not challenge the statements Dr. McBride made to him.

21 The reason the Crown did not object to the evidence given by the respondent about the complainants and about Ms. L. and Ms. W. was that it was the Crown that had insisted that the respondent be qualified as an expert witness in the way in which he was at trial.

22 The learned trial judge provided the jury with a general instruction to consider the impartiality of each expert in deciding what weight to give to their testimony. The trial judge also instructed the jury that if an expert relied on facts which were not proven in evidence, they should give less weight to his opinion.

23 The Crown contends the trial judge ought to have analyzed the respondent's evidence for the jury pointing out which was hearsay, which was opinion, and which was irrelevant. To do so in this case, given the basis on which the respondent was permitted to testify, would have left the jury in a state of confusion.

24 It is not now open to the Crown to raise the many objections it seeks to take at this stage with respect to the expert evidence of the respondent.

Similar Fact Evidence - Burden of Proof

25 At the first trial of these charges there were four complainants, namely Ms. C., Ms. G., Ms. L. and Ms. W. At that trial the respondent was convicted. The Court of Appeal directed a new trial. At the second trial there were only two complainants, Ms. C. and Ms. G. The Crown did not call either Ms. L, or Ms. W. as witnesses. However, the Crown sought to introduce their evidence before the jury on the basis that their statements to third parties were true.

26 The Crown had two ways to introduce the truth of the evidence of Ms. L. and Ms. W. First, it could have called them as witnesses. The jury could then decide whether to accept their evidence against the respondent as true. Second, it could

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introduce their evidence upon the basis of what Crown counsel described as "adoptive admissions" by the respondent. The latter course was the one adopted by the Crown at trial.

27 Three witnesses were called on the *voir dire* seeking a ruling by the trial judge that the evidence of Ms. W. and Ms. L. should be admitted as similar fact evidence. The three witnesses called were Mr. Low, an investigator employed by the College of Physicians and Surgeons of British Columbia, Dr. Hutchison, a past registrar of the College, and Dr. McBride. Mr. Low testified about an interview with the respondent when he obtained Ms. W.'s file from him.

28 Dr. Hutchison testified to an interview he had with the respondent when he outlined the nature of a report he received from a Mrs. Reynolds, who was the probation officer of Ms. W. Initially Ms. W. had been referred to the respondent in order that he could prepare a report for use in court proceedings pending against Ms. W.

29 The third interview involved Dr. McBride, a psychiatrist, who met with the respondent to outline what her patient Ms. L. had told her about what the respondent had said and done to her while she was his patient.

30 In view of the position taken by the Crown at trial in seeking to introduce the evidence of Ms. L. and Ms. W. as similar fact evidence on the basis of adoptive admissions made by the respondent to the three witnesses, it is necessary to consider what admissions are disclosed by the evidence. If the Crown failed to establish that the respondent made adoptive admissions specifically in regard to the allegations of misconduct concerning Ms. W. and Ms. L., then there was no substance to the similar fact evidence.

31 First, with respect to the evidence of Mr. Low. He did not testify that the respondent made any admission to him with respect to Ms. W.

32 Dr. Hutchison said that after interviewing Dr. Tyhurst he made notes of the interview, then he made summaries from his original notes and then destroyed the original notes. He was permitted to use those summaries to refresh his memory. Dr. Hutchison said that at the interview he had with Dr. Tyhurst, he informed him of the nature of the complaint and as best as he could the substance of what Mrs. Reynolds had said, namely that Ms. W. had been subjected to a form of indenture and that the control exerted by Dr. Tyhurst in his management seemed to be a very strict form of control, that there were complaints also of servitude which had been disturbing to Ms. W. and to Mrs. Reynolds when Ms. W. recounted these to her. Dr. Hutchison said there was reference to a master/slave relationship but he was equivocal in his own mind as to what exact time that phrase surfaced. He testified that Dr. Tyhurst was upset by the nature of the allegations. He discussed with Dr. Hutchison at some considerable length the nature of Ms. W.'s problems in that she was an impulsive character and that there was a need for a strong strengthening of her attitudes and the changing of her personality habits, but that in order to achieve this he employed a form of indenture and he felt that if he was to achieve any degree of modification it was necessary for him to develop a very strong control. Dr. Hutchison reported that Mrs. Reynolds said that Ms. W. had been required to disrobe. Dr. Tyhurst had said that this matter involved two aspects. First, that it enhanced his subjugation and behaviour modification and, second, that she was a rather obese lady and that it was his feeling that one way of her increasing her awareness of her obesity and the need for, again, self-control in her eating habits, was to demonstrate her obesity in the nude or semi-nude state. Dr. Tyhurst said that he had observed a noticeable asymmetry in her breasts, that he had palpated a tumor in one breast and had recommended to Ms. W. that she see her family physician with a view to further investigation.

33 In cross-examination it turned out that Dr. Hutchison had no independent recollection of his interview with the respondent. He admitted that looking at the notes upon which he relied to give his evidence he was unable to say whether they were accurate. He testified:

> Q You tried to be as accurate as you could but looking at them today, you can't tell us whether or not these notes are accurate because you don't have an independent recollection; correct?
>
> A Correct.

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Q And you don't have your original notes to compare these summaries with?

A Um-hum.

Q Do you sir?

A No, I do not.

34 Dr. Hutchison had no recollection of the questions and answers given at that interview. He said:

Q And you can't recall what you told him?

A At that time?

Q Yeah. You can't recall what you told Dr. Tyhurst?

A Precisely, no.

Q And you can't recall with accuracy what his responses were because you can't recall the questions?

A Precisely.

. . . . .

Q Yeah. And you see, I guess the point I am getting at it's obviously extremely difficult for you to remember now what was said to him and what he said to you in the first interview; isn't it?

A Other than in very general terms, quite correct.

Q Yeah. The only thing you could remember with clarity was that he defended his method of management quite strongly, to use your words?

A Um-hum.

35 From a careful examination of the evidence of Dr. Hutchison it is not apparent that the respondent made adoptive admissions in respect of the complaint emanating from Ms. W. Dr. Hutchison's memory was vague as to just what had occurred at his interview with Dr. Tyhurst.

36 The evidence of Dr. Hutchison does not disclose an adoptive admission by Dr. Tyhurst that would make the evidence of Ms. W. admissible for the truth of her evidence.

37 Turning to the third witness, Dr. McBride, she said that she attended the respondent's office in 1983. In arranging the appointment she did not indicate the purpose of the interview. Dr. McBride testified that she communicated to the respondent what Ms. L. had told her while she was a patient of the respondent. Dr. McBride testified that as she was laying out the allegations made by Ms. L. the respondent said that it had gone too far, he got carried away.

38 When asked at what point in the narrative he expressed that, she replied:

A As I recall he expressed that a couple of times throughout the conversation, that he had mentioned it shortly after I started in on those items but I was clear in my own mind that I wanted to go through all of what I knew so I persisted.

Q Then when did you recall him saying that for the second time, was that after you finished all your allegations or when was it?

A To be honest I don't recall exactly.

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39 Dr. McBride made no notes of her interview with the respondent which occurred on January 5, 1983. Her interpretation was that the respondent had admitted to the things she had stated to him.

40 From Dr. McBride's evidence, assuming that the respondent made these statements attributed to him, it is impossible to know the context in which those statements were made. The evidence does not support the submission of the Crown that the respondent in making those statements was making adoptive admissions from which it could be said that he was admitting that the statements of Ms. L. were true and that he was adopting them.

41 On this appeal, the Crown contended that the learned trial judge had misdirected the jury in respect of the similar fact evidence by telling the jury that the burden of proof on the Crown was to prove that evidence beyond a reasonable doubt.

42 In response, the respondent contended that the trial judge had not erred in so directing the jury.

43 In the view I take of this issue it is unnecessary to determine the appropriate direction on the burden of proof. The respondent had an alternative submission. The respondent contended that the learned trial judge had erred in ruling the similar fact evidence to be admissible because he had overlooked entirely the threshold issue as to whether or not the respondent had made adoptive admissions in respect of the evidence of Ms. W. and Ms. L.

44 The learned trial judge gave extensive reasons for judgment dealing with the admissibility of the similar fact evidence. In my opinion, in dealing with the question of admissibility the trial judge was concerned with determining whether or not the evidence could properly be classified as similar fact and whether its probative value outweighed its prejudicial effect. That, however, was the second level for consideration on admissibility. The primary question on admissibility for the trial judge was whether the evidence of Mr. Low, Dr. Hutchison and Dr. McBride disclosed that the respondent had made adoptive admissions in respect of the evidence of Ms. W. and Ms. L. The similar fact evidence was totally dependent on the adoptive admissions. Reference was made to the decision of the Alberta Court of Appeal in *R. v. Ferris* (1994), 149 A.R. 1, 63 W.A.C. 1, 27 C.R. (4th) 141. An appeal to the Supreme Court of Canada was dismissed [1994] 3 S.C.R. 756. In that case a police officer overheard a telephone conversation by the accused in which he heard him say the words "... I killed David ...." Conrad J.A., delivering the majority judgment, made reference (at p. 8 (A.R.)) to *Wigmore on Evidence*, vol. 7, para. 2094, where the following appears at p. 604:

> The general principle, then — which may be termed the principle of completeness — that the whole of a verbal utterance must be taken together, is accepted in the law of evidence; for the law in this respect does no more than recognize the dictates of good sense and common experience. There are in the application of it important qualifications and exceptions, but the recognition of a principle and the reason for it, are unquestionable.

45 Conrad J.A. continued, at p. 8 (A.R.):

> In the case at bar, Sergeant Schmidt testified that he did not know what words preceded or followed the statement. To allow the statement into evidence would be to make the highly prejudicial assumption that the words were uttered as an admission.
>
> Where one party seeks to tender an admission of the other party into evidence, he must introduce all of the statement and not just the portion which favours the party tendering. As was stated in *Capital Trust Corp. v. Fowler* (1921), 64 D.L.R. 289 (Ont. C.A.), at p. 292:
>
>> The law seems quite settled that, if an admission is used by one party, it must be used in its entirety, that is, everything must be read that is necessary to the understanding and appreciation of the meaning and extent of the admission.

46 In the present case Dr. Hutchison has no clear recollection of any statement attributed to the respondent. He only has an impression that the respondent strongly defended his treatment of Ms. W.

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47 Turning to the evidence of Dr. McBride, it is not possible to know in relation to which of her statements the respondent said, "it went too far, I got carried away." So it is not possible to understand and appreciate the meaning and extent of the alleged admission.

48 In these circumstances, in my opinion, the learned trial judge erred in admitting the similar fact evidence. Thus whether or not the direction he gave to the jury on the burden of proof in respect of the similar fact evidence was correct is immaterial because the jury could not properly consider the similar fact evidence based on alleged adoptive admissions. There was no similar fact evidence properly before the jury for it to consider.

Character Evidence

(1) Respondent's good character

49 The respondent's wife, two children, two former secretaries and two cleaning ladies testified on his behalf. They did not see or hear anything indicative of the respondent behaving abusively to his patients and they testified that the respondent kept nothing locked — rooms or receptacles — and all, if they so wished were accessible to them. The respondent's daughter was permitted to testify that she had never seen the respondent act in a demeaning or sadistic way to other members of the family, her friends or other members in the community.

50 The Crown objects to the admission of this evidence on the basis that it was not evidence of the respondent's general reputation in the community. The learned trial judge referred to this evidence as character evidence but, in my opinion, he misspoke when he used that term. This evidence was not led to establish the general reputation of the respondent in the community. Rather it was led to show disposition and opportunity. Upon that basis, in my opinion, such evidence was clearly admissible.

(2) Complainant's evidence — corroboration

51 The learned trial judge charged the jury that corroboration was required for the offence contained in Count 1 of the indictment, an offence that occurred prior to 1976. He was of the opinion that offence required a charge to the jury on corroboration in the words of s. 142, R.S.C. 1970, C-34 as it was before its repeal by S.C. 1974-75-76, c. 93, s. 8. The learned trial judge was in error. No direction on corroboration was required pursuant to that section: *Regina v. Firkins* (1977), 37 C.C.C. (2d) 227 (B.C.C.A.), *Regina v. Bickford* (1989), 51 C.C.C. (3d) 181 (Ont. C.A.).

52 With respect to Counts 2 and 3, the trial judge proceeded to give a further direction on corroboration which was slightly different from the instruction he had given on Count 1. He then said:

> The alleged indecent assaults referred to in Count 2 occurred when no one else was present other than Dr. Tyhurst and Ms. [G.]. Ms. [G.] said they happened. Dr. Tyhurst said they did not. Where there are these conflicting stories, it may be difficult to determine the truth. In such case, the supporting evidence or testimony from independent sources other than Ms. [G.] may assist you in deciding what weight you should give to her testimony. Examples of the supporting evidence I will now outline to you are matters which you may take into account in determining Ms. [G.'s] credibility and the weight you should give to her evidence. I do not pretend that these examples are exhaustive. It is entirely up to you to decide whether these examples, or any others of a similar nature arising from the independent evidence, support her testimony and make her more worthy of belief.

53 Then the judge proceeded to discuss the indictment, then to read the *Criminal Code* sections dealing with sexual assault and finally to list the elements or essential ingredients the Crown must prove before the jury could find the respondent guilty of sexual assault. In the course of doing so, the learned trial judge said:

> Now, an alleged offence of this nature often occurs again when no one else is present other than the man and woman involved. Therefore, I am going to give you this direction on supporting evidence. Where there are conflicting stories, it may be difficult to determine the truth. Here the defence says the incidents never happened. Dr. Tyhurst contends

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> that Ms. [G.] made it all up. He argues that Ms. [G.] was and is a mentally-troubled person whose testimony you cannot trust.

54 The respondent contends that even if the trial judge was in error in directing the jury on corroboration in the words of s. 142 of R.S.C. 1970, C-34, that nevertheless he had a discretion to warn the jury as to the weight to be attached to the evidence of Ms. C. and Ms. G. and to consider whether or not their evidence was supported by other independent evidence.

55 In *Regina v. V.K.* (1991), 68 C.C.C. (3d) 18, this Court had occasion to consider the discretion available to a trial judge in these circumstances. Wood J.A. delivering the judgment of the court said at p. 30:

> The focus of the new discretion, which has replaced the old common rules of practice, is the potential for the witness's evidence to be unreliable. No automatic assumptions of unreliability arise because of age or the nature of the complaint. There must be an evidentiary basis upon which it would be reasonable to infer that the witness's evidence is or may be unreliable. Absent such evidentiary foundation, it could not possibly be argued that failure to exercise a discretion resulted in a miscarriage of justice. Were it otherwise the purpose of Parliament in enacting s. 274 would be circumvented.

56 There are passages in the directions of the learned trial judge which would suggest that to some extent his directions on corroboration were influenced by the nature of the complaints made against the respondent as set forth in the indictment. However, there was other important evidence upon which the trial judge could exercise his discretion and alert the jury to consider the weight to be attached to the evidence of the complainants. From the outset the Crown was concerned about the fact that each complainant had a history of mental problems. It was for that reason that Dr. Semrau was called as an expert to testify that the complainant's memories were not affected by psychotic illness, hallucinations, or delusions. It was on that evidentiary basis that the trial judge could exercise his discretion to instruct the jury as he did.

57 While he committed an error of law in his view that Count 1 required a charge on corroboration, in my opinion, in view of the evidence at trial of the complainants, the trial judge could have exercised the same discretion he did in respect of Counts 2 and 3 and warned the jury appropriately.

58 In those circumstances, I would not accede to this ground of appeal.

Rebuttal Evidence

59 The principal issue in this case was whether the respondent indecently and sexually assaulted the complainants. His defences were innocent association and disposition — he was not a sexual sadist. In connection with the defence of innocent association he suggested that Ms. C. was an erotomaniac, suffering from a disorder in which it was not uncommon to seek to take vengeance against the person who refuses the erotomaniac's passion.

60 With respect to the issue of sexual sadism, the defence called Dr. Bradford who was an acknowledged expert in the field of sexual sadism. As a result of various tests conducted by Dr. Bradford of the respondent, Dr. Bradford expressed the opinion that the respondent was not a sexual sadist. At the conclusion of the evidence for the defence the Crown sought to call rebuttal evidence dealing with erotomania and sexual sadism. The trial judge exercised his discretion and refused to permit the Crown to call rebuttal evidence. He did so on the basis that to permit the Crown to call rebuttal evidence would be to allow it to split its case and further that the evidence on erotomania and sexual sadism was collateral and therefore the Crown was bound by the answers of Dr. Bradford on cross-examination.

61 The Crown proposed to call Dr. Semrau in rebuttal and furnished to counsel for the respondent an outline of the evidence that Dr. Semrau would give in rebuttal. The respondent opposed the admission of such evidence on the basis that what Dr. Semrau proposed to do was to criticize the methodology adopted by Dr. Bradford in forming his opinion.

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62 Recently, the Supreme Court of Canada has had occasion to consider the admissibility of rebuttal evidence in *Biddle v. The Queen*, [1995] 1 S.C.R. 761, 96 C.C.C. (3d) 321. Sopinka J. delivered the judgment of the majority. To begin with he considered the rationale behind the rule against allowing the Crown to split its case. He said, at pp. 770-71 (S.C.R.), p. 327 (C.C.C.):

> The rationale behind the rule against allowing the Crown to split its case was stated by this Court in *John v. The Queen* (1985), 23 C.C.C. (3d) 326, 24 D.L.R. (4th) 713, [1985] 2 S.C.R. 476. The judgment of a unanimous court was delivered by Estey J. and Lamer J. (as he then was) who wrote, at pp. 329-30:
>
> > Clearly, this is the situation referred to in criminal practice as the prosecution splitting its case. The wrongs which flow from such a practice are manifold and the practice has been prohibited from the earliest days of our criminal law.
> >
> > . . . . .
> >
> > These are the consequences that flow from a violation of one of the fundamental precepts of our criminal process, namely, the dividing of the prosecution's case so as to sandwich the defence. This is a particularly lethal tactic where the evidence in reply raises a new issue and attacks the accused's credibility for this is the last evidence which the members of the jury hear prior to their deliberations. It also raises the question as to the propriety of the Crown's conduct in the context of the accused's right to elect to remain silent or to elect to enter the witness-box in his own defence. He must be given the opportunity of making this decision in the full awareness of the Crown's complete case. This did not occur in these proceedings.

63 Then Sopinka J. turned to consider when the Crown may call evidence in rebuttal. He said, at p. 771 (S.C.R.), pp. 327-28 (C.C.C.):

> In *R. v. Krause* (1986), 29 C.C.C. (3d) 385, 33 D.L.R. (4th) 267, [1986] 2 S.C.R. 466, McIntyre J., for the court, explained under what circumstances the Crown may call evidence in rebuttal. At p. 390, he noted that the general rule is that the Crown cannot split its case. McIntyre J. added [at pp. 390-1]:
>
> > The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings, in a criminal case, the indictment and any particulars ... This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence — as much as it deemed necessary at the outset — then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. *The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response*.
> >
> > The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, *where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made*.
>
> [Sopinka J.'s emphasis]

64 In addressing this issue Crown counsel stated that he was not particularly concerned about not being permitted to lead evidence on erotomania. But he was concerned that the Crown ought to have been permitted to lead rebuttal evidence on sexual sadism.

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65 The issue of sexual sadism was not an essential element in proof of the charges made by the Crown. It was an issue that was raised by the defence through its expert, Dr. Bradford. Thus the Crown was not splitting its case in seeking to lead evidence of erotomania and sexual sadism in reply. Nor can it be said the evidence of Dr. Bradford was collateral. In *R. v. Aalders* [1993], 2 S.C.R. 482, Cory J., delivering the judgment of the majority said at p. 498-99:

> In my view, the crucial question with regard to the admission of rebuttal evidence is not whether the evidence which the Crown seeks to adduce is *determinative* of an essential issue, but rather whether it is *related* to an essential issue which may be determinative of the case. . . .
>
> . . . the rules should not go so far as to deprive the trier of fact of important evidence, that can be helpful in resolving an essential element of the case.

66 The evidence of Dr. Bradford was introduced to support the defence of the respondent that the events of which the complainants testified did not happen.

67 It was not incumbent on the Crown to anticipate the opinion of Dr. Bradford and attempt to deal with it by leading as part of its case expert opinion evidence on sexual sadism. Further, the Crown would have been at a considerable disadvantage in attempting to anticipate the basis for Dr. Bradford's opinion. I conclude that the Crown was not splitting its case and was not attempting to lead evidence on a collateral issue. It follows that the learned trial judge erred in law in refusing to permit the rebuttal evidence.

68 It then becomes necessary to consider the rebuttal evidence that the Crown proposed to lead. The notes of Dr. Semrau indicate that he proposed to criticize the methodology followed by Dr. Bradford in reaching his conclusion that the respondent was not a sexual sadist. That was about as far as Dr. Semrau could go because he was not in a position to express a weighty opinion on the subject-matter. He had never been in a position to conduct the kinds of tests and examinations conducted by Dr. Bradford. In that way, his evidence in rebuttal would be restricted. Further, Dr. Bradford was challenged on cross-examination and agreed with many of the propositions put to him by the Crown which the jury may have considered qualified the basis for the opinion that he had expressed. There were certain areas that Dr. Semrau proposed to give evidence about which were not touched upon by Dr. Bradford but they do not appear to be of great substance.

69 While I conclude that the learned trial judge erred in refusing to permit the Crown to call rebuttal evidence, after considering the proposed rebuttal evidence, in my opinion, that was not a significant error in the circumstances.

The Legal Test

70 In a judgment rendered on November 16, 1995, in *The Queen v. Livermore* (No. 24143), the Supreme Court of Canada had occasion again to consider the basis on which a new trial should be ordered where the trial judge had made errors of law.

71 McLachlin J. said, at p. 13:

> The test for setting aside an acquittal and directing a new trial was set out by Sopinka J. in *R. v. Morin*, [1988] 2 S.C.R. 345 at 374:
>
> > An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error of the first trial was such that there was a reasonable degree of certainty that the outcome may well have been affected by it.
>
> In this case, we have no way of knowing whether the jury acquitted because it had reasonable doubt about whether Valerie consented, or whether it acquitted on the basis of a defence which should not have been left with it. The

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> cumulative effect of the numerous errors in this case is such that the *Morin* test is made out. Absent the significant errors at trial, a reasonable jury properly charged may well have reached a different verdict.

72 Applying that test the cumulative effect of the errors in this case does not lead me to conclude that the *Morin* test is made out. While there were errors of law by the trial judge none of them was so significant that they would lead me to conclude that a reasonable jury properly charged may well have reached a different verdict.

Conclusion

73 I would dismiss the appeal.

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2012 BCPC 74
British Columbia Provincial Court

Rizzuto v. Fernie (City)

2012 CarswellBC 777, 2012 BCPC 74, [2012] B.C.W.L.D. 4790, [2012] B.C.W.L.D. 4891, [2012] B.C.W.L.D. 4892, 214 A.C.W.S. (3d) 54

Garth A. Rizzuto, Claimant and City of Fernie, Defendant

L.J. Mrozinski Prov. J.

Heard: February 23, 2012
Judgment: March 14, 2012
Docket: Cranbrook 20615

Counsel: G. Rizzuto, for himself
G. Purdy, Q.C., for Defendant

Subject: Public; Torts; Civil Practice and Procedure; Municipal

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XVII Default proceedings
XVII.1 Noting default or pleadings closed
XVII.1.a Application to set aside

Municipal law

XII Municipal liability
XII.4 Practice and procedure
XII.4.a Actions
XII.4.a.x Miscellaneous

Municipal law

XIII Planning
XIII.2 Enactment and approval of plans
XIII.2.c Jurisdiction and powers to approve
XIII.2.c.i Municipal council

Headnote

Municipal law --- Municipal liability — Practice and procedure — Actions — Miscellaneous

When applicant R purchased property in December, 2004, it was subject to statutory building scheme ("SBS") that restricted height on homes in subdivision — R's building plans were reviewed and approved by developer and on February 1, 2007, R was granted building permit by respondent municipality F — R alleged that F decided not to honour SBS and brought claim for damages — F sought and obtained court order that hearing would proceed without calling of viva voce evidence to determine whether "assuming . . . [F] required [R] to provide it with proof that [R] had complied with the SBS before it would issue a building permit, and assuming [F] did not require other property owners to provide proof of compliance with the SBS before issuing them building permits", there was cause

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of action and if so, was it statute barred by way of limitations contained in Local Government Act — On January 23, 2012, F appeared in court to argue its application to strike R's claim; R did not appear — Court granted F default order — R applied to set aside default order — Application granted — F relied on s. 285 of Local Government Act, which states that all actions against municipality must be commenced within six months after cause of action first arose — It was not clear that damages, if they occurred at all in this case, occurred in 2007 when F issued R's building permit — If damages occurred as alleged by R, they would have occurred sometime after that, once R acted to his detriment and upon reliance of comfort he thought F had given him — Time at which damages in this case occurred was not so clear that claim could be said to be completely without merit for purposes of this application to set aside default order.

Municipal law --- Planning — Enactment and approval of plans — Jurisdiction and powers to approve — Municipal council

Applicant property owner alleged he would have built his property differently had he known respondent municipality would not and, as matter of law, could not enforce statutory building scheme; this was was matter for trial judge to decide, thus default judgment against applicant was set aside.

Civil practice and procedure --- Default proceedings — Noting default or pleadings closed — Application to set aside

Fact that respondent municipality had no authority to enforce statutory building scheme would not bar applicant property owner's claim in negligent misrepresentation; applicant's claim disclosed cause of action known in law and default judgment against applicant was set aside.

Table of Authorities

Cases considered by *L.J. Mrozinski Prov. J.*:

Century Holdings Ltd. v. Delta (District) (1994), 89 B.C.L.R. (2d) 193, [1994] 5 W.W.R. 229, 43 B.C.A.C. 123, 69 W.A.C. 123, 13 C.L.R. (2d) 289, 19 M.P.L.R. (2d) 232, 1994 CarswellBC 143 (B.C. C.A.) — considered

Grande v. Nelson (1989), 42 M.P.L.R. 286, 1989 CarswellBC 461 (B.C. S.C.) — considered

Lou Guidi Construction Ltd. v. Fedick (1994), 1994 CarswellBC 2818 (B.C. Prov. Ct.) — considered

Statutes considered:

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165
Generally — referred to

Local Government Act, R.S.B.C. 1996, c. 323
s. 285 — considered

Small Claims Act, R.S.B.C. 1996, c. 430
Generally — referred to

Rules considered:

Small Claims Rules, B.C. Reg. 261/93
R. 17(2) — considered

R. 17(2)(b) — considered

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R. 20(5) — referred to

APPLICATION brought by land owner to set aside default judgment against him in his action against respondent muncipality.

***L.J. Mrozinski Prov. J.*:**

1 Mr. Rizzuto applies to set aside a default order dated January 23, 2012 in which his claim against the City of Fernie (the "City") was struck for failure to appear at a summary application by the City to dismiss his claim as being without merit. In addition to the default order, Mr. Rizzuto was also directed to pay the City a penalty pursuant to Rule 20(5) of the *Small Claims Rules* in the amount of $2,500.00

2 The City opposes Mr. Rizzuto's application to set aside the default order. It submits that Mr. Rizzuto has provided no reasonable explanation for failing to appear at the hearing of its summary application but that in any event his claim has no merit. The City also submits that it has been put to considerable expense with respect to this claim and ought not to be required to bear any further costs.

The Nature of the Claim

3 The claim in this case concerns property owned by Mr. Rizzuto in the City of Fernie, in a subdivision known as Castle Mountain. When Mr. Rizzuto and his wife purchased the property in December, 2004, it was subject to a Statutory Building Scheme ("SBS") which, among other things, provided for height restrictions on homes in the subdivision to preserve the view of each of the lots.

4 The developer of Castle Mountain, Elk River Developments, was required to approve the building plans proposed by purchasers of property in the subdivision. On the evidence which the parties agreed was available for review on the summary application to strike, it is apparent that Mr. Rizzuto's building plans were reviewed by the developer and approved by letter dated April 18, 2005. On January 18, 2007, Mr. Rizzuto applied to the City of Fernie for a building permit which was granted by the City on February 1, 2007.

5 Mr. Rizzuto brought this claim for damages in the Provincial Court in May, 2010 in the amount of $25,000.00. He reduced his damages' claim to fit within the small claim's limits. In the claim, he acknowledges having purchased property in Castle Mountain subdivision which property was subject to the SBS. He then alleges that:

> The City of Fernie Building Inspector would not give us a building permit until our building plans were approved and signed off by a designate of Elk River Developments. Our plans were submitted to Abugov-Kaspar, an architectural firm in Calgary, who reviewed the plans, (sic) asked for setback and design changes before approving the plans.
>
> The City of Fernie has now decided not to honour the Statutory Building Scheme. The City has misled us since we believed we would be protected by the Registered Building Scheme. We incurred additional expenses at the hands of the City when we presented our plans, since the Building Inspector at that time gave us incorrect setbacks which did not conform to the Building Scheme....

6 Mr. Rizzuto further alleges that he seeks damages in the amount of $25,000.00 "as a result of the City of Fernie approving the building permits in Castle Mountain subdivision which do not comply with the Statutory Building Scheme." On page 2 of his claim, Mr. Rizzuto adds that he is seeking damages for the City's failure to enforce the SBS after forcing him to do so. Mr. Rizzuto further alleges that had he known the City would not "honour the Scheme" he and his wife would have built differently or purchased property in an area not covered by the SBS.

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7 It is apparent from Mr. Rizzuto's claim that other purchasers of lots in the Castle Mountain subdivision have built homes that do not comply with the SBS and which obscure the view he once enjoyed thus, among other things, reducing the value of his property.

8 It is also apparent from the material that Mr. Rizzuto feels greatly aggrieved by these facts and has pursued this matter with the City for some time, with not inconsiderable vigour, and at some expense to himself and to the City.

The Application to Strike

9 The City, being of the view that Mr. Rizzuto's claim must fail either because it fails to disclose a cause of action, or because any cause of action has long since been time barred by a limitations period, pressed for a speedy resolution of this case. It sought and obtained an order of the Court dated November 24, 2011 (the "Order"), that a hearing proceed without the calling of (*viva voce*) evidence to determine whether:

> ...assuming ...the City required the claimant to provide it with proof that the claimant had complied with the SBS before it would issue a building permit, and assuming the City did not require other property owners to provide proof of compliance with the SBS before issuing them building permits, is there a cause of action and if so is it statute barred by way of the limitations contained in the *Local Government Act*.

10 It was agreed for the purposes of the summary application firstly that if the matter was resolved in favour of Mr. Rizzuto, his claim would be set down for trial. It was agreed by the parties that the Court could consider the claimant's trial book, filed November 24, 2011, and the City's law and documents book, filed November 24, 2011 as part of the application to strike. Finally, it should be noted that the City was prepared to admit certain facts for the purpose of its summary application but not for the purposes of the subsequent trial if there was one.

11 The Order further provided that the summary application would be heard on January 23, 2012 or such other date. It is noted on the Order that both parties indicated they might have other commitments on January 23rd, and that both would respect each other's commitments.

12 The City also agreed it would provide the claimant with a brief summary of its argument by January 6, 2011. By letter dated December 15, 2011, counsel for the City forwarded a copy of the City's brief of argument to Mr. Rizzuto. The letter asked Mr. Rizzuto to provide counsel with any materials in response before the January 23, 2012 hearing date.

13 On January 23, 2012, the City appeared in Small Claims Court at 9:30 a.m. in Fernie to argue its application to strike Mr. Rizzuto's claim. Mr. Rizzuto did not appear. Counsel for the City quickly left a message for Mr. Rizzuto reminding him of the court date. However, as Mr. Rizzuto was still not present in court by 10:45 a.m., the Court granted the City the default order and imposed a penalty in the amount of 10% of the claim on the ground that it was without merit, that Mr. Rizzuto had made numerous unsuccessful applications in the matter, and that he had been told by the Ombudsman's office that the City had no legal authority to enforce the SBS.

14 At 4:40 p.m. on January 23, 2012, Mr. Rizzuto phoned counsel for the City and advised him that he had been under the impression the City was supposed to notify him of the court date.

15 Mr. Rizzuto then filed this application to set aside the default order on January 27, 2012.

Application to set aside the default order

16 In his affidavit in support of the application to set aside the default order, Mr. Rizzuto averred that he left the pre-trial conference of November 24, 2011 with the impression that as both parties had indicated they might have other commitments on January 23, 2012, the City would communicate with him respecting a confirmed hearing date. He added that his non-attendance was in no way intentional and further that he was still awaiting certain documents from the City pursuant to the *Freedom of Information and Privacy Act*.

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17 In argument before this court, Mr. Rizzuto added to his affidavit material. Firstly, he pointed to the fact that he has been prescribed the drug Prednisone and that the medication has caused him to become confused at the very least. Additionally, Mr. Rizzuto received a notice of the January 23 hearing from the Registry which was unfortunately dated January 23, 2011. I doubt very much whether this in itself caused Mr. Rizzuto to miss the January 23, 2012 hearing date but I accept that he was confused about the date in any event. I have no doubt that Mr. Rizzuto did not intentionally miss his hearing date. He is evidently anxious for his day in court.

The Law

18 Under sub-rule 17(2) of the *Small Claims Rules*, this Court may set aside a dismissal or default order made in the absence of a party. Sub-rule 17(2)(b) provides that in doing so, the Court must consider the following:

i. the reason the party did not file a reply or attend the settlement conference, trial conference, or trial;

ii. the reason for the delay, if any, in filing the application; and

iii. the facts that support the claim or the defence.

19 In *Lou Guidi Construction Ltd. v. Fedick*, [1994] B.C.J. No. 2409 (B.C. Prov. Ct.), Judge Stansfield observed at para. 5 that given the purpose of the *Small Claims Act*, and the preponderance of self represented litigants in this court, as a general rule greater emphasis should be placed upon the facts which support the claim or defence than the other factors in s. 17(2)(b). He added that though "the reasons for the party failing to do that which led to the default, or delaying bringing the application to set aside, are relevant considerations, they are less so than whether on the merits the party deserves their day in court."

20 It follows that it is necessary to consider these other relevant factors only if the court is satisfied there is merit to the claim. The question on this leg of the test under sub-rule 17(2)(b) is whether there is any evidence on which this court could find the applicant has a meritorious claim or at least one worthy of investigation. The standard against which the court must consider the merits of a claim on this application is obviously lower than that which must be applied in any hearing or trial of the case on its merits.

The Merits of this claim

21 As it stated in the written argument prepared for its summary application, the City argued on this application that Mr. Rizzuto's claim is patently without merit and ought not to be revived. Counsel submitted that even assuming the City had required Mr. Rizzuto to obtain approval of his building plans from the developer before the City would issue a building permit as alleged, those facts nonetheless do not give rise to any cause of action.

22 The City submits firstly that it has neither the lawful authority nor the obligation to enforce the SBS. In the result, assuming for the sake of argument that it did require compliance with the SBS before issuing a building permit, the City admits it was acting without lawful authority. The City maintains however, that even if it did unlawfully require Mr. Rizzuto to comply with the SBS, it was doing no more than requiring him to do that which he was already required to do under the SBS and that this does not establish a cause of action.

23 Secondly, the City characterizes Mr. Rizzuto's claim as one in damages arising out of the City's failure to continue to act unlawfully by requiring other property owners in the subdivision to prove compliance with the SBS, which it submits also does not disclose a cause of action known in law.

24 Alternatively, the City submits that even if it could lawfully enforce the SBS, which it denies is the case, it is clear in law that the enforcement of such a covenant is discretionary and no cause of action can arise for a failure of a municipality or local government to enforce a covenant.

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25 In the further alternative, the City submits that even if Mr. Rizzuto did sustain damages by reason of having to obtain approval from the developer prior to the issuance of a building permit, his action is statute barred by s. 285 of the *Local Government Act*.

26 The question on this application is whether it is plain and obvious that these defences give rise to an absolute bar to this claim such that it is not even worthy of investigation. In this regard, it is useful to bear in mind Mr. Rizzuto's claim as I have set it out in paras. 5 and 6 above.

27 I find that Mr. Rizzuto's claim, though not expressly stated (and not surprisingly given that he is self-represented), is one for damages arising out of an alleged negligent misrepresentation or, alternatively abuse of public office. Mr. Rizzuto specifically alleges that by requiring him to prove compliance with the SBS before issuing a building permit, the City misled him into believing that it would enforce the SBS. If, as alleged, the City led Mr. Rizzuto to believe it would enforce the SBS, it is no answer to the claim of negligent misrepresentation to say the City had no authority to do so. The questions that must be answered are whether Mr. Rizzuto can prove reasonable reliance, what he did or did not do in reliance on this alleged misrepresentation, and whether he can prove damages flowed as a result.

28 Mr. Rizzuto alleges that had he known the City would not honour the SBS, he would have built differently or purchased property in an area not covered by the SBS. He did neither and now owns a home the value of which is alleged to have declined as a consequence of the City's non-action.

29 I have some difficulty with Mr. Rizzuto's allegation that he would have built differently had he known the City would not and, as a matter of law, could not enforce the SBS given that he purchased the property and obtained approval from the developer well before seeking a building permit from the City. However, this would be a matter for the trial judge to decide. I cannot say at this point that the claim is unworthy of investigation on its face on the ground that it discloses no cause of action.

30 Mr. Rizzuto claims not only to have been misled by the City to his detriment, but he seeks damages for the failure of the City to enforce the SBS. The City, as noted, submits it either has no authority to enforce the SBS in which case it could not be compelled to do so, or alternatively, if it does have authority, it cannot be compelled to enforce the SBS. That, the City says, is because *Century Holdings Ltd. v. Delta (District)*, [1994] B.C.J. No. 693 (B.C. C.A.), holds that the enforcement of a covenant by a municipality is a discretionary matter. Either way, the City submits that Mr. Rizzuto's claim cannot succeed. I have already concluded that the fact the City had no authority to enforce the SBS would not bar Mr. Rizzuto's claim in negligent misrepresentation.

31 As for the alternative argument, even if I accept that the enforcement of the SBS is purely discretionary, it is implicit in the argument that the decision to enforce or not to enforce the SBS constitutes the exercise of a public law power. It is clear in law that the exercise of a public law power may be subject to claims of abuse. Here, though not perfectly drafted, Mr. Rizzuto's claim is that the City has done one thing in his case and another in the case of other similarly situated property owners. In other words, he has been singled out and the City's exercise of its discretion has been improper and an abuse of public office. Whether or not such a claim can be proven is another matter but Mr. Rizzuto's claim does disclose a cause of action known in law.

32 The second leg of the City's argument on the merits of this case is that whether or not Mr. Rizzuto's claim discloses a cause of action, his claim for damages is statute barred.

33 The City relies on s. 285 of the *Local Government Act* which provides as follows:

> All actions against a municipality for the unlawful doing of anything that
>
> > a) is purported to have been done by the municipality under the powers conferred by an Act, and
> >
> > b) might have been lawfully done by the municipality if acting in a manner established by law,

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> must be commenced within 6 months after the cause of action first arose, or within a further period designated by the council in a particular case, but not afterwards.

34 The City submits, in reliance on the reasons of Robinson L.J.S.C. in *Grande v. Nelson*, [1989] B.C.J. No. 476 (B.C. S.C.), that a cause of action for the purpose of s. 285 arises at the time the damages occur; not from the time the damages are discovered. As such, it is submitted, it is clear in law that whether or not the City acted unlawfully to the detriment of Mr. Rizzuto, any damages he suffered occurred in 2007 at the latest when the City led him to believe it would enforce the SBS.

35 I do not find it so clear that the damages if they occurred at all in this case occurred in 2007 when the City issued Mr. Rizzuto's building permit. If the damages occurred as alleged by Mr. Rizzuto, they would have occurred sometime after that once Mr. Rizzuto acted to his detriment and upon reliance of the comfort he thought the City had given him. In my view, the time at which the damages in this case occurred is not so clear that the claim can be said to be completely without merit for the purposes of this application to set aside the default order.

36 Turning to the City's alternative argument, if it does have authority to enforce the SBS and simply chooses not to in Mr. Rizzuto's case, Mr. Rizzuto's claim, assuming he has one, is ongoing. The City may succeed on the argument that it exercises sole discretion in deciding whether or not to enforce a covenant which discretion is immune from judicial review, but if it is wrong Mr. Rizzuto's claim would not otherwise be time barred.

37 I have found that Mr. Rizzuto's claim is at least worthy of investigation. For the reasons set out immediately above, I am also not satisfied that the case for the statutory time bar is so clear that the claim should not be allowed to proceed at least to the summary argument. Given these findings, I must now consider whether Mr. Rizzuto has met the remaining conditions for the setting aside of the default order.

Other Considerations

38 There is no doubt that Mr. Rizzuto acted quickly in seeking to set aside the default order. The only question is whether his explanation for failing to attend is reasonable. I have found it evident that Mr. Rizzuto wants his day in court and for that reason I accept his explanation that he was unaware of the hearing date. It follows that the default order must be set aside as well as the penalty granted in default.

39 Even though I find Mr. Rizzuto has provided a reason for failing to appear, it is appropriate in this case that he compensate the City for its appearance on January 23, 2012 and at this application to set aside the default order. I order that Mr. Rizzuto pay to the City its reasonable costs for attending both hearings forthwith and in any event of the cause.

40 This matter must be set back on the list for a hearing of the City's summary application to strike if the City chooses to proceed with that application. Otherwise, the matter may be set for trial. However, the matter may not be set back on the list for either a hearing or trial until Mr. Rizzuto pays the City pursuant to this Order.

Application granted.

End of Document

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2009 ABQB 715
Alberta Court of Queen's Bench

SemCanada Crude Co., Re

2009 CarswellAlta 2010, 2009 ABQB 715, [2010] A.W.L.D. 402, [2010] A.W.L.D. 406, 183 A.C.W.S. (3d) 83, 486 A.R. 329, 61 C.B.R. (5th) 242

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of a Plan of Compromise or Arrangement of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 319278 Nova Scotia Company and 1380331 Alberta ULC

B.E. Romaine J.

Heard: October 9, 2009
Judgment: December 4, 2009
Docket: Calgary 0801-08510

Counsel: A. Robert Anderson, Q.C., Thomas D. Gelbman, W.K. Levi Cammack for SemCanada Crude
Charles P. Russell, Q.C. for HEMI

Subject: Corporate and Commercial; Civil Practice and Procedure; Contracts; Property; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Commercial law

V Sale of goods
V.9 Buyer's remedies
V.9.b Set-off
V.9.b.i General principles

Contracts

VII Construction and interpretation
VII.4 Resolving ambiguities
VII.4.b Contra proferentem

Headnote

Commercial law --- Sale of goods — Buyer's remedies — Set-off — General principles

Parties entered into agreements for purchase and sale of crude oil — Section 18 of agreements provided that if party filed proceeding for protection of creditors, this was event of default which gave performing party right to take certain steps including set-off amounts as provided for in s. 14 — Section 14 provided that in event buyer failed to make timely payment of monies due and owing to seller or seller failed to make timely delivery of crude oil to buyer, party not receiving timely delivery or payment ("non-defaulting party") could set-off amounts defaulting party owed to it against any other deliveries or payments which it owed to defaulting party — "Party" for purpose of s. 14 included affiliates — Seller filed for protection of creditors — Application was made for determination of whether buyer was entitled to exercise contractual set-off of money it owed under agreements against amounts owed

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by seller's affiliate to buyer's affiliate — Order made declaring that amount owed by buyer to seller was due and payable without set-off — Interpretation of set-off provisions put forward by seller was commercially reasonable and consistent with intention of parties as determined from whole of contract and plain meaning of its language — While set-off was possible remedy triggered by event set out in s. 18, present circumstances did not give buyer right of set-off as provided for in s. 14 — Only default under contract was that buyer had failed to make payments for crude oil delivered under agreements — Thus non-defaulting party was seller and it was seller that had right to set-off and not buyer — This interpretation limited options available under s. 18 depending on circumstances of triggering breach, but that did not make s. 18 commercially unreasonable or ineffective — It was not intention of parties to give performing party under s. 18 right to set-off even if it was not in default under s. 14 — Whether term "party" included its affiliates was irrelevant to issue — Corporation can enter into contract that benefits its affiliate but not one that binds its affiliate without affiliate's consent — Necessity to address double recovery scenario supported seller's argument that set-off right provided by s. 14 was not intended by parties to be cross-affiliate set-off.

Contracts --- Construction and interpretation — Resolving ambiguities — Contra proferentem

Parties entered into five agreements for purchase and sale of crude oil — Section 18 of agreements provided that if party filed proceeding for protection of creditors, this was event of default which gave performing party right to set-off amounts as provided for in s. 14 of agreement — Section 14 provided that in event buyer failed to make timely payment of monies due and owing to seller or seller failed to make timely delivery of crude oil to buyer, party not receiving timely delivery or payment ("non-defaulting party") could set-off amounts defaulting party owed to it against any other deliveries or payments which it owed to defaulting party — Party for purpose of s. 14 included affiliates of each party — Seller filed for protection from creditors — Application was made for determination of whether buyer was entitled to exercise contractual set-off of money it owed under agreements against amounts owed by seller's affiliate to buyer's affiliate — Order made declaring that amount owed by buyer to seller was due and payable without set-off — Interpretation of set-off provisions put forward by seller was commercially reasonable and consistent with intention of parties as determined from whole of contract and plain meaning of its language — While set-off was possible remedy triggered by event set out in s. 18, present circumstances did not give buyer right of set off as provided for in s. 14 — If this interpretation was incorrect, interpretation put forward by buyer gave rise to ambiguity and it was necessary to resort to contra proferentem — Terms of contract were presented to seller as fait accompli — Seller had no meaningful negotiating ability with respect to terms of agreements — Ambiguity interpreted in manner least favourable to buyer.

Table of Authorities

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Forbes v. Git (1921), 59 D.L.R. 155, 1921 CarswellOnt 56, 62 S.C.R. 1 (S.C.C.) — referred to

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Scanlon v. Castlepoint Development Corp. (1992), 29 R.P.R. (2d) 60, 59 O.A.C. 191, 11 O.R. (3d) 744, 99 D.L.R. (4th) 153, 1992 CarswellOnt 633 (Ont. C.A.) — referred to

Scanlon v. Castlepoint Development Corp. (1993), 102 D.L.R. (4th) vii (note), 64 O.A.C. 320 (note), 157 N.R. 400 (note), [1993] 2 S.C.R. x (note), 32 R.P.R. (2d) 160 (note) (S.C.C.) — referred to

550 Capital Corp. v. David S. Cheetham Architect Ltd. (2009), 2009 CarswellAlta 837, 8 Alta. L.R. (5th) 1, 81 R.P.R. (4th) 1, 2009 ABCA 219, 457 W.A.C. 83, 457 A.R. 83 (Alta. C.A.) — followed

369413 Alberta Ltd. v. Pocklington (2000), 2000 ABCA 307, (sub nom. *Gainers Inc. v. Pocklington Holdings Inc.*) 234 W.A.C. 280, (sub nom. *Gainers Inc. v. Pocklington Holdings Inc.*) 271 A.R. 280, 88 Alta. L.R. (3d) 209, 12 B.L.R. (3d) 147, 2000 CarswellAlta 1295, 194 D.L.R. (4th) 109, [2001] 4 W.W.R. 423 (Alta. C.A.) — referred to

APPLICATION for determination of whether buyer was entitled to exercise contractual set-off of money it owed under crude oil agreements against amounts owed by seller's affiliate to buyer's affiliate.

***B.E. Romaine J.*:**

Introduction

1 In this application, Husky Energy Marketing Inc. ("HEMI") submits that it is entitled to exercise contractual set-off of money it owes under crude oil agreements it entered into with SemCanada Crude Company ("SemCanada Crude") against amounts owed by SemCrude, L.P. ("SemCrude U.S.") to Husky Marketing and Supply Company ("Husky U.S.") under crude oil agreements entered into by those two U.S. entities.

Analysis

2 SemCanada Crude and HEMI entered into five similar but separate agreements for the purchase and sale of crude oil, with commencement dates ranging from November, 1996 to June, 2008. Attached to and forming part of each of these crude oil agreements are schedules entitled "General Terms and Conditions" prepared by HEMI. The most recent of such schedules is stated to be effective January 1, 2003 (the "HEMI Terms").

3 It is common ground that the right to contractual set-off, if it exists in these circumstances, must be found in sections 14 and18 of the HEMI Terms. The core issue is whether the right to set-off that is triggered by section 18 is to be interpreted through a literal interpretation of section 14 or by substituting the concepts of "Performing" and "Non-Performing Party"as set out in section 18 for the concepts of "Defaulting" and "Non-Defaulting Party" as used in section 14; in other words, by interpreting section 18 as providing additional circumstances in which set-off may be allowed.

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4 Section 18 provides in part that if a party, thereafter defined as a "Non-Performing Party", files a proceeding under a law for the protection of creditors, which SemCanada Crude concedes that it has, this is an "Event of Default" which gives the "Performing Party", HEMI in these circumstances, the right exercisable in its discretion to take *any or all* of certain listed steps. These steps include the following:

> (a) withhold or suspend shipments under any or all Crude Oil Contracts (as Crude Oil Contracts are defined in Section 13 herein) between the parties without prior notice, (provided that, as soon as possible after having withheld or suspended shipments, the Performing Party shall give notice of such withholding or suspension); *and/or*
>
> (b) request any or additional Security as provided for in Section 17 herein; *and/or*
>
> (c) set-off amounts and/or deliveries as provided for in Section 14 herein, *and/or*
>
> (d) establish an Early Termination Date (as defined below) upon which Early Termination Date this Agreement or all Crude Oil Contracts (at the Performing Party's sole option) (as Crude Oil Contracts are defined in Section 13 herein) shall terminate and the Performing Party shall immediately liquidate any or all Transactions (as defined below) then outstanding at such Early Termination Date by following the liquidation steps as outlined in sub-Sections (e) through (g) below [...].
>
> (emphasis added)

5 Section 14 provides as follows:

> In the event that Buyer shall fail to make timely payment of monies due and owing to Seller *hereunder* or in the event that Seller shall fail to make timely delivery of any Crude Oil to Buyer *hereunder*, (the party so failing to perform or pay is referred to herein as the "Defaulting Party") the party not receiving timely delivery or payment (the "Non-Defaulting Party") may, at its option, set-off any or all of the amounts or deliveries which the Defaulting Party owes to it at the time of such set-off (whether under this Agreement or under any other Crude Oil Contract) against any other deliveries or payments which it owes to the Defaulting Party at the time of such set-off (whether under this Agreement or under any other Crude Oil Contract).
>
> (emphasis added)
>
> "Party" for the purpose of this Section 14 shall include the affiliates of each party (including, but not limited to, parent and subsidiary companies), it being the intent of the parties to this Agreement to treat each party hereto and its respective affiliates as a single legal entity for the purpose of set-off pursuant to this Section 14.
>
> "Crude Oil Contract" for the purpose of this Section 14 shall be defined in Section 13 herein.

6 The definition of Crude Oil Contracts is not contentious. The parties agree that as long as this term is being used within the parameters of section 14, it may include the contract at issue between SemCrude U.S. and Husky U.S. It is also common ground that SemCrude, and Husky U.S. are affiliates of SemCanada Crude and HEMI, respectively.

7 The recent case of *550 Capital Corp. v. David S. Cheetham Architect Ltd.*, 2009 ABCA 219, 81 R.P.R. (4th) 1, 2009 CarswellAlta 837 (Alta. C.A.) at paras. 26 -28, provides a useful summary of the principles of contractual interpretation that are relevant to this application:

> The objective of contract interpretation is to discover and give effect to the real intention of the parties. "That intention must be found, in the first instance, in the operative words of the document, read as a whole, giving meaning to every provision if that is possible.": *Western Irrigation District v. Alberta*, 2002 ABCA 200, 312 A.R. 358 (Alta. C.A.) at para. 21 quoting *Scurry-Rainbow Oil Ltd. v.Kasha* (1996), 184 A.R. 177 (Alta. C.A.) at para. 43.

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8 A key principle of contract interpretation requires that words are to be given their ordinary and grammatical meaning: K. Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell, 2004) at 115. As well, a court must strive to harmonize apparently conflicting terms in a contract. Whenever possible, effect is to be given to all the terms of contracts, and none are to be rejected as having no meaning: *369413 Alberta Ltd. v. Pocklington*, 2000 ABCA 307, 271 A.R. 280 (Alta. C.A.) at para. 19 citing *Cotter v. General Petroleums Ltd.* (1950), [1951] S.C.R. 154 (S.C.C.) at 158 and *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744 (Ont. C.A.) at 770, 776, leave to appeal refused, [1993] 2 S.C.R. x (note) (S.C.C.).

9 Where there is apparent conflict or inconsistency between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question: *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.) at para. 9. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: *BG Checo* at para. 9 citing *Chitty on Contracts* (26th ed., 1989) at 526; Lewison, *The Interpretaion of Contracts* (1989) at 206: *Forbes v. Git* (1921), 62 S.C.R. 1 (S.C.C.) per Duff J. (as he then was), dissenting, at 10, rev'd (1921), [1922] 1 A.C. 256 (Canada P.C.); (*Hassard v. Peace River Co-operative Seed Growers Assn.*, [1954] 2 D.L.R. 50 (S.C.C.), at 54. In seeking reasonable consistency between terms, they will, if reasonably possible, be reconciled by construing one term as a qualification of the other term; frequently, the general terms of a contract will be seen to be qualified by specific terms; *BG Checo* at para. 9, citing *Forbes v. Git* (1921), [1922] 1 A.C. 256 (Canada P.C.): *Cotter v. General Petroleums Ltd.* But if "an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails.": *Alberta Power Ltd. v. McIntyre Porcupine Mines Ltd.*, 58 D.L.R. (3d) 303, [1975] 5 W.W.R. 632 (Alta. C.A.), quoting *Forbes v. Git* at 259.

10 SemCanada Crude submits that section 14 of the HEMI Terms must be read to mean that, for a set-off to arise, there must be a Buyer that fails to make timely payment of amounts due under a Crude Oil Contract governed by the HEMI Terms or a Seller that fails to make timely delivery of crude oil pursuant to a Crude Oil Contract governed by the HEMI Terms. In the present circumstances, the only default under a contract governed by the HEMI Terms is that HEMI, as Buyer, has failed to make payments for crude oil delivered under crude oil agreements between HEMI and SemCanada Crude. Thus, the Non-Defaulting Party is SemCanada Crude, and it is SemCanada Crude that has the right to set-off and not HEMI. In other words, while set-off is a possible remedy triggered by an event set out in section 18, the present circumstances do not give HEMI a right of set off "as provided for in Section 14."

11 HEMI submits that this interpretaion of sections 18 and 14 is not correct because it has the effect of limiting or eliminating the use of the options available to a Performing Party under section 18, depending on the circumstances of the triggering breach. While that may be so, that does not make section 18 commercially unreasonable or ineffective. Section 18 provides for a list of options, "any or all" of which may be available to a Performing Party if section 18 is triggered by one or more of the listed breaches. A plain reading of section 18 indicates that the parties did not intend all of these options to be free-standing, as, for example, both subsections (b) and (c) refer to other provisions of the HEMI Terms for their implementation. While one of the options may not be available given the circumstances in effect at the time of the triggering event, this does not mean section 18 (c) is unnecessary in any scenario. As submitted by SemCanada Crude, section 18 provides an additional trigger to invoke a right to set-off that would not otherwise be available to a party if the right was only exercisable in the circumstances that arise under section 14.

12 HEMI submits that section 14 should be interpreted by moving the concept of "Performing "Party" and "Non-Performing Party" from the triggering provisions of section 18 and then using those concepts to allow the non-defaulting party in Section 18 terms to exercise the right of set-off in section 14. Interpreting section 14 in this way requires the court to ignore the first three lines of section 14 which set out the parameters of its use. HEMI submits that this is necessary because these first three lines cannot have been intended by the parties to limit set-offs solely to a failure to deliver or pay for crude oil, as otherwise it would have been entirely unnecessary to have set-off as one of the remedies under Section 18.

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13 Had it been the intention of the parties to edit or amend section 14 in this manner, it would have been possible for them to do so in clear contractual language by either drafting the section 18 remedies as free-standing remedies available to a Performing Party or by clarifying in section 18(c) that section 14 should be interpreted in this way. Instead, section 18(c) refers specifically to section 14 for the exercise of this optional remedy.

14 It is also notable that section 18 provides for a variety of remedies for a variety of defaults, and that it allows the Performing Party to take "any or all" of the listed remedies at its discretion. The purpose of section 18 appears to be to provide a Performing Party with maximum flexibility to invoke remedies as appropriate in a wide variety of circumstances. Thus, if the event of default is a failure by a party to provide adequate security, for example, the other party as Performing Party not in default could withhold shipments of crude oil and then invoke section 14 to trigger set-off, without being considered a defaulting party under section 14. Similarly, if the event of default is a material breach of an obligation, the party not in default may trigger an early termination of the agreement and section 18 makes it clear that it could also invoke the right of set-off and is not limited to a single remedy. While the set-off remedy may not work in every situation of default, or may have been available in any event and therefore not strictly necessary to be included among the remedies available to the Performing Party, other than for purposes of clarity, that alone does not make section 18 ineffective.

15 Section 18 allows the Performing Party to use certain remedies in the event of an Event of Default by referring, in the cases of the remedies of set-off and requesting additional security, to the more specific provisions of the HEMI Terms that govern the exercise of that remedy. It does not amend those specific provisions by removing the specific requirements to their use. To interpret section 14 in the manner suggested by HEMI would be to give a party that is a Performing Party under section 18 the right to set-off even if it is not in default under section 14. That this was not the intention of the parties is clear from the reference in section 18(c) to the specific provisions of section 14.

16 HEMI submits that the second part of section 14 which defines "party" is a "qualifying clause" which qualifies the word "party" as it is used in the whole of section 14. (While "party" is capitalized in the definition, it appears as the first word in a sentence. What follows makes it clear that the defined term is "Party" or "party"). Thus, HEMI submits that this clause does not offend the rule against repugnancy, as it falls within the exception to the rule set out in *Alberta Power Ltd.*, supra at para. 14. That may be so, but does not help HEMI in its assertion that section 14 allows it to set-off debt owed by SemCrude U.S. to Husky U.S. against its debt to SemCanada Crude.

17 The operative words of section 14 that give rise to the right of set-off are the words "the party not receiving timely delivery or payment (the "Non-Defaulting Party") may ....". Thus, as SemCanada Crude submits, if Party A fails as Buyer to make timely payment of amounts due and owing under the crude oil contract to which the HEMI Terms are attached or fails as Seller to make timely delivery of crude oil under that contract, Party B can set-off amounts it owes to Party A (direct set-off) or amounts its affiliates owe to Party A (triangular set-off). Party A has no rights of set-off under this scenario and therefore whether the term "party" includes its affiliates is irrelevant to the issue. This is consistent with what SemCanada Crude submits is a basic rule that a corporation can enter into a contract that benefits its affiliate, but not one that binds its affiliate without the affiliate's consent. Giving section 14 the interpretation submitted by HEMI would offend that trite rule of law, and would require, not only clearer language in section 18, but the consent of the affiliates of the parties.

18 While the parties and their affiliates could have entered into such a contractual relationship, they did not. While the definition of "party"in section 14 of the HEMI Terms includes the statement that the intention of the parties is to treat each party and its respective affiliates as a single legal entity for the purpose of set-off, it specifies that this is "for the purposes of set-off pursuant to this Section 14", which refers this intention back to the requirements of section 14.

19 HEMI submits that the rule that a party to a contract cannot bind a non-party without that other party's consent does not apply in the case of contractual set-off, quoting Kelly Palmer, *The Law of Set-off in Canada* (Aurora: Canada Law Book Inc., 1993) at page 263 as follows:

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> Contractual set-off is, not surprisingly, more a matter of contract law than a separate application of set-off. Consequently, the normal rules of set-off regarding mutuality, liquid debts and connected debts do not apply: within the bounds of legality and public policy, parties are free to contract whatever result they wish. (emphasis added)

20 As Mr. Palmer makes clear, the parties are *not* free to enter into contracts that may be illegal. While the usual rules of legal or equitable set-off do not apply to contractual set-off, the normal rules of contract still do.

21 HEMI also submits that interpreting set-off in accordance with its submissions does not create any obligations for SemCrude U.S. since the only party that would be affected by set-off in these circumstances would be SemCanada Crude. This, however, raises the issue of double recovery, as Husky U.S. has made a claim for the debt owing to it by SemCrude U.S. in the United States Chapter 11 proceedings. To resolve this issue, HEMI covenants to remit to SemCanada Crude that portion of the amount that would ultimately result in a double recovery for the Husky group of companies as a whole.

22 It is noteworthy that it is not Husky U.S. that is covenanting before this court to do anything. As SemCanada Crude correctly notes, Husky U.S. is not constrained contractually by the set-off provisions of the HEMI Terms and is free to pursue SemCrude U.S. for the debt owing to it (although Husky U.S. disclosed in a footnote to its claim in the Chapter 11 proceedings that HEMI has asserted a claim of set-off against SemCanada Crude, and that it thus reserves its right to amend or withdraws its claim). Eliminating the possibility of double-recovery through HEMI's covenant does not change the fact that HEMI's interpretation of the set-off provisions thus leads to a commercially unreasonable result. The necessity to address the double recovery scenario supports SemCanada Crude's argument that the set-off right provided by section 14 was not intended by the parties to be a cross-affiliate set-off.

23 In summary, I am satisfied that the interpretation of the set-off provisions of the HEMI Terms put forward by SemCanada Crude is commercially reasonable and consistent with the intention of the parties as determined from the whole of the contract and the plain meaning of its language.

24 If I am incorrect in accepting this interpretation, the interpretation put forward by HEMI gives rise to ambiguity, and the principle of *contra proferentem* must be considered.

25 It is clear from the evidence that the HEMI Terms are contracts of adhesion, presented to SemCanada Crude as a *fait accompli* by letter dated May 11, 2004. SemCanada Crude's deponent testified that it was SemCanada Crude's understanding with companies like HEMI that have general terms and conditions that they attach to contracts that "if you're going to do business with them you're going to do business with them on their terms".

26 HEMI submits that *contra proferentem* only applies where a party did not have an opportunity to modify a contract, whether or not it took the opportunity to negotiate, relying on an Ontario decision where the court commented that where the parties are of approximately equal bargaining power and have an opportunity to negotiate, particularly where, as in that case, the partes had an opportunity to seek legal advice, the rule has little application: *Bank of Nova Scotia v. Phatas Inc.*, [2008] O.J. No. 3218 (Ont. S.C.J.) at paras. 80 - 81.

27 The court in *Bank of Nova Scotia* cited *Ironside v. Smith*, [1998] A.J. No. 1225 (Alta. C.A.) at para. 67, where the Alberta Court of Appeal comments that:

> *Contra proferentem* should not be used to construe an agreement against its drafter unless it is clear that the non-drafting party had no meaningful opportunity to participate in the negotiation of the instrument. In most commercial situations each party will bargain, insisting on certain concessions and giving up others. Although one party may take charge of drafting, the agreement is a product of negotiations. The use of *contra proferentem* is contingent on an absence of meaningful negotiating ability. So long as a party is permitted to participate in real negotiations, even if he chooses not to do so, it is inappropriate to invoke the rule.

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(emphasis added)

28 I am satisfied from the evidence before me that SemCanada Crude had no meaningful negotiating ability with respect to the HEMI Terms, and that, if it was necessary to resort to *contra proferentem*, I would interpret the ambiguity inherent in HEMI's interpretation of the right to set-off in the manner least favourable to HEMI.

Conclusion

29 SemCanada Crude is entitled to an order:

(a) declaring that the amount of $2,115,599.58 plus interest payable thereon is due and payable by HEMI to SemCanada Crude, being the amount owed by HEMI to SemCanada Crude for crude oil transactions between SemCanada Crude and HEMI for the months of April through July 2008 (the "HEMI Indebtedness"):

(b) declaring that HEMI is not entitled to set off any amounts owed to Husky U.S. or any other affiliate of HEMI by SemCanada Crude's U.S. affiliates, including SemCrude U.S., against the HEMI Indebtedness and that the HEMI Indebtedness is therefore payable to SemCanada Crude in full without set-off or deduction of any kind whatsoever;

(c) directing HEMI to pay the HEMI Indebtedness to SemCanada Crude by no later than seven days after entry of the order arising from this decision.

30 If the parties are unable to agree on costs, they may be addressed.

Order accordingly.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Winch v. Keogh | 2005 CarswellOnt 5987, 33 C.C.L.I. (4th) 102, 78 O.R. (3d) 468, [2005] O.J. No. 4759, 143 A.C.W.S. (3d) 745, [2006] I.L.R. I-4463 | (Ont. S.C.J., Nov 4, 2005)

1995 CarswellBC 282
British Columbia Court of Appeal

Steyns v. Manitoba Public Insurance Corp.

1995 CarswellBC 282, [1995] 7 W.W.R. 507, [1995] I.L.R. 1-3242, [1995] B.C.W.L.D. 1900, [1995] B.C.J. No. 1385, 100 W.A.C. 20, 126 D.L.R. (4th) 394, 12 M.V.R. (3d) 165, 31 C.C.L.I. (2d) 60, 56 A.C.W.S. (3d) 404, 61 B.C.A.C. 20, 7 B.C.L.R. (3d) 106

JUDITH STEYNS v. MANITOBA PUBLIC INSURANCE CORPORATION and INSURANCE CORPORATION OF BRITISH COLUMBIA

Lambert, Goldie and Finch JJ.A.

Heard: March 29-30, 1995
Judgment: June 23, 1995
Docket: Doc. Vancouver CA018469

Counsel: *Vincent R.K. Orchard*, for appellant Manitoba Public Insurance Corporation.
Guy P. Brown, for respondent Insurance Corporation of British Columbia.

Subject: Insurance; Civil Practice and Procedure; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XVIII Summary judgment
XVIII.3 Availability of summary judgment
XVIII.3.b Miscellaneous

Insurance

X Actions on policies
X.4 Third party proceedings
X.4.g Principles particular to automobile insurance
X.4.g.i Statutory right of third party against insurer
X.4.g.i.C Insurance coverage

Motor vehicles

X Offences and penalties
X.1 Offences
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X.1.e.ii Miscellaneous

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Headnote

Insurance --- Actions on policies — Third party proceedings — Principles particular to automobile insurance — Statutory right of third party against insurer

Motor Vehicles --- Registration and licensing — Effect of non-compliance — Failure to register

Practice --- Summary judgment — Availability of summary judgment

Insurance — Motor vehicle insurance — Interpretation of contract — Owner of motor vehicle insured in Manitoba failing to obtain registration and licensing in British Columbia within 30 days of removal of vehicle to British Columbia as required by British Columbia law — Failure resulting in deemed revocation of Manitoba owner's certificate — Manitoba Public Insurance Corporation Act, s. 40, not preserving insurance coverage for benefit of innocent third parties.

Civil procedure — Summary trial — Powers of court — Chambers judge erring in giving judgment under R. 18A on assumed facts over objections of party — Judge to proceed only on facts found or admitted.

Insurance — Motor vehicle insurance — Extent of liability of insurer — Owner of motor vehicle insured in Manitoba failing to obtain registration and licensing in British Columbia within 30 days of removal of vehicle to British Columbia as required by British Columbia law — Failure resulting in deemed revocation of Manitoba owner's certificate — Insurance Act, s. 252, not preserving Manitoba insurance coverage for benefit of innocent third parties.

H. owned a truck, licensed and insured in Manitoba. In April 1989 her son brought the truck to British Columbia where he took up residence. He operated the truck in British Columbia under its Manitoba registration until October 1989 when he loaned it to a friend whose negligence caused an accident in which the plaintiff was injured. The plaintiff recovered judgment against H. and the driver in the amount of $254,047. She then made a demand upon both I.C.B.C. and the Manitoba Public Insurance Corporation ("M.P.I.C."), seeking indemnity in respect of the judgment. I.C.B.C. denied liability, relying on s. 58 of the *Manitoba Public Insurance Corporation Act*. According to M.P.I.C., because British Columbia legislation required the truck to be registered and insured in British Columbia within 30 days of being brought into the province, the owner's certificate was deemed to have been revoked at the time British Columbia law required registration in British Columbia. The plaintiff brought an action against both I.C.B.C. and M.P.I.C. and she recovered judgment against M.P.I.C. The trial judge applied s. 252 of the *Insurance Act* and concluded that the owner's contravention of the provisions of the *Motor Vehicle Act* could not deprive the plaintiff of her right under s. 252 of the *Insurance Act* to recover against M.P.I.C. M.P.I.C. appealed.

Held:

Appeal allowed; new trial ordered.

While s. 40(1) of the *Manitoba Public Insurance Corporation Act* contemplates that M.P.I.C. shall satisfy a judgment held by a person having a claim against an insured for which indemnity is provided by virtue of an owner's certificate, that provision does not create rights for third parties independent of a valid and existing owner's certificate. The provision does not prevail over s. 58 of the Act which clearly revokes insurance coverage as of the date on which registration is required but is not obtained in another jurisdiction. Although s. 40(4) provides that no contravention of a provincial statute by the owner or driver designated in "the certificate" shall prejudice the rights of a third party under s. 40(1), that section offers no protection to the third party unless the owner or driver was an "insured" and that there was an "insured vehicle" as those terms are used in the legislation. Here, when the plaintiff's claim arose,

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H.'s owner's certificate was no longer "valid and subsisting," having been revoked under s. 58. The judgment under appeal was given under R. 18A on assumed facts, over the objection of M.P.I.C. The judge should not have decided the matter in the absence of facts either found or admitted. There would have to be a trial on the issues of fact.

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s. 26(5)*considered*

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s. 9(1)(*a*)*referred to*

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s. 252*referred to*

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s. 1(1) "insured"*considered*

s. 1(1) "owner's certificate"*considered*

s. 40(1)*considered*

s. 40(4)*considered*

s. 58*considered*

Motor Vehicle Act, R.S.B.C. 1979, c. 288

s. 3(1)*considered*

s. 20(1)*considered*

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British Columbia, Rules of Court (1990)

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Automobile Insurance Coverage Regulation, Man. Reg. 290/88

Pt. IV

s. 77

s. 78(1)

Words and phrases considered:

revoke

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Appeal from judgment of Hardinge J., 88 B.C.L.R. (2d) 125, [1994] 4 W.W.R. 449, [1994] I.L.R. 1-3060, 25 C.C.L.I. (2d) 41, granting application for judgment under R. 18A.

The judgment of the court was delivered by *Finch J.A.*:

1 The main issue on this appeal is which of two insurers is liable to pay a judgment obtained by the plaintiff in the Supreme Court of British Columbia on 8 June 1993. The judgment of $254,047.22 was for damages suffered by the plaintiff in a motor vehicle accident. The Insurance Corporation of British Columbia ("ICBC") says that the Manitoba Public Insurance Corporation ("MPIC") is liable to pay the judgment as the insurer of the vehicle whose driver caused the plaintiff's injuries. MPIC says that at the time of the accident its insurance certificate had been revoked by operation of law. It says the vehicle was therefore uninsured, and that ICBC is liable for losses caused in British Columbia by an uninsured vehicle.

2 The plaintiff was injured in the motor vehicle accident on 17 October 1989 in Vancouver, British Columbia. The accident was caused by the negligence of Ms. Laura Bernhardt in the operation of a 1987 Ford pickup truck bearing Manitoba licence plates, and owned by Mrs. Kathleen Harper, a resident of Manitoba.

3 On 8 March 1989, MPIC is said to have issued an "owner's certificate" for the pickup truck to Mrs. Harper. The material before this Court does not disclose the period of time for which the owner's certificate was issued. In April 1989, the pickup was brought to British Columbia by Mrs. Harper's son, and Ms. Bernhardt's boyfriend, Mr. Jeffrey Harper. Apparently, the vehicle was not licensed or insured, in accordance with the laws of British Columbia, in the six or seven months after it arrived in this province.

4 Sections 3 and 20 of the British Columbia *Motor Vehicle Act*, provide, in pertinent part:

> **Registration and licence**
>
> 3. (1) Except as otherwise provided in this Act, the owner of a motor vehicle or trailer shall, before it is used or operated on a highway, cause the motor vehicle or trailer to be registered with the superintendent, and a licence for its operation to be obtained pursuant to this section, and a certificate of insurance to be obtained pursuant to the *Insurance (Motor Vehicle) Act*; except that a trailer towed by a tractor licensed under section 7 need not be licensed.
>
> **Registration of foreign motor vehicles and trailers**
>
> 20. (1) The owner of a motor vehicle or trailer
>
> > (*a*) that is duly registered outside the Province;
> >
> > (*b*) for which the licensing requirements of the jurisdiction in which it is registered are fulfilled; and
> >
> > (*c*) that has displayed on it the registration number plates of that jurisdiction for the current year
>
> is exempt from the requirements to register and license the motor vehicle or trailer under this Act, where
>
> > (*d*) the owner or operator of the motor vehicle or trailer is in the Province for, and uses the motor vehicle or trailer for, touring purposes only, for a period of 6 months; or
> >
> > (*e*) the owner or operator of the motor vehicle or trailer is in the Province for, and uses the motor vehicle or trailer for, other than touring purposes, for a period of 30 days
>
> from the date he commenced to operate the motor vehicle or trailer on a highway in the Province.

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5 MPIC alleged that, according to those provisions, the pickup should have been licensed and registered in British Columbia within 30 days from the time its use in British Columbia commenced. So, MPIC says the operator of the pickup was in breach of the licensing and registration provisions of the British Columbia *Motor Vehicle Act*, at the time of the accident.

6 MPIC says that breach of those provisions of the British Columbia *Motor Vehicle Act* gave rise to the "deemed revocation" of Mrs. Harper's owner's certificate by virtue of s. 58 of the *Manitoba Public Insurance Corporation Act*. It provides:

> **Cancellation where motor vehicle operated contrary to laws.**
>
> 58 Where a motor vehicle or trailer designated in an owner's certificate is operated in another province, state or country when the motor vehicle or trailer is required by the law of that province, state or country to be registered or licensed in that province, state or country but is not registered or licensed, that owner's certificate shall be deemed to have been revoked at the time of the commencement of such operation.

7 ICBC disagrees. It says MPIC is liable to pay the judgment by virtue of s. 40 of the *Manitoba Public Insurance Corporation Act*. The relevant provisions are:

> **Third Party Rights.**
>
> 40(1) A person having a claim against an insured for which indemnity is provided by virtue of an owner's certificate under a plan or part of a plan shall, notwithstanding that there is no contractual relationship between that person and the corporation, be entitled, upon recovering judgment against the insured, or upon settlement with the corporation, to have the insurance moneys payable under a plan or part of a plan applied in or towards satisfaction of his judgment or the settlement of any other judgments or claims against the insured covered by the indemnity and may, if no settlement is made, on behalf of himself and all persons having such judgments or claims, maintain an action against the corporation to have the insurance moneys so applied. No prejudice to rights of certain persons.
>
> 40(4) No
>
> > (*a*) assignment, transfer, surrender, cancellation, suspension, waiver, or discharge of a certificate or any provision of a plan or part of a plan or of any interest therein or for any insurance moneys payable thereunder made by the insured after the happening of the event giving rise to a claim under the certificate; or
> >
> > (*b*) act or default of the insured before or after that event in contravention of this Act or the regulations or any plan; or
> >
> > (*c*) contravention of The Criminal Code or of any law or statute of any province, state, or country by the owner or driver of the motor vehicle designated in the certificate
>
> shall prejudice the right of a person entitled under subsection (1) to have the insurance moneys applied upon his judgment or claim, or be available to the corporation as a defence to such action.

8 Those statutory provisions give rise to the main issue on this appeal. The British Columbia *Motor Vehicle Act* requires out of province vehicles, used in British Columbia for other than touring purposes, to be registered and licensed in British Columbia if operated there for more than thirty days. MPIC says failure to register and licence in accordance with British Columbia law gives rise to the deemed revocation of Mrs. Harper's owner's certificate under s. 58 of the *Manitoba Public Insurance Corporation Act* effective the thirty-first day of such operation. ICBC, on the other hand, says that failure to comply with British Columbia law in that regard is the "contravention" of a provincial law and that s. 40(4)(*c*) of the *Manitoba Public Insurance Corporation Act* says that such contravention shall not prejudice the third party's rights to recover directly against MPIC under s. 40(1).

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9 The plaintiff obtained judgment against Ms. Bernhardt and Mrs. Harper on 8 June, 1993. As her judgment was not paid, she then sued both MPIC and ICBC. The plaintiff applied under R. 18A for judgment on summary trial. The Supreme Court of British Columbia held on 16 February 1994 [88 B.C.L.R. (2d) 125, [1994] 4 W.W.R. 449] that MPIC was liable to pay the plaintiff's judgment against Mrs. Harper. The court dismissed the plaintiff's claim against ICBC.

10 Since the commencement of this appeal, by agreement between MPIC and ICBC, the plaintiff has been paid in full the amount owing to her on the judgment of 8 June 1993. Consequently, the two insurers were the only parties to appear on this appeal.

11 In addition to the legal issue described above, this appeal also raised a procedural question. That question is whether a legal issue, such as described above, can be decided under R. 18A on assumed facts, or whether such an issue may only be decided on facts which have been either found or admitted.

12 For the purposes of the plaintiff's application for judgment under R. 18A, the learned Chambers judge assumed to be true the facts asserted in MPIC's statement of defence, and then decided the legal issue against MPIC's interests. MPIC says there should be a trial to decide the facts before the legal issue is addressed.

13 I propose first to consider the legal question, and then to return to the procedural issue.

The Law Applicable

14 On the plaintiff's application for judgment under R. 18A, her counsel argued that the question of an injured third party's rights to recover against a motor vehicle insurer should be decided under the laws of the province where the motor vehicle accident occurred. The learned trial judge accepted that submission, and he applied the provisions of s. 252 of the British Columbia *Insurance Act*.

15 The judge observed that the Manitoba legislation was so nearly identical to the British Columbia legislation in this respect, that it made little or no difference to the outcome of the case, which legislation was to be applied. On this appeal, both ICBC and MPIC agreed that Manitoba law applies. I agree with that view, so I do not propose to consider further the British Columbia insurance legislation, nor any differences between it and the Manitoba legislation.

The Parties' Positions

16 MPIC's argument is that when the Harper pickup truck was operated in British Columbia for more than 30 days, there was a breach of s. 3 of the British Columbia *Motor Vehicle Act*, which was not within the exemption afforded by s. 20(1)(*e*) of that Act. The case was argued both in this Court, and below, on the assumption that the pickup truck was used in British Columbia for other than touring purposes, so the six-month exemption under s. 20(1)(*d*) was considered to be inapplicable.

17 MPIC says that once there was a breach of ss. 3 and 20 of the British Columbia *Motor Vehicle Act*, Mrs. Harper's owner's certificate was deemed to have been revoked by operation of s. 58 of the *Manitoba Public Insurance Corporation Act*. It says that once Mrs. Harper's owner's certificate was revoked, the statutory obligations of the insurer ceased for all purposes. It says that when there is no owner's certificate, there is no insurance coverage or policy in effect. It says that if there is no insurance coverage, a third party cannot recover in an action directly against the insurer, notwithstanding the "third party rights" provisions of s. 40(1) and (4) of the *Manitoba Public Insurance Corporation Act*.

18 ICBC responds that failure to comply with ss. 3 and 20 of the British Columbia *Motor Vehicle Act* can properly be characterized as the "contravention ... of any law or statute of any province ..." for the purposes of s. 40(4)(*c*). That section specifically provides that such a statutory contravention shall not prejudice the third party's right to be paid by the insurer. It says that, if a revocation of the policy pursuant to s. 58 is interpreted as leaving unimpaired the rights of a third party claimant under s. 40(1), there is then no conflict between s. 40(4) and s. 58 of the *Manitoba Public Insurance Corporation Act*.

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19 On the other hand, ICBC says there is a clear conflict between s. 40(4) and s. 58 of the *Manitoba Public Insurance Corporation Act*, if the revocation of the policy under s. 58 is interpreted as extinguishing third party rights otherwise available under s. 40(1). Section 40(4) specifically provides that contraventions of provincial laws will not prejudice a claim under s. 40(1). The essence of MPIC's defence is that the contravention of the British Columbia *Motor Vehicle Act* by its insured has extinguished the plaintiff's right to claim under s. 40(1).

20 ICBC relies on the fundamental principle of statutory construction that provisions of a statute dealing with the same subjects should be read together, where possible, so as to avoid conflict, citing *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688 at 716.

21 ICBC says that to achieve the goal of protecting third party claimants from defences arising out of an insured's breach of policy conditions, s. 58 of the *Manitoba Public Insurance Corporation Act* must be interpreted as subject to s. 40(4) of that Act. In support of this submission, ICBC relies on *White v. Murphy* (1987), (sub nom. *Murphy v. Casualty Co. of Canada)* 36 D.L.R. (4th) 87 (Nfld. C.A.), and *Shaw v. Home Assurance Co. of Canada*, [1940] 1 W.W.R. 655 (Alta. T.D.), which hold that insurers' obligations under automobile insurance contracts to third party claimants continue even when misrepresentations on the application for insurance render the contract void ab initio with respect to the would-be insured, on the basis of provisions parallel to s. 40.

Discussion

22 Before consideration of the saving provisions of s. 40(4), and their proper interpretation in relation to s. 58, the third party claimant must first establish her rights to recover under s. 40(1). Unless such a right is made out, at least on a prima facie basis, consideration of s. 40(4) is unnecessary.

23 To come within the provisions of s. 40(1) the third party must have a claim against an "insured" for which "indemnity" is provided by an "owner's certificate".

24 The *Manitoba Public Insurance Corporation Act* in s. 1(1) provides the following definitions:

> "owner's certificate" means a certificate issued under this Act or the regulations to the owner of a motor vehicle, trailer or semi-trailer or to the holder of a dealer's permit for a motor vehicle under The Highway Traffic Act; ("certificat de propriété")
>
> "insured" means an insured as defined in the regulations; ("assuré")

25 The referred to "regulations" are the *Automobile Insurance Coverage Regulation*, Man. Reg. 290/88; Pt. IV of which relates to public liability. The following provisions are relevant:

> Definitions
>
> 77 In this Part,
>
> "insured" means a person who is named in a valid and subsisting owner's certificate, and includes a person who,
>
> (*a*) being named in a valid and subsisting driver's certificate, or
>
> (*b*) being a resident of a jurisdiction other than Manitoba,
>
> (i) is qualified and authorized by law to operate a motor vehicle in the jurisdiction of his residence, and
>
> (ii) is at least 16 years of age,
>
> operates a vehicle designated in an owner's certificate with the consent of the person named therein; ("assuré")

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"insured vehicle" means a vehicle designated in a valid and subsisting owner's certificate; ("véhicule assuré")

Coverage

78(1) Subject to the Act and this regulation, coverage is hereby provided to an insured under this Part, for damages, in the amounts herein specified, for liability imposed by law in respect of bodily injuries to, or the death of, another person, or in respect of the loss of, or damage to, the property of another arising out of the ownership, use, or operation, of an insured vehicle by an insured, in Canada, in the United States of America, or upon a vessel plying between ports of Canada, between ports of the United States of America, or between a Canadian port and an American port.

26 Those Regulations add further meaning to the language of s. 40(1) of the Act. A third party is entitled to have insurance monies payable by the insurer, paid to him or her directly, where the claim arises from the operation of a vehicle designated in a "valid and subsisting owner's certificate". In this context, I think "valid" must mean legally enforceable, and "subsisting" must mean of continuing existence. In other words, the claim must be for a loss caused by the insured vehicle during the period for which the owner's certificate continued in force.

27 An example may clarify this point. Consider a claim made from an accident caused in October 1995 by a vehicle for which an owner's certificate had been issued for a period ending 30 September 1995, and which had not been renewed. Section 40(1) would not afford the third party claimant a right to recover from the insurer, because there was no insurance at the time of the accident. There was no "valid and subsisting owner's certificate", so the vehicle could not be designated therein as an "insured vehicle", and there would be no "insured" within the meaning of s. 77 of the Regulations.

28 In my opinion, s. 40(1) does not create rights for third parties independent of a valid and subsisting owner's certificate. If the owner's certificate has lapsed, as in the example above, the third party claimant would not have the remedy s. 40(1) provides. Similarly, a third party cannot successfully bring an action against an insurer for indemnity beyond the scope originally contemplated by the contract of insurance with the insured. In *Insurance Corp. of British Columbia v. Turner* (1983), 43 B.C.L.R. 59 (C.A.), this rule was applied to deny an injured third party claimant from obtaining indemnification from ICBC under a single-use contract of automobile insurance which was valid only for a single passage between two specified points, because the injury was caused when the vehicle was not being operated for the insured voyage.

29 In *Kiryluik v. Manitoba Public Insurance Co.*, [1989] I.L.R. 1-2505, the Manitoba Queen's Bench considered the correct meaning of "revoke" for the purposes of what was then s. 53 (now s. 58). It adopted the *Shorter Oxford English Dictionary* definition: "to annul, repeal, rescind, cancel", and said that an owner's certificate which had been annulled by operation of law did not "exist", and was of no "force or effect". The claim in *Kiryluik*, against MPIC for indemnity, was made by a party who claimed to be an "insured" under an MPIC owner's certificate. In this case, any claims by the owner Mrs. Harper, or the driver Ms. Bernhardt, to be "insured", would fail on the authority of *Kiryluik*. The question is whether the injured third party is in any better position.

30 In *White v. Murphy* (1987), (sub nom. *Murphy v. Casualty Co. of Canada*) 36 D.L.R. (4th) 87, the Newfoundland Court of Appeal held that, under s. 26 of the Newfoundland *Automobile Insurance Act* (a provision similar to s. 40 of the Manitoba Act), an insurer could not use as a defence against an innocent third party, the fact that the contract of insurance had been obtained on material misstatements by, and was void ab initio with respect to any claim by, the insured. Gushue J.A., for the Court, commented on the legislative purpose of the third party rights provisions, at p. 91:

The intent of s. 26 of the *Automobile Insurance Act* is clearly to preserve that protection for innocent third parties despite any cancellation or voiding of the policy by the insured or the insurer.

And, further on the same page:

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> Thus, in my view, and hopefully to make the matter completely clear, the expressed intent of s. 26 as a whole is that once an insurer issues a motor vehicle liability policy in respect of a certain vehicle, the insurer may not avoid a third party claim in respect of the operation of that vehicle *during the policy period*, by the named insured(s) or any person driving the vehicle with the insured's concurrence, where there exists a valid claim against either the named or unnamed insured arising out of that operation. (my emphasis)

Similar results have been reached in other jurisdictions (see: *Shaw v. Home Assurance Co. of Canada*, [1940] 1 W.W.R. 655 (Alta. T.D.), *Weavers Estate v. Biseau* (1992), 8 O.R. (3d) 781 (Gen. Div.), *Ontario (Minister of Transport) v. London & Midland General Insurance Co.*, [1971] 3 O.R. 147 (C.A.), *Dore v. General Insurance Corp. of New Brunswick* (1991), [1992] I.L.R. 1-2784, 115 N.B.R. (2d) 123 (Q.B.)).

31 If MPIC's argument is correct, of course, the policy was revoked by operation of s. 58, and it may therefore be said that the claim did not arise from the operation of a vehicle during the policy period. Moreover, in this case, the evidence is silent as to the duration, or the termination date, of the period for which the owner's certificate was originally issued.

32 It should be noted as well that s. 26 of the Newfoundland Act and the parallel provisions in British Columbia, Ontario and New Brunswick all contain a subsection similar to what follows, which is absent from the Manitoba Act:

> (5) It is not a defence to an action under this section that an instrument issued as a motor vehicle liability policy by a person engaged in the business of an insurer and alleged by a party to the action to be such a policy is not a motor vehicle liability policy, and this section applies *mutatis mutandis* to the instrument.

Shaw v. Home Assurance Co. of Canada (supra), however, was decided under an Alberta statute which did not include a provision such as above.

33 While the rationale for s. 40 is no doubt to protect third party claimants, there is no clear reason for giving it precedence over the clearly expressed intention of s. 58, to revoke insurance coverage as of the date on which registration and licensing were required and not obtained. The operation of s. 40(4), in my view, is not inconsistent with s. 58, but rather of different scope. With specific regard to s. 40(4)(*c*), it continues to be of effect in protecting the interests of third party claimants, as may be observed in the instance of injuries sustained by intentional and criminal acts, where claims by insureds are denied (see: *Scott Estate v. Feil* (1992), [1993] 2 W.W.R. 586 (Man. Q.B.)).

34 The crucial question in this appeal is whether the retroactive revocation of an owner's certificate by operation of law terminates the insurer's obligations for all purposes, releasing the insurer from liability to the insured *and all others*; or whether it simply renders the insurance coverage null and void with respect to the insured, allowing the rights of third parties to continue under the protection of s. 40(4). In my view, s. 40(4) offers no such protection.

35 The saving provision of s. 40(4)(*c*), relied upon by ICBC in this case, says that no contravention of a provincial statute by the owner or driver designated in "the certificate" shall prejudice the rights of a third party under s. 40(1) to have the "insurance monies" applied toward satisfaction of her judgment or claim. I do not read s. 40(4) as creating any new rights in a claimant. The effect of that subsection is simply to preserve, in certain circumstances, rights arising under s. 40(1) which might otherwise have been thought to be prejudiced. The words "the certificate" in s. 40(4) must mean the "owner's [or driver's] certificate" as described in the Regulations set out above, and "the motor vehicle" must be one that is designated in an owner's certificate that is "valid and subsisting" at the time of the loss.

36 On the facts assumed in this case, there are two potential insureds against whom the plaintiff has obtained judgment: Mrs. Harper and Ms. Bernhardt. To bring her claim within s. 40(1), the plaintiff must show that one of them is properly characterized as "insured", and that there was an "insured vehicle", as those terms are used in the Act and regulations.

37 For convenience, I repeat the definitions of "insured" and "insured vehicle" from s. 77 of the Regulation:

> "insured" means a person who is named in a valid and subsisting owner's certificate, and includes a person who,

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(*a*) being named in a valid and subsisting driver's certificate, or

(*b*) being a resident of a jurisdiction other than Manitoba,

(i) is qualified and authorized by law to operate a motor vehicle in the jurisdiction of his residence, and

(ii) is at least 16 years of age

operates a vehicle designated in an owner's certificate with the consent of a person named therein; ("assuré)

"insured vehicle" means a vehicle designated in a valid and subsisting owner's certificate; ("véhicule assuré")

38 Mrs. Harper does not come within the definition of an insured, because, when the plaintiff's claim arose, the owner's certificate in which Mrs. Harper was named was no longer "valid and subsisting". The owner's certificate was revoked on the thirty-first day the vehicle was operated for other than touring purposes in British Columbia. On that date, there was not merely the contravention of a British Columbia statute, as contemplated in s. 40(4)(*c*). There was, as well, the legal consequence of that contravention, deemed by s. 58, which occurred at the same time as the contravention. That legal consequence was the revocation of the owner's certificate, and that revocation occurred before the plaintiff's third party claim arose. There was no valid and subsisting owner's certificate at the time of the plaintiff's injury, therefore the plaintiff acquired no rights under s. 40(1) with regard to Mrs. Harper.

39 The assumed facts are insufficient to determine whether Ms. Bernhardt comes within the definition of "insured". There was no discussion below or at the hearing of this appeal as to whether Ms. Bernhardt was "named in a valid and subsisting *driver's* certificate", as required under subs. (*a*) of the definition, or whether she was "qualified and authorized to operate a motor vehicle" in British Columbia, as subs. (*b*) of the definition would require. The latter of these two possibilities assumes Ms. Bernhardt was a resident of British Columbia, and of at least 16 years of age at the time of the accident. It is noted that the concluding phrase of the definition does not expressly require that consent be from a person named in a *valid and subsisting* owner's certificate, although that may be implied from reading the definition as a whole. In any event, the evidence falls short of proving that Ms. Bernhardt was an "insured". And, establishing that at least one of Mrs. Harper or Ms. Bernhardt was an "insured" was critical to bring the plaintiff's claim within s. 40(1).

40 Moreover, the plaintiff's claims cannot be brought within s. 40(1) regardless of whether Ms. Bernhardt was an insured. This is so because the claims against her and Mrs. Harper were not such that "indemnity [was] provided by virtue of an owner's certificate under a plan or part of a plan", as expressly required by s. 40(1). The scope of indemnity is limited by s. 78(1) of the Regulation to liability "arising out of the ownership, use, or operation, of an *insured vehicle*". The definition of "insured vehicle" is "a vehicle designated in a *valid and subsisting owner's certificate*". The plaintiff's claims cannot succeed under s. 40(1) because the Harper vehicle was not an "insured vehicle" at the time of the plaintiff's injury, and neither the owner nor driver was shown to be an "insured".

41 On the facts assumed in this case, the plaintiff did not acquire any rights under s. 40(1) because there was no valid and subsisting owner's certificate, and no "insured vehicle" at the time her claim arose. The owner's certificate was revoked on the thirty-first day the vehicle was operated in British Columbia. At that time, there was not merely the contravention of a British Columbia provincial statute, as contemplated in s. 40(4)(*c*). There was, as well, the legal consequence of that contravention deemed to have occurred by operation of s. 58, as soon as that contravention occurred. That legal consequence was the revocation of the owner's certificate before the plaintiff's third party claim arose. The plaintiff acquired no rights under s. 40(1), because when the loss occurred there was no owner's certificate in force and no insured vehicle.

42 On this analysis of the legislation, the apparent conflict between s. 58 and s. 40(4)(*c*), suggested by ICBC, does not arise. The third party's rights, and MPIC's obligations, must first be determined under s. 40(1). If no rights or duties arise prima facie under s. 40(1), then s. 40(4) is not called into play.

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43 I am therefore of the view that the learned trial judge erred in holding MPIC liable to pay the plaintiff's judgment.

The Procedural Issue

44 By its statement of defence, MPIC pleaded those facts sufficient to give rise to the argument for deemed revocation under s. 58. On her application for judgment under R. 18A, the plaintiff asked the learned trial judge to assume those facts to be true, for the purposes of her application, so that the legal issue could be decided without the delay and expense of a trial on those factual issues. MPIC objected to this procedure, and said the procedure under R. 18A could not be invoked on provisionally assumed facts. It said the legal question could only be decided after the facts had been found, or admitted unequivocally. MPIC took the same position on this appeal. It was a part of MPIC's submission that R. 18A cannot be used at all to decide an issue of law on assumed facts. Counsel for MPIC relied on *Hill v. Vernon (City)* (B.C.C.A., 25 March, 1991, CA010436), particularly at p. 2, in support of that conclusion. On the other hand, *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.* (1991), 53 B.C.L.R. (2d) 180 [[1991] 4 W.W.R. 251] (C.A.), particularly at p. 184, is to the contrary.

45 ICBC did not oppose a decision of the legal issue on provisionally assumed facts. It must be noted that neither the plaintiff nor ICBC admitted the facts necessary for MPIC's defence as true, or for purposes other than determining whether s. 58 is available as a defence for MPIC in the assumed circumstances.

46 In view of my conclusion that MPIC is not precluded from relying on s. 58 as a defence to the plaintiff's claim by operation of s. 40, the determination of the factual basis for this defence will be conclusive as to which insurer is liable. The Chambers judge's assumption of those facts to determine the legal issue cannot suffice to determine the matter where the conclusion is in the interest of the party whose claim, or (as in this instance) defence, alleges the facts assumed. In these circumstances, any judgment based upon factual conclusions must be made on facts found or admitted for such purpose, and not on their assumption. I do not think either *Hill* or *Edgeworth* (both supra) should be considered as establishing either that R. 18A can never be used to decide an issue of law on assumed facts, or that it can always be used in that way. Rule 18A is frequently used to decide limitation issues on the assumption that the cause of action could be established. I would not be disposed to restrict the discretion given to the judge who hears the summary trial application under R. 18A. Sometimes it will be appropriate to use R. 18A to decide a question of law on assumed facts and sometimes not.

47 I would also observe that the facts assumed were not sufficient to determine the issue against MPIC's interest, had I concluded that MPIC's s. 58 defence was precluded by the provisions of s. 40(4)(*c*). The facts pleaded in MPIC's defence do not include the period of time for which the vehicle's owner's certificate was issued. The plea in para. 2(a) is simply that "MPIC issued an owner's certificate ... on or about March 8, 1989". The termination date of the owner's certificate is not pleaded. There follows a plea of the facts which MPIC said would constitute a breach of ss. 3 and 20 of the British Columbia *Motor Vehicle Act*, and a further plea of deemed revocation by operation of s. 58 of the *Manitoba Public Insurance Corporation Act*.

48 It may be a fair inference in these circumstances that, but for a deemed revocation, the owner's certificate would have continued to be "valid and subsisting" up to and including the date of the accident on 17 October 1989. I say that it may be a fair inference, because if the owner's certificate had lapsed before the accident date, MPIC would in all likelihood have taken that position, and produced the owner's certificate to prove it. However, that there existed a "valid and subsisting" owner's certificate on 17 October 1989 is, on the assumed facts, nothing more than an inference, and it may not be a correct inference. The owner's certificate could have been issued for one, three or six months, or for any other period of time ending before or after the date of the accident.

49 In addition, there are no facts found or admitted concerning the use of the Harper vehicle while it was in British Columbia, so as to establish the applicability of s. 20(1)(*d*) or (*e*) of the British Columbia *Motor Vehicle Act*.

50 As a result of my conclusions as to the defence proffered by MPIC, and the absence of facts found or admitted, in my view, the Court has no alternative but to refer this matter for trial on those issues of fact. Of course, now that

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the legal question has been decided, and the applicability of s. 58 recognized, the parties may be able to agree on the facts necessary to facilitate a proper disposition of the case. If this is not possible, a trial may take a somewhat unusual form, because the plaintiff no longer has an interest in its outcome, and has ceased to be an active litigant. However, the two insurer's opposite and active interests should ensure a proper trial of the factual questions. Applying R. 18A(7) and s. 9(1)(*a*) of the *Court of Appeal Act*, I would order a conventional trial on the limited factual issues as to the period of time for which the owner's certificate was issued, and the use of the vehicle in British Columbia, so as to decide the applicability of s. 20(1)(*d*) or (*e*) of the British Columbia *Motor Vehicle Act*.

51 I would allow the appeal, declare that a defence to MPIC under s. 58 of the *Manitoba Public Insurance Corporation Act* is not barred by s. 40(4)(*c*) of that Act, and direct a trial on the limited questions of fact described above.

Appeal allowed; trial of factual issues ordered.

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Most Negative Treatment: Not followed
Most Recent Not followed: St. Andrews Links Ltd. v. Glen Argyle Inc. | 2009 CarswellNat 5041, 2009 CarswellNat 5364 | (T.M. Opp. Bd., Dec 30, 2009)

1972 CarswellNat 526
Federal Court, Trial Division

Vapor Canada Ltd. v. MacDonald

1972 CarswellNat 526, 6 C.P.R. (2d) 204

VAPOR CANADA LTD. v. MacDONALD et al.

Walsh, J

Judgment: April 19, 1972
Docket: None given

Proceedings: affirmed *Vapor Canada Ltd. v. MacDonald* (1972), (sub nom. *MacDonald v. Vapor Canada Ltd.*) [1972] F.C. 1156, 8 C.P.R. (2d) 15, 33 D.L.R. (3d) 434 (Fed. C.A.)**Proceedings: reversed *Vapor Canada Ltd. v. MacDonald* (1976), (sub nom. *MacDonald v. Vapor Canada Ltd.*) [1977] 2 S.C.R. 134, 22 C.P.R. (2d) 1, 66 D.L.R. (3d) 1, 7 N.R. 477 (S.C.C.)**

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J. Nelson Landry and Joan Clark, Q.C., for defendants, John A. MacDonald and Railquip Enterprises Lid.

Subject: Intellectual Property; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

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Servo Corp. of America v. General Electric Co. (1968), 393 F.2d 551, 157 U.S.P.Q. 470 (U.S. 4th Cir. Va.) — considered

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Tenatronics Ltd. v. Hauf (1971), [1972] 1 O.R. 329, 23 D.L.R. (3d) 60, 4 C.P.R. (2d) 72, 1971 CarswellOnt 212 (Ont. H.C.) — considered

Statutes considered:

Code de procédure civile, S.Q. 1965, c. 80
art. 315 — considered

Patent Act, R.S.C. 1970, c. P-4
s. 48 — referred to

s. 57(2) — referred to

Trade Marks Act, R.S.C. 1970, c. T-10
s. 7(a) — considered

s. 7(e) — considered

Rules considered:

Federal Court Rules, SOR/71-68
Generally — referred to

R. 332 — referred to

R. 332(1) — considered

R. 332(5) — referred to

***Walsh J.*:**

1 This case came on for hearing before me in Montreal on February 19, 1972, on plaintiff's motion for an interlocutory injunction against defendants, John A. MacDonald and Railquip Enterprises Ltd., first made presentable on August 11, 1971. In the interval three affidavits had been submitted on behalf of plaintiff, and nine on behalf of defendants and, with two exceptions, the witnesses had been cross-examined and re-examined on these affidavits resulting in some 3,000 pages of transcript of these examinations, and 58 exhibits had been produced on behalf of plaintiff and 229 on behalf of defendants, with the result that the argument on the motion and certain preliminary motions made by the parties which were heard at the same time lasted for five days.

2 Plaintiff's claim sets out that defendant MacDonald had been in its employ since July 5, 1951, having, at the time he entered its employ, signed an agreement not to divulge to any unauthorized person any information or knowledge acquired by reason of his said employment. At the time he left the employ of the company as of April 30, 1971, he was vice-president of it. While still in its employ he incorporated, together with a fellow officer of plaintiff (the evidence discloses that this was George James who subsequently changed his mind and decided to remain in the employ of plaintiff and is therefore not a party to these proceedings) the defendant Railquip Enterprises Ltd. on March 2, 1971. One of plaintiff's principal products is a heater for railway boxcars, its principal customers being the Canadian National Railway Company and the Canadian Pacific Railway Company, although the heater assembly is actually sold to the companies who manufacture the boxcars for these railways and install same in accordance with their specifications. The heater unit or assembly consists of three principal elements, the actual burner, a coil through which the fluid to be heated flows and a control valve arrangement in the nature of a thermostat. This heating unit is housed in a special type of box designed to

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admit air but in such a way that neither the pilot light nor the main burner will be extinguished as a result of the suction caused by a train passing on an adjacent track at a high speed or as the result of ice, snow or dirt accumulation since the entire unit is located on the outside of the boxcar underneath same. There is also a fuel tank, a stack specially designed to carry off the exhaust gases between the double walls of the car without constituting a fire hazard, and a specially designed type of fin radiator with the heated fluid running in a pipe through the middle of the fins which distributes the heat evenly throughout the length of the car. These latter two items are an important part of auxiliary equipment, and plaintiff does a substantial business in replacement parts. While none of the individual units of the heater assembly are protected by patents, the assembly as a whole is protected by three patents held by plaintiff, defendant MacDonald being the inventor of two of them while in plaintiff's employ and having duly assigned same to plaintiff. Prior to the time MacDonald left plaintiff's employ, plaintiff had prepared tenders to supply 500 of these heater units and a substantial quantity of replacement parts to the Canadian National Railway Co. and defendant MacDonald was allegedly familiar with the amounts of these tenders and, according to plaintiff, submitted bids slightly under them on behalf of Railquip Enterprises Ltd. and, as a result, got an order from the railway for 150 of these units as well as a substantial quantity of replacement parts. Plaintiff, according to its original statement of claim, suffered damages amounting to $250,000 as a result of this. Plaintiff alleges patent infringement, disclosure of trade secrets and business practices contrary to honest industrial and commercial usage in Canada, and states that neither defendant MacDonald nor defendant Railquip have assets sufficient to pay the sort of damages being suffered by plaintiff and which will continue to be suffered in the future, pointing out that it had incurred the cost of research and development required to bring the trade secrets in question to fruition while defendants will not have to do that, and that the field of prospective buyers and users of the product is quite limited. Plaintiff also alleges that MacDonald also made derogatory statements against it to certain of plaintiff's customers. Going into further detail as to what MacDonald did, which was allegedly contrary to his written agreement with plaintiff and contrary to honest industrial and commercial usage, plaintiff states that MacDonald took documents belonging to it and parts and descriptions thereof as well as plans and used same by obliterating plaintiff's name but retaining the part numbers of plaintiff, that MacDonald and Railquip illegally took from plaintiff's plant and kept at the Office of Railquip nearly 200 plans, specifications and letters belonging to plaintiff which were still there on July 15, 1971, that defendant MacDonald used these things, many of which were trade secrets to compete with plaintiff in tendering competitively with it, and that he obtained certain papers from James, another long-time trusted and important employee and officer of plaintiff. It is stated that defendant Vapor Corp. is joined merely as a patentee of certain patents pursuant to s. 57(2) of the *Patent Act*, R.S.C. 1970, c. P-4 and that no relief is sought against it.

3 Plaintiff asks for an injunction restraining defendants, other than Vapor Corp. and each of them, their servants and agents and any one on their behalf:

> 1. From making, constructing, using, or vending to others in Canada, the inventions set forth in the Statement of Claim herein and from divulging to any unauthorized person any information or knowledge acquired by reason of the employment with the Plaintiff of the Defendant MacDonald; and
>
> 2. From using for their own personal benefit any confidential information which MacDonald had acquired in his employment with the Plaintiff; and
>
> 3. From making any tenders in respect of products in respect of which the knowledge acquired by MacDonald is used or useful; and
>
> 4. From using the things referred to in paragraphs 22 and 23 of the Statement of Claim in tendering or in any manner whatsoever; and
>
> 5. From conniving at the wrongful acts set forth in the Statement of Claim, with any employee of the Plaintiff; and
>
> 6. Proceeding with his arrangement with Canadian National Railway referred to in paragraph 30 of the Statement of Claim; and [1]

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> 7. For an order requiring the Defendant, their officers, servants and agents, to deliver up forthwith to the Plaintiff all these things set forth in paragraphs 22 and 23 of the Statement of Claim including all copies or reproductions of such things. [2]

4 The original statement of claim and particulars of breaches dated August 10, 1971, was supported by the affidavit of George Coull, executive vice-president of plaintiff and the statement of claim was attached as an exhibit to the said affidavit. The affidavit states that all of the paragraphs of the statement of claim are true to the personal knowledge of affiant as vice-president of plaintiff except for paras. 5, 12, that part of para. 29 which refers to customers of the plaintiff, and para. 31 which relates to s. 57(2) of the *Patent Act*. [3] The affiant states that as to para. 5, he is satisfied that from the things described in para. 23 as being in the possession of MacDonald and Railquip and from his personal knowledge of his conduct, particularly as learned since his departure from the company, that defendants are conducting their operations without regard to the patent rights of the plaintiff but that until discovery and inspection of the documents and other things pursuant to the rules of the Court [*Federal Court Rules*, P.C. 1971-270, SOR/71-68] and until the company's lawyers have had an opportunity to compare the combinations and elements involved in the patents with the articles other than those set forth in para. 30, he is not in a position to swear as to the truth of all the allegations involved in the paragraph. As to para. 12, he states that he is informed that this is true, the source of his information being an employee who states that he was at the office premises and that the office of Railquip was a small room at the back of the second floor of a two-storey small building with one filing cabinet and no furniture of any consequence, in a building with only two offices on the second floor and no evidence that Railquip has any substantial assets. As to that part of para. 29 which relates to customers of the plaintiff, the source of his information is D. Hellmann, vice-president of marketing, who received this information verbally from those customers and the grounds for his belief is that the said source is in a position to know these facts.

5 The statement of claim and particulars of breaches of August 10, 1971, was subsequently replaced by an amended statement of claim produced November 9, 1971 and by amended particulars of breaches produced November 3, 1971 and further amended particulars of breaches produced November 10, 1971. Pursuant to a judgment on a motion by defendants to strike out plaintiff's statement of claim and amended statement of claim on the ground that it disclosed no reasonable cause of action, was vexatious and might prejudice, embarrass or delay the fair trial of the action, judgment was rendered on November 25, 1971, striking out certain paragraphs of the amended statement of claim and particulars of breaches with leave to plaintiff to substitute other pleadings for same. This was done by a further amended statement of claim produced January 5, 1972, and leave to substitute these other pleadings with certain further amendments was granted by judgment dated January 17, 1972. This further amended statement of claim, in addition to giving more details as required by the said judgment respecting the said patents and the alleged infringements of same, made a specific allegation of copyright infringement in para. 10.3 which reads as follows:

> 10.3. In getting the above orders Railquip, through its President MacDonald, and with full knowledge of the breach of confidence on the part of MacDonald that was entailed in such actions, used confidential knowledge and trade secrets of the plaintiff consisting of MacDonald's knowledge of the plaintiff's secret bid previously made up by the plaintiff for the same order as shown in handwritten memo Exhibit as well as the confidential manufacturing drawings and other drawings in which the plaintiff has copyright, as set forth in the documents described in Schedule A.

and in para. 19 stated:

> 19. The field of prospective buyers of the things which are the subject matter of the above patents, copyrights, trade marks, trade secrets and confidential information, and of users of the products generated as the result of the use of such things, is quite limited and can be occupied by a competitor such as the defendants are, who can underbid the plaintiff because of the fact that they are using such things which the plaintiff accumulated at a great cost over the years.

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6 While there was a somewhat similar paragraph in the original statement of claim there was no specific mention of the words "copyrights, trade marks or confidential information" in same, the paragraph mentioning only "patents and trade secrets".

7 At the opening of the hearing before me, defendants' counsel argued that while the action on the merits will proceed on the basis of the allegations in the further amended statement of claim, the hearing on the motion for the interlocutory injunction must be confined to the affidavits submitted in support of it which refer to the original statement of claim and that therefore the questions of copyright and trade mark infringement as such cannot be pleaded in support of the present motion. While the further amended statement of claim is now a part of the Court record, the affidavits cannot be said to have been submitted in support of it except to the extent that they support paragraphs in the original statement of claim to which the affidavits had reference. Moreover, by the interlocutory judgment rendered on January 17, 1972, when plaintiff was given permission to substitute other pleadings for the amended statement of claim and amended particulars of breaches which were struck out by the order of November 25, 1971, permission was also given to make further amendments to this further amended statement of claim which, *inter alia*, struck out altogether any reference to trade mark infringement without prejudice to plaintiff's rights to re-introduce same by further amendment in the event that it could allege precisely and in sufficient detail any trade mark infringement by defendants. This has never been done. I have examined the authorities cited to me by both sides and the jurisprudence is quite clear that on a motion for an interlocutory injunction the evidence must be confined to what is set out in the affidavits submitted in support of it and the affidavits submitted in opposition to this by defendant, and of course the cross-examination on these affidavits, save to the extent that *viva voce* evidence is permitted by the Court at the hearing which permission is given only in very exceptional circumstances, and which I refused in this case save for permitting the bailiff, who had seized certain documents in the possession of defendants in connection with proceedings brought by plaintiff against them in the Superior Court in Montreal, to be summoned by the defendants to produce these documents as allegedly they had certain writings or markings on them in coloured ink or pencil which would not be reproduced as such by the photostats of these exhibits which had been produced by plaintiff. If we must rely then on the affidavits submitted on behalf of plaintiff at the time of the original motion, at which time there was no specific reference to copyright infringement as such in the motion or pleadings, we cannot then at this stage of the proceedings deal with copyright infringement as such. This is not to say, however, that plaintiff cannot complain at this stage of the use of these documents by defendants on the basis that they contained trade secrets or confidential information, which matters were clearly alleged in the proceedings as originally brought, trade secrets being specifically referred to in para. 8 thereof, and confidential information in para. 9.

8 This brings us to defendants' motion, made at the commencement of the hearing and taken under reserve, to strike out the affidavit of George Coull as well as the cross-examination and re-examination thereon and exhibits thereto on the ground that it did not comply with Rule 332 of the *Federal Court Rules* in that, with the exception of certain paragraphs, the facts alleged in the affidavit and ex. 1 being the original statement of claim annexed thereto are improperly and falsely represented as being to the personal knowledge of the affiant Coull whereas it appears from the transcript of the cross-examination thereon that these allegations were based on information and belief without indicating the source of such information or such belief. Alternatively, the motion asks for the striking out of paras. 8, 9, 10, 11a, 15, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29 and 30, of the affidavit and the cross-examination and re-examination thereon and exhibits thereto for the same reason. [4] The motion also asks for the striking out of the entire re-examination of the affiant Coull starting at p. 549 and ending at p. 965 of the transcript of his evidence and the exhibits thereto for the reason that the re-examination was improper, unfounded and inadmissible and more particularly did not properly arise out of the cross-examination but was solely for the purpose of making evidence the plaintiff should have made and was in a position to make in chief by the affidavit of Coull and others; or alternatively, striking out certain questions and answers objected to and exhibits produced in certain instances at pages:

(1) 554, 558 — 569

(2) 570, 571, 578, 579

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(3) 583 — 585

(4) 589 — 593

(5) 598, 599

(6) 604 — 614

(7) 614 — 618

(8) 634 — 636

(9) general questions at pages 640 & 641 on Exhibits D-190 to D-213

(10) 750 — 752

(11) 826 — 845

(12) 907 — 908

(13) 924, 926

(14) 945 — 955

for the same reasons.

9 Rule 332 of the *Federal Court Rules*, on which the first part of this motion is based, reads in part as follows:

> Rule 332.(1) Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereon may be admitted.

10 The exception permitting the introduction into an affidavit on an interlocutory motion of hearsay evidence provided the affiant indicates the grounds for his belief that the facts so stated are true, even though he does not have personal knowledge of them, has as its purpose the avoidance at that stage of the proceedings of the production of a multiplicity of affidavits from a great number of persons, each of whom has personal knowledge of the facts deposed to, in view of the fact that it is desirable that such a motion be dealt with as expeditiously as possible, although rigorous proof in accordance with the regular rules of evidence will be required when the matter is heard on the merits. While the rule must be strictly interpreted, as is required in the case of all rules of exception, and the grounds of belief must therefore be shown with respect to all matters which are not to the personal knowledge of the affiant, I nevertheless believe that some latitude must be allowed in interpreting what constitutes "personal knowledge" of the affiant, and consideration must be given to the position held by the affiant and the nature of the facts to be proved. A constant line of jurisprudence has held that it is not sufficient for the affiant to state that the facts alleged in his affidavit are true to the best of his knowledge and belief, or that he is credibly informed and has reason to believe the facts, but that is not what is complained of here. Instead, the objection is based on the fact that although Mr. Coull alleges that (with the exception of paras. 5, 12, that part of para. 29 which refers to customers of the plaintiff, and para. 31 which relates to s. 57(2) of the *Patent Act*) all the paragraphs in the statement of claim attached thereto are true to his personal knowledge as vice-president of plaintiff company, it allegedly became apparent during his cross-examination on his affidavit that this was not the case. Looked at in one sense, the principal executive officer of a company (in this case Coull, although vice-president, was the principal executive officer in Canada) can perhaps be deemed to have personal knowledge of everything of importance that is transpiring with respect to the company's business, whereas on the other hand, if personal knowledge is to be interpreted restrictively he would have little personal knowledge of anything that went on. For example, he would not himself prepare the tenders being made by the company for a contract which it is seeking but he would certainly see these tenders when they were prepared and before they were submitted and thus, I believe, could fairly be said to have

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personal knowledge of them. Similarly, he might not personally have drawn any of the engineering drawings or prepared the specifications for any of the company's products, but he would be able to look at such drawings and say that to his personal knowledge they are the company's drawings or that the specifications are the company's specifications. To give too restrictive an interpretation to what constitutes the affiant's own knowledge and require him to go into great detail in his affidavit as to how he acquired this knowledge in connection with each and every statement he makes would defeat the whole purpose of Rule 332(1); on the other hand, to permit him to include in his affidavit statements based on pure hearsay without at least indicating who told him the fact deposed to and under what circumstances, would defeat the requirement of the rule that this must be done except with respect to matters in his own knowledge. The dividing line is difficult to draw, but I do not believe that in the present case Coull should be allowed to state as facts within his own knowledge matters which have merely been told him by others such as George James, or his attorney, without giving the source of this information. On the other hand, when he has seen certain documents that were seized and copies of certain letters allegedly written by defendants to third parties that have been shown to him, or has information which he knows can be supported by documents as to what has taken place, it would not be going too far to say that he knows this of his own knowledge. As the result of a seizure before judgment made in Superior Court case No. 811419 on July 15, 1971, of a series of documents in the office of Railquip Enterprises Ltd. and defendant MacDonald, and an investigation made internally within his own company, the affiant Coull had seen documents and obtained knowledge otherwise than by pure hearsay of a number of the facts to which he is deposing in his affidavit. Examining Mr. Coull's replies during his cross-examination on his affidavit it appears that he had seen letters or documentary evidence allegedly supporting at least in part paras. 8, 10, 15, 17, 18, 22, 23, 24 and 28 of the original statement of claim, although his knowledge was supplemented in some cases by hearsay information conveyed to him. Paragraphs 11a, 19, 20 and 21 are matters which would be within his personal knowledge.

11 With respect to paras. 9, 25, 26, 27 and 30, however, it appears that the allegations of Coull's affidavit supporting these paragraphs are based entirely on information given to Coull by George James in the case of the first four of these paragraphs and from the C.N.R. in the case of para. 30 and this should have been indicated in the affidavit [5] . Defendants' motion asks for the striking out of these paragraphs, referring to them as "paragraphs of the said affidavit", whereas they are, in fact, paragraphs of the original statement of claim exhibited to the affidavit and, as such, cannot be struck. They may, and in fact are to some extent, supported by the affidavits of other deponents such as Bruno Waldhart, or the admissions of defendant MacDonald in cross-examination on his affidavit, but in so far as Mr. Coull's affidavit is concerned, I must find that it cannot be held to support the allegations in these paragraphs nor can his cross-examination and re-examination and exhibits filed with respect to these paragraphs be used at this stage of the proceedings. These paragraphs should have been supported by an affidavit from George James in the case of the first four of these paragraphs, and from someone in the Canadian National Railway Co. or the National Steel Car in a position to have personal knowledge with respect to the order referred to in para. 30.

12 Defendants' second objection to Mr. Coull's affidavit and the evidence given in cross-examination and re-examination thereon relates to the fact that the re-examination did not properly arise out of the cross-examination and that new evidence was made and exhibits filed during the course of the re-examination which should have been included in and annexed to the original affidavit. The affidavit itself constitutes the evidence in chief of the witness who is then cross-examined by the opposing party (Rule 332(5)). Although re-examination is not specifically referred to in the rule, it is not excluded and is permissible under the basic rules of evidence and must comply with these rules. It is trite law to state that re-examination must be confined to dealing with or explaining matters which have been raised in cross-examination and cannot be used as an excuse for introducing evidence which should have been put in during the examination in chief (in this case, the affidavit). A clear expression of this rule is found in art. 315 of the Quebec *Code of Civil Procedure*, 1965 (Que.), c. 80 which reads:

> 315. A witness may be heard again by the party who produced him, either to be examined on new facts elicited by the cross-examination or to explain his answers to the questions put by another party.

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13 Provided the questioning conforms to this rule, the fact that further information may be elicited from the witness or additional exhibits produced as a result of this re-examination does not mean that the witness is re-making his affidavit or introducing additional evidence after his affidavit has been completed and filed, which is not permissible save with the permission of the Court. The jurisprudence submitted by counsel for defendants, therefore, to the effect that an affidavit submitted in support of an interlocutory motion cannot be amended or supplemented by a further affidavit or additional evidence without such express permission of the Court is not applicable, if plaintiff's contention is sustained that any such additional evidence made or further exhibits produced during re-examination of the witness Coull resulted either from new facts elicited by defendants during his cross-examination or was for the purpose of explaining and expanding on his answers to such cross-examination.

14 Although the affidavit of George Coull was very brief and might well with advantage have gone into further detail with respect to plaintiff's claim, it did produce the statement of claim itself as an exhibit and it is really on this original statement of claim that he was examined. This examination by defendants' attorney resulted in 548 pages of transcript of his evidence and the re-examination ran from pages 549 to 965, a total of 418 further pages. It is evident that such a sweeping and far-ranging cross-examination inevitably opens the door to the introduction of evidence and documents on re-examination, relating to new facts elicited during the cross-examination or for the purpose of explaining the witness's answers during such cross-examination, and I do not find, therefore, that the re-examination was improper, unfounded or inadmissible as a whole or that it did not properly arise out of cross-examination but was solely for the purpose of making evidence that the plaintiff should have made and was in a position to make in chief by the affidavit of Coull and others, as defendants contend in their motion to strike out the entire re-examination and exhibits thereto. This is not to say, however, that all the questions asked and evidence introduced as a result of the re-examination properly arose out of the cross-examination and I have therefore directed my attention particularly to the pages of the re-examination enumerated in defendants' motion, *supra*, and to defendants' demand that the questions and answers objected to and exhibits produced in the course of the re-examination transcribed on those pages be struck. Even here it is necessary to approach the matter from a general point of view rather than with respect to certain particular questions and answers as in many instances the questions and answers are in part proper and in part improper. To the extent that the witness is making answers which are clearly based on hearsay and in which he did not disclose the source of his information in his affidavit, I have already ruled that the answers are inadmissible. To the extent that the questions and answers clearly did not arise from the cross-examination but are introducing new matters which should have been introduced in the examination-in-chief they are also inadmissible. However, to a very large extent the cross-examination consisted of asking the witness the basis of the statement in a specific paragraph of the statement of claim and how he acquired his knowledge of this. The witness in reply would then frequently refer to a letter emanating from defendants or copies of documents, plans and specifications seized in the possession of one of the defendants as the source and justification of his statement. When defendants' attorney did not then ask that these documents which the witness had referred to in this cross-examination be produced as exhibits it was, in my view, perfectly proper for plaintiff's attorney in re-examination to require that they be produced as exhibits and to question the witness further in explanation of them as this would fall within the scope of proper re-examination.

15 Dealing more specifically with the objections then I find with respect to the questions and answers on pages 554, 558-569 of the transcript of Mr. Coull's evidence that it was proper for him to testify that the defendant MacDonald was president of defendant Railquip Enterprises Ltd., having seen letters signed by him as president, the context of which clearly indicated that he was president of this company. I would not admit his evidence as to the names of the other officers, however, since this was obtained by him as hearsay.

16 With respect to his evidence at pages 583-5 and 634-6 of the transcript, I would admit the witness's evidence as to the length of time it takes his company to prepare a quotation for the heater assembly, but would reject his evidence as to how long it would take defendants to prepare a quotation, since this is a matter of opinion and speculation and he was not testifying as an expert witness although undoubtedly he has wide experience in this field. To the extent that his answers draw conclusions, these are matters for the Court to reach rather than for the witness to testify to.

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17 With respect to pages 924-6 of the transcript and 945-955 dealing with the amount of damages claimed by plaintiff, para. 11 claims damages known to the plaintiff to have been suffered by it by reason of the alleged wrongful acts in an amount of $250,000, and para. 11(a) refers to damages continuing at a rapid and increasing rate because plaintiff's best customer is being solicited by the defendants to turn over to defendants the business that once went to the plaintiff. The continuing damages, therefore, would appear to be limited to claims resulting from future dealings of defendants with the Canadian National Railway Co. and not generally with other customers or with respect to other products of plaintiff. While the questioning of the witness in re-examination at pages 907 and 908 respecting the sale of Locotrol, a product for the control of slave locomotives, would seem to be proper under para. 8 alleging business practices contrary to honest industrial and commercial usage in Canada, it must be pointed out that any alleged damages arising in the future out of such dealings with other than the Canadian National Railway Co. are not covered in the amount claimed in the statement of claim.

18 Subject to the above exceptions and reservations, I find the rest of the evidence adduced and the exhibits filed during the re-examination of the witness Coull to be admissible in view of the far-ranging scope of the cross-examination.

19 Defendants' motion is therefore maintained but in part only, the costs to be in the event of the cause.

20 Having disposed of the preliminary objections I can now deal with the merits of plaintiff's motion for interlocutory injunction against defendants John A. MacDonald and Railquip Enterprises Ltd. I may say that for the purposes of the present proceedings, no distinction can be made between them despite the principles of separate corporate personality. Railquip Enterprises Ltd. was incorporated by MacDonald and others who have not been made parties to the present proceedings and has, at all relevant times, been under MacDonald's control. If I should reach a conclusion that MacDonald improperly acquired confidential information and trade secrets belonging to plaintiff and engaged in business practices contrary to honest industrial and commercial usage in Canada it is evident that he disclosed such trade secrets and confidential information to his company, Railquip Enterprises Ltd. and the fact that any sales or solicitation of business was made by the company and any patent infringements which might be found to have taken place were infringements by the company would not relieve defendant MacDonald from responsibility for same. It would be purposeless to issue an injunction against Railquip Enterprises Ltd. and not against MacDonald or *vice versa* merely because it was MacDonald and not the company who allegedly obtained the confidential information and trade secrets and the company which then used this information and these secrets and allegedly infringed the patents.

21 With respect to plaintiff's claim for an interlocutory injunction based on patent infringement four elements of proof are necessary before such an injunction can be granted. First, plaintiff must establish a *prima facie* case as to the validity of the patent. Secondly, it must establish a *prima facie* case, free of serious contradiction by defendants that the device complained of is infringing it. Thirdly, it must establish that unless an injunction is granted it will suffer prejudice which is irreparable by financial compensation. Fourthly, it must establish that the balance of convenience is in its favour that an injunction be granted to maintain the *status quo* until the proceedings are heard on the merits.

22 With respect to the validity of plaintiff's patents, I do not believe that a serious doubt has been raised. Although they have not been tested in the Courts, plaintiff, in addition to having the benefit of the presumption of s. 48 of the *Patent Act* is also in the position with respect to defendant MacDonald that he was the inventor of the second patent No. 774371 while in plaintiff's employ and duly assigned the patent to it. He has at least impliedly recognized the validity of both patents in correspondence with third parties and is not, I believe, in a position to make a successful contestation of their validity. Leaving aside the second element for a moment, I can say that I am also satisfied that the third and fourth elements are in plaintiff's favour. Plaintiff not only has suffered but will continue to suffer very extensive damage if the volume of its sales of these unit heater assemblies and the spare parts and ancillary equipment for them is seriously curtailed as a result of the alleged infringement of its patent by defendants. It was virtually in a monopoly position and all such sales were to two customers, namely, the two railway companies or the car manufacturers who manufacture equipment for them according to their specifications. Defendants, not having had to incur the very extensive expenses for research and development incurred by plaintiff over the years in perfecting its patented equipment can readily undersell

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it and take orders from it resulting in continuing damages of hundreds of thousands of dollars. It would be unrealistic to say that these are damages which can be compensated in money, since, according to the evidence in the record, neither defendant MacDonald nor defendant Railquip Enterprises Ltd. would be likely to have sufficient funds to pay any such claims should final judgment be rendered against them. Plaintiff, on the other hand, is well able to and has offered to put up a guarantee to indemnify defendants against any damages which might occur to them should an interlocutory injunction be granted and the action eventually dismissed following final judgment on the merits. If the matter were to be decided on patent infringement alone, I would decide that the balance of convenience is in favour of plaintiff, and that the *status quo* should be maintained until the proceedings are finally disposed of.

23 The element which is difficult to decide, however, is whether or not defendants have, at this stage of the proceedings, established a sufficiently serious case to indicate that it may eventually be found, following judgment on the merits, that there has been no infringement. It is difficult at this stage of the proceedings, and in the absence of expert evidence, to compare the heater assembly covered by plaintiff's patent claims with the assembly manufactured by defendants which is substantially similar save for the insertion of a different type of pot burner, allegedly developed independently by the Canadian Pacific Railway Co.

24 Plaintiff's patents are for a combination of facts and normally, in such cases, infringement occurs only if the entire combination has been taken. The doctrine of equivalence provides an exception to this, however. This was expressed by Parker, J., in *Marconi & Marconi's Wireless Telegraph Co. v. British Radio Telegraph & Telephone Co.* (1911), 28 R.P.C. 181 where he stated at p. 217:

> ... where the Patent is for a combination of parts or a process, and the combination or process, besides being itself new, produces new and useful results; everyone who produces the same results by using the essential parts of the combination or process is an infringer, even though he has, in fact, altered the combination or process by omitting some unessential part or step and substituting another part or step, which is, in fact, equivalent to the part or step he has omitted.

25 This doctrine was considered and applied by Thorson, P., in *McPhar Engineering Co. v. Sharpe Instruments Ltd.* (1960), 35 C.P.R. 105 (Can. Ex. Ct.), at pp. 157 -8, (1960), [1956-60] Ex. C.R. 467, 21 Fox Pat. C. 1 (Can. Ex. Ct.) and following, and was also applied by Puddicombe, J., in the Quebec Superior Court in *Rocform Corp. v. Levasseur Construction Inc.* (1961), 38 C.P.R. 43, 22 Fox Pat. c. 92 (C.S. Que.). In the present case the substitution in the heating unit of the type of burner developed by the Canadian Pacific Railway Co. would not, however, on the face of it, appear to be merely the substitution of an *unessential* part since this would seem to be a principal element of the heater assembly and a serious argument can be made by defendants, therefore, that the heater assembly as a whole as manufactured by them differs from that covered by plaintiff's patent claims. Defendants' witness Watkins testified in cross-examination on his affidavit that the pot burner developed by the Canadian Pacific Railway Co., his employers, was developed by them independently and differs from both the wick and wickless type of burner manufactured by plaintiff. Defendants further argue that it is, in effect, a simplified type of burner and trace its origin more to prior art than to plaintiff's patents. An examination of the heater assembly discloses considerable physical differences between the two types of burner, although I am not deciding at this stage that these differences are essential or make the burner a different one from that manufactured by plaintiff which has concentric rings with channels connecting them to prevent spillage of fuel when the pot burner is tilted from the horizontal, and which has a different arrangement of holes for air intake, and so forth. It appears therefore that defendants have a serious contestation to make on the question of patent infringement and that I should not issue an interlocutory injunction at this stage of the proceedings, on the basis of this alleged infringement alone.

26 In the absence of specific allegations of copyright infringement in the original statement of claim and affidavits supporting same, plaintiff's case at this stage of the proceedings must therefore depend on the application of s. 7 of the *Trade Marks Act*, R.S.C. 1970, c. T-10 which reads, in part, as follows:

> 7. No person shall

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(a) make a false or misleading statement tending to discredit the business, wares or services of a competitor;

(e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

27 Defendant MacDonald, when he entered into the employ of the predecessor company of the present plaintiff, named at that time Vapor Car Heating Company of Canada Ltd. on July 5, 1951, signed an agreement, the preamble of which states that in consideration of his employment by the said company and/or any of its subsidiaries and:

> realizing that, by virtue of my said employment, I will be in a position to acquire, by observation and communication, vital and confidential information regarding the constructions and principles embodied in ... and the problems dealt with in the production of ... the devices and structures made, sold, developed or used by this company in connection with its business, during the term of my employment;

and para. 5 of which reads:

> I will not divulge to any unauthorized person any information or knowledge acquired by reason of my employment by the company.
>
> (Exhibit D-5)

28 I do not accept defendant MacDonald's contention that this agreement was cancelled due to the fact that for a period of some two years he was employed by the American parent corporation before returning to plaintiff's employ. He was, in any event, obliged not to divulge any trade secrets or confidential information obtained during the course of his employment and this would apply whether this limitation resulted from express agreement or basic principles of honest industrial and commercial usage. It must be emphasized, however, that this was not a restrictive covenant requiring him not to engage in similar business after leaving the company's employ so that cases dealing solely with the enforcement of restrictive covenants cannot be relied on. He had a right to use, for his own purposes after leaving the company's employ, personal knowledge acquired during his 21 years of work in this field while in the employ of the company, and it is evident that this knowledge would include a wide experience with the problems associated with the design and manufacture of boxcar heaters, including a knowledge of the sources of supply for materials and component parts, and an approximate knowledge of the cost of constructing such heaters, the identity of the potential customers for same and for replacement parts, the names of the parties to deal with in these various companies and so forth. On the other hand, details of the design and specifications, including drawings and plans giving exact measurements arrived at by plaintiff after years of research and development in this field, part of which was done by defendant MacDonald personally, would constitute trade secrets or confidential information belonging to it and should not be taken, copied, or used by him. If such information had been released by plaintiff to third parties, however, with no restrictions as to its use or reproduction by them and thereby became public knowledge, it would cease to be a trade secret or confidential, and if MacDonald obtained this information from such third parties, as he contends, and not by use of any drawings, documents, specifications or models belonging to plaintiff, then he was entitled to do so.

29 A very good summary of the law on this point is found in the editorial note in the report of *Needco Cooling Semiconductors Ltd. v. Mester* (1961), 38 C.P.R. 115 (C.S. Que.) , which footnote at p. 116 reads, in part, as follows:

> It is fundamental that the ordinary experience and skills acquired during experience cannot be the subject of a restrictive covenant or an injunction. A covenant that seeks to restrict the employee from the use of such information is invalid as contrary to public policy: Herbert Morris, Ltd. v. Saxelby, [1916] 1 A.C. 688; Triplex Safety Glass Co. v. Scorah (1937), 55 R.P.C. 21.

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> However subject-matter that constitutes a trade secret will be protected by the Court and an injunction will be granted preventing the disclosure of such information whether it is the subject of a formal covenant or an implied covenant as a term of employment.

30 This case dealt with not only an agreement not to disclose production secrets or methods acquired during the employment and for two years thereafter but also a restrictive covenant not to engage in employment in similar business for two years after cessation of employment. The judgment in the Quebec Superior Court, granting an interlocutory injunction, held at p. 120:

> CONSIDERING that while, in principle, when there is a breach of an obligation, damages may be the rule and specific performance the exception (Mr. Justice Casey in Guaranteed Pure Milk Co. v. Patry, [1957] Que. Q.B. 54 at p. 56), there are nevertheless, under the very terms of art. 1065 C.C., cases where, in the event of a breach of contract, the creditor is primarily entitled to demand, in addition to or without damages, the specific performance of the obligation.
>
> Indeed, where the obligation is one not to disclose secrets and methods the disclosure of which may entail incalculable and inappreciable damages, nor to engage in activities amounting to unfair and unjust competition which might entail similar inappreciable and incalculable damages, specific performance of the obligation constitutes the main and essential remedy and recourse of the plaintiff against whom the breach of contract has been committed.

and again at p. 122:

> While the evidence is very weak as to the present existence of secrets of petitioner in the field of scientific knowledge, there is no doubt in the undersigned's opinion that petitioner has practical methods of production, still undisclosed, as distinguished from scientific secrets, and that respondent was and is, by the very nature of the circumstances under which he was employed and under which he worked with petitioner and by the very fact that he is a professional engineer, in possession of such secret practical methods of production and that the disclosure by him of such secrets would, for the reasons aforesaid, cause irreparable damage to petitioner.

31 In the case of *Pre-Cam Exploration & Development Ltd. v. McTavish* (1966), 50 C.P.R. 299, 57 D.L.R. (2d) 557, [1966] S.C.R. 551 (S.C.C.) (although this was admittedly a clearer case than the present one in that in it the defendant McTavish had, as a result of magnetometer readings made by him while in the employ of plaintiffs, determined in a general way where an oil body was likely to run and he then resigned from the company and staked some claims for himself ad- jacent to his former employers' property and in the area where he had determined the oil body would likely run), Judson, J., in rendering judgment said at p. 304:

> The constructive trust is imposed in a case of this kind because of the mere use of confidential information for private advantage against the interest of the person who made the acquisition of the information possible.

32 Four other cases referred to by counsel for plaintiff are of considerable interest but it will be necessary to analyse the admissible evidence in the record of the present case to see whether they are directly applicable. The first of these, *International Tools Ltd. v. Kollar* (1966), 48 C.P.R. 145, 56 D.L.R. (2d) 289, [1966] 2 O.R. 201 (Ont. H.C.) , later confirmed with minor modification in the Appeal Court (1968), 54 C.P.R. 171, 67 D.L.R. (2d) 386, [1968] 1 O.R. 669 (Ont. C.A.) , enjoined defendants from using trade secrets and knowledge relating to processes and devices developed by the plaintiff for manufacturing extremely accurate precision pins used in reflectors. Two of the defendants had left plaintiff's employment and with the third defendant formed a partnership which manufactured similar products by similar methods copying plaintiff's devices and processes. It was held that an injunction should be granted as:

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> An ex-servant who has been confidentially employed in the manufacture of an article under a secret process is under an implied obligation to his former master not to use or disclose any knowledge or information as to the secret process acquired by him during his employment.

33 The conclusion from the evidence was that the process was secret. The ex-employees when they acquired knowledge of it knew it was a trade secret of the plaintiff and the use of it was a conscious breach of confidence and good faith towards the plaintiff. The third partner, to whom the defendants had communicated information as to the secret process, was in no better position. In the present case, however, I cannot find as a fact that a secret process of manufacture was involved. The plans and drawings and specifications would, nevertheless, as I have already stated, save to the extent that by disclosure to third parties they had become matters of public knowledge, constitute confidential information. Defendant MacDonald denies that any of the information which he used was of a confidential nature and a finding will have to be made on this.

34 The second case to which I have reference is that of *Electric Reduction Co. v. Crane* (1957), 29 C.P.R. 134, 18 Fox Pat. C. 72 (Ont. H.C.) in which defendant was employed by plaintiff company on its technical staff and he obtained some 500 plans and documents to which he had contributed some technical knowledge. The contents of the plans and documents were of a highly confidential secret nature. Defendant, since leaving plaintiff company, worked for a rival company. Plaintiff applied for an interim injunction restraining the defendant from giving or divulging the contents of the plans and documents. Defendant simply swore that he did not have them in his possession and had burned them. It was held that the facts disclosed raised so strong a suspicion that the blank statement that the defendant had burned the documents, although sworn, could not be accepted under the circumstances for the defendant to satisfy the Court that the grounds for suspicion were unfounded. This is exactly the situation in the present case where the defendant MacDonald denies that he took plans and documents from plaintiff for use in connection with the manufacture of his competitive heater, which plaintiff claims he did, and it will be necessary to examine the evidence to determine which is more likely to be the truth.

35 The third case is a recent Ontario judgment, *Tenatronics Ltd. v. Hauf* (1971), 4 C.P.R. (2d) 72, 23 D.L.R. (3d) 60, [1972] 1 O.R. 329 (Ont. H.C.) , where the individual defendant had been employed by the purchasing department of a large department store but had left to become general manager of the plaintiff manufacturing company. Notwithstanding that he had executed an agreement not to disclose confidential information, defendant left the employ of plaintiff company and accepted a position with the defendant manufacturing company. The defendant company, because of the acquisition of the individual defendant's services which allowed them to copy plaintiff's product and also ensured cancellation of plaintiffs contract with the department store, entered into the production of plaintiff's product and arranged to sell it to the department store. It was held that plaintiff was entitled to enjoin the defendant company from copying, manufacturing copies or marketing copies of plaintiff's products until the trial of the action, as damages would not be an adequate remedy if the facts were as alleged by plaintiff, since the plaintiff could not be restored to its position in the market if defendant's company were allowed to take advantage of individual defendant's allegedly dishonest act. Here again, in order to apply this decision to the present case, it would be necessary to reach a conclusion that defendant MacDonald did, in fact, use confidential information obtained during the course of his employment with plaintiff and that his heater and the parts which he sold to the Canadian National Railway Co. were, in fact, copied from plaintiff by use of such confidential information.

36 The last of plaintiff's cases to which I shall refer is an American case, that of *Servo Corp. of America v. General Electric Co.*, 393 F.2d 551 (U.S. 4th Cir. Va. 1968) which found:

> (The defendant) would not be allowed to avoid consequences of its breach of confidence by piecing together in retrospect bits of information which had been disclosed in variety of places and which as combination were not clearly matter of public knowledge.

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37 Defendants, for their part, cite the case of *R.L. Crain Ltd. v. Ashton* (1949), 11 C.P.R. 53, [1950] 1 D.L.R. 601, [1950] O.R. 62 (Ont. C.A.) which in many respects also resembles the present case. The headnote of that case reads as follows [C.P.R.]:

> The appellant (plaintiff) sought to enjoin the defendants from selling continuous form presses or soliciting orders for presses similar to those used by it, and embodying the secret processes and advancements developed by it. The respondent Ashton was employed by the appellant from 1930 to 1946. Ashton was successively machine shop foreman, mechanical superintendent and director of the appellant. The improvements and assemblies embodied in the presses made by the appellant and alleged to be secrets were originated or perfected by Ashton. The respondent company was incorporated by Ashton to manufacture continuous form presses. Such presses embodied the improvements made by Ashton while with the appellant. The respondent sold one of such presses to a competitor of the appellant.
>
> Held: The onus of proof is upon the party supporting a claim based upon an alleged trade secret, to show that the restraint requested in the form of an injunction, goes no further than is reasonably necessary to protect the employer.
>
> Ashton used more than mere personal skill and knowledge (subjective knowledge) but included the use of those devices made from time to time in improving the appellant's press (objective knowledge). Ashton had become a trustee for his employer of such devices and improvements which were the exclusive property of the appellant.
>
> If devices and improvements became known to the trade the character of secrecy with which the devices and improvements were surrounded would disappear. The evidence adduced by the appellant was not sufficient to discharge the onus which rested upon it to establish that those matters relating to the press, claimed to be trade secrets, were unknown to the trade. The evidence establishes that the alleged secrets were known to others in the trade and can not be held to be secret to the appellant alone.
>
> The appeal is dismissed with costs.

38 That case referred to the judgment of Mr. Justice Astbury in the case of *Amber Size & Chemical Co. v. Menzel* (1913), 30 R.P.C. 433 (Eng. Ch. Div.) at p. 441, where he set out the tests to be used in the case of a plaintiff attempting to restrain a former employee from disclosing trade secrets as follows:

> (1) Did the Plaintiffs in fact possess and exercise a secret process? (2) Did the Defendant during the course of his employment know that such process was secret? (3) Did the Defendant acquire knowledge during his employment of such secret or a material part thereof? and, if so, (4) Has he since leaving the Plaintiffs' employ made an improper use of the knowledge so acquired by him?

39 Plaintiff in the present case does not contend that it had a secret process such as that dealt with in the *Amber Size* and *International Tools Ltd.* cases, *supra*, but rather that its plans and specifications, and in particular the measurements down to the 1,000th of an inch of some of the parts for its heater assembly, were confidential information which defendant MacDonald could not retain in his memory and could obtain only from plaintiff's plans and specifications (unless of course this information were obtained from third parties or by "back engineering" — that is, by obtaining a model of the heater from one of the purchasers, taking it apart, examining and measuring each piece and redrawing plans and specifications from them, which plaintiff claims defendants did not have time to do before tendering or even before commencing manufacturing their heater).

40 Turning now to the facts respecting the alleged disclosure of trade secrets and confidential information by defendant MacDonald first to his company Railquip Enterprises Ltd. and subsequently through it to the Canadian National Railway Co. and various suppliers from whom he sought tenders for portions of the heater assembly and replacement parts therefor, I have carefully examined the portions of the voluminous transcript and of the exhibits to which my

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attention was particularly directed by counsel for the parties and, as a result of this, have reached certain conclusions of fact despite the very conflicting testimony and assumptions which both parties have asked the Court to draw therefrom.

41 There is no doubt that MacDonald, while still in the employ of plaintiff, caused defendant Railquip Enterprises Ltd. to be incorporated on March 2, 1971 and associated George James, another trusted and important employee of plaintiff, with him in this business venture although, subsequently, in July, James changed his mind and remained in plaintiff's employ. MacDonald continued to work for plaintiff until April 15, 1971 and was paid until April 30th, and while still in its employ participated in a quotation by it for the supply of 500 boxcar heater assemblies including fuel tanks, stacks and fin tubing to be supplied to the Canadian National Railway Co. MacDonald claims that when he incorporated Railquip Enterprises Ltd. it was his intention to establish a sales agency for railway supplies and equipment which it was certainly his right to do and there is evidence to support this in copies of letters he wrote to various corporations after May 1, 1971, seeking to represent them. In soliciting this business, however, he was prone to make derogatory remarks about his former employer. For example, in a letter to Radiation Inc. respecting their product "Locotrol" he states that he is familiar with all the personnel of the railroads and the methods of selling this product and goes on to say:

> Vapor Canada Ltd. had two men who were familiar with Locotrol, and had attended a service school. Clark Buskard has left Vapor Canada, and Fred Routledge who remains at Vapor has been service manager for Vapor products in Canada, and is not familiar with the purchasing people.

43 He goes on to say that he can do a better job of selling Radiation Inc. products to railroad industries in Canada than can any other firm. In a letter to the L. Faiveley Company in Paris on May 10, 1971, respecting equipment for new subway cars for the extension of the Montreal subway system, he points out that, as vice-president of Vapor Canada Ltd., he met representatives of the Faiveley Company on several occasions during the initial subway car deliveries and is now in a position to do a better job of selling their products in Canada than any other firm. He states that he is particularly interested in their door hangar and reversing assembly and in the electric door operator which he has discussed several times with Dr. Delaney of Vapor International and concludes:

> I do not believe that Vapor Canada Ltd., who now represent you are interested in selling your products. Vapor have designed a new electric operator that is applied with one on each door leaf so it eliminated the need of a reversing mechanism for the door. Vapor Corporation have also designed a new door hangar, so this completely eliminates your products from Vapor's sales picture.

44 On June 15, 1971, he writes to the purchasing agent of M.L.W. Worthington Limited regarding water circulating pumps used in generators enclosing a quotation for same, stating:

> ... The units quoted are identical to those quoted by Vapor Canada Ltd., and are supplied by the same manufacturer.

45 At the same time he had apparently written the Weil Pump Company about supplying these because they wrote back to him on July 1, 1971, pointing out that many years ago Vapor Heating Company in Chicago had requested them to make a special pump design for use as a circulating pump in Diesel engines and that since the beginning Vapor Heating has been their only customer and sole distributor both in the United States, Canada and all parts of Europe and because of this relationship it was not possible for them to set up any form of dealership, which might operate in competition with Vapor Heating.

46 Whatever his initial intentions when he incorporated Railquip Enterprises Ltd., it is apparent that MacDonald soon decided to get into competition with plaintiff in connection with the railway boxcar heaters and parts manufactured and sold by them, and on May 1, 1971, the day after he came off the plaintiff's pay roll, although two weeks after he last actually worked for them, he submitted a tender to the Canadian National Railway Co. for a boxcar heater which he alleges was different from that to be supplied by plaintiff and covered by plaintiff's patent in that it used a pot-type burner in place of plaintiff's ceramic wick or wickless burner, which pot-type burner had been designed by the Canadian Pacific Railway Co. and was to be used by him with their permission in connection with the heaters he would supply to

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the Canadian National Railway Co. and in that certain minor changes which he claims were improvements were made by him to the design of the bellows assembly which operated as a sort of thermostatic control for the heater and was manufactured for both plaintiff and him by Cliflex Bellows. This had not operated to everyone's entire satisfaction for some time and attempts had been made to improve it by him while still in plaintiff's employ, as well as by the Cliflex Bellows Company and by the railroads. As a result of his tender he obtained an order for 150 of these heater assemblies and the auxiliary equipment consisting of tanks, stacks and the fin tubing which carries the heat through the boxcars.

47 In making this tender, MacDonald had the advantage of prior knowledge gained during the month of March while he was still in plaintiff's employ of the figures submitted by plaintiff in its tender. Exhibit P-2, seized in his possession, is a hand-written notation in which the first column headed "file" shows the following figures:

Heaters	$662
Fin Tubing	196
Tanks	138
Stack	120
Filter pipe and valve assembly	34

48 The next column has no heading but has corresponding (and lower) figures for heaters $550; fin tubing $167; tanks $130; stack $115; filter pipe and valve assembly $24. Exhibit D-6A dated May 1, 1971, is a copy of a letter written by MacDonald as president of Railquip Enterprises Ltd. to National Steel Car Co. Ltd. enclosing his quotation in which he refers to the enclosure of drawings covering the dimensions of the heater, tank and stack and promises delivery within 60 days after receipt of an order. The quotations in this letter give identical figures to those shown in the second column of ex. P-2 for the heater, stack, fuel tanks and filter pipe and valve assembly. Exhibit D-6C also quotes the identical figure for the fin tubing, so it is a reasonable assumption that these were the figures determined on by MacDonald as shown in ex. P-2 at a time when he had plaintiff's quoted figures shown in the same exhibit before him, which figures he had obtained knowledge of while in plaintiff's employ. These were items which were not quoted on frequently, the last heater assemblies supplied by plaintiff having been sold in 1967, so that the preparation of plaintiff's quotation had involved about two weeks' work by two men in its employ.

49 Before submitting his tender of May 1, 1971, defendant MacDonald had taken steps to ensure himself, while still in plaintiff's employ, that he would be able to obtain the necessary parts and supply the equipment on which he was tendering. The Canadian Pacific Railway Co. had been doing some research for some time on a pot-type burner which they themselves had installed and used on some of their boxcars in heater assemblies obtained from plaintiff in place of plaintiff's type of burner, and during the latter part of April, MacDonald had received verbal assurance that the C.P.R. would not object to his using their type of pot burner in the heaters he proposed to supply to the C.N.R. although it was not until May 4, 1971, that they actually delivered to him a model of the heater assembly with their type of burner installed. Meanwhile, defendants had been enquiring respecting potential sources of supply for the other parts of the heater assembly since they were not in a position to manufacture themselves. Replies to these enquiries were directed to James' home residence. Exhibit P-5, seized in defendants' possession, is a letter from Albon Welding and Mechanical Works Ltd., dated April 21, 1971, to IEC-Holden Limited (which, incidentally, is headed "REF: Scotch-Guard Heater" which is the trade name of plaintiff's brand heater) which sets out that they understand that IEC-Holden Ltd. will supply the valve capillary coil and float control for $112 per unit and help them through their personnel in purchasing and building a prototype and tooling, and on this basis they quote on 500 units a price of $103.47 for the exhaust stack (reference drawing 66-6-007) $109.41 for a 100 gallon capacity fuel tank (reference drawing 65-5-010) and $409.83 for Scotch-Guard heater model KD 4901. These drawing numbers are all plaintiff's numbers and it is reasonable to presume that Albon Welding had copies of these drawings before making these quotes. They had never supplied any such equipment to plaintiff, however. Exhibit P-6 is a letter dated May 1, 1971, from MacDonald, as president of Railquip Enterprises Ltd. to IEC-Holden Ltd. thanking them for the quotation received from Albon Welding and Mechanical Works Ltd., covering three items forming part of a heating system for the boxcars. He goes on to confirm that should an order be placed with Albon Welding and Mechanical Works Ltd. by Railquip, Railquip will supply the

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detailed manufacturing drawings which will remain the property of Railquip and be returned after completion of the contract. They will also provide the technical assistance and information. A further condition is that IEC-Holden will not enter into competition on this equipment with Railquip at any time. Thus he himself foresees the danger of a supplier pirating drawings and becoming a competitor.

50 Exhibit P-34 is a quotation addressed to Mr. James by the Wallace Barnes Company Ltd. dated April 8, 1971, referring to an inquiry date of March 25, 1971, for various pieces of equipment used in the heaters. This refers to five drawings, all of which are given drawing numbers identical to plaintiff's with what are apparently defendants' drawing numbers pencilled in beside them, and has a notion "drawings returned, sample retained", thus inferring that a sample of the article had also been provided. There is also a further pencilled notation at the bottom "drawings with MacDonald". Plaintiff's drawing 59-P-25, one of those referred to, was produced as ex. P-34A as an example to show the detailed specifications given on some drawings. This particular drawing, relating to a spring in the regulator control valve, showed specifications with a fine tolerance to the 1,000th of an inch and considerable other detailed information which could not be readily reproduced without access to the original drawing or specifications.

51 Exhibit P-35 is a letter from N. Slater Company to Mr. James dated May 5, 1971, confirming various discussions (which it can be inferred took place prior to May 1st) and quoting on certain other parts and contains the paragraph:

> We wish to point out to you that we have based our prices on the Vapor design ferrules, and we would not be responsible for any patent infringements.

52 Other similar exhibits include quotations from Garlock of Canada Ltd. dated May 5, 1971 and May 25, 1971, for certain gaskets which quotations (exs. P-31 and P-32) in addition to giving drawing numbers which presumably are those of defendants, give the drawing numbers of plaintiff (although in the case of ex. P-31 this number is written on apparently in pencil or ink and may have been added later by MacDonald).

53 The affidavit of Bruno Waldhart, an employee of plaintiff, who in his quality as administrator of its engineering department had charge of its drawings, states that between April 1st and 15th he had given MacDonald three complete sets of drawings for the heaters and has not seen them since. There may be some confusion as to the date since he also stated that at the time MacDonald made the request he did not know that he was leaving plaintiff's employ, but subsequently he testified that he learned this about March 27th when MacDonald submitted his resignation, so he may have given these drawings to him at an earlier stage at the time the tender was being made by the company to the C.N.R. MacDonald would not have participated directly in the tender, however, or needed the drawings for this purpose, although he would know the figures arrived at by the employees who prepared it and, in fact, had discussed these figures with Mr. Coull, the vice-president of the company. Plaintiff makes the assumption that since these sets of drawings were never found on the company's premises subsequently, despite a diligent search, that MacDonald must have removed them when he left. MacDonald not only denies this but relies on the fact that (with a few exceptions which will be dealt with subsequently) no drawings or specifications belonging to plaintiff were found in his possession when a surprise search was made on July 15, 1971, in Quebec Superior Court proceedings both at Railquip's business premises and MacDonald's home. In the absence of admissible evidence from the witness James, who could have thrown some light on the matter, it cannot be assumed, as plaintiff claims, that these drawings must have been taken from plaintiff's premises by the defendant MacDonald. MacDonald does admit receiving from James an envelope containing certain drawings, although he denies recalling that this was during the month of April, and is very vague as to the contents of the envelope, but he states that these were drawings of the stack and of castings of alcohol heaters and that he neither requested James to provide them for him nor did he use them. He did not, however, return them to plaintiff, While admitting that ex. P-1 which was seized in his possession is a photostat of a Vapor Corp. drawing for a needle control valve, he states that he did not know he had it and that it must have been brought home by him by accident, inserted in the pages of an engineering journal which he had been reading while in the employ of the company and doing work attempting to improve this control.

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54 Also seized in defendants' possession on July 15, 1971, were exs. P-9 and P-10. Exhibit P-10 is a photostatic copy of a Vapor Canada drawing for the temperature regulating assembly dated March 22, 1971. This is an assembly drawing rather than a manufacturing drawing but the photostatic copy seized has extensive ink or pencil notations giving dimensions to 1,000th of an inch. Exhibit P-9 is the same drawing but without any of these pencilled notations and is stamped: "ISSUED MAR. 29, 1971 DESTROY OLD PRINT". The portion of P-10 giving a description of the various parts of same and the name Vapor Canada Ltd. has all been deleted from P-9 and it has been given in pencil or ink the No. 4037, presumably defendants' number, and the words "Railquip Enterprises Ltd." have also been written in in pencil or ink. While a similar drawing appears in the manual of instructions issued to purchasers of the Scotch-Guard Heater and hence defendants contend that this is not a trade secret, the drawing in the manual was dated June 19, 1968. It is apparent, therefore, that P-9, the photostat used by defendant MacDonald and given his own number with any indication that it was a Vapor Canada Ltd. drawing deleted, could not have been photostated from the manual but appears to have been photostated from P-10, a Vapor Canada drawing.

55 Defendant MacDonald claims that he did not use any drawings or specifications belonging to plaintiff in connection with the heater assembly which he manufactured and sold to the C.N.R., but rather got the necessary engineering drawings from that company or from the C.P.R. According to the evidence of the witnesses Parker and Parks, he got six drawings from the C.P.R. showing the heater assembly with their type pot burner incorporated in same. With respect to the Cliflex Bellows drawings, he believes he got them from Cliflex. He had had a conference with their representatives on May 11th, the same day that they had conferred with plaintiff, and subsequently he received in an unmarked envelope a report dated May 27, 1971, from Cliflex Bellows Corporation entitled "Report on Vapor Canada Temperature Regulating Valve 64-Q-251 & Bellows Assy. 61-P-123 (C.B.C. 10779-1)" recommending changes and improvements to same. A photostat of this was found in MacDonald's possession and produced as ex. D-197. Plaintiff claims that it is unlikely that Cliflex Bellows would have sent this report to defendant MacDonald and states that James photostated the report which was sent to plaintiff and sent it to MacDonald, but this is an assumption that I cannot accept at this stage of the proceedings in the absence of James' evidence and in view of the possibility that, as defendant MacDonald contends, Cliflex might send him a copy of their report following their conference with him on May 11th, knowing that he was also interested in improving the bellows. The vagueness of his evidence on this point, however, to the effect that he thinks he got it in an unmarked envelope should be noted, as one would have assumed that had it been sent to him by Cliflex Bellows there would have been a covering letter and he would have been well aware of the origin of it. Plaintiff considered these bellows very important as it had spent four years and a great deal of money in developing same in conjunction with Cliflex Bellows who manufactured them for plaintiff.

56 Drawings relating to the bellows assembly, being exs. D-196, D-198 and D-205, were seized in defendant MacDonald's possession. Exhibits D-198 and D-205 appear to be modifications of the drawing D-196, D-205 being the final drawing made and given defendants' number in place of plaintiff's number. It should be pointed out, however, that these are Cliflex Bellows' drawings and while plaintiff contends that the drawing D-196 is a photostat of the drawing which it would have, it is at least possible that defendants obtained a copy of this drawing from Cliflex Bellows in the unmarked envelope as defendant MacDonald contends. In this event it is perhaps surprising, however, that it is not a blue print but merely a photostat.

57 Of considerable importance are seized documents D-207 and D-208. Exhibit D-207 is a hand-written list showing parts numbers, estimated costs, a third column headed "Steel Tex" and a fourth column "Selling Price". Two numbers are given for each part, one presumably being that of defendants and the other being in many instances that of plaintiff. This can be compared with ex. D-208, which is a list showing plaintiff's parts numbers in the first column, labour cost in the second, a third column which doubles the labour costs rounded off to the nearest cent, a fourth column showing material costs and a fifth column which adds the doubled labour costs to the material costs. This document, according to the witness Coull, was prepared in connection with plaintiff's estimate. It is difficult to see how defendant MacDonald could properly have come into possession of D-208, although, in fairness to him, it must be pointed out that it may not

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have been of too much assistance in connection with his quotation, since apparently the prices quoted by Steel Tex in ex. D-207 were higher than plaintiff's in those cases where the same item is concerned.

58 Of some interest is a letter dated October 14, 1969, from MacDonald to Mr. C. J. Mulvenna of Vapor Canada Ltd., reading in part:

> With regard to the 5 pot type burners that were manufactured at Angus and are being applied by the C.P.R. Do not worry about this since we designed the pot burner and it has not nearly the capacity of our small burner with the Ceramic wick.

59 Despite this reassurance we find that in May, 1971, he is installing a C.P.R. pot type burner on the heater which he is selling to the C.N.R. and claiming that the pot burner is an original C.P.R. design. It is, of course, possible as defendants contend that this letter has reference to a type of pot burner which Vapor Corp. was experimenting with and which proved to be unsuccessful. However, the drawings of the assembly containing the C.P.R. type pot burner which C.P.R. gave to MacDonald are dated between November 1, 1968 and February 24, 1969 (affidavit of Rowland Park, pare. 6) so the C.P.R. had apparently developed its burner before MacDonald's assurance to Mr. Mulvenna that the burner being tested by C.P.R. was a Vapor Corp. design. It is not clear when he wrote this letter whether he knew that the C.P.R. had designed an allegedly entirely different pot burner.

60 Plaintiff lays great stress on the disclosure of the specifications for the fin tubing by MacDonald. This design had taken years to develop as there were particular problems in distributing the heat throughout the entire boxcar without overheating at any part and it also had to be capable of withstanding any vibration and shock. While the patent had expired, this fin tubing was of a very special nature and there were no other manufacturers of same in Canada. Defendants disclosed the detailed specifications to the Canadian National Railways and also to Air Flo Systems Services Inc. enabling either of them to manufacture it and thus destroy plaintiff's exclusive market for this important replacement part. The specifications accompanying MacDonald's tender to the C.N.R. stated that it consists of:

> 1 $^{1}/_{4}$;" I.P.S. welded steel tubing with 4" x 2 $^{1}/_{2}$" fins of .032" thickness spaced at 40 fins per foot. The tubing is expanded over the fins by pulling an expander through the tubing. The tubing is expanded 25 thousands of an inch in diameter over the diameter of the hole in the fin.

61 It goes on to say that this method of manufacturing embeds the fin in the tubing to get maximum heat transfer and the fins can only be removed by cutting them off. In addition to repeating this information in a letter to the C.N.R. on July 14, 1971, he adds the following information:

> The tubing is hot rolled electric resistance welded, fully drawn, annealed, and tested to 300 p.s.i, and with the flashing removed. Tubing is 1.625" O.D. x .140" wall.
>
> (Exhibit P-8)

62 The letter from Air Flo Systems Services Inc. dated April 26, 1971 (while MacDonald was still on plaintiff's pay roll) with their tender refers to it as being "as per drawings and specifications". There is now therefore another market for this fin tubing in Canada, greatly aided by the information provided by defendant MacDonald and acquired by him during the course of his employment with plaintiff.

63 After examining all this evidence I have reached the conclusion that while defendant MacDonald may not have disclosed any trade secrets as such belonging to plaintiff within the meaning of the criteria set out by Astbury, J., in *Amber Size & Chemical Co. v. Menzel* , he, nevertheless, did make use of and disclose confidential information of an objective nature acquired during the course of his employment. The difference between trade secrets and trade knowledge is well expressed by Lord Shaw in *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688 (U.K. H.L.) when he states at p. 714:

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> Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge — these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability — all those things which in sound philosophical language are not objective, but subjective — they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself.

64 The fact that in December, 1969, and January, 1970, a new order for boxcars by the C.N.R. was in the wind was known to defendant MacDonald as a result of his employment by plaintiff, as were the detailed figures worked out by other of plaintiff's employees in the preparation of plaintiff's tender, and the figures shown in such tender were known to him as a result of his employment. Even though the tender was not a sealed tender, this was confidential information. Despite this, in January and February we find him discussing with James the incorporation of a company, arranging for the incorporation of Railquip Enterprises Ltd. in March, and we find James communicating with various potential suppliers in March and April, while MacDonald communicated with representatives of the C.P.R. during April to obtain permission to use their pot type burner in connection with the heater assembly on which he proposed to tender to the C.N.R., and we find him making this tender on May 1, 1970, the first day on which he was no longer on plaintiff's pay roll. Whether or not MacDonald took with him a full set of drawings of plaintiff's heater assembly has not been established at this stage of the proceedings, but at least a few documents belonging to plaintiff were found in his possession or in the possession of Railquip Enterprises Ltd., and certainly a number of plaintiff's drawings were referred to by plaintiff's numbers in the quotations given by various suppliers of parts with whom he had communicated. His explanation that some, if not all, of these drawings and specifications were obtained by him from the railway companies, Cliflex or other sources has not been satisfactorily established at this stage of the proceedings. Most of plaintiff's drawings, including those in the manual of operating maintenance instructions for the Scotch-Guard heater contain a notice that:

> Plans, specifications and: engineering data submitted herewith, or which may be submitted, remain the property of Vapor Canada Ltd., Montreal, and shall not be reproduced or altered excepting by express consent of the said Company.

65 The general principle on which plaintiff seeks to restrain the defendant MacDonald is set out in Fox, *Canadian Law of Trade Marks*, 2nd ed. (1956), vol. 2, p. 944, as follows:

> A plaintiff not having the privilege of a patentee may have no title to be protected in the exclusive manufacture and sale of an article or the use of a process against the world, but he may, notwithstanding, have a good title to protection against a particular defendant on the principle of unjust enrichment (Ackermans v. General Motors Corporation (1952), 95 USPQ 214).

66 This principle is further explained at pp. 945-6:

> Whether bound by express contract or not, no employee is entitled to filch his employer's, property, in whatever form that property may be, whether as a secret process, technical data, formulae or other type of confidential information. Whatever is the property of the employer must not be wrongfully used by the employee in any way, but remains the property of the employer. The Court, in interfering in such cases, does so in pursuance of the equitable doctrine of enforcing an obligation where a corresponding benefit has been received, the benefit in such cases being the original conferring of trust and confidence.
>
> It is immaterial whether the secret information is in writing or not. The principle of non-disclosure on the part of an employee applies to information acquired and retained in the servant's memory as well as to information committed to writing and existing in tangible form.

67 It appears to me that in the present case the detailed specifications and data relating to the fin tubing, for example, while the manufacture of same was no longer protected by patent nor was the process secret, nevertheless,

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constituted technical data or confidential information, and while a third party might be entitled to manufacture this tubing by examining, measuring and analysing same while in possession of the railway companies or other purchasers, the conveying of such technical information to the railways and to other manufacturers by defendant MacDonald who had been bound by express contract not to disclose confidential information acquired during the course of his employment, was a breach of confidence.

68 As Turner, L.J., said in *Morison v. Moat* (1851), 9 Hare 241 at pp. 258-9, (1851), 68 E.R. 492:

> ... what we have to deal with here is, not the right of the Plaintiffs against the world, but their right against the Defendant. It may well be, that the Plaintiffs have no title against the world in general, and may yet have a good title against this Defendant; ...

69 The position of a master obtaining a higher right than copyright under such circumstances was indicated by Kay, L.J., in *Lamb v. Evans*, [1893] 1 Ch. 218 (Eng. C.A.) where he said at p. 237:

> The jurisdiction against these Defendants is because these materials which they want to use were obtained by them when they were in the position of agents for the Plaintiff, and, although the Plaintiff might not be able to prevent anybody else in the world from publishing or using such materials as he is trying to prevent these Defendants from using, that would be no answer, because these Defendants, from the position in which they were in, are put under a duty towards the Plaintiff not to make this use of the materials.

70 I might refer also to the judgment of Bowen, L.J., in *Helmore v. Smith (No. 2)* (1886), 35 Ch. D. 449 (Eng. C.A.) at p. 456:

> ... nor could I sit by and allow it to go forth to the world that I countenance the doctrine that the confidential information received by a servant to advance his master's business may be used afterwards by him to advance his own business to the injury of his master's interests. It is part of the implied contract between the master and the servant that such confidential information is not to be used to the master's disadvantage.

71 I have reached the conclusion therefore that the broad terms of s. 7(*e*) of the *Trade Marks Act* apply in this case and that plaintiff is entitled to an interlocutory injunction restraining defendants MacDonald and Railquip Enterprises Ltd. from doing any acts or adopting any business practice "contrary to honest industrial or commercial usage in Canada".

72 A serious difficulty arises, however, in the wording of the injunction. The injunction to be granted must be of a somewhat limited nature. It is well-established law that an injunction will not be granted when the actions which it seeks to enjoin defendants from performing have already been performed and the matter then resolves itself into a determination of damages after a hearing on the merits. There is no evidence in the record to show whether the order for 150 box-car heaters and accessories, given defendants by the Canadian National Railway Co., has been completed or not.

73 With respect to taking from plaintiff and using for his own purpose any plans, drawings, specifications or other documents, defendant MacDonald no longer has an opportunity of doing this, but can only be restrained from using for his own purpose any such documents which it can be established that he has so taken.

74 Much of the damage plaintiff complains of has already occurred. If the plans and specifications and manufacturing instructions for the fin tubing are confidential information, which defendant MacDonald had no right to use or disclose to third persons, this information has already been disclosed by him to the Canadian National Railway Co. and to Air Flo Systems Services Inc. enabling either or both of them to compete with plaintiff in the manufacture of this tubing. The letters to Faiveley Company and to Radiation Inc. making somewhat derogatory comments as to plaintiff's ability to continue to represent them as well as defendants' claim they can, have already been written and defendants can only be enjoined from writing further similar letters. It must always be borne in mind that MacDonald is perfectly entitled to compete with plaintiff in the spare parts business and, in fact, there are several other competitors already who make identical parts for some of the items used in plaintiff's heater assembly, these parts being what MacDonald refers to as

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"shelf hardware". He is entitled to use his personal knowledge acquired as a result of 20 years' experience in the heating field, even if this should result in taking away business from plaintiff. There was no restrictive covenant attached to his employment. However, what he is not entitled to use is confidential information, or to copy plans, drawings or specifications of plaintiff of a confidential nature unless such plans, drawings and specifications have been disclosed to third parties with no restrictions on their use or reproduction so that such information has become part of the public domain, and defendants then obtained this information from such third parties.

75 Bearing all this in mind and applying it to the relief asked for by plaintiff in its notice of motion for an interlocutory injunction, the injunction shall be as follows:

76 Defendants John A. MacDonald and Railquip Enterprises Ltd. and each of them, their servants and agents and anyone on their behalf are restrained from:

1. Making, constructing, using or vending to others in Canada any inventions belonging to the plaintiff and covered by its patents Nos. 621537 and 774371;

2. Using for their own personal benefit or divulging to any unauthorized person any confidential information or knowledge acquired by reason of the employment with plaintiff of defendant MacDonald, or making any tenders for the manufacture or sale of products in respect of which such confidential information acquired by MacDonald is used or useful;

3. Using any plans, specifications, reports, letters or other documents belonging to plaintiff for their own purposes or conniving with any employee of plaintiff to obtain any such plans, specifications, letters or other documents;

4. Delivering to National Steel Car Co. for the Canadian National Railways or accepting any further orders for any box car heaters and other associated equipment which may infringe plaintiff's said patents.

77 Defendants John A. MacDonald and Railquip Enterprises Ltd., their officers, servants and agents are required to deliver up forthwith to plaintiff any plans, specifications, reports, letters or ether documents belonging to plaintiff, including all copies or reproductions made from such documents belonging to plaintiff as may be in their possession.

78 The Court takes note of the fact that plaintiff has expressed its willingness to give an undertaking with respect to any damages which may be caused to defendants by the granting of this interlocutory injunction in the event that plaintiff's claims against defendants shall not be sustained on the merits and I accordingly direct that this interlocutory injunction shall only take effect from such time as plaintiff shall have given such undertaking in the amount of $50,000 either in person or by some person of substance residing within the jurisdiction.

79 The interlocutory injunction shall remain in effect until final disposition of the proceedings on the merits and I am of the view that, because of the nature of the present case, it is desirable and in the interests of all parties that such a hearing should take place at the earliest possible date.

80 The costs of this motion shall be in the event of the cause.

Footnotes

1 Paragraph 30 of the statement of claim reads as follows:

"30. Since the 30th April, 1971, Defendants have by underbidding Plaintiff, sold 150 box car heaters to National Steel Car (a builder of box cars for the Canadian National Railways) which infringe Patent No. 774,371 and the other patents referred to for $90,000 and other items based on trade secrets of Plaintiff for a total of around $260,000, as compared with Plaintiff's bid of $289,000. MacDonald having, while an employee, assisted in preparing the Plaintiff's secret bid."

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2 Paragraphs 22 and 23 of the statement of claim read as follows:

"22. MacDonald took documents belonging to the Plaintiff and parts and descriptions thereof, as well as plans to be used by obliterating the name of the Plaintiff but retaining the Part Numbers of the Plaintiff.

"23. MacDonald and Railquip, unknown to the Plaintiff illegally took from the Plaintiff's plant and kept at the office of Railquip at 11387 Gouin Boulevard West, Roxboro, Quebec, nearly 200 plans, specifications and letters belonging to the Plaintiff and on 15th July, 1971 had them there."

3 Paragraphs 5, 12 and 29 read as follows:

"5. The infringement consists of infringement of every claim in the said letters patent and every element of the combinations respectively set forth in each of the claims, by using, in some products the identical combinations and identical elements and in other products unsubstantial variations thereof.

....

"12. Railquip has no assets of any consequence.

....

"29. Purporting to have special true knowledge as a former senior officer, MacDonald has made false derogatory statements against the Plaintiff to certain of the Plaintiff's customers,

....

"

4 Although the motion refers to paragraphs of the affidavit it was made clear in argument that the reference is to paragraphs bearing these numbers in the Statement of Claim, and the evidence given in support thereof.

5 The paragraphs referred to read as follows:

"9. MacDonald, and others at present unknown to the Plaintiff from January 1971 onward, formulated a common plan for their own personal benefit to use, wrongfully confidential information which MacDonald had acquired in his employment with the Plaintiff; and such persons from the incorporation of the corporate defendant (herein called Railquip) on the 2nd March, 1971, conspired with it for the improper use of the information thus in the possession of MacDonald. certain papers that James had in his possession, the details of all of which are not at present known to the Plaintiff.

. . . . .

"30. Since the 30th April, 1971, Defendants have by underbidding Plaintiff, sold 150 box car heaters to National Steel Car (a builder of box cars for the Canadian National Railways) which infringe Patent No. 774,371 and the other patents referred to ... "

. . . . .

"25. In or about January or February, 1971, MacDonald persuaded George James (also a long-time trust (*sic*) and important employee and officer of the Plaintiff and still employed by the Plaintiff) to assist MacDonald in using and divulging to others trade secrets and to deal with customers of the Plaintiff.

"26. In due course James realized the wrongful nature of these acts and withdrew his consent.

"27. In the interval between his being approached by MacDonald and his finally rejecting MacDonald's efforts, James gave to MacDonald

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Most Negative Treatment: Reversed
Most Recent Reversed: Vapor Canada Ltd. v. MacDonald | 1976 CarswellNat 428, 1976 CarswellNat 428F, 22 C.P.R. (2d) 1, 66 D.L.R. (3d) 1, [1977] 2 S.C.R. 134, 7 N.R. 477 | (S.C.C., Jan 30, 1976)

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1972 CarswellNat 66F, 1972 CarswellNat 66, [1972] F.C. 1156, 33 D.L.R. (3d) 434, 8 C.P.R. (2d) 15

John A. MacDonald, Railquip Enterprises Ltd. (Appellants) v. Vapor Canada Limited (Respondent) and Attorney General of Canada, Attorney General of the Province of Quebec (Intervenants)

Jackett C.J., Thurlow J. and Choquette D.J.

Heard: September 19, 1972; September 20, 1972; September 21, 1972
Judgment: September 22, 1972

Counsel: *J. Nelson Landry* and *Malcolm E. McLeod* for appellants.
Redmond Quain, Q.C., and *H.C. Salman* for respondent.
G.W. Ainslie, Q.C., and *A.P. Gauthier* for Attorney General of Canada.
A. Geoffrion, Q.C., for Attorney General of the Province of Quebec.

Subject: Intellectual Property; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XI Practice on interlocutory motions and applications
XI.7 Evidence on motions and applications
XI.7.b Use of affidavit evidence
XI.7.b.ii Miscellaneous

Constitutional law

VII Distribution of legislative powers
VII.5 Relation between federal and provincial powers
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Intellectual property

III Trade-marks
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Remedies

II Injunctions
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II.3.h Evidence

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II.3.h.ii Affidavits
II.3.h.ii.A Grounds for information and belief

Headnote

Trade Marks --- Legislative principles — Constitutionality

Constitutional law — Trade and Commerce — Jurisdiction — Trade Marks Act, R.S.C. 1970, c. T-10 — Whether intra vires — Practice contrary to honest industrial or commercial usage — Trade Marks Act, s. 7 — Whether cause of action — Jurisdiction of Federal Court.

M signed an agreement on entering the employ of Vapor Canada Ltd. that he would not divulge any information he acquired by reason of his employment. He was in the company's employ for almost ten years, ending up as a vice-president. Near the end of his employment he participated in the preparation of a bid by the company to supply 500 box car heater assemblies to the C.N.R. In May 1971, two weeks after he ceased work for the company, he submitted a tender through appellant company, whose incorporation he had caused and which he controlled, to supply box heaters to the C.N.R., and an order for 150 heater assemblies was obtained. In preparing the tender *M* made use of knowledge acquired as an employee of Vapor Canada Ltd. of the figures on which its tender was based, and made use of other confidential information obtained during his employment with Vapor Canada Ltd., and in addition took from that company's possession a number of its documents bearing on the matter. Vapor Canada Ltd. sued for damages and an injunction, and obtained an interlocutory injunction pending trial of the action.

Held, an appeal by *M* and appellant company must be dismissed.

1. Appellants contravened section 7(*e*) of the *Trade Marks Act*, R.S.C. 1970, c. T-10, which prohibits any act or business practice contrary to honest industrial or commercial usage in Canada: appellant company by using business information obtained for it from a former employee of a competitor in breach of his confidential relationship with the competitor, and *M* when, as that company's directing mind, he caused it to contravene section 7(*e*). *Breeze Corp. v. Hamilton Clamp & Stampings Ltd.* (1962) 37 C.P.R. 153; *Clairol International Corp. v. Thomas Supply and Equipment Co.*, [1968] 2 Ex.C.R. 552, referred to. By virtue of section 55 of the *Trade Marks Act* the Trial Division has jurisdiction to entertain an action for breach of section 7.

2. The *Trade Marks Act* as a law of general application regulating standards of business conduct in Canada is a valid exercise of Parliament's legislative jurisdiction under section 91(2) of the *British North America Act* to make laws regulating trade and commerce. *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96; *Dominion Trade and Industry Commission*, [1937] A.C. 405; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Board of Commerce Reference*, [1922] 1 A.C. 191; *Reference re The Natural Products Marketing Act, 1934*, [1936] S.C.R. 398.

Appeal from Walsh J. (unreported) granting interlocutory injunction.

***Jackett C.J.*:**

1 This is an appeal from a judgment [1] of the Trial Division dated April 19, 1972, whereby the appellants were restrained, *inter alia*, from ...

> (2) using for their own personal benefit or divulging to any unauthorized person any confidential information or knowledge acquired by reason of the employment with [the respondent] of [the appellant] MacDonald, or making any tenders for the manufacture or sale of products in respect of which such confidential information acquired by MacDonald is used or useful;

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> (3) using any plans, specifications, reports, letters or other documents belonging to [the respondent] for their own purposes or conniving with any employee of [the respondent] to obtain any such plans, specifications, letters or other documents; ...

and were required to deliver up forthwith to the respondent any plans, specifications, reports, letters or other documents belonging to the respondent, including all copies or reproductions made from such documents belonging to the respondent, as may be in their possession.

2 After the appeal was launched, the appellants, as the basis for an order dispensing with the printing of the evidence on which the judgment appealed against was founded, undertook to this Court that they would not base their appeal on anything other than the following grounds:

> 1. that all or part of the judgment appealed from should be quashed because there is no statute giving or purporting to give, the Federal Court of Canada the jurisdiction to make it; and
>
> 2. as to all or some part of the judgment appealed from, if there is a statute that gives or purports to give, the Federal Court of Canada jurisdiction to make it, that statute is, to that extent, beyond the powers of the Parliament of Canada;

3 By their Memorandum of Fact and Law, the appellants attack the portion of the judgment appealed against that is referred to above on the following grounds:

> 1) that the said parts of the judgment appealed from should be quashed because there is no statute giving or purporting to give the Federal Court of Canada the jurisdiction to make it; and
>
> 2) that as to the said parts of the judgment appealed from, if there is a statute that gives or purports to give the Federal Court of Canada jurisdiction to make it, that statute is, to that extent, beyond the powers of the Parliament of Canada.

4 The facts, as they must be accepted for the purposes of this appeal, may be stated quite simply. [2]

5 The respondent has been in the heating equipment business for several years and the appellant MacDonald worked for the respondent and a predecessor company for almost 10 years ending up as a vice-president of the respondent. When he entered into the employ of the predecessor company, MacDonald signed an agreement, the preamble of which reads in part as follows:

> ... realizing that, by virtue of my said employment, I will be in a position to acquire, by observation and communication, vital and confidential information regarding the constructions and principles embodied in — and the problems dealt with in the production of — the devices and structures made, sold, developed or used by this company in connection with its business during the term of my employment;

and paragraph 5 of which reads:

> I will not divulge to any unauthorized person any information or knowledge acquired by reason of my employment by the company.

6 While still in the respondent's employ, MacDonald caused the appellant Railquip Enterprises Ltd. to be incorporated and he has controlled Railquip at all relevant times.

7 During the last part of his period of employment with the respondent, MacDonald participated in the preparation of a bid made by the respondent to supply 500 box car heater assemblies to the Canadian National Railway Company. MacDonald ceased to work for the respondent on April 15, 1971, and, on May 1, 1971, he submitted a tender, presumably

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in Railquip's name, to supply box car heaters to Canadian National, and as a result of that tender, Railquip obtained an order for 150 heater assemblies. In preparing the tender in question MacDonald made use of knowledge, which he acquired as an employee of the respondent, of the figures on which the respondent's tender was based. To prepare those figures had taken considerable work on the part of the respondent's employees. In connection with this bid by the corporation that he controlled, MacDonald also made use of and disclosed other confidential information acquired during the course of his employment with the respondent. In addition, he took from the respondent's possession a number of documents belonging to the respondent that bore on the matter.

8 On the above facts, which are not in dispute on this appeal, the trial judge found that there had been a breach by the appellants of section 7(*e*) of the *Trade Marks Act*, which reads:

> *7.* No person shall
>
> . . . . .
>
> (*e*) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

and decided that it was a case for the part of the relief granted by the judgment appealed against that has already been summarized under section 53 of the *Trade Marks Act*, which reads as follows:

> *53.* Where it is made to appear to a court of competent jurisdiction that any act has been done contrary to this Act, the court may make any such order as the circumstances require including provision for relief by way of injunction and the recovery of damages or profits, and may give directions with respect to the disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

9 The Trial Division has jurisdiction to entertain an action for breach of section 7 by virtue of section 55 of the *Trade Marks Act* as amended by section 64(2) of the *Federal Court Act*, read with section 26(1) of the latter Act. Those provisions read as follows:

> *55.* The Federal Court of Canada has jurisdiction to entertain any action or proceeding for the enforcement of any of the provisions of this Act or of any right or remedy conferred or defined thereby.
>
> *26.* (1) The Trial Division has original jurisdiction in respect of any matter, not allocated specifically to the Court of Appeal, in respect of which jurisdiction has been conferred by any Act of the Parliament of Canada on the Federal Court, whether referred to by its new name or its former name.

10 In effect, as I understand it, the appellants' position on this appeal is that the Trial Division had no jurisdiction to deliver the judgment appealed from because

> (a) section 7(*e*) does not apply to the facts as found by the Trial Division, and
>
> (b) alternatively, if section 7(*e*) does apply to those facts, it is *ultra vires* the Parliament of Canada. [3]

11 I shall consider first whether, on the facts as found by the Trial Division, the appellants have contravened section 7(*e*). [4]

12 Section 7 is found in a statute the long title of which is *An Act Relating to Trade Marks and Unfair Competition*, and is found in a part of that statute headed *Unfair Competition and Prohibited Marks*. In this context, section 7, after prohibiting certain classes of act, all of which are obviously prohibited as constituting "unfair competition", prohibits "any other act ... contrary to honest industrial or commercial usage in Canada". It has been common ground on this appeal that a business man, in Quebec as well as in the common law provinces, is, quite apart from statute, liable to damages and an injunction if he embarks on a course of using in his business information that has been obtained for him

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from a competitor by an employee of that competitor in contravention of the employee's contract of employment with that competitor. [5] That being so, in my view it must be "contrary to honest industrial or commercial usage in Canada", in the absence of evidence to the contrary, to use information so obtained in that way and it is, therefore, contrary to section 7(*e*) of the *Trade Marks Act* to do so. [6]

13 This is not a novel view of section 7(*e*). Not only did Donnelly J., in *Breeze Corp. v. Hamilton Clamp & Stampings Ltd.* (1962) 37 C.P.R. 153, hold that the use of confidential and technical information for purposes other than that for which it was disclosed constituted an act contrary to honest industrial or commercial usage in Canada as those words are used in section 7(*e*), but my brother Thurlow, while discussing the ambit of section 7(*e*) in *Clairol International Corp. v. Thomas Supply and Equipment Co.*, [1968] 2 Ex.C.R. 552 said, "Acts or conduct involving some breach of trust or confidence may well be considered to fall within that purview" and, in the 3rd edition of Fox on *The Canadian Law of Trade Marks and Unfair Competition* 1972, at page 652, after section 7(*e*) is quoted, the following statement appears:

> Obviously the improper communication of confidential information and trade secrets will fall within that prohibition....

14 In the absence of some convincing reasoning or authoritative or persuasive authority to the contrary, I am of opinion that the corporate appellant contravened section 7(*e*) when it used in its business information obtained for it from a former employee of a competitor in breach of the former employee's confidential relationship with that competitor. [7] I am further of opinion that the appellant MacDonald contravened section 7(*e*) when, as the directing mind of the corporate appellant, he caused the corporate appellant to be in contravention of that provision. [8]

15 There remains on this branch of the case to deal with the question of documents. In my view, section 7(*e*) applies to the obtaining and use of documents that have been wrongfully purloined from a competitor in exactly the same way as it applies to the obtaining and use of confidential information. The wording and spirit of section 7(*e*) apply equally to the one as to the other.

16 My conclusion is, therefore, that the Trial Division was correct in holding that the appellants were in contravention of section 7(*e*) in connection with both the confidential information and the documents.

17 I turn now to the question whether section 7(*e*) is a valid exercise of Parliament's legislative powers.

18 The primary question is whether the *Trade Marks Act*, as a whole, is a valid exercise of Parliament's legislative powers. If the answer to that question were in the negative, the further question that would arise is whether section 7, or section 7(*e*), is severable from the rest of the statute and, taken by itself, is a valid exercise of Parliament's legislative powers.

19 In my view, while other questions have been raised, the real question to be decided in this case is whether the *Trade Marks Act* is a "law" in relation to a "matter" coming within the class of subjects set out in section 91(2) of the *British North America Act, 1867*, "The Regulation of Trade and Commerce", in which event it is a valid exercise of Parliament's powers, or whether it is a "law" in relation to a "matter" that does not come within that class of subjects, in which event it is a law in relation to a "matter" coming within the class of subjects set out in section 92(13) of the Act, "Property and Civil Rights in the Province", or is a law in relation to a matter coming within the class of subjects set out in section 92(16), "... Matters of a merely local or private nature in the Province". Those provisions read, in so far as relevant, as follows:

> *91.* It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —

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. . . . .

2. The Regulation of Trade and Commerce.

. . . . .

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —

. . . . .

13. Property and Civil Rights in the Province.

. . . . .

16. Generally all Matters of a merely local or private Nature in the Province.

20 Applying well established principles concerning the interpretation of sections 91 and 92, even though the *Trade Marks Act* is, otherwise, a "law" in relation to a "matter" falling within section 92(13) or section 92(16), if it is a "law" in relation to a "matter" falling within section 91(2), that "matter" is to be regarded as not falling within either section 92(13) or section 92(16). (See *Reference re Alberta Statutes*, [1938] S.C.R. 100, per Duff C.J.C. at page 115.)

21 To decide whether the "matter" of a "law" is in "pith and substance" a matter falling within section 91(2) requires a chronological review of the more important decisions even though, in the result, few of them will bear on the problem in hand. I have attempted such a review as a background for my consideration of the question whether the *Trade Marks Act* is in relation to a "matter" falling within section 91(2), and I propose to attach a copy of it to these reasons, before I deposit them in the Registry, for such use as it may be in understanding my reasoning on this branch of the appeal.

22 Before examining the *Trade Marks Act* to form a judgment as to its "pith and substance", it is, in my view, important to have in mind that, at common law, apart from statute, trade marks have their origin in the *tort* of passing off. The fundamental rule was that no man has the right to put up his goods for sale as the goods of a rival trader. Using the trade marks with which the rival trader marked his wares to enable the purchasing public to distinguish them from those of others was one way of committing the *tort* of passing off. Gradually this protection afforded to the user of a trade mark by way of the *tort* of passing off crystallized into the recognition of the trade mark as a property belonging to the trader who had so used it that, in the minds of the purchasing public, it distinguished the wares to which he attached it from the wares to which it was not attached. (*The Leather Cloth Co. v. American Leather Cloth Co.* (1863) 4 DeG.J. & S. 136, per Lord Westbury L.C., and (1865) 11 H.L.C. 523 (H.L.); *Singer Manufacturing Co. v. Loog* (1882) 8 App. Cas. 15, per Lord Blackburn at pages 29 *et seq.; Somerville v. Schembri* (1887) 12 App. Cas. 453.) The general rule against "passing off" gave rise to problems that resulted in registration schemes created by statute as well as statutory modifications in the substantive rights arising therefrom.

23 Examining the *Trade Marks Act* in the light of this background, it will be seen that, when the "Interpretation" provisions (sections 1 to 6) are put to one side, it consists of

(a) certain general rules under the heading "Unfair Competition and Prohibited Marks" (sections 7 to 11);

(b) a registration system for trade marks (sections 12 to 46) and a related scheme of registered users (section 49);

(c) certain modifications in the general law of trade mark (sections 47, 48, 50 and 51);

(d) ancillary provisions (legal proceedings, etc.).

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The statute is therefore a law that, "in pith and substance", creates

(a) a set of general rules applicable to all trade and commerce in Canada, including a statutory version of the common law rule against passing off, and

(b) a registration system for trade marks.

The other provisions of the statute are all incidental to those principal parts of the law.

24 What has to be determined on this branch of this case is whether Parliament had power to create those general rules for the regulation of trade and commerce in Canada. Those rules are contained in the following portion of the statute:

UNFAIR COMPETITION AND PROHIBITED MARKS

7. No person shall

(*a*) make a false or misleading statement tending to discredit the business, wares or services of a competitor;

(*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

(*c*) pass off other wares or services as and for those ordered or requested;

(*d*) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to

(i) the character, quality, quantity or composition,

(ii) the geographical origin, or

(iii) the mode of the manufacture, production or performance

of such wares or services; or

(*e*) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

8. Every person who in the course of trade transfers the property in or the possession of any wares bearing, or in packages bearing, any trade mark or trade name, shall, unless before the transfer he otherwise expressly states in writing, be deemed to warrant, to the person to whom the property or possession is transferred, that such trade mark or trade name has been and may be lawfully used in connection with such wares.

9. (1) No person shall adopt in connection with a business, as a trade mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for

(*a*) the Royal Arms, Crest or Standard;

(*b*) the arms or crest of any member of the Royal Family;

(*c*) the standard, arms or crest of His Excellency the Governor General;

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(*d*) any word or symbol likely to lead to the belief that the wares or services in association with which it is used have received or are produced, sold or performed under royal, vice-regal or governmental patronage, approval or authority;

(*e*) the arms, crest or flag adopted and used at any time by Canada or by any province or municipal corporation in Canada in respect of which the Registrar has at the request of the Government of Canada or of the province or municipal corporation concerned, given public notice of its adoption and use;

(*f*) the heraldic emblem of the Red Cross on a white ground, formed by reversing the federal colours of Switzerland and retained by the Geneva Convention for the Protection of War Victims of 1949, as the emblem and distinctive sign of the Medical Service of armed forces and used by the Canadian Red Cross Society; or the expression "Red Cross" or "Geneva Cross";

(*g*) the heraldic emblem of the Red Crescent on a white ground adopted for the same purpose as specified in paragraph (*f*) by a number of Moslem countries;

(*h*) the equivalent sign of the Red Lion and Sun used by Iran for the same purpose as specified in paragraph (*f*);

(*i*) any national, territorial or civic flag, arms, crest or emblem, or official control and guarantee sign or stamp, notice of the objection to the use of which as a commercial device has been received pursuant to the provisions of the Convention and publicly given by the Registrar;

(*j*) any scandalous, obscene or immoral word or device;

(*k*) any matter that may falsely suggest a connection with any living individual;

(*l*) the portrait or signature of any individual who is living or has died within the preceding thirty years;

(*m*) the words "United Nations" or the official seal or emblem of the United Nations;

(*n*) any badge, crest, emblem or mark

(i) adopted or used by any of Her Majesty's Forces as defined in the *National Defence Act*,

(ii) of any university, or

(iii) adopted and used by any public authority in Canada as an official mark for wares or services,

in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority as the case may be, given public notice of its adoption and use; or

(*o*) the name "Royal Canadian Mounted Police" or "R.C.M.P." or any other combination of letters relating to the Royal Canadian Mounted Police, or any pictorial representation of a uniformed member thereof.

(2) Nothing in this section prevents the use as a trade mark or otherwise, in connection with a business, of any mark described in subsection (1) with the consent of Her Majesty or such other person, society, authority or organization as may be considered to have been intended to be protected by this section.

10. Where any mark has by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services, no person shall adopt it as a trade mark in association with such wares or services or others of the same general class or use it in a way likely to mislead, nor shall any person so adopt or so use any mark so nearly resembling such mark as to be likely to be mistaken therefor.

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> *11.* No person shall use in connection with a business, as a trade mark or otherwise, any mark adopted contrary to section 9 or 10 of this Act or contrary to section 13 or 14 of the *Unfair Competition Act*, chapter 274 of the Revised Statutes of Canada, 1952.

25 This portion of the *Trade Marks Act* is certainly a law regulating trade and is therefore a law in relation to a matter coming within the words of section 91(2) of the *British North America Act* — "The Regulation of Trade and Commerce" — if those words are taken in their unlimited sense uncontrolled by the context and other parts of the *British North America Act*. (Cf. *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96, per Sir Montague Smith at page 112.) It has, however, been determined that the words "Regulation of Trade and Commerce" were not used in such an unlimited sense, because, so it has been reasoned,

> (a) the collocation of section 91(2) with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were intended, and
>
> (b) if the words had been intended to have full scope, the specific mention of such heads as banking, weights and measures, bills of exchange and promissory notes, interest and bankruptcy, and insolvency would have been unnecessary.

This was laid down in *Citizens Insurance Company of Canada v. Parsons* (1881) 7 App. Cas. 96 at pages 112 *et seq.* and has been acted upon ever since. There has never been any doubt that section 91(2) includes the regulation of international trade and interprovincial trade. (See *Murphy v. C.P.R.*, [1958] S.C.R. 626, *Caloil Inc. v. Attorney General of Canada*, [1971] S.C.R. 543, and *Attorney General of Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689.) On the other hand, it has been established that it does not extend to the regulation of the contracts of a particular trade in a province, to the regulation, by a licensing system or otherwise, of the operations of a particular trade in a province, or to the regulation of the relations of masters and servants. (See review of authorities by Duff C.J.C. in *Reference re Alberta Statutes*, [1938] S.C.R. 100 at pages 118-119; and *Reference as to the Validity of section 5(a) of The Dairy Industry Act*, [1949] S.C.R. 1, [1951] A.C. 179.) In addition, it may be said that, whenever the ambit of section 91(2) has been discussed in a general way, it has been recognized that it did, or might, authorize Parliament to make laws for the general regulation of trade affecting the whole country. [9]

26 It is this latter aspect of section 91(2) that has to be considered in connection with the *Trade Marks Act*. This appeal makes it necessary to attempt to reach some conclusion as to the ambit of Parliament's powers to make laws for the general regulation of trade affecting the whole country.

27 In the first place, there is little help to be obtained from actual decisions. [10] The ambit of Parliament's power to make laws under section 91(2) for the general regulation of trade affecting the whole country has not been the subject of decisions of which I am aware except for the decision of the Privy Council on the *Dominion Trade and Industry Commission Reference (Attorney-General for Ontario v. Attorney-General for Canada)*, [1937] A.C. 405, where it was held that it was competent to Parliament under section 91(2) to create a national trade mark known as the "Canada Standard", and the decision of the Supreme Court of Canada on the same reference ([1936] S.C.R. 379) where the trade and commerce power was linked with the criminal law power as authority for Parliament to enact provisions concerning the investigation of matters relating to commodity standards. On the other hand, as far as I am aware, there are no decisions holding that attempts by Parliament to make trade and commerce laws were bad except where such laws purported to regulate local forms of trade in a province or the employer-employee relationship.

28 In so far as judicial expression of opinion is concerned, there is no definitive statement of which I am aware that can be used to solve the problem raised by this appeal. There are, however, two very significant opinions expressed in the relevant authorities. The first of these two opinions occurs in the *Reference re Alberta Statutes*, [1938] S.C.R. 100, where Duff C.J.C. and Davis J. expressed the view that legislation creating a new system of "credit" to be used as a means of exchange, in lieu of bank credit, was trade and commerce legislation. The second opinion to which I refer occurs in the

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Dominion Trade and Industry Commission Reference, [1937] A.C. 405 where Lord Atkin, delivering the opinion of the Privy Council, expressed the opinion that section 91(2) was an obvious source of authority for Parliament to enact the *Trade Marks and Designs Act*, R.S.C. 1927, chapter 201. This latter expression of opinion is sufficiently important for present purposes to warrant quoting the passage in question, *viz.*:

> There exists in Canada a well established code relating to trade marks created by Dominion statutes, to be found now in the Trade Marks and Designs Act, R.S.C., 1927, c. 201, amended by S.C., 1928, c. 10. It gives to the proprietor of a registered trade mark the exclusive right to use the trade mark to designate articles manufactured or sold by him. It creates, therefore, a form of property in each Province and the rights that flow therefrom. No one has challenged the competence of the Dominion to pass such legislation. If challenged one obvious source of authority would appear to be the class of subjects enumerated in s. 91(2), the Regulation of trade and commerce, referred to by the Chief Justice. There could hardly be a more appropriate form of the exercise of this power than the creation and regulation of a uniform law of trade marks. [Page 417]

There is, in addition, a suggestion in the *Board of Commerce* case ([1922] 1 A.C. 191 at pages 200-01) that Parliament may make laws for the gathering of statistics.

29 I find some further help of a more general character in the judgment of Duff C.J.C. in the *Reference re The Natural Products Marketing Act, 1934*, [1936] S.C.R. 398 where, at page 412, after indicating that the enactments there in question were bad because they extended to "the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local", he said:

> It should also be observed that these enactments operate by way of the regulation of dealings in particular commodities and classes of commodities. The regulations contemplated are not general regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in Parson's case.

30 To summarize the result of the authorities as I understand them, there has been removed from the *prima facie* ambit of the "Regulation of Trade and Commerce" entrusted to Parliament by section 91(2)

(a) the regulation of dealings in particular commodities or classes of commodities in local trade in a province,

(b) the regulation of the contracts of a local trade in a province, and

(c) the regulation of the employer-employee relationships in local trade in a province;

while, on the other hand, it would appear that what is left to Parliament to regulate (in addition to international trade and interprovincial trade), as being general regulations of trade as a whole or regulations of general trade and commerce, includes

(a) the creation of a national mark to be used in trade to indicate standards, and the control of the use thereof,

(b) a system of trade marks,

(c) a system of credits to be used in lieu of bank credit,

(d) commodity standards, and

(e) statistics.

31 Against the background of these authorities, my conclusion is that a law laying down a set of general rules as to the conduct of business men in their competitive activities in Canada is a law enacting "regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in *Parsons* case". From this point of view, I can see no difference between the regulation of commodity standards and a law regulating standards of business

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conduct; and, in my view, if there is anything that can be general regulation of trade as a whole it must include a law of general application that regulates either commodity standards or standards of business conduct.

32 In my opinion the *Trade Marks Act*, as a whole, is a law of general application regulating standards of business conduct in Canada and is, therefore, within the powers conferred on Parliament by section 91(2) of the *British North America Act, 1867*. It is therefore unnecessary for me to consider the other grounds advanced for supporting the validity of section 7(*e*).

33 I am therefore of opinion that the Trial Division had jurisdiction to give the relief which, as I read the reasons for judgment delivered by Walsh J., it was intended to give. However, having regard to the further light thrown on the ambit of section 7(*e*) as a result of the attack that has been made somewhat belatedly on its validity, I am of opinion that certain changes should be made in the wording of the judgment appealed from to ensure that it does not go further than section 7(*e*) authorizes. In my opinion, therefore, the appeal should be allowed and the judgment appealed from should be amended

> (1) by deleting the paragraph numbered 2 therein and substituting therefor the following paragraph:
>
> 2. Using in the business of Railquip Enterprises Ltd., or in any other business in which either of them may be in any way associated or concerned, either by communication to third persons or otherwise, any confidential information or knowledge acquired by reason of the employment with plaintiff of defendant MacDonald, or making any tenders for the manufacture or sale of products in respect of which such confidential information acquired by MacDonald is used or useful;
>
> (2) by deleting the paragraph numbered 3 therein and substituting therefor the following paragraph:
>
> 3. Using in the business of Railquip Enterprises Ltd., or in any other business in which either of them may be in any way associated or concerned, any plans, specifications, reports, letters or other documents belonging to plaintiff acquired by reason of the employment with the plaintiff of defendant MacDonald or conniving with any employee of plaintiff to obtain any such plans, specifications, letters or other documents;

and

> (3) by deleting the unnumbered paragraph immediately following the paragraph numbered 4, and by substituting therefor the following paragraph:
>
> Defendants John A. MacDonald and Railquip Enterprises Ltd. are required to deliver up forthwith to the plaintiff all plans, specifications, reports, letters and other documents belonging to the plaintiff that are in his or its possession as a result of having been acquired for use in the business of Railquip Enterprises Ltd. by reason of the employment with the plaintiff of the defendant MacDonald and all copies or reproductions of any such documents that are in his or its possession.

34 Having regard to all the circumstances, I am of opinion that the costs of this appeal should follow the event of the cause.

***Thurlow J.*:**

35 I concur.

***Choquette D.J.*:**

36 I concur.

Footnotes

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1 This judgment was called an "order" but, under the *Federal Court Act*, the more appropriate term is "judgment". See, for example, section 27 of that Act.

2 While I state the facts categorically, it must be recognized that it is only for the purposes of this appeal. There is no attack at this stage on the Trial Division's findings of fact. When the matter comes to trial, if it does, the facts will be determined on whatever evidence is then available.

3 No question is raised on this appeal as to whether, assuming the Court's jurisdiction in the matter, the relief granted was authorized by section 53. I express no opinion on that question.

4 On my view of the matter, it is not necessary to consider the rule that requires an ambiguous statute to be interpreted so as to fall within Parliament's powers, if such an interpretation is open on the wording of the statute.

5 See authorities cited in chapter XIII of Fox, *The Canadian Law of Trade Marks and Unfair Competition*, 3rd edition, at pages 652 *et seq*.

6 While I have no doubt about its application in this case, I find the language of section 7(*e*) difficult to analyze. What follows in this footnote is a tentative view that I have formed and that I express in the full realization that more mature consideration may result in a different appreciation of it.

When one looks at the language of the prohibition contained in section 7(*e*), one finds that it reads:

No person shall ... do any ... act or adopt any ... business practice contrary to honest industrial or commercial usage in Canada. Taking the latter part of the clause first, it would seem that the words "honest industrial or commercial usage in Canada" must mean that which it is usual for honest business men in Canada to do in carrying on their industrial or commercial operations. If that is the correct view as to the meaning of that part of the clause, then the clause as a whole must mean that no person shall do any act or adopt any business practice in carrying on his industrial or commercial operation if such act or practice is "contrary to" that which honest business men in Canada usually do, or, to put it another way, an act or practice in the carrying on of an industrial or commercial operation is prohibited if it would be unacceptable to an honest business man in Canada. Put that way, section 7(*e*) prohibits, apart from very exceptional circumstances, any act or business practice, in the course of an industrial or commercial operation, that involves a breach of the law either civil or criminal because any such act or practice would, I should have thought, be unacceptable to an honest business man in Canada. (This is the category of matter that is involved in the present appeal.) Section 7(*e*) would also, on this view, extend to acts or practices that do not otherwise involve illegality provided that they would be unacceptable to honest business men in Canada. (An example of such a case is the dishonest conduct dealt with by Noël J., as he then was, in *Therapeutic Research v. Life Aid* (1969) 56 C.P.R. 149.)

Looking at section 7 from the point of view of the *ejusdem generis* rule, it seems to me that Parliament has so worded section 7(*e*) as to define explicitly the common class into which all the paragraphs of section 7 fall. All the acts or practices prohibited by section 7 are acts or practices that are "contrary to honest industrial or commercial usage in Canada". It does not seem to me that, having regard to the express statement of this common class, section 7 is open to an interpretation that would imply an additional class of a more limited nature as a limitation on the ambit of section 7(*e*). Moreover, I do not think that this view differs in substance from that adopted by Schroeder J.A. in *Eldon Industries Inc. v. Reliable Toy Co.* (1967) 48 C.P.R. 109. In any event, I should have thought that it would have resulted in the same decision in that case for, in the absence of evidence of some "usage" to the contrary, there would seem to be no reason why an honest business man would not take advantage of a design or an invention open to public view when, having regard to the conditions established by Parliament for the existence of monopoly rights, such design or invention is in the public domain. As far as I know, our law still favours competition.

It has been established by *S. & S. Industries Inc. v. Rowell*, [1966] S.C.R. 419, that section 7 is not restricted to a prohibition of things that are otherwise illegal.

It seems to me that the appropriate sense of "usage" as found in section 7(*e*) is sense numbered one in the Shorter Oxford English Dictionary: "Habitual use, established practice, customary mode of action, on the part of a number of persons".

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7 Experience will probably establish the limits of the prohibition contained in section 7(*e*). For example, it will probably be interpreted as a regulation of "business" as "business" and not as a "regulation of contracts". (Compare *Reference re Ontario Farm Products Marketing Act*, [1957] S.C.R. 198, per Kerwin C.J.C., at pages 204-05.)

8 It is important to make a distinction here between this rule of unfair competition, which relates to acts committed by the business man in the course of his business, and the contractual relation between the competitor and the disloyal employee. In my view, section 7(*e*) applies to the unfair competition and operates against the corporate business man who is guilty of it as well as to the directing mind (officer or shareholder) who causes the corporation to do the forbidden act. On the other hand, in my view, section 7(*e*) has no application to the conduct of the disloyal employee as employee. If, therefore, an employee divulged confidential information to a competitor of his employer but took no part in the competitor's business operations, section 7(*e*) could not, as I see it, be invoked by the employer against such employee. Section 7(*e*), like the rest of section 7, is restricted to acts of unfair competition and does not govern employer-employee relations.

9 This statement should be qualified by recalling the decisions that threw doubt on the efficacy of section 91(2) to authorize, by itself, laws that might otherwise fall within section 92(13) or (16). This doubt seems to have been put to rest by subsequent decisions. See *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310, per Lord Atkin at page 326, *Reference re Alberta Statutes*, [1938] S.C.R. 100, per Duff C.J.C. at pages 120-21, and *Reference re Ontario Farm Products Marketing Act*, [1957] S.C.R. 198, per Kerwin C.J.C. at pages 204-05.

10 I use the word "decisions" to include advisory opinions expressed by a court pursuant to statutory references.

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Most Negative Treatment: Not followed
Most Recent Not followed: St. Andrews Links Ltd. v. Glen Argyle Inc. | 2009 CarswellNat 5041, 2009 CarswellNat 5364 | (T.M. Opp. Bd., Dec 30, 2009)

1976 CarswellNat 428
Supreme Court of Canada

Vapor Canada Ltd. v. MacDonald

1976 CarswellNat 428F, 1976 CarswellNat 428, [1977] 2 S.C.R. 134, 22 C.P.R. (2d) 1, 66 D.L.R. (3d) 1, 7 N.R. 477

John A. MacDonald and Railquip Enterprises Ltd., Appellants and Vapor Canada Limited, Respondent and Attorney General for Canada, Attorney General for Ontario and Attorney General for Quebec, Intervenors

Laskin C.J. and Martland, Judson, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

Judgment: February 25, 1975
Judgment: February 26, 1975
Judgment: February 27, 1975
Judgment: January 30, 1976

Proceedings: On appeal from the Federal Court of Appeal

Counsel: *Malcolm E. McLeod* and *J. Nelson Landry*, for the appellants.
G.F. Henderson, Q.C., and *E. Binavince*, for the respondent.
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J.D. Hilton, Q.C., for the Attorney General of Ontario.
Jean LeFrançois, for the Attorney General of Quebec.

Subject: Intellectual Property; Property

Related Abridgment Classifications
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Constitutional validity of federal statutory provisions — Trade Marks Act, R.S.C. 1970, c. T-10, ss. 7(e), 53 — Constitution Act, 1867 (30 & 31 Vict.), c. 3, ss. 91¶¶2, 27, 92¶¶13, 16.

Federal Trade Marks Act providing civil action by employer against employee for breach of contract -- Not valid exercise of federal trade and commerce power -- Not criminal law matter -- Not legislation implementing treaty -- Legislation invasion of provincial legislative power.

The judgment of Laskin C.J. and Spence, Pigeon, Dickson and Beetz JJ. was delivered by *The Chief Justice*:

1 This appeal, brought here by leave given by the Federal Court of Appeal pursuant to s. 31(2) of the *Federal Court Act*, 1970 (Can.), c. 1, concerns three paragraphs of an interlocutory injunction order which, as varied by the Federal Court of Appeal upon an appeal thereto from the order as originally made by Walsh J. of the Federal Court, reads as follows:

> Defendants John A. MacDonald and Railquip Enterprises Ltd. and each of them, their servants and agents and anyone on their behalf are restrained from
>
> (1) Using in the business of Railquip Enterprises Ltd., or in any other business in which either of them may be in any way associated or concerned, either by communication to third persons or otherwise, any confidential information or knowledge acquired by reason of the employment with plaintiff of defendant MacDonald, or making any tenders for the manufacture or sale of products in respect of which such confidential information acquired by MacDonald is used or useful;
>
> (2) Using in the business of Railquip Enterprises Ltd., or in any other business in which either of them may be in any way associated or concerned, any plans, specifications, reports, letters or other documents belonging to plaintiff acquired by reason of the employment with the plaintiff of defendant MacDonald or conniving with any employee of plaintiff to obtain any such plans, specifications, letters or other documents;
>
> (3) Defendants John A. MacDonald and Railquip Enterprises Ltd. are required to deliver up forthwith to the plaintiff all plans, specifications, reports, letters and other documents belonging to the plaintiff that are in his or its possession as a result of having been acquired for use in the business of Railquip Enterprises Ltd. by reason of the employment with the plaintiff of the defendant MacDonald and all copies or reproductions of any such documents that are in his or its possession.

Two other paragraphs of the injunction, each relating to patent infrigement have not been challenged and are not in issue before this Court.

2 The action out of which the interlocutory injunction arose was brought in the Federal Court by the respondent complaining of patent infringement by a former employee, the personal appellant herein, and by the appellant Railquip, a company incorporated by and controlled by the personal appellant, and complaining also of unlawful disclosure, in

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breach of contract, of trade secrets and unlawful business use of such trade secrets (including certain plans, specifications and letters) to the damage of the respondent and contrary to honest industrial and commercial usage in Canada. Relief by way of damages, an accounting of profits and an injunction, and delivery up of the allegedly misappropriated materials, was sought in the action.

3 Unlike the proceedings before Walsh J., the main issue before the Federal Court of Appeal and before this Court is a constitutional one, involving the jurisdiction of the Federal Court, as a Court established pursuant to s. 101 of the *British North America Act*, to entertain the plaintiff's claims for civil redress by way of damages and injunction and ancillary relief; and this issue in turn involves the question whether the statutory basis for such relief, under ss. 7(*e*), 53 and 55 (as amended by s. 64(2) of the *Federal Court Act*, 1970 (Can.), c. 1) of the *Trade Marks Act*, R.S.C. 1970, c. T-10 is one that the Parliament of Canada may prescribe.

4 It is trite law that the Federal Court, being a Court established pursuant to s. 101 aforesaid "for the better administration of the laws of Canada", can only be endowed with such jurisdiction as flows from laws competently enacted by Parliament. In *R. v. Hume, Consolidated Distilleries Ltd. v. Consolidated Exporters Corp. Ltd.* [1], the point is well made by Anglin C.J.C. who said (at p. 535) that "while there can be no doubt that the powers of Parliament under s. 101 are of an overriding character when the matter dealt with is within the legislative jurisdiction of the Parliament of Canada, it seems equally clear that they do not enable it to set up a court competent to deal with matters purely of civil right as between subject and subject". Over and above this, the question of validity of ss. 7(*e*) and 53 would arise even if it were the provincial superior courts that were charged with enforcement of the substantive provisions of s. 7(*e*). Legislation sought to be enforced in provincial courts must, of course, be legislation which it was competent for the enacting legislature to pass.

5 I would note at this point that if the conclusion be that s. 7(*e*) is valid federal legislation, competently committed to the Federal Court for its enforcement, I would not interfere with the determination of the courts below that, on the facts, the interlocutory injunction order in issue here was a proper one in the light of the prescriptions of s. 7(*e*).

6 The constitutional issue raised in this case, one of high importance as to the scope of federal legislative power, especially as it arises under s. 91(2) of the *British North America Act*, has brought the Attorneys-General for Canada, for Ontario and for Quebec into this case as intervenors, pursuant to Rules of Court governing notice of constitutional issues and opportunity for intervention. The Attorney-General for Canada supports the judgment in appeal but the Attorneys-General for Ontario and Quebec support the appelants' contention that ss. 7(*e*) and 55 are *ultra vires* and that s. 53 must fall with them.

7 Proper perspective requires a reference to the whole of s. 7 and, indeed, to the scheme of the *Trade Marks Act* and to some legislative history. I reproduce here ss. 7, 53 and 55 before proceeding to examine their context and the constitutional issue arising upon the whole of the case. They are as follows:

> *7*. No person shall
>
> (a) make a false or misleading statement tending to discredit the business, wares or services of a competitor;
>
> (b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;
>
> (c) pass off other wares or services as and for those ordered or requested;
>
> (d) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to
>
> (i) the character, quality, quantity or composition,

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(ii) the geographical origin, or

(iii) the mode of the manufacture, production or performance

of such wares or services; or

(e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

53. Where it is made to appear to a court of competent jurisdiction that any act has been done contrary to this Act, the court may make any such order as the circumstances require including provision for relief by way of injunction and the recovery of damages or profits, and may give directions with respect to the disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

55. The Federal Court of Canada has jurisdiction to entertain any action or proceeding for the enforcement of any of the provisions of this Act or of any right or remedy conferred or defined thereby.

8 Section 7 of the *Trade Marks Act* is the first of five sections of the Act (ss. 7 to 11) that are subsumed under the sub-title "Unfair Competition and Prohibited Marks". It stands alone, however, among those sections in not being concerned with trade marks or trade names. It alone gives any substance to the "Unfair Competition" portion of the sub-title. Section 7 had a forerunner in s. 11 of the *Unfair Competition Act*, 1932 (Can.), c. 38. That Act, like the present *Trade Marks Act*, which replaced it, was concerned with the regulation of the use of trade marks and with a scheme of registration and protection therefor; and although it contained a sub-title "Unfair Competition", covering ss. 3 to 11 thereof, the only provision that related to unfair competition was s. 11. This section was in these words:

11. No person shall, in the course of his business,

(a) make any false statement tending to discredit the wares of a competitor;

(b) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be reasonably apprehended that his course of conduct was likely to create confusion in Canada between his wares and those of a competitor;

(c) adopt any other business practice contrary to honest industrial and commercial usage.

9 It is evident from a comparison of s. 7 of the present *Trade Marks Act* and s. 11 of the Act of 1932 that the former has expanded the acts proscribed by the latter and indeed has added in s. 7(*c*) and (*d*) provisions not found in s. 11. Section 7(*e*) differs from its predecessor equivalent s. 11(*c*) in three respects. It has added the words "do any other act" to what is proscribed, it has introduced the disjunctive in place of the conjunctive when referring to "honest industrial or commercial usage" and it has added the qualifying words "in Canada". There is, however, a more significant difference between the old s. 11 and the present s. 7. There was no provision in the 1932 Act for civil enforcement of the proscriptions of s. 11 at the suit of persons injured by their breach. There was, of course, provision there, as in the present *Trade Marks Act*, for enforcement of its *trade mark* provisions at the suit of an injured person. The provisions of s. 20 of the 1932 Act giving the then Exchequer Court of Canada "jurisdiction to entertain any action or proceeding for the enforcement of any of the rights conferred or defined by this Act" were not urged in this Court in this case as providing a civil remedy in support of s. 11 equivalent to that expressly ordained by s. 53 of the present *Trade Marks Act* in support of s. 7 as well as in support of other substantive provisions of the Act. I note, however, that in *The Kitchen Overall & Shirt Co. Ltd. v. Elmira Shirt & Overall Co. Ltd.* [2], Maclean P. looked upon s. 11 as giving "a statutory right of action for the same wrongs for which a remedy was given at common law in passing off cases".

10 Section 11 has had but a modest exposure to judicial scrutiny. In only one of the few cases in which it was considered did its constitutionality come into question, and that was in *Good Humor Corp. of America v. Good Humor Food Products*

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Ltd. [3], a case involving alleged trade mark infringement. There Angers J. dealt with an objection that ss. 3, 7 and 11 of the *Unfair Competition Act* were *ultra vires* and that consequently the Exchequer Court had no jurisdiction to entertain the action. Sections 3 and 7 dealt with trade marks and trade names respectively and, as to those sections, the trial Judge was of opinion that they fell within federal competence under the trade and commerce power. He made no pronouncement as to s. 11 (despite what the headnote to the report says) because (to use his words, at p. 75) "section 11 applies to acts of unfair competition and has no relevance to the present case".

11 In the other cases in which s. 11 was considered, the questions in them concerned the application of that provision in the various situations that were said to bring it into play. In *A.C. Spark Plug Co. v. Canadian Spark Plug Service* [4], it appeared to be the opinion of the Court that s. 11 did nothing more than codify the tort of passing off, and the same view was apparent in the *Kitchen Overall* case. The *Spark Plug* case concerned an alleged infringement of a registered trade mark and there was also an allegation of contravention of s. 11 of the *Unfair Competition Act*. Maclean J. concluded his reasons for dismissing the action as follows (at p. 69):

> Inasmuch as I find that there has been no infringement and no passing off, I cannot see how it can be said that the business carried on by any one of the defendants offends sec. 11 of the Act or is contrary to honest industrial and commercial usage.

The *Kitchen Overall* case, in deciding that s. 11 gave a statutory cause of action as at common law in passing off cases, may have proceeded on the basis that it was enough to sustain s. 11 that jurisdiction was vested in the Exchequer Court. If so, this is an unacceptable proposition. There is reference in the reasons for judgment of Maclean J. to the international convention, to which I refer later in these reasons, and it was said by him that s. 11 was intended to implement Canada's obligation thereunder. He did say as well that no question was raised as to the jurisdiction of the Exchequer Court to entertain actions contemplated by s. 11. The action in the *Kitchen Overall* case was for an injunction to restrain use of an unregistered trade mark or trade name, and it succeeded.

12 *Booth v. Sokulsky* [5], gave effect to s. 11(*c*) in an action brought in the Exchequer Court under the *Unfair Competition Act*, 1932, and based on an alleged misuse of plaintiff's unregistered trade mark and trade name on wares sold by the defendant which were similar to those of the plaintiff. Although it was a passing off action, it was held that the Exchequer Court had jurisdiction under s. 22(*c*) of the *Exchequer Court Act* because, within the terms of that provision, the action was one "respecting any trade mark". I do not regard this case as being at all helpful on the question in issue here, which does not concern trade mark litigation.

13 *Kellogg Company v. Helen Kellogg* [6], was another case touching the jurisdiction of the Exchequer Court as a matter of construing legislation conferring jurisdiction but again without touching constitutionality, a point that was made expressly in that case.

14 The contention of the appellants and of the supporting intervenants, briefly put, was that s. 7(*e*), if not also the whole of s. 7, was legislation in the relation to property and civil rights in the province or, alternatively, legislation in relation to matters of a local or private nature in the province, within s. 92(13) or (16) of the *British North America Act*. The respondent and the Attorney-General for Canada supported s. 7(*e*) as being (1) legislation in relation to the regulation of trade and commerce within s. 91(2) of that Act; (2) supportable as legislation in implementation of a Canadian international obligation arising out of a treaty or convention, and thus falling within federal power for the peace, order and good government of Canada in relation to a matter not coming within s. 92; and (3) legislation in relation to the criminal law within s. 91(27).

15 This last mentioned basis of validity deserves no more than a brief statement of reasons for rejecting it. Assuming that s. 7(*e*) (as, indeed, the other subparagraphs of s. 7) proscribe anti-social business practices, and are thus enforceable under the general criminal sanction of s. 115 of the *Criminal Code* respecting disobedience of a federal statute, the attempt to mount the civil remedy of s. 53 of the *Trade Marks Act* on the back of the *Criminal Code* proves too much, certainly

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in this case. The principle which would arise from such a result would provide an easy passage to valid federal legislation to provide and govern civil relief in respect of numerous sections of the *Criminal Code* and would, in the light of the wide scope of the federal criminal law power, debilitate provincial legislative authority and the jurisdiction of provincial Courts so as to transform our constitutional arrangements on legislative power beyond recognition. It is surely unnecessary to go into detail on such an extravagant posture. This Court's judgment in *Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen* [7], upholding the validity of federal legislation authorizing the issue of prohibitory order in connection with a conviction of a combines offence, illustrates the preventive side of the federal criminal law power to make a conviction effective. It introduced a supporting sanction in connection with the prosecution of an offence. It does not, in any way, give any encouragement to federal legislation which, in a situation unrelated to any criminal proceedings, would authorize independent civil proceedings for damages and an injunction.

16 I point out also that s. 115 of the *Criminal Code* is, so to speak, a "default" provision, coming alive when no "penalty or punishment" is expressly provided, and I cannot subscribe to the proposition that s. 115 can be a base upon which to support the validity, under the federal criminal law power, of a completely independent civil remedy, which lies only at the behest of private parties claiming some private injury.

17 I did not understand counsel to urge that s. 7, or s. 7(*e*) alone, should be supported under the criminal law power by excluding s. 53 as a means of enforcement. If that had been the argument, it would have meant a concession by the respondent and the intervening Attorney-General for Canada that s. 53 should be regarded as inapplicable to s. 7(*e*). No such concession was made.

18 The contentions of the appellants and the remaining two contentions of the respondent, supported as they are by the intervenors, require a more extensive canvass of the scope of legislative power than I have made in disposing of the submission under the criminal law power. I approach this canvass by examining first what it is that the legislation in question does, and what the legal position (not the constitutional position necessarily) was and would be apart from the challenged legislation.

19 I think it fair to look upon s. 7 as embodying a scheme, one limited in scope perhaps but nonetheless embodying an array of connected matters. I shall come later to what appeared to be a fundamental underpinning of the respondent's position and that of the Attorney-General for Canada, namely, that s. 7 or at least s. 7(*e*) must not be construed *in vacuo*, but must itself be brought into account as a segment or a piece of a tapestry of regulation and control of industrial and intellectual property.

20 It was not disputed that the common law in the provinces outside of Quebec and the *Civil Code* of Quebec governed the conduct or aspects thereof now embraced by s. 7 and embraced earlier by s. 11 of the Act of 1932. To illustrate, s. 7(*a*) is the equivalent of the tort of slander of title or injurious falsehood, albeit the element of malice, better described as intent to injure without just cause or excuse, is not included as it is in the common law action: see Fleming on Torts (4th ed. 1971), at p. 623. Section 7(*b*) is a statutory statement of the common law action of passing off, which is described in Fleming on Torts, *supra*, at p. 626 as "another form of misrepresentation concerning the plaintiff's business ... which differs from injurious falsehood in prejudicing the plaintiff's goodwill not by deprecatory remarks but quite to the contrary by taking a free ride on it in pretending that one's own goods or services are the plaintiff's or associated with or sponsored by him". It differs from injurious falsehood in that "it is sufficient that the offensive practice was calculated or likely, rather than intended, to deceive".

21 Section 7(*c*) is a curious provision to be armed with a civil sanction by way of damages when one already exists in the ordinary law of contract. The provision refers to substitution of other goods for those ordered or requested, but there is always the right to reject upon discovery of the substitution, and if the substituted goods are knowingly accept ed there would appear to be no relief. If s. 7(*c*) purports to give additional relief even if the substituted goods are knowingly accepted, where are the damages? Or does the provision envisage damages arising from failure to deliver the proper goods in time? If so, there is the usual remedy for breach of contract. I can see s. 7(*c*) in the context of a regulatory

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regime subject to supervision by a public authority, but its presence under the sanction of a private civil remedy merely emphasizes for me federal intrusion upon provincial legislative power.

22 Section 7(*d*) appears to be directed to the protection of a purchaser or a consumer of wares or services, in contrast with s. 7(*a*) which involves slander of title or injurious falsehood *qua* a competitor in business. It involves what I would term deceit in offering goods or services to the public, deceit in the sense of material false representations likely to mislead in respect of the character, quality, quantity or composition of goods or services, or in respect of their geographic origin or in respect of their mode of manufacture, production or performance. If any aggrieved person would have a cause of action under s. 53 in respect of damages suffered by him by reason of a breach of s. 7(*d*), it would ordinarily be expected to arise through breach of contract. One can envisage, of course, a statutory tort of deceit under s. 7(*d*), but this hardly adds to its constitutional propriety as federal legislation. Whether sounding in contract or in tort, it is not limited to those bases of relief in respect of enterprises or services that are otherwise within federal legislative competence. Again, the issue of a violation of s. 7(*d*) could as easily arise in a local or interprovincial transaction as in an interprovincial one; there is nothing in s. 7 (*d*) that emphasizes any interprovincial or transprovincial scope of the prohibition in s. 7(*d*) so as to establish some connection with federal legislative authority under s. 91(2) of the *British North America Act*.

23 Section 7(*e*) is, in terms, an additional proscription to those enumerated in subparagraphs (*a*) to (*d*) of s. 7. Its vagueness is not, of course, a ground of constitutional invalidity, but I am satisfied that it does have subject matter, as the facts of this very case demonstrate. It would encompass breach of confidence by an employee by way of appropriating confidential knowledge or trade secrets to a business use adverse to the employer. So too, it would appear to be broad enough to cover the fruits of industrial espionage. Counsel for the respondent referred the Court to the judgment of the Supreme Court of the United States in *International News Service v. Associated Press* [8], as exemplary of the thrust of s. 7(*e*). It recognized as enjoinable unfair competition the "pirating" of news by one news service from another and selling it while its commercial value as news was still evident, although the appropriation was effected by lawful means, e.g., through the reading of bulletin boards and early editions of the complainant's newspapers. I note only that this result, albeit not without dissent, was reached on grounds which included equitable considerations; and it was reached without reliance on statute. In a later case, *A.L.A. Schecter Poultry Corp. v. U.S.* [9], at pp. 531-2, Hughes C.J. saw the *Associated Press* case as an extension of the passing off cases (which, as the main instance of unfair competition at common law, involved the palming off of one's goods as those of a rival trader). The scope of the tort has been extended, he said, "to apply to misappropriation as well as to misrepresentation, to the selling of another's goods as one's own — to misappropriation of what equitably belongs to a competitor".

24 The fact that s. 7(*e*) has subject matter, whether as embodying claims cognizable at common law or as providing a statutory basis for a civil cause of action, does not differentiate it, in constitutional terms, from s. 7(*a*) (*b*) (*c*) and (*d*). As a class of prescriptions, additional to those in the preceding catalogues, it appears to me to be simply a formulation of the tort of conversion, perhaps writ large and in a business context.

25 As does the common law, as applied in the provincial courts in the common law provinces, so does the Quebec *Civil Code* comprehend civil actions for relief in respect of matters covered by s. 7. The causes of action are founded largely on the general fault provision, art. 1053: see, for example, *Corbeil v. Dufresne* [10] (a slander of title situation as understood at common law); *Iguère Automobile Ltée v. Universal Auto Ltd.* [11] (false and misleading advertisements, amounting to deceit); *Eagle Shoe Co. Ltd. v. Slater Shoe Co. Ltd.* [12] (passing off in use of trade name).

26 The similarity of what is covered by the Quebec *Civil Code* to what is dealt with in s. 7 is underlined by the following extract from Nadeau, *Traité Pratique de la Responsibilité Civile Délictuelle* (1971) at p. 221:

> *Civil Code*. — Unlawful or unfair competition injustly causing injury to others comes within the civil responsibility contemplated in Art. 1053 of the *Civil Code*. Actions for damages for unfair competition lie not only under federal law, but also under the general principles of civil delictual responsibility. Accordingly, an act of unfair competition will be a cause of action for damages only for a competitor who can prove actual damage. It should also be noted

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> that federal law does not cover all possible cases of unfair competition, since the latter may border on defamation, if there is disparagement of a competitor.
>
> Forms of unfair competition. — It may generally be stated that competition is unfair if it goes against the "accepted practice" of industry or business. It then oversteps the bounds of fairness. Our courts require an element of bad faith or at least of malicious intent in order to constitute unfair competition. While one's desire to benefit from the misfortune of a competitor, whose factory has been partly destroyed by fire, by inviting some of the latter's customers and salesmen to place their orders with him, betrays an obvious lack of magnanimity, it is not in itself an act of unfair and unlawful competition, any more than a mere inaccurate statement would support a judgment, if no damage has been caused. The same holds true for sensational or even malicious advertising that is not directed at a particular person.
>
> P. Cousineau J. in *Corbeil* defined unfair competition as [TRANSLATION] "an act done in bad faith for the purpose of causing confusion between the products of two manufacturers or tradesmen, or an act which without causing confusion, casts discredit on a rival firm". Unfair competition may accordingly take various forms. It may refer to passing off, fraudulent copying, resorting to fraudulent practices to create difficulties for a competitor by hiring away his staff, using highly deceptive advertising, such as offering for sale at extremely low prices automobiles of the same make as a competitor's when none are available, stealing secrets, and, finally, assuming a trade name without authorization.

27 Turning to the cases which have dealt with s. 7, I know of none in which the constitutionality of that provision or of any of its parts has been passed upon prior to the present case. Some at least of the cases may be said or thought to assume the validity of s. 7 or the part thereof involved, as for example *Canadian Converters Co. Ltd. v. Eastport Trading Co. Ltd.* [13] . The cases are instructive, however, for revealing the scope of s. 7, and how it either squares with or overlays or extends, where it does so at all, the common law and the civil law on the matters with which that section deals.

28 The references that I now make are illustrative rather than exhaustive. *Breeze Corp. v. Hamilton Clamp Stampings Ltd.* [14] , a judgment of Donnelly J. of the Ontario Supreme Court, concerned an alleged breach of confidence in violation of an agreement and the use of the confidential information outside the limits permitted by the agreement. The only interest of the case here is in the observation that s. 7, as was evident from clause (*c*) thereof, was not limited to the common law action for passing off.

29 A long line of cases, both in the Exchequer Court and in the provincial courts, exhibit either direct or alternate reliance on s. 7(*b*) to support claims for relief to protect trade names. Examples are *Building Products Ltd. v. B.P. Canada Ltd.* [15] and *Greenglass v. Brown* [16] , both Exchequer Court cases which agree that s. 7 (*b*) goes beyond the old s. 11 of the *Unfair Competition Act* in not requiring that the likelihood of confusion be between competitors, but appear to disagree on whether ss. 2 and 6, which relate to the meaning and application of "confusing" for trade mark and trade name purposes, apply when s. 7(*b*) is invoked. In *The Noshery Ltd. v. The Penthouse Motor Inn Ltd.* [17] , Addy J., then in the Ontario Supreme Court, differed from both of the foregoing cases in holding that s. 7(*b*) applied only as between competitors.

30 Two cases in particular which canvassed s. 7 show how much it reflects well known common law and civil law causes of action between private persons. The two cases are *Eldon Industries Inc. v. Reliable Toy Co. Ltd.* [18] , and *Clairol International Corp. v. Thomas Supply & Equipment Co. Ltd.* [19] . I cite these cases not for what they actually decided but for the view that they take of s. 7. Thus, in the *Eldon Industries* case, which involved claims for relief in respect of the copying of a toy by a competitor of the plaintiffs, Schroeder J.A., speaking for the Ontario Court of Appeal, had this to say (at pp. 105-106, 107-108):

> It has not been suggested that the defendants' conduct was brought within the prohibition of s. 7(*a*) of the Act nor has it been claimed that they offended in any respect against the provisions of s. 7(*d*). Paragraphs (*b*) and (*c*) of s.

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7 declare in codified form the common law tort of passing off one person's wares for those of another. Paragraph (*b*) relates to the wrongful act of passing off one's wares as and for those of another by directing public attention to the wares (not necessarily in compliance with an order or request) as, *e.g.*, by giving one's products a particular marking, shape or appearance which has become recognized in the public eye as indicative of another source, and thereby creating confusion or a likelihood of confusion in the minds of the public. Paragraph (*c*), on the other hand, points to a particular kind of passing off — substituting wares or services for those ordered or requested, as when a product manufactured by A is ordered and the vendor supplies a product made by B as answering the description.

A claim founded on the alleged marking or appearance of wares contrary to s. 7(*b*) is doomed to failure unless the claimant establishes that the marking or appearance has become recognized by the public as having a particular origin....

. . . . .

Considerable argument was addressed to us as to the effect to be given to s. 7(*e*) of the *Trade Marks Act*. I am in agreement with the conclusion of the learned Judge of first instance that s. 7(*e*) must be read in conjunction with paras. (*a*), (*b*), (*c*) and (*d*) of that section: *A.C. Spark Plug Co. v. Canadian Spark Plug Service*, [1935] Ex.C.R. 57, [1935] 3 D.L.R. 84; *Kitchen Overall* & *Shirt Co. v. Elmira Shirt* & *Overall Co.*, [1937] Ex.C.R. 230, [1938] 1 D.L.R. 7. These cases were decided under s. 11 of the *Unfair Competition Act*, 1932 (Can.) c. 38, which had codified the common law of passing off, and s. 7 of the *Trade Marks Act* is substantially a re-enactment of s. 11 of the *Unfair Competition Act* with some additions thereto. Section 7(*e*), therefore, must be read *ejusdem generis* with s. 7(*a*), (*b*), (*c*) or (*d*). The principles governing cases of product simulation have been carefully evolved both at common law and in equity and are now stated in statutory form in s. 7(*a*) to (*d*). They were never intended to yield to a subjective or unknown standard embraced in the words "any other business practice contrary to honest industrial or commercial usage in Canada", which would be the effect of the provisions in s. 7(*e*) if removed from the contextual influence of the foregoing clauses of the section....

31 In the *Clairol* case, which was a trade mark infringement action, with the plaintiff also invoking s. 7 (*d*) and (*e*), Thurlow J. found on the facts that there was no violation of either s. 7(*d*) or (*e*). In addressing himself to s. 7(*e*), he said this (at p. 561):

...The particular statutory provision does not stand by itself but is the last of at least five separate prohibitions comprised in the section as a whole. It is, moreover, by its terms, applicable only to acts or practices of the nature prohibited other than those mentioned in the preceding paragraphs. The first of these preceding paragraphs is an express prohibition against making a false or misleading statement tending to discredit the business, wares or services of a competitor. In this the key words in my opinion are "false or misleading" and it is the falseness or deceptiveness of the statement which renders the statement dishonest and unfair. The corollary to this as I see it is that to make a statement that is neither false nor misleading is not prohibited even though it may tend to discredit the business, wares or services of a competitor. That this is the legal situation becomes plain I think when one considers that it never has been regarded, at least so far as I am aware, as dishonest or wrong for a business man to seek by any honest means to attract the customers of his competitors and thus to reduce the custom which they have theretofore enjoyed. The same thread appears to me to pervade paragraphs (*b*), (*c*) and (*d*), as well, of section 7, since each by its terms is limited to conduct which is deceptive or likely to result in deception and is in that sense dishonest. When therefore one comes to paragraph (*e*) and finds it prohibiting any other act or business practice contrary to honest industrial or commercial practice in Canada it seems clear that acts or practices that are dishonest in the sense of their being in some way deceptive or calculated to result in deception would fall within its purview. Acts or conduct involving some breach of trust or confidence may well be considered to fall within that purview as well. But I do not think that in the context of the section as a whole the language used can properly be extended to prohibit conduct which can be regarded as dishonest only in the much more refined sense of taking advantage of a market situation even though that situation has been created, as in this case, largely by the efforts and expenditures of another so long as the means used to take advantage of the situation are not in themselves dishonest. The view of the scope

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> of section 7(*e*) expressed by Schroeder J.A., speaking for the Court of Appeal of Ontario in *Eldon Industries Inc. v. Reliable Toy Co. Ltd.* is, I think, to the same effect...

Whether there is in fact a consonance between the *Eldon Industries* case and the *Clairol* case on the position of s. 7(*e*) in relation to the other parts of s. 7 is not of importance here.

32 There is one judgment of this Court, *S. & S. Industries Inc. v. Rowell* [20], which is of particular importance in any assessment of the scope of s. 7 and, especially of s. 7 (*a*) and (*e*), as it bears on validity. There was no constitutional question raised in that case which involved two points first, whether the appellant's patent was invalid and second, whether the respondent was entitled to damages for what was in essence slander of title or injurious falsehood. In delivering the judgment of the Court, Martland J. said this (at pp. 422-3):

> The appellant's submission was that the respondent, in order to recover damages, must bring his claim within the requirements of the common law action, which has been described as "injurious falsehood", "slander of goods", and "trade libel". This assumes, probably correctly, that the respondent's cause of action, if one existed, arose in the Province of Ontario and would be governed by the laws of that Province. I will deal with the appellant's argument upon that basis, although, as will appear later, my opinion is that the respondent's claim for damages in this case can properly be founded upon a federal statute, and, accordingly, it is not necessary to decide that point in this case.
>
> That a claim could be made at common law, provided the necessary conditions of liability were established, for damages resulting from the threat of legal proceedings in respect of alleged infringement of an invalid patent or trade mark has been established by English authorities...

After noting the appellant's submission that malice (in the sense of want of just cause or excuse for making the untrue statements) was a necessary ingredient of the cause of action, Martland J. continued as follows:

> In England the matter of threats of proceedings for alleged patent infringement was dealt with by statute, in s. 32 of the *Patents Act of 1883*, but no similar provision is included in the Canadian *Act*. The respondent, however, relies upon the provisions of s. 7(*a*) of the *Trade Marks Act*, c. 49, Statutes of Canada 1952-53, as creating a statutory cause of action, similar in nature to the action for injurious falsehood, limited to claims in respect of statements made by a competitor, but in which malice is no longer an ingredient....
>
> . . . . .
>
> There is no express requirement that the false or misleading statements be made with knowledge of their falsity, or that they be made maliciously. To interpret these provisions as though such elements were implied would be to construe them as merely restating rules of law which already existed. I do not think this approach is a proper one. The *Unfair Competition Act* was a statutory code to provide for fair dealing in trade. Section 11 was based upon Article 10*bis* of the *International Convention for the Protection of Industrial Property*, made at the Hague, November 6, 1925, to which Canada was a party...
>
> . . . . .
>
> In my opinion, the natural meaning of s. 7(*a*) is to give a cause of action, in the specified circumstances, in respect of statements which are, in fact, false, and the presence or absence of malice would only have relevance in relation to the assessments of damages.
>
> The circumstances of this case bring the respondent within the provisions of s. 7(*a*) and accordingly, in my opinion, the appeal should be dismissed with costs.

Spence J. in a concurring judgment held that even if malice was necessary, there was evidence thereof upon which the trial judge could act.

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33 The Court in the *S. & S. Industries* case did not pronounce upon s. 7(*e*), and its concern with damages under s. 7(*a*) was in the context of a patent issue, and hence in respect of a matter on which Parliament is expressly authorized to legislate.

34 Overall, whether s. 7(*e*) be taken alone or, more properly, as part of a limited scheme reflected by s. 7 as a whole, the net result is that the Parliament of Canada has, by statute, either overlaid or extended known civil causes of action, cognizable in the provincial courts and reflecting issues falling within provincial legislative competence. In the absence of any regulatory administration to oversee the prescriptions of s. 7 (and without coming to any conclusion on whether such an administration would in itself be either sufficient or necessary to effect a change in constitutional result), I cannot find any basis in federal power to sustain the unqualified validity of s. 7 as a whole or s. 7(*e*) taken alone. It is not a sufficient peg on which to support the legislation that it applies throughout Canada when there is nothing more to give it validity.

35 The cases to which I have referred indicate some association of s. 7(*a*), (*b*) and (*d*) with federal jurisdiction in relation to patents and copyrights arising under specific heads of legislative power, and with its jurisdiction in relation to trade marks and trade names, said to arise (as will appear later in these reasons) under s. 91(2) of the *British North America Act*. If, however, this be enough to give a limited valid application to those subparagraphs it would not sweep them into federal jurisdiction in respect of other issues that may arise thereunder not involving matters that are otherwise within exclusive federal authority. Certainly, it would not engage s. 7(*e*) which, as interpreted in the cases which have considered it, does not have any such connection with the enforcement of trade marks or trade names or patent rights or copyright as may be said to exist in s. 7(*a*), (*b*) and (*d*). Even if it be possible to give a limited application to s. 7, in respect of all its subparagraphs, to support existing regulation by the Parliament of Canada in the fields of patents, trade marks, trade names and copyright, the present case falls outside of those fields because it deals with breach of confidence by an employee and appropriation of confidential information.

36 It was emphasized again and again by counsel for the respondent that s. 7(*e*) deals with predatory practices in competition, in a competitive market, that it postulates two or more aspirants or competitors in business and that it involves misappropriation and a dishonest use, in competition, of information or documents so acquired. This may equally be said of the tort of conversion where it involves persons in business or in competition. The fact that Parliament has hived off a particular form of an existing tort or has enlarged the scope of the liability does not determine constitutionality. The relevant questions here are whether the liability is imposed in connection with an enterprise or an activity, for example, banking or bills of exchange, that is itself expressly within federal legislative power; or, if not, whether the liability is dealt with in such a manner as to bring it within the scope of some other head of federal legislative power.

37 This depends not only on what the liability is, but as well on how the federal enactment deals with its enforcement. What is evident here is that the predatory practices are not under administrative regulation of a competent federally-appointed agency, nor are they even expressly brought under criminal sanction in the statute in which they are prohibited. It is, in my opinion, difficult to conceive them in the wide terms urged upon the Court by the respondent and by the Attorney-General of Canada when they are left to merely private enforcement as a private matter of business injury which may arise, as to all its elements including damage, in a small locality in a Province or within a Province. I do not see any general cast in s. 7(*e*) other than the fact that it is federal legislation and unlimited (as such legislation usually is) in its geographic scope. Indeed, the very basis upon which s. 7(*e*) is analyzed by the respondent, namely, that it postulates two or more competitors in business, drains it, in my opinion, of the generality that would have been present if the legislation had established the same prescriptions to be monitored by a public authority irrespective of any immediate private grievance as to existing or apprehended injury.

38 The source of authority for s. 7(*e*), alleged to be in s. 91(2) of the *British North America Act*, may now be examined. The reasons for judgment of the Federal Court of Appeal, delivered by Jackett C.J. are adopted by the respondent and by the Attorney-General of Canada and I turn to them. The initial proposition stated in those reasons as a base for what follows is not one which I can accept. Jackett C.J. says this:

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> The primary question is whether the *Trade Marks Act*, as a whole, is a valid exercise of Parliament's legislative powers. If the answer to that question were in the negative, the further question that would arise is whether section 7, or section 7(*e*), is severable from the rest of the statute and, taken by itself, is a valid exercise of Parliament's legislation powers.

No attack has been made on the *Trade Marks Act* as a whole, and the validity of its provisions in so far as they deal with trade marks is not in ques tion. Since s. 7(*e*) is not a trade mark provision, its inclusion in the *Trade Marks Act* does not stamp it with validity merely because that Act in its main provisions is quantitatively unchallenged. I come back to the question whether s. 7, and particularly s. 7(*e*), can stand as part of the scheme of the *Trade Marks Act* and other related federal legislation. If it can stand alone, it needs no other support; if not, it may take on a valid constitutional cast by the context and association in which it is fixed as complementary provision serving to reinforce other admittedly valid provisions.

39 Having regard to the way in which the issue of validity came to this Court, I think the proper approach is to inquire whether s. 7(*e*), taken alone, can be supported as valid federal legislation, and, if not, whether it can be supported as part of a scheme of legislative control that Parliament may establish. In this connection I would not characterize the *Trade Marks Act* as the Federal Court of Appeal did in associating ss. 7 to 11 of the Act as representing "a set of general rules applicable to all trade and commerce in Canada, including a statutory version of the common law rule against passing off". I have already noted that ss. 8 to 11 belong to trade mark enforcement, and if we are left with s. 7 to represent *general* rules applicable to all trade and commerce in Canada, the generality resides only in the fact that s. 7 has no geographic limitation. This is the beginning of the problem not the end.

40 Two decisions of the Privy Council lie at the base of the Federal Court's conclusion on the validity of s. 7 including s. 7(*e*); they are *Citizens Insurance Co. v. Parsons*[21], and *Attorney-General of Ontario v. Attorney-General of Canada*[22]. The conclusion was stated as follows:

> Against the background of these authorities, my conclusion is that a law laying down a set of general rules as to the conduct of business men in their competitive activities in Canada is a law enacting "regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in Parsons case". From this point of view, I can see no difference between the regulation of commodity standards and a law regulating standards of business conduct; and, in my view, if there is anything that can be general regulation of trade as a whole it must include a law of general application that regulates either commodity standards or standards of business conduct.
>
> In my opinion the *Trade Marks Act*, as a whole, is a law of general application regulating standards of business conduct in Canada and is, therefore, within the powers conferred on Parliament by section 91(2) of the *British North America Act, 1867*. It is therefore unnecessary for me to consider the other grounds advanced for supporting the validity of section 7(*e*).

41 I am quite prepared, in considering the scope of federal legislative power in relation to the regulation of trade and commerce, to look at the *Parsons* case in the widest aspects of its pronouncements on what that scope is. The attenuation of this broadly phrased power cannot be attributed to the *Parsons* case but to a sequential course of decision which, in my view, failed to redeem the promise of what the *Parsons* case said. The *Parsons* case itself, on its facts, may even now be taken to have been correctly decided in so far as it concerned the validity of provincial legislation respecting contracts of insurance in the province, and the prescription of statutory conditions for policies of fire insurance on property in the province. It should not be forgotten that this Court had sustained the validity of the legislation, albeit with two dissents, when the case was before it: see (1880), 4 S.C.R. 215. In sustaining the provincial enactment, this Court was careful to emphasize the sweep and primacy of the federal trade and commerce power but found its limits not to be transgressed by the provincial legislation under consideration. Thus Ritchie J. said (at p. 242):

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> No one can dispute the general power of parliament to legislate as to "trade and commerce," and that where, over matters with which local legislatures have power to deal, local legislation conflicts with an Act passed by the Dominion parliament in the exercise of any of the general powers confided to it, the legislation of the local must yield to the supremacy of the Dominion parliament; in other words, that the provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion parliament may prescribe. I adhere to what I said in *Valin v. Langlois*, that the property and civil rights referred to, were not all property and all civil rights, but that the terms "property and civil rights" must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion parliament, and that the power of the local legislatures was to be subject to the general and special legislative powers of the Dominion parliament, and to what I there added: "But while the legislative rights of the local legislatures are in this sense subordinate to the right of the Dominion parliament, I think such latter right must be exercised, so far as may be, consistently with the right of the local legislatures; and, therefore, the Dominion parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the parliament of *Canada*."
>
> I think the power of the Dominion parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the local legislatures to regulate property and civil rights in respect to all matters of a merely local and private nature, such as matters connected with the enjoyment and preservation of property in the province, or matters of contract between parties in relation to their property or dealings, although the exercise by the local legislatures of such powers may be said remotely to affect matters connected with trade and commerce, unless, indeed, the laws of the provincial legislatures should conflict with those of the Dominion parliament passed for the general regulation of trade and commerce....

42 The Privy Council's assessment of the trade and commerce power in the *Parsons* case, upon which the Federal Court of Appeal relied in this case, was expressed in the following words (at p. 113 of 7 App. Cas.):

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulations of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92.

Lord Watson in the *Local Prohibition* case, *Attorney-General of Ontario v. Attorney-General of Canada* [23], at p. 363 was content to leave open the exact scope of the federal trade and commerce power, saying of the *Parsons* case that it was there decided "that in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade". The truncation of the federal trade and commerce power appeared in the Insurance Reference case of 1916, *Attorney-General of Canada v. Attorney-General of Alberta* [24], at p. 596, where Lord Haldane, making no specific reference to the *Parsons* case but to two other cases, *Hodge v. The Queen* [25], and to the unreported Privy Council decision in the McCarthy Act case (as to which see schedule to 1885 (Can.), c. 74), stated that "it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces".

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43 The *Parsons* case, as already noted from the quotation therefrom, spoke of the *contracts* of a particular business or trade, and excluded these from regulation by the federal Parliament under s. 91(2). The process of truncation was continued in the *Board of Commerce*[26] case, but was arrested in *Proprietary Articles Trade Association v. Attorney-General of Canada*[27].

44 I do not find it necessary to examine in any detail subsequent cases, either in the Privy Council or in this Court which canvassed or considered the federal trade and commerce power. In so far as they involved marketing regulation, whether under federal legislation, as in *The King v. Eastern Terminal Elevator Co.*[28], in the *Natural Products Marketing Act* reference[29], and in *Murphy v. C.P.R.*[30], or under provincial legislation, as in *Shannon v. Lower Mainland Dairy Products Board*[31] or in *Reference re Ontario Farm Products Marketing Act*[32], they do not bear directly upon the present case. The bearing they do have, however, is in indicating that regulation by a public authority, taking the matter in question out of private hands, must still meet a requirement, if federal regulatory legislation is to be valid, of applying the regulation to the flow of interprovincial or foreign trade; or, if considered in the aspect of regulation of credit (to adopt views expressed by Duff C.J. in *Reference re Alberta Statutes*[33] it must be such as to involve a public regulation thereof applicable to the conduct of trading and commercial activities throughout Canada.

45 I do not find anything in the case law on s. 91(2) that prevents this Court, even if it would retain a cautious concern for *stare decisis*, from taking the words of the Privy Council in the *Parsons* case, previously quoted, as providing the guide or lead to the issue of validity that arises here. I think the Federal Court of Appeal was correct in doing so, but I do not agree with its use of the *Parsons* criteria to sustain s. 7(*e*). I repeat the relevant sentence in the *Parsons* case:

> The words "regulation of trade and commerce" ... would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulations of trade affecting the whole dominion.

It is the last mentioned category that is to be considered here. I take it as it is phrased, or as paraphrased by Duff C.J. in the *Natural Products Marketing Act* reference[34], at p. 412 where he spoke of "general regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in *Parsons* case".

46 The plain fact is that s. 7(*e*) is not a regulation, nor is it concerned with trade as a whole nor with general trade and commerce. In a loose sense every legal prescription is regulatory, even the prescriptions of the *Criminal Code*, but I do not read s. 91(2) as in itself authorizing federal legislation that merely creates a statutory tort, enforceable by private action, and applicable, as here, to the entire range of business relationships in any activity, whether the activity be itself within or beyond federal legislative authority. If there have been cases which appeared to go too far in diminution of the federal trade and commerce power, an affirmative conclusion here would, in my opinion, go even farther in the opposite direction.

47 What is evident here is that the Parliament of Canada has simply extended or intensified existing common and civil law delictual liability by statute which at the same time has prescribed the usual civil remedies open to an aggrieved person. The Parliament of Canada can no more acquire legislative jurisdiction by supplementing existing tort liability, cognizable in provincial Courts as reflective of provincial competence, than the provincial legislatures can acquire legislative jurisdiction by supplementing the federal criminal law: see *Johnson v. Attorney-General of Alberta*[35].

48 One looks in vain for any regulatory scheme in s. 7, let alone s. 7(*e*). Its enforcement is left to the chance of private redress without public monitoring by the continuing oversight of a regulatory agency which would at least lend some colour to the alleged national or Canada-wide sweep of s. 7(*e*). The provision is not directed to trade but to the ethical conduct of persons engaged in trade or in business, and, in my view, such a detached provision cannot survive alone unconnected to a general regulatory scheme to govern trading relations going beyond merely local concern. Even

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on the footing of being concerned with practices in the conduct of trade, its private enforcement by civil action gives it a local cast because it is as applicable in its terms to local or intraprovincial competitors as it is to competitors in interprovincial trade.

49 It is said, however, that s. 7, or s. 7(*e*), in particular, may be viewed as part of an overall scheme of regulation which is exemplified by the very Act of which it is a part and, also, by such related statutes in the industrial property field as the *Patent Act*, R.S.C. 1970, c. P-4, the *Copyright Act*, R.S.C. 1970, c. C-30 and the *Industrial Design Act*, R.S.C. 1970, c. I-8.

50 The *Trade Marks Act* and the *Patent Act*, as the keystones of the arch, are characterized by public registers and administrative controls which are not applied in any way to s. 7. This is also true of copyright legislation but, of course, both patents and copyrights are expressly included in the catalogue of enumerated federal powers and the exclusive federal control here excludes any provincial competence. That is not so in the case of unfair competition as it is dealt with in s. 7 of the *Trade Marks Act*. Trade mark legislation (and industrial design legislation, also providing for a registration system, would come under the same cover) has been attributed to the federal trade and commerce power in a cautious pronouncement on the matter by the Privy Council in *Attorney-General of Ontario v. Attorney-General of Canada* [36]. That case, which is relied on here by the respondent and by the Attorney-General of Canada, was concerned with certain provisions of the *Dominion Trade and Industry Commission Act*, 1935 (Can.), c. 59 (repealed by 1949 (Can. 2nd sess.), c. 31, s. 9). The Act provided for a national mark, Canada Standard or C.S., which was vested in the Crown in right of Canada, and which could be applied to goods which met the requirements for its use established by the legislation. No one was compelled to use it even if the standards for its use were met. It was a form of non-compulsory regulation, inviting a sanction only if the mark was used without satisfying the qualifying conditions.

51 In the course of sustaining this aspect of the Act, the Privy Council took the opportunity to comment on the validity of existing federal trade marks legislation saying (at p. 417) that "no one has challenged the competence of the Dominion to pass such legislation. If challenged, one obvious source of authority would appear to be the class of subjects enumerated in s. 91(2), the regulation of trade and commerce".

52 The Supreme Court of Canada, when the foregoing case was before it (*In re Dominion Trade and Industry Commission Act, 1935* [37]) considered not only ss. 18 and 19 of the 1935 Act respecting the C.S. mark (which it held was *ultra vires* but on which it was reversed by the Privy Council), but also s. 14 which provided for government approval of agreements between persons engaged in any specific industry, in which there was wasteful or demoralizing competition, for controlling and regulating prices. This provision was held to be *ultra vires* because it contemplated application to individual agreements which might relate to trade which was entirely local. The Supreme Court of Canada added this (at p. 382):

> If confined to external trade and interprovincial trade, the section might well be competent under head no. 2 of section 91; and if the legislation were in substance concerned with such trade, incidental legislation in relation to local trade necessary in order to prevent the defeat of competent provisions might also be competent; but as it stands, we think this section is invalid.

No appeal was taken on this provision to the Privy Council, and, in my view, the Supreme Court did not consider that s. 14 could be saved on the basis of being part of a scheme of regulation.

53 I think that in the present case this is *a fortiori* so when s. 7 has not only been focussed on interprovincial or external trade but has not been brought under a regulatory authority in association with the scheme of public control operating upon trade marks. To refer to trade mark regulation as a scheme for preventing unfair competition and to seek by such labelling to bring s. 7 within the area of federal competence is to substitute nomenclature for analysis.

54 I come to consider, finally, whether s. 7, including s. 7(*e*), can be supported as federal legislation in implementation of an obligation assumed by Canada under an international treaty or convention. There are two important issues that arise in this connection. First, assuming that I have cor rectly concluded that s. 7, as it stands, is outside of federal

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legislative power, does the *Labour Conventions* [38] case, stand in the way of federal power to enact it in implementation of an international obligation arising out of an international treaty or convention? Second, if the answer to that is "no" and there is such power, was there a proper implementation of an international obligation in the enactment of s. 7?

55 The *Labour Conventions* case is too well-known to require either quotation or statement of its holding. In *Francis v. The Queen* [39] , at p. 621, the then Chief Justice of this Court, Kerwin C.J., speaking for himself and two other members, Taschereau and Fauteux JJ. (each of whom later became Chief Justice), said that it might be necessary in the future to consider (which I take to mean reconsider) the judgment in the *Labour Conventions* case. Lord Wright, who sat as a member of the Board in that case, said in a later *ex cathedra* comment (see (1955), 33 Can. Bar Rev. 1123, at pp. 1125 ff.) that the Judicial Committee has expressed a view of ss. 91 and 92 of the *British North America Act* in that case which he could not reconcile with the federal general power under the opening words of s. 91, nor with what had been said by the Privy Council in the *Aeronautics* [40] case, and in the *Radio* [41] case.

56 In the latter case, Lord Dunedin, speaking for the Privy Council, said this (at p. 312):

> ...Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either s. 91 or s. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion the power to make laws "for the peace order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing....

In another *ex cathedra* statement, a former member of this Court, the late Mr. Justice Rand, also expressed the view that the residual power of the Parliament of Canada comprehended plenary authority to legislate to implement international obligations assumed by Canada, regardless of whether the subject matter fell otherwise within or outside of federal competence: see RAND, "Some Aspects of Canadian Constitutionalism" (1960), 38 Can. Bar Rev. 135, at p. 142.

57 Although the foregoing references would support a reconsideration of the *Labour Conventions* case, I find it unnecessary to do that here because, assuming that it was open to Parliament to pass legislation in implementation of an international obligation by Canada under a treaty or Convention (being legislation which it would be otherwise beyond its competence), I am of the opinion that it cannot be said that s. 7 was enacted on that basis.

58 The obligation is said to have arisen under the International Convention for the Protection of Industrial Property (the Union Convention of Paris) of March 20, 1883, as revised at Brussels, December 14, 1900, at Washington, June 2, 1911, at the Hague, November 6, 1925 and at London, June 2, 1934. Canada's instrument of accession to the latest of the above-mentioned revisions (there was a later one, that of Stockholm, July 14, 1967 to which Canada acceded but it has no bearing on this case) was deposited on June 26, 1951 and the revised Convention came into force on July 30, 1951. The *Trade Marks Act*, of which s. 7 is part, was enacted in 1953 by 1952-53 (Can.), c. 49, with effect from July 1, 1954.

59 Article 1, s. 2 of the Convention as revised provides as follows:

> The protection of industrial property is concerned with patents, utility models, industrial designs or models, trade marks, trade names and indications of source or appellations of origin, and the repression of unfair competition.

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Article 10*bis* is the only article that deals with protection against unfair competition. It reads as follows:

> 1. The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
>
> 2. Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
>
> 3. The following in particular shall be prohibited:
>
> > (1) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
> >
> > (2) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
> >
> > (3) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.

It is couched in terms of obligation and its provisions bear a similarity to s. 7(*e*) and as well to s. 7(*a*) and (*b*). There are no parallels, except by an overextension of language, with s. 7(*d*) and none with s. 7(*c*).

60 There is nothing in the *Trade Marks Act* of 1953 to indicate that it was passed in implementation of the aforementioned Convention except that there is a reference to the Convention in the interpretation section and there is a definition of "country of origin" and "country of the Union", which bring in the Convention. These references are for a very narrow purpose of trade mark regulation, as is evident from ss. 5, 29 and 33 of the *Trade Marks Act*. They do not, in themselves, support the conclusion that the Act was passed in implementation of the Convention, and certainly not that s. 7 was so enacted.

61 In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference. The Courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation. Of course, even so, a question may arise whether the legislation does or does not go beyond the obligations of the treaty or convention.

62 Express reference existed in the various pieces of legislation which were the subject of the decision of this Court and of the Privy Council in the *Labour Conventions* case, *supra*. When that legislation was referred to this Court, being entitled, in brief, *References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and The Limitation of Hours of Work Act*[42], the Order in Council under which the references were made recited what was the fact, namely, that the three Acts "were respectively passed, as appears from the recitals set out in the preambles of the said Acts, for the purpose of enacting the necessary legislation to enable Canada to discharge certain obligations declared to have been assumed by Canada ...". In an earlier reference to this Court, *Reference re Legislative Jurisdiction over Hours of Labour*[43], which concerned a draft con vention on limitation of hours of work in industrial undertakings, adopted by the International Labour Conference of the League of Nations, the Order in Council directing the reference recited the opinion of the Minister of Justice that there was no enacting obligation upon the Parliament of Canada but only an obligation to bring any draft convention "before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action". The opinion of the Court on this Reference proceeded on this footing.

63 In the absence of an express declaration in the *Trade Marks Act* that the Act as a whole, including s. 7, or s. 7 itself was enacted in implementation of the obligations of the Convention, above referred to, I would not hold that there

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has been a valid exercise in this case of the federal treaty or convention implementing power, assuming such a power exists in the present case.

64 The position which I reach in this case is this. Neither s. 7 as a whole, nor section 7(*e*), if either stood alone and in association only with s. 53, would be valid federal legislation in relation to the regulation of trade and commerce or in relation to any other head of federal legislative authority. There would, in such a situation, be a clear invasion of provincial legislative power. Section 7 is, however, nourished for federal legislative purposes in so far as it may be said to round out regulatory schemes prescribed by Parliament in the exercise of its legislative power in relation to patents, copyrights, trade marks and trade names. The subparagraphs of s. 7, if limited in this way, would be sustainable, and, certainly, if s. 7(*e*) whose validity is alone in question here, could be so limited, I would be prepared to uphold it to that extent. I am of opinion, however (and here I draw upon the exposition of s. 7(*e*) in the *Eldon Industries* case), that there is no subject matter left for s. 7(*e*) in relation to patents, copyright, trade marks and trade names when once these heads of legislative power are given an effect under the preceding subparagraphs of s. 7. In any event, in the present case the facts do not bring into issue any question of patent, copyright or trade mark infringement or any tortious dealing with such matters or with trade names. There is here merely an alleged breach of contract by a former employee, a breach of confidence and a misappropriation of confidential information. It is outside of federal competence to make this the subject of a statutory cause of action.

65 In the result, I would allow the appeal, in respect of those clauses of the interlocutory injunction which are in dispute here and direct that those clauses be expunged and that the judgment of the Federal Court be varied accordingly. The appellants are entitled to their costs in the Federal Court of Appeal and in this Court. There will be no costs to or against the intervenants. This direction is, of course, without prejudice to any action that the respondent may wish or be able to take in a provincial Court.

The judgment of Martland, Judson, and de Grandpré JJ. was delivered by *de Grandpré J.*:

66 The constitutional question raised by this appeal arises in a narrow factual context. In the words of Jackett C.J., in the Court of Appeal (at pp. 1158-9):

> The respondent has been in the heating equipment business for several years and the appellant MacDonald worked for the respondent and a predecessor company for almost 10 years ending up as a vice-president of the respondent. When he entered into the employ of the predecessor company, MacDonald signed an agreement, the preamble of which reads in part as follows:
>
>> ...realizing that, by virtue of my said employment, I will be in a position to acquire, by observation and communication, vital and confidential information regarding the constructions and principles embodied in — and the problems dealt with in the production of — the devices and structures made, sold, developed or used by this company in connection with its business during the term of my employment;
>
> and para. 5 of which reads:
>
>> I will not divulge to any unauthorized person any information or knowledge acquired by reason of my employment by the company.
>
> While still in the respondent's employ, MacDonald caused the appellant Railquip Enterprises Ltd. to be incorporated and he has controlled Railquip at all relevant times.
>
> During the last part of his period of employment with the respondent, MacDonald participated in the preparation of a bid made by the respondent to supply 500 boxcar heater assemblies to the Canadian National Railway Company. MacDonald ceased to work for the respondent on April 15, 1971, and on May 1, 1971, he submitted a tender, presumably in Railquip's name, to supply boxcar heaters to Canadian National, and as a result of that tender, Railquip obtained an order for 150 heater assemblies. In preparing the tender in question MacDonald made use of

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> knowledge, which he acquired as an employee of the respondent, of the figures on which the respondent's tender was based. To prepare those figures had taken considerable work on the part of the respondent's employees. In connection with this bid by the corporation that he controlled, MacDonald also made use of and disclosed other confidential information acquired during the course of his employment with the respondent. In addition, he took from the respondent's possession a number of documents belonging to the respondent that bore on the matter.

67 By its action, respondent seeks relief by way of injunction, damages and other conclusions of an accessory nature. Upon filing its statement of claim, respondent gave notice of a motion for an interlocutory injunction. This remedy was essentially granted by Walsh J. in words to be found at p. 243 of 6 C.P.R. (2d) 204. In appeal, this judgment was amended so that the substance of the Order at this time restrains appellant from

> 1) using any invention belonging to respondent and covered by two patents;
>
> 2) using confidential information acquired by reason of MacDonald's employment;
>
> 3) using any document therein acquired;
>
> 4) effecting delivery of, or accepting orders for, equipment infringing respondent's patents;
>
> 5) keeping in their possession any document belonging to respondent.

68 Notwithstanding the reference in paras. 1 and 4 above to respondent's patents, the judgments below have not pronounced the interlocutory injunction for the reason that respondent had made out a *prima facie* case of violation by appellant of its patent rights. The following extract from p. 224 of the trial judgment makes it abundantly clear:

> It appears therefore that defendants have a serious contestation to make on the question of patent infringement and that I should not issue an interlocutory injunction at this stage of the proceedings, on the basis of this alleged infringement alone.
>
> In the absence of specific allegations of copyright infringement in the original statement of claim and affidavits supporting same, plaintiff's case at this stage of the proceedings must therefore depend on the application of s. 7 of the *Trade Marks Act*, ...

It is in that light that must be read the Order of the former Chief Justice defining the constitutional question. The sole issue is to determine on the facts of this case whether absent an infringement of a patent, of a trade mark, of a copyright, of a trade name, and given the bare allegation of misappropriation of confidential information by a former employee, s. 7(*e*) is *ultra vires* of the Parliament of Canada.

69 Having had the advantage of reading the reasons prepared for delivery by the Chief Justice, I would dispose of this appeal as he proposes. I do not see how the criminal law power can be invoked here in support of the validity of s. 7(*e*) standing alone. As to the trade and commerce power, I share the view that the facts of this case do not permit its application, the contract between the individual appellant and respondent being of a private nature and involving essentially private rights.

70 Respondent's other submission, that s. 7(*e*) is legislation enacted by Parliament under the Treaty making power of Canada, at first attracted me. Upon further examination, it seems however that this argument cannot be accepted for the simple reason that the Treaty to which it refers does not deal with unfair competition in a vacuum but only in a context which is not created by the facts of this case. The Union Convention of Paris for the Protection of Industrial Property of March 20, 1883 was revised on various occasions and finally at London, on June 2, 1934. It is to that London Revision that Canada adhered by Instrument of Accession deposited on June 26, 1951. The purpose of that Convention is to be found in art. 1:

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> 1. The countries to which the present Convention applies constitute themselves into a Union for the protection of industrial property.
>
> 2. The protection of industrial property is concerned with patents, utility models, industrial designs or models, trade marks, trade names and indications of source or appellations of origin, and the repression of unfair competition.

Articles 4 to 10 thereof deal at length with patents, trade marks, etc. Article 10*bis* is the only one dealing with unfair competition:

> 1. The countries of the Union are bound to assure to persons entitled to the benefits of the Union an effective protection against unfair competition.
>
> 2. Every act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
>
> 3. The following acts among others shall be prohibited:
>
>> (1) All manner of acts of such a nature as to create confusion by any means whatsoever with the establishment, the goods, or the industrial or commercial activities of a competitor;
>>
>> (2) False allegations, in the course of trade, of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities of a competitor.

71 Sweeping as this text might appear, it does not in my view afford any support to s. 7(*e*) when there has been a finding as here that respondent's industrial property (other than unfair competition) as such has not been invaded. Article 10*bis* must be read in the context of the other articles of the Convention, none of which deals with the contractual relationship between employer and employee.

72 I would allow the appeal.

Appeal allowed with costs.

Solicitors of record:
Solicitors for the appellants: *Ogilvy, Cope, Porteous, Hansard, Marler, Montgomery* & *Renault*, Montreal.
Solicitors for the respondent: *Gowling* & *Henderson*, Ottawa.
Solicitor for the Attorney General of Canada: *George W. Ainsley*, Ottawa.
Solicitor for the Attorney General of Quebec: *Geoffrion* & *Prud'homme*, Montreal.
Solicitor for the Attorney General of Ontario: *J.D. Hilton*, Toronto.

Footnotes

1 [1930] S.C.R. 531.

2 [1937] Ex. C.R. 230.

3 [1937] Ex. C.R. 61.

4 [1935] Ex. C.R. 57.

5 (1953), 13 Fox Pat. Cas. 145.

6 [1941] S.C.R. 242.

7 [1956] S.C.R. 303.

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8 (1918), 248 U.S. 215.

9 (1935), 295 U.S. 495.

10 (1933), 40 R.L.N.S. 40.

11 (1941), 70 Que. Q.B. 166.

12 (1929), 46 Que. K.B. 121.

13 (1968), 70 D.L.R. (2d) 149.

14 (1961), 37 C.P.R. 153.

15 (1961), 21 Fox Pat. Cas. 130.

16 (1962), 24 Fox Pat. Cas. 21.

17 (1969), 61 C.P.R. 207.

18 (1965), 54 D.L.R. (2d) 97.

19 [1968] 2 Ex. C.R. 552.

20 [1966] S.C.R. 419.

21 (1881), 7 App. Cas. 96.

22 [1937] A.C. 405.

23 [1896] A.C. 348.

24 [1916] 1 A.C. 588.

25 (1883), 9 App. Cas. 117.

26 [1922] 1 A.C. 191.

27 [1931] A.C. 310.

28 [1925] S.C.R. 434.

29 [1937] A.C. 377.

30 [1958] S.C.R. 626.

31 [1938] A.C. 708.

32 [1957] S.C.R. 198.

33 [1938] S.C.R. 100.

34 [1936] S.C.R. 398.

35 [1954] S.C.R. 127.

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36 [1937] A.C. 405.

37 [1936] S.C.R. 379.

38 [1937] A.C. 326.

39 [1956] S.C.R. 618.

40 [1932] A.C. 54.

41 [1932] A.C. 304.

42 [1936] S.C.R. 461.

43 [1925] S.C.R. 505.

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1993 CarswellBC 3843
British Columbia Supreme Court

Williamson v. Ewachniuk

1993 CarswellBC 3843, 43 A.C.W.S. (3d) 302

BETWEEN: NOELLA WILLIAMSON, PLAINTIFF, AND A. TED EWACHNIUK, DEFENDANT

B.D. Macdonald J. in Chambers

Judgment: October 13, 1993
Docket: Vancouver B921843

Counsel: Alan B. Hudson & D.D. Nugent for the Applicant/Defendant
M. David Wilder for the Plaintiff

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

VII Limitation of actions
VII.5 Actions in tort
VII.5.a Specific actions
VII.5.a.ii "Damages occasioned by motor vehicle"

Civil practice and procedure

VII Limitation of actions
VII.5 Actions in tort
VII.5.b Statutory limitation periods
VII.5.b.iii When statute commences to run
VII.5.b.iii.E Miscellaneous

***MACDONALD, J.*:**

1 The plaintiff sues in professional negligence. The defendant raises a *Limitation Act*, R.S.B.C. 1979, c. 236 defence, and applies under Rule 18A in advance of a scheduled jury trial to have that issue determined.

THE FACTS

2 There is a gap of 14 years between the events which give rise to this action by a client against her former solicitor and the commencement of this action. The plaintiff was injured in a motor vehicle accident on May 8, 1977. She retained

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the defendant on a contingency fee contract (40% of recovery) and an action was started. The trial was scheduled for May of 1978.

3 In April of 1978, the action was settled for $10,000.00 plus a small amount for special damages and a $1,000.00 allowance for costs. The plaintiff signed a release on May 3, 1978. She had not then recovered from the neck pain which was her chief complaint following the accident, and she had been in hospital for observation for some weeks during early April of 1978. No active treatment was recommended at the time of her release from hospital.

4 Her complaints persisted, and as early as October of 1978, surgery on her cervical spine was recommended. That surgery was eventually performed in 1985. It was not entirely successful in relieving the plaintiff's neck troubles.

5 In mid-1991, the plaintiff was dealing with her solicitor in this action, Graham B. Walker, on other matters. Her dissatisfaction with the settlement negotiated for her by the defendant in 1978 came up in the context of monies which she owed to Mr. Walker for services rendered some years earlier. When she explained the "ridiculous amount" of that settlement, in the light of her subsequent operation and ongoing discomfort, he agreed to look into the matter. This action resulted.

6 For the purposes of this application alone, the defendant is prepared to concede that he was negligent in negotiating the settlement, having regard to the uncertain nature of the plaintiff's medical condition at the time and the absence of any reliable prognosis regarding her recovery.

DISCUSSION

7 The *Limitation Act* (the Act) clearly bars this action (see s. 3(4) - 6 years for any action not specifically provided for in the Act) unless the running of time has been postponed by the operation of s. 6 of the Act. The relevant portions thereof read:

> *Running of time postponed*
>
> 6.(3) The running of time with respect to the limitation periods fixed by this Act for an action
>
> ....
>
> (c) for professional negligence
>
> ....
>
> is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that
>
> (i) an action ... would ... have a reasonable prospect of success; and
>
> (ii) the [plaintiff] ... ought, in his own interests and taking his circumstances into account, to be able to bring an action.
>
> ....
>
> (5) The burden of proving that the running of time has been postponed ... is on the person claiming the benefit of the postponement.

"Appropriate advice" in relation to facts, is defined in s. 6(4)(a) of the Act as the advice of competent persons, qualified in their respective fields (such as lawyers and doctors) as the case may require.

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Levitt v. Carr (1992) 66 B.C.L.R. (2d) 58 (B.C.C.A.) is accepted as the leading decision on the operation of s. 6 of the Act. At p. 72 of that report, this passage appears:

> ... the British Columbia statute rejected simple ignorance of a cause of action as sufficient to postpone the running of time. The solution ... was to introduce another level of abstraction: notional advice by notional advisors. This advice ... when added to those [facts] within the plaintiff's means of knowledge, forms the body of information upon which the reasonable man decides...

Thus, the acknowledged fact that the plaintiff did not know until 1991 that she had a right to sue the defendant, in the face of her agreement to the 1978 settlement and her execution of a release, is not sufficient to trigger the operation of s. 6 of the Act.

8 To her own knowledge must be added (or imputed) the advice she would have received had she gone to a lawyer within the 6 year limitation period or at some date prior to her discussion with Mr. Walker in 1991. And it is not only her actual knowledge to which that advice must be added, but also that which would become known if she took such steps as would have been reasonable for her to take in her circumstances.

9 That latter consideration heightens the importance of the neck surgery which finally took place in April of 1985. While that surgery was contemplated in October of 1978 (to the point of a pre-operative report) the actual occurrence of that surgery in 1985, almost exactly seven years before this action was commenced, leaves little room for speculation about the medical facts as was the case in *Levitt v. Carr* (above).

10 I have found the approach taken in *Perron v. R.J.R. Macdonald Inc.* (unreported; March 22, 1993; B.C.S.C. No. C883254, Vancouver Registry) to be of considerable assistance in applying *Levitt v. Carr* to different facts. At pp. 23 and 24 of the reasons for judgment in *Perron*, the court states:

> ... the plaintiff may not rely on the mere fact of his ignorance of the law to support a claim for postponement .... The *Levitt* case requires the court to determine what notional advice the plaintiff would have received had he consulted a lawyer....
>
> The burden of proving that the running of time has been postponed lies upon the plaintiff who claims the benefit of... s. 6(5). The plaintiff's knowledge of his injuries, his failure to make reasonable enquiries...and the standard of the reasonable man's duty of care owed to himself, weighs negatively against the plaintiff. There is no evidence that the plaintiff received advice to delay taking action. It seems *unlikely* that a *reasonable man, given the plaintiff's injuries and his knowledge of their cause would not have made legal enquiries prior* to 1987.

THIS CASE

11 The plaintiff alleges that the defendant knew or ought to have known that the 1978 settlement was too low. She was unhappy with the amount at the time because of the pain she had been and was suffering. She now describes that settlement as ridiculous. The plaintiff also alleges that the defendant advised settlement when there was insufficient medical information available to properly assess her claim. Those facts are admitted, solely for the purposes of this Rule 18A application.

12 What the defendant does not concede is the allegation that the plaintiff was incapable of providing meaningful instructions at the time of the settlement. The evidence of the plaintiff on examination for discovery does not support that allegation in any event.

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13 The plaintiff was unhappy with the settlement from the outset. Her neck pain did not improve thereafter, leading to the recommendation for surgery in October of 1978. Thereafter, her condition worsened (she describes her pain as "extreme most of the time") until the April, 1985 surgery. She consulted and was referred to a number of medical specialists, as well as her family doctor, between 1978 and 1985. In each case she attributed her neck pain to the motor vehicle accident in 1977 which was the subject of the 1978 settlement.

14 Prior to the motor vehicle accident, the plaintiff operated four companies involved in real estate investment and development. Between the late 1970's and 1988 she was involved in litigation arising out of her affairs, and one of her companies was placed in receivership. As a result, the plaintiff was in regular contact with a number of lawyers between 1978 and March of 1986 (a date 6 years prior to the commencement of this action).

15 I accept the submission of the defendant that, whenever the plaintiff's cause of action arose, it was well before March of 1986. Thus the plaintiff is dependent upon s. 6 of the Act to support this action.

16 There is no question that the defendant will be prejudiced to some degree due to the passage of 14 years if this action does proceed to trial. The I.C.B.C. file has been destroyed. The adjuster employed by it is deceased, as is the doctor who conducted an independent medical examination of the plaintiff at its request. The lawyer engaged by I.C.B.C. to defend her claim has no recollection of the case. The plaintiff's tax returns for the relevant period are no longer available and the accountant for her companies is no longer in practice.

17 The identity of the defendant has never been an issue. If anyone was professionally negligent in connection with the impugned settlement, it was him. By the time of her operation in April of 1985, at the latest, the plaintiff had all the facts at her disposal necessary for a meaningful discussion with a notional legal advisor.

18 Those facts would inevitably have led a competent legal advisor to suggest that she might possibly have a cause of action against the defendant, subject only to further investigation such as that undertaken by Mr. Walker between mid-1991 and the commencement of this action in March of 1992. I reject the argument of the plaintiff that a notional advisor, faced with the release and the medical report which was available at the time of the settlement, would have advised her that she had no cause of action. The amount of the settlement, together with her post-settlement medical history, would have resulted in further enquiries, just as they did when Mr. Walker was consulted. Nothing had changed between March 27, 1986 and mid-1991 to result in any different advice from a competent legal advisor.

19 I conclude that, within months of her 1985 operation at the latest, the plaintiff had an obligation under s. 6 to seek legal advice if she wished to take the benefit of that section. Had she done so, she would have received the advice she got from Mr. Walker in 1991. As a result, she would have discovered then that an action against the defendant would have a reasonable prospect of success. There was nothing in her circumstances to prevent the bringing of such an action. In the result, her present action is barred by the Act, and must be dismissed.

20 One further submission of the plaintiff requires comment. She suggests that what was, or should have been, known to her at the relevant times should not be determined on a Rule 18A application. That point was taken only after the full force of the defendant's argument was brought home to her. I reject it. The availability of the plaintiff's evidence on examination for discovery, coupled with the defendant's admission (for the purposes of this application) of liability and acceptance of the plaintiff's version of events (his worst-case scenario), enables the disposition of a technical defence such as one under the Act on an application of this nature. Indeed, in these days of crowded court calendars, the defendant might well be criticized, or even penalized in costs, for failing to seek a ruling on such a defence in advance of trial (See, *Perron V. R.J.R. Macdonald Inc.* (above) at p.26).

JUDGMENT

21 The defendant's application under rule 18A to dismiss this action, with costs, is granted.

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CHAPTER 32

UNJUST ENRICHMENT

§32.1 THE LAW OF THE OBLIGATION TO MAKE RESTITUTION

It is particularly challenging to identify the law governing the obligation of a person to make restitution for an unjust enrichment enjoyed at another person's expense because the obligation is not a cause of action but a remedy appropriate for situations in which a wrong sounds more in the gain to the wrongdoer than the loss to the victim.[1] Since choice of law rules tend to be based on the elements of a cause of action and not on the appropriate consequences of seeking relief, the law governing a claim for unjust enrichment will depend on the nature of the wrong giving rise to the claim.[2]

For instance, where the obligation arises in connection with a pre-existing contractual relationship either actual or intended, the obligation is most closely connected with the law applicable to the contractual relationship.[3] Similarly, the obligation to restore the benefit of an unjust enrichment in connection with a person's ownership of an immovable may have its closest and most real connection with the law of the legal unit where the immovable is situated.[4] Where an obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land, a principled approach would be to examine all the factors relevant to the strength of the connection between the obligation and the competing legal systems and to give them weight according to their relative importance to the issues at stake. These factors could include:

- where the transaction underlying the obligation occurred or was intended to occur;
- where the transaction underlying the obligation was or was intended to be carried out;
- where the parties are resident;
- where the parties carry on business;
- what the expectations of the parties were with respect to governing law at the time the obligation arose; and
- whether the application of a particular law would cause an injustice to either of the parties.[5]

Alternatively, it has been proposed that the law governing restitutionary claims in general should be the "law of the unjust factor."[6] Should an analysis based on this approach fail to yield a compelling result, the obligation to restore the unjust enrichment could be regarded as more closely connected with the law of the place where the

THE LAW OF EVIDENCE IN CANADA

FOURTH EDITION

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> The rationale underlying the exclusion of hearsay evidence is primarily the inherent untrustworthiness of an extra-judicial statement which has been tendered without affording an opportunity to the party against whom it is adduced to cross-examine the declarant. This rationale applies equally in both criminal and civil cases. It loses its force when the party has chosen to rely on the hearsay statement in making an admission. Presumably in so doing, the party making the admission has satisfied himself or herself as to the reliability of the statement or at least had the opportunity to do so. The significance of this factor is evident in the decision of this Court in *Ares v. Venner*, [1970] S.C.R. 608, in which evidence was admitted as an exception to the hearsay rule where the party against whom the evidence was tendered had the opportunity to test the accuracy of the evidence.
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> Accordingly, once it is established that the admission was in fact made, there is no reason in principle for treating it any differently than the same statement would be treated had it been made in the witness box. In the latter case, if a party indicates a belief in or acceptance of a hearsay statement, that is some evidence of the truth of its contents. The weight to be given to that evidence is for the trier of fact. On the other hand, if the party simply reports a hearsay statement without either adopting it or indicating a belief in the truth of its contents, the statement is not admissible as proof of the truth of the contents.[595]

§6.410 But how strong or probative is an admission which is not based upon any firsthand knowledge or experience? Although the party intended to acknowledge the existence of the fact against his interest, and although such an admission is admissible, the court will examine the extent of the party's knowledge when he or she made the statement.[596] If the admission was made without any knowledge of the facts, the probative value of the admission in the view of the trier of fact may not be regarded as high and its weight discounted.

§6.411 Admissions made by a party are receivable only as evidence against him or her. Normally, a party who has made a self-serving or favourable admission cannot take advantage of such. The reason for the prohibition against self-serving statements made by a party out of court is considered elsewhere in this book,[597] but suffice it to say that, if such statements were admissible, the danger would exist that every person would seek to improve his or her own position in pending or anticipated litigation by making statements in his or her own favour.

§6.412 One word of qualification, however, is necessary. The whole of a statement which is alleged to be an admission must be put into evidence, and there may be parts thereof which are in fact favourable to the maker of the

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[595] [1989] 1 S.C.R. 1521, at 1529-30, [1989] S.C.J. No. 59 (S.C.C.); *R. v. Matte* (2012), 294 O.A.C. 242, 111 O.R. (3d) 791, [2012] O.J. No. 3327 (Ont. C.A.).

[596] "Any evidentiary weakness in the information on which the admission was based was a matter of weight and not admissibility": *per* Sopinka J. in *R. v. Streu*, *ibid.*, at 1530 (S.C.R.).

[597] See Chapter 7, Self-Serving Evidence.

statement. Thus, if an admission contains statements both adverse and favourable to a party and if an opponent tenders it, he or she may thereby be adducing evidence both helpful and damaging to his or her cause. In *Capital Trust Corp. v. Fowler*,[598] the plaintiff, who was seeking to prove that the defendant agreed to purchase certain shares in a company, tendered a letter in which the defendant stated that he had purchased the shares. Included in the letter, however, was a statement by him that there had been misrepresentations made to him in respect of the sale which supported his defence at trial. The Court held that the letter did constitute some evidence of misrepresentation in favour of the party against whom the letter was adduced. Such evidence, however, was not conclusive against the plaintiff tendering the admission, for he was at liberty to call qualifying evidence to rebut the unfavourable portion of the letter.

§6.413 Another illustration is found in the case of *Albert v. Tremblay*.[599] That was an action for the price of goods sold and delivered to the defendant and installed at the defendant's premises. The defendant claimed that the materials were different from those that he bargained for. The plaintiff, in proving his case at trial, put in the entire examination for discovery of the defendant. Under the provincial rules of court, a party is permitted to read in at trial parts of the other party's examination for discovery.[600] Here, the plaintiff read into evidence the entire transcript of the defendant to put before the Court the admissions against the defendant's interest that he had made on discovery. But the defendant had also stated on his examination for discovery that the materials he received were different from those that he contracted for. An examination for discovery is merely an admission made under oath and is the same as other admissions.[601] The discovery in question contained not only admissions which were unfavourable to the defendant's case, but also some statements which were helpful to his case. The Court held that the whole statement, including those parts favourable to the maker, was admissible into evidence. If a party uses an admission, he or she therefore may make it evidence for both his or her case and the opponent's case.

§6.414 The rationale for the principle that the whole of an admission is receivable is based on the fact that a party does not usually make a statement which is both damaging and helpful in the hope that he or she can get the favourable part before the court. The self-serving aspect of the admission is receivable in evidence only after the unfavourable part goes in. It is difficult to believe that an individual will make an incriminating statement in order to ensure that some self-serving evidence goes in as well. Moreover, if the

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598 (1921), 64 D.L.R. 289, [1921] O.J. No. 81 (Ont. C.A.); *Harrison v. Turner* (1847), 10 Q.B. 482.
599 (1963), 49 M.P.R. 407 (N.B.C.A.).
600 For example, see r. 31.11(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
601 *Capital Trust Corp. v. Fowler* (1921), 64 D.L.R. 289, [1921] O.J. No. 81 (Ont. C.A.); *Modriski v. Arnold*, [1947] O.W.N. 483 (Ont. C.A.).