[***Miquelon Properties Ltd. v. Squamish (District), [2001] B.C.J. No. 884***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X32D-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Loo J.

Heard: August 28 - September 1, 2000.

Judgment: April 20, 2001.

Vancouver Registry No. C985634

**[2001] B.C.J. No. 884** | 2001 BCSC 598 | 20 M.P.L.R. (3d) 76 | 104 A.C.W.S. (3d) 780

Between Miquelon Properties Ltd., plaintiff, and District of Squamish, defendant

(29 paras.)

**Case Summary**

**Municipal law — Liability of municipalities — *Negligence* — Standard of care — Defences, policy decisions — Failure to pass a bylaw within a reasonable time.**

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| Action by Miquelon Properties against the District of Squamish for damages for ***negligence***. Miquelon sought to develop certain lands, and as such entered into an agreement of purchase and sale subject to certain conditions. A feasibility study determined that the existing zoning bylaw of the District required 45 parking stalls, whereas there was only enough space for 19. Miquelon sought a relaxation of the parking requirements. A motion was passed in which the parking requirements were relaxed to provide for 20 stalls, with a minimum of 10 being on-site. However, under the existing bylaw, the maximum number of off-site stalls that could be purchased from the District was limited to four. In April 1998, Miquelon learned that a motion to amend the bylaw had been deferred. In July, when no progress was made towards amending the bylaw, Miquelon collapsed the sale on the basis that the vendors were growing tired of the delays. Miquelon then commenced an action against the District for damages for failing to pass the requisite bylaw within a reasonable period of time.  HELD: Action dismissed.  The District was under no duty to ensure that any bylaw was passed within a reasonable period of time, and had the discretion not to amend the bylaw at all. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 40A.

**Counsel**

J.A. Adelaar, for the plaintiff. J.M. Poole, for the defendant.

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| **LOO J.** |

Introduction

**1**  The issue in this case is whether a municipality is under a duty to ensure that a by-law is passed within a reasonable period of time. The plaintiff wanted to buy land and construct a building which required both relaxing and amending certain by-laws. The plaintiff alleges that the municipality was negligent in failing to pass the requisite by-law within a reasonable period of time, and as a result, the plaintiff could not complete the land purchase and suffered damages. For reasons which follow, I find that the action must fail.

Background

**2**  Tom Jarvis is the president and director of Miquelon Properties Ltd. ("Miquelon"), and his wife Betty Jarvis is the secretary and treasurer. Mrs. Jarvis is also a realtor. Mr. Jarvis was interested in developing a mixed commercial and residential building on two and a half lots on Cleveland Avenue in downtown Squamish ("the District"). Mr. Jarvis had experience building residential homes and single family dwellings, but had no experience in developing commercial properties. With Mrs. Jarvis acting as the realtor, on July 10, 1997, Miquelon entered into a contract of purchase and sale to purchase the lands for $190,000, subject to the following conditions for its benefit:

1. Completing a feasibility study by July 25, 1997.
2. Receiving an acceptable parking by-law amendment and/or variance by September 15, 1997.
3. Receiving a development permit by December 15, 1997.
4. Receiving satisfactory construction financing by January 15, 1998.

**3**  The completion date was February 6, 1998.

**4**  Mr. Jarvis retained Alpine Architecture & Planning Inc. to prepare a feasibility study. The architect from that firm, Brigitte Loranger, determined that the District's existing zoning by-law required 45 parking stalls for the development but there was only enough space for 19 stalls. On August 7, 1997 Ms. Loranger met with Frank Limshue, the District's Deputy Community Planner. She followed up with a letter to him seeking a relaxation of the parking requirements:

...in order that this type of density and mix of use be accommodated on site, the parking requirements as per the bylaw cannot be met. Our preliminary analysis indicates that for the proposed development, the current parking Bylaw would require 45 stalls. We can only fit 19 stalls in the current scheme. Our purpose in presenting this scheme to the Committee of the Whole is to determine whether the Committee would support a relaxation of the parking requirements. We need to resolve the parking requirements before we can proceed any further with the Development Permit process. Our client will not pursue the option to buy and develop this piece of property if the parking requirements cannot be relaxed.

**5**  On August 10, 1997 Miquelon removed the feasibility "subject to" clause.

**6**  On August 12, 1997 the District's Committee of the Whole passed a motion recommending that Council consider a partial relaxation of the parking requirements and that the entire issue of downtown parking requirements be re-examined. The minutes read:

1. PLANNING DEPARTMENT
2. Mixed Use Development on 38148 Cleveland Ave. (Wigan Pier Site)

The Committee of the Whole considered the Deputy Community Planner's August 7, 1997 report regarding the proposed commercial/residential development along Cleveland Avenue. Tom Jarvis, proponent and Brigitte Loranger, architect were in attendance to answer the Committee's questions. The Committee discussed the following:

1. proposed development of ground oriented commercial with fourteen residential units;
2. parking required for the development proposed is 45 parking stalls, 24.5 commercial, 17 residential, 3.5 visitors, the proponent is requesting a relaxation to 19 stalls total;
3. underground parking and related drainage issues for the area;
4. current parking locations and the purchase of four additional parking spaces in municipal parking lots;

...

1. the proponent to have a Geotechincal [sic] Engineer complete a study into the feasibility of the underground parking. The proponent is to notify the Planning Department if it is feasible for them to proceed with the development by way of putting in underground parking; and
2. staff were requested to do a parking study for the downtown corridor.

It was moved by Mayor Lonsdale, seconded by Councillor Young, that the Committee of the Whole recommends to Council **that Council consider a partial relaxation of parking requirements through the development process under Section 920 of the Municipal Act; AND FURTHER THAT Council provide direction to District Staff to re-examine the parking requirements for the Downtown area.**

CARRIED

...

[bolding and underlining in original]

**7**  Miquelon retained consulting geotechnical engineers who found that underground parking was not feasible.

**8**  On October 7, 1997 the Committee of the Whole passed a motion directing that the Planning Department report on the downtown parking requirements, and that the Department of Public Works report on the cost of off-site parking stalls which was covered by Off-Street Parking Facility By-Law No. 1103. That by-law provided that any building downtown:

... may supplement their offstreet parking requirements by the acquisition of a maximum of four (4) parking spaces of the required parking spaces in undesignated spaces in a municipal offstreet parking facility for a non-refundable fee of six thousand dollars ($6,000.00) per space.

**9**  The District was trying to attract development downtown, but recognized that By-Law No. 1103 could be an impediment.

**10**  On December 2, 1997 Council passed a motion relaxing the parking requirements for Miquelon's development to 20 parking stalls; there had to be a minimum of 10 on-site stalls and the remaining stalls could be off-site. The motion reads:

THAT the District of Squamish relax the parking requirement for the property located at 38148 Cleveland Ave. having fourteen residential units and 3000 square feet of office floor area to a total of twenty parking stalls including a minimum ten residential stalls provided on site and all other parking stalls offsite with four dedicated for residential use; AND THAT this relaxation be dealt with through a Development Permit application.

**11**  Mr. Jarvis thought the parking problem had been resolved, and removed the "subject to" clause relating to the parking by-law, extended the completion date to May 16, 1998, and arranged to pay a $5,000 non-refundable deposit to the vendors. What Mr. Jarvis failed to appreciate was that an amendment to By-Law No. 1103 was still required. While the zoning by-law had been relaxed from 45 parking stalls to 20, including ten off-site stalls, the maximum number of off-site stalls that could be purchased from the District under By-Law No. 1103 was limited to four.

**12**  On February 3, 1998, Council passed a motion directing staff to bring forward for its consideration, an amendment to By-Law No. 1103 increasing the maximum number of off-site stalls that could be purchased from the District from four to ten.

**13**  On February 12, 1998 Miquelon submitted its Development Permit Application and amended the "subject to" clause with the vendors so that the development permit had to be received by March 31, 1998.

**14**  On March 19, 1998, Mr. Jarvis and Ms. Loranger reviewed the project drawings with the District's Technical Planning Committee Meeting. A number of the technical aspects of the development were also discussed, including the material and appearance of the front facade, landscaping, signs, fire alarm and sprinkler requirements. In addition, Mr. Jarvis was told at the meeting that on April 14, 1998 the Clerk's Department was presenting to the Committee of the Whole an amendment to By-Law No. 1103.

**15**  On March 31, 1998, feeling confident that the District was on side with the project, Mr. Jarvis removed the "subject to" clause relating to the development permit.

**16**  On April 8, 1998, the District wrote to Mr. Jarvis informing him that there had been an error in the February 3, 1998 Council minutes. Instead of passing a motion directing staff to bring forward an amendment to By-Law No. 1103 for Council's consideration, the motion had been deferred. The letter of April 8, 1998 reads:

Further to a review of the Deputy Community Planner's Memorandum of March 13, 1998 by Joe Barry, Clerk of the District of Squamish, it has been confirmed that the Council motion pertaining to Municipal Off-Street Parking Facility Bylaw No. 1103, as noted at the end of Section 8 - "Parking", was not passed by Council at its regular meeting on February 3, 1998 as indicated. In fact, on this date, Council decided to refer this motion and the Minutes of the Technical Planning Committee ("TPC) meeting held January 15, 1998 to a future Committee of the Whole meeting. A copy of the relevant TPC minutes and February 3, 1998 Council Minutes have been attached for your information.

Please be advised that it is Mr. Barry's intention to bring the issue of Downtown Parking back to the Committee of the Whole on April 14, 1998 for further discussion. You may wish to contact Mr. Barry directly at (604) 815-5003 concerning this presentation.

**17**  When Mr. Jarvis read the letter, he thought that the District had "reversed" itself. However, from discussions with the Municipal Clerk, and various documents that the District had sent him, he was aware that the District was still reviewing the downtown parking issues. On April 30, 1998 Mr. Jarvis extended the parking "subject to" clause to June 15, and the completion date to June 30.

**18**  Mr. Jarvis complains that in June, he heard nothing from the District about any progress towards amending By-Law No. 1103. He also says that by then the vendors were getting "fed-up" with all of the extensions for time. On July 15, Mr. Jarvis collapsed the sale. The reason given on the Collapsed Sale Report is "subjects not removed". This action was commenced on November 23, 1998.

**19**  The District led much evidence, including the evidence of five employees or former employees who testified about the reasons for the delay in amending By-Law No. 1103. The reasons included an upcoming election, the municipal budget, a shortage of staff, a turnover of staff, and a new District Administrator who wanted a more in-depth review of the issues, including the financial implications of off-site parking fees and their impact on municipal revenue. As of the date of trial, more than two years after the collapsed sale, By-Law No. 1103 had still not been amended. The reason now given for the delay is that Miquelon's development was the only development affected by the by-law and no other development has been proposed that would be affected by the by-law.

**20**  I was left with the impression that, at times, the District's left hand did not know what its right hand was doing. For example, the person responsible for dealing with the development permit said that the "intent was for the development permit application to proceed to Council" at the same time as the amendment to By-Law No. 1103, in order to streamline the process for Miquelon. Yet she did not know the status of the amendment, even though the person responsible for amending the by-law sat in the next office. All she could say was that she asked him if he was handling it, and he said yes. The same could be said of him. He has no recollection if he ever asked her about the status of the development permit application and I doubt that he did. It was apparent to me that dealing with the District must have been extremely frustrating for Mr. Jarvis, but that does not give rise to a cause of action.

The Issue: Is a municipality under a duty to ensure that a by-law is passed within a reasonable period of time?

**21**  Mr. Jarvis says that in August 1997, he was told by the District's Deputy Community Planner that the development permit application would take six to nine months. However, that discussion would have occurred after Miquelon had offered to purchase the lands. No application was made until February 11, 1998, and five months later, Mr. Jarvis collapsed the sale. It is unreasonable to maintain that the Municipality's duty, if any, started to run from the time he started talking to the District in August 1997. In any event, it does not answer what counsel for the Miquelon says is the issue that I must decide: whether a municipality is under a duty to pass a by-law within a reasonable period of time.

**22**  Miquelon relies on Cook v. Bowen Island Realty Limited et al. (22 October 1997) Vancouver Registry, C933096 (B.C.S.C.), and the cases referred to in that decision: Kamloops v. Nielsen, [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=) (S.C.C.); Rothfield v. Manolakos, [*[1989] 2 S.C.R. 1259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652M-00000-00&context=) (S.C.C.); and Just v. British Columbia, [*[1989] 2 S.C.R. 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652N-00000-00&context=) (S.C.C.). Miquelon argues that the December 2, 1997 motion relaxing the parking requirements from 45 stalls to 20 stalls was a policy decision that gave rise to a duty of care to pass a by-law within a reasonable period of time. However, in my view, Kamloops v. Nielsen, Rothfield v. Manolakos, and Just v. British Columbia all deal with negligent inspection by a municipality, and that largely involves the operational area of decision making. If, as Miquelon argues, the relaxation of the parking requirements and the amendment of By-Law No. 1103 falls within the area of policy, then an element of discretion is involved and a municipality cannot be held liable. A municipality for any number of reasons may exercise its discretion not to pass a by-law, including reasons relating to budgetary constraints. Indeed, one of the reasons given for the delay in amending By-Law No. 1103 was the financial implications for the District in deciding whether to lease or to sell parking stalls.

**23**  What is not disputed is that at no time did Mr. Jarvis inform the District of any particulars of Miquelon's offer to purchase the lands on Cleveland Avenue. However, I am in no way suggesting that had he done so, it would have imposed a duty on the District to pass any by-law within a reasonable period of time.

**24**  Counsel for Miquelon was quite frank when he said that he could find no case dealing with any duty on a municipality to pass a bylaw within a reasonable period of time, and that he had no "clue" where to look. In my view, that is likely because the law has not extended the duties of municipal authorities that far. I conclude that Miquelon has not established that the District has breached any duty of care owed to it.

Damages

**25**  Miquelon claims damages of $30,909.55 in pursuing the development, including the $5,000 non-refundable deposit. In addition, Miquelon claims $285,000 in loss profit it contends it would have made had the development proceeded and the units sold. Alternatively, Miquelon claims a gross profit of $158,000 a year, had the development proceeded and the units rented out. After taking into account financing charges of $120,000, it is claimed that the development would have netted rental income of $38,000 annually.

**26**  Had Miquelon convinced me that the District was liable, I would have awarded damages of $30,909.55, but its claim for lost profit and lost revenue is woefully inadequate. The claim is based on Mr. Jarvis' rough hand scratched calculations with bare bone figures; one of the sources for the calculations is an incomplete copy of a March 31, 1998 appraisal by Free Lee & Associates Limited which was prepared in order to obtain financing for the land purchase. The size of the units used in the appraisal are not the same as the size of the units in the development permit plans and the difference impacts on the construction costs. No notice was given that Miquelon intended to rely on the appraisal and the appraisal meets none of the requirements of a Rule 40A expert report: there are no qualifications of the expert, and no facts or assumptions on which the opinion is based.

**27**  The other source of the calculations which consist of just seven lines including $85.00 a square foot for the residential suites, and $65.00 a square foot for the commercial suites were "confirmed" by Mr. Jarvis consulting others, but who they were and what their experience was, I do not know.

**28**  Miquelon has not satisfied me on a balance of probabilities of any damages it has suffered but for the $30,909.55. However in view of my other finding on liability, I make no award for damages.

**29**  The plaintiff's claim is dismissed with costs.

LOO J.

**End of Document**

[***Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Co., [2012] B.C.J. No. 1987***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S24R-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: April 28 and May 2-3, 2011.

Judgment: September 27, 2012.

Docket: S074302

Registry: Vancouver

**[2012] B.C.J. No. 1987** | 2012 BCSC 1415 | 38 B.C.L.R. (5th) 169 | 222 A.C.W.S. (3d) 258 | 2012 CarswellBC 2999

Between Mitsubishi Heavy Industries Ltd., Plaintiff, and Canadian National Railway Company, Defendant

(179 paras.)

**Case Summary**

**Transportation law — Carriers — Liability — Limitation of liability — Determination of whether the defendant Canadian National Railway (CN) had the benefit of a limitation of liability provision — A train owned and operated by CN derailed, damaging an aircraft part owned by the plaintiff Mitsubishi — Mitsubishi claimed damages in excess of $1.6 million for *negligence* — Casco Forwarding Limited was the shipper as it arranged for the loading of the railcars and had significant related dealings with CN — CN established that there was a signed written agreement with Casco which included the limitation of liability clause — CN had the benefit of the provision — Canada Transportation Act, s. 137(1).**

**Transportation law — Railways — Liability — Freight — Determination of whether the defendant Canadian National Railway (CN) had the benefit of a limitation of liability provision — A train owned and operated by CN derailed, damaging an aircraft part owned by the plaintiff Mitsubishi — Mitsubishi claimed damages in excess of $1.6 million for *negligence* — Casco Forwarding Limited was the shipper as it arranged for the loading of the railcars and had significant related dealings with CN — CN established that there was a signed written agreement with Casco which included the limitation of liability clause — CN had the benefit of the provision — Canada Transportation Act, s. 137(1).**

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| Determination of whether the defendant Canadian National Railway (CN) had the benefit of a limitation of liability provision. The plaintiff Mitsubishi owned aircraft parts which were being carried by a train owned and operated by CN. That train derailed and, as a result, one of Mitsubishi's aircraft parts was severely damaged. Mitsubishi commenced a claim against CN for damages in excess of $1.6 million, claiming that CN was negligent. However, CN asserted that its liability was limited to $50,000 pursuant to a contract between it and Casco Forwarding Limited, the company that arranged for the carriage of the aircraft parts with CN. CN took the position that Casco was the shipper. Mitsubishi took the position that it was unclear who the shipper was in the circumstances and, even if Casco was the shipper, there was no signed agreement between CN and Casco.  HELD: CN had the benefit of the limitation of liability provision.  Mitsubishi was not the shipper as it clearly intended that others would be responsible for transporting the aircraft parts and there was no evidence that Mitsubishi was involved in the specifics of arranging the transportation with CN. Casco, on the other hand, had an agreement with CN relating to the shipment of the goods and had significant dealings with CN regarding the negotiation and payment of freight rates. Casco arranged for the loading of the railcars for shipment with CN and was the shipper in relation to the CN shipments. Although CN was unable to produce a written agreement signed by Casco, CN established that there was a written agreement which included the limitation of liability clause. CN also established that Casco had sufficiently agreed to and acknowledged the written agreement. |

**Statutes, Regulations and Rules Cited:**

Canada Transportation Act, [*S.C. 1996, c. 10, s. 5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5XBT-KMM1-F5T5-M0R0-00000-00&context=), s. 6, s. 113(1)(c), s. 113(4), s. 116(5), s. 116(6), s. 117, s. 118, s. 121, s. 126, s. 137(1), s. 137(2)

Interpretation Act, [*R.S.C. 1985, c. I-21, s. 12*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B9C1-FJDY-X0FY-00000-00&context=)

National Transportation Act, 1987, R.S.C. 1985, c. 28, s. 3(1), s. 153(1)

Railway Traffic Liability Regulations, [*SOR/91-488, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5FBX-WG41-JN6B-S28C-00000-00&context=), s. 5

**Counsel**

Counsel for Plaintiff: A. Barry Oland and Leona Baxter.

Counsel for Defendant: Thomas G. Keast, Q.C. and Andrew Epstein.

**Reasons for Judgment**

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| **S.C. FITZPATRICK J.** |

**Introduction**

**1**  On July 5, 2005, a train owned and operated by the defendant Canadian National Railway Company ("CN") derailed near Avola, British Columbia. That train was carrying certain aircraft parts owned by the plaintiff Mitsubishi Heavy Industries Ltd. ("MHI") and as a result of the derailment, one of those parts was severely damaged.

**2**  MHI claims damages against CN for the value of the damaged part, estimated to be in excess of $1.6 million. CN says that its liability is limited to $50,000 pursuant to a certain contract between it and Casco Forwarding Limited ("Casco"), who arranged for the carriage of the aircraft parts with CN.

**3**  On April 21, 2010, Mr. Justice Willcock ordered that the issues of liability and quantum were to be tried and determined separately. On May 6, 2010, following a later application by CN, Mr. Justice Verhoeven ordered that the following issue was to be tried and determined before the issue of liability generally and before any assessment of damages:

Whether [CN] has the benefit of a limitation of liability provision set out in a contract between [CN] and Casco.

**4**  Accordingly, the only issue for determination in this portion of the trial is whether or not CN's liability is limited as CN contends.

**5**  I will begin by reviewing some of the background facts and the statutory regime which governs the relationship between the parties. I will then address three issues, as framed by the parties:

1. Who is the "shipper"?
2. Is there an agreement between CN and Casco, as "shipper", and is that agreement "signed" in accordance with the legislation?
3. If there is an agreement between CN and Casco, is MHI entitled to advance its tort claim against CN in any event?

**Factual Background**

**6**  The parties introduced into evidence a Statement of Agreed Facts and Joint Book of Documents. The agreed facts and certain provisions of agreed documents are as follows:

1. CN owns and operates a transcontinental railway system, including provision of rail service from Vancouver, British Columbia to Downsview, Ontario.
2. MHI, a Japanese company, manufactured Dash-8 fuselage parts, including central fuselage barrels, at its manufacturing facility in Japan (the "Nagoya Works"). MHI sold Dash-8 fuselage parts, including central fuselage barrels, to Bombardier Aerospace Inc. ("Bombardier").
3. On June 15, 1976, MHI entered into a transportation agreement (the "Master Transportation Agreement") with Fujiki Kaiun Kabushiki Kaisha, now known as Fujitrans Corporation ("Fujitrans"), for the transportation of goods of MHI, including central fuselage barrels, from MHI's Nagoya Works to customers of MHI worldwide, including Bombardier.
4. The Master Transportation Agreement provided in Article 18 (as translated from Japanese to English):

Article 18 Transport subcontractor

18.1 [Fujitrans] shall request [MHI's] prior written approval when it is to use other transport operators for all or a part of the transportation work in order to fulfill its obligations under an Individual Contract [defined in Article 2 as "contracts for transactions concerning transportation" to be concluded between Fujitrans and MHI].

18.2 [Fujitrans] shall not be exempted from the liability defined in the Individual Contract even when it has obtained the approval of [MHI] as provided in the foregoing paragraph.

1. Pursuant to the Master Transportation Agreement, Fujitrans transported Dash-8 fuselage parts, including central fuselage barrels, from MHI's Nagoya Works to Bombardier's factory in Ontario, except for deep sea carriage of the parts from the port of Nagoya, Japan to Vancouver, B.C.
2. By invoice No. Dash-8-115 dated June 3, 2005, MHI sold to Bombardier three centre fuselage barrels for Dash-8 Aircraft No. 4115 at a total cost of US $2,108,675.62 (the "4115 Barrels").
3. MHI prepared three Packing Lists for the centre forward barrel, centre mid barrel and centre aft barrel of the fuselage comprising the 4115 Barrels.
4. The 4115 Barrels were transported by Fujitrans, pursuant to the Master Transportation Agreement, from MHI's Nagoya Works and loaded on board the ship WESTWOOD COLUMBIA at Nagoya, Japan on or about June 8, 2005, for carriage to Vancouver, B.C.
5. The 4115 Barrels were discharged from the ship WESTWOOD COLUMBIA at Vancouver, B.C. on or about June 26, 2005.
6. On or about June 29 or 30, 2005, the 4115 Barrels were loaded onto flat cars nos. CN 639972 and CN 639868 as follows:

CN 639972 centre fuselage mid barrel

CN 639868 centre fuselage forward and aft barrel

1. The 4115 Barrels loaded on flat cars nos. CN 639972 and CN 639868 were to be carried by CN from Vancouver, B.C. to Downsview, Ontario.
2. On or about July 1, 2005, near Avola, B.C., flat cars nos. CN 639972 and CN 639868, as part of the CN train E-202-51-01, derailed.
3. As a result of the derailment, there was physical damage to the centre fuselage mid barrel of the 4115 Barrels which was being transported by CN on flat car no. CN 639972.
4. At all material times, the train locomotive, flat cars for train E-202-51-01 and the track on which the train operated were owned and/or operated by CN.
5. As a result of damage to the centre fuselage mid barrel of the 4115 Barrels, the centre fuselage mid barrel could not be repaired or used in construction of Dash-8 Aircraft No. 4115.

**7**  In addition to the Agreed Statement of Facts and Joint Book of Documents, CN introduced further evidence and documents through Fiona Murray, an account manager of CN at the material times. The evidence of Atsuo Utsumi, an employee of Fujitrans, was also obtained by way of deposition and presented at the trial.

**8**  At the conclusion of the trial and during final argument in May 2011, issues arose between the parties concerning the failure of CN to call two individuals who were Casco employees, being Chieko Querner and William Weymark. There were also issues raised by MHI concerning what weight the Court should place on certain documents admitted into evidence through Ms. Murray, as they related to Ms. Querner and Mr. Weymark.

**9**  In August 2011, CN applied to reopen the trial to introduce the evidence of Ms. Querner and Mr. Weymark. Despite opposition from MHI, I allowed that application: *Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Company*, [*2011 BCSC 1536*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22F1-00000-00&context=). Following my ruling, by agreement, that evidence was put in affidavit form in December 2011 and cross-examinations and re-examinations on the affidavits took place in early April 2012. The Court has now received revised final arguments from the parties based on this new evidence.

**Position of the Parties**

**10**  Both parties refer to the central statutory provision relevant to this issue as contained in s. 137(1) of the *Canada Transportation Act*, [*S.C. 1996, c. 10*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB71-FJM6-620V-00000-00&context=) (the "*Act*"):

**137**. (1) A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.

1. If there is no agreement, the railway company's liability is limited or restricted to the extent provided in any terms and conditions that the Agency may
2. on the application of the company, specify for the traffic; or
3. prescribe by regulation, if none are specified for the traffic.

**11**  MHI claims that CN was negligent. MHI denies that it is a party to any written agreement with CN as contemplated by s. 137(1) of the *Act* that would limit CN's liability for damage to its goods.

**12**  CN denies that it was negligent, but more importantly for the purposes of this portion of the trial, it takes the position that it entered into an agreement with Casco for the transportation of certain goods, which included the 4115 Barrels and the damaged aircraft part of MHI. CN says that Casco is the "shipper" in these circumstances and that there is a contract between CN and Casco which specifically limits CN's liability to $50,000. Thus, CN says that it is entitled to the benefit of this limitation as against MHI, in accordance with s. 137(1) of the *Act*.

**13**  In reply, MHI says that it is unclear who the "shipper" is in these circumstances. Further, if Casco is the "shipper", MHI denies that there is any signed written agreement between CN and Casco. In the alternative, MHI takes the position that even if there is such an agreement, it has no bearing on its tort claim against CN.

**The Statutory Regime**

**14**  A review of the history leading to the enactment of s. 137 of the *Act* is of assistance in determining the legislative intent underlying that provision.

**15**  At common law, a railway was held to be a common carrier responsible for the safety of the goods entrusted to it: see *Canadian National Railway Co. v. Harris*, [*[1946] S.C.R. 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B06R-00000-00&context=) at 369-370:

The common law liability of a common carrier is, I think, authoritatively stated in 4 Halsbury, at p. 12 and following pages:

A common carrier is responsible for safety of the goods intrusted to him in all events, expect where loss and injury arises solely from act of God or the King's enemies. He is therefore liable even where he is overwhelmed and robbed by an irresistible number of persons. He is an insurer of the safety of the goods against everything extraneous which may cause loss or injury except the act of God or the King's enemies.

**16**  In the face of exposure to liability under the common law, in the early 1970s, railways, working with the Government of Canada and the Canadian Transport Committee, developed Special Terms and Conditions for carriage of cargo which prescribed limits of liability.

**17**  Later, in April 1980, on application by the Canadian Freight Association on behalf of rail carriers, Order R-30750 was issued by the Railway Transport Committee to amend the Special Terms and Conditions relating to the liability of the railways for loss, damage or delay to containers (other than that owned by the railways) and their contents. Order R-30750 provided that the railway was not to be liable except for ***negligence*** on the part of the carrier, but in no event would the liability of the carrier for a container and its content exceed certain amounts. In respect of 20 foot containers and their contents, the limits of liability were the lesser of: (a) the value of the contents; (b) the sum of $10,000; or (c) an amount equal to the liability of the steamship company pursuant to the Ocean Bill of Lading.

**18**  In 1989, the Shipping Federation of Canada (who I am advised acts for shipping companies) applied to the Canadian Transportation Agency (the "CTA") to rescind Order R-30750 on the grounds that the financial limitations set out in R-30750 would not compensate for container damage. The CTA issued its Decision No. 559-R-1991 on November 8, 1991. The CTA referred to the philosophy of marketplace regulation expressed in the *National Transportation Act*, *1987*, R.S.C. 1985, c. 28 (the predecessor legislation to the *Act*) and decided that container liability limits for general freight should be established by negotiations between the parties. The CTA also decided that:

The new *Railway Traffic Liability Regulations*, SOR/91-205-01 will apply on the subject traffic. In the absence of an agreement between a shipper and a carrier limiting liability, rail carriers will be liable for the value of the container and its contents at the place and time of shipment.

**19**  Accordingly, the previous limits of liability imposed by regulation were eliminated and the matter was left to be addressed by the parties directly in their contractual arrangements.

**20**  The *Act* is currently the primary legislation governing the carriage of goods by rail. Relevant portions of the *Act*, other than s. 137 (see para. 10 of these reasons), are as follows:

**6.** "shipper" means a person who sends or receives goods by means of a carrier or intends to do so;

...

**113**. (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,

...

1. without delay, and with due care and diligence, receive, carry and deliver the traffic;

...

1. A shipper and a railway company may, by means of a confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.

...

**116.** (5) Every person aggrieved by any neglect or refusal of a company to fulfill its service obligations has, subject to this Act, an action for the neglect or refusal against the company.

1. Subject to the terms of a confidential contract referred to in subsection 113(4) or a tariff setting out a competitive line rate referred to in subsection 136(4), a company is not relieved from an action taken under subsection (5) by any notice, condition or declaration if the damage claimed in the action arises from any ***negligence*** or omission of the company or any of its employees.

......

**117**. (1) Subject to section 126, a railway company shall not charge a rate in respect of the movement of traffic or passengers unless the rate is set out in a tariff that has been issued and published in accordance with this Division and is in effect.

1. The tariff must include any information that the Agency may prescribe by regulation.
2. The railway company shall publish and either publicly display the tariff or make it available for public inspection at its offices.
3. The railway company shall provide a copy of the tariff, or any portion of it, to any person who requests it and pays a fee not exceeding the cost of making the copy.
4. The railway company shall keep a record of the tariff for at least three years after its cancellation.

.....

**118**. (1) A railway company shall, at the request of a shipper, issue a tariff in respect of the movement of traffic on its railway.

...

**121.** (1) If traffic is to move over a continuous route in Canada and portions of it are operated by two or more railway companies, the companies shall, at the request of a shipper intending to move the traffic,

(*a*) agree on a joint tariff for the continuous route and on the apportionment of the rate in the joint tariff; or

(*b*) enter into a confidential contract for the continuous route.

1. If the railway companies fail to agree or to enter into a confidential contract, the Agency, on the application of the shipper, may

(*a*) direct the companies, within any time that the Agency may specify, to agree on a joint tariff for the continuous route and an apportionment of the rate that is satisfactory to the Agency; or

(*b*) within ninety days after the application is received by the Agency,

1. determine the route and the rate and apportion the rate among the companies, and
2. determine the dates, not earlier than the date of receipt by the Agency of the application, when the rate comes into effect and when it must be published.
3. If the Agency determines a rate under paragraph (2)(*b*), the companies that operate the route shall pay a shipper who moved traffic over the route an amount equal to the difference, if any, between the rate that was paid by the shipper and the rate determined by the Agency, applicable to all movements of traffic by the shipper over the route from the date on which the application was made to the date on which the determined rate comes into effect.

....

1. (1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting
2. the rates to be charged by the company to the shipper;
3. reductions or allowances pertaining to rates in tariffs that have been issued and published in accordance with this Division;
4. rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;
5. any conditions relating to the traffic to be moved by the company; and
6. the manner in which the company shall fulfill its service obligations under section 113.
7. No party to a confidential contract is entitled to submit a matter governed by the contract to the Agency for final offer arbitration under section 161, without the consent of all the parties to the contract.

[Emphasis added]

**21**  The *Railway Traffic Liability Regulations*, [*SOR/91-488*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W3Y-TSP1-F7ND-G051-00000-00&context=) (the "*Regulations*") are referenced by s. 137(2) of the *Act*. The *Regulations* provide:

**4.** Subject to sections 8 and 15, for the purposes of subsection 137(2) of the Act, a carrier is liable, in respect of goods in its possession, for any loss of or damage to the goods or for any delay in their transportation unless that liability is limited by these Regulations.

**22**  Section 5 of the *Regulations* states that a carrier will not be liable for any loss or damage for goods or for any delay in the transportation of goods which result from various matters, such as acts of God, war, riot, strike and the like. CN does not allege in this case that any of these circumstances apply.

**23**  It can be seen from the foregoing that the matter of limiting a carrier's liability has now been essentially deregulated and that the parties are free to negotiate on this issue and contract as to the basis upon which they will do business: see *Canadian National Railway Co. v. Neptune Bulk Terminals (Canada) Ltd.*, [*2006 BCSC 1073*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G35M-00000-00&context=) at paras. 10-12, 89-93, [*60 B.C.L.R. (4th) 96*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G35M-00000-00&context=) for a history of this process.

**24**  Accordingly, a railway will be fully liable for loss of goods being transported by it unless it can bring itself within one of two circumstances: firstly, those set out in s. 5 of the *Regulations* (acts of God, etc.); or secondly, where the railway has entered into a "confidential contract" under s. 126 which contains a contractual limitation of liability and the contract is a "written agreement signed by the shipper" pursuant to s. 137(1) of the *Act*. In this case, the only issue is whether the latter circumstance has been proven.

**25**  The parties agree that CN bears the burden of proving the elements required to be established - a written agreement or "confidential contract" signed by a "shipper" which contains a limitation of liability - in accordance with s. 137(1) of the *Act*.

**Discussion and Analysis**

1. ***Who is the "shipper"?***

**26**  In accordance with its pleading, CN contends that Casco is the "shipper". MHI says that it is uncertain whether MHI, Fujitrans or Casco are the "shipper" and that in the face of CN not having proved that fact, CN's argument must fail.

**27**  Despite what appears to be a relatively straight forward definition of "shipper" in s. 6 of the *Act* - namely, a person who sends or receives goods by means of a carrier or intends to do so - it is necessary to review the complexity of the relationships between all parties in this case to determine who, in fact, bears this role.

**28**  At this stage it is useful to review the evidence of Mr. Utsumi, Ms. Murray, Ms. Querner and Mr. Weymark.

**29**  As is evident from the Statement of Agreed Facts, MHI's cargo was being transported from Japan to Ontario pursuant to the Master Transportation Agreement between MHI and Fujitrans. This Agreement covered all legs of the transportation, except for the deep sea carriage from Nagoya, Japan to Vancouver.

**30**  Mr. Utsumi's evidence confirmed that he was the operational coordinator for Fujitrans USA at its Portland, Oregon office. Fujitrans USA functioned as an agent for MHI through Fujitrans, which is located in Japan. Fujitrans is Fujitrans USA's parent company. Fujitrans USA took instructions from Fujitrans in Japan. For the purpose of these reasons, there is no distinction between Fujitrans and Fujitrans USA so I will refer to both collectively in these reasons as "Fujitrans", except to distinguish between the respective Fujitrans offices in Japan and the U.S.

**31**  Fujitrans had a freight forwarding department and an ocean vessel agency. Mr. Utsumi worked for Fujitrans from 1990 to April 2009. His job was coordinating freight transport from Japan to North America and from the United States to Japan. The majority of Fujitrans' business was export freight forwarding.

**32**  Fujitrans acted as the agent of MHI in arranging for the transportation of aircraft parts from Japan to Ontario. MHI contracted with Fujitrans Japan for the movement of the aircraft parts from Japan to Ontario, except for the ocean-voyage portion. In Japan, Fujitrans moved the fuselage parts to alongside the vessel and arranged for the loading onto the deep sea vessel. Fujitrans would then receive the cargo from the vessel and then load it onto the railcars for rail transport to Ontario. Casco was employed by Fujitrans for that purpose.

**33**  Part of Mr. Utsumi's job was to communicate directly with MHI, in person or by phone.

**34**  From time to time, Mr. Utsumi also had communications with CN personnel, including Ms. Murray. One communication in particular from 2002 dealt with CN's quotation of certain rates. He confirmed that his communications with personnel at CN related only to the MHI business. Finally, Mr. Utsumi dealt with various personnel at Casco. He dealt with Johnny Onodera, the manager of Casco, and his subordinate, Ms. Querner, an account representative of Casco. Mr. Utsumi understood that Mr. Onodera was the person at Casco who prepared the shipping contract with CN and calculated the freight rate. I was advised that Mr. Onodera is now deceased.

**35**  Mr. Utsumi had heard about the Master Transportation Agreement between MHI and Fujitrans Japan, but he had never seen it.

**36**  One of the documents produced by Mr. Utsumi was an undated and unsigned "draft" Confidential Transportation Agreement No. 13349 between CN, and Casco and MHI as "Customers", relating to transportation services to be provided by CN for the period December 6, 1996 to January 31, 1997 with respect to aircraft parts. Fujitrans was not identified as a party to this contract although someone added in handwriting a place for Fujitrans to sign on the signature page of the contract. This draft agreement specifically refers to CN's liability being "limited to $50,000 (Cda)" in two separate places. Mr. Utsumi believes that he received this Confidential Transportation Agreement somewhere around 2000 to 2002 and he faxed it to an unidentified person named Philip on July 18, 2005 (just after the derailment).

**37**  From 1999, Ms. Murray was CN's account manager for Casco, along with other CN customers, and she dealt with dimensional loads requiring special clearance for movement (such as aircraft parts).

**38**  Ms. Murray's job was to get back the business of transporting aircraft parts which CN had previously lost to trucking companies. On December 3, 1999, she wrote to Casco proposing rates and train service transit times to Casco based on MHI's and Casco's requirements.

**39**  Ms. Murray was successful in winning back this business of transporting MHI's goods across Canada.

**40**  The central document in this litigation is a later version of Confidential Transportation Agreement No. 13349 relating to transportation services to be provided by CN for the period July 12, 2000 to March 31, 2006 ("CTA-13349") again relating to the shipment of aircraft parts. This time period covers the date of the derailment in 2005. It also follows some seven months from the date of Ms. Murray's letter to Casco seeking to win the MHI business back. Ms. Murray said that CTA-13349 bears the same number as the earlier draft contract because once a contract number is assigned by CN to a customer, all subsequent contracts bear the same number.

**41**  CTA-13349 is in substantially the same form as the earlier draft confidential agreement. This is understandable since both documents originated from CN and represent a standard form contract on their system.

**42**  CTA-13349 is stated to be between CN, and then Casco and MHI as "Customers". The relevant clauses of CTA-13349 are as follows:

1. Effective Date and Term

This Contract shall be effective as of the 12th day of July 2000 and shall remain in effect until the 31st day of March 2006 ("Contract Period").

2. Transportation Service and Charges

1. This Contract is for the transportation of the commodity or commodities ("Commodity") described in Schedule 1 - "Commodity and Transportation Particulars".
2. The Customer represents to CN that it controls the traffic covered by this Contract and it agrees to ship the Commodity in accordance with the terms and conditions set forth herein. CN, acting solely as a Contract carrier, agrees to transport the Commodity between the Origins and Destinations and at the rates specified in Schedule 1.

3. Customer to Advise Contract Number

The Customer shall advise CN of the Contract Number when cars are released for shipment pursuant to this Contract or cause the shipper to advise CN of the Contract Number. If the bill of lading or other written or electronically transmitted documentation is issued. All documentation shall include a statement "Subject to CN's Confidential Transportation Contract No. 13349".

...

1. Liability and Claims

Except as otherwise provided in any schedule to this Contract, the liability of CN for any alleged loss, damage or delay to the Commodity shall be identical to the standards applicable to a Canadian rail common carrier, as specified in Railway Traffic Liability Regulations, [*SOR/91-488*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W3Y-TSP1-F7ND-G051-00000-00&context=).

...

11. Schedules

1. In the event that any Schedule hereto is inconsistent with the terms and conditions of this head agreement, the Schedule shall prevail.
2. This Contract includes the following schedules:

Schedule 1 - "Commodity and Transportation Particulars"

Schedule 2 - "Additional Special Conditions"

**43**  The matter of CN's liability under the confidential contract was specifically addressed in both Schedule 1 and 2 (in the same manner as it was addressed under the earlier draft confidential contact discussed above).

**44**  Schedule 1 to CTA-13349 sets out a "Description of Commodity" as "Aircraft Parts". It also sets out freight rates per car which were established each year and escalated over the five year period. As referenced in clause 5 ("except as otherwise provided in any schedule to this Contract"), Note 1 to Schedule 1 provided that:

Liability coverage while in possession of CN is limited to $50,000 (Cda).

Similarly, Schedule 2 to CTA-13349 is titled "Additional Special Conditions" and provided that "Liability is limited to $50,000 (Cda) while in the possession of CN".

**45**  CTA-13349 was signed by Mr. Utsumi under the line that said "Mitsubishi Heavy Industries (MHI)". Underneath his name he wrote "as agents of MHI" and underneath that applied a stamp that included his name and the words "Attorney-in-fact Fujitrans USA, Inc.". Mr. Utsumi indicated that he would only use the stamp when he signed for a customer who had authorized him to sign the contract. When he received CTA-13349 he sent it on to Fujitrans in Japan. He was authorized to sign CTA-13349 by the person at Fujitrans Japan who was in charge of the MHI business, but he does not remember that person's name.

**46**  Mr. Utsumi recalled that he was asked to sign CTA-13349 by either Mr. Onodera or Ms. Querner of Casco. He never received a copy of it signed by CN (indicated on the document to be the signature of Jerry Boland) or Casco (indicated on the document to be the signature of Mr. Onodera).

**47**  No copy of CTA-13349 was produced which bears the signature of any person from either CN or Casco. Ms. Murray was unable to locate any such copy in CN's files. Other searches for such a document have not been fruitful.

**48**  It is not entirely clear when Mr. Utsumi signed CTA-13349. It could have been anytime between the year 2000 and 2003. He also indicates that he was asked to sign CTA-13349 because of the change of the freight rates and that he communicated the change of freight rates to Fujitrans Japan.

**49**  Ms. Murray gave evidence that CTA-13349 set out the agreement regarding the movement of the MHI Dash-8 aircraft parts and the rates and conditions under which CN moved those parts.

**50**  Ms. Murray testified that she normally went through Casco and Fujitrans in discussing the aircraft parts traffic and that she had met with Mr. Utsumi on several occasions to talk about the business. Nevertheless, she considered it "MHI business" and also considered that MHI was an indirect customer. From her perspective, MHI was named in CTA-13349 because it was the manufacturer, but she considered that Casco, also named in the agreement, was the party with whom she dealt.

**51**  She said that she negotiated rates with Ms. Querner of Casco and Mr. Utsumi of Fujitrans. The freight rates charged by CN were the rates specifically listed in CTA-13349. According to Ms. Murray, these rates were preferential rates for aircraft parts based on the limitation of liability in that she "backed the risk out of the pricing" to provide a lower rate for the rail movements. She indicated that by limiting CN's liability in CTA-13349, she was able to provide more competitive rates to secure the business.

**52**  During the period July 2000 through July 2005, MHI shipped aircraft parts with CN and CN invoiced MHI through Casco and/or through Fujitrans for the freight rates set out in CTA-13349. Fujitrans USA received copies of CN's invoices through Casco's office and also invoices from Casco or Casco Terminals (which appears to be a related party operating under the Casco name). Casco's invoices were sent by Fujitrans USA to Fujitrans Japan.

**53**  Mr. Utsumi indicates that he would discuss freight rates with Casco and CN separately and that sometimes all three of them would have discussions on that matter. His discussions with CN went beyond those relating to the Dash-8 aircraft parts (the ones damaged in the derailment). In September 2002, Mr. Utsumi was involved in discussions with Ms. Murray about other matters, including the rates applied in the shipment of MHI aircraft parts for a regional jet with CN and also the matter of the return of lashings used on CN shipments.

**54**  Ms. Querner deposed that she recalls checking rates from time to time by reference to CTA-13349, when Mr. Onodera would provide a piece of paper to her from CTA-13349. She indicated that she was not involved in negotiating any terms of the contract with CN. This is a slight conflict in relation to the evidence of Ms. Murray who indicated that she negotiated with both Ms. Querner and Mr. Onodera. I accept the evidence of Ms. Querner in this respect and find that the contract negotiations and agreements made between CN and Casco were completed between Ms. Murray and Mr. Onodera.

**55**  In addition, Ms. Querner specifically recalls discussing the calculation of freight rates under CTA-13349 with Ms. Murray and she recalls calculating those freight rates from CTA-13349 (by reference to Schedule 1 of CTA-13349 which sets out specific rates over the approximate 5 1/2 year term of the agreement). She identified CTA-13349 as being the agreement in effect at the relevant time. It bears noting that Schedule 1, which references the rates, also includes the limitation of liability clause relied upon by CN.

**56**  That the freight rates specified under CTA-13349 applied to dealings between the parties was confirmed in a certain e-mail exchange between them in 2002. On April 8, 2002, consistent with her role in checking the billing rates under the confidential contract, Ms. Querner of Casco sent an e-mail questioning certain invoices issued by CN. That same day, Ms. Murray confirmed the correctness of those invoices in an e-mail back to Ms. Querner, which e-mail was copied to Mr. Utsumi:

... As per our contract the rate goes up 2% on April 1st, 2002. MHI agreed to this and Johnny/Atsuo signed on their behalf. I don't have a copy of the original contract but I can send you a copy if you need this.

**57**  Ms. Querner replied "OK. I have check [sic] the contract. Sorry I should checked before I sent the message". Mr. Utsumi did recall in his evidence that there was a rate change for the aircraft parts in 2000 or 2001 or 2002. The rates and increases discussed in this exchange of e-mails are the freight rates that were billed and paid, including the increase for April 2002, and all of which are derived from CTA-13349, as confirmed by Ms. Murray.

**58**  Ms. Querner has no recollection of seeing - or not seeing - any signatures on CTA-13349, whether they be from Mr. Utsumi, Mr. Boland or Mr. Onodera.

**59**  Another important document is an assignment of CTA-13349 executed on February 25, 2003. The assignment document specifically provides for an assignment by Casco of:

... all of its interest in Confidential Transportation Agreement No. 13349 made as of \_\_\_\_\_\_ between Casco Forwarding Limited and Mitsubishi Heavy Industries Ltd. as the "Customer", and Canadian National Railway Company ("CN") effective 07/12/2000 - 03/31/2006 ... a true copy of which is attached hereto as Schedule "A".

This assignment was executed by Casco in favour of P&O Ports Canada Inc. and was acknowledged by P&O Ports Canada Inc. that same day. A copy of CTA-13349 is attached to the assignment, but the copy attached is not as signed by Mr. Utsumi.

**60**  The assignment is executed by Mr. Weymark as President of Casco and is acknowledged by the President of P&O Ports Canada Inc. Mr. Weymark executed the assignment, along with many other documents, as part of the sale of Casco by BCR Marine (the parent company of Casco) to P&O Ports Canada Inc. He acknowledges his signature, but has no other specific recollection of the documentation or the surrounding circumstances, particularly as they relate to CTA-13349.

**61**  The bottom third of the assignment (relating to the consent of CN) bears certain handwriting of Ms. Murray. The consent is signed by Jacques Ruest, a Vice President of CN, as identified by Ms. Murray. Ms. Murray testified that she would have attached a copy of CTA-13349 to the assignment when the document was prepared.

**62**  Mr. Utsumi was never asked to sign an assignment of CTA-13349 on behalf of MHI.

**63**  In an e-mail dated January 31, 2003, copied to Mr. Onodera of Casco, Ms. Murray communicated to the lawyer handling the Casco/P&O Ports transaction regarding the need for the assignment. At that time, she was providing clarification regarding the assignment of "our contract with Mitsubishi Heavy Industries and Casco Forwarding (BCR Marine) to P&O Port Canada". She confirmed certain aspects of CTA-13349 and, in particular, stated that there was no volume commitment in the agreement. She further stated:

[t]he existing contract is indeed the entire contract, meaning there exists no additional or supplemental contracts, addendums.

**64**  In further e-mail exchanges in February 2003 related to the assignment, a Casco representative (Barry Wilson) presses for CN's consent to the assignment. Casco (Mr. Onodera) pursues this with Ms. Murray of CN. In this e-mail exchange, Casco (Mr. Wilson) confirms "[w]e received the consent from Mitsubishi Heavy Industries on February 5th". On February 19, 2003, Ms. Murray of CN confirmed that she had CN's consent in hand and that she was sending it to Casco (Mr. Onodera).

**65**  MHI denies that this is evidence that MHI did in fact consent to the assignment.

**66**  Ms. Murray also testified as to how shipments would originate. Customers were required to fill in a blank form which CN provided to its customers. Those forms were then filled in by the customers with information known only to the customer.

**67**  For the specific shipment of the 4115 Barrels, Ms. Querner of Casco prepared two "Memoranda" dated July 1, 2005 for each of the rail cars. These were intended to be an acknowledgement that a bill of lading had been issued for the shipment. This form, when filled out, was then faxed to CN's Winnipeg customer service center for billing purposes. The Memoranda filled out by Ms. Querner included the following information provided by Casco:

1. the accounts were to be mailed to Casco;
2. the "Shipper" was described at the top of the documents as "Mitsubishi Heavy Industries, c/o Casco Forwarding Limited";
3. there is a specific reference to "CONTRACT NO.: CN13349"; and
4. under "Shipper" at the bottom of the documents, the documents indicated "Casco Forwarding Ltd. O/B of Mitsubishi Heavy Industries, Chieko Querner-Tsuruta".

Ms. Querner specifically filled out the name of the shipper and the reference to CTA-13349 in these Memoranda.

**68**  The fact that Casco was filling out forms to transport goods for MHI in 2005, when there was supposedly an assignment from Casco to P&O Ports earlier in 2003, raises the question as to whether the assignment was ever effective. The answer to that question was not answered by the evidence and the validity of the assignment is not an issue in these proceedings. In any event, it is clear that Casco continued to be involved in the MHI shipments even past the date of the assignment as evidenced by these Memoranda.

**69**  The question of who is a "shipper" under s. 137(1) of the *Act* was addressed in *Canadian National Railway Company v. Sumitomo Marine & Fire Insurance Company Ltd.*, [*2007 QCCA 985*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JHT1-FG68-G0K3-00000-00&context=), leave to appeal to SCC refused, [*[2007] S.C.C.A. No. 490*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-F57G-S3B9-00000-00&context=), 32282 (February 28, 2008). In that case, Sanyo Canada Inc. ("Sanyo") retained TransX-Intermodal Ltd. ("TransX") to send goods from British Columbia to Quebec. TransX then sub-contracted the rail movement to CN for the purpose of transporting the goods by rail. TransX received the goods from Sanyo and issued a bill of lading denoting Sanyo as the shipper. A derailment occurred during the rail transportation by CN. Since Sanyo was insured by Sumitomo, Sumitomo sought recovery of the value of the goods.

**70**  A unanimous Quebec Court of Appeal found that the *Act* permitted a rail carrier to limit its liability by contracting with the shipper. The "shipper" was deemed to be the entity that "chose" to use a railway and had "effective control" in negotiating the terms of carriage: paras. 48-49. As a result, TransX, who had a long standing contractual relationship with CN, who had chosen CN and had effective control of the terms of carriage, was found to be the "shipper" and CN was able to limit its liability. Since Sumitomo was found not to be a "shipper", there was no privity of contract that would allow it to bring a cause of action against CN under the contract.

**71**  (The *Sumitomo* decision is in French. However, an English translation of portions of the decision is found in the Federal Court of Appeal's decision in *Boutique Jacob Inc. v. Canadian Pacific Railway Co.*, [*2008 FCA 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4C1-JWXF-20JD-00000-00&context=), [*375 N.R. 160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4C1-JWXF-20JD-00000-00&context=) as discussed below).

**72**  The issue was also addressed in *Boutique Jacob Inc. v. Pantainer Ltd.*, [*2006 FC 217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4B1-FG68-G46X-00000-00&context=), [*288 F.T.R. 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4B1-FG68-G46X-00000-00&context=), rev'd [*2008 FCA 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4C1-JWXF-20JD-00000-00&context=), [*375 N.R. 160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4C1-JWXF-20JD-00000-00&context=). Boutique Jacob had retained Pantainer Ltd., through its related company, Panalpina Inc., to transport certain goods from Hong Kong to Montreal. Pantainer in turn subcontracted with OOCL to carry the cargo that same distance. OOCL subsequently retained CPR under a confidential contract to carry the cargo by rail from Vancouver to Montreal. A derailment occurred while the cargo was being transported by CPR and the goods were damaged.

**73**  At the trial level (and before the appeal decision in *Sumitomo*), the Court dealt with the ability of the four defendants (Pantainer, Panalpina, OOCL and CPR) to limit their liability to Boutique Jacob. The trial judge in *Boutique Jacob* (beginning at para. 42) discussed the liability of CPR. de Montigny J. observed that, based on *Regulations* 4 and 5, CPR was "clearly liable for the loss or damage to the Plaintiff's cargo" (para. 43). CPR argued in part, however, that it could benefit from the terms and conditions in its confidential contract with OOCL and limit its liability.

**74**  The trial judge observed that having regard to s. 137 of the *Act*, there was no written agreement limiting liability between Boutique Jacob and CPR, nor did he consider that there was such an agreement between OOCL and CPR. He concluded that the "shipper", for purposes of the *Act*, was Boutique Jacob, not OOCL, who he considered simply a "carrier" (para. 45). He relied on the 2004 trial decision in *Sumitomo*, [*[2004] J.Q. no 11243*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JGY1-FC6N-X2V4-00000-00&context=). In any event, the trial judge concluded that, even if the confidential contract was in play, it did not operate to limit CPR's liability.

**75**  On appeal, the principal question related to the liability of CPR, including the question of who was the "shipper" in relation to CPR. The Federal Court of Appeal overturned the finding by the trial judge on this point and found that OOCL was the "shipper". The Court, after reviewing the statutory provisions under the *Act* reproduced above, agreed with the Quebec Court of Appeal's decision in *Sumitomo* and applied a "realistic" approach to a determination of who was the "shipper":

[46] Section 6 of the Act defines a "shipper" as "a person who sends or receives goods by means of a carrier or intends to do so". This broad definition must, in my view, be read in the context of the other provisions of the Act. This issue was squarely addressed by the Quebec Court of Appeal in *Canadian National Railway Company Ltd.*, above, wherein it concluded that the "shipper" within the meaning of section 137 of the Act was the person who directly contracted with the railway company. At paragraphs 48 and 49 of his Reasons for the Court, Dussault J.A. wrote the following:

[TRANSLATION]

[48] Reviewing these submissions, I note that the parties are debating the meaning and the scope that should be given to the notion of "shipper" defined at section 6 of the Act, without actually relying on the other terms of the Act. It is true that, based on its generality, the definition provided by this section -- "means a person who sends or receives goods by means of a carrier" -- may at first seem vague. However, if we review subsection 117(1), section 118, and subsections 121(1) and 164(2) of the Act, dealing with establishing tariffs and rates for the movement of goods, it is quite another matter.

[49] Therefore, reading subsection 121(1), I note that rates are determined either by joint tariff for the various rail carriers, by agreement or a confidential contract. In the latter case, paragraph 121(1)(*b*), section 126 and subsection 164(2) all state that it necessarily involves a relationship between the rail carrier and the shipper which, in fact, negotiates the terms of the rates with the carrier. Part IV of the Act, which provides for arbitration when a disagreement arises between the shipper and the carrier on the rates proposed or applied, indeed confirms this "realistic" perception of the notion of shipper. Subsection 164(2) states on this point that "Unless the parties agree otherwise, in rendering a decision the arbitrator shall have regard to whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the matter relates ...". The shipper is therefore the one that, given the possibilities available, made a concrete decision to call on a rail carrier rather than another carrier. In other words, the shipper has a direct connection and, especially, effective and real control over the negotiation of an agreement or contract made with the carrier.

[Emphasis added]

[47] Considering the grammatical and ordinary meaning of the word "shipper", section 6 of the Act and the scheme of the Act, I cannot but agree with the Quebec Court of Appeal's interpretation of the meaning of the word "shipper" found in section 137 and other provisions of the Act. Consequently, there can be no doubt that, in the present matter, the "shipper" was OOCL and not Boutique Jacob. In effect, not only was OOCL the entity which contracted directly with CPR by way of a confidential rate contract, it was OOCL which handed over the container to CPR in Vancouver. Thus, there was, as required by section 137, a written agreement between the railway carrier, CPR, and the "shipper", OOCL. The fact that OOCL was the carrier retained by Pantainer to carry the goods from Hong Kong to Montreal does not deter from the fact that OOCL was the "shipper" insofar as the contract of carriage by rail is concerned.

**76**  It is apparent, following *Sumitomo* and *Boutique Jacob,* that for purposes of s. 137(1) of the *Act*, a "realistic" approach should be taken in determining who the shipper is, having regard to: whether the entity has a direct contractual connection with the rail carrier; whether the entity made a decision or chose to call on the rail carrier for its services; and, whether the entity has effective and real control over the negotiation of an agreement made with the carrier.

**77**  The question here is thus - which of MHI, Fujitrans or Casco is the "shipper" in relation to CN as it relates to this shipment of aircraft parts?

**78**  In my view, MHI could hardly be described as the "shipper" in these circumstances. In accordance with Article 18 of the Master Transportation Agreement, MHI clearly intended that others (principally Fujitrans and possibly other subcontractors) would be responsible for transporting the aircraft parts, save for the ocean voyage. Again, Fujitrans was a freight forwarder, but was not a rail carrier.

**79**  In addition, there is no evidence that any person at MHI was involved in the specifics of arranging the transportation with CN. MHI introduced no evidence to suggest that it was involved in the decision to retain CN or that negotiations took place between MHI and CN to negotiate the terms of carriage of the aircraft parts. It is well acknowledged that MHI never had any direct dealings with CN.

**80**  There is no contractual relationship between MHI and CN, and MHI does not assert that any such relationship exists, despite MHI signing CTA-13349 by Mr. Utsumi/Fujitrans as attorney-in-fact. MHI also was not a party to the assignment - only Casco was. I am unable to conclude that MHI consented to the assignment despite some suggestion in the evidence to that effect.

**81**  MHI is clearly referenced in the Memoranda; however, CN submits that the use of the word "shipper" in this document should not be substituted for the interpretation of the term "shipper" under the *Act*. I agree. In my view, the proper interpretation of these documents is that Casco prepared this document and included references to MHI for its own purposes, but that all communications were to continue directly between Casco and CN. This recognizes the reality of the situation, consistent with the case law discussed above.

**82**  Ms. Murray confirmed in her evidence that CN's relationship with MHI was only "indirect" and that she referred to it as "MHI business" only in the sense of making clear who owned the aircraft parts. In fact, CTA-13349 specifically provided that MHI was the legal owner of the freight until delivered to and accepted by the consignee, Bombardier. In this context, the fact that MHI was asked to sign CTA-13349 was not an intention to create a direct relationship between CN and MHI.

**83**  I conclude that MHI is not the "shipper" for the purposes of the *Act*.

**84**  Discerning whether Fujitrans or Casco is the "shipper" is a closer call.

**85**  MHI concedes that there was an agreement between CN and Casco relating to the shipment of the goods.

**86**  In addition, there is no doubt that Mr. Utsumi of Fujitrans was involved to a certain extent in the dealings with CN. He met with Ms. Murray and he was involved in discussions about freight rates both with CN and Casco separately and when both were involved. He received copies of e-mails between Casco and CN discussing rate changes.

**87**  Ms. Murray, however, confirmed in her evidence that her dealings were mainly with Casco in terms of arranging for the transportation of the aircraft parts. While Mr. Utsumi may have had some involvement in the negotiation of the contract and the rates set out in that contract, Mr. Onodera and Ms. Querner were principally the people at Casco that she dealt with in terms of making these arrangements and also in relation to CN's performance under the contract. The e-mail chain from 2002 discussing the rate change under the contract is an example of this interaction. Ms. Querner's evidence is consistent with Casco having significant dealings with CN regarding the negotiation and payment of freight rates.

**88**  Mr. Utsumi confirmed that Mr. Onodera was the person at Casco who prepared the shipping contract and calculated the freight rates. This is consistent with Ms. Querner's evidence that her role related mainly to checking rates, but not negotiating these agreements herself. Mr. Utsumi confirmed that Casco was employed for the purpose of receiving the cargo off the ship and loading the aircraft parts onto the railcar, which was the responsibility of Fujitrans under the Master Transportation Agreement.

**89**  Fujitrans is not named as a party or "Customer" under either the earlier draft confidential contract or CTA-13349, although it appears to have been anticipated that Fujitrans would sign the draft contract.

**90**  As noted above, the Memoranda were filled out by Ms. Querner at Casco. The Memoranda are consistent with clause 3 of CTA-13349 which requires that a "Customer" or a "shipper" advise of the Contract Number when the rail car is released for shipment pursuant to the Contract and specifically, requires that all documents include a statement "Subject to CN's Confidential Transportation Contract No. 13349". That is exactly what Casco did in those documents.

**91**  Further, clause 2.B of CTA-13349 provides that the "Customer" represents to CN that it controls the traffic covered by the Contract and agrees to ship in accordance with the terms and conditions set out in the contract. It was Casco who was controlling the shipment in terms of arranging for the loading of the railcars for shipment with CN.

**92**  In support of its argument that it is unclear who the shipper is, MHI points out that Ms. Murray could find no client file for Casco - only one entitled "MHI/Bombardier". In my view, this is hardly determinative. In fact, it is consistent with Ms. Murray viewing MHI as the "indirect" customer as noted above. It does not address who she actually dealt with in terms of arranging for the shipments.

**93**  The way in which the assignment was drawn up and signed (by Casco only) is also consistent with Casco being the "shipper" in terms of representing who has the interest under CTA-13349 and who is the one bound by and making arrangements under that contract. It was a Casco representative and lawyer acting for Casco who dealt with CN in terms of obtaining CN's consent to that assignment. Fujitrans is not a party to that assignment.

**94**  MHI argues that the assignment is of little relevance since CTA-13349 provided in clause 10.C that:

Non-Assignment: This Contract shall not be assigned by any Party to this Contract.

**95**  However, I do not see that this restriction detracts from the fact that Casco was the one who was acting as the shipper with respect to CTA-13349. Clause 10.C clearly prohibited a unilateral assignment by one party without the consent of the other, but it would not have prevented a consensual assignment by the parties to the confidential agreement such as appears to have been intended, and accomplished, here. The evidence indicates that CN consented to the assignment.

**96**  After reviewing the entirety of the evidence of Mr. Utsumi, Ms. Querner and Ms. Murray and the relevant documentation, it is my view that, for the purposes of s. 137(1) of the *Act,* the "shipper" in respect of the arrangements for the transportation of MHI's aircraft parts is Casco, not Fujitrans.

**97**  The fact that Casco is, as stated by MHI, a "freight forwarder" or "intermediary" does not detract from this conclusion. Mr. Utsumi acknowledged that Fujitrans would receive the CN and Casco invoices directly from Casco and forward them to Japan. This is consistent with Casco providing the specific services relating to making arrangements for the transportation of MHI's aircraft parts on behalf of Fujitrans/MHI with CN, as was contemplated by the Master Transportation Agreement.

**98**  Fujitrans was employed by MHI to receive the cargo off the ship and load it onto rail cars to be transported to Ontario. Fujitrans then in turn subcontracted with Casco as the "other transport operator" under Article 18.1 of the Master Transportation Agreement with the intention that Casco would arrange for the rail transport with CN. In this way, Fujitrans simply acted as an intermediary in respect of these rail transportation arrangements and Mr. Utsumi's involvement in both the negotiation of rates and the later forwarding of the specifics of these rates and documents by CN and Casco relating to the rail transportation is consistent with this role.

**99**  I conclude that Casco is the "shipper" in relation to the CN shipments for the purposes of the *Act*.

***(b) Is there an agreement between CN and Casco, as "shipper", and is that agreement "signed" in accordance with the Act?***

**100**  There is no doubt that CN has been unable to produce a written agreement relating to the shipment of MHI's aircraft parts, whether CTA-13349 or otherwise, that has been "signed" by Casco in the traditional sense. In fact, it appears that CN searched for their copy of CTA-13349 and they were unable to find anything (beyond copies of the e-mails introduced as part of Ms. Murray's evidence).

**101**  MHI says that this fact must lead to the conclusion that CN is unable to bring itself within the parameters of s. 137(1) of the *Act* and as a result, CN's liability is not limited.

**102**  CN takes the position that the production of an agreement "signed" by Casco is not necessary in the circumstances. CN says that it may prove the existence of the agreement without the necessity of a signature by Casco and CN and that there is, in any event, no disagreement that an agreement exists between it and Casco.

**103**  CN points out that it expressly pled the existence of such an agreement and that it was not disputed by MHI. MHI does, however, take the position that no *signed* agreement exists.

**104**  CN relies principally on *Boutique Jacob* in support of its position. In that case, the trial judge stated that there was no written agreement limiting liability between OOCL and CPR (see para. 45). This was an odd statement given para. 24 of the Agreed Statement of Facts (see para. 1 of the decision) which referenced a Confidential Rate Contract between OOCL and CPR, however, it appears that the statement was based on the fact that the agreement produced at trial was not signed.

**105**  In any event, on appeal, having found that OOCL was the "shipper" who had made the arrangements for the rail transportation with CPR, the Federal Court of Appeal considered the alternate argument of Boutique Jacob that CPR could not limit its liability because no signed agreement had been produced. The Court rejected that argument:

[48] Counsel for Boutique Jacob argued, in the alternative, that even if we found that OOCL was the "shipper", CPR could not, in any event, limit its liability because the written agreement adduced in evidence was not signed. That argument is, in my view, without merit, as neither party to the confidential rate contract disputed the validity of their agreement.

[Emphasis added]

**106**  The application of the above statement from the Federal Court of Appeal is questionable in these circumstances. There, OOCL and CPR, the parties to the agreement, were parties to the litigation and neither was pressing the position that the confidential contract should be ignored by reason of the fact that it was not signed. Here, Casco is not a party to this litigation. Nor was there any evidence from Ms. Querner, the only Casco witness, that this was Casco's position. I would note, in any event, that Ms. Querner would have had no authority to do so since she is now retired and no longer in the employ of Casco.

**107**  CN submits that the evidence is overwhelming and uncontroverted that the damaged fuselage was moved by rail pursuant to CTA-13349 with the full knowledge and authority of MHI, Fujitrans and Casco and that there is clear and convincing evidence that both MHI and Casco were aware of CTA-13349 and the limitation of liability in that agreement.

**108**  CN relies on the following evidence:

1. although MHI pleads that it is not a party to any agreement with CN that would limit CN's liability, CTA-13349 identifies both MHI and Casco as the "Customers". Mr. Utsumi executed that agreement on behalf of MHI;
2. in 1976, MHI entered into a Master Transportation Agreement with Fujitrans, which specifically provided (Article 18) that Fujitrans could subcontract, with MHI's prior approval, all or part of the transportation contemplated by the Master Transportation Agreement;
3. Mr. Utsumi of Fujitrans testified that CTA-13349 (for the period 2000-2006) was signed by him under the line that says "Mitsubishi Heavy Industries (MHI)". This is confirmed when underneath his name he wrote "as agents of MHI" and then placed a stamp that included his name and the words "Attorney in-fact Fujitrans USA, Inc.". Mr. Utsumi testified that he would only use the stamp when he signed for a customer who had authorized him to sign the contract. He said that he was authorized to sign CTA-13449 by the person at Fujitrans who was in charge of the MHI business;
4. when Mr. Utsumi received CTA-13349 he sent it on to Fujitrans in Japan;
5. although Casco was named in CTA-13349 as a "Customer", there is no version of the contract available indicating the signature of Casco. However, in the context of the transfer of the Casco assets to P&O Ports Canada Inc., Casco, by Mr. Weymark's signature, executed an assignment of CTA-13349 in February, 2003. This was a significant commercial transaction with the benefit of legal advice. This step would only have been necessary if Casco considered it was a party to CTA-13349 and that the document represented the agreement between the parties;
6. Casco's representative stated that MHI had consented to the assignment of CTA-13349 to P&O Ports Canada Inc. in 2003;
7. CN consented to the assignment given its clear understanding that CTA-13349 was the operative agreement between it and its "Customers" (MHI and Casco, but principally Casco as the "shipper") in relation the transport of MHI's aircraft parts by rail;
8. by clause 2.B of CTA-13349, Casco represented to CN that it controlled the traffic covered by the contract and it agreed to ship the aircraft parts in accordance with the terms and conditions set forth therein. CN, for its part, acting solely as a contract carrier, agreed to transport the aircraft parts between Vancouver, B.C. and Downsview, Ontario and at the rates specified in Schedule 1;
9. in April, 2002, an exchange of e-mails took place between Casco and CN whereby Casco questioned the per car freight rates which were being charged by CN for the shipments. Casco thought the rate should be $10,390 and CN had invoiced $10,597. CTA-13349, for the period 2000-2006, provided for annual rate increases on April 1 of each year with the rate increasing on April 1, 2002 from $10,390 to $10,597. Casco (Ms. Querner) acknowledged in an e-mail exchange with Ms. Murray that, having checked CTA-13349, CN was correct in charging the rate of $10,597 as of April 1, 2002;
10. Ms. Querner, on behalf of Casco, completed the Memoranda in relation to the shipment of the 4115 Barrels on July 1, 2005 which specifically refers to the aircraft parts (including the part which ultimately was damaged in the derailment) and confirms that those goods were moving under CTA-13349. Casco, on behalf of MHI, was identified as the shipper by Ms. Querner. On the evidence, there is no dispute from Ms. Querner that there was an agreement (CTA-13349) pursuant to which the aircraft parts were moving by rail; and
11. Ms. Murray confirmed in her evidence that CTA-13349 was the agreement by which CN was transporting MHI's parts and was the operative agreement at the time of the derailment.

**109**  MHI agrees that the evidence shows that a contract existed between CN and Casco for the movement of freight.

**110**  In light of all of the evidence, I agree with CN's position and find that CN has proved, on a balance of probabilities, that there is a written agreement - CTA-13349 - between it and Casco relating to the shipment of MHI's aircraft parts.

**111**  In addition, I find that CTA-13349 clearly included the necessary limitation of liability clause upon which CN now seeks to rely. It must be kept in mind that MHI, Casco and CN are all sophisticated parties. Casco, in particular, had extensive experience in arranging for rail transportation and would have been fully aware of limitation of liability issues in respect of those arrangements. As stated earlier, the rates in CTA-13349, which were known to Mr. Utsumi on behalf of Fujitrans/MHI, and Mr. Onodera and Ms. Querner on behalf of Casco, were set out in the same schedule which contained the express and unambiguous limitation of liability in favour of CN.

**112**  The more difficult issue is whether CN has proven that this written agreement is "signed". As stated earlier, there has been no copy of CTA-13349 produced which bears the signature of a representative of either Casco or CN.

**113**  On these facts, the issue must be addressed based on an interpretation of the statutory provisions in s. 137(1) of the *Act*.

**114**  MHI submits, and I agree, that the wording of the *Act* must be given its plain and ordinary meaning.

**115**  Elmer Driedger set out the approach to be taken when interpreting the words of a statute in *Construction of Statutes*, 2d ed. (Toronto: Butterworths & Co. (Canada) Ltd., 1983) at 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

**116**  Mr. Justice Iacobucci, speaking for the Court, in *Bell ExpressVu Limited Partnership v. Rex*, [*2002 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4CN-00000-00&context=), [*[2002] 2 S.C.R. 559*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4CN-00000-00&context=), cited the above comments from Mr. Driedger and referred to them as Mr. Driedger's "definitive formulation". Iacobucci J. went on to state that:

[26] ..... Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [*[1984] 1 S.C.R. 536*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2335-00000-00&context=), at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [*[1994] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3FG-00000-00&context=), at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [*[1998] 1 S.C.R. 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3X1-00000-00&context=), at para. 21; *R. v. Gladue*, [*[1999] 1 S.C.R. 688*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M421-00000-00&context=), at para. 25; *R. v. Araujo*, [*[2000] 2 S.C.R. 992*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46G-00000-00&context=), [*2000 SCC 65*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46G-00000-00&context=), at para. 26; *R. v. Sharpe*, [*[2001] 1 S.C.R. 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46S-00000-00&context=), [*2001 SCC 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46S-00000-00&context=), at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [*[2002] 1 S.C.R. 84*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4B4-00000-00&context=), [*2002 SCC 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4B4-00000-00&context=), at para. 27.

**117**  Iacobucci J. also noted that in the context of federal legislation this approach is buttressed by s. 12 of the *Interpretation Act*, [*R.S.C. 1985, c. I-21*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9T1-JGBH-B3CT-00000-00&context=). Section 12 of the *Interpretation Act* provides:

**12**. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

**118**  The current case, as in the case of *Bell ExpressVu,* involves federal legislation.

**119**  Iacobucci J. further expanded on the Court's preferred approach to statutory interpretation by noting that this approach recognizes the importance of the *context* of the provision in question and in particular whether the provision is a component within a larger statutory scheme. He stated:

[27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [*[2001] 2 S.C.R. 867*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48T-00000-00&context=), [*2001 SCC 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48T-00000-00&context=), at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [*[1993] 2 S.C.R. 1069*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M38T-00000-00&context=), at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [*[1997] 1 S.C.R. 1015*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3VD-00000-00&context=), at para. 61, *per* Lamer C.J.)

**120**  It is clear from *Bell ExpressVu* that s. 137(1) must be read in the context of the *Act* and in its grammatical and ordinary sense in harmony with the statutory scheme and objects of the *Act*, and the intention of Parliament.

**121**  The *Act* provides that liability may be limited only by a "written agreement signed by the shipper". At first blush, that sounds simple enough. However, I see nothing in the wording in the *Act* that requires that a physical copy of the signed agreement be produced before a party may rely on it.

**122**  It should also be noted that there is no evidence that CTA-13349 was *not* signed by either CN or Casco.

**123**  During cross-examination by MHI, Ms. Querner gave evidence that she was not aware of certain other clauses in CTA-13349, such as a clause in Schedule 2 that required the Customer to indemnify CN for legal costs incurred in defending against claims by a third party arising from services provided by CN under the contract. Ms. Querner also stated that she could not remember the document at all, either with or without signatures. This evidence does not confirm, as suggested by MHI, that no signatures were ever obtained on it from CN or Casco. It simply reflects that Ms. Querner did not pay particular attention to the document given that her clerical role was more directed at ensuring that CN was using correct billing rates under CTA-13349.

**124**  Mr. Weymark's evidence is similarly inconclusive on this point, given his lack of recall with respect to CTA-13349. In addition, I do not view his lack of recall regarding the actual document attached to the assignment or that that document was unsigned to be relevant. Given the wording of the assignment, there can be no doubt but that the parties intended to assign Casco's interest in CT-13349, as opposed to any other agreement between Casco and CN.

**125**  Central to CN's arguments are what it contends are the policy reasons behind s. 137(1) of the *Act*. CN submits:

... the obvious policy of the Act is to ensure that, if there is to be a binding limitation of liability that could work against a shipper seeking full recovery of loss or damage suffered at the hands of a rail carrier, the shipper must have been made aware of the limitation in writing. The *Boutique Jacob* decision then assists the rail carrier to limit its liability in circumstances where the agreement containing the limitation provision was not "signed by the shipper" but was, without dispute, in play between the shipper and the carrier. It is submitted that the policy behind this law is not to allow the shipper the benefits of the confidential contract without taking the burden when it has been fully informed and has acknowledged its adherence to the contract.

**126**  It is clear that the words of s. 137(1) need to be interpreted with regard to the purpose and object of the *Act.* Insight into Parliament's intention and the policy reasons behind an enactment can come from a variety of different sources.

**127**  Section 5 of the *Act* itself sets out the national transportation policy and contains the following declaration:

**5.** It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

(*a*) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

(*b*) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

(*c*) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;

(*d*) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and

(*e*) governments and the private sector work together for an integrated transportation system.

**128**  The objectives set out in s. 5 suggest that the purpose of the *Act*, at least in part, was to promote competition in the transportation industry while providing a limited level of regulation. This is consistent with my earlier review of the legislative history which is set out earlier in these reasons in paras. 14-19.

**129**  In *Canadian Pacific Ltd. v. Canada (National Transportation Agency)*, [*[1992] F.C.J. No. 449*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M421-F900-G53N-00000-00&context=), [*[1992] 3 F.C. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-F873-B07B-00000-00&context=), the Federal Court of Appeal cited parts of s. 3(1) of the *National Transportation Act*, *1987*, which contained provisions similar to those found in s. 5 of the *Act*. Justice Linden then stated:

[10] It should be noted that there are novel features in this policy which, inter alia, promote intramodal railway competition, underscore that competition and market forces are the prime agents of an effective transportation system and protect shippers without limiting the opportunity of carriers to compete. Before the enactment of this Act in 1987, regulation of railway rates was more rigid, more public and rates were collectively set. With the page of the new Act, rates are no longer established collectively and publicly in all cases; they may be negotiated individually and confidentially. Rebates and specific rates are allowed, whereas they were not before. The system has been rendered more limber.

**130**  Linden J. then interpreted the statute according to this specific legislative policy and found that the *National Transportation Act*, *1987* promoted competition and negotiation of contractual terms, while still providing some protection to shippers. It should be noted that s. 153(1) of the *National Transportation Act*, *1987* was substantially the same as s. 137(1) of the *Act*.

**131**  Comments made by Mr. Young, then Minister of Transportation, during the second reading of Bill C-101, the bill that enacted the *Act*, also provide some insight into some of the policy objectives behind the *Act*: *House of Commons Debates,* 35th Parl., 1st Sess., No. 235 (2 October 1995) at 15078-15079. Mr. Young stated, in part:

Mr. Speaker, the government's vision for the future of transportation is clear and attainable. Our commitment is to take Canadian transportation into the 21st century on a more viable, integrated and competitive footing.

While we have protected shipper rights we have made amendments to give more precise direction to the regulatory agency in its decision making process. The government's view is that regulated solutions should only be a last resort.

The new legislation will put in place a policy that is consistent, transparent and fair and will enhance competition. Canada's transportation system must be modern, dynamic and as unrestricted as possible while maintaining the world class safety record we have earned over the years.

**132**  These quotes support the conclusion that Parliament's intention and the underlying policy reasons behind the *Act* was to promote competition in the transportation (including rail) industry and reduce regulation in that industry. This is consistent with s. 137(1) which allows parties to contract on terms that would reduce a railway company's liability from what it would otherwise be. However, it also appears that the *Act* was also intended to continue to provide some level of protection for shippers.

**133**  I conclude that the legislative purpose behind s. 137(1) of the *Act* was to protect shippers from being subject to a limitation of liability without having full knowledge and appreciation for the terms of such a limitation. Section 137(1) still allows for the parties to negotiate limitations on liability, but it must be clear what is being agreed to. This is consistent with the words of Mr. Young when he stated that the "new legislation will put in place a policy that is consistent, transparent and fair and will enhance competition". An interpretation of s. 137(1) as a means of protecting shippers from being subject to limitations on liability without having a full appreciation of what had been agreed too is consistent with the *Act* creating an environment that is "transparent and fair". The fact that s. 137(1) allows parties to negotiate and agree to a limitation in liability ensures that the legislative objective to enhance competition is also met.

**134**  Again, looking at the legislative objectives, I must consider what circumstances will support a finding that an agreement has been "signed". Various dictionary authorities support the argument that the act of "signing" has a meaning well beyond the simply affixation of a signature to a particular document.

**135**  *Black's Law Dictionary*, 9th ed., *sub verbo*"sign" defines "sign" as:

**1.** To identify (a record) by means of a signature, mark, or other symbol with the intent to authenticate it as an act or agreement of the person indentifying it <both parties signed the contract>. **2.** To agree with or join <the commissioner signed on for a four-year term>.

**136**  A previous version, *Black's Law Dictionary*, 4th ed., *sub verbo* "sign", defines "sign" with reference to a number of American cases. *Black's Law Dictionary*, 4th ed. defines "sign", in part, as:

To affix one's name to a writing or instrument, for the purpose of authenticating it, or to give it effect as one's act ... To make any mark, as upon a document, in token of knowledge, approval, acceptance, or obligation.

**137**  *The Canadian Law Dictionary*, *sub verbo* "signature" defines "signature" as:

The name of a person or something representing his name written, stamped or inscribed by himself or by someone properly deputised as a sign of agreement or acknowledgement. The act of putting down a man's name at the end of an instrument to attest its validity. A signature may also be a mark made by the party who is unable to write.

**138**  *The Oxford Canadian Dictionary*, 1998, *sub verbo* "sign" defines "sign" in part as:

*v.***1***tr. & intr.***a** write (one's name or initials etc.) on a document etc. to authorize or authenticate it. **b** mark (a document etc.) with one's name or autograph etc. to authorize or authenticate it.

**139**  The above definitions point to the term "sign", and by extension "signed", as including a form of acceptance or agreement with the terms set out in the document in question. Furthermore, *The Canadian Law Dictionary* defined "signature" as "a sign of agreement or acknowledgement".

**140**  In my view, these legislative objectives may still be met by allowing CN to prove, on a balance of probabilities that such a "signed" agreement existed, even though they are currently unable to produce a fully signed copy at this time.

**141**  The assignment of CTA-13349 by Casco plays an important role in meeting the requirements under s. 137(1) of the *Act*. In the present case, Mr. Weymark signed the assignment of CTA-13349 to P&O Ports Canada Inc. By doing so, he accepted and agreed with the terms in the assignment. The assignment clearly indicated that CTA-13349 had been made between Casco and MHI as the "Customer" and CN and was considered by Casco to be an extant agreement between it and CN. While it is somewhat unclear on the evidence, a copy of CTA-13349 was attached to the assignment. This was the document that clearly set out the basis upon which Casco and CN arranged for the rail services and upon which those rail services were provided.

**142**  Mr. Weymark's signature on the assignment is an indication or "sign" of both Casco's agreement and acknowledgement that the contract, CTA-13349, existed between Casco and CN and also Casco's agreement and acknowledgement of the underlying contractual terms of CTA-13349, which included the limitation of liability clause.

**143**  Section 137(1) of the *Act* requires a "written agreement signed by the shipper". Mr. Weymark's clear signature on the assignment provides a written, signed document by which Casco agrees with or acknowledges the underlying terms of CTA-13349. In this way, it can be said that Mr. Weymark's signature on the assignment represented the "signing" of CTA-13349 by Casco as the shipper.

**144**  This interpretation of the phrase "written agreement signed by the shipper" is consistent with the purpose of s. 137, which as stated above, is to protect shippers from being subject to a limitation of liability without having full knowledge and appreciation for the terms of such a limitation.

**145**  While no copy of CTA-13349 has been produced bearing Casco's signature, I am satisfied that CN has shown that Casco had sufficiently agreed to and acknowledged CTA-13349 - in other words, that Casco has "signed" CTA-13349 which includes the limitation of liability clause - so as to meet the requirements in the *Act*.

**146**  MHI submits, and I agree, that the requirement of a written signed agreement under s. 137(1) of the *Act* was intended to avoid the very problems that have arisen in this case. There is no doubt that CN could be criticized in respect of their record keeping, or lack thereof, in respect of this confidential contract.

**147**  MHI further submits that CN does not need the Court to find a solution to CN's difficulties given that they have other options for recovery. It is said that they could, if CTA-13349 is binding on Casco, enforce the clause that provides for the recovery of legal costs in defending third party claims. They also could have negotiated other indemnity provisions with Casco. CTA-13349 also provides that the Customer was to arrange for a waiver of subrogation in favour of CN and MHI suggests that CN could pursue Casco for failing to do this.

**148**  Finally, MHI suggests that CN could have required that Casco ensure that upstream contracts (such as between Casco/Fujitrans and Fujitrans/MHI) contain clauses limiting liability upon which CN could rely. These types of clauses are known as "Himalaya clauses" and apply when there are benefits in certain contracts of carriage which may protect third parties who are engaged by the carrier to fulfill that carrier's obligations under the contracts. These types of clauses were also in play in *Boutique Jacob* at paras. 37-38, 50 (FC), paras. 30, 59 (FCA) and a decision discussed in more detail below, *Cami Automotive, Inc. v. Westwood Shipping Lines Inc.*, [*2009 FC 664*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4D1-JC0G-61M4-00000-00&context=) at paras. 84-87, [*351 F.T.R. 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4D1-JC0G-61M4-00000-00&context=), aff'd [*2012 FCA 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4F1-JF75-M4BN-00000-00&context=), [*428 N.R. 382*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4F1-JF75-M4BN-00000-00&context=).

**149**  The short answer to these submissions is that these so called "solutions" do not exist for CN. There is no indemnity by Casco in relation to this claim, only one potentially relating to legal costs. There is no waiver of subrogation from MHI although I would note that MHI does not assert that it claims by way of subrogation. Finally, there is no "Himalaya clause" in the upstream contractual arrangements between MHI/Fujitrans/Casco which might benefit CN at this time.

**150**  Accordingly, CN must bring itself within the provisions of the *Act* in terms of its ability to rely on the limitation clause.

**151**  Here, a failure to produce a copy of CTA-13349 which has been signed by Casco raises little concern.

**152**  This is a document which Casco fully accepted as its own. It sought to assign this document to a third party and by doing so, fully acknowledged that it was a party to CTA-13349 and all its terms. At no time did Casco raise any issues concerning the clear and unambiguous limitation provision in favour of CN.

**153**  In my view, it would be a completely unfair and arbitrary result to hold in this case that a simple failure to produce the written document with signatures should deny the benefit of the limitation clause which CN negotiated in good faith with its contractual partner, Casco. This is nothing more than a "form over substance" result which does not do justice between the parties.

**154**  I would also note that this result does no violence to the intent and purpose of the *Act*. The requirements under the *Act* were intended to ensure that contracting parties had written notice of any limitations sought by the railway company as part of the negotiation process. It avoids arrangements where the rail carrier alleges a verbal agreement to limit its liability and the shipper must attempt to refute that contention without the benefit of documentation. Here, there is clear written documentation which was known to both parties and which documentation was the basis upon which they performed their respective contractual obligations.

**155**  Accordingly, I find that the requirement in s. 137 of the *Act* has been met in that CN has proven a written agreement signed by Casco as the shipper.

***(c) If there is an agreement between CN and Casco, is MHI entitled to advance its tort claim against CN in any event?***

**156**  This issue involves an analysis as to whether, as contended by CN, MHI is bound by the limitation in CTA-13349. CN further contends that MHI has explicitly, or implicitly, agreed to be so bound.

**157**  There could have been no doubt in MHI's mind, based on the description of Fujitrans' business by Mr. Utsumi, that Fujitrans would be subcontracting the rail movement of MHI's aircraft parts and specifically, the 4115 Barrels. Fujitrans itself was not a rail carrier.

**158**  Pursuant to Article 18 of the Master Transportation Agreement, Fujitrans was required to obtain MHI's consent to the subcontracting of all or part of the transportation.

**159**  CN says that there is ample evidence that MHI consented to the subcontracting of the Vancouver vessel offloading, the loading to rail transport and, more specifically, the rail transportation, by Fujitrans to Casco.

**160**  CN says, in particular, that:

1. the Master Transportation Agreement specifically contemplated that Fujitrans could subcontract all or part of the transportation of the aircraft parts with MHI's approval;
2. Mr. Utsumi of Fujitrans USA was authorized and instructed to sign and did sign CTA-13349 on behalf of MHI, which agreement was between CN, Casco and MHI;
3. Mr. Utsumi forwarded a copy of CTA-13349 to his Japan office where the Fujitrans representative for MHI was located;
4. Mr. Utsumi was well aware that CN was acting under the contractual terms of CTA-13349. He was aware of the specifics of the contractual arrangements between Casco and CN. He was also aware of discussions concerning rates being charged under CTA-13349 and he would forward invoices from both CN and Casco to Fujitrans' Japan office; and
5. Casco's representative indicated that MHI later consented to the assignment of CTA-13349 by Casco to P&O Ports Canada.

**161**  CN relies on *Boutique Jacob*. At the trial level, the Court addressed the subcontracting issue. Boutique Jacob's contractor, Pantainer, was specifically entitled to subcontract "on any terms" and it did subcontract with OOCL. CPR argued that this meant that Boutique Jacob was bound by the limitation clauses found in documentation between Pantainer and OOCL and also, between OOCL and CPR.

**162**  The Court agreed:

[26] The issue has been well defined by Lord Denning in *Morris v. Martin*, [1966] 1 Q.B. 716, at p. 729-730), a decision that has been quoted to me both by the Plaintiff and the Defendant OOCL. In that case, the Plaintiff had sent her mink stole to a furrier to be cleaned; the furrier did not clean it himself but telephoned to the Plaintiff and offered to send it away to a reputable cleaner to be cleaned, which she accepted. That cleaner, known to the Plaintiff, only worked for the trade and not for the private individuals. While the fur was with the cleaner it was stolen by one of their servants. The question was whether the limitation clauses in the cleaning contract could be opposed to the Plaintiff:

Now comes the question: Can the cleaners rely, as against Mrs. Morris, on the exempting conditions, although there was no contract directly between them and her? There is much to be said on each side. On the one hand, it is hard on Mrs. Morris, if her just claim is defeated by exempting conditions of which she knew nothing and to which she was not a party. On the other hand, if is hard on the cleaners if they are held liable to a greater responsibility than they agreed to undertake. (...) The answer to the problem lies, I think, in this: the owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise. (...) In this case, Mrs. Morris agreed that Mr. Beder should send the fur to the cleaners, and by so doing I think she impliedly consented to his making a contract for cleaning on the terms usually current in the trade.

[27] In a maritime law context, the Privy Council also held that the authorization to sub-contract the whole or any part of the carriage of the goods "on any terms" demonstrated that the owner had "expressly consented" to the sub-bailment of their goods on any terms, and that the scope of that express consent was broad enough to include an exclusive jurisdiction clause (See *K.H. Entreprise (The) v. Pioneer Container (The)*, [1994] 2 A.C. 324; see also *Singer Co (U.K.) Ltd. v. Tees and Hartlepool Port Authority*, [1988] 2 Lloyd's Rep. 164).

[28] These principles have been incorporated into Canadian law on numerous occasions: see, for example, *Punch v. Savoy's Jewellers Ltd. et al.* [*(1986), 14 O.A.C. 4*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-FGY5-M314-00000-00&context=) (Ont. C.A.); *Bombardier Inc. v. Canadian Pacific Ltd.* [*(1991), 85 D.L.R. (4th) 558*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G3SV-00000-00&context=) (Ont. C.A.). In this last case, Mitsubishi had consigned three containers of its cargo to N.Y.K. for carriage from Kobe, Japan to Mitsubishi's agent at Montreal and from thence to its final destination, Bombardier at La Pocatière, Québec. This was authorized by an ocean bill of lading which provided that the goods were to be shipped in the vessel named "and/or other means of transport". The cargo was carried by ship to Vancouver and discharged into the custody of CPR for transport by rail to Montreal. The train was derailed without the Appellant's ***negligence***. The Court found that Mitsubishi had expressly authorized the sub-bailment and was as much bound by the terms and conditions of the CPR bill of lading as if it had executed the document as shipper itself. It is immaterial, for the purposes of this analysis, that the standard bill of lading that was used at the time by CPR contained the terms prescribed by the Canadian Transport Commission instead of the terms mutually agreed by the parties, as is now the case.

[29] The question that must be answered, therefore, is whether Jacob and Pantainer have expressly or implicitly consented to OOCL's terms and conditions. Neither Jacob nor Pantainer have admitted that they had actual knowledge of OOCL's terms and conditions, which are found on its website. The fact remains that Pantainer, through Panalpina (China) Ltd., and Panalpina Inc., have a history of prior dealings, particularly with respect to cargo from the Far East. OOCL's documentation alerts any reader, such as Pantainer, to the existence of OOCL terms subject to the applicable tariff, which can easily be found on its website. Pantainer admits using the OOCL website for other purposes related to booking and tracking cargoes. Anyone in Pantainer or in the Panalpina group could have found out by clicking onto the "B/L Terms" icon on the website (see Agreed Facts, paras. 18-23).

[30] Given the circumstances, I agree with counsel for OOCL that Pantainer must be taken to have knowledge of its standard terms due to previous dealings, the course of dealing and the fact that nothing in the terms that OOCL relies on is unduly burdensome or unconscionable in the commercial context. In fact, as we shall see shortly, the limitations found in OOCL's terms are very similar in scope and application as those in Pantainer's terms.

[31] Counsel for the Defendant OOCL has quoted to me a number of cases establishing that the party entering into a contract for the shipping of goods must be presumed to know that the terms and conditions are to be found on the bill of lading. The most relevant of those authorities, in Canadian law, is the decision of the Supreme Court in *Anticosti Shipping Co. v. St. Amand*, [*[1959] S.C.R. 372*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X2SD-00000-00&context=). In that case, the Plaintiff, through his agent, had entered into a contract of carriage with the defendant for the transport by sea of his truck. A bill of lading was filled out at the time but apparently no original or copy of it was given to the agent. The original of the bill was not signed and became mislaid. The truck was damaged through the fault of the defendant and action was brought for loss of its use during the time repairs were carried out. In the Supreme Court, the main question was whether the contract for the carriage by water of the truck was or was not covered by a bill of lading within the meaning of the Rules relating to bills of lading contained in the schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291. Rand. J., on behalf of the court, wrote:

When Riddell requested the shipment to be made, what terms could he possibly have had in mind other than those on which invariably goods were carried by the company? His bald request implies, carry this truck "according to your regular practice". How can we possibly say that anything else could be intended? It was an ordinary transaction, and if, as the respondent's agent, he did not see fit to demand a bill of lading - as by art. III rule (3) he had the right to do - it cannot affect what on both sides was contemplated. (pp. 374-375)

[32] There is no need to belabour this point, since the case law is replete with illustrations of this principle. This is particularly apposite when the parties are sophisticated shippers and businesses, as opposed to private individual as in *Punch*. The fact that these terms and conditions could only be accessed through the Internet is irrelevant; in an age where computerized transactions are ever more pervasive, it would be disingenuous for a commercial enterprise like Pantainer to claim that they were unaware of OOCL's terms and conditions, especially when they admit having made frequent use of OOCL's online services (Agreed Facts, para. 23).

[33] As for Jacob, they are bound by Pantainer's bill of lading according to which Pantainer can subcontract "on any terms". The terms and conditions found in OOCL waybill are of the type that would ordinarily be expected to be found in that sort of contract, and are certainly not unreasonable or unconscionable. Moreover, these terms are very similar to those accepted by Jacob in Pantainer's bill of lading. Consequently, Jacob cannot argue that they were taken by surprise and that they could not foresee the OOCL's limitations.

[Emphasis added.]

**163**  The finding of the trial judge in *Boutique Jacob* on this point was upheld by the Federal Court of Appeal:

[52] It is also important to restate what the Judge clearly said in his Reasons, i.e. that by reason of the sub-contracting clause found in Pantainer's bills of lading (clause 3.1 thereof), Boutique Jacob was clearly informed of the possibility that the whole or part of the carriage of its good would be executed by sub-carriers and that they would perform their obligations subject to terms and conditions applicable to it. Hence, Boutique Jacob knew or ought to have known that the railway portion of the carriage might be performed by a sub-carrier whose terms and conditions would apply to it.

.....

[55] CPR says that by reason of Tariff CPRS 7589, which was incorporated in the confidential rate contract, it is entitled to limit its liability to that found in OOCL's bill of lading. In my view, CPR's submission must succeed. As I indicated earlier, Boutique Jacob knew or ought to have known that the contract of carriage undertaken by Pantainer might be sub-contracted to others whose terms and conditions would be applicable to it. The provisions found in Tariff CPRS 7589 are such terms and conditions.

[Emphasis added.]

**164**  The law as stated by the Federal Court of Appeal in *Boutique Jacob* was applied in *Cami Automotive*. Cami Automotive was the shipper who had engaged Westwood Shipping Lines ("WSL") to complete certain shipments from Japan to Ontario. WSL and CN had in turn entered into a confidential contract relating to the shipment of the goods from Vancouver to Ontario. The WSL/CN confidential contract included certain limitations.

**165**  Cami Automotive was not aware of the terms of the confidential contract, but it was aware that WSL would be subcontracting the carriage of the goods from Vancouver to Ontario to CN.

**166**  The Court found that Cami Automotive was bound by the limitation clauses in the WSL/CN confidential agreement:

[64] The Plaintiffs are not parties to the Confidential Contract entered into between WSL and CN. The question is, whether absent privity of contract between CN and the Plaintiffs, can CN nevertheless rely on the Confidential Contract with WSL to limit its liability to the Plaintiffs. The English jurisprudence has addressed the issue of lack of privity of contract in the context of bailment. In *Morris v. Martin,* [1966] 1 Q.B. 716, the English Court of Queen's Bench held that an owner, in suing a sub-bailee for reward, is bound by the terms of the contract between the bailee and sub-bailee if the owner had expressly or impliedly consented to the terms of the subcontract. This approach was adopted in Canada in the context of contracts for the carriage of goods by sea, and most recently followed in *Boutique Jacob Inc. v. Canadian Pacifique Railway Co.,* [*2008 FCA 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4C1-JWXF-20JD-00000-00&context=) (*Boutique Jacob* (FCA)).

[65] At first instance, in *Boutique Jacob Inc. v. Canadian Pacifique Railway Co.,* [*2006 FC 217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4B1-FG68-G46X-00000-00&context=) (*Boutique Jacob* (FC)), Mr. Justice de Montigny wrote at para. 27 of his reasons: [quoted above]

[66] The above finding is undisturbed on appeal. Here, as in *Boutique Jacob*, the owner Cami agreed that, "[t]he OCEAN CARRIER shall be entitled to subcontract on any terms the whole or any part of the handling and CARRIAGE of the GOODS" (emphasis added). As in *Boutique Jacob*, this indicates that Cami has expressly consented to the terms of the sub-bailment to CN.

[67] In Canada, the liability of rail carriers is governed by the *Canadian Transportation Act* (1996, c. 10) (the CTA). Pursuant to section 137 of the CTA, a rail carrier may only limit its liability by way of a written agreement signed by the shipper. In *Boutique Jacob* (FCA), at para. 47, it was found that the shipper, for the purposes of the CTA, is the entity which directly contracts with the rail carrier. In that case, as in this case, it is the ocean carrier who is the shipper for the purposes of the CTA. It follows, therefore, that since the Confidential Contract is signed by WSL, the ocean carrier, this would satisfy the section 137 requirement of the CTA. The Confidential Contract is a written contract signed by the shipper.

[68] Therefore, it appears that a rail carrier may bind an owner of goods to the terms of a sub-contract in accordance with the principles of bailment mentioned above. In *Boutique Jacob* (FCA) the Court found that Boutique Jacob (the owner) was bound to the tariff found in the Confidential Contract between OOCL (the ocean carrier) and Pacific Rail, a common carrier. ...

......

[80] ... Therefore, the Plaintiffs, having agreed to allow WSL to subcontract on any terms, are bound by the terms of the confidential Contract which limits CN's liability in accordance with the Regulations.

.......

[82] In the present case, the relevant terms of the subcontract are those which limit CN's liability in accordance with the Regulations. Since the Regulations are issued pursuant to the CTA, they should be familiar to all in the industry and are not, in my view, onerous or unreasonable. Nor can it be said that anyone has been taken by surprise.

**167**  On the particular facts of *Cami*, CN was unable to rely on an exclusion provision in the confidential contract for reasons that are not relevant here.

**168**  The reasons in *Boutique Jacob* and *Cami* illustrate that there are various ways by which an owner of shipped goods may be bound by a limitation found in the contractual arrangements of other parties. For the purposes of this discussion, I will address a simplified set of relationships: A is the owner of the goods, B is the freight forwarder or "shipper"; C is the rail carrier. There is a contractual relationship between A and B, and between B and C. However, there is no contractual relationship between A and C.

**169**  The basis upon which A, the owner of the goods, may be bound by a limitation of liability agreed between B and C is based upon two concepts: knowledge and consent. There are a number of ways by which A, the owner, is taken to have known of and agreed to the limitation of liability.

**170**  Firstly, the owner may have specifically authorized the subcontracting of further transportation services "on any terms" or in similar broad language that allowed the contractor to use its discretion to make these arrangements. As such, an owner will be bound by clauses where knowledge of and consent to the limitation can be imputed or implied, such as through industry standards or general knowledge as to the basis upon which subcontractors contract and where such clauses are not commercially unconscionable (see *Boutique Jacob*, paras. 29-33 (FC), paras. 19, 52 (FCA) and *Cami*, paras. 80, 82). Secondly, it may be shown that the owner has express knowledge as to the basis upon which the further contractual arrangements have been made and consents to those arrangements.

**171**  I agree that MHI must be taken to have either impliedly or expressly consented to the subcontracting by Fujitrans to Casco, and Casco's further subcontracting in favour of CN.

**172**  Article 18 of the Master Transportation Agreement, which allowed the subcontracting to occur, contained no restriction on the terms of any such subcontracting. However, unlike the contracts in the authorities discussed above, the Master Transportation Agreement did not state that such subcontracting could take place "on any terms". MHI controlled such subcontracting by requiring their consent on any such subcontract.

**173**  As such, if such consent can be implied, MHI must be taken to have agreed to such terms as may have been negotiated between Casco and CN, provided that they were reasonably within industry standards and were commercially reasonable. MHI does not suggest in any way that the limitation clause under CTA-13349 is otherwise.

**174**  In addition, the limitation clause in this case was specifically known to MHI, given Mr. Utsumi's execution of CTA-13349 on the authority of MHI, through Fujitrans' Japan office. Mr. Utsumi later forwarded CTA-13349 to Japan. MHI does not deny that they ultimately received the document. In fact, Mr. Utsumi had a previous draft of CTA-13349 from the 1996/97 time frame in his possession well before the derailment, which draft included the same limitation of liability clause found in the later contract.

**175**  There is therefore no doubt that MHI had express knowledge of CTA-13349 and its terms. That knowledge would include the limitation of liability clause found in that document.

**176**  Accordingly, even if MHI had argued that this limitation clause was not "standard" in the sense of being in CN's normal confidential contract or normal in the industry, MHI's actual knowledge of that term imports to them indisputable knowledge of the limitation clause. In the face of that knowledge, MHI continued to ship its aircraft parts under CTA-13349, knowing that such a limitation would apply. Consent was therefore given by MHI as to the terms by which the CN shipments would occur.

**177**  In accordance with the reasoning of *Boutique Jacob* and *Cami*, and given the undisputed facts concerning MHI's knowledge of and consent to the terms of CTA-13349, including the limitation in favour of CN, MHI is bound by that limitation even without any privity of contract between it and CN.

**Conclusion**

**178**  Accordingly, I find that the question posed in the order of Mr. Justice Verhoeven - whether CN has the benefit of a limitation of liability provision set out in a contract between CN and Casco - is to be answered in the affirmative.

**179**  Costs of this portion of the trial are awarded to CN in any event of the cause.

S.C. FITZPATRICK J.

**End of Document**

[***MTU Maintenance Canada Ltd. v. Kuehne & Nagel International Ltd., [2006] B.C.J. No. 2775***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2JD-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Bauman J.

Heard: August 23, 2006.

Judgment: October 24, 2006.

Vancouver Registry No. S062470

**[2006] B.C.J. No. 2775** | 2006 BCSC 1573 | 62 B.C.L.R. (4th) 341 | 34 C.P.C. (6th) 246 | 153 A.C.W.S. (3d) 109 | 2006 CarswellBC 2593

Between MTU Maintenance Canada Ltd., Plaintiff, and Kuehne & Nagel International Ltd. and Norman G. Jensen, Inc., Defendants

(37 paras.)

**Case Summary**

**International law and conflict of laws — Jurisdiction — Determination of — Real and substantial connection — Application by defendant Jensen Inc. for dismissal of action against it and order setting aside service of pleadings dismissed — Jensen, a US company, was sued by BC plaintiff for breach of contract and *negligence* — Defendant was hired as subcontractor for customs clearing service for movement of engine parts for plaintiff into and out of US — Statement of claim clearly alleged facts which bought case within s. 10 of Court Jurisdiction and Proceedings Transfer Act — Real and substantial connection between British Columbia and those facts was presumed under Act — Court Jurisdiction and Proceedings Transfer Act, s. 10.**

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| --- |
| Application by defendant Jensen Inc. for dismissal of action against it and order setting aside service of pleadings -- Jensen, a US company, argued court had no jurisdiction in action against it -- Plaintiff, a BC company, contracted with defendant Kuehne & Nagel for customs clearing service for movement of engine parts into and out of US -- Kuehne subcontracted much of the work to Jensen, a customs broker and freight forwarder -- Plaintiff's claim for breach of contract and ***negligence*** involved services and advice given by defendants -- Plaintiff argued BC's territorial competence was established based on factors in s. 10 of Court Jurisdiction and Proceedings Transfer Act as case involved contractual obligations to be performed in British Columbia, a tort committed in British Columbia and a business carried on in British Columbia -- HELD: Application dismissed -- Statement of claim clearly alleged facts which bought case within s. 10 -- Real and substantial connection between British Columbia and those facts was presumed under Act -- Although Jensen denied many of the allegations in statement of claim, it admitted that it did provide certain services to plaintiff -- Plaintiff had pleaded jurisdictional facts sufficient, with aid of s. 10 presumption, to establish a real and substantial connection to Jensen and cause of action -- Tort of alleged negligent misrepresentation advanced in pleadings occurred in BC, jurisdiction in which the advice was received. |

**Statutes, Regulations and Rules Cited:**

Court Jurisdiction and Proceedings Transfer Act, [*S.B.C. 2003, c. 28, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FGJR-216G-00000-00&context=)(2), s. 3(e), s. 10, s. 10(e), s. 10(g), s. 10(h)

**Counsel**

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| **BAUMAN J.** |

**I**

**1**  Norman G. Jensen, Inc. ("NGJ") is a Minnesota company joined as a defendant in these proceedings. It submits that the court does not enjoy jurisdiction *simpliciter* in the action against it and it brings application to set aside service of the pleadings and to dismiss the action.

**2**  The ***Court Jurisdiction and Proceedings Transfer Act***, *S.B.C. 2003, c. 28* (the "***Act***"), in force as of 4 May 2006, is engaged.

**3**  I will expand upon the nature of the litigation below but, briefly, the plaintiff ("MTU"), a company carrying on business out of facilities in Richmond, British Columbia, is a provider of independent commercial aircraft engine services.

**4**  The plaintiff contracted with the defendant, Kuehne & Nagel International Ltd. ("K & N") for customs clearance services for the movement of engine parts into and out of the United States. K & N, in turn, subcontracted much of the work to NGJ, a customs broker and international freight forwarder. The claim arises out of those services and the advice allegedly given to the plaintiff in connection therewith.

**II**

**5**  Prior to the ***Act***, the modern law of jurisdiction *simpliciter* began with the Supreme Court of Canada's decision in ***Morguard Investments Ltd. v. De Savoye***, [*[1990] 3 S.C.R. 1077*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-601H-00000-00&context=) and its adoption of the real and substantial connection test. That is, a court has jurisdiction *simpliciter* over a case when there is a real and substantial connection between the court and the defendant or the subject matter of the litigation: (amongst others see ***Furlan v. Shell Oil Co.***, [*[2000] B.C.J. No. 1334*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2293-00000-00&context=), [*2000 BCCA 404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2293-00000-00&context=) at paragraph 3).

**6**  Prior to the promulgation of the ***Act***, "the correct approach" to the question of jurisdiction *simpliciter* was summarized by Justice Smith in ***Roth v. Interlock Services, Inc.***, [*[2004] B.C.J. No. 1514*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X08C-00000-00&context=), [*2004 BCCA 407*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X08C-00000-00&context=) at paragraph 15:

[15] The correct approach to the question of jurisdiction simpliciter is outlined in two decisions of this Court which were pronounced the same day: ***Furlan v. Shell Oil Co.*** [*(2000), 77 B.C.L.R. (3d) 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2293-00000-00&context=), [*2000 BCCA 404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2293-00000-00&context=) at paras. 14-16, leave to appeal to S.C.C. refused, [*[2000] S.C.C.A. No. 476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G435-00000-00&context=), and ***AG Armeno Mines and Minerals Inc. v. PT Pukuafu Indah*** [*(2000), 77 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2294-00000-00&context=), [*2000 BCCA 405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2294-00000-00&context=) at paras. 14, 19. The first step is to examine the plaintiff's pleading to determine whether it alleges "jurisdictional" facts sufficient to establish a real and substantial connection to the defendant or to the cause of action. Affidavit evidence of facts relevant to jurisdiction *simpliciter* is admissible when the facts are not alleged in the plaintiff's pleading because they are not material facts, or when they are, are not particularized in the pleading in sufficient detail to enable determination of the issue. If those unpleaded jurisdictional facts are contentious, the plaintiff bears the burden of showing a good arguable case that they can be established. Affidavit evidence is also admissible for the purpose of demonstrating that the plaintiff's claim is tenuous and without merit. In that situation, the plaintiff must show a good arguable case.

[See also ***Uninet Technologies Inc. v. Communication Services Inc.*** [*(2005), 38 B.C.L.R. (4th) 366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M40X-00000-00&context=) (C.A.).]

**7**  The Ontario Court of Appeal provided a treatise on the law of assumed jurisdiction in ***Muscutt v. Courcelles*** [*(2002), 60 O.R. (3d) 20*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1YC-00000-00&context=).

**8**  Justice Sharpe for the court (with Rosenberg and Feldman JJ.A.) concluded that one cannot reduce the real and substantial connection test to a fixed formula - it requires a considerable measure of judgment and flexibility (paragraph 75):

[76] But clarity and certainty are also important. As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative. Rather, all relevant factors should be considered and weighed together. In my view, a weighing of the factors in the present case favours the assumption of jurisdiction against the out-of-province defendants in this case.

(paragraph 76)

**9**  Justice Sharpe identifies these eight factors:

1. *The connection between the forum and the plaintiff's claim*

[77] The forum has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors. ...

1. *The connection between the forum and the defendant*

[82] If the defendant has done anything within the jurisdiction that bears upon the claim advanced by the plaintiff, the case for assuming jurisdiction is strengthened.

1. *Unfairness to the defendant in assuming jurisdiction*

[86] ... Some activities, by their very nature, involve a sufficient risk of harm to extra-provincial parties that any unfairness in assuming jurisdiction is mitigated or eliminated.

1. *Unfairness to the plaintiff in not assuming jurisdiction*

[88] The principles of order and fairness should be considered in relation to the plaintiff as well as the defendant. ...

1. *The involvement of other parties to the suit*

[91] ... The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations. ...

1. *The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis*

[93] ... Every time a court assumes jurisdiction in favour of a domestic plaintiff, the court establishes a standard that will be used to force domestic defendants who are sued elsewhere to attorn to the jurisdiction of the foreign court or face enforcement of a default judgment against them. ...

1. *Whether the case is interprovincial or international in nature*

[95] The decisions in *Morguard, Tolofson* and *Hunt* suggest that the assumption of jurisdiction is more easily justified in interprovincial cases than in international cases. ...

1. *Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere*

[102] One aspect of comity is that in fashioning jurisdictional rules, courts should consider the standards of jurisdiction, recognition and enforcement that prevail elsewhere. ...

**10**  This brings us to the ***Act***.

**11**  It has been judicially considered by Justice Davies in the context of a forum *non conveniens* argument in ***Lloyd's Underwriters v. Cominco Ltd. et al.***, [*[2006] B.C.J. No. 1917*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3MH-00000-00&context=), [*2006 BCSC 1276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3MH-00000-00&context=).

**12**  Justice Davies noted that by s. 2(2) of the ***Act***, "the territorial competence of a court is to be determined solely by reference" to the ***Act***.

**13**  My colleague found it appropriate to quote the Attorney General, the Hon. G. Plant, on the introduction of the Bill in the legislative assembly:

I'm pleased to introduce the Court Jurisdiction and Proceedings Transfer Act. This statute is based on a uniform act prepared by the Uniform Law Conference of Canada at the request of the provincial and territorial ministers responsible for justice. The purpose of the bill and the uniform act upon which it is based is to establish clear and harmonized statutory rules to accord with the principle enunciated by the Supreme Court of Canada respecting the basis upon which a court in a province or territory may properly hear and determine a matter upon which its decision is sought.

(See: British Columbia, Legislative Assembly, *Hansard*, 2003, Vol. 14 No. 4 (8 April 2003) at 6123.

**14**  Davies J. was dealing with s. 11 of the ***Act***, but his comments on its interpretation are apposite:

[102] I am accordingly satisfied that the provisions of s. 11 of the ***CJPTA*** should be considered to be part of a comprehensive remedial statutory scheme that is intended to codify the determination of jurisdictional issues in British Columbia. As such the provisions of s. 11 should be interpreted as being informed by but neither dictated nor constrained by the existing case law. Expression must be given to the statutory provisions by means of a fair, large and liberal construction and interpretation that best ensures that the objects of the legislation are attained. See: s. 8 of the ***Interpretation Act***, *R.S.B.C. 1996, c. 238*.

**15**  I have already noted the direction in s. 2(2) of the ***Act***. Section 3(e) provides:

**3** A court has territorial competence in a proceeding that is brought against a person only if

...

1. there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

**16**  Section 10 of the ***Act*** sets out circumstances where a substantial connection is presumed to exist. I reproduce the subsections which are relevant on the facts before me:

**10** Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

...

1. concerns contractual obligations, and
2. the contractual obligations, to a substantial extent, were to be performed in British Columbia,
3. by its express terms, the contract is governed by the law of British Columbia, or
4. the contract
5. is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
6. resulted from a solicitation of business in British Columbia by or on behalf of the seller,

...

1. concerns a tort committed in British Columbia,
2. concerns a business carried on in British Columbia,

...

**17**  Because the ***Act*** is the product of the Uniform Law Conference of Canada, it is helpful to refer to its commentary on s. 10 in the draft uniform act which is almost identical to the corresponding section in the British Columbia legislation:

**10.1** The purpose of section 10 is to provide guidance to the meaning of "real and substantial connection" in paragraph 3(e). Instead of having to show in each case that a real and substantial connection exists, plaintiffs will be able, in the great majority of cases, to rely on one of the presumptions in section 10. These are based on the grounds for service ex juris in the rules of court of many provinces. If the defined connection with the enacting jurisdiction exists, it is presumed to be sufficient to establish territorial competence under paragraph 3(e).

**10.2** A defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial Conversely, a plaintiff whose claim does not fall within any of the paragraphs of section 10 will have the right to argue that the facts of the particular case do have a real and substantial connection with the enacting jurisdiction so as to give its courts territorial competence under paragraph 3(e). ...

**10.3** One common ground for service ex juris is not found among the presumed real and substantial connections in section 10, namely, that the defendant is a necessary or proper party to an action brought against a person served in the jurisdiction. The reason is that such a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction. If a plaintiff wishes to bring proceedings against two defendants, one of whom is ordinarily resident in the enacting jurisdiction and the other of whom is not, territorial competence over the first defendant will be present under paragraph 3(d). Territorial competence over the second defendant will not be presumed merely on the ground that that person is a necessary or proper party to the proceeding against the first person. The proceeding against the second person will have to meet the real and substantial connection test in paragraph 3(e).

**18**  What emerges then is a welcome shortcut for the court faced with determining territorial competence in a proceeding. If a plaintiff can bring itself within the presumptions set out in s. 10, territorial competence is made out (that is a rebuttable presumption in support thereof arises).

**19**  This makes reference to the common law of "real and substantial connection" and the factors to be taken into consideration in assessing that, as set out in ***Muscutt***, among others, unnecessary unless the plaintiff cannot bring her case within the provisions of s. 10.

**III**

**20**  In the case at bar, the plaintiff maintains that its case for British Columbia's territorial competence over NGJ is found in s-ss. 10(e), (g) and (h). Briefly, these include "contractual obligations to be performed in British Columbia," "a tort committed in British Columbia" and "a business carried on in British Columbia".

**21**  I turn then to consider these grounds in the context of the plaintiff's claim as pleaded.

**22**  I have already described MTU's general undertaking. In the summer of 2000, MTU was in the market for new customs support services. The statement of claim continues:

1. MTU invited tenders with respect to the provision of customs clearance services. K&N responded to the invitation and made a written and oral proposal to MTU, during which K&N espoused its expertise in dealing with US Customs issues.

**Procedures for Importation of Civil Aircraft Engines and Parts into the United States**

1. The importation of civil aircraft engines and parts into the United States is governed by the U.S. Customs Code Title 19, the Custom Federal Regulations (the "CFR"), the Harmonizing Tariff Schedule of the United States (the "HTSUS") and the Agreement on Trade in Civil Aircraft, also known as Civil Aircraft Agreement (the "CAA")
2. Civil aircraft parts entering the United States may be subject to duties and a merchandise processing fee ("MPF"). The type of part, how it is imported into the United States and its country of origin will determine whether or not the part is duty free and/or MPF free. Depending upon the method of importation certain parts may be imported duty free but not MPF free.

**23**  By paragraph 14 of the statement of claim, MTU pleads that it entered into an agreement with K & N "whereby K&N assumed all customs clearance for MTU's Canadian Operations". Paragraph 16 pleads the critical express or implied terms of that agreement.

**24**  By paragraph 17, MTU alleges that "on or about October 19, 2000, K&N subcontracted some or all of MTU's US customs clearance work to Norman Jensen".

**25**  The statement of claim goes on to relate that in 2002, MTU was facing a U.S. Customs review of its U.S. shipments. The statement of claim continues:

1. As of August 2000, all of these US importations had been undertaken by K&N and/or Norman Jensen on MTU's behalf and many had been handled and processed in a manner that did not fully and effectively mitigate or eliminate MTU's potential customs liability, including, *inter alia*, insufficient documentation, improper entry procedures and the use of incorrect country of origin declarations for shipments that had been improperly entered duty free under Section 9801.00.10 of HTSUS (collectively the "Improper Entries").
2. Pursuant to US law if a party voluntarily discloses the circumstances of a violation to US Customs before the commencement of a formal investigation of that violation it can significantly reduce, or fully avoid, penalties that it would otherwise be subject to. The prior disclosure requires a thorough description of the errors made and a calculation of duties that should have been paid.
3. In order to avoid significant additional US Customs penalties, MTU undertook voluntary review of all of its prior US-bound shipments. This review disclosed in excess of 1000 Improper Entries relating to the period commencing in or about August 2000.

...

1. As part of its voluntary disclosure process MTU made repeated requests of K&N and Norman Jensen for assistance. Despite such repeated requests, K&N and Norman Jensen failed to provide any material assistance to MTU, its contractors or its counsel with the voluntary disclosure process, or alternatively, if K&N or Norman Jensen did provide assistance it was minimal, insufficient and was not done on a timely basis.

**26**  Paragraphs 25 to 27 of the statement of claim state:

1. At all material times, K&N and Norman Jensen owed a duty of care to MTU to exercise reasonable care, skill, diligence and competence in the importation of goods into the United States on behalf of MTU. K&N and Norman Jensen, and each of them, breached their duty of care owed to MTU.
2. Further and alternatively, K&N breached the express or implied terms of the Contract.
3. Particulars of K&N's breach of contract and K&N's and/or Norman Jensen's ***negligence*** include, *inter alia*:
4. failing to use the Hannover Procedures, either as instructed or at all;
5. failing to take and or all necessary steps to ensure that MTU's parts were handled and processed in a manner that effectively mitigated or eliminated MTU's need to pay US duties and MFPs, or any other potential US customs liability in a manner consistent with US law;
6. failing to provide MTU with the proper US tariff codes for goods imported into the United States;
7. improperly indicating that imported goods were "US origin" when they were not;
8. failing to provide, complete and/or file, properly or at all, all necessary supporting documentation required under US customs law, including complete and accurate proof of origin forms;
9. failing to provide any, or alternatively sufficient, training to MTU staff on the proper completion of US Customs documentation;
10. providing improper, incorrect or otherwise erroneous advise [*sic*] to MTU concerning the completion of US Customs documentation, including, *inter alia*, advising MTU's staff to classify parts for US Customs purposes as "US Goods Returning";
11. failing to undertake completely, or at all, a sufficient and proper Customer Needs Analysis;
12. failing to promptly or properly rectify or make the necessary corrections to its procedures once the problems were first discovered; and
13. such further and other particulars that may become known to the plaintiff.

**27**  On its face, the statement of claim clearly alleges facts which bring the case within the quoted subsections of s. 10 of the ***Act***. A real and substantial connection between British Columbia and "those facts" is presumed.

**28**  While NGJ, by its statement of defence, denies many of the allegations in the statement of claim, and, in particular, that it was negligent in providing services and advice to the plaintiff, it does admit:

1. that it filed customs entries on the plaintiff's behalf beginning at least in September 2000 (para. 8);
2. that it did give advice to the plaintiff about making a "prior disclosure" under the U.S. law (para. 9(a)); and
3. that NGJ provided assistance to the plaintiff in connection with the voluntary disclosure process including cooperating with the plaintiff's legal counsel, responding to the plaintiff's requests for information and documents and providing the plaintiff with advice on the classification of imported merchandise under the U.S. Tariff Schedule (para. 11(a)).

**29**  And while denying many of the allegations set out in the statement of claim and in particular that it was negligent, the defendant, NGJ, has not filed any affidavit evidence on this application. In my opinion, the plaintiff has pled jurisdictional facts sufficient, with the aid of the s. 10 presumption, to establish a real and substantial connection to this defendant and the cause of action.

**30**  In particular, on the criterion "tort in British Columbia" the plaintiff enjoys the support of the jurisprudence which holds that the tort of negligent misrepresentation (advanced on these pleadings) occurs in the jurisdiction in which the advice is received - here, largely, British Columbia:

1. ***CB Distribution Inc. v. BCB International Inc.*** [*(2003), 33 C.P.C. (5th) 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDK1-JGHR-M01V-00000-00&context=) (Ont. S.C.J.)
2. ***Canadian Commercial Bank v. Carpenter*** [*(1989), 39 B.C.L.R. (2d) 312*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B0F6-00000-00&context=) (C.A.)

**31**  In the result, the plaintiff has brought its case within s. 10 of the ***Act***. NGJ endeavours to argue that as against the real and substantial connection test articulated in cases like ***Muscutt***, the plaintiff's case against it fails.

**32**  But NGJ's submission simply overlooks the facts which brings the plaintiff's claim within s. 10 and the presumptive real and substantial connection. NGJ says nothing to rebut the statutory presumption. It leads no evidence of facts showing that the defined connection is not real and substantial.

**33**  However, even in the context of the common law of real and substantial connection, it is clear that the action against K & N is properly brought in British Columbia. Indeed, it likely could not be brought anywhere else. The action against NGJ is intimately connected with that against K & N. The two are virtually inseparable. In these circumstances, the common law of real and substantial connection, as articulated in cases like ***McNichol Estate v. Woldnik*** [*(2001), 13 C.P.C. (5th) 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-JFSV-G3BM-00000-00&context=) (Ont. C.A.), is engaged.

**34**  At paragraph 13 of his reasons in that case, Justice Goudge (for the court) writes:

13 Rather, I think that the approach prescribed by *Morguard* and *Hunt* requires the court to evaluate the connection with Ontario of the subject matter of the litigation framed as it is to include both the claim against the foreign defendant and the claims against the domestic defendants. In doing so, the courts must be guided by these requirements of order and fairness. If it serves these requirements to try the foreign claim together with the claims that are clearly rooted in Ontario, then the foreign claim meets the "real and substantial connection" test. This is so even if that claim would fail the test if it were constituted as a separate action. This approach goes beyond showing that the foreign defendant is a proper party to the litigation. It rests on those values, namely order and fairness, that properly inform the real and substantial connection test and allows the court the flexibility to balance the globalization of litigation against the problems for a defendant who is sued in a foreign jurisdiction.

**35**  ***McNichol Estate*** was applied by Justice Kelleher in ***Power Measurement Ltd. et al. v. Ludlum et al.***, [*[2006] B.C.J. No. 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23CH-00000-00&context=), [*2006 BCSC 157*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23CH-00000-00&context=).

**36**  In my view, Justice Goudge's reasons apply to the case before this court on this application.

**37**  The application is dismissed. The plaintiff will have its costs in any event of the cause.

BAUMAN J.

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[***Newton v. Newton, [2005] B.C.J. No. 3041***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3GW-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Cohen J. (In Chambers)

Oral judgment: October 25, 2005.

Vancouver Registry No. S045960

**[2005] B.C.J. No. 3041** | 2005 BCSC 1880 | 151 A.C.W.S. (3d) 575

Between Christine Diane Newton, Plaintiff, and Lyle George Newton, Dinyar Marzban, Jenkins Marzban Logan, Gordon F. Hubley, Bestwick & Partners, Meyers Norris Penny LLP, D. Jeffrey Harder, BDO Dunwoody LLP, Gary S. Brewer and Brewer, Edge & Company, Defendants

(33 paras.)

**Case Summary**

**Civil procedure — Pleadings — Striking out pleadings or allegations — Application by the defendant Hubley, a chartered accountant, for an order that certain allegations be struck from the plaintiff's statement of claim — Action was commenced by the plaintiff against her former husband and several legal and accounting professionals who advised the parties during their matrimonial litigation — Application dismissed — There was enough evidence to demonstrate a bona fide triable issue between the plaintiff and Hubley concerning Hubley's role and the appropriate standard of care.**

**Professional responsibility — Professions — Other — Accountants — Application by the defendant Hubley, a chartered accountant, for an order that certain allegations be struck from the plaintiff's statement of claim — Action was commenced by the plaintiff against her former husband and several legal and accounting professionals who advised the parties during their matrimonial litigation — Application dismissed — There was enough evidence to demonstrate a bona fide triable issue between the plaintiff and Hubley concerning Hubley's role and the appropriate standard of care.**

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| Application by the defendant Hubley, a chartered accountant, for an order that certain allegations be struck from the plaintiff's statement of claim -- Action was commenced by the plaintiff against her former husband and several legal and accounting professionals who advised the parties during their matrimonial litigation which was ultimately settled in October 2001 -- In her statement of claim, the plaintiff alleged, among other things, that Hubley was negligent and that as a result of that ***negligence*** the plaintiff entered into a settlement of the matrimonial proceedings on terms which were materially unreasonable -- HELD: Application dismissed -- There was enough evidence to demonstrate a bona fide triable issue between the plaintiff and Hubley that by providing the plaintiff with assistance and advice with the settlement discussions and negotiations surrounding the matrimonial litigation he may have taken a role that was to be measured by the standard of care of a matrimonial lawyer -- Further, under Rule 19(24)(a), there was a question fit to be tried on the standard of care to be applied to the professional services provided by Hubley to the plaintiff. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18(6), Rule 19(24) (a)

**Counsel**

Counsel for Plaintiff, D. Hobbs

M. Brotchee A/S, Counsel for G. Hubley and Bestwick & Partners, M. Hewitt

Counsel for Dinyar, Marzban & Jenkins Marzban Logan, L.J. Muir

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| **COHEN J. (orally)** |

**1**   This is an application by the defendant Gordon F. Hubley, a chartered accountant, seeking an order that certain allegations be struck from the plaintiff's statement of claim.

**2**  The action was commenced by the plaintiff against her former husband and several legal and accounting professionals who advised the parties during their matrimonial litigation which was ultimately settled on October 15, 2001.

**3**  In her Statement of Claim, the plaintiff alleges *inter alia*, as follows:

1. In the circumstances it was a term of the agreement or alternatively it was the duty of Mr. Hubley to exercise all reasonable care and skill, as an accountant advising Ms. Newton in the settlement of the matrimonial proceedings and valuation of her shares to take all reasonable and proper care that the settlement advice and share valuation would be correct and would not contain inaccuracies or be absent necessary advice such that Ms. Newton would be lead in reliance thereon into making a settlement on unreasonable terms of her claims in the matrimonial proceedings with Mr. Newton.
2. By reason of the ***negligence*** and breach of agreement by Mr. Hubley, Ms. Newton entered a settlement of the matrimonial proceedings on the terms of the settlement which were materially unreasonable. The particulars of Mr. Hubley's breaches include:
3. advising Ms. Newton that she was not entitled to or should waive her claim to spousal support.

...

1. acting as an advisor to Ms. Newton on matters pertaining to settlement of the matrimonial dispute which were beyond Mr. Hubley's qualifications, experience and training as a chartered accountant and failing to advise Ms. Newton that the limits of Mr. Hubley's training, experience and qualifications in the aforesaid regard.
2. advising Ms. Newton to settle her matrimonial dispute with Mr. Newton without full disclosure of all the assets of Mr. Newton and the ABG of C, including the absence of any written or oral testimony or list of documents from Mr. Newton regarding disclosure of his personal or ABG of C's assets.

...

1. failing to advise Ms. Newton that the presumption of an equal division of the family assets between Ms. Newton and Mr. Newton was rebuttable when in circumstances of her financial contribution, Ms. Newton may have been entitled to a portion greater than 50% of the family assets.

**4**  The defendant, Hubley, relies on Rules 18 (6) and 19 (24) (a) of the Rules. Under Rule 18(6) the defendant is required to establish that there is no *bona fide* triable issue of fact or law. Matters of fact cannot be weighed. Under Rule 19(24) (a), the action should be dismissed only if it is certain or sure to fail because it contains a radical defect. The test is stringent. The facts as stated in the statement of claim are taken as proven: See ***Carnahan v. Coates*** [*(1990), 71 D.L.R. (4th) 464*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M10F-00000-00&context=); ***Odhavji Estate v. Woodhouse***[*(2003), 233 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=).

**5**  In ***Kripps v. Touche Ross & Co*** [*[1992] B.C.J. No. 1550*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S0W5-00000-00&context=), Taylor J. A. for the Court states, as follows:

Referring to the judgment of the court given by Madam Justice Wilson in that case, Madam Justice Boyd says:

As I understand it, before summarily striking any portion of the Statement of Claim, it must be plain and obvious to the chambers judge "at once", that the pleading cannot stand. Put another way, the court must be satisfied that the outcome of the claim at trial is "beyond reasonable doubt". The issue is, whether there is a question fit to be tried, regardless of the complexity or novelty of that question

I agree that the decision of the Supreme Court of Canada in Carey Canada Inc. does not mean that complicated questions of law are necessarily unsuited to resolution on an application under Rule 19(24). That case stands, of course, for a different proposition -- that the fact that the questions raised are complex ought not to influence the court in favour of striking out a claim.

It seems to me that a court is not bound to refuse relief under Rule 19(24) simply because the relevant area of law is uncertain, that is to say because it seems possible another court might come to a different conclusion on the law. Every aspect of the common law is necessarily the product of evolution, and this process must continue if the common law is to serve its purpose. It would be wrong that those against whom action is brought in an area of law which happens to be in an active state of development should for that reason alone be required to bear the cost of enquiry into the facts before the court will decide whether the claim is one which calls for an answer. But it must also be said that it follows from the nature of the test which has to be met in order to strike out a claim under Rule 19(24) that where the court dismisses an application under the rule that does not mean that the plaintiff is entitled to succeed if the allegations pleaded are proved. To say that it is not obvious "at once" beyond reasonable doubt that a claim, as pleaded or as it might be amended, is in law "bound to fail", is something very different from saying, as did the House of Lords in Donoghue v. Stevenson, [1932] A.C. 462, that the plaintiff, if she proved the facts which she averred, would be entitled to succeed. There are obvious differences in this regard between the Scottish law of "relevancy" and the law as it has come to be applied today under Rule 19(24).

I am therefore in agreement with Madam Justice Boyd when she characterizes the issue raised by these applications as being "whether there is a question fit to be tried, regardless of the complexity, or novelty, of that question" and that issue must be decided on the basis of the pleadings as they stand or as they might be amended: see Minnes v. Minnes (1962), 39 W.W.R. 112; approved in Carey Canada Inc. v. Hunt, *[1990] 2 S.C.R. 959*.

**6**  Mr. Hubley does not object to the pleadings relating to his activities qua chartered accountant. He says that those issues are contentious but they will be tried in due course. However, he submits that the plaintiff went well beyond reason and particularized the alleged breaches of duty of Mr. Hubley as including the duties of a lawyer. He asserts that the plaintiff has provided no evidence that would suggest Mr. Hubley provided advice to her on legal issues. He argues that in the absence of any material facts or evidence that demonstrates that Mr. Hubley expanded the scope of a typical accounting engagement, she is bound to fail on her claims against him on these issues. In the circumstances, he asks the Court to strike para. 45(a), (c), (d) and (f), under Rule 18(6).

**7**  Mr. Hubley also relies on Rule 19(24)(a) on the basis that the pleadings do not raise a cause of action, and Rule 19(24)(b) on the basis that the pleadings are unnecessary or vexatious, as they do not advance any claim known to law. He contends that the issue of whether a duty of care was owed to the plaintiff is a question of law and that if it is plain and obvious that no duty of care exists, it would be plain and obvious there is no cause of action and the claim should be struck: See ***Border Enterprises v. Beazer***, [*[2001] B.C.J. No. 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G19R-00000-00&context=), [*2001 BCSC 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G19R-00000-00&context=).

**8**  Mr. Hubley submits that the generally established principles relating to an accountant's ***negligence*** have no application to the instant case. He says that the plaintiff has pleaded no material facts that would demonstrate that he has a duty of care to advise her on the matrimonial issues.

**9**  In sum, Mr. Hubley submits that a claim against a chartered accountant for failure to provide legal services, in the absence of very unique facts, not pleaded in this case, is without foundation and is bound to fail.

**10**  I am satisfied that Mr. Hubley's application should be dismissed.

**11**  The thrust of the plaintiff's argument is not founded on an assertion that Mr. Hubley was in breach of a duty of care to the plaintiff qua lawyer. Rather, it is founded on the premise that if a chartered accountant wades into the settlement of matrimonial litigation then, depending on the facts, he may have assumed the standard of care of a matrimonial lawyer.

**12**  There is some persuasive legal authority which I think supports the plaintiff's position. In ***Drabinsky v. KPMG et al.*** [*41 O.R. (3d) 565*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1P5-00000-00&context=), the Court found that a serious issue to be tried existed as to whether KPMG was in breach of its fiduciary duty to the plaintiff in accepting a retainer to carry out an investigation of irregularities in certain financial statements. While I recognize that this case involves a breach of fiduciary duty and not professional ***negligence***, nevertheless I think that the statement set out in the case, and the case that it relies upon are apposite to the allegations in the case at bar.

**13**  At p. 3 of the decision, Ground J. states as follows:

The question to be determined is whether, if a breach of the duty of loyalty and good faith and of the duty not to act in a manner adverse to the interest of the client is established, whether such breach is remedied by the establishment of a Chinese wall to prevent the disclosure of confidential information.

As to whether any distinction should be drawn between lawyers and accountants, in this respect, I adopt the words of Mr. Justice Pumphrey in the Prince Jefri decision referred to by counsel [His Royal Highness Prince Jefri Bolkiah v. KPMG, unreported, Engl. Ch., released September 15, 1998], pp. 22 and 23 as follows:

My attention has been drawn to all the principal, relevant English authorities. None are concerned specifically with the position of an accountant undertaking forensic services. Before turning to the authorities, which concern the position either or solicitors or of counsel, I should deal first with the question whether accountants offering forensic services are, in relation, at least, to those retainers concerned with forensic services, to be viewed as subject to similar obligations as are imposed on solicitors. I have come to the clear conclusion that they are. Nothing which I will say in this judgment is to be taken as having any impact, whatsoever, upon other work which accountants undertake and, in particular, work relating to audit. However, in relation to the supply of forensic services, in relation to the performance of tasks which can be and often are undertaken by solicitors and in relation to the giving and receiving of advice in relation to the conduct of litigation or threatened litigation, I can find no rational basis for drawing any distinction between the duty owed by an accountant to his client and that owed by his solicitor or counsel.

**14**  In the Appeal Decision of ***Bolkiah v. KPMG*** [1998] E.W.J. No. 2937, the Court considered when it is permissible for a firm of accountants to conduct an investigation on behalf of a client against a former client for whom they have previously acted when they still possess information of a confidential nature relating to the former client which is relevant to the investigation. Lord Woolf, MR at p. 44 states, as follows:

It is inherent in the approach which I have adopted, which is not intended to differ from that of the New Zealand court that there is in the case of both solicitors and accountants no single test as to whether a firm of accountants or solicitors are or are not entitled to take instructions from a client to act against a former client. The answer in each case will depend on the steps which the firm has taken to protect the interests of the former client. There are differences between the position of solicitors and accountants but what is involved on the accountant's part is forensic work it is not likely that the difference between the two professions will be decisive. The difference between the culture of the two professions, if in a particular case it exists, is the extent to which it interferes with the ability of the firm to protect the legitimate interests of the former client.

**15**  At para. 105 Lord Justice Waller states, as follows:

The question then is whether by virtue of what Mr. Donaldson described as the culture of the accountants profession including in particular the culture of the major firms whether accountants should be treated any differently from solicitors. I am not persuaded that where they conduct an investigatory role of this sort they should be treated any differently. It seems to me that a client of an accountant's firm would react in exactly the same way as the client of a solicitor's firm and would be entitled so to react, where, having provided information in relation to a certain area he found that the firm was acting against him. Would a reasonable man informed of the facts as in this case reasonably anticipate a danger that confidential information might have already leaked prior to a wall being erected and might still leak once the wall was erected? I for my part, have little difficulty in seeing that he would consider that there was such a danger particularly having regard to the lack of consultation with him when the changeover took place.

**16**  What I take from these authorities is the general principle that if a chartered accountant holds himself out as possessing special skill and knowledge to provide forensic accounting services then he undertakes to use care, knowledge and skill in providing those services. That is his clear professional duty to the client. However, in certain circumstances, the fair and reasonable standard of care and competence to be applied to determine whether the chartered accountant's duty has been met may be that of a solicitor.

**17**  Applying the above general principle to the allegations in the instant case, the question arises as to whether the accounting services supplied by Mr. Hubley to the plaintiff were the conventional kind or whether they fall into a category possibly attracting a different standard of care. For the purposes of this application, I find that the pleadings and the evidence before the Court raise a triable issue on whether Mr. Hubley failed to meet the appropriate standard of care required of him when he assisted and advised the plaintiff on the settlement of her matrimonial claims in the litigation with her former husband.

**18**  In his affidavit sworn April 14th, 2005, Mr. Hubley deposes that by May 1st, 2001, when the parties had still been unable to negotiate a settlement, the plaintiff then requested that he take a more active role negotiating her settlement interest in the group of companies owned by the parties. He says that between approximately May and August 2001, on behalf of the plaintiff, he negotiated her interest in the companies with the plaintiff's former husband and his financial advisor. He also says that during this period he often met with the plaintiff to ensure that she was kept up to date on the details of the negotiations as well as the arguments available to both sides regarding the settlement figures.

**19**  I am mindful that Mr. Hubley claims in his affidavit that negotiating the plaintiff's overall matrimonial settlement was never within the scope of his engagement and that he was retained only to assist in negotiating her interest in the companies, the purpose of which was to enable the plaintiff and her professional advisors to negotiate an overall matrimonial settlement with the plaintiff's former husband. He also claims that he did not provide any advice or counsel on legal issues or provide advice generally on broader issues associated with the plaintiff's overall matrimonial dispute.

**20**  However, Mr. Hubley's evidence is in conflict with the evidence set forth in the plaintiff's affidavit sworn by her on April 15, 2005. She deposes that her understanding was that Mr. Hubley, the defendant D. Jeffrey Harder, an expert in the valuation of company shares and the defendant Dinyar Marzban, her matrimonial lawyer would work together as lawyers and accountants to obtain the best result for her in her matrimonial dispute. She says that Mr. Hubley did not tell her that he was advising her in some limited way. Her concern at the time of the negotiations with her former husband was to arrive at a fair settlement on the value of her shares and she relied on Messrs. Harder, Hubley and Marzban to guide her through the process.

**21**  In particulars delivered to Mr. Hubley under cover of her lawyer's letter dated March 8th, 2005, the plaintiff alleges, *inter alia,* that she entered into an agreement on or about June 15, 2000, whereby the plaintiff agreed to retain the services of Mr. Hubley for a fee to advise her in the settlement of the matrimonial proceedings between her and her former husband and the value of her shares in the parties' group of companies; that she met personally with and communicated with Mr. Hubley on numerous occasions by telephone and fax; that Mr. Hubley advised the plaintiff, instructed and advised other advisors to the plaintiff and negotiated settlement on the plaintiff's behalf concerning the value and division of her interest in the family assets of her marriage; that he advised the plaintiff that she was not entitled to or should waive her claim to spousal support; acted as an advisor to her on matters pertaining to settlement of the matrimonial dispute which were beyond Mr. Hubley's qualifications, experience and training as a chartered accountant and failed to advise her of the limits of his qualifications in this regard; advised her to settle without full disclosure of all of the assets of her former husband and the parties' group of companies; failed to advise her that the presumption of an equal division of the family assets between the parties was rebuttable in the circumstances of her financial contribution to the marriage.

**22**  According to Mr. Hubley's counsel, the issue is how the duty owed by his client to the plaintiff translates to the kind of allegations contained in para. 45 of the Statement of Claim when the plaintiff pleads in para. 44 that it was the duty of his client to exercise all reasonable care and skill as an accountant.

**23**  Counsel insists that there is no authority to suggest that the duty of an accountant to his client can be measured on the standard of a lawyer. He also insists that the ***Drabinsky*** decision cannot apply since it deals with a breach of a fiduciary duty. He says that the case involved a supply of forensic services by an accountant and that the services in the case at bar do not fall into that category of professional advice. He argues that Mr. Hubley's engagement by the plaintiff was solely to supply accounting advice and to work with the plaintiff's other professional advisors in his capacity as an accountant.

**24**  With respect, I disagree with Mr. Hubley's counsel that there is no factual allegations giving rise to the allegations raised in para. 45 of the Statement of Claim, or that there is no evidence to support the plaintiff's allegations.

**25**  According to the plaintiff's evidence and particulars, Mr. Hubley held himself out to provide her with professional services which not only included accounting advice but also assistance and advice in the settlement of her matrimonial litigation. I do not agree with counsel that her evidence points away from her allegations or that there is no legal, factual evidentiary foundation for the plaintiff's claim against Mr. Hubley. In my view, the plaintiff's evidence and the particulars of her allegations against Mr. Hubley serves to refute his complete denial that he supplied the plaintiff with assistance, advice or counsel on legal issues.

**26**  As plaintiff's counsel pointed out, on an application under Rule 18(6) the evidentiary burden on a plaintiff is very low. The plaintiff merely has to show that Mr. Hubley may have given her assistance and advice on the settlement of her matrimonial litigation. In her evidence and in her particulars she alleges that he did so. In his evidence he concedes that he took an active role in the settlement of the matrimonial litigation. Thus, it appears from the whole of the evidence before me that Mr. Hubley was a participant in the thick of the negotiations between the parties and directly involved in giving the plaintiff assistance and advice on the manner and means of settling the matrimonial dispute between the parties.

**27**  It is not for me on this application to weigh the evidence. Rather, I am satisfied under Rule 18(6) that there is enough evidence to demonstrate a *bona fide* triable issue between the plaintiff and Mr. Hubley that by providing the plaintiff with assistance and advice with the settlement discussions and negotiations surrounding the matrimonial litigation he may have taken on a role that is to be measured by the standard of care of a matrimonial lawyer.

**28**  I am also satisfied under Rule 19(24)(a) that there is a question fit to be tried on the standard of care to be applied to the professional services provided by Mr. Hubley to the plaintiff.

**29**  In the result, Mr. Hubley's application is dismissed, with costs to the plaintiff.

(Submissions)

**30**  THE COURT: My answer to your first question, is that I am certainly content to hear the matter if schedules permit. I do not wish to be seized of the matter in the event that I am not available and you wish to pursue the matter more quickly than I would be available. So I am certainly content to hear it, but if schedules do not permit, then certainly you are entitled to set it down before any judge in chambers and deal with the balance of the applications in this fashion.

**31**  On the matter of costs, my view is that the costs should be in the cause.

**32**  MR. HOBBS: We have consent that the defendant Gordon Hubley Limited would be added as a defendant so I would ask that we include that in the order and then I have agreement from counsel for Mr. Newton to adjourn our motion for production of privileged documents so I would like to include that in the order and the order would say that if Mr. Newton wishes to make some sort of application regarding costs arising out of these matters that that would be left open so costs would be adjourned vis-à-vis those motions so if I could deal with those matters and just put them in the order then we would have those bits and pieces dealt with. Counsel for Mr. Newton has made those agreements with me that we could deal with those matters that way.

**33**  THE COURT: I do not have any difficulty with that. Thank you.

COHEN J.

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[***Plummer v. University College of the Cariboo, [2003] B.C.J. No. 1817***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20CC-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

Powers J.

Heard: July 10, 2003.

Judgment: July 30, 2003.

Kamloops Registry No. 29944

**[2003] B.C.J. No. 1817** | 2003 BCSC 1199 | 125 A.C.W.S. (3d) 712

Between Adam Plummer, plaintiff, and The University College of the Cariboo and Trevor Owen Architects Inc., defendants, and Trevor Owen Architects Inc., third party

(32 paras.)

**Case Summary**

**Limitation of actions — Actions in tort — *Negligence* — Occupiers' liability — When time begins to run — Postponement or suspension of statute.**

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| Application by the plaintiff Plummer for a determination that the defendant Trevor Owen Architects could not raise a limitation defence. Application by Trevor to dismiss Plummer's action against it. Plummer was injured while he was playing soccer in the gymnasium of the defendant University College. He collided with the gymnasium entry door and his arm went through the door window. The accident occurred on December 17, 1998. He commenced his action pursuant to the Occupiers Liability Act on August 15, 2000. Trevor was added as a party on March 5, 2001. It had designed and installed the door. Plummer claimed that he was unaware of Trevor's involvement until the University filed its statement of defence on November 9, 2000.  HELD: Plummer's application was allowed.  Trevor's identity was only known to the University. Its involvement was not within Plummer's knowledge at the time of the accident. Even if Plummer exercised reasonable diligence it would have taken him longer than until March 5, 1999 to discover Trevor's involvement. Trevor was added as a party within the two-year limitation period under the Limitation Act. It was therefore not entitled to raise the limitation defence. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rules 15(5), 18A. Limitation Act, R.S.B.C. 1996, c. 266, ss. 3(2), 3(2)(a), 4, 4(1)(b), 4(1)(d), 6, 6(3)(a), 6(4), 6(5), 6(6). Occupiers Liability Act, [*R.S.B.C. 1996, c. 337, ss. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P7-00000-00&context=), 5, 5(1).

**Counsel**

M. Sutherland, for the plaintiff. C.E. Hirst, for the defendant and third party, Trevor Owen Architects Inc.

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| **POWERS J.** |

**1**   The plaintiff was injured while playing indoor soccer at the University College of the Cariboo's gymnasium. He collided with the gymnasium entry door, and his arm went through the window in the door causing injury to his right hand and wrist. The window had been recently placed in the door. The accident occurred on December 17, 1998. The plaintiff commenced an action claiming damages against the University College of the Cariboo ("UCC") on August 15, 2000. The cause of action was pursuant to the Occupiers Liability Act, [RSBS 1996] c. 337.

**2**  UCC filed their statement of defence November 9, 2000, and pled s. 5 of the Occupiers Liability Act alleging that if the plaintiff suffered injury or damage, the injury or damage was caused or contributed to by the ***negligence*** or breach of contract on the part of Trevor Owen Architects Inc.

**3**  On February 2, 2001, plaintiff's counsel received a third party notice issued by UCC naming Trevor Owen Architects Inc. as third party, and claiming indemnity and contribution.

**4**  Plaintiff's counsel applied February 7, 2001 to have Trevor Owen Architects Inc. added as a defendant. UCC and Trevor Owen Architects Inc. consented to an order that Trevor Owen Architects Inc. be added as a defendant. The order stated that it was:

"...without prejudice to the right of Trevor Owen Architects Inc. to raise any limitation or other defences accrued to the date of this order;"

**5**  The plaintiff seeks a judgment that the limitation defence raised by Trevor Owen Architects Inc. fails because pursuant to s. 6 of the Limitation Act [RSBC 1996] c. 266, the claim against Trevor Owen Architects Inc. was not commenced out of time, or alternatively, pursuant to Rule 15(5) of the Rules of Court, that the defendant cannot rely on that defence having been properly added as a defendant. The defendant, Trevor Owen Architects Inc., applies for an order pursuant to Rule 18A dismissing the plaintiff's action for failure to bring the action within the applicable two year limitation period.

**6**  This matter is of importance to both the plaintiff and the defendant, Trevor Owen Architects Inc., because of the operation of the Occupiers Liability Act and the Limitation Act.

**7**  The Occupiers Liability Act creates a duty on an occupier to take reasonable care to see that a person will be reasonably safe in using the premises. The duty applies to the condition of the premises, activities on the premises, and conduct of third parties on the premises. (s. 3) UCC is the owner and the occupier of the gymnasium.

**8**  However, s. 5 provides:

1. Despite section 3(1), if damage is caused by the ***negligence*** of an independent contractor, engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances,
2. the occupier exercised reasonable care in the selection and supervision of the independent contractor, and
3. it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.

**9**  In other words, if the damage was caused by the ***negligence*** of Trevor Owen Architects Inc., then the plaintiff will not be able to recover from UCC. If Trevor Owen Architects Inc. is able to rely on the limitation defence, then the plaintiff will not be able to recover from Trevor Owen Architects Inc.

**10**  The Limitation Act provides at s. 3(2):

After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:

1. ... for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

**11**  Section 4 provides:

1. If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

...

1. third party proceedings,

...

1. adding or substituting a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

**12**  The Limitation Act also provides:

1. The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
2. for personal injury;

...

1. Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
2. an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
3. the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
4. For the purposes of subsection (4),
5. "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
6. "facts" include
7. the existence of a duty owed to the plaintiff by the defendant, and
8. that a breach of a duty caused injury, damage or loss to the plaintiff,

...

1. The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

ISSUES

1. When did the time begin to run against the plaintiff with respect to the action against Trevor Owen Architects Inc?

**13**  The limitation period to commence an action is two years after the date on which the right to do so arose, although the running of time may be postponed pursuant to s. 6(3) of the Limitation Act. To determine when the time begins to run, the court must first decide when the potential defendant's identity was first known to the plaintiff, and secondly, when the facts from which it could be concluded that a successful action could be brought against the potential defendant, were first within the plaintiff's means of knowledge, or when the plaintiff could reasonably have discovered such facts.

Krusel v. Firth [*(1991), 58 B.C.L.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60WG-00000-00&context=) (B.C.C.A.)

Karsanjii Estate v. Roque, [*[1990] B.C.J. No. 279*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61J5-00000-00&context=) (B.C.C.A.)

**14**  The court in Krusel said that lack of actual knowledge of the identity of the defendant is not sufficient to delay the running of the limitation period. The running of the limitation period is postponed only so long as it is not within the plaintiff's means of knowledge to discover the identity of the potential defendant. In other words, if the plaintiff could not discover the identity of the potential defendant, despite exercising reasonable diligence.

**15**  Trevor Owen Architects Inc. was joined as a party on March 5, 2001. The question, therefore, is whether the plaintiff could have discovered the identity of Trevor Owen Architects Inc., by exercising reasonable diligence, before March 5, 1999, two years before. It is also important to ask when would the plaintiff have known, or had the means to know the facts, including the existence of a duty owed to the plaintiff by Trevor Owen Architects Inc., and a breach of that duty causing injury to the plaintiff, that they had a reasonable prospect of success, and that they ought to have been able to bring that action, and whether they would have had this knowledge before March 5, 1999.

**16**  Clearly, on the date of the accident, December 17, 1998, or shortly thereafter, the plaintiff knew of the identity of UCC, and that he had been injured on property owned and occupied by UCC. The plaintiff suffered a deep laceration of the ulna region of his right arm, and lacerated tendons in his right arm, requiring immediate medical attention.

**17**  The plaintiff and plaintiff's counsel state that they were not aware of the involvement of Trevor Owen Architects Inc. in the design and installation of the door where the plaintiff was injured until UCC filed their statement of defence on November 9, 2000. There is no indication that plaintiff's counsel considered the possibility that somebody other than UCC might be responsible for the plaintiff's injuries, until delivery of the statement of defence. However, it would certainly be reasonable for the plaintiff and plaintiff's counsel to consider that well before the statement of defence was delivered. The plaintiff was aware that renovations had been done to the gymnasium and the door in question two or three months before the day of his injury.

**18**  However, the evidence does not suggest that the identity of Trevor Owen Architects Inc. would be something immediately known to the plaintiff at the time of the accident, or even that anybody other than UCC was involved in the design and installation of the door in question.

**19**  The identity of Trevor Owen Architects Inc. was peculiarly within the knowledge of UCC, although it was something that the plaintiff could have discovered at some time by exercising reasonable diligence. However, it is not knowledge which would be immediately available to the plaintiff, and I am satisfied that it would, even with reasonable diligence, have taken longer than March 5, 1999 to discover.

**20**  The case Braunizer v. Canadian Pacific Ltd., [*[1995] B.C.J. No. 1745*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0VP-00000-00&context=) (B.C.S.C.) is a case which dealt with adding new defendants after the action had already been commenced, almost four years after an injury had been suffered by the plaintiff. The proposed defendants were architects responsible for the design and construction of a stairway in a hotel. The hotel owner had been named originally as a defendant when the writ was issued. The names of the architects, consultants and their contractor were drawn to the attention of plaintiff's counsel, more than two years after the accident occurred. The court there found that the identity of those defendants was peculiarly within the knowledge of the persons who had contracted with them. The court did not specifically make a finding that the running of the limitation period had been postponed. It certainly considered that as a factor in determining whether to add the new parties.

**21**  The decision Cooley v. Siemens, [*[1994] B.C.J. No. 1845*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S30C-00000-00&context=) (B.C.S.C.) was a case in which the parties were added despite the application being brought more than two years after a motor vehicle accident. The court found that although the plaintiff may have been aware that the proposed defendants were incidentally involved in the accident, it was not within their means of knowing that they were substantially involved at the time of the accident itself. The court found that it was reasonable for counsel to have commenced the action against the original defendants based on the information he had presently received from his clients, and then to apply to add the new parties when the new information came to his attention. The court found that the plaintiff in that case did not have facts within her knowledge as to the involvement of the new defendants until the statement of defence had been filed.

**22**  I am satisfied that the identity of Trevor Owen Architects Inc. was peculiarly within the knowledge of UCC, and not within the means of knowledge of the plaintiff at the time of the accident, before March 5, 1999. Therefore, Trevor Owen Architects Inc. were added as a party within the two year limitation described by the Limitation Act.

**23**  The defendant's application to dismiss the claim based on the limitation defence is dismissed, and I grant the plaintiff's application for judgment that the limitation defence raised by Trevor Owen Architects Inc. fails.

1. Does the existing order adding Trevor Owen Architects Inc. reserve to them the right to rely on the limitation defence, if any, or simply allow the parties to argue whether it is just and convenient to add them as a defendant considering that they may have lost the benefit of a limitation defence?

**24**  The defendants argue that the plain wording of the order reserves to them the right to argue the limitation defence. That is clearly the understanding of Trevor Owen Architects Inc. The plaintiff argues that the order really does no more than leave the issue of the limitation defence to a later date, and leaves it open to the court at a later date to consider whether that limitation defence is the factor that should be considered in determining whether to allow the proceeding to continue against Trevor Owen Architects Inc. In argument, the plaintiff said:

"Fundamentally, it makes no sense to add a defendant who is entitled to rely on a limitation defence."

**25**  However, that statement assumes that a limitation defence would still apply after a party had been added.

**26**  The effect of adding a party under Rule 15(5) of the Rules of Court, and s. 4 of the Limitation Act is that the limitation defence no longer applies. In other words, if the court decides it is just and convenient to add a party pursuant to Rule 15(5), despite the passage of a limitation period, the new party loses the benefit of that defence.

Brito (Guardian ad litem of) v. Wooley, [*[1997] B.C.J. No. 2487*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M227-00000-00&context=) (B.C.S.C.)

Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd., [*[1996] B.C.J. No. 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=) (B.C.C.A.)

Cementation Co. (Canada) v. American Home Assurance Co., [*[1989] B.C.J. No. 1048*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M1MX-00000-00&context=) (B.C.C.A.)

Karsanjii Estate v. Roque, [*[1990] B.C.J. No. 279*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61J5-00000-00&context=) (B.C.C.A.)

Tri-Line Expressways v. Ansari, [*[1997] B.C.J. No. 180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S324-00000-00&context=) (B.C.C.A.)

Takenaka v. Stanley, [*[2000] B.C.J. No. 288*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X24J-00000-00&context=) (B.C.S.C.)

Lui v. West Granville Manor Ltd., [*[1985] B.C.J. No. 2364*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61WY-00000-00&context=) (B.C.C.A.)

Lui v. West Granville Manor Ltd., [*[1987] B.C.J. No. 332*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3V4-00000-00&context=) (B.C.C.A.)

**27**  The passage of the limitation period is a factor that the court will consider in determining whether it is just and convenient to add a new party, but once the court decides to do so, the limitation defence is gone.

**28**  With regard to the meaning of the order, on its face, it appears that it does allow Trevor Owen Architects Inc. to actually argue that they have a defence. The plaintiff argues that if it is ambiguous I should find in favour of the plaintiff, or simply answer the question whether it be just and convenient to add these defendants. It is hard to say on the affidavits of the plaintiff what was really intended, although I suspect they simply did not realize that they could avoid the limitation defence under 15(5) if these new defendants were added.

1. Is it just and convenient to add Trevor Owen Architects Inc. as a defendant despite the fact they may lose the benefit of a limitation defence?

**29**  Trevor Owen Architects Inc. took the position that this was not an issue that they had been prepared to address on these applications. Their position is that the order itself reserves to them the right to argue the limitation defence.

**30**  In the event that I am wrong in determining that the limitation defence does not apply, I would have allowed the plaintiff and the defendant, Trevor Owen Architects Inc. to argue the issue of whether it was just and convenient, that they be added under Rule 15(5). I would do so because it appears on the material that it is not clear the parties were in agreement as to the affect of the order that they consented to. The defendants believe that the order allowed them to rely on the limitation defence, and the plaintiffs believe that the order simply allowed the court to consider the limitation defence as a factor in continuing with the proceeding against the defendants, if after proper discoveries and investigations, it appeared the limitation had actually expired by the time the defendants were added.

**31**  However, given my findings with regard to the postponement of the running of the limitation period, it is not necessary to determine that issue now.

**32**  The costs of these applications will be costs in the cause.

POWERS J.

**End of Document**

[***Pratten (Guardian ad litem of) v. Cozens, [2001] B.C.J. No. 2846***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Nanaimo, British Columbia

R.M.J. Hutchinson J.

Heard: November 21, 2001.

Judgment: December 20, 2001.

Nanaimo Registry No. S25711

**[2001] B.C.J. No. 2846** | 2001 BCSC 1825 | 112 A.C.W.S. (3d) 599

Between Olivia Pratten, an infant by her Guardian ad litem, Shirley Pratten and the said Shirley Pratten, plaintiffs, and Shirley Ginger Cozens and Financialinx Corporation/ Credilinx Corporation, defendants

(14 paras.)

**Case Summary**

**Torts — *Negligence* — Motor vehicle, standard of care of driver — Keeping proper lookout — Duty to pay attention.**

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| This was an action by Pratten and her mother for damages for personal injuries arising out of a motor vehicle accident. Pratten, who was a 17-year old-novice driver, was turning left when she was hit by the defendant Cozens. The traffic light had just turned yellow. Pratten indicated that she saw it turn yellow as she was in the left turn lane. She indicated that she saw the vehicles in the other direction slow down to stop. She also saw Cozens' vehicle, which she estimated to be four to five car lengths from the intersection. Cozens' passenger testified that she saw the light turn yellow and that Cozens had had ample opportunity to stop before she reached the stop line. Cozens admitted that she had not seen Pratten's vehicle until the last second. Cozens had been travelling at 53 km/h, 3 km/h over the posted speed limit.  HELD: Action allowed.  Cozens was driving in a negligent manner. She was exceeding the limit, albeit marginally. As well, she did not see Pratten's vehicle until an instant before the collision and she failed to stop her vehicle at a yellow light when she could have done so in safety. Pratten was not at fault. She could not stop in safety when the light changed to yellow and she had made a reasonable estimate as to the distance of Cozens' vehicle from the intersection. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, s. 128.

**Counsel**

R. Hornquist, for the plaintiffs. P. MacNeil, for the defendants.

[Quicklaw note: A Corrigendum was released by the Court February 13, 2002. The correction has been made to the text and the Corrigendum is appended to this document.]

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| **R.M.J. HUTCHINSON J.** |

**1**   The issue of quantum has been settled by the parties. I have to decide the issue of liability arising out of a motor vehicle accident that occurred on 16 May 1999.

**2**  The plaintiff was then a 17-year-old woman with a novice license. She was driving north on Terminal Avenue approaching the intersection of St. George Street. She was alone in her 1992 Dodge Shadow vehicle. She intended to turn left (west) onto St. George Street. The weather was clear, the visibility good and it was broad daylight. The plaintiff said she did not know the speed at which she was travelling when she entered the left turn lane, but she was moving at the same speed as the other traffic. She said she put on her left turn indicator before moving into the left turn lane, and the light facing her for northbound traffic turned from green to yellow before she crossed the stop line. At trial she could not remember how far she was from the stop line when that happened but soon after the accident she told an adjuster she was about 10 feet from the stop line: I accept that statement as a fact because it was made shortly after the accident, and was her best estimate at that time. She saw a south bound vehicle slowing down to stop in the southbound left turn lane i.e. proposing to turn east, and some three to four car lengths behind that vehicle in the centre southbound lane was another vehicle; she estimated it was altogether four or five car lengths from the intersection. The plaintiff then directed her attention to the route she proposed to follow, and had crossed into the southbound through lane when she was struck by the defendant's 1999 Ford Explorer on the right front corner of her vehicle.

**3**  The defendant was travelling south in the centre southbound lane of Terminal Avenue intending to go through the intersection. She said she was going at 30 M.P.H. (48 k.p.h.) approaching the intersection on a green light. She did not see the light change to yellow, and suddenly the plaintiff's vehicle drove into her lane: she had not seen it before. Her passenger, Kerry Lynn Jaswal, saw the light change to yellow, but the defendant did not slow down. The police found no skid marks from either vehicle leading to the point of impact.

**4**  An engineer, B.E. Heinrichs, prepared a report and in it he indicated the point of impact. He obtained police photographs of the vehicles, examined the scene and prepared sketches of the area. He timed the lights for north/southbound traffic. The sequence was -

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| --- | --- | --- | --- |
|  | Green | 7 to 34 seconds |  |
|  | Amber | 4.5 seconds |  |
|  | Red | 11.2 to 56.2 seconds |  |

Both the north/south and east/west lights indicated red at the same time for 1.2 seconds at the end of the yellow light for north/south traffic before the east/west light turned green.

**5**  Using the PC Crash accident simulation model, Heinrichs concluded that the plaintiff's vehicle was travelling between 25 and 35 k.p.h. at the time of the impact, and the defendant's vehicle was travelling at 53 k.p.h. I have based my conclusions on the estimated speed of the plaintiff's vehicle at 30 k.p.h. or 8.33 meters per second and the defendant's vehicle at 53 k.p.h. or 14.72 meters per second.

**6**  The intersection is a large and busy one, bounded on the west by a railway line that parallels the highway in a north/south direction. Each road leading into the intersection has a wide slot for right turning traffic. There are three lanes south bound, two for through traffic, and one for left turning traffic: the stop line for all three lanes is in line and parallel to St. George Street and the stop line for the lane in which the defendant was travelling is 11 meters from the point of impact. This figure and other measurements are taken from a scale drawing prepared by Heinrichs and appended to his report.

**7**  The stop line for the two through lanes for northbound traffic on Terminal Avenue is 11 meters closer to the true intersection of St. George Street than the left turn lane. The left turn lane is set back to enable traffic turning left from Princess Street, the easterly extension of St. George Street, to make a shallow turn. The stop line for the plaintiff's left turn from Terminal Avenue to St. George Street was 23 meters from the point of impact. Assuming the speeds of the plaintiff's and defendants' vehicles remained constant, the plaintiff would have crossed her stop line 2.8 seconds before the accident and the defendant would have crossed her stop line .74 seconds before the accident. When the plaintiff crossed her stop line the defendant was 41 meters north of the point of impact and 30 meters north of her stop line; according to the engineer the defendant required 29 meters at 53 kilometers per hour for reaction and braking to enable her to stop.

**8**  I accept the plaintiff's evidence that she saw the traffic light turn to amber as she was in the left turn lane, before she crossed the stop line. She was 3 meters south of the stop line at that point, and she would have travelled beyond the stop line for a further 6 meters before she could apply her brakes (1.1 seconds reaction time or 9.16 meters). In braking she would have continued several meters beyond that point before she could stop. That figure was not in evidence but I conclude it would have been considerably more than 6 meters which would have placed her beyond the stop lines for the two northbound through lanes, and thus would have placed her in a position that would have caused her to obstruct westbound and southbound traffic from Princess Street as well as eastbound traffic on St. George Street. From those facts I conclude that when she saw the light turn from green to yellow she could not have brought her vehicle to a stop in safety. In those circumstances her decision to proceed with her left turn was a reasonable one, unless the southbound traffic on Terminal Avenue was so close as to constitute an immediate hazard.

**9**  I find the traffic light changed to amber for south bound traffic 1/3 of a second before the plaintiff crossed her stop line. At that moment the defendant would have been a further 5 meters back, putting her 35 meters north of her stop line when the light facing her turned to yellow. On those facts I find she was not so close to the intersection as to constitute an immediate hazard. Had she been travelling at the posted speed limit, not 3 kilometers over it, the distance she would require before she brought her vehicle to a stop would have been less than 29 meters. The plaintiff was entitled to expect the defendant to be travelling within the limit when deciding whether the defendant was so close as to constitute an immediate hazard, and based on what she saw, she had reason to believe the defendant would be able to brake and stop before the light turned to red.

**10**  In reaching that conclusion, I have not relied on the evidence of Ms. Eckford, an independent witness called by the plaintiff. Her evidence that the defendant's vehicle entered the intersection after the light facing the defendant turned red is inconsistent with that of the plaintiff, the defendant and Ms. Jaswal, the passenger in the defendant's vehicle. Ms. Jaswal's evidence supports the finding that when the light turned yellow the defendant had ample opportunity to stop before she reached the stop line, but does not support Ms. Eckford's evidence that the defendant went over the stop line when the light facing her was red.

**11**  I find the defendant was driving in a negligent manner. She was exceeding the limit, albeit marginally, by 6%; she did not see the left turn indicator on the plaintiff's vehicle, indeed she never saw the plaintiff's vehicle until an instant before the collision; and she failed to stop her vehicle when it was facing a yellow light when she could have done so in safety, contrary to s. 128 of the Motor Vehicle Act.

**12**  The defendant argues that the plaintiff's ***negligence*** contributed to the cause of the accident. I disagree: as indicated she could not stop in safety when the light changed to yellow. She made a reasonable assumption of the distance of the defendant from the intersection and correctly concluded the defendant had time to stop her vehicle in safety. She was required to take her eyes off the defendant and look to the left, the direction in which she proposed to travel, as there could have been pedestrians on the crosswalk or a train on the tracks approaching that area. The comments of Newbury J.A. in Kokkinis v Hall [*(1996), 19 B.C.L.R. (3d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=) at 278 (paragraph 10) are appropriate to this situation:

. . . To say that the plaintiff can be found at fault because she relied on the assumption that Mr. Hall would stop, and because she checked cross-traffic, would in my view subvert the duty on Mr. Hall to bring his vehicle to a safe stop at the amber light as the other traffic did. An amber light is not, as the current witticism suggests, a signal to accelerate or to pass traffic that is slowing to a stop. Indeed, as Mr. Justice Esson noted in Uyeyama, [*[1985] B.C.J. No. 1883*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61N3-00000-00&context=), in a busy city like Vancouver and at a busy intersection like 25th and Granville, an amber is likely the only time one can complete a left turn. Drivers approaching intersections must expect that this will be occurring. Putting a burden on a left-turning driver to wait until he or she sees that all approaching drivers have stopped would, in my view, bring traffic to a standstill. We should not endorse such a result.

**13**  In this case the plaintiff was not at fault because she made the reasonable assumption that the defendant would and could safely stop when facing the yellow light. In fact she did not, and made no effort to do so despite the concerns of her passenger, Ms. Jaswal.

**14**  In the result I find the defendant wholly at fault; the plaintiff will recover her costs on Scale 3.

R.M.J. HUTCHINSON J.

\* \* \* \* \*

CORRIGENDUM

Released: February 13, 2002

[1] It has been noted that the neutral citation number [*2001 BCSC 1698*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M48H-00000-00&context=), under which the judgment in this matter was filed, is a duplicate.

[2] The citation number for the judgment in this matter issued on December 20, 2001, is 2001 BCSC 1825.

R.M.J. HUTCHINSON J.

**End of Document**

[***Premji v. Westfair Foods Ltd., [2001] B.C.J. No. 319***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1FY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Cole J.

Heard: February 2, 2001.

Judgment: February 21, 2001.

New Westminster Registry No. S060769

**[2001] B.C.J. No. 319** | 2001 BCSC 285

Between Westfair Foods Ltd., appellant/petitioner, and Zainab Premji, respondent

(11 paras.)

**Case Summary**

**Torts — Occupiers' liability for dangerous premises — *Negligence* of occupier — Visitors — Standard of care — Floors — *Negligence* of particular occupiers — Retail store.**

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| This was an appeal by Westfair Foods from the finding of liability made against it. Premji sued Westfair for damages for injuries she sustained when she slipped and fell in Westfair's store. The day in question was a stormy January day. Premji slipped in a pool of water in front of the beauty department. She hurt her lower back, left thigh and knee. Westfair did not call either the person who was responsible for that area, or the employees of the beauty department, to provide evidence that they followed the Westfair's policy with respect to sweeping the floor. The trial judge found that while the overall maintenance program adopted by Westfair was adequate, Westfair had failed to prove on balance that the employees adhered to the maintenance program on the day of the accident. Based on the weather that day, the trial judge found it reasonable to conclude that the employees would be busy responding to calls and that it would be reasonable to conclude that the sweep would be delayed.  HELD: Appeal dismissed.  The trial judge was alive to all the issues, considered and weighed the evidence and drew the necessary inferences. He did not misinterpret the evidence or err in law. |

**Statutes, Regulations and Rules Cited:**

Occupier's Liability Act, [*R.S.B.C. 1996, c. 377, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B1RT-00000-00&context=).

**Counsel**

I.C. Hallam, for the appellant/petitioner. A.L.B. Kaario, for the respondent.

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| **COLE J.** |

Introduction:

**1**  The appellant, Westfair Foods Ltd., appeals the finding of liability made against it following a trial on January 13, 2000, in Provincial Court, [*[2000] B.C.J. No. 1571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22NX-00000-00&context=).

Background:

**2**  It was snowing on January 22, 1996, when the respondent, a 54-year-old homemaker, slipped and fell in the appellant's store in Coquitlam. The respondent entered the store with her husband and sister at approximately 12:45 p.m. Once inside the store, the respondent headed in the direction of the pharmacy department while her husband turned left to go to the washroom. When the respondent walked by the beauty department she stepped onto a pool of water which caused her to slip and she fell down on the floor hurting her lower back, left thigh and knee. Damages were assessed at $10,000.

**3**  The Learned Provincial Court judge gave detailed written Reasons on March 30, 2000. In his Reasons, he concluded as follows:

The Claimant slipped and fell on a pool of water while shopping in the Defendant's store and sustained injuries. I find the overall maintenance program adopted by the Defendant to be adequate in meeting the statutory duty of care imposed under The Occupier's Liability Act, *R.S.B.C. 1996, c. 377* in the particular circumstances.

The accident occurred at 12:45 p.m. However, while the Defendant is able to establish that the area in which the incident took place was dry mopped by one of the employees in the beauty department at 11:00 a.m., there is no convincing evidence that the area was swept again prior to 12:45 p.m. Mr. Crosby of the general services department was the person who signed the log record indicating that the area was swept, but he was not in Court to give evidence to establish the precise time for the sweep. The Defendant did not call the host to provide evidence to show that he followed the "as required" policy of the Defendant, as he was the person stationed in the area of the accident and was charged with the responsibility to respond to spills of this sort. I reject the part of evidence given by Miss Muzzolini in which she testified that the area was swept by Mr. Crosby at 12:45 p.m. Furthermore, there is no evidence offered by the Defence that any of the employees from the beauty department dry mopped the area after the scheduled sweep at 11:00 a.m. Therefore I find that the Defendant failed to prove on balance that the employees adhered to the maintenance program that was in place on the day of the accident. The claim is allowed in full.

**4**  The appellant's stated grounds of appeal are that the learned trial judge erred:

1. in finding that the appellant failed to prove on balance that the employees adhered to the maintenance program that was in place on the date of the accident. The trial judge erred in respect to the burden of proof as set forth in Atkins v. Jim Pattison Industries Ltd. [*(1998), 61 B.C.L.R. (3d) 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2W3-00000-00&context=) (C.A.) and that the trial judge further erred with respect to the evidentiary burden upon an occupier on the authority of Atkins and Kayser v. Park Royal Shopping Center Ltd. [*(1995), 16 B.C.L.R. (3d) 330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2B9-00000-00&context=) (C.A.).
2. In the alternative on the direct evidence before the Court, and accepted by the Court, the standard of reasonableness in the circumstances was met by the appellant in the case at bar.
3. In the further alternative the inferences drawn by the learned trial judge were based on an incorrect interpretation of the evidence.

**5**  Section 3 of the Occupiers Liability Act, *R.S.B.C. 1996, c. 337* states:

Occupiers' duty of care

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| 3 | (1) |  | An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises. |  |

**6**  In Atkins, Ryan J.A. at paragraph 5 sets forth the conclusion of the trial judge:

The trial judge concluded (para 13):

In my opinion, there is nothing in the evidence before me, to compel a finding that the system in place was not complied with, any more than a finding that the system was adhered to. I think the onus was on the plaintiff to prove that there was not adherence. In the words of Dumaresq, she may not seek an affirmative finding of fact on a want of evidence on both sides. The plaintiff not having proved, on a preponderance of probability, that the defendants were in breach of their duty of care, her action is dismissed.

In my view this demonstrates error of law. The plaintiff had established a prima facie case of ***negligence***. The defendant sought to refute it by showing that it had a reasonable scheme in place which was being followed. It is not enough to demonstrate that there is a plan in existence. The defendant must call some evidence to show that it was being followed. To paraphrase Cumming J.A. in Kayser v. Park Royal Shopping Centre Ltd. [*(1995), 16 B.C.L.R. (3d) 330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2B9-00000-00&context=) (B.C.C.A.) at p. 334, there must be evidence from which it is reasonable to infer that the system in place for ensuring that hazards are minimized was followed on the day in question. In some cases the occupier may not be in a position to call evidence to show that a particular person swept the floor (or did whatever the plan required) on the particular day in question. It must at least establish that there was routine compliance with the scheme from which the trial judge can infer observance on the day in question.

According to the trial judge in the case at bar the defendant was not required to call evidence that the plan was being followed, it was up to the plaintiff to prove that it was not. I think that this is wrong. It is not up to the plaintiff to negative a potential defence. It is up to the defendant to call evidence in support of its defence. The onus remains with the plaintiff to prove her case. She must overcome the defence on a preponderance of evidence or lose her case.

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| [Emphasis added] |  |

**7**  In Kayser, Cumming J.A. at page 336 states:

It is always a very nice question how much evidence the occupier must adduce to overcome what is, in fact, an evidentiary presumption of breach of duty, in part because the evidence, not only of the scheme, but also of its proper operation, is peculiarly within the knowledge of the occupier.

**8**  The appellant called two witnesses: Ms. Kathy Muzzolini, the general merchandising manager of the appellant, and Ms. Ildigo Ven, the beauty department assistant who was working at the time of the accident.

**9**  The learned trial judge reviewed the evidence of both the appellant's witnesses. He was satisfied that the maintenance program that the appellant had in place that included sweeps every hour-and-a-half to two hours was, under normal circumstances, sufficient in ensuring that the premises were kept reasonably safe. He found however that the program with only the scheduled sweeps would not meet the duty of care expected of the appellant given the stormy weather conditions on the date of the accident. The learned trial judge then examined the other portions of the appellant's maintenance program and found that the maintenance program itself was acceptable due to the fact that the appellant employed a host by the front entrance whose duties included greeting customers and giving out towels to wipe the carts. The host also had a mop to mop up spills. The appellant also had a policy requiring employees to sweep the floor of their department on "as required" basis. The trial judge was satisfied that the arrangements provided safeguards and assurances that in the event of spills or hazards that occurred between the scheduled sweeps, other employees were charged with the responsibility of dealing with those situations.

**10**  Ms. Muzzolini's evidence was that Mr. Crosby of general services would have swept the entire area of the accident at 12:30 p.m. The trial judge concluded however that the logs indicated the time that the employees were to commence their duties and he concluded that there was no indication as to time when the chores specified in the log were in fact done. He concluded that it would take approximately 30 minutes to complete the tasks and given the snowy conditions on the date in question, he concluded it was likely the employees in the general services department would be busy responding to calls. He found that it would be reasonable to conclude that Mr. Crosby was delayed in commencing the sweeping duties set for 12:30 p.m. and he rejected Ms. Muzzolini's testimony that Mr. Crosby had the entire service floor swept by 12:30 p.m. He further concluded that if there is evidence to show either that the host or the employees in the beauty department attended to spills after the 11:00 a.m. sweep as stated by Ms. Ven, it would demonstrate that the "as required" aspects of the defendant's program was working. He concluded that since the defendant presented no such evidence, he was not convinced that the defendant's employees adhered to the maintenance program at the relevant time when the claimant was in the defendant's premises.

**11**  After considering and weighing all the evidence the trial judge was obviously not satisfied and could not infer from the evidence that the "as required" aspect of the program was being complied with on the date in question. I am satisfied that the learned trial judge was alive to all the issues, considered and weighed the evidence and drew the necessary inferences. I am not satisfied that the trial judge misinterpreted the evidence or erred in law and I would dismiss the appeal. The funds will be paid out to the respondent and she is entitled to her costs.

COLE J.

**End of Document**

[***Revane v. Homersham, [2005] B.C.J. No. 1046***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0W1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Nanaimo, British Columbia

Shabbits J.

Heard: March 17, 2005.

Judgment: May 4, 2005.

Nanaimo Registry No. S35964

**[2005] B.C.J. No. 1046** | 2005 BCSC 491 | 13 C.P.C. (6th) 44 | 140 A.C.W.S. (3d) 175 | 2005 CarswellBC 1107

Between Paul Scott Revane, plaintiff, and Larry Douglas Homersham, defendant

(47 paras.)

**Case Summary**

**Civil procedure — Disposition without trial — Dismissal of action — Frivolous, vexatious or abuse of process — Tort law — *Negligence* — Motor vehicles — Damages — General damages — For personal injuries.**

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| Application by the defendant, Homersham, for an order that the plaintiff, Revane's, claim be dismissed on the basis that it was frivolous, vexatious and an abuse of process. Revane was injured in a motor vehicle accident 20 years earlier. Homersham had admitted liability for the accident, and the matter went to trial on the issue of quantum of damages. The trial judge found no physical or neurological basis for Revane's subjective complaints regarding neck and back pain. The trial judge questioned Revane's credibility due to non-disclosure of certain doctor's reports and exaggeration. Revane was awarded damages of $44,500 in total. He now brought a new action arguing that fresh evidence had been found four years ago that linked a disc fragment to the motor vehicle accident. He ended up having a microsurgical discectomy.  HELD: Application allowed.  The action was dismissed. Homersham was entitled to rely on the principle of finality especially as he was not guilty of any misconduct. Revane was just seeking to re-try the same issue that had been tried in an effort to increase the assessment of damages. It was inconsistent with the system of one time lump sum awards for personal injuries to set aside the final judgment because evidence developed after the judgment indicated the award was too low. Revane did have a CT scan done 13 years ago which had provided a physical basis for his complaint. Yet he did not pursue an appeal. This action was commenced over 10 years after Revane learned of an annular budge that he related to the motor vehicle accident. Revane unreasonably delayed bringing the discovery of the annular bulge for consideration by the court. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules Rule 18A, Rule 19(24)

**Counsel**

Counsel for the plaintiff: G.E.T. Beaubier

Counsel for the defendant: M.M. Skorah

[Editor's note: A Corrigendum was released by the Court May 4, 2005. The correction has been made to the text and the Corrigendum is appended to this document.]

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| **SHABBITS J.** |

**1**   The defendant applies pursuant to Rule 19(24) and Rule 18A for an order that the plaintiff's claim be dismissed. The defendant submits that it discloses no reasonable claim, and that it is unnecessary, scandalous, frivolous, or vexatious.

**2**  The plaintiff was injured on October 20, 1985 in a motor vehicle accident in Burnaby, British Columbia. He commenced action number E860014 in the County Court of Vancouver on February 12, 1986, naming Larry Douglas Homersham as defendant. The plaintiff alleged that the accident had been caused by Mr. Homersham's ***negligence***. He claimed general damages and special damages for the injury, loss and damages he sustained as a consequence of the defendant's ***negligence***.

**3**  The plaintiff's statement of claim in action number E860014 was dated February 11, 1986. It was filed when the writ of summons was issued on February 12, 1986. The statement of claim included the following claims:

1. As a consequence of the aforesaid ***negligence*** of the defendant the plaintiff Paul Scott Revane has sustained injury, loss and damages, and in particular he sustained:
2. a whiplash - type injury;
3. a back injury.
4. Further, as a result of the aforesaid collision and the ***negligence*** of the defendant, the plaintiff Paul Scott Revane has been unable to continue in his normal course of employment incurring loss and expense thereby and will suffer past and future loss of income.

**4**  Mr. Homersham admitted liability in action number E860014. The action went to trial on the issue of quantum of damages.

**5**  The action was tried before Mr. Justice Cowan on June 6, 7, 8, 9 and 13, 1988. Reasons for judgment were filed on December 23, 1988, [*[1988] B.C.J. No. 2615*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F81W-21C5-00000-00&context=). Judgment was entered on February 16, 1989.

**6**  In his reasons for judgment, Mr. Justice Cowen expressed concerns about the medical basis for the injuries the plaintiff claimed to have suffered:

A review of the many medical reports filed leads me to conclude that no physical or neurological basis can be found for his complaints by nearly all of the numerous physicians and specialists who have examined and treated him since the accident. His complaints are purely subjective.

This is yet another of those cases referred to by McEachern C.J.S.C. (as he then was) in Price v. Kostryba [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) at 399 where he stated:

In Butler v. Blaylock, [*[1981] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NJ-00000-00&context=), decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complains of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

In large measure the issue comes down to the credibility of the plaintiff.

**7**  He continued:

With respect to the matter of credibility there are several aspects of the evidence which give me concern in this regard.

I refer to the plaintiff's failure to disclose to his treating physician and other doctors who he saw that he had prior back injuries some 2 to 3 years before the accident.

As well I consider he gave an exaggerated account of the heavy nature of his work when he described the same to several of the doctors and consultants he saw. I say this, since his description of the work does not accord with that given by his fellow employees who testified. Those employees also testified that during the periods the plaintiff worked post the accident they saw no deterioration in his capacity to work.

I have concluded that the plaintiff has failed to prove that as a result of the accident he could not after a reasonable period of time have resumed his former employment.

**8**  The plaintiff was awarded the sum of $20,000 for general damages, $24,000 for wage loss, and $500 for special damages, for a total award of $44,500.

**9**  In his reasons for judgment, Cowan J. explained the breakdown of the award as follows:

My assessment of the medical evidence leads me to conclude that the plaintiff suffered a moderate whip lash injury. I assess his non-pecuniary damages at $20,000.00.

As to the plaintiff's claim for past wage loss, I do not consider it possible given what I consider to be the plaintiff's potential to have resumed work and the potential for lay off periods to arrive at a detailed calculation in this regard. I am of the opinion in the circumstances that an appropriate award in this regard would be the sum of $24,000.00.

There will be no award for future wage loss or retraining expenses. . .

**10**  In this proceeding the plaintiff pleads that fresh evidence was found in December of 2001. He claims that that evidence could not have been discovered by due diligence at the time of trial. The plaintiff alleges that after the conclusion of the trial in December 1988, he continued to suffer back pain that did not improve. He alleges that the back pain was so debilitating that he could not continue to work at his former occupation as a steel fabricator, and that as a consequence he retrained for other employment.

**11**  The plaintiff underwent computerized tomography (CT) scans in March of 1992 and November of 2001. He underwent a microsurgical discectomy on December 5, 2001. That operation disclosed a large extruded disc fragment affecting the lumbar 4 vertebra root of the plaintiff's backbone.

**12**  The radiological report of March 11, 1992 concludes with this: "Impression: The combination of disc bulge and posterior element encroachment is deforming the thecal sac at L4-5 and this may be producing a clinically significant spinal stenosis."

**13**  On April 3, 1992, Dr. Schweigel, an orthopaedic surgeon, concluded that the plaintiff's pain was probably due to chronic disc degeneration at L4-5 with some osteoarthritis of the facets, and that it was highly unlikely that there was disc protrusion.

**14**  On June 5, 1992, Dr. R.C. Rickards, an orthopaedic surgeon, wrote this:

RADIOGRAPHIC EXAMINATION:

X-Rays AP, lateral and oblique views of the lumbosacral spine taken January 22, 1992 at Manning Radiology Associates is within normal limits.

A CT scan of the lumbosacral spine taken March 11, 1992 at Surrey Memorial Hospital notes compromise of the spinal canal at the L4-L5 level due to combination of neural disc bulge and facet hypertrophy.

IMPRESSION:

1. Degenerative joint disease, lumbosacral spine.
2. Possible lumbar spinal stenosis.

The situation was discussed with the patient. Although this patient has CT scan evidence to suggest compromise of the lumbar canal, symptoms do not correspond well with diagnosis of spinal stenosis. I have encouraged the patient to continue with non-operative treatment. Should this be ineffective over the long term, a trial of epidural steroids may be of benefit. Further investigation should symptoms persist may include a myelogram followed by a CT scan in order to more clearly delineate possible nerve root compromise.

**15**  Dr. G. Stuart Cameron of Victoria performed microsurgical discectomy on the plaintiff on December 5, 2001. In a letter dated January 25, 2002, Dr. Cameron offers this opinion.

He has a good result from his discectomy. There is still a reduced right knee jerk, probably slight weakness of right quadriceps and slight weakness of foot dorsiflexion. There is some left leg pain which probably represents some settling of the disc space. In retrospect it is quite likely that he sustained an L4-5 disc injury from his motor vehicle accident in 1985 which left him with persistent symptoms sufficient to require a job change and with vulnerability and then there was a spontaneous disc extrusion at the L4-5 level precipitating his recent disc operation.

**16**  Dr. Cameron's notes reflect that he expressed this opinion to the plaintiff's counsel in a telephone call:

... probably the car accident in 1985 or 1988 precipitated the disc bulge seen in 1992. Unless there was sciatica or nerve root signs there was not a good indication to order a CAT scan earlier. Had the accident not happened then perhaps he would not have had the disc extrusion and the surgery.

**17**  In this proceeding, the plaintiff pleads:

1. The disc damage observed as a result of the 5th of December 2001 operation was directly related to the plaintiff's motor vehicle accident of the 20th of October 1985.
2. The evidence disclosed by the operation of the 5th of December 2001 is fresh evidence, which could not have been disclosed by the due diligence of the plaintiff prior to his trial in June 1988.
3. The result of the fresh evidence and finding of credibility made against the plaintiff in the trial of June of 1988 has resulted in a fundamental miscarriage in the Vancouver Registry Action.

Wherefore the plaintiff:

1. Seeks an Order setting aside the judgment of the Honourable Mr. Justice Cowan delivered the 23rd of December 1988 in Supreme Court of British Columbia, Vancouver Registry Action number E860014.
2. General and special damages arising from the motor vehicle accident of the 20th of October 1985.

**18**  In his statement of defence in this proceeding, the defendant pleads that the issue between the parties arising from the motor vehicle accident of October 20, 1985 was determined with the 1988 trial. The defendant pleads that the claim of the plaintiff in this proceeding discloses no reasonable cause of action in fact or in law, and that the bringing of an action to determine an issue that has already been determined constitutes a vexatious proceeding.

**19**  The jurisdiction to set aside a judgment on the ground of subsequently discovered evidence is found in the decision of the Supreme Court of Canada in Royal Trust Co. v. Jones, [*[1962] S.C.R. 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X32K-00000-00&context=). In that decision, Mr. Justice Cartwright wrote this for the Supreme Court of Canada:

An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal. Section 9 of the Supreme Court Act, R.S.B.C. 1936, c. 56, which was in force at the time when Manson J. dealt with the matter (and which is now section 9 of the R.S.B.C. 1960, c. 374) reads as follows:

1. The Court is and shall continue to be a Court of original jurisdiction, and shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the Province.

There appears to be nothing in the statutes constituting and continuing the courts in British Columbia or in the Rules of Court of that Province to suggest that there is any difference between the law and practice on this point in British Columbia and in England; in my opinion they are the same.

**20**  The application before me is Mr. Homersham's application to dismiss the present action as frivolous and vexatious. This procedure was approved by the British Columbia Court of Appeal in D.K. Investments Ltd. v. S.W.S. Investments Ltd. [*(1990), 44 B.C.L.R. (2d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61V3-00000-00&context=) (B.C.C.A.). The judgment of the court was delivered by Madam Justice Southin. She referred to the proceeding, at page 4, as "the rare action to set aside a judgment given and sustained on appeal on the ground of fresh evidence." At page 13 she considered the procedure appropriate to determining whether an action to set aside a judgment would be entertained. She said:

In Daniell's Chancery Practice, 6th ed. (1882), at p. 1526, we find this:

No action of review, or supplemental, or new, action in the nature of an action of review, grounded upon new matter discovered after the judgment, can be brought without the special leave of the Court, first obtained for that purpose. The new matter need not necessarily be evidence upon matters in issue in the original suit: although, if the pleadings were properly framed, it would rarely happen that it would not be, in some degree, evidence of such matters then in issue.

The application for leave to bring the action may be made by petition, motion, or summons in the former action: it is usually made by motion. Upon the application, the Court must be satisfied that the new matter has come to the knowledge of the applicant and his agents for the first time since the period at which he could have made use of it in the suit, and that it could not, by reasonable diligence, have been discovered sooner, and that it is of such a character that, if brought forward in the suit, it would probably have altered the judgment.

It was subsequently held that the application for leave to bring the bill was no longer necessary and that the proper course for a defendant who objected was an application to stay the action as frivolous and vexatious. See Boswell v. Coaks (1894), 6 R. 167.

**21**  Rule 19(24) permits the court to order that a proceeding be dismissed.

**22**  The principles applicable to a motion to overturn a final judgment on the basis of new evidence are similar to those applicable to a motion to admit fresh evidence on appeal. In Coulter (Guardian ad litem) v. Leduc, [*[2005] B.C.J. No. 732*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0DR-00000-00&context=), [*2005 BCCA 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0DR-00000-00&context=), Mr. Justice Braidwood and Mr. Justice Mackenzie of the British Columbia Court of Appeal wrote:

The principles applicable to the admissibility of fresh evidence were reiterated by this Court in Topgro Greenhouses Ltd. v. Houwelling, [*[2004] B.C.J. No. 110*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S385-00000-00&context=), [*2004 BCCA 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S385-00000-00&context=). At para. 26 of that judgment Smith J.A. wrote as follows:

The admissibility of fresh evidence is governed by the principles set out in Palmer v. The Queen (1979), [*[1980] 1 S.C.R. 759*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1TK-00000-00&context=) at 775-776:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen, [*[1964] S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X3BB-00000-00&context=).
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
3. The evidence must be credible in the sense that it is reasonable capable of belief, and
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

**23**  The principle of finality is a concern where a party seeks to enter new evidence to overturn a final judgment in a proceeding that has long since ended: Tsaoussis v. Baetz [*(1998), 41 O.R. (3d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1N8-00000-00&context=) at page 272 (C.A.). Earlier judgments are not to be set aside lightly: Trenwith (Trustee of) v. Goddard (Trustee of), [*[1937] S.C.R. 347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1FT-00000-00&context=), Bains v. Bhander, [*[1997] B.C.J. No. 1686*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0V4-00000-00&context=) at para. 38 (B.C.S.C.). In Tsaoussis, supra, at 263-265, Mr. Justice Doherty explained the importance of finality as follows:

A person who is injured as a result of the ***negligence*** of another is entitled to full but fair compensation for those injuries: Watkins v. Olafson, [*[1989] 2 S.C.R. 750*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-651P-00000-00&context=) at p. 757, [*61 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-651P-00000-00&context=) at p. 581. Under our system of adjudication of personal injury cases, full but fair compensation is determined at a specific point in time on a once and for all basis, and awarded in the form of a single lump sum payment. Absent statutory authority, a court cannot provide for periodic payments to a plaintiff in a personal injury case, or periodically review damages based on developments subsequent to the initial assessment: Watkins v. Olafson, supra, at pp. 756-64 S.C.R., pp. 580-86 D.L.R. Because we assess damages on a once and for all basis and award a single lump sum amount, judges must determine what constitutes full but fair compensation on the basis of information available at the time the adjudication is made. Judges must also factor future costs and future losses into that assessment in many personal injury cases. It is almost inevitable, particularly where future damages are involved, that the amount awarded will in time prove to provide over- or under-compensation. Despite the likelihood of inaccuracy which has spawned strong judicial and academic criticism of one time lump sum awards, [4] this province maintains that approach in personal injury cases in all but very limited circumstances. [5] One time lump sum awards are seen as having sufficient advantages over other proposed forms of compensation to justify the inaccuracy inherent in those words. [6]

Paramount among those advantages is finality. Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, The Fabric of English Civil Justice, Hamlyn Lectures 1987, at pp. 23-24.

The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal injury claims, that end point occurs when a final judgment has been entered and has either not been appealed, or all appeals have been exhausted.

Finality is important in all areas of the law, but is stressed more in some than in others. Its significance in tort law was highlighted by McLachlin J. in Watkins v. Olafson, supra, at p. 763 S.C.R., p. 585 D.L.R., where in the course of discussing problems associated with a scheme of compensation based on reviewable periodic payments, she said:

Yet another factor meriting examination is the lack of finality of periodic payments and the effect this might have on the lives of plaintiff and defendant. Unlike persons who join voluntarily in marriage or contract -- areas where the law recognizes periodic payments -- the tortfeasor and his or her victim are brought together by a momentary lapse of attention. A scheme of reviewable periodic payments would bind them in an uneasy and unterminated relationship for as long as the plaintiff lives.

**24**  Our Court of Appeal cited this portion of Tsaoussis with approval in Singh v. Brar, [*[2002] B.C.J. No. 1347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2R1-00000-00&context=), [*2002 BCCA 378*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2R1-00000-00&context=).

**25**  Royal Trust Co. v. Jones, supra, and other decisions, refer to the setting aside of a judgment on the ground of fraud or on the ground of newly discovered evidence. See, for example, Harwardt v. Cormack, [*[1997] B.C.J. No. 923*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B10W-00000-00&context=) (B.C.S.C.), and Trenwith, supra. Because those two grounds for relief are so often referred to together, and because the setting aside of a judgment on the ground of fraud depends on the admissibility of fresh evidence relating to fraud, the plaintiff submitted that the same principles applicable to an application to set aside a judgment on the ground of fraud are applicable to an application to set aside a judgment on the ground of newly discovered evidence. I do not agree with that submission. Litigants are entitled to rely on the principle of finality, even though they may not be allowed to benefit from their own wrongdoing. There is no suggestion that the defendant at bar was guilty of any misconduct.

**26**  The plaintiff submits the evidence discovered in 2001 is fresh evidence that falls within the parameters of the principles outlined above. He submits that even though he was aware of an annular bulge at L4-5 on March 11, 1992, it was not until he received Dr. Cameron's opinion following the December 5, 2001 discectomy that the plaintiff had evidence that the L4-5 injury related to his motor vehicle accident in 1985 "which left him with symptoms sufficient to require a job change".

**27**  In Christy (Guardian ad Litem of) v. Insurance Corp of British Columbia, [*[1993] B.C.J. 1280*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3NC-00000-00&context=) (B.C.C.A.), the plaintiff on appeal applied to introduce fresh evidence. He claimed that since the trial he had developed epilepsy, which was directly attributable to the accident. The application was allowed, and a new trial was ordered on that issue. In writing for the British Columbia Court of Appeal, Mr. Justice Wood said there was no suggestion that the potential to develop epilepsy could or should have been diagnosed prior to trial. He said that the new evidence could not have been discovered by the exercise of reasonable diligence before the end of the trial.

**28**  Of significance to this application is this observation of Mr. Justice Doherty at page 266 of Tsaoussis:

I am not aware of any personal injury case in which a

final judgment has been set aside, other than on appeal,

because evidence developed after the judgment indicated

that the award was much too high or much too low.

[7] I would be surprised to find

such a case as it would be entirely inconsistent with our

system of one time lump sum awards for personal injuries.

As assessments which ultimately prove to be inaccurate

are inherent in that scheme, I do not see how the

demonstration of that inaccuracy in a particular case

could, standing alone, justify departure from the

finality principle.

**29**  Mr. Justice Doherty's Note 7 at end of document is as follows:

Note 7: In Tiwana v. Popove [*(1988), 23 B.C.L.R. (2d) 392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-610Y-00000-00&context=) (S.C.), the court re-opened the trial after it had delivered its reasons for judgment, set aside its reasons and allowed the plaintiff to call further evidence concerning certain medical evidence which had developed after the trial had ended. In that case, however, formal judgment had not been entered when the plaintiff moved to set aside the reasons and call further evidence. A trial judge has a wide discretion to permit the reopening of a case prior to the entering of judgment: Castlerigg Investments Inc. v. Lam [*(1991), 2 O.R. (3d) 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M437-00000-00&context=), [*47 C.P.C. (2d) 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M437-00000-00&context=) Div.).

**30**  In my opinion, the plaintiff is seeking to re-try the same issue that was tried before Mr. Justice Cowen. The plaintiff wishes to have the assessment of damages for the back injury caused by the 1985 accident reconsidered. The plaintiff submits that he now has evidence that was not before Mr. Justice Cowan, and that the evidence falls within the principles set out in Coulter, supra. This evidence is not evidence of the discovery of a different injury such as occurred in Christy, supra, where it was found that the plaintiff might have accident caused epilepsy. The plaintiff's fresh evidence is different evidence relating to the same injury that was considered at the 1988 trial. Mr. Justice Doherty in Tsaoussis, supra, said that setting aside a final judgment because evidence developed after the judgment indicates the award was much too low is entirely inconsistent with the system of one time lump sum awards for personal injuries. I am of the opinion that the plaintiff's cause of action has already been considered, and that the law does not allow him a second trial. In my opinion, his gathering of more and better evidence relating to an issue that was tried is not cause for a second trial. I am of the view that for that reason alone the action must be dismissed.

**31**  There is another consideration.

**32**  The plaintiff swore an affidavit on October 14, 2004. Appended as Exhibit 6 to that affidavit is a document captioned "Revane v. Homersham & ICBC Timeline" The plaintiff deposed that Exhibit 6 was "your deponent's medical history, with extracted comments from some of the medical reports obtained on my behalf".

**33**  The timeline includes these entries:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Date | Incident | Doctor/Lawyer | Opinion/Details |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 15 Apr 92 | Fusion?? | Dr. Blackshaw, G.P. |  |  |
|  |  |  | Dr. Blackshaw |  |
|  |  |  | said I may need |  |
|  |  |  | a spinal |  |
|  |  |  | fusion. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 5 Jun 92 | Report | Dr. Rickards, |  |  |
|  |  | Orthopaedic Surgeon | Degenerative |  |
|  |  |  | joint disease |  |
|  |  |  | and possible |  |
|  |  |  | lumbar spinal |  |
|  |  |  | stenosis |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 13 Jan 93 | Possible |  |  |  |
|  | Appeal | Gordon Turriff | Advised that no |  |
|  |  |  | action against |  |
|  |  |  | previous |  |
|  |  |  | lawyers is |  |
|  |  |  | justified. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Feb 93 | Possible |  |  |  |
|  | Appeal | Legal Aid/UBC Law |  |  |
|  |  | Students/ICBC/ |  |  |
|  |  | Ombudsman | Various phone |  |
|  |  |  | calls and |  |
|  |  |  | research over |  |
|  |  |  | several days re |  |
|  |  |  | appeal or |  |
|  |  |  | re-opening of |  |
|  |  |  | file. Robyn |  |
|  |  |  | Allen, Mark |  |
|  |  |  | Patterson, |  |
|  |  |  | Audrey, Dan |  |
|  |  |  | Barret, Ed |  |
|  |  |  | Gontes, Cindy |  |
|  |  |  | Lowe, Cleta |  |
|  |  |  | Brown, Ken |  |
|  |  |  | Jones |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 8 Feb 93 | Report | Dr. Rankin, |  |  |
|  |  | Anaesthetist | Hope that |  |
|  |  |  | symptoms will |  |
|  |  |  | improve +/- |  |
|  |  |  | help of |  |
|  |  |  | epidural |  |
|  |  |  | steroids, |  |
|  |  |  | however, |  |
|  |  |  | radiologic |  |
|  |  |  | findings are |  |
|  |  |  | worrying. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 9 Feb 93 | Report | Dr. Richards |  |  |
|  |  | Orthopaedic Surgeon | Degenerative |  |
|  |  |  | joint disease |  |
|  |  |  | and possible |  |
|  |  |  | lumbar spinal |  |
|  |  |  | stenosis, |  |
|  |  |  | Epidural |  |
|  |  |  | steroid |  |
|  |  |  | injections. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 16 Feb 93 | Report | Dr. Smith, Internal |  |  |
|  |  | Medicine | Gastric |  |
|  |  |  | distress made |  |
|  |  |  | worse by the |  |
|  |  |  | non-steroidal |  |
|  |  |  | anti |  |
|  |  |  | -inflammatories |  |
|  |  |  | which he needs |  |
|  |  |  | for treatment |  |
|  |  |  | of the pain |  |
|  |  |  | arising in the |  |
|  |  |  | spinal stenosis |  |
|  |  |  | in his lumbar |  |
|  |  |  | spine. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 24 Feb 93 | Possible |  |  |  |
|  | Appeal | Legal Aid | Applied for |  |
|  |  |  | legal aid to |  |
|  |  |  | help me get an |  |
|  |  |  | appeal |  |
|  |  |  | extension. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 17 Mar 93 | Possible |  |  |
|  | Appeal | Requested trial |  |
|  |  | and discovery |  |
|  |  | transcripts. |  |
|  |  | Started to |  |
|  |  | research law |  |
|  |  | regarding |  |
|  |  | appeal |  |
|  |  | extension. Have |  |
|  |  | receipts to |  |
|  |  | verify dates. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 6 Apr 93 | Possible |  |  |
|  | Appeal | Harvey Blackmore Met with Mr. |  |
|  |  | Blackmore for |  |
|  |  | opinion on |  |
|  |  | appeal |  |
|  |  | extension. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 14 Apr 93 | Possible |  |  |  |
|  | Appeal | Harvey Blackmore | Mr. Blackmore |  |
|  |  |  | set up an |  |
|  |  |  | appointment for |  |
|  |  |  | me with Harvey |  |
|  |  |  | Grey for |  |
|  |  |  | opinion on |  |
|  |  |  | appeal |  |
|  |  |  | extension. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 14 Apr 93 | Possible |  |  |  |
|  | Appeal | Harvey Grey | Met with Mr. |  |
|  |  |  | Grey re his |  |
|  |  |  | taking on my |  |
|  |  |  | case. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 14 May 93 | Possible |  |  |  |
|  | re-opening |  |  |  |
|  | of claim | Mark Patterson ICBC | Sent letter to |  |
|  |  |  | Mr. Mark |  |
|  |  |  | Patterson of |  |
|  |  |  | ICBC along with |  |
|  |  |  | new medical |  |
|  |  |  | evidence he |  |
|  |  |  | requested over |  |
|  |  |  | the phone. Mr. |  |
|  |  |  | Patterson |  |
|  |  |  | called back at |  |
|  |  |  | a later date |  |
|  |  |  | and said if a |  |
|  |  |  | specialist were |  |
|  |  |  | to relate the |  |
|  |  |  | new evidence to |  |
|  |  |  | the 1985 |  |
|  |  |  | accident that |  |
|  |  |  | ICBC would |  |
|  |  |  | review my file. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 9 Apr 02 | Possible |  |  |  |
|  | Appeal | Ted Beaubier | Met with Mr. |  |
|  |  |  | Beaubier to |  |
|  |  |  | review |  |
|  |  |  | possibility of |  |
|  |  |  | re-opening my |  |
|  |  |  | case on the |  |
|  |  |  | grounds of new |  |
|  |  |  | evidence as I |  |
|  |  |  | finally have a |  |
|  |  |  | specialist that |  |
|  |  |  | can relate my |  |
|  |  |  | problems back |  |
|  |  |  | to the 1985 |  |
|  |  |  | accident as |  |
|  |  |  | requested by |  |
|  |  |  | Mr. Mark |  |
|  |  |  | Patterson in |  |
|  |  |  | May 1993. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 4 Jun 02 | Possible |  |  |  |
|  | Appeal | Ted Beaubier | Sent letter to |  |
|  |  |  | ICBC asking |  |
|  |  |  | them to review |  |
|  |  |  | my file. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 5 Sep 02 | Possible |  |  |  |
|  | Appeal | Ted Beaubier | Filed action |  |
|  |  |  | against ICBC in |  |
|  |  |  | Supreme Court |  |
|  |  |  | of B.C. |  |

**34**  The plaintiff did not have a CT scan done for the purposes of the 1988 Vancouver trial. The plaintiff submits that because there was not then a good indication to order a scan, the results of a CT scan were therefore not available to him, even with the exercise of due diligence.

**35**  The plaintiff did have a CT scan in 1992. That scan disclosed the existence of the annular bulge at L4-5 that the plaintiff submits was accident caused. The plaintiff submits that the 1992 CT scan was not sufficient reason for him to start an action to set aside the 1988 judgment for two reasons. First, Dr. Schweigel and Dr. Rickards had not diagnosed disc protrusion or spinal stenosis. Second, there was an absence of a medical opinion that the injury was related to the 1985 motor vehicle accident.

**36**  The CT scan of March 11, 1992 provided a physical or neurological basis for the plaintiff's complaints. His complaints were no longer "purely subjective." The plaintiff's efforts in 1992 and 1993 to pursue an appeal of Mr. Justice Cowen's judgment establish that the plaintiff considered he had, or might have had, an accident-caused L4-L5 injury.

**37**  This proceeding was commenced in 2002, almost 17 years after the motor vehicle accident, and over 13 years after the first judgment. It was commenced over 10 years after the plaintiff learned of an annular bulge that he related to the motor vehicle accident.

**38**  In Bains v. Bhandar, [*[1997] B.C.J. No. 1686*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0V4-00000-00&context=) (B.C.S.C.) Mr. Justice Lowry, who was then of the British Columbia Supreme Court, considered an application for a summary trial to set aside judgments of the Supreme Court of British Columbia and the Court of Appeal based on an inference that the successful plaintiff in another action, tried five years earlier, had concealed evidence.

**39**  Mr. Justice Lowry concluded there could be material evidence that, if accepted, would incline him to direct the trial of an issue. He said however, that a further consideration was that of due diligence. At paragraph 43, Lowry J. said:

The law attaches importance to certainty and finality in the disposition of litigation, and I do not consider that litigants who may have grounds to set aside a judgment are entitled to wait, perhaps indefinitely, until It may, for some reason, be convenient to take advantage of circumstances. Delay is to be avoided, and, where it exists, it must be explained. Here Mr. Bains offers no explanation at all for what can only be seen as an inordinate delay.

**40**  Mr. Justice Lowry concluded that the plaintiff's failure to prosecute the relief he was seeking with diligence precluded the action to set aside the earlier judgment from being maintained.

**41**  Mr. Justice Cohen came to a similar finding in an application to re-open an action for ***negligence*** in Coughlin v. Kuntz [*[1997] B.C.J. No. 1624*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0R2-00000-00&context=) (B.C.S.C.). He said this at para. 65:

By 1991, and certainly by 1993, the defendant had formulated his allegations of conflict of interest against his former counsel, yet he did not bring a motion to re-open on this ground until January 1997, some nine years after the judgment was entered. In the result, I think that the balance of interests weighs against granting the motion, given the defendant's inordinate delay in bringing the motion.

**42**  By March 11, 1992, the plaintiff in the case at bar was aware that there was radiological evidence that provided a physical or neurological basis for his complaints. He actively considered taking proceedings to have Mr. Justice Cowen's judgment "appealed". However, he did not then seek to have the 1988 judgment set aside. The plaintiff submits that it was the discovery of fresh evidence in 2001 that led to this suit. This new evidence is the observation of the annular bulge, and the medical opinion of the surgeon who observed that it was likely that the annular bulge was caused by the 1985 motor vehicle accident. Since the plaintiff concedes that in 1992 he knew of the annular bulge, his action to set aside the 1988 judgment rests on whether the 2001 medical opinion that the L4-5 injury left the plaintiff "with injuries sufficient to require a job change" should result in the 1988 judgment being set aside.

**43**  The defendant addresses the issue of delay in paragraphs 15 and 16 of his written outline of argument:

1. There is another test which he has failed to meet. We say below that he is clearly out of time under the Limitations Act [sic]. But before getting to that one can see that he has not proceeded with dispatch and for that reason should be denied his relief. He knew, he says, that as far back as 1992 doctors were attributing his problems to a bulge. It seems as well that he knew they might attribute that to the car accident. Yet he did not proceed until 2002 - even though he was seeing lawyers in the meantime.
2. His chronology shows even more clearly the problems in this approach. He has had many motor vehicle accidents since. Causation, 17 years after the trial and 20 years after the accident, is going to be a nightmare for the court to decide. If this had been a live case, it would never have dragged on this long or else it would have been dismissed for want of prosecution. No writ would have been renewed this late as prejudice to the defendant is clear. Files from intervening accidents have been destroyed, scans and x-rays may be long gone. Even if everything was still preserved, the volume of evidence is too great to allow a useful review of the case.

**44**  I am of the view that the plaintiff has unreasonably delayed bringing the 1992 discovery of an annular bulge for consideration by the court. The medical opinion of 2001 that the bulge was probably caused by the 1988 accident was not the discovery of something new. The plaintiff's efforts in 1992 and 1993 to pursue an "appeal" of the 1988 judgment were based on his view that the bulge was accident caused. The 2001 opinion that the back injury was the cause of the plaintiff being required to retrain is also not a discovery of something new. The plaintiff was always of the opinion that it was an accident caused back injury that required him to retrain for different employment.

**45**  In my opinion, the plaintiff's inordinate delay and lack of due or reasonable diligence in starting the second proceeding is a separate reason why the defendant's application must succeed.

**46**  I order that this action be dismissed.

**47**  The defendant is entitled to costs on Scale 3.

SHABBITS J.

\* \* \* \* \*

CORRIGENDUM

Released: May 4, 2005.

[1] It has been brought to my attention that page 9, paragraph 21 reads "Rule 15(24) permits the court to order that a proceeding be dismissed."

[2] The paragraph should read, "Rule 19(24) permits the court to order that a proceeding be dismissed."

SHABBITS J.

**End of Document**

[***Robbins v. Webb, [2011] B.C.J. No. 1508***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22TR-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Penticton, British Columbia

T.J. Melnick J.

Heard: June 27-29, 2011.

Judgment: August 5, 2011.

Docket: 32765

Registry: Penticton

**[2011] B.C.J. No. 1508** | 2011 BCSC 1073 | 206 A.C.W.S. (3d) 236 | 2011 CarswellBC 2149

Between Keith Robbins, Plaintiff, and Bradney Roy Webb, Defendant

(15 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Determination of liability for a motor vehicle accident — The defendant Webb's truck struck the side of the plaintiff Robbins' vehicle — The most reliable evidence was that of the witness first on the scene who observed the tire tracks before they were disturbed — Based on that evidence, Webb was fully in his lane when he applied his brakes hard, causing his vehicle to slide, in response to Robbins' temporary loss of control of his vehicle due to poor tire treads and icy conditions — Therefore, Robbins was 100 per cent liable.**

**Counsel**

Counsel for the Plaintiff: J. Thomas.

Counsel for the Defendant: D. Graves.

**Reasons for Judgment**

|  |
| --- |
| **T.J. MELNICK J.** |

**1**   This was a trial to determine liability for damages resulting from a motor vehicle accident. The essential question is: who reacted to whom in commencing the chain of events that led to the impact?

**I. Background**

**2**  Both the plaintiff, Keith Robbins ("Mr. Robbins"), and the defendant, Bradney Roy Webb ("Mr. Webb"), lived on Green Lake Road near Okanagan Falls on December 19, 2008. On that day, Mr. Robbins decided to go into town for a haircut. He had already been in town that morning for a coffee and to meet with colleagues on the Okanagan Falls Volunteer Fire Department. He was aware that Green Lake Road was very slippery. The conditions were icy with a light covering of snow. He left just before 11:30 a.m., driving his daughter-in-law's 2006 Chevrolet Cobalt automobile. Unknown to him (for he had not checked), that vehicle was equipped with three well-worn all season tires and one summer tread tire.

**3**  A short distance from his driveway, Mr. Robbins was rounding a slight right-hand corner on Green Lake Road when, he said, he saw a pickup truck half-way in his lane. He said he applied his brakes and tried to turn to the right. This, he said, caused the rear of his vehicle to fish-tail out to the left. Despite that, Mr. Robbins maintained that no part of his vehicle crossed into the oncoming, southbound lane. The car was struck on the left-hand side by the pickup.

**4**  Mr. Webb, on the other hand, said that he was driving his 1994 Chevrolet Silverado pickup truck south on Green Lake Road below the posted speed limit of 50 km/hr. At a point just prior to the accident scene, he said he observed the rear end of the vehicle driven by Mr. Robbins "kick out" toward the centre line as the driver of the car appeared to lose control, then regain it. In those few seconds, said Mr. Webb, he reacted in the only way he could - he braked. At that point, he maintained, he was still fully in his own, southbound, lane. In cross-examination he denied cutting the corner and driving into the oncoming, northbound, lane. Mr. Webb recollected that he stayed in the southbound lane despite having skidded when he braked and it was the force of the collision with the Cobalt that ultimately carried his vehicle into the northbound lane. The front left-hand corner of the Silverado was damaged from the collision.

**5**  The first witness on the scene was Mr. Charles Cameron ("Mr. Cameron"). He observed skid mark tracks from the pickup, which he presumed were from its tires being "locked up", leading from the tires of the pickup back into the right-hand (southbound) lane. The tracks were in a straight line to the pickup, he said. It was pointed out to Mr. Cameron in cross-examination that in his statement to ICBC, given a few months after the accident, he had said: "I saw skid marks from the pickup leading from the centre of the road before the curve through the apex of the curve, and then they kept going straight into the oncoming northbound lane". In cross-examination, he agreed that statement conveyed the indication that at least part of the pickup truck was on the wrong side of the road. However, his evidence was that what he had actually intended by the statement was that the skid marks from the pickup had originated in the centre of the southbound lane, not the centre of the road. He pointed to a diagram in one of the experts' reports to demonstrate this.

**6**  Mr. Cameron was also on the scene for a considerable amount of time; although not present right at the accident scene every minute of that time (he assisted by opening the gate to the park below the accident scene where Mr. Robbins' vehicle had ended up).

**7**  Mr. Fred Dobransky ("Mr. Dobransky") and Mr. Daryl Hudson ("Mr. Hudson") attended the scene in response to a call placed by Mr. Robbins to the Okanagan Falls Volunteer Fire Department (Mr. Robbins was also a member).

**8**  Mr. Cameron said that he saw no one kicking snow in the area of the tire tracks left by the Silverado. This is notable because both Mr. Dobransky and Mr. Hudson said that they saw Mr. Webb doing so in the area around his vehicle. The effect of this, said Mr. Hudson, was to cover up the tracks. Mr. Webb denied that he had kicked any snow or done anything to attempt to cover the tracks of his vehicle. Mr. Hudson also said that he could see tracks going back from the pickup for 80 to 100 feet, that they came from the southbound lane, but that they were moving or rolling tracks and only became skid mark tracks after they passed into the northbound lane.

**9**  Each party called an accident reconstruction expert witness. It was the opinion of Mr. Robbins' expert, Mr. Andrew Craig ("Mr. Craig"), of Crashtec Canada, that:

1. Immediately prior to the collision the Chevrolet Cobalt sedan was travelling 30.6 km/h.
2. Immediately prior to the collision the Chevrolet Silverado pick-up truck was travelling at between 32 km/h and 36 km/h.
3. The collision occurred within the north-eastbound traffic lane, the correct traffic lane for the Chevrolet Cobalt sedan.
4. At point of collision the front of the south-westbound Chevrolet Silverado pick-up truck had slid across the centre line and the front left corner of the vehicle impacted the left side of the Cobalt sedan within the north-eastbound traffic lane.

**10**  It was the opinion of Mr. Webb's expert, Mr. Jean-Francois Goulet ("Mr. Goulet"), of MEA Forensic, that:

1. At impact, the Webb Silverado was probably partially in the northbound lane (the Cobalt's lane).
2. The Robbins Cobalt was likely significantly angled relative to the road at impact, which is consistent with the Cobalt going sideways before the collision.
3. The left rear tire of the Robbins Cobalt was a four-season tire and the right rear tire was a summer tire. This may have adversely affected the vehicle handling and may have contributed to the loss of control.
4. The electronic crash data indicates that about five seconds before impact the Cobalt was travelling at a speed of about 55 km/h.
5. The electronic crash data indicates that Mr. Robbins braked between about 3 and 4 seconds before the collision.
6. The documented physical evidence does not exclude the possibility that the Silverado was entirely in its lane at start of skidding.
7. The documented physical evidence does not exclude the possibility that at some point before the collision the Robbins Cobalt was partially across the centerline and into the northbound lane.

**11**  Mr. Goulet also had some criticisms of Mr. Craig's analysis.

**II. Analysis**

**12**  I find that the most reliable evidence is that of Mr. Cameron. He was first on the scene and has no relationship to either party. He observed the tire tracks leading from the Silverado before anyone else was on the scene (and before anyone could have observed Mr. Webb kicking snow, if he did kick snow). His statement to ICBC was misleading as to the location of the tracks, but he clarified that in evidence at trial. I have no doubt that what he meant to convey to the ICBC adjuster is what he said in evidence at trial: skid marks from the Silverado pickup originated in the centre of the southbound lane. I accept this evidence over that of Mr. Hudson as Mr. Cameron would have been in a better position to observe the truck's tire tracks prior to their being affected by other vehicles arriving on the scene or any other change from the passage of time.

**13**  Thus, I accept that Mr. Webb was fully in his own southbound lane when he first commenced braking. I also find that the reason Mr. Webb applied his brakes hard, locking them and causing his vehicle to slide into the northbound lane, was because Mr. Robbins had temporarily lost control of his vehicle due to the poor tread on the Cobalt's tires coupled with his driving too fast for the icy road conditions, which caused the left rear of the Cobalt to skid sideways in a clockwise direction, crossing partially into the southbound lane. Mr. Webb reacted to a situation precipitated by Mr. Robbins, not the other way around.

**14**  It may well be that if Mr. Webb had not braked, his vehicle would not have skidded into the oncoming lane. Mr. Robbins was probably in the process of regaining control of the Cobalt when he was struck. But, in the heat of the moment, one cannot say that Mr. Webb's reaction was inappropriate. To his right was a steep uphill bank, so his options were very limited. He reacted to the position he found himself in as a result of the ***negligence*** of Mr. Robbins.

**III. Conclusion**

**15**  I find that the accident resulted 100% from the ***negligence*** of Mr. Robbins. Costs will follow the event on Scale B unless there is some reason to address me concerning costs.

T.J. MELNICK J.

**End of Document**

[***Sadlowski v. Yeung, 2008 CHFL para. 15,521***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-H241-JNS1-M0MX-00000-00&context=)

Canadian Health Facilities Law Guide

British Columbia Supreme Court

Before: Slade J.

Decision: April 15, 2008.

Docket No. S92740

***Canadian Health Facilities Law Guide*  > *Cases* > *2000s* > *2008***

**2008 CHFL para. 15,521** | [*2008 BCSC 456*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X3X9-00000-00&context=)

Sadlowski v. Yeung

**Case Summary**

***Negligence* — Plaintiff believed, based on her discussions with physician, that she had cancer and that her only option was to have hysterectomy — Patient proceeded with hysterectomy — Patient did not have cancer — Action against physician allowed — Physician did not take reasonable steps to ensure patient understood his explanation of her condition and treatment options available to her.**

|  |
| --- |
| **Facts:** In 2001, the plaintiff, Sadlowski, experienced some pain and bleeding with intercourse. Her family physician administered a pap smear, which showed abnormal cells. She was referred to the defendant, Dr. Yeung, a general practitioner with a specialty in obstetrics and gynaecology. In October 2001, Dr. Yeung performed a colposcopy, which uses a magnifying microscope, to examine Sadlowski's cervix. If abnormal cells are seen, a biopsy is taken. Sadlowski met with Dr. Yeung in December 2001 to discuss the test results. The colposcopy revealed that cancerous cells were present. She was told of two options: one was further investigation by a biopsy, the other was a hysterectomy. Sadlowski told Dr. Yeung that she wished to maintain her fertility. A biopsy was performed in February 2002. In July 2002, Sadlowski underwent a further colposcopy and pap smear to determine whether cancerous or other abnormal cells of the kind that were found in the first colposcopy were still present. The colposcopy revealed nothing abnormal. The pap smear showed atypical cells. Sadlowski saw Dr. Yeung on August 9, 2002. According to Sadlowski, Dr. Yeung told her that she had cancer. She maintained that she had been upset and had remained in Dr. Yeung's office crying for 35 minutes. She claimed that she was told that if she did not have a hysterectomy, the cancer could spread. She also claimed that there had been no discussion of the option of ongoing monitoring without surgery. She maintained that she told Dr. Yeung that she wanted to have children in the future. She told Dr. Yeung that she would proceed with a hysterectomy. She confirmed her decision to proceed with the hysterectomy when she saw Dr. Yeung on August 23, 2002. She also told him that she wanted her ovaries to remain intact. Dr. Yeung performed the hysterectomy in September 2002. Dr. Yeung maintained that based on his "invariable practice", when Sadlowski attended his office on August 9, 2002, he would have explained that the colposcopy reports were normal and that the pap smear showed atypical cells. He would have suggested a colposcopy in the future. Dr. Yeung denied that he had ever told Sadlowski that she had cancer. He testified that, as of December 2001, he was satisfied that Sadlowski understood his explanations of her condition as she appeared intelligent and had asked appropriate questions. At issue was whether Dr. Yeung took reasonable steps to ensure on August 9, 2002, or thereafter up to September 2002, that Sadlowski understood his explanation of her condition and the treatment options available to her. Sadlowski alleged that Dr. Yeung had failed to adequately inform her of her medical condition and of the treatment options available to her.  HELD: The action was allowed.  Dr. Yeung did not take reasonable steps to ensure that Sadlowski understood his explanation of her condition and the treatment options available to her. Sadlowski believed, based on her discussions with Dr. Yeung, that as of August 9, 2002, she had cancer, and that her only option was to have a hysterectomy. The Court accepted that on August 9, 2002, Dr. Yeung would have told Sadlowski the results from the July 2002 colposcopy and pap smear. The Court accepted that Dr. Yeung would have advised Sadlowski of the options of monitoring with a further colposcopy in around six months' time and the option of a hysterectomy. However, Sadlowski was distraught during the August 9, 2002, meeting. It was apparent that she misunderstood Dr. Yeung's advice that there was an option of monitoring and a follow-up colposcopy in six months. She thought the option was to conceive within six months. Dr. Yeung should have been concerned that Sadlowski had not opted for a hysterectomy in December 2001, when cancerous cells were present, and then decided to have a hysterectomy after being told on August 9, 2002, that she was negative for cancer. It should have been obvious to Dr. Yeung that Sadlowski needed to receive and consider advice on her condition and her options when she was capable of clear and rational thought. The August 23, 2002, meeting provided an opportunity for Dr. Yeung to review the matter with Sadlowski. On the evidence, it was apparent that nothing more was discussed on August 23, 2002, other than Sadlowski's confirmation of her August 9, 2002, decision to proceed with the hysterectomy. It was incumbent on Dr. Yeung to take reasonable steps to ensure that he was understood, and he failed to do so. Sadlowski was 30 years of age when the hysterectomy was performed. She and her partner had intended to marry, and hoped to have children together. As such, the Court assessed Sadlowski's damages for loss of fertility at $90,000. The Court also awarded $10,000 for pain, suffering, and loss of enjoyment of life. |

**Counsel**

P.K. Hamilton for the plaintiff; D.W. Pilley for the defendant.

**End of Document**

[***Sherwood v. Strata Plan VIS 1549, [2018] B.C.J. No. 3764***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5TWR-3431-JKB3-X2D4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.E. Hinkson C.J.S.C.

Heard: October 24, 2018.

Judgment: November 29, 2018.

Docket: S147102

Registry: Vancouver

**[2018] B.C.J. No. 3764** | 2018 BCSC 2105 | 95 C.L.R. (4th) 343 | 2018 CarswellBC 3200

Between Douglas Sherwood and Rosslyn Sherwood, Plaintiffs, and The Owners, Strata Plan VIS 1549 and Cinnabar Brown Holdings Ltd., Defendants, and The Owners, Strata Plan VIS 1549, Third Party

(58 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Costs — Offers to settle — Bullock or Sanderson order — Application by defendant Cinnabar Ltd. for variation of order requiring Cinnabar to pay trial costs to plaintiffs including costs plaintiffs were ordered to pay to Strata Corporation dismissed — Cinnabar argued trial judge unaware of its offers to settle — First offer not a valid offer because it was not intended to include plaintiffs, was not served on all parties and did not include mandatory language — Second offer to settle was not a valid joint offer because offer was not capable of acceptance by plaintiffs or the Strata Corporation without the other also accepting.**

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| Application by the defendant Cinnabar Ltd. for variation of a trial order requiring Cinnabar to pay the trial costs to the plaintiffs including, as a disbursement, the costs the plaintiffs were ordered to pay to the defendant Strata Corporation. Cinnabar argued that the trial judge was not made aware of settlement offers made by the parties prior to the trial and that, had she known of those offers, her award of costs would have differed from that which she made. The plaintiffs and Cinnabar owned units in a condominium duplex. In order to increase their living spaces, both parties intended to construct a new roof. Cinnabar first started construction but its construction was ultimately stopped as it failed to comply with the building permit, resulting in the roof not being symmetrical. The plaintiffs then sued Cinnabar and the strata corporation in ***negligence***. The trial judge ordered Cinnabar to remove the newly built roof and replace with one similar to the original roof. Cinnabar had made two offers to settle. The first offer did not include the plaintiffs. The second offer to the Strata Corporation was contingent on the plaintiffs accepting the offer.  HELD: Application dismissed.  The first offer did not meet the definition of an "offer to settle" because it explicitly was not intended to include the plaintiffs, was not served on all parties of record, and did not include the mandatory language required by Rule 9-1(c)(iii). It was also superseded by the second offer which did meet the definition of offer to settle but was not a valid joint offer. The second offer was not effective because the plaintiffs and the Strata Corporation did not have a joint interest in many of the claims addressed in this offer. Even if this offer were considered valid, the offer was not capable of acceptance by the plaintiffs or the Strata Corporation without the other also accepting. The plaintiffs could not compel the Strata Corporation to accept the offer, nor could Strata Corporation compel the plaintiffs to do so. The offer was also not one that should reasonably have been accepted. |

**Statutes, Regulations and Rules Cited:**

Strata Property Act, [*S.B.C. 1998, c. 43, s. 71*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JSXV-G0KJ-00000-00&context=)

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 9-1*, Rule 13-1(17), Rule 14-1, Rule 23-1(10)

**Counsel**

Counsel for the Plaintiffs: D.P. Lucas.

Counsel for the Defendant Cinnabar Brown Holdings Ltd.: E.T. Kahs.

Counsel for the Defendant and Third Party The Owners, Strata Plan VIS 1549: A.R. Tryon.

**Reasons for Judgment**

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| **C.E. HINKSON C.J.S.C.** |

**I. Introduction**

**1**  This application arises out of a dispute over the construction of the roof of a duplex. The plaintiffs, Douglas Sherwood and Rosslyn Sherwood (the "Sherwoods"), and Cinnabar Brown Holdings Ltd. ("Cinnabar") sought to add a modest amount of living space to their respective strata units in a duplex in Beach Acres Resort in Parksville, B.C. Cinnabar started construction before the Sherwoods. This construction was ultimately stopped as it failed to comply with the building permit. The result being that the roof of the duplex was not symmetrical.

**2**  The Sherwoods brought claims in ***negligence*** against Cinnabar and "The Owners, Strata Plan VIS 1549", the strata corporation, consisting of all the owners of the strata lots in Beach Acres ("BA Strata Corporation").

**3**  At trial, Madam Justice Gray held that the Cinnabar had to remove the newly built roof and replace with one similar to the original roof. Failing that, Gray J. ordered the BA Strata Corporation to do so.

**4**  Gray J. ordered the Sherwoods pay the costs of the proceeding to the Strata Corporation, and Cinnabar to pay the costs of the proceeding to the Sherwoods including, as a disbursement, the costs the Sherwoods were ordered to pay to the Strata Corporation.

**5**  In this application, Cinnabar seeks to vary the order of Gray J. ("Order") with respect to costs. The Sherwoods and the BA Strata Corporation oppose this application.

**II. Background**

**6**  Beach Acres is a condominium property containing a variety of building configurations in the Beach Acres Resort in Parksville, B.C. The day-to-day management of BA Strata Corporation is performed by the corporation's Strata Council, which is comprised of elected owners of the strata lots ("BA Strata Council").

**7**  The Sherwoods are a married couple who own strata lot 13 ("Sherwood SL"). Their unit is a beachfront duplex that has a common wall with strata lot 14 ("Sharp SL"). The Sharps are a married couple and are the principals of Cinnabar, which owns the Sharp SL.

**8**  In 2012, the owners of the Sherwood SL and the Sharp SL sought to add a modest amount of living space to their respective units from what was common property of the BA Strata Corporation. For the proposed additions to proceed, the two owners had to obtain approval from both the BA Strata Corporation and the City of Parksville.

**9**  The owners of those two lots applied jointly to BA Strata Corporation for the approval of the proposed alterations to their units. The BA Strata Corporation approval process required compliance with s. 71 of the *Strata Property Act*, *S.B.C. 1998, c. 43* [*Act*], and the written approval of BA Strata Corporation for the intended changes to the common property and structure or exterior appearance of the strata lots.

**10**  Section 71 of the *Act*, provides, in part, that:

**Changes in use of common property**

71 Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless

1. The change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting...

**11**  At its annual general meeting in 2012, the Beach Acres strata lot owners passed the necessary resolution to permit the planned alterations on certain conditions. Thereafter, BA Strata Council resolved to permit the alterations, subject to the building plan renovations being reviewed by an engineer who was a member of the strata council.

**12**  Cinnabar commenced their renovation work on the Sharp SL in 2013 but did not complete it. An issue arose as to whether the work complied with the building permit. The incomplete work raised issues regarding the appearance of the roof of the Sharp SL ("new roof") and the structural integrity of the duplex. These issues, in turn, lead to a stop work order and numerous meetings of the BA Strata Corporation.

**13**  Two actions arose out of these circumstances. In the first, the Sherwoods sought damages for alleged ***negligence***, an order that the BA Strata Corporation remove the new roof at its expense or that the Sharps be ordered to do so, and remedies under s. 164 of the *Act* due to alleged unfair treatment by the BA Strata Council. The BA Strata Corporation took the position it acted fairly to all, and that the appropriate outcome was to require the Sharps to remove the roof.

**14**  It was this action that proceeded to trial before Gray J.

**15**  The second action was commenced in the Victoria Registry of this Court by BA Strata Corporation against Cinnabar ("the Victoria Lawsuit") to recover fines levied against it and its administrative and legal fees.

**16**  The trial proceeded for some 18 days. In reasons for judgment, indexed at [*2018 BCSC 890*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SGX-98H1-JF1Y-B40B-00000-00&context=) ("Reasons"), Gray J. dismissed the claim in ***negligence***, but found that the roof built by Cinnabar was not built in accordance with the building permit and the approvals granted by the BA Strata Council. As a result, Gray J. ordered that Cinnabar remove the new roof and replace it with one similar to the original. Failing that, she ordered the BA Strata Corporation to remove and replace the roof.

**III. The Order**

**17**  In her Reasons, Gray J. dealt with costs as follows:

[349] Ordinarily, a successful party is entitled to an order that the unsuccessful party pays them costs. Such costs are usually assessed by the registrar under Appendix B to the *Supreme Court Civil Rules*. Matters of ordinary difficulty, such as this case, are assessed using Scale B.

[350] The order the Sherwoods achieved against the BA Strata Corporation is essentially the order suggested by the BA Strata Corporation, and requires the Sharps to remove the As-Built Sharp Roof. The responsibility of the BA Strata Corporation to remove the roof arises only if the Sharps fail to do so in a timely way. The Sherwoods failed against the Sharps in their claim for ***negligence***.

...

[354] The BA Strata Corporation does not claim costs from Cinnabar in this proceeding. The BA Strata Corporation's claim for those costs, on a full indemnity basis, is the subject of the Victoria Lawsuit, and must be dealt with there.

[355] The BA Strata Corporation conceded that it was a necessary party to this lawsuit, and that once the Sherwoods started this proceeding, both the BA Strata Corporation and the Sharps were necessary parties.

[356] The BA Strata Corporation argued that if the court made the orders proposed by the BA Strata Corporation, then the Sherwoods have succeeded against Cinnabar and have not succeeded against the BA Strata Corporation.

[357] In these circumstances the BA Strata Corporation argued that Cinnabar should pay to the Sherwoods the costs which the Sherwoods would otherwise be required to pay to the BA Strata Corporation. Such an order is often referred to as a "Bullock" order. Essentially, it would provide that the Sherwoods should pay costs to the BA Strata Corporation because the order made is what the BA Strata Corporation proposed, but that Cinnabar should pay that amount to the Sherwoods because it is Cinnabar's conduct which gave rise to the Sherwoods' claim against the BA Strata Corporation.

[358] The Bullock order is described in Rule 14-1(18) of the *Supreme Court Civil Rules*, as follows:

**Costs of one defendant payable by another**

1. If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

[359] The BA Strata Corporation argued that, from the beginning of this action, the BA Strata Corporation has concurred with the order for Cinnabar to remove the unapproved alterations. The BA Strata Corporation submits a Bullock order which permits a successful plaintiff to add to the costs recoverable from the unsuccessful defendant the amount of costs which the plaintiff might otherwise be obliged to pay to the successful defendant.

[360] I agree. In this case, the problems all arose from Cinnabar's construction of the As-Built Sharp Roof, which does not comply with the Sharp February 2013 BP or the approvals by the BA Strata Corporation.

[361] As a result, Cinnabar is required to pay the Sherwoods their costs of this lawsuit. The Sherwoods are required to pay the BA Strata Corporation its costs of this lawsuit, but the Sherwoods are entitled to include in their claim for costs from Cinnabar, as a disbursement, the costs payable by them to the BA Strata Corporation.

**18**  Cinnabar endorsed the Order, including the part that provided that:

1. The Sherwoods pay to the Strata Corporation the costs of this proceeding;
2. Cinnabar Brown pay to the Sherwoods the costs of this proceeding including, as a disbursement the costs which this order requires the Sherwoods to pay to the Strata Corporation.

**19**  Cinnabar contends that Ms. Li Sharp--on behalf of Cinnabar--approved the Order with an understanding she would have an opportunity to make submissions on costs.

**20**  The Order was filed for entry on June 28, 2018. Prior to its entry, counsel for Cinnabar advised the respondents that the Order "did not properly reflect the court's manifest intention as the issue of costs was not fully canvassed at trial". Despite this advice, neither of the respondents took any steps to prevent the entry of the Order, and the Order was entered in the Registry on August 14, 2018.

**IV. The Application of Cinnabar**

**21**  The application before me is to vary the order after trial of Gray J. ("Order") with respect to costs. It was brought after the retirement of Gray J., and therefore came before me pursuant to Rule 23-1(10) of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*.

**22**  In its application, Cinnabar seeks the following orders:

1. the entered order of Gray J. in these proceedings be "corrected" pursuant to Rule 13-1(17);
2. that pursuant to Rules 14-1 and 9-1:
3. either or both of the respondents, the Sherwoods and BA Strata Corporation, are deprived of any and all of their costs;
4. Cinnabar is awarded costs on a solicitor-client basis with double costs payable from their offer to settle of July 13, 2017;
5. Cinnabar is awarded its costs for all or some of the steps taken after the date of delivery or service of the offer to settle; or
6. the Sherwoods pay to Cinnabar any costs payable by Cinnabar to the BA Strata Corporation; and
7. the costs of this application.

**V. Legal Principles**

**23**  In the normal course, once an order has been entered, the court which made the order is *functus officio* with respect to the issues therein: *Piyaratana Unnanse et al v. Wahareke Sonuttara Unnanse et al*, [1950] 2 W.W.R. 796 (P.C.). In some circumstances, however, the court retains jurisdiction to re-visit some issues. Generally speaking, that jurisdiction is confined to making corrections or amendments.

**24**  Under Rule 13-1(17) of the *Supreme Court Civil Rules*:

The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter that should have been but was not adjudicated on.

**25**  A court may also correct an entered order "where there has been an error in expressing the manifest intention of the court": *Harrison v. Harrison*, [*2007 BCCA 120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S412-00000-00&context=) at para. 29; *Buschau v. Rogers Communications Inc.*, [*2004 BCCA 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3SV-00000-00&context=); see also *Chandler v. Alberta Association of Architects*, [*[1989] 2 S.C.R. 848*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6520-00000-00&context=).

**26**  Therefore, after an order has been entered, a court may still be obliged to hear an application for costs if the trial judge was unaware of and entitled to know about offers to settle or if the manifest intention of the court was not expressed: see e.g. *Keller v. Peterson*, [*2014 BCSC 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1T8-00000-00&context=) at paras. 14-17; *Smart v. McCall Pontiac Buick Ltd.*, [*2001 BCSC 467*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2VD-00000-00&context=); *GC Parking Ltd. v. New West Ventures Ltd.*, [*2004 BCSC 1700*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S11R-00000-00&context=) at paras. 19, 20.

**VI. Discussion**

**27**  Cinnabar contends that Gray J. was not made aware of settlement offers made by the parties prior to the trial of this matter and that had she known of those offers, her award of costs would have differed from that which she made. Cinnabar therefore asks this Court to exercise its jurisdiction to re-visit the issue of costs.

**28**  In this case, the Cinnabar argues that the court may re-visit the issue of costs because the Order, as entered, did not contemplate or adjudicate the effect of the offers to settle. Cinnabar argues that the court should correct the order as the issue respecting costs was brought to the attention of the respondents to this application before the order was entered and they failed to prevent its entry.

**29**  In the circumstances, despite the entry of the Order, I am satisfied that Cinnabar should not be refused the opportunity of attempting to persuade me that the Order, as entered, did not adjudicate upon the effect of offers to settle or did not express the manifest intention of the Court.

**30**  In determining whether this Court should exercise its jurisdiction to re-visit the Order, I will proceed by first assessing whether the settlement offers made by Cinnabar could have impacted the costs decision. If I find that the offers may have affected the Order, I will then assess whether the order should be re-visited. Conversely, if I find that Cinnabar's settlement offers could not have impacted the Order, it follows that this Court is *functus officio* with respect to the issues decided therein.

**1. Settlement Offers**

**31**  On September 13, 2014, before the Sherwoods commenced this litigation, the BA Strata Corporation held a general meeting where a resolution regarding a mediated settlement requested by Cinnabar was defeated.

**32**  On October 14, 2014, after the litigation had been commenced, Cinnabar emailed the BA Strata Council proposing settlement to resolve the matter. Cinnabar offered to pay $19,000 to be shared between the Sherwoods and the BA Strata Corporation if the new roof were approved; or alternatively, $16,000 to be shared if a two-slope roof design were approved ("Offer #1"). There is no evidence that the Sherwoods were contacted at this time.

**33**  On April 27, 2015, the BA Strata Corporation faxed a settlement offer to the parties, indicating that it would approve the new roof and forgive all fines if Cinnabar paid all the legal costs to date, and the Sherwoods paid all legal costs of this proceeding.

**34**  By letter dated September 11, 2015, Cinnabar offered the following settlement proposal as final settlement of all matters, including the Victoria Lawsuit: it would pay $10,000 to the Sherwoods if they agreed to the new roof or alternatively, $5,000 if they approved a two-slope roof design, and $13,500 to $15,000 to the BA Strata Corporation if it approve either design and, if the two-slope roof was selected, provide the necessary approval to facilitate its construction ("Offer #2").

**35**  Offer #2 did not contain an offer to remedy the bylaw contravention. It presumed that the Sharps and the Sherwoods would settle their issues and required that the BA Strata Corporation would approve any design the Sharps and the Sherwoods agreed on.

**36**  In a letter responding to Offer #2, the BA Strata Corporation noted that the authority of the BA Strata Council was constrained by the result of the September 13, 2014, general meeting in which the owners refused to pass a resolution to authorize the BA Strata Council to make a mediated settlement "on terms that [the BA Strata Council] deems appropriate". The BA Strata Corporation further noted the amount offered was insufficient to pay the BA Strata Corporation's costs and expenses and that it rejected Cinnabar's claim about its alleged significant unfair treatment.

**37**  On September 18, 2015, the Sherwoods rejected Offer #2, instead seeking $17,500 from Cinnabar and an additional $12,500 from the BA Strata Corporation in full satisfaction of their claims against both parties, covering their legal costs to date and the substantial additional costs that they said would be required to build based on the new roof design (the "Sherwood Rejection Letter").

**38**  On September 24, 2015, the BA Strata Corporation also rejected Post-Litigation Offer #2 on the basis that "the amount offered to compensate the strata corporation for costs and expenses [was] not sufficient." The BA Strata Corporation included the Sherwoods in its correspondence and again noted that it intended to seek all of its costs as against Cinnabar in the Victoria Lawsuit (the "Strata Rejection Letter").

**2. Effect of the Settlement Offers**

**39**  For the Court to exercise its jurisdiction to re-visit the issue of costs in this case, the settlement proposals must have been capable of impacting the costs award. Rules 14-1 and 9-1 of the *Rules* provide guidance to courts with respect to awarding costs.

**40**  First, Rule 14-1 considers the entitlement of parties to cover or partially recover the costs associated with litigation.

**41**  Rule 9-1 provides outlines how "offers to settle" impact a party's entitlement to costs under Rule 14-1. Under subrule 9-1(1) "offer to settle" is defined:

1. In this rule, "**offer to settle**" means
2. an offer to settle made and delivered before July 2, 2008 under Rule 37 of the former Supreme Court Rules, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,
3. an offer of settlement made and delivered before July 2, 2008 under Rule 37A of the former Supreme Court Rules, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule, or
4. an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that
5. is made in writing by a party to a proceeding,
6. has been served on all parties of record, and
7. contains the following sentence: "The ...*[party(ies)]..*..., ...*[name(s) of party(ies)]..*..., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

**42**  The conditions of Rule 9-1(1)(c) require strict compliance: *Lau v. Rai*, [*2009 BCSC 696*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G0-00000-00&context=) at para. 26; *BCI Bulkhaul Carriers Inc. v. Wallace*, [*2015 BCSC 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4K8-00000-00&context=) at para. 22.

**43**  Subrules (5) and (6) explain what a court may do when an offer to settle has been made:

1. In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
2. deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
3. award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
4. award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
5. if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
6. In making an order under subrule (5), the court may consider the following:
7. whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
8. the relationship between the terms of settlement offered and the final judgment of the court;
9. the relative financial circumstances of the parties;
10. any other factor the court considers appropriate.

**44**  If an offer does not meet the definition of "offer to settle" in Rule 9-1(1), the circumstances listed in Rule 9-1(6) need not be considered because the Rule does not apply to the offer: see e.g. *Wormell v. Hagen*, [*2009 BCSC 1530*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2B1-00000-00&context=). As a result, such an offer would not impact a decision as to costs.

**45**  I find that Offer #1 does not meet the definition of an "offer to settle" under Rule 9-1(1). It explicitly was not intended to include the plaintiffs, was not served on all parties of record, and did not include the mandatory language required by Rule 9-1(c)(iii).

**46**  It was, as well, superseded by Offer #2, which does meet the definition of "offer to settle" in Rule 9-1(1)(c) but is nonetheless not considered a valid offer under Rule 9-1.

**47**  Offer #2 was a joint offer to the Sherwoods and the BA Strata Corporation.

**48**  In *AWD v. CCDD and SJD*, [*2006 BCSC 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23Y3-00000-00&context=) at para. 16, Gray J. held that the predecessor to Rule 9-1(6) did not provide a mechanism for making a joint offer to parties who do not have a joint interest in all the claims addressed therein: at para. 29.

**49**  For a joint offer to be effective, the parties must have a joint interest.

**50**  The Sherwoods and the BA Strata Corporation did not have a joint interest in many of the claims addressed in this Offer. The Sherwoods sought to have BA Corporation remove the new roof or alternatively, that Cinnabar do so. BA Corporation took the position that Cinnabar ought to be required to remove the roof. BA Strata Corporation did not claim costs from Cinnabar in this proceeding, having commenced the Victoria Lawsuit to recover those costs on a full indemnity basis.

**51**  Even if this Offer were considered valid, for an offer to settle to have an effect on any given party's costs, the offer must be one that was capable of being accepted by that party without the necessity of obtaining the cooperation or consent of any other party: see *Brook v. Tod Estate*, [*2013 BCSC 330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1Y8-00000-00&context=) at para. 27.

**52**  In considering whether the Offer ought reasonably to have been accepted, the court should ask "whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted"*: Hartshorne v. Hartshorne*, [*2011 BCCA 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2V7-00000-00&context=) at para. 27. The burden of proof rests on the party claiming the offer ought to have been accepted: *British Columbia Society for the Prevention of Cruelty to Animals v. Baker*, [*2008 BCSC 947*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M393-00000-00&context=) at para. 36 (Chambers).

**53**  In my view, the Offer was not capable of acceptance by the Sherwoods or BA Strata Corporation without the other also accepting. Cinnabar's offer to BA Strata Corporation was contingent on the Sherwoods accepting the offer. It was explicitly premised on the Sherwoods having accepted Cinnabar's offer. But the Sherwoods could not compel BA Strata Corporation to accept the offer, nor could BA Strata Corporation compel the Sherwoods to do so. Thus, neither party could separately accept the Offer and thereby bring the proceeding to a conclusion as was discussed in *Aspen Enterprises Ltd. v. Quiding*, [*2009 BCSC 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B106-00000-00&context=) at para. 19.

**54**  Further, if the Sherwoods accepted Cinnabar's offer by agreeing to either the new roof or the two-roof design, BA Strata Corporation's approval was required. Pursuant to s. 71 of the *Act*, this would require a three-quarters vote at an annual or special general meeting. Neither the Sherwoods nor BA Strata Corporation were capable of guaranteeing this approval.

**55**  Finally, BA Strata Corporation was only offered $13,300 - $15,000 "as final settlement of all matters" related to both this action and the Victoria Lawsuit in which its claim was well in excess of $15,000. The Offer also required all three parties to execute a mutually agreeable release and therefore, to later agree on the terms of the three party mutual release instrument. I am not prepared to accept that that Offer was one that ought reasonably to have been accepted.

**56**  The purpose of these rules is to encourage the acceptance of reasonable offers. In this case, I conclude the Offer was not one that should reasonably have been accepted.

**VII. Conclusion**

**57**  Therefore, although the Order of Gray J. did not adjudicate upon the effect of the Offer, because I am satisfied that the Offer did not comply with the requirements of Rule 9-1, I conclude that Gray J.'s Order would not have been affected by the Offer.

**58**  As a result, I am satisfied that her Order expresses her manifest intention, and dismiss the application of Cinnabar to vary that Order or to reapportion costs on a basis other than that determined by Gray J.

C.E. HINKSON C.J.S.C.

**End of Document**

[***Sibley v. British Columbia Custom Car Assn. (c.o.b. Mission Raceway Park and/or Mission Race Ways), [2005] B.C.J. No. 745***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0F6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Cohen J.

Heard: January 25 and February 14, 2005.

Judgment: April 6, 2005.

New Westminster Registry No. S73674

**[2005] B.C.J. No. 745** | 2005 BCSC 509 | 138 A.C.W.S. (3d) 398

Between James Frank Sibley, plaintiff, and British Columbia Custom Car Association doing business as Mission Raceway Park and/or Mission Race Ways, National Hot Rod Association and Bryce Connor, defendants

(76 paras.)

**Case Summary**

**Contracts — Formation — Incorporation of terms by reference — Form of contract-- Implied — Interpretation — Understanding of the parties — Breach of contract — Conditions and warranties — Fundamental breach.**

|  |
| --- |
| Application by the defendants, the British Columbia Custom Car Association and the National Hot Rod Association, to dismiss the action of Sibley against all of the defendants. Sibley was a competitive motorcycle and drag car racer. He was a member of the Hot Rod Association. He sued the defendants for damages after he was injured in a collision between his motorcycle and a snowmobile operated by the defendant Connor. The collision took place in the staging lanes at a raceway where Sibley and Connor waited to be called forward to race. Neither party was engaged in competition at the time of the collision. They were also not scheduled to race against each other. The raceway was a member of the Hot Rod Association. Prior to the collision Sibley signed a release agreement. Sibley did not claim that the release was not binding. He submitted that the agreement incorporated the rules of the Hot Rod Association or the rules constituted a collateral warranty. The defendants breached these rules in several ways. One way was that Connor installed a reverse throttle on his snowmobile. The breaches were fundamental to the release agreement and amounted to a complete non-performance of the contract.  HELD: Application allowed.  The rules did not constitute a warranty that were incorporated into the release agreement. The parties did not intend that the rules would form part of the release agreement. The rules were not incorporated expressly or by inference into the release agreement. The statement that Sibley relied upon did not constitute a collateral warranty. If this finding was incorrect Sibley's argument based on the doctrine of fundamental breach could not succeed. Even if the installation of the throttle was a fundamental breach of the rules, this breach did not render the release agreement a nullity. The reason was that the rules did not guarantee or ensure the safety of participants. The primary responsibility for the safe condition and operation of a vehicle rested with the vehicle owner and river. The track operator's main concern was to provide a place to conduct events. No representations were made that compliance with the rules would prevent or guarantee against injury or death to the participants. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A.

**Counsel**

Counsel for the plaintiff: R.B. Kearl

Counsel for the defendants: D.R. Eyford

|  |
| --- |
| **COHEN J.** |

1. BACKGROUND

**1**  The plaintiff is a competitive motorcycle and drag car racer. He seeks damages for personal injuries he suffered in a collision between his motorcycle and a snowmobile operated by the defendant Bryce Connor at the Mission Raceway Park ("MRP") in Mission, British Columbia on May 20, 2000.

**2**  The collision took place in the staging lanes at the MRP where the plaintiff and Mr. Connor were waiting to be called forward to race. Neither the plaintiff nor Mr. Connor were engaged in competition at the time of the collision. Nor were they scheduled to race against each other.

**3**  Prior to the collision the plaintiff executed a "Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement" (the "Release Agreement") which provides, as follows:

IN CONSIDERATION of being permitted to compete, officiate, observe, work for, or participate in any way in the EVENT(S) or being permitted to enter for any purpose any RESTRICTED AREA (defined as the advance staging area, burn out area, competition area, shutdown area, staging lanes, return road area, and any other area within the barriers, fences and/or structures separating the general public from racing activities), EACH OF THE UNDERSIGNED, for himself/herself, his/her personal representatives, heirs, and next of kin:

1. Acknowledges, agrees and represents that he/she has or will immediately upon entering any of such RESTRICTED AREAS, and will continuously thereafter, inspect the RESTRICTED AREAS which he/she enters and he/she further agrees and warrants that, if at any time, he/she is in or about RESTRICTED AREAS, and he/she feels anything to be unsafe, he/she will immediately advise the officials of such and will leave the RESTRICTED AREA and/or refuse to participate further in the EVENT(S).
2. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants, racing associations, sanctioning organizations or any subdivision thereof, track operators, track owners, officials, car owners, drivers, pit crews, rescue personnel, any persons in any RESTRICTED AREA, promoters, sponsors, advertisers, owners and lessees of premises used to conduct the EVENT(S), premises and event inspectors, surveyors, underwriters, consultants and others who give recommendations, directions, or instructions or engage in risk evaluation or loss control activities regarding the premises or EVENT(S) and each of them, their directors, officers, agents, and employees, all for the purposes herein referred to as "Releasees", FROM ALL LIABILITY TO THE UNDERSIGNED, his/her personal representatives, assigns, heirs, and next of kin FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFORE ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY OR RESULTING IN DEATH OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENT(S), WHETHER CAUSED BY THE ***NEGLIGENCE*** OF THE RELEASEES OR OTHERWISE.
3. HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the Releasees and each of them FROM ANY LOSS, LIABILITY, DAMAGE, OR COST they may incur arising out of or related to the EVENT(S) WHETHER CAUSED BY THE ***NEGLIGENCE*** OF THE RELEASEES OR OTHERWISE.
4. HEREBY ASSUMES FULL RESPONSIBILITY FOR ANY RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE arising out of or related to the EVENT(S) whether caused by the ***NEGLIGENCE*** OF RELEASEES or otherwise.
5. HEREBY acknowledges that THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or death and/or property damage. Each of THE UNDERSIGNED also expressly acknowledges that INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.
6. HEREBY agrees that this Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement extends to all acts of ***negligence*** by the Releasees, INCLUDING NEGLIGENT RESCUE OPERATIONS and is intended to be as broad and inclusive as is permitted by the laws of the Province or State in which the Event(s) is/are conducted and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

I HAVE READ THIS RELEASE AND WAIVER OF LIABILITY, ASSUMPTION OF RISK AND INDEMNITY AGREEMENT, FULLY UNDERSTAND ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND HAVE SIGNED IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT, ASSURANCE OR GUARANTEE BEING MADE TO ME AND INTEND MY SIGNATURE TO BE A COMPLETE AND UNCONDITIONAL RELEASE OF ALL LIABILITY TO THE GREATEST ALLOWED BY LAW.

**4**  In this application by the British Columbia Custom Car Association ("BCCCA") and the National Hot Rod Association ("NHRA") (the "defendants"), pursuant to Rule 18A, the defendants seek an order that the plaintiff's action be dismissed.

1. THE ISSUE

**5**  The single issue to be decided in this application is whether the Release Agreement executed by the plaintiff precludes the plaintiff's claim against the defendants.

1. DECISION

**6**  The defendants' application is allowed and the plaintiff's action against the defendants is dismissed.

1. THE AGREED FACTS

**7**  The parties have agreed upon certain facts.

**8**  The plaintiff is a competitive motorcycle and drag car racer who has competed for cash prizes at drag racing competitions in the United States and Canada since 1960. He has been a member of the NHRA for over 35 years.

**9**  On May 20th, the plaintiff was present at the MRP to compete in the elapsed time motorcycle division drag racing competition. The MRP is a member track of the NHRA, and as a condition for being permitted to compete in the drag racing competitions the plaintiff executed the Release Agreement. The plaintiff read the Release Agreement before he signed it.

**10**  The Release Agreement is reproduced in the NHRA 2000 Rulebook (the "Rulebook"). The plaintiff was familiar with the content of the Rulebook prior to competing in the drag racing competition on May 20th.

**11**  The Rulebook prohibited competition between snowmobiles and other types of vehicles. Prior to May 20th, the plaintiff attended two meetings convened by racetrack owners, operators and officials where it was proposed that motorcycles would compete against snowmobiles during the 2000 race season at the MRP. At the meetings, the plaintiff expressed the view that snowmobiles should not race in the same class against motorcycles because it was his view that snowmobiles are dangerous and can go out of control.

**12**  The vehicles which competed at the MRP on May 20th were required to pass a technical inspection prior to competition.

**13**  The collision between the plaintiff's motorcycle and Mr. Connor's snowmobile occurred in the staging lanes at the MRP which are included within the definition of "restricted area" under the terms of the Release Agreement.

**14**  At the time of the collision, the throttle orientation on Mr. Connor's snowmobile had been altered from that of the original position, in that it was installed in reverse.

1. THE RULEBOOK

**15**  The Rulebook contains certain provisions which are relevant to this application, as follows. At p. 8 under the heading "The Basics of Drag Racing" the text provides:

prime responsibility for the safe condition and operation of a vehicle in competition rest with the vehicle owner and driver. The track operator's main concern is to provide a place to conduct events.

**16**  Under the heading "How to use this Rulebook", at p. 16, the text provides:

the Rulebook provides guidelines and minimum standards for the construction and operation of vehicles used in NHRA Championship Drag Racing events. As a general rule, unless optional equipment or a modification is specifically permitted by the Rulebook, it is prohibited. The Rulebook divides the guidelines into two basic groups:

Specifications and Requirements: The minimum standards that differentiate the various categories of competition vehicles.

General Regulations: Guidelines that concentrate on specific areas of construction or operation of a vehicle. Many guidelines in the Rulebook are applicable to many or all categories. General Regulations provides a central location for the description of those guidelines.

[emphasis added]

**17**  Under the same heading, at pp. 16-17 the text provides:

In many instances the Requirements and Specifications for a particular class will reference a General Regulation Section ...

...

Conversely, General Regulations may refer the reader back to Requirements and Specifications by stating "See Class Requirements" ...

...

Before deciding which standards are applicable to your vehicle, Class Requirements AND General Regulations must both be considered.

**18**  Under the heading "E.T. Snowmobile", at p. 33, the text provides:

For snowmobiles running 7.50 (4.50) and slower. All snowmobiles must be factory-production assembled, showroom available and in the hands of the general public ...

Competition structure will be conducted on a E.T. dial-your-own format. Competition with any other type of vehicle prohibited.

[emphasis added]

**19**  Under the heading "Section 17 - General Regulations", at p. 187, the text provides:

Each car, regardless of class or category, must complete and satisfactorily pass inspection by the Technical Department before being allowed to make a trial run or participate in any event conducted at an NHRA member track (this includes private test sessions).

Throughout this Rulebook, a number of references are made for particular products to meet certain specifications (i.e. SFI Specs, SNELL, DOT, etc.). It is important to realize that these products are manufactured to meet certain specifications, and upon completion, the manufacturer labels the product as meeting that spec. Therefore, except as outlined under SFI requirements, any change to the product voids that certification; under no circumstances may any certified product be modified, altered, or in any way vary from the as manufactured' condition. Such a practice is in violation of the SFI, SNELL, DOT, etc., program and in so doing voids such certification and will not be accepted by NHRA.

[emphasis added]

**20**  Under the heading at p. 236 "Section 20 - Administration Procedures and Appeals - Authority for Conduct of Racing", appears the following text, beginning at p. 238:

The participant agrees that by entering an event, the participant acknowledges that the event site is safe and suitable for racing and the participant acknowledges that by participating in the event, the participant may suffer bodily injury or death or loss or damage to property ... All participants shall be required as a condition of participation to sign all required entry forms, including such releases as shall be required by NHRA insurance policies, consisting of the following or similar wording:

[emphasis added]

**21**  Following the above passage appear the words "Release and Waiver" and, at pp. 238-239, the text of a form of release in the identical form to that signed by the plaintiff in the instant case with the exception that following the form of the release in the Rulebook the following words appear, at p. 240:

NHRA makes no representations or express or implied warranties that compliance with the rules and regulations published in this Rulebook or published during the course of the year in National DRAGSTER will prevent or guarantee against injury or death to spectators or participants or damage to personal property. These rules and regulations constitute the minimum acceptance standards for competition and are intended as a guide for the conduct of the sport. Safety is the responsibility of equipment manufacturers, builders, and the participants in the event.

[emphasis added]

**22**  Under the heading "Technical Inspection", at p. 243, the text provides:

Prior to competition, all cars and drivers must pass a technical and safety inspection (this includes private test sessions) ... As a general rule, unless optional equipment or a modification is specifically permitted by this Rulebook, it is prohibited.

[emphasis added]

VI. THE PLAINTIFF'S TESTIMONY

1. Signing the Release Agreement

**23**  At his examination for discovery the plaintiff testified as follows with respect to the Release Agreement and its execution:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Did you read the waiver before you signed it? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I believe I've read the waiver. I think it's posted at the front gate on the way in. |  |
|  | Q |  | It's a document you were familiar with before you signed it on May 20, 2000? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Same waiver for the last 35 years, I'd say. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And it's a document you signed at every event you've attended as a participant? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | You have to sign it, yeah. |  |

...

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Is your signature on the document? |  |
|  | A | Right there. |  |
|  | Q | This is your signature, Mr. Sibley? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes. On that - on this piece of paper from here down. |  |
|  | Q |  | You knew when you signed the document that you were agreeing to the terms and conditions that are reflected on Defendant Document No. 10? |  |
|  | A |  | Well, I mean, as far as me reading this off and knowing everything about it, I know what it says and I've always known what it says. |  |
|  | Q |  | You knew when you signed this document that you were agreeing to the terms and conditions that are reflected in Defendant Document No. 10? Is that a yes? |  |
|  | A |  | Let me read it. Yeah. That's exactly what I understand it to be. |  |
|  | Q |  | Just so that it's clear for the record, Mr. Sibley, when you signed this document, you knew you were agreeing to the terms and conditions that are reflected in Defendant Document No. 10? |  |
|  | A |  | Yes. I would like to say something else, but I won't. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Well, go ahead, Mr. Sibley. |  |
|  | A | No. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You were familiar with this form of document when you signed it on May 20th, 2000? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And as I understand it, Mr. Sibley, signing a waiver is a common feature of the common racing events you've attended since the early 1960's? |  |
|  | A |  | Well, I don't - I, you know, let's say the last, no doubt about it, the last 15 years, let's say. |  |
|  | Q |  | In the 15 years preceding May 20th of 2000, you were required to sign this form of document at all racing events you participated at; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Do you know how many times you signed a Release of Waiver and Liability form during the course of your racing career? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Lots. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Prior to May the 20th of 2000, would you have signed that form of document on more than 100 occasions? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Oh, yeah. |  |
|  | Q | More than 200 occasions? |  |
|  | A | I'm sure. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You understood at the time you signed the Release and Waiver Agreement on May 20th of 2000, that you couldn't compete at the Mission Raceway Park if you didn't sign it; correct? |  |
|  | A |  | Well, you've got to sign it. I mean, if you're going to race, I understand that. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | If you don't sign it you can't compete? |  |
|  | A | No. |  |
|  | Q | You agree with that? |  |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And if you don't sign it, you can't have access to the racing activity area? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you knew at the time you signed it on May the 20th, 2000 that the document would affect your legal rights if your vehicle was damaged or you suffered an injury at the Mission Raceway Park? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Did you ever ask anyone to explain the significance of the document on any of the occasions when you signed it? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

**24**  The plaintiff also testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Are spectators allowed to gain access to either the staging area, the burnout area, the competition area or the shutdown area? |  |
|  | A |  | Spectators can go - they can go in the spectator area, they can go in the pits. They can't go on the burnout area, or on the starting line. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Can they go into the staging area? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | They can, but theoretically, they have to have a - they have to have signed a waiver and they have to have a band on their arm. If you don't, they throw you out of there. |  |
|  | Q |  | I take it then, people in the restricted areas have to have some sort of identification? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |
|  | Q | And they have to sign a waiver to gain - |  |
|  | A | You have to sign a waiver to be there. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And the waiver, is that a standard form document that you are familiar with through - |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | - the course of your career, racing at different venues? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

1. The Risks of Drag Racing

**25**  With respect to the risks of drag racing the plaintiff testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Do you consider the racing to bring with it the risk of injury, death or damage to vehicles? |  |
|  | A |  | I mean, you know, it has and it can. But you know, I mean, you know, so can walking to the mailbox. |  |
|  | Q |  | Have you been present at competitions where other participants have been injured? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Have you been present at competitions where some participants have been killed? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

1. The Meetings

**26**  With respect to the meetings in Bellingham, Washington State, the plaintiff testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | I'm going to stop you there, Mr. Sibley. I just want to put everything in a chronological context. You described a few moments ago attending two meetings where there was a discussion about combining snowmobiles and other vehicles? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Right. |  |
|  | Q | Those other vehicles being motorcycles? |  |
|  | A | Motorcycles. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So these would be Canadian racing officials who came to Washington State to meet with Washington State racers? |  |
|  | A |  | Right. In Bellingham to meet with Washington State racers. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And you attended the two meetings? |  |
|  | A | Yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And you voiced your concerns about having |  |
|  |  | snowmobiles race against motorcycles? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | In the same class? |  |
|  | A | In the same class, against each other. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And this was before or after the May 22 [sic], 2000, incident? |  |
|  | A |  | This would have been probably February, March, April, May is when I got hit. |  |
|  | Q |  | So in February of 2000, you attended these two meetings? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I believe that was the date. |  |
|  | Q | Before your injuries? |  |
|  | A | Before I was injured, yeah. |  |

1. The Accident

**27**  With respect to the accident the plaintiff testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | In your experience, do snowmobiles pose a greater risk to safety than other vehicles that race? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | At the time of the incident, I would say yes ... |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | I'm going to ask you to explain how snowmobiles race on a - |  |
|  | A |  | They still have the skis on the front, but they incorporate, it's in that rule book, it shows exactly what they do. And they put these little tiny wheels on the front where the - where normally those would be in the snow. And then they take the paddle belt off the back and they put a flat belt on it, like a just a big flat piece of rubber that's a belt. Instead of having traction, it has no traction, because that's on a drag strip you don't have any tire tread, you know, I mean that interferes with it. It's a flat belt, like an eraser, you know, so it will bite, hook up real hard. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | How long were you in the staging lane prior to the impact between the snowmobile and your motorcycle? |  |
|  | A |  | I couldn't say for sure, but I'd say maybe 10 minutes. |  |

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|  | Q |  | Tell me what happened as you were waiting in the staging lane. |  |

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|  | A | While I was waiting in the staging lanes? |  |
|  | Q | Yes. |  |

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|  | A |  | Well, it's the first time the snowmobiles were there for this because they race during the winter. They race right up into almost the end of June, so they convert their June - their winter snowmobiles, some of them, into a summer activity, but they don't finish their winter thing until after the summer thing starts. So there was 7 snowmobiles that showed up and I think there were 6 or 7 bikes. This would be the first time that we were going to compete with them. |  |

So when I pulled into the lanes, there was a snowmobile in front of me. I mean, the first one in the right side in lane 1 was a snowmobile, a brand new one, a street stock one. Behind that was another snowmobile and then me. Well, the guy in front of me, when he started his up, the guy in front of him wasn't on his bike, but his helmet was on his snowmobile. And when he started his up, it hit the snowmobile in front of him and knocked the helmet off on the ground. And I said this is exactly what I'm talking about. That these things shouldn't be in the lanes together by themselves because you've got these big, long, wheely bars and then you've got those tracks on those snowmobiles.

So what happened from there, the lane started to filter out. I started to pull forward. If I was going to run a motorcycle, I would run a motorcycle. If I was going to run a snowmobile, I was going to protest, I was going to say no, and either make a single by myself but not pair up alongside one. And I already told the starter that I was totally against it and that was - that I was against it and that I - next thing I know I'm laying on the ground. That's all I can tell you.

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|  | Q |  | Again, your concern about the snowmobiles related to the fact that they couldn't keep the vehicle in a straight line after they'd finished the quarter mile run? |  |
|  | A |  | That was one - that was one thing. The other thing was is that they had what is known as a reactive clutch. When you start them, if the throttle sticks, you're gone. It takes off. |  |
|  | Q |  | Now, prior to your motorcycle being struck by the snowmobile, had any of the motorcycles or snowmobiles competed on the racetrack? |  |

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|  | A | No. |  |

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|  | Q |  | You knew before you attended at the Mission Raceway Park on that weekend that snowmobiles would be competing against motorcycles? |  |
|  | A |  | I knew - I knew that was in the making, but I didn't - but the weekend before that they weren't there. See what I mean? So this is the first weekend that they showed up that the bikes officially had to compete with points against the snowmobiles. |  |
|  | Q |  | Do you recall today, having seen this snowmobile before it collided with your motorcycle. |  |
|  | A |  | You mean at the time it collided with it at the scene? |  |

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|  | Q | Yes. |  |
|  | A | No, not at all. You mean, did I know it was coming? |  |
|  | Q | Yes. |  |
|  | A | No, not at all. |  |

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|  | Q |  | And you've estimated that Mr. Connor's snowmobile was approximately 50 feet back of your motorcycle, I guess when you last saw it, prior to the collision? |  |
|  | A |  | Yeah. That when I was sitting about - there's one, two, I would have been sitting right there. That might have been what I was trying to show here. |  |

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|  | Q |  | Mr. Sibley, the collision between Mr. Connor's snowmobile and your motorcycle occurred in an area where the general public was not permitted access; correct? |  |
|  | A |  | Yeah. You can - I could have - both him or I could have at least one person out there with us. |  |
|  | Q |  | Anybody within that area would have had to have signed the release? |  |

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|  | A | Yeah. |  |
|  | Q | The general public weren't permitted in that are? |  |
|  | A | No. |  |

1. DISPUTED FACTS

**28**  In his affidavit sworn October 7, 2004, the plaintiff deposed that Mr. Connor's snowmobile did not have a proper tech certificate that it had been inspected and was safe for racing. He claims that it only had a helmet number and a name on the tech card, which was signed by the driver's father-in-law and not a tech official. He also claims that the problem stems from the improper tech inspection for the snowmobile. He deposed that the throttle was installed backwards and that if properly inspected the snowmobile would have been found to be illegal, because no unapproved alterations to throttles were allowed. He says that for Mr. Connor to run the snowmobile at the MRP, or any NHRA sanctioned track, he had to sneak the modified throttle by the inspection tech. He says that this would explain why the improperly filled out tech inspection slip was signed by the driver's father-in-law rather than an official tech inspector as required by the rules.

**29**  The plaintiff also deposed that the NHRA allowance of a snowmobile on the racetrack was a violation of its own rules and that he in no way assumed the risk of this violation. He says that May 20th was the first time he had seen a snowmobile on the track competing with motorcycles and that he was surprised that snowmobiles and motorcycles were combined. He says that he had no prior knowledge that they would compete that day and that the snowmobiles should not have been in the same waiting area.

**30**  In his affidavit sworn October 14, 2004, the plaintiff deposed that he has received the Rulebook every year as a part of his membership with the NHRA. He has been a member of the NHRA for over 35 years and he is very familiar with the Rulebook, and has relied on its contents in competitions at various racetracks, including the MRP.

**31**  The plaintiff claims that the Rulebook sets out minimum standards for competition at the MRP, including the staging area. He says that he has read the Rulebook, and it is important to him because it is necessary to follow in order for him to participate in NHRA events, and that compliance with the rules is necessary for the safety of all competitors. He also says that he has read the form of release in the Rulebook and understands the rules set a minimum standard to be followed.

**32**  On the issue of the Release Agreement, in his affidavit sworn September 28, 2004, Mr. Wally Duperon Jr., an executive director of the BCCCA and the race director at the MRP, deposed that all persons wishing to participate in racing events at the MRP are required to sign a standard form of release before being permitted to compete or participate in any way in the scheduled events, or being permitted access to any of the restricted areas, including the advance staging area, burnout area, competition area, shut down area, staging lanes, return road area, and any other area within the barriers, fences, and/or structures separating the general public from the racing activities at the MRP.

**33**  Mr. Duperon deposed that he was present at the MRP on May 20th. He says that the collision occurred in the advance staging area at the MRP. Admission to the advance staging area is restricted to persons who have signed a release and that both the plaintiff and Mr. Connor were competing in racing events organized by the defendant BCCCA and were not competing against each other.

**34**  On the issue of the technical inspection of Mr. Connor's snowmobile, Mr. Mark Boutilier, an automotive technician, deposed in his affidavit sworn November 8, 2004, that he is certified by S.F.I. Foundation, Inc., a non-profit organization established to issue and administer standards for safety/performance automotive and racing equipment, and to inspect NHRA race vehicles. He says that he performed tech inspections for the race vehicles at the MRP on May 20th and that he was present at the MRP when the plaintiff's vehicle was involved in a collision with Mr. Connor's snowmobile.

**35**  According to Mr. Boutilier's affidavit, at the time of the collision he was head of the tech department at the MRP. As such, his responsibilities and duties were to inspect competition vehicles prior to racing to ensure that they met the technical requirements set out in the Rulebook. He attached to his affidavit pp. 33-35 from the Rulebook concerning the racing class snowmobiles, which sets out the requirements and specifications for snowmobiles at the time of the collision.

**36**  Mr. Boutilier deposed that on May 20th he performed the tech inspection of Mr. Connor's snowmobile and he attached to his affidavit the Inspection Classification Form ("Tech Card"). He deposed that the only items on the Tech Card that pertained to snowmobiles are those concerning the fuel system and the rider's personal equipment, such as helmet and protective clothing. He noted the type and rating of Mr. Connor's helmet at item 29 of the Tech Card and he deposed that the tech inspection he performed was full and complete based on the requirements listed in the Tech Card. He says that Mr. Connor's snowmobile complied with the requirements of the tech inspection in all respects.

**37**  Mr. Boutilier also deposed that at the time of the collision, the throttle orientation on Mr. Connor's snowmobile had been altered from that of the original position, in that it was installed in reverse. He says that there was no prohibition in the Rulebook against that type of modification to snowmobiles at the time of the collision. He explained that if the throttle on a snowmobile is installed in reverse, its appearance resembles a bicycle handbrake, but it operates in the reverse manner, so that if the driver pulls on the throttle with his or her fingers, the speed of the vehicle will increase rather than decrease.

**38**  Finally, Mr. Boutilier deposed that he is not Mr. Connor's father-in-law, and he is not related to Mr. Connor by blood or marriage.

**39**  On the issue of modifying vehicles, in his Declaration sworn November 18, 2004, Mr. Danny Gracia, National Technical Director of the NHRA, deposed that there is not a general prohibition in the Rulebook about modifying vehicles for racing. Section 17 of the Rulebook refers to particular products meeting certain specifications. The SFI specification that applied to NHRA championship drag racing in 2000 are described in the Rulebook. Snell independently tests helmets and other protective headgear. The Snell specifications referred to in s. 17 of the Rulebook apply to the helmets worn by racing participants. The DOT specifications referred to in s. 17 of the Rulebook are the U.S. Department of Transport specifications for tires. According to Mr. Gracia, the specifications for snowmobiles are those detailed on pp. 33 - 36 of the Rulebook and they do not prohibit modifications to throttles.

1. THE PLAINTIFF'S POSITION

**40**  The plaintiff's position is that he was waiting to participate in a motorcycle race when Mr. Connor's snowmobile lost control and ran him down, causing him serious personal injuries. He asserts that the throttle on the snowmobile was installed in reverse and that if properly inspected by the defendants would not have been allowed on the racetrack. He says that a reverse throttle causes the snowmobile to run at full speed without the operator's control and therefore is extremely dangerous.

**41**  According to the plaintiff, on May 20th he signed the same form of release as he had through 40 years of competitive drag racing, but he did not intend to assume the risk of competition with the snowmobile. He says that the NHRA allowance of a snowmobile on the racetrack was a violation of its rules and the plaintiff in no way assumed this risk. Moreover, he claims that the throttle installed in reverse on the snowmobile was an alteration contrary to the NHRA rules and that the plaintiff never assumed the risk of competing with a snowmobile with a reverse throttle.

**42**  Plaintiff's counsel argued that when interpreting the Release Agreement the Court has to import certain words which appear at p. 240 in the Rulebook under the heading "Release and Waiver".

**43**  On this point, plaintiff's counsel referred to the decision in Gallen et al v. Butterley [*(1984), 53 B.C.L.R. 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JF75-M33H-00000-00&context=) (C.A.), where at p. 51 Lambert J.A. dealt with the question of whether a warranty is one of the terms that may form part of a contractual relationship and said, as follows:

The distinction does not turn on whether the recipient of the representation acted on it. The distinction turns on whether the representation became part of the contractual relationship between the maker and the recipient. That, in turn, depends on the intention of the parties, as derived from objective evidence, including, but not limited to, evidence that tends to show whether the representation was intended to be acted upon and was in fact acted upon.

**44**  Counsel argued that in the instant case the warranty contained in the words "These rules and regulations constitute the minimum acceptance standards for competition" form part of the Release Agreement.

**45**  Counsel submitted that the Release Agreement was intended to release the defendants from liability for accidents caused within the rules of the NHRA. He submitted that the plaintiff intended to release the defendants from any liability if there had been an accident with another motorcycle, but not for an accident with a snowmobile. Furthermore, he said that the release was not intended to release the defendants from liability for an accident with a snowmobile with a reverse throttle.

**46**  Finally, counsel also argued the doctrine of fundamental breach. On this point, he referred to a passage in A.G. Guest, Anson's Law of Contract, 24th ed. (Oxford: Claredon Press, 1975) at p. 162, where the learned author states, as follows:

There were, it was said, in every contract certain terms which were fundamental, the breach of which amounted to a complete non-performance of contract. A fundamental term was conceived to be something more basic than a warranty or even a condition. It formed the core' of the contract, and therefore could not be affected by any exemption clause.

**47**  Counsel contended that the core of the Release Agreement was that the defendants would comply with their own rules so that motorcycles would race against motorcycles and snowmobiles only against snowmobiles. He also submitted that it was a core of the Release Agreement that the vehicles racing would not be modified, but in this case the snowmobile was modified with a reverse throttle contrary to the NHRA rules. Counsel said that the rules form the core of the Release Agreement as they are rules which provide the basis for the safety of all competitors on the MRP racetrack.

1. REASONS

**48**  Issues relating to the enforceability of release agreements in the context of sports and recreation activities have been found suitable for determination by Rule 18A: See Dixon v. B.C. Snowmobile Federation, [*[2003] B.C.J. No. 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S291-00000-00&context=), [*2003 BCCA 174*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S291-00000-00&context=); Clarke v. Action Driving School Ltd., [*[1996] B.C.J. No. 953*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3MJ-00000-00&context=) (S.C.); Karroll v. Silver Star Mountain Resorts Ltd. [*(1988), 33 B.C.L.R. (2d) 160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JTNR-M4B7-00000-00&context=) (S.C.); Schuster v. Blackcomb Skiing Enterprises Ltd. Partnership, [*[1995] 3 W.W.R. 443*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63P6-00000-00&context=) (B.C.S.C.). In Dixon, supra, the Court gave effect to a release in essentially the same form as the Release Agreement.

**49**  In Schuster, supra, at p. 446 Hall J. (as he then was) states, as follows:

Counsel are agreed that the narrow issue presented for decision here is appropriate for decision under the provisions of R. 18A. It should be noted at the outset that although the defendant certainly takes issue with the question of ***negligence*** alleged against it or its servants, the parties are agreed that for the purposes of this application it must be assumed that the plaintiff may be able to prove one or more acts of ***negligence*** against the defendant.

On this point, the defendants accept that for the purposes of their application Mr. Connor's negligent operation of his snowmobile caused the collision with the plaintiff's motorcycle.

**50**  At law, the purpose of a release is to absolve a party from liability for ***negligence*** or for breach of contract. Such agreements are binding, provided they are not illegal, voidable, or unconscionable: See Photo Production Ltd. v. Securicor Transport Ltd., [1980] 1 All ER 556 (H.L.) at p. 570; Hunter Engineering Co. v. Syncrude Can. Ltd. [*(1989), 57 D.L.R. (4th) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23NF-00000-00&context=) (S.C.C.) at 337.

**51**  The plaintiff has not argued that the Release Agreement is not binding. Rather, the plaintiff's argument proceeds on two grounds. First, that the Release Agreement, expressly or by inference incorporates the NHRA rules, or alternatively, that the rules constitute a collateral warranty. Secondly, the plaintiff alleges that the defendants breached the rules in the following manner:

1. by allowing Mr. Connor's snowmobile to operate on the racetrack with other types of vehicles;
2. by failing to properly inspect Mr. Connor's snowmobile;
3. by permitting Mr. Connor to operate a snowmobile with a modified throttle.

and that the breaches were fundamental to the Release Agreement, amounting to a complete non-performance of the contract.

1. Collateral Warranty

**52**  Counsel for the plaintiff mainly argued that the statement at p. 240 of the Rulebook that "these rules and regulations constitute the minimum acceptance standards for competition" constitutes a warranty, which was incorporated into the Release Agreement. I do not agree.

**53**  In addition to the text of Gallen, supra, relied on by the plaintiff, reproduced above, Lambert J.A. at pp. 51 - 52 made the following comment on the determination of whether a pre-contractual oral representation is a warranty or a bare representation:

If [the statement] must be taken to have been intended, and understood, when said, to form a part of the contractual relations between the parties, then it is a warranty.

**54**  In my opinion, the principles relating to parol evidence dealt with in Gallen, supra, have no application to the facts in the instant case. First, unlike Gallen, supra, where the oral representation relied upon by the plaintiffs was made to them before they signed the defendant's standard form contract, in the instant case the statement relied upon by the plaintiff is a written statement contained in the Rulebook. There is no evidence of an oral representation made by the defendants before the Release Agreement was signed which the plaintiff alleges contains a collateral warranty.

**55**  Secondly, even if the principles in Gallen, supra, were applicable to the facts in the instant case it must be clear from the statement relied upon that it was the intention of the parties to have the NHRA rules form part of the Release Agreement. I think that the plaintiff's argument on this point fails for several reasons.

**56**  First, the statement relied upon by the plaintiff is clearly set out in the Rulebook following the defendants' standard form of release. Secondly, and most significantly, in my view, at p. 238 the Rulebook provides that all participants shall be required as a condition of participation to sign a release "consisting of the following or similar wording". In my opinion, this language makes it plain that the standard form release contained in the Rulebook is only a sample of what a participant will be required to sign before entering an event. In my opinion, these facts are entirely inconsistent with the plaintiff's assertion that the statement he relies upon from the Rulebook was intended by the parties to form part of the Release Agreement.

**57**  Thirdly, the plaintiff's argument that the statement he relies upon constitutes a collateral warranty is not supported by a plain reading of the paragraph in which the statement is found. The paragraph begins with the statement that the NHRA makes no representations or express or implied warranties that compliance with the rules will prevent or guarantee against injury or death to participants or damage to personal property. This is followed by the words "These rules and regulations constitute the minimum acceptance standards for competition and are intended as a guide for the conduct of the sport." The plaintiff relies on the first half of the preceding sentence. The paragraph closes with the clear provision that safety is the responsibility of equipment manufacturers, builders and participants.

**58**  The paragraph is about the purpose of the NHRA rules. That is, compliance with the rules does not guarantee safety, but rather, the rules serve merely as a guide for the conduct of the sport. Adopting the meaning proposed by the plaintiff would require the Court to interpret the part of the statement relied upon by the plaintiff in isolation without reference to the important words that precede and follow the statement.

**59**  Thus, I find that the NHRA rules are not incorporated expressly or by inference into the Release Agreement, nor does the statement relied upon by the plaintiff constitute a collateral warranty. Therefore, the plaintiff's allegations based upon breaches of the rules must fail. In my opinion, this conclusion is a complete answer to both branches of the plaintiff's argument on the enforceability of the Release Agreement. However, even if I am in error on whether the rules form part of the contract, I am of the opinion that the plaintiff's argument based upon the doctrine of fundamental breach cannot succeed.

1. Fundamental Breach:

**60**  The plaintiff has argued that there were three breaches of the NHRA rules:

1. Allowing Mr. Connor's snowmobile to operate on the racetrack with other types of vehicles.

**61**  The collision occurred in the staging lanes at the MRP. The plaintiff was one of 6 or 7 motorcycle racers who were called forward and marshalled in staging lane number 1. He was in the area for approximately 10 minutes. He waited as a different class of vehicle was being filtered out of staging lane 6 to the starting line. He and other motorcycle racers progressed forward in staging lane 1 to a point where the plaintiff's motorcycle was one of the next vehicles to be called forward to race. Mr. Connor was approximately 50 - 80 feet behind the plaintiff. He started his snowmobile, apparently lost control of it and collided with the plaintiff who was stationary on his motorcycle.

**62**  The collision occurred in a "restricted area" which persons were not permitted access unless they signed a release.

**63**  The Rulebook prohibited competition between snowmobiles and any other type of vehicle. However, the Rulebook did not prohibit snowmobiles from being present in the staging area with other types of vehicles.

**64**  In his affidavit evidence, the plaintiff deposed that he signed the Release Agreement based on assuming the risk of racing motorcycles, but not assuming the risk of snowmobile competition. However, the plaintiff was not engaged in competition with a snowmobile at the time of the collision. Nor had he competed against snowmobiles while he was in attendance at the MRP on May 20th.

**65**  Thus, I find that there was no contravention of the NHRA rules as the incident giving rise to this litigation occurred in the staging lanes and there is no prohibition in the Rulebook against the simultaneous presence in the staging lanes of snowmobiles and other types of vehicles.

**66**  Moreover, the plaintiff remained in attendance in the staging lanes at the MRP after he became aware that snowmobiles were being marshalled there for competition. The fact he did so is relevant given the position he is now taking that snowmobiles are "extremely dangerous" and that he did not assume the risk of snowmobile competition when he signed the Release Agreement, para. 1 of which states, as follows:

1. Acknowledges, agrees, and represents that he/she has or will immediately upon entering any of such RESTRICTED AREAS, and will continuously thereafter, inspect the RESTRICTED AREAS which he/she enters and he/she further agrees and warrants that, if at any time, he/she is in or about RESTRICTED AREAS and he/she feels anything to be unsafe, he/she will immediately advise the officials of such and will leave the RESTRICTED AREA and/or refuse to participate further in the EVENT(S).
2. Failing to properly inspect Mr. Connor's snowmobile.

**67**  I find that the plaintiff's assertions about improper inspection of Mr. Connor's snowmobile are not correct. Mr. Boutilier is certified to inspect drag racing vehicles. He performed the tech inspection on May 20th and found that Mr. Connor's snowmobile complied with the requirements of the tech inspection in all respects. He denied the plaintiff's assertion that he is Mr. Connor's father-in-law, and states that he is not related to Mr. Connor by blood or marriage.

1. Permitting Mr. Connor to operate a snowmobile with a modified throttle.

**68**  Mr. Boutilier also deposed that the Rulebook did not prohibit the throttle modification to Mr. Connor's snowmobile. Mr. Gracia deposed that there is no general prohibition against modifying vehicles. On this point I disagree with Mr. Boutilier and Mr. Gracia.

**69**  The Rulebook sets out at p. 16 and at p. 243 that "as a general rule" unless a modification is specifically permitted by the Rulebook, it is prohibited. This general rule applies to both the Specifications and Requirements and the General Regulations sections of the Rulebook. Furthermore, the Rulebook provides at pp. 16-17 that before deciding which standards are applicable to a vehicle Class Requirements and General Regulations must both be considered.

**70**  There is no permission for the installation of a reverse throttle in either the General Regulations section of the Rulebook, or at pp. 33-35 of the Rulebook, which sets out the Specifications and Requirements for snowmobiles. Thus, given that any modification is prohibited unless specifically permitted in the Rulebook, I find that the installation of a reverse throttle on Mr. Connor's snowmobile was prohibited. As such, the installation of a reverse throttle constitutes a breach of the NHRA rules. However, in my opinion, such a finding does not render the Release Agreement a nullity as alleged by the plaintiff.

**71**  In Delaney v. Cascade River Holdings Ltd. [*(1981), 34 B.C.L.R. 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FD4T-B088-00000-00&context=) (S.C.), the deceased died by drowning during a white water raft excursion on the Fraser River conducted by the corporate defendant. The plaintiff, acting on behalf of herself as widow and the three children of the deceased, and as executrix, brought an action in tort and contract. She alleged that there was an implied term of the agreement that the defendants would convey the deceased safely to his destination and that the defendants were negligent in equipping and operating the expedition. Callaghan J. at, p. 69, said as follows:

There is, accordingly, no substantive rule of law whereby a fundamental breach automatically nullifies an exclusion clause. Rather the court must consider fundamental breach by the defendant in the context of the contract as a whole in order to derive the true construction to be placed on the exclusion clause. The British Columbia Court of Appeal in Beldessi [*(1973), 41 D.L.R. (3d) 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G26D-00000-00&context=), took that position. Therefore, the issue becomes whether, in the context of the agreement as a whole, the clause can be construed as excluding liability for fundamental breach. Here the corporate defendant agreed to transport Delaney and the others on a white water rafting expedition. There were obvious dangers. A spill meant immersion in the frigid waters of the Fraser with the possibility of hyperventilation, hypothermia or death by drowning. The corporate defendant wanted protection and therefore it was not unreasonable to obtain a signed release excluding "***negligence*** on the part of the company, its agents or servants". The words are clear and unambiguous and the agreement when read as a whole must be taken to exclude liability for fundamental breach.

Even though the corporate defendant failed to provide adequate life-jackets and consequently was in breach of an implied obligation to operate its white water rafting expeditions with due and proper regard for the safety of its passengers, nevertheless the exemption clause is determinative of that issue and consequently the action against the corporate defendant must be dismissed.

**72**  I emphasize that Callaghan J. held that the release was effective, despite the breach on the part of the corporate defendant of an implied obligation to operate the tour with due regard to the safety of the passengers. McFarlane J.A., Taggart J.A. concurring, held at pp. 42-43 of Delaney v. Cascade River Holidays Ltd. [*(1983), 44 B.C.L.R. 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-FJTD-G258-00000-00&context=) (C.A.), that Callaghan J. was correct in his decision on the enforceability of the release agreement.

**73**  Thus, in determining whether the breach of the NHRA rules by installation of the reverse throttle would nullify the enforcement of the Release Agreement, presuming for this that the rules form part of the Release Agreement, and that the breach is fundamental, I must look to the contract as a whole. Having done so, I am satisfied that the true construction of the contract clearly results in a dismissal of the plaintiff's claims against the defendants.

**74**  The NHRA rules do not guarantee or ensure the safety of participants. Rather, the rules are entirely consistent with the terms of the Release Agreement: p. 8 of the Rulebook provides that the prime responsibility for the safe condition and operation of a vehicle in competition rests with the vehicle owner and driver and that the track operator's main concern is to provide a place to conduct events; p. 238 provides that the participant agrees that by entering an event, the participant acknowledges that the event site is safe and suitable for racing and acknowledges that by participating in the event, the participant may suffer bodily injury or death or loss or damage to property; p. 240 provides that the NHRA makes no representations or express or implied warranties that compliance with the rules will prevent or guarantee against injury or death to participants; that the rules are intended as a guide for the conduct of the sport; and, that safety is the responsibility of participants in the event.

**75**  Accordingly, I find that even if the breach of the rules occasioned by the installation of a reverse throttle on Mr. Connor's snowmobile constitutes fundamental breach, the Release Agreement would still operate to exempt the defendants from liability to the plaintiff.

1. CONCLUSION

**76**  In the result, the defendants are entitled to an order dismissing the plaintiff's claim, with costs.

COHEN J.

**End of Document**

[***Sjoblom v. Dueck Chevrolet Oldsmobile Cadillac Ltd., [2006] B.C.J. No. 3451***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S4FR-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Wedge J. (In Chambers)

Oral judgment: September 13, 2006.

Released: April 4, 2007.

Vancouver Registry No. M024680

**[2006] B.C.J. No. 3451** | 2006 BCSC 2002 | 156 A.C.W.S. (3d) 330

Between Lars Cedric Sjoblom, Plaintiff, and Dueck Chevrolet Oldsmobile Cadillac Limited, Ryan Robert Angus and Noreen Brenda Angus, Defendants

(43 paras.)

**Case Summary**

**Civil procedure — Trials — Juries — Setting aside jury notice — Application by the plaintiff to set aside a jury notice allowed — The action was for injuries arising from a motor vehicle accident — The trial, set for 25 days, would address liability, damages and contributory *negligence* — The parties planned to introduce expert medical, psychological and economic evidence — The trial would involve prolonged examination of lengthy scientific documents and the issues were complex — British Columbia Rules of Court, Rule 39(27)(a).**

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| Application by the plaintiff to set aside a jury notice -- In the action the plaintiff claimed damages for injuries sustained in a motor vehicle accident -- Liability, pre-existing injuries, contributory ***negligence*** and damages were all at issue -- The plaintiff claimed that he had suffered a severe brain injury as a result of the accident -- The trial was set for 25 days -- The plaintiff planned to introduce expert medical, psychological and economic evidence, including evidence relating to his pre-accident medial history -- The defendants intended to call evidence from seven experts -- Many of the expert reports to be relied on were hundreds of pages long -- The plaintiff claimed that the trial would involved complex issues requiring prolonged examination of documents -- HELD: Application allowed -- The plaintiff had established that the trial would involve scientific investigation with prolonged examination of documents that could not conveniently be heard by a jury -- Further, the legal issues involved were complex. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 35(4)(a), Rule 39(27), Rule 39(27)(a)

**Counsel**

Counsel for the Plaintiff: R.S. Watts.

Counsel for the Defendant, Dueck Chevrolet Oldsmobile Cadillac Limited: J.P. Cahan.

For Defendants, Ryan and Noreen Angus: No appearance.

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| **WEDGE J. (orally)** |

**1**   The plaintiff applies under Rule 39(27) to dispense with the jury for the trial of this action. The trial is set for 25 days commencing October 16, 2006.

**2**  The plaintiff was injured in a single vehicle accident in 1997 when he was 15 years of age. He suffered, among other injuries, a traumatic brain injury. The defendant does not dispute that the plaintiff suffered a severe brain injury, but will take the position at trial that any ongoing physical, intellectual, and emotional deficits are due to pre-existing injuries and conditions.

**3**  The action was commenced in 2002. In July 2005, one of the defendants and the third party, ICBC, filed a notice requiring trial with a jury. By order of Mr. Justice Cole, the case management judge, at a pretrial conference on August 8, 2006, the plaintiff was given until September 18, 2006, to bring this application.

**4**  The plaintiff says the provisions of Rule 39(27)(a) are engaged in this case. First, the issues require prolonged examination of documents or accounts or local investigation which cannot be made conveniently with a jury. Second, the issues are of an intricate or complex nature.

**5**  By way of background, the defendant Ryan Angus was driving a minivan owned by his mother, the defendant Noreen Angus, in a residential area of Vancouver. The plaintiff was a passenger in the van. The plaintiff fell from the minivan in circumstances that are unclear. Ryan Angus lost control of the van at some point. The plaintiff alleges that the loss of control resulted in his fall from the vehicle. The van eventually left the road, went through a fence, and came to rest in a nearby yard. The defendant says the plaintiff caused or contributed to his fall from the van by being seated unsafely in the van or hanging out of the window.

**6**  The plaintiff was in a coma for several days. His Glasgow Coma score immediately after the accident was three, which is the lowest possible score compatible with survival. It remained below 10 for approximately two weeks. The plaintiff underwent rehabilitation therapy for a considerable period of time from a range of rehabilitation professionals.

**7**  The defendants do not dispute that the plaintiff suffered severe traumatic brain injury. However, they point to two previous accidents suffered by the plaintiff in his childhood, one of them severe, and a whole host of other difficulties encountered by the plaintiff before the accident, as the cause of any ongoing damage.

**8**  The issues in this trial will be the following: (1) liability, (2) contributory ***negligence***, (3) the existence and/or extent of any ongoing medical, psychiatric, and social problems and their cause, and (4) quantum of damages including non-pecuniary general damages, cost of future care, past and future loss of income, loss of income earning capacity and special damages. There will be actuarial evidence required with respect to future losses and expert evidence concerning future care.

**9**  The plaintiff expects to tender evidence from a number of experts. They include Dr. Izabela Schultz, psychologist; Dr. Hugh Anton, physical medicine and rehabilitation specialist; Dr. Derryck Smith, psychiatrist; Barbara Baptiste, care planning consultant; and Rob Carson, economic consultant. The plaintiff was also treated by a number of additional health care professionals whose reports may be referred to at trial. They include Dr. George Hahn of G.F. Strong Rehab Centre; Reg Norris of Vocational Rehabilitation Service; Graeme Sandilands of I.C.B.C. Rehab Department; Lori Reed, counselling psychologist; Dr. Piotr Blachut, orthopaedic surgeon; Dr. Bryce Kelpin, family medicine; Dr. Felix Durity, neurosurgeon; a physiotherapist from Dundarave Physiotherapy Clinic; and Dr. Audrey Mattson, neuropsychologist. There are also a number of records pertaining to the plaintiff's pre-accident medical history and treatment by 12 medical and paramedical professionals. Their reports may be referred to and some of them may be called to testify with respect to the plaintiff's pre-accident condition.

**10**  The defendants have served notice that they will rely on the following seven experts in presenting opinion evidence: Dr. D.J. Magrega, psychologist; Gerald Kerr, occupational therapist; Dr. Stanley Semrau, psychiatrist; Dr. Alister Prout, neurologist; Dr. Robert McGraw, orthopaedic surgeon, Craig Brown, mechanical engineer; and Dennis Chimich, biomechanical engineer. The latter two experts will speak to the liability issue.

**11**  The neuropsychological reports in this case are extensive. The plaintiff was tested on numerous occasions. Most recently, he was tested by Dr. Schultz. That occurred in February of 2006. In her lengthy report, Dr. Schultz states in part the following:

Overall, Mr. Sjoblom's neurocognitive impairments were consistent with history of severe traumatic brain injury. The most significant impairments were identified in the following cognitive domains:

1. executive, integrative functions of the brain with impairment in intersensory integration, transfer of learning between hemispheres and brain adaptability to novel complex situations/tasks;
2. auditory speech sounds ...;
3. auditory-verbal learning, particularly after distraction or interference and delay;
4. speed of visual scanning, tracking and visual-motor sequencing, particularly on complex tasks;
5. visual memory: immediate visual memory and delayed visual memory for pictures;
6. fine motor speed, with particular impairment in right hand speech;
7. low mental stamina and fatigability.

Academically, Mr. Sjoblom demonstrated low average to average skills in word recognition, spelling, reading, and comprehension; and handwriting. Speed of reading, calculations, math fluency, writing fluency, and written expression were all borderline impaired. Academic skills that fell more than one and a half standard deviations below Mr. Sjoblom's intellectual abilities were: math fluency; calculation, and written expression.

The patterns of [his] neuropsychological impairments were generally consistent, with few discrepancies, with previous neuropsychological assessments by Dr. Audrey Mattson and Dr. Rosemary Vernon-Wilkinson.

**12**  Dr. Anton, a specialist in physical medicine and rehabilitation examined the plaintiff and prepared a report dated April 10, 2006. He observed, in part, the following:

The large majority of persons who suffer severe [traumatic brain injuries] like Mr. Sjoblom's are left with significant impairments. Those include motor impairment, cognitive impairment, and neurobehavioural changes.

Dr. Anton observed that in many respects the plaintiff has made remarkable recovery given the severity of the brain injury. However:

... he has residual impairments that are [significant] enough to negatively affect most aspects of his life.

**13**  Dr. Anton's report contains a detailed discussion of these impairments. The most significant ongoing physical injury to the plaintiff in the accident were fractures to his right upper arm and elbow which, according to the plaintiff's experts, will significantly limit his ability to perform jobs requiring physical exertion. The plaintiff was 15 years of age at the time of the accident and the actuarial evidence will be extensive. Mr. Carson has completed four reports concerning loss of income, loss of earning capacity, tax gross-up and management fees.

**14**  The defendants' position at trial will be that most or all of the plaintiff's ongoing neurological and psychological deficits, function limitations and emotional problems were attributable to a host of pre-existing factors including pre-existing learning deficits and psychological makeup, alcohol and drug use, and a pre-accident head injury. The defendants will also lead evidence concerning inadequate post-accident parenting, educational, treatment and familial stressors, as well as non-related adolescent maladjustment and development. Finally, there will be evidence of the plaintiff's injuries sustained in a jet-ski accident when he was 10 years of age in which he suffered severe internal injuries. There will likely be issues as to whether the plaintiff also suffered a brain injury in the Jet Ski accident, whether the injury had any effect on his cognitive abilities thereafter, or whether that injury left him predisposed to a worse outcome after the subsequent head injury.

**15**  The defendants had the plaintiff assessed by Dr. Stan Semrau, a psychiatrist, in January of this year. Dr. Semrau prepared a lengthy and comprehensive report dated May 10, 2006, in which he expresses the opinion that pre-existing factors were such that the plaintiff's difficulties would have been no different absent the severe brain injury suffered in 1997. Dr. Semrau also expressed the view that the plaintiff has recovered fully and will not need future care or treatment of any kind.

**16**  The defendants also had the plaintiff assessed by Dr. Magrega, a neuropsychologist, who preformed a series of psychological and vocational tests. His report is voluminous. He points to alleged criminal activity by the plaintiff pre-accident, as well as pre-accident substance abuse and Attention Deficit Disorder. He concludes that, but for the accident, the plaintiff would have "sunk deeper into substance abuse and perhaps criminal activity." That opinion stands in stark contrast to the opinion of Dr. Schultz, who concluded that the severity of the plaintiff's 1997 brain injury would have overridden and overshadowed any past problems.

**17**  Thus, says the plaintiff, while the fact of the plaintiff's severe traumatic brain injury is not in dispute, every other possible aspect of the case is disputed. The issues will require extensive examination of the plaintiff's pre-accident social, psychological, and medical conditions, as well as those conditions post-accident. The plaintiff says the fact that he was in early adolescence at the time of the accident, and an adolescent during his years of recovery, are factors further complicating the issues.

**18**  The defendants submit that the issues in this case are not overly complex. They say the issues are liability, the nature and extent of the plaintiff's ongoing disabilities, whether they were caused by the accident and the effect of the injuries on his current condition. They submit that it is common for juries to decide such issues. The defendants also submit that the plaintiff's application to strike the jury notice is untimely, coming as it does more than a year after the notice of trial with a jury was filed.

**19**  I will turn first to the issue of timeliness of the plaintiff's application. Mr. Justice Cole, who is the case management judge and will be the trial judge in this case, held a pretrial conference in August of this year, in the course of which he ordered that the application to strike the jury notice take place on or before September 18, 2006. I do not know the basis for that order. However, it is clear that many of the expert opinions, and in particular the opinions of the defendants' experts, have been filed in the past six months, some as recently as two to three months ago, long after the jury notice was filed.

**20**  As case management judge, Mr. Justice Cole is entitled to schedule pretrial conferences and set the schedule for pretrial applications. Rule 35(4)(a) makes clear that the judge in the pretrial conference may, whether or not on the application of a party, order that the trial be heard without a jury on any of the grounds set out in Rule 39(27). Mr. Justice Cole could not hear the application to strike the jury notice because he is involved in a trial outside Vancouver, but he ordered that the application be heard within a specified time. Had timeliness been a concern, he would have raised it at the pretrial conference. In any event, numerous expert reports have been filed in the past few months, all of which set out the diametrically opposed positions of the parties on the medical and psychiatric issues. The defendants' engineering reports have only recently been finalized and set out the defendants' theory as to liability for the accident. For these reasons, I conclude the plaintiff's application is timely despite the seven-day requirement of the Rule.

**21**  I turn now to the substantive requirements of the Rule. In ***Nichols v. Gray*** [*(1978), 9 B.C.L.R. 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-F60C-X0SM-00000-00&context=), which deals with the scope of the judge's discretion under Rule 39(27), Lambert J.A., writing for the majority, said the following at p. 14:

On the basis of the evidence before him, the chambers judge may find or may decline to find 1) that the issues require prolonged examination of documents or accounts, 2) that the issues require a scientific or local investigation, or 3) that the issues are of an intricate or complex character. When he makes those findings he is not, at that stage, exercising a discretion, but, rather, making findings of fact on the basis of evidence. If, after considering the evidence, he does not make one of those findings then there is no ground for granting the order. However, if the evidence is such that one or more of those findings of fact is made, or should be made, then the Judge is required to exercise the discretionary jurisdiction contemplated by the subrule. If the finding is either that the issue require prolonged examination of documents or accounts, or that the issues require a scientific or local investigation, then the discretion must be exercised in relation to the question of whether the examination or investigation can be made conveniently with a jury. If the finding is that the issue are of an intricate or complex character then the discretion must be exercised in relation to the question of whether the trial should be heard by the Court without a jury. Clearly the discretion in the latter case has a broader amplitude.

**22**  While the trial of an action with a jury that involves a scientific investigation may not be the most convenient mode of trial, that is not enough to displace the right of the litigant who seeks trial by jury. In ***Mewhort v. Frimer*** (1980), 19 C.P.C. 59, McEachern C.J.S.C., as he then was, said that:

... "convenience" in the context of ... Rule [39(27)] ... relates to the proper conduct of the trial, including an understanding of the issues and evidence, the submissions of counsel, and the Judge's charge.

He also observed the following:

[When] the case involves a prolonged examination of documents ... or a scientific, or a local investigation, then the [trial] Judge must consider not only the issues and the nature of the evidence and exhibits, but also whether the examination or investigation may conveniently be made with a jury. On the other hand, if the issues are intricate or complex then the [trial] Judge may, in the proper exercise of his discretion, order that the trial proceed without a jury, and convenience [in that case] need not necessarily be a factor.

**23**  The Chief Justice again considered the meaning of "convenience" in the context of the Rule in ***Wipfli v. Britten*** [*(1981), 32 B.C.L.R. 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1PC-00000-00&context=), observing the following at p. 347:

Convenience, in the sense in which that word is used in the Rule, does not depend solely upon whether or not the jury can be made to understand the evidence. I accept the evidence of Drs. Riddell and Henniger whose useful evidence on their cross-examinations satisfies me that they can probably make an understandable description of the actual surgical procedures and they can explain the present condition of the infant plaintiff. But that is not the point. What is required before it is convenient to have a scientific investigation made with a jury, is the ability to have a proper trial, which includes not just an understanding of the evidence as it is being given, but also an ability to retain this understanding throughout a long trial in a form which permits an analysis of the evidence in relation to the difficult questions which must be decided at the end of the case.

**24**  In the present case, many experts will be giving evidence in the course of the 25-day trial. As noted, engineers will testify concerning the cause of the accident itself. The medical, psychological, psychiatric, and rehabilitation opinions will be in the form of clinical records, consult reports, neuropsychological testing results, and other reports. With respect to the neurological assessments, the test procedures and results will have to be explained, particularly as they are so diametrically opposed in the result.

**25**  I am satisfied the liability and damages issues at this trial will involve a scientific investigation. They will, in all likelihood, also involve a prolonged examination of documents. The question remains whether this investigation can be made conveniently with the jury. Approximately 12 experts will be called in the course of the trial. Significantly, many of those experts have, in their opinions, relied on the records and reports of other treating physicians and paramedical professionals.

**26**  The central issue in this case is whether the severe brain injury suffered by the plaintiff is the cause of the various neuropsychological deficits and other disabilities. That will clearly involve a careful review of the lengthy psycho/neurological reports and the multitude of underlying tests, as well as the psychiatric assessments. The plaintiff's pre-existing medical condition will feature largely in the assessments, as will his other pre-existing conditions. The plaintiff's current condition is itself very much in issue. The plaintiff's experts say he has significant, even if somewhat subtle, deficits that will impact on issues of income earning capacity and cost of future care. The defendants' experts strongly disagree. Hence the 25-day time estimate for this trial, which, so far as I can tell, does not factor in time for the jury's deliberations.

**27**  I will turn next to the case law. In ***Campbell v. Khan***, [*[1996] B.C.J. No. 2005*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S0RK-00000-00&context=), the trial of the action was set to be heard for 10 days. The plaintiff alleged that he suffered a closed head injury leading to personality changes. The plaintiff intended to call 10 expert witnesses including a neurologist, a neurosurgeon, and a psychiatrist. Low J., as he then was, said the following at para. 8:

... a sampling of medical reports from the plaintiff's side makes it clear that this case is rich with complex medical concepts. The medical terminology alone will be difficult to master. There are very difficult causation issues and it is reasonable to expect substantial differences of medical opinion.

At paras. 9 to 10, Low J. said as follows:

In ***MacDonald v. Smith*** [*(1983), 48 B.C.L.R. 285*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F956-S05H-00000-00&context=), McEachern, then C.J.S.C., said (p. 288):

Briefly, I think a case of this complexity cannot conveniently or suitably be tried and a proper conclusion assured to the parties when there is no opportunity for thoughtful and timely consideration, particularly after several days of evidence and other proceedings which follow the completion of evidence. There must, in a case such as this, be an opportunity for thoughtful review after preliminary conclusions have been reached and there is too much risk of a compromise verdict being accepted by the jury or a majority of the jury under pressures of time and other personal consideration.

**28**  Mr. Justice Low was of the view that the above observations were particularly applicable to the case before him:

The issues here will require prolonged consideration of scientific matters and weighing of conflicting medical opinions and theories about the unusual sequence of events. The issues are complex and will require an understanding of intricate medical and legal matters. In addition, the court will have to decide the primary liability issue and assess damages. This will be a very difficult case for a judge to decide. It is not suitable for a jury.

**29**  In ***Guichon v. Johnston et al***, [*[1998] B.C.J. No. 2643*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M11Y-00000-00&context=), the plaintiff began to complain of symptoms that could be evidence of traumatic brain injury. Master Baker considered some of the scientific and medical evidence that was likely to be placed before the trier of fact. He concluded that the report of the specialist in physical medicine and rehabilitation, on the issue of whether or not the plaintiff was brain injured, would be required. As such, the degree and effect of such injury was "... deep, complex, multi-facetted and not easily or lightly considered or understood." Regarding the report of a neuropsychologist who administered 22 tests, Master Baker said, "While not dividing and subdividing the analysis in quite the same way as [the physical medicine specialist, the neuropsychologist's] explanation of multitudinous testing methods is detailed and complex." Master Baker concluded that the case before him fell squarely within the parameters defined by Rule 39(27)(a)(i) and (ii) and set aside the jury notice. Master Baker's decision was appealed, but dismissed by Preston J., [*[1998] B.C.J. No. 3375*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61XN-00000-00&context=), of this court.

**30**  In ***Patterson v. Rankel***, [*[2001] B.C.J. No. 1335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23P1-00000-00&context=), Mr. Justice Cohen considered circumstances similar to those in the present case. The medical evidence established that the plaintiff had suffered a closed head injury in the accident. He subsequently suffered cognitive and personality changes which he alleged were caused by post-concussive syndrome. The nature and cause of the plaintiff's difficulties were disputed by the defendants. Numerous neuropsychological tests had been conducted to address the opinions. The trial was scheduled for 15 days before a jury. Although liability and contributory ***negligence*** were also in issue, Cohen J. concluded that the jury notice ought to be struck solely as a result of the proposed evidence concerning the damages claim.

**31**  The reasoning of Cohen J. in ***Patterson*** was commented upon favourably by our Court of Appeal in ***MacPherson v. Czaban***, [*[2002] B.C.J. No. 2208*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-608F-00000-00&context=). The chambers judge in ***MacPherson*** had granted an application to strike the jury notice and relied on the similarities between the case before her and the ***Patterson*** case. ***MacPherson*** involved a brain injury in which causation and damages were in issue. Liability was admitted. The trial was scheduled to proceed for 20 days. Numerous experts were to be called, particularly on the issue of neuropsychological testing results and their significance to the claim.

**32**  On appeal, the Court of Appeal noted the chambers judge's reliance on the reasoning in ***Patterson***. There were enough similarities between the two cases, said the Court of Appeal, to support the trial judge's reliance on ***Patterson*** even though liability was also in issue in ***Patterson***. Mackenzie J.A., writing for the court, noted that the plaintiff:

... has had an eventful pre-accident history and there are likely to be difficult issues of causation particularly with respect to post-accident psychological symptoms.

**33**  In the course of upholding the chambers judge's decision, Mackenzie J.A. commented on cases such as ***Molnar v. Hardham Estate***, [*[1987] B.C.J. No. 302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3TN-00000-00&context=) and ***Ball v. Novlesky***, [*[1981] B.C.J. No. 677*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FD4T-B063-00000-00&context=). Mackenzie J.A. noted that in ***Ball***, the injury asserted was "mild concussion with rather insignificant future implications." He further noted that in ***Molnar*** there did not appear to have been significant conflicts in the expert medical reports. In the result, while the Court of Appeal in ***MacPherson*** issued the reminder that a jury trial in a personal injury case is a presumptive right, it also concluded that in the particular circumstances of the case, the chambers judge did not err in ruling that the issues in the case could not be tried fairly with a jury.

**34**  Both the ***Patterson*** and ***MacPherson*** cases were the subject of comment in ***Lomax v. Weins***, [*2003 BCSC 396*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2C5-00000-00&context=), a decision of Madam Justice Daphne Smith. ***Lomax*** involved a claim for damages arising from a car accident in which the plaintiff suffered a closed head injury. Liability was admitted. The central issue was whether the injuries suffered by the plaintiff as a result of the accident were the cause of his present condition. The trial was set to proceed for 20 days. The defendant characterized the issues as being:

... the nature and extent of the plaintiff's injuries, whether they were caused by the accident, and the effect of those injuries on his current condition.

**35**  Madam Justice Smith observed that numerous expert witnesses would be giving evidence over the course of the 20-day trial. The experts' opinions would include numerous neurological assessments, including test procedures and results that would require explanation.

**36**  After holding that the investigation was of a scientific nature, D. Smith J. concluded that it would not be convenient to have the matter heard by a jury. In doing so, D. Smith J. referred to a number of cases in which the application to strike the jury notice was refused. In many of the cases the applications involved trials of 10 days or less. In addition, the medical reports were described as clear and not particularly complicated, and the issues to be determined not great in number. In the result, although the central issue was whether the injuries suffered by the plaintiff as a result of the accident were the cause of his present condition, D. Smith J. concluded that the jury notice ought to be dispensed with. She also concluded that the factual and legal issues to be determined were of an intricate and complex nature similar to those in ***Patterson*** and ***MacPherson***. The medical evidence would be detailed and technical, particularly with respect to the neuropsychological reports.

**37**  I have reviewed the oft-cited decision of Madam Justice MacKenzie in ***MacKinnon v. Ebner***, [*[1997] B.C.J. No. 364*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21CY-00000-00&context=) in which the court concluded that "juries are sophisticated enough today that, with the assistance of counsel and instructions of the trial judge, ..." the jury would not find the evidence beyond their ability to comprehend, retain, and apply to the case. It is important to note, however, that ***MacKinnon*** involved a rear-end car accident in which liability was admitted. It was described as a "no crash, no cash" issue. It was estimated that the trial would take 8 days to complete. The circumstances of that case bear little resemblance to the facts of the present case.

**38**  I have reviewed some, but by no means all, of the medical reports filed in this case. The psychiatric reports are close to a hundred pages in length and refer extensively to other reports and assessments. The neuropsychological reports are equally long and deal with dozens of tests. The neuropsychological report filed by the defendants is lengthy and complex. There are, as already noted, numerous other reports. Overall, the reports are in the many hundreds of pages and the clinical records are more voluminous. This case, in my view, closely resembles the facts in the ***Patterson***, ***Lomax***, and ***MacPherson*** cases.

**39**  I am satisfied that both tests articulated in Rule 39(27) have been satisfied. First, the case will involve a scientific investigation with prolonged examination of documents that cannot conveniently be heard by a jury. Simply put, justice would not be done by having the case heard by a jury. Second, the issues are sufficiently intricate and complex in nature that the trial should not proceed with a jury. In the result, I direct that the trial be heard by the judge without a jury.

**40**  MR. WATTS: Costs, My Lady?

**41**  MR. CAHAN: In the cause, My Lady. In the cause, that's agreed.

**42**  MR. WATTS: That's fine, My Lady.

**43**  THE COURT: Thank you.

WEDGE J.

**End of Document**

[***Strachan (Guardian ad litem of) v. Winder, [2005] B.C.J. No. 101***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0YK-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Macaulay J. (In Chambers)

Heard: December 23, 2004.

Judgment: January 19, 2005.

Victoria Registry No. 01/4093

**[2005] B.C.J. No. 101** | [*2005 BCSC 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F65M-61HS-00000-00&context=) | [*137 A.C.W.S. (3d) 545*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F65M-61HS-00000-00&context=)

Between Sidney Strachan, an infant, by her Guardian Ad Litem, Holly Strachan, Holly Strachan and Clifford Strachan, plaintiffs, and Dr. M.J. Winder, Dr. J.D. Mathews, Dr. E.F. Vreede, Dr. R.M. Gaultois, Nurse P. Spencer, Nurse S. Bisseseur, Nurse D. Mowbray, Nurse John Doe, Nurse Robyn Wells and Nanaimo Regional General Hospital, defendants, and Nurse P. Spencer, Nurse S. Bisseseur, Nurse D. Mowbray and Nanaimo Regional General Hospital and Dr. M.J. Winder, Dr. J.D. Mathews, Dr. E.F. Vreede, Dr. R.M. Gaultois, third parties

(40 paras.)

**Case Summary**

**Civil procedure — Settlements - Approval — Legal profession — Barristers and solicitors — Compensation — Contingency arrangement.**

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| Application by Strachan, as Guardian ad litem for her daughter Sidney, for court approval of a settlement and legal fees. Sidney was a severely disabled child whose problems stemmed from the negligent medical treatment she had received during her birth. Her parents had sued the doctors, nurses and hospital involved. Although liability was ultimately resolved, it was not done so until shortly before trial. Settlement on damages was reached after one day of trail. The settlement amount was $4,000,000. Of that, approximately $862,0000 represented legal fees charged by the firm representing Sidney. It had acted on a contingency fee basis.  HELD: Application allowed, subject to a reduction in fees to $800,000.  The contingency fee agreement was both fair on its face and fairly obtained. Sidney's parents received independent legal advice before entering it. They were both intelligent people who understood the effect of the agreement. A reasonable fee for the firm was $800,000. |

**Counsel**

Counsel for the Plaintiffs: I.C. Faulkner

Counsel for the Defendants and Third Parties (by telephone) Dr. M.J. Winder and Dr. J.D. Mathews: C.E. Hinkson, Q.C.

Counsel for the Defendants and Third Parties Nurse P. Spencer, Nurse S. Bisseseur, Nurse Robyn Wells and Nanaimo Regional General Hospital: L.N. Bakan

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| **MACAULAY J.** |

**1**   Sidney Strachan is a severely disabled child. She was born on May 19, 1997 at Nanaimo General Hospital. Sidney and her parents sued the hospital, as well as the doctors and nurses involved with Mrs. Strachan's labour and Sidney's delivery, for negligent medical treatment. By the time of trial, some of the defendants admitted liability. In February 2004, on the second day of a two week trial to assess damages, counsel for the plaintiffs, J.J. Arvay, Q.C. and I.C. Faulkner, reached a settlement with the hospital and some of the other defendants. The trial was adjourned pending the written comments of the Public Guardian and Trustee (the "public trustee") pursuant to s. 40(10) of the Infants Act, *R.S.B.C. 1996, c. 223* (the "Act") respecting the proposed settlement of $4,000,000 (Cdn.).

**2**  By letter dated December 10, 2004, the public trustee recommended court approval of the settlement and the proposed legal fees of the law firm that represents the plaintiffs, Arvay Finlay. The legal fees total $862,500, plus applicable taxes and disbursements and represent about 22.4 per cent of the settlement.

**3**  The plaintiffs now seek court approval of the settlement and legal fees. This application is brought pursuant to s. 40(8) of the Act, Supreme Court Rule 6(14), the court's parens patriae jurisdiction to protect the welfare of infants, and the inherent jurisdiction of the court. These require the court to review the proposed settlement from the perspective of the child's best interests. This includes determining the fairness and reasonableness of the contingency fee agreement.

**4**  I am indebted to the public trustee for the careful analysis and commentary prepared by that office and also to Ms. Faulkner, co-counsel for the plaintiffs, for her thorough submissions.

**5**  Sidney is now age 7 and suffers from cerebral palsy. Her disabilities are permanent and severe. She can only speak with basic sounds. Her vision is impaired. Sidney's feet and legs are deformed requiring special shoes and leg braces. As a result, her mobility is also impaired. Sidney also suffers from epilepsy with sporadic grand-mal seizures. Brain damage has reduced her cognitive powers. The plaintiffs contended that the defendants' breach of the standard of care during Mrs. Strachan's labour and the delivery of Sidney caused these injuries.

**6**  The plaintiffs commenced their action on September 17, 2001. The matter was originally set for a 20 day trial commencing September 8, 2003. As is usually the case when plaintiffs allege medical ***negligence***, the defendants contested liability. Highly experienced and capable counsel acted for the defendants.

**7**  While some of the defendants admitted liability before trial, this only occurred after the completion of examinations for discovery and the plaintiffs had commissioned and served numerous expert reports. In spite of the resolution of the liability issue, counsel anticipated that the assessment of damages would require ten days. That was not unusual. Much was at stake when assessing damages.

**8**  Assessing damages in medical ***negligence*** cases can be a difficult task at the best of times. The injuries suffered are frequently catastrophic. When a child suffers catastrophic injuries at birth, and given the often uncertain life expectancy of such children, the parties to ensuing lawsuits frequently and understandably can have very different views of the appropriate range of awards for future pecuniary losses. These factors are all present here.

**9**  The question of damages is further complicated in this case because the Strachan family permanently moved to the state of Utah in the United States in about June 2003. That move necessitated the retaining of additional experts to address the impact of local area costs and state law on the future care claim. It also led to an adjournment of the assessment of damages so that counsel could obtain additional expert evidence. The assessment of damages was re-scheduled for hearing before me in February 2004.

**10**  At the commencement of the assessment, the issue of Sidney's life expectancy remained particularly contentious. Simply put, the longer the life expectancy, the greater the potential claim for future pecuniary losses. The risk for the plaintiffs was that the court might conclude that Sidney's life expectancy is less than the plaintiffs' experts predict. This likely would have translated into a lesser award for such losses than the plaintiffs sought.

**11**  Plaintiffs' counsel addressed this risk, in part, by negotiating a structured settlement that ensures a life-long stream of tax-free annuity payments for Sidney. A structured settlement offers greater protection because it offsets the risk that, in a judgment after trial, the court may prefer the defendants' expert opinions that postulated a shorter life expectancy than those of the plaintiffs' experts.

**12**  Any trial award for future pecuniary loss necessarily reflects a judicial conclusion about probable life expectancy that might fall short of the child's actual lifespan. Accordingly, a key consideration regarding the appropriateness of the settlement is that it provides for an annuity, payable monthly in U.S. funds on a tax-free basis, for Sidney's actual life, and that it is guaranteed for 35 years, even if she dies before that time.

**13**  The summary of the proposed settlement of $4,000,000 (Cdn.) is as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Costs | $ | 150,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | 50,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | In Trust for Parents | 100,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary | 290,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Earning Capacity | 1,000,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future Care | 2,410,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL | $4,000,000 |  |

I observe that the non-pecuniary loss component is the maximum permitted by law in Canada for catastrophic injuries. The issues of special damages and the "in trust" claim for the parents do not appear to have been particularly contentious.

**14**  The issue of life expectancy drives much of the proposed compromise on the claims for future income loss and future care costs. In part, this is because Sidney will never be competitively employable, given the extent of her disabilities. Both the number of employable years and the number of years during which Sidney will require care are determined by her compromised life expectancy. There would also have been significant issues at trial respecting the extent to which the state of Utah will cover Sidney's present and adult care needs, thus reducing her future care costs.

**15**  Taking into account the available evidence, as reviewed by counsel, and the risks associated with proceeding to final judgment, I am satisfied that the proposed settlement is in the best interests of the child. I am also satisfied that the form of settlement maximizes the advantages available to Sidney. I approve the amount of the proposed settlement.

**16**  After payment of all legal fees, disbursements and the in-trust claim of the parents, the net settlement proceeds available for Sidney approximate $2,736,917 (Cdn.) or $2,039,830 (U.S.). The cost of the structured settlement is $2,000,000 (U.S.). It will provide the annuity payments of $9,170 (U.S.) per month commencing immediately for Sidney's lifetime and, as stated above, is guaranteed for 35 years. Accordingly, the minimum that Sidney (or her estate) will recover is $3,851,400 (U.S.).

**17**  If Sidney lives as long as the most optimistic life expectancy projection suggests, namely to age 62, the total annuity payments will be $6,382,320 (U.S.). This provides a further financial benefit to Sidney.

**18**  The monthly annuity payments are more than required to meet Sidney's special needs while she remains a child. The settlement addresses the means by which extra monies will be retained to assist with meeting Sidney's future needs as an adult if the monthly annuity payments prove inadequate. This requires court approval of an out-of-province trust.

**19**  The plaintiffs propose that the net settlement proceeds as well as the structured settlement payments be held by a conservator in the state of Utah. The Third Judicial District Court of Salt Lake County, State of Utah, has ordered that Western National Trust Company, an affiliate of Zions Bank, be appointed as Conservator of the property of Sidney. That court also ordered that Mr. and Mrs. Strachan be appointed as joint general guardians of Sidney's person.

**20**  Plaintiffs' counsel received a tax opinion indicating that it is most advantageous from a tax perspective that the trust monies be held in the United States. As well, the anticipated fees for the conservator are less than those customarily charged by the public trustee in this jurisdiction. In addition, the public trustee noted the practical benefit of having the net settlement proceeds located near where costs will be incurred and that locating the trust in the United States avoids potential problems associated with volatile currency rates.

**21**  I am satisfied that the Utah court order and applicable statute impose investment criteria for the conservator based on prudence: see, for example, the Uniform Probate Code, Utah Code Ann. s. 75-5-425 (2004). Under Utah law, both the guardians and the conservator are required to make annual accounts to the court of their stewardship and are subject to the court's superintendence.

**22**  I am persuaded that this court's parens patriae jurisdiction permits me to make an order placing an infant's settlement fund with a professional trust company rather than with the public trustee: see Bizovie (Guardian ad litem of) v. Cornish, [*2004 BCSC 553*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2F2-00000-00&context=), [*[2004] B.C.J. No. 827*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2F2-00000-00&context=), at paras. 8 to 12, 34 and 35. I also observe that the court has previously ordered such funds to be held in trust according to the laws of another jurisdiction: see Kupper v. Jorgensen, Vancouver Registry No. M003761, October 1, 2004.

**23**  I agree that it is in Sidney's best interests that the settlement funds be transferred to the State of Utah to be held by the conservator there as outlined above.

**24**  I turn now to my review of the fairness of the original contingency fee agreement and the reasonableness of the proposed fee, keeping in mind that liability was resolved shortly before trial and settlement was reached on damages after only one day of trial. My consideration of these issues is guided by the following cases referred to by counsel: MacLeod v. Harrington (Public Trustee of), [*[1995] B.C.J. No. 2717*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2B8-00000-00&context=) (C.A.) sub nom: Harrington (Guardian ad litem of) v. Royal Inland Hospital [*(1995), 14 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2B8-00000-00&context=) (B.C.C.A.); Commonwealth Investors Syndicate Ltd. v. Laxton, [*[1990] B.C.J. No. 2147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2VM-00000-00&context=); [*50 B.C.L.R. (2d) 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2VM-00000-00&context=) (C.A.); Adams (Guardian ad litem of) v. Emmott, [*[1997] B.C.J. No. 2473*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X415-00000-00&context=) (S.C.); Renaerts (Guardian ad litem of) v. Korn, [*[1999] 9 W.W.R. 499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0X6-00000-00&context=), [*[1998] B.C.J. No. 3223*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0X6-00000-00&context=) (S.C.); Bizovie (Guardian ad litem of) v. Cornish, [*2003 BCSC 1615*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0D6-00000-00&context=), [*[2003] B.C.J. No. 2432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0D6-00000-00&context=) (S.C.); Duchene (Guardian ad litem of) v. Woolley, [*2002 BCSC 1878*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1B9-00000-00&context=), [*[2002] B.C.J. No. 3232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1B9-00000-00&context=) (S.C.); Audet (Guardian ad litem of) v. Bates, [*(1998), 18 C.P.C. (4th) 357*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22CK-00000-00&context=) (B.C.S.C.); and Chong (Guardian ad litem of) v. Royal Columbian Hospital [*(1997), 31 B.C.L.R. (3d) 303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S34N-00000-00&context=) (B.C.S.C.).

**25**  The first step in the review process is to determine whether the agreement was fair on its face and fairly obtained. This requires an investigation of the mode of obtaining the contract and whether the client understood and appreciated its content. See Commonwealth and Audet. The parents entered into the contingency fee agreement with Arvay Finlay in April 2001 after receiving an explanation of the various alternatives for funding the anticipated lawsuit. They told the firm that they could not afford to pay a fee for legal services and instead, chose to proceed by way of contingency fee agreement. The parents obtained independent legal advice before the terms of the agreement were finalized. The agreement provided that the law firm would fully fund the lawsuit, including assuming the full risk for funds expended on disbursements and time expended by the lawyers in investigating and prosecuting the matter. Mr. and Mrs. Strachan are educated and intelligent people. They both provided affidavits confirming their agreement with the fee arrangement. I am satisfied they fully understood the nature and effect of the agreement they entered into. I find that the agreement was fair on its face and fairly obtained.

**26**  The second step in the review process is to determine whether the contingency fee is reasonable in the circumstances. Before considering the factors set out in Harrington, I make the following observations. As is frequently the case in contingency fee agreements, where successful prosecution of the claim can result in extremely large awards, the agreement provided for gradations of recovery depending on both the amount obtained for damages and the stage of the proceedings at which resolution is accomplished. For example, the agreement provided that fees would be 20 per cent of any settlement or award between $1,000,001 and $2,000,000 if achieved on or after examinations for discovery increasing to 30 per cent if achieved within 60 days, or less, preceding trial, or upon proceeding to trial. If the settlement or award exceeded $2,000,000, as was the case here, the agreement provided for fees of 15 and 25 per cent respectively at those two stages.

**27**  The authorities cited above recognize that the court should not choose a particular percentage, but rather set a reasonable dollar fee, after taking into account all the factors referred to in Harrington set out below. Largely, this is because the court must set a fee that reflects all the circumstances of the particular case rather than impose a one-size fits all solution.

**28**  I believe the case law also counters the danger lurking in the beguiling simplicity of percentage fees, particularly when the fees are gradated as is the case here. Without directing any undue criticism of the drafters of the contingency fee agreement here, I observe, for example, that the fees calculated on an award of $1,999,999 at trial would be $599,999, yet fees calculated on a trial award of $2,000,001 would be only $500,000. If the second amount is fair and reasonable, it would be very difficult to argue that the first could also be so.

**29**  Counsel for the plaintiffs advised that the law firm does not seek to rely directly on the provision in the agreement for a 25 per cent fee here. Instead, the firm voluntarily proposed to reduce its fees to 22.4 per cent of the settlement proceeds of $3,850,000 ($4 million less $150,000 costs), which amounts to $862,500. That fee would, in turn, be apportioned between the parents, whose claims totalled $150,000, and Sidney, on the same basis, as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | The Parents | $ 33,600 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Sidney | 828,900 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL | $862,500 |  |

The public trustee has recommended approval of the fees. Nonetheless, the question before me is whether the proposed fee of $828,900 is reasonable in the circumstances and, if not, what other fee is. The analysis requires a consideration of all the factors identified in Harrington.

**30**  In Harrington, the court identified the factors to be taken into account when assessing the reasonableness of a contingency fee. These included the following ten factors:

1. the financial circumstances of the client;
2. whether the law firm carried the disbursements;
3. the complexity and difficulty of the issues;
4. the experience and competence of defence counsel;
5. the degree of risk assumed by plaintiff's counsel;
6. the experience and competence of plaintiff's counsel;
7. the time expended by plaintiffs' counsel;
8. the timing of the settlement;
9. the importance of the case to the plaintiffs; and
10. whether the settlement was a good one.

I considered all these factors. Some are more important in the circumstances here than others.

**31**  In considering the factors, I also kept in mind the particular context for the inquiry in medical ***negligence*** cases, as stated at para. 210k of Harrington, that is:

11. A solicitor who undertakes the prosecution of a difficult case, the prospects of which are uncertain due to various issues such as liability, causation or damages, is entitled to be well compensated in the event the case is brought to a successful conclusion. Such remuneration must be substantial, but not exorbitant, in order to make up for those cases taken by the solicitor on a contingency fee basis which do not result in success.

In addition, I recognize that determining a reasonable fee requires a consideration of all the circumstances existing up to the conclusion of the retainer.

**32**  Before setting out my conclusions, I wish to comment on the question of time expended by counsel, one of the factors set out above. I caution that courts should avoid the trap of relying too heavily on such records.

**33**  The law recognizes the dangers to both the client and the law firm in placing undue weight on recorded hours. While I agree with other judicial comments that recorded hours provide useful information, I also agree equally with comments that hours recorded do not necessarily reflect the skill, judgment and experience of the particular lawyer. There are some highly capable and experienced members of the bar who accomplish more and obtain better results in significantly less time than their peers.

**34**  Equally, in the case of the less experienced or talented lawyer, the recording of hours may tell little of the necessity for or the quality of the time spent. Having said that, I hasten to add that there is nothing in the recorded hours disclosed by the evidence that leads me to conclude that is the case here. The recorded time in the case at bar is valued at about $484,000. The firm, as a whole, enjoys an excellent reputation and has significant experience in claims of this type.

**35**  I am satisfied that one of the principal reasons, if not the principal reason, that Mr. and Mrs. Strachan and Sidney were able to gain access to the court, with the assistance of properly qualified and experienced counsel, was because the law firm agreed to act on a contingency fee basis with the law firm assuming full responsibility for paying all necessary disbursements, without any recourse to the clients in the event of failure. By entering into the particular contingency fee agreement, the parents, acting on behalf of Sidney, had the considerable comfort of knowing their personal financial resources were not being placed at risk in prosecuting the claim. They also had the advantage of knowing the maximum fees potentially payable.

**36**  There are only a limited number of lawyers in the province with the necessary expertise to act in medical ***negligence*** claims and not all of those lawyers have the financial ability to pay for disbursements and accept the risk of not being reimbursed. The law firm here paid or incurred disbursements of $168,103.29. The risk of non-reimbursement arose, of course, on top of the ever-present risk that an unsuccessful conclusion would also have meant no recovery at all for the legal time expended.

**37**  Settlement of the litigation is of great importance to the family, provided it is a good settlement. I have already indicated that the settlement is a good one and adopt the following comments of the public trustee:

The proposed settlement was agreed to on the second day of the trial for damages. Plaintiff's Counsel had spent a significant amount of time preparing for trial and faced risks on the issue of damages, particularly given the diminished life expectancy of Sidney. The proposed settlement ensures that Sidney will have the necessary resources to cover the future costs pertaining to her care, treatment and equipment for the rest of her life.

The result might have been better if the plaintiffs had continued the trial, but that does not reflect adversely on the quality of the settlement. I say that because compromise is the essence of all settlement. In exchange for the benefit of a certain outcome, claimants necessarily forego aspects of claims that might have exceeded the agreed upon amounts. Similarly, defendants compromise for certainty. By doing so, they give up the opportunity to resist claims in exchange for the certainty of a result they can accept. In the result, counsel may bring just as much skill to the negotiation process as to the actual trial.

**38**  Of course, settlement also brought certainty for the plaintiffs' law firm. The law firm's reasonable fees and disbursements will now be paid. As well, some lawyer time was freed up as a result of the trial not proceeding past the second day. In my view, these are additional factors that must also be reflected in the final fee. A similar result achieved only by way of judgment at the end of trial would have justified a greater fee than I propose to approve in the present circumstances.

**39**  Finally, I recognize that the fees in relation to Sidney's settlement will come out of the settlement proceeds otherwise available for her future needs. In all the circumstances, I consider a reasonable fee in relation to Sidney's settlement to be $800,000. Taken together with the proposed fee payable by the parents of $33,600, the total fees payable, before taxes and disbursements, will be $833,600.

**40**  Counsel may submit a revised form of settlement order reflecting the approval as well as payment of the law firm fees in accordance with the above. In the meantime, I have endorsed the two consent dismissal orders respecting the claims against Dr. Vreede and the third party claims against Nurse Mowbray and returned them to the court registry for entry.

MACAULAY J.

**End of Document**

[***Taktikos v. Doe, [2005] B.C.J. No. 770***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0G8-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Gill J.

Oral Judgment: March 10, 2005.

Released: April 11, 2005.

Vancouver Registry No. M042362

**[2005] B.C.J. No. 770** | 2005 BCSC 512 | 139 A.C.W.S. (3d) 398

Between George Taktikos, plaintiff, and John Doe, Benjamin Arthur Franklin Defreitas, and Insurance Corporation of British Columbia, defendants

(14 paras.)

**Case Summary**

**Torts — *Negligence* — Motor vehicles — Standard of care — Action -- for personal injuries arising from motor vehicle accident allowed in part — Unidentified driver who lost control of vehicle was 100 per cent liable for accident — Plaintiff acted properly in taking evasive action.**

|  |
| --- |
| Action for damages for injuries suffered in motor vehicle accident -- Liability at issue -- Plaintiff and defendant Defreitas traveled southbound -- Defreitas and plaintiff saw white van in front of them hit the concrete on side of a bridge -- Van driven by unidentified driver -- Van the travelled across southbound lanes -- Plaintiff claimed he hit his brakes to avoid collision - Plaintiff's and Defreitas' vehicle collided -- Plaintiff denied his vehicle moved into lane in which Defreitas was traveling -- HELD: Action allowed in part -- Unidentified driver 100 per cent liable for accident -- Plaintiff took appropriate evasive action to avoid van -- In circumstances, plaintiff not expected to exercise self-control, poise or to posses presence of mind or extraordinary skills. |

**Counsel**

Counsel for the Plaintiff: D.P. Yerema

Counsel for the Defendants: K.E. Ducey

|  |
| --- |
| **GILL J. (orally)** |

**1**   In this action, the plaintiff Mr. Taktikos seeks damages for injuries sustained in a motor vehicle accident which occurred on April 27, 2003 at approximately 2:30 a.m. By agreement, issues of liability and damages have been severed. The hope is that with a determination in respect of liability, damages can be resolved as between the parties. Agreement has been reached about what will occur if an appeal is taken from this judgment.

**2**  The accident occurred on the Knight Street Bridge. Mr. Taktikos and Mr. Defreitas, one of the defendants, were travelling southbound. Mr. Defreitas was in the lane to the right of Mr. Taktikos and slightly behind him. The plaintiff was travelling with family members. The defendant was alone in his vehicle.

**3**  Both parties testified as to their observations of a white van which was travelling in front of them. Mr. Taktikos and Mr. Defreitas each described essentially the same thing. Both saw the white van hit the concrete on one side of the bridge, travel across the southbound lanes and hit the concrete on the other side, presumably meaning the meridian separating north and southbound traffic. At one point they both observed the van travelling sideways. Mrs. Taktikos also testified in these proceedings. Her observations do not differ from those that I have already recited.

**4**  The plaintiff testified as to his concern about the safety of his family and himself. It was his evidence that to avoid an accident, he hit his brakes hard. Almost immediately there was a collision with the defendant's vehicle. The plaintiff's vehicle sustained damage to the passenger side, both at the rear and on the front passenger door. (The plaintiff described two impacts.) Mr. Taktikos denied that his vehicle moved into the lane in which Mr. Defreitas was travelling.

**5**  As to the evidence of Mr. Defreitas, he testified that he, too, slowed his vehicle when he saw what was occurring in front of him. However, his evidence was that when the plaintiff braked, the plaintiff's vehicle moved into his lane of travel. But for that, he felt he could have brought his vehicle safely to a stop.

**6**  Mr. Taktikos was also asked about whether he could have brought his vehicle safety to a stop. His testimony on this issue is not quite as clear, as there was some difference between what he said on direct and cross-examination, but he did give evidence which was to the same effect as that of Mr. Defreitas.

**7**  I would add that neither party could say how far in front the white van actually was. It is, however, clear that both drivers felt this van was a hazard.

**8**  Turning to the arguments, the argument on behalf of the plaintiff is that the unidentified driver of the white van is solely responsible for what occurred. The first position of the defence is that the plaintiff is 100% responsible for the accident. Alternatively, it is argued that he overreacted and liability should be apportioned as between the plaintiff and the unidentified driver.

**9**  I begin by saying that I have absolutely no doubt but that every driver in the situation of the plaintiff and Mr. Defreitas would quickly have decided that they needed to slow down to ensure that they remained as far behind the white van as possible. As Mr. Defreitas said at his examination for discovery, he knew he "should be hitting my brakes."

**10**  In argument, the white van was described as being driven "erratically". In my view, that word does not adequately describe what was occurring. The white van was being driven dangerously. One might conclude that the driver had lost control or was intoxicated by alcohol or some other substance. Indeed, at his examination for discovery, when attempting to describe what occurred, Mr. Defreitas commented that the driver must have been smoking crack.

**11**  Counsel for the plaintiff referred to a number of authorities dealing with situations in which drivers have faced emergencies which required evasive action. In my view, this is one of those cases. It is clear that a driver in such circumstances is not expected to exercise nice judgment or to possess extraordinary skill, presence of mind, poise or self-control.

**12**  In March v. March, [*[1992] B.C.J. No. 1251*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M13V-00000-00&context=) (B.C.S.C.) Houghten, J. said this:

The law is set out in Kenneth Van Zanten v. Hans Peter Bruhs and Lidia Garpal Neves, [*[1991] B.C.J. No. 1045*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JGPY-X1HB-00000-00&context=), New Westminster Registry C891913 April 30th, 1991 and in Neufeld et al. v. Landry [*(1974), 55 D.L.R. (3d) 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DD1-JFKM-64FV-00000-00&context=). In the latter case, Freedman C.J.M. said at p. 298:

"The conduct of the plaintiff driver must be assessed in the light of the crisis that was looming up before her. If in the "agony of the moment" the evasive action she took may not have been as good as some other course of action she might have taken -- a doubtful matter at best -- we would not characterize her conduct as amounting to contributory ***negligence***. It was the defendant who created the emergency which led to the accident. It does not lie in his mouth to be minutely critical of the reactive conduct of the plaintiff whose safety he has imperilled by his ***negligence***."

**13**  To comment on the defence argument, rarely would I say this, but I am surprised at the defence position that the plaintiff is 100% responsible for this accident. Mr. Taktikos feared for his safety and for the safety of his family. He had good reason to be fearful. Even if it was the case that he braked too hard and too quickly and drifted into the lane to his right, it is not my view that he bears any responsibility for this collision. He took evasive action in the agony of the moment.

**14**  I conclude that the unidentified driver is 100% responsible for this accident.

GILL J.

**End of Document**

[***Tim Keith Contracting Ltd. v. Richform Construction Supply Co., [2010] B.C.J. No. 2611***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4VC-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Chilliwack, British Columbia

T.A. Schultes J.

Heard: November 5, 2010.

Oral judgment: November 17, 2010.

Docket: S020855

Registry: Chilliwack

**[2010] B.C.J. No. 2611** | 2010 BCSC 1861 | 98 C.L.R. (3d) 189 | 196 A.C.W.S. (3d) 333 | 2010 CarswellBC 3559

Between Tim Keith Contracting Ltd., Plaintiff, and Richform Construction Supply Company Limited and Bradley Bond, Defendants

(63 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Costs — Security for costs — Where plaintiff insolvent or impecunious — Where plaintiff is corporation or association — Application by defendant for security for costs allowed — Plaintiff's action stayed pending payment of security — Court convinced plaintiff company was under serious financial pressure from evidence there were several lien claims and actions pending against it — No evidence provided of plaintiff's exigible assets — Defendant had arguable defence against plaintiff's claims of breach of contract, *negligence*, defamation and misrepresentation — Plaintiff's claims that it was not in poor financial position meant it would not be prevented from continuing litigation if security for costs ordered — British Columbia Supreme Court Act, s. 236.**

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| Application by Richform for an order requiring Tim Keith to post security for costs of its action against Richform. Tim Keith, a company in the business of concrete pouring and fabrication, sued Richform, a provider of concrete forms and equipment, for misrepresentation, breach of contract, ***negligence***, interference with contractual relations and defamation in relation to the parties' common involvement in a construction project. Tim Keith claimed Richform misrepresented its level of expertise and the appropriateness of its equipment for the project, failed to provide the promised expert engineering advice and drawings, breached its duty of care to Tim Keith and interfered with Tim Keith's relationships with the project's general contractor and its own subcontractors by making defamatory statements about Tim Keith's level of competence. Richform's president provided affidavit evidence that Richform made it clear to customers that it provided no warranties about the fitness of its concrete forms or equipment. He denied any defamatory statements were made by Richform. He pointed out that Richform had its own action pending agaibst Tim Keith arising from the same project, seeking to enforce a lien for services of $230,000. Other lien claims had been filed against Tim Keith by businesses involved in the same construction project, representing a value of between $350,000 and $460,000. Tim Keith was behind in its WorkSafe premiums and had seven actions pending against it for claims totalling more than $150,000. Two charges were registered against Tim Keith's property in relation to tax liabilities. Its credit report indicated a very high risk of delinquency. A creditor of Tim Keith provided affidavit evidence that its principal had indicated the company might end up declaring bankruptcy. Tim Keith's principal deposed the company was not in dire financial circumstances, taking the position Richform had orchestrated the many liens and claims against Tim Keith which had in turn damaged its credit rating. He deposed the company had satisfied its debt to WorkSafe BC. He denied making statements about the company's precarious financial situation to the creditor.  HELD: Application allowed.  Tim Keith's action was stayed pending its payment of security for costs. Richform established a prima facie case that Tim Keith would not be able to satisfy an order for costs if unsuccessful in its action against Richform. The evidence as a whole convinced the court Tim Keith was under very significant financial pressure. Tim Keith failed to provide evidence of any exigible assets that could satisfy a costs order. Richform had an arguable defence to the action. A security for costs order would not stifle Tim Keith's claim, given the principal's assertion it was not in dire financial straits. The court was not convinced Tim Keith's potential inability to pay costs was the result of any conduct by Richform. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Act, s. 8(1)(d.1), s. 236

British Columbia Supreme Court Civil Rules,

Builders Lien Act, [*SBC 1997, CHAPTER 45, s. 27*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JKPJ-G0C1-00000-00&context=)

Law and Equity Act, [*RSBC 1996, CHAPTER 253, s. 21*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-F4NT-X09J-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: D. Stander.

Counsel for the Defendants: B.D. Rhodes.

**Oral Reasons for Judgment**

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| **T.A. SCHULTES J. (orally)** |

**1**   Richform Construction Supply Limited, the defendant in this matter, is applying for an order that Tim Keith Contracting Ltd., the plaintiff, provide security for costs.

**2**  In the event that such security is ordered, the plaintiff does not dispute that the estimate of costs provided by the defendant is a reasonable one.

**3**  The plaintiff is in the business of concrete pouring and fabrication. The defendant provides concrete forms and equipment for that purpose.

**4**  This dispute arises from the common involvement of the parties in the construction of a conference centre in Surrey in 2009 (the "Surrey project").

**5**  On February 5, 2010, the plaintiff began this action in the Chilliwack registry, alleging such matters as pre-contractual misrepresentation, breach of contract, negligent misrepresentation, ***negligence***, tortious interference with contractual relationships and defamation by the defendants, all arising out of the nature and quality of the services that were provided to the plaintiff by the defendant in the Surrey project.

**6**  In overview, the statement of claim alleges that the defendant misrepresented its level of experience and expertise in this type of work and the appropriateness of the equipment that it was able to provide to assist the plaintiff with the Surrey project, that it failed to provide the expert engineering advice and drawings to the plaintiff as agreed, that it breached its duty of care to the plaintiff in the manner that it carried out their relationship, and that it tortiously interfered with the plaintiff's relationships with the general contractor and its own subcontractors by making defamatory statements about the plaintiff's level of competence.

**7**  In an effort to demonstrate the defendant has a bona fide defence to these claims, Bradley Bond, its president, has deposed that the defendant did not provide any warranty as to the performance or suitability of the concrete forms that it rented to the plaintiff and that it does not provide any advice to its customers about the use of this equipment.

**8**  Attached to Mr. Bond's affidavit was a copy of the defendant's standard rental agreement, which he said accompanied all of the forms it delivered to the plaintiff. In this form, the lessee acknowledges that there are no warranties with respect to the form. Mr. Bond also denies the defamatory words that have been attributed to him by the plaintiff in its statement of claim.

**9**  In October of 2009 and in January of this year, the defendant filed claims of lien for services that it had provided to the plaintiff, and which it had not been paid for, in the same Surrey project.

**10**  On September 14th of this year, the defendant began a separate action against the plaintiff in the Vancouver registry to enforce these claims of lien. An amount in excess of $230,000 is claimed by the defendant in that action[**1**](#Forward_fnref_fnr-1).

**11**  The plaintiff has filed a defence and a counterclaim to the Vancouver action.

**12**  The defendant has provided evidence of the plaintiff's legal and related business difficulties for the purpose of supporting an inference that the plaintiff will not be in a position to satisfy an order for costs if it is unsuccessful in the present action.

**13**  Lien claims by other businesses involved in the Surrey project, representing a value of between $350,000 and $460,000 approximately (the exact amount is disputed by the parties) were filed against the plaintiff. As permitted by the *Builders Lien Act*, the general contractor on the Surrey project posted security in order to have these liens discharged, but the amounts claimed by many of the original lien claimants remain unpaid.

**14**  There is evidence, in the form of letters from WorkSafe BC to the plaintiff, that it was unable to pay its WorkSafe premiums during the Surrey project and that the general contractor had to pay these amounts as well.

**15**  There are six outstanding Provincial Court actions and one outstanding Supreme Court action against the plaintiff for amounts said to be owed to various businesses. The total amounts claimed are in excess of $150,000.

**16**  There are two charges registered against the personal property of the plaintiff for amounts owing under the *Income Tax Act* and the *Excise Act*.

**17**  A report from the credit monitoring agency Equifax rates the plaintiff as having "a very high risk of delinquency."

**18**  Finally, there is an affidavit from Shawn Denevers, a sales manager at Leavitt Machinery, which is also owed money by the plaintiff, recounting numerous conversations with Tim Keith, the plaintiff's principal, during the course of the Surrey project.

**19**  According to Mr. Denevers, during these conversations Mr. Keith said that the plaintiff had no assets and might end up declaring bankruptcy if Revenue Canada would not accept a payment plan for the taxes it was owed or if the plaintiff's creditors "pushed much harder for payment."

**20**  The defendant submitted a further affidavit describing an additional action that was commenced against the plaintiff in Supreme Court by Formicary Construction in September of this year. Counsel for the plaintiff objected to this affidavit, because it was filed outside of the time period required by the *Supreme Court Civil Rules,* unless he was permitted to provide the plaintiff's response through oral submissions.

**21**  I received the affidavit and counsel for the plaintiff's oral response provisionally pending a further ruling on the point. I have decided not to admit this affidavit and have not considered its contents in reaching my decision.

**22**  In his affidavit, Mr. Keith, the president and owner of the plaintiff company, denied that the plaintiff is in dire financial circumstances and asserted that it will be able to pay any order of costs, if one were to be made, at the conclusion of this action.

**23**  He indicated that the plaintiff stopped paying the defendant company because of the significant costs that the plaintiff had incurred as a result of the improper actions of the defendant, as detailed in the plaintiff's statement of claim.

**24**  Mr. Keith accused the defendant, in essence, of orchestrating the lien claims by the other subcontractors and also thereby damaging the plaintiff's credit rating.

**25**  He denied the statements about the plaintiff's precarious situation that were attributed to him by Mr. Denevers.

**26**  He said that the plaintiff had made good on the Worksafe BC premiums, which were not paid originally because of the actions of the defendant, and that he was "currently working on resolving" the other outstanding legal actions against the plaintiff company.

**27**  For a concise yet comprehensive summary of the applicable legal principles in an application of this nature, I refer to the recent decision of Griffin J. in *Integrated Contractors Ltd. v. Leduc Development Ltd.*, [*2009 BCSC 965*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0GV-00000-00&context=):

[9] This application is governed by the provisions of s. 236 of the *Business Corporations Act*, *S.B.C. 2002, c. 57*, which reads as follows:

If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

[10] The court also has inherent jurisdiction to order a party to post security for costs.

[11] The first stage of the legal test on an application for security for costs is the requirement that the applicant make out a *prima facie* case that the respondent would be unable to pay the applicant's costs if the respondent's claim fails: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* [*(1999), 36 C.P.C. (4th) 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1HH-00000-00&context=) B.C.S.C., [*91 A.C.W.S. (3d) 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1HH-00000-00&context=); *Kropp v. Swaneset Bay Golfcourse Ltd.* [*1997 CanLII 4037*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21RG-00000-00&context=) (B.C.C.A.), [*(1997), 29 B.C.L.R. (3d) 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21RG-00000-00&context=), [*90 B.C.A.C. 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21RG-00000-00&context=); and *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* [*1993 CanLII 1669*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-2327-00000-00&context=) (B.C.C.A.), [*(1993) 76 B.C.L.R. (2d) 231*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-2327-00000-00&context=) (C.A.), [*25 B.C.A.C. 95*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-2327-00000-00&context=).

[12] If the applicants do meet this requirement, the respondent may resist an order for security for costs by showing that it has sufficient exigible assets to satisfy an award of costs: *Scopeset Technology Inc. v. Astaro Corp.*, [*2004 BCSC 830*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44B-00000-00&context=).

[13] As well, the respondent to a security for costs application can resist an order for security for costs if it can show there is no arguable defence to its claim: *Scopeset* at para. 15.

[14] In addition, there are other factors which may touch upon the exercise of the court's discretion in determining whether or not to grant an order requiring a party to post security for costs. Potentially relevant on the facts of this application are the following factors:

1. Where the court is satisfied that ordering security for costs would unfairly stifle a valid claim, the court may refuse to order security: *Kropp* at para. 17;
2. Where the security for costs application is brought against a defendant advancing a counterclaim, and the counterclaim is sufficiently intertwined with the defendant's defence of the main claim: *Gray v. Powerassist Technologies Inc.*, [*2001 BCSC 1208*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-2425-00000-00&context=), [*10 C.P.C. (5th) 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-2425-00000-00&context=) (B.C.S.C.), and *Scotford Electrical & Technical Services Ltd. v. Blue Mountain Log Sales Ltd.*, [*2005 BCSC 538*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0GX-00000-00&context=), [*10 C.P.C. (6th) 237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0GX-00000-00&context=) (B.C.S.C., Master); and
3. Where the financial hardship that may give rise to the respondent's inability to pay costs is due to the very actions of the applicants at issue in the respondent's claim: *Tour-Mate Technologies Corp. v. Syntronix Systems Limited et al.*, [*[1993] B.C.J. No. 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-235D-00000-00&context=) (S.C.); and *Middlekamp v. Fraser Valley Real Estate Board*, [*[1993] B.C.J. No. 2965*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63NY-00000-00&context=) (S.C.).

[15] Finally, if the court concludes a security for costs order is warranted, the court has discretion as to the quantum of security.

**28**  With respect to the first test to be applied, I am satisfied that there is a *prima facie* case that the plaintiff will not be able to satisfy an order for costs if it is unsuccessful in the present action.

**29**  Notwithstanding Mr. Keith's assertions in his affidavit, the confluence of the sheer number of legal actions against the plaintiff and the amounts claimed in them, the charges on its personal property held by the federal government, its dismal credit rating and the admissions by Mr. Keith to Mr. Denevers defies innocent coincidence and leads me to the overwhelming inference that the plaintiff is under very significant financial pressure.

**30**  In this regard I am mindful that Mr. Denevers is an employee of another company that is also in litigation over money owed to it by the plaintiff, but I found the statements that he attributed to Mr. Keith to be consistent with what one would expect to hear from a businessman who is being harried to the point of insolvency by creditors, and as far as they refer to the actions of Revenue Canada and the plaintiff's subcontractors, these alleged remarks are confirmed by independent and reliable evidence to which Mr. Denevers would be unlikely to have had access. I prefer his evidence on this point to that of Mr. Keith and find that these statements were made as Mr. Denevers described them.

**31**  The plaintiff's material does not disclose any exigible assets that could satisfy an order for costs.

**32**  The defendant has at least an arguable defence to this action. Without delving too far into the merits of it, it appears from Mr. Bond's affidavit that the defendant will be able to point to written agreements and a course of dealings with the plaintiff that may be found to have precluded the granting of any warranty as to the fitness of the forms and equipment provided or the provision of any technical advice in using them.

**33**  Given Mr. Keith's assertion that the plaintiff would be able to satisfy a costs order, and more importantly the absence of any assertion in the plaintiff's material that a requirement to post security would be impossible for it, I do not find that the order sought would have the effect of stifling the plaintiff's claim.

**34**  Perhaps the plaintiff's strongest argument in this application is on the intertwining of the issues between the present action and the lien claim. In *Gray*, Joyce J. found that it would have been unfair to the defendant to require him to post security for costs in his counterclaim when the plaintiff would not have incurred substantially more costs in defending the counterclaim than he would have in pursuing his original claim as plaintiff.

**35**  In addition, Joyce J. found that the requirement of posting security would have had the unfair effect of stifling the counterclaim, even though the issues between the parties were significantly intertwined. The same factors were found by Griffin J. to weigh heavily against a requirement for security in the *Integrated Contractors* decision as well.

**36**  The plaintiff argues that it has been made subject to this litigation involuntarily because of the actions of the defendant and that the resulting unfairness, if it is required to provide security, is analogous to that which the defendants in *Gray* and *Integrated Contractors* would have suffered if they had been required to post security for their counterclaims.

**37**  There are, however, very significant factual differences between those cases and the present one.

**38**  As I have said, there is no evidence here that requiring security will stifle the plaintiff's claim. That removes any potential threat of unfairness from treating the parties unequally through an order for security against one of them.

**39**  I also do not find the situation of the plaintiff in the present action to be analogous to that of the defendants mounting a counterclaim in *Gray* and *Integrated Contractors* in which, as Griffin J. aptly characterized it, a defendant pursuing such a claim is doing no more than defending an action fully on its merits that it had never sought to bring about.

**40**  Counsel for the plaintiff in his able submissions has characterized the situation between the parties as a "race to the registry", but the timing of the respective actions, both in terms of the gap between the respective actions and who began an action first, does not really support that characterization, and I cannot find that the present action is in any respect an involuntary one for the plaintiff that is precipitated solely by the defendant's actions in pursuing its lien claims.

**41**  Most significantly on this issue, I should note that the plaintiff has filed a counterclaim to the builders lien action in Vancouver that appears virtually identical in its terms to its pleadings as a plaintiff in this action. If the present action has no intrinsic value from the plaintiff's perspective, aside from its need to respond to the lien initiated by the defendant, then it is not clear to me why the present action continues, in view of the existence and nature of the counterclaim.

**42**  Lastly, I do not find that the plaintiff's inability to pay costs is the result of the actions of the defendant.

**43**  Several of the actions against it, such as the one by Luso Concrete for failure to pay approximately $78,000, or the one by a law firm for failure to pay $3,000 in fees, do not arise at all from the circumstances of the Surrey project.

**44**  More importantly, in none of its statements of defence to any of the actions against it does the plaintiff indicate that its inability to pay those claims arises from the conduct of the defendant in the Surrey project.

**45**  As I said in a previous context in this judgment, the much stronger inference from the number of actions against the plaintiff and the amounts claimed in them is that the plaintiff has been defaulting on its financial commitments to a variety of creditors for reasons that extend beyond its dispute with this defendant.

**46**  The allegations that the defendant orchestrated the other liens is at this point only a bare, unsupported assertion by Mr. Keith, one that attributes sinister motives to the defendant that would not seem to have any productive business purpose.

**47**  As a result, I am satisfied that the defendant has met the test set out in s. 236 and the authorities, and accordingly there will be an order that the plaintiff post security for costs in the amount sought in the notice of application and that this action is stayed until such security has been posted.

**48**  Costs of this application will be in the cause.

**49**  I thank both counsel for their significant assistance in the argument of this matter.

**50**  MR. STANDER: Two things arising if I might have a moment.

**51**  THE COURT: Yes, of course, Mr. Stander.

[Submissions by Counsel]

**52**  THE COURT: Counsel for the plaintiff raises two additional issues arising from the order that I just made. Given the time available to us I will resolve them in a fairly summary fashion.

**53**  The first of these is there was an outstanding disclosure of documents request in this matter, which predated the application for security for costs. I have heard from counsel for the defendant that he has obtained from the defendant some of these documents, as well as some of the closest corresponding documents to others that were requested.

**54**  Secondly, pursuant to the mediation regulation, there has been a notice to mediate, and it is scheduled to take place early in January of 2011.

**55**  The question is whether the stay order applies to either or both of these matters.

**56**  The language of s. 236 is not particularly helpful; it simply provides that the court may stay all legal proceedings until the security is given, and that is also the type of language that emerges in the cases.

**57**  The legislation does not encompass all of the court's authority here, because it has also been said in the cases that the court has inherent jurisdiction to order the posting of security for costs. I think I have a discretion therefore to do what is just in the circumstances.

**58**  With respect to the disclosure request, while an application to enforce the production of a document would certainly be a legal proceeding, the requests for document disclosure as between counsel are simply a type of communication that takes place within the context of the *Rules.* Whether or not such disclosure is caught by the stay is a nice point, but in the circumstances, given the fact that this material exists and that it may be of some use to the plaintiff, either if this matter is ever able to proceed or in deciding whether to take other steps, such as appealing my order, I think it would be unjust in the circumstances to direct that the defendant not act on material that he has already acquired at the plaintiff's request and that he intended to disclose. Indeed, counsel for the defendant, in a fair and professional approach, is not suggesting that he would want to withhold this material.

**59**  Given such a responsible position it may be that any direction by me is unnecessary, but for the sake of clarity, I will specifically provide that the material currently in the hands of counsel for the defendant, pursuant to the outstanding document disclosure request, should still be disclosed in the usual way and that this stay does not affect it.

**60**  With respect to the notice to mediate, it is an interesting point that the regulation does not contain any specific provision allowing for it to be derailed by other court orders or proceedings. It has a policy reason for existing, which is that parties should think about mediation as a way of avoiding litigation's cost, delay and uncertain results. I do take that into account.

**61**  However, when one looks at the successful application that has been made by the defendant, the point is really that it should not now have to engage in any legal steps, whether within a courtroom or in an alternate proceeding mandated by the *Rules,* until its ability to obtain costs, if it is successful in the litigation, has been secured. That is the nature of the order for security for costs.

**62**  While mediation is a parallel process, it is at the end of the day a legal proceeding that is intimately related to and effectively stems from the same main proceeding. I will explicitly provide that this stay order catches mediation as well.

**63**  Thank you very much.

T.A. SCHULTES J.

[**1**](#Backward_fnref_fnr-1) Although the present action had already been commenced by the plaintiff in Chilliwack by the time the defendant began its lien action, counsel for the defendant has submitted that the defendant was required to commence that action as a separate one in Vancouver, rather than as a counterclaim to the Chilliwack action, by the operation of s. 27 of the *Builders Lien Act*. That provision adopts s. 21 of the *Law and Equity Act* as the means of determining the venue of a builders lien action. If, as in this case, there is no Supreme Court registry in the municipality in which the land that is the subject of the claim is located, the claim is to be filed "in any registry in the judicial district in which the land that is the subject of the claim is located." For the purposes of s. 21, Vancouver and New Westminster are deemed to be the same registry. Surrey is in the Vancouver Westminster Judicial District, which is established as a judicial district comprising the counties of Vancouver and Westminster by s. 8(1)(d.1) of the *Supreme Court Act*. Chilliwack is of course part of the County of Westminster, so there was actually no legislative barrier operating to the defendants proceeding by counterclaim in the present action. For reasons I will discuss, however, nothing ultimately turns on this error by the defendants.

**End of Document**

[***Trahan v. R.F. Hauser Shows Ltd., [2001] B.C.J. No. 1268***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23RT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Powell River, British Columbia

Collver J. (On Costs)

Heard: May 17 - 20, 2000.

Submissions on costs: January 5 and 17, 2001.

Supplementary judgment: June 19, 2001.

Powell River Registry No. S767

**[2001] B.C.J. No. 1268** | 2001 BCSC 879 | 105 A.C.W.S. (3d) 1034

Between Michael Carey Trahan, plaintiff, and R.F. Hauser Shows Ltd. and West Coast Amusements Ltd., defendants

(11 paras.)

**Case Summary**

**Practice — Costs — Special orders — Increase in scale of costs, effect of settlement offers.**

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| Application by the defendants, Hauser Shows and West Coast Shows, for extra costs consequent on the plaintiff Trahan's rejection of their pre-trial settlement offer. Trahan sued the defendants for injuries sustained on an amusement park ride. The jury found him 90 per cent liable for his own injuries. They awarded him $3,528, reduced for his contributory ***negligence*** to $353. The defendants had offered him $45,000 to settle, and now presented a bill of costs for $23,212. Trahan's appeal of the trial verdict was pending.  HELD: Application allowed.  There was no basis on which to deny the defendants their costs incurred from the date of the offer, as stipulated in British Columbia Supreme Court Rule 37(24). |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 37(24).

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B068-00000-00&context=)(1).

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| [Quicklaw note: Original reasons for judgment were released July 28, 2000. See [*[2000] B.C.J. No. 1566*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22M8-00000-00&context=)]. |

**Counsel**

A.R.M. Johston, for the plaintiff. Steven D. Wallace, for the defendants.

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| **COLLVER J.** |

**1**   These reasons concern costs payable following a jury trial in which the plaintiff was awarded damages amounting to only a fraction of what he would have received had he accepted the defendants' pre-trial offer.

**2**  The plaintiff, Michael Carey Trahan, sought damages for a back injury suffered on September 24, 1994 when he landed on his buttocks rather than his feet at the end of an amusement show ride operated by the defendants, R.F. Hauser Shows Ltd. and Westcoast Amusements Ltd., at Powell River.

**3**  The trial was heard at Powell River, from May 17 to May 20, 2000, and both liability and causation were disputed. The defendants were found liable, but the jury somehow decided that Mr. Trahan's own ***negligence*** had contributed to the occurrence to the extent of 90%.

**4**  Equally surprising, Mr. Trahan was awarded nothing for pain, suffering, and loss of enjoyment of life, even though the jury must have determined that he was incapacitated to the extent that he was unable to immediately return to work. Mr. Trahan had sought more than $80,000 for his past income loss, but was awarded only $3,528. That, of course, means that his net recovery amounts to $352.80, as the jury awarded him nothing for loss of future income.

**5**  On July 28, 2000, I denied an application to have the jury's verdict rejected and my own judgment substituted, [*[2000] B.C.J. No. 1566*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22M8-00000-00&context=), and I am advised that both the correctness of my jury instructions and the propriety of the jury's verdict will be considered by the Court of Appeal on September 7, 2001.

**6**  Two issues arise with respect to costs.

**7**  First, is there justification for directing that costs be assessed in an amount that does not reflect the jury's finding of split liability? In that regard, s. 3(1) of the ***Negligence*** Act, *R.S.B.C. 1996, c. 333* ("the Act") provides as follows:

Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

**8**  Pursuant to the decision of the Court of Appeal in Flatley v. Denike [*(1997), 144 D.L.R. (4th) 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21G4-00000-00&context=) (B.C.C.A.) the defendants must pay 10% of Mr. Trahan's costs up to March 15, 2000, the date of their offer to settle, but Mr. Trahan is not liable to pay any portion of the defendants' costs incurred up to that date. With respect to possibly exercising discretion pursuant to s. 3(1) of the Act, I find no "principled basis" for denying the defendants their costs: Robinson v. Lakner [*(1998), 159 D.L.R.(4th) 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22C3-00000-00&context=) (B.C.C.A.).

**9**  The second issue involves the disastrous consequences of Mr. Trahan's rejection of the defendants' pre-trial offer to settle. On March 15, 2000 the defendants offered Mr. Trahan $45,000 plus costs, which he refused. Having prepared a bill of costs totalling $23,212.28, the defendants now argue that they are entitled to application of the provisions of R. 37(24) of the Rules of Court, which read as follows:

1. if the plaintiff obtains judgment for the amount of money specified in the offer or a lesser amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed from that date,

**10**  In Sitwell v. Sitwell [*(1997), 29 B.C.L.R. (3d) 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21NX-00000-00&context=) (B.C.S.C.) Mr. Justice Bouck considered the prospect of overriding the provisions of R. 37(24) through the exercise of inherent jurisdiction. After reviewing applicable authorities he concluded as follows:

... it appears that a court has the discretion to deny a defendant costs after making a successful offer to settle. But the test is a high one. I should only refuse costs to Mr. Sitwell if the interests of justice require it and only then for a very good reason.

Mr. Justice Bouck determined that there was no such reason to deny the defendant his costs, and ordered that he was entitled to costs from the date of the offer to settle.

**11**  I have characterized the results of this litigation as disastrous for Mr. Trahan because his testimony revealed that he is in dire financial straits. However, the significance of the defendants' pre-trial settlement offer was undoubtedly explained to him at the time of its rejection, and there simply is no reason for denying the defendants costs incurred from the date of that offer.

COLLVER J.

**End of Document**

[***Ward v. Vancouver (City), [2003] B.C.J. No. 1752***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-208Y-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Romilly J.

Heard: July 15, 2003.

Judgment: July 23, 2003.

Vancouver Registry No. S030038

**[2003] B.C.J. No. 1752** | 2003 BCSC 1158 | 123 A.C.W.S. (3d) 1145

Between Alan Cameron Ward, plaintiff, and City of Vancouver, Her Majesty the Queen In Right of the Province of British Columbia, as represented by the Ministry of Attorney General and Ministry of Public Safety and Solicitor General, Her Majesty In Right of Canada, Attorney General of Canada, Sergeant Kelly, Constable Prasobsin, Constable Fodor, Sergeant Gatto, Constable Cope and other unidentified members of the Vancouver Police Department, Royal Canadian Mounted Police and Jail Staff of the Vancouver Jail, defendants

(18 paras.)

**Case Summary**

**Practice — Pleadings — Striking out pleadings — Grounds, failure to disclose a cause of action or defence — Bars, issue to be tried — Police — Actions against police — Defences — Statutory immunity, limits of.**

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| Application by the City of Vancouver to strike Ward's statement of claim. Ward was known to the police to be a lawyer who brought numerous complaints against members of the Police Department with widespread media coverage and publicity. The Prime Minister was scheduled to visit Vancouver and preside over a public ceremony. The Vancouver police were responsible for his security. They suspected that Ward had a pie which he was going to throw at the Prime Minister. Ward attended the ceremony as an observer, was the subject of police surveillance, and acted peacefully. He alleged that after leaving the ceremony he was detained, imprisoned, strip searched and confined for five hours. He further alleged that his vehicle was seized and searched by the police, who suspected he was concealing a pie on his person or in his vehicle. The Police Act provided immunity to police officers in the execution of their duty, but exempted malicious or wilful misconduct. The police officers argued that even if Ward's allegations were true, they were immune from suit for their actions and Ward's claim disclosed no cause of action. Ward argued that their actions constituted wilful misconduct, specifically assault, battery, wrongful imprisonment, and conversion.  HELD: Application dismissed.  The purpose of the Police Act was to prevent police from abusing their powers in ways alleged by Ward, as the torts alleged by him were by definition wilful acts. In addition there was an irresistible inference from Ward's allegations that the police acted maliciously in seeking to embarrass and punish him for his past history, as demonstrated by the strip search, given the impossibility of a pie being hidden beneath his clothes. Therefore, since it was not plain and obvious that Ward's claim disclosed no reasonable cause of action it was not struck. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 19(24)(a).

Police Act, [*R.S.B.C. 1996, c. 367, ss. 21*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JPGX-S0S6-00000-00&context=), 21(3)(b).

**Counsel**

B. Samuels and K. Bridge, for the plaintiff. T. Zworski, for the defendants, Sergeant Kelly, Constable Prasobsin, Constable Fodor, Sergeant Gatto and Constable Cope.

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| **ROMILLY J.** |

NATURE OF THE APPLICATION

**1**  This is an application by the Defendants, Sergeant Kelly ("Kelly"), Constable Prasobsin ("Prasobsin"), Constable Fodor ("Fodor"), Sergeant Gatto ("Gatto"), and Constable Cope ("Cope") (collectively the "Police Defendants") pursuant to Rule 19(24)(a) for an Order striking out the Plaintiff's Amended Statement of Claim as against the Police Defendants on the ground that it discloses no reasonable claim and dismissing the claim against them.

**2**  The Police Defendants claim that no reasonable claim is disclosed because, at all material times, they were acting in the performance of their duties as police officers and therefore, the claim against them personally is statute barred by s. 21 of the Police Act, *R.S.B.C. 1996, c. 367*.

**3**  For the reasons stated below I find that the Police Defendants cannot rely on s. 21 of the Police Act and as such their application must fail.

BACKGROUND

**4**  The Plaintiff's action arises out of events that took place on August 1, 2002, at which time the Plaintiff alleges that he was stopped and then arrested by members of the Vancouver Police Department (the "VPD") during an official visit to Vancouver by the Right Honourable Jean Chretien, the Prime Minister of Canada.

**5**  The Plaintiff, Alan Cameron Ward, is a lawyer who has practised law in or about the City of Vancouver since 1984. He has practised mainly in the areas of civil litigation and administrative law and has represented numerous people who have made complaints against members of the VPD and members of the Royal Canadian Mounted Police (the "RCMP"). Several of the Plaintiff's cases, including a public hearing into complaints about RCMP conduct at APEC '97 and a public hearing into complaints about VPD conduct at the Hyatt Hotel in December, 1998, have been the subject of widespread media coverage and publicity.

**6**  The Plaintiff makes a myriad of claims against the Police Defendants in his Amended Statement of Claim including claims against the individual officers for assault, battery, wrongful imprisonment and conversion. He claims that the actions of the Police Defendants constituted gross ***negligence*** and malicious or wilful misconduct.

RULE 19(24)(a)

**7**  To succeed on an application under Rule 19(24)(a), the Police Defendants must show that it is "plain and obvious" that the Statement of Claim discloses no reasonable claim: Hunt v. Carey Canada Inc., *[1990] 2 S.C.R. 959*. No evidence is admissible on an application of this nature. Instead, the facts alleged in the Statement of Claim are treated as proven: Hunt, supra; Rule 19(27). It will therefore be useful for me to canvass the facts as alleged in the Plaintiff's Amended Statement of Claim.

FACTS AS ALLEGED IN THE AMENDED STATEMENT OF CLAIM

**8**  The alleged facts, as extracted from the Amended Statement of Claim, are as follows:

The Incident of August 1, 2002

1. On the morning of the 1st day of August, 2002, the Right Honourable Jean Chretien, the Prime Minister of Canada, attended at or near the intersection of Taylor and Pender Streets, in the City of Vancouver, Province of British Columbia to preside over a public ceremony to officially open a monument known as the "Millenium Gate". The RCMP and VPD shared the responsibility of providing policing services and security for the ceremony.
2. The Plaintiff attended the ceremony as an observer and was the subject of surveillance conducted by members of the RCMP and VPD.
3. The Plaintiff left the ceremony at approximately 10:20 a.m. and proceeded on foot in a southerly direction toward Keefer Street. When the Plaintiff was approximately one block away from the ceremony, and out of sight, he was accosted by a uniformed peace officer who requested that the Plaintiff speak to the Defendant Kelly. The Plaintiff complied with that request.
4. The Defendant Kelly, along with the Defendant Prasobsin and one other uniformed member of the VPD whose identity is unknown to the Plaintiff, then grabbed and handcuffed the Plaintiff. The Plaintiff repeatedly asked whether he was under arrest and repeatedly requested the opportunity to contact legal counsel by telephone. Kelly refused to advise the Plaintiff whether he was under arrest, refused the Plaintiff's repeated requests to contact counsel and threatened to charge the Plaintiff with assaulting a police officer unless the Plaintiff stopped asking questions. When the Plaintiff attempted to use his personal cellular telephone to contact counsel, one of the three VPD members seized the telephone.
5. The Defendants Kelly, Prasobsin and the other VPD member searched the Plaintiff and seized his wallet, keys and watch. They opened the Plaintiff's wallet and found his driver's licence, his business card, and other cards identifying the Plaintiff as a member of the Law Society of British Columbia, the Canadian Bar Association and the American Civil Liberties Union. Kelly then used his radio to report his findings to his colleagues.
6. After concluding these radio conversations, Kelly, Prasobsin and the other VPD member forcibly moved the Plaintiff in a southerly direction along Taylor Street and forcibly pushed him into a VPD vehicle. The Plaintiff, who was still in handcuffs, offered no resistance.
7. The Defendant Fodor drove the VPD vehicle in a circuitous route and ultimately arrived at the Jail. The Plaintiff was left unattended in the parked vehicle outside the Jail for approximately thirty minutes.
8. When the Plaintiff was removed from the vehicle and taken into the Jail, he repeatedly requested the opportunity to contact legal counsel. Those requests were refused. Several of the Jail staff, whose identities are unknown to the Plaintiff, together with the Defendant Gatto, then conducted a strip search of the Plaintiff. The strip search was recorded by a closed-circuit television video camera.
9. The Plaintiff again repeatedly requested the opportunity to contact legal counsel and again those requests were refused. The Plaintiff was then confined in a large jail cell.
10. After some time passed, the Plaintiff was granted the opportunity to make a telephone call. He was then taken to a small jail cell marked "INTOX" and unlawfully and [sic] confined in solitary confinement until approximately 3:30 p.m. on August 1, 2002, when he was released without an apology.
11. The Plaintiff was detained in custody for a total of approximately five hours. He was never charged with any offence and was never taken before a judge.
12. While the Plaintiff was in custody, the Defendant Cope conducted a search of city streets for the Plaintiff's automobile, located it, and seized, searched and impounded it in a VPD garage at 342 Alexander Street in the City of Vancouver. Cope undertook these actions pursuant to a suspicion that there may have been a pie in the trunk of the automobile.

**9**  I will now deal with the Police Defendants' claim that the Amended Statement of Claim discloses no reasonable cause of action against them on the basis that they cannot be personally liable because of s. 21 of the Police Act.

IS THE MATTER STATUTE BARRED PURSUANT TO S. 21 OF THE POLICE ACT?

**10**  The Police Defendants submit that, even if all the allegations of fact in the Amended Statement of Claim are accepted as proven, they cannot be personally liable to the Plaintiff because of s. 21 of the Police Act.

**11**  The relevant parts of s. 21 read as follows:

1. No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercised of his or her power.
2. Subsection (2) does not provide a defence if
3. the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross ***negligence*** or malicious or wilful misconduct, or
4. the cause of action is libel or slander.

It is clear and apparent from the text of s. 21 that this provision will only assist the Police Defendants if it can be said that the facts alleged in the Amended Statement of Claim do not establish gross ***negligence***, or malicious or wilful misconduct on their part.

**12**  I note once again that on an application under Rule 19(24)(a) I must accept as true the facts alleged in the Amended Statement of Claim. As such under this motion I must accept that the police did in fact detain, imprison and strip search the Plaintiff, and seize and search his car arbitrarily and without any legal justification. The Plaintiff's tortious claims in the form of assault, battery, wrongful imprisonment and conversion are intentional torts and by definition "wilful" acts.

**13**  In my view the purpose of s. 21(3)(b) of the Police Act is to prevent police officers from abusing their power in ways such as those alleged by the Plaintiff. These alleged actions at a minimum amount to gross ***negligence*** and more likely amount to malicious or wilful misconduct. Certainly police officers cannot expect to evade personal liability via s. 21(2) of the Police Act when they are alleged to have engaged in such behaviour.

**14**  In Walkey (Guardian ad litem of) v. Canada (Attorney General), [*[1997] B.C.J. No. 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21RM-00000-00&context=) (S.C.) police officers were found personally liable and unable to rely on s. 21(2) as a defence for conduct which, in my view, was far less egregious than that alleged in the case at bar.

**15**  As set out above, the Police Defendants are alleged to have been involved in arresting, imprisoning, and strip searching the Plaintiff, in addition to seizing and searching his vehicle. The basis for their actions was a suspicion that the Plaintiff might have had a pie on him that he was going to throw in the face of the Prime Minister. While I recognize the importance of protecting our Prime Minister, I also recognize the importance of protecting the rights of an individual.

**16**  From the statements included in the Amended Statement of Claim, which for the purpose of this application I have to treat as being true, there would seem to be an irresistible inference that the Police Defendants, all of whom knew the identity of the Plaintiff and his past history with the police, sought by their actions to embarrass and punish the Plaintiff. In so doing they infringed a number of the Plaintiff's Charter protected rights. In this regard, I cannot help but question the purpose of the alleged strip search of the Plaintiff. Did the police officers really expect to find a pie hidden beneath the Plaintiff's clothes?

**17**  Having considered the alleged conduct of the Police Defendants and taking it to be true as I am required to do in these proceedings, I am unable to find that the Police Defendants' personal liability is statute barred by s. 21(2) of the Police Act. As such I am unable to find that it is "plain and obvious" that the Plaintiff's Amended Statement of Claim discloses no reasonable cause of action.

CONCLUSION

**18**  The Police Defendants' application is dismissed. The Plaintiff is entitled to costs on this application.

ROMILLY J.

**End of Document**

[***Affinity Auto Group Inc. v. Manheim Auto Auction, [2009] B.C.J. No. 1315***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0C1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D. Satanove J.

Heard: June 1, 2009.

Judgment: July 2, 2009.

Docket: S088306

Registry: Vancouver

**[2009] B.C.J. No. 1315** | 2009 BCSC 873 | 98 B.C.L.R. (4th) 334 | 2009 CarswellBC 1770

Between Affinity Auto Group Inc., Plaintiff, and Manheim Auto Auction, Manheim's Pennsylvania Auction Services, Inc. and Manheim Auto Auctions Company dba Toronto Auto Auctions and Manheim's Oshawa Dealers Exchange, Defendants

(27 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Disposition without trial — Dismissal of action — Order of — Application to set aside — Application to set aside a writ of summons and statement of claim allowed — The plaintiff sued the wrong parties — The plaintiff conceded two of the named defendants were not legal entities — The defendants had no affiliates in B.C., were not extra-provincially registered in B.C. and none of them did any business in B.C. — As auctioneers the defendants bore no liability under the Sale of Goods Act as they were not privy to the contract between the buyer and seller — The statement of claim did not set out how the plaintiff relied on an allegedly inaccurate vehicle inspection report — Sale of Goods Act, s. 18(a).**

**Commercial law — Sale of goods — Sale by auction — Auctioneers — Duties — Application to set aside a writ of summons and statement of claim allowed — The plaintiff sued the wrong parties — The plaintiff conceded two of the named defendants were not legal entities — The defendants had no affiliates in B.C., were not extra-provincially registered in B.C. and none of them did any business in B.C. — As auctioneers the defendants bore no liability under the Sale of Goods Act as they were not privy to the contract between the buyer and seller — The statement of claim did not set out how the plaintiff relied on an allegedly inaccurate vehicle inspection report — Sale of Goods Act, s. 18(a).**

**Statutes, Regulations and Rules Cited:**

Sale of Goods Act, SBC 2006, CHAPTER 410, s. 18(a)

**Counsel**

Counsel for the Plaintiff: Gerald J. Fahey.

Counsel for the Defendants: Alan S. Cofman.

**Reasons for Judgment**

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| **D. SATANOVE J.** |

**1**   The plaintiff operates a luxury car dealership in Vancouver, British Columbia. Through an on-line bidding service called MANHEIM.COM, the plaintiff participated in a Pennsylvanian auction of a 2004 Porsche 911 GT3 automobile owned by Robb Francis Motor Cars, LLC (the "Porsche"). The plaintiff's bid of $65,000.00 U.S. did not succeed. The next day the auctioneer, the defendant Manheim's Pennsylvania Auction Services Inc., contacted the plaintiff's representative and asked if the plaintiff was still interested in purchasing the Porsche for that amount. The plaintiff's representative said it was and so the defendant posted the Porsche on another website, OVE.COM, for the price of $65,000.00 U.S. and the plaintiff bought it on June 12, 2008.

**2**  The plaintiff arranged for the Porsche to be delivered to the plaintiff in Bellingham, Washington on July 3, 2008 at which time the plaintiff requisitioned Roger Jobs Porsche of Bellingham to inspect and qualify the Porsche for driving in Canada. Roger Jobs Porsche discovered serious defects in the Porsche that the plaintiff alleges render the Porsche unfit for resale. The Porsche was imported into Canada and on November 27, 2008, the plaintiff issued against all the defendants listed in the style of cause a Writ of Summons with the following endorsement:

The plaintiff claims against the defendants for breach of contract and negligent misrepresentation in tort contrary to the *Sale of Goods Act,* R.S.B.C. 2006, c. 410, providing to the plaintiff a vehicle more particularly described as Porsche 911 GT3, VIN No. WPOAC299X4S692819 which was not fit for the purpose for which it was sold.

**3**  The Writ was served personally on Manheim Auto Auctions Company's authorized representative in Nova Scotia on January 6, 2009 but has never been served personally on the other defendants.

**4**  The defendants entered an Appearance on January 26, 2009 and filed an application on February 23, 2009 to set aside, or stay, the Writ of Summons for lack of jurisdiction or improper service.

**5**  On the 29th of May, 2009, which was the Friday before this application was heard by me on Monday, June 1, 2009, the plaintiff filed a Statement of Claim alleging, *inter alia*, that the plaintiff purchased directly from Manheim's Pennsylvania Auction Services Inc. a full post-sale inspection with a 14 day guarantee. The Statement of Claim alleges that although the inspection was carried out on June 12, 2008, it was negligently performed, failed to discover serious and significant mechanical problems, and was not provided to the plaintiff until July 10, 2008, which date was long past the fourteen day guarantee period. The Statement of Claim seeks damages for breach of contract and ***negligence*** in:

1. failing to ensure proper title to the vehicle;
2. failing to observe that the Porsche had sustained significant damage;
3. failing to report to the plaintiff that the Porsche had sustained significant damage;
4. failing to provide an accurate written inspection report in a timely fashion.

**6**  The essence of the defendants' position on this application is that the plaintiffs' entire claim is ill founded because:

1. the Style of Cause includes names that are not legal entities;
2. the Writ of Summons does not set out a cause of action against the named defendants;
3. the Statement of Claim does not cure the Writ of Summons because the Statement of Claim attempts to plead a new and different cause of action, and does not plead it properly;
4. this Court has no territorial jurisdiction over the proper defendants;
5. alternatively, this Court should decline jurisdiction over the proper defendants as it is not a convenient forum;
6. in the further alternative, if this Court does have jurisdiction over the proper defendants and assumes that jurisdiction, then the plaintiff requires leave to serve *ex-juris* the Writ of Summons on the proper defendants.

**Style of Cause**

**7**  The plaintiff concedes that Manheim Auto Auction, Toronto Auto Auctions and Manheim's Oshawa Dealers Exchange are merely business names and not legal entities. The plaintiff submits that the real defendants are Manheim's Pennsylvania Auction Services, Inc. ("Manheim Pennsylvania") and Manheim Auto Auctions Company dba Toronto Auto Auctions ("Manheim Canada").

**8**  The evidence establishes that the defendant Manheim Pennsylvania is a Michigan company. It is in the business of providing auto auction and ancillary services to commercial consignors, wholesalers, brokers and licensed dealers. It operates live auctions in Manheim, Pennsylvania and online auction services on the MANHEIM.COM and OVE.COM websites.

**9**  The defendant Manheim Canada is a Nova Scotia company with its registered offices in Nova Scotia, New Brunswick, Quebec and Ontario, but not in British Columbia. It carries on the same type of business as Manheim Pennsylvania.

**10**  While Manheim Pennsylvania and Manheim Canada are both ultimately related to a parent company called Cox Enterprises, Inc., they are not directly related to one another and they have no interaction with one another.

**11**  The defendants have no affiliates in British Columbia. They are not extraprovincially registered in British Columbia, and none of them do any business in British Columbia.

**12**  MANHEIM.COM and OVE.COM are operated by Delaware companies that are controlled by Cox Enterprises Inc. They are respectively called Manheim Auctions Inc. and Online Vehicle Exchange, LLC. However, the plaintiff has made neither of these companies a party to this action.

**13**  Buyers and sellers can only gain access to the auction services on MANHEIM.COM and OVE.COM with a valid "auction access" membership. That membership is provided by a company called AutoTec, LLC, which also has not been made a party to this action. The defendants have no direct relationship with AutoTec, LLC or the membership-granting process.

**14**  It is obvious from the above description of the parties that the plaintiff did not properly ascertain who it should be suing before issuing the Writ. That being said, it is the plaintiff's choice of whom to name as defendants and I can only analyze the claim as it is made against these named defendants. However, the plaintiff's choice of defendants in this case may prove to be fatal to its claim as it now stands.

**The Writ of Summons**

**15**  The endorsement on the Writ of Summons refers to breach of contract and negligent misrepresentation in tort, but those allegations are followed by the qualifying words "contrary to the *Sale of Goods Act* ... providing to the plaintiff a vehicle ... which was not fit for the purpose ...". There is no separate plea of a contract, other than providing a vehicle, and no pleas of the requisite elements of an actionable misrepresentation, such as duty or reliance. The essence of the endorsement appears quite clearly to be a commercial claim under the *Sale of Goods Act* for receipt of deficient goods.

**16**  Although the endorsement does not cite a specific provision of the *Sale of Goods Act*, *R.S.B.C. 1996, c. 410* (the "*Act*"), s. 18(a) of the *Act* deals with claims of lack of fitness for purpose. That section binds sellers and lessors, not auctioneers. Auctioneers, such as the Defendants, are not "sellers" for the purposes of Sales of Goods legislation in Canada (*Modern Livestock Ltd. v. Elgersma* [*(1989), 97 A.R. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9301-F2TK-23K6-00000-00&context=), [*50 C.C.L.T. 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9301-F2TK-23K6-00000-00&context=) (Q.B.), and *Tkachuk v. Saskatoon Auction Mart Ltd.,* [*284 D.L.R. (4th) 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-F1P7-B3VN-00000-00&context=), [*2007 SKCA 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-F1P7-B3VN-00000-00&context=).

**17**  Thus the endorsement on the Writ of Summons contains no cause of action against the defendants. It is the endorsement one would expect to see (perhaps more precisely worded) against the seller of the Porsche, Robb Francis Motor Cars Ltd.

**18**  The plaintiff does not disagree that it is foreclosed in law from bringing a sale of goods action against these defendants. It submits, however, that the endorsement on the Writ is a mere irregularity and that its defect has been cured by issuance of the Statement of Claim. I disagree.

**19**  In most situations, the low threshold of sufficiency of a Writ will be met, particularly with the issuance of a Statement of Claim. The British Columbia Court of Appeal in *Hicks v. Beaver Lumber* [*(1993), 98 B.C.L.R. (2d) 206*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S3HC-00000-00&context=), 29 C.P.C. (3d) 295 (C.A.), stated that the words of Rule 8(2) requiring a Writ to be endorsed with "a concise statement of the nature of the claim made" are not words of art and there is no specific wording that must be contained in an endorsement in order to link the concise statement of the facts to a particular cause of action or form of action.

**20**  I am also cognisant of the admonition by the Court in that case to consider the interests of justice as they are revealed by an assessment of the prejudice to the party whose claim is dismissed and the prejudice to the party who is misled by the endorsement.

**21**  However, the law does not stretch so far as to allow a plaintiff in a Statement of Claim to completely change the nature of the claim against the defendant in order to cure the insufficiencies of a defective Writ. As Bouck J. stated in *Canadian National Railway Company v. Canadian Pacific Ltd*. [*(1978), 5 B.C.L.R. 242*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-FFTT-X0G9-00000-00&context=) at 245 (S.C.), that would be an abuse of process:

The intention of the law is for the plaintiff to state some sort of claim in the endorsement which gives him an apparent right to relief. As an extreme example, a plaintiff might endorse a writ with a headline taken from the front page of the morning newspaper. He could not correct this by filing a statement of claim which pleaded a cause of action. That would be an abuse of the process of the court.

**22**  *Elloway v. B.C. Electric Railway Company Limited* (1956), 19 W.W.R. 408 at 412, [*4 D.L.R. (2d) 734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B23Y-00000-00&context=) (S.C.) is often quoted for its analysis of the difference between a defective endorsement and no endorsement:

... There is a distinction to be drawn between a defective endorsement and no endorsement. It is not always easy to distinguish between an irregularity which can be cured and a nullity which is incapable of being brought to life but I take it that a nullity can be described for the purpose of litigation as being some act or process which has no legal effect and upon the strength of which no further legal activity can be based. Certainly the plaintiffs acting upon the basis of this endorsement standing by itself could not have proceeded to judgment in default of appearance.

**23**  In the case at bar, the endorsement discloses no claim against the defendants. The defendants, receiving and reading this endorsement, would be entitled to conclude that they were not liable to the plaintiff, and that the plaintiff had sued the wrong parties because as auctioneers the defendants were not privy to the contract between buyer and seller and bore no liability under the *Sale of Goods Act*.

**24**  The Statement of Claim, on the other hand, relates to something else entirely - an inaccurate vehicle inspection report performed by Manheim Pennsylvania. Further, the Statement of Claim does not set out how the plaintiff relied on this report, if at all, or what were the consequences of the report's inaccuracies. The affidavit evidence discloses that the plaintiff knew of the alleged defects in the Porsche days before it received the report. The claim of lost guarantee is ill-founded, too, because the plaintiff concedes that it relates to something else entirely and does not exist in respect to the plaintiff's purchase.

**25**  In conclusion, I am of the opinion that the endorsement on this Writ has no legal effect against these defendants and cannot form the basis of further legal activity such as issuance of a Statement of Claim. It seems to me that to let these ill-founded pleadings stand would be an abuse of the process of the Court. There are no limitation issues of which I am aware and the Writ and the Statement of Claim must be set aside.

**26**  There will be no action extant as a result of this judgment so the jurisdictional and service issues are moot.

**27**  The defendants are entitled to their costs on a Party/Party basis at Scale 3.

D. SATANOVE J.

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[***Bier v. Continental Motors Inc., [2016] B.C.J. No. 1602***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KD1-W4V1-JC5P-G3DP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.A. Skolrood J.

Heard: June 23, 2016.

Judgment: July 27, 2016.

Docket: S140623

Registry: Vancouver

**[2016] B.C.J. No. 1602** | 2016 BCSC 1393 | 269 A.C.W.S. (3d) 89 | 90 C.P.C. (7th) 165 | 2016 CarswellBC 2084

Between Anthony Bier, Darren Bullen and Trevor Scott Keesey, Plaintiffs, and Continental Motors, Inc., Great River Aviation Ltd., Okanagan Aero Engine Ltd., Amsafe, Inc., Defendants, and Continental Motors, Inc., Great River Aviation Ltd., Okanagan Aero Engine Ltd., Amsafe, Inc. Third Parties

(71 paras.)

**Case Summary**

**Civil litigation — Civil evidence — Opinion evidence — Expert evidence — Admission of reports — Criteria for admissibility — Qualification as an expert — Application by Continental Motors for order dismissing third party notices filed against it dismissed — Application by Okanagan Aero Engine for order striking Continental's expert report dismissed — Report prepared by Ford, American lawyer who opined Alabama courts would likely refuse to recognize judgment by British Columbia court — Ford met threshold test of properly qualified expert — Relationship with Continental was insufficient to establish realistic concern about his ability or willingness to comply with his duty to court — While probative value of report might be minimal, it was not outweighed by any prejudicial effect.**

**Conflict of laws — Jurisdiction — International issues (with foreign state or territory) — Determination of — Real and substantial connection — Application by Continental Motors for order dismissing third party notices filed against it dismissed — Application by Okanagan Aero Engine for order striking Continental's expert report dismissed — Continental, American corporation, manufactured engine of plane that crashed in Yukon — Engine had been overhauled by Okanagan Aero — There was presumed real and substantial connection between claims advanced by Okanagan Aero against Continental pursuant to s. 10(g) and 10(h) of Court Jurisdiction and Proceedings Transfer Act — Presumption had not been rebutted — Court Jurisdiction and Proceedings Transfer Act, ss. 10(g), 10(h).**

**Conflict of laws — Conflicts by legal area — Tort law — Law of the place of the tort — Application by Continental Motors for order dismissing third party notices filed against it dismissed — Application by Okanagan Aero Engine for order striking Continental's expert report dismissed — Continental, American corporation, manufactured engine of plane that crashed in Yukon — Engine had been overhauled by Okanagan Aero — There was presumed real and substantial connection between claims advanced by Okanagan Aero against Continental pursuant to s. 10(g) and 10(h) of Court Jurisdiction and Proceedings Transfer Act — Presumption had not been rebutted — Court Jurisdiction and Proceedings Transfer Act, ss. 10(g), 10(h).**

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| Application by Continental Motors for an order dismissing third party notices filed against it. Application by Okanagan Aero Engine for an order striking Continental's expert report relied on for its application. The plaintiffs were passengers in an airplane that crashed in the Yukon while attempting to make an emergency landing after the engine failed. The plane was operated by Great River Aviation, a Yukon-based air service. The plane's engine was manufactured by Continental, an American corporation with its principal place of business in Alabama. The engine was manufactured in Alabama and sold to a company based in Florida. The engine had been overhauled by Okanagan Aero in 2009. Okanagan Aero was approved by Continental to carry out repairs and maintenance on its engines. Continental's expert report was prepared by Ford, an American lawyer who opined the Alabama courts would likely refuse to recognize a judgment by the British Columbia court on the basis the British Columbia court had no jurisdiction over Continental.  HELD: Applications dismissed.  Ford met the threshold test of a properly qualified expert. Ford's relationship with Continental was not sufficient to establish a realistic concern about his ability or willingness to comply with his duty to the court. Ford's report was helpful but not determinative of the forum conveniens analysis. While the probative value of the report might be minimal, it was not outweighed by any prejudicial effect. The third party notice made it clear the failure to warn occurred in British Columbia. The absence of an actual physical presence in British Columbia did not mean Continental was not carrying out business in the province. There was a presumed real and substantial connection between the claims advanced by Okanagan Aero against Continental pursuant to s. 10(g) and 10(h) of the Court Jurisdiction and Proceedings Transfer Act. The presumption had not been rebutted. Continental had not established Alabama was clearly the more appropriate forum. |

**Statutes, Regulations and Rules Cited:**

Court Jurisdiction and Proceedings Transfer Act, [*S.B.C. 2003, c. 28, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FGJR-216H-00000-00&context=), s. 3(e), s. 10, s. 10(a), s. 10(e), s. 10(g), s. 10(h), s. 10(l), s. 11

**Counsel**

Counsel for the Plaintiffs: No Appearance.

Counsel for the Defendant and the Third Party, Continental Motors, Inc.: B.C. Poston.

Counsel for the Defendant and the Third Party, Great River Aviation Ltd.: R. Samtani.

Counsel for Defendant and Third party, Okanagan Aero Engine Ltd.: M. Dery, S.M. Foster.

Counsel for Defendant and Third Party, Amsafe, Inc.: No Appearance.

**Reasons for Judgment**

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| **R.A. SKOLROOD J.** |

**Introduction**

**1**  There are two applications before the court. The first application is brought by Continental Motors, Inc. ("CMI") which seeks an order dismissing third party notices filed against it on the basis that this Court lacks jurisdiction over CMI or, alternatively, staying the proceeding on the basis that the court should decline jurisdiction (the "jurisdictional application").

**2**  The second application is brought by Okanagan Aero Engine Ltd. ("OAE"), one of the parties that issued a third party notice to CMI. OAE applies for an order striking, or declaring inadmissible, an expert report on which CMI seeks to rely in the jurisdictional application (the "expert report application").

**3**  While OAE sought to have the expert report application heard first as a preliminary matter, in order to streamline the proceeding, I ordered that it address the issue of the expert report as part of its response to CMI in the jurisdiction application.

**The Parties and the Underlying Litigation**

**4**  On May 8, 2012, the plaintiffs were passengers in a Cessna airplane that crashed in the Yukon Territory while attempting to make an emergency landing following the failure of the plane's engine (the "accident"). The engine failure was apparently due to problems with the crankshaft.

**5**  The plane was operated by Great River Aviation Ltd. ("Great River"), a Yukon-based air service.

**6**  The engine in the Cessna plane was manufactured by CMI. CMI is incorporated under the laws of Delaware in the United States and its principal place of business is in Mobile, Alabama.

**7**  According to the evidence led by CMI, the engine was originally manufactured by it in Mobile, Alabama in 1995, after which it was sold to a company based in Florida. CMI says that it had no specific knowledge of what became of the engine after selling it to the Florida company. However, at some point it was installed in the Cessna operated by Great River.

**8**  OAE is in the business of maintaining and overhauling aircraft engines, including engines manufactured by CMI. OAE conducts its business out of a facility located in Kelowna, B.C.

**9**  It is common ground that the engine was shipped to OAE and overhauled by it between January -- March, 2009 pursuant to an agreement between OAE and Great River.

**10**  According to OAE, for the purpose of performing work on engines manufactured by CMI, it purchases an annual subscription for access to materials published by CMI in respect of its engines, including an overhaul manual and various service bulletins. As a result of its purchase of the subscription from CMI, OAE was designated by CMI as a fixed-based operator ("FBO") approved by CMI to carry out repairs and maintenance on CMI's engines.

**11**  Following the accident, the plaintiffs brought an action for damages for personal injuries sustained in the accident. The named defendants were CMI, Great River, OAE and Amsafe, Inc., which is the manufacturer of the seatbelts used in the airplane.

**12**  Each of OAE and Great River issued a third party notice to CMI. While the plaintiffs subsequently discontinued their claims against CMI, the third party claims of OAE and Great River remain outstanding.

**13**  As set out in the jurisdictional application, CMI takes the position that this court lacks jurisdiction over it or, alternatively, should decline jurisdiction.

**The Expert Report Application**

**14**  In support of its jurisdictional application, CMI served a report prepared by Mr. Benjamin Ford, a lawyer licenced to practice law in Alabama, in which Mr. Ford opines that the Alabama courts would likely refuse to recognize a judgment by a B.C. court against CMI on the basis that the B.C. courts have no jurisdiction over CMI.

**15**  In response, OAE served a report prepared by Professor Montre Carodine, a professor at the University of Alabama School of Law. In Professor Carodine's opinion, it is not in fact clear that an Alabama court would refuse to recognize a B.C. judgment given that the state of the law governing the issue is currently unclear. She suggests a number of factors that would support the validity of a B.C. court exercising jurisdiction over CMI which would in turn support recognition by an Alabama court.

**16**  As noted, OAE also brought an application to strike out, or rule inadmissible, Mr. Ford's report. The basis for OAE's application is that Mr. Ford is not a qualified expert because i) he lacks expertise in the subject matter of his opinion and ii) he is unable to comply with the duty to the court to provide independent, impartial evidence given the long-standing solicitor-client relationship between Mr. Ford's law firm and CMI. In the alternative, OAE submits that Mr. Ford's report should be excluded because the potential harm in admitting it outweighs any probative value.

**17**  The principles governing the admissibility of expert opinion evidence have been set out by the Supreme Court of Canada in the leading cases of *R. v. Mohan*, [*[1994] 2 S.C.R. 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3D0-00000-00&context=), [*114 D.L.R. (4th) 419*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3D0-00000-00&context=) [*Mohan*]; and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [*2015 SCC 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HBF-Y861-FGRY-B2CW-00000-00&context=) [*White Burgess*].

**18**  One of the criteria for admissibility is that the expert be "properly qualified". In *Mohan*, the Supreme Court described a properly qualified expert as someone "who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify" (at 25).

**19**  Here, OAE says that while Mr. Ford professes to practice in the area of general civil litigation, he has no demonstrated expertise in the recognition of foreign judgments in Alabama. However, I agree with CMI that the broad nature of his civil and commercial litigation practice, as noted in his CV, would no doubt give rise to jurisdictional issues from time to time. Moreover, in his report, he states that he has "extensive experience in Alabama law and U.S. Federal law applicable to the Eleventh Circuit of the United States, wherein Alabama is located". He then goes on in his report to demonstrate familiarity with the Alabama legislation dealing with the recognition of foreign money judgments.

**20**  In my view, Mr. Ford meets the threshold test of a properly qualified expert.

**21**  The second prong of OAE's attack on Mr. Ford's report is that, due to the relationship between his law firm and CMI, Mr. Ford is unable to fulfill his duties owed to the court.

**22**  As held by the Supreme Court in *White Burgess*, once an expert attests that he or she will comply with the duties owed to the court, which Mr. Ford did here, the burden shifts to the party opposing the admission of the evidence to establish a "realistic concern" that the expert is unable or unwilling to comply with that duty (at para. 48).

**23**  The Court does not define what constitutes a "realistic concern" but it is apparent that more than the existence of a relationship between the expert and a party is required:

... it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible (*White Burgess* at para. 49).

**24**  Where the party challenging admissibility does raise a realistic concern, the burden shifts back to the party seeking to rely on the evidence to establish on a balance of probabilities that the expert is capable of complying with his or her duty to the court. However, as the Court in *White Burgess* notes at para. 49:

This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it.

**25**  In the present case, the concern raised by OAE about Mr. Ford's independence and impartiality is based solely on the existence of a relationship between his law firm and CMI and Mr. Ford's failure to disclose that relationship in his report. In my view, this is not sufficient to establish a realistic concern about Mr. Ford's ability or willingness to comply with his duty to the court.

**26**  I would add that where, as here, the expert who attests to his or her awareness of the duty and willingness to comply is a lawyer, the court should be particularly reluctant to go behind the attestation given the professional obligations inherent in that position that exist quite independently of the lawyer's role as an expert witness.

**27**  Lastly, I would not refuse to admit Mr. Ford's report based on a cost-benefit analysis of its prejudicial effect versus its probative value.

**28**  CMI seeks to rely on the report to argue that a B.C. judgment would not be recognized by an Alabama court. However, recognition of a judgment is but one of a number of factors that the court will consider in determining whether B.C. is the appropriate jurisdiction in which to hear the claim. Thus, while Mr. Ford's report is helpful in considering that factor, it is by no means determinative of the *forum conveniens* analysis.

**29**  In any event, OAE, as noted, has produced an expert report that offers a different opinion. Thus, the best that can be said is that there is a live issue as to whether a B.C. judgment will be recognized by the Alabama courts.

**30**  In the circumstances, while the probative value of the report may be minimal, it is not outweighed by any prejudicial effect.

**The Jurisdiction Application**

**31**  The jurisdiction application is governed by the *Court Jurisdiction and Proceedings Transfer Act,* *S.B.C. 2003, c. 28* [*CJPTA*], the relevant provisions of which state:

**Proceedings against a person**

**3** A court has territorial competence in a proceeding that is brought against a person only if

...

1. there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

...

**Real and substantial connection**

**10** Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

...

1. concerns contractual obligations, and
2. the contractual obligations, to a substantial extent, were to be performed in British Columbia,
3. by its express terms, the contract is governed by the law of British Columbia, or
4. the contract
5. is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
6. resulted from a solicitation of business in British Columbia by or on behalf of the seller,

...

1. concerns a tort committed in British Columbia,
2. concerns a business carried on in British Columbia,

**32**  In *Stanway v. Wyeth Pharmaceuticals Inc.*, [*2009 BCCA 592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24TW-00000-00&context=), leave to appeal ref'd [*[2010] SCCA No. 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-JWXF-21G5-00000-00&context=) [*Stanway*], Mr. Justice Smith for the Court of Appeal discussed the relationship of ss. 3 and 10 of the *CJPTA*, at paras. 13, 19-22:

[13] The substantive rules for determining territorial competence are set out in s. 3, which provides so far as it is relevant for present purposes,

A court has territorial competence in a proceeding that is brought against a person only if:

...

1. there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

...

[19] Before enactment of the *CJPTA*, questions of jurisdiction *simpliciter* were normally decided solely on the basis of the material facts alleged in the plaintiff's pleading. The pleading was examined to determine whether it alleged "jurisdictional" facts sufficient to establish a real and substantial connection to the defendant or to the cause of action and, if it did, that was sufficient: *Furlan v. Shell Oil Co.*, [*2000 BCCA 404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2293-00000-00&context=), [*77 B.C.L.R. (3d) 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2293-00000-00&context=) at paras. 13-14, leave to appeal ref'd [*[2000] S.C.C.A. No. 476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G435-00000-00&context=).

[20] However, the pleaded allegations did not suffice when the foreign defendant contradicted them with evidence. As Mackenzie J.A. said, writing for the Court in *AG Armeno Mines and Minerals Inc. v. PT Pukuafu Indah*, [*2000 BCCA 405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2294-00000-00&context=), [*77 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2294-00000-00&context=), at para. 19,

[19] ... Normally, issues of jurisdiction *simpliciter* fall to be decided on the sufficiency of the pleadings alone but as we have observed in *Furlan v. Shell Oil Co.*, [*2000 BCCA 404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2293-00000-00&context=), there is an exception where the material before the court establishes that the plaintiff's claim is tenuous. A tenuous claim is one where evidence introduced by the foreign defendant contradicts material facts pleaded by the plaintiff or otherwise proves facts fatal to the plaintiff's claim.

He described the respective evidentiary and persuasive burdens in such a contest in para. 26, where he said,

[26] I think that an evidentiary issue only arises if the defendant applicant tenders evidence that puts in question facts essential to the plaintiff's case. In that sense, the applicant has the initial burden of introducing evidence that challenges the plaintiff's allegations in the writ or statement of claim... Once the defendant has discharged its initial burden, I think that the plaintiff is required to tender evidence that satisfies the judge that the plaintiff has a good arguable case in the sense of a triable issue on the facts put in issue by the defendant's evidence.

[21] In my view, this approach has been eclipsed by the enactment of the *CJPTA*, which signals a legislative intention to settle the law on territorial competence and by Rule 14 of the Rules of Court, proclaimed in force at the same time, which sets out the procedure for challenging territorial competence. When a challenge is made to territorial competence, the presumption in s. 10 of the *CJPTA* comes into play. In *R. v. Oakes*, [*[1986] 1 S.C.R. 103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2393-00000-00&context=) at 115-16, the Court discussed the nature of presumptions in this passage:

Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see Cross On Evidence, 5th ed., at pp. 122-23).

Basic fact presumptions can be further categorized into permissive and mandatory presumptions. A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

[22] The presumption of a real and substantial connection in s. 10 is a mandatory presumption with basic facts. The basic facts are those set out in s. 10(a) through (l), which are taken to be proven if they are pleaded. While the presumption is rebuttable, it is likely to be determinative in almost all cases.

**33**  If it is established that the court has jurisdiction, it may nonetheless decline to exercise that jurisdiction under s. 11 of the *CJPTA* on the ground that there is a more appropriate forum to hear the matter. Section 11 provides:

**Discretion as to the exercise of territorial competence**

**11** (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

1. A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
2. the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
3. the law to be applied to issues in the proceeding,
4. the desirability of avoiding multiplicity of legal proceedings,
5. the desirability of avoiding conflicting decisions in different courts,
6. the enforcement of an eventual judgment, and
7. the fair and efficient working of the Canadian legal system as a whole.

**34**  In considering whether to decline jurisdiction, the courts have noted that a plaintiff has a *prima facie* right to proceed in his or her chosen forum and that a defendant asking the court to exercise its discretion to decline jurisdiction has a significant onus to meet.

**35**  In *Club Resorts Ltd. v. Van Breda*, [*2012 SCC 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X203-00000-00&context=) [*Club Resorts*], the Supreme Court of Canada said the following:

[103] If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

...

[108] Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*, [*[1993] 1 S.C.R. 897*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-60BM-00000-00&context=) . On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the *Civil Code of Québec*, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: "... it may exceptionally and on an application by a party, decline jurisdiction ...".

[109] The use of the words "clearly" and" exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

**36**  As suggested in the final sentence of the above passage, the objective of the court in deciding a *forum non conveniens* application is to ensure fairness to the parties and the efficient resolution of the dispute.

**Does the court have territorial competence over the proceeding against CMI?**

**37**  CMI submits that it is not ordinarily resident in B.C. nor does it have an operational presence or carry on business here. Moreover, to the extent that OAE's claim against CMI is framed in tort, CMI submits that the *situs* of the tort must be Alabama, where the engine was manufactured and sold initially.

**38**  Alternatively, if a presumption of a real and substantial connection is established under any of the elements of s. 10 of the *CJPTA*, CMI submits that the presumption is rebutted because the only connection to B.C. is the overhaul of the engine by OAE three years before the accident, which CMI says constitutes only a minor element of the proceeding.

**39**  OAE submits that there is a real and substantial connection between its claim against CMI and B.C. It relies specifically on ss. 10(e) (contractual obligations performed in B.C.), 10(g) (tort committed in B.C.) and 10(h) (business carried out in B.C.)

**40**  With respect to s. 10(e), OAE points to the fact that it overhauled the engine pursuant to its status as a CMI FBO and says it relied upon materials and information provided to it by CMI. With respect to 10(g), OAE alleges that CMI committed a tort in B.C. by failing to warn it about problems with the engine and by failing to provide it with proper criteria for the inspection and maintenance of the engine. With respect to s. 10(h), OAE submits that CMI carries on business in B.C. in that it has two distributors in the province along with numerous FBOs. Moreover, on its own evidence, CMI sold $450,000 worth of engines and over $2 million worth of parts into B.C. in the period of May 2007 to May 2012.

**41**  The burden is on OAE to establish that it has a good arguable case that there is a real and substantial connection between B.C. and the facts of the case: *Purple Echo Productions, Inc. v. KCTS Television*, [*2008 BCCA 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1NB-00000-00&context=) at paras. 33-37; *Alpha Resource Management Inc. v. Brown*, [*2014 BCSC 1339*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B18C-00000-00&context=) at para. 13 [*Alpha*].

***S. 10(e)--Contractual Obligations in B.C.***

**42**  In terms of s. 10(e), CMI submits that OAE's claim against it is framed in tort, not contract, and, in any event, OAE overhauled the engine pursuant to a contract between it and Great River to which CMI was not a party. Thus, there were no contractual obligations as between CMI and OAE performed in B.C.

**43**  OAE acknowledges that it overhauled the engine pursuant to a contract with Great River but says that CMI failed to give it proper or adequate information in the materials supplied to it as an FBO. Accordingly, OAE submits that "the proceeding clearly concerns contractual obligations between [OAE], Great River and [CMI]".

**44**  It is not necessary for me to decide whether the general contractual matrix alleged by OAE is sufficient to meet s. 10(e), or whether there must be a breach of specific contractual obligations alleged. This is because, in my view, the question of the court's territorial competence falls to be determined under ss. 10(g) and (h).

***S. 10(g)--Tort Committed in B.C.***

**45**  As noted by Mr. Justice Smith in *Stanway*, the jurisdictional facts relating to ss. 10(a)-(l) are taken to be proven as pleaded. It is therefore necessary to examine the allegations advanced by OAE in its third party notice to CMI.

**46**  Under Part 3 of the third party notice, OAE alleges:

1. OAE says that if the Plaintiffs suffered damages, loss or expense as alleged or at all, which is denied, then such damages, loss or expense were caused or contributed to by the ***negligence*** of Continental.
2. At all material times, Continental owed the Plaintiffs a duty of care and breached such duty of care.
3. Particulars of the ***negligence*** of Continental include, but are not limited to, the following:

...

1. Failing to establish adequate inspection criteria, including but not limited to a safe inspection interval, for the crankshaft;
2. Failing to warn, adequately or at all, operators, maintenance personnel, or others of any propensity for, or history of, premature crankshaft failure;

...

1. Failing to issue adequate or any service bulletins or other instructions pertaining to the inspection of the Engine, including but not limited to the crankshaft;

...

1. OAE says that Continental's failure to provide adequate or any information or warning concerning the matters set out in the preceding paragraph was a tort committed in British Columbia.

**47**  In *Stanway*, Mr. Justice Smith discussed the *situs* of the tort of failure to warn at paras. 60-62:

[60] As well, a failure to warn British Columbia consumers of a hazardous product is a tort committed in British Columbia, regardless of where the omission took place, if the defendant knew or ought to have known the product would be used in British Columbia -- the duty to warn is a duty to warn the consumer in this jurisdiction: *G.W.L. Properties Ltd. v. Grace & Co.-Conn* [*(1990), 50 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2DT-00000-00&context=) at 264 (C.A.).

[61] The plaintiff pleaded the defendants (including the US defendants) manufactured unsafe products and that they jointly "marketed, tested, manufactured, labelled, distributed, promoted, sold, and otherwise placed" the products into the stream of commerce in British Columbia when they knew or ought to have known the products were unsafe. She also pleaded the defendants failed to warn her of the risks of using the products. Further, she pleaded she suffered damage in British Columbia as a result of the defendants' wrongful acts and omissions.

[62] Thus, s. 10(g) of the *CJPTA* was satisfied on the plaintiff's pleading and there was a presumed real and substantial connection between British Columbia and the facts on which the proceeding against the defendants was based on the basis that the proceeding concerns torts committed in British Columbia.

**48**  While OAE's claims against CMI are perhaps not as clearly set out as in *Stanway*, the third party notice nonetheless makes clear that the failure to warn occurred as a result of CMI's alleged failure to provide adequate information to OAE about the engine in the materials that CMI supplied to OAE in B.C. by virtue of OAE's status as a CMI FBO.

**49**  The jurisdictional facts alleged in the third party notice are supported by the evidence of Mr. Haasdyk, the president of OAE, that the materials purchased from CMI were relied on by him directly in overhauling the engine. In my view, this is sufficient to bring the claim within s. 10(g).

**50**  Moreover, even if the alleged omission occurred elsewhere, for example where the materials in issue were produced, the failure to warn is still a tort committed in B.C. if the alleged torfeasor knew or ought to have known the product would be used in B.C. (*Stanway* at para. 60).

**51**  Here, CMI knew that its materials were being distributed, and its engines repaired, in B.C. by virtue of the fact that it had numerous approved FBOs, including OAE, in the province.

**52**  I therefore find that there is a presumed real and substantial connection between the claims advanced by OAE against CMI pursuant to s. 10(g) of the *CJPTA.*

***S. 10(h)--Business Carried on in B.C.***

**53**  While a real and substantial connection may be established if just one of the factors set out in s. 10 is met, I find that such a connection may also be presumed under s. 10(h) on the basis that CMI carries on business in B.C.

**54**  On this point, OAE cites *Equustek Solutions Inc. v. Google Inc.*, [*2015 BCCA 265*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G74-D9V1-F2TK-22GW-00000-00&context=), leave to appeal granted [*[2015] SCCA No. 355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H30-9M31-F4W2-64T7-00000-00&context=), where the Court of Appeal held that advertising by Google and the collection of information in B.C. through proprietary software in B.C. was sufficient to support a finding that Google carries on business in the province.

**55**  OAE also points to *Smith v. Teledyne Continental Motors, Inc.*, 840 F. Supp. 2d 927 (D.S.C. 2012), a decision of the United States District Court for the District of South Carolina. In that case, the plaintiff's husband was killed when struck by an airplane that crash landed on a beach after the plane's propeller fell off.

**56**  The plaintiff filed an action in South Carolina against various parties including Teledyne Continental Motors Inc., which I am told is the former name of CMI. Teledyne took the position that the South Carolina court had no jurisdiction over it.

**57**  The learned judge dealt with this point at 932 of the decision:

The first question is the *Lesnick* analysis is "whether the defendant has created a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protection of the laws of the state." (citation omitted).

It is apparent that Teledyne meets this test. Over the past ten years, Teledyne has sold at least 400 engines directly to South Carolina purchasers at a cost of about $40,000 apiece for a total revenue of approximately $1,600,000 (citation omitted). Further, its engines are installed in approximately one-third of general aviation aircraft based in South Carolina. It maintains a continuous relationship with the owners of these engines through its warranty programs.

Further, it advertises in South Carolina through aviation magazines. It maintained a distributor here until 2004. It directly sells parts for its engines and other products to South Carolina customers through one or more interactive websites. It provides warranty work on its engines in the state. It investigates crashes in South Carolina involving airplanes containing its engines.

Significantly, Teledyne maintains ongoing relationships with at least eleven "fixed base operators" (FBOs). These are stores/service centers located at South Carolina airports. Teledyne has a contract with each FBO which requires it to display Teledyne's logos and actively promote the sale of its products. Teledyne maintains a continuing interactive internet relationship with these FBOs, through which it provides them with technical support in repairing Teledyne products. Teledyne warranty work must be performed by these FBOs.

Teledyne both buys and sells products over the internet and through retailers to South Carolina residents. It admits it has derived over $1 million in revenue from its sales to South Carolina residents over the past 10 years. (Citation omitted).

**58**  These facts were sufficient to allow the court to find the requisite "substantial connection" to South Carolina.

**59**  While the decision is obviously not binding, the test to be met in South Carolina is similar to the "real and substantial connection" test under the *CJPTA*. Moreover, the facts relied on by the judge are similar to the facts about how CMI operates in B.C., specifically the use of FBOs and the sale of engines and parts into the jurisdiction through distributors. The absence of an actual physical presence in B.C. does not mean that CMI is not carrying out business here (*Alpha* at paras. 19-20).

**60**  I am satisfied that OAE has established a good arguable case that there is a real and substantial connection between its claims against CMI and B.C. by virtue of the fact that CMI carries on business in the province.

***Has the presumption of a real and substantial connection been rebutted?***

**61**  CMI submits that the presumption may be rebutted if only a minor element of the case occurred in the target jurisdiction: *Club Resorts* at para. 96. It says that here, the only connection to B.C. is that the engine was overhauled in the province three years before the accident, which is a minor aspect of the case.

**62**  I disagree. OAE's overhaul of the engine lies at the heart of the plaintiffs' claims against it and, in turn, is a central element of OAE's third party claim against CMI. I find that the presumption has therefore not been rebutted.

**Should the court decline jurisdiction?**

**63**  CMI submits that if this Court has jurisdiction over CMI, it should nonetheless decline to exercise that jurisdiction because Alabama is a more appropriate forum. It submits further that because the plaintiffs have discontinued their claims against CMI, the remaining third party claims of OAE and Great River are easily severed from the main action and can be litigated separately, thus resulting in a simplification of this action.

**64**  Further, CMI submits that allowing the third party claims to stand will result in a multiplicity of proceedings and potentially inconsistent decisions given that a judgement obtained against CMI in B.C. will not be recognized in Alabama. On this point, CMI relies on the expert opinion of Mr. Ford.

**65**  In contrast, OAE submits that a multiplicity of proceedings would necessarily result if this Court declines to exercise jurisdiction over CMI, thus compelling OAE to litigate its claims against CMI in Alabama. As to whether an Alabama court would recognize a B.C. judgment against CMI, as noted above in the discussion of the expert report application, OAE relies on the expert opinion of Professor Carodine who opined that it is far from clear that an Alabama court would not recognize a B.C. judgment and that there are numerous facts that favour recognition.

**66**  It is not necessary for me to resolve this issue as it is not determinative of the jurisdiction application. That said, on balance I would tend to prefer the opinion of Professor Carodine in that I found it to contain an objective and reasonable review of the applicable legal principles, whereas Mr. Ford's report strays closer to advocacy. However, for the purposes of deciding the jurisdiction application, it is again fair to say that the two opinions give rise to a live issue about whether a B.C. judgment against CMI would be recognized in Alabama.

**67**  OAE submits further that the third party claims are inextricably connected to the issues that arise in the main action and that it would be far more efficient to have all of the claims tried together.

**68**  As set out in *Club Resorts*, once it is established that the court has territorial jurisdiction, the party seeking to have the court decline jurisdiction has a significant burden of establishing why it would be fairer and more efficient to have the matter heard in an alternate forum thereby denying the party advancing the claim of the benefits of his or her chosen forum. In order to grant such an application, the court must be satisfied that the alternate forum is clearly "in a better position to dispose fairly and efficiently of the litigation" (at para. 109).

**69**  In the present case, I am not satisfied that CMI has met the burden of establishing that Alabama is clearly a more appropriate forum. I arrive at this conclusion for the following reasons:

1. While there may be some issue about whether an Alabama court would recognize a B.C. judgment, there is little doubt that if this Court declines jurisdiction over CMI, there will be a multiplicity of proceedings and a possibility of inconsistent decisions by virtue of the fact that OAE and Great River will have to pursue their claims against CMI in separate proceedings in Alabama;
2. The claims of OAE and Great River against CMI are closely connected to the claims advanced by the plaintiffs and are not easily severable;
3. As I have found, OAE's claim involves a tort committed in B.C., thus the law of B.C. will govern. Even if I am mistaken on this point, CMI has not indicated how Alabama law might differ, if at all; and
4. I agree with OAE that CMI has chosen to do business in B.C., by way of selling directly into the province and by appointing FBOs. In the circumstances, it cannot reasonably assert that it would be unduly prejudiced as a result of being subjected to this Court's jurisdiction.

**Conclusion**

**70**  In summary, I make the following orders:

1. OAE's application to strike out, or declare inadmissible, the expert report of Mr. Ford, is dismissed; and
2. CMI's application for an order declaring that this Court lacks jurisdiction over it, or alternatively, declining jurisdiction, is dismissed.

**71**  Costs of both applications will be in the cause.

R.A. SKOLROOD J.

**End of Document**

[***British Columbia v. Lemare Lake Logging Ltd., [2012] B.C.J. No. 244***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1V4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

K.N. Affleck J.

Heard: January 18 and 19, 2012.

Judgment: February 8, 2012.

Dockets: S118530 and S117872

Registry: Vancouver

**[2012] B.C.J. No. 244** | 2012 BCSC 193 | 211 A.C.W.S. (3d) 460 | 99 W.C.B. (2d) 252 | 2012 CarswellBC 345

Between Her Majesty the Queen in Right of the Province of British Columbia, Plaintiff, and Lemare Lake Logging Ltd., Lone Tree Logging Ltd., Christopher Dutcyvich, Eric Dutcyvich, Darryl Arsenault and Shannon Jackson, Defendants And between Lemare Lake Logging Ltd., Petitioner, and Minister of Forests Lands and Natural Resource Operations and the Minister of Finance on behalf of Her Majesty the Queen in Right of the Province of British Columbia and Daniel Smallacombe, a Forest Officer, and Joseph Chellappan, a Judicial Justice, Respondents

(34 paras.)

**Case Summary**

**Criminal law — Powers of search and seizure — Search warrants — Validity — Seizure — Disclosure or return of property seized — Petition by Lemare Logging to quash a 2011 warrant issued under Offence Act and for return of items seized allowed — Province investigated Lemare for participating in fraudulent scheme to reduce stumpage fee payable to Province — Province had obtained search warrant in 2009 under Criminal Code and had seized records which were forwarded to Ministry — 2009 warrant was quashed — Province then obtained 2011 warrant to re-seize items from Ministry — Province was in no better position in relation to items seized pursuant to 2011 warrant than it was with the items seized in 2009.**

**Natural resources law — Forestry and timber — Offences and penalties — Application by Lemare to dismiss action by Province against Lemare for fraudulent misrepresentation on the ground that it was an abuse of process and disclosed no reasonable claim allowed — Province sued Lemare for defrauding Province of stumpage fees payable by Lemare — Province's remedies in respect of all matters concerning stumpage fees were governed by the appeal provisions of the Forest Act, and it was an abuse of process to use civil proceedings where a statutory process was available.**

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| Petition by Lemare Logging to quash a 2011 warrant issued for the seizure of certain records held by the Minister of Forests Lands and Natural Resource Operations and an application to dismiss the action by the Province against Lemare for fraudulent misrepresentation on the ground that it was an abuse of process and disclosed no reasonable claim. In its action, the Province alleged that the defendants participated in a fraudulent scheme to reduce the amount of stumpage payable by Lemare to the Province on timber harvested on forest tenures held by the defendants. Lemare had been investigated in 2008 for alleged non-compliance with the log scaling requirements of the Forest Act. In 2009 search warrants issued under the Criminal Code were executed and electronic media storage devices were seized from Lemare's premises and copies of the data stored were made. A subsequent court order held that the 2009 warrants were unlawful and all materials seized and copied were ordered to be returned to Lemare. The judge permitted the Ministry to keep the copies for 14 days to permit the Ministry to take any proceedings available under the Forest Act to re-seize the material as the Province had indicated it wanted to do. Instead, the Province obtained a search warrant under the Offence Act to re-seize the items already in the possession of the Forest Ministry. Lemare then filed the present petition. Although the Province consented to the 2011 warrant being quashed, it resisted the application to destroy all the fruits of the 2011 warrant, including all copies.  HELD: Petition allowed.  The warrant was quashed and the Province had to rerun all items seized as well as all copies made. The Province was in no better position in relation to the items seized pursuant to the 2011 warrant than it was with the items seized in 2009. The Province's remedies in respect of all matters concerning stumpage fees were governed by the appeal provisions of the Forest Act, and it was an abuse of process to use civil proceedings where a statutory process was available. It was plain and obvious the Province could not advance a common law claim for damages such as in the present action. The action was bound to fail and must be struck out as an abuse of process and for its failure to disclose a reasonable claim. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, R.S.C. 1985, c. C-46,

Forest Act, [*RSBC 1996, CHAPTER 157, s. 97*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FN1-JB7K-21GC-00000-00&context=), s. 142.2, s. 142.3, s. 142.21

Forest and Range Practices Act, [*SBC 2002, CHAPTER 69, s. 61(2)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FN1-JB7K-21T1-00000-00&context=) <LEGISATION/> Rules of Court Rule 9-5(1)(a), Rule 9-5(1)(d)

**Counsel**

Counsel for the Plaintiff/Respondents: J.E. Gouge, Q.C.

Counsel for the Defendants/Petitioner: K.I. Denhoff, D.L. Dalke.

**Reasons for Judgment**

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| **K.N. AFFLECK J.** |

**1**   I have before me two proceedings. The first was commenced by petition on November 21, 2011, by Lemare Lake Logging Ltd. ("Lemare"), and the second by Her Majesty in Right of British Columbia ("the Province") in a notice of civil claim on December 13, 2011.

**2**  Part 1 of the petition reads as follows:

1. The warrant issued to Daniel Smallacombe by Judicial Justice Joseph Chellappan (the "Justice") on November 9, 2011 to seize certain things held by the Minister of Forests Lands and Natural Resource Operations ("Forests") be quashed;
2. Forests and the Minister of Finance ("Finance") immediately destroy all things seized pursuant to the search warrant dated November 9, 2011, and all copies of things seized;
3. Forests and Finance identify any parties to whom copies of the things seized have been given;
4. Forests, Finance and any other parties over which they have control and with whom the things seized have been shared or to whom copies have been given, immediately destroy all notes, copies of notes and electronic storage data to the extent they record information taken from the things seized;
5. Such further and other relief as this Court deems just; and
6. Special costs or such costs as this Court deems just.

**3**  In the notice of civil claim, the Province alleges the defendants, which include Lemare, participated in a fraudulent scheme to reduce the amount of stumpage payable by Lemare to the Province on timber harvested on forest tenures held by the defendants, except for the defendants Darryl Arsenault and Shannon Jackson, who are alleged to be employees of Lemare. It is alleged Lemare was the owner and operator of scale sites at which all timber harvested from the several tenures described in the notice of civil claim was scaled, and that the defendants fraudulently altered data received from licensed scalers, or that each of the defendants knew that the other defendants had fraudulently altered the data; were under a duty to disclose their knowledge to the Province, and failed to do so "for the purposes of assisting [Lemare] to deceive [the Province]".

**4**  The Province pleads Lemare, as the owner and operator of the scale sites, was obliged by the *Forest Act*, *R.S.B.C. 1996, c. 157*, to maintain and store certain records. It is alleged the Province, through "a forest revenue official" is entitled by authority of the *Forest Act*, ss. 142.2, 142.3, and 141.21, to conduct an inspection or audit of scaling records in the possession of Lemare and to require production of and also copies of the records if it wishes to do so.

**5**  The Province, in its notice of civil claim, seeks injunctive relief in the nature of an Anton Piller order to prevent destruction or alteration of the records or copies of them, and to that end, the appointment of a supervising solicitor to hold copies of the records. The Province also seeks damages for fraudulent misrepresentation and special costs.

**6**  Lemare and the Province, through the Ministry of Forests Lands and Natural Resources Operations, (the "Forest Ministry") have been engaged in a hard-fought struggle in the courts to assert what they say are their respective rights in relation to records in the possession of Lemare and copies of those records which are in the possession of the Province as a result of the execution of search warrants at the premises of Lemare and the home of the defendant Arsenault.

**7**  On this hearing I am asked to give the relief requested in the petition, and Lemare, in its notice of application in the action, relies on R. 9-5(1)(a) and (d), and on this Court's inherent jurisdiction, to seek dismissal of the Province's action on four bases, namely:

1. it is an abuse of process;
2. the doctrine of *res judicata*;
3. it is an improper collateral attack on orders of the Provincial Court and of this Court; and
4. it discloses no reasonable claim.

**The Facts**

**8**  The parties have provided numerous affidavits to support their respective positions. The conclusions I have reached do not require me to review in these reasons all of the evidence that I have considered. Of course, no evidence is admissible on an application pursuant to R. 9-5(1)(a).

**9**  Daniel Smallacombe is employed as a natural resource officer by the Ministry of Forests. In December 2008 he suspected "[Lemare] and its employees had fraudulently altered scale data to reduce the stumpage payable by [Lemare]." Mr. Smallacombe's suspicions grew, and on March 5, 2009, he made an affidavit in an earlier proceeding in which Lemare was the petitioner (Vancouver No. S091543). The affidavit describes in some detail Mr. Smallacombe's investigations of Lemare's alleged non-compliance with the log scaling requirements of the *Forest Act*.

**10**  On February 10, 2009, search warrants were issued pursuant to the *Criminal Code* by the respondent Joseph Chellappan, a judicial justice, and executed the next day. "Electronic media storage devices" were seized from the premises of Lemare and from the home of Arsenault. Smallacombe made copies of the data stored on the devices.

**11**  The items seized were subject to a detention order which expired. No charges were laid. Lemare then applied to the Provincial Court for an order pursuant to the *Criminal Code* that the things seized by the Province, and any copies of those things, be returned. The Province applied to the Provincial Court for an order permitting it to inspect the seized items for the purposes of an audit. In reasons of September 8, 2010, Bagnall P.C.J. ordered the return to Lemare and Arsenault of the things seized pursuant to the search warrants but held the Provincial Court lacked jurisdiction to order return of the copies. Judge Bagnall dismissed the Province's application to prolong the detention of the things seized to enable an inspection and audit.

**12**  That part of the decision of Her Honour Judge Bagnall, in which she declined to order the return of the copies, was appealed by Lemare and Arsenault to this Court. In reasons of July 7, 2011, [*[2011] B.C.J. No. 1291*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22H7-00000-00&context=), Ehrcke J. held the issue before him was "whether the [Province] should be ordered to return to [Lemare and Arsenault] copies of the items seized pursuant to the three search warrants obtained by the Ministry of Forests on February 10, 2010." By the time of the hearing before Ehrcke J., the originals of the items seized had been returned, but not the copies. The Province alleges in the notice of civil claim that the defendants "destroyed the original Records as soon as they received them."

**13**  Ehrcke J. held that Judge Bagnall was correct in deciding that she lacked jurisdiction to order the return of the copies. However, Ehrcke J. also had before him the petition of Lemare and Arsenault, seeking judicial review of the decision of the judicial justice of the peace who had issued the search warrants. Lemare and Arsenault sought an order quashing the warrants and an order that the copies be returned.

**14**  His Lordship held the search warrants had been improperly obtained and therefore the things seized had been improperly detained by the Province. He ordered the return of the copies which "would not have been in the Ministry's possession but for the unreasonable seizure".

**15**  The Province submitted to Ehrcke J. that it had other lawful means, namely various provisions of the *Forest Act*, to obtain the copies that were in its possession. Ehrcke J. declined to express an opinion on whether those provisions could permit the Province to obtain the same information as was in its possession as a result of the illegal seizures saying that "if the Ministry has an alternative, legal means of obtaining the same information, then it is up to them to execute those alternative procedures".

**16**  Mr. Justice Ehrcke permitted the Ministry a further 14 days before returning the things it obtained through the search warrants, "but at the end of the 14 days, all items seized and all copies of such items must be returned to Lemare at Lemare's place of business. This will permit the respondents to attempt to take whatever legal processes they believe are available to them to re-seize the material."

**17**  Ehrcke J. dismissed an application by the Province for an order for the preservation and detention of the property which was to be returned to Lemare.

**18**  The Province did not appeal from the order of Ehrcke J., but Lemare and Arsenault appealed, asserting the remedy provided to them was inadequate. They argued that Ehrcke J. had erred "in failing to direct that all copies of seized items be destroyed or, in the alternative, that all copies of the items seized 'be forensically restored to their seizure state' and returned, or that the Ministry make available at its premises all copies of items seized from [Lemare and Arsenault]."

**19**  Pending the hearing of the appeal, the parties agreed the 14-day period provided by Ehrcke J. be suspended.

**20**  On the hearing of the appeal, Lemare and Arsenault argued that although Ehrcke J. held that the Province should not benefit from any illegal seizure, that would be the effect if the Province was permitted to exercise the provisions of the *Forest Act* to re-seize the items seized pursuant to illegal search warrants.

**21**  The appeal was dismissed on November 4, 2011, with reasons to follow. In reasons delivered on November 23, 2011, [*[2011] B.C.J. No. 2217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22HH-00000-00&context=), the court held that Ehrcke J. did not err in intentionally leaving open the question of the Province's access to administrative procedures to inspect and copy materials in the possession of Lemare and Arsenault relevant to the stumpage issue. On the appeal the Province had argued that destruction of the copies would "potentially immunize [Lemare and Arsenault] from administrative action." The Court of Appeal declined to engage this question.

**22**  An effect of the dismissal of the appeal on November 4, 2011, was to start the running of the 14-day period provided by Ehrcke J. However, on November 9, 2011, instead of invoking the provisions of the *Forest Act* to inspect and copy documents in the possession of Lemare, as the Province had advised Ehrcke J., it intended to do, the Province obtained a search warrant pursuant to the *Offence* Act, *R.S.B.C. 1996, c. 338*, to re-seize the items already in the possession of the Forest Ministry. On November 17, 2011, the Province informed Lemare that it had executed the warrant on November 10, 2011, and that a forest revenue official from the Ministry of Finance had inspected and copied the seized materials. On November 17, the Province also made a demand pursuant to the *Forest Act* for Lemare to produce the items Judge Bagnall had ordered returned.

**23**  On November 21, 2011, Lemare filed the petition which is before me. In its response to the petition, the Province acknowledged it had failed to make material disclosures to the judicial justice and consented to the search warrant of November 9, 2011, being quashed. Lemare seeks an order that the Province destroy all the fruits of the November 9, 2011 warrant, including all copies. The Province resists that application.

**24**  The Court of Appeal had no criticism of the orders of Ehrcke J. described in these reasons, and I see no difference in principle between his order to return the copies and the one I am asked to make on the petition proceeding. The Province has consented to an order that the November 9, 2011 search warrant be quashed, and it follows that the copies must be returned to Lemare.

**25**  The Province is in no better position in relation to the items seized pursuant to that warrant than it was with the items seized on February 10, 2009. I decline to order the destruction of all things seized and copies made pursuant to the search warrant of November 9, 2011, but, like Ehrcke J., I order the Province to return to the business premises of Lemare all things seized and all copies pursuant to that now-quashed warrant.

**26**  Counsel for the Province wrote to counsel for Lemare on January 3, 2012, saying the Province "intends to exercise its right, under s. 142.21 of the *Forest Act*, to inspect and copy the records which the defendants are required by s. 97 and 136 of the *Forest Act*, to create and retain in respect of each of the tenures identified in the notice of civil claim." Mr. Gouge, on behalf of the Province, apparently to smooth in advance the path of that exercise, asks me to declare "that the Province is at liberty to exercise its rights of inspection and copying under s. 61(2) of the *Forest and Range Practices Act* and s. 142.21 of the *Forest Act*." For several reasons I do not consider it appropriate to make that declaration. The Province has not given notice as provided by the *Rules of Court* that it intended to make such an application on the hearing of the petition or the return of the notice of application. Like Mr. Justice Ehrcke, and in the circumstances of this lengthy and complex dispute, I express no opinion on whether those sections of the statutory scheme the Province apparently intends to rely on are available as a basis for the Province to inspect and copy the documents it seeks. If the Province carries through with its intention, and if it is challenged, this Court may be asked to address those issues in the circumstances that then prevail.

**27**  The Province had informed the Court of Appeal and Mr. Justice Ehrcke that it needed time to employ the administrative provisions in the *Forest Act*. However, the Province has also adopted another approach and on December 13, 2011, filed the notice of civil claim before me, the validity of which is challenged by the defendants, who argue:

1. it seeks to circumvent the orders of Judge Bagnall and Mr. Justice Ehrcke which refused the Province's application to preserve and detain the things seized;
2. through the procedural rules governing a civil action it seeks to gain the fruits of the illegal search and seizure;
3. it offends the doctrine of *res judicata*;
4. it is a collateral attack on the orders of the Provincial Court and of this Court;
5. it fails to allege facts which, if true, would establish a cause of action for damages for deceit;
6. it is simply a fishing expedition to obtain discovery; and
7. it asserts a right of action for matters governed by a code or a comprehensive statutory scheme found in the *Forest Act*, a position the Province has successfully urged, it is said, on the courts of this Province on other occasions.

**28**  Lemare relies on *Forest Glen Wood Products Ltd. v. British Columbia (Minister of Forests)*, [*2009 BCCA 492*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B28P-00000-00&context=), to demonstrate the Province has no cause of action as pleaded in the notice of civil claim. In *Forest Glen*, the Court of Appeal addressed the question of:

... whether the appellant, Forest Glen Wood Products Ltd., may sue the respondent, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Forests (the "Province"), for breach of contract, ***negligence*** and restitution, in connection with the reappraisal of the stumpage fee payable by the appellant under a timber sale licence. The Supreme Court chambers judge struck out these claims under Rule 19(24) [now Rule 9-5] on the ground that the appellant's remedies in respect of all matters concerning stumpage fees are governed by the appeal provisions of the *Forest Act*, ... and it was an abuse of process to use civil proceedings where a statutory process was available.

**29**  In reasons given by Levine J.A., the appeal was dismissed, with the learned judge saying, "I agree with the chambers judge, [*[2007] B.C.J. No. 394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S430-00000-00&context=), that all matters concerning stumpage fees fall within the statute". Levine J.A. observed, at paras. 17 and 18:

... The Province maintained that the appeal provisions in the *Forest Act* are a complete code governing disputes concerning all matters relating to stumpage, citing *International Forest Products Ltd. v. British Columbia*, [*2004 BCSC 387*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B22P-00000-00&context=) [*Interfor*], and the appellant's civil proceedings were an abuse of process because it had not proceeded under those appeal provisions, citing *Gemex Developments Corp. v. Coquitlam (City)*, [*2002 BCSC 412*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3V5-00000-00&context=), aff'd [*2002 BCCA 573*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60FB-00000-00&context=). The appellant attempted to distinguish *Interfor* on its facts, and argued that the appeal provisions in the *Forest Act* did not oust its common law rights to claim overpayment or damages as a result of breach of contract or ***negligence***.

[18] The trial judge accepted the Province's arguments. He held, applying *Interfor*, that if the appellant's "root assertion ... is that the stumpage is too high", the appellant "was obligated to exhaust its internal remedies under the *Act*" (at para. 39). He held further that the civil proceedings were an abuse of process.

**30**  I know of no basis on which *Forest Glen* can be distinguished on this issue from the same issue in the application before me which calls into question the Province's notice of civil claim. As the appellant did in *Forest* Glen, the Province argues before me that the *Forest Act* contains no provisions which expressly oust the common law right of action pleaded in the notice of civil claim. The difficulty with this argument is that there are no common law rights in respect of payment of stumpage and, as held in *Forest Glen*, "[t]hat conclusion effectively ends the matter".

**31**  The Province has not yet taken steps to enforce the rights given in the *Forest Act*. Division 1 of Part 11 of the *Act* provides the Province with means to recover money owed pursuant to that *Act*. If it employs those means but remains dissatisfied, it may be entitled to a remedy in this Court not contemplated by the *Forest Act*, but I express no opinion on that.

**32**  In my view, the position of the Province on the hearing before me in relation to its purported common law right of action against Lemare is indistinguishable from the position taken unsuccessfully by Forest Glen Wood Products Ltd. before the Court of Appeal. That court held that "the particulars of its [Forest Glen Wood Products] claims for damages all come down to claims for overpayment." The claim for damages by the Province against Lemare and others comes down to a claim for underpayment. Whether the allegation is of deceit or miscalculation or for some other reason and whether the claim is for underpayment or overpayment, makes no difference in principle to the viability of the Province's pleading. In my opinion, it is plain and obvious the Province cannot advance a common law claim for damages such as that before me. The action is bound to fail and, as in *Forest Glen*, must be struck out as an abuse of process under R. 9-5(1)(d) and for its failure to disclose a reasonable claim under R. 9-5(1)(a). See: *R. v. Imperial Tobacco Canada Ltd.*, [*2011 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XK-00000-00&context=).

**33**  The defendants advance other arguments to strike out the notice of civil claim, but I consider it undesirable in this complex dispute to express opinions that are not necessary to decide the applications before me.

**Summary**

1. The search warrant issued to Daniel Smallacombe on November 9, 2011, to seize certain items in the possession of the Minister of Forests is quashed;
2. All things seized and all copies of things seized pursuant to that warrant shall be returned to the business premises of Lemare Lake Logging Ltd.; and
3. The Province's notice of civil claim is struck out.

**34**  The parties may make arrangements to speak to costs.

K.N. AFFLECK J.

**End of Document**

[***Cail v. Spinks, [2005] B.C.J. No. 661***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M4C9-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vernon, British Columbia

Brooke J.

Heard: January 27 and February 1, 2005.

Judgment: March 24, 2005.

Vernon Registry No. S33255

**[2005] B.C.J. No. 661** | 2005 BCSC 441 | 138 A.C.W.S. (3d) 855

Between Robert George Cail, plaintiff, and Randall Spinks, Lloyd Spinks and Eveline Spinks, defendants

(31 paras.)

**Case Summary**

**Damages — Physical injuries — Body injuries — Back — Limits on compensatory damages — Thin or crumbling skull rule — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Non-pecuniary damages, including pain and suffering — Loss of earning capacity — Retroactive loss of income.**

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| Action by Cail against the defendant, Spinks, for an assessment of his damages from a motor vehicle accident. The accident occurred when the rear of Cail's vehicle was struck by Spinks' car. Liability was admitted. Cail was employed as a paramedic. He did not go to work for three weeks after the collision. Cail returned to work while he was sore and had trouble lifting because he did not receive his full pay under his disability insurance and could not support his family with the compensation payments he recived. Spinks claimed that Cail sustained significant work-related and recreational injuries before and after the accident. He was diagnosed before the accident with a degenerative disc disease in his neck. He had also been diagnosed with rheumatoid arthritis before the accident. Cail claimed that the injury to his left shoulder and left trapezius were new injuries that resulted from the accident. Within 24 hours of the accident he experienced pain in his neck, lower and mid-back, in addition to the shoulder, shoulder blade and trapezius on his left side.  HELD: Action allowed.  Cail's original position, imperfect as it was, was significantly exacerbated by the accident. Spinks was required to make fair and reasonable compensation. The court considered the two work-related injuries that occurred three and seven months after the accident in its calculation of damages. Non-pecuniary damages were set at $25,000. Despite Cail's ability to carry on with his physically demanding employment he was less capable overall of earning income. He was also less attractive as an employee, was less attractive to himself as a person capable of earning income and his range of available occupations was restricted. Damages for impairment of future earning capacity was assessed at $15,000. Cail was entitled to an amount to be determined as past wage losses. This represented the difference between his salary and the compensation payments. |

**Counsel**

Counsel for the Plaintiff: J.D. Cotter

Counsel for the Defendants: D.R. Lewthwaite

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| **BROOKE J.** |

**1**   This summary trial under Rule 18A arises out of a motor vehicle accident in Vernon in January 2002, when the plaintiff's vehicle was struck in the rear by that of the defendants. Liability is admitted and at issue is the quantum of damages. The plaintiff seeks non-pecuniary damages, as well as damages arising out of his reduced earning capacity and claims for past loss of income, and special damages. I am satisfied that I can find the facts necessary to assess the plaintiff's damages and that it would not be unjust for me to do so.

The Facts

**2**  The plaintiff was driving his 1992 Dodge Caravan and was struck from behind while stopped on 32nd Avenue. He was wearing a seatbelt and his headrest was adjusted. With him in his motor vehicle were his three children. Immediately following the accident and after speaking with the police, the plaintiff drove the children to the hospital, where they were checked and released. Shortly after the accident, the plaintiff experienced pain and discomfort in the trapezius muscle, running down the left side of his neck to his left shoulder, and a sensation of burning pain in the area of his left shoulder blade. The damage to his motor vehicle was repaired at a cost of $2,674. The plaintiff was and is employed as a paramedic by the B.C. Ambulance Service. Following the collision, the plaintiff did not go to work for three weeks, which amounted to a loss of eight shifts. He returned to work because he did not receive his full pay under his disability insurance, and he says that he could not properly provide for his family with the compensation payments he was receiving. Hence, when he returned to full-time work, he was still sore and having some difficulty lifting and carrying, and carrying out the usual household chores such as chopping wood. These household chores were somewhat increased because his wife had had a new baby very shortly before the accident and, in fact, he and the children had been visiting her in the hospital the day of the accident.

**3**  The defendants say that the plaintiff had sustained significant work-related and recreational injuries, both before the accident and after the accident, and that he had been diagnosed before the accident with a degenerative disc disease in the structures of his neck, which is related to a rugby injury as a young man. Moreover, before the accident, the plaintiff had been diagnosed with rheumatoid arthritis. His pre-existing condition was far from perfect and, coupled with the physical demanding nature of his employment as an ambulance attendant, had resulted in numerous Workers' Compensation Board ("WCB") claims. In summary, the defendants say that the injuries sustained by the plaintiff in the motor vehicle accident were, in their nature and effect, the same as or similar to a series of injuries that he had sustained both before and after that accident. The defendants referred to the historical records, which included chiropractic clinical records, emergency records, Workers' Compensation Board records, and physiotherapy records. The defendants say that, at the time of the accident, the plaintiff's pre-existing medical condition was symptomatic and that the injuries sustained by him were an aggravation of an existing condition rather than the cause of a new injury.

**4**  The plaintiff says that the injury to his left shoulder and left trapezius are new injuries in the sense that they did not trouble him before the accident. Moreover, the plaintiff says that, within 24 hours of the accident, he experienced pain in his neck, lower and mid-back, in addition to the shoulder, shoulder blade and trapezius on his left side. The plaintiff relies upon the medical reports of his family physician, Dr. Lemiski. In his report of December 13, 2002, Dr. Lemiski notes that he first saw the plaintiff on January 25, 2002, and that he had then prescribed codeine and Ibuprofen to assist Mr. Cail in sleeping. Upon examination, he noted tenderness in the upper back and lower neck muscles on the left side, as well as discomfort and restriction of range of motion in rotation or flexion of the plaintiff's neck to the left side. He noted muscular tenderness of the lower back, and he thought that the plaintiff had sustained a neck strain.

**5**  Dr. Lemiski saw the plaintiff again on February 4th, when he complained of pain in the back of his neck, radiating to his shoulder on the left side, and pain between his shoulder blades, as well as some right forearm discomfort and tingling of his left armpit. He continued to complain of pain between the shoulder blades and some left leg discomfort. Upon examination, Dr. Lemiski noted discomfort at the extreme ranges of motion of his cervical spine and tenderness at the base of the neck and on the left side and left shoulder. Dr. Lemiski concluded that the plaintiff had sustained muscular injuries for which chiropractic manipulation might assist in his recovery, as well as the continuing use of pain killers.

**6**  By March 19, 2002, Dr. Lemiski noted that the plaintiff was generally improved with ongoing stiffness of his left trapezius and discomfort between his shoulder blades. Upon examination, he noted tenderness of the left trapezius muscle and the muscle between the shoulder and the neck with some discomfort at the base of the neck and down between his shoulder blades.

**7**  Dr. Lemiski also refers to x-rays taken of the plaintiff's thoracic spine on presentation at the emergency room, which showed moderate spondylosis of the lower cervical spine and bilateral foraminal narrowing consistent with pre-existing arthritis. On March 22, 2002, Dr. Lemiski ordered further x-rays of the plaintiff's thoracic spine, which did not show any abnormalities that could be attributed to the accident of January 23, 2002, but did note some degenerative changes consistent with osteoarthritis.

**8**  Dr. Lemiski noted two emergency records of April 18 and July 24, 2002: the first noting that the plaintiff had strained his left neck and shoulder while working; and the second, a work-related injury where he twisted and stretched his left shoulder. Dr. Lemiski saw the plaintiff twice more in 2002, once on September 3rd and once on October 4th. On these attendances, it was noted that the plaintiff was attending physiotherapy but that his back remained somewhat uncomfortable on the left upper side. Upon examination, tenderness was noted of the left trapezius, but the range of motion in the cervical spine was found to be normal.

**9**  In summary, Dr. Lemiski says that the course of recovery has been relatively slow and that the principal injuries to the left trapezius and neck muscles were probably exacerbated in the incidents of April 18 and July 24, 2002. Dr. Lemiski concluded that the muscle areas in which the plaintiff complained of pain were asymptomatic "as far as I know" before the accident, and he expressed some confidence in a complete recovery without any long-term disability.

**10**  In his report of July 16, 2004, Dr. Lemiski notes that the plaintiff "had, and continues to have, stiffness of his neck and pain that involves both his neck and left upper back", which he considers attributable to the accident. He says this:

Mr. Cail's current disabilities are related to chronic pain. Currently, he is able to work full time as a paramedic for the B.C. Ambulance Service. Although he does this with constant, albeit minor discomfort and stiffness that involves his neck and left upper back, he reports to me that he is much more cautious about lifting and getting himself in awkward positions than he used to be because this will result in increased pain involving these areas.

Mr. Cail's disability has gone on for two and a half years now since the time of the accident and at this point, appears unlikely to significantly improve in the foreseeable future.

...

It's my opinion that because of his current injuries he is more likely in the future to become injured at work to the degree that he would be disabled at least temporarily. The same could be said for any physically demanding work that he might undertake in the future. In other words, Mr. Cail is more vulnerable to disabling injury because of the chronic problems that he currently has.

**11**  Dr. Lemiski's clinical records indicate his involvement in 2004 on August 11th and 18th in respect of what appears to be a work-related injury on July 13th to the neck and lower back. He was seen again on November 16th in respect of intra-scapular pain with no precipitating factors known.

**12**  On referral by his counsel, the plaintiff was seen by Dr. Stephen Vallentyne, an expert in physical medicine and rehabilitation. In his report of September 17, 2003, he noted certain confounding factors, including the pre-accident diagnosis of rheumatoid arthritis, as well as several work-related injuries. He expresses the opinion that the plaintiff "was not experiencing neck, back, or shoulder troubles predating the 2002 MVA" (this is questioned by counsel for the defendants, who point to the plaintiff's attendance with his chiropractor a month prior to the accident for complaints related to neck, back and shoulder pain). Dr. Vallentyne's diagnostic impression is that the plaintiff sustained a combination of soft tissue injury to the neck and upper back, as well as "enhancement of underlying degenerative disc disease", which he says refers "to the conversion from asymptomatic to symptomatic status". He evaluates the plaintiff's degree of impairment as a 5 percent whole-person permanent impairment due to the neck and upper back soft tissue injury and the enhancement of disc degeneration. With respect to the plaintiff's residual disability, Dr. Vallentyne says this:

Mr. Cail is medically and physically fit to undertake activities-of-daily-living. While he will not have any difficulty with simpler personal care activities, home and yard maintenance activities involving heavy lifting and overhead work will likely cause increased pain and may necessitate temporary activity restrictions. In other words, he will need to pace heavier activities such as wood chopping and he may need to have assistance with such activities from time-to-time. He is physically fit to continue working in his usual occupation although it is recognized that the persistent neck pain does cause increased fatigue as his workday goes on.

**13**  Dr. Vallentyne prepared a further report on January 17, 2005. This report did not involve a further examination of the plaintiff but rather a review of various documents, and he was then asked to answer four questions: (1) Was the plaintiff suffering from a pre-existing condition pre-dating the MVA responsible for the ongoing symptoms? (2) What injuries did the plaintiff sustain in the accident? (3) Has the plaintiff recovered from the injuries caused by the accident? and (4) Is the plaintiff disabled as a result of the accident?

**14**  With respect to the first question, Dr. Vallentyne says:

Given the limited correlation between spinal symptoms and spinal degeneration, however, it cannot be concluded necessarily that Mr. Cail was suffering from ongoing neck pain and/or stiffness ... Consequently, even though it is likely that Mr. Cail had pre-existing cervical disc degeneration, it does NOT appear that Mr. Cail had an active ongoing pre-existing condition a the time of his 2002 MVA. Nonetheless, it is fair to say that Mr. Cail would have been at risk for episodic neck pain and stiffness due to gradual deterioration of the underlying cervical degeneration over time.

**15**  With respect to the second question, Dr. Vallentyne opines that, because of the persistence of symptoms, the accident likely caused a permanent enhancement of the pre-existing cervical degeneration.

**16**  With respect to the third question, Dr. Vallentyne opines that:

Due to the injuries arising from the 2002 MVA, I suspect that Mr. Cail will continue to be at risk for flare-ups triggered by heavier work and jarring injuries in the long-run.

**17**  With respect to the fourth question, Dr. Vallentyne repeats that Mr. Cail is medically fit to continue working full time, though he is at increased risk of flare-ups and will likely require more time off, as well as medical treatment and physical therapy.

**18**  The plaintiff was also seen on independent medical examination by a second expert in physical medicine and rehabilitation, Dr. Coghlan. On his review of the plaintiff's chiropractic history, Dr. Coghlan noted that Mr. Cail had 36 treatments between November 2000 and December 2001, which included treatments to his middle or lower back, as well as his neck. He expresses the opinion that the plaintiff displayed a whiplash associated disorder of his cervical spine with some referred pain into the upper back. He notes Dr. Vallentyne's report of a slip-and-fall injury sustained by the plaintiff in April 2002, resulting in an aggravation of the neck and shoulder pain. He notes as well two separate WCB claims: the first in June 2001, relating to thoracic spine pain and neck pain; and the second on August 1, 2001, relating to neck and shoulder pain, as well as right arm numbness. He opines that the plaintiff has a significant degenerative disc disease symptomatic prior to the accident. He does not agree that the plaintiff was asymptomatic as Dr. Vallentyne noted. Dr. Coghlan says:

I am sure that the accident, because of his underlying degenerative disease in his neck, caused more aggravation of his neck symptoms than one would expect if his neck had not shown any evidence of pre-existing disease.

In the long term I do not feel that this accident will be a cause of progression of his disease and therefore will not be a cause of any long term problems.

**19**  The plaintiff submits that a reasonable damage award would include the following: non-pecuniary damages, $45,000; special damages, $548.73; past loss of income, $2,326.75; and loss of earning capacity, $50,000 for a total of $97,875.48. Central to the plaintiff's position is the proposition that the plaintiff's condition is directly linked to the accident, and on the basis of Athey v. Leonati, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), where the defendant's conduct is a cause of the injury, the presence of other non-tortious contributing causes does not reduce that defendant's liability.

**20**  The defendants, on the other hand, say that the plaintiff sustained an aggravation of a pre-existing medical problem at most and that a reduction should be made to any award to reflect symptomatic and active pre-existing medical difficulties, which the defendants say should by in the range of 25 to 40 percent. In the result, it is submitted that an appropriate award for non-pecuniary damages is $20,000. The defendants say that no award should be made for a loss or diminution of earning capacity because the plaintiff has only missed eight shifts immediately following the accident, and his own doctors say that he is fit to continue the physically demanding work of a paramedic.

Decision

**21**  I have read the authorities referred to by counsel, and I have found particularly helpful the decision of this court in Hoskin v. Trisevic, [*[2002] B.C.J. No. 1326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2PP-00000-00&context=) (S.C.), a decision relied upon by the defendants, and Ewing v. Sidhu, [*[2000] B.C.J. No. 1528*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22K3-00000-00&context=) (S.C.), a decision of the Honourable Mr. Justice Williamson. In Ewing, the plaintiff sustained soft tissue injuries to the left arm, neck and left shoulder, as well as an injury to the sacroiliac joint. The soft tissue injuries largely resolved within three and a half months, but he continued to have difficulty with his sacroiliac joint. Mr. Ewing had been injured in earlier accidents in 1987 and 1988, which led him to give up his then employment as an ambulance attendant to find less physically demanding work. It was held that the injury that the plaintiff sustained in 1996, which was the subject of this action, exacerbated the impairment of his employment options that he had sustained in the 1987 and 1988 accidents with the result that an award of $30,000 was made for non-pecuniary damages and an award for the impairment of future earning capacity was made of $25,000.

**22**  In Hoskin, Madam Justice Satanove reviewed the interplay between tortious and non-tortious causes of a loss, where she concluded as follows at para. 45:

... I cannot find the evidence sufficient to show, on a balance of probabilities, whether the defendant's ***negligence*** materially contributed to the plaintiff's back injury. It could have been the cause, but it is equally likely, if not more so on the medical evidence before me, that his pre-existing disc degenerative disease combined with the physical strains of his work, athletic activities, and subsequent injuries to his back were sufficient on their own to have caused the plaintiff's chronic back pain and need for surgery.

This forcefully sets out the position of the defendant.

**23**  On all of the evidence, I am satisfied that the plaintiff's original position, imperfect though it was at the time of the accident, was significantly exacerbated by the accident. Despite the chiropractic treatment to the plaintiff's neck and shoulder a little more than a month before this accident, the plaintiff lost no work and was able to continue in a physically demanding occupation which he continues to pursue. Accordingly, I conclude that the plaintiff's condition was materially worsened by the accident and the defendants must make fair and reasonable compensation for that injury. I must, however, take into account the post-accident work-related injuries of April 18 and July 24, 2002: the first resulting in a strain to the thoracic spine and the second resulting in a left shoulder trapezius strain. It must be noted that the first work-related injury occurred less than three months, and the second a little more than seven months, after the injuries that the plaintiff sustained in the accident.

**24**  When previously seen by Dr. Lemiski on March 19th, a general improvement was noted, as well as continuing tenderness and discomfort in the left trapezius muscle and the muscle between the shoulder and the neck and between the shoulder blades. I find that the injuries of April 18 and July 24, 2002, aggravated the injury that the plaintiff sustained in the accident. I find that, but for those injuries, the plaintiff would have made a reasonably complete recovery within the normal recovery period of six months.

**25**  I assess non-pecuniary damages at $25,000.

**26**  I now turn to a consideration of the plaintiff's claim for the impairment of his earning capacity. In Ewing, Mr. Justice Williamson referred to the decision of the Court of Appeal in Palmer v. Goodall [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) at p. 59, where this is said:

Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

**27**  The factors to be taken into account in assessing the impairment of earning capacity are these:

1. Has the plaintiff been rendered less capable overall of earning income from all types of employment?
2. Is the plaintiff less marketable or attractive as an employee to potential employers?
3. Has the plaintiff lost the ability to take advantage of all job opportunities, which might otherwise have been open to him had he not been injured?
4. Is the plaintiff less valuable to himself as a person capable of earning income in a competitive labour market?

(See Pallos v. Insurance Corp. of British Columbia, [*[1995] B.C.J. No. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.))

**28**  Here, despite the ability of Mr. Cail to carry on with his physically demanding employment as an ambulance attendant seemingly with the approval of Dr. Lemiski and Dr. Vallentyne, I find that as a result of the injury he now complains of the plaintiff is less capable overall of earning income, less attractive as an employee, and less valuable to himself as a person capable of earning income, and that the range of occupations available to him has been restricted. I assess damages for the impairment of future earning capacity at $15,000.

**29**  With respect to the plaintiff's claim for past wage loss, this is in respect of the difference between what he would have been paid had he worked the eight shifts that he lost and the amount of compensation he was paid. There is, as I understand it, no subrogated claim advanced. I find that the plaintiff is entitled to the difference between what he would have been paid for the eight shifts that he lost and whatever benefits he received in respect of that loss. The plaintiff says that this amounts to $2,236.75 which seems excessive. The defendants, however, concede that the plaintiff is entitled to the difference between what he would have earned and what he was, in fact, paid. If that can be calculated on the evidence, then there will be an award for that amount.

**30**  There will also be an award for $548.73 representing special damages in respect of the cost of physiotherapy treatments and chiropractic treatments. I am satisfied that these treatments were reasonably undertaken to recover from the injuries sustained by the plaintiff in the accident.

**31**  Costs will follow the event, unless there are offers that the parties wish to bring to my attention.

BROOKE J.

**End of Document**

[***Cam v. Hood, [2006] B.C.J. No. 1255***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1HD-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vernon, British Columbia

Brooke J.

Oral judgment: March 2, 2006.

Released: June 6, 2006.

Vernon Registry Nos. 26386, 17757 and 16026

**[2006] B.C.J. No. 1255** | [*2006 BCSC 842*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1MR-00000-00&context=) | [*150 A.C.W.S. (3d) 1064*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1MR-00000-00&context=)

Between Denise Cam, plaintiff, and George Hood and Marilynne Ruth Calver, defendants (Registry No. 26386) And between Denise Christine Cam, plaintiff, and Alfred Fowler, defendant (Registry No. 17757) And between Denise Christine Cam, plaintiff, and Jamie Lee Hague and Gunn Venke Hague, defendants (Registry No. 16026)

(19 paras.)

**Case Summary**

**Civil evidence — Admissibility — Objections — Relevancy — Facts directly in issue — In this case where the plaintiff sought damages from what appeared to be soft tissue injuries sustained in three accidents, the court ruled that a videotape surreptitiously made of the complainant playing volleyball was admissible as evidence — The manner in which the surveillance was taken would not outrage the conscience of the community, and the videotapes were relevant to the plaintiff's disability and loss of enjoyment of life and had some probative value on those issues.**

**Civil evidence — Methods of proof — Electronic surveillance — In this case where the plaintiff sought damages from what appeared to be soft tissue injuries sustained in three accidents, the court ruled that a videotape surreptitiously made of the complainant playing volleyball was admissible as evidence — The manner in which the surveillance was taken would not outrage the conscience of the community, and the videotapes were relevant to the plaintiff's disability and loss of enjoyment of life and had some probative value on those issues.**

**Civil evidence — Documentary evidence — Photographs and videotapes — In this case where the plaintiff sought damages from what appeared to be soft tissue injuries sustained in three accidents, the court ruled that a videotape surreptitiously made of the complainant playing volleyball was admissible as evidence — The manner in which the surveillance was taken would not outrage the conscience of the community, and the videotapes were relevant to the plaintiff's disability and loss of enjoyment of life and had some probative value on those issues.**

**Statutes, Regulations and Rules Cited:**

Privacy Act, *R.S.B.C. 1996, c. 373*,

**Counsel**

Counsel for the Plaintiff: D.J. Daley R.P. Barton

Counsel for the Defendants: J.A. Hemmerling M.P. Geekie

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| **BROOKE J. (orally)** |

**1**   The plaintiff seeks damages arising from what appear to be soft tissue injuries that she sustained in three accidents. The first two in 1994 and the last in 2004. Liability is admitted by the defendants in each action, and there is no defence alleged of either contributory ***negligence*** or a failure to mitigate in any of the actions, which have been ordered to be tried together.

**2**  The defendants have caused the plaintiff's activities to be observed and recorded by videotape beginning in 1994 and continuing into 1995 and 1996. It is said that some ninety hours of surveillance has resulted in approximately five hours of video of the plaintiff playing volleyball. The defendants wish to put the video into evidence and put it to the plaintiff and to the medical witnesses, some twelve to fifteen in all of the latter.

**3**  The plaintiff says that the videos should be declared inadmissible because their prejudicial value outweighs their probative value. It is submitted that the videos are neither representative nor fair, nor reasonable, and that they were obtained surreptitiously in circumstances where the court should rebuke what is tantamount to an unbridled invasion of privacy, and that the court should do so by making an order for the exclusion of the videotapes.

**4**  The defendants, on the other hand, say that the videos are relevant to the issue of what, if any, disability or loss of enjoyment the plaintiff has suffered as a result of the injuries she alleges she sustained in these three accidents. The defendants say that the videos are probative, that is, that they provide evidence which tends to prove or disprove a fact in issue.

**5**  I find that in civil proceedings such as these the test is whether the proffered evidence is relevant and probative of a fact in issue. Where a videotape is proffered and is shown to be accurate in its depiction, and it fairly represents what is depicted, then so long as it is relevant and probative of the fact in issue, it is admissible.

**6**  In the videos proffered here, all of the breaks and the interruptions were explained as "end-of-tape" events, or dead battery events, and the interval between the interruption and the resumption of recording was no longer than reasonably necessary to replace the tape or the battery, with one exception of a gap of some five minutes. Other interruptions occurred to enable the investigator to avoid detection as operating a video camera. These were explained in that fashion. The quality of the videotape, while varying, goes not to the admissibility of the videos but to their weight.

**7**  I do not find the test of whether the prejudicial value of the proffered evidence outweighs its probative effect to be applicable on these facts, which are in civil not criminal proceedings. Nor do I find that the manner in which the surveillance was undertaken is reprehensible in the sense that I do not find that it would outrage the conscience of the community if all of the facts were known. There was no entry upon private property. There was no disturbance of curtains or windows or insertion of recording devices within private property.

**8**  To the extent that the reasonable expectation of the plaintiff to privacy has been infringed, she has a remedy under the ***Privacy Act***, *R.S.B.C. 1996, c. 373*, but the remedy supported under that statute does not include an exclusionary rule with respect to video or other evidence.

**9**  In any event, there was some evidence that the investigator operated on or from public property and in accordance with certain standards which take heed of the offensive nature of clandestine surveillance and the importance of recognizing rights of privacy. Moreover, the investigators employed by the defendants were registered and supervised under relevant provincial legislation.

**10**  In the result, I find the videotapes marked A1 to A10 to be relevant to the plaintiff's disability and loss of enjoyment of life and to be of some probative value upon those issues.

**11**  I find as well that the relevant videos are limited to the volleyball activities in which the plaintiff participated and that the time outside the scope of those volleyball activities are irrelevant and must be excluded.

**12**  I should add that I have read the authorities referred to by counsel: ***Hilliard v. Bennett***, [*[2001] B.C.J. No. 2421*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M404-00000-00&context=) (S.C.); ***Richardson v. Davis Wire Industries Ltd.***, [*[1997] B.C.J. No. 937*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B11P-00000-00&context=) (S.C.) [***Richardson***]; ***Milner v. Manufacturers Life Insurance Co.***, [*[2005] B.C.J. No. 2632*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2PX-00000-00&context=) (S.C.); ***Houseman (Guardian ad litem of) v. Sewell***, [*[1997] B.C.J. No. 1478*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61GF-00000-00&context=) (S.C.); and the learned article in *Goldstein, Visual Evidence, A Practitioner's Manual*, at paras. 8.2 and 12.1. I find that the authority which is most helpful in these circumstances is the decision of Madam Justice Kirkpatrick (as she then was) in ***Richardson*** where, at para. 42, she adopted the proposition contained in ***Anderson v. Maple Ridge (District)*** [*(1992), 10 C.P.C. (3d) 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S19X-00000-00&context=) (B.C.C.A.), which reads as follows:

I begin with the fundamental proposition that evidence which is relevant, and which is not excluded by any rule of evidence, is admissible.

**13**  She goes on to say at para. 44:

In my view, if the video tape evidence is probative of a matter in issue, and is made in the context of the company's legitimate right to investigate Mr. Richardson's misconduct, then it ought to be admitted.

**14**  ***Richardson*** was a wrongful dismissal case, but the principle of admissibility set out by Madam Justice Kirkpatrick applies here as well. Here, I find that the defendants had a legitimate right to investigate the abilities or disabilities of the plaintiff who is claiming compensation against them.

**15**  Having held that the videotapes are admissible in evidence, the next question is what use can be made of them during the course of trial and the examination of witnesses. To some extent, much depends upon what is said by the plaintiff who has not, at this juncture, given evidence. She may well admit to all of what is depicted in the videotapes, but she may as well explain or qualify what appears in the video. The plaintiff has seen these videos, and it will not be necessary to replay them to her for this purpose if she agrees that the videos accurately depict what they do display, taking into account the flawed nature of some of the video recording. By this, I mean the interruptions of clarity, where the focus of the video camera has been lost, or the interruption in filming, where the battery has died or the tape has run out.

**16**  All of the medical witnesses, who may be asked to comment on the apparent physical abilities or physical limitations of the plaintiff, have been or will be afforded the opportunity to review the videos showing volleyball play prior to being called to give evidence. Much of the play depicted is repetitive, although there may be differences either during the course of a single game or single evening of play or over the expanse of years between the first and the last videos.

**17**  At this juncture, I do not consider it necessary or expedient to replay for each witness all or any of the videos. To the extent that there is a conflict as to whether or not an activity is depicted as distinct from how the activity is interpreted, it may be necessary to find and play either the part of the videotape in issue or, if fairness and justice require, the whole of the tape for the period covered by the video, as the circumstances may require and the court may order.

**18**  My point is that it would be an egregious waste of the time of the court and the parties to replay the video edited as directed for each witness who might be asked to comment on what is depicted.

**19**  It must be remembered that all the admissible videos are limited to the single activity of volleyball. There is no video of the plaintiff at work. There is no video of the plaintiff in her home doing kitchen or household chores. There is no video of the plaintiff doing gardening chores. There is no video of the plaintiff undertaking any other recreational activity save volleyball, nor is there any video of the plaintiff's pre-morbid physical activities and conditions. Thus, it must be remembered that the videos are but one thin slice of a much larger pie and that, while relevant and probative of the plaintiff's abilities, the weight to be given to the video evidence is ultimately for the trier of fact to decide. Thank you.

BROOKE J.

**End of Document**

[***Canmerica Mortgage Corp. v. Yu, [2015] B.C.J. No. 944***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G48-YC61-JGPY-X0HF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.J. Sewell J.

Heard: April 7-11, 14-17, June 9-13,

October 16, 17, November 4, 5, 2014;

February 25, March 5, 2015.

Judgment: May 12, 2015.

Docket: S114141

Registry: Vancouver

**[2015] B.C.J. No. 944** | 2015 BCSC 773 | 2015 CarswellBC 1263 | 123 W.C.B. (2d) 57 | 256 A.C.W.S. (3d) 184 | 75 B.C.L.R. (5th) 146 | 41 B.L.R. (5th) 199

Between Canmerica Mortgage Corporation, Plaintiff, and Pak Yip Yu, Li Yi Wu, Jian Ping Tao, Quo Zhu Huang, Tao Natural Health Care Supplies Ltd., Chiu Ling Chung, Xi Bo Wu, the Owners Strata Plan BCS2645, the Owners Strata Plan BCS2252, and Tenant or Owner of Subject Property, Defendants, and William H. Lim Personal Law Corporation, William H. Lim Personal Law Corporation doing business as Lim & Company Lawyers, William H. Lim, Justin B. Lim, Helena H. Shum, Chiu Ling Chung and Sheung Ming Li, Defendants by Counterclaim

(221 paras.)

**Case Summary**

**Legal profession — Barristers and solicitors — Relationship with others — Relationship with opposite party — Counterclaim against solicitors for breach of fiduciary duty dismissed — Defendants obtained mortgage from plaintiff — Plaintiff's principal was managing partner of law firm preparing mortgage documentation — Defendants lost mortgage funds in Ponzi scheme and thus defaulted on loan — There was no reliance placed on lawyers for advice or protection of defendants' interests, nor were lawyers under a contractual duty to anyone else to do anything for the benefit of the defendants.**

**Professional responsibility — Self-governing professions — Professions — Legal — Barristers and solicitors — Counterclaim against solicitors for breach of fiduciary duty dismissed — Defendants obtained mortgage from plaintiff — Plaintiff's principal was managing partner of law firm preparing mortgage documentation — Defendants lost mortgage funds in Ponzi scheme and thus defaulted on loan — There was no reliance placed on lawyers for advice or protection of defendants' interests, nor were lawyers under a contractual duty to anyone else to do anything for the benefit of the defendants.**

**Real property law — Mortgages — Mortgage agreement — Persons liable — Mortgagors — Payment — Interest — Excessive interest — Action by mortgagee to enforce mortgage and for judgment in amount owed allowed in part — Plaintiff entitled to repayment of amount advanced but not to interest — Mortgage provided for compound interest calculated monthly resulting in criminal interest rate — Defendant advanced funds to Chung in return for high interest rate from Chung — Unknown to defendants, Chung operated Ponzi scheme and never repaid defendants — Defendants defaulted on loan to plaintiff — Mortgage was not unconscionable — Defendants understood nature of transaction and that they were putting their properties at risk if the loan was not repaid.**

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| --- |
| Action by the mortgagee to enforce a mortgage and for judgment in the amount owed. Counterclaim against the lawyers. The plaintiff loaned the defendants $3,100,000 secured by a mortgage on several properties. The defendants defaulted on the loan. The defendants argued that they were induced to enter into the loan by the fraud of the defendant Chung and her company, Moneytrans. They argued that Chung should be solely responsible for payment of the loan or be required to indemnify them for any amount they owed the plaintiff. Chung had been noted in default. The loan was the culmination of a business relationship among the defendants. Pursuant to that relationship, the defendants Wu and Huang lent or arranged for others to lend large sums of money to Chung and Moneytrans. Chung agreed that Moneytrans would pay interest on the loans at the highest rate of interest used by the bank and promised an additional bonus at the end of the year if her business did well. By January 2011, Chung was no longer able to continue to pay interest on all the loans outstanding. Chung represented to Wu and Huang that Moneytrans was close to completing a large transaction that would generate sufficient revenue to repay what had previously been advanced, but needed an additional $2,500,000 to finance that transaction. She also represented that Moneytrans had a $10,000,000 security deposit with a bank that could be accessed to provide funds to meet its obligations. The defendants then obtained the loan from the plaintiff. The loan documentation was prepared by a law firm whose managing partner was the plaintiff's principal and director. Sometime after she obtained substantially all of the loan proceeds, Chung left Canada. The defendants had not been able to recover any part of the money that Chung received from them and could thus no repay the plaintiff.  HELD: Action allowed in part.  Counterclaim dismissed. The plaintiff was entitled to repayment of the principal amount of the loan, but was not entitled to recover interest. The defendants were entitled to be indemnified by Chung for the amounts they owed to the plaintiff. Chung was running a Ponzi-type scheme with the money obtained from the defendants. Neither Huang nor Wu were Chung's partners or participants in the Ponzi scheme. The terms of the loan agreement and mortgage required payment by the principal together with interest compounded and calculated monthly, resulting in an effective annual rate of interest on the loan that was at least 96 per cent. This was an illegal rate. The appropriate remedy was to sever the interest provisions from the balance of the transaction and substitute an obligation on the borrowers to repay only $2,496,000, the amount actually advanced. The loan agreement was not enforceable and was not unconsionable. Despite the unequal bargaining positions, the defendants understood the nature of the transaction they entered into and that they were putting the properties they owned at risk if the loan was not repaid. The plaintiff's principal did not do anything to cause the defendants to conclude that he was acting for them or that he was in any way protecting their position with respect to the loan. The defendants were not relying on the lawyers for advice with respect to any aspect of the loan and understood its essential terms. There was no reliance placed on the lawyers for advice or protection of the defendants' interests, nor were the lawyers under a contractual duty to anyone else to do anything for the benefit of the defendants. |

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, *SBC 2004, CHAPTER 2*,

Criminal Code, R.S.C. 1985, c. C-46, s. 347

Land Title Act, [*RSBC 1996, CHAPTER 250, s. 47*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FBN1-20WN-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: C. Ferris, Q.C., L. Bevan.

Counsel for the Defendant Xi Bo Wu: K. Friesen.

Counsel for the Defendants Jian Ping Tao, Tao Natural Health Care Supplies Ltd. and Quo Zhu Huang: W.D. Simpson.

Counsel for Defendants by Counterclaim Helena H. Shum, William H. Lim, Justin B. Lim and Lim and Company: C. Ferris, Q.C., L. Bevan.

Appearing on their own behalf: Pak Yip Yu, Li Yi Wu.

Appearing on their own behalf: Sheung Ming Li.

No other appearances.

[Editor's note: A correction was relased by the Court May 28, 2015; the change has been made to the text and the correction is appended to this document.]

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| **R.J. SEWELL J.** |

**Introduction**

**1**  This litigation arises out of a transaction (the "Loan") in which the defendants, Pak Yip Yu, Li Yi Wu, Jian Ping Tao, Quo Zhu Huang, Tao Natural Health Care Supplies Ltd., Chiu Ling Chung and Xi Bo Wu (collectively the "Borrowers"), borrowed $3,100,000 from the plaintiff, Canmerica Mortgage Corporation ("Canmerica"), on the terms contained in a loan agreement dated February 15, 2011 (the "Loan Agreement"). The Loan was secured by a mortgage (the "Mortgage") of eight properties listed as Schedule A to these reasons.

**2**  The Borrowers were unable to repay the Loan. Canmerica brings this proceeding to enforce the Mortgage and obtain judgment against the Borrowers for the amount it alleges it is owed.

**3**  In these reasons, I will use the English names of most of the witnesses and parties because that is how they were referred to in the evidence. I will also use diminutive names for the same reason. In so doing, I intend no disrespect to the persons referred to.

**4**  Chiu Ling Chung, whose English name is Tracy Chung, owned two of the properties. She did not defend this action and those two properties have been sold by court order. The net proceeds of sale are held in trust pending the outcome of this proceeding.

**5**  The remaining defendants, whom I shall refer to collectively as the Defendants, defend the action on the grounds that I describe later in these reasons. They ask that the action against them be dismissed.

**6**  The Defendants counterclaim against William (Bill) Lim, his law firm, Lim & Company LLP ("Lim & Company"), his son, Justin Lim, and Helena Shum, whom I will refer to collectively as the Lawyers. At trial, the counterclaim against Justin Lim was dismissed by consent without costs. The Defendants allege that the Lawyers are responsible for the losses they incurred as a result of entering into the Loan.

**7**  The Defendants say that they were induced to enter into the Loan by the fraud of Tracy Chung and her company, Canada World Moneytrans Finance Ltd. ("Moneytrans"). They submit that, except for the sum of $100,000 that Amy Wu and Dorina Huang received from the proceeds of the Loan, Tracy Chung should be solely responsible for payment of the Loan or be required to indemnify them for any amount they owe Canmerica. They also seek judgment against Sheung Ming Li, whom they say assisted Tracy Chung in defrauding them and received a large part of the proceeds of the Loan.

**8**  For the reasons that follow I have decided that:

1. Canmerica is entitled to repayment of the principal amount of the Loan and to enforce the Mortgage against the Defendants, but is not entitled to recover interest from them;
2. The counterclaim against the Lawyers must be dismissed;
3. The Defendants are entitled to be indemnified by Tracy Chung for the amounts they owe to Canmerica;
4. The Defendants are entitled to judgment against Sheung Ming Li for $100,000.00; and
5. Dorina Huang will recover judgment against Tracy Chung for an additional $1,670,000 in relation to previous loans to her.

**9**  I will begin these reasons with a description of the parties, followed by a listing of the legal issues and my reasons for deciding the issues.

**The Parties**

**10**  Canmerica is a private equity lender. It makes loans to borrowers based on the value of the security they offer and not on their ability to repay.

**11**  The defendants Pak Yip Yu, whose English name is Jim Yu, and Li Yi Wu, whose English name is Amy Wu, are spouses.

**12**  Xi Bo Wu is Amy Wu's father. Amy Wu executed all of the Loan documentation on behalf of Xi Bo Wu pursuant to a power of attorney granted by him to her on September 23, 2003.

**13**  The defendants Quo Huo Huang, whose English name is Dorina Huang, and Jian Ping Tao, whose English name is Hector Tao, are also spouses.

**14**  The defendant Tao Natural Healthcare Supplies Ltd. is a corporation owned by Dorina Huang and Hector Tao. It owns a commercial building that is one of the properties mortgaged as security for the Loan.

**15**  The defendant Tracy Chung resided in British Columbia until February or March 2011, but has since left Canada and her whereabouts are unknown.

**16**  William H. Lim ("Bill Lim") is the principal and director of Canmerica. He is also a member of the Law Society of British Columbia and the managing partner of Lim & Company. Helena Shum is a lawyer who was employed by Lim & Company at the time of the Loan. She prepared some of the Loan documentation and witnessed the Borrowers' execution of them.

**17**  The defendant by counterclaim Sheung Ming Li operates a cabinet making business in Vancouver.

**18**  The Owners Strata Plan BCS2645 and The Owners Strata Plan BCS2252 are named as defendants because they held certain charges against the two properties owned by Tracy Chung. No relief was sought against them at trial.

**The Loan Documentation**

**19**  The terms of the Loan Agreement included:

1. The Principal Sum was $3,100,000;
2. Interest on the amount outstanding under the Loan was payable at 4% per month, calculated and compounded monthly;
3. The Loan was repayable in full on May 16, 2011;
4. Canmerica agreed to waive interest if the Borrowers repaid the Principal Sum on or before May 16, 2011;
5. Canmerica agreed to advance $2,500,000 on February 16, 2011;
6. The Borrowers agreed to execute a Promissory Note in favour of Canmerica for the amount of that advance; and,
7. The Loan was to be secured by the Mortgage.

**20**  The terms of the Promissory Note included:

1. Principal Sum of $2,500,000;
2. Interest on the Principal Sum at a rate of 4% per month calculated and compounded monthly not in advance, both before and after maturity and before and after default; and,
3. The Principal Sum plus interest was payable on May 16, 2011.

**21**  The terms of the Mortgage included:

1. Principal amount of $3,100,000;
2. Term of three months;
3. Interest calculated at 4% per month, compounded monthly, not in advance; and,
4. The amount outstanding was payable on May 16, 2011.

**22**  The proceeds of the Loan were paid to Lim & Company and disbursed by it in accordance with an amended order to pay signed by the Borrowers. The initial order to pay directed Lim & Company to pay the net proceeds of the Loan to all of the Borrowers. However, at the Borrowers' request, Lim & Company amended the order to pay to make the net proceeds payable as follows:

1. $1,900,000 to Sheung Ming Li;
2. $50,000 to Amy Wu;
3. $50,000 to Dorina Huang; and,
4. $496,000 to Tracy Chung.

**Background**

**23**  The Loan was the culmination of a business relationship among the Borrowers. Pursuant to that relationship, Amy Wu and Dorina Huang lent or arranged for others to lend large sums of money to Tracy Chung and Moneytrans. The full extent of those loans was not made clear in the evidence.

**24**  Tracy Chung did not testify at trial and has apparently returned to Hong Kong or China. I therefore have only Amy Wu's and Dorina Huang's version of the nature of their business dealings with her.

**25**  Among the Defendants, Dorina Huang and Amy Wu had by far the greatest dealings with Tracy Chung. They testified that they met Tracy Chung in 2009. Throughout 2010, they advanced or arranged for others to advance very large loans to Tracy Chung and Moneytrans. Some of these loans were repaid but others were not. Neither Dorina Huang nor Amy Wu presented a clear accounting of the transactions that they were involved in with Tracy Chung. They both stated that, at first, their husbands were not aware of the extent of their dealings with Tracy Chung. However, some of the loans they made were funded by mortgages on properties they owned jointly with their husbands. This would indicate that the husbands knew more about their wives' dealings with Tracy Chung than their evidence disclosed.

**26**  By early 2011, Amy Wu and Dorina Huang had advanced a large percentage of the personal funds belonging to themselves and their respective spouses to Tracy Chung, as well as in excess of $1,000,000 of funds obtained from relatives and friends.

**27**  Amy Wu and Dorina Huang testified that Tracy Chung agreed that Moneytrans would pay interest on the loans at "the highest rate of interest used by the bank" and promised an additional bonus at the end of the year if her business did well. They did not specify what the actual interest payable or paid was, or what the terms of repayment were, although a number of the loan agreements with Tracy Chung and Moneytrans put into evidence had a one-year term.

**28**  Despite the fact that it was uncontradicted, I cannot accept Amy Wu's and Dorina Huang's evidence about the nature of their dealings with Tracy Chung. I do not accept that they would have lent or arranged to lend such large sums of money to Tracy Chung, with no security, without being promised high rates of return. In this regard, in an action commenced against her under Vancouver Registry No. S123358, Amy Wu alleged in her response to civil claim that Tracy Chung agreed to pay interest of 8% per month with respect to a loan of $100,000 to Tracy Chung that Amy Wu had arranged from the plaintiff in that action.

**29**  I conclude that Tracy Chung was running a Ponzi-type scheme in which she obtained increasingly large advances from or through Dorina Huang and Amy Wu and others, and used the funds received from the later loans to make payments on the earlier ones. I am satisfied that neither Dorina Huang or Amy Wu were Tracy Chung's partners nor participants in the Ponzi scheme.

**30**  I find that by January 2011, Tracy Chung was no longer able to continue to pay interest on all the loans outstanding. I infer that, as a result of the cessation of interest payments, Amy Wu and Dorina Huang were being pressured by the people from whom they had arranged financing for Tracy Chung, and were also concerned about repayment of their own family funds advanced to her.

**31**  At about this time, Tracy Chung made two representations to Amy Wu and Dorina Huang. The first was that Moneytrans was close to completing a large transaction that would generate sufficient revenue to repay what had previously been advanced, but needed an additional $2,500,000 to finance that transaction. The second was that Moneytrans had a $10,000,000 security deposit with a bank that could be accessed to provide funds to meet its obligations. Amy Wu and Dorina Huang accepted those representations as true and agreed to try to find the funds Tracy Chung required.

**32**  The Defendants did not have $2,500,000, but they did have equity in properties they owned.

**33**  In January or February of 2011, Tracy Chung and Dorina Huang sought to find a lender who could provide a loan of $2,500,000. They first found Ben Ng, who was prepared to consider providing a short term loan of $2,500,000, subject to his security requirements being met. Lim & Company were Mr. Ng's lawyers. On or shortly before February 10, 2011, Mr. Ng called Justin Lim and arranged for a meeting to discuss a loan.

**34**  I find that a meeting was held at the offices of Lim & Company in Richmond on February 10, 2011. It is unclear who attended that meeting. However, I am satisfied that Dorina Huang attended at the meeting with Tracy Chung, Justin Lim, Ben Ng and Michelle Cheung. Ms. Cheung had previously made loans to Tracy Chung through Dorina Huang, but ultimately did not participate in the transaction at issue in this case.

**35**  No agreement was reached at the February 10, 2011 meeting. Justin Lim told those present that he could not prepare documents for any loan that might be agreed to because he was about to leave the country on vacation. He arranged for his father, Bill Lim, to act for Mr. Ng in further dealings with regard to any loan. I accept Justin Lim's evidence that he told the persons attending the meeting that he was Mr. Ng's lawyer and that they should retain their own lawyer with respect to the transaction. Justin Lim took no part in any matter in issue in this case after February 10th.

**36**  Bill Lim testified that he met with Dorina Huang and Tracy Chung on February 11th. After some brief discussion about the terms of the proposed loan and security, he phoned Mr. Ng, who insisted that he would require a professional appraisal of the properties that were originally offered as security for his loan. This was unacceptable to Dorina Huang and Tracy Chung, who said it would be too expensive and take too long to obtain the appraisals. Mr. Ng refused to rely on the B.C. Assessment Authority's actual value assessments for the properties and said he was no longer interested in providing the loan.

**37**  When Bill Lim told Dorina Huang and Tracy Chung that Mr. Ng would not provide the loan, Tracy Chung or Dorina Huang asked him if he knew of any other lender who could provide financing. They said they were now prepared to offer eight properties as security for a loan of $2,500,000. At some point in the meeting, they said they would repay $3,100,000. Bill Lim said he might be able to provide a loan on the same terms offered by Mr. Ng. According to Bill Lim, he had a fairly detailed discussion with Dorina Huang and Tracy Chung about the terms of a loan and the security that would be required. He testified that Dorina Huang took an active part in those discussions. His evidence was that he asked about the purpose of the loan and was told that the Borrowers required bridge financing for a business deal, but they did not elaborate about their business and he did not press them about it.

**38**  By the end of the meeting on February 11, Bill Lim thought he could provide the loan if he was satisfied with the security offered to him. After the meeting, he proceeded with some due diligence by obtaining searches and assessment roles for the properties and by visiting some of them. The due diligence continued until February 15, 2011, after the Loan documentation was executed, with a visit to Dorina Huang's home on Tisdall Avenue in Vancouver.

**39**  By February 14, Bill Lim decided he would proceed with the Loan, based on his estimate of the amount of equity in the eight properties offered as security. He testified that he calculated that the Borrowers had between $4,000,000 and $4,500,000 in equity in the eight properties. After confirming with his bank that he had sufficient funds available on short notice, he phoned Dorina Huang on the afternoon of February 14th to tell her that he was prepared to fund the Loan. He testified that he asked her if she wanted the Loan documents sent to her lawyer, but she said no and asked if he had anyone who could witness signatures. According to Bill Lim, Dorina Huang asked if the Loan could be funded on February 15th, but he said the earliest would be February 16th.

**40**  After the call, Bill Lim provided hand-written instructions to Helena Shum to prepare the Loan documentation.

**41**  The instructions stated:

Instructions to HHS Feb 14/ 2011

Pls. have Isobel/Lena prepare an Inter-Alia mortgage on 8 properties.

Canmerica Mortgage Corporation - Mortgagee.

See attached 8 properties to be mortgaged.

Principal Amount (Face Value) $3,100,000.

Interest Rate: 4% per month

Due date: 3 months from Feb. 16/2011

Amount to be advanced: $2,500,000.

Legal Fees + Disb. to Limco for Mtge doc + registration $4,000 - All Incl.

Pls. speak to WHL if any questions.

Loan Mtg., P/N etc. as per standard.

**42**  Helena Shum prepared the Loan Agreement and Promissory Note and instructed a paralegal to prepare the other Loan documents. Helena Shum had considerable experience in acting on real estate transactions. She testified that she had the written instructions referred to above when she prepared the Loan Agreement and Promissory Note.

**43**  Although she could not specifically recall doing so, Helena Shum stated that she must have consulted with Bill Lim about some of the terms in the Loan Agreement. Specifically, she said she must have discussed the compounding period and the term that interest would be waived if the Loan was repaid within three months because those terms were not set out in his written instructions.

**44**  Helena Shum also stated that, after she prepared them, she left the Loan Agreement and Promissory Note for Bill Lim to review and that he did not ask her to make any changes to those documents. I infer from this that Bill Lim was satisfied with the terms of the Loan Agreement as drafted and that he did not instruct her to make any changes to it at any time prior to its execution and the advance made to the Borrowers.

**45**  Helena Shum testified that Bill Lim asked her to witness the signatures of the Borrowers on the Loan documentation and that she did so on February 15th in a meeting that lasted about 10 to 15 minutes. She confirmed that Bill Lim was never in the room with her and the Borrowers at the same time on February 15th.

**46**  She stated that her unfailing practice when witnessing signatures of non-clients on legal documents is to state:

1. That she was there to witness signatures only;
2. That she was not representing them;
3. That she would not review the documents or advise them with respect to them;
4. That if they understood and were satisfied with the documents they could go ahead and sign but that if they were not satisfied they should get clarification and sign at a later date; and,
5. Once they signed the documents no further changes could be made.

**47**  She stated that she followed her practice at the February 15th meeting.

**48**  Amy Wu and Dorina Huang stated that, in early 2011, Tracy Chung told them that Moneytrans was negotiating a large transaction that required it to invest $2,500,000. They testified that Tracy Chung asked them to help her to raise this amount by showing a lender the properties their families owned. Both said that they brought title documentation to Lim & Company to show the lawyers. They testified that they did not think they were borrowing money, but did not explain why they signed the Loan documents, or how merely showing title documents to lawyers would in any way assist Tracy Chung to borrow money.

**49**  All of the Defendants present at the February 15 meeting, at which the Loan documents were executed, testified that Bill Lim came into the meeting room where they were gathered and introduced Helena Shum. They all testified that after he left, Helena Shum said words to the effect of "are you here to borrow money?" and Dorina Huang and Amy Wu replied, "No, it is Tracy that is borrowing the money". Their evidence is that, when they said this, Helena Shum took the documents out of the room and returned a short time later.

**50**  Hector Tao and Jim Yu generally supported their wives' evidence. However, in cross examination they both agreed that they were apprehensive about the transaction, but were told by their wives that they did not have to worry because Tracy's company had a $10,000,000 security deposit that would be enough to repay any amount advanced to Tracy. From this evidence, I infer that both husbands knew that they were mortgaging their properties as security for a loan.

**51**  Helena Shum denied that anyone at the meeting stated that they were not there to borrow money, or said it was Tracy Chung who was borrowing the money. She testified that, if anyone had said anything to that effect, she would not have let them sign the Loan documents but would have sought further instructions.

**52**  She confirmed that she witnessed the Borrowers' signatures and placed a stamp beside her signature stating "witnessed as to execution only no advice sought or given". She stated that no one asked her for any legal advice and she did not give any.

**53**  With respect to the defendant Xi Bo Wu, Helena Shum said she found out at the February 15 meeting that his daughter, Amy Wu, had a power of attorney for him which had been filed in the Land Title Office, and that she considered that the power of attorney gave Amy Wu authority to sign the Loan documents, including a registerable Mortgage, on his behalf. She made no further inquiries about Xi Bo Wu or his relationship to the Loan or the Borrowers.

**54**  Finally, Helena Shum testified that, after she presented the order to pay directing Lim & Company to pay the proceeds to the Borrowers, they had a discussion among themselves and provided her with a hand written document setting out how they wanted the Loan proceeds to be distributed, that she made the requested changes to the order to pay, and that the Borrowers initialled the changes that had been made.

**55**  Bill Lim testified that at the end of the February 15 meeting and after the Loan documents had been signed, he met with the Borrowers and explained how the Loan worked.

**56**  The Loan documentation was signed and registered and the cheques representing the payout of the Loan proceeds were distributed by February 16, 2011.

**57**  Pursuant to the order to pay directed to it, Lim & Company paid out the Loan proceeds as follows:

|  |  |  |
| --- | --- | --- |
| 1. Sheung Ming Li | $ 1,900,000 |  |
| 2. Dorina Huang | $ 50,000 |  |
| 3. Amy Wu | $ 50,000 |  |
| 4. Tracy Chung | $ 496,000 |  |

**58**  Sheung Ming Li was not a party to the Loan, nor was he present at the February 15 meeting.

**59**  I will deal with the claims made against Sheung Ming Li later in these reasons. However, in relation to the narrative of events leading up to this litigation, I accept his evidence that he distributed all but $100,000 of the Loan proceeds he received to persons designated by Tracy Chung. In the result, except for the funds retained by Sheung Ming Li and $50,000 each received by Dorina Huang and Amy Wu, all of the Loan proceeds were either paid to Tracy Chung directly or distributed at her direction.

**60**  On February 15, 2015, after the Loan documentation had been signed, Dorina Huang, Amy Wu and Tracy Chung attended at the office of Stephen Chong, a notary public practicing in Richmond, and signed an agreement that Mr. Chong witnessed. The agreement is entitled Loan Agreement and describes Tracy Chung and Moneytrans as borrowers and Dorina Huang and Amy Wu as lenders. In this loan agreement, the borrowers acknowledge receipt of a loan for $3,100,000 from the lenders and agreed to repay that amount to the lenders by May 16, 2011, the same date that the Canmerica Loan was due.

**61**  Both Amy Wu and Dorina Huang testified that Tracy Chung gave a paper to Mr. Chong and that he had the loan agreement prepared. They then signed it before him and he notarized it. However, I accept Mr. Chong's evidence that he did not prepare this loan agreement and that his role was limited to notarizing it for the parties. The terms of this loan agreement are clear. The parties acknowledge in it that Dorina Huang and Amy Wu are making a loan to Tracy Chung and Moneytrans for the same amount and payable at the same time as the Loan Agreement between Canmerica and the Borrowers.

**62**  Sometime after she obtained substantially all of the Loan proceeds, Tracy Chung left Canada to return either to Hong Kong or China. Except for a further $50,000 recovered by Amy Wu from her in March 2011, the Defendants have not been able to recover any part of the money that Tracy Chung received from the proceeds of the Loan, or any other funds loaned to her.

**63**  The Defendants were dependent upon Moneytrans or Tracy Chung repaying them to provide the funds required to repay the Loan. Because no such repayment was received, they were unable to repay Canmerica. On April 27, 2011, Bill Lim wrote to the Borrowers on the letterhead of Lim & Company reminding them of their obligation to repay the Loan. The material parts of that letter are as follows:

Dear Sirs/Madams:

**RE: Loan in the amount of $3,100,000.00 in favour of Canmerica Mortgage Corporation**

We are writing to remind you that the above-noted loan is scheduled to mature on May 16, 2011. You will recall that if the loan is not repaid by that date, that interest at a rate of 4% per annum shall apply to the outstanding balance.

Please arrange for full payment in the amount of $3,100,000.00 to be paid to Canmerica Mortgage Corporation on or before May 16, 2011 at the following address:

c/o Lim & Company

#202-2232 West 41st Avenue

Vancouver, B.C.

V6M 1Z8

We trust the above to be in order.

**64**  When the Borrowers failed to pay the amount sought in the April 27, 2011 letter, Bill Lim retained Mr. Brian Markus, a lawyer with knowledge of foreclosure matters, to enforce the Mortgage. However, in a demand letter dated May 25, 2011, Mr. Markus did not demand payment of the Principal Sum owing pursuant to the Mortgage and Loan Agreement. Instead, he demanded payment only of the sum of $2,500,000 with simple interest at 4% per month. The total amount demanded in the demand letter was $2,830,299.60

**Position of the Parties**

**65**  Canmerica's position is that it has a validly enforceable Loan and Mortgage requiring the Defendants to pay the Principal Sum of $2,500,000 with simple interest at 4% per month from February 16, 2011, and that the Defendants have shown no grounds on which the relief that it seeks can be denied. Canmerica submits that the Loan does not require payment of interest at a criminal rate.

**66**  Canmerica's alternative position is that if the mortgage did require payment of interest at a criminal rate, in the circumstances, the Court should reduce the effective rate to 60% per annum and grant judgment and an order nisi of foreclosure on that basis.

**67**  As against Canmerica's claim, Hector Tao and Dorina Huang's position is that:

1. The Loan transaction is unconscionable and ought to be set aside against them, except for requiring Dorina Huang to repay the $50,000 of Loan proceeds she received on February 16, 2011.
2. The Loan requires the payment of interest at a criminal rate and should not be enforced for that reason or that no interest should be payable to Canmerica.
3. In the alternative, if the Loan and Mortgage are found to be enforceable against them, that they be granted judgment against the Lawyers for ***negligence***, recklessness and breach of fiduciary duty in any amount they are found liable to pay Canmerica.
4. In the further alternative, if they are not successful in having the Canmerica Loan and Mortgage set aside or obtaining judgment against the Lawyers, Tracy Chung, Moneytrans and Sheung Ming Li should be held responsible for paying the amounts owed to Canmerica and that they should be required to pay Canmerica only $50,000 plus court order interest from February 16, 2011.

**68**  Dorina Huang and Hector Tao also seek judgment against Tracy Chung for $1,670,000 for other funds loaned to her prior to February 2011.

**69**  Amy Wu and Jim Yu seek dismissal of the claim against them and judgment against the Lawyers on essentially the same grounds advanced by Dorena Huang and Hector Tao.

**70**  Xi Bo Wu's position at trial was as follows:

1. The Loan Agreement and Mortgage are not enforceable against him because Canmerica cannot rely on Amy Wu's execution of the Loan documents pursuant to the power of attorney.
2. The Loan Agreement and Mortgage require payment of a criminal interest rate and should be set aside in their entirety against him.
3. The Loan Agreement and Mortgage are unconscionable either at common law or pursuant to the *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2* [*BPCPA*].
4. The Loan Agreement and Mortgage were not executed in compliance with s. 47 of the *Land Title Act*, *R.S.B.C. 1996, c. 250* [*Land Title Act*].

**71**  All the Defendants submit that if the Mortgage and Loan Agreement are enforceable as against them, they are entitled to damages from the Lawyers because:

1. The Lawyers owed a fiduciary duty to them, which they breached.
2. The Lawyers owed a duty of care to them, which they breached.

**72**  The Lawyers deny that they owed any duty of care or fiduciary duty to the Defendants. They submit that there was no evidence led to establish that any such duties are owed and that, even if they did owe such duties, there is no evidence that they breached any applicable standard of care to the Defendants.

**73**  Sheung Ming Li submits that he had no knowledge that Tracy Chung was involved in a dishonest or improper scheme. He submits that he was merely accommodating her request with respect to the distribution of the Loan when he received Loan Proceeds of $1,900,000. He submits that, except for $100,000, he distributed the funds he received at Tracy Chung's direction and that the $100,000 he retained was a loan from her.

**74**  In the course of preparing these reasons, I had a concern that Xi Bo Wu might have been in a position to argue that the Loan documents were not enforceable against him because, by executing them on his behalf, Amy Wu breached her fiduciary duty to him as his agent, and that it was arguable that Canmerica could be held to have knowingly received property, in the form of the mortgage, obtained as a result of that breach of fiduciary duty.

**75**  I accordingly asked counsel to make further submissions as to whether it was open to me on the pleadings to find a knowing receipt of property obtained by breach of fiduciary duty, and, if not, whether Xi Bo Wu should be given leave to amend his defence to plead knowing receipt. In his further submissions, Xi Bo Wu's counsel argued that his response to civil claim did raise that issue, but he also applied to amend the response to civil claim to plead knowing receipt expressly.

**76**  I conclude that the response to civil claim relied on at trial did not raise any issue of knowing receipt.

**77**  I have also concluded that it would be unjust to Canmerica to permit an amendment to raise that issue at this stage of the proceedings.

**78**  The essential precondition to a claim based on knowing receipt is the existence of a breach of trust or of fiduciary duty. Xi Bo Wu did not allege any such breach by Amy Wu at any time up to the completion of argument in this case. He did not seek leave to amend to claim breach of fiduciary duty against her even after receiving my memorandum to the parties asking for further submissions.

**79**  Further, there was nothing in the evidence led by Xi Bo Wu to suggest that he was making any such claim against his daughter. Initially, the same counsel represented Amy Wu and Xi Bo Wu and filed a response to civil claim jointly for Amy Wu, Jim Yu and Xi Bo Wu, although by the time of trial he acted only for Xi Bo Wu.

**80**  In these circumstances, counsel for Canmerica quite understandably did not find it necessary to cross examine Xi Bo Wu on the issue of what information he had about the transaction, what role, if any, he played in the dealings between his daughter and Tracy Chung, and why he did not raise the issue of her unauthorized use of the power of attorney as soon as he became aware that she had used it to execute the Loan documents.

**81**  The principles applicable to an application to amend pleadings after trial were addressed by Gray J. in *Lam v. Chiu*, [*2012 BCSC 677*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3NB-00000-00&context=) at para. 10:

[10] Counsel have not been able to find any law relating to this, which is perhaps not surprising. I am going to refer to a decision of Mr. Justice Harvey in *Macdonald v. Macdonald Estate*. That is reported at [*(1996), 21 B.C.L.R. (3d) 379*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2JT-00000-00&context=), and I will read the five principles he sets out for consideration when a party applied to amend pleadings at the end of a trial after the close of evidence:

1. is it inconsistent with the pleadings already filed on behalf of the party seeking the amendment;
2. is it inconsistent with evidence already tendered by that party and his witnesses at trial and on discovery;
3. if it had been asked for at the outset of the trial, would it have changed the whole course of the trial;
4. would it be unfair to the opposite party;
5. is it necessary for the purpose of determining the real issues raised or depending upon the pleadings?

**82**  In this case, the pleading is not necessarily inconsistent with Xi Bo Wu's previous pleadings, although it is difficult to reconcile it with the joint defence filed by Amy Wu and Xi Bo Wu. However, I am satisfied that had the issue been pleaded at the outset, it would have substantially changed the manner in which Canmerica dealt with the evidence of Xi Bo Wu. In addition, counsel would have been in a position to cross-examine Amy Wu on this point.

**83**  Based on the pleadings as they stood during the trial, counsel did not need to address these issues. In the result, the only evidence about how much Xi Bo Wu knew about his daughter's dealings with Tracey Chung and the Loan was his simple denial that he knew she used the power of attorney to execute the documents on his behalf and her confirmation of that evidence.

**84**  I also find it difficult to understand how one counsel could have acted on behalf of Amy Wu and Xi Bo Wu if Xi Bo Wu genuinely believed that Amy Wu acted improperly in executing the Loan documents. I find that counsel for Canmerica could not reasonably have contemplated that Xi Bo Wu considered that his daughter had acted in breach of her fiduciary duties to him by using the power of attorney to execute the Loan documents. I am also satisfied that the trial, insofar as it related to Xi Bo Wu, would have been conducted quite differently by Canmerica if such a plea had been made.

**85**  In all of the circumstances, I therefore conclude that it is not in the interests of justice to permit Xi Bo Wu to raise this issue at this late stage of the proceedings. I will not therefore consider this issue in my reasons.

**Issues**

**86**  The following issues arise in this case:

1. Do the Loan Agreement and Mortgage require payment of a criminal rate of interest contrary to s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?
2. If the answer to question 1 is yes, what consequences flow from the agreement requiring payment of interest at a criminal rate? In other words, what is the appropriate remedy?
3. Are the Loan Agreement and Mortgage unenforceable against the Defendants because they are unconscionable?
4. Is Xi Bo Wu bound by the Loan Agreement and Mortgage executed by Amy Wu pursuant to the power of attorney?
5. Does s. 47 of the *Land Title Act* provide any defence to the Defendants?
6. Is the *BPCPA* applicable to the Loan?
7. Are the Lawyers liable to the Defendants for any loss the Defendants suffered as a result of the Loan?
8. What remedy, if any, do the Defendants have against Sheung Ming Li for the role he played in receiving and distributing $1,900,000 of the Loan proceeds?
9. Are the Defendants entitled to judgment against Tracy Chung for any loss they suffered as a result of entering into the Loan Agreement and Mortgage?
10. Is Dorina Huang entitled to judgment against Tracy Chung for loans made to her prior to the Loan Agreement and Mortgage?
11. What costs order is appropriate?

**Credibility**

**87**  There was considerable conflict in the evidence. In addition, much of the uncontradicted evidence has been challenged. I have already addressed some credibility issues in setting out the background facts in this case. I will address specific credibility issues in making findings of fact with respect to the issues identified in the preceding paragraph. However, at this point, before addressing the issues that arise in this case, I will make some general observations about the credibility of the witnesses.

**88**  I found Helena Shum, Justin Lim, Stephen Chong and Michelle Cheung to be credible witnesses whose evidence I accept. They all gave their evidence in a straightforward manner and did not attempt to embellish or exaggerate it. Their testimony is not contradicted by any documentary evidence. In addition, Stephen Chong and Michelle Cheung are independent witnesses who have no interest in the outcome of this case.

**89**  I am unable to reach a similar conclusion about the evidence of the other witnesses. While I accept some of their evidence, I have reservations about other parts of it. I will explain why I reject some of the evidence of Bill Lim, the Defendants and Sheung Ming Li in the course of dealing with each of the issues I have identified above.

**90**  With these preliminary comments in mind I turn to a consideration of the issues.

**Do the Loan Agreement and Mortgage Require Payment of Interest at a Criminal Rate?**

**91**  I will address this issue first because its resolution is also relevant to the question of whether the transaction is unconscionable. A finding of a criminal rate of interest is one factor relevant to determining whether a transaction is unconscionable.

**92**  Section 347 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides:

347**.** (1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is

(*a*) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) guilty of an offence punishable on summary conviction and liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.

**93**  It is now settled law that s. 347 creates an offence that can be committed in two different ways; by entering into an agreement to receive interest at a criminal rate or by receiving a payment at a criminal rate: *Degelder Construction Co. v. Dancorp Developments Ltd.*, [*[1998] 3 S.C.R. 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M40P-00000-00&context=). Because the Loan has not been repaid, I am concerned with only the first; entering into an agreement to receive interest at a criminal rate.

**94**  No party led any actuarial evidence as to the effective interest rate charged on the Loan. When I raised my concern about this in the course of the trial, the parties filed an agreed statement of facts in which they agreed that the effective interest rate of requiring payment of $600,000 in interest over three months on principal of $2,500,000 is 96% per annum.

**95**  I am satisfied, based on the agreed statement of facts and on the application of simple arithmetic to the stated terms of the Loan Agreement and Mortgage, that if the Borrowers were required to repay $3,100,000 plus compound interest on that amount at 4% per month, calculated monthly in respect of an advance of $2,496,000, the effective annual rate of interest on the Loan was at least 96%.

**96**  The Defendants submit that the Loan Agreement clearly requires payment of interest at a criminal rate. Canmerica submits that, properly construed, the Loan Agreement does not require payment in the manner set out in the preceding paragraph.

**97**  I find that the terms of the Loan Agreement and Mortgage do require payment by the Borrowers of the sum of $3,100,000 together with interest at 4%, compounded and calculated monthly, and therefore require payment at an illegal rate pursuant to s. 347 of the *Criminal Code*.

**98**  The Loan Agreement sets out the agreed obligations of the Borrowers to pay principal and interest. The recitals to the Loan Agreement provide:

WHEREAS:

1. The Lender has agreed to loan to the Borrowers the sum of Three Million One Hundred Thousand Dollars ($3,100,000.00) (the "Principal Sum"), a portion of which is to be advanced to the Borrowers on or about February 16, 2011.
2. The Borrowers agree to re-pay the Loan to the Lender and agree to provide the Security as set out in this Agreement.

**99**  Paragraphs 1-3 provide as follows:

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of One Dollar ($1.00) and the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each of the parties, the parties agree, each with the other, as follows:

1. THE LOAN

1.1 The Lender shall, on the terms and conditions of this Agreement, loan to the Borrowers the amount of Three Million One Hundred Thousand Dollars ($3,100,000.00) in lawful money of Canada as a loan (the "Loan").

1.2 The Lender shall advance a portion of the Principal Sum, namely $2,500,000.00 to the Borrowers on or about February 16, 2011.

1.3 The advance under the Loan shall be evidenced by a Promissory Note signed by the Borrowers in the form set out in Schedule A attached hereto.

2. INTEREST ON THE LOAN

2.1 The Borrowers shall pay interest to the Lender on the amount outstanding at the interest rate equal to four percent (4%) per month, calculated monthly and compounded monthly, not in advance, both before and after maturity, and both before and after default, until the Loan and interest thereon has been repaid in full.

2.2 The Lender agrees to waive all interest charges provided the Borrowers repay the Principal Sum in full on or before May 16, 2011.

3. REPAYMENT OF THE LOAN

3.1 Subject to clause 3.2, the Borrowers shall repay the Loan plus interest to the Lender on or before the earlier of the following:

1. May 16, 2011, and
2. the date on which a Borrower sells, assigns, transfers, or otherwise disposes of any of the properties comprising the Property.

3.2 The parties herein agree that if the Property, or any portion of the Property is sold, assigned, transferred, or otherwise disposed of, the Principal Sum and interest shall, at the Lender's option, become immediately due and payable.

**100**  Canmerica relies on para 2.1 of the Loan Agreement, which states that the Borrowers shall pay interest on the "amount outstanding." It argues that the phrase "amount outstanding" is intended to refer only to the amount actually advanced pursuant to the Loan Agreement and not the Principal Sum as defined in recital A. It also relies on the term of the Promissory Note that defines the Principal Sum as $2,500,000 and charges interest on that amount only.

**101**  I do not accept Canmerica's submission. It is premised on equating "amount outstanding" with the amount actually advanced to the Borrowers. However, the Loan Agreement makes a clear distinction between the amount the Borrowers are required to repay and the amount actually advanced to them.

**102**  Any doubt as to the obligation of the Borrowers to pay the full amount of $3,100,000 is resolved by reviewing the recitals and paragraphs 1 to 3 of the Loan Agreement.

**103**  The recitals define the Principal Sum as $3,100,000.

**104**  Paragraph 1.1 defines the "Loan" as $3,100,000 and para 3.1 obligates the Borrowers to repay the Loan on or before May 16, 2011.

**105**  Paragraph 1.2 of the Loan Agreement stipulates that "the Lender shall advance a portion of the Principal Sum, namely $2,500,000" (emphasis added) to the Borrowers on or about February 16, 2011, making it clear that $2,500,000 is only a portion of the amount outstanding. In paragraph 2.2 Canmerica agrees to waive all interest if the Principal Sum is repaid on or before May 16, 2011. This is clearly a reference to interest on the Principal Sum, that is, $3,100,000.

**106**  Paragraph 3.3 gives Canmerica the option to demand payment of the Principal Sum if any part of the land securing the Loan is sold.

**107**  These clauses refute the idea that the Borrowers were only obligated to repay the amount actually advanced.

**108**  The difference between the Principal Sum and the amount actually advanced was intended to be a bonus payable by the Borrowers. A bonus is a well-recognized means of increasing the effective rate of return on a loan.

**109**  Consistent with the terms of the Loan Agreement, the Mortgage states that the principal amount of the Mortgage is $3,100,000, the interest rate is 4% per month and the interest calculation period is monthly. Paragraph 4 of the Standard Mortgage Terms, which constitutes an agreement between the Mortgagors and Mortgagee, require the Mortgagors to repay the mortgage money to the Mortgagee. The Standard Mortgage Terms define "mortgage money" as the principal amount together with interest and all other amounts owed by the mortgagor under the Mortgage.

**110**  The combined provisions of the Loan Agreement and Mortgage leave no doubt that the Borrowers were required to pay $3,100,000 plus interest on that amount at 4% per month, calculated monthly, subject only to forgiveness of interest on the Principal Sum if the Loan was repaid on or before May 16, 2011.

**111**  Paragraph 1.3 of the Loan Agreement expressly states that the Promissory Note evidences the advance of $2,500,000. There is no indication, either in the Promissory Note or the Loan Agreement, that the Promissory Note reduces or modifies the Borrowers' obligations set out in the Loan Agreement and Mortgage. The Promissory Note therefore does not assist Canmerica on this issue.

**112**  Canmerica also relies on Bill Lim's oral evidence to the following effect:

1. The Borrowers were required to pay $3,100,000 only if the Loan was repaid by May 16, 2011;
2. If the Borrowers failed to repay the Principal Sum, interest would accrue only on the amount actually advanced at 4% per month simple interest from February 16, 2011 to the date of payment; and
3. The provisions in the Loan Agreement, Promissory Note and Mortgage requiring the payment of compound interest were a mistake.

**113**  No objection was made to Bill Lim's evidence to the above effect. However, I find that this evidence was not admissible on the issue of the proper construction of the Loan Agreement and Mortgage. The parol evidence rule of contractual interpretation precludes admission of evidence of the parties' subjective understanding of the terms of an agreement for the purpose of interpreting an agreement.

**114**  Even if Bill Lim's evidence on this point had been admissible, I would have rejected it for the reasons I will elaborate on when I deal with the issue of the appropriate remedy to address the criminal rate of interest.

**115**  I therefore conclude that the Loan Agreement and Mortgage require the Borrowers to pay the sum of $3,100,000 together with interest on that amount at 4% calculated and compounded monthly and constitute an agreement by Canmerica to receive interest at a criminal rate prohibited by s. 347 of the *Criminal Code*.

**What Remedy Should be Granted for the Breach of s. 347 of the *Criminal Code*?**

**116**  Historically, a finding of illegality of a contract resulted in the contract being void. However, in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [*2004 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B10C-00000-00&context=), the Supreme Court decided that courts that find that an agreement has violated s. 347 of the *Criminal Code* must consider what remedy is appropriate on a spectrum from striking down the entire contract at one extreme to reducing the interest payable to the maximum rate of 60% at the other.

**117**  At para. 6 of *Transport North American*, Arbour J. articulated the correct approach:

6 A spectrum of remedies is available to judges in dealing with contracts that violate s. 347 of the *Code*. The remedial discretion this spectrum affords is necessary to cope with the various contexts in which s. 347 illegality can arise. At one end of the spectrum are contracts so objectionable that their illegality will taint the entire contract. For example, exploitive loan-sharking arrangements and contracts that have a criminal object should be declared void *ab initio*. At the other end of the spectrum are contracts that, although they do contravene a statutory enactment, are otherwise unobjectionable. Contracts of this nature will often attract the application of the doctrine of severance. The agreement in this case is an example of such a contract. In each case, the determination of where along the spectrum a given case lies, and the remedial consequences flowing therefrom, will hinge on a careful consideration of the specific contractual context and the illegality involved.

**118**  At para 24., Arbour J. approved the process for analyzing what remedy is appropriate set out in the judgment of Blair J.A. in *William E .Thomson Associates Inc. v. Carpenter* [*(1989), 61 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGCG-S2MY-00000-00&context=):

24 In *Thomson*, at p. 8, Blair J.A. considered the following four factors in deciding between partial enforcement and declaring a contract void *ab initio*: (i) whether the purpose or the policy of s. 347 would be subverted by severance; (ii) whether the parties entered into the agreement for an illegal purpose or with an evil intention; (iii) the relative bargaining positions of the parties and their conduct in reaching the agreement; and (iv) whether the debtor would be given an unjustified windfall. He did not foreclose the possibility of applying other considerations in other cases, however, and remarked (at p. 12) that whether "a contract tainted by illegality is completely unenforceable depends upon all the circumstances surrounding the contract and the balancing of the considerations discussed above and, in appropriate cases, other considerations".

**119**  The first consideration I must address is whether partial enforcement of the contract would subvert the purpose of s. 347. In my view, it would not. This is not a case in which the entire transaction should be tainted with illegality. In *Transport North American,* the Court directed that violations of s. 347 that do not involve loan sharking or contracts made for an illegal purpose should be approached cautiously.

**120**  The second consideration I must address is whether the parties entered the agreement for an illegal purpose or with an illegal intention. I am satisfied that Canmerica was not engaged in loan sharking. Loan sharking involves some element of coercion or intimidation to collect the debt. While the Loan did require payment of interest at a usurious rate, there was no evidence that Canmerica engaged in any intimidation or coercion either in its formation or collection. However, I am satisfied that Canmerica knowingly charged interest at the criminal rate of more than 60%, and that the remedy in this case should reflect that fact.

**121**  Bill Lim's state of mind is relevant to the issue of what remedy is appropriate to address the illegal interest provisions of the Loan Agreement and Mortgage. Had I found that he genuinely believed that Canmerica would receive interest calculated in accordance with his oral evidence, I would have taken that into account in deciding whether and to what extent the illegal interest provision should be severed and the rest of the agreement enforced.

**122**  However, I am unable to accept Bill Lim's evidence that he intended to require payment only of the amounts actually advanced without the bonus and intended to charge simple interest at 4% per month only on that amount. I found Bill Lim's evidence on this issue to be contrived and designed to persuade the Court that he did not intend to charge criminal interest. I find that a person of Bill Lim's intelligence, experience and education could not honestly have believed that the $600,000 bonus stipulated for in the Loan Agreement and Mortgage would only have been payable if the Loan was repaid on time. I am satisfied that he knew that the rate of interest payable on the Loan was significantly higher than 60% per annum.

**123**  Apart from the clear wording of the Loan Agreement and Mortgage to the contrary, there are several factors that contradict Bill Lim's evidence. The first is that, if that was his intention, the Borrowers would have been penalized for repaying the Loan off on time. He testified that the only circumstance in which the Borrowers would be required to pay the Principal Sum, defined in the Loan Agreement as $3,100,000, was if they repaid the Loan on or before its maturity date of May 16, 2011. He also testified that he intended to charge only simple interest on the amount actually advanced if the Loan was not paid on time. If this evidence is to be believed, the Borrowers would have had to repay $3,100,000 to repay the Loan on May 16, 2011 but would have been required to pay only $2,803,288 (three months plus one day's interest on $2,500,000) on May 17, 2011.

**124**  In addition, there is no dispute that there was to be only one advance under the Loan. If Bill Lim intended only to require payment of $2,500,000 after May 16, it is difficult to understand why the Loan is defined in the Loan Agreement and Mortgage as $3,100,000.

**125**  Bill Lim testified that he discussed his written instructions with Helena Shum and that he reviewed some of the documents she prepared and was satisfied that the documents she prepared were consistent with his understanding of the terms of the Loan. Helena Shum testified that she must have discussed the interest provisions with Bill Lim because the Loan documents contain provisions not set out in his written instructions. I cannot accept that Helena Shum, a careful solicitor, would have drafted interest and repayment provisions so widely divergent from those asserted by Bill Lim.

**126**  In addition, Bill Lim testified that he kept careful notes of his discussions and meetings with the Borrowers. However, I can find no clear statement of any discussion or agreement supporting his version of the terms of the Loan in those notes. In his oral evidence he said that he met with the Borrowers and explained how the Loan worked on February 15th, after they had signed the Loan documentation. However, his notes of that meeting contain no reference to the terms of the Loan and instead focus on the value of the security for the Loan. Even in his oral evidence, he did not expressly say that he told the Borrowers that if they did not repay the Loan by May 16, they would only be required to pay $2,500,000 with simple interest at 4%. His evidence was that he told them that they had to repay $3,100,000 by May 16, and that if they did not they would have to pay interest at 4% per month.

**127**  I cannot accept that Bill Lim, who relied on his notes in giving his evidence, would not have documented what at the very least would have been highly unusual terms of repayment of any loan.

**128**  I also consider it significant that the first time that a demand was made based on a $2,500,000 Loan amount was after Canmerica retained foreclosure counsel. There is no suggestion that interest should be calculated in that way in Bill Lim's own letter of April 27, 2011.

**129**  I am therefore forced to conclude that Bill Lim was not being truthful in his evidence that he only intended to require repayment of the sum of $2,500,000 with simple interest of 4% per month from the Borrowers. I find that Bill Lim gave this explanation to avoid having Canmerica face the consequences of a finding of a criminal rate of interest.

**130**  I find that Bill Lim's subjective intention was to receive interest at a rate in excess of 60% per annum. On this issue, I accept Dorina Huang's evidence that Tracy Chung offered Bill Lim interest at 8% per month on the Loan and find that Bill Lim told Tracy Chung that he could not write the Loan up in that way. However, even on Bill Lim's own evidence, he clearly intended that Canmerica would receive interest at a criminal rate, 8% per month, from February 16, 2011 to May 16, 2011, a rate the parties agree was 96% per annum, but which was probably significantly higher.

**131**  I find that simply reducing the rate of interest to the maximum rate permitted by law would not adequately address the purpose of s. 347 in this case. This was not a case in which any informed person could reasonably have believed that the rate of interest charged was less than 60% per annum. Unlike the facts in *Transport North America,* charging the high rate did not arise inadvertently from the insertion of a provision for additional compensation to the lender.

**132**  In *William E. Thompson Associates Inc.*, Blair J.A. referred with approval to *Mira Design Co. Ltd. v. Seascape Holdings Ltd.*, [*[1982] 4 W.W.R. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X2D7-00000-00&context=), a decision of Huddart L.J.S.C., as she then was, in which she held that the purpose for which the loan was made is an important element in determining how the court should react to an agreement to receive interest at a criminal rate:

18 In *Mira Design Co. Ltd. v. Seascape Holdings Ltd.*, [*[1982] 4 W.W.R. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X2D7-00000-00&context=), [*36 B.C.L.R. 355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X2D7-00000-00&context=), [*23 R.P.R. 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X2D7-00000-00&context=) (B.C.S.C.), the face value of a mortgage was $100,000 which had been given to secure the unpaid balance of the purchase price of property of $84,000 with the result that the interest rate prescribed in the mortgage exceeded 60%. Huddart L.J.S.C. held that the agreement was severable and that, although the provisions for the payment of interest were not enforceable, the repayment of the principal sum was. Section 347, in her opinion, provides only for punishment of persons agreeing to receive interest at criminal rates but does not prohibit agreements providing for such rates. She stated at p. 104:

The purpose of s. 305.1 [347] is to punish everyone who enters into an agreement or arrangement to receive interest at a criminal rate. It does not expressly prohibit such behaviour, nor does it declare such an agreement or arrangement to be void. The penalty is severe, and designed to deter persons from making such agreements ... It is designed to protect borrowers ... It is not designed to prevent persons from entering into lending transactions per se. As regards subject matter, its scope and application are limited to agreements regarding interest.

19 Madam Justice Huddart was of the view that whether an agreement contravening s. 347 was enforceable had to be determined in each case by ascertaining its primary purpose. She said at p. 101: "If a contract has an illegal purpose or is fundamentally illegal it will be void ab initio and in toto."

20 She found that the primary purpose of the mortgage in Mira was to secure the unpaid balance of the purchase price. It was the "true consideration" for the agreement.

**133**  *Mira* was of course decided before *Transport North American,* and must be read in light of that decision. Nevertheless, its underlying reasoning is consistent with the approach mandated in *Transport North American.* In my view, Canmerica's conduct in this case is more worthy of sanction than that of the lenders in *William E. Thompson* and *Transport North American.* I am satisfied that Canmerica did enter into this agreement precisely for the purpose of obtaining interest at a criminal rate, that is, a rate in excess of 60% per annum.

**134**  The third factor identified in *Transport North American* is the relative bargaining power of the parties and their conduct in reaching the agreement in question. I find that the Defendants were desperate to obtain the Loan proceeds because, in their minds, Moneytrans needed the proceeds to close the transaction that Tracy Chung said would permit repayment of the amounts the Defendants had previously advanced to her. By February 2011, it appears that some of the other lenders were pressing for repayment and Dorina Huang and Amy Wu had advanced a significant percentage of their own families' net worth to Tracy Chung. The Defendants were naïve in making investment decisions. They also, to the knowledge of Canmerica, entered into the Loan Agreement and carried out the transaction without the benefit of legal or other professional advice. Unlike the borrowers in *Transport North American*, they were not pursuing a well thought out commercial plan. I am satisfied that the Defendants were disadvantaged with respect to the interest rate charged by not having legal advice.

**135**  In addition, in this case, Canmerica contracted for a criminal rate of interest in respect of a transaction in which the principal amount of the Loan was well secured.

**136**  Finally, except for the receipt of the $50,000 received by Dorina Huang and Amy Wu respectively, the Defendants will not be enriched if the entire transaction is set aside. However, if the Loan is set aside the Defendants will benefit by transferring from themselves to Canmerica the loss they suffered by allowing Tracy Chung to take the Loan proceeds. Given the overall circumstances of the Loan transaction, I do not consider that such a result would be equitable to Canmerica.

**137**  In *Transport North American*, the Supreme Court restored the trial judgment that allowed the lender to recover principal plus interest at the maximum legal rate of 60%. However, in that case it was clear that the Lender had accommodated a sophisticated transaction on the part of the borrower that permitted the borrower to preserve full equity ownership of its business. The transaction was also one in which the lender assumed significant risk and the borrower was sophisticated and was legally represented throughout.

**138**  In *William E. Thompson Associates Inc.,* the Ontario Court of Appeal restricted the creditor, who was found to have charged a criminal interest rate unintentionally, to receipt of repayment of the principal amount of the Loan only. In that case, the court stressed that each case must be addressed on its own facts and circumstances.

**139**  In *Eha v. Genge*, [*2007 BCCA 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HJ-00000-00&context=), the Court of Appeal reversed a trial judgment that had refused to enforce repayment of the principal and interest of a pawn transaction that contained a criminal rate of interest. In brief reasons, the court referred to *Transport North American*, and held that the appropriate remedy in the case before the court was to permit the lender to recover principal plus interest at court order rates.

**140**  Taking the guidance set out in *Transport North American* into account, and having regard to the conduct of the parties, I find that in this case the appropriate remedy is to sever the interest provisions from the balance of the transaction and substitute an obligation on the Borrowers to repay only the amount actually advanced.

**141**  I have reached this conclusion principally because I am satisfied that Canmerica's object in making the loan was to earn interest in excess of 60% per annum and this case therefore lies at the more serious end of the spectrum addressed in *Transport North American.* I have also relied on the other factors I have just outlined. In so doing I have been guided and attempted to apply the comments of Arbour J. at para 40 of *Transport North American*:

Thus, the appropriate approach is to vest the greatest possible amount of remedial discretion in judges in courts of first instance. The spectrum of available remedies runs from a court holding contracts in violation of s. 347 void ab initio, in the most egregious and abusive cases, according to the criteria identified in Thomson, supra, to notional severance. In the determination of where along the spectrum a particular contract lies, the considerations identified in Thomson by Blair J.A. should be referred to and analysed carefully. Although Blair J.A. was considering the desirability of severing illegal interest from principal, the same factors are helpful in determining whether to reduce illegal interest to a legal level.

**142**  In accordance with the definition of credit advanced in s. 347 of the *Criminal Code*, the amount actually advanced is $2,496,000. Subject to the other defences I will address, the amount of the judgment and redemption amount will therefore be $2,496,000.

**Is the Loan Agreement Unconscionable or Otherwise Unenforceable?**

**143**  The onus is on the Defendants to establish that the Loan was unconscionable.

**144**  The Defendants submit that, taking all of the circumstances relating to the Loan into account, it would be unconscionable for Canmerica to enforce it. They say that the Defendants collectively were unsophisticated, had limited ability to read or understand English and were the victims of a Ponzi-type scheme perpetrated on them by Tracy Chung that left them in a particularly vulnerable position.

**145**  The Defendants characterize Bill Lim as being greedy and unscrupulous. They say that he took advantage of the desperate situation that the Defendants found themselves in to impose an agreement containing obligations that they had no prospect of satisfying.

**146**  The test for determining whether a contract is unconscionable is well established. It requires a two-step analysis. Firstly, the party alleging that a contract is unconscionable must establish that there was an inequality of bargaining power and that there was substantial unfairness in the bargain obtained by the stronger party. If the weaker party establishes these two factors, the onus shifts to the stronger party to establish that the contract was fair, just and reasonable.

**147**  In *Murray v. Affordable Homes Inc.*, [*2007 BCSC 1428*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1FT-00000-00&context=), Brown J. summarized the applicable principles:

[29] The first part of the test requires the plaintiff to show that there was inequality in bargaining power. If this inequality exists, the court must determine whether the power of the stronger party was used in an unconscionable manner. The most important factor in answering the second inquiry is whether the bargain reached between the parties was fair (*Warman v. Adams*, [*2004 BCSC 1305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S34C-00000-00&context=), [*[2004] 17 C.C.L.I. (4th) 123*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S34C-00000-00&context=) at para. 7).

[30] If both parts of the test are met, a presumption of fraud is created and the onus shifts to the party seeking to uphold the transaction to rebut the presumption by providing evidence that the bargain was fair, just and reasonable. (*Morrison*, at 713).

[31] The court will look to a number of factors in determining whether there was inequality of bargaining power: the relative intelligence and sophistication of the plaintiff; whether the defendant was aggressive in the negotiation; whether the plaintiff sought or was advised to seek legal advice; and whether the plaintiff was in necessitous circumstances which compelled the plaintiff to enter the bargain (*Warman* at para. 8). The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered. The test in *Morrison* has also been stated as a single question: was the transaction as a whole, sufficiently divergent from community standards of commercial morality? (*Harry v. Kreutziger* [*(1978), 95 D.L.R. (3d) 231*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BW-00000-00&context=) at 241, [*9 B.C.L.R. 166*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BW-00000-00&context=).)

**148**  Many of the considerations set out in para. 31 of *Murray* are similar to those to be considered in determining what remedy is appropriate in cases involving a criminal rate of interest. The similarity between the two situations lies in determining what outcome will properly balance the protection of the weaker party and the societal interest of maintaining to the greatest extent possible the sanctity of contract and avoidance of unjust enrichment of one party at the expense of the other.

**149**  In *Roy v. 1216393 Ontario Inc.*, [*2011 BCCA 500*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22PV-00000-00&context=), Tysoe J.A., speaking for the court, reiterated the elements of unconscionability:

[29] The Vendor has cited several case and text authorities discussing the elements of unconscionability. It is sufficient for our purposes to set out the following from the reasons of Madam Justice McLachlin (as she then was) in *Principal Investments Ltd. v. Thiele Estate* [*(1987), 12 B.C.L.R. (2d) 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-62MH-00000-00&context=) at 263, [*37 D.L.R. (4th) 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-62MH-00000-00&context=) (C.A.):

Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrsion v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, [*55 D.L.R. (2d) 710*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G20G-00000-00&context=) (B.C.C.A.); *Harry v. Kreutziger* [*(1978), 9 B.C.L.R. 166*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BW-00000-00&context=), [*95 D.L.R. (3d) 231*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BW-00000-00&context=) (C.A.).

**150**  In this case, essentially because of the circumstances set out in paragraph 134 of these reasons, I am satisfied that the Defendants have established that there was an inequality of bargaining power between them and Canmerica.

**151**  Having concluded that there was an inequality of bargaining power, I must now consider whether the bargain obtained by Canmerica was substantially unfair.

**152**  The facts of this case are somewhat unique because there are, in effect, two contracts; the one negotiated by the parties and the one that remains after severance of the illegal interest provisions contained in the first. I was unable to find any specific judicial guidance as to how to apply the test for unconscionability in these circumstances. However, I have concluded that, for the purposes of determining whether the transaction is substantially unfair, it is the terms of the contract after severance that must be considered. In my view, the question of whether it would be unconscionable to enforce a contract must be decided based on the actual obligations imposed on the parties.

**153**  Before turning to a consideration of the terms of the contract, I will address the conduct of the parties.

**154**  Bill Lim's evidence is that he saw nothing unusual or out of the ordinary in the contract being negotiated or the conduct of the Borrowers. I have some difficulty with this evidence. The manner in which the Loan was negotiated was unusual. The Borrowers were obviously in a great hurry to obtain the Loan proceeds. All of the properties offered as security were encumbered to a significant degree. The Borrowers gave only the vaguest explanation of how they planned to be able to repay $3,100,000 within three months. Bill Lim sought no explanation of the relationship among the various borrowers. He quite frankly acknowledged that he was principally interested in the value of the security offered for the Loan. From this I infer that he had no great concern about whether the Borrowers defaulted or not.

**155**  Based on the circumstances in which the Loan was negotiated, I conclude that Bill Lim must have known that the Borrowers had an urgent need for the Loan proceeds and that they were in a positon in which they had very little bargaining power. I have no doubt that he knew he was negotiating from a position of strength and that the Borrowers had little choice but to accept any terms he demanded.

**156**  However, on the other hand, I find that the Defendants did understand the nature of the transaction they entered into. With the exception of Hector Tao, they have little formal education. However, both Amy Wu and her husband Jim Yu, and Dorina Huang and her husband, Hector Tao, had considerable experience in obtaining financing with respect to purchasing real estate. Both couples had borrowed funds in the past to acquire properties that were used for investment purposes. Through their company, Tao Natural Health Care Supplies Ltd., Dorina Huang and Hector Tao owned a commercial building on the west side of Vancouver that had been acquired with the assistance of borrowed money.

**157**  I find that the Defendants understood that they were putting the properties they owned at risk if the Loan was not repaid.

**158**  It follows from my credibility findings that I accept the evidence of Helena Shum where it conflicts with that of the Defendants. Specifically, I find the Defendants' evidence about what was said at the February 15th signing meeting to be untrue. I am satisfied that they did not say or do anything at that meeting to put Helena Shum on notice that they did not understand or did not agree to the essential terms of the Loan Agreement.

**159**  I also find that the Defendants' explanation as to what they thought they were doing at Lim & Company on February 15 defies credibility. Dorina Huang and Amy Wu testified that they brought their title documents to Lim & Company to show them to the lawyers to help Tracy Chung. They were unable to explain how showing the title documents could have helped Tracy Chung unless the properties shown in the documents were charged as security for the Loan. In addition, both Jim Yu and Hector Tao testified that they agreed to the transaction because their spouses told them that Moneytrans had a $10,000,000 bond that could be accessed to repay the Loan. That evidence strongly suggests that they understood that they were assuming a risk in respect of the Loan.

**160**  Dorina Huang's and Amy Wu's evidence that they did not borrow money is also inconsistent with the terms of the loan agreement they made with Tracy Chung and Moneytrans on February 15, 2011, after the Loan documentation was signed but before the Loan proceeds were paid out. That loan agreement, which I have found was prepared by Tracy Chung and not by Stephen Chong, expressly states that they, as lenders, had advanced a Loan for a total of $3,100,000 to Moneytrans and Tracy Chung as borrowers. It is clear that the $3,100,000 referred to in this Loan agreement was the same as the amount outstanding under the Loan.

**161**  I find that it was Tracy Chung who duped the Defendants into borrowing funds from Canmerica. While I have reservations about Bill Lim's credibility, I accept his evidence that the Borrowers did not disclose to him that they were under pressure, although as I have indicated above, I am also of the view that he deduced that fact from the circumstances of negotiations. I also accept Bill Lim's evidence that he advised Dorina Huang and Tracy Chung on February 11, 2011, to get legal advice from their own lawyer.

**162**  In assessing Amy Wu and Dorina Huang's credibility, I am forced to conclude that they were not candid and forthright in their evidence or in their document disclosure. I do not believe that they provided or arranged to provide very large sums of money to Moneytrans and Tracy Chung for the best rate paid by a bank. I conclude that the arrangements described in the amended response to civil claim filed on behalf of Amy Wu in Action No. S123358 provide an insight into the true terms on which funds were advanced to Moneytrans and Tracy Chung. In that pleading, Amy Wu alleged that Tracy Chung had agreed to pay interest at 8% per month. That was also the rate that Tracy Chung offered to Bill Lim.

**163**  I also reject the evidence given by Dorina Huang and Amy Wu and their husbands that, at the February 15 meeting, Helena Shum asked them if they were there to borrow money, and that both Dorina Huang and Amy Wu replied to the effect that, "No, you have it wrong, it is Tracy Chung who is borrowing the money", to be untrue. Apart from the fact that I found her to be credible, it is unreasonable to think that Helena Shum would have continued to witness the execution of the Loan documents showing the defendants as borrowers if any such statement had been made to her.

**164**  I therefore conclude that the Defendants understood the business terms and the risks they were facing when they signed the Loan documents. I also find that they hoped to obtain a substantial personal advantage from obtaining the Loan and were therefore in a different position from the litigants in such cases as *Harry v. Kreutziger* [*(1978), 95 D.L.R. (3d) 231*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BW-00000-00&context=), and *Morrison v. Coast Finance* [*(1965), 55 D.L.R. (2d) 710*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G20G-00000-00&context=).

**165**  As already indicated, I have concluded that it is the contract with the criminal interest rate severed that must be examined to determine whether it is unfair. I think that the question of whether enforcing a contract would impose an unconscionable burden on the Defendants must be determined on the basis of the actual burden they face, and not on the theoretical burden they would have faced had the Court not intervened to sever the most unfair provision of the Loan.

**166**  In my view, the contract as modified is not unfair to the Defendants. They are required only to repay the money they borrowed.

**167**  I therefore conclude that the Defendants have not succeeded in establishing that the bargain as modified is unfair.

**168**  If I am wrong, I am also of the view that the severance ordered to address the statutory illegality of the interest rate would have been relevant in considering whether Canmerica has established that the transaction was fair, just and reasonable. I consider that upholding Canmerica's ability to recover its principal is fair, just and reasonable to all parties. I find that depriving Canmerica of its principal would unjustly shift the burden of Tracy Chung's fraud from the Defendants, who made it possible, to Canmerica, who had no actual knowledge of the fraud at the time the Loan Agreement was executed.

**169**  In the result, therefore, I do not find the Loan Agreement and Mortgage to be unconscionable.

**Is Xi Bo Wu Bound by the Loan Documentation?**

**170**  Xi Bo Wu did not personally execute any of the Loan Documentation. His daughter, Amy Wu, executed the documentation on his behalf pursuant to a power of attorney he granted to her in 2003, and which was filed in the Land Title office in 2004.

**171**  Canmerica relied on the power of attorney to permit Amy Wu to execute the Loan Documentation and register the Mortgage against Xi Bo Wu's property.

**172**  Both Amy Wu and Xi Bo Wu testified that Xi Bo Wu was not aware that Amy Wu mortgaged his property and made him a party to the Loan Agreement and that he had no knowledge of the Loan until April or May 2011. However, at trial both Amy Wu and Xi Bo Wu acknowledged that Xi Bo Wu had executed the power of attorney and that Amy Wu had used it on one previous occasion to execute a mortgage of property he owned. Their evidence was that the purpose of the power of attorney was to permit Amy Wu to look after her father's affairs in Canada on those occasions when he returned to China to care for his ailing wife.

**173**  The first question is whether Xi Bo Yu has established that Amy Wu did not consult with him or inform him of her intention to use the power of attorney to execute the Loan Documents on his behalf. The onus is on Xi Bo Wu to prove that Amy Wu did not have his consent to enter into the Loan on his behalf. While I acknowledge that there were inconsistencies in his evidence at trial and on examination for discovery about whether he knew Amy Wu had used the power of attorney in the past, I accept his evidence that he had no knowledge that Amy Wu used it on this occasion. I find it extremely unlikely that Xi Bo Wu would have agreed to assume the risks inherent in the Loan, had he been informed about the transaction.

**174**  The second and more difficult question is whether, in the circumstances of this case, Canmerica was entitled to rely on the authority given to Amy Wu by the power of attorney.

**175**  Xi Bo Wu relies on the decision of the Supreme Court of Canada in *Begley v. Imperial Bank of Canada*, [*[1935] S.C.R. 89*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X192-00000-00&context=), to argue that Canmerica had a duty to make reasonable inquiries to satisfy itself that Amy Wu was acting lawfully in using the power of attorney to execute the Loan Documentation. He submits that the circumstances in which the Loan was negotiated should have put Canmerica and Lim & Company on notice that they could not safely rely on the power of attorney.

**176**  Canmerica submits that it was entitled to rely on the express provisions of the power of attorney and that it had no duty to look behind it. It also submits that there was nothing in the circumstances of this transaction to cause any suspicion about whether Amy Wu acted properly. It relies on *Canada Trust Co. v. Gladding* [*(1995), 23 O.R. (3d) 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4P2-00000-00&context=) (Ont Ct. (Gen. Div)).

**177**  I agree with counsel for Canmerica that *Begley* does not stand for the proposition advanced by Xi Bo Wu. In *Begley*, the Bank received a cheque payable to a financial advisor drawn on its customer's account, but signed by the financial advisor pursuant to a power of attorney. The advisor then endorsed the cheque to the Bank to pay his long standing indebtedness to it. The Bank had been pressing the financial advisor for payment for a considerable time before he endorsed the cheque to it. The court found that the Bank's manager knew that the customer had given the power of attorney to the advisor to permit him to make investments on her behalf. The Bank was held to be liable to account to the customer because it had sufficient knowledge to be on notice of the advisor's breach of fiduciary duty in using the power of attorney to obtain his client's money for his own purposes.

**178**  I agree with Canmerica's counsel that the basis on which the Bank was liable to the customer was knowing receipt of trust property or property obtained by a breach of fiduciary duty. Given my ruling that this defence cannot be raised by Xi Bo Wu, *Begley* does not assist him.

**179**  In *Canada Trust*, the plaintiff was granted judgment on a note signed by the defendant's agent pursuant to a power of attorney granted by the defendant to a developer from whom he had purchased a property. The defendant argued that his financial advisor had fraudulently induced him into signing the power of attorney and that it was therefore void. The court rejected that argument and held that the plaintiff was entitled to rely on the power of attorney and that the defendant's remedy for any fraudulent inducement was against his financial advisor.

**180**  *Canada Trust* is also distinguishable from this case because the issue in that case was whether the power of attorney was void from the outset and not whether the use to which it was put was outside of the agent's authority. The court held that the plaintiff was not affected by any fraud that had induced the defendant to sign the power of attorney.

**181**  Xi Bo Wu submits that the circumstances of the Loan are sufficient to have put Canmerica on notice that Amy Wu was not properly authorized to use the power of attorney to execute the loan documents. The circumstances include:

1. The haste with which the Loan was negotiated and closed;
2. The extremely high rate of interest charged on the Loan;
3. The short term nature of the Loan;
4. The lack of any specific information provided as to the purpose of the Loan;
5. The lack of independent legal advice; and,
6. The fact that no portion of the Loan proceeds was payable to Xi Bo Wu.

**182**  I have concluded that Xi Bo Wu has not succeeded in establishing that Canmerica was not entitled to rely on the apparent authority granted to Amy in the power of attorney. I accept Canmerica's submission that this was a commercial transaction. At best, the circumstances outlined in the preceding paragraph might be said to be constructive notice of some irregularity on Amy Wu's part in using the power of attorney. However, the doctrine of constructive notice does not apply to the negotiation of commercial agreements.

**183**  I would be reluctant to impose duties of inquiry on parties to a commercial arrangement. In my view, Xi Bo Wu must look to his daughter to compensate him for the loss he suffered as a result of her improper use of the power of attorney.

**Do the Land Title Act or Business Practices and Consumer Protection Act Provide any Defences?**

**184**  The defences based on the *BPCPA* and s. 47 of the *Land Title Act* are without merit.

**185**  The Loan was a commercial transaction and therefore not subject to the *BPCPA.*

**186**  Section 47 of the *Land Title Act* is not concerned with the enforceability of contracts. It is in Part 5 of the *Land Title Act,* which deals with execution and attestation of documents for registration. As I read s. 47, it provides that the signature of an officer on an instrument is, in the case of persons who cannot speak English, a certification by the officer that the person who signed the instrument communicated to the officer that he or she fully understood the contents of the instrument. In my view, the purpose of s. 47 is to protect the Registrar of Land Titles and permit the Registrar to register instruments executed by persons who cannot read or write English without any inquiry beyond the signature of the witnessing officer. Its purpose is not to protect the persons who sign instruments from liability for the obligations contained within them.

**187**  I therefore conclude that Xi Bo Wu is bound by the terms of the Loan documents. Xi Bo Wu has not sought any remedy against the other Defendants, such as an order indemnifying him for any loss he suffers from the enforcement of the Loan documents or for an order that the other Defendants' security be resorted to before his in satisfaction of Canmerica's claim. In the absence of any such claim, I cannot make such an order.

**188**  Accordingly, I find that the Defendants are jointly and severally liable to Canmerica for the amount properly owing to Canmerica, calculated in accordance with these reasons. Because I am satisfied that the Defendants' loss was caused by Tracy Chung's fraud, I direct that the amounts held in trust from the sale of her properties should be applied first to the amount owing and the remaining balance should be a joint and several obligation of the Defendants. Canmerica may forthwith obtain the proceeds from trust.

**189**  Canmerica is entitled to an order nisi of foreclosure with a six month redemption period over the six properties that have not been sold. There will be a reference to the Registrar to determine the amount of Canmerica's judgment and the redemption amount.

**Counter Claim Against the Lawyers**

**190**  The Defendants counterclaim against the Lawyers for the amount they have lost as a result of entering into the Loan Agreement. Their claim against Justin Lim was abandoned during the trial and dismissed without costs by consent.

**191**  While the counterclaim is not as clear as it could be, the Defendants appear to make the following allegations against the Lawyers:

1. In the circumstances of this case, given the close connection between Lim & Company and the lender, Canmerica, and the Defendants' lack of sophistication, the Lawyers owed a fiduciary duty to the Defendants.
2. Because of the onerous terms of the Loan, the Lawyers owed a duty of care to ensure that the Borrowers understood those terms.
3. That the Lawyers had a duty to advise the Borrowers that they required independent legal advice, but they negligently failed to meet that duty.
4. That Helena Shum had a duty to be satisfied that the Borrowers understood the nature of the documents they were signing, but failed to ensure that they did.

**192**  While I have rejected Bill Lim's evidence on the criminal interest rate issue, I do accept his evidence that he told Dorina Huang and Tracy Chung that once he became the lender in the transaction, he was no longer acting as a lawyer, that Lim & Company would act on behalf of Canmerica to prepare the Mortgage documents and that the Borrowers could review the documents with their own lawyers prior to signing. In my view, it accords with prudent business practice for Bill Lim to have said these things to Dorina Huang and Tracy Chung.

**193**  I also note that the Defendants did not testify that they thought that Lim & Company was acting as their lawyer in the transaction. Their evidence was that they were reassured in their dealings with Bill Lim because he was a famous lawyer whom they had seen on television, but not that they relied on him or any of the Lawyers for legal advice with respect to the Loan.

**194**  I also accept Bill Lim's evidence that Tracy Chung and Dorina Huang appeared to working together on the Loan transaction and that both were very concerned to ensure that the Loan be funded as quickly as possible. I conclude that Bill Lim did not do anything to cause the Defendants to conclude that he was acting for them or that he was in any way protecting their position with respect to the Loan.

**195**  I have already found Helena Shum to be a credible and reliable witness. I have accepted her evidence about what transpired in the sign up meeting on February 15th. In particular, I find that, speaking in Cantonese, she told all of the borrowers that she was not reviewing the Loan documents for them or giving them any advice with respect to them. She also told them that if they were satisfied with the documents they could go ahead and sign, but if they were not they could get the documents clarified and sign at a later date.

**196**  I have already rejected the Defendants' evidence that they told Helena Shum that they were not borrowing money, but that it was Tracy Chung that was borrowing money. I accept Helena Shum's evidence that if the Defendants had said words to that effect she would not have let them sign, but would have sought further instructions.

**197**  I find that the only changes made to the Loan documents presented at the February 15 meeting were the changes to the order to pay to Lim & Company, directing it to pay out the Loan proceeds in accordance with an instruction sheet prepared by the Borrowers and written out in English characters.

**198**  As I have already indicated, I also find that the Defendants understood the nature of the documents they were signing, that they were granting a mortgage over their properties as security for the amount they were borrowing and the important commercial terms on which they were borrowing.

**199**  It is clear from the terms of the loan agreement that Tracy Chung, Moneytrans, Dorina Huang and Amy Wu prepared and signed at Stephen Chong's office that they were aware that Dorina Huang and Amy Wu, and by extension their spouses, had borrowed funds from Canmerica and had in turn loaned the same funds to Moneytrans and Tracy Chung.

**200**  Given these findings of fact, I can see no basis on which I can conclude that the Defendants were relying on the Lawyers for advice with respect to any aspect of the Loan, or that they did not understand its essential terms.

**201**  Counsel for the Defendants relied on a number of decisions in support of their submission that the Lawyers owed a duty of care to the Defendants in the circumstances of this transaction. In my view, all these decisions are distinguishable and turn on the special facts before the court in each of them.

**202**  I can see nothing in the facts of this case to take it out of the general rule that a lawyer acting for a client in a transaction has no duty of care or fiduciary duty to the other party to the transaction.

**203**  The Defendants' claim against the Lawyers is for economic loss. In *Esser v. Luoma*, [*2004 BCCA 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44N-00000-00&context=), Newbury J.A. stated the circumstances in which a solicitor may be found to owe a duty of care to someone other than his or her client:

[32] As has been seen, where liability for purely economic loss is sought to be imposed on a solicitor *vis à vis* a person other than his or her client, courts have trod carefully, realizing that, as Taylor J.A. stated in *Kamahap*, *supra*:

. . . the infliction of foreseeable pure economic loss must necessarily result from very many acts and omissions which take place routinely in the course of everyday business activities under our economic system, and that any law imposing a general duty of care to avoid the infliction of such loss would greatly hamper the conduct of commercial and private business, and would probably interfere fundamentally with the operation of that economic system. [at 293]

As has also been seen, two "established categories" of cases in which liability has been imposed for pure economic loss on a solicitor for harm to a person other than his or her client are those in which proof of reasonable reliance on the part of the third party is shown, and those in which the solicitor assumed a contractual duty to one person to do something for the benefit of the third party. Like *Kamahap*, the facts of this case do not fall into either of these classes.

[Emphasis in original.]

**204**  Neither of the established categories in which a duty of care has been found to exist between a solicitor and a non-client is present in this case. There was no reliance placed on the Lawyers for advice or protection of the Defendants' interests, nor were the Lawyers under a contractual duty to anyone else to do anything for the benefit of the Defendants.

**205**  I cannot find anything else in the evidence that would constitute special circumstances giving rise to a duty of care outside of the established categories. As was pointed out in *Esser,* the terms of the Loan and the haste with which it was agreed to and executed would have been relevant had the Lawyers owed a duty of care to the Defendants. They cannot, however, be the source of a duty of care.

**206**  As the Defendants have not established that they relied on the Lawyers in any way in this transaction, nor that there are any special circumstances that would impose a duty of care on the Lawyers, the counterclaim against the Lawyers must be dismissed.

**Claim Against Sheung Ming Li**

**207**  The defendants claim against Sheung Ming Li for contribution to the loss they have suffered from entering into the Loan.

**208**  Sheung Ming Li testified that he disbursed the $1,900,000 in Loan proceeds he received as directed by Tracy Chung and retained only $100,000, which he said was a loan from Tracy Chung to him.

**209**  I accept his evidence that he was acting under Tracy Chung's direction but did not know that her activities were fraudulent. While the manner in which funds were directed to Tracy Chung and Moneytrans was highly unusual, it seemed to be consistent with the way that funds had been directed to Tracy Chung by Dorina Huang and Amy Wu throughout 2010 and into 2011.

**210**  I am unable to find any basis on which Sheung Ming Li should be found liable to the Defendants for any amount in excess of the funds he retained. Based on all the evidence, and in particular the terms of the loan agreement executed at Stephen Chong's office, I find that Dorina Huang and Amy Wu knew that the funds paid to him were funds that were intended for Tracy Chung or Moneytrans and that they considered those funds as part of the amounts covered by the Moneytrans loan agreement.

**211**  However, in my view, Sheung Ming Li is liable to pay the Defendants the $100,000 he retained from the Loan proceeds on the basis of unjust enrichment.

**212**  I reject his evidence that the $100,000 was a loan from Tracy Chung. I find it was a fee for his services in facilitating distribution of the Loan proceeds. All of the elements necessary to establish a claim in unjust enrichment are present with respect to the $100,000. Sheung Ming Li has been enriched by receipt of the $100,000 obtained on the Defendants' credit. The Defendants have been deprived of the $100,000. There is no juridical reason for the enrichment or deprivation. Accordingly, I find that Sheung Ming Li held the $100,000 subject to a constructive trust in favour of the Defendants. Because there was no evidence as to whether Sheung Ming Li still has the funds, I find that the appropriate remedy in this case is to grant judgment against him in that amount in favour of the Defendants. The Defendants are entitled to interest on the $100,000 at prejudgment interest rates from February 16, 2011 to the date of judgment.

**Indemnity of Borrowers by Tracy Chung and Moneytrans**

**213**  I am satisfied that Tracy Chung received the bulk of the funds advanced pursuant to the Loan Agreement and that she fraudulently induced the Defendants into pledging their properties as security for the Loan.

**214**  I find that the Defendants are entitled to be indemnified by Tracy Chung for the amounts that they are required to pay Canmerica, including costs, subject to a credit for the $50,000 that Dorina Huang and the $100,000 that Amy Wu received.

**Claim Against Tracy Chung and Moneytrans**

**215**  Dorina Huang seek judgment against Tracy Chung for amounts advanced to her prior to the Loan. Dorina Huang's evidence is that her loans to Tracy Chung and Moneytrans were consolidated in two loan agreements both dated December 16, 2010; one loan agreement is for $700,000 and the other is for $1,070,000.

**216**  While it is unlikely that this judgment is collectable, I accept that Tracy Chung and Moneytrans are liable for the amount of these loans. However, apparently $100,000 of the $700,000 Loan was provided by Dorina's friends, who are not seeking repayment of it. Accordingly, Dorina Huang seeks only $600,000 in respect of this Loan.

**217**  Based on the contents of the loan agreements and Dorina's uncontradicted evidence that Hector Tao and Dorina Huang did raise funds to invest with Tracy Chung by previously mortgaging their properties, I am satisfied that Dorina Huang is entitled to judgment in the amount she seeks, that is $1,670,000, plus court order interest from December 16, 2010.

**Summary of Relief Granted**

**218**  In summary, I make the following orders:

1. Canmerica is granted judgment for $2,496,000, less the net amount held in trust from the sale of the properties formerly owned by Tracy Chung and an order nisi of foreclosure against the remaining properties charged by the Mortgage.
2. The redemption period will be six months.
3. There will be a reference to the Registrar to determine the judgment amount and the redemption amount.
4. The counterclaim against the Lawyers is dismissed.
5. The Defendants are granted judgment against Sheung Ming Li in the amount of $100,000, together with court order interest from February 16, 2011.
6. The Defendants are entitled to be indemnified by Tracy Chung for the amounts they are required to pay to Canmerica and for their costs of defending this action.
7. Dorina Huang is granted judgment against Tracy Chung for $1,670,000, plus court order interest from December 16, 2010.

**Costs**

**219**  Subject to any application the parties wish to make, the Lawyers are entitled to their costs on Scale B.

**220**  Canmerica and the Defendants may apply for a costs order consistent with these reasons. If no application is made, Canmerica is entitled to 2/3 of its costs against the Borrowers on Scale B.

**221**  No costs will be payable by any other party, but the Defendants are entitled to be indemnified for their costs by Tracy Chung.

R.J. SEWELL J.

\* \* \* \* \*

SCHEDULE "A"

1. Civil address: 2615 Hoylake Avenue, Vancouver, B.C., Legal Description: Parcel Identifier: 008-244-537, Lot 5, Block 48, Fraserview Plan 8514 Registered owner(s): Jim Yu and Amy Wu;
2. Civil address: 6605 Tisdall Street, Vancouver, B.C., Legal Description: Parcel Identifier: 009-462-929, Lot 5, Block 893, District Lot 526, Plan 9773 Registered owner(s): Dorina Huang and Hector Tao;
3. Civil address: 5345 West Boulevard, Vancouver, B.C., Legal Description: Parcel Identifier: 007-682-310, Lot 20 of Lot 9, Block 17, District Lot 526, Plan 4569. Registered owner(s): Tao Natural Healthcare Supplies Ltd.;
4. Civil address: 26149 Fern Crescent, Maple Ridge, B.C., Legal Description: Parcel Identifier: 006-161-855, Lot 85, Section 22, Township 12, New Westminster District Plan 47070 Registered owner(s): Dorina Huang and Hector Tao;
5. Civil address: 513-750 West 12th Avenue, Vancouver, B.C., Legal Description: Parcel Identifier: 027-311-139, Strata Lot 218, District Lot 526, Group 1, New Westminster District Strata Plan BCS 2645 Registered owner: Tracy Chung;
6. Civil address: 710-5811 No. 3 Road, Richmond, B.C., Legal Description: Parcel Identifier: 027-009-700, Strata Lot 58, Section 5, Block 4 North, Range 6 West, New Westminster District Strata Plan BCS 2252; Registered owner(s): Tracy Chung;
7. Civil address: 12065-203rd Street, Maple Ridge, B.C., Legal Description: Parcel Identifier: 003-888-045, Lot "K", District Lot 263, Group 1, New Westminster District Plan 18612 Registered owner(s): Xi Bo Wu; and
8. Civil address: 12105-203rd Street, Maple Ridge, B.C., Legal Description: Parcel Identifier: 002-810-948, Lot "J", District Lot 263, Group 1, New Westminster District Plan 18612 Registered owner: Pak Yip Yu

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**CORRECTION**

Released: May 28, 2015

Please be advised that the attached Reasons for Judgment of Mr. Justice Sewell dated May 12, 2015 have been amended as follows: On the front page C. Ferris, Q.C., and L. Bevan are listed as counsel for William H. Lim in place of A. Ross and D. Klassen.

**End of Document**

[***Dempsey v. Envision Credit Union, [2006] B.C.J. No. 1073***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B25Y-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Garson J.

Heard: April 6, 2006.

Judgment: May 11, 2006.

New Westminster Registry Nos. S91786, S89429, S89429,

S87315

Vancouver Registry Nos. L050637, L050149, S044649,

S045442

**[2006] B.C.J. No. 1073** | 2006 BCSC 750 | 151 A.C.W.S. (3d) 204

Between John Ruiz Dempsey, on behalf of the People of Canada, plaintiffs, and Envision Credit Union, Laurentian Bank of Canada, Royal Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Montreal, TD Canada Trust, Canadian Payments Association and others, defendants Brought Under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (New Westminster Docket No. S91786) And between Pavel N. Darmantchev, Ian Denis Gravlin, Dena Alden, plaintiffs, and MBNA Canada Bank and others, defendants Brought Under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (Vancouver Docket No. L050637) And between Ian Denis Gravlin and Pavel N. Darmantchev, plaintiffs, and Canadian Imperial Bank of Commerce; Kronis, Rotsztain, Margles, Cappel; Barbara K.H. Damm; Richards and Richards; and George Richards and others, defendants Brought Under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (Vancouver Docket No. L050149) And between Citi Cards Canada Inc., plaintiff, and Pedro Liong also known as Pedro C. Liong and Linda Liong also known as Linda Kua Liong, defendants Brought Under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (New Westminster Docket No. S89429) And between Bank of Montreal, plaintiff, and Pedro Liong and Linda Liong, defendants Counterclaim Brought Under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (Vancouver Docket No. S044649) And between MBNA Canada Bank, plaintiff, and Otto Louis Luinenburg, defendant Brought Under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (Vancouver Docket No. S045442) And between Canadian Imperial Bank of Commerce, plaintiff, and Otto Louis Luinenburg, defendant, and Kronis, Rotsztain, Margles, Cappel, Barbara K.H. Damm, Richards and Richards, George Richards and others, defendants by counterclaim (New Westminster Docket No. S87315)

(103 paras.)

**Case Summary**

**Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Res judicata — Applications by defendant financial institutions for dismissal of actions and counterclaims allowed — Claims and counterclaims were an abuse of process and disclosed no cause of actions as they were based on assertions that financial institutions created money out of thin air by failing to make payments in cash money or hard currency — Some claims were res judicata as they disputed validity of loans on basis of arguments that were not made in prior foreclosure proceedings — British Columbia Rules of Court, Rule 19(24).**

**Commercial law — Banking — Financial institutions — Applications by defendant financial institutions for dismissal of actions and counterclaims allowed — Claims and counterclaims were an abuse of process and disclosed no cause of actions as they were based on assertions that financial institutions created money out of thin air by failing to make payments in cash money or hard currency — Some claims were res judicata as they disputed validity of loans on basis of arguments that were not made in prior foreclosure proceedings.**

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| Applications by defendants for dismissal of actions and counterclaims -- Plaintiffs advanced allegations including breach of contract, unjust enrichment, mental distress, unlawful creation of money, fraudulent transfer of funds, conversion on basis that the defendant financial institutions created money out of thin air by failing to make payments in cash money or hard currency -- Banks argued that creation of money theory was without merit and that pleadings based on this assertion did not disclose a reasonable cause of action -- Banks argued that the claims were brought in attempt to avoid paying credit card debts or mortgages and that the claims were frivolous and vexatious -- HELD: Applications allowed -- Claims based on or derivative of unlawful creation of money theory were without merit -- Money was not restricted to cash or hard currency in Canadian law -- Plain and obvious that causes of actins based on plaintiffs' assertions that banks' failure to deal in cash or hard currency did not disclose a reasonable claim -- Claims against the solicitors who acted for banks in debt enforcement actions disclosed no cause of action known to law and should be struck -- These claims were also derivative of money for nothing claims -- Claims against solicitors constituted collateral attacks to extent that banks had obtained judgment in other debt enforcement actions -- Claims by Dempsey respecting invalidity of loans in relation to which foreclosure proceedings were brought were res judicata as Dempsey had never appealed the orders made in the foreclosure proceedings as he never raised the substantive claim in the foreclosure proceedings that he raised now -- Action was an abuse of process and some portions of the claim were unintelligible -- Darmantchev action was struck as an abuse of process as Darmantchev had been noted in default in an Ontario action commenced by the bank against him -- Darmantchev never appealed the default judgment and could not now raise the same allegations in British Columbia that he raised in his counterclaim in the Ontario action. |

**Statutes, Regulations and Rules Cited:**

Bank Act, R.S.C. 1991, c. 46, s. 409(2)(d)

British Columbia Rules of Court, Rule 19(1), Rule 19(24)(a), Rule 19(24)(b), Rule 19(24)(c), Rule 19(24)(d), Rule 19(27)

Class Proceedings Act, *R.S.B.C. 1996, c. 50*,

**Counsel**

Ian Dennis Gravlin, Notice of Discontinuance filed on August 2, 2005

Appearing on his own behalf in Action Nos. L050149 and L050637, Pavel N. Darmantchev

Dena Alden, Notice of Discontinuance filed on August 15, 2005

Appearing on his own behalf in Action No. S91786, John Ruiz Dempsey

Appearing on his own behalf in Action Nos. S87315 and S045442, Otto Louis Luinenburg

Appearing on his own behalf and for Linda Liong in Action Nos. S044649 and S89429, Pedro Liong

Counsel for Envision Credit Union, Canadian Imperial Bank of Commerce, Bank of Montreal and Canadian Payments Association in Action Nos. S91786, L050149 and S87315, D.R. McGowan and A.J. Davison

Counsel for the Defendants Laurentian Bank of Canada Royal Bank of Canada and TD Canada Trust in Action No. S91786, A.D. Borrell

Counsel for the Defendants Kronis, Rotsztain, Margles, Cappel; Barbara K.H. Damm; Richards and Richards; and George Richards and others in Action Nos. L050149 and S87315, D.R. McGowan and A.J. Davison

Counsel for MBNA Canada Bank in Action Nos. L050637 and S045442, D.T. Neave and A. Staunton

Counsel for Citi Cards Canada Inc. in Action No. S89429, D.T. Neave and A. Staunton

[Editor's Note: A Corrigendum was released by the Court September 25, 2006. The correction has been made to the text and the Corrigendum is appended to this document.]

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| **GARSON J.** |

**INTRODUCTION**

**1**  These applications are made pursuant to R. 19(24)(a)(b)(c) and (d) to dismiss some of these actions and in others to strike out and dismiss counterclaims.

**2**  I will first consider the pleadings that are common to most of these actions and decide if those common pleadings disclose reasonable claims, or should be dismissed on grounds that they are an abuse of the process of the court, or are frivolous or vexatious.

**3**  Next I shall turn to the specific pleadings in each individual action, and determine if those pleadings should be struck and/or the claims dismissed.

**4**  In summary, these claims of Messrs. Dempsey, Darmantchev, Luninenburg, Liong and Mrs. Liong (collectively the "Claimants") advance a number of allegations described as breach of contract, unjust enrichment, mental distress, unlawful creation of money, fraudulent transfer of funds, money laundering, conversion of funds, fraudulent or negligent misrepresentation, breach of fiduciary duty, bad faith, unlawful seizure of property and usury. All of these allegations are founded upon the assertion that the financial institutions, that are parties to the various actions, (the "banks") created money out of "thin air" by failing to make payments in cash money or hard currency.

**5**  Counsel for the banks contend that the Supreme Court of Canada's decision in ***Reference Re Alberta Legislation***, [*[1938] S.C.R. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1GS-00000-00&context=), makes it plain and obvious that the "creation of money" thesis is entirely without merit such that the pleadings, however framed, do not disclose a reasonable cause of action. In the alternative, the banks contend that the claims are unnecessary, scandalous, frivolous and vexatious and will prejudice and embarrass a fair trial or hearing of the proceedings such that they should be struck out and dismissed pursuant to R. 19(24)(b)(c) or (d). The banks contend that the claims are brought by the claimants in an attempt to avoid their contractual obligations to pay their respective credit card debts or mortgages when due or payable. In some of these actions, collection proceedings by the banks are pending, in others, judgments have been obtained against the claimants.

**LEGAL TEST TO STRIKE PLEADINGS OR ACTIONS PURSUANT TO R. 19(24)**

**6**  R. 19(24) of the ***Rules of Court*** provides as follows:

1. At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
2. it discloses no reasonable claim or defence as the case may be,
3. it is unnecessary, scandalous, frivolous or vexatious,
4. it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
5. it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

1. No evidence is admissible on an application under sub rule (24) (a).

**7**  The question of whether a pleading discloses no reasonable claim under R. 19(24)(a) is to be determined on the basis that the facts as pleaded are true. Where it is "plain and obvious" that the claims, as pleaded, or as they might be amended, disclose no reasonable claim, the court has the discretion to dismiss the claim. Any doubt is to be resolved in favour of allowing the pleadings to stand (see ***Hunt v. T & N plc***, *[1990] 2 S.C.R. 959* at p. 980; ***Citizens of Foreign Aid Reform Inc. v. Canadian Jewish Congress*** [*(1999), 36 C.P.C. (4th) 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1HH-00000-00&context=) (B.C.S.C.) at p. 276, [paragraph] 3.

**RULE 19(24)(b) (c) and (d)**

**8**  In ***Citizens for Foreign Aid Relief Inc.*** the court set out a useful summary of the jurisprudence respecting R. 19(24)(b) and (c) as follows at [paragraph] 47:

Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc*. (1987), 17 B.C.R. (2d) 38 (B.C. S.C.) ... A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan*, [*[1992] B.C.J. No. 86*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61FJ-00000-00&context=) (December 2, 1991), Doc. Vancouver C9136131 (B.C.S.C.) ... A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd.*, [*[1992] B.C.J. No. 1567*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S0YN-00000-00&context=) (July 3, 1992), Doc. Prince George 20714 (B.C. Master). (see also *Borsato v. Basra*, [*2000 BCSC 28*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1TN-00000-00&context=))

**9**  Pleadings will be struck out if they abuse the process of the court. Abuse of process is a flexible doctrine that allows the court to prevent a claim from proceeding where it "violates such principles as judicial economy, consistency, finality and the integrity of the administration of justice". (see ***Toronto (City) v. Canadian Union of Public Employees (CUPE) Local 79***, [*[2003] 3 S.C.R. 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=) at [paragraph] 37).

**10**  One way in which these principles are violated is where parties make allegations in subsequent proceedings that are *res judicata*. Parties may not bring forward in a subsequent action, points related to the subject matter of previous litigation that the parties, exercising reasonable diligence, might have been able to bring forward. (***Johnson v. Gore Wood & Co.***, 2002 2 A.C. 1 at 23 English Court of Appeal and ***Samos Investments Inc. v. Pattison***, [*[2004] B.C.J. No. 705*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B284-00000-00&context=)).

**11**  In ***Henderson v. Henderson***, 3 Hare 100, 114 to 115, cited in ***Samos***, the plea of *res judicata* was discussed.

In trying this question, I believe I state the rule of court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from ***negligence***, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

**12**  In ***Babavic v. Babowech***, [*[1993] B.C.J. No. 1802*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F4NT-X2W2-00000-00&context=) (S.C.) at [paragraph] 18 it was held that R. 19(24)(d) gives the court the discretion to dismiss actions on the basis of abuse of process, that is, where the court process is being used for an improper purpose:

The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceeding which are without foundation or serve no useful purpose and multiple or successive readings which cause or are likely to cause vexation or oppression.

**13**  In ***Babavic,***Baker J. cited with approval the statement from I.H. Jacob, in "The Inherent Jurisdiction of the Court" as follows at page 9:

[The principle of abuse of process] connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. Unless the court had power to intervene summarily to prevent the misuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice into an instrument of injustice.

It follows that where an abuse of process has taken place, the intervention of the court by stay or even dismissal of proceedings may often be required by the very essence of justice to be done, and so to prevent parties being harassed and put to expense by frivolous, vexatious or groundless litigation.

**14**  In ***Toronto v. CUPE,***Arbour, J. stated at [paragraph] 35;

Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice". (*R. v. Power,* [*[1994] 1 S.C.R. 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CS-00000-00&context=), at page 616), and as "oppressive treatment" (*R. v. Connelly*, [*[1989] 1 S.C.R. 1659*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-650V-00000-00&context=), at page 1667).

**15**  In ***Toronto v. CUPE***, Arbour J. cited with approval Madam Justice McLachlin's statement concerning the doctrine of abuse of process in ***R. v. Scott*** [*[1990] 3 S.C.R. 979*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-601D-00000-00&context=) as follows at [paragraph] 35;

Abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underlying the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

**16**  In ***Borsato v. Basra***, [*[2000] B.C.J. No. 84*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1TN-00000-00&context=) (S.C.), reversed on other grounds, [*[2000] B.C.J. No. 2855*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X3SJ-00000-00&context=)) Master Baker said at [paragraph]24:

The plaintiff also attacks the statement of defence under Rule 19(24). A pleading is frivolous if it is without substance, is groundless, fanciful, "trifles with the court" or wastes time. This statement of defence does, in my view, waste time and verges on the fanciful. There may, somewhere in the general traverse, be grounds, but as pleaded it lacks substance. It is therefore frivolous.

A pleading is vexatious if it is without bona fides, is "hopelessly oppressive" or causes the other party anxiety, trouble or expense. This statement of defence cannot be said to be oppressive and possibly not without bona fides, but is almost certain to cause the plaintiff (and indeed has already caused) anxiety, trouble and expense. It is therefore vexatious.

A pleading, to avoid being embarrassing, must not be concealing or evasive. It must state the real issue in an intelligible form. It must, in short, be a part, even in a minimally articulated form, of that constructive conversation to which I have alluded. This statement of defence does not meet that standard. It is therefore embarrassing.

**17**  In summary, a pleading will be struck out if:

1. the pleadings are unintelligible, confusing and difficult to understand (***Citizens for Foreign aid Reform, supra***);
2. the pleadings do not establish a cause of action and do not advance a claim known in law (***Citizens for Foreign aid Reform, supra***);
3. the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time (***Borsato v. Basra***)
4. the pleadings are not bona fides, are oppressive and are designed to cause the Defendants anxiety, trouble and expense (***Borsato v. Basra, supra***);
5. the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants (***Ebrahim v. Ebrahim***, [*2002 BCSC 466*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0P8-00000-00&context=)).

**18**  I now turn to an examination of the pleadings that are repeated in and are common to all actions in the applications before me, in order to determine if they fail to disclose a cause of action, are an abuse of the courts process or are frivolous, vexatious or embarrassing.

**REVIEW OF COMMON PLEADINGS**

**19**  I attach as Schedule A to these reasons for judgment, the statement of claim filed in Vancouver Registry Action No. L050149 (***Gravlin and Darmantchev v. Canadian Imperial Bank of Commerce, Kronis, Rotsztain, Margles, Cappel;(sic) Barbara K.H. Damm; Richards and Richards; and George Richards and others***, brought under the ***Class Proceedings Act***, *R.S.B.C. 1996, c. 50*).

**20**  I begin my analysis with the statement of claim in this particular action (Action No. L050149) because it includes most of the impugned claims that are common to some or all of these actions or counterclaims, that are the subject matter of these applications.

**GRAVLIN ET AL. V. CIBC ET AL VANCOUVER ACTION NO. L050149**

**Claims against the solicitors**

**21**  The individual solicitors who are defendants and their law firms have acted for the defendant financial institutions in commencing proceedings against the plaintiffs and others for debts owed to the defendants. The solicitor defendants are alleged to "have acted together in a concentrated scheme to unlawfully interfere in the contractual relationships between the plaintiffs and the Defendant, CIBC".

**22**  The plaintiffs say that the debt collection proceedings are unlawful because the plaintiffs received no money or any tangible asset from the defendant financial institution. The plaintiffs say that the defendant solicitors are not entitled to practice law in British Columbia.

**23**  The plaintiffs say that they offered not to charge the defendant solicitors $100,000 if the solicitors ceased and desisted from interfering with the plaintiffs' contractual relationship with CIBC. The plaintiffs then offered not to charge the defendant solicitors $300,000 if they ceased and assisted from interfering with the plaintiffs' contractual relationship with CIBC.

**24**  The plaintiffs say the defendants elected to continue to interfere, making them liable to the plaintiffs.

**25**  The defendant, Richards, is alleged to have committed fraud against the court by naming himself and claiming for himself that he was at material times the solicitor for the plaintiff, CIBC. The defendant, Richards is alleged to have commenced proceedings on behalf of the bank in registries with no close connection with the plaintiffs in defiance of established legal procedure. The plaintiffs say Richards has no legal standing to file the writs without the explicit or legal authority of CIBC. The plaintiffs say that they did not file an appearance and did not attorn to the jurisdiction of the court because, Richards knew, or ought to have known, that the writs and statements of claim he filed had no force and effect. The solicitor, Richards is said to have surreptitiously obtained default judgments.

**Claims against the bank(s)**

**26**  The second section of this statement of claim is titled "claims against the bank(s)".

**27**  In his submissions on the motions, in the actions concerning him, Mr. Dempsey described the "money for nothing" theory. He stated that the banks do not have money. Rather, they create money out of "thin air". He asks, "where did that money come from", he answers "it came from us". He says the plaintiffs create money by signing promissory notes, and as soon as the promissory note is signed the banks deposit money in their own statement of account. The banks do not place hard currency in the hands of the debtors. Mr. Dempsey complains that the banks then charge interest on nothing and that is a criminal rate of interest because interest is charged on nothing. Mr. Dempsey states, "it is not like the old days, when people used to go to the bank and, in the back room, count out dollars, there is no law that allows the banks to create dollars out of thin air."

**28**  In his submissions, Mr. Liong stated, "in the old days, even a loan shark took actual dollars out of his pockets, he actually gave me money, now the banks have zero reserve banking, they use this system to unlawfully create a debt and then demand payment."

**29**  Paragraph 41 of the ***Gravlin and Darmantchev v. CIBC*** statement of claim states:

The defendant, CIBC, fraudulently, unlawfully and without colour of right, created money out of thin air, and at no cost or risk to the Defendant CIBC who fraudulently and unlawfully "loaned" these unlawfully created monies to the plaintiffs and the proposed class members with interests;

**30**  The pleadings go on at length, but the basic allegation is that the banks have created money out of "thin air."

**31**  The statement of claim also describes the nature of the class action. It is said at [paragraph] 60:

This is a proposed class action brought pursuant to the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* on behalf of persons who entered into any type of loan agreements or contracts whether secured or unsecured within or without British Columbia with the Defendant CIBC. The class is intended to include all persons who are "borrowers" within the meaning of the *Bank Act*, the *Bank of Canada Act*, and the *Canadian Payments Act* and the *Bills of Exchange Act*. Excluded from the proposed class are directors, officers and senior employees of the Defendant CIBC.

**32**  Under the heading Relief Sought, at [paragraph] 84 one of the claims for relief, it requests:

A declaration that the loans and financing agreements made between the Defendant CIBC, and the Plaintiffs and the proposed class members are illegal, unconscionable and therefore void for lack of consideration or for unlawful consideration and of no force and effect as against the proposed Class.

At [paragraph] 86:

A declaration that the legal proceedings and foreclosure proceedings filed by the Defendant, CIBC and all subsequent court ordered sales and vesting orders be and are declared null and void as against the Plaintiffs and the proposed class members.

**33**  I propose to first deal with this statement of claim under R. 19(24)(a). In accordance R. 19(27) I will not, for the purposes of my analysis under R. 19(24)(a), consider the affidavit material filed in support of the applications under the other sub rules of R. 19(24). The defendants say it is this core theory (money out of thin air, or money for nothing) of the pleadings that is deficient and that all the other pleadings are derivative of this core defective theory, and therefore all the pleadings should fail.

**34**  In ***Reference Re Alberta Legislation*** the Supreme Court of Canada considered the definition of "money" in the context of the proposed ***Alberta Social Credit Act***. Although that decision was focused on a division of powers issue, Duff C.J. made the following comments regarding the scope of legal tender:

First, as to banking. A banker has been defined as "a dealer in credit." True, in ordinary speech, bank credit implies a credit which is convertible into money. But money as commonly understood is not necessarily legal tender. Any medium which by practice fulfils the function of money and which everybody will accept in payment of a debt is money in the ordinary sense of the words even although it may not be legal tender ...

*Reference re Alberta Legislation, supra*, p. 116.

**35**  Duff C.J. cited with approval the concept of credit, as follows:

The word credit is used in a variety of meanings between which it is not at the moment necessary to distinguish. Suffice it to say that when the creation of credit is discussed there is a general agreement that by credit is meant a banker's credit, that is to say, the right to draw cheques on a bank. The exercise of this right involves either the withdrawal from the bank of legal tender, in the shape of bank notes or silver and bronze coin, or the transfer of such a right to some other person in the books of the same or another bank.

*Reference re Alberta Legislation, supra*, p. 124

**36**  In a separate set of reasons in ***Reference Re Alberta Legislation***, Kerwin J. noted at p. 156:

It is not necessary to refer to the various schools of economists with their divergent views as to the extent to which banks create credit or as to the wisdom or otherwise of a state empowering such institutions to do so. It suffices that by current common understanding a business transaction whereby credit is created, issued, lent, provided or dealt in by means of bookkeeping entries is considered to be part of the business of banking as it has been practised and developed. It is well known that in addition to creating credit banks also issue, lend, provide and deal in credit by means of bookkeeping entries.

**37**  Under Canadian law, "money" is not restricted to "cash" or "hard currency" and any medium of payment which fulfills the function of money and which everyone will accept in payment of a debt is money. On this basis alone, it is plain and obvious that the claimants' assertions that a failure on the part of the defendant banks to deal in "cash" or "hard currency", a premise fundamental to the claimants' purported causes of action, do not disclose a reasonable claim. Pleadings based on such a theory are bound to fail.

**38**  Furthermore, as noted by Mr. Neave, counsel for MBNA and Citibank, s. 409(2)(d) of the ***Bank Act*** R.S.C. 1991, c. 46 gives MBNA, a Schedule II Bank, and Citi Cards, a wholly owned subsidiary of Citibank Canada, also a Schedule II Bank, the power to issue payment, credit or charge cards and to operate payment, credit or charge card plans. Accordingly in issuing credit cards such as MasterCards and operating plans relating to those cards the creditors are conducting activities which they are permitted by law to do.

**39**  I conclude that claims based on, or derivative of, the unlawful of creation of money theory are entirely without merit. For this reason alone, the claims which are derivative of this basic theory do not disclose a reasonable cause of action as drafted or as they might be amended and are properly dismissed under R. 19(24)(a).

**Claims against the solicitors**

**40**  Similarly, the claims against the solicitors disclose no cause of action known to law and should be struck to pursuant to R. 19(24)(a).

**41**  The claims against the solicitors are derivative of the money for nothing claims. The claims against the solicitors for interfering with the contractual relationships of the plaintiffs with the financial institutions on the basis described in the statement of claim, are not claims that could succeed at trial because they are in essence a collateral attack on a judgment in another proceeding.

**42**  In ***Samos Investments Inc. v. Pattison*** [*(2003), 3 B.L.R. (3d) 283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X22V-00000-00&context=) at [paragraph] 74 the doctrine of collateral attack was discussed by Mr. Justice Bauman, he quoted with approval from ***Wilson v. the Queen***, [*[1983] 2 S.C.R. 594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M29X-00000-00&context=):

It has long been a fundamental rule that a court order made by a court having jurisdiction to make its stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed ... and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal variation or nullification or order or judgment.

**43**  The claims against the solicitors in these proceedings constitute collateral attacks to the extent that the banks have obtained judgment in other debt enforcement actions. The debtors had other modes of challenging those judgments or challenging the venue in which those claims were brought than by bringing these claims. They could have applied to set aside or appeal the judgment obtained against them, should they have felt it necessary. These sections of the statement of claim are struck pursuant to R. 19(24)(a) as disclosing no cause of action. They are also struck pursuant R. 19(24)(d), as an abuse of process of the court.

**Claims against non-parties**

**44**  There are also claims made against non-parties which are struck pursuant to R. 19(24)(a). There are claims made against the Canadian Payments Association, although it is not a party. There are claims made against others "like the banks" listed as defendants and there are claims made against other financial institutions.

**45**  None of those claims can withstand a challenge pursuant to R. 19(24)(a). This action is dismissed.

**46**  I now turn to the other actions.

**DEMPSEY V. ENVISION CREDIT UNION, NEW WESTMINSTER ACTION NO. S91786**

**47**  Mr. Dempsey brings this action under the ***Class Proceedings Act***. This action is not certified. The description of the class is as follows:

The plaintiff, the People of Canada, comprise[sic] of all peoples who are legal residents of Canada, whether Canadian Citizens, Landed Immigrants, with permanent or non-permanent visas who have been granted any type of loans whether secured or unsecured by any of the defendants.

**48**  In [paragraph] 11-30, of the statement of claim, Mr. Dempsey, the named plaintiff, in this proposed class action, describes a series of loan transactions he entered into with Envision Credit Union, Laurentian Bank, Royal Bank, CIBC, Bank of Montreal and Canada Trust. He alleges that the sum total of the loans he received from these institutions was $1.2 million, plus $15,000 as over-draft lines of credit.

**49**  In [paragraph] 31 he states that in none of these transactions did he receive any real money, that is, legal tender.

**50**  Paragraph 50 states, "by virtue of the promissory notes received by the defendant banks and credit unions, which they deposited and converted for their own use, it was the lenders' who owed the plaintiff money, not the other way around". He describes these loan transactions as the illegal creation of money from nothing.

**51**  His description of the class includes every person in Canada who has entered into any type of loan transaction with the defendants, all of which he claims are void. Some of his claims for relief at [paragraph] 87 includes a declaration that any debts incurred against the plaintiff and the proposed class by the defendants be and are hereby discharged.

**52**  For the reasons given at [paragraph] 26-39 above, pursuant to R. 19(24)(a) the action based on the money for nothing theory discloses no cause of action.

**Royal Bank Loan to Mr. Dempsey**

**53**  The affidavit of Lindsay Goldberg, on August 5, 2005, refers to the $140,000 loan to Mr. Dempsey from the Royal Bank referred to in [paragraph] 19 in the statement of claim. Mr. Goldberg describes the foreclosure proceedings that took place with respect to that loan and which resulted in an order for sale of the property made April 28, 1999. Mr. Goldberg swears that no appeal was taken from the orders made in the foreclosure proceedings and he also swears that "at no time during the RBC foreclosure proceeding did the plaintiff raise against RBC the substantive claims and allegations currently raised against RBC in the statement of claim." (The reference to the statement of claim in Mr. Goldberg's affidavit, is a reference to the within action.) Accordingly, the pleadings that allege that the RBC loan to Mr. Dempsey is void or illegal and any of the other claims Mr. Dempsey makes that arise from this loan are *res judicata* and must be struck as an abuse of process pursuant to R. 19(24)(d).

**Laurentian Bank Loan to Mr. Dempsey**

**54**  The affidavit of Andrew Bury, solicitor for the defendant, Laurentian Bank of Canada, sworn August 11, 2005, is also before me. That affidavit recounts the circumstances of a $247,500 loan to Mr. Dempsey from the Laurentian Bank. It is the same loan referred to at [paragraph] 18 of Mr. Demspey's statement of claim. Foreclosure proceedings were commenced and eventually resulted in an order approving the sale of his property on July 26, 1999. No appeals were taken from any of the foreclosure orders. Mr. Dempsey did not raise against the defendant Laurentian Bank the substantive claims and allegations currently raised against the Laurentian Bank in the within action. For the same reason, as in respect to the RBC loan, portions of the statement claim in which Mr. Dempsey challenges the legality of the Laurentian Bank loan must fail.

**Canada Trust Credit Card Loan to Mr. Dempsey**

**55**  At [paragraph] 22 the plaintiff refers to a $23,000 loan in the form of the credit card loan he obtained from Canada Trust.

**56**  The affidavit of George Richards, solicitor for Canada Trust Company (now TD Canada Trust) is before me. That affidavit recounts details of the Supreme Court of British Columbia action against Mr. Dempsey for unpaid debts. Judgment was obtained against Mr. Dempsey on March 20, 2000, in the amount of $21,886.79. A series of garnishing orders were issued and Mr. Dempsey took steps to set aside the garnishing orders. He was ultimately unsuccessful. Mr. Richards swears, "at the hearing of the appeal [concerning the garnishing orders] before Madam Justice Wedge, the plaintiff raised many, if not all, of the same substantive claims and allegations currently raised against TD in the Statement of Claim. These arguments were rejected by Madam Justice Wedge ...". There was no appeal taken from the February 4, 2005, order of Madam Justice Wedge.

**Envision Credit Union loan to Mr. Dempsey**

**57**  In [paragraph] 17 of Mr. Dempsey's claim he refers to a $356,000 loan from Envision Credit Union (previously First Heritage Delta Credit Union). The loan resulted in an *order nisi*, an order for conduct of sale on October 25, 2001, and an approval of sale on January 29, 2002. No appeal was taken from that final order of foreclosure.

**Bank of Montreal loan to Mr. Dempsey**

**58**  The Bank of Montreal loans referred to at [paragraph] 21 of the statement of claim also resulted in legal proceedings which were concluded by default judgments in British Columbia Provincial Court.

**59**  The materials do not disclose the specific details of those proceedings.

**The Canadian Imperial Bank of Commerce mortgage to Mr. Dempsey**

**60**  At [paragraph] 20 of the statement of claim, the plaintiff refers to a $240,000 loan from CIBC to Mr. Dempsey.

**61**  The affidavit of Janie Bulick, a legal secretary for the solicitors for the defendant CIBC was sworn August 12, 2005, and includes registry documents relating to CIBC's action against Mr. Dempsey for this unpaid loan. On June 11, 1999, CIBC commenced foreclosure proceedings relating to the defaulted mortgage. It appears, from the court's recitation of the background to the action in ***Law Society of British Columbia v. Dempsey***, [*[2005] B.C.J. No. 1985*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1G9-00000-00&context=), that the property was ultimately sold by way of a vesting order, after Mr. Dempsey's attempts at an appeal were unsuccessful.

**62**  This claim raises allegations related to the subject matter of previous litigation that could or should have been raised in that litigation and is therefore an abuse of this process.

**Summary of Conclusions in Respect to Action No. S91786**

**63**  Consequently, I conclude that the claims relating to debts owed by the debtor, in this case Mr. Dempsey, where judgments have already been issued against him in other proceedings should be struck out as an abuse of process.

**64**  There are other grounds upon which some or all of the claims in Action No. S91786 should be struck. Paragraph 10 purports to claim the right to sue other parties named as "others" in the style of cause. Paragraphs 36, 41, 52, 67 and 76 are allegations of a crime and the plaintiff has no standing to advance such claims. Paragraphs 49, 51, 63, 53, 26 and 77 are unintelligible.

**65**  In summary, I conclude that Action No. S91786 discloses no cause of action, is an abuse of process or the pleading is unintelligible. The writ and statement of claim must be struck and the action is dismissed pursuant to R. 19(24)(a) and (d).

**DARMANTCHEV, GRAVLIN AND ALDEN V. MBNA CANADA BANK AND OTHERS, VANCOUVER ACTION NO. L050637**

**66**  The applicant MBNA Canada Bank applies for an order that the statement of claim in this proceeding be struck and the within action dismissed under R. 19(24) of the ***Rules of Court***. Mr. Gravlin and Ms. Alden are no longer parties to this proceeding. They filed Notices of Discontinuance on August 2 and 15, 2005 respectively.

**67**  Mr. Darmantchev entered into a credit agreement (the "Darmantchev Agreement") with MBNA, and was provided with a MBNA MasterCard in about June 2002. That agreement provides, *inter alia*:

You promise to pay us the amounts of all credit you obtain; any fees, charges and insurance premiums we charge against your account; and interest charges; all at the times and in the manner set out in this Agreement.

**68**  Mr. Darmantchev used his card to obtain goods, services and/or cash advances and as of September 23, 2003, he had a balance in his account of $32,031.45, past due and payable.

**69**  In response to MBNA's efforts to collect payment of Mr. Darmantchev's outstanding debt, he forwarded various correspondence and documents to MBNA in which he asserted that MBNA was liable to him on a variety of grounds. For example, in December 2003, Mr. Darmantchev purported to charge MBNA $600,000 for "each and every unauthorized use" of his name, claiming that his name and all derivatives of it were his property under "s. 39:1 of the Canadian *Criminal Code*" and that they were his "copy claim".

**70**  In February 2004, MBNA forwarded a demand letter to Mr. Darmantchev in which it demanded payment of the outstanding balance plus interest and costs. Mr. Darmantchev was informed that unless payment or suitable arrangements for the payment of this amount were made, legal proceedings might be commenced against him without further notice.

**71**  In April 2004, Mr. Darmantchev forwarded a document entitled "Report and Notice to Solicitor/Counsel and Notice of Suspension of Account Pending Provision of Proof of Non-Criminality of Activity" and another entitled "Notice of Unconditional Tender of Full Payment on Demand".

**72**  On June 14, 2004, MBNA commenced an action in the Ontario Superior Court of Justice against Mr. Darmantchev with respect to the outstanding MasterCard debt then past due and payable ("Darmantchev Ontario Action"). Mr. Darmantchev was served with the statement of claim on or before July 2, 2004.

**73**  On or about July 6, 2004, MBNA received correspondence from Mr. Darmantchev entitled "Notice of Fault/Opportunity to Cure".

**74**  On July 8, 2004, Mr. Darmantchev served on MBNA, but did not file, a statement of defence and counterclaim in the Darmantchev Ontario Action. That pleading asserts virtually the same allegations against MBNA which are now pleaded in the Darmantchev statement of claim in Action No. L050149, and the statement of claim in this British Columbia action.

**75**  On August 18, 2004, the Ontario Superior Court of Justice issued default judgment against Mr. Darmantchev in the amount of $37,652.05 plus interest at the rate of 17.99% per annum from the date of judgment (the "Darmantchev Order").

**76**  In August 2004, Mr. Darmantchev forwarded two separate documents entitled "Notice of Dishonour" to MBNA stating that the certificate of dishonour would "act as a Default Judgment against the respondent, who will then be taken into bankruptcy liquidation, whereby all the equity in the name of the respondent will be disposed of in a foreign proceeding."

**77**  Mr. Darmantchev has not appealed the Darmantchev Order and he has not taken any steps to set that Order aside.

**78**  It is apparent that Mr. Darmantchev was not only aware of the matters now contained in his statement of claim prior to the Darmantchev Order being pronounced by Ontario Supreme Court of Justice, but also he chose not to pursue that defence in the Ontario proceeding. Clearly, having decided not to pursue those allegations in the Ontario proceeding, the advancement of the same allegations in British Columbia offends the ***Henderson v. Henderson*** principle. His decision cannot reasonably be viewed as constituting "special circumstances". For that reason the statement of claim is struck as an abuse of process and pursuant to R. 19(24)(d) the writ and statement of claim should be dismissed. I would also dismiss this action under R. 19(24)(a) on the basis that it discloses no cause of action, because the entire claim is derivative of the "money for nothing" theory advanced by the plaintiffs in all these actions and discussed above at [paragraph] 26-39. Action No. L050637 is dismissed.

**CITI CARDS CANADA INC. V. PEDRO LIONG AND LINDA LIONG, NEW WESTMINSTER ACTION NO. S89429**

**79**  In this action, MBNA Canada Bank applies to strike the counterclaim filed by Pedro and Linda Liong.

**80**  The writ and statement of claim issued by the plaintiff, Citi Cards Canada Inc., claims judgment against Pedro and Linda Liong jointly and severally in the sum of $15,334.84 as at November 5, 2004, plus interest at the rate of 19.5% per annum, $8.19 per day from that date until payment or judgment, in respect to a MasterCard No. 1. In respect to MasterCard No. 2, Citi Cards Canada Inc. claims judgment in the sum of $8,090.92 as at November 3, 2004, at an interest rate of 18.9% per annum, that is $4.18 per day.

**81**  The statement of defence and counter claim were filed on December 20, 2004. Mr. and Mrs. Liong filed an amended statement of defence and counterclaim on March 30, 2006. The amended pleading adds the defendant's solicitors as defendants by counterclaim, George H. Richards, Richards and Richards, Barristers and Solicitors and David T. Neave, of Blake Cassels and Graydon LLP.

**82**  The original December 20, 2004, counterclaim is similar to the statement of claim in Gravlin et al. v. CIBC et al Action No. L050149. It is based on the same allegations of money for nothing'.

**83**  The amended counterclaim does not repeat the allegations in the December 20, 2004, counterclaim. I am not sure if Mr. and Mrs. Liong intended the amended pleading to be an addition to the original pleading, or in substitution therefore. For the purposes of this application I shall assume they intended to add further allegations and not to withdraw the original allegations. The amended counterclaim is unintelligible (as is the statement of defence). The document reads as follows:

**Amended Statement of Defence and Counterclaim**

1. This Statement of Defence and Counterclaim is filed on behalf of the Nominal Defendants, Pedro Liong a.k.a. Pedro C. Liong and Linda Liong a.k.a. Linda Kua Liong by Third Party Intervener, Real Party in Interest and Authorized Representative, Pedro C. Liong.
2. The Authorized Representative, Pedro C. Liong, accepts the Plaintiff's presentments/claims for value in exchange for settlement and closure of this accounting, certified and sworn on the commercial liability of the Plaintiff's authorized representative and its solicitors as true, correct, and complete, with all related endorsements front and back.
3. The Authorized Representative, Pedro C. Liong, accepts for value and returns for value all of the charging instruments in this matter and make his exemption available for discharge of all obligations and charges connected to this case.
4. The Authorized Representative's, Pedro C. Liong, acceptance for value for settlement and closure is subject to:
5. the Plaintiff providing all original or certified true copies of contracts, records, promissory notes (front and back) and other instruments and audited statements which substantiate the validity of every ledger entry including proof of loss;
6. the Plaintiff providing record of accountability of the party who made the entries on the records or ledger;
7. the Plaintiff attesting the accuracy, relevance and verifiability of every record with supporting sworn statement signed by a human being who takes full commercial liability and responsibility for the validity and truthfulness of all information contained in the Plaintiff's records and presentments.
8. Failure to prove 4a, 4b, and 4c above, the Nominal Defendants instruct the court the Plaintiff's claims be dismissed and demand that special costs be awarded to the Nominal Defendants.

**Amended Counterclaim**

1. In the event that the Plaintiff and its solicitors are not able to produce the materials required per paragraphs 4a, 4b, and 4c above, the Nominal Defendants revoke acceptance for value and counterclaim as follows:
2. Breach of contract, breach of fiduciary duty, fraud and fraudulent misrepresentation against the Plaintiff;
3. Conspiracy to commit fraud and unjust enrichment against the Plaintiff and its solicitors;
4. Malicious institution of civil proceeding against the Plaintiff and its solicitors;
5. Abuse of process against the Plaintiff and its solicitors;
6. Unlawful interference with the Nominal Defendant's private contract adaint the Plaintiff's solicitors;
7. Compensatory damages against the Plaintiff and its solicitors;
8. Punitive damages against the Plaintiff and its solicitors;
9. Special costs against the Plaintiff and its solicitors;
10. Such further and other relief this court deems meet and just.

**84**  Rule 19(1) of the ***Rules of Court*** states:

Pleadings shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

**85**  This amended counterclaim fails to comply with R. 19(1) as it does not state the facts upon which the asserted claims are made. The amended counterclaim is also dismissed in its entirety pursuant to Rule 19(24)(a). The original counterclaim discloses no reasonable cause of action. The original counterclaim is based on the money for nothing' theory discussed above at [paragraph] 26-39 and is therefore bound to fail. The original and amended counterclaim are dismissed.

**86**  The counterclaim should also be dismissed pursuant to R. 19(24)(c). Embarrassing pleadings are those that are so irrelevant that to allow them to stand would involve useless expense and would prejudice the trial of the action by involving the parties in a dispute that is tangential to the main claim. Claims will also be embarrassing if they fail to state a real issue between the parties in an intelligible way. (see ***Keddie v. Dumas Hotels Ltd*** [*(1985), 62 B.C.L.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61X7-00000-00&context=) at 147 (B.C.C.A.)) This pleading is embarrassing because it fails to meet the test in ***Keddie***.

**BANK OF MONTREAL V. PEDRO LIONG AND LINDA LIONG, VANCOUVER ACTION NO. S044649**

**87**  The application before me is to dismiss the counterclaim in the within action.

**88**  The writ of summons and statement of claim was issued by the Bank of Montreal on August 20, 2004. The plaintiff Bank of Montreal claims against the defendants jointly and severally for the sum of $10,463.58 for a Bank of Montreal MasterCard debt.

**89**  On January 17, 2005, Mr. and Mrs. Liong filed a statement of defence and counterclaim. The counterclaim is brought under the ***Class Proceedings Act***. It tracks the same or similar language and similar theories advanced in the Darmantchev Action No. L050637 at [paragraph] 32 of the statement of claim and Dempsey Action No. S91786 at [paragraph] 31 of the statement of claim. The basic theory advanced set out at [paragraph] 17 of the counterclaim is that "in none of these transactions did the defendants and the proposed class members receive any real money that is legal tender in Canada from the plaintiff as contemplated by the loan agreement(s)." All other claims are derivative of this basic theory.

**90**  On March 31, 2006, Pedro and Linda Liong filed an amended statement of defence and counterclaim adding D. Ross McGowan and Borden Ladner Gervais LLP as defendants by counterclaim. It is not clear if the amended counterclaim deletes [paragraph] 14 - 81 of the counterclaim filed January 17, 2005. I shall assume for the purposes of this application that the amended counterclaim is intended as an addition to the existing counterclaim.

**91**  The amendment and addition of the solicitors for the Bank of Montreal contravenes the order I made in an earlier ruling staying this action pending this hearing pursuant to R 19(24). Consequently, the amendment to the counterclaim must be struck.

**92**  In any event, the amended counterclaim fails to disclose a reasonable claim and fails to contain a statement of material facts on which the claim is based and thus breaches R 19(1). It reads as follows:

**Amended Statement of Defence and Counterclaim**

1. The Nominal Defendants, PEDRO LIONG and LINDA LIONG are corporate/legal fictions.
2. This Statement of Defence and Counterclaim is filed on behalf of the Nominal Defendants, PEDRO LIONG and LINDA LIONG by Third Party Intervener, Real Party in Interest and Authorized Representative, Pedro Liong.
3. The Authorized Representative, Pedro C. Liong, accepts the Plaintiff's presentments/claims for value in exchange for settlement and closure of this accounting, certified and sworn on the commercial liability of the Plaintiff's authorized representative and its solicitors as true, correct and complete, with all related endorsements front and back.
4. The Authorized Representative's, Pedro C. Liong, accepts for value and returns for value all of the charging instruments in this matter and make his exemption available for discharge of all obligations and charges connected to this case.
5. The Authorized Representative's, Pedro Liong, acceptance for value and closure is subject to:
6. the Plaintiff providing all original or certified true copies of contracts, records, promissory notes (front and back) and other instruments and audited statements which substantiate the validity of every ledger entry including proof of loss;
7. the Plaintiff providing record of accountability of the party who made the entries on the records or ledger;
8. the Plaintiff attesting the accuracy, relevance and verifiability of every record with supporting sworn statement signed by a human being who takes full commercial liability and responsibility for the validity and truthfulness of all information contained in the Plaintiff's records and presentments.
9. Failure to prove 5a, 5b, and 5c above, the Nominal Defendants instruct the court the Plaintiff's claims be dismissed and demand that special costs be awarded to the Nominal Defendants.

**Amended Counterclaim**

1. In the event that the Plaintiff and its solicitors are not able to produce the materials required per paragraphs 5a, 5b, and 5c above, the Nominal Defendants revoke acceptance for value and counterclaim as follows:
2. Breach of contract, breach of fiduciary duty, fraud and fraudulent misrepresentation against the Plaintiff;
3. Conspiracy to commit fraud and unjust enrichment against the Plaintiff and its solicitors;
4. Malicious institution of civil proceeding against the Plaintiff and its solicitors;
5. Abuse of process against the Plaintiff and its solicitors;
6. Unlawful interference with the Nominal Defendant's private contract against the Plaintiff's solicitors;
7. Compensatory damages against the Plaintiff and its solicitors;
8. Punitive damages against the Plaintiff and its solicitors;
9. Special costs against the Plaintiff and its solicitors;
10. Such further and other relief this court deems meet and just.

**93**  The amended statement of defence and counterclaim are unintelligible and therefore the counterclaim must be struck on that basis also. This counterclaim should also be dismissed pursuant to R. 19(24)(c) for the same reasons as I dismissed the similar pleading in Action No. S89429.

**MBNA CANADA BANK V. OTTO LUINENBURG, VANCOUVER ACTION NO. S045442**

**94**  The application before me in this action is for dismissal of the counterclaim.

**95**  On October 1, 2004, MBNA Canada Bank issued a writ and statement of claim naming Otto Luinenburg as defendant. The claim against Mr Luinenburg is for breach of two credit card agreements. It is alleged that he is indebted to MBNA Canada Bank in respect to the use of the two credit cards in the amount of $19,301.40 plus interest of 18.99% per annum on the first account, and $29,908.06 plus interest of 19.99% on the second account.

**96**  On February 7, 2005, Mr. Luinenburg filed a statement of defence and counterclaim under the ***Class Proceedings Act***, similar to those in the aforementioned actions. Mr. Luinenburg has also filed a lengthy reply to the statement of defence to the counterclaim which includes further allegations of creation of money out of "thin air".

**97**  The counterclaim in this action tracks the same or similar language as in the Liong counterclaims in Action No. S044649 and S89429 and for the same reasons discussed above I strike the counterclaim in this action.

**CANADIAN IMPERIAL BANK OF COMMERCE V. OTTO LUINENBURG, NEW WESTMINSTER ACTION NO. S87315**

**98**  In this action the Canadian Imperial Bank of Commerce sues Mr. Luinenburg for the sum of $18,095.06 as at May 12, 2004, plus interest at the rate of 18.5% per annum which is equal to $9.17 per day from that date until payment or judgment, in respect to Visa Card No. 1. In respect to Visa Card No. 2, the Canadian Imperial Bank of Commerce sues for the sum of $18,061.50 as at May 15, 2004, plus interest at the rate of 18.5% per annum which is equal to $9.15 per day from that date until payment or judgment. In respect to Visa Card No. 3, the Canadian Imperial Bank of Commerce sues for the sum of $16,763.23 as a May 12, 2004, plus interest at the rate of 5.75% per annum which is equal to $2.64 per day from that date until payment or judgment. The Canadian Imperial Bank of Commerce also sues for post-judgment interest to the date of payment, and costs.

**99**  A statement of defence and counterclaim were filed in this action on October 6, 2004. A second statement of defence and counterclaim were filed on April 21, 2005. The April 21, 2005, pleading is not titled as an amended pleading but I shall assume it was intended to amend the earlier pleading.

**100**  The counterclaim in this action contains the same allegations as the claim in Gravlin and Darmantchev v. CIBC Vancouver Action No. L050149. It is dismissed for the same reasons discussed above at [paragraph] 26-39.

**DISPOSITION**

**101**  In summary the following claims and counterclaims are dismissed:

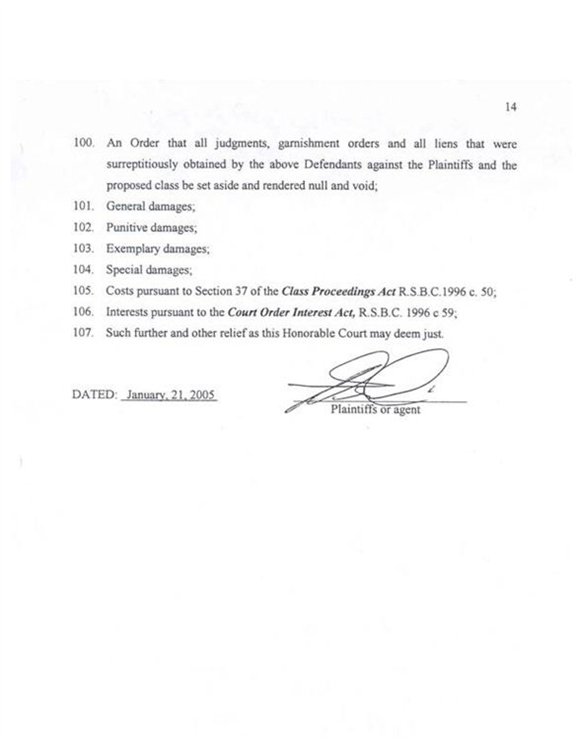
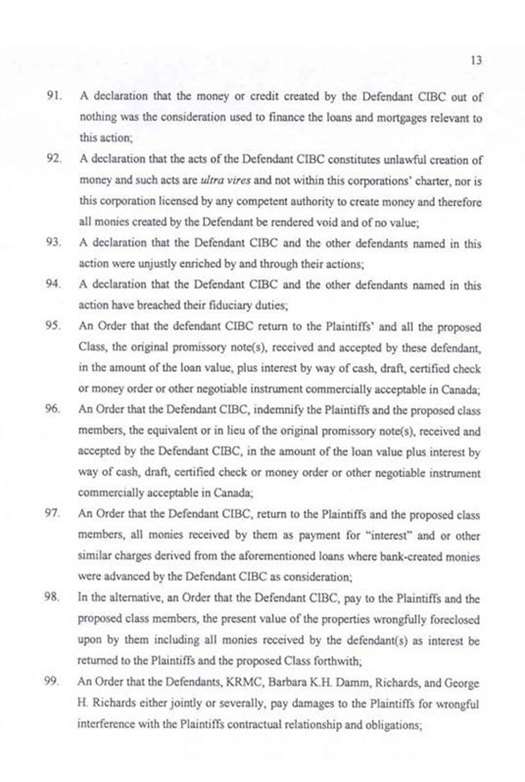
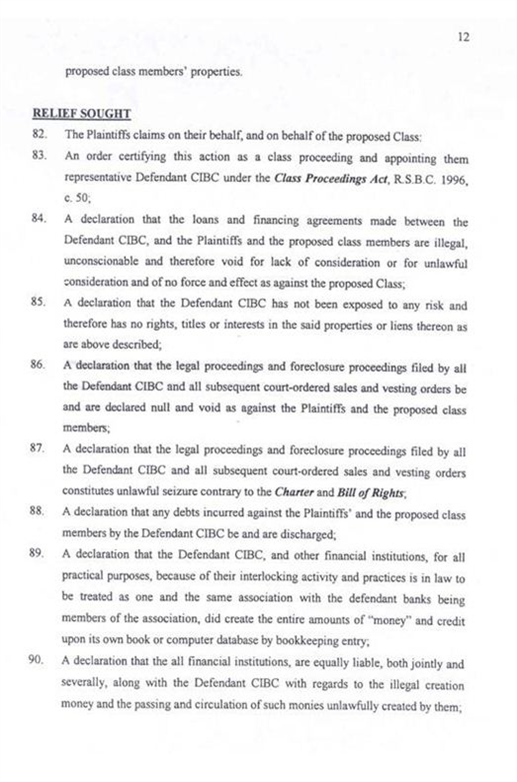
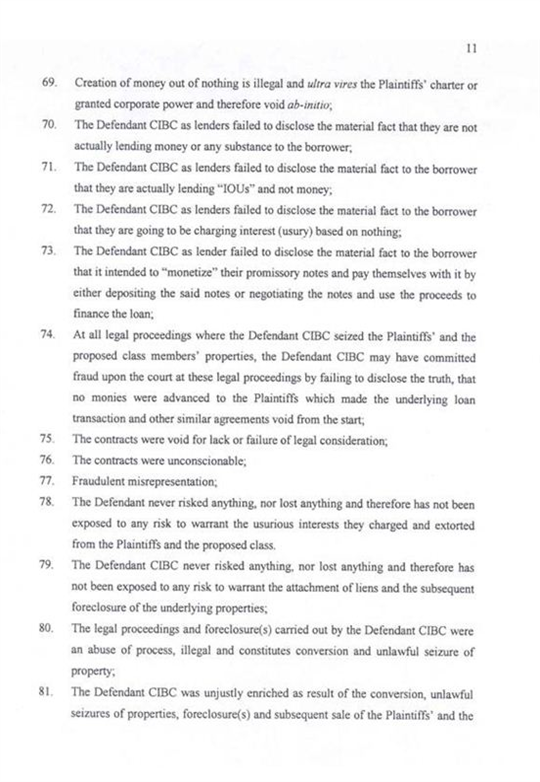
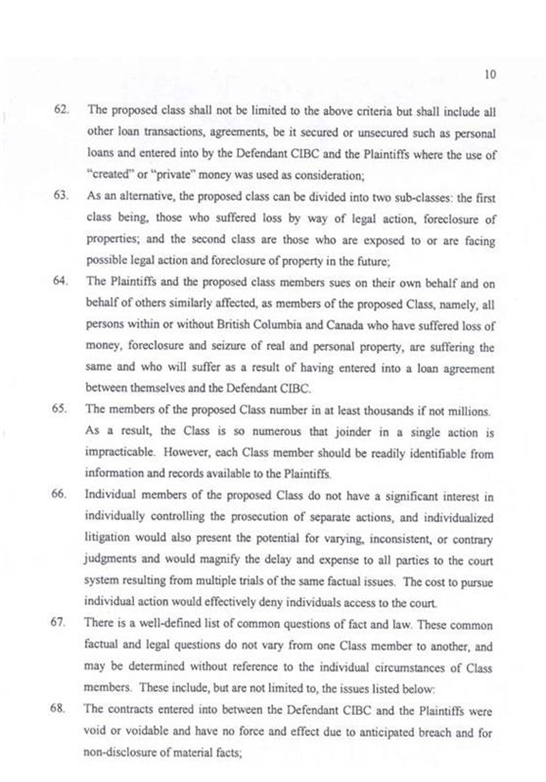
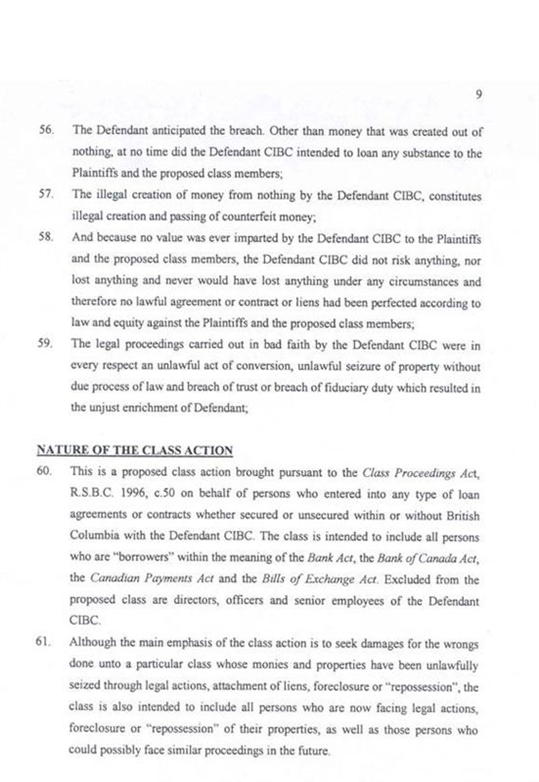
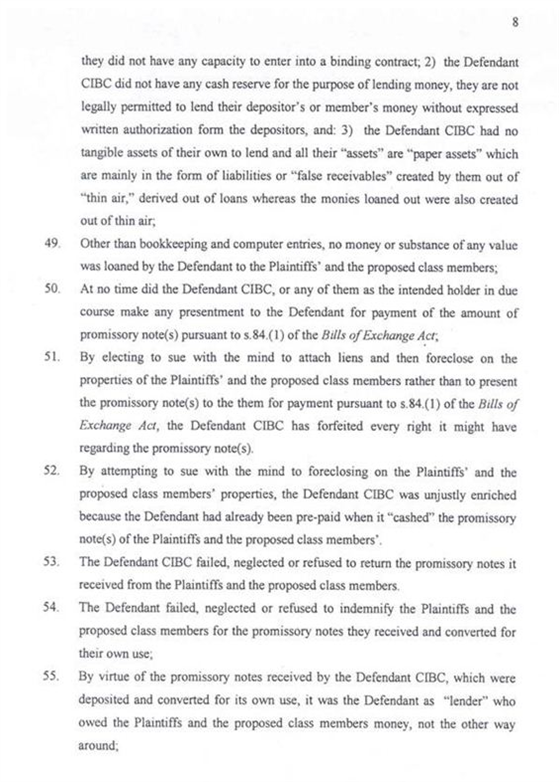
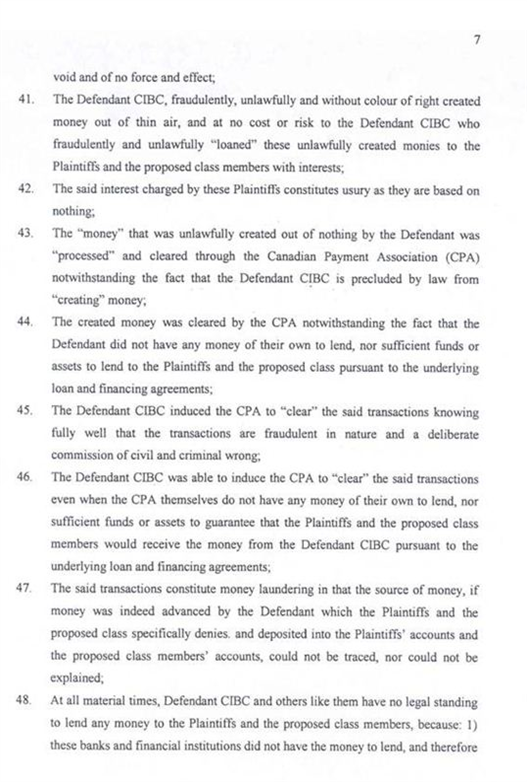
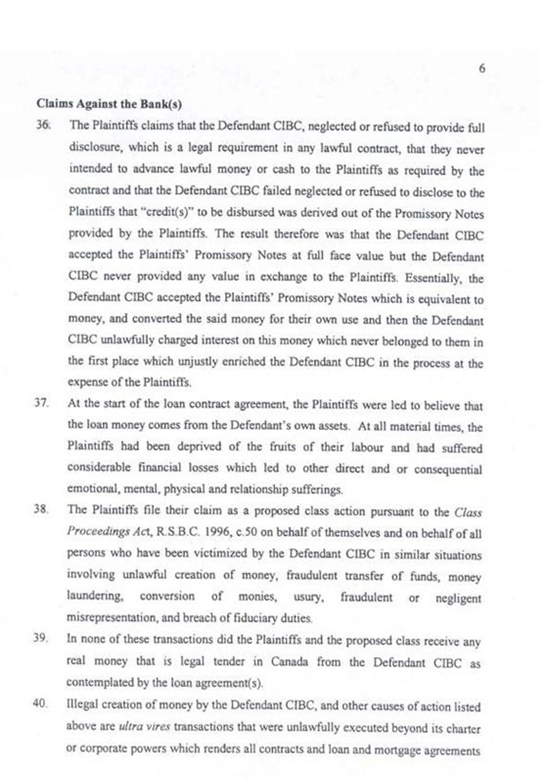
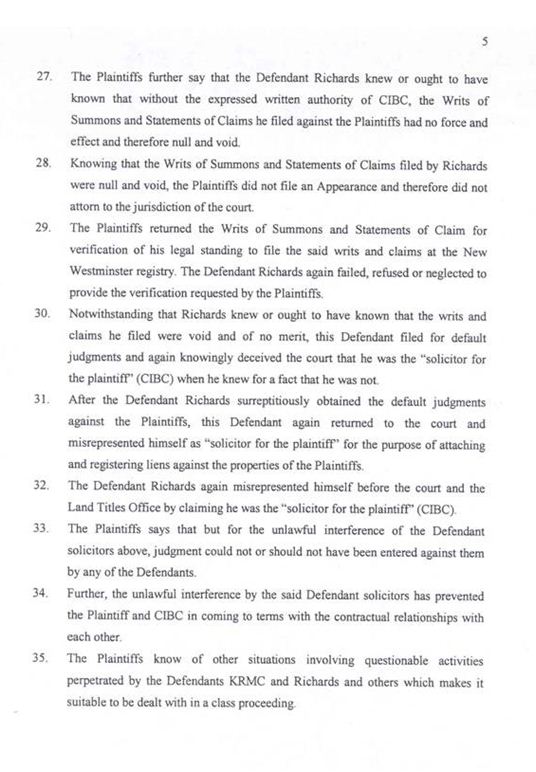
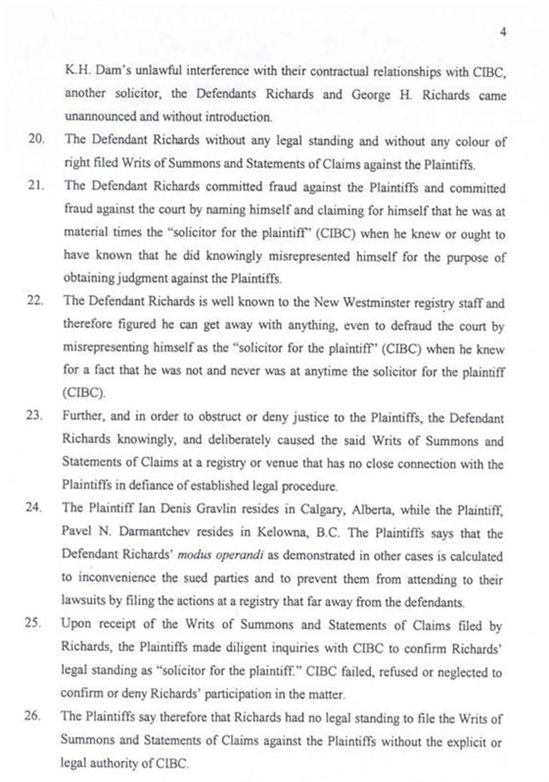
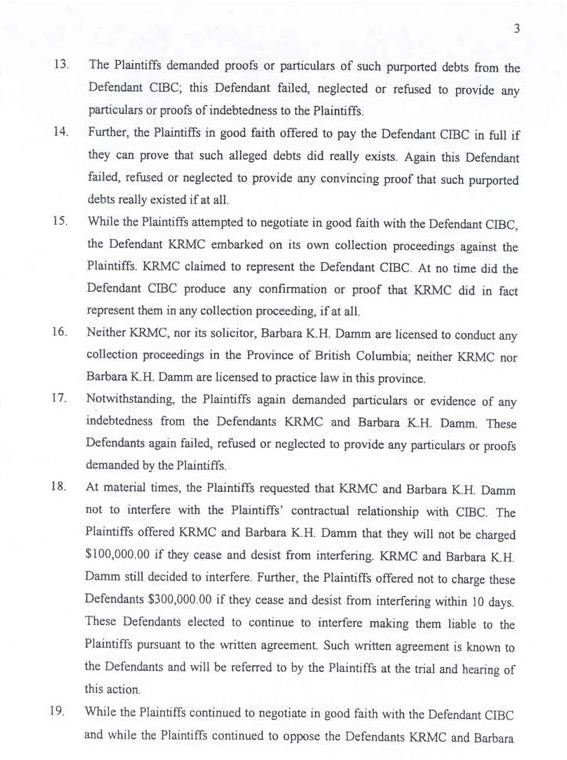
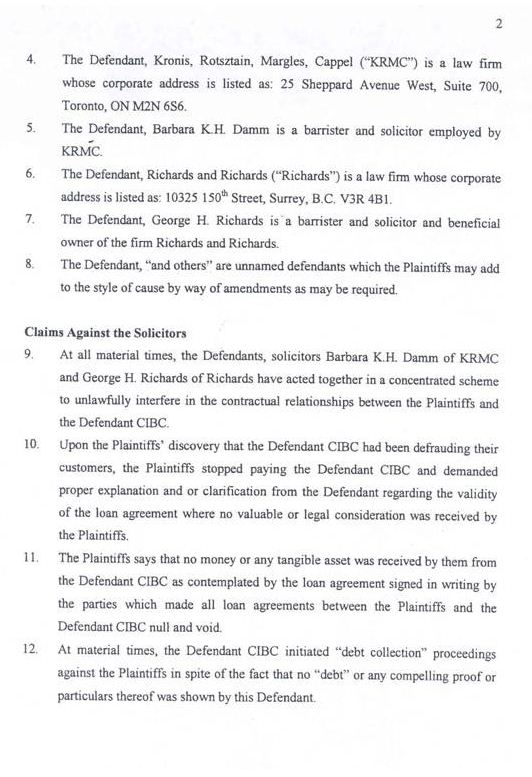
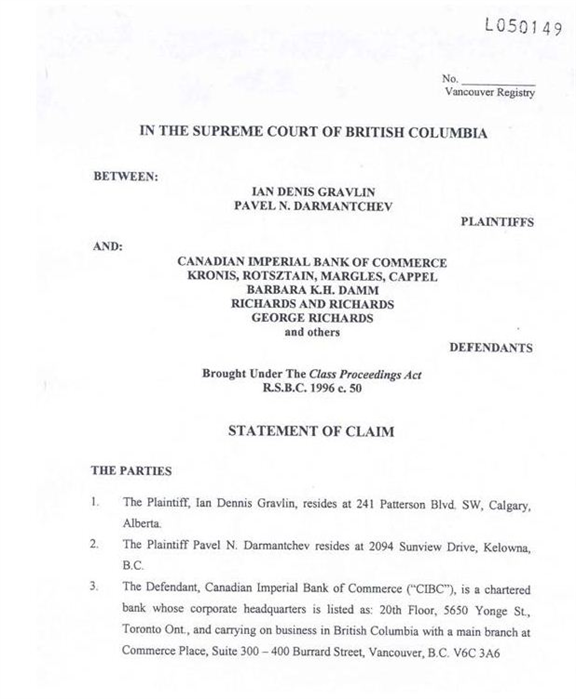
1. Gravlin et al. v. CIBC et al., Vancouver Action No. L050149. The action is dismissed;
2. Dempsey v. Envision Credit Union, New Westminster Action No. S91786. The action is dismissed;
3. Darmantchev, Gravline and Alden v. MBNA Canada Bank et al, Vancouver Action No. L050637. The action is dismissed;
4. Citi Cards Canada Inc. v. Pedro Liong and Linda Liong, New Westminster Action No. S89429. The counterclaim is dismissed;
5. Bank of Montreal v. Pedro Liong and Linda Liong, Vancouver Action No. S044649. The counterclaim is dismissed;
6. MBNA Canada Bank v. Otto Luinenburg, Vancouver Action No. S045442. The counterclaim is dismissed; and
7. CIBC v. Otto Luinenburg, New Westminster Action No. S87315. The counterclaim is dismissed.

**102**  In Action Nos. S89429, S044649, S045442, and S87315, there are outstanding actions in debt. Although in each case I have dismissed the counterclaims, I have not struck the statements of defence because no such relief was claimed in the notices of motion before me and no amendment to those motions was sought at the April 6, 2006, hearing.

**103**  The applicants on these motions have claimed costs. I did not hear submissions concerning costs at the hearing of these applications. The applicants may make submissions in writing concerning costs within 30 days of the date of these Reasons for Judgment. The respondents have a further 30 days to respond in writing to the applicants' submissions on costs. Submissions must be delivered to the registry in care of Trial Division, (Supreme Court of British Columbia, 800 Smithe Street, Vancouver, British Columbia V6Z 2E1).

GARSON J.

**SCHEDULE A**



\* \* \* \* \*

CORRIGENDUM

Released: September 25, 2006.

Corrigendum to the Reasons for Judgment issued advising that the citation in paragraph 17(e) should read Ebrahim v. Ebrahim, [*2002 BCSC 466*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0P8-00000-00&context=).

**End of Document**

[***Denmar Equipment Rentals Ltd. v. 342699 B.C. Ltd., [2004] B.C.J. No. 1874***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2SV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

District Registrar Bouck

Heard: August 26, 2004.

Judgment: September 7, 2004.

Victoria Registry No. 97/0562

**[2004] B.C.J. No. 1874** | 2004 BCSC 1169 | 134 A.C.W.S. (3d) 38

Between Denmar Equipment Rentals Limited, plaintiff, and 342699 B.C. Ltd. formerly known as Wigmar Construction (B.C.) Ltd., The Attorney General of Canada representing Her Majesty The Queen in Right of Canada, Defence Construction (1951) Limited, Agra Earth & Environmental Limited, and Island Geotechnical Services Ltd., defendants

(68 paras.)

**Case Summary**

**Practice — Costs — Party and party costs — Counsel fees — Disbursements — Photocopies — Travelling expenses, counsel — Computer research — Cost of expert advice — Taxation of costs.**

|  |
| --- |
| Assessment of costs after a summary trial. The defendant Agra was successful during the three-day summary trial on its application to have Denmar's claim against it dismissed. The trial judge allowed Agra its costs. Agra presented a bill of costs of $29,000. Denmar argued that Agra should not be paid for the attendance of junior counsel; that travel, courier, photocopying, and Quicklaw charges were excessive; and that Agra's expert's fee was unreasonable.  HELD: Costs assessed at $23,000.  Fees were reduced due to duplication of counsel's effort with a related earlier action between the same parties. There were very few new documents involved in this action. Agra was not entitled to units for the entry of orders that were prepared and entered by the opposite party. It was reasonable for Agra to incur travel expenses in order to retain out-of-town counsel because this counsel represented it successfully in the previous matter between the parties. However, counsel was not entitled to expenses for travel by Helijet when less expensive air transportation would have been suitable. Junior counsel's attendance was probably of assistance but was not necessary given senior counsel's skill and experience in the previous litigation. Photocopying charges were reduced from $1,800 to $900 because some photocopying was done for the client's benefit and much could have been done outside of counsel's office at a lower cost. Quicklaw research was reduced from $650 to $150. The expert's report was comprehensive and, in the absence of any evidence questioning the reasonableness of his fee, the full amount of $7,600 was allowed. |

**Counsel**

Counsel for the Plaintiff: James A.S. Legh

Counsel for the Defendant, Agra Earth & Environmental Limited: John R. Singleton, Q.C.

[Editor's note: A corrigendum was released by the Court September 13, 2004. The corrections have been made to the text and the corrigendum is appended to this document.]

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| --- |
| **DISTRICT REGISTRAR BOUCK** |

**1**   This is an assessment of the bill of costs of the defendant Agra Earth & Environmental Limited ("Agra") resulting from the order of Melvin J. made April 8th, 2004. The bill in question claims the following:

Tariff Items:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 143.5 x $80.00 | = | $11,480.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GST: | $ | 803.60 |  |
|  | PST: | $ | 861.00 |  |

|  |  |  |
| --- | --- | --- |
| $13,144.60 | $13,144.60 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Taxable Disbursements: | $14,361.29 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | GST: | $ 1,005.29 |  |

|  |  |  |
| --- | --- | --- |
| $15,366.58 | $15,366.58 |  |

Non-taxable

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | Disbursements: | $ | 507.00 | $ | 507.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL: | $29,018.18 |  |

**2**  The order of Melvin J. followed a three-day summary trial hearing in which the court considered four notices of motion. The defendant Agra was successful on its application to have the plaintiff's claim against it dismissed. In dismissing the claim, Melvin J. allowed the defendant Agra its costs of the proceeding, with the exception of time spent by Mr. Legh cross-examining the defendant Agra's expert, C.O. Brawner, P.Eng. That cross-examination took place in advance of the summary trial application. However, the costs of retaining that expert were allowed.

**3**  The parties are in agreement on a number of the tariff items and disbursements claimed. The major issues between the parties are the following:

1. the appropriate number of units to be allowed for item 1;
2. whether an application heard by Allan, J. on July 17th, 2002 occupied one-half or one full day;
3. the appropriate number of units for item 8;
4. allowances for item 31 (4 units claimed);
5. tariff items and disbursements relating to travel by Agra's solicitors;
6. photocopying charges;
7. courier charges;
8. Quicklaw charges; and
9. the reasonableness of the fee charged by Dr. Brawner.

BACKGROUND

**4**  Mr. Singleton describes the proceeding as a "multi-party complex commercial litigation". He notes that the action was commenced in 1998 but not resolved for another four years.

**5**  This lawsuit emanates from the construction of the NCO officers' mess at C.F.B. Esquimalt. Predecessors to the defendant Agra were retained by Her Majesty the Queen in Right of Canada ("Canada") to conduct a geotechnical survey. Wigmar Construction (B.C.) Ltd. ("Wigmar") was the successful bidder on the project. In turn, Wigmar subcontracted the plaintiff to perform excavation of the site. The contract entered into by Wigmar specifically excludes reliance on the geotechnical survey.

**6**  It turned out that the survey was not entirely accurate. Both Wigmar and Denmar claimed that they were put to additional expense not contemplated by the bid. As a result, Wigmar commenced an action against Canada and Agra in or about 1993. Agra retained Singleton Urquhart to defend that action. The defendants maintained that the contract specifically excluded any reliance on the geotechnical survey.

**7**  Agra was successful in having the claim against it dismissed: Wigmar Construction (B.C.) Ltd. v. Canada (Attorney General) [*[1997] B.C.J. No. 2530*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X434-00000-00&context=) (S.C.). Mr. Singleton was counsel on that application. Vickers J. found that:

"21 Of more importance, however, is the fact that Wigmar did not rely on the geotechnical reports in the preparation of its bid. The evidence is clear and can lead to but one conclusion. Wigmar relied on Denmar to perform its contract and take the excavation to the appropriate grades. No reliance was placed by Wigmar on the geotechnical reports, nor could such reliance be inferred.

22 Whether the defendants knew or ought to have known the reports were inaccurate is not relevant to the issues in this case where there was no actual reliance on the reports by Wigmar. ***Negligence*** in the administration of the contract is not pleaded.

Conclusion

23 As Wigmar did not rely on the geotechnical reports the claim for negligent misrepresentation is dismissed. As Wigmar has abandoned other claims pleaded against Agra, the action against that defendant is dismissed."

**8**  The plaintiff commenced this action following dismissal of the Wigmar claim. Among other things, Denmar claimed against the defendant Agra for negligent misrepresentation.

**9**  Singleton Urquhart was, of course, retained by the defendant Agra to defend this proceeding.

**10**  In addition to examining the principal of Denmar, the defendant Agra made or attended at four applications concerning security for costs.

**11**  Agra was successful in obtaining an order that Denmar post security for costs. Denmar was later successful in reducing the amount of security. Mr Legh says that the litigation stalled while Denmar dealt with posting this security. I am advised that there is sufficient security to pay the costs claimed in this bill.

**12**  This matter was apparently scheduled to proceed to trial. However, in late 2003 or early 2004, Agra set down the summary trial application.

**13**  Mr. Singleton had conduct of the file on and off during this retainer; he was lead counsel at the summary trial. He says that a junior was an absolute necessity given the volume of documents and affidavit material presented.

**14**  According to the reasons for judgment, the plaintiff's claim was dismissed on the basis of issue estoppel. That is, the decision of Vickers J. was determinative on the issue of negligent misrepresentation as Denmar had subordinated its claim to Wigmar in a "litigation contract". In any event, by virtue of that contract, Denmar must have been aware of the exclusion clause concerning the geotechnical reports.

**15**  In December 2003, the defendant Agra retained Dr. Brawner to prepare an opinion on whether or not the earlier geotechnical reports were correct and, whether they were properly relied on at all by Denmar. His opinion was intended to be relied on at trial, hence the cross-examination by plaintiff's counsel. Melvin J. found that the costs of retaining Dr. Brawner "are properly taxable".

**16**  Dr. Brawner has presented two bills totalling $7,600. Mr. Singleton says that the opinion was required to address three expert opinions relied on by Denmar. The affidavit of justification deposed to by Ms. Cornish states that the services of Dr. Brawner "were ... necessary and proper for the conduct of this proceeding".

THE LAW

Tariff Items

**17**  In determining the appropriate number of units to be allowed for items 1 and 8, I must consider how much time a reasonably competent lawyer should have spent on the work for which the costs claim is made. I must also consider the particular circumstances of the proceeding. That is, was this a complex multi-party commercial proceeding justifying units at the higher end of the scale? Or, was it a duplication of earlier litigation in which the counsel had been involved and as such, should attract a minimum number of units?

Disbursements

**18**  With respect to disbursements, I must consider whether each was necessary and the amount charged reasonable: Rule 57(4). The exception being that Dr. Brawner's services have been found to be necessary. The only issue is whether his charges are reasonable.

**19**  The evidence required to support the necessity and reasonableness of the charges claimed is discussed in various cases including:

1. Bell v. Fantini (No. 2) [*(1981), 32 B.C.L.R. 322*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X20X-00000-00&context=) (S.C.)
2. Holzapfel v. Matheusik [*(1987), 14 B.C.L.R. (2d) 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-6371-00000-00&context=) (C.A.)

**20**  At page 140 of Holzapfel v. Matheusik, supra, the court states:

"But, of course, taxation by ambush should be as much a thing of the past as trial by ambush. If the party presenting the bill for taxation has taken all reasonable steps to disclose his affidavit of justification in good time, and has inquired whether any disbursement will be contested and, if so, which disbursement, and on what grounds, then the opposing party ought to confine his opposition to those disbursements which he has said, reasonably in advance, that he will be contesting, and to those grounds which he has said, reasonably in advance, that he will be making the basis of his objection. The party presenting the bill can then concentrate his evidence, by affidavit or otherwise, on the precise points on which he has received informal notice of intention to dispute. If that procedure is followed, then if either the party opposing the taxation, or the Registrar, objects to a disbursement on which no informal notice of dispute has been given, or raises grounds of objection of which no informal notice of dispute has been given, then ordinary rules of justice, fairness and prejudice would dictate that an adjournment should be granted, if it is requested, so that the party presenting the bill can arrange to produce such evidence as he wishes with respect to the new matter that has been raised at the taxation."

**21**  As to any allegation of "ambush", Mr. Legh says that he advised Mr. Singleton in advance of this assessment of the contentious issues, and in particular, the matter of Dr. Brawner's account.

**22**  In considering the reasonableness of that or any other disbursement, I have borne in mind the comments of Huddart L.J.S.C. (as she then was) in Henry Electric Ltd. v. Woodwest Developments Ltd. [*(1983), 50 B.C.L.R. 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F2TK-22DT-00000-00&context=) @ paras. 7 to 9:

"7 In my view, the change in the Rule requires the Registrar to consider first whether a disbursement is necessary or proper, that is, whether it is reasonable in all the circumstances: Bowers v. White et al [*(1977) 2 B.C.L.R. 355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-FFTT-X0FC-00000-00&context=). If it is, then, except as against the party who incurred it, the Registrar must further consider whether or not the disbursement has been incurred or increased through extravagance, ***negligence*** or mistake or by payment of unjustified charges or expenses. Counsel for the plaintiffs argues that personal service of a writ on a corporate defendant cannot fall within the exception to Rule 57(4) because it is an alternative method of service made available to a plaintiff by the Company Act.

8 I am satisfied that when the authors of the Rules chose to replace the word "overcaution" with the word "extravagance", they intended to change the test for disbursements that are not to be allowed. "Overcautious" means more cautious than is necessary; "extravagance" means unsuitable, excessive, unusual, abnormal, extreme and includes wasteful or prodigal. In my view, the circumstances must be reviewed by the Registrar bearing in mind this change of language. I cannot conclude that it is extravagance for a plaintiff to use a method of service permitted as an alternative by the Company Act.

9 However, it is also incumbent upon the registrar to consider whether or not personal service was "unjustified" in the particular case. I am not persuaded that the general practice of counsel for the plaintiff is a sufficient justification for the use of a more expensive means of service in every case. It is incumbent upon counsel to defend as appropriate his selection of the more expensive form of service. The fact that a company is not in good standing at the Companies' office might furnish adequate grounds for choosing personal service. There will, of course, be other proper justifications for personal service. However, in my view, there must be some evidence of justification showing that a decision has been made in each individual case before the costs of personal service must be allowed." [my emphasis]

**23**  That test may be particular important when considering travel expenses of counsel.

**24**  As to whether the costs of out-of-town counsel should properly be visited upon the unsuccessful party, I have considered the principles stated in Allen v. Homan [*[1998] B.C.J. No. 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2M2-00000-00&context=) (S.C. Registrar).

THE BILL OF COSTS

Item 1:

**25**  I allow 9 units for this item. While I appreciate that counsel was not "starting from scratch", I accept Mr. Singleton's submission that this proceeding was not a mere duplication of the Wigmar action.

Item 8:

**26**  I allow 5 units for this item. Mr. Legh points out that the list of documents in this action is a duplication of the list delivered in the Wigmar action. As such, there would be little need for a further inspection by counsel. There were few, if any, "new" documents disclosed. Mr. Singleton did not take serious issue with this description of the respective lists except to say that there were additional documents reviewed and produced peculiar to the Denmar action.

**27**  I have concluded that competent counsel should review the documents in considering how some may relate to the Denmar claim; that requires more time than simply printing off the Wigmar list.

Items 16(b) & 17(b) - July 17th, 2002:

**28**  I allow 1.5 units for tariff items 16(b) and 2.5 units for 17(b). According to the clerk's notes, the application consumed at most 90 minutes, thus attracting units for one-half of the day.

Item 31:

**29**  The defendant Agra claims 1 unit each for the entry of four orders. Mr. Legh believes that his office may have prepared and entered some of the orders, although he is not able to identify any in particular.

**30**  This item is intended to compensate the party who prepared and entered the order. It is not allowed to a party who merely reviewed or consented to the order.

**31**  I have perused the pleadings binder and note that the orders of February 9th, 2000 and July 17th, 2002 were not entered by Singleton Urquhart. However, because I have no evidence to the contrary (i.e., backing sheets)on the other two orders, I allow 2 units.

TRAVEL EXPENSES

**32**  In addition to item 36, the defendant Agra also claims $3,094.33 for travel expenses preceding the assessment. An additional $220 is claimed as a non-taxable disbursement for Mr. Singleton's travel expenses to attend the assessment.

**33**  The plaintiff contests the necessity and reasonableness of all travel expenses. Mr. Legh submits that many competent counsel in Victoria were available to defend this action on Agra's behalf.

**34**  I conclude that travel expenses are properly claimed. It was reasonable and appropriate for the defendant Agra to retain Singleton Urquhart if for no other reason than the firm represented Agra in the Wigmar proceedings.

**35**  I allow 10 units under item 36 representing five days travel to Victoria for the purposes of an examination for discovery, the summary trial and this assessment. I allow an additional 4 units under item 2 for the costs applications. I note that the defendant Canada retained an agent to speak to those applications. The defendants Canada and Agra took similar, if not the same, positions on these applications. There is no explanation as to why an agent could not have retained by the defendant Agra. Put another way, the evidence does not support the necessity of the attendance by out-of-town counsel at these applications. Accordingly I have allowed 1 unit (as per item 2) to instruct an agent for each of those attendances.

**36**  With respect to the travel disbursements, a greater analysis as to the necessity and reasonableness of these charges is required. For example, should the plaintiff bear the costs of counsel returning to Vancouver following the first two days of hearing of the summary trial? And, should the plaintiff bear the costs not only of two counsels' travel but the choice of counsels' mode of travel (i.e., Helijet)?

**37**  The party claiming the "cadillac" service should offer an explanation as to why a less expensive option was not pursued: Henry Electric Ltd. v. Woodwest Developments Ltd., supra, and Moore v. Dhillon [*[1992] B.C.J. No. 3055*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1YP-00000-00&context=) (Master).

**38**  Upon perusal of various invoices, it appears that counsel traveled by Helijet on the following occasions:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Date | Total Expense |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Dec 11/98 (round trip) | $ | 276.06 |  |
|  | Feb 9/00 (round trip) | $ | 297.46 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | June 19/01 (round trip) | $ | 286.76 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Jan 28/02 (round trip) | $ | 356.31 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Apr 5/04 (round trip) | $ | 372.36 x 2 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Apr 7/04 | $ | 372.36 |  |

**39**  These figures include GST charged on the ticket price. As well, travel agency surcharges of $15 and $32 are claimed but only in connection with Helijet flights. There is also a credit card statement indicating a credit from Helijet for transactions completed on May 11th, 2004. That travel or payment of those fees was not substantiated in the affidavit material or explained at the assessment.

**40**  In my experience, and as evidenced by the other invoices presented, Helijet is the most expensive mode of travel between Vancouver and Victoria. Arguably, the least expensive mode of travel would be by B.C. Ferries. However, I am satisfied that air travel can be proper in circumstances where counsel is required to be at an examination or in Chambers and should avoid the vagaries of ferry travel.

**41**  Based on the invoices presented, travel by Harbour Air or West Coast Air is less costly than travel by Helijet. There is no evidence addressing the necessity of travel by Helijet instead of these other carriers. Accordingly, I find that there should be some reduction in the air travel expenses claimed.

**42**  I also appreciate that not all of counsel's travel expenses have been claimed. For example, Mr. Singleton notes that his junior's hotel expense was not claimed. However, even if claimed, I would not have allowed these expenses as I am unable to find on the evidence presented that the attendance of junior counsel was necessary in these circumstances.

**43**  As noted, I have read Mr. Justice Melvin's reasons for judgment. I appreciate from those reasons as well as the court file that counsel was required to refer to voluminous material to address the four notices of motion.

**44**  In my view, while no doubt junior counsel was of great assistance, her presence was not necessary. Counsel of Mr. Singleton's expertise and reputation could have argued the applications without assistance. Furthermore, much of the material appears to have been relied on by Mr. Singleton in the application before Vickers J. (albeit some six years ago).

**45**  Considering all of the above, I have reduced the travel expenses, somewhat arbitrarily, to $1,000 (plus GST). This figure represents the cost of travel on four occasions (examination for discovery and the three day summary trial) plus miscellaneous expenses for taxi and parking of vehicles at the sea plane terminals. I find that it was reasonable for counsel to return to Vancouver during the course of the summary trial application as the cost of a return flight is roughly equivalent to a reasonable hotel charge.

**46**  It is not clear whether meals are included in this claim; some of the credit card receipts suggest that to be the case. If so, I am satisfied that the amount allowed provides some indemnity for any meals taken by counsel.

**47**  With respect to travel on August 26th, 2004, I allow the $220 as claimed.

PHOTOCOPYING CHARGES

**48**  The defendant Agra claims $1,824 in photocopying charges representing 9,120 pages at $.20 per page. The plaintiff suggests $600 is a reasonable sum for the photocopying required in this proceeding.

**49**  As explained by Mr. Singleton, those charges include copying all of the contract documents to be included in a package sent to Dr. Brawner. Mr. Singleton notes that the court file alone is contained in at least three boxes, demonstrating the volume of documents required at the various applications.

**50**  Despite this explanation, I am not satisfied that the photocopying of some 9,000 pages was justified in this proceeding. Some of the photocopying appears to have been for the benefit of the client. In my view, those costs are not to be borne by the plaintiff. Furthermore, the copying of contract documents could have been done at a cost of less than $.20 per page by an outside business. I allow $900 for the photocopying charge.

COURIER CHARGES

**51**  I have reviewed the invoices and find that the use of couriers to deliver the material to counsel (including Canada's agent) in Victoria to be proper. However, I see no reason why the material need be delivered by courier to the Department of Justice counsel in Vancouver. The courier charges are reduced by $2.50 for a total of $133.27.

TELEPHONE/FAX

**52**  Based on my review of Exhibit "A" to Ms. Rustad's affidavit, many of the telephone/fax charges were to numbers other than Victoria-based counsel. Mr. Singleton's clients were in Burnaby. The affidavit material does not provide an explanation as to why facsimiles were necessary (albeit no postage is claimed). Nor does the material address the per page or per unit cost of these charges. I have concluded that the amount charged is unjustified. I find that $75 is a reasonable amount for these charges.

QUICKLAW RESEARCH

**53**  The defendant Agra claims $650.18 for Quicklaw research. Mr. Singleton argues that the issues involved in the litigation required extensive research as the law was unsettled or at least evolving on such issues as negligent misrepresentation and the law of tender. There is no evidence as to whether or not the law firm is charged a flat rate by Quicklaw, nor the time involved conducting this research.

**54**  The plaintiff relies on the decision of Powar v. British Columbia, [*[1995] B.C.J. No. 706*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X114-00000-00&context=), [1995] B.C.W.L.D. 1098 (S.C. Registrar) for the proposition that a party may not recover the cost of computer assisted research as a disbursement. The defendant Agra relies on the contrary view expressed in Parsons v. Canada Safeway Ltd., [*[1995] B.C.J. No. 1947*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B15F-00000-00&context=), [1995] B.C.W.L.D. 1983 (S.C. Registrar).

**55**  It is fair to saw that the law in this area remains un settled with registrars continuing to hold disparate views on the necessity and propriety of computer assisted research. The most recent discussion of the issue is found in Registrar Jordan's decision in Girocredit Bank Aktiengesellschaft Der Sparkassen v. Bader, [*[1999] B.C.J. No. 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M36B-00000-00&context=), [*1999 BCCA 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M36B-00000-00&context=).

**56**  I am of the view that Quicklaw research can be allowed as a proper disbursement but that the reasonableness of the amount claimed must be critically analyzed. In my experience, it is common for most major law firms to have a flat fee arrangement with the Quicklaw provider. I would also expect that Singleton Urquhart would have some precedent material given its expertise in the areas of law involved. Furthermore, counsel relied on some of the same law in its application for dismissal of Wigmar's claim. I do note the inclusion of decisions from other provinces in Agra's Book of Authorities. In all of the circumstances, I am prepared to allow the sum of $150 for the Quicklaw research.

BRAWNER ENGINEERING FEES

**57**  Dr. Brawner claims fees of $7,600 set out in two bills dated January 8th, 2004 and February 5th, 2004 respectively.

**58**  The January 8th bill charges $4,600 for the "review of Affidavits of Martie Robertson; binder of documents provided to C.O. Brawner; examination of discovery of Martie Robertson; prepare comments on report by Bruce Geotechnical and Pakalnis Associates and Ireco; two meetings at Singleton Urquhart."

**59**  The bill of February 5th charges $3,000 for a "review of documents; prepare draft and final report of expert opinion."

**60**  Dr. Brawner spent 38 hours on this matter charging his services at $200 per hour. The preparation of the report took 15 hours, including a draft and final version. There is no evidence from Dr. Brawner justifying the time spent nor the hourly rate charged. Indeed, Mr. Singleton states that he would be embarrassed to query an expert of Mr. Brawner's "impeccable reputation" regarding these charges.

**61**  Mr. Singleton justifies the expense noting that Mr. Brawner was required to review all of the contract documents as well as reports prepared by three other engineers. He submits that the report is worthy of the $3,000 charged.

**62**  Mr. Legh submits that $3,500 is an appropriate fee for all of Dr. Brawner's services. He questions the time spent reviewing material as set out in the January 8th, 2004 invoice. He does not challenge the reasonableness of Dr. Brawner's hourly rate. The suggested "reasonable" charge of $3,500 appears to have been chosen arbitrarily by the plaintiff. There was no evidence of an amount that might be charged by the other engineers.

**63**  As I commented during this hearing, Dr. Brawner would not be the first expert of impeccable credentials asked to defend his charges. The onus remains on the defendant Agra to justify the reasonableness of this expense.

**64**  I accept that the report is comprehensive and required the review of a good portion, but not necessarily all, of the contract documents. However, I also note that much of the report simply re-states the contract terms.

**65**  The difficulty I face is that I have no objective standard to measure the reasonableness of the overall account. It might have been helpful to have before me the affidavits from other engineers suggesting what in their view a reasonable fee might be. At the very least, it might have been helpful to have some indication of the amount charged by the plaintiff's experts. I was not made aware of any fee guidelines for professional engineers analogous to those issued to physicians by the BCMA. Absent such evidence, I am left to infer that the amount charged by Dr. Brawner is not out of line.

**66**  The disbursement for Brawner Engineering is allowed as presented.

SUMMARY

**67**  In addition to the above, I have allowed 1 unit for item 20 and 2 units for item 21, subject to any offers to settle: s. 10, Appendix B.

**68**  In summary, the Bill of the defendant Agra is allowed as follows:

1. Tariff Items:

|  |  |  |  |
| --- | --- | --- | --- |
|  | 122.5 x $80.00 = | $ 9,800.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GST 7%: | $ | 686.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | PST 7.5%: | $ | 735.00 |  |

|  |  |  |
| --- | --- | --- |
| $11,221.00 | $11,221.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 2. |  | Taxable Disbursements: | $10,715.27 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GST 7%: | $ | 750.07 |  |

|  |  |  |
| --- | --- | --- |
| $11,465.34 | $11,465.34 |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 3. |  | Non-taxable Disbursements: | $ | 507.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL: | $23,193.34 |  |

DISTRICT REGISTRAR BOUCK

\* \* \* \* \*

CORRIGENDUM

Released: September 13, 2004. [1] This Corrigendum is issued to the Registrar's Decision which was originally released on September 7th, 2004 and is amended as follows.

[2] Paragraph 68 should read:

In summary, the Bill of the defendant Agra is allowed as follows:

1. Tariff Items:

|  |  |  |  |
| --- | --- | --- | --- |
|  | 122.5 x $80.00 = | $ 9,800.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GST 7%: | $ | 686.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | PST 7.5%: | $ | 735.00 |  |

|  |  |  |
| --- | --- | --- |
| $11,221.00 | $11,221.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 2. |  | Taxable Disbursements: | $10,715.27 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GST 7%: | $ | 750.07 |  |

|  |  |  |
| --- | --- | --- |
| $11,465.34 | $11,465.34 |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 3. |  | Non-taxable Disbursements: | $ | 507.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL: | $23,193.34 |  |

DISTRICT REGISTRAR BOUCK

**End of Document**

[***Embleton v. Innes, [2013] B.C.J. No. 1006***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20HP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vernon, British Columbia

P. Rogers J.

Heard: April 23-26, 2013.

Judgment: May 15, 2013.

Docket: 48559

Registry: Vernon

**[2013] B.C.J. No. 1006** | 2013 BCSC 851

Between Michelle Embleton, Plaintiff, and Jordan John Alexander Innes and Dueck Chevrolet Buick Cadillac GMC Limited, Defendants

(84 paras.)

**Case Summary**

**Damages — Types of damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Non-pecuniary loss — Pain and suffering — Action for personal injuries suffered in a 2009 motor vehicle accident allowed in part — Plaintiff suffered soft tissue injures and still complained of headaches and fatigue — She was unable to work full-time as personal care aid in hospital after accident and switched to less demanding part-time position — Plaintiff awarded $60,000 as non-pecuniary damages, $36,000 for past loss of income, $40,000 for reduction of earning capacity and $3,000 for cost of future care — Plaintiff's injuries would resolve in about five years — Her prior arthritis and degeneration in her knees would have caused her to decrease her work schedule in any event.**

|  |
| --- |
| Action for personal injuries suffered in a 2009 motor vehicle accident. The plaintiff was rear-ended by the defendant. The plaintiff was 37 at the time of the accident. She worked full-time as a care aide in a hospital. Care aide work was very physically demanding. The plaintiff was also very engaged in recreational sports. After the accident the plaintiff experienced pains in her neck, upper back, and shoulders. She felt that her neck and back were too sore to continue with the care aide work. She then moved to a less demanding care aide position, but it was only part-time. Since the collision, the plaintiff's main accident-related complaints had been of headaches and fatigue. The plaintiff continued to do the sports she played before the collision, but she was generally slower, more hesitant, and less competitive than before. She claimed that her symptoms would permanently impair her function at work, in the home, and in her recreational sports play.  HELD: Action allowed in part.  The plaintiff's current accident-related symptoms were closer to a nagging irritant than they were to an actual disability. The weight of medical opinion indicated eventual recovery and return to the plaintiff's pre-accident health. Non-pecuniary damages of $60,000 were awarded. The injuries she sustained in the accident were a significant contributing factor in the plaintiff working only part-time after the accident. Her prior arthritis and degeneration in her knees, would have caused her to decrease her work schedule in any event for some time. Past loss of income, including loss of pension entitlement, was assessed at $36,000. No award for additional housecleaning services was made as the plaintiff would have increased the housecleaning services in any event if she had returned to work full-time. There was not a real and substantial possibility that the accident-caused symptoms would permanently impair the plaintiff's function. It would require a few years, however, for her to recover fully during which headaches and neck pain would prevent her from taking additional shifts of work or from working in her previous job as a residential aide. She was awarded $40,000 for loss of earning capacity and $3,000 for medication and a gym pass for the next five years. |

**Counsel**

Counsel for Plaintiff: G.P. Weatherill, Q.C.

Counsel for Defendants: G. Ginter.

**Reasons for Judgment**

|  |
| --- |
| **P. ROGERS J.** |

**Introduction**

**1**  The plaintiff was injured in a car accident. The central issue in her claim for damages is whether there is a substantial possibility that her injuries will permanently impair her function.

**The Facts**

**2**  On September 22, 2009 Ms. Embleton was the right front seat passenger in her family's minivan when that vehicle was struck from behind by a vehicle driven by the personal defendant and owned by the corporate defendant. The defendants have admitted liability for the collision. Ms. Embleton was stunned and shocked by the event. In the immediate aftermath of the collision, her attention was focused on her two children, aged one and three, who were also in the vehicle. Emergency personnel attended the collision scene. No one in the Embleton vehicle required immediate medical attention, and no one was transported to the hospital. The Embleton van was not roadworthy and the family called for a ride home with Ms. Embleton's mother.

**3**  Ms. Embleton was 37 years old when the accident happened. She had grown up in Vernon, B.C. She graduated from grade 12 and went on to several years of generally unsuccessful post-secondary study. She first thought to become a physical education teacher but soon abandoned that plan. She then thought to become an accountant but after a short while in an accountancy program she decided against that career as well. Eventually, Ms. Embleton decided to try her hand in the healthcare industry. In 1992 she enrolled in a 10-month program and she graduated in June of 1993 with a certificate as a care aide.

**4**  Earlier, when she was in her teens, Ms. Embleton joined the Cadets. Later she joined the Army Reserve. After completing her training as a care aide, Ms. Embleton took a job with the Reserves. She spent about six months in 1993 posted to a military base in Alberta. There she acted as a helper at a military driver training program.

**5**  In 1994, Ms. Embleton obtained casual on-call work as a care aide at the Vernon Jubilee Hospital. She also found part-time employment as a care aide at two residential homes in Vernon. These homes were called Gateby Place and Noric House. Ms. Embleton saw her employment at the Hospital as her best chance to get secure work in the future. For that reason she concentrated on building up as many hours of work at the hospital as she could. By that means she planned to increase her seniority among the care aide workforce and thus be better positioned to obtain permanent full-time work.

**6**  In 1997, Ms. Embleton achieved her goal of obtaining permanent full-time work. In that year she began to work full-time, i.e.: 37.5 hours per week, as a residential care aide in the Polson wing of the Jubilee Hospital. Patients in the Polson wing are typically elderly, infirm, and unable to attend to their own personal care. Care aides are required to provide personal care to these patients. Care aides attend to dressing, toileting, feeding, washing, and bathing patients. In order to do these tasks care aides must often lift, roll, and transfer patients from bed to wheelchair and back again several times per day. Some of the patients are large individuals. Care aide work is, therefore, very physically demanding.

**7**  The work is demanding in other ways as well. Patients require assistance throughout their waking hours. Care aides must therefore work in shifts. One shift starts early in the morning and goes until early or mid-afternoon. The next shift starts in the afternoon and goes until early evening. During each two-week cycle care aides rotate through morning and afternoon shifts. In the result, residential care aides cannot count on working a steady day shift, nor can they count on working weekdays only and enjoying their weekends off.

**8**  In 1999 or 2000, Ms. Embleton began a romantic relationship with Mr. Burke. The two moved in together, and they have lived as a married couple since then. The couple's first child was born in 2004. Ms. Embleton took a year of maternity leave following his birth. In 2005, she returned to her full-time rotating shift work as a residential care aide.

**9**  Ms. Embleton's employment at the hospital permits her to apply for different positions throughout the institution. If she is the successful applicant she is allowed to try out the new job for three months. Any time within that three month window Ms. Embleton can switch back to her previous position. So, if she finds that the new job does not suit her, she can leave it and return to her regular job. If she stays in the new position longer than three months, she will lose her old job, and the new job will become her regular position.

**10**  In 2006, Ms. Embleton decided to make a change in her work schedule. She moved over to a job as a hospital housekeeper. This job was days only, so it suited her lifestyle as a new mother and homemaker. The housekeeper job paid $4 less per hour than the residential care aide position. Before the end of the three month try-out period, Ms. Embleton decided to go back to her regular full-time residential care aide position.

**11**  Ms. Embleton continued to look for a change. In February 2007 she took a care aide position working in place of an employee who was on leave. This job was confined to giving baths to Polson residents. Instead of full-time work, the bath posting was part-time. It offered .67 of a full-time equivalent position. In short, by moving to this job, Ms. Embleton had thus elected to work and be paid less. Ms. Embleton stayed in this position until May 2008 when its owner returned to work.

**12**  In May 2008, Ms. Embleton returned to her full-time job doing residential care in the Polson wing of the Vernon Hospital. By then, Ms. Embleton was pregnant with the family's second child. She was on sick leave from August 2008 until October 10, 2008 when she gave birth to a daughter. Ms. Embleton then went on a year-long maternity leave.

**13**  The traffic accident happened about two weeks before she was to return to work.

**14**  Ms. Embleton's partner Mr. Burke manages a hockey rink. He works from mid-afternoon until late evening weeknights, and often works on the weekends as well. Mr. Burke is heavily engaged in hockey for his work and for recreation.

**15**  Ms. Embleton has been enthusiastically engaged in recreational sports throughout her life. In the years before and since the traffic accident, during the spring and summer she plays women's and mixed team slo-pitch and soccer. In the winter season she plays volleyball and hockey. She is a keeper on the soccer pitch and a goalie on the ice. She is a fielder on her softball teams and a setter on the volleyball court. She will often play sports three or four evenings per week throughout the year. This is despite her having to work evening shifts, despite her partner's work schedule, and despite her responsibilities as a homemaker and a mother to two young children. If it were possible to do so, Ms. Embleton's preference is to play her sports six nights per week.

**16**  Ms. Embleton has attended at her chiropractor Dr. Kinakin at least monthly since the early 1990s. She started seeing Dr. Kinakin for relief from work-related low back pain. Ms. Embleton has also seen Ms. Torrie, a massage therapist, on a regular basis since the 1990s. Ms. Embleton's complaints to Ms. Torrie have been of various aches and pains in her knees, legs, throughout her back including her neck, and her shoulders.

**17**  The evidence offered by Ms. Embleton, her partner Mr. Burke, her softball and volleyball teammates, and her co-worker uniformly described Ms. Embleton as being before the traffic accident fully capable of performing at a high level in sports and operating without limitation at work.

**18**  After the accident Ms. Embleton experienced pains in her neck, upper back, and shoulders. She had headaches which she associated with pain in her neck. Ms. Embleton started working again after her maternity leave ended in early October. She resumed her job doing rotating shifts as a residential care aide in the Polson wing. She felt that her neck and back were too sore to continue with that work. Two weeks after returning to work, Ms. Embleton applied for a care aide job in a different unit of the hospital. This unit was the ALC ward. The patients there are generally less dependent on care aides for their needs. The work on the ALC ward is, therefore, somewhat lighter and less demanding than in the Polson wing. The ALC job was part-time -- it was .68 FTE. Ms. Embleton stayed in this position after the three month try out period. In the result, she lost ownership of her full-time job and owned, instead, the .68 FTE position.

**19**  Ms. Embleton's position has since been increased to .72 FTE. Full-time work would be 37.5 hours per week. Ms. Embleton does extra shifts when they are available and averages 30 hours per week.

**20**  Since the collision, Ms. Embleton's main accident-related complaints have been of headaches and fatigue. Notably, by the spring of 2009 Dr. Kinakin, to whom Ms. Embleton testified she turns for primary care of her aches and pains, stopped recording headache as a significant complaint.

**21**  In the summer of 2010, Ms. Embleton developed plantar fasciitis in her foot. That condition was treated with orthotics. Ms. Embleton has bilateral chondromalacia in her knees. Her right knee became symptomatic and disabling in the spring of 2011. She had surgery on that knee in August 2011 and has had a good recovery. Her left knee became symptomatic in 2012 and surgery was done in it in November 2012. She is still recovering from that surgery.

**22**  Ms. Embleton continues to do the sports she played before the collision, but she is generally slower, more hesitant, and less competitive than before. The evidence did not clearly delineate the degree to which accident-related injuries, her foot, and her knee problems have contributed to the decline of her sporting prowess.

**23**  In April 2012, the physiatrist Dr. Travlos assessed Ms. Embleton. She advised him that her last headache had been two weeks earlier, and the last one before that had occurred two weeks earlier. Ms. Embleton was working .78 FTE as a care aide doing baths for patients in the Polson wing. She testified that the bath position was a "dream job" for her because it involved lighter work and because it was days only. Working days only allowed her to be with her family in the evenings (when her partner is usually at work) and to do her sports. Ms. Embleton left the bath team when the incumbent in that position returned to work. She then returned to her .72 FTE on the ALC ward.

**24**  Presently, Ms. Embleton's main complaints are headaches, neck pain, and fatigue that come on after a hard day of work. She asserts that she did not feel this way before the traffic accident. Ms. Embleton feels that she is working at her maximum capacity and that she could not handle her previous full-time job in the hospital's Polson wing.

**25**  She says that she takes over-the-counter pain medication on a daily basis to deal with her headaches and neck pain. She has been prescribed sleeping medication, but stopped using it due to the groggy feeling it leaves with her in the mornings.

**26**  Ms. Embleton had a housekeeper come in to the family home once per month before the accident. She has the housekeeper come in twice a month now. The extra visit is to look after housekeeping tasks that Ms. Embleton says she cannot do now, such as cleaning the bathtub, mopping, and cleaning walls and windows. The housekeeper charges $18 per hour and is typically on site 1.5 hours per visit.

**Expert Evidence**

**27**  The plaintiff adduced opinion evidence from the physiatrist Dr. Travlos, the general practitioner Dr. Williams, and the occupational therapist Ms. Galbraith. The plaintiff also relied on fact evidence from the chiropractor Dr. Kinakin and the massage therapist Ms. Torrie.

**28**  The defendant adduced a medical report from the physiatrist Dr. Coghlan.

**29**  As noted, Ms. Embleton relied on Dr. Kinakin before and after the accident for primary care of her complaints. Dr. Kinakin's evidence simply confirmed that before the accident Ms. Embleton's complaints were generally concentrated in her lower back but that she occasionally also complained of neck, mid-back, and shoulder pains. Dr. Kinakin has persuaded Ms. Embleton that she should attend his office at least monthly whether she is feeling symptomatic or not. After the accident her main complaint was of headache, and that complaint disappeared in the Spring of 2009. After that, her complaints concentrated on her neck and back. The frequency of Ms. Embleton's visits to Dr. Kinakin increased after the accident, but have now returned to their pre-accident level.

**30**  The massage therapist, Ms. Torrie, confirmed that her notes show that before the accident Ms. Embleton complained of aches and pains in virtually all areas of her body. These complaints were often related to Ms. Embleton's sporting activities. After the accident, Ms. Embleton complained primarily of neck pain and headaches.

**31**  Dr. Williams saw Ms. Embleton rarely before and after the collision. She attended at his office for medical problems other than aches, pains, and strains. She took those latter complaints to Dr. Kinakin. After the accident, Ms. Embleton saw Dr. Williams on September 30, 2009. He examined her and found that she had tenderness in her trapezius and lumbo-sacral muscles. He recommended over-the-counter pain medication. He saw her again in December 2009 and recommended that she have the benefit of a personal trainer to develop a rehabilitative exercise regime. Dr. Williams' clinical records indicate that a personal trainer did work with Ms. Embleton for six sessions in January and February 2010. The trainer reported that Ms. Embleton complied with his recommendations and had made progress but had not yet fully recovered.

**32**  Under cross-examination, Ms. Embleton's counsel asked Dr. Williams whether he agreed that it was likely that her motor vehicle accident-related symptoms would be permanent, given that they were still bothering her three and a half years after the collision. Dr. Williams refused to endorse that notion. He maintained that he was optimistic that Ms. Embleton would go on to experience a full recovery.

**33**  Dr. Travlos noted Ms. Embleton's various complaints before and after the accident. He reported that Ms. Embleton had difficulty describing to him how her symptoms differed before and after the accident. Dr. Travlos opined that Ms. Embleton's neck and headache pains are accident related in that they may be new to her or they may be an aggravation of previous symptoms. He felt that her low back complaints were basically the same as they had been before the accident. Dr. Travlos said that the arthritis and chondromalacia in both of Ms. Embleton's knees is not accident related, will require further treatment but that treatment will not make the pains go away. He recommended medication to help her sleep and occasional use of medication for head and neck symptoms. He recommended against full-throttle recreational activity, especially as such will likely aggravate Ms. Embleton's knee problems. Dr. Travlos's medical prognosis was this:

Ms. Embleton should continue to improve in terms of her upper body and should return back to her baseline. It is possible, however, that she will remain with the same ongoing symptoms as she has now into the future. Her current level of symptoms will be higher than that expected for her pre-accident complaints. In my opinion, her lower back pain is back to baseline.

**34**  Dr. Travlos's assessment of Ms. Embleton's current and future functional ability was this:

Ms. Embleton will have restrictions with heavier work and chores around the home due to a combination of symptoms from her upper body through her low back into her knees. ... For example, vacuuming will affect her back, cleaning bathrooms will affect her knees and her back, and to a lesser degree her upper body. Cleaning walls, windows or washing overhead or other such activities will likely impact primarily her neck more than any other region. In other words, they all contribute to her current limitations. It is my expectation that Ms. Embleton's restrictions will probably remain over the long term.

**35**  Dr. Travlos wrote this about Ms. Embleton's current and future vocational abilities:

... It is my opinion that Ms. Embleton could work at a lighter-duty job in a full-time capacity if such work were available. In my opinion, Ms. Embleton would struggle to work at her previous job (that she was doing prior to the accident) in a full-time capacity even at this time, as the job was very physical and involved being a care aide for very physically limited individuals in an extended care environment. I recommend she not return back to that line of work, as it will almost certainly aggravate all of her complaints ...

**36**  In July 2012, the occupational therapist Ms. Galbraith assessed Ms. Embleton's functional capacity and her cost of future care needs. Ms. Galbraith tabulated the physical demands of the care aide job and compared Ms. Embleton's measured capacity to those demands. Ms. Galbraith concluded that Ms. Embleton's limitations are concentrated around low level crouching, kneeling, and crawling activities -- limitations which are attributable to problems in her knees. Ms. Galbraith felt that Ms. Embleton's neck pains somewhat limited her ability to do overhead work. Like Dr. Travlos, Ms. Galbraith opined that Ms. Embleton was capable of working as a care aide on a full-time basis provided that she was not called upon to heavier tasks than she was asked to do during the functional capacity evaluation. In that regard, Ms. Galbraith wrote:

According to the information from the job description and job demands analysis Ms. Embleton does not meet *all* of the criteria for a care aide. That being said however she meets the majority of the criteria and has been successfully working as a care aide since 1 month post accident. It is possible that when Ms. Embleton is at work she performs tasks of greater demands and as a result experiences higher levels of pain. This is not to say that she should not work in such a position but that accommodations should be put in place to ensure that she does not experience increases in functionally limiting pain ...

**37**  As for future care, Ms. Galbraith recommended that Ms. Embleton continue to use over-the-counter pain medication, sleeping medication (it is unclear whether Ms. Galbraith was aware that Ms. Embleton had eschewed sleeping pills), counselling, a personal trainer, a back rest and extended mirrors for her vehicle, and a gym pass.

**38**  The physiatrist Dr. Coghlan assessed Ms. Embleton in September 2012. Dr. Coghlan diagnosed Ms. Embleton's accident-related injuries as an acute whiplash of her neck which caused pain in her neck and shoulders and headaches. He said that the accident aggravated her pre-existing lower back pain, but that her lower back had returned to its pre-accident condition. He said:

As a result of the accident I do not feel that she is physically restricted in terms of work, household activities or recreation.

**39**  But he went on to say:

I do feel that her knees and her back may be more of a restriction in her physical capability than her other symptoms and I think this was also the impression of Dr. Travlos. Her knees may continue to limit her vocational and sporting activities over time and may indeed become more restrictive.

**40**  Ms. Embleton's counsel did not put to Dr. Coghlan the proposition that because her symptoms have lingered as long as she says, those symptoms are likely to be permanent.

**41**  Presently, Ms. Embleton works an average of 60 hours per week at the same pay rate as she would if she were working full-time. That rate is $22.38 per hour. Her employer contributes 9.67 percent of her hourly wage to her pension plan. For every hour of work that she misses due to the accident, she also loses her employer's contribution of $2.16 to her pension.

**42**  Ms. Embleton does exercises at home and goes to a gym on a regular basis. It has been some years since she last had the benefit of a personal trainer to formulate and regulate an exercise regime tailored to her needs.

**The Parties' Positions**

**The Plaintiff**

**43**  Ms. Embleton submits that her accident-related symptoms continue to severely impact her life. She says that she cannot work full-time as a residential care aide because her stamina for heavy work is much reduced. She attributes the reduction to headaches and neck pain and general fatigue. Ms. Embleton argues that her symptoms will permanently impair her function at work, in the home, and in her recreational sports play.

**44**  In support of her claim for non-pecuniary damages, Ms. Embleton cites *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) for the general principles that guide the assessment of general damages. As to quantum, Ms. Embleton relies on *Morgan v. Scott*, [*2012 BCSC 1237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2DN-00000-00&context=), *Culos v. Chretien*, [*2012 BCSC 1050*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24ST-00000-00&context=), *Foster v. Kindlan*, [*2012 BCSC 681*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3NG-00000-00&context=), *Delgiglio v. Becker*, [*2012 BCSC 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62HJ-00000-00&context=), *Hosking v. Mahoney*, [*2009 BCSC 803*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1X0-00000-00&context=), *Jopling v. Brodowich*, [*2009 BCSC 653*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2KK-00000-00&context=), and *Kuskis v. Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=). She asserts that the proper award for non-pecuniary loss in her case is $80,000.

**45**  For past income loss, after accounting for time she took off work after her knee surgeries, Ms. Embleton claims $34,338 plus $2,678 for loss of past pension benefits. The parties agreed that they would work to determine Ms. Embleton's net income loss based upon whatever figure the court may award together with the marginal tax rate that would apply to that award.

**46**  Ms. Embleton maintains that her injuries will permanently impair her ability to do all of the work-related tasks she could do before the accident. She says this will reduce her capacity to earn income in the future. Her counsel prepared detailed formulas showing how future loss may be determined based on various scenarios, but in the end counsel acknowledged that the exercise is really one of assessment rather than calculation. Counsel argued that Ms. Embleton's loss of earning capacity should be assessed at $100,000. Counsel sought to add to that figure an additional $10,000 for loss of pension entitlement.

**47**  Ms. Embleton claims future care costs for continued house cleaning assistance, medications, gym membership, exercise equipment, sleeping and posture aides, and extended mirrors for her vehicle. She quantifies these claims at $40,000.

**48**  In addition to house cleaning, Ms. Embleton says that her capacity to be a housekeeper has been reduced and that she should have $10,000 to compensate her for that loss.

**49**  Finally, the parties agreed on some of Ms. Embleton's special damages, and fixed $4,329.79 for those agreed items. The only item they were not able to agree upon was the cost of one additional housecleaning session per month from the date of the accident to trial. According to Ms. Embleton, that cost was $5,230. She claims that figure as a special damage.

**The Defendants**

**50**  The defence argues that Ms. Embleton sustained a moderate soft tissue injury to her upper back and neck and an aggravation of her pre-existing low back symptoms. The defence says that Ms. Embleton was substantially recovered from her accident-related problems within about a year of the collision. The defence relies on *Bjarnason v. Parks*, [*2009 BCSC 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B104-00000-00&context=), *Hammond v. Meeker,* [*2012 BCSC 198*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1V8-00000-00&context=), *Schmidt v. Hawkins*, [*2010 BCSC 1154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-212G-00000-00&context=), *Atker v. Nair*, [*2011 BCSC 1877*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M3BY-00000-00&context=), *Parker v. Lemmon*, [*2012 BCSC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1FJ-00000-00&context=), and *Travelbea v. Henrie*, [*2012 BCSC 1532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2C6-00000-00&context=), and says that Ms. Embleton's general damages should be assessed at $35,000.

**51**  The defence acknowledges that Ms. Embleton was properly unable to work full-time immediately after the accident and that it was appropriate for her to switch to a .68 FTE position. The defence says that the medical evidence indicates that she had recovered sufficiently to return to her full-time job within the three month try-out period allowed by her employer's policy. The defence says that Ms. Embleton's claim for past income loss should be fixed at $5,000.

**52**  According to the defence, Ms. Embleton's claim for future care should be limited to $1,000 for over-the-counter medications. The defence argues that her claim for past housecleaning services should be denied because she would likely have kept her house cleaner twice per month in any event. That would be because she would have returned to her full-time job, her partner would be working nights and does no housework himself, and she would have had two young children to care for. The defence says that Ms. Embleton can do her housework, albeit with some discomfort, and that discomfort is properly compensated by non-pecuniary damages.

**53**  Finally, the defence submits that the medical evidence does not support the proposition that Ms. Embleton's accident-related complaints will be permanent or that they in fact limit her ability to fully participate in the work force. The defence says that if Ms. Embleton's capacity to earn income is less now than before, that loss is attributable to problems with her low back and especially to her knees, neither of which can be blamed on the accident.

**Discussion**

**Injuries**

**54**  All of Ms. Embleton's claims are directly related to the degree and longevity of her accident-related symptoms and loss of function. It makes sense, then, to begin discussion of the quantum of her claims with findings of fact concerning those injuries and consequent loss of function.

**55**  The collision itself was significant but not catastrophic. Within a few days of the accident Ms. Embleton complained to her chiropractor and to her medical doctor of pains in her neck, shoulder, mid-back, lower back, and of headaches. Several months after the collision she attended at a gym with a personal trainer and there she faithfully performed the exercise routines he established for her. She experienced some relief from her pains and some increase in function and tolerance for activity. About six months after the accident, Ms. Embleton's headaches had diminished in frequency and severity, but they had not disappeared altogether. By the first anniversary of the accident, Ms. Embleton was attending yoga and was playing all of the sports that she had played before the accident, albeit with less tolerance for extreme exertion.

**56**  Based on Dr. Kinakin's notes, which I accept as an accurate record of the complaints that Ms. Embleton voiced during her many visits, I find that by 2012 her lower back had returned to its pre-accident state.

**57**  In April 2011 Ms. Embleton's right knee became symptomatic with arthritis and chondromalacia. The knee was troublesome to her, and she attended an orthopaedic surgeon. The surgeon operated on the knee in August 2011.

**58**  In 2011, Ms. Embleton's main accident-related complaints remained headache and neck pain, but they were less intrusive than they had been a year earlier. By the spring of 2012, the frequency of Ms. Embleton's headaches had diminished to once every two weeks. Her left knee had become symptomatic at this time and it eventually required surgery. That surgery took place in November 2012.

**59**  I find that by the time that Ms. Embleton saw Dr. Travlos her accident-related symptoms had diminished to headaches and neck pain that bothered her roughly every two weeks. She was doing a relatively lighter bath job then. She has since returned to her regular duties on the ALC ward. The frequency of her headaches and neck symptoms increased following the move back to her usual position.

**60**  I am satisfied that at present, Ms. Embleton continues to have headaches and fatigue after a strenuous day at work. Ms. Embleton still plays her sports, though, and whatever problems she has at the end of a shift of work are not sufficient to keep her from going to the field, court or rink to compete. I find that Ms. Embleton's current accident-related symptoms are closer to a nagging irritant than they are to an actual disability.

**Non-Pecuniary Loss**

**61**  The authorities on which Ms. Embleton relies tend to involve accident-caused symptoms that will impair the plaintiff's function in the long-term.

**62**  Of the three medical doctors who provided opinion evidence, only Dr. Travlos allowed for the possibility that Ms. Embleton's upper body symptoms may continue to bother her into the future. To repeat, he said:

It is possible, however, that she will remain with the same ongoing symptoms as she has now into the future.

**63**  This is at best a lukewarm endorsement of persistent symptoms arising from the accident. It may be contrasted against Dr. Travlos's more assertive opinion that:

Ms. Embleton should continue to improve in terms of her upper body and should return back to her baseline.

**64**  In my view, the weight of medical opinion lies on the side of eventual recovery and return to Ms. Embleton's pre-accident health (leaving foot and knee troubles aside, of course). With that prognosis in mind, and giving consideration to the fact that three and a half years after the collision Ms. Embleton still has some symptoms, I find that a non-pecuniary award of $60,000 is reasonable compensation for her pain and loss of enjoyment of life.

**Past Income Loss**

**65**  The defence position on past income loss is, basically, that Ms. Embleton did not take reasonable steps to mitigate her loss. The defence says that she should have tried to return to her full-time job in the Polson wing shortly before the three month window for her to make that move closed. It maintains that by not even trying to go back to her full-time job she prematurely resigned herself to never holding a full-time position again.

**66**  The evidence persuaded me that in October 2009, Ms. Embleton was motivated to fall back to a part-time job by a number of considerations, of which her accident-caused injury was only one. The other considerations were her dedication to her sports play and the time sports demanded from her home life, the fact that her partner was not in the house weeknights, the fact that her partner does no housework, and the advent of an additional child in the household. These factors all weighed on Ms. Embleton. They influenced her decision to try the part-time position.

**67**  Those factors were also in play when Ms. Embleton decided to stay in the part-time job. I accept her evidence that by February 2010, Ms. Embleton's injuries were still bothering her, and her life circumstances were such that even without those injuries she would likely have been well motivated to stay at part-time.

**68**  If follows, then, that multiple factors led to Ms. Embleton working only part-time after the accident. The injuries she sustained in the accident were a significant contributing factor in that event. The principles of causation laid down in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) dictate that where, in a case such as this, past loss has been caused by multiple factors, the loss is recoverable so long as the defendant's ***negligence*** was a material contributing cause of the loss. In Ms. Embleton's case, the defendants' ***negligence*** caused her physical injuries and those injuries were a material contributing factor in her decision to seek and keep part-time work.

**69**  However, I have no doubt that even if the accident had not happened, Ms. Embleton would have suffered pain and disability in her arthritic knees. That factor would have caused Ms. Embleton to decrease her work schedule sometime in 2011 in any event. Ms. Embleton had long-standing arthritis and degeneration in her knees. The accident neither caused nor aggravated that condition. The advent of her knee problems is, therefore, a true intervening cause. The time she had off work due to knee problems must be excepted from her claim for income loss consequent to the accident.

**70**  In the result, I find that the accident was a material contributing cause of Ms. Embleton working part-time rather than full-time from the accident. After accounting for the intervening problems with her knees, I would assess Ms. Embleton's past loss of income, including loss of pension entitlement, at $36,000.

**Special Damages**

**71**  I find that if she had not been injured in the accident, it is more likely than not that after she returned to full-time work Ms. Embleton would have increased the frequency of her house cleaner's visits to twice per month. I have come to that conclusion because had she been working full-time, Ms. Embleton's schedule would have been full what with having two children in the house, a full-time job, persistent pre-existing low back pain associated with her work, a partner who did not help with housework, and sports practices, games, and tournaments throughout the year. I would make no award for the additional housecleaning services from the accident to the present day.

**Reduction of Earning Capacity**

**72**  I accept Ms. Galbraith's finding that Ms. Embleton's current functional capacity limitations arise primarily from her knees and to a lesser extent from her low back and neck. I also accept the opinions of Dr. Travlos and Dr. Coghlan that to the extent that Ms. Embleton may have trouble in the future, that trouble will be caused primarily by her arthritic knees. Further, she will be at higher risk of disability stemming from her knees if she continues to play all of her sports at a competitive level. Ms. Embleton's evidence was that she intends to continue to play sports notwithstanding the condition of her knees. It follows that Ms. Embleton's ability to work in the future may well be diminished due to her adherence to sport and not due to anything caused by the accident.

**73**  The test for proof of a future loss is whether the evidence shows that there is a "real and substantial possibility" that the loss will occur: *Perrin v. Lalari,* [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at paragraph 32.

**74**  I recognize Ms. Embleton's lack of confidence that she will eventually recover from her accident-caused injuries. However, a plaintiff's subjective pessimism is not the kind of evidence that can establish a real and substantial possibility that a future event (in this case: recovery) will not happen. Medical evidence is, in my view, much the better tool for that exercise. Dr. Williams testified that he is optimistic for eventual full recovery. Dr. Coghlan believes that Ms. Embleton is already not functionally limited by accident symptoms. The weight of Dr. Travlos's opinion tends to recovery as well.

**75**  The evidence indicates that it is a bare possibility that Ms. Embleton's accident-related symptoms will continue to impair her function in the future, but the law is clear that a bare possibility is not sufficient to bottom an award for future loss.

**76**  For these reasons I find that there is not a real and substantial possibility that Ms. Embleton's accident-caused symptoms will permanently impair her function.

**77**  That said, Ms. Embleton's symptoms do still bother her and her recovery is not absolutely complete. It may be a few years yet for her to return to her pre-accident baseline condition. There is a substantial possibility that during those years, her headaches and neck pain will prevent her from taking additional shifts of work or from working in her previous job as a residential aide. I would award $40,000 to Ms. Embleton for the real possibility that her symptoms may interfere with her ability to earn income and accrue pension benefits over the next five years.

**Cost of Future Care**

**78**  It is not unreasonable for Ms. Embleton to continue to use over-the-counter medications to manage the headache and neck symptoms that may continue in the future. An award of $1,000 would be reasonable in that regard. Likewise, it is not unreasonable for her to have access to a gym pass at $480 per year for the next five years. An award of $2,000 would be adequate for that future cost.

**79**  Ms. Embleton has tried and rejected sleeping medication, and no award for its cost in the future should be made. The cost of the extended mirrors for her vehicle is very modest -- in my view if Ms. Embleton truly felt that those mirrors were necessary for her to safely drive her car, she would have already bought them. She has not, and from that I infer that Ms. Embleton does not actually need the mirrors. I would make no award for them.

**80**  For the reasons noted above, I make no award for ongoing housecleaning.

**Loss of Housekeeping Capacity**

**81**  Ms. Embleton's evidence at trial was that she felt too tired at the end of the day to do all of her house cleaning. It is for that reason that she has her house cleaner come in twice a month. I have already concluded that she would likely have had the house cleaner in twice a month even if the accident had not happened. Ms. Embleton did not assert that for reasons attributable to the accident she is unable to do any other aspect of her normal housekeeping tasks. These would include laundry, cooking, shopping, making the children's school lunches, et cetera. I am unable to conclude, therefore, that Ms. Embleton has suffered a loss of housekeeping capacity.

**Conclusion**

**82**  Ms. Embleton is entitled to an award as follows:

1. Non-pecuniary loss $60,000
2. Special damages $4,330
3. Past income loss (before taxes) $36,000
4. Reduction of earning capacity $40,000
5. Cost of future care $3,000

**83**  The parties may apply for directions if they cannot agree upon Ms. Embleton's net income loss.

**84**  Subject to an application concerning a pre-trial offer to settle, Ms. Embleton shall have her costs on Scale B.

P. ROGERS J.

**End of Document**

[***Fink v. British Columbia (Public Guardian and Trustee), [2003] B.C.J. No. 2421***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0CT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Satanove J. (In Chambers)

Oral judgment: October 3, 2003.

Vancouver Registry No. S013723

**[2003] B.C.J. No. 2421** | 2003 BCSC 1592 | 127 A.C.W.S. (3d) 35

Between Monique Roy Fink, plaintiff, and Public Guardian and Trustee of British Columbia, and Her Majesty the Queen in Right of the Province of British Columbia, defendants

(25 paras.)

**Case Summary**

**Practice — Costs — Party and party costs — Special orders — Increase in scale of costs, novel or important issues — Offers to settle — Whether judgment equal to or more favourable than offer — Liability for party and party costs — Bullock order or Sanderson order, where success divided.**

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| Application by the plaintiff Fink for costs assessed on scale 5, double costs from the date of a settlement offer and for a Sanderson or Bullock order. Fink recovered judgment against the Crown in the amount of $80,733 plus interest. Her action against the Public Trustee was dismissed. Fink's settlement offer was in the amount of $86,459. She submitted that the action involved unusually difficult and important issues of fact and law which warranted costs on scale 5. She sought a Sanderson order to have the Crown pay the costs of the Public Trustee.  HELD: Application allowed in part.  The litigation raised issues of importance and complexity that were unique or unusual. The principal amount of the judgment plus interest to the date of the offer was $760 less than the offer, so there was no basis on which to order double costs. The Public Trustee was brought into the litigation by an act of the Crown, so a Sanderson order was appropriate. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rules 37(23), 67(18).

**Counsel**

Gordon Turriff, Q.C., for the plaintiff. J.E. Gouge, Q.C. and E. Hughes, for Her Majesty the Queen in Right of the Province of British Columbia.

[Editor's note: A corrigendum was released by the Court November 14, 2003; the correction has been made to the text and the corrigendum is appended to this document.]

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| **SATANOVE J. (orally)** |

**1**   On February the 2nd, 2003, I found that the plaintiff was entitled to judgment against the defendant Crown in the sum of $80,733.10 plus interest and costs. I dismissed the case against the defendant Public Trustee with costs.

**2**  The plaintiff applies for an order that its costs, including the costs of this application, be assessed on Scale 5 and that she receive double costs from August 21st, 2002. She also applies for a Sanderson, or alternatively, Bullock order that would result in the defendant Crown paying the costs of the defendant public trustee.

Scale 5

**3**  The plaintiff submits that this action involves issues of fact and law that were of unusual difficulty and importance to the public at large thereby warranting assessment under Scale 5 of the tariff of costs.

**4**  The defendant submits that while one aspect of the case may have been complex, it was disposed of on a point of law ruling made by Madam Justice Dillon in favour of the defendant long before trial. The defendant also submits that in K.L.B. v. British Columbia [*(1997), 51 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3XM-00000-00&context=) (S.C.) where the Superintendent's standard of care toward permanent wards was at issue, the trial judge only awarded Scale 3 costs and I should do the same here.

**5**  In my view, the complexity or importance of a case should not be decided on the basis of individual aspects of it but on the case as a whole. There is no doubt that at certain times it suited the defendants to take the position before the Court that this matter was both difficult and important.

**6**  For example, in an affidavit sworn December 7th, 2001, a barrister and solicitor in the Attorney General's office said in paragraphs 7 and 8 that:

1. Once the facts were clear it became necessary to research the common law and/or statutory basis for making such payments. It appears that there is no specific statutory authority entitling a guardian, in particular a Crown office holder acting as guardian of the person of a child in care to payment from a child's estate to cover the cost of maintaining the child. Research showed that at common law a guardian is not obliged to support his ward out of his own funds if the ward has sufficient funds of his own. The guardian is entitled to take the income, and with court approval the capital, to the extent necessary to provide reasonable maintenance.
2. In my opinion it is arguable that the common law position has not been altered by statute, and is applicable to guardians of the persons of children in care. Accordingly it is arguable that the MCFD is entitled to payment from the estates of children in care for the reasonable costs of maintenance. If this argument is accepted by the Court there would have been a legal basis for the policy of making payments from the estates of children in care, and it is unlikely that the plaintiff's claim that the payments were in some way wrongful could be sustained. It therefore is an arguable defence to the Plaintiff's claim.

**7**  She also said in paragraph 9, (I will only quote from the middle section of that paragraph):

1. ...The process of searching for the documents mentioned above, researching considerable 19th century authority on the common law of guardianship, researching the many statutory provisions concerning the rights and obligations of parents, guardians, children, trustees and public officers, discussing the position with MCFD and engaging in correspondence with the Public Guardian and Trustee's solicitors, was not complete until about the middle of November.

**8**  Another example can be found in the submissions before Madam Justice Dillon wherein counsel for the defendant Crown wrote this:

1. From a public policy point of view, this would have a very chilling effect on any person considering being the guardian of a child.

**9**  Mr. McLaughlin, Q.C., who is representing the defendant Crown on appeal, swore an affidavit stating in part:

1. The reasoning of the Court had profound implications for the day to day of the operation of the Government and our office had not identified any principled reason that would confine such reasoning to the facts of the plaintiff's case.

**10**  In my view, the evidence establishes that this litigation raised issues of importance and complexity that were not only "more than ordinary", but actually unique or unusual as that term is used in Section 2(2) of Appendix B to the Rules of Court.

**11**  Comparisons of this case to K.L.B. v. British Columbia is of limited value because Madam Justice Dillon gave no reasons for her decision in that case, nor did she allow submissions from counsel.

Double Costs

**12**  The plaintiff submits that the amount awarded to her of $80,773.10 plus court ordered interest to the date of trial, $8,139.71 exceeded the amount of her offer to settle made on August 21st, 2001 which was for the amount of $86,459.25.

**13**  A strict reading of Rule 37(23) entitles her to double costs from August 21st, 2001 to trial.

**14**  The defendant Crown says that the Court of Appeal in Alberta Wheat Pool v. Northwest Piledriving Ltd., [*[2000] B.C.J. No. 2336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2CB-00000-00&context=), [*2000 BCCA 641*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2CB-00000-00&context=) held that prejudgment interest does not form part of the judgment for purposes of determining entitlement to costs. The correct way to compare an offer to settle with what was awarded is to look at the principal amount of the judgment plus court ordered interest up to the date of the offer. The parties agree that this amount is $85,698.60 or $760.68 less than the offer to settle.

**15**  I agree with defence counsel that I am bound by the decision of the Court of Appeal in this regard. I do not think it makes any difference whether the order has been entered or not. The method of calculation for the purposes of costs should be the same.

**16**  Counsel for the plaintiff argued in the alternative that I should exercise my discretion and award double costs anyway. I decline to do so for two reasons: 1) it is doubtful that I have any discretion under Rule 37(23); and 2) counsel did not provide me with any grounds on which to exercise my discretion judicially other than the usual submission of hardship.

Sanderson or Bullock Order

**17**  The Court of Appeal in Grassi v. WIC Radio Ltd., [*[2001] B.C.J. No. 1073*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63BD-00000-00&context=), [*2001 BCCA 376*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63BD-00000-00&context=), considered Rule 67(18) which states that where the costs of a defendant "ought to be paid" by another defendant, the Court may order it be paid directly.

**18**  Madam Justice Southin said this:

1. I do not go so far, as some of the cases have suggested, as to say that such an order should be made "whenever it was reasonable for the plaintiff to have sued the successful defendant", if, by "reasonable", one is looking at the matter from the perspective of counsel for the plaintiff. One must bear in mind that the present rule as to joinder of causes of action is so broad that the causes of action alleged against the various defendants may be completely different, even though they arise out of the same transaction. ...

**19**  She went on to say in paragraph 34:

1. But orders under Rule 57(18) are not restricted to cases where the unsuccessful defendant in the course of the litigation has blamed the successful defendant but may extend to acts of the unsuccessful defendant which caused the successful defendant to be brought into the litigation.

**20**  In my view, it is the act of the defendant Crown which caused the defendant Public Trustee to be brought into this litigation. It was through the ***negligence*** of the Superintendent's office that no exemption was obtained for the plaintiff, thus requiring the Public Trustee to make the impugned payment to the Superintendent's office.

**21**  There was a connection between the offices of the two defendants, a system which had been set up, that resulted in the depletion of the plaintiff's estate. It was only through my findings of fact at trial that the Public Trustee was exonerated and that the defendant Crown was found liable for the ***negligence*** of the Superintendent.

**22**  Furthermore, one of the means by which the Superintendent sought to shirk responsibility in the matter was to point to the Public Trustee as being the party in control of the plaintiff's estate and the payment of her debts. Thus it was not inappropriate that the plaintiff continued its action against the Public Trustee.

**23**  In my view, a Sanderson order is appropriate in these circumstances and I so order.

Conclusion

**24**  The plaintiff is entitled to all her costs of the action, including this application on Scale 5. The defendant Crown is liable to pay the defendant Public Trustee's costs.

**25**  There will be no order for double costs.

SATANOVE J.

\* \* \* \* \*

CORRIGENDUM

Released: November 14, 2003

[1] My Oral Reasons for Judgment handed down October 3, 2003, were reported incorrectly. They should have indicated that Mr. Gordon Turriff, Q.C. appeared for the plaintiff.

SATANOVE J.

**End of Document**

[***Four Star Auto Lease Ltd. v. 565204 B.C. Ltd. (c.o.b. Daewoo Richmond), [2008] B.C.J. No. 126***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-20F1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

B. Fisher J.

Heard: November 27, 2007.

Judgment: January 25, 2008.

Docket: S91568

Registry: New Westminster

**[2008] B.C.J. No. 126** | 2008 BCSC 98 | 165 A.C.W.S. (3d) 442 | 55 C.C.L.T. (3d) 134 | 2008 CarswellBC 572

Between Four Star Auto Lease Ltd., Plaintiff, and 565204 B.C. Ltd. d.b.a. Daewoo Richmond et al., Defendants

(30 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Judgments and orders — Summary judgments — Availability — Debt or liquidated demand — The motion for summary judgment in conversion was dismissed — It was not possible to make the determination sought on a summary application because the undisputed facts could not be considered separately from the disputed facts.**

**Tort law — Trespass — To goods — Conversion — The motion for summary judgment in conversion was dismissed — It was not possible to make the determination sought on a summary application because the undisputed facts could not be considered separately from the disputed facts.**

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| The plaintiff company sought summary judgment for damages for conversion against the defendant, Daewoo Richmond -- Both parties sold motor vehicles, and the case stemmed from the loss of a motor vehicle the plaintiff had initially purchased from Daewoo for the purpose of leasing it to a third party -- In this case, the third party had defaulted on his payments, and decided to sell the vehicle back to Daewoo -- Daewoo then re-sold the vehicle to another third party, a Mr. Carvell -- Carvell failed to complete the purchase, and was involved in an accident in the vehicle -- The vehicle then disappeared while at the repair shop, and the plaintiff was never paid for it -- Although the plaintiff brought an action against numerous defendants, here it only sought judgment against Daewoo for breach of an express or oral contract and fraud, or alternatively in conversion -- It argued that Daewoo was liable for conversion of the truck because it was not able to transfer both title and possession to the plaintiff -- It argued that when Daewoo took possession of the truck from the original third party, it had done so without the plaintiff's consent, and had done so with the obligation of paying out the plaintiff's interest in the vehicle -- HELD: The motion was dismissed -- It was not possible to make the determination sought on a summary application because the undisputed facts could not be considered separately from the disputed facts -- Although it was clear that a bailee was responsible to take reasonable care for the safe custody and return of goods in its care, conversion resulted from an intentional act which denied or seriously interfered with the plaintiff's possessory rights -- There was no evidence that Daewoo intended to exercise control over the truck in such a way as to interfere with the plaintiff's rights of possession -- However, its intention could only be determined from examining the entire set of circumstances and that could not be done on a summary application -- The matter was to be referred to the trial list. |

**Counsel**

Counsel for the Plaintiff: P. Goodwin.

Counsel for the Defendant, 565204 B.C. Ltd.: T. Hewitt.

**Reasons for Judgment**

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| **B. FISHER J.** |

**1**   The plaintiff, Four Star Auto Lease Ltd. (Four Star) applies for judgment under Rule 18A of the ***Rules of Court*** seeking damages for conversion against the defendant 565204 B.C. Ltd. dba Daewoo Richmond (Daewoo). Four Star leases and Daewoo sells motor vehicles and at the relevant time they had a close business relationship. The case stems from the loss of a motor vehicle that Four Star had initially purchased from Daewoo for the purpose of leasing it to a third party.

**Facts**

**2**  For many years, Four Star and Daewoo did a lot of business together. If a customer of Daewoo wished to acquire a vehicle by way of lease, Daewoo referred the customer to Four Star. If the customer's credit was approved, Four Star would purchase the vehicle from Daewoo and enter into a lease agreement with the customer. Four Star would prepare the lease documents and send them to Daewoo. Daewoo would have the customer sign the lease documents and would prepare the transfer documents. A representative of Daewoo was authorized by Four Star to sign documents transferring title of the vehicle to Four Star. Four Star would then pay Daewoo for the vehicle.

**3**  Daewoo also re-sold vehicles that had been leased from Four Star. This occurred where a customer wanted to get out of a lease or where Four Star had repossessed a vehicle. In this circumstance, Four Star would provide Daewoo with a buy-out statement showing the amount required to cancel the lease. When the sale with the new customer was to complete, the vehicle would be transferred from Four Star to Daewoo, and Daewoo would then transfer it to the customer. There is some dispute in the evidence as to whether Four Star provided blanket authorization for Daewoo to sign documents transferring title from Four Star. Four Star says that such transfers were only authorized after the parties had agreed on the purchase price and after it had received a bill of sale from Daewoo.

**4**  On September 26, 2003, Four Star purchased a 2002 Ford F-150 truck from Daewoo for a purchase price of $43,845, for the purpose of leasing it to a third party, the defendant Jasbinder Sandhar. Four Star was the registered owner of the F-150 and Mr. Sandhar was the registered lessee. Mr. Sandhar defaulted on a number of lease payments. In July 2004, Mr. Sandhar decided to sell the F-150 to Daewoo. At that time, Mr. Sandhar owed Four Star $43,323.87 plus taxes for the vehicle.

**5**  Daewoo had another customer interested in purchasing the F-150, John Carvell. Daewoo agreed to sell the F-150 to Mr. Carvell for $40,000, payable with a down payment and the balance within 30 days. On July 13, 2004, Daewoo transferred title to the F-150 from Four Star to Daewoo in order to effect this agreement. There is no documentary evidence regarding this sale: no buy-out statement from Four Star, no bill of sale, and no sale agreement. The amount of the down payment received by Daewoo is not known.

**6**  There is considerable dispute in the evidence about the details and circumstances of this arrangement, and whether Daewoo was authorized to make the transfer. Four Star says it did not consent to this transfer and would not have consented to it unless and until it had received from Daewoo a bill of sale with the agreed purchase price of $43,323.87. Daewoo says it advised Four Star of the agreement with Mr. Carvell, that it would transfer title to Daewoo until Mr. Carvell paid the purchase price, and would then pay Four Star or, alternatively, transfer the title back to Four Star in the event Mr. Carvell did not complete the purchase. Four Star denies any knowledge of the transaction with Mr. Carvell at the time, and only became aware in late August 2004 that the F-150 had been transferred to Daewoo.

**7**  Not only did Mr. Carvell fail to complete the purchase, but he was also involved in an accident with the F-150 on about August 19, 2004. Daewoo arranged to have the vehicle taken to the defendant Bestway Autobody Ltd. for repairs. Daewoo did not inform Four Star about this at the time. At the end of August, Four Star contacted Daewoo to inquire why the lease had not been paid out, and was informed that the vehicle had been damaged and was being repaired by Bestway. On August 31, 2004, Daewoo transferred title back to Four Star. There is some dispute in the evidence as to the date of this transfer, but for the purpose of this application, the plaintiff accepts August 31, 2004, as the correct date.

**8**  Four Star then instructed its bailiff to seize the F-150 from Bestway. The bailiff attended at Bestway on September 1, 2004, but the vehicle was at another repair shop. The next day, September 2, 2004, the bailiff returned to Bestway. The vehicle was still not ready for pick-up. The bailiff served a Notice of Seizure for the F-150 on an employee of Bestway. On September 3, 2004, the bailiff was advised by Bestway that the F-150 had been taken from the repair shop by a person who looked like Mr. Sandhar. The circumstances of this are very suspicious. The vehicle was never recovered and Four Star was never paid for it. No insurance claim for the loss of the vehicle was ever made.

**9**  Four Star brought this action against numerous defendants, but seeks judgment here only against Daewoo. Its primary claim against Daewoo is for breach of an express or implied contract and it also makes allegations of fraud. Its alternative claim is in conversion, and that is the only claim being pursued in this application.

**The plaintiff's submission**

**10**  Four Star's position is that Daewoo is liable for conversion of the F-150 because it was not able to transfer to Four Star both title and possession. Mr. Goodwin says that when Daewoo took title and possession of the F-150 on July 13, 2004, it did so without Four Star's consent and in any event, it took on the obligation of paying out Four Star's interest in the vehicle. Daewoo obtained a down payment from Mr. Carvell and then gave up possession to him. After the F-150 was damaged, Daewoo re-gained possession, and was then obligated to take proper care of it. It delivered the vehicle to its agent, Bestway, for the purpose of making repairs. Mr. Goodwin submitted that Daewoo was responsible for the F-150, regardless of fault, and is liable in conversion for its failure to deliver the vehicle back to Four Star. This is so despite the fact that title to the vehicle was transferred back to Four Star before the vehicle was stolen.

**The defendant's submission**

**11**  Daewoo denies that it acted without consent and says it was never required to provide actual possession to Four Star. Mr. Hewitt submitted that once Daewoo informed Four Star of the location of the F-150 and once Four Star sent its bailiff to seize the vehicle, Daewoo fulfilled its obligations. Daewoo did not intend to interfere with Four Star's rights and is not liable in conversion. All of Four Star's actions at that point were consistent with ownership.

**12**  Mr. Hewitt submitted that the statement of claim makes numerous claims against Daewoo that cannot be determined on the evidence before me in this application, and urged me to dismiss Four Star's application on that basis.

**The pleadings and the evidence**

**13**  The statement of claim alleges that Daewoo "improperly converted the F-150 vehicle for its own use and enjoyment without the consent or permission of the plaintiff". The material facts relate to Daewoo's transfer of title "on or about July 15, 2004" and the subsequent events whereby the vehicle was damaged and stolen.

**14**  The statement of defence contains a denial of specific paragraphs in the statement of claim with respect to these issues but sets out no grounds for a defence; it submits that "the statements made in the above mentioned paragraphs are untrue".

**15**  There is a significant dispute in the affidavit evidence regarding the circumstances under which Daewoo transferred title of the F-150 on July 13, 2004, and whether or not Four Star knew about the circumstances and consented to Daewoo's actions. Mr. Goodwin acknowledged that it would not be possible for me to determine that issue in a summary trial. However, he urged me to make a determination as to whether Daewoo is liable in conversion on the undisputed facts regarding Daewoo's failure to return possession to Four Star after August 31, 2004.

**16**  For the reasons set out below, it is not possible to make the determination urged upon me by Mr. Goodwin, because the undisputed facts cannot be considered separate and apart from the disputed facts.

**17**  I note that Mr. Hewitt raised, as an issue of mitigation, the fact that Four Star never submitted an insurance claim for the loss of the vehicle notwithstanding that it held ownership and insurance at the time of the loss. This was not raised in the pleadings. Mr. Goodwin submitted that such issue is not relevant. For the purpose of this application, I agree.

**Conversion**

**18**  Conversion is a wrongful interference with chattels that is inconsistent with the rights of the owner: ***R.F. Fry & Associates (Pacific) Ltd. v. Reimer*** [*(1993), 83 B.C.L.R. (2d) 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-23DS-00000-00&context=) (C.A.) at para. 23. Professor Fridman[**1**](#Forward_fnref_fnr-1) describes it as follows:

Conversion consists in a wrongful taking, using or destroying of goods or the exercise of dominion over them that is inconsistent with the title of the owner. It is an intentional exercise of control over a chattel which seriously interferes with the right of another to control it.

**19**  In this case, Daewoo transferred title back to Four Star but did not give it possession. The key issue here is whether the plaintiff has proven that Daewoo intended to assert a right of possession so as to negative the rights of Four Star. Professor Klar[**2**](#Forward_fnref_fnr-2) states:

The crucial issue in most conversion disputes is whether or not the defendant's dealings with the plaintiff's goods were serious enough to amount to a denial of the plaintiff's possessory rights and hence a conversion. The basic proposition established in early cases is that not every asportation or interference with possession is serious enough to amount to a conversion. As Fleming has stated: "The controlling factor ... seems to be, not necessarily the defendant's act viewed in isolation, but whether it has *resulted in a substantial interference* with the owner's rights so serious as to warrant a forced sale."

**20**  Mr. Goodwin submitted that actual possession by the defendant is not a necessary element for the tort of conversion, citing ***Unisys Canada Inc. v. Imperial Optical Co.*** [*(1998), 43 C.C.L.T. (2d) 286*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-JB2B-S08J-00000-00&context=) (Ont. Sup. Ct. Jus.), a case involving the conversion of computer software. I agree that there may be conversion in circumstances where the defendant is not in possession of the chattels, or where, as here, the defendant has given possession to a third party. However, the defendant's acts must amount to "an absolute denial and repudiation of the plaintiff's right": ***Unisys*** at para. 15, quoting from ***Oakley v. Lyster*** [1931], 1 K.B. 148, 153, C.A.

**21**  Conversion is a tort of strict liability, in the sense that any lack of knowledge on the part of a defendant regarding the state of title of the goods is no defence: ***Mutungih v. Bokun*** [*(2006), 40 C.C.L.T. (3d) 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-FC6N-X01B-00000-00&context=) (Ont. Sup. Ct. Jus.) at para. 16-18. This kind of conversion is most commonly found where a person takes title to goods without notice of a prior right.

**22**  This case does not involve any lack of knowledge on the part of Daewoo, but it is the case that Daewoo was not responsible for the theft that took place while the vehicle was in the possession of Bestway. Four Star asserts that Daewoo was responsible for its safekeeping at the time of the theft despite the fact that it had given possession to Bestway and regardless of the prior transfer of title.

**23**  The cases on which Mr. Goodwin relies for this proposition are not cases in conversion. They involve circumstances where the defendant was held liable as a bailee. In ***Rogozinsky v. I.C.B.C.***, [*2004 BCSC 423*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B252-00000-00&context=), the stereo deck in the plaintiff's damaged vehicle was stolen while the vehicle was in ICBC's yard. ICBC was held to be responsible for the loss of the stereo on the basis that it was a gratuitous bailee of what was left of the vehicle, that it had an obligation to take a reasonable degree of care with respect to the goods in the vehicle and that it failed to do so. In ***Valley Auto Wrecking & Demolition Ltd. v. Colonial Motors Ltd.***, [*[1977] 1 W.W.R. 759*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-DXWW-22VX-00000-00&context=) (B.C.S.C.), it was held that an individual who had borrowed a vehicle did so on the understanding that he would return it safely to the owner. When the vehicle was not safely returned, the borrower was responsible, despite the fact that it was damaged while being driven by another person at the request of the borrower.

**24**  Mr. Goodwin also submitted that

1. because conversion is a tort of strict liability, Daewoo cannot delegate its duty to take reasonable care, citing *Const. Scarmar Ltee v. Geddes Const. Co****.***[*(1989), 38 B.C.L.R. (2d) 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B07K-00000-00&context=) at 195, which quotes from *Clerk and Lindsell on Torts*, and
2. Daewoo remained liable for damages in conversion after Four Star's bailiff served its Notice of Seizure on Bestway, citing Robinson, *British Columbia Debtor-Creditor Law and Precedents* at 5-15 and *General Securities Ltd. v. Parsons* (1995), 14 W.W.R. 424 (B.C.C.A.).

**25**  In my opinion, neither of these principles apply in the circumstances of this case. The principle of non-delegable duty in the authorities cited arose in the context of ***negligence***. The principle stated in *Robinson*, that an execution debtor retains his property interest after a seizure but before a sale, applies, in again, a different context, and ***General Securities*** involved an innocent third party taking title without notice, a clear case of conversion where the defendants were liable in damages.

**26**  It is quite clear that a bailee is responsible to take reasonable care for the safe custody and return of goods in its care. This may be applicable to Four Star's claims against Bestway, and Four Star neither pleaded nor argued that Daewoo was a bailee. This principle cannot be applied to found a claim against Daewoo in conversion. Conversion results from an intentional act. Professor Klar[**3**](#Forward_fnref_fnr-3) states:

In order to be actionable, a conversion must result from a positive act of the defendant which denies or seriously interferes with the claimant's possessory rights. A destruction or loss of chattels occurring as a result of the defendant's ***negligence*** or passivity is not actionable as conversion.

**27**  Considering only Daewoo's actions on and after August 31, 2004, there is no evidence that Daewoo intended to exercise control over the F-150 in such a way as to interfere with Four Star's rights of possession. To the contrary, Daewoo gave Four Star the information it needed to be able to assert its possessory rights over the vehicle and Four Star exercised those rights through the acts of its bailiff. Four Star never had actual possession of the vehicle, but it had the right to repossess it if the lease (or a contract for sale) was in default.

**28**  Having said that, it would be unjust, in my opinion, to decide the issue of conversion based only on these facts. Daewoo's intention can only be discerned from examining the entire series of circumstances from the time it transferred title on July 13, 2004, to the time of the theft in September. The facts necessary to determine that issue are in dispute and cannot be determined on a Rule 18A application. The evidence that there was no documentation of the transaction with Mr. Carvell and that Daewoo retained a down payment is particularly disturbing, and whether or not Four Star consented to that transaction is critical to an assessment of the evidence and the application of the relevant legal principles.

**Conclusion**

**29**  Four Star's application for judgment against Daewoo is dismissed. I am not able to grant judgment for either party on the basis of the material before me, so the matter is to be referred to the trial list.

**30**  I appreciate that, by bringing this application, Four Star was attempting to simplify the issues in this rather unusual set of circumstances. Given that no judgment has been granted for either party, costs will be in the cause.

B. FISHER J.

[**1**](#Backward_fnref_fnr-1) The Law of Torts in Canada, 2nd ed. (Carswell: Toronto, 2002) at 135.

[**2**](#Backward_fnref_fnr-2) Tort Law, 3rd ed. (Carswell 2003) at 93-94.

[**3**](#Backward_fnref_fnr-3) Tort Law, 3rd ed. (Carswell 2003) at 92.

**End of Document**

[***Gairdner v. Dhaliwal, [2014] B.C.J. No. 2431***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G0GH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

G.P. Weatherill J.

Heard: August 28, 2014.

Judgment: September 30, 2014.

Docket: S147267

Registry: New Westminster

**[2014] B.C.J. No. 2431** | 2014 BCSC 1831

Between Michael Sheldon Larry Gairdner, Plaintiff, and Bhupendra Singh Dhaliwal, Nirmal Kaur Dhaliwal, Alain Cloutier, Manpreet Singh Kailay, Kulvir Kaur Kailay and Harpreet Singh Kailay, Defendants

(41 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Adding or substituting — After expiry of limitation period — Pleadings — Institution of proceedings — Notice of action — Renewal — Service — Appeal by defendants, the Kailays, from two master's orders, the first renewing a notice of civil claim and, the second, adding defendants outside limitation period dismissed — Claim related to alleged slip and fall on walkway between properties owned by Kailays and other defendants — Notice of civil claim was not served on original defendants through plaintiff's lawyers inadvertence — Plaintiff's lawyer also inadvertently named wrong defendant, thinking Kailays' residence was owned by that person — Master entitled to exercise discretion in finding orders would not cause irremediable prejudice — Parties should not be punished for counsel's actions — Expiration of limitation period not determinative.**

**Civil litigation — Limitation of actions — Expiry of limitation periods — Effect of — Appeal by defendants, the Kailays, from two master's orders, the first renewing a notice of civil claim and, the second, adding defendants outside limitation period dismissed — Claim related to alleged slip and fall on walkway between properties owned by Kailays and other defendants — Notice of civil claim was not served on original defendants through plaintiff's lawyers inadvertence — Plaintiff's lawyer also inadvertently named wrong defendant, thinking Kailays' residence was owned by that person — Master entitled to exercise discretion in finding orders would not cause irremediable prejudice — Parties should not be punished for counsel's actions — Expiration of limitation period not determinative.**

**Statutes, Regulations and Rules Cited:**

Limitation Act, RSBC 1996, CHAPTER 266, s. 4(1)(d)

Occupiers Liability Act, *RSBC 1996, CHAPTER 337*,

**Appeal From:**

On appeal from the orders of a Master of the Supreme Court of British Columbia, dated April 16, 2014.

**Counsel**

Counsel for the Plaintiff/Respondent: A. Leoni.

Counsel for the Defendants/ Appellants, M. Kailay, K. Kaillay and H. Kailay: K. Saunders.

**Reasons for Judgment**

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| --- |
| **G.P. WEATHERILL J.** |

**Introduction**

**1**  This is an appeal by the defendants Manpreet Singh Kailay, Kulvir Kaur Kailay and Harpreet Singh Kailay (the "Kailays") from two orders made by Master Keighley on April 16, 2014.

**2**  The first order renewed the notice of civil claim filed November 27, 2012. Through inadvertence on the part of the plaintiff's lawyer, it was not served on the original defendants, Dhaliwal and Cloutier, within one year of it being filed ("First Order").

**3**  The second order added the Kailays as defendants to the action ("Second Order").

**Errors Alleged**

**4**  Firstly, the Kailays argue that the learned Master erred in finding that despite significant prejudice to the Kailays, the interests of justice and the balance of convenience between the parties overrode that prejudice.

**5**  Secondly, the Kailays argue that the learned Master erred by stating that the Kailays could argue the doctrine of spoliation in their defence.

**6**  Thirdly, the Kailays argue that the learned Master erred by failing to find that photographs of the scene that were lost by the Kailays after the two year limitation period expired was material to their defence.

**7**  Fourthly, the Kailays argue that the learned Master erred by finding that, despite the broad allegations of ***negligence*** asserted by the plaintiff in the amended notice of civil claim, the only real allegation against the Kailays concerned the failure to adequately light their property.

**8**  Lastly, the Kailays argue that the learned Master erred by finding that the Kailays lack standing to oppose the application to renew the notice of civil claim that resulted in the First Order.

**Background**

**9**  The plaintiff's claim relates to an alleged slip and fall that occurred November 27, 2010 on a walkway between residential properties owned by the defendants Bhupendra Singh Dhaliwal and Nirmal Kaur Dhaliwal (the "Dhaliwals") and the Kailays. Although not set out in the pleadings, it is alleged that the fall occurred during the evening when it was dark.

**10**  The Dhaliwals' and Kailays' homes are close together -- some seven to eight feet apart. Two concrete walkways, one for each residence, run parallel to each other in the space between the homes ("Walkways"). The Walkways lead from the driveways on the properties to the backyards and to rental suites in the basements of the properties. The Walkways are separated by a gravel area of approximately one and a half feet wide.

**11**  Each of the Kailays' and Dhaliwals' homes has rental suites in their respective basements.

**12**  Each of the Kailays' and Dhaliwals' homes also has basement window wells alongside the Walkways. The Kailays allege that at all times the window wells on both the Dhaliwals' and Kailays' properties were covered by grates. They also allege that there were functioning motion detection lights along each of the residences lighting the Walkways.

**13**  The Kailays purchased their property in January 2010. At that time the window wells on both the Kailays' and Dhaliwals' properties were covered with wooden grates. The Kailays arranged to replace the wooden grates with metal grates and placed the original wooden grates overtop of the metal grates to conceal them from potential thieves. Apparently the Dhaliwals did likewise.

**14**  While on the Walkways either going to or coming from a visit with the Kailays' tenant on November 27, 2010, the plaintiff alleges he fell into a window well on the Dhaliwals' property and was injured.

**15**  The plaintiff commenced this action two years to the day of his injury, namely November 27, 2012. Through inadvertence on the part of his counsel, the notice of civil claim was not served on the defendants. Through inadvertence as well, plaintiff's counsel incorrectly named another property owner, Mr. Ali, as a defendant thinking that Mr. Ali owned the residence that was in fact owned by the Kailays. Prior to March 3, 2014 the Kailays had no knowledge of either the plaintiff's fall or of this action.

**16**  The plaintiff's allegations against the Kailays include failing to have adequate lighting along the Walkways, general allegations of ***negligence*** for maintaining an unsafe premises contrary to the *Occupiers Liability Act*, *R.S.B.C. 1996, c. 337*, failing to ensure that visitors to the Kailays' premises would be safe and generally failing to ensure that the Walkways were not dangerous.

**Alleged Prejudice on the Part of the Kailays**

**17**  The Kailays say that at some point after they purchased their premises in January 2010 they took photographs of the Walkways and the area where the plaintiff fell. They allege that the photographs were taken during and after the metal grates were installed showing the condition of the Walkways in the months prior to the plaintiff's fall. Those photographs were kept on their home computer.

**18**  In December 2013 the hard drive on their computer failed and the photographs were lost. They allege that if they were aware of the plaintiff's claim prior to December 2013 they would have been able to make copies of the photographs. The prejudice they have suffered as a result of being unable to produce photographs is at the heart of this appeal.

**Standard of Review**

**19**  Counsel for both the plaintiff and the Kailays agree that this appeal is of a purely interlocutory matter and the decision should not be interfered with unless it can be shown that the Master was clearly wrong: *Stoicevski v. Casement*, [*(1983), 43 O.R. (2d) 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-K0HK-22GW-00000-00&context=); *Abermin Corp. v. Granges Exploration Ltd.* [*(1990), 45 B.C.L.R. (2d) 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4J3-00000-00&context=); and *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd.*, [*2011 BCSC 999*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22P9-00000-00&context=).

**Issue**

**20**  The issue on this appeal is whether the Master was clearly wrong in exercising his discretion in making the First Order and the Second Order.

**21**  Put another way, was the Master clearly wrong in determining that the balance of justice and convenience respecting the Orders weighted in favor of the plaintiff?

**Discussion**

**22**  At the heart of this appeal is the prejudice alleged by the Kailays related to the lost photographs. I propose to deal with the alleged errors together.

**23**  In deciding the First Order and the Second Order the Master was required to balance justice and convenience between the parties with the issue of prejudice to the Kailays. In all the circumstances, he determined that the prejudicial effect of renewing the notice of civil claim and adding the Kailays as defendants after the limitation period and after the photographs of the scene had been lost, was overridden by the balance of justice and convenience between the parties.

**24**  In my judgment Master Keighley was free to exercise his discretion in the manner that he did and he was not clearly wrong in so doing. It is clear to me that he considered and weighed the factors that he needed to in order to judicially exercise his discretion.

**25**  Even though there was no mention in the Master's ruling of prejudice to the plaintiff with respect to the First Order or the Second Order, it does not mean he didn't consider it.

**26**  I adopt the comments of Ehrcke J. in *Badesha v. Snowland Sporting Goods Ltd.,* [*2014 BCSC 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1T9-00000-00&context=) at para. 24:

It must be remembered that these were oral reasons delivered at the end of a day-long hearing. The Master was not required to recite in his reasons all of the points that he considered. The appeal is from his decision, not from his reasons *per se: Convoy Supply Ltd. v. CDN Roof Doctor Ltd.,* [*2011 BCSC 1320*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B7-00000-00&context=) at para. 27.

**27**  In reading his reasons as a whole, it is evident to me that the learned Master balanced the prejudice to both parties though he did not explicitly mention prejudice to the plaintiffs. He was entitled to exercise his discretion in favour of extending the notice of civil claim and adding the Kailays as defendants.

**28**  Respecting the First Order, it was in the Master's discretion to extend the time for service of the notice of civil claim. In exercising his discretion, he was required to consider a number of factors including the length of delay, the reasons for delay and the presence or absence of prejudice. The overriding consideration is what is just and convenient (*Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd* [*[1996] B.C.J. No. 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=) (C.A.)).

**29**  He also ruled that the Kailays had no standing to make submissions respecting the First Order, because they were not a party to the proceeding at that point. I have been referred to no authority that would suggest the Master's ruling was in error.

**30**  The rationale for extending the notice of civil claim was based on the delay caused by the conduct of the lawyer for the plaintiff.

**31**  Parties should generally not be punished for the actions of counsel. In *McIntosh v. Nilsson Bros. Inc*., [*2005 BCCA 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0PB-00000-00&context=) [*McIntosh*], our Court of Appeal stated at para. 10:

1. ... It is important not to be diverted from the conduct of the parties to the conduct of their lawyers, except to the extent that the conduct of the lawyers may be at the heart of real prejudice to the other side. In this case, the plaintiffs were neither the cause of the failure to add Bavaria in the first instance nor the cause of any of the delays. They should not be prejudiced because of conduct on the part of their lawyer unless that conduct was the cause of irremediable prejudice to the other side. ...

[Emphasis added.]

**32**  In the case at bar, the Master considered the inadvertence on the part of the plaintiff's lawyer in not serving the original defendants within the limitation period and weighed it against the potential prejudice to the defendants that would result from extending the notice of civil claim. He was entitled to exercise his discretion to find that it did not cause irremediable prejudice.

**33**  In my judgment, he was not clearly wrong in making the First Order.

**34**  Respecting the Second Order, in exercising his discretion to add the Kailays outside the limitation period, the Master was similarly required to consider what is just and convenient. One of the factors a court will consider in deciding whether it is just and convenient to add a party is whether the application is brought outside an expired limitation period. By virtue of s-s. 4(1)(d) of the *Limitation* Act, the expiration of a limitation period is not determinative: *Fazell v. British Columbia (Attorney General)* [*2009 BCSC 1273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62FT-00000-00&context=). Even the fact that adding parties would remove a limitation defence that may otherwise have been available is not necessarily determinative: *Strata Plan LMS 1463 v. Krahn Bros. Construction Ltd.,* [*2004 BCCA 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B260-00000-00&context=), [2004] B.C.W.L.D. 515 [*Strata Plan LMS*]. In that case, the Court of Appeal stated at para. 37:

In this case, I am satisfied that the chambers judge properly interpreted and applied the decision in Lui (No. 2). She concluded that, even if the limitation period against Krahn and Redkop had expired, it was just and convenient to add them as parties and to permit the Owners to amend their pleadings accordingly. The effect of joining them in these circumstances was to preclude them from arguing the limitation defence at trial.

**35**  The Kailays argue that in deciding to grant the Second Order, the learned Master failed to balance the prejudice of the Kailays against the prejudice to the plaintiff. The Kailays say that the lost photographs were the only objective evidence available showing the state of the Walkways prior to the plaintiff's fall.

**36**  After accepting for the purposes of the application that the Kailay's photographs were irretrievably lost, the learned Master stated:

[27] That to me is the significant issue of prejudice facing these proposed defendants. The question is it overridden by the balance of convenience or the interests of justice? I am satisfied in the circumstances of this case that it is.

[28] I cannot make any determination at this point, and indeed it would be for the trial judge, as to the materiality of the photographs that they had taken. There is no detail given of the specific scenes depicted, and in fairness to the Kailays that will be difficult to provide after three and a half years or so but they have had an opportunity to review the photographs which the plaintiff has included in his material on this application and no comment has been made of those as to whether they depict the condition of the premises accurately or otherwise.

[29] I am not able to determine whether in fact those photographs, which are now, I assume, irretrievably lost, would have any evidentiary impact on the issues between these parties.

[30] In the circumstances I have arrived at the decision that these proposed defendants should be added as parties to the action. That is not the end of the matter, of course. There is the issue of spoliation which will remain live in the event that the parties, or any of them, are able to satisfy the court that they no longer have access to evidence which is material to the claims against them. It may well be that they are able to trim or otherwise bring applications with respect to the pleadings themselves.

**37**  In *Morice v. Toronto-Dominion Bank,* [*2014 BCSC 380*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61PW-00000-00&context=) [*Morice*], Rogers J. was faced with an application to join a landlord of commercial premises as a defendant to an action commenced against the tenant Toronto-Dominion Bank involving a slip and fall that had allegedly occurred in the parking lot nine years before. The plaintiff had not prosecuted the claim since he commenced it and it had sat idle for a number of years. The bank applied to dismiss the claim for want of prosecution. The landlord had long since destroyed its maintenance records, which would have been helpful to the bank in maintaining its defence that it had in place a reasonable system of inspection. Further, the whereabouts of the landlord's then maintenance personnel at the time of the fall, was unknown. In granting the bank's motion for dismissal, Rogers J., noted at paras. 50-51:

In the present case, were it not for the destruction of the maintenance records, I would have been persuaded to allow Mr. Morice's application to add Starr Schein as a defendant. That is to say, even though the delay was long and Mr. Levin and Mr. Morice were both responsible for the delay, the fact that Starr Schein was and has always been the proper target of Mr. Morice's claim would have tipped the balance of justice and convenience in favour of adding it to the action.

However, the loss of the maintenance records has caused significant prejudice to Starr Schein's ability to advance what is likely to be the only viable defence it might have to the claim. Mr. Morice has adduced no evidence to show that Starr Schein could somehow retrieve the lost information from some other source. On the record before me, I find that Starr Schein's prejudice goes directly and profoundly to its ability to participate in the proceeding. I find that the prejudice is irremediable.

**38**  In my judgement, *Morice* is distinguishable on its facts. In the case at bar, the lost photographs are not fundamental to the Kailays' defence. There is no evidence that the photographs were taken when it was dark which is when the alleged slip and fall occurred. There is also no evidence that the photographs showed the state of the Walkways and window well grates immediately prior to the fall. The best evidence is that the photographs were taken sometime in 2010 when the grates were replaced and showed the condition "in the months before" the fall. All that means is that the Kailays cannot produce photographs depicting the Walkways in the months before the alleged event.

**39**  Furthermore, unlike in *Morice,* even though the photographs have been lost, the Kailay's are available to testify and comment on the status of the Walkways and their state of repair at trial. Irremediable prejudice has not occurred in this case. The Kailays argue that the learned Master erred by suggesting that spoliation remained a "live" issue and could be raised at the trial as a defence to the plaintiff's claim. While I agree that once the Kailays were added as defendants, the spoliation of the photographs became moot (*Strata Plan LMS*), it is apparent that the learned Master had already determined that the balance of justice and convenience weighed in favor of adding the Kailays as defendants.

**Disposition**

**40**  In sum, I find that Master Keighley was not clearly wrong in exercising his discretion the First Order and the Second Order and I am dismissing the Kailay's appeal.

**41**  The plaintiff will be entitled to costs of this appeal.

G.P. WEATHERILL J.

**End of Document**

[***Gibson v. Sun, [2018] B.C.J. No. 2877***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SY2-T191-FK0M-S316-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

P. Abrioux J.

Heard: April 23-27, May 10, June 18-20, July 9, 2018.

Judgment: July 30, 2018.

Docket: S183775

Registry: New Westminster

**[2018] B.C.J. No. 2877** | 2018 BCSC 1277

Between Jan Heather Gibson, Plaintiff, and Christina Sun, Defendant

(146 paras.)

**Case Summary**

**Damages — For torts — Affecting property — Real property — Nuisance — Action by plaintiff for damages for nuisance allowed — After defendant removed fence, plaintiff did not spend time in easement area or her property, which she previously used to sit outside and barbecue, and was wary to be outside due to his history of aggressive behaviour — Plaintiff was awarded $12,500 for nuisance and $5000 in punitive damages.**

**Damages — Types of damages — General damages — Categories of — Loss of use of property — Exemplary or punitive damages — Action by plaintiff for damages for nuisance allowed — After defendant removed fence, plaintiff did not spend time in easement area or her property, which she previously used to sit outside and barbecue, and was wary to be outside due to his history of aggressive behaviour — Plaintiff was awarded $12,500 for nuisance and $5000 in punitive damages.**

**Tort law — Nuisance — What constitutes nuisance — Remedies — Action by plaintiff for damages for nuisance allowed — After defendant removed fence, plaintiff did not spend time in easement area or her property, which she previously used to sit outside and barbecue, and was wary to be outside due to his history of aggressive behaviour — Plaintiff was awarded $12,500 for nuisance and $5000 in punitive damages.**

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| Action by the plaintiff for a declaration that she was entitled to use an easement and for damages for nuisance. The parties were neighbours. The defendant removed a fence that the plaintiff said was constructed in accordance with a restrictive covenant and/or on a registered easement in favour of her property. The fence had been there for several years before she bought the property. The restrictive covenant formed part of a building scheme that included guidelines in relation to a village. The easement, which was entered into and registered on title one-and-a-half years later, provided that a fence could not be built "on any portion of the Easement Area other than as specifically permitted herein". The easement did not refer to the restrictive covenant. After the defendant removed the fence, the plaintiff did not spend time in the easement area or the property, which she previously used to sit outside and barbecue, and was wary to be outside due to his history of aggressive behaviour.  HELD: Action allowed.  The fence was permitted by the restrictive covenant and the easement. The fence was in the location permitted by the restrictive covenant and the guidelines. The restrictive covenant and the easement could be read together such that one did not conflict with the other. The existence of the guidelines was a surrounding circumstance when the easement was granted and informed its interpretation. To interpret the easement to override the guidelines, which outlined a comprehensive community plan, would render them ineffectual. The plaintiff was awarded $12,500 for nuisance and $5000 in punitive damages. The plaintiff was deprived of the physical use and enjoyment of the property for nearly three years, the deprivation was significant and it was accompanied by aggressive behaviour that forced her to alter her behaviour in response. The punitive damages award was based on the defendant's high-handed conduct in exercising a self-help remedy, aggressive conduct and derogatory comments. |

**Statutes, Regulations and Rules Cited:**

City of Surrey by-law number 12285,

Court Order Interest Act, *R.S.B.C. 1996, c. 79*,

Land Title Act, *R.S.B.C. 1996, c. 250* as amended, s. 28

Property Law Act, [*R.S.B.C. 1996, c. 377, s. 36*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B1T4-00000-00&context=)

Rules, Scale B

**Counsel**

Counsel for the Plaintiff: R. Doran.

The Defendant, appearing in person: C. Sun.

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| **P. ABRIOUX J.** |

**I: INTRODUCTION**

**1**  This proceeding concerns a dispute between neighbours regarding a fence.

**2**  On February 26, 2016, the defendant exercised a self-help remedy by removing a fence that the plaintiff, Ms. Gibson, asserts was lawfully constructed in accordance with a restrictive covenant and/or on a registered easement in favour of her property. The uncontradicted evidence is that the fence had been in its then location for several years prior to the plaintiff purchasing the property in 2010.

**3**  The plaintiff seeks:

1. a declaration that she is entitled to use the easement;
2. an injunction restraining the defendant from interfering with or obstructing the plaintiff's use of the easement; and
3. compensatory, punitive and exemplary damages for the defendant's acts of trespass and nuisance.

**4**  For her part, the defendant, Ms. Sun, says that Ms. Gibson has wrongfully interfered with the use of her property, including the easement, and seeks damages by way of counterclaim as a result of Ms. Gibson's alleged trespass and nuisance.

**5**  Ms. Sun also seeks damages as a result of alleged breaches of her rights to privacy, in particular Ms. Gibson and/or her agents videotaping certain of Ms. Sun's activities.

**6**  For the reasons that follow, the relief sought by the plaintiff is largely granted, and the counterclaim is dismissed.

**II: BACKGROUND**

**7**  Many of the principal facts are not in dispute.

**8**  The plaintiff is, and was at all material times, the registered owner and in possession of the lands and premises at 14908-57 Avenue, Surrey, British Columbia (the "Gibson property").

**9**  The defendant is, and was at all material times, the registered owner and in possession of the lands and premises at 14902-57 Avenue, Surrey, British Columbia (the "Sun property").

**10**  The Gibson and Sun properties adjoin each other and form part of a development in Surrey called Panorama Village.

**11**  Both properties are subject to a restrictive covenant filed on December 5, 1995, under registration number BJ374186 (the "Restrictive Covenant").

**12**  The Restrictive Covenant formed part of a building scheme that included "Village Lot Design Guidelines" in relation to Panorama Village (the "Guidelines"). The Guidelines were appended as Schedule A to the Restrictive Covenant, and contain a diagram identifying a "privacy fence" at the back of the properties between the various lots, which is essentially contiguous with the foundation of the neighbouring property.

**13**  The Restrictive Covenant provides that the covenantor (being the developer):

1. ... covenants and agrees with Surrey that:
2. No building, fence, foundation, excavation, well or structure shall be made, placed, erected or maintained on any portion of the Lands except in accordance with Schedule "A",

...

1. the Covenantor shall not place, install, erect or construct any building, structure, or improvement on the Lands that does not strictly comply with the terms and conditions with respect to tree preservation as set forth in paragraph 6.2, as outlined in attached Schedule "A",

...

1. The Covenantor agrees to obtain from any prospective purchaser, leaseholder, tenant or other transferee of any right in the Lands, an agreement to be bound by the terms of this Agreement and to provide Surrey with a copy of the said agreement.

...

1. The parties agree that they will do such further acts and give such further assurances as necessary tot implement the true intent and meaning of this Agreement.

...

1. It is mutually understood and agreed by and between the parties hereto that this Agreement and the covenants herein contained shall be construed as running with the Lands and shall be binding upon and, subject to section 7, enure to the benefit of the respective parties hereto, their administrators, personal representatives, successors and assigns.

**14**  City of Surrey by-law number 12285 was adopted on July 31, 1995. It deals with, amongst other things, landscaping and fencing in relation to the Panorama Village. A copy of the Guidelines is attached to the by-law (the "By-law").

**15**  The Sun property is subject to a 24-inch "Access Easement" in favour of the Gibson property, which was registered under number BL301869 on August 9, 1997 (the "Easement").

**16**  The Easement defines Ms. Sun's property as the "First Owner", and Ms. Gibson's property as the "Second Owner". Paragraph 1.01 of the Easement sets out the essential grant:

1.01 Easement. Subject to the terms and conditions set out in this Agreement, the First Owner hereby grants to the Second Owner and its permittees and invitees, in perpetuity, for the benefit of and to be appurtenant to the Second Owner's Lot, the nonexclusive, full and free right, liberty and easement over that portion of the First Owner's lot (the "Easement Area") ... for the Second Owner and its permittees and invitees at all times and at their free will and pleasure, to enter upon, stay on, go across, pass over and repass over the Easement Area for the purpose of:

1. obtaining access to and egress from the Second Owner's lot;
2. landscaping the Easement area, including, without limitation, planting and placing lawns, trees, shrubs, plants and flowers within the Easement area and inspecting, altering, maintaining, renewing, removing and replacing the same;
3. building, constructing, installing and placing entranceways, walkways and foot paths within the Easement area and inspecting, altering, maintaining, repairing, renewing, removing and replacing the same;
4. building, constructing installing and placing swimming pools, ponds, fountains, lawn chairs, picnic tables, swings and other similar improvements and other appurtenances within the Easement area and inspecting, altering, maintaining, repairing, renewing, removing and replacing the same; and
5. entering upon, staying on and otherwise reasonably using and enjoying the Easement area as a yard area appurtenant to and for the benefit of the Second Owner's Lot,

provided that any such landscaping or improvement constructed, installed, planted or placed on the Easement area will not adversely affect the first owner's lot, or any improvement thereon or access thereto, and provided that all of such rights will be exercised at the sole cost and expense of the second owner.

[Emphasis added.]

**17**  Paragraph 2.01 of the Easement provides, further, that the first owner (*i.e.*, Ms. Sun) "will not construct, install, place or erect any building, structure or other improvement on the Easement area, other than landscaping".

**18**  Paragraph 3.01 sets out the second owner's (*i.e.*, Ms. Gibson's) covenants which include:

3.01 Second Owner's Covenants. The Second Owner hereby covenants and agrees with the First Owner that the Second Owner will:

...

1. not disturb the First Owner or any person using or enjoying the First Owner's Lot or create any nuisance on or about the Easement Area or create any inconvenience to the First Owner or any person using or enjoying the First Owner's Lot,

...

1. not build construct, install or, place, erect, maintain or install any wall, fence, building or other improvement on any portion of the Easement Area other than as specifically permitted herein;

...

1. permit the First Owner to clear and keep clear the Easement Area or anything which in the reasonable opinion of the First Owner may constitute a danger or obstruction to any person using the Easement Area;

3.02 Default. If the Second Owner fails to perform any of its duties or obligations under this Agreement, the First Owner may, at its discretion and at the cost and expense of the Second Owner, perform any of the Second Owner's duties or obligations and in such case the Second Owner will, on demand, reimburse the First Owner on a complete indemnity basis for all costs and expenses in connection with such performance. For so long as the Second Owner is in default of the performance or observance of any of its duties or obligations contained in this Agreement and such default has continued for a period of 10 days after receipt by the Second Owner of written notice from the First Owner setting out the particulars of such default, all rights granted to the Second Owner hereunder will be suspended until such default is cured.

**19**  Ms. Sun purchased her property on August 8, 2008, and Ms. Gibson, who by the time of the trial had retired from her position as City Clerk for the City of New Westminster, purchased her property on September 22, 2010. Ms. Gibson lived at the property with her husband Glenn Fyfe. Their son also resided with them.

**20**  Ms. Sun, who I find to be a sophisticated businesswoman, owned several rental properties, including the one in question. The property was rented to two tenants, including her former husband who resided in one of the units with the couple's son. Ms. Sun says she did not become aware of the existence of the Easement until the fall of 2015.

**21**  When Ms. Gibson purchased her property, there was no fence in the front yard. At the back of her property, there existed a privacy fence between the Gibson and Sun properties, which I find had been constructed some years beforehand. Whether it was the original privacy fence is not, in my view, significant because it was located in accordance with the privacy fence set out in the Guidelines and contained in the Restrictive Covenant. There were also concrete paving stones that existed both on Ms. Gibson's property and the Easement. The paving stones are loose and are not permanently affixed. Loose paving stones are permitted under clause 1.01(2) or (4) of the Easement agreement.

**22**  At the time Ms. Gibson purchased her property, the previous owner, Ms. Anita Desjardins, had installed a wood shed on the paving stones. Ms. Gibson and Mr. Fyfe subsequently removed the shed in 2010.

**23**  There is a privacy fence which is to the benefit of Ms. Sun's property between her property and her neighbour to the west.

**24**  During the spring/summer of 2011, Ms. Gibson and Mr. Fyfe had a fence constructed in the front yard. For the reasons I shall outline below, I find that the front fence was built within the Easement. I also accept Mr. Fyfe's evidence that the front fence was constructed with Ms. Sun's permission and it was not until the fall of 2015 that Ms. Sun indicated that she wanted the front fence removed.

**25**  Later in these reasons, I will deal with whether the back fence was located within the Easement or on Ms. Sun's "own" property as she described it, that is her property that is not subject to the Easement.

**26**  At the back of her property, Ms. Gibson and her husband placed a fireplace on the concrete paving stones where the shed had existed before. They added patio chairs and a barbeque, all of which were located behind the backyard privacy fence built in accordance with the Guidelines.

**27**  It was Ms. Sun's evidence that in late October 2015 she became aware that both the front and back fences were located on her property.

**28**  On October 31, 2015, she delivered a "Notice of Trespass" (the "Notice") to Ms. Gibson. She says that she was confronted by Mr. Fyfe and that he behaved in an aggressive way towards her, although she was not hurt. Her account is, to an extent, corroborated by her contractor, Mr. Westover, who was seated in Ms. Sun's car across the street.

**29**  Mr. Fyfe denies he went to the door that evening, and this is corroborated by Ms. Gibson. She says that she heard a sound, went to the front door and what turned out to be the Notice had been wedged in the front door. It fell to the ground when she opened the door.

**30**  The Notice was to the effect that the back and front fences were on Ms. Sun's private property and had to be removed by December 1, 2015, failing which Ms. Sun would hire a contractor to have them removed and claim the expense involved from Ms. Gibson.

**31**  According to Ms. Gibson, on November 15, 2015, she agreed to move the front fence and requested an extension of time to do so until the new year. Ms. Sun says that Ms. Gibson agreed to remove both fences.

**32**  On January 23, 2016, Ms. Gibson sent an email to Ms. Sun in which she advised that she had consulted with the Municipality of Surrey and had become aware of the Easement. She pointed out that Ms. Sun had an easement in her favour with her neighbour to the west. It was Ms. Gibson's position that she was entitled to use the Easement in the manner she had done to date.

**33**  On January 24, 2016, Ms. Sun responded by email. She accused Ms. Gibson of breaking her promise to remove "your fence ... from the Easement area". She advised that failure "to remove your fence" from the Easement and her property by February 1, 2016, would result in her hiring a contractor to do so.

**34**  On January 31, 2016, Ms. Gibson and Mr. Fyfe had the front yard fence removed.

**35**  On or about February 4, 2016, Ms. Gibson planted boxwood hedge shrubs where the front fence had been and placed a rock garden within the Easement, her position being that this was permitted under clause 1.01(2) of the Easement.

**36**  During the mid to late afternoon of February 26, 2016, Ms. Sun and Mr. Westover entered onto the Easement at the front of the property and removed the shrubs and the rock garden, which they then moved to Ms. Gibson's property.

**37**  Ms. Sun and Mr. Westover then started to remove the back fence. Mr. Westover needed a blade for his saw, so they left the property for a period of time. During their absence, Ms. Gibson returned and became aware of what had occurred. When Ms. Sun and Mr. Westover returned, a confrontation occurred. There was conflicting evidence as to whether Mr. Fyfe and his son behaved in an intimidating way towards Ms. Sun and/or whether her cell phone was taken from her. In any event the police attended, as did neighbours, and some of the interaction was videotaped by a neighbour.

**38**  With the police present, Mr. Westover completed removing the back fence.

**39**  On March 9, 2016, Mr. Fyfe met with the City of Surrey Planning Department and was provided with a copy of the By-law.

**40**  On March 12, 2016, Ms. Sun entered onto the Easement and planted grass seed within it. One of the issues is whether she also entered upon Ms. Gibson's property and/or obstructed the Easement area. On the same day, Ms. Sun removed the cover of Ms. Gibson's fireplace, leaving it uncovered.

**41**  There is a video of Ms. Sun taken on March 19, 2016, at the back of the Sun and Gibson properties. She is observed to deface Ms. Gibson's fireplace and cover by writing the word "Free". Ms. Sun's evidence was that the fireplace, which had been removed from the Easement area on February 26, 2016, had been returned to the Easement area. By using the word "Free", she was inviting anyone who might come down the alley to take the fireplace.

**42**  On July 15, 2016, Ms. Gibson engaged the services of Dhaliwal & Associates, Surveyors to prepare a survey of the Easement which is registered in favour of her lot over that of Ms. Sun's. Mr. Lorin Levac was the professional land surveyor who had conduct of the matter.

**43**  He was made aware that the Easement was over part of 14902-57 Avenue Surrey, British Columbia, being the Sun property. He was also advised there was a dispute going on between Ms. Gibson and her neighbour and that the matter would be going to court.

**44**  He stated that his intent, at the outset, was to survey the lot, including the placement of boundary markers, to survey the Easement with temporary markers, and also to take photographs when the posts were set. He had a crew attend at the Gibson property to perform these functions but did not attend himself.

**45**  The field survey was completed on July 15, 2016, and the plan was completed and checked by him on July 19, 2016, then filed with the Land Title Office under plan number EPP 63781. This plan did not specifically identify the dimensions of the Easement. The photographs were filed as exhibits at the trial.

**46**  Ms. Gibson testified that on August 8, 2016, she observed Ms. Sun pulling up the easement markers from the ground at the front of the properties and throwing them onto her property. She said she also observed Ms. Sun at the back of the properties, throwing around her patio furniture and destroying two chairs. Ms. Gibson called the Surrey RCMP and an officer attended, but Ms. Sun had left her property before the officer arrived.

**47**  Ms. Sun testified that on August 8, 2016, she became aware from her tenant that there were survey pins and markers at the front of her property. That day she removed certain of those survey markers. An issue to be decided is whether the survey markers and pins were in the Easement area or on Ms. Sun's property which is not subject to the Easement.

**48**  Mr. Levac also stated that until he was contacted by Ms. Sun several months later, which I find to be in early December 2016, he was not aware that his crew had set iron pins as opposed to temporary markers identifying the boundaries of the Easement at the front of the property.

**49**  According to Mr. Levac, Ms. Sun complained that the posts were "not legal". He instructed a crew to return to the site. They checked the boundary and the Easement points which had been set in July 2016. He also reviewed the photographs taken by his crew and concluded the Easement was accurately identified.

**50**  Mr. Levac stated that Ms. Sun was also concerned that the metal pins could be a potential hazard if they were left in their location. In a subsequent conversation he had with Ms. Sun after his crew had returned to the property, he told her that the easement markers at both the front and back of the property were in their correct locations. He told her that since he had confirmed their accuracy, he had instructed the crew to remove the metal pins at the front since they were no longer required, thereby removing any safety concerns she may have had.

**51**  He then had a second survey plan prepared that identified the dimensions of the Easement, which was dated March 6, 2017, and filed in the Land Title Office under plan number EPP70765.

**52**  Ms. Sun gives a different account of her interactions with Mr. Levac. She stated that when she became aware that Ms. Gibson had ordered a survey, she considered obtaining one herself. Having made some inquiries, she decided to contact Mr. Levac instead and spoke to him in early December 2016. She complained that the metal pins in the front of the property were a hazard and that the markings themselves were wrong.

**53**  According to Ms. Sun, a few days later she and Mr. Levac spoke. Mr. Levac acknowledged that the survey pins which outlined the boundaries of the Easement were wrongly placed and that he had instructed his crew to remove them.

**54**  On cross-examination, Mr. Levac denied that he had advised Ms. Sun that the pins were wrongly placed. He reiterated that the only reason they were removed was that having confirmed the accuracy of the Easement boundaries, the metal pins were no longer needed to be imbedded in the land.

**55**  Both Mr. Levac and Ms. Sun agree that in their second conversation, he told her that the survey markers at the back of the property were placed in the correct location and would not be moved.

**56**  On October 5, 2016, Ms. Sun emailed Ms. Gibson, advising of what she considered to be "facts" "before the REAL UGLY WAR starts". She accused Mr. Fyfe of placing "the false survey pin".

**57**  Ms. Gibson's counsel responded the same day advising in part:

Regarding the survey stakes that were placed into the ground which you unlawfully removed, my client had a legal survey completed and the survey stakes were placed by the surveyor. My client has photographs of you removing the survey stakes.

**58**  Ms. Gibson testified that on October 13, 2016, she observed Ms. Sun and another person, who I find to be Ms. Sun's private investigator, Mr. Michael Marek, trespassing at the side of her property. Both Ms. Sun and Mr. Marek denied trying to access the side of the property from the front that day.

**59**  On December 9, 2016, Mr. Fyfe photographed Ms. Sun in what the plaintiff claims was the Easement area.

**60**  I would also add that the Sun property within the side yard to the Gibson property is comprised only of lands subject to the Easement. In other words, Ms. Sun does not have any exclusive property within the side yard outside of the Easement.

**61**  It bears remembering that the Easement is entitled "Access Easement". When accessing the Gibson property's side yard from the front yard, there is now no gate or fence separating the front and side yard. When accessing the side yard from the back, there was the privacy fence which existed when Ms. Gibson purchased the property in 2010, being the fence removed by Ms. Sun on February 26, 2016. After that date, there has been no back fence separating both properties.

**62**  It was Ms. Gibson's evidence that prior to February 26, 2016, Ms. Sun had only asked on two occasions for permission to enter Ms. Gibson's property in order to access the side yard to paint her property, and has not done so since that date. She also testified that since she purchased her property in 2010, the only change to the side yard of the Easement that she made was planting a lilac bush.

**63**  Ms. Anita Desjardins, who owned the Gibson property from August 1999 until she sold it to Ms. Gibson in September 2010, testified that when she purchased the property, there was a fence at the back of the property that ran along the boundary line between her property and Ms. Sun's. The fence was approximately six feet high, extended from the lane and ended at the Sun residence, which was purchased by Ms. Sun after Ms. Desjardins had purchased her property. Ms. Sun lived in the property for a period of time before moving out and renting it to tenants.

**64**  She stated that there was also a fence on the other side of the property with her other neighbour, which also ran along the property line extending from the lane to the start of her residence. There was also a short fence in her back yard, which ran parallel to the lane. There were no gates at the back of her property.

**65**  Ms. Desjardins also said that when she purchased the property, there was already landscaping that consisted of plants and two hydrangea bushes along the side yard in between her property and Ms. Sun's property that touched both residences. There were no fences at the front of the property.

**66**  During her ownership of the property, she did not build any fences, nor did she dismantle or make any changes to any fences that existed on her property or along the property line between her property and the defendant's lands. She also hired a contractor to construct the shed previously located on the paving stones.

**67**  According to Ms. Desjardins, Ms. Sun never complained about the existence of any fences or the shed.

**III: DISCUSSION**

**A: Credibility**

**68**  It is probably not surprising that in a dispute amongst neighbours of some duration which involves the use of their respective properties and which also necessitated the involvement of the police, there are significant differences in their accounts as to what occurred on various occasions.

**69**  Some of those differences, which are largely of the "I said, you said" variety, are not fundamentally necessary to the findings I need to make in this proceeding. Accordingly, I decline to make them either because it is not possible to decide which of the two "sides" I could believe or they are not required for my conclusions.

**70**  An example is the events of October 31, 2015, when the Notice was delivered by Ms. Sun to the Gibson property. It matters not whether Ms. Sun attempted to provide it to Ms. Gibson or Mr. Fyfe, or placed it in the door. In part, that is because although Ms. Sun says she was intimidated by Mr. Fyfe's behaviour and that "he almost cut my finger off", she stated that she did not in fact sustain any injuries. What is important is that the Notice was delivered that evening, a fact none of the parties denies.

**71**  Another example relates to some of the events of February 26, 2016. It is clear that tensions were high between the parties with neighbours and the police attending. But the evidence is conflicting as to whether Ms. Sun's cell phone was grabbed by Ms. Gibson's son and thrown to the ground or whether Mr. Fyfe and/or his son behaved in an aggressive manner towards Ms. Sun. If that did occur, the police did not pursue the matter any further, and, in any event, Ms. Sun acknowledges that she was not injured in the exchanges that occurred that evening.

**72**  What is relevant and not disputed by Ms. Sun is that, on her instructions, Mr. Westover removed the back fence and that the boxwood hedge and landscaping materials were removed and moved to Ms. Gibson's property.

**73**  However, whether Ms. Sun and/or Mr. Westover and/or Mr. Marek trespassed on the Gibson property at various times does need to be addressed, as does the interaction between Ms. Sun and Mr. Levac in December 2016.

**74**  In considering these different versions, I will follow the framework set out in *Bradshaw v. Stenner*, [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=) at paras. 186-187, aff'd [*2012 BCCA 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24KX-00000-00&context=), where Justice Dillon provided a useful summary of the principles that govern the court's approach to assessing the evidence when there are significantly different versions of events advanced by the parties:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* [*(1919), 59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G14C-00000-00&context=), [*50 D.L.R. 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [*(1926), 31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=) (Ont.H.C.); *Farnya v. Chorny*, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [*[1997] 3 S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

**75**  In this case, there are videos, photographs, and Mr. Levac's surveys which are of assistance in determining whether "the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time".

**76**  In that regard, I do not accept Ms. Sun's evidence that at no time did she enter on the Gibson property, remaining at all times either on her own property or the Easement. The Easement itself was only 24" wide commencing at her foundation line, and it was simply not possible, in my view, considering all the evidence, to conclude that Ms. Sun was at all times able to keep herself within that 24".

**77**  It is clear from the videos and the photographs that the fireplace and barbeque were, at times, partly on the easement and partly on the Gibson property, and for Ms. Sun to either move them or deface the fireplace as she did must have involved her at least momentarily being on the Gibson property.

**78**  There is also the fact that Ms. Sun acknowledged that she could not access the side of her house to have it painted or perform any maintenance without requiring Ms. Gibson's permission. Her conduct in the past when she requested permission to access the side of her house confirms this.

**79**  Mr. Marek testified that he and Ms. Sun did not enter on the Gibson property from the side, but that evidence is based, in part, on what I conclude to be a mistaken belief that the easement markers at the front of the property were in the wrong locations.

**80**  This leads to whether the fences, both at the front and the back, were in the Easement area or on Ms. Sun's "own" property.

**81**  In that regard, I accept Mr. Levac's evidence where it conflicts with Ms. Sun's regarding their discussions in December 2016. Ms. Sun was adamant that the easement markers were on her property, not the Easement. She points to photographs and her own observations. Mr. Westover was also convinced that the easement markers at the front were in the wrong locations. He reached this conclusion by visually comparing the markers to the foundation line. Mr. Marek's similar conclusion and the measurements he took were made without reference to the survey pins.

**82**  Clearly, the best evidence as to the boundaries of the easement are Mr. Levac's surveys and the survey plans which were registered with the Land Title Office. Ms. Sun, notwithstanding her deep-felt belief that Mr. Levac's survey was wrong, chose not to obtain her own survey, which may have put Mr. Levac's work into doubt.

**83**  I do not accept that a licensed surveyor such as Mr. Levac, if he had acknowledged to Ms. Sun in December 2016 that his survey boundaries were in error as she alleges he did, would have filed the survey plan in March 2017 with the Land Title Office. The fact that he did so, in my view, confirms his evidence as to the boundaries of the Easement.

**84**  I note that Ms. Sun lodged a complaint with the British Columbia Association of Land Surveyors with respect to Mr. Levac's actions and the Law Society of British Columbia pertaining to Ms. Gibson's counsel's involvement in this matter. While Mr. Levac appears to have acknowledged to his professional association that he ought to have been aware that his crew had placed metal pins at the front of the property, the accuracy of his survey work itself never appears to have been questioned by a professional land surveyor.

**85**  I would add that there is nothing in the evidence before me that would lead to the conclusion that Ms. Gibson's counsel acted in an unprofessional manner, to the contrary.

**86**  These are both examples, in my view, of Ms. Sun's intense belief that she is correct with respect to the matters in issue and no one is spared from her wrath if they hold or represent those who have a different view.

**87**  There is also the fact that in her evidence as well as during her questioning of certain witnesses, and in her closing submissions, Ms. Sun alleges, amongst other things, that Ms. Gibson and Mr. Fyfe lied on multiple occasions, committed acts of violence against her, set "traps" for the RCMP officers so that she would be improperly investigated, and obtained a survey that was "designed to damage me".

**88**  On the whole, I found both Ms. Gibson and Mr. Fyfe to be credible and reliable witnesses who appeared to be attempting to tell the truth. There was some question with respect to Mr. Fyfe's testimony regarding the date of one of the videos taken of Ms. Sun; however, in the video she threatens to mark the fireplace, stating "I will use a pen to mark it". The subsequent video of her marking the fireplace was taken March 19, 2016, and given this corroborating evidence I find Mr. Fyfe's recollection of the date, being March as opposed to August 2016, to be accurate. Either way, what is depicted on the video is the relevant consideration rather than the date is was taken.

**89**  On the whole, I found Ms. Sun's evidence to be coloured by her steadfast, but erroneous, belief that the fences were located on her property and/or contrary to the terms of the Easement, an issue to which I shall return.

**90**  An issue also arose with respect to a racist comment allegedly made by Ms. Sun to Ms. Gibson and her husband. Both parties had a different interpretation of the comment in question, which is stated on one of the videos. Ms. Sun maintains she said "Go back to your junk", while Ms. Gibson asserts she said "Go back to your jungle". Having reviewed the video, it is clear that Ms. Sun said "Go back to your jungle".

**91**  She did acknowledge making a mistake related to her accusation that it was Mr. Fyfe who had placed the metal pins in the front of the property when it turned out to be Mr. Levac's survey crew.

**92**  I was not assisted by Mr. Westover's evidence. I found it to be conveniently uncertain and imprecise at times, and conclude that he was more interested in being an advocate for Ms. Sun than an impartial witness attempting to assist the court. An example is his evidence regarding the boundaries of the Easement since it was based on his conclusion that one of the pins "looked like it was [Ms. Sun's] property line pin and another two and a half feet onto her property".

**93**  On the whole, I found that Mr. Marek was attempting to be accurate in giving his evidence, although on a key issue being the location of the easement markers at the front of the property, he was of no assistance for the reasons I have mentioned.

**94**  In conclusion, when the evidence of Ms. Gibson, Mr. Fyfe, and Mr. Levac conflicts with that of Ms. Sun, Mr. Westover, and Mr. Marek on material issues, I accept the evidence of the former over the latter.

**B: Was the Back Fence Permitted by either the Restrictive Covenant and/or the Easement?**

**95**  I have concluded that the back privacy fence was permitted by both the Restrictive Covenant and the Easement.

**96**  The back fence, whether it was the original privacy fence or one that was erected thereafter, was in the location permitted by the Restrictive Covenant and the Guidelines.

**97**  An issue arises as to whether it was in violation of the Easement, in particular para. 3.01(6), which I shall repeat and which provides:

1. not build construct, install or, place, erect, maintain or install any wall, fence, building or other improvement on any portion of the Easement Area other than as specifically permitted herein.

**98**  The Easement, entered into and registered on title approximately one and a half years after the Restrictive Covenant, does not refer to the Restrictive Covenant. Accordingly, it is not "specifically permitted herein".

**99**  I accept that the Easement may not be well drafted in that it did not refer to the Restrictive Covenant with its appended Guidelines, but I am of the view that the two documents can be read together such that one is not in conflict with the other.

**100**  Restrictive covenants, whether contained in building schemes or not, are contractual documents and are interpreted in accordance with general principles of contractual interpretation: *Hofer v. Guitonni*, [*2011 BCCA 393*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-629T-00000-00&context=) at paras. 11-14; *Zhang v. Davies*, [*2017 BCSC 1180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P1T-XTV1-JX8W-M3P7-00000-00&context=) at para. 55.

**101**  Easements are also contractual documents, and demand a similar interpretive approach. In *Smith v. Balen*, [*2018 BCSC 918*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SHB-BV91-JJD0-G3NR-00000-00&context=), this approach was described as follows:

[39] In *Avanti Mining Inc. v. Kitsault Resource Ltd.*, [*2010 BCSC 1181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-2142-00000-00&context=) (CanLII), Mr. Justice Joyce summarized the applicable principles for interpretation of an easement. In doing so, he summarized the main authorities in this province which have interpreted rights of way, easements, and contracts. At para. 61 the Court stated as follows:

[61] From the foregoing review of the authorities, I would distil the following principles that I think should govern my interpretation of the meaning and scope of the Right of Way:

...

1. The following principles that apply to the construction of a contract also apply to the interpretation of the Right of Way:
2. The intention of the parties is to be determined by looking first to the plain and ordinary meaning of the words used, in the context of the whole of a contract and in a manner that does not render one part of the contract ineffective.
3. The words must be read in the context of the surrounding circumstances when the contract was made, including facts known to both parties but not negotiations or evidence of subjective intent.
4. The standard is an objective one.
5. If the words of the instrument are unambiguous that is the end of the matter. If there is ambiguity or if the plain language leads to an absurdity, a result that both parties could not have intended, then regard may be had to extrinsic evidence to assist in determining the parties' intent.
6. Evidence of context or surrounding circumstances must not be allowed to overwhelm the plain language of the document.

*0746727 B.C. Ltd. v. Cushman & Wakefield LePage Inc*. [*[2008] B.C.J. No. 641*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1TB-00000-00&context=) ; *Water Street Pictures Ltd. v. Forefront Releasing Inc* [*[2006] B.C.J. No. 2652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1R5-00000-00&context=).

1. Thus, with regard to an easement in particular, the wording of the instrument creating the Right of Way should govern its interpretation unless (a) There is an ambiguity in the wording or (b) the surrounding circumstances demonstrate that both parties could not have intended a particular use of the easement that is apparently authorized by the wording of the document. [Emphasis added.]

**102**  In my view, the existence of the Guidelines was a surrounding circumstance existing at the time the Easement was granted, and its existence informs the interpretation of the Easement agreement.

**103**  Permissible surrounding circumstances include objective evidence of background facts existing at the time of the execution of a contract. In other words, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting: *Sattva Capital Corp. v. Creston Moly Corp.*, [*2014 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FXJ-PSX1-JNJT-B0JG-00000-00&context=) at para. 58.

**104**  Clearly, the existence of a pre-existing charge on title is a fact that, even if it was not within the knowledge of the parties, ought to have been when the Easement agreement was concluded. As such, it properly informs the interpretation of the Easement, and I interpret the Easement agreement to permit structures maintained in accordance with the Restrictive Covenant, specific to this case, privacy fences located at the back of the property.

**105**  This is the only possible interpretation of these agreements that allows the effective operation of both the Easement and the Guidelines, both of which remain registered charges on the property. To interpret the Easement any other way renders the Guidelines, which outline a comprehensive community plan, ineffectual. As emphasized in the above excerpt from *Smith*, this is a strong indication that the parties could not have intended the Easement to override the terms of the Guidelines where the two conflict, even though a strict reading of the Easement appears to preclude the maintenance of a back privacy fence in the Easement area.

**106**  If I am wrong in finding that the two agreements can co-exist as I have described, then I would find that any contradiction between the Restrictive Covenant on one hand and the Easement on the other should be resolved in favour of the Restrictive Covenant since it ranks in priority to the latter pursuant to s. 28 of the *Land Title Act*, *R.S.B.C. 1996, c. 250* as amended. See *R.A.D. v. Campbell*, [*2015 BCCA 494*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HK3-JGT1-JPGX-S3VG-00000-00&context=) at paras. 18-19; *Remington v. Crystal Creek Homes Inc.*, [*2018 ABQB 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RMT-87D1-JJ6S-64B6-00000-00&context=) at paras. 108-111.

**C: Additional Findings of Fact and Conclusions on the Evidence**

**107**  Accordingly, I make the following additional findings of fact, and reach certain conclusions:

1. both the front and back fences were located within the Easement boundaries and were not, in whole or in part, located on Ms. Sun's "own" property, that is her property that is not subject to the Easement in favour of the Gibson property;
2. Ms. Sun first became aware of the Easement after the Notice was delivered to Ms. Gibson on October 31, 2015. The Notice makes no reference to the Easement, and I find that upon receiving Ms. Gibson's email of January 23, 2016, which refers to the Easement, Ms. Sun then obtained a copy for herself upon having a title search conducted on or about January 26, 2016. At most, by October 31, 2015, Ms. Sun had a copy of the survey obtained by Mr. Westover, which did not indicate the boundary of the Easement;
3. although the Notice refers to both the "back and front fence", it also refers to Ms. Gibson removing "your fence". I find on all the evidence that Ms. Gibson only communicated to Ms. Sun her intention to remove the front fence, which is what she did on January 31, 2016;
4. the back privacy fence, which was removed by Ms. Sun and Mr. Westover on February 26, 2016, was permitted by the Restrictive Covenant and the Easement;
5. on February 26, 2016, Ms. Sun entered onto the Easement at the back yard of Gibson property and removed the back privacy fence that had been in place for several years before both Ms. Gibson and Ms. Sun purchased their respective properties. Ms. Sun and Mr. Westover then entered the Gibson property where they discarded portions of the fence they had destroyed;
6. on or about March 18, 2016, Ms. Sun entered the Easement and Ms. Gibson's lands and defaced Ms. Gibson's back yard fireplace by writing the word "Free" on the brick and the canvas cover;
7. on other occasions, including March 12 and August 8, 2016, Ms. Sun entered onto the Gibson property, albeit temporarily, without Ms. Gibson's permission;
8. Ms. Sun offered passers by the opportunity to take free-of-charge property that did not belong to her. She also damaged chairs which did not belong to her; and
9. Ms. Gibson, throughout her dealings with Ms. Sun, attempted to be non- confrontational while at the same time doing what she considered necessary to protect her interests, such as arranging for video or photos to be taken to record Ms. Sun's actions. Ms. Sun, on the other hand, as is seen on the videos and in the tone of some of her written communications, was aggressive and confrontational with Ms. Gibson, particularly after she formed the opinion that Ms. Gibson had lied to her about removing both fences and was "robbing' her of her land.

**108**  In so far as the location of fences between other properties in the area is concerned, the evidence is to the effect that similar privacy fences exist between certain of the properties, for example, Ms. Sun and her neighbour to the west. I was not assisted by the evidence of Mr. Troncoso. His property is in the same block as that of Ms. Gibson and Ms. Sun but does not have a privacy fence at the back. Rather, there is a newer fence that appears to be built some distance from his foundation, but Mr. Troncoso indicated that the fence was in place prior to his purchase. His property also appears larger than both Ms. Gibson and Ms. Sun's.

**D: Did Ms. Sun Commit Acts of Trespass and/or Nuisance?**

**109**  The tort of trespass to land was discussed in *Watson v. Charlton*, [*2016 BCSC 664*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JMG-WY01-F2TK-2271-00000-00&context=) at para. 224, where the court endorsed the following summary from *Glashutter v. Bell*, [*2001 BCSC 1581*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M467-00000-00&context=) at para. 26, "Trespass to land occurs when one enters onto land in the possession of another without lawful justification. Trespass is actionable per se; there is no requirement to prove actual damage to the property".

**110**  The legal principles relating to nuisance were summarized by Justice Verhoeven in *Suzuki v. Monroe*, [*2009 BCSC 1403*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B222-00000-00&context=) at paras. 33-36 and 39:

[33] A leading authority in British Columbia on the law of nuisance is *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* [*(1979), 95 D.L.R. (3d) 756*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BY-00000-00&context=). The judgment of the Court was delivered by McIntyre J.A. He noted at 759 that "The essence of the tort of nuisance is interference with the enjoyment of land. (Street, *Law of Torts*, at p. 212.)". He added at 759:

That interference need not be accompanied by ***negligence***. In nuisance one is concerned with the invasion of the interest in the land, in ***negligence*** one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. ...

[34] McIntyre J.A. referred to the following proposition from H. Street, *The Law of Torts*, 4th ed. (London: Butterworths, 1968) at 215:

A person then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

[35] He added at 760-61:

What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. ...The conflicting interests must be weighed and considered against all the circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected.

[36] The principles were also reviewed by the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board*, [*[1989] 2 S.C.R. 1181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652P-00000-00&context=), at 1190 through 1192, and more recently in *St. Lawrence Cement Inc. v. Barrette*, [*2008 SCC 64*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1DH-00000-00&context=), at para. 77. There, the Court stated as follows (references omitted):

At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct. Nuisance is defined as unreasonable interference with the use of land. Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance. The interference must be intolerable to an ordinary person. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.

...

[39] The invasion complained of must be substantial and serious, and it must be clearly unacceptable according to accepted concepts of the day.

**111**  When I apply these principles to the findings of fact and other conclusions I have reached, I conclude that Ms. Sun has committed acts of both trespass and nuisance.

**E: Damages and Other Relief**

**112**  Damages in trespass and nuisance are, by their nature, contextually driven. Where a technical trespass is committed, such as an unintentional encroachment, damages may be nominal only: *Wasserman v. Hall*, [*2009 BCSC 1318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62K2-00000-00&context=) at para. 90.

**113**  Compensatory damages in both trespass and nuisance may take into account the aggravation and foreseeable mental distress flowing from the defendant's conduct: *Wasserman* at para. 91; *Suzuki* at para. 103.

**114**  In my view, the damages for trespass in this case really relate to the brief intrusion by Ms. Sun onto the Gibson property at various times either to move the fireplace and barbeque, and/or the placing of the boxwood hedges, removed fence posts or landscaping material onto the Gibson property.

**115**  I award nominal damages of $500 for these acts of trespass.

**116**  Of much greater significance, in my view, are the consequences which flow from the unlawful removal of the back fence related to the claim in nuisance. Ms. Gibson and Mr. Fyfe testified as to the harmful effects this action has had on their enjoyment of the Easement area and their back yard. In particular, they do not spend time in the Easement area or their own property, which they had previously used to sit outside, barbeque, etc. Any barbequing is now done on a small deck off their home. They are also wary to be outside due to Ms. Sun's history of aggressive behaviour.

**117**  The Easement specifically permits Ms. Gibson to "reasonably us[e] and enjoy ... the Easement area as a yard area appurtenant to and for the benefit of [her] lot".

**118**  I was provided with several authorities, including:

1. *Wasserman*: damages in trespass - $5,000, nuisance - $3,500;
2. *Moyer v. Mortensen*, [*2010 BCSC 1528*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B32S-00000-00&context=): damages in nuisance - $7,500;
3. *Watson*: damages in trespass - $9,000, nuisance - $2,000; and
4. *Wallace v. Joughin*, [*2014 BCPC 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2P7-00000-00&context=): punitive damages in trespass - $4,000, compensatory damages in trespass - $90.

**119**  I accept the entirety of Ms. Gibson and Mr. Fyfe's evidence as to the harmful effects of Ms. Sun's conduct in removing the back fence, in particular the negative effects this has had on their ability to use the property.

**120**  Accordingly, I award damages in nuisance in the amount of $12,500. While this is a substantial award based on the authorities I have reviewed, I consider it appropriate given the fact that: (i) Ms. Gibson and her family have been deprived of the physical use and enjoyment of their property they are entitled to for nearly three years; (ii) the deprivation has been significant; and (iii) it has been accompanied by aggressive behavior that has forced Ms. Gibson and her family to alter their behavior at home in response.

**121**  The plaintiff also seeks aggravated and punitive damages for Ms. Sun's high-handed and malicious conduct, including exercising a self-help remedy by removing the back fence.

**122**  Aggravated damages are compensatory in nature. The purpose of an award of aggravated damages was summarized in *Azak v. Chisholm*, [*2018 BCSC 1051*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SPW-M341-JNCK-20DG-00000-00&context=) at para. 77:

[77] Aggravated damages are meant to compensate for the aggravation of intangible injuries such as distress, anguish, grief, humiliation and damaged self-pride brought about by the defendant's high-handed and culpable conduct: *Vorvis v. Insurance Corporation of British Columbia*, [*1989 CanLII 93*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23P9-00000-00&context=) (SCC), [*[1989] 1 S.C.R. 1085*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23P9-00000-00&context=) at para. 16

See also: *Hill v. Church of Scientology of Toronto*, [*[1995] 2 S.C.R. 1130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K1-00000-00&context=) at para. 188; *Nazerali v. Mitchell*, [*2018 BCCA 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RXP-NCC1-JT42-S4X3-00000-00&context=) at para. 84.

**123**  Punitive damages do not serve a compensatory function. They are intended to punish and deter. The nature of an award of punitive damages was discussed in *Hill* at para. 196:

196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence. [Emphasis added.]

**124**  As mentioned previously, part of the malicious conduct alleged is that Ms. Sun made a racist comment to Ms. Gibson and her husband. I have concluded that such a racist comment was in fact made.

**125**  Accordingly, I also award punitive damages in the amount of $5,000 for Ms. Sun's high-handed conduct in exercising a self-help remedy, the aggressive conduct displayed over time and the derogatory comments apparent on at least one of the videos, and the act of offering passers by property that was not hers to give.

**126**  I am of the view that an award of punitive damages is appropriate to sanction this behaviour rather than an award of aggravated damages. It is clear that much of Ms. Sun's behavior has been malicious and oppressive, and the evidence highlights the inappropriate and disruptive nature of Ms. Sun's conduct rather than show that her conduct has inflicted significant anguish, humiliation, or damaged self pride that would justify a compensatory award.

**127**  I note that instead of unilaterally demolishing the privacy fence and continuing to direct various forms of oppressive conduct at the plaintiff and her family, Ms. Sun could have applied to the court under s. 36 of the *Property Law Act*, *R.S.B.C. 1996, c. 377*, for an order that the plaintiff remove or relocate the fence. Although this would have required her to order a survey of the properties, which she could have perhaps jointly financed with Ms. Gibson, it would have provided a convenient and fair way to resolve the dispute. See, for example, *Epp v. Franson*, [*2008 BCSC 1133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M381-00000-00&context=). Instead, Ms. Sun took the law, wrongfully, into her own hands.

**128**  Finally, I accept Mr. Fyfe's evidence regarding the out-of-pocket expenses the plaintiff has or will incur as a result of Ms. Sun's actions. Accordingly, special damages are awarded for the following:

1. easement survey: $2,310.00;
2. installation of rock garden and boxwood hedge: $2,800.00;
3. replacement of boxwood hedge: $360.00;
4. cost to replace two damaged chairs: $365.98;
5. replacement of back fence $1,545.00; and
6. replacement of fireplace and cover: $750.00.

Total including taxes: $8,537.53

**129**  A permanent injunction is also an appropriate remedy in this case such that Ms. Gibson is entitled to maintain a privacy fence in the Easement area in accordance with the building scheme contained in the Restrictive Covenant, and Ms. Sun is prohibited from interfering further with the reconstruction or maintenance of that fence.

**130**  In coming to this conclusion, I have considered the factors related to enforcing compliance with building schemes set out in *Suomalainen v. Jernigan et al.*, [*2004 BCSC 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B27W-00000-00&context=) at para. 52, and I am of the view that it is likely Ms. Sun's conduct can only be deterred by the clearest of measures, necessitating final injunctive relief as discussed in *McLean v. Law Society of British Columbia*, [*2016 BCCA 368*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KRM-JB41-F81W-210F-00000-00&context=) at para. 17.

**F: The Counterclaim**

**131**  It follows from my conclusions that Ms. Sun's claims which relate to damages for trespass and nuisance, are dismissed.

**132**  Additional claims are also advanced. Some are far-fetched, if not frivolous, including damages for Ms. Gibson referring to Ms. Sun's son in an affidavit. She also claims damages for her mother passing away without seeing Ms. Sun's son due to the legal proceedings commenced against her. In addition, she seeks an order compelling Ms. Gibson to have third party liability insurance in place. All these claims are dismissed.

**133**  Ms. Sun also claims damages for invasion of privacy as a result of Ms. Gibson and/or Mr. Fyfe videotaping or taking photographs of her.

**134**  These claims are also dismissed. Ms. Gibson and Mr. Fyfe were entitled, in my view, to record Ms. Sun's aggressive and, at times, entirely inappropriate behaviour. Furthermore, it cannot be said that Ms. Sun had any expectation of privacy at the times she was videotaped or photographed: *Wasserman* at paras. 73-77.

**135**  Ms. Sun also claims relief with respect to the state of the side yard. She says she has been denied reasonable access both from the front and the back.

**136**  Ms. Sun says that Ms. Gibson added two pieces of fence at the back of her property next to the privacy fence which prevented her from accessing the side yard from the back. This is denied by Ms. Gibson, and Ms. Desjardins confirmed the extent of the back fence as at the time the property was sold to Ms. Gibson.

**137**  For her part, Ms. Gibson seeks a broad injunction restraining Ms. Sun from interfering with or obstructing the Easement area.

**138**  Both these claims are dismissed. I am not satisfied that Ms. Sun is unable to access the Easement area from the front of her property. In any event, if she wishes to perform maintenance to the side of the residence she will require Ms. Gibson's permission, so an injunction that limits obstruction of the Easement area is not necessary to protect Ms. Gibson's interests.

**139**  Based on the evidentiary record, I am also not satisfied that the condition of the side yard, from an access perspective, is materially different from when Ms. Desjardins owned the property. It may have been for a period of time when the front fence was in place, but that is no longer the case.

**IV: CONCLUSION**

**140**  The claim is allowed as indicated in these reasons and the plaintiff is awarded damages as follows:

1. Damages in trespass: $500.00.
2. Damages in nuisance: $12,500.00.
3. Special damages for out-of-pocket expenses either incurred or to be incurred: $8,537.53.
4. Punitive damages: $5,000.00.

**141**  The plaintiff's total damages are therefore assessed at $26,537.53.

**142**  There will also be a permanent injunction permitting the plaintiff to replace and maintain the destroyed back privacy fence, as well as use and enjoy the Easement area in accordance with the terms of the Easement, the Restrictive Covenant, and the Guidelines. The terms of the injunction will preclude Ms. Sun from interfering with the reconstruction or maintenance of the fence or interfering with the lawful use of the Easement area.

**143**  The plaintiff is entitled to interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79* from February 26, 2016, to the date of judgment on the sum of $8,537.53.

**144**  The plaintiff seeks special costs. I do not find the defendant's conduct in the conduct of the proceeding itself to be deserving of reproof or rebuke and decline to order special costs on that basis.

**145**  Unless there are other factors pertaining to costs of which I am unaware, the plaintiff is entitled to her costs of the proceeding at scale B.

**146**  The defendant's approval as to form on the order is dispensed with, but I direct that the order be forwarded to me for my review prior to entry.

P. ABRIOUX J.

**End of Document**

[***Gondal v. Teck Resources Ltd., [2013] B.C.J. No. 2003***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-237V-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

K.N. Affleck J.

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Registry: Vancouver

**[2013] B.C.J. No. 2003** | 2013 BCSC 1676

Between Rizwan Ahmad Khan Gondal, Plaintiff, and Teck Resources Ltd. a.k.a. Teck Cominco Ltd., Donald R. Lindsay, Anthony A. Zoobkoff, Gary M. Jones, NovaGold Resources Inc., Rick Van Nieuwenhuyse, Eagle Plains Resources Ltd., Timothy J. Termuende, Darren B. Fach, Trade Winds Ventures Inc., Doug Moher, McLeod & Company, Joshua Sadovnick, Eliza Longshore, Shannon Reimer, Kristen Kinney, Watson Goepel Maledy LLP, Steven W. Abramson, Blake, Cassels & Graydon LLP, William C. Kaplan, Marco Vojvodic, Timothy Louman-Gardiner, Kimberly Grierson, Amanda Lamb, Nathanson, Schachter & Thompson LLP, Geoffrey Gomery, James Macinnis, Peter Senkpiel, Catherine Nash, Kayla Vantriet, Kathie Austin, Patricia McGuffie, Singleton Urquhart LLP, John R. Singleton, Aaron L. Sherriff, Clark Wilson LLP, Nicole M. Byres, Boughton Law Corporation, George E.H. Cadman, Davies Ward Phillips & Vineberg LLP, Cara Cameron, Irving Mitchell Kalichman LLP, Doug Mitchell, Mathieu Bouchard, Nicholl Paskell-Mede LLP a.k.a. Clyde & Co., Caroline Malo, K-III Communications Inc. a.k.a. Primedia Inc., Charles G. McCurdy, Beverly C. Chell, William F. Reilly via Estate, Curtis Thompson, Michaelanne Discepolo, Gary Weidy, Rebecca Albrecht, Clio Alexiadis, Cheryl Spivak, Evette Pastoriza, Dana Cowap, Christina Wagner, Kohlberg, Kravis, Roberts & Company, Henry R. Kravis, Vanguard Temporarie Inc., Vanguard Accounting Temporaries, Inc., John McGrath, Natalie Brown, Grinnell College, Eric Chen, Tahir Aziz, Steven Heilig, Paula V. Smith, Elizabeth Dobbs, Paul Tjossem, Henry M. Walker, Raymond Obermiller, Barry Ancona, Andrew Cooper via Estate, New York Stock Exchange Euronext a.k.a. NYSE, Charles Schwab & Co., Inc., Fordham University via Lincoln Square Legal Services a.k.a. Fordham University Law Clinic, Richard Goldstein, Frank Sullivan, Patrick O'Neil, Karen Kupersmith, Marcella Silverman, Mohammad Naroor, Sajid J. Qureshi, Shaheen A. Qureshi, United States Department of Homeland Security, United States Department of Justice Immigration and Naturalization Service, United States Citizenship and Immigration Services, United States Department of State, Eric Holder, Sarah E. Wilberne, Corina Luna Benevides, John Doe and Jane Doe, Defendants (Docket: S125746) And between Eagle Plains Resources Ltd., Timothy J. Termuende and Darren Fach, Petitioners, and Rizwan Ahmad Khan Gondal, Teck Cominco Ltd., Donald R. Lindsay, Gary M. Jones, NovaGold Resources Inc. and Rick Van Nieuwenhuyse, Respondents (Docket: S128773)

(46 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Vexatious litigants — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Costs — Particular orders — Special orders — For reprehensible or inefficient conduct — Application by defendants to strike claim and for vexatious litigant declaration allowed — Plaintiff had multiple proceedings against up to 99 defendants in New York, Quebec British Columbia struck or dismissed — He was habitual and persistent vexatious litigant — Pleading was comprised of plethora of claims without common questions of law and fact other than repeated references to conspiracy — It disclosed no reasonable claim, was vexatious, and constituted an abuse of process — Defendants entitled to special costs — Supreme Court Act, s. 18.**

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| Application by the defendants for a declaration that the plaintiff, Gondal, was a vexatious litigant, an order striking his notice of civil claim, and related relief. The plaintiff was a self-described investment advisor engaged in a variety of legal proceedings in New York and British Columbia related to his purported provision of those services. In 2004, the plaintiff was enjoined from making any further filings or motions related to his action in New York. The plaintiff commenced two actions in British Columbia. The first action was struck in 2008. An appeal was dismissed in 2010 and a second action was commenced. The pleadings included 647 paragraphs over 206 pages. The plaintiff followed the court's direction to circulate amended pleadings for comments by defence counsel. The court found that the pleadings remained deficient and struck the plaintiff's re-amended notice of civil claim. A parallel action commenced in Quebec was struck. In 2012, the plaintiff commenced a third action in British Columbia against many of the same defendants, 99 in total, and duplicating many of the claims pled in the earlier actions. The plaintiff alleged several breaches of legal and statutory duties in the context of a sweeping conspiracy. The defendants sought to strike the claim and obtain a vexatious litigant order prohibiting commencement of further proceedings by the plaintiff.  HELD: Application allowed.  The plaintiff was habitual and persistent in instituting vexatious litigation, repeating a pattern that had occurred in other jurisdictions. The plaintiff's threatening language, his assertion he was judgment-proof against costs awards, his multiple efforts to sue the same parties using deficient pleadings devoid of reasonable grounds, and his refusal to take advice to draft a viable pleading objectively supported a vexatious litigant declaration. The plaintiff was prohibited from instituting further pleadings without prior leave. The plaintiff's notice of civil claim in the predicate action was not a pleading in any reasonably recognizable sense. It was a plethora of claims without common questions of law and fact other than the repeated references to a conspiracy. It disclosed no reasonable claim, was vexatious, and constituted an abuse of process. The plaintiff's notice of civil claim was struck and his action was dismissed. The plaintiff's conduct entitled the defendants to special costs. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 9-5(1)

Supreme Court Act, [*RSBC 1996, CHAPTER 443, s. 18*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JGBH-B10R-00000-00&context=)

**Counsel**

Counsel for Petitioners in S128773: J.R. Singleton, Q.C., M. Peraya.

Counsel for Respondents, Teck Cominco Ltd., Donald R. Lindsay and Gary M. Jones: P.R. Senkpiel.

Counsel for Respondents, Rick Van Nieuwenhuyse and NovaGold Resources Inc.: W.C. Kaplan, Q.C., T. Siddiqui.

No other appearances.

**Reasons for Judgment**

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| **K.N. AFFLECK J.** |

**1**   There are two applications to be decided. Action No. S128773 seeks a declaration pursuant to s. 18 of the *Supreme Court Act*, *R.S.B.C. 1996, ch. 443*, that the respondent Rizwan Ahmad Khan Gondal has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in this Court against the petitioners and others, and an order that the respondent may not without leave of this Court institute a legal proceeding in any Court. In action no. S125746 (the "third B.C. action") the defendants, NovaGold Resources Inc., Rick Van Nieuwenhuyse and Teck Resources Ltd., aka Teck Cominco Ltd., apply pursuant to R. 9-5(1) for an order striking out the notice of civil claim and dismissing the action.

**2**  Mr. Gondal provided a response to the petition and an application response in the action, both of which bear no date stamp, but which I presume were filed electronically.

**3**  On May 8, 2013, Mr. Justice Cohen had adjourned on terms the hearing of the applications referred to in these reasons. Mr. Gondal was directed to provide six dates in August 2013 on which he would be available for the hearing of the applications, failing which the applicants would be entitled to set them down for hearing in August on a date of their choosing and could serve Mr. Gondal with notice of that date at his email address. I am informed Mr. Gondal did not provide dates. He was given notice of the date chosen by the applicants but did not appear in person or by counsel at the hearing.

**The Vexatious Litigant Application**

**4**  Mr. Gondal describes himself as an investment advisor and has engaged in a variety of legal proceedings relating to his purported provision of those services. The evidence discloses those proceedings have included:

1. an arbitration in 2002 before the New York Stock Exchange in which Mr. Gondal instructed counsel with Lincoln Square Legal Services, a legal clinic with the Fordham University School of Law, to act for him. The award was unfavourable to Mr. Gondal and he then sued Lincoln Square Legal Services, the Fordham University School of Law and his counsel in New York state;
2. a suit against the members of the New York Stock Exchange arbitration panel in the State of New York and against them again in the third B.C. action;
3. an application in the Supreme Court of the State of New York to set aside the arbitration award on grounds including corruption and fraud, asserting that lawyers with Fordham Law School and others were in "cahorts" to "fix the outcome" of the arbitration. The relief sought by Mr. Gondal in the New York State Supreme Court was refused on the basis that his challenges to the arbitration proceedings were without merit. A motion to reargue was denied;
4. an appeal from that denial argued that the judge had failed to disclose a conflict of interest which Mr. Gondal asserted was evidenced by her ownership of shares in a company listed in the New York Stock Exchange. The appeal was dismissed. A further appeal was taken to the New York State Court of Appeals and was dismissed as was a motion for reconsideration;
5. a petition in the U.S. District Court for the southern district of New York to vacate the arbitration award on grounds similar to those Mr. Gondal relied on before the Supreme Court of the State of New York;
6. a new action in the New York State Supreme Court against the arbitrators and more than 20 additional defendants seeking to stay an order which had confirmed the arbitration award. Mr. Gondal pleaded multiple causes of action with allegations similar to those in the third B.C. action. In that new action in New York Mr. Gondal applied for an order for the New York Stock Exchange to show cause why it should not be broken up. On November 5, 2004 the New York State Supreme Court enjoined Mr. Gondal from making any further filings or motions on matters related to his action in that state. An appeal from the injunction was dismissed;
7. concurrently, in a 173 page pleading, Mr. Gondal petitioned the U.S. District Court for the southern district of New York for a re-hearing of the arbitration proceeding. The petition was dismissed with the court observing that the New York State Supreme Court had barred Mr. Gondal from taking further proceedings in regard to the New York Stock Exchange arbitration. The court certified that any appeal from its order "would not be taken in good faith". A motion to reconsider was dismissed as was a further appeal;
8. in 2007 Mr. Gondal instituted proceedings pursuant to the *Americans with Disabilities Act* in the U.S. District Court for the southern district of New York, naming lawyers and their firms who had acted for him in the arbitration proceedings alleging they had been involved in a conspiracy which included the New York State Supreme Court. The proceedings were dismissed with the court certifying that any appeal would not be taken in good faith;
9. on March 10, 2008 Mr. Gondal issued a writ of summons out of the Supreme Court of British Columbia in action no. S081714 ("the first B.C. action"). The defendants were the petitioners before me as well as NovaGold Resources Inc., Rick Van Nieuwenhuyse, Teck Cominco Ltd., Donald S. Lindsay and Gary M. Jones, who are also defendants in the third B.C. action. The statement of claim in the first B.C. action had 175 pages with 282 paragraphs and in addition 121 "exhibits". On April 17, 2008 Master Baker struck out the statement of claim in the first B.C. action finding that it was so "absolutely and totally flawed" as "not [to] be an effective pleading in any reasonable way". Mr. Gondal had not appeared on April 17, 2008 before Master Baker, but applied unsuccessfully to Master Baker to vacate the order to strike the statement of claim;
10. action no. S087961 in this Court (the "second B.C. action") seeking relief similar to the relief he had sought in the first B.C. action. Simultaneously Mr. Gondal appealed the order of Master Baker. The defendants applied pursuant to R. 9-5 to strike out the statement of claim in the second B.C. action. Before the hearing of that application Mr. Gondal filed an amended statement of claim with 647 paragraphs over 206 pages. On March 29, 2010 Mr. Justice Leask dismissed the appeal from Master Baker's order and "proposed a plan of action intended to assist Mr. Gondal in solving his difficulties in properly pleading his case". The plan is described in paras. 25 through 29 in *Gondal v. Eagle Plains Resources Ltd.,* [*2011 BCSC 1004*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RD-00000-00&context=), as follows:

[25] First, the Court strongly urged Mr. Gondal to obtain legal assistance in drafting his pleading, stressing the complexity of Mr. Gondal's alleged claims and the difficulty that any self-represented litigant would have in preparing a proper pleading in such a matter.

[26] Second, one of the defence counsel, in partial response to the Court's comments, offered to provide Mr. Gondal with pleading precedents from his office. This was subsequently done.

[27] Third, the Court directed Mr. Gondal to prepare a draft Amended Statement of Claim and circulate it to defence counsel. Defence counsel were directed to provide constructive comments on the draft. In submissions, I was informed that these two steps were carried out.

[28] Mr. Gondal then delivered an Amended Statement of Claim on July 15, 2010. The Amended Statement of Claim was 131 pages and was divided into 535 paragraphs. Counsel prepared and delivered to Mr. Gondal written submissions outlining problems with the July 15, 2010 Amended Statement of Claim.

[29] In preparation for the Court hearing on September 30, 2010, Mr. Gondal prepared a Re-Amended Notice of Civil Claim dated September 21, 2010. This pleading was 86 pages and contained 427 paragraphs.

**5**  Mr. Justice Leask found the amended notice of civil claim that Mr. Gondal delivered after the proposed plan of action had been suggested to him suffered from the same deficiencies that were present in the earlier versions. Leask J. observed that the re-amended notice of civil claim "would form a completely unsatisfactory basis for carrying on litigation in this Court" and was an abuse of process. It was struck and the action dismissed. Mr. Gondal did not appeal the order of Leask J. but on July 28, 2011 sent an email to counsel for the petitioners and a number of the defendants which reads:

Yes I object to the Order. It is erroneous. I intend to schedule a hearing in front of Judge Leask for him to explain his actions. And I intend to proceed further with my causes of action against all the defendants. And to inform you all that any and all of my bank accounts and assets are exempt from any collection proceedings if you venture to collect on any costs orders as I receive my child support money from the government into that account and my scholarship money is dispensed to me from the government for the continuation of my Legal Studies. The Judge's Order has given me another cause of action and I intend to proceed to another Court to address that issue. You, the Counsel, are in violation of the Legal Profession Act and any further actions on your part will only get you deeper into the abyss. Its not me who is going to "back off." You all lost on the merits.

Sincerely,

Rizwan Ahmad Khan Gondal

Plaintiff

[Emphasis in Original.]

**6**  Previously Mr. Gondal had commenced an action in Quebec against many of the same defendants he had sued in B.C. but added further parties including lawyers who had acted for the defendants in those actions. The defendants in Quebec applied to strike that action on several grounds including that the courts in B.C. were in a better position to address the issues in dispute. On January 13, 2011 the Quebec Superior Court agreed it must be dismissed on the grounds advanced by the defendants. Downs J. commented on the "several bizarre and/or outrageous allegations" in the pleading. No doubt Mr. Gondal was encouraged by the reasons for dismissing the Quebec action to carry on in B.C.

**The Notice of Civil Claim in Action No. S125746: the Third B.C. Action**

**7**  On August 19, 2012, the third B.C. action was commenced. It duplicates many of the claims made against many of the same parties as were impleaded in the earlier actions with the addition of a large number of new defendants and with allegations encompassing those made in the New York State proceedings. Many of the defendants are grouped together in the notice of civil claim but by my count there are 99 defendants, most of whom are outside British Columbia, appear to have no relevant connection to this jurisdiction and include the New York Stock Exchange, Fordham University, The United States Department of Homeland Security, The United States Department of State and Eric Holder, the Attorney General of the United States, Sarah E. Wilberne, a field office director in the United States Embassy in Islamabad, Pakistan, and Corina Luna Benevides, a field officer director in the United States Embassy in New Delhi, India.

**8**  Mr. Gondal alleges breach of contract, breach of confidence, deceit, intentional interference with economic relations, defamation, breach of duty of care, breach of fiduciary duty, breach of the duty of good faith and fair dealing, intimidation, and unjust enrichment. All are encompassed in sweeping conspiracy allegations.

**9**  The applicable law is alleged to be derived from:

1. the Common Law;
2. the *Competition Act*, R.S.C. 1985, c. 34;
3. the *Constitution Act*, 1982;
4. the *Trade-Marks Act*, [*R.S.C. 1985, c. T13*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9Y1-F2F4-G3VM-00000-00&context=);
5. the *Copyright Act*, [*R.S.C. 1985, c. C-42*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9R1-F2MB-S2P6-00000-00&context=);
6. the *Criminal Code*;
7. the *Civil Rights Protection Act*, *R.S.B.C. 1996, c. 49*;
8. the *Employment Standards Act*, *R.S.B.C. 1996, c. 113*;
9. the *Supreme Court Act*, *R.S.B.C. 1996, c. 443*;
10. the *Business Practices Consumer Protection Act*, *S.B.C. 2004, c. 2*;
11. the *Libel and Slander Act*, *R.S.B.C. 1996, c. 263*;
12. the *Human Rights Code*, *R.S.B.C. 1996, c. 210*;
13. the *Law Society of British Columbia Rules;*
14. the *Legal Profession Act*, R.S.B.C. 1998, c. 9;
15. the *Privacy Act*, R.S.B.C. 1996, c. 733;
16. the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*; and
17. the *Law and Equity Act,* *R.S.B.C. 1996, c. 253*

**10**  After identifying the defendants, the notice of civil claim alleges the following:

1. The named defendants, their counsel, their management, board, advisors, employees, agents, associates and/or others, all referred to from herein as "members of the conspiracy", are interlinked via various forms of relationships inter alia Joint Ventures, Stock or Equity ownership, debtor/creditor, employee/employer, advisee/advisor, associates, contractors, investors, individual and group friendships, affinities and the like.

**11**  In the next portion of these reasons I will make some brief comments on the notice of civil claim in the above action. I do not intend to describe the very elaborate allegations in their entirety. My purpose is to give only an overview and to make some brief comments.

**Grinnell College Defendants**

**12**  The defendant Grinnell College is alleged to be a corporation in the United States which provides education to those who enroll in it. One of those was apparently the plaintiff. He alleges it conspired with others unknown to him, but which will "become clear after discovery and exchange of documents". The object of the conspiracy was, inter alia, to "bring the plaintiff 'down'", to stop him from being on the dean's list, to stop him from getting excellent grades, to "defame his character such that he would not be able to raise a family;" to "prevent the plaintiff from enjoying the fruits of his labour" and to prevent the plaintiff "from enjoying his life". As a result of this misconduct, the plaintiff alleges among other things, that he was fired from his jobs on campus, was not recruited by any company that interviewed him, experienced "low performance on the sports field" and was displaced from his home in Lahore Pakistan. It is difficult to discern a viable cause of action in this pleading or to understand how even if there is a cause of action B.C. could be the appropriate jurisdiction to try these allegations.

**The New York Stock Exchange Defendants**

**13**  The New York Stock Exchange defendants are alleged to have attempted to prevent the plaintiff from "conducting business as an investment advisor" by recruiting "three Pakistani individuals ... knowing that the plaintiff had a soft spot for people from the same origin as himself, but who put short squeezes on and deliberately cut down the market prices of the plaintiff's clients' holdings causing severe losses in the plaintiff's clients' investment accounts". If there is a cause of action against these defendants this is not the appropriate jurisdiction in which to hear it.

**The Teck Defendants**

**14**  The Teck defendants are alleged on the instructions of Grinnell, the New York Stock Exchange defendants and other defendants to have entered into a confidential agreement with the plaintiff "to initiate and consummate transactions without compensating the plaintiff". The conspiracy led to "derogatory and defamatory information" about the plaintiff reaching "The Interior News in British Columbia" which was published in an article which reads in part:

... Montreal businessman Rizwan Gondal of Gondal Asset Management is suing three major figures in the shelved gold and copper mine: NovaGold, Teck Cominco and junior exploration company Eagle Plains Resources. Gondal, contacted by Black Press at his home in Montreal, declined to elaborate on the nature of his claims, or his involvement with the project. The case is still pending in the court and I don't know if I can discuss it until the case has been litigated and adjudicated, he said. NovaGold however has already filed for a motion of dismissal. The claims are without merit, said NovaGold spokesperson Rhylin Ballie. Gondal's other claims, filed with the B.C. Court Registry in Vancouver, include defamation, intentional interference with business relationships, intentional infliction of emotional distress and nervous shock, discrimination and oppression, unjust enrichment, ***negligence*** and breach of the covenant of good faith and fair dealing, for recompance (sic) totalling $1,156,707,000. Construction of the Galore Creek Mine was put on indefinite hold last year when costs ballooned to $3 billion over budget. Gondal's filing of a claim against that project do not mark the first time he's entered the judicial process. In March 2007 he filed a claim of almost $10 million with the New York Southern District Court in a Civil Rights and Disabilities suit against a New York law firm. In 2002 Gondal himself was one of several defendants in a $56,000 claim on allegations of unsuitable trading, breach of fiduciary duty and fraud.

**15**  The plaintiff alleges at para. 216 of the notice of civil claim that:

1. The above quoted article and other derogatory and defamatory information of the Plaintiff and about the Plaintiff was disseminated to and is continuing to be disseminated to, among other parties, the Human Resources Departments at all the major corporations and employers in Canada, the United States and internationally including but not limited to The National Bank Financial Group in Montreal, Quebec. As a result of which all of Plaintiff's applications for employment were denied.

**16**  B.C. may be the appropriate jurisdiction to hear a defamation action against a B.C. newspaper but there is nothing in the pleading by innuendo or otherwise that could be described as defamatory.

**The Eagle Plain Defendants**

**17**  The plaintiff makes allegations that at "the behest" of Grinnell and other defendants the defendant Tim Termuende retained the plaintiff as a strategic advisor and advised the plaintiff that he would put their agreement in writing. Later Mr. Termuende told the plaintiff that he did not need his help "in assessing the impact of Barrick Gold's takeover of NovaGold on Copper Canyon", and later hired the defendant Charles Schwab and Co Inc. as strategic advisors. That company is alleged to have made derogatory comments "and passed on defamatory information to Mr. Termuende about the plaintiff. The contents of which will become clear after discovery". Mr. Termuende and Eagle Plains Resources Ltd. are alleged to be resident in B.C. and although defamation is alleged, the defamatory words are not pleaded.

**18**  The plaintiff alleges many other dealings with Mr. Termuende and other defendants which involve the plaintiff passing along confidential information to them. These dealings are alleged to have led to an agreement in writing for the plaintiff to provide services and "the defendants knew what the plaintiff's understanding of the agreement was". The plaintiff alleges that pursuant to the agreement he sent Mr. Termuende a confidential weekly advisory that even though Mr. Termuende "did not receive the message and even when he had the power to, had the discretion and was capable of responding, he did not send the plaintiff a reply". This allegation could not sustain a claim for breach of contract.

**19**  The alleged written agreement was terminated by Mr. Termuende on January 17, 2007 "at the behest of the Teck defendants". On June 15, 2007 Teck Cominco and Eagle Plains Resources Ltd. issued a press release announcing the formation of a strategic alliance "but the plaintiff's name was not mentioned in the press release". Failing to mention the plaintiff in a press release, at least without more, is not actionable wrongful conduct.

**The NovaGold Defendants**

**20**  The plaintiff repeats many of the allegations he makes against the "Eagle Plains defendants". After reciting many alleged dealings with Mr. Termuende and with the defendant Nieuwenhuyse, and in particular the "thwarted hostile takeover bid" of NovaGold by Barrick Gold the plaintiff alleges that:

1. On December 07, 2006, in reliance upon the agreements and the understanding, the Plaintiff sent Mr. Rick Van Nieuwenhuyse a congratulatory note for successfully thwarting the Barrick Gold hostile bid and asked him for a deal or two in compensation for his help, advice, time, work, and effort. Mr. Rick Van Nieuwenhuyse did receive the Plaintiff's message and did not reject his contentions thus tacitly accepting the responsibility and the Plaintiff's right to compensation.

**21**  Unsatisfied with only a "tacit" acceptance of his request for compensation, the plaintiff alleges in paras. 281 to 283 of the notice of civil claim that:

1. In an effort to wake his conscience, on June 04, 2007 the Plaintiff sent Mr. Rick Van Nieurwenhuyse a message expressing his interest in a Chief Investment Officer position at NovaGold. Mr. Van Nieuwenhuyse did receive the Plaintiff's message and the same day he sent a reply and denied the Plaintiff's request for employment. Mr. Van Nieuwenhuyse sent a copy of that message to Ms. Sacha Iley, Director of Human Resources.
2. Recognizing the difficulty of proving a verbal agreement and in an effort to make Mr. Van Nieuwenhuyse admit to and recognize the Plaintiff's work himself, on June 04, 2007 the Plaintiff sent Mr. Van Nieuwenhuyse a congratulatory message about his deal with Teck Cominco.
3. Mr. Van Nieuwenhuyse did receive the message, and the same day sent the Plaintiff a reply denying the Plaintiff the opportunity to work with him and NovaGold Resources Inc. Mr. Van Nieuwenhuyse however did not make any comments on the Plaintiff's involvement in the NovaGold deal with Teck Cominco.

None of these allegations could sustain an action for breach of contract.

**The KKR and K-111 Defendants**

**22**  The plaintiff alleges that KKR is a New York corporation called Kohlberg, Kravis, Roberts & Company and K-III is alleged to be K-III Communications Inc. headquartered in New York and owned by KKR.

**23**  It is alleged these defendants received defamatory information from "the alumni of Grinnell College one of which was the defendant Cheryl Spivak's grandmother" which included:

1. the plaintiff is "a Saudi" to which the plaintiff attributed a defamatory meaning;
2. the plaintiff is "a temp" which the plaintiff alleges meant he was an incompetent servant who did "not deserve to be employed on a full-time basis";
3. the plaintiff is a "commis" which he alleges is a French word meaning a clerk and which had been "pronounced in a way" to mean the plaintiff "is not qualified to hold a higher position than that of a clerk".

Even if the words alleged are defamatory, which is doubtful, B.C. could not be the appropriate jurisdiction for the trial of the action.

**The USCIS Defendants**

**24**  The plaintiff makes allegations about his thwarted efforts to travel to the United States namely:

1. At the behest of the Grinnell, KKR, K-III, Vanguard, NYSE, Eagle Plains, Trade Winds, Teck and NovaGold Defendants on August 18, 2006 in Toronto ON and then again on or about February 04, 2008 in Montreal, Quebec, the visa consulars rejected the Plaintiff's non-immigrant visa to travel to the United States even when there was no lawful reason for them to do so.
2. On both occasions the visa consulars verbally abused the Plaintiff and told him to leave the embassy or they will have security personnel throw him out. The Plaintiff was humiliated and put in fear of immediate physical injury.

...

1. The USCIS acted maliciously in bad faith with the intent to deliberately and wilfully reject the Plaintiff's petition to travel to the United States to unite with his mother. His mother is seventy two years old, a United States Citizen, all by herself with no one else in the United States to take care of her.
2. The USCIS and the named defendants' malicious acts were designed to inflict pain and suffering upon the Plaintiff and his mother and designed to unlawfully keep him out of the United States.

This Court has no jurisdiction over the conduct of U.S. consular officials or agencies of the U.S. government for the misconduct alleged.

**25**  Near the end of his notice of civil claim at para. 301 the plaintiff makes allegations about a number of lawyers he sues in the action saying they "knowingly, willfully and intentionally used high handed tactics and abused their positions as officers of the court" in a variety of ways to obtain orders the courts had no jurisdiction to grant, to make fraudulent representations to the courts, to insert "ambiguous clauses in agreements", to interpret the law falsely, to "take advantage of the plaintiff's lack of knowledge of the law", and "called the plaintiff a nuisance to humiliate him".

**26**  The evidence discloses the plaintiff has written in a threatening manner to some of the parties, their counsel and Mr. Justice Leask. For example on January 17, 2010 Mr. Gondal wrote to some of the counsel to say:

Every time you, your clients and your associates do this, it gives me a new cause of action. Seems like there is no end to your arrogance and continuing illegal acts ... You and your clients remain defendants in Montreal and if the lawyers in Montreal perpetrate this crime with you, their names will be added as well ... Furthermore, if Canada has a problem with my claims in this matter, I also remain a citizen of Pakistan ... But to inform you, Sharia Law is the Law of the Land in Pakistan and the punishment for the crime that you and your clients are accused of carries a different penalty than the one that you are used to. Would you like to try your luck over there?

**27**  On August 30, 2011, Mr. Gondal wrote to Mr. Justice Leask, who he alleges is part of a conspiracy with Mr. Justice Downs of the Quebec Superior Court, in a letter which ends as follows:

Let me remind you of your oath to your office. Do no harm to me. Nothing less will do. In the alternative, despite whatever you do, I will bring a new action and I will name you as a defendant. My holy Quran says that don't say something that you are not going to do. I am a practicing Muslim. Do you want me to say it?

**The Law Relating to Vexatious Legal Proceedings**

**28**  In *Holland v. Marshall*, [*2010 BCSC 1560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B34W-00000-00&context=) at paras 7 and 8, Madam Justice Brown set out the test to be applied on an application pursuant to s. 18 of the *Supreme Court Act* as follows:

[7] To succeed on an application pursuant to s. 18, the applicant must demonstrate:

1. that the proceedings are vexatious in the sense of having been taken in the absence of objectively reasonable ground; and
2. that proceedings have been brought habitually or persistently, such that the litigant has continued obstinately in the course of conduct, despite protests or criticism. *(British Columbia) Public Guardian and Trustee v. Brown* [*2002 BCSC 1152*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-201W-00000-00&context=).

[8] In *Lang Michener v. Fabian* [*(1987) 37 D.L.R. (4th) 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M1FG-00000-00&context=), the Ontario High Court described the characteristics of a typical vexatious proceeding:

1. bringing one or more actions to decide an issue which has already been determined by a court of competent jurisdiction;
2. where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
3. actions brought for an improper purpose, including the harassment or oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
4. grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
5. failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings;
6. persistently taking unsuccessful appeals from judicial decisions; and
7. in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action.

**29**  In *Jamieson v. Denman,* [*[2004] A.J. No. 904*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JT99-21JN-00000-00&context=) (Q.B.) at paras. 126 and 127, Watson J. (as he then was) described vexatiousness in the context of legal proceedings as follows:

**126** I consider the word "vexatious" to carry with it a normative concept as well as a legal one. It seems to me that a party can be said to have acted in a vexatious manner, not merely that they acted in a manner which might be characterized as mean-spirited or nasty, but also that in fact the nastiness conveyed itself through to the legal process itself. In other words, that the legal process was being misused[42].

**127** My view of the word "vexatious" is that it connotes not simply that the party was acting without the highest of motives, or was acting in a manner which was hostile towards the other side. "Vexatious", as a word, means to me that the litigant's mental state goes beyond simple animus against the other side, and rises to a situation where the litigant actually is attempting to abuse or misuse the legal process[43].

**30**  In *O'Neill v. Deacons,* [*2007 ABQB 754*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9391-F528-G48K-00000-00&context=), Wittmann A.C.J.Q.B. observed at para. 25:

**25** What the various common law and statutory criteria suggest is that vexatious litigants are those who persistently exploit and abuse the processes of the court in order to achieve some improper purpose or obtain some advantage. Vexatious litigants tend to be self-represented, and quite often the motivation appears to be to punish or wear the other side down through the expense of responding to persistent, fruitless applications. This is why the failure to pay costs for such applications is a significant element in determining whether a litigant is vexatious.

**31**  In *British Columbia (Public Guardian and Trustee) v. Brown,* [*2002 BCSC 1152*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-201W-00000-00&context=), Halfyard J. at para. 48 held:

[48] The second element that must be proved on an application under s. 18 of the ***Supreme Court Act***, in my view, is that there must be a knowing and deliberate repetition or continuation of the vexatious conduct. I think that is the only reasonable inference from the words "habitually" and "persistently" used in s. 18. The word "persist" conveys the meanings to repeat, or to continue obstinately in a course of action despite protests or criticism. I do not suggest that the respondent on such an application must have known that his or her conduct was vexatious, but rather that the conduct should be viewed on an objective basis. That is, would a reasonable person in the same circumstances, have believed that the conduct was vexatious?

**32**  The petitioners are entitled to a declaration that the plaintiff is a vexatious litigant. There can be no doubt the plaintiff has been habitual and persistent in instituting vexatious litigation in this Court. In reaching that conclusion I take account, not only of the litigation in British Columbia, but also that in Quebec and New York State. There is a pattern in those other jurisdictions which is being repeated in British Columbia. Mr. Gondal's threatening language, his assertion that he is judgment proof in regard to a costs award, his multiple efforts to sue the same parties for conduct that he does not plead sufficiently to disclose a cause of action, and his refusal to take advice to draft a viable pleading that would disclose a cause of action satisfy me he is a vexatious litigant. Whether Mr. Gondal intends to harass or annoy need not be demonstrated. Viewed objectively his conduct has had that effect.

**33**  For s. 18 to apply to the plaintiff it must be demonstrated not only that he has habitually and persistently instituted vexatious litigation, the litigation also must be devoid of reasonable grounds. Buried in Mr. Gondal's immense notice of civil claim in the third B.C. action there may be a viable cause of action. I have not found it. It is true that Mr. Gondal uses the language of the law such as breach of contract, breach of fiduciary duty, deceit or defamation and attributes all or most of this misconduct to a conspiracy. However doing so does not make for a reasonable and viable claim unless the pleading adequately sets forth a factual and legal basis on which the causes of action which he purports to plead can be demonstrated.

**34**  On a number of occasions Mr. Gondal has been told by the courts of several jurisdictions, including British Columbia, that his pleadings do not disclose reasonable grounds for a lawsuit. He is not deterred. I am satisfied that if an order is not made pursuant to s. 18 of the *Supreme Court Act* Mr. Gondal will continue to pursue proceedings in this jurisdiction against many of the same defendants, by relying on many of the same allegations which he persists in pleading in a manner inconsistent with the rules relating to pleadings in this province.

**35**  In the second B.C. action Mr. Justice Leask gave Mr. Gondal every opportunity to prepare a proper pleading. Mr. Justice Leask attempted in vain to assist the plaintiff to understand the nature of a proper pleading. At the request of Leask J. counsel for the defendants made explicit drafting suggestions to assist Mr. Gondal in putting his case properly before the court. He ignored those suggestions. There is reason to believe he will continue to issue process out of this Court while ignoring the rules unless he is prevented from doing so.

**36**  Mr. Gondal appears, on the record before me, to be an intelligent man. His failure to take advice to enable him to draft a pleading, which can properly be described as such, inclines me to the view that he intends to vex the defendants with costly litigation incapable of resolution unless he is successful in what he wants. The email quoted in para. 5 of these reasons reinforces that view.

**37**  My order is that the plaintiff must not, without leave of the court, institute any legal proceedings in any court.

**The Application to Strike the Pleading and Dismiss the Third B.C. Action**

**38**  As described earlier in these reasons the third B.C. action alleges a widespread conspiracy to injure 99 defendants including individuals and corporations, and as well U.S. government departments and actors. Part 3 of the notice of civil claim, which describes the legal basis for the action, implicitly alleges all 99 defendants are involved in the conspiracy:

1. The Plaintiff repeats and re-alleges all the facts and allegations as if fully plead herein. The Defendants acted individually and jointly within and beyond the scope of their employments as such they are jointly, severally and vicariously liable for the following:

**39**  In my opinion the notice of civil claim in the third B.C. action is not a pleading in any reasonably recognizable sense. Leask J. held in regard to the re-amended notice of civil claim in the second B.C. action, that it would be a "completely unsatisfactory basis for carrying on litigation in this Court". Those words apply to the notice of civil claim in the third B.C. action.

**40**  In *Thorp v. Holdsworth* (1876) 3 Ch. D. 637 at 639, Jessel M.R. held that:

The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules ... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

**41**  Nothing could be further from Mr. Gondal's intention than "to prevent the issue being enlarged". He is not interested in diminishing expense and delay. His attempt to join many claims of differing kinds in a pleading against widely disparate defendants leads to confusion and certainly does not "narrow the parties to definite issues." The task faced by each of the defendants to respond in a coherent manner to the notice of civil claim in the third B.C. action would be daunting to say the least. In my opinion it is not possible to do so. A trial on the notice of civil claim would be unmanageable.

**42**  In *Lysko v. Braley,* [*[2004] O.J. No. 4727*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDP1-DYFH-X1VP-00000-00&context=), the court commented that:

A case properly pleaded permits an efficient use of judicial resources and the parties' resources. Bad pleadings do the opposite and more. They are instruments of potential mischief in the litigation process.

**43**  Mr. Gondal's notice of civil claim cannot be properly characterized even as a bad pleading. It is not in truth a pleading at all. There are a plethora of claims with no apparent common questions of fact and law, except for the repeated use of the word "conspiracy". As already mentioned I cannot detect a wrong of which Mr. Gondal complains for which he alleges the elements of a viable cause of action. The plaintiff pleads 16 statutes and rules as well as the entire common law without specifying how any defendant has transgressed any legal principle derived from statute or the common law.

**44**  As Leask J. held in regard to the pleading before him, so it is in the application before me, that "no half measures or pruning of this pleading are appropriate. It must be accepted as its author intended or struck out".

**45**  The notice of civil claim offends much of R. 9-5(1). It discloses no reasonable claim, it is vexatious, it would prejudice, embarrass or delay a fair trial and is otherwise an abuse of process. It will be struck out and the action dismissed.

**46**  The defendants seek special costs. Special costs may be awarded as a deterrent to misconduct in litigation and as a punitive measure. The plaintiff's persistence in pressing meritless claims and his evident intention of visiting expense on the defendants while immunising himself from the payment of costs, justify such an award. The petitioners are entitled to an award of special costs in respect of the petition and the defendant applicants in action no. S125746 are entitled to special costs of their application to strike the notice of civil claim and dismiss the action.

K.N. AFFLECK J.

**End of Document**

[***Greenfield v. Albion Properties Ltd., [2007] B.C.J. No. 323***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S3YN-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Metzger J.

Heard: February 8, 2007.

Judgment: February 16, 2007.

Victoria Registry No. 05-0257

**[2007] B.C.J. No. 323** | [*2007 BCSC 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21H-00000-00&context=) | [*155 A.C.W.S. (3d) 1037*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21H-00000-00&context=)

Between Leslie Greenfield, Plaintiff, and Albion Properties Ltd. and Robbins Parking Inc. and The Town of Sidney, Defendants

(20 paras.)

**Case Summary**

**Civil procedure — Costs — Complex, novel or test case — Offers to settle — The defendant town's motion for double costs after the plaintiff's trip-and-fall case was dismissed — As the town did not comply with Form 64, or be as close to it as possible, there was not a valid offer for the plaintiff to accept, reject, or clarify.**

**Municipal law — Actions by or against municipalities — Types of actions against municipalities — The defendant town's motion for double costs after the plaintiff's trip-and-fall case was dismissed — As the town did not comply with Form 64, or be as close to it as possible, there was not a valid offer for the plaintiff to accept, reject, or clarify.**

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| The defendant town sought double costs after the plaintiff's trip-and-fall case against the alleged joint tortfeasors was dismissed, claiming it made a valid offer to settle -- The plaintiff argued that no costs should be awarded as the claim alleging liability under the common law even though the town was not an occupier of the parking lot was novel -- HELD: The plaintiff's motion was dismissed, and she was liable for costs; however, the town's motion for double costs was dismissed, and it would have costs on Scale 3 -- The issue was not sufficiently unsettled to warrant departing from the normal costs rule -- However, because the town did not comply with Form 64, or be as close to it as possible, there was not a valid offer for the plaintiff to accept, reject or clarify -- The offer to settle should have been made under Rule 37(2) not Rule 37A(1). |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 37A

Occupiers Liability Act, *R.S.B.C. 1996, c. 337*

**Counsel**

Counsel appearing for the Plaintiff: K.T. Karaszkiewicz

Counsel for the Defendant, The Town of Sidney: T.A. Livingston

[Editor's Note: A Corrigendum was released by the Court February 20, 2007. The corrections have been made to the text and the Corrigendum is appended to this document.]

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| **METZGER J.** |

**1**   The plaintiff allegedly tripped and fell over an unused electrical conduit while walking through a privately owned parking lot in Sidney, British Columbia. She sued three defendants, one of which was the Town of Sidney ("Sidney").

**2**  The plaintiff s case against Sidney was dismissed. Sidney is seeking double costs as it submits that on February 17, 2005, it made a valid offer to settle under Rule 37A.

**3**  There are two issues raised on this application for costs. First, should the court depart from the general rule that costs follow the event? Second, should the court award Sidney double costs?

**4**  The general rule is that costs follow the event (***Brito (Guardian ad litem of) v. Woolley,*** [*2007 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61M4-00000-00&context=) at paras. 25-29). The discretion to deny costs to a successful party must be exercised judicially (***Bailey v. Victory*** [*(1995), 4 B.C.L.R. (3d) 389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2C0-00000-00&context=) (B.C.C.A.)). The court can deny costs because of conduct during the litigation or because the case raises issues that are novel or unsettled (***Baart v. Kumar*** [*(1985), 66 B.C.L.R. 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-212F-00000-00&context=) (B.C.C.A.)).

**5**  The plaintiff submits that her case raises a novel and unsettled issue and she should not pay Sidney's costs. According to the plaintiff, the novel and unsettled issue in this case is whether Sidney is liable under the common law even though Sidney is not an occupier of the parking lot, as defined by the ***Occupiers Liability Act***, *R.S.B.C. 1996, c. 337*. The plaintiff points to the February 16, 2006 judgment of R.D. Wilson J. in which he dismissed Sidney's 18A application. Wilson J. found that there is conflicting case law regarding whether there exists a common law duty of care for non-occupiers despite the ***Occupiers Liability Act***. In my view, the issue is not novel but is unsettled. However, I am satisfied that the issue is not sufficiently unsettled to warrant departing from the normal costs rule.

**6**  The second issue is whether Sidney should be awarded double costs because of its offer to settle with the plaintiff. Rules 37 and 37A govern the issue of double costs.

**7**  The relevant portions of Rule 37 include:

1. A party to a proceeding may deliver to any other party of record a written offer in Form 64 to settle one or more of the claims in the proceeding in the terms specified in the offer.
2. If the defendant has made an offer to settle a claim for money and the offer has not expired or been withdrawn or been accepted
3. if the plaintiff obtains judgment for the amount of money specified in the offer or a lesser amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed from that date, or
4. if the plaintiff's claim is dismissed, the defendant is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.
5. Other than in an action for defamation, if several defendants are sued jointly, a plaintiff may not make an offer to settle except jointly to all defendants, and a defendant may not make an offer to settle except jointly with all other defendants.

**8**  Form 64 reads as follows:

To: [party]

the [party] offers to settle this proceeding [or the following claims in this proceeding] on the following terms [set out terms in consecutively numbered paragraphs] and costs in accordance with Rule 37.

**9**  Rule 37A provides that:

1. In any circumstance to which Rule 37 does not apply, a party to a proceeding may deliver a written offer of settlement, in any form, of one or more of the claims in the proceeding if that offer of settlement includes a statement that the party delivering the offer of settlement reserves the right to bring it to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in the proceeding.
2. If an offer of settlement has been delivered under subrule (1) and brought to the attention of the court, the court may
3. award costs to the offering party in an amount not greater than the costs to which the party would have been entitled had the offer been made under Rule 37, or
4. deprive the party to whom the offer was made of costs to an extent not greater than that which the court could have ordered had the offer been made under Rule 37.

**10**  Under Rule 37(24) a defendant is entitled to double costs and there is no discretionary alternative (***Cridge v. Harper Grey Easton & Co****.*, [*2005 BCCA 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0X4-00000-00&context=) at para. 23). Rule 37A(2) confers a discretionary power on the court to grant double costs.

**11**  There has been confusion as to which Rule applies when there are multiple defendants in an action. It is clear that Rule 37A applies only when a party is unable to avail itself of Rule 37 (***Cao (Guardian ad litem of) v. Natt***, [*2004 BCSC 813*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X41X-00000-00&context=), aff'd [*2005 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X12H-00000-00&context=)).

**12**  If there are multiple defendants who are jointly sued, they can take advantage of Rule 37(31). However, jointly sued, in this context, means joint tortfeasors. In ***Brown v. Lowe***, [*2002 BCCA 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61D4-00000-00&context=) (B.C.C.A.), Southin J.A., for the majority, considered the meaning of the phrase "sued jointly" in Rule 37(31). In ***Brown***, the plaintiff was injured in a vehicle which collided with a horse on the highway. The plaintiff sued the driver, the owners of the horse, and the individual who boarded the horse in a fenced field. The court held that the driver and the plaintiff were contributorily negligent and dismissed the action against the owners and boarder of the horse. Southin J.A. explains the meaning of "jointly sued" at para. 156:

With all respect, the defendants here were not sued "jointly". Under s. 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, their liability is joint but they are not joint tortfeasors. The cause of action against each is several. Tortfeasors can only be said to be sued "jointly" if they have joined together in committing the tort and the liability of the one is the liability of the other, e.g. if two landowners agree to enter upon the land of another and cut down his trees.

**13**  The B.C. Court of Appeal affirmed ***Brown*** in ***Canadian Forest Products Ltd. v. B.C. Rail Ltd*.**, [*2005 BCCA 460*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1H2-00000-00&context=) stating, at para. 27, that Rule 37(31) refers to joint tortfeasors, not "simply where one or more of the defendants are alleged to be liable for the damages suffered by the plaintiff". In ***Canadian Forest Products***, the plaintiff alleged that all three defendants were contributorily negligent in either introducing or increasing contamination of pulp. Only B.C. Rail was held liable. The B.C. Court of Appeal held that the defendants were not joint tortfeasors so Rule 37(31) did not apply. According to the Court, in order to avail itself of the double cost consequences prescribed by Rule 37, the plaintiff, who had made a global offer to all of the defendants, would have had to make individual offers to settle with the defendants.

**14**  Thus, by the Court's reasoning in ***Canadian Forest Products***, defendants, who are not joint tortfeasors, can make individual offers to settle with a plaintiff. Indeed in ***Brown***, Southin J.A. states that there is nothing to prevent one defendant, in an action where there is more than one defendant, from making an offer to settle as prescribed by Rule 37 (see ***Brown*** at para. 157).

**15**  Although the plaintiff sued Albion Properties Ltd., Robbins Parking Inc. and Sidney in the same action, the plaintiff did not sue them as joint tortfeasors as described by Southin J.A. Consequently, Rule 37(31) does not apply to Sidney. Sidney was entitled to make an individual offer to settle with the plaintiff pursuant to Rule 37(2).

**16**  For an offeror to avail itself of the double costs consequences pursuant to Rule 37(24)(b), the offer must either comply with Form 64 or be as close to it as possible (***Berger v. Clark***, [*2000 BCSC 365*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X042-00000-00&context=) at para. 17). Sidney delivered its offer to the plaintiff in a letter dated February 17, 2005. The letter opens with: "I write this letter pursuant to Rule 37A of the *Rules of Court*". Sidney did not use Form 64 because it believed that Rule 37A applied.

**17**  Sidney should have made its offer to settle according to Rule 37(2), not Rule 37A(1). Because Sidney did not comply with Form 64, or be as close to it as possible, there was not a valid offer for the plaintiff to accept, reject or to clarify.

**DECISION**

**18**  The plaintiff's motion is dismissed and she will be liable for costs.

**19**  Sidney's motion for double costs is dismissed and it will have costs at scale 3.

**20**  Each party will bear its own costs for the motions before me.

METZGER J.

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CORRIGENDUM

Released: February 20, 2007.

Corrigendum to the Reasons for Judgment issued advising that page one of the Reasons for Judgment should read:

Counsel appearing for the Plaintiff: K.T. Karaszkiewicz

Counsel for the Defendant,

The Town of Sidney: T.A. Livingston

Paragraph five of the Reasons for Judgment should read:

**5**  The plaintiff submits that her case raises a novel and unsettled issue and she should not pay Sidney's costs. According to the plaintiff, the novel and unsettled issue in this case is whether Sidney is liable under the common law even though Sidney is not an occupier of the parking lot, as defined by the ***Occupiers Liability Act***, *R.S.B.C. 1996, c. 337*. The plaintiff points to the February 16, 2006 judgment of R.D. Wilson J. in which he dismissed Sidney's 18A application. Wilson J. found that there is conflicting case law regarding whether there exists a common law duty of care for non-occupiers despite the ***Occupiers Liability Act***. In my view, the issue is not novel but is unsettled. However, I am satisfied that the issue is not sufficiently unsettled to warrant departing from the normal costs rule.

**End of Document**

[***Hou v. McMath, [2012] B.C.J. No. 351***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-621F-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D. Kloegman J.

Heard: February 7-9, 2012.

Judgment: February 22, 2012.

Docket: M110677

Registry: Vancouver

**[2012] B.C.J. No. 351** | 2012 BCSC 257

Between Su Xiang Hou, Plaintiff, and Lloyd McMath, Defendant

(34 paras.)

**Case Summary**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Intersections — Liability — Civil actions — Breach of rules of the road — Causation — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Parties collided near centre of intersection — Plaintiff alleged she proceeded into intersection after light turned green — Defendant alleged light was green as he approached intersection and remained green as he proceeded into intersection — Light was triggered to change when vehicle approached intersection — Defendant was 100 per cent liable for accident as it was more likely than not that defendant entered intersection on a red light.**

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| Action by a motorist for damages for injuries sustained in a motor vehicle accident. The plaintiff, who was travelling northbound, and the defendant, who was travelling eastbound, collided in an intersection. The collision occurred south of the centre of the intersection. The right front corner of the defendant's vehicle collided with the left front corner of the plaintiff's vehicle. Each party's view of the intersection was partially obstructed. The plaintiff and her husband, who was with her at the time of the accident, alleged that the plaintiff stopped at a red light at the intersection, proceeded into the intersection when the light turned green and was struck by the defendant. The defendant alleged that as he approached the intersection, he had a green light and the light remained green when he entered the intersection. As a result, both parties alleged that the traffic light facing them as they entered the intersection was green and they each blamed the other for the accident. Witnesses to the accident observed the plaintiff's vehicle stopped at the intersection and the defendant's vehicle approaching the intersection, but did not see the colour of the lights. The light was triggered to change when a vehicle approached the intersection.  HELD: Action allowed.  The defendant was 100 per cent liable for the accident. On a balance of probabilities, it was more likely than not that the defendant entered the intersection on a red light. |

**Counsel**

Counsel for the Plaintiff: B.A. McIntosh.

Counsel for the Defendant: G.G. Gibb.

**Reasons for Judgment**

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| **D. KLOEGMAN J.** |

**1**   This is a personal injury claim brought by the plaintiff for damages she allegedly suffered as a result of a motor vehicle accident on April 17, 2010.

**2**  Both parties desired to sever the issue of liability from damages and proceed on the question of liability alone. However, due to the defendant's position that this accident caused no damage or compensable injury to the plaintiff, I refused to make an order severing liability from quantum. It is basic tort law that without damages there can be no finding of ***negligence*** or liability. I suggested instead that we proceed to hear *viva voce* evidence on the sole issue of "fault" for the accident; that is, who breached the standard of care of the reasonable, prudent driver in the circumstances?

**3**  The answer to this question turns on the colour of the traffic light when the plaintiff and the defendant each entered the intersection of 53rd Avenue and 204th Street in Langley, British Columbia, at around noon on April 17, 2010.

**4**  The subject intersection consists of four legs. To the south is a two-lane, two-way local road with parking on both sides and ending at a dead end. To the north is a two-lane, two-way collector road with parking on both sides. To the east is a four-lane, two-way arterial roadway with no parking on either side. To the west is a two-lane, two-way arterial road with parking on both sides. 53rd Avenue runs in an east/westerly direction, and 204th Street runs in a north/southerly direction.

**5**  There are traffic lights facing 204th Street in both directions and traffic lights facing 53rd Avenue in both directions. At the corners of the intersection, there are pedestrian crossings with accompanying pushbutton pedestrian signals. There are vehicle detection loops on the southern leg of the intersection, just behind the stop line in the northbound lane.

**6**  At the time of the accident, the plaintiff was travelling northbound on 204th Street in a 2004 Honda Civic. The defendant was travelling eastbound on 53rd Avenue in a Toyota SUV. They both agree that the collision took place at a point on the scale map that appears to be south of the center of the intersection. The right front corner of the defendant's vehicle collided with the left front corner of the plaintiff's vehicle.

**7**  The defendant and the plaintiff also agree that there were two bushes (or trees), and a mailbox on the southwest corner of the intersection that partially obstructed their view. The plaintiff had trouble seeing down the eastbound lane of 53rd Avenue, and the defendant had trouble seeing down the northbound lane of 204th Street.

**8**  Both parties agreed that there was no other traffic in the area.

**9**  The parties diverge in their evidence regarding the colour of the traffic lights facing them when they entered the intersection. They both say that the light facing them was green, which is impossible, short of a traffic light malfunction. Mr. Vlieg, an engineer with the Parks and Engineering Department of Langley, testified that there were no complaints of malfunction that day and he is not aware of any malfunction in the traffic lights at that intersection. Therefore, either the plaintiff or the defendant is mistaken in their belief that they entered the intersection on a green light.

**10**  The plaintiff is a 47-year-old woman who at the time was the holder of a valid B.C. learner's driver licence. Her husband, holder of a valid Class 5 B.C. driver's licence, was a passenger in the front seat. He was training her to drive and watching for hazards in accordance with his duty as a driver accompanying a learner.

**11**  The plaintiff testified that on the day of the accident, she and her husband had driven south on 204th Street looking for a Vietnamese restaurant at which to eat lunch before going shopping at Costco. They had not found the restaurant by the time they reached the dead end, so they turned the car around to head north on 204th Street back to Costco. They had decided that if they found the restaurant on the way they would stop, otherwise they would simply proceed to Costco.

**12**  The plaintiff testified that after she had turned around at the end of 204th Street, she drove slowly north toward the intersection. The traffic light facing her was red. She stopped behind the white stop line and waited for the light to turn green. She estimated that she waited about 8-10 seconds and then the red light changed to green. She did a shoulder check from left to right, then back to center. The intersection was safe. She started to move her vehicle forward, slowly.

**13**  The plaintiff testified that while she was checking to her left and right, her husband said, "green light is on, you can go." She moved slowly forward, then all of a sudden, the defendant came from her left and collided into her vehicle. At the time of collision, she was looking straight ahead.

**14**  The plaintiff was asked if she saw any pedestrians before she entered the intersection. She said there were no pedestrians crossing the intersection or in the area of the intersection. However, she noticed two pedestrians further north on the east side of 204th Street while she was waiting at the stop line for the green light, and when she started checking for traffic. The plaintiff estimated that 3-5 seconds had passed from when the light turned green to when the collision took place. She said that at the time of impact, she was going slowly, about 20 kilometers per hour.

**15**  The plaintiff denied that she was distracted by anything. She knew that her husband expected her to concentrate and check the road conditions and not to do anything else.

**16**  The plaintiff's husband testified and corroborated the plaintiff's evidence in all respects, except that he did not agree they were still looking for the restaurant at the time of the accident, or discussing going to Costco. He also admitted that he was aware that they could not see down 53rd Avenue past a certain point because of the trees and mailbox. He did not tell the plaintiff to pull further forward, but he said she entered the intersection slowly. The light was green and there were no cars at the stop line of 53rd Avenue.

**17**  The defendant testified that just before the accident he was travelling straight down 53rd Avenue, eastbound, from his home about three blocks away. He had driven this route hundreds of times before. He was going to pick up his daughter from a friend's house.

**18**  He stopped at the intersection of 53rd Avenue and 203rd Street because the light was red. A car went south through that intersection. When the light turned green he proceeded east toward 204th Street. He knew that the south side of 204th Street led to a dead end. He also knew that if a car came up to the intersection on 204th Street, the traffic lights would change. He said the traffic light on 53rd and 204th Street was solid green as he drove toward it. He knew that if there was no traffic travelling north or south on 204th Street, the light on 53rd Avenue would not change from green.

**19**  The defendant testified that as he approached 204th Street, his ability to see traffic on the south side of the intersection was blocked by two bushes, and that he could not see much at the stop line on 204th Street.

**20**  At trial, the defendant said he was travelling at the speed limit of 50 kilometers per hour and that he first saw the green light on 53rd Avenue and 204th Street when he was about 100 meters away. He said that the light stayed green from when he first saw it to when he entered the intersection. He calculated, at the request of plaintiff's counsel, that it took him 13.8 seconds to travel at a steady rate of 50 kilometers per hour over the 100 meters, from when he first saw the green light to when he entered the intersection. Both counsel checked the defendant's calculations and are in agreement that it takes 7.2 seconds to travel 100 meters at 50 kilometers per hour, not 13.8 seconds.

**21**  The defendant further testified that before he entered the intersection, he looked to the right and left and did not see any cars or pedestrians. When he was close to midway through the intersection he saw a white car out of the corner of his eye, to his right. He swerved to the left but was unable to avoid hitting it.

**22**  One of the pedestrians seen by the plaintiff, a Mr. Hannam, testified that he was at the northeast corner of the intersection with his roommate when he observed the collision. Unfortunately, he could not say what the colour of either traffic light was at the time of impact. He saw the plaintiff's vehicle pull up to the stop line on 204th Street, stop and remain stationary for a time. He also saw the defendant's vehicle approaching and anticipated the collision.

**23**  The other piece of relevant evidence came from Mr. Vlieg, who explained that when facing northbound at that intersection, approximately 6.4 seconds will pass from the time a vehicle triggers the loop, until the light on 204th Street changes from red to green. He derived this figure by adding one second for the sensor in the loop to communicate with the computer, plus 3.5 seconds for the opposing light on 53rd Avenue to remain yellow, plus 1.9 seconds for all the lights to be red before the light on 204th Street turns green.

**24**  I found all the witnesses to be credible and forthright. Defendant's counsel submitted that the plaintiff and her husband were argumentative, but I did not find that to be the case. They were testifying through an interpreter which can be a frustrating process.

**25**  The defendant submitted that the plaintiff and her husband were inconsistent in their testimony with each other, and with the statement made by the plaintiff to an ICBC adjuster three days after the accident. The defendant submitted that the plaintiff's evidence was therefore not reliable and did not meet the onus upon her to establish, on a balance of probabilities, that she entered the intersection on a green light and the defendant entered on a red light.

**26**  I agree with defendant's counsel that the plaintiff bears the onus of proof, but I found both her and her husband to be consistent throughout their testimony, despite rigorous cross-examination. The defendant, on the other hand, did admit to guessing at how fast the plaintiff was going when she entered the intersection; he did not know.

**27**  When all witnesses appear credible, and it is difficult to choose between two possible scenarios, it is not enough to say the plaintiff has not made out her case. As the trial judge, I must go on to consider from an objective basis, which scenario is more in harmony with the preponderance of probabilities: *Faryna v. Chorny* (1951), [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=), [*4 W.W.R. (N.S.) 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=). See also *Gariepy v. Ritchie*, [*[1993] B.C.J. No. 2304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FG12-61MH-00000-00&context=), [*1993 CarswellBC 2058*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FG12-61MH-00000-00&context=) (S.C.).

**28**  I agree with plaintiff's counsel that from a common sense point of view, it is more likely that the plaintiff was paying close attention to the traffic light and was very aware of its colour when she entered the intersection. She was learning to drive and knew she had to focus on the driving conditions. Her husband was beside her, coaching. He too was focused on the driving conditions. They were in an area unfamiliar to them. They had stopped at the light because it was red. They did not know at the time that they were triggering the light change or how long it would take to change. They were aware of pedestrians on the side of the road. The plaintiff checked side to side before slowly entering the intersection. The plaintiff's husband specifically noted that the light was green and told the plaintiff "green light is on, you can go."

**29**  The defendant, on the other hand, was driving his usual route. He knew that the lights would stay green on 53rd Avenue, unless triggered to change by a car at the intersection. He did not see any cars. In fact, he did not see the pedestrians either. He saw the light was green from a distance. He entered the intersection from a continuous speed of 50 kilometers per hour. I find that he probably did not expect the light to change and did not notice it had changed.

**30**  I am somewhat supported in this finding by the calculations of the defendant and Mr. Vlieg. If the defendant had first seen the light was green at the intersection from 100 meters away, as he testified, then it took him 7.2 seconds to travel from that point to the point of impact.

**31**  The plaintiff testified that she was at the stop line 8-10 seconds before her light turned green. Therefore she must have been at the stop line for about 1-3 seconds when the defendant first saw his green light. On the evidence of Mr. Vlieg, once the plaintiff had triggered the loop, the defendant's light would have turned yellow for 3.5 seconds and then turned to red.

**32**  Therefore, although the defendant saw that the light was green from 100 meters away, about 5-6 seconds later his light would have turned red when he had not yet reached the intersection. Thus he entered the intersection on a red light.

**33**  The mathematical calculations are not conclusive because they rely on the plaintiff's estimate of how long she was at the light. However, the calculations do show that if one accepts the evidence of both the plaintiff and the defendant, even allowing for a margin of error, it was more likely than not that the light was red when the defendant entered the intersection.

**34**  I conclude, from all of the evidence and on a balance of probabilities, that it was more likely than not that the defendant entered the intersection on a red light. Therefore, the defendant is 100% at fault for the motor vehicle accident.

D. KLOEGMAN J.

**End of Document**

[***Iliopoulous v. Abbinante, [2008] B.C.J. No. 478***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1C0-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

L.W. Bernard J.

Heard: October 4, 2007.

Judgment: March 18, 2008.

Docket: M92424

Registry: New Westminster

**[2008] B.C.J. No. 478** | 2008 BCSC 336 | 166 A.C.W.S. (3d) 258

Between Jolanta Iliopoulous, Plaintiff, and Vincenzo Abbinante, Defendant

(37 paras.)

**Case Summary**

**Damages — General damages — For personal injuries — Loss of earning capacity — Non-pecuniary damages, including pain and suffering — The plaintiff was awarded $102,680 in damages for injuries sustained as a passenger in a motor vehicle accident for which the defendant admitted liability — The medical evidence supported the chronic nature of her symptoms and her poor prospects for substantial improvement in the future — The plaintiff was awarded $50,000 in non-pecuniary damages, $1,460 in special damages, $35,000 in damages for future loss, and $16,220 in future care costs.**

**Damages — Physical injuries — Age of claimant — 36 to 45 — Non-pecuniary award — $40,001 to $60,000 — The plaintiff was awarded $102,680 in damages for injuries sustained as a passenger in a motor vehicle accident for which the defendant admitted liability — The medical evidence supported the chronic nature of her symptoms and her poor prospects for substantial improvement in the future — The plaintiff was awarded $50,000 in non-pecuniary damages, $1,460 in special damages, $35,000 in damages for future loss, and $16,220 in future care costs.**

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| --- |
| The plaintiff, 45 years old, sought damages for injuries sustained in a motor vehicle accident when she was a passenger in the defendant's vehicle. Liability was admitted by the defendant. The issue was the effect of a second accident wherein the plaintiff was the driver and the party responsible, whether it was an intervening act and whether the plaintiff had failed to mitigate her damages. She claimed to suffer from soft tissue and ligament injuries to her neck, shoulder, back and right hip and severe anxiety while driving.  HELD: The plaintiff was awarded $102,680 in damages.  The medical evidence supported the chronic nature of her symptoms and her poor prospects for substantial improvement in the future. As for the second accident, the impact from that second collision was relatively minor and it caused only a short-lived aggravation of her injuries from the first collision. Unlike in the first collision she was not taken by surprise or thrust laterally. The plaintiff had not been shown to have failed to mitigate her damages. She was the sole income earner for a large family living through a trying time as her husband struggled with cancer, and she had persevered through pain to meet the needs of her family, leaving her without personal reserves or resources for exercise and treatments. Her chronic pain would more than likely compromise her future employability, the number of hours she would be able to work, and the duration of her working years. The plaintiff was awarded $50,000 in non-pecuniary damages, $1,460 in special damages, $35,000 in damages for future loss, and $16,220 in future care costs. |

**Counsel**

Counsel for the Plaintiff: D. Kennedy.

Counsel for the Defendant: D. Framingham.

**Reasons for Judgment**

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| **L.W. BERNARD J.** |

**A.** **Introduction**

**1**  On January 11, 2004, Jolanta Iliopoulos was the front-seat passenger in a mini-van struck, on the driver's side, by the front of a mini-van driven by Mr. Abbinante. Ms. Iliopoulous was wearing a seatbelt. The collision was the sole fault of Mr. Abbinante. The mini-van occupied by the plaintiff sustained extensive damage and was "written-off." The collision occurred without warning and the impact was relatively severe. Ms. Iliopoulous sustained soft-tissue injuries, some of which she says persist and are likely permanent.

**2**  On August 12, 2005, Ms. Iliopoulous was driving a mid-sized sedan when she "rear-ended" a vehicle which had stopped in traffic. The front of her car went under the back of the vehicle she struck, causing more damage to her car than to the one struck. Her car, worth $5,000, was "written-off." The collision was the sole fault of Ms. Iliopoulous. Ms. Iliopoulous says that this collision temporarily aggravated her injuries from the earlier collision.

**3**  Ms. Iliopoulous's claim is for damages arising from the first collision. The defendant's liability is admitted. In dispute is the effect of the second collision as an "intervening act" and whether Ms. Iliopoulous failed to mitigate her damages. The head of damages where there is significant disagreement is in respect of future loss of income earning capacity.

**4**  The plaintiff seeks damages as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| (1) |  | Non pecuniary | $55,000 - $60,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| (2) |  | Special | $1,457 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| (3) |  | Loss of Future |  |  |
|  |  | Earning Capacity | $50,000 - $80,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| (4) |  | Future Care | $20,450 |  |

**B.** **Evidentiary Synopsis**

**5**  Ms. Iliopoulous was a healthy, pain-free, physically fit 45-year old mother of four teenagers at the time of the collision in 2004. She stretched, walked, did yoga, gardened, did household chores, cared for her family, and was employed as a medical office assistant. In 2004, she was the sole income earner for her family. Her husband was disabled with lymphoma, which he had been battling since 2000. He succumbed to his illness in 2004.

**6**  In the morning following the 2004 collision, Ms Iliopoulos saw her physician, Dr. Bitonti. She was experiencing pain in her head, neck, shoulders, feet, lower back, right hip, and knees. Despite the pain, she continued to work in order to support her family. She struggled with her duties at work and at home. She said she suffered from extreme fatigue from working in pain at her job. It left her with no energy to work at home. She described having a heavy head, and suffering from pain in her head, neck, shoulder, lower back, hip and feet. She said the problems with her feet subsided within 6 months and that the "crunching" in her neck resolved before the second collision; however, the other symptoms persisted through 2005 and 2006. She noted that she would be adversely affected by changes in the weather.

**7**  Ms. Iliopoulous did not have physiotherapy. She claims that she was unable to get funding for it. In June 2005, she saw a chiropractor for the pain in her lower back. She took various anti-inflammatory and pain-relieving medications and hot showers.

**8**  Ms. Iliopoulous said that the 2005 collision "set her back" or aggravated her condition "a bit," specifically around the right shoulder and lower back. She sustained a new injury to her chest. She said: "I only felt worse for a week or two after the second MVA and then I returned to my previous state."

**9**  At the time of her trial testimony (May 2007) Ms. Iliopoulous said that she experience pain on a daily basis - "some days much worse than others."

**10**  She described a pain in her right hip which radiates through her waist and lower back. She suffers from "pins and needles." She says her symptoms are aggravated by bending at the waist. Her job duties are primarily secretarial and she works with a headset which helps her to "multitask." She is often required to type for three-hour periods, which she finds difficult because of her condition.

**11**  Ms. Iliopoulous estimated that she has had about 50 per cent improvement in her condition since the 2004 collision, but that this trend halted about one year ago. She said that her condition worsened in the winter just past.

**12**  In January 2004, general practitioner Dr. Bitonti diagnosed Ms. Iliopoulous as suffering from soft tissue and ligament injuries to her neck, shoulder, back and right hip and severe anxiety while driving, all arising from the 2004 collision. Dr. Bitonti said that Ms. Iliopoulous "followed the medical advice and treatment given faithfully." In February 2007, Dr. Bitonti opined that the 2004 collision is the cause of Ms. Iliopoulous's chronic pain and spasm in the neck, back, and right hip muscles. Dr. Bitonti said that is unlikely that Ms. Iliopoulous will have any major improvement in the future; that she will require regular massage, physiotherapy, and medical treatment to help manage the pain and improve her neck and back range of motion; that she will likely require someone to help her with heavy housework and gardening; and, that the chronic condition will likely force her to make changes to her personal and professional life in the future.

**13**  In relation to the 2005 collision, Dr. Bitonti testified that the injuries were short-lived and related to the right shoulder - a different area of injury than that in the first collision. She opined that it was not possible that Ms. Iliopoulous would have recovered from her injuries sustained in the first collision "but for" the second collision. She regarded the second collision as only a temporary aggravation of Ms. Iliopoulous's problems arising from the first collision.

**14**  Dr. Hershler, a specialist in physical medicine and rehabilitation saw Ms. Iliopoulous on August 17, 2004, February 22, 2005, and February 15, 2006. He prepared a report in October 2006. In his report he wrote that he found significant connective tissue injuries to the upper cervical spine, right sacroiliac joint and right lumbar region, all of which he attributed to the 2004 collision. His prognosis for recovery and resolution of pain was "extremely guarded." He added that there was a "good" likelihood that Ms. Iliopoulous's chronic pain would lead to a reduction in work hours and a premature shortening of her work years. He recommended ten counselling sessions to assist her with pain management and anxiety.

**15**  Dr. Hershler testified that he did not know that Ms. Iliopoulous had been in a second collision in August 2005; however, he said that by August 2005 Ms. Iliopoulous had reached "chronicity" of symptoms, and in such a state recovery is "less likely to be affected by a subsequent injury." He added that if Ms. Iliopoulous's neck was not injured in the second collision then his conclusions would remain the same.

**16**  Dr. Hill, an orthopaedic surgeon, interviewed and physically examined Ms. Iliopoulous on February 7, 2007. Dr. Hill prepared a report which was tendered into evidence by the defendant. Dr. Hill's diagnosis was substantially the same as the others' and he opined that the "primary trauma" was the 2004 collision. He said that Ms. Iliopoulous was never properly rehabilitated and that her recovery "would have been more complete and less elongated" if she had not been in the second collision. He recommended an exercise regimen and attributed Ms. Iliopoulous's failure to pursue regular exercise as contributing to her "deconditioned" state which he refers to as "a secondary factor in causing her ongoing complaints." In his report he concludes that "she will probably over the long-term gradually experience resolution of her problem and may end up with a degree of sensitivity about her neck and back and it will be less so if she is provided a rehabilitation program and carries out the fitness activities that I have suggested."

**17**  In February 2007, physiotherapist Katie Barr evaluated Ms. Iliopoulous's physical capacity. The results led Ms. Barr to opine that Ms. Iliopoulous was employable, on a full-time basis, only in a "limited strength" occupation. Ms. Iliopoulous's position as a medical office assistant is such an occupation. She concluded that Ms. Iliopoulous will always require a flexible employer, a flexible schedule, and a position with variable demands. She will need to be able to have breaks and rests, and to be able to pace her activities.

**18**  Alison McLean, an occupational therapist, analysed the costs of future care for Ms. Iliopoulous. She states that Ms. Iliopoulous, as a result of her symptoms, her reduced range of motion, and her physical deconditioning, has not been able to resume leisure/recreational activities and has difficulties with: (a) her tolerance for work tasks; (b) gardening; (c) cleaning her car; and (d) heavier household tasks. She recommends:

1. 18 to 24 physiotherapy assessment/treatment sessions, at a cost ranging from $640 to $1,325;
2. A fitness program, including kinesiology, at a cost ranging from $1,500 to $3,800 in the first year, and approximately $500 per year, thereafter;
3. 26 massage therapy sessions, at a cost ranging from $1,300 to $1,700;
4. 18 pulse signal therapy sessions at a cost of $2,500;
5. 10 counselling sessions at a cost of $1,500;
6. Homemaking assistance at a cost ranging from $2,800 to $3,360 per year, for five years, and $800 to $960 thereafter;
7. Grocery delivery at a cost of $312 per year, for five years, and $156 per year, thereafter;
8. Ergonomic assessment at a cost of $225 to $300;
9. Driving program at a cost of $800;
10. Car wash service at a cost ranging from $30 to $120 per year;
11. Yard maintenance at a cost of $850 per year;
12. Ergonomic work station at a cost ranging from $800 to $1230;
13. Extended car mirror at a cost of $5 to $10;
14. Heating pad at a cost of $20 per year; and,
15. Medications, at an unknown cost.

**C.** **Findings and Analysis**

**19**  Ms. Iliopoulous sustained significant soft tissue injuries from the 2004 collision. The impact from the defendant's vehicle was great and came without warning. Ms. Iliopoulous's body experienced a violent lateral thrust. Ms Iliopoulos sustained the sort of injuries one would expect from such a collision.

**20**  Ms. Iliopoulous attended to her physician immediately but obtained little, if anything, to assist her and to promote recovery. At the time of the collision she was caring for her terminally ill husband and four teenaged children. As the sole income earner for the family, she persevered through pain-filled work days, and collapsed with exhaustion at the end of each day. Not surprisingly, her priority was providing needed financial support to her family.

**21**  Ms. Iliopoulous has not recovered from all the injuries she sustained. She has been frank about those which resolved through the passage of time. She now suffers from chronic radiating pain from her right hip to her lower back. This pain has a significantly negative impact on her work, on her leisure activities, and on her general enjoyment of life. The medical evidence supports the chronicity of her symptoms and her poor prospects for substantial improvement in the future.

**22**  I am satisfied that the controversy over the second collision as an intervening cause ought to be resolved in favour of the plaintiff. I accept Ms. Iliopoulous's testimony that the impact from the second collision was relatively minor and that it caused a short-lived aggravation of her injuries from the first collision. There is medical evidence which corroborates Ms. Iliopoulous's testimony in this regard; moreover, it is noteworthy that the second collision was materially different from the first. In the second collision, Ms. Iliopoulous drove into the rear of another vehicle. Unlike the earlier collision, she was not taken completely by surprise and she was not thrust laterally. The evidence establishes that she did not sustain an injury to her neck in this second collision; accordingly, the evidence of Dr. Hershel is not undermined.

**23**  In relation to mitigation of damages, I am not persuaded that Ms. Iliopoulous showed any failure, in all the circumstances. Perhaps there are situations where one could be faulted for failing to focus one's time and energy on recovery, rather than upon earning an income and meeting the needs of one's family; however, this was not one of them. Ms. Iliopoulous was the sole income earner for a large family living through a trying time as the father/husband struggled with, and succumbed to, cancer. She persevered through the pain to meet the needs of her family, and this left her without personal reserves or resources for exercise and treatments.

**24**  I accept the evidence of Drs. Bitonti and Hershler in relation to the impact Ms. Iliopoulous's chronic injuries will have on her working life. I am satisfied that her chronic pain will more than likely compromise: (a) her future employability; (b) the number of hours she will be able to work, if employable; and (c) the duration of her working years. I accept Ms. Barr's evidence that Ms. Iliopoulous is, by her injuries, restricted to limited strength occupations and needs an understanding and flexible employer. Prior to the 2004 collision, she was a strong, healthy and fit woman who did not face these restrictions and needs in the workforce.

**D.** **Damages**

**(1)** **Non-pecuniary**

**25**  The plaintiff seeks $55,000 to $60,000. In support of her position she cites the following cases: ***Gibbs v. Skemp***, [*[1998] B.C.J. No. 680*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S280-00000-00&context=) (S.C.) (QL), ($55,000); ***Jackman v. All Season Labour Supplies Ltd.***, [*2006 BCSC 2053*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21V3-00000-00&context=), ($40,000); ***Kahle v. Ritter***, [*2002 BCSC 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1D9-00000-00&context=), ($50,000); ***Paller v. Paller***, [*2004 BCSC 977*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2NV-00000-00&context=),($60,000); and ***Prevette v. Cusano***, [*2001 BCSC 489*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X327-00000-00&context=), ($50,000). I agree that these cases bear relevant similarities to the instant case (in particular, the ***Kahle*** case) and offer a useful measure for the quantum of non-pecuniary damages.

**26**  The defendant's position is that $30,000 to $35,000 is appropriate and that it must be reduced by 40 per cent in recognition of: (a) the plaintiff's failure to mitigate; and, (b) the exacerbation of her injuries through her ***negligence*** in causing the second collision.

**27**  For reasons previously stated, I am satisfied that there is no reasonable basis upon which the fair and just award for non-pecuniary damages ought to be reduced; accordingly, having regard to the cases cited, non-pecuniary damages are set at $50,000.

**(2)** **Special**

**28**  The plaintiff claims $1,460. The only controversy arises from the defendant's position that the plaintiff: (a) failed to mitigate and (b) exacerbated her injuries through her own ***negligence***. In light of the rejection of these two positions, special damages are set at $1,460.

**(3)** **Loss of Earning Capacity**

**29**  The plaintiff seeks $50,000 to $80,000. In support of her position, she cites the following cases: ***Gibbs v. Skemp*** ($55,000); ***Kahle v. Ritter*** ($80,000); ***Miscisco v. Small***, [*[1999] B.C.J. No. 1105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G469-00000-00&context=) (S.C.) (QL), aff'd [*2001 BCCA 576*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-615P-00000-00&context=), ($40,000); ***Prevette v. Cusano*** ($40,000).

**30**  The defendant submits that the plaintiff has failed to prove a substantial possibility of a future event leading to an income loss to justify an award of compensation based upon an estimation of the chance that the event will occur (see ***Parypa v. Wickware***, [*1999 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=), [*65 B.C.L.R. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=), at para. 65).

**31**  In support of his position, the defendant argues that the plaintiff's career ambition is to work as a doctor's assistant for the remainder of her working years, and that there is no reason to believe, based upon her full-time employment since the first collision, that she will not do so.

**32**  I am satisfied that evidence of Drs. Bitonti and Hershel proves a substantial possibility that Ms. Iliopoulous's working hours, working years, and future employability will be compromised by her chronic injury. She has suffered a loss or impairment of her earning capacity as a capital asset; however, in light of: (a) her career objectives; (b) her relatively secure employment; (c) her demonstrated work ethic; and (d) the prospect for some improvement in her condition with the benefit of future care and treatment, I would not consider the probability of actual future loss to be very high.

**33**  Assessing this loss on a judgmental basis, with due regard to the cases cited and to Ms. Iliopoulous's personal circumstances, damages for future loss are set at $35,000.

**(4)** **Future Care**

**34**  Notwithstanding the occupational therapist's recommendation, Ms. Iliopoulous does not seek, as part of her future care, the costs for fitness and kinesiology programs after the first six months, counselling, housecleaning, grocery shopping, a driving program, a telephone headset, and an extended car mirror. The plaintiff's claim is for the balance of Ms. McLean's recommendations, at a total cost of $20,450.

**35**  The defendant submits that there is no evidentiary foundation to support many of these future care costs; that a mere proposal from Ms. McLean is not enough. The most contentious costs are for the costliest items: kinesiology treatments, massage therapy, pulse signal therapy, yard maintenance, and medications.

**36**  I am satisfied that Ms. McLean's recommendations are rationally linked to Ms. Iliopoulous's diagnosis and prognosis, and that they are supported by the whole of the evidence. For example, Ms Iliopoulos testified to her struggles with gardening, and Dr. Hershel specifically recommended pulse signal therapy, and testified to its merit. The chronicity of Ms. Iliopoulous's pain and the poor prospects for recovery establish that the periods which the various costs are intended to cover are reasonable, with the exception of the period for yard maintenance which is shortened from ten years to five, based upon a lack of evidence supporting the former. Future care costs are set at $16,220.

**E.** **Disposition**

**37**  The plaintiff's claim for damages is allowed. The quantum is set at $102,680.

L.W. BERNARD J.

**End of Document**

[***Jack v. Sidhu, [2006] B.C.J. No. 1833***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3GJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Leask J.

Heard: June 22, 2006.

Judgment: August 8, 2006.

Vancouver Registry No. S040958

**[2006] B.C.J. No. 1833** | 2006 BCSC 1218 | 151 A.C.W.S. (3d) 524

Between Greg Jack, Plaintiff, and Dharam Sidhu and North Star Patrol 1996 Ltd., Defendants

(17 paras.)

**Case Summary**

**Limitation of actions — Time — When time begins to run — In this case where the plaintiff sought damages for assault after allegedly being struck in the head with a baseball bat by the defendant, the court dismissed the defendant's application to dismiss the plaintiff's action as being brought after the applicable limitation period — The writ was filed only one week after the alleged expiration of the two year limitation period, and the delay was reasonable given his medical problems — The operation of s. 6(4) of the Limitation Act postponed the commencement of the running of the limitation period — Limitation Act, s. 6(4).**

**Limitation of actions — Extension, suspension and inapplicability of limitation periods — General — In this case where the plaintiff sought damages for assault after allegedly being struck in the head with a baseball bat by the defendant, the court dismissed the defendant's application to dismiss the plaintiff's action as being brought after the applicable limitation period — The writ was filed only one week after the alleged expiration of the two year limitation period, and the delay was reasonable given his medical problems — The operation of s. 6(4) of the Limitation Act postponed the commencement of the running of the limitation period — Limitation Act, s. 6(4).**

**Tort law — Trespass — To person — Assault — In this case where the plaintiff sought damages for assault after allegedly being struck in the head with a baseball bat by the defendant, the court dismissed the defendant's application to dismiss the plaintiff's action as being brought after the applicable limitation period — The writ was filed only one week after the alleged expiration of the two year limitation period, and the delay was reasonable given his medical problems — The operation of s. 6(4) of the Limitation Act postponed the commencement of the running of the limitation period — Limitation Act, s. 6(4).**

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A

Limitation Act, s. 6(4)

**Counsel**

Counsel for the Plaintiff: Stephen E. Gibson

Counsel for the Defendants: R. Nigel Beckmann

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| **LEASK J.** |

**1**   Counsel for the defendants Dharam Sidhu and North Star Patrol 1996 Ltd. apply under the authority of Rule 18A to have the plaintiff's action dismissed against them. The plaintiff s claim is for assault. The defendant Sidhu was employed as a security guard by the corporate defendant. It is alleged that on the evening of February 12, 2002 Sidhu struck the defendant in the head with a baseball bat. The basis for the defendants' Rule 18A application is that the writ of summons was filed on behalf of the plaintiff on February 17, 2004. It is common ground between the parties that the applicable limitation period is two years.

**2**  On the night when he was hit with the baseball bat, the plaintiff was seen by ambulance attendants, taken to Langley Memorial Hospital, then taken home by a friend. He remained at home until February 18, 2002 when he attended the office of his family physician, Dr. Bradford. On examination, Dr. Bradford noted bruising, sutures, headaches and dizziness. She wrote a medical letter on April 20, 2006 expressing the opinion that it is reasonable to assume that the plaintiff would have been incapacitated with respect to getting legal advice from the 12th to the 17th (inclusive). The defendants had a neurologist, Dr. Tessler, review the clinical records of Dr. Bradford, the Ambulance Crew Report of February 12, 2002 and the Emergency Room Record of February 12. Dr. Tessler's conclusion was that the plaintiff's "physical and mental condition would not have prevented him from undertaking any activities which may have been considered imperative to the management of his personal affairs."

**What is the relevant law?**

**3**  Section 6(4) of the ***Limitation Act*** states:

Time does not being to run against a plaintiff ... until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that:

1. an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
2. the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

**4**  In ***Krusel v. Firth*** [*(1991), 2 B.C.A.C. 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60WG-00000-00&context=), [*[1991] 6 W.W.R. 651*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60WG-00000-00&context=) (B.C.C.A.), the Court of Appeal held that there was a due diligence requirement regarding the identity of a potential defendant. Taylor J.A. said at paragraph 45:

I find that it is not sufficient that a plaintiff does not in fact know the identity of a potential defendant in order to delay the running of time under Section 6(3), but necessary that the plaintiff *could not with reasonable diligence* have been expected to discover that person's identity.

**5**  The leading case defining the proper interpretation of s. 6(4)(b) is ***Novak v. Bond***, [*[1999] 1 S.C.R. 808*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M428-00000-00&context=). In that case, McLachlin J. (as she then was), writing for majority said at paragraph 90:

I conclude that delay beyond the prescribed limitation period is only justifiable if the individual plaintiff's interests and circumstances are so pressing that a reasonable person would conclude that, in light of them, the plaintiff could not reasonably bring an action at the time his or her bare legal rights crystallized. The task in every case is to determine the point at which the plaintiff reasonably could bring an action, taking into account his or her own interests and circumstances.

**6**  In ***Novak v. Bond***, *supra*, the alleged ***negligence*** of the doctor was failing to diagnose breast cancer, which failure allowed the cancer to spread to the lymph nodes. After proper diagnosis, the plaintiff was treated and decided not to sue, preferring to concentrate on maintaining her health and a positive belief that she had been cured. The cancer recurred four years later, spreading to the spine, liver and lung. Both the B.C. Court of Appeal and the Supreme Court of Canada were satisfied that, on these facts, s. 6(4)(b) of the ***Limitation Act*** permitted a four and a half year postponement of the limitation period.

**7**  I have been referred to a number of decisions by judges of this Court. In ***Cowen v. Gray***, [*[2001] B.C.J. No. 662*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-637H-00000-00&context=), [*2001 BCSC 487*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-637H-00000-00&context=), Drost J. dealt with a case where a motor vehicle accident occurred in August, 1995 and the lawsuit commenced in February 2000. He was not convinced that the limitation period should be postponed for two and a half years.

**8**  In ***Ounjian v. St. Paul's Hospital***, [*[2002] B.C.J. No. 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61GK-00000-00&context=), [*2002 BCSC 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61GK-00000-00&context=), Tysoe J. was dealing with a medical ***negligence*** action. The surgery occurred on October 30, 1995; the action was commenced in May 1998. Tysoe J. would have been prepared to postpone the limitation period to March, 1996 but not to May 1996.

**9**  In ***Taylor v. Paulson***, [*[2005] B.C.J. No. 1937*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1D9-00000-00&context=), [*2005 BCSC 1249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1D9-00000-00&context=), Truscott J. was dealing with an assault in a hotel which occurred on March 25, 2001. The writ was issued January 13, 2004, some nine and a half months after the expiry of the statutory limitation. Trustcott J. was unwilling to postpone the limitation period in that case.

**10**  Counsel have been unable to refer me to any case, from B.C. or elsewhere, dealing with a proposed postponement of the limitation period of less than one week. Indeed, I have been referred to no cases where proposed postponements involve time periods of weeks rather than months. In a decision on a related subject, the B.C. Court of Appeal permitted a plaintiff insured to add a new cause of action to its claim after the expiry of the limitation period. The new claim was first added to the pleadings five months after the expiry of the limitation period. In ***Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*** [*(1996), 19 B.C.L.R. (3d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=) (B.C.C.A.), McEachern C.J.B.C., in concurring reasons, said at paragraph 75:

The amount of delay in this case was only a few months .... This shorter period militates in favour of the appellant ....

**What are the facts of this case?**

**11**  The plaintiff, Greg Jack, swore an affidavit on March 3, 2006 in which he stated that he did not know the name of the defendant Sidhu nor the name of the company he worked for on the evening of February 12, 2002. He also swore that, after being brought home from the hospital by his friend:

I was confined to my home and bed for the next six days. I was barely able to walk around the house and my head was pounding, I was unable to leave the house during this time. I was first physically able to attend a doctor's office on February 18, 2002. I went to see Dr. Bradford, my family physician, on February 18, 2002.

Mr. Jack's wife, Linda, swore an affidavit on April 18, 2006. In it, she said that when Mr. Jack got home on the night of the alleged assault, he seemed to be in significant pain, dazed and "out of it". She also said that for the next five days he felt so lethargic that he barely got out of bed. She swore that:

He had difficulty getting around because of headaches/dizziness or fatigue. He was not thinking clearly, and he didn't want to see anybody. It was hard getting him to talk much, as he wanted to rest all the time.

She confirmed that, to the best of her recollection, the first time that her husband left the house after returning from the hospital was to see Dr. Bradford on February 18th.

**12**  Both husband and wife mention that, at first, Mr. Jack's attention was on the criminal aspects of the alleged assault. He first attended a lawyer's office to seek advice on March 1, 2002. That lawyer was a personal friend unfamiliar with legal matters of this kind who referred him to the law firm of Lindsay Kenney in Langley. He met his current lawyer on April 30, 2002 and mistakenly informed that lawyer that the incident had occurred on February 18, 2002.

**13**  An R.C.M.P. officer who attended the scene that evening, Constable Singh, swore an affidavit on September 28, 2005 in which he stated that he arrived at the scene after the altercation had ended. He said that he spoke to both Mr. Sidhu and Mr. Jack at the scene. He swore in his affidavit that:

I determined that if assault charges were to be laid they would be laid against both Mr. Jack and Mr. Sidhu. I communicated this to both men on the date of the incident.

Constable Singh also wrote that:

At no time since the Altercation first occurred did Mr. Jack not know who the other party to the Altercation was. Throughout my discussions with Mr. Jack at the scene of the Altercation ... we both referred to the other party as Mr. Sidhu.

**14**  On this 18A application by the defendants, they have the burden of establishing contested facts on a balance of probabilities. I am unable to find, on the basis of Constable Singh's affidavit, that Mr. Jack knew Mr. Sidhu's full name with the particularity necessary to name him as a defendant in the action on the evening of February 12, 2002. I reach that conclusion partly based on Mr. Jack's sworn denial and partly on the undisputed fact that he was hit on the head with a baseball bat that evening; taken to the hospital; bed ridden for five days; and still displaying symptoms six days later when seen by Dr. Bradford. If it were necessary, I would be prepared to find as a fact that Mr. Jack did not know Mr. Sidhu's name on the evening of February 12, 2002. I accept the evidence of Mr. Jack, his wife and his physician, Dr. Bradford, concerning his physical condition between February 12, 2002 and February 18, 2002. In so doing, I reject the opinion of Dr. Tessler based on his review of the medical records.

**Conclusion**

**15**  The defendant's principal submission before me was that Mr. Jack had failed to exercise due diligence in learning the names of the potential individual and corporate defendants. For the period between February 12, 2002 and February 18, 2002, I reject this submission. In my view, it was reasonable for a man struck on the head with a baseball bat to concentrate on his medical problems before his legal problems. Five days of bed rest followed by attendance at his family physician appears to me to be the actions of a reasonable man. If it were necessary for me to do so, I would find a further period of two to three weeks delay to seek legal advice (particularly in the light of the views apparently held and expressed by Constable Singh of the R.C.M.P.) would have been justifiable. However, it is only necessary for me to find that the operation of s. 6(4) of the ***Limitation Act*** postponed the commencement of the running of the limitation period to February 18, 2002 and I do so find.

**16**  I very much appreciated the careful submissions of both counsel in this case.

**17**  Costs will be costs in the cause at Scale 3.

LEASK J.

**End of Document**

[***Joe v. Insurance Corp. of British Columbia, [2008] B.C.J. No. 2008***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3SS-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Campbell River, British Columbia

D.A. Halfyard J.

Heard: October 16, 2008.

Judgment: October 24, 2008.

Docket: S7086

Registry: Campbell River

**[2008] B.C.J. No. 2008** | [*2008 BCSC 1426*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2BT-00000-00&context=) | [*[2009] I.L.R. I-4758*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2BT-00000-00&context=) | [*172 A.C.W.S. (3d) 610*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2BT-00000-00&context=)

Between Helen Marie Joe, Plaintiff, and Insurance Corporation of British Columbia, Per and Renay Turner Claims Representative for ICBC, Shook, Wickham, Bishop and Field Per and Vishal K. Bajpai, Defendants

(63 paras.)

**Case Summary**

**Insurance law — Insurers — Liability — Application to strike plaintiff's claim allowed — The plaintiff was the subject of a motor vehicle accident claim that was settled — She commenced an action alleging that the insurance adjuster and her appointed counsel intimidated and manipulated her version of events, and conspired to have her commit perjury — She alleged that their conduct violated her rights — The court found that no facts were pleaded to support the allegations — The plaintiff was never induced to make a false statement, and did not plead any loss or damages.**

**Insurance law — Adjusters — Liability — Application to strike plaintiff's claim allowed — The plaintiff was the subject of a motor vehicle accident claim that was settled — She commenced an action alleging that the insurance adjuster and her appointed counsel intimidated and manipulated her version of events, and conspired to have her commit perjury — She alleged that their conduct violated her rights — The court found that no facts were pleaded to support the allegations — The plaintiff was never induced to make a false statement, and did not plead any loss or damages.**

**Insurance law — Actions — By insured against insurer — Jurisdiction — British Columbia — Practice and procedure — Pleadings — Application to strike plaintiff's claim allowed — The plaintiff was the subject of a motor vehicle accident claim that was settled — She commenced an action alleging that the insurance adjuster and her appointed counsel intimidated and manipulated her version of events, and conspired to have her commit perjury — She alleged that their conduct violated her rights — The court found that no facts were pleaded to support the allegations — The plaintiff was never induced to make a false statement, and did not plead any loss or damages.**

**Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Application to strike plaintiff's claim allowed — The plaintiff was the subject of a motor vehicle accident claim that was settled — She commenced an action alleging that the insurance adjuster and her appointed counsel intimidated and manipulated her version of events, and conspired to have her commit perjury — She alleged that their conduct violated her rights — The court found that no facts were pleaded to support the allegations — The plaintiff was never induced to make a false statement, and did not plead any loss or damages.**

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| Application by the defendants, the Insurance Corporation of British Columbia (ICBC) and others, for an order striking the statement of claim or dismissing the action of the plaintiff, Joe. The plaintiff was self-represented and prepared her own pleadings. The plaintiff was involved in a minor motor vehicle accident that led to a personal action against her. The defendant Turner was the ICBC adjuster that handled the claim. ICBC appointed the defendant Bajpai to act as counsel defending the claim on the plaintiff's behalf. Prior to the examination for discovery, the plaintiff gave Bajpai two different versions of the accident. Bajpai took the position with Turner that liability should not be admitted, as the other driver may have been contributorily negligent. The plaintiff believed that Bajpai was trying to improperly influence her version of the events. During the preparation for discovery, she accused Bajpai and Turner of acting in concert to make a fraudulent claim on behalf of the other driver. The plaintiff refused to participate in any further preparation. Turner subsequently sent the plaintiff a letter informing her that failure to cooperate with her counsel could result in a breach of her insurance contract. The plaintiff took the letter as a threat. She subsequently received a letter from Bajpai and Turner that the matter had been settled. However, the plaintiff previously received another caution letter from ICBC regarding investigation for breach of her insurance contract. The plaintiff commenced the predicate action. Turner subsequently sent a letter confirming that no investigation for breach was pending. The plaintiff contended that the ICBC and the defendants breached her rights protected by ss. 2, 7 and 12 of the Canadian Charter of Rights and Freedoms. She alleged that the defendants intimidated, manipulated and defamed her. She alleged that the defendants committed professional misconduct, breached her trust, abused their power, and conspired to have her commit perjury.  HELD: Application allowed.  The plaintiff did not plead any material facts in support of her allegations that the defendants owed her a constitutional duty and breached that duty in violation of her rights. Disbelief of the plaintiff's version of events related to the accident did not amount to infringement of her right to freedom of expression. In addition, the individual defendants, as private parties, were not subject to Charter claims. There was no material facts pleaded that supported the remainder of the plaintiff's claims. The plaintiff did not plead that Bajpai or Turner asked her to changer her story, or threatened her regarding cancellation of her coverage. The plaintiff was not, in fact, induced by the conduct of Bajpai or Turner to make a false statement. She did not suffer any loss or damage as a consequence of their conduct. Turner's evidence supported a conclusion that she acted in good faith. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18(6), Rule 19(1), Rule 19(24), Rule 19(24)(a), Rule 19(24)(b), Rule 19(24)(d)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 2, s. 2(a), s. 2(b), s. 7, s. 12

Insurance Corporation Act, [*RSBC 1996, CHAPTER 228, s. 30*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B0GD-00000-00&context=)(3)

Insurance Liability Act,

Insurance (Vehicle) Regulation, s. 73, s. 74.1

**Counsel**

Plaintiff appeared on her own behalf.

Counsel for the defendants: A.R. Westmacott.

**Reasons for Judgment**

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| **D.A. HALFYARD J.** |

**The Application**

**1**  This is an application by the defendants for the following relief:

1. An order striking out the statement of claim pursuant to Rule 19(24)(a), (b) and (d) on the grounds that the statement of claim discloses no reasonable cause of action, is unnecessary, scandalous, frivolous or vexatious and is otherwise an abuse of process; and an order dismissing the proceeding on one or more of these grounds;
2. In the alternative, an order dismissing the action pursuant to Rule 18(6) on the ground that it has no merit; and
3. An order that the plaintiff pay the costs of the defendants.

**The Statement of Claim**

**2**  The statement of claim is just over one page in length, and consists of six numbered paragraphs and a prayer for relief. I would paraphrase the allegations made in paragraphs one and two, as follows:

1. The defendants owed a constitutional duty to the plaintiff not to infringe her right to "freedom of thought, belief, opinion and expression", as guaranteed by s. 2 of the ***Canadian Charter of Rights and Freedoms***.
2. The defendants refused to accept the plaintiff's statement of how the motor vehicle accident of December 13, 2003 occurred, and thereby infringed her said ***Charter*** rights.

**3**  Paragraphs three and four of the statement of claim allege in substance that the defendants had a duty not to infringe the plaintiff's rights under s. 7 and s. 12 of ***Charter of Rights***. There is no express allegation that the defendants have breached those rights, but it could be implied that the corresponding breaches are asserted in paragraphs five and six.

**4**  I set out paragraphs five and six of the statement of claim verbatim:

1. The defendants applied intimidation, manipulation, defamation of my character and uttered threats in respect of influencing my testimony so as to limit liability in the case of ***Knight v. Joe et al***, motor vehicle accident of December 13, 2003.
2. I believe that the defendants are responsible for professional misconduct; breach of my trust; abuse of power; and conspiracy to suborn perjury. In so doing are responsible for ignoring my rights set down and defined in the ***Canadian Constitution***, the ***Canadian Charter of Freedoms and Rights***, and the ***Bill of Rights***.

**Procedural Issues**

**5**  On the hearing of an application to strike out a statement of claim on the ground that it discloses no reasonable claim, no evidence is admissible. However, the plaintiff Helen Joe has prepared her own pleadings and has represented herself throughout this proceeding, from the time she commenced her action on March 2, 2006. She opposes the application of the defendants and has taken the position that, if the statement of claim is defective, she should be allowed to make all proper and necessary amendments. Of course, evidence is admissible on the other applications under Rule 19(24) and evidence is essential on the application under Rule 18(6) for summary judgment. Accordingly, I find it convenient to summarize the relevant facts before considering any of the applications.

**The Facts**

**6**  On December 13, 2003, the plaintiff was driving her husband's motor vehicle in Campbell River, and he was riding in the car with her as a passenger. This motor vehicle was involved in a collision with another vehicle, at an intersection. The plaintiff was facing west, emerging from a stop sign on Pinecrest Street, when a motor vehicle being driven by Darren Knight north along Dogwood Street, collided with the driver's side of the motor vehicle, being driven by the plaintiff. There did not appear to be any serious injuries sustained by anyone in either motor vehicle. The police attended at the scene of the accident, and issued a traffic ticket to the plaintiff, for failing to stop at a stop sign. The plaintiff later paid the fine amount indicated on the traffic ticket.

**7**  On June 6, 2005, Mr. Knight commenced action against the plaintiff and her husband, claiming damages for personal injuries sustained as a result of the plaintiff's negligent driving. On July 19, 2005, the defendant Insurance Corporation of British Columbia ("I.C.B.C.") appointed the defendant law firm Shook, Wickham, Bishop and Fields as defence counsel. The defendant Vishal Bajpai, an associate of the law firm, was assigned as counsel for Ms. Joe and her husband.

**8**  The defendant Renay Turner was a claims adjuster employed by I.C.B.C. at Victoria, who was handling Mr. Knight's claim and giving instructions to defence counsel.

**9**  Mr. Bajpai and Ms. Joe had a telephone conversation on or about August 11, 2005. Mr. Bajpai say that, during this conversation, the plaintiff told him in effect that she was uncertain as to whether or not she had stopped at the stop sign and that she may have had a muscle spasm which caused her to move the car forward into the intersection. Mr. Bajpai says that, in a later telephone conversation on November 23, 2005, the plaintiff told him that she had come to a complete stop at the stop sign, she then edged out to see if traffic was coming, and then the other car hit her car.

**10**  The plaintiff deposes that she told the investigating police officer on December 13, 2003 that she stopped at the stop sign and then edged forward to get a better view and states that she told Mr. Bajpai essentially the same thing in both of their telephone conversations about the accident (although she seems to dispute the dates of the telephone conversations).

**11**  In late November 2005, Mr. Bajpai advised Ms. Turner that liability for the accident should not be admitted because Mr. Knight might have been contributorily negligent, based on Ms. Joe's second version of events. Mr. Bajpai also advised that Mr. Knight's potential contributory ***negligence*** for failing to wear a seat belt should be pursued.

**12**  Mr. Bajpai says that, on December 7, 2005, he informed the plaintiff by telephone that he needed to meet with her to prepare for her examination for discovery, which had been set for February 1, 2006. He says he told Ms. Joe that he needed to discuss her recollection of the motor vehicle accident; she told him there was no need to do so because she had told him about it already and he told Ms. Joe that she had (in effect) given him two different versions.

**13**  It is difficult to determine the plaintiff's version of the telephone conversation described by Mr. Bajpai as having occurred on December 7, 2005. But Ms. Joe does say that she repeated to Mr. Bajpai essentially the same thing that she had already told him. Ms. Joe also states that, in one or more of these telephone conversations, Mr. Bajpai scolded her for paying the traffic ticket, but Mr. Bajpai denies this. The plaintiff deposed further that she felt alright with accepting total fault for the accident, because her car was in the pathway of Mr. Knight's vehicle, when his car collided with hers. The thrust of the plaintiff's evidence was that she may not have used the same words each time in describing her actions just before the collision, but that she believed her descriptions were essentially the same. She insisted that she had always stated she had come to a full stop at the stop sign, and then had to edge out forward to see if any traffic was approaching.

**14**  Mr. Bajpai admits that he did ask the plaintiff why she had paid the traffic ticket if she had stopped at the stop sign, but denies being critical of her for doing so.

**15**  Ms. Turner deposes that she had telephone conversations with Ms. Joe on January 11 and January 17, 2006. She says that, during these conversations, Ms. Joe complained that it was "unfair" to deny liability on her behalf, she was upset at Mr. Bajpai for asking her why she had paid the traffic ticket, and she told Ms. Turner that "she was not going to change her testimony." Ms. Turner also states that Ms. Joe "again described in detail how the accident occurred."

**16**  The plaintiff's version of her telephone discussions with Ms. Turner is somewhat different, but she seems to agree that these topics were discussed.

**17**  The next significant event is the plaintiff's meeting with Mr. Bajpai on January 30, 2006, for the purpose of preparing for the examination for discovery. At that meeting, Mr. Bajpai asked a number of questions about the plaintiff's employment history, which the plaintiff was reluctant to answer and did not answer. The plaintiff alleges that Mr. Bajpai wanted to revisit the question of how the accident occurred, and that she told Mr. Bajpai that she would not change her testimony. She states that Mr. Bajpai told her that she had to answer his questions, or I.C.B.C. might refuse insurance coverage for Mr. Knight's claim. She states that Mr. Bajpai asked her if she knew Mr. Knight (the other driver), and that she believed that Mr. Bajpai was thereby accusing her of conspiring with Mr. Knight to enable him to make a fraudulent claim.

**18**  Mr. Bajpai denies that he told the plaintiff that she had to answer his questions or she might be in breach of her insurance coverage. He admits that Ms. Joe accused him of trying to change her story. He admits he asked the plaintiff if she knew Mr. Knight, and says that he did so because he became suspicious of the plaintiff's insistence that she was totally at fault for the accident. It is agreed that the meeting did not last very long, and that the plaintiff walked out. Mr. Bajpai's only note of the content of their conversation was: "Won't give me info on her background."

**19**  On January 30, 2006, after his meeting with the plaintiff, Mr. Bajpai telephoned Renay Turner and told her about the abortive meeting. Ms. Turner told Mr. Bajpai that she would speak to Ms. Joe.

**20**  On January 30 or 31, 2006, Ms. Turner spoke to the plaintiff by telephone. Ms. Turner states that she told Ms. Joe that she had a duty to cooperate as an insured and to answer Mr. Bajpai's questions. She said she told the plaintiff that she would be sending her a letter informing her that she would have to cooperate because the failure to cooperate could be a breach of her insurance contract. Ms. Turner states that the plaintiff was upset about Mr. Bajpai asking her why she had paid the traffic ticket, and about liability for the accident being denied on her behalf.

**21**  The plaintiff's account of her telephone discussion with Ms. Turner differs in some respects. Ms. Joe agrees that she was told about having a duty to cooperate and that Ms. Turner would be sending her a letter concerning a potential breach of her insurance contract. The plaintiff states that Ms. Turner put these matters in stronger terms, which she took to be a threat that she would have to comply, or she would have to pay Mr. Knight's claim herself. Ms. Joe also says that she believed Ms. Turner was accusing her of fraud.

**22**  On January 31, 2006, the plaintiff called the defendant law firm and discussed her concerns with Mr. Shook. She complained about the conduct of Mr. Bajpai, and Mr. Shook said that he would look into her concerns. Mr. Shook spoke to Mr. Bajpai, and on February 2, 2006, Mr. Bajpai wrote a letter to the plaintiff. In that letter, Mr. Bajpai acknowledges the plaintiff's belief that he was trying to influence her version of how the motor vehicle accident occurred, and assured her that he was not trying to do so. He did describe the change that he perceived the plaintiff to have made, in the descriptions of the accident that she gave to him.

**23**  The discovery was cancelled (for an un-stated reason), and was rescheduled for March 1, 2006.

**24**  At or around this time, the plaintiff met with Ron Woiden, a claims manager for I.C.B.C. at Campbell River, and voiced her concerns about the conduct of Mr. Bajpai. She told Mr. Woiden that Mr. Bajpai had threatened to hold her in breach of her insurance policy "if she did not cooperate."

**25**  On February 7, 2006, Ms. Turner directed that a caution letter be prepared and sent to the plaintiff. On February 16, 2006, Ms. Turner settled Mr. Knight's claim, but she inadvertently did nothing to prevent the caution letter being sent to Ms. Joe. That letter, over Ms. Turner's name (but not signed by her), was sent to Ms. Joe on February 16, 2006, by certified mail. The text of that letter was as follows:

We are still investigating this accident. However, there is some indication that you did not meet a condition of your insurance contract. This means I.C.B.C. may not pay for your claims and you may have to repay I.C.B.C. for any payments it makes to others for losses that are your responsibility.

When we have completed our investigation, we will let you know if your autoplan insurance will cover you for losses from this accident.

This letter does not affect any of I.C.B.C.'s legal rights regarding your insurance coverage, or any time limits related to this accident.

**26**  On February 23, 2006, the plaintiff received the letter from Ms. Turner. At a later date not specified, the plaintiff received a letter dated February 21, 2006 from Mr. Bajpai informing her that the case had been settled and that the examination for discovery set for March 1, 2006 had been cancelled.

**27**  On February 23, 2006, Ms. Joe again telephoned Mr. Shook, and told him that she had received the letter from I.C.B.C. stating that she was being investigated for breach of her insurance contract. Mr. Shook told the plaintiff that any potential breach was a matter between herself and I.C.B.C. and that he could not help her in getting a letter from I.C.B.C. stating that her insurance coverage would not be breached.

**28**  On February 23, 2006, Ms. Joe also telephoned Mr. Peavey Brown of I.C.B.C., who was the supervisor for Renay Turner. After speaking to Ms. Joe, Mr. Brown contacted Ms. Turner "and advised her to address the breach issue by arranging to have a letter sent to Ms. Joe." In his notes, Mr. Brown indicated he told Ms. Turner to tell Ms. Joe that she was not being breached. His notes also indicate that Ms. Joe told him that she would sue, if she did not get assurance that she would not be breached.

**29**  On February 28, 2006, Ms. Turner sent a letter to the plaintiff advising that I.C.B.C. had settled the claim of Darren Knight. She said nothing about the breach of coverage issue.

**30**  On March 2, 2006, the plaintiff commenced this action. On March 15, 2006, Ms. Turner sent a letter to Ms. Joe, stating that she was not being held in breach of her insurance policy.

**31**  At the end of the hearing, counsel for the defendants asked for and was granted leave to file further affidavit material to clarify two points of uncertainty in the evidence. That was done. However, Ms. Joe took it upon herself to also file another affidavit, which she believed might answer some of the questions I had asked during the hearing. Ms. Westmacott has quite properly objected to the admission of this affidavit. Accordingly, I looked only at the Police Report of the accident, so as to better understand the occurrence of the collision.

**The Issues**

**Rule 19(24)(a)**

**32**  The first issue is whether the statement of claim discloses any reasonable cause of action.

**The Law**

**33**  Under an application under Rule 19(24)(a) the applicant must show that the action has no chance of success and is certain to fail. In deciding this question, the court must assume that the material facts pleaded in the statement of claim are true. See ***Hunt v. Carey Canada Inc***., *[1990] 2 S.C.R. 959*.

**34**  Rule 19(1) requires that pleadings "must contain a statement in summary form of the material facts on which the party relies."

**Discussion**

**35**  The defendants argue that the statement of claim fails to plead any or any sufficient material facts which, assuming them to be true, could amount to a cause of action for:

1. Breach of the plaintiff's constitutional rights;
2. Intimidation of the plaintiff;
3. Professional misconduct;
4. Breach of trust;
5. Abuse of power; and
6. Conspiracy to suborn the plaintiff to commit perjury.

**36**  In my opinion, the plaintiff has not pleaded any material facts in support of her allegations that the defendants had a constitutional duty to respect her rights under sections 7 and 12 of the ***Charter of Rights***, and that they breached their duty in that respect.

**37**  With respect to the allegation that the defendants infringed the plaintiff's right to freedom of thought, belief, opinion and expression, the only fact pleaded in support of this allegation is the alleged refusal by the defendants "to accept [the plaintiff's] testimony as a statement of fact ... to determine liability under the ***Insurance Liability Act***." If it is assumed that the defendants did not believe the plaintiff's statement as to how the accident occurred, I do not see how that fact could infringe the plaintiff's rights under s. 2(b) of the ***Charter***. Disbelief by the defendants as to the plaintiff's version of events could not infringe the plaintiff's right to freedom of thought, belief or opinion. As to her right to freedom of expression, it is not alleged that the defendants attempted to suppress the plaintiff's statement or prevented her from making it. An allegation that the defendants refused to believe the plaintiff's statement could not (even if proved) amount to an infringement of her right to freedom of expression, in my view.

**38**  There is an additional obstacle to the plaintiff's claims based on the alleged infringement to her constitutional rights. With respect to the claims as against Shook, Wickham, Bishop and Fields, and Mr. Bajpai, they are private parties and the general rule is that the ***Charter of Rights*** does not apply to private litigation. See ***R.W.D.S.U. v. Dolphin Delivery Ltd***., [*[1986] 2 S.C.R. 573*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23CG-00000-00&context=). If the plaintiff had alleged that these defendants were relying on a statute or a regulation to justify an infringement of the plaintiff's constitutional rights, the ***Charter*** could potentially have application, because government action would have been required to create the statute or regulation. But no material facts are alleged in this regard.

**39**  Counsel for the defendants took the position that the court should assume, for the purposes of this application only, that I.C.B.C. should be considered to be a governmental entity, so that, in certain circumstances, the ***Charter of Rights*** would apply to its actions. But there is no allegation in the statement of claim that I.C.B.C. has purported to invoke any statute or regulation (or any rule of the common law) to authorize and justify an infringement of the plaintiff's constitutional right to freedom of expression. Moreover, as I have previously mentioned, the disbelief of an insured's statement of an accident occurrence without more, could not constitute an infringement of this constitutional right.

**40**  I conclude that the statement of claim fails to disclose a reasonable cause of action based on the alleged infringement of the plaintiff's rights under the ***Charter***.

**41**  In my opinion, there are absolutely no material facts pleaded which could, if proved, constitute any cause of action for defamation, professional misconduct, breach of trust or abuse of power. These matters seem to me to be included in or subsumed by the allegations of intimidation and conspiracy, as against Mr. Bajpai and Ms. Turner separately, and together as alleged co-conspirators.

**42**  The essence of the plaintiff's other claims taken at their strongest, is that Mr. Bajpai and Ms. Turner, both alone and together, wrongly tried to make her change her story and make a false statement as to how the accident occurred, by threatening to cancel her insurance coverage for Mr. Knight's claim if she did not comply. Although this content of the alleged intimidation is not made clear in paragraphs 5 and 6 of the statement of claim, I think it is necessarily implied, on a reading of those paragraphs together with paragraph 2. It is apparent from paragraph 5 that the alleged motive for this wrongdoing was "to limit liability in the case of ***Knight v. Joe et al***."

**43**  The statement of claim does not allege that the plaintiff was in fact induced by the conduct of Mr. Bajpai and Ms. Turner to make a false statement. Nor is it alleged that the plaintiff suffered loss or damage as a consequence of the conduct of these defendants. Moreover, there are no material facts pleaded to establish the essential elements of the tort of conspiracy to injure. But there is an outline of the nature of the alleged wrongdoing, including the content and purpose of the alleged conspiracy. In these circumstances, I think it is arguable that the statement of claim could be amended so as to allege a cause of action for conspiracy to suborn perjury.

**Rule 19(24)(b) and (d)**

**44**  The defendants also argue that the statement of claim should be struck out (in whole or in part) because it contains pleadings which are "unnecessary, scandalous, frivolous or vexatious." I was referred to the decision of Mr. Justice Romilly in ***Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress***, [*[1999] B.C.J. No. 2160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1HH-00000-00&context=), in particular, paragraph 47.

**45**  As I understand our procedural law, these kinds of complaints about pleadings are generally made where the pleadings do disclose a cause of action, but go far beyond what is necessary or proper to allege. However, I agree with Romilly J. that:

A pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law ....

**46**  It may be said that the pleadings of defamation, professional misconduct, breach of trust and abuse of power are "unnecessary." But I do not think that any Rule 19(24)(b) defects in the statement of claim would justify striking out the statement of claim.

**47**  As to the assertion that the statement of claim is an abuse of process, I reject the submission of the defendants.

**Rule 18(6)**

**48**  Before considering the issue of whether the statement of claim could be properly amended so as to allege a cause of action, I will consider the defendants' application for summary judgment. For the purposes of this application, I will presume that the statement of claim does disclose a cause of action for intimidation and conspiracy to injure, and that all material facts necessary to such claims have been pleaded. The question then becomes whether the affidavit evidence contains facts which, if accepted as true, could support a judgment in favour of the plaintiff.

**Law**

**49**  In order to succeed on this application, the defendants must establish that the plaintiff is "bound to lose" if the action proceeds to trial. In other words, the defendants must show that there is no bona fide triable issue. See ***Serup v. School District No. 57*** [*(1989), 54 B.C.L.R. (2d) 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JTNR-M4PK-00000-00&context=) (C.A.); ***Skybridge Investments Ltd. v. Metro Motors Ltd***. [*2006 BCCA 500*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2R8-00000-00&context=), 61 B.C.L.R. (4d) 241 (at paragraphs 10-13).

**Discussion**

**50**  Nowhere in her evidence does the plaintiff depose that either Mr. Bajpai or Ms. Turner asked her or told her to change her story about how the accident happened. Nor does she assert that if she did not change her story in a certain way, her insurance coverage would be cancelled. I found Ms. Joe's evidence on this issue confusing, to say the least. First, she states that she consistently gave only one version of events, claiming that she had always said that she stopped at the stop sign, and then edged forward to see whether any traffic was coming. She does not say:

I told Mr. Bajpai that I didn't know whether I stopped at the stop sign or not, but he wanted me to change my story to say that I had stopped.

**51**  Mr. Bajpai states that in his first telephone conversation with Ms. Joe (in August), she was uncertain as to whether she had come to a stop at the stop sign, but later (in November) stated clearly that she had stopped. The end result is that there is not even an assertion under oath by the plaintiff that either Mr. Bajpai or Ms. Turner tried to get her to change her story (let alone change her true story to a false one).

**52**  From the plaintiff's affidavit evidence, I infer that she believed that Mr. Bajpai (and perhaps Ms. Turner) was trying to coerce her into changing her story. She seems to believe that Mr. Bajpai's motive was one of self interest, to enable him to "win the case" and (possibly) to gain the respect of his law firm and/or I.C.B.C. The plaintiff appears to believe that Ms. Turner's motive was to save money for I.C.B.C. in paying for Mr. Knight's claim. It is clear that the plaintiff believes that both of these defendants threatened her with the cancellation of her insurance coverage, if she did not change her story in the way she felt they wanted her to. But as mentioned, the plaintiff never identifies what part of her story they wanted her to change, or what they wanted her to change it to. The closest she comes to identifying a reason why these defendants were threatening to cancel her insurance coverage is to say that she would not answer Mr. Bajpai's questions about matters she thought to be irrelevant (namely, the names of former employers). But that has absolutely nothing to do with them wanting her to change her statement about how the accident happened.

**53**  Section 73 of the ***Insurance (Vehicle) Regulation*** requires an insured to cooperate with I.C.B.C. in the investigation, settlement or defence of a claim or action, and provides that I.C.B.C. will not be liable to an insured who, to the prejudice of I.C.B.C., fails to comply with this legal obligation. Section 74.1 gives I.C.B.C. the exclusive conduct and control of the defence of an action for damages brought against an insured, including the power to appoint and instruct counsel to defend the action, to admit liability in whole or in part on behalf of the insured, and to settle the action.

**54**  It was counsel's duty to assess Ms. Joe's statement of how the accident occurred, and to then advise I.C.B.C. as to whether or not liability should be admitted. Under the regulations, I.C.B.C. had the exclusive authority to decide whether liability would be admitted, in whole or in part, on behalf of Ms. Joe. Many cases occur in which I.C.B.C admits 100% liability on behalf of insured drivers who deny they were at fault for the accident. In the present case, there was nothing improper in defence counsel and I.C.B.C. taking the initial position that Mr. Knight was partly at fault for the accident. Mr. Knight had apparently admitted he was not wearing a seat belt. That position was also justified by Ms. Joe's description of her actions, even accepting the statement she claims to have consistently given. But counsel would understandably want to pin down the version of events that she would be giving on discovery, in the circumstances of this case. That could never amount to an attempt to make Ms. Joe deny that she was at fault. It was for counsel to predict what degree of fault should be attributed to her, based on her own statement and the other circumstances surrounding the accident.

**55**  Accordingly, I think that defence counsel appointed to represent Ms. Joe acted quite properly in wanting to review again her statement of how the accident occurred, in light of his perception that she had given two different accounts. In my opinion, Ms. Joe acted unreasonably in refusing to further discuss that matter with him. I think her conduct in that regard would justify Ms. Turner in telling the plaintiff that she was not fulfilling her duty to cooperate with the Corporation. But her refusal or failure to answer questions as to the identity of her former employers would not, in my opinion, justify such a warning. There is no evidence which describes the "questions" of defence counsel that Ms. Turner told the plaintiff she must answer, in their telephone conversation.

**56**  The plaintiff's existing grounds for feeling she had been wronged were amplified when Ms. Turner sent her a letter warning Ms. Joe that she might not be covered by insurance for Mr. Knight's claim. In the context of the present dispute, the letter was defective in the sense that it did not even purport to identify the conduct of the plaintiff which was said to amount to a failure to cooperate. If the plaintiff had been told that she must give a statement to defence counsel about how the accident occurred or risk breach of her insurance coverage, the written warning may have been justified.

**57**  However, it is necessarily implicit in Ms. Turner's evidence that, when she settled Mr. Knight's claim, she had no intention of pursuing any breach of coverage against the plaintiff. The "breach" letter should never have been sent at all.

**58**  I return to the central issue. The plaintiff does not depose to the existence of facts which, directly or by inference, could support the conclusion that any of the defendants wanted the plaintiff to change her story about how the accident occurred, or that they knowingly conveyed that message to her. Even if the statement of claim was amended so as to allege that Mr. Bajpai or Ms. Turner, either individually or together, tried to get the plaintiff to commit perjury by changing her true story to a false one, the plaintiff would be bound to lose at trial. Her beliefs may be genuine, but they do not amount to evidence. Moreover, as I have tried to explain, her stated beliefs do not even go far enough to encompass the material facts which would have to be proved to establish a cause of action for intimidation or for conspiracy to suborn perjury.

**59**  There is another ground upon which the application for summary judgment should succeed, with respect to Renay Turner. Section 30(3) of the ***Insurance Corporation Act*** states as follows:

30(3) No action or other proceeding whatever may be commenced against a person in respect of any Act or omission done in good faith in the administration or carrying out of this Act, regulations or any insurance plan established under any Act.

**60**  The evidence of the plaintiff makes it plain that she believes Ms. Turner was not acting in good faith when she warned the plaintiff about the potential breach of her insurance coverage, and then failed to revoke the warning after settling Mr. Knight's claim. But I do not think the facts deposed to by the plaintiff are capable of supporting a finding that Ms. Turner was not acting in good faith. Moreover, Ms. Turner's evidence supports the conclusion that she was acting in good faith, notwithstanding the sending of the warning letter to the plaintiff after settlement of the claim. I hope Ms. Joe will be able to accept the apology offered so graciously and professionally by Ms. Westmacott during the hearing.

**Disposition**

**61**  In my opinion, no useful purpose would be served in allowing the plaintiff to amend the statement of claim. It is my opinion that most of the possible causes of action fail to disclose any reasonable claim, and those that might be amended so as to allege causes of action for intimidation and conspiracy to suborn perjury are bound to fail. Accordingly, the application of the defendants is granted, the statement of claim is struck out in its entirety and the action is dismissed.

**62**  At the end of argument on the hearing of the defendants' application, I adjourned the plaintiff's application (to compel further and better answers to interrogatories) pending my decision on this application. It follows that the plaintiff's application must be dismissed.

**Costs**

**63**  It appears that Ms. Joe told Mr. Peavey Brown on February 23, 2006, that she would be commencing a law suit, if she did not receive written assurance from I.C.B.C. that her insurance coverage would not be revoked. She had received no such letter when she filed her action on March 2, 2006, and did not receive the letter (which was dated March 15, 2006) until two weeks after commencing her action. She clearly believes that she would not have received this letter from I.C.B.C. had she not brought this action. I am persuaded that her belief is mistaken, but in the circumstances of this case, I would not award costs to the defendants. There will be no costs of this proceeding, including this application, and the application of the plaintiff to compel further and better answers to interrogatories.

D.A. HALFYARD J.

**End of Document**

[***Johannesson v. Wallis, [2016] B.C.J. No. 491***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JBT-WT01-JT42-S16C-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

Master S. Wilson (Sitting as Registrar)

Heard: December 22, 2015; February 16, 2016.

Judgment: March 10, 2016.

Docket: 108970

Registry: Kelowna

**[2016] B.C.J. No. 491** | 2016 BCSC 407

Between Aidan Johannesson, Client, and Kimberly Wallis, Solicitor

(64 paras.)

**Case Summary**

**Legal profession — Barristers and solicitors — Retention of counsel -- retainer — Termination of retainer — Compensation — Measure of compensation — Reasonable charges, reasonably performed — Taxation or assessment of accounts — Application by the client Johannesson for review of a solicitor Wallis' accounts — The account was reduced from $9,285 to $7,800 — The client retained the solicitor in 2015 with respect to the validity of her grandmother's will — The client disputed the hours billed and the solicitor's advice to accept a proposed settlement — The time spent researching was reasonable — The solicitor spent a total of 35 to 40 hours on the file — The solicitor's advice not to pursue the other claims, and to accept a settlement offer, was in the client's best interests — Legal Profession Act, s. 71.**

**Professional responsibility — Self-governing professions — Remuneration — Deposits and retainers — Professions — Legal — Barristers and solicitors — Application by the client Johannesson for review of a solicitor Wallis' accounts — The account was reduced from $9,285 to $7,800 — The client retained the solicitor in 2015 with respect to the validity of her grandmother's will — The client disputed the hours billed and the solicitor's advice to accept a proposed settlement — The time spent researching was reasonable — The solicitor spent a total of 35 to 40 hours on the file — The solicitor's advice not to pursue the other claims, and to accept a settlement offer, was in the client's best interests — Legal Profession Act, s. 71.**

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| Application by the client Johannesson for review of a solicitor Wallis' accounts. The client retained the solicitor in 2015 with respect to the validity of her grandmother's will and her uncle's conduct surrounding the execution of the will. The solicitor met with the client several times, conducted research and wrote and responded to emails and letters. The solicitor claimed that the client terminated the retainer after being advised to accept a settlement offer for one-third of the estate. The client did not want to take the offer. The solicitor claimed that the offer was in the client's best interests, since her bequest in the will was $10,000 and the estate was valued at approximately $300,000. The solicitor sent the client an account totalling legal fees of $9,285, including 49 billable hours and charges for electronic communications. The solicitor conceded that there had been an error with respect to the number of emails sent and received. The client also claimed that the solicitor failed to follow her instructions to pursue three related claims against other persons. The solicitor claimed that the claims were not the best way to proceed, given the possibility of a reasonable settlement. The solicitor's advice was to pursue the argument that the testatrix had lacked testamentary capacity, rather than pursue a claim of undue influence against the uncle. The client claimed that the solicitor spent too much time researching what was a simple case; the solicitor claimed that the legal issues involved were sufficiently complex to warrant the time spent. The solicitor had submitted one account to the client, in the amount of $9,285. Soon after, the client sent a letter terminating the retainer; the client argued that, by refusing to follow her directions, the solicitor had terminated the retainer.  HELD: Application allowed.  The account was reduced to $7,800. The client had clearly and unequivocally terminated the retainer by her letter. The solicitor's time spent researching was reasonable, given that this was a case of average complexity. the solicitor's records did not seem to have been made contemporaneously, leaving some doubt as to their accuracy. The solicitor had spent considerable time, which was reasonably necessary and was authorized by the client. The solicitor spent between 35 and 40 hours on the file. The solicitor's advice not to pursue the other claims was reasonable and in the client's best interests. The solicitor had taken the client from a position where she was entitled to $10,000 under the will, to a settlement for one-third of the estate. The solicitor's advice on the settlement issue had been prudent. Based on a consideration of all factors, an appropriate fee for the solicitor's services was $7,800. |

**Statutes, Regulations and Rules Cited:**

Legal Profession Act, s. 71, s. 71(1), s. 71(2), s. 71(3), s. 71(4), s. 72(1)

Wills, Estates and Succession Act,

**Counsel**

Appearing on her own behalf: A. Johannesson.

Counsel for the Solicitor: S.T. Rule.

**Reasons for Decision**

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| --- |
| **MASTER S. WILSON** |

**Background**

**1**  This is a review of the legal accounts rendered by Kimberly Wallis to Aidan Johannesson, pursuant to the *Legal Profession Act*. Ms. Wallis was retained by Ms. Johannesson to dispute her grandmother's will.

**2**  Ms. Johannesson was referred to Ms. Wallis by a mutual friend. The circumstances of the case for which Ms. Johannesson was consulting with Ms. Wallis were that Ms. Johannesson had concerns about her uncle's conduct surrounding a will executed by her grandmother. The facts relating to the will as I understand them are as set out below.

**3**  Ms. Johannesson's grandmother, Irene Johannesson, had three children - Karl, Brian and Sheri. The client, Ms. Johannesson, was the only child of Karl, who predeceased his mother, Irene. Karl had previously had a power of attorney for Irene. The circumstances of the disputed will were that Brian contacted a notary public, Ms. Leda Kwichak, to draft a new will for Irene Johannesson shortly after Karl died. Ms. Kwichak prepared a new will, which was executed by Irene and witnessed (the "Will"). Under the Will, each grandchild was to receive a gift of $10,000, with the residue to be split equally between Brian and Sheri, the effect of which would be to exclude Karl's branch of the family.

**4**  During the initial meeting that occurred on April 8, 2015, Ms. Johannesson and Ms. Wallis discussed the family background and discussed issues of capacity and undue influence. Ms. Johannesson also expressed a concern about whether she had standing to bring a claim, a matter that Ms. Wallis was not overly concerned about given that Ms. Johannesson was named in the Will (as one of the grandchildren), was likely in the previous will, and would be an intestate heir under the *Wills, Estates and Succession Act*.

**5**  Because of the social connection (I understood that Ms. Johannesson and Ms. Wallis had children at the same school and the referral was through a mutual friend also connected with the school), the formal retainer of Ms. Wallis evolved over the course of a couple of weeks. After the initial meeting, there were communications between the parties and Ms. Wallis' evidence is that she had already spent a significant amount of time before deciding that a formal retainer was appropriate. The retainer agreement was signed on April 28, 2015 (the "Retainer Agreement").

**6**  I will set out three sections of the Retainer Agreement as they are significant in this dispute:

**1. Description of Services**

You have asked us, and we have agreed, to act for you in the matter described below. On April 28, 2015, we discussed the scope of our firm's intended representation. We covered this subject in some detail and considered the nature of our fee arrangement. The purpose of this letter is to summarize and confirm the terms of your engagement of us.

You retain us to represent you to contest the Will of your grandmother.

...

**3. Fees**

The writer's current hourly discounted rate is $210.00 per hour.

While we expect that our fee will be calculated on the basis of our regular hourly rates, we reserve the right to charge more in appropriate cases, such as pressing circumstances, the requirement for work outside normal business hours, exceptionally successful or efficient representation, or special demands on us.

You will be charge GST AND PST on fees and GST on some disbursements.

...

**10. Termination of Legal Services**

You have the right to terminate our services to you upon written notice to us.

Subject to our obligations to you to maintain proper standards of professional conduct, we reserve the right to terminate our services to you for good reasons which include, but are not limited to:

1. if you fail to cooperate with us in any reasonable request;
2. if our continuing to act would be unethical or impractical;
3. if our retainer has not been paid; or
4. if you fail to pay our accounts when rendered.

If you terminate our services or we withdraw, you would only have to pay our fees and expenses up until the time we stopped acting for you.

**7**  Subsequent to the initial meeting, Ms. Wallis considered the underlying facts, conducted some research, had further discussions with Ms. Johannesson, and reviewed a copy of the notary's file documents and then sent a letter on behalf of Ms. Johannesson to Brian's lawyer, Mr. Jay Redmond, after first preparing a draft for Ms. Johannesson's review and approval. There was a series of correspondence back and forth over the course of a couple of months, with Brian initially making a minimal offer and ultimately making an offer on June 17, 2015, that would provide Ms. Johannesson with one-third of the estate. It is around this time that the relationship between Ms. Johannesson and Ms. Wallis deteriorated -- Ms. Wallis considered this last offer to be one that should have been accepted, whereas Ms. Johannesson was not inclined to agree.

**8**  In the result, Ms. Johannesson and Ms. Wallis parted company. Ms. Johannesson then proceeded to represent herself in bringing the claim to conclusion.

**The Client's Concerns**

**9**  I understand Ms. Johannesson's concerns about Ms. Wallis' account to be broken down into three categories:

1. She questions whether 49 billable hours spent on the file;
2. there is a discrepancy between the number of emails billed for and the number of file-related emails for which Ms. Johannesson could account;
3. Ms. Johannesson says that Ms. Wallis failed to follow her instructions to pursue three other related claims:
4. against Leda Kwichak, the notary public who prepared Ms. Johannesson's grandmother's will;
5. a claim against Brian Johannesson regarding his administration of the estate; and
6. a claim of undue influence against Brian Johannesson ought to have been advanced.

**10**  As the hearing progressed, it became clear that Ms. Johannesson had an additional concern, namely whether Ms. Wallis had terminated the retainer.

**Legal Test**

**11**  A review of a lawyer's account is governed by s. 71 of the *Legal Profession Act*. I am required pursuant to s. 71(2) to allow fees, charges and disbursements for services that were reasonably necessary and proper to the conduct of the matter and those services that were authorized or approved by the client, whether or not those services were reasonably necessary. Section 71(3) is to be contrasted with s. 71(2) and provides that I have discretion to allow for fees, charges and disbursements, even if they were unnecessary, if they were reasonably intended to advance the interests of the client at the time the services were provided or the services were requested by the client even though the lawyer thought they were unnecessary. While a written retainer agreement is informative as to the appropriate account in all of the circumstances, it is not necessarily determinative and I have discretion to determine an appropriate fee, regardless of the written agreement between the parties.

**12**  Finally, I am to consider the factors enumerated in s. 71(4) in determining what would be an appropriate fee account. Those factors are well known, and include the complexity or difficulty of the matters involved, the skill, knowledge and character of the lawyer, the amount involved, the time spent, the importance of the matter to the client and, finally, the result obtained.

**Analysis**

**13**  Ms. Johannesson's first two concerns about the account as outlined above are largely inter-related to the extent they relate to the time spent by the solicitor, and I therefore intend to deal with them together rather than individually. I will start with the account that is in issue (only one account was ever issued). The account, which is dated June 21, 2015, lists over one page of services by way of bullet points, but without a breakdown as to the time spent on each item. These bullet points generally reference Ms. Wallis' third party communications but also refer to some drafting. There is then a general descriptor at the end of the account that summarizes work done as follows:

Legal research and review of evidentiary documents; further legal advice given to Ms. Johannesson; negotiating settlement with Jay Redmond for the benefit of the Estate of Irene Margaret Johannesson; and generally all other correspondence and telephone calls from April 08, 2015 to June 21, 2015; and advising and reporting to you herein.

**14**  The account is then calculated as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | TO OUR FEES: | 49 hrs x $350.00/hr = $17,150.00 |  |

Discounted rate as per Retainer Agreement

49 hrs x $210.00/hr = $10,290.00

Courtesy Discount (less $2,000.00)

|  |  |  |
| --- | --- | --- |
| SUBTOTAL | $ 8,290.00 |  |
| GST at 5% | $ 414.50 |  |
| PST at 7% | $ 580.30 |  |
| TOTAL FEES | $ 9,285.80 |  |

**15**  Ms. Wallis' evidence was that she instructed her assistant to post time into a computer-based time recording system, which resulted in a total of 30.85 billable hours being posted. This equates to $6,478.50 based upon the hourly rate in the Retainer Agreement of $210.00. The remaining 18.15 hours were estimated, and will be discussed later.

**16**  Ms. Johannesson takes issue with the recorded time of 30.85 hours and says that Ms. Wallis ought to have been in a position to advance the claim without spending so much time on research. She points to the following time entries as those that were for research:

04/17/15 Review of Notary papers and research 4.00

04/24/15 Research cases on incapacity 3.00

04/24/15 Research of Poyser - incapacity 2.00

04/27/15 Research cases on incapacity 2.00

**17**  Ms. Wallis says that the strength of the case comes from detailed research up front in order to present the case in the best possible light, including advancing strong arguments with a view to persuading the opposing party to settle quickly.

**18**  Although Ms. Johannesson was of the view that the case was very strong from the beginning and that not much work ought to have been required, the fact that a client holds a strong belief or conviction as to the merits of the case is not the same as having proven the allegations that would need to be established in order to succeed. A case will often seem to have been simpler with the benefit of hind-sight, but decisions on how to approach a case must be made at the time. I am therefore satisfied that Ms. Wallis spent significant time on Ms. Johannesson's file, even though a lot of it was spent prior to formalizing her retainer with Ms. Johannesson, and that her time was spent in a manner that advanced the case.

**19**  Ms. Johannesson says that she did not receive the notary Ms. Kwichak's file contents until April 22, 2015, and as such the indication on Ms. Wallis' computer based time recording that she spent four hours on April 17, 2015, to "Review of Notary papers and research" cannot be correct.

**20**  Based upon the wording it is clear that Ms. Wallis had the notary Ms. Kwichak's file notes in hand before her first letter was sent to Mr. Redmond, a draft of which was sent to Ms. Johannesson on April 27, 2015.

**21**  On April 28, 2015, Ms. Johannesson sent an email to Mr. McKendrick, the lawyer for Ms. Kwichak, and posed some follow-up questions by which time she clearly had already received at least some parts of Ms. Kwichak's file notes.

**22**  I am unable to conclude that Ms. Wallis had received any portion of the notary's file by April 17, which is the date for which time for research was recorded with reference to those notes. However, it is clear that Ms. Wallis had thoroughly reviewed them by April 27, because her draft letter makes specific references to the notes. I therefore conclude that the solicitor's time records were likely not made contemporaneously and were done at some later time. This does not mean that time was not spent on the various activities indicated, and as I have already said, the letter sent to Mr. Redmond is very detailed and was drafted with the notary's file notes at hand; however, but it does leave me with some uncertainty as to when the records were created and therefore how accurately they were created.

**23**  Ms. Johannesson also questions the recorded time based upon the memorandum that Ms. Wallis prepared relating to her research, and points to the fact that the time recorded refers to research of 'Poyser' on April 24, by which time there had already been seven hours of research posted to the file. Ms. Johannesson says that the first reference to Poyser in the research memorandum is on the first page, which would be inconsistent with Ms. Wallis having spent seven hours researching previously. However, Ms. Wallis was not examined on the question of whether new research was recorded in the memorandum by adding it at the end or if it were inserted at an appropriate location. As such, I do not draw any inference from the form of the memorandum as to the time spent on the research that let to its preparation.

**24**  I turn now to the issue of the electronic communications. Ms. Wallis says she determined the time spent on emails and texts on the basis of 0.15 of an hour for incoming and 0.25 of an hour for outgoing, all calculated after deducting personal or social communications. Based upon the information she had assembled, Ms. Wallis had noted 74 incoming emails (text messages are included in these communications) and 34 outgoing communications. However, subsequent to rendering the account she discovered an error, in that the search that she had undertaken in her computer included the outgoing communications in the number she had believed was only for incoming communications, and as such, the number of 74 captured both incoming and outgoing - there were 34 outgoing and 40 incoming communications for a total of 74. Ms. Johannesson in cross-examination endeavored to make the point that Ms. Wallis had not performed the Microsoft Outlook search functions correctly; however, I am satisfied with Ms. Wallis' explanation of what she did, even if it did not generate the correct answer at the time she did the search.

**25**  In generating her account, Ms. Wallis used the numbers that she subsequently determined were incorrect, but then adjusted her account downwards by $2,000.00, as she considered that the amount for these electronic communications to be too high.

**26**  Ms. Wallis pointed out that there were substantive letters with opposing counsel that are referenced in the bill but are not in the recorded time entries, and that there were a couple of meetings with Ms. Johannesson that took place out of the office and are also not recorded.

**27**  Ms. Johannesson said that when she first met with Ms. Wallis, she was told the first meeting was complimentary. Ms. Wallis agreed to a point, namely, that if Ms. Johannesson did not retain Ms. Wallis, there would be no bill for the meeting. However, Ms. Wallis intended to bill for the first meeting, which included significant detail about the background of the file, if she were retained. Ms. Wallis said that it is not unusual for clients to retain her in what she described as a "loose fashion" and at times an entire file can proceed from start to finish without a written retainer. Ms. Wallis' evidence was that she was implicitly retained subsequent to the first meeting due to the communications between the parties, which was formalized in the Retainer Agreement of a couple of weeks later.

**28**  I do not consider that the subsequent preparation of the Retainer Agreement as being indicative of the fact that any work done prior would not be billed. It is clear to me from the communications between the parties that Ms. Johannesson retained Ms. Wallis following the initial meeting and I do not consider the fact that the written Retainer Agreement was not finalized until after a lot of the legal research had been done as indicative of the fact that all work prior to April 29, 2015, would be for no charge. Ms. Wallis' claim for a fee for her research may have been on more shaky ground had Ms. Johannesson not subsequently formalized her retainer of Ms. Wallis, but that is not a matter I need to consider here.

**29**  In the circumstances, I am satisfied that Ms. Wallis spent significant time, that the time spent was reasonably necessary and that it was authorized by the client. Given that the time records were not made contemporaneously and were posted by Ms. Wallis' assistant at her direction, I am unable to conclude that the posted time entries are an accurate reflection of the time actually spent. This does not necessarily mean that Ms. Wallis spent less time, or that the hours posted are inflated, but rather that I cannot accept that the 30.85 hours posted accurately records the time spent on the enumerated items as set out on the account.

**30**  Ms. Wallis' calculation of the time she spent on electronic communications in the preparation of the account is flawed, a fact she willingly conceded. A number of the communications were very brief - one line - and while Ms. Wallis points to some that were more lengthy and substantive, it is difficult for me to conclude that the average of 0.15 hours per incoming and 0.25 for outgoing electronic communications is anything other than a guess. There were also electronic communications that formed part of Ms. Wallis' calculations when the amount of the bill was determined but ought not to have been, including messages of May 25, 26 and April 27, 2015, the content of which was not file related.

**31**  In all of the circumstances, when adjusting the time claimed for the electronic communications but also considering that there were substantive pieces of correspondence that did not get entered into the time records coupled with some meetings that were not billed, I would conclude that Ms. Wallis spent between 35 and 40 hours working on Ms. Johannesson's file.

**Claim against Leda Kwichak**

**32**  The parties each agree that there were discussions between them as to whether or not a claim should be advanced against the notary who prepared Irene Johannesson's Will. The evidence would suggest that Ms. Johannesson was most anxious to proceed with a claim, whereas Ms. Wallis did not think it prudent. Ms. Wallis says that she specifically told Ms. Johannesson that she was not aware of any case authority to support the proposition that a professional who prepares a will in circumstances whereby it is subsequently determined that the party did not have capacity would be liable. In any event, Ms. Wallis said that she would not be proceeding with a professional ***negligence*** claim as it was outside the scope of her practice. Ms. Johannesson tried to suggest that Ms. Wallis changed her position because Mr. Rule (another lawyer at Ms. Wallis' firm) was concerned about the loss of referrals and that she was not to proceed with such a claim. Ms. Wallis did not agree and said that she was not familiar with Ms. Kwichak prior to this case.

**33**  Ms. Wallis prepared a lengthy list of written questions that she had intended to put to Ms. Kwichak. She said that originally the questions were more aggressive, and that she subsequently revised them to be more polite or conciliatory, the reason for which was that Ms. Kwichak was the key witness in the claim to overturn Irene Johannesson's Will. Ms. Wallis said it made no sense to alienate Ms. Kwichak, thus her amendments to the questions.

**34**  Although the questions were never answered by Ms. Kwichak, I note that they were sent shortly before the termination of the retainer, and it is therefore not surprising that a lengthy list of questions would not yet have been answered.

**35**  Given that Ms. Kwichak prepared the Will, obtaining her evidence was clearly going to be a necessary part of advancing Ms. Johannesson's claim that her grandmother did not have capacity. As such, it was entirely reasonable of Ms. Wallis to prepare questions that focussed on all aspects of the Will, from the initial instructions through to execution.

**36**  I do not accept that Ms. Wallis was retained to make a claim against Ms. Kwichak. Ms. Johannesson agreed that Ms. Wallis had told her that she was not aware of any successful claims against professionals who draft wills that are subsequently set aside for incapacity, but believed that Ms. Wallis was working on it. It is not clear on the evidence as to why Ms. Johannesson would have this impression given that Ms. Wallis had stated that she did not do professional ***negligence*** claims, and it is also clear from the Retainer Agreement that the only matter for which Ms. Wallis was retained was to contest the validity of the Will.

**Claims against Brian Johannesson**

**37**  Ms. Johannesson indicated that she wanted to proceed with a claim for undue influence against her uncle. Ms. Wallis' opinion was that it was not necessary to make those allegations given the strength of the evidence on capacity, and that allegations on undue influence can result in negative cost consequences if they are unproven. Ms. Wallis' opinion was that if the Will was to be set aside for incapacity, it was not necessary to make the additional allegations, the likely effect of which would have been to make the file acrimonious and therefore less likely to resolve favourably or quickly. Ms. Wallis said that the claim for undue influence was an arrow in the quiver that did not need to be used at the outset, a phrase she also used in an email to Ms. Johannesson on the issue.

**38**  This seems to have been a prudent approach, given that the underlying objective was to set aside the Will; in terms of that objective, only one argument needed to succeed and if it could be established that Ms. Johannesson's grandmother did not have capacity to execute the Will, the presence or absence of undue influence would not change the outcome.

**39**  While I accept that Ms. Johannesson was keen to make an allegation of undue influence against her uncle, Brian Johannesson, I do not find that Ms. Wallis failed to follow Ms. Johannesson's instructions to make such a claim; rather, I find that Ms. Wallis' advice was that it was not in Ms. Johannesson's best interests to advance an undue influence claim at that time, and that Ms. Johannesson followed the advice she received from Ms. Wallis in this regard even though she was doing so reluctantly.

**40**  I do not find that Ms. Wallis was retained to challenge Brian Johannesson's administration of Irene Johannesson's estate. There is no reference to such a claim in the Retainer Agreement, and this argument was not advanced with much vigor in the hearing before me. I acknowledge that Ms. Johannesson said that she was subsequently able to make some headway in that regard subsequent to the end of Ms. Wallis' involvement, but that is not relevant here.

**41**  As to the various issues that Ms. Johannesson says that Ms. Wallis failed to pursue on her behalf, I note that Ms. Johannesson comments in a letter to Ms. Wallis at the end of the retainer that cost was an issue. In those circumstances, it would not seem prudent to have proceeded with three additional claims when a claim for lack of capacity was sufficient in order to accomplish the one objective identified in the Retainer Agreement.

**Who Terminated the Retainer?**

**42**  Ms. Johannesson says that she met with Ms. Wallis after receipt of an offer from Brian that Ms. Wallis was recommending be accepted. This meeting did not take place in the office but was during a hike. Ms. Johannesson's evidence was that Ms. Wallis made reference to the term in the Retainer Agreement that would have allowed Ms. Wallis to terminate service for good reason (s. 10 of the Retainer Agreement). Ms. Wallis does not deny that such a conversation may have taken place.

**43**  Ms. Wallis was concerned about Ms. Johannesson turning down an offer that Ms. Wallis considered to be as good as was likely going to be accomplished even if the parties went to Court. She was also concerned that Ms. Johannesson could be exposed to costs consequences if she subsequently lost, especially if an allegation of undue influence were made. Finally, Ms. Wallis was concerned that a trial would be very expensive, regardless of who won.

**44**  Ms. Wallis was alive to the possibility that Ms. Johannesson's instructions were potentially inconsistent, in that she could not expect to get the $10,000 gift to her as a grandchild, which was provided for in the disputed Will, while also arguing that the Will was invalid due to incapacity.

**45**  Ms. Wallis sent a letter to Ms. Johannesson on June 22, 2015, which confirmed Ms. Wallis' opinion that the offer received "represents very close to the best possible outcome in court". Ms. Wallis then goes on to advise as to the cost of proceeding with litigation and the following advice:

If successful you would receive 1/3 of the estate being your share on an intestacy plus some but not necessarily all of your legal expenses. Legal expenses may be ordered out of the estate, thereby reducing your share. If you lose, you will receive the $10,000 gifted to you under the last Will, and may be required to pay some of the other side's legal expenses as well as your own.

In the circumstances this offer represents an excellent settlement and we recommend that you take it.

Ms. Wallis enclosed with that letter the account that is in issue in this assessment.

**46**  The following day, Ms. Wallis recommended that Ms. Johannesson obtain a second opinion and provided the names of five estate litigation lawyers.

**47**  Ms. Wallis then included a draft of a letter setting out what she understood to be Ms. Johannesson's alternative positions that she had proposed to make by way of counter offer. Ms. Johannesson says that she interpreted these letters, when coupled with the account, as her having been terminated by Ms. Wallis.

**48**  Ms. Wallis says that she did not terminate Ms. Johannesson as a client under s. 10 of the Retainer Agreement. Ms. Wallis' evidence was that she was concerned that a good offer might be rejected and she was hoping to persuade Ms. Johannesson to accept it.

**49**  I do not accept that Ms. Wallis terminated the retainer. To the contrary, I view Ms. Wallis' correspondence to Ms. Johannesson to be entirely appropriate and consistent with her continuing to try to represent Ms. Johannesson's best interests. It was prudent of Ms. Wallis to summarize her advice in writing, and it was similarly prudent to recommend a second opinion if, as Ms. Wallis thought, Ms. Johannesson was losing confidence in Ms. Wallis' advice. There is nothing in any of the correspondence from Ms. Wallis to Ms. Johannesson that would support the conclusion that Ms. Wallis had terminated the retainer, which correspondence is wholly consistent with Ms. Wallis' evidence that she was of the view that the offer ought to be accepted and that she was hoping to so persuade Ms. Johannesson.

**50**  I find that the retainer was terminated by Ms. Johannesson by way of her letter dated June 24, 2015, that outlines her concerns in some detail. The penultimate paragraph of the letter states the following:

In any event, two things are true. #1) I can't remotely afford you. #2) Against your recommendation, I am not willing to accept the current offer. I understand that in order to proceed I will need to do so without your representation, so in accordance with our contract I would like to terminate your services.

I will be in to settle my account within the week.

**51**  Ms. Johannesson's letter is unequivocal as to the fact that she is terminating Ms. Wallis' services, and it would make no sense for her to write the above paragraph if she was of the view that the retainer had already been terminated by Ms. Wallis.

**Disposition**

**52**  While Ms. Johannesson took issue with the amount of time spent by Ms. Wallis in conducting research in this matter, there is no basis to conclude that Ms. Wallis provided any services that were not necessary or proper related to the claim Ms. Wallis was retained to advance. Indeed, one of Ms. Johannesson's complaints, to the contrary, was that Ms. Wallis failed to pursue other avenues of attack. As such, in setting an appropriate fee for the work performed by Ms. Wallis in this matter, I need only consider the factors enumerated in s. 71(4) of the *Legal Profession Act*, which provides as follows:

71(4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including

1. the complexity, difficulty or novelty of the issues involved,
2. the skill, specialized knowledge and responsibility required of the lawyer,
3. the lawyer's character and standing in the profession,
4. the amount involved,
5. the time reasonably spent,
6. if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
7. the importance of the matter to the client whose bill is being reviewed, and
8. the result obtained.

**53**  The parties differ as to the complexity and difficulty associated with the claim. Ms. Wallis' view was that the claim for incapacity was not an easy one to make, given that any case in which a professional has prepared the will has its challenges. While Ms. Wallis was of the view that the claim was a strong one, the strength lay not in the fact that an undue influence claim could be brought, but rather that it appeared from a review of the notary's file that Ms. Johannesson's grandmother did not necessarily appreciate her assets and that the effect of the will that she was signing would have been to disinherit one of the three branches of her family.

**54**  On the issue of undue influence, Ms. Wallis' view was that there was no evidence of it, and that a claim for influence that is "undue" will generally succeed in only the most extreme of cases.

**55**  I agree with submissions on behalf of the solicitor that Ms. Johannesson gives little or no credit to the fact that the ground work for what was ultimately a successful resolution on Ms. Johannesson's part was laid by the work undertaken by Ms. Wallis. At the time of Ms. Wallis' retainer, Ms. Johannesson was to receive the $10,000 gift as a grandchild. Over the course of Ms. Wallis' involvement, improved offers were received to the point where Ms. Johannesson was offered one-third of the estate, which would accord with a stirpital distribution. I expect that Ms. Johannesson's opinion that this was a simple and straightforward case is likely coloured by her opinion of her uncle, but I am nevertheless satisfied that this was a matter of at least average complexity or difficulty.

**56**  The skills and specialized knowledge of the solicitor were not in issue. Ms. Wallis was called to the Bar of Ontario and British Columbia in 1994 and practiced in Vancouver until 1997. She then relocated to London, England, and became a lawyer in the U.K., where she practiced from 1999 to 2002. She was then out of the work force until 2009 and obtained her Masters in Law from the University of British Columbia in 2007. She relocated to Kelowna in 2010, since which time her practice has been focused in the wills and estates, estate planning and estate administration area. She has taught a number of courses on those topics and has been asked to teach courses by the Continuing Legal Education Society. The fact that she has taught a number of courses for CLE would vouch for her character and standing in the legal profession.

**57**  The estate in issue was roughly $300,000, at least to Ms. Wallis' knowledge. Ms. Johannesson inferred that additional estate assets may have been recovered. Ultimately, however, Ms. Wallis' work took Ms. Johannesson from the position of receiving $10,000 by way of the gift provided for in the will to one-third of whatever the estate turned out to be.

**58**  I have already reviewed in some detail the time spent by Ms. Wallis in this matter, and concluded that Ms. Wallis spent between 35 and 40 hours working on the file. The retainer agreement provides for an hourly rate of $210 per hour, representing the discount from Ms. Wallis' stated usual rate of $350 per hour. I have no doubt that solicitors of Ms. Wallis' skill and experience charge more than $210 per hour, and as such, I find that the rate as provided in the retainer agreement is reasonable.

**59**  The *Legal Profession Act* requires that I consider the importance of the issue to the client, and there is no doubt that this matter was extremely important from Ms. Johannesson's perspective, a fact that was readily apparent both during her involvement with Ms. Wallis and in her testimony in this review. I am also satisfied that Ms. Wallis' involvement had a significant impact on the final outcome of Ms. Johannesson's claim, even though Ms. Johannesson had terminated Ms. Wallis before a final settlement was effected.

**60**  In consideration of all of the factors in determining a fair fee for Ms. Wallis' work, I am encouraged to undertake a global assessment. Authority for this proposition was found *Davis LLP v. Statham*, [*2013 BCSC 2035*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3YF-00000-00&context=), in the decision of Registrar Sainty, at para. 64:

[64] That being said, it is not my role on a review of a lawyer's bill under the *Act* to undertake a line by line review of the lawyer's time records. I am not to (and do not intend to here) conduct a forensic audit of each minute of time recorded to a file by counsel (see *Fiddes Van Der Flier Law Corp. v. Lamoureux*, [*2005 BCSC 981*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X12X-00000-00&context=), at para. 63 (Master, as Registrar)). It is more appropriate that I take a more global approach (as is indicated by the very wording of s. 71(4) of the *Act* - I am to consider "all of the circumstances", including the time expended; not simply the time expended) in deciding what is the proper amount of fees the Client should pay to the Law Firm in the circumstances of this particular retainer.

**61**  I agree with this approach, and indeed a global approach is inevitable given that the factors that are enumerated under s. 71(4) include both qualitative and quantitative considerations. For the reasons set out earlier, I did not have a lot of confidence in the calculation of the hours spent by the solicitor, which further lends itself to a more global type of approach. The solicitor recognized the weakness in the determination of the hours spent, firstly because she provided for a discount in the original bill before she was aware of the calculation errors related to the electronic communications, and subsequently by way of her evidence at this hearing when those errors were brought to the Court's attention during her direct evidence.

**62**  Based upon my consideration of all of the factors, I find that an appropriate fee for the solicitor's services is $7,800.00. This fee is within the range of what I find to be the time spent multiplied by the agreed upon hourly rate, and is an amount I consider fair having considered the factors under s. 71(4). The disbursements are payable as charged, and the fees and disbursements are subject to all applicable taxes.

**63**  Pursuant to s. 72(1) of the *Legal Profession Act*, I am obligated to award costs of this review to the solicitor if the bill is reduced by less than one sixth and to the client if the bill is reduced by more than one sixth, absent a finding of special circumstances. Subject to something of which I am unaware, I would award the solicitor her costs of this review but only for one of the two days, as much time was taken up with what the solicitor admitted were errors in calculating the time spent on the electronic communications, which errors only came to light at or on the eve of the hearing.

**64**  The parties will have 14 days to notify the registry as to whether they wish to make submissions on the issue of costs, failing which the solicitor will have her costs as set out above.

MASTER S. WILSON

**End of Document**

[***K.A.K. v. British Columbia, [2013] B.C.J. No. 1147***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M0S5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B. Fisher J.

Heard: May 21, 2013.

Judgment: May 31, 2013.

Docket: 05-2992

Registry: Victoria

**[2013] B.C.J. No. 1147** | 2013 BCSC 973

Between K.A.K., K.N.K., C.K., M.K., C.N.K., M.M.K, C.G.K., K.G.K., M.A.K. By Their Litigation Guardian, The Public Guardian and Trustee of British Columbia, Plaintiffs, and Her Majesty the Queen in Right of the Province of British Columbia, G.K., M.H., Jane Doe and John Doe, Defendants

(40 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Costs — Assessment or fixing of costs — Whether amount fair and reasonable — Particular items — Disbursements — Application by Office of Public Guardian and Trustee ("PGT") to amend order that approved legal fees of plaintiffs' counsel dismissed — Plaintiffs' counsel had been hired by PGT with 35 per cent contingency agreement — After fees approved, PGT objected to charge for legal assistant's work as disbursement and stated 35 per cent fee was too high — Order was not amended; fee was reasonable even when disbursement was taken into account — Factors including plaintiffs' disability and legal complexity supported contingency fee in accordance with original retainer.**

**Legal profession — Barristers and solicitors — Compensation — Contingency agreements — Fair and reasonable — Fees and disbursements — Application by Office of Public Guardian and Trustee ("PGT") to amend order that approved legal fees of plaintiffs' counsel dismissed — Plaintiffs' counsel had been hired by PGT with 35 per cent contingency agreement — After fees approved, PGT objected to charge for legal assistant's work as disbursement and stated 35 per cent fee was too high — Order was not amended; fee was reasonable even when disbursement was taken into account — Factors including plaintiffs' disability and legal complexity supported contingency fee in accordance with original retainer.**

**Professional responsibility — Self-governing professions — Remuneration — Contingency fees — Application by Office of Public Guardian and Trustee ("PGT") to amend order that approved legal fees of plaintiffs' counsel dismissed — Plaintiffs' counsel had been hired by PGT with 35 per cent contingency agreement — After fees approved, PGT objected to charge for legal assistant's work as disbursement and stated 35 per cent fee was too high — Order was not amended; fee was reasonable even when disbursement was taken into account — Factors including plaintiffs' disability and legal complexity supported contingency fee in accordance with original retainer.**

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| Application by the Office of the Public Guardian and Trustee ("PGT") to amend an order that approved the legal fees of the plaintiffs' counsel. The plaintiffs' counsel had been hired by the PGT to represent nine individuals, who were under a disability, for psychological injuries against the Crown. $1,106,000 in damages were obtained in the judgment. The PGT and the plaintiffs' counsel had a 35 per cent contingency agreement. However, after the account of the plaintiffs' counsel was approved by the court and by the PGT's counsel, PGT realized the disbursements included $107,000 for the work of a legal assistant. PGT objected and argued the amount paid for the legal assistant's work should have been taken into account as a fee or income item rather than a third party disbursement. They submitted the 35 per cent contingency fee was too high when this was properly considered. The PGT argued the fee should be reduced from $387,100 to $318,810, which was a 28 per cent payment.  HELD: Application dismissed.  Whether the fee based on a 35 per cent contingency was reasonable was to be assessed on the basis of the revised evidence, including the clarification of the legal assistant's charges of $107,000, and the PGT's different position. The main question was whether the original order expressed the court's manifest intention to approve the fee, now knowing that the $107,000 disbursement was to be paid directly to counsel in addition to the fee. The order was not amended; the fee was reasonable even when the disbursement was taken into account. The plaintiffs' counsel had taken significant risk on the case due to the circumstances of the plaintiffs, their injuries and the legal complexity. The factors supported a contingency fee in accordance with the original retainer. Although the case had a high cost in relation to the damages obtained, the 35 per cent contingency fee of $387,100 was not unreasonable. The legal assistant's fees had from the outset been treated as a disbursement and were to be paid from the from the judgment proceeds, in addition to the contingency fee. The assistant had been required and was properly characterized as a special overhead expense. If the fee had been found unreasonable, there would not have been undue prejudice substantial enough to have prevented the order from being amended. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 13-1(17)

**Counsel**

Counsel for the Public Guardian and Trustee: P.A. Mazzone.

Counsel for Gary Coad and Diana Davison: J.M.P. Firestone.

**Reasons for Judgment**

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| **B. FISHER J.** |

**1**   This is an application by the Office of the Public Guardian and Trustee (the PGT) to amend an entered order approving the legal fees of counsel for the plaintiffs.

**2**  In 2004, the PGT retained Gary Coad as counsel to represent the plaintiffs in an action in ***negligence*** against the Province of British Columbia. Dyan Davison acted as co-counsel. The plaintiffs are either under the age of 19 or under a disability, and the PGT was the Litigation Guardian. The matter was resolved after a 29 day trial on the issue of damages in a decision dated October 18, 2011. I assessed damages in favour of six plaintiffs for a total amount of $988,000. On May 9, 2012, a further $118,000 was awarded for management fees, by consent, increasing the total award to $1,106,000.

**3**  On July 6, 2012, I approved the account of plaintiffs' counsel for a total of $651,292.89, which consisted of $387,100 for legal fees, HST of $46,452, and $217,740.89 for disbursements (including interest). The fee represented a 35% contingency fee agreement between plaintiffs' counsel and the PGT. The order has been entered.

**4**  The PGT did not appear at the hearing on July 6, 2012 but provided a letter from Peter Brown, its solicitor, dated July 4, 2012, stating that he agreed that the proposed fee of 35% plus taxes and disbursements was reasonable given the complexity of the matter, the enormous time and skill involved, and the positive result.

**5**  The disbursements did not include $133,922 that the PGT had paid prior to trial. This was omitted from the material put before the Court due to inadvertence of plaintiffs' counsel. The PGT was unaware of this omission as Mr. Brown thought that the $133,922 was included in the $217,740.89 that was approved.

**6**  The disbursements did include $107,000 for the work of a legal assistant at $35 per hour, which was a term of the original retainer between the PGT and Mr. Coad. Mr. Brown did not realize that the disbursements put before the Court included this amount.

**7**  In September 2012, costs were settled at $265,000. This did not include recovery of the $107,000. There is no issue about this, as the PGT did not instruct, nor did Mr. Coad include this in the settled bill of costs.

**8**  It was after costs were settled and counsel were reconciling the amounts to be paid to each plaintiff that these errors and omissions were discovered by both sides.

**9**  Despite the retainer agreement, the PGT is now of the view that the amount paid for the legal assistant's work should be taken into account as a fee or income item rather than a third party disbursement, and when this is properly considered, the contingency fee at 35% is too high.

**10**  Plaintiffs' counsel applied for an order approving the disbursements of $133,922 and this order was granted by consent on May 21, 2013 at the conclusion of the hearing.

**11**  These reasons address the PGT's application to amend the order of July 6, 2012 to reduce the amount of the approved legal fees.

**Jurisdiction to amend orders**

**12**  The Court is *functus officio* once an order has been entered, but there remains a limited jurisdiction to amend an order after entry.

**13**  Rule 13-1(17) of the *Supreme Court Civil Rules* permits the Court to correct a clerical mistake or an error arising from an accidental slip or omission, or to amend an order to provide for any matter that should have been, but was not adjudicated on. This rule is narrow. It does not permit the Court to amend a substantive finding and it does not permit parties to provide fresh details of matters already before the Court: see *Chand v. Insurance Corporation of British Columbia*, [*2009 BCCA 559*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24PJ-00000-00&context=) at para. 44.

**14**  However, there is inherent jurisdiction to amend an entered order where there has been an error in expressing the manifest intention of the Court and to avoid the perpetration of an injustice. The principle was outlined in *Buschau v. Rogers Communications Inc.*, [*2004 BCCA 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3SV-00000-00&context=). At para. 26, Newbury J.A. (for the Court) referred to this passage from *Paper Machinery Ltd. v J.O. Ross Engineering Corp.* [*[1934] SCR 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X173-00000-00&context=):

The question really is therefore whether there is power in the Court to amend a judgment which has been drawn up and entered. In such a case, the rule followed in England is, we think -- and we see no reason why it should not also be the rule followed by this Court -- that there is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) Where there has been error in expressing the manifest intention of the Court

[emphasis added in *Buschau*; citations omitted]

**15**  In exercising this jurisdiction, the Court should consider if there is evidence that a party has taken an irrevocable step in reliance on the order or would suffer undue prejudice were it corrected: *Buschau* at para. 27. Absent such evidence, the Court may exercise its jurisdiction to correct an order where it is in the interests of justice to do so.

**Application in this case**

**16**  This case presents unusual circumstances due to the Court's overriding jurisdiction to approve legal fees for plaintiffs who are under a legal disability. In order to determine if the order expresses the manifest intention of the Court, I must assess whether the fee based on a 35% contingency is reasonable on the basis of the evidence now before me, which includes additional disbursements of $133,922, clarification of the legal assistant's charges of $107,000, and a different position of the PGT.

**17**  Both sides were mistaken about the evidence that was put before the Court. The PGT did not realize that the $107,000 for the legal assistant's fees was included in the disbursements to be approved but thought that the $133,992 of prior disbursements was included. Mr. Coad did not realize that he had not included the $133,992 of prior disbursements. The $107,000 disbursement was listed in an account that was before the Court, there was evidence about the fact that counsel were required to hire extra assistance to review and organize the large volume of documents, but the Court was not specifically apprised of the disbursement that related to this. In these circumstances, due to errors or omissions of both sides, I did not have before me all of the information on which to assess the reasonableness of the fees.

**18**  I also relied substantially on the fact that the PGT had reviewed the accounts and considered the 35% contingency fee to be reasonable. That position has now changed.

**19**  Both Mr. Mazzone on behalf of the PGT and Mr. Firestone on behalf of plaintiffs' counsel agree that the order in this case may be amended under the Court's inherent jurisdiction. They say that both parties were mistaken about whether the $133,922 disbursement was before the Court and this led the Court to be misinformed; thus its manifest intention is not set out in the order. They also agree that once I determine that I have jurisdiction to amend the order, the entire matter is "opened up" and I can then re-assess the reasonableness of the fee on the basis of the proper information.

**20**  Mr. Mazzone submitted that I may amend the order not only on the basis that it does not express the manifest intention of the Court, but also on the basis that it was obtained by consent on grounds that would invalidate a compromise not contained in the order. He relied on mutual mistake as the ground that would invalidate the PGT's prior consent.

**21**  I have considerable doubt that the mistakes made here are sufficient to render the consent of the PGT invalid; such mistakes must be of material facts common to all parties: see *Buschau* at paras. 28 and 29. In any event, I do not consider my order to have been made by consent. Rather, it was an order made after reviewing the materials before me, which included the opinion of the PGT that the fees and disbursements were reasonable. The PGT neither appeared nor signed the order.

**22**  I also have some doubt, notwithstanding the positions of counsel, that my inherent jurisdiction to amend the July 6, 2012 order allows the entire matter to be opened up. What has really happened is that plaintiffs' counsel has put new evidence before the Court regarding the disbursements of $133,922 that were inadvertently omitted. At the hearing, I concluded that it was not necessary to amend the order to approve these disbursements and instead I made a new order, which was by consent, approving them. Importantly for the purpose of this application, the PGT has changed its position due to its own mistake about the $107,000 disbursement. I think it is questionable whether the omission of the $133,922 of disbursements allows me to amend the order on another basis as proposed by counsel, but I agree that the main question is whether the original order as it stands expresses my manifest intention to approve the 35% contingency fee knowing that the $107,000 disbursement was to be paid directly to counsel in addition to the fee.

**23**  Whether or not I have jurisdiction to amend the order as proposed by the PGT, I would not amend it, as I find the fee to be reasonable even when the $107,000 disbursement is taken into account, and in this sense the order does express my manifest intention.

**The reasonableness of the fee**

**24**  Mr. Brown deposed that had he realized his mistake about the disbursements that were before the Court, he would not have supported plaintiffs' counsel's claim for fees and disbursements. His opinion is that the disbursement for the legal assistant was either part of the law firm's overhead or was income to the firm and is properly considered as such. He calculates the total fee to plaintiffs' counsel as 44.75% if the cost of the legal assistant is part of the fee, which he says is too high and also more than the maximum fee percentage permitted under the Law Society Rules.

**25**  The PGT's position today is that counsel's fee should be reduced from $387,100 to $318,810. This results in a contingency fee of about 28% if the $107,000 is considered as money received by counsel. This would require Mr. Coad and Ms. Davison to repay $68,290 in fees and to adjust the amount of taxes payable.

**26**  Mr. Coad deposed that he had an agreement with the PGT for a fee of 35% and an additional $35 per hour for a legal assistant. He and Ms. Davison are single practitioners who work together on certain cases, and neither of them had staff in place to handle the documentary reviews that were required. Taking on this retainer required them to hire an assistant specifically for this case. Mr. Coad says that neither he nor Ms. Davison would have agreed to take the case without this agreement. In his affidavit, he deposed:

1. I made it very clear to Peter Brown that this was an unusual file given the breadth of the documents and the likelihood that the Plaintiffs may not be of much assistance to our case. I explained to Peter Brown that if we were to do the file, we would require extra help and would have to hire a part time assistant to help us with file management. This assistance would be an extra cost to us and we were not willing to take on this file without the extra help. We were also not willing to pay for this help ourselves because we knew that the file would take up a great deal of our time focus and the remainder of our practices would suffer.
2. If we did not have this special disbursement, our fee would have been eaten up by our increased office overhead.

**27**  The PGT does not dispute that at the outset of the retainer (in January 2004), it agreed with Mr. Coad to a contingency fee of 35% as well as the sum of $35 per hour for the services of a legal assistant, both sums to be paid out of judgment proceeds. It says, however, that the retainer is not binding and at the end of the case is only a factor to take into account.

**28**  I am particularly mindful of the Court's role in approving fees charged to plaintiffs who are infants or under a disability. Regardless of the terms of a retainer, the Court has an overriding jurisdiction to ensure that a contingency fee is reasonable: *MacLeod v. Harrington* [*(1995), 14 BCLR (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2B8-00000-00&context=) (CA). Numerous factors go into such a determination, such as the extent and character of the services rendered; the labour, time and trouble involved; the character and importance of the litigation; the amount involved; the complexity of the case and the degree of skill and experience required; the length of the trial; the extent of the risk (including whether counsel has advanced disbursements); and the results achieved: see *Yule v. Saskatoon (City)* (1955), 16 WWR 305 (QB), aff'd [*17 WWR 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K741-JGBH-B1B3-00000-00&context=) (CA).

**29**  In this case, plaintiffs' counsel took on a significant risk. There were initially nine plaintiffs, all but one who were under a disability. The Crown did not admit liability until three weeks before trial. The trial was lengthy. The damage claims involved psychological injuries that were challenging to prove due to the nature and volume of the evidence. The legal issues were complex; they included issues of divisible or indivisible damages, whether the plaintiffs would have suffered future losses in any event, and whether significant contingencies had to be made to avoid double recovery. Mr. Coad carried a considerable amount of disbursements. All of these factors support a contingency fee in accordance with the original retainer. The only factor that could militate in favour of reducing the fee is the amount of damages recovered. While substantial, the judgment was quite a bit less than the potential amount assessed by counsel.

**30**  This last point was emphasized by the PGT in this application but I note that this is not the view it took in July 2012. In his letter of July 4, 2012, Mr. Brown expressed the view that counsel had obtained a positive result on behalf of their respective clients.

**31**  Mr. Mazzone provided me with a list of cases addressing contingency fees. Most of these involved matters that never went to trial. In *Audet (Guardian ad litem of) v. Bates,* [*[1998] B.C.J. No. 678*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S27W-00000-00&context=) (S.C.), a medical ***negligence*** case, the plaintiff recovered a judgment of over $1.8 million after a relatively short trial (seven and a half actual trial days), and the Court reduced a 35% contingency fee to about 30%. The judge did not think the matter should have attracted the maximum fee of 35%, as he regarded the case as one of moderate complexity and difficulty and the issue a narrow one. In contrast, the case at bar was considerably more difficult in both length and volume and the issues were broad.

**32**  Unquestionably, this case had a high cost in relation to the $1,106,000 obtained in the judgment. However, while on the high end, I cannot conclude that the 35% contingency fee of $387,100 was unreasonable even when the additional $107,000 disbursement is considered.

**33**  The legal assistant's fees were treated right from the start as a disbursement and were to be paid, in addition to the 35% contingency, from the judgment proceeds. Counsel had to hire additional resources to perform work that was necessary for the proper preparation of the case. Mr. Firestone characterized this not as overhead but as a third party disbursement. My view is that it is more properly characterized as a special overhead expense, one that was over and above the firm's general office overhead. And while I agree with Mr. Mazzone that the arrangement has the effect of reducing counsels' expenses, it does so in a somewhat unique situation. It cannot be forgotten that plaintiffs' counsel worked for over seven years to bring this difficult case to trial. Mr. Coad carried the legal assistant's cost throughout and took the risk of receiving no reimbursement and no fee. Additionally, he received no portion of any post-judgment interest and is continuing to work on the case until all judgment proceeds are distributed to the PGT in trust for each plaintiff. There is no question that Mr. Coad and Ms. Davison have devoted a tremendous amount of time, energy and skill to this case on behalf of the plaintiffs.

**Undue prejudice**

**34**  The issue of prejudice must also be considered.

**35**  Plaintiffs' counsel relied on the 2004 retainer agreement with the PGT to take on the case in the first place, and to continue with it for so many years. They also relied on the PGT's approval and the order itself and have received the fees. I am told it would be difficult for counsel to re-pay the $68,290 proposed by the PGT now.

**36**  The PGT's position seems unfair given the long-standing importance of this issue to Mr. Coad and Ms. Davison. The PGT does not refute Mr. Coad's evidence about the importance of this issue to him. He had taken on a significant risk and at one point was personally carrying about $200,000 in disbursements.

**37**  That said, I would not consider this prejudice to be substantial enough to prevent the order from being amended if I had concluded that the fee was unreasonable. Both counsel knew that they were taking the risk of receiving nothing and they also knew that all fees and disbursements were subject to Court approval regardless of the retainer and regardless of the position of the PGT.

**38**  Mr. Firestone submitted that as a matter of public policy, the PGT should not be permitted to repudiate an essential term of a retainer agreement when it acts in the role of client. He says that to permit this will have a chilling effect on the PGT's ability in future to retain counsel to take on difficult cases. I understand the problems this raises but I would not accede to this argument. Regardless of the terms of a retainer, fees will always be subject to review by this Court, and I would not wish to place constraints on the PGT's obligations to act in the best interests of those for whom it acts as litigation guardian.

**Conclusion**

**39**  I do not criticize the PGT for bringing on this application. As Mr. Mazzone said, the PGT was "duty bound" to do so. It candidly acknowledged its mistake and had second thoughts about the wisdom of the retainer agreement that had been made with plaintiffs' counsel. However, for the reasons I have expressed, it is my view that the circumstances do not justify the Court exercising its inherent jurisdiction (assuming it has such jurisdiction in these circumstances) to amend the previously entered order approving counsels' fees.

**40**  Given these circumstances, each party will bear their own costs of this application.

B. FISHER J.

**End of Document**

[***Lau v. Rai, [2007] B.C.J. No. 2578***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21WT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.E. Powers J.

Heard: October 1-5 and November 22-23, 2007.

Judgment: December 3, 2007.

Docket: S042178

Registry: Vancouver

**[2007] B.C.J. No. 2578** | [*2007 BCSC 1746*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X214-00000-00&context=) | [*163 A.C.W.S. (3d) 1074*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X214-00000-00&context=)

Between Yen Ping Lau, Plaintiff, and Gurnek Rai and Manjit Rai, Defendants

(32 paras.)

**Case Summary**

**Damages — For torts — Affecting property — Real property — Trespass — The plaintiffs were awarded $7,243 in damages for trespass to restore the property to its original condition plus $2,000 in aggravated damages as against the defendants, who had damaged the plaintiffs' fence, property and plants while building a retaining wall.**

**Tort law — Trespass — To land — The plaintiffs were awarded $7,243 in damages for trespass to restore the property to its original condition plus $2,000 in aggravated damages as against the defendants, who had damaged the plaintiffs' fence, property and plants while building a retaining wall.**

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| The plaintiffs sought damages from their neighbours, the defendants, for having allegedly damaged their fence, flowerbeds and rose bushes during the construction of a retaining wall -- The plaintiffs claimed that after they had refused permission to encroach on their property, the defendants simply decided to go ahead regardless -- HELD: The plaintiffs were awarded $7,243 in damages for trespass to restore the property, fence and plants, plus $2,000 in aggravated damages -- The court was not satisfied on the balance of probabilities that the defendants intended to pull the fence down -- Based on the engineer's evidence, the lock block procedure was an acceptable method of building a retaining wall -- However, the defendants had committed trespass and the plaintiffs were entitled to the cost to restore the property to its prior condition -- The plaintiffs were awarded $2,000 in aggravated damages to reflect the upset and distress they had suffered as the result of the encroachment and damage to the property -- The court declined to award punitive damages as the defendants had acted reasonably in immediately offering to restore the property to its prior condition. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 57(10)

**Counsel**

Yen Ping Lau: appeared on his own behalf.

Counsel for the defendants: A.J. Roberts.

**Reasons for Judgment**

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| **R.E. POWERS J.** |

**1**   The plaintiff and defendants are neighbours. The plaintiff purchased his home in 1994. The defendant purchased the lot next door sometime in 2002. The defendant began construction of a home on that lot in early 2003. The defendants' lot is slightly lower than the plaintiff's. The defendants' plans called for building his home five feet from the property line, which is the closest it could be located according to the city building by-laws. The defendant needed to excavate for the basement. The excavation occurred close to the plaintiff's property. It became apparent that some form of retaining wall would be necessary to prevent the bank created by the excavation from collapsing. A portion of the bank seemed to be saturated with water.

**2**  The defendant, Gurnek Rai's father was supervising the construction of the house. On May 23, 2003, the defendant's father spoke to the plaintiff's son on the telephone. The son acted as an intermediary for his father. The defendant's father was seeking permission to remove a portion of the fence on the property line to construct the retaining wall. He made it clear that the fence would be replaced. However, the plaintiff made it clear that he did not want the fence removed.

**3**  The defendant's father requested an engineer to attend the site of the excavation on May 23. The engineer indicated that a lock block wall should be put in place to prevent the soil from slipping and it should be backed with gravel. There was still some soil at the toe of the excavation.

**4**  The defendant's father supervised the excavation which occurred on May 24, 2003. The plaintiff was not home at the time. When the plaintiff returned home, the defendant's father approached them and told them that while doing the excavation a portion of the fence had fallen. He assured them, however, that the fence would be repaired. The plaintiff had not seen the fence and thought at the time it was a minor accident and was not concerned. However, almost immediately he viewed the fence from his backyard and saw that two 8 foot panels were missing. The excavation was continuing. He felt that this was much more than a minor accident, and believed that the excavators had intentionally destroyed a portion of the fence. He evidence, and that of his wife and son, is that they could see the excavator actually pulling down portions of the remaining fence.

**5**  The plaintiff, his wife and his son, immediately confronted the workers, demanding that they stop. They were very upset about what had occurred. The defendant's father was at home, approximately one kilometre away, having lunch, and he received a telephone call from the operator of the excavator that there were problems and he should attend the site. The defendant, Gurnek Rai's mother did attend and had a discussion with the plaintiff, his wife and their son. There is a great deal of conflict in the evidence about the nature of that conversation. The police were called by the plaintiff's son. The defendant, Gurnek Rai was called by one of his parents and he and his wife attended the site. The defendant, Gurnek Rai's evidence is that he also asked his wife to call the police. The defendant's father or the operator of the excavator may have shown a plan to the police officer indicating that they were simply following the plans that had been approved by the city. This would have been the plans for the home rather than any plans or directions the engineer had given for construction of the retaining wall.

**6**  Work stopped at that time. This was a Saturday. No work was done on Sunday, and city hall became involved on the Monday. The city building inspectors did attend. They attempted to mediate between the plaintiff and defendants. The defendants wished to remove some additional fence in order to complete the construction of the retaining wall. The plaintiff was not prepared to agree to that.

**7**  The defendant, Gurnek Rai, did prepare a letter of apology which was delivered to the plaintiff through city hall. He made it clear that he was prepared to pay for any damage and restore the plaintiff's property to its original condition. He had made that offer on Saturday, May 23, as well as tendering a post-dated cheque for $500.00 to cover a portion of the cost. The plaintiff doubted the sincerity of this apology. They were upset by the way in which things had already occurred and believed they had been badly treated by the defendants or their family.

**8**  On May 28, the excavation was completed as well as the retaining wall. The retaining wall consists of a number of lock blocks, 2 1/2 feet high by 2 1/2 feet deep by 5 feet long. They were placed 4 high and 8 wide. The retaining wall itself therefore is approximately 10 feet high by 40 feet wide, although the depth of the excavation was actually greater. The gap behind this wall, where the soil had fallen away from the bank, including soil from the plaintiff's property, was filled with gravel. This gravel provided drainage at the back of the wall and held back the soil.

**9**  During the construction of this retaining wall, approximately 40 feet of fence was removed, and a significant amount of soil from the plaintiff's side of the property either collapsed or was removed by the excavation and replaced with gravel. A number of flowerbeds and rose bushes were also destroyed in the process. The plaintiff seeks damages, including aggravated and punitive damages.

**10**  The plaintiff's position is that the defendants decided to build their retaining wall in the cheapest way possible and in such a manner as to allow them to build their house as close to the property line as the city by-laws allow. The plaintiff argues that when he refused permission to encroach on his property, the defendants simply decided to go ahead in any event. He argues that the defendants had their excavator intentionally tear down portions of the fence. He argues it was only when he and his wife and son confronted the defendants' workers and called the police that they were able to get the work stopped.

**11**  The defendants' position is that they were proceeding in a reasonable fashion. The excavation did come to the property line, but the plan, as approved by their engineer was to place lock blocks near the bank with gravel filling the space between the bank and the lock blocks. This would hold the soil in place while they continued with the construction of their home. Their evidence is that when they began removing soil for this purpose, the bank simply gave way, taking some of the soil from the plaintiff's property and falling onto their property and some of the fence being undercut and falling in. Their intention was to place the lock blocks as soon as possible in order to prevent any further subsidence.

**12**  I have listened carefully to the evidence of all of the parties and reviewed the photographs. I am not satisfied on the balance of probabilities that the defendants intentionally pulled the fence down. It may have appeared that way to the plaintiff when portions of the fence which had been undercut were taken down by the excavator. However, the excavator's evidence was clear that he did not intentionally tear down any portion of the fence.

**13**  The defendants did retain an engineer to give them advice as to how to proceed once the subsidence occurred. The engineer recommended the placement of the lock blocks and gravel backing. The engineer noted that the soil was of fairly high moisture content where it had subsided and was concerned that the retaining wall be put into place as soon as possible. This resulted in the blocks being placed closer to the plaintiff's property line or just on the plaintiff's property line than originally anticipated. I am not satisfied that the defendants proceeded in this fashion intentionally for the purposes of making it easier to construct their house within 5 feet of the property line. The placing of gravel behind the lock blocks has aided in the drainage of any moisture that may accumulate against the retaining wall from the plaintiff's property as well as any seepage that may have passed through the defendants' property from other locations.

**14**  The plaintiff argues that the defendants could have proceeded by building a cast in place concrete retaining wall instead of lock blocks. This would have been more expensive and time consuming. Therefore the plaintiff argues that the defendants simply chose the cheapest and quickest way of proceeding at the expense of the plaintiff's property. However, I am satisfied, based on the engineer's evidence that the lock block procedure was an acceptable method of building a retaining wall. In addition, once the initial subsidence occurred, it was the most reasonable way to proceed, given the need to proceed quickly. There was the danger of further subsidence if there were heavy rains.

**15**  There is a great deal of conflict between the parties about what actually occurred on the Saturday afternoon that the slippage occurred. The plaintiff and his family were obviously upset about what had occurred. The defendant's mother alleges that the plaintiff's son was yelling obscenities, that he was hysterical and that he even attempted to hit her, having to be restrained by his father and the operator of the excavator. The operator of the excavator did not remember this. The plaintiff denied that this occurred. The plaintiff claims that the defendant, Mr. Rai attended and when the plaintiff's son pointed his finger at him, Mr. Rai threatened to break his finger. Mr. Rai is much bigger. The plaintiff's wife alleges that Mr. Rai was pulling up his sleeves and coming towards her son as if he were going to beat him up. The plaintiff's son said that he was told his finger would be broken and when he said that he would sue the defendant, he was told that this was not the United States and the laws of Canada did not apply to him. The plaintiff also says that the defendant's wife said that she would not speak to them because they were uneducated. This is part of the treatment that the plaintiff says that upset them so much. The defendants deny that these events occurred.

**16**  The only thing that I can say is that the plaintiff and his family were obviously very upset; they continued to be upset when the defendants' first engineer attended at their residence to try and explain what repairs would be done and that there would be no permanent damage to their property. This engineer's evidence was that the plaintiff and his family were so upset, that he decided not to continue to be involved whatsoever. The plaintiff told him that he and everyone else would be sued and he simply decided that it was not worth his trouble to be involved.

**17**  The plaintiff represented himself. He is not trained in the law, but he is a very intelligent and well educated man. His wife and son are also intelligent and well educated. I believe that he and his wife and son overreacted to what had occurred, but I understand why. He explained to me of the difficulty that he and his family had while he and his family lived in mainland China and before moving to Hong Kong and then eventually to Canada. On two occasions he and his family lost basically everything they had during the initial communist revolution and then subsequently during the period of the red guards. One of the reasons he and his family moved to Canada, and view it as a good place to live, is the fact that people's rights are respected and enforced by the law, particularly their rights to their property.

**18**  I found the defendants to be credible witnesses. They gave their evidence in a straightforward manner. I had more difficulty with the defendant's mother and father. The defendant's mother's evidence about what occurred on the Saturday afternoon when the bank collapsed was not corroborated by the excavator operator. The excavator operator, in my opinion, gave his evidence in an honest and straightforward manner.

**19**  The defendant's father denied speaking to the plaintiff's son on the evening of May 23. The defendant's mother had left a note with the plaintiff to have their son call to discuss the possibility of removing a portion of the fence to construct the retaining wall. The plaintiff's evidence is clear and his son's evidence is clear that they did call and denied permission. There is no reason for them to fabricate this evidence. The defendant's father also said that he did not place any gravel on the plaintiff's property. The photographs however make it clear that the lock blocks were placed almost right up to, if not on the property line. The subsidence of soil occurred on the plaintiff's side of the property line and required that the lose soil be removed and the gap between the lock block and the remaining soil be back filled with gravel. The notices to admit include an admission that the fence runs on the property line. The photographs in Exhibit 1 and 2 that the gravel was placed on the plaintiff's side of the property line. It was suggested that perhaps the defendant's father did not understand the questions. In any event it reduces the weight that I can place on his evidence.

**20**  I find that the defendants have commit trespass on the plaintiff's property. Actionable trespass occurs when a party enters onto lands without the permission of the occupier. (Linden, Allen M., ***Canadian Tort Law*** 7th ed. (Toronto: Butterworths, 2001) at 639.) It does not depend upon fault, ***negligence*** or consequential damage. (Klar, Linden et al. ***Remedies in Tort*** at 23-11.) The defendants acknowledge that they committed trespass on the plaintiff's property when their actions resulted in the subsidence of the plaintiff's property and subsequent encroachment in order to build a retaining wall.

**21**  The damages for this trespass can fall into two categories: compensatory and punitive. Compensatory damages compensate a plaintiff for losses that can be identified and punitive damages are awarded above and beyond that in order to discourage a defendant and others from high handed conduct that is contemptuous of the plaintiff's rights. (***Rogers v. Landmark***, [*[2000] B.C.J. No. 419*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X023-00000-00&context=) (B.C.S.C.) (Q.L.) at para. 81.)

**22**  The plaintiff is entitled to damages which will allow him to put his property back into the condition that it was before. This includes replacement of the fence and the flower beds and plants which were destroyed. The entire length of the fence along the property line is approximately 90 feet. Approximately 42 feet was taken down. However, I am satisfied that the 90 feet of fence should be replaced so that it is consistent throughout. The defendants should not simply replace a portion of the fence leaving a patchwork. The plaintiff is also entitled to whatever it costs to have the flower beds restored to their prior condition. Exhibit 5 was an estimate that the plaintiff received for repairing the fence. That estimate however includes the 50 feet of side fence which was not affected. The defendants are not responsible for the replacement of that fence. The estimate consists of the following:

|  |  |  |  |
| --- | --- | --- | --- |
|  | 1. Building Fences 92 ft. (8x6) |  |  |
|  | 92 ft at $15.80 per sq. ft. | $1,453.60 |  |
|  | a. Column 13 pcs. at $12/pc. | $ 156.00 |  |
|  | b. Cement, stone 680 kg | $ 360.00 |  |
|  | c. Other things, nails iron stock etc. | $ 235.00 |  |
|  | d. Labour cost 48 hours at $18/hr | $ 864.00 |  |
|  | e. Add top soil and flower bed | $1,400.00 |  |
|  |  | --------- |  |
|  | Total: | $4,468.60 |  |

They also included something for painting 192 feet of fence. I assume that is one side of the 92 feet and both sides of the 50 foot fence. The total amount was $2,016.00 and a reasonable amount would be approximately one-half of that, being two coats on the 92 foot fence on one side. Therefore I will allow $1,000.00 for painting. The total for supplies is $5,468.60 plus 6% GST $328.12 equals $5,796.72.

**23**  There were some additional estimates about the cost of rebuilding the fence in 2006, but I think it is more appropriate to use the current estimates.

**24**  In addition, there should be some allowance for plants. An estimate, Exhibit 6, was obtained from M.Z. Landscape Design Ltd. which included the following for plants:

|  |  |  |  |
| --- | --- | --- | --- |
|  | 15 carpet pink roses | $ 375.00 |  |
|  | 4 red roses | $ 100.00 |  |
|  | 1 white roses | $ 25.00 |  |
|  | 2 yellow roses | $ 50.00 |  |
|  | 4 dahlias | $ 40.00 |  |
|  | 50 tulips | $ 50.00 |  |
|  | Labour | $ 540.00 |  |
|  | Delivery | $ 100.00 |  |
|  | Subtotal | $1,280.00 |  |
|  | GST (6%) | $ 76.80 |  |
|  | PST (7%) | $ 89.60 |  |
|  |  | --------- |  |
|  | Total: | $1,446.40 |  |

**25**  I am satisfied that those are reasonable amounts for restoring the property to its original condition. In addition, some amount should be allowed for aggravated damages. This is to reflect the upset and distress that the plaintiff suffered as a result of the damage and encroachment to his property. I fix that amount at $2,000.00. I have not allowed anything for the plaintiff's wife or son may have experienced. They are not plaintiffs in this action.

**26**  In addition, it is my view that the plaintiff's son's reaction was wholly out of proportion to what had occurred. Even during the trial when he gave his evidence, he broke down crying. His reaction is not reasonable.

**27**  The plaintiff believes that part of the general damages should be approximately $50,000.00. He calculated this by estimating the number of times an excavator would have had to encroach on his property both for removal of soil and replacement of gravel. He estimated 256 at $200.00 in damages per trespass. I find that that would not be appropriate way to assess damages. This was essentially one trespass, not 256. In any event, it is the cost of restoring the plaintiff's property to its original condition that is a better measure of the damages rather than some artificial calculation based on the number of times the excavator may have encroached on to the plaintiff's property.

**28**  I do not award anything for punitive damages. I accept that the defendants were acting reasonably when they immediately offered to be responsible for restoring the plaintiff's property to its original condition. They provided a letter of apology which was delivered through city hall, who was also trying to mediate this dispute. I am satisfied that they were willing to pay reasonable compensation to restore the plaintiff's property to its original condition. The parties may have disagreed as to what was reasonable, but I am satisfied the defendants were genuine in their efforts to try and resolve the dispute. I am also satisfied that the defendants did not simply ignore the plaintiff's wishes and encroach on their property in order to save money or to allow them to improve their view from their home by building closer to the plaintiff's property.

**29**  The action was originally commenced in small claims court when the plaintiff was representing himself. The defendants were represented by counsel and when matters were not resolved, the plaintiff's sought advice of legal counsel. On the advice of legal counsel, the matter was raised to Supreme Court. The amounts allowed are $5,796.72 and $1,446.40 to restore the property equals $7,243.12. I have also allowed an additional $2,000.00 by way of aggravated damages for a total of $9,243.12.

**30**  The plaintiff is also entitled to court ordered interest at the registrar's rates from May 28, 2006.

**31**  The parties will have to do a calculation to determine whether the total including interest is within the monetary jurisdiction of the small claims court at the time the matter was raised to Supreme Court. If it was, some argument may be necessary under Rule 57(10) of the ***Rules of Court*** which provides:

A plaintiff who recovers his sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceedings into the Supreme Court and so orders.

If the amount out loud exceeds the monetary jurisdiction of the Provincial Court at that time, and there are no other matters that affect the issue of costs, then the plaintiff would have his costs on scale A, on the basis that this was a matter of little or less than ordinary difficulty.

**32**  The parties are at liberty to bring the matter back before me on the issue of costs if either of them wishes to seek an order with regard to costs on different terms. I would hope that does not become necessary.

R.E. POWERS J.

**End of Document**

[***Leihl v. Sangha, [2007] B.C.J. No. 887***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24BK-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Master Caldwell

Heard: January 12, 2007.

Judgment: May 1, 2007.

New Westminster Registry No. M87463

**[2007] B.C.J. No. 887** | [*2007 BCSC 602*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X244-00000-00&context=) | [*[2007] I.L.R. I-4592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X244-00000-00&context=) | [*157 A.C.W.S. (3d) 292*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X244-00000-00&context=)

Between Mohinder Singh Leihl, Plaintiff, and Kashmir Sangha, Rajbir Singh Sangha, Kamaljit Kaur Leihl, and Enterprise Leasing Company dba Enterprise Rent-A-Car, Defendants, and Kamaljit Kaur Leihl, Kashmir Sangha and Rajbir Singh Sangha, Third Parties

(26 paras.)

**Case Summary**

**Civil procedure — Actions — Joinder of causes of action and consolidation — Application by third party defendants to try three actions together under one case management judge dismissed — There was no clear reason that the matters must be heard at the same time.**

|  |
| --- |
| Application by third party defendants to try three actions together under one case management judge -- Vehicle A, driven by Kamaljit collided with vehicle B driven by Rajbir -- Jagdev and Mohinder were passengers in vehicle A -- Jagdev sued everyone except Mohinder, alleging certain injuries -- Mohinder sued everyone excluding Jagdev -- Kamaljit sued everyone associated with vehicle B -- Liability was denied throughout, with each driver pointing at the other as being liable for the motor vehicle accident -- The parties agreed to accept the liability ruling as between the two drivers -- HELD: Application dismissed -- There was no clear reason that the matters must be heard at the same time -- There was little if anything to be gained in terms of court time or process -- There was no danger of inconsistent findings especially with the admission that they would all accept the liability finding as between the drivers -- At best, the application was premature. |

**Statutes, Regulations and Rules Cited:**

Rules of Court, Rule 18A

**Counsel**

Counsel for the Plaintiff, Mohinder Singh Leihl: D.N. Robinson.

Counsel for the Plaintiff, Kamaljit Kaur Leihl (Action Number M87465): B. Rana.

Counsel for the Defendants and Third Parties, Kashmir Sangha, Rajbir Singh Sangha and Enterprise Leasing Company: R.G. Boswall.

Counsel for the Defendant, Kamaljit Kaur Leihl: C. Goldin.

REASONS FOR JUDGMENT

|  |
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| **MASTER CALDWELL** |

**1**   This is an application, brought by the defendants/third parties, Kashmir Sangha, Rajbir Singh Sangha, and Enterprise Leasing Company dba Enterprise Rent-A-Car, for:

1. the within action and Action Nos. M87465 and M87461 be tried at the same time, subject to the direction of the Trial judge;
2. one Case Management Judge be appointed for all aspects of New Westminster Supreme Court Registry Action Nos. M87465, M87463, and M87461; and
3. the Defendants and Third Parties, Rajbir Singh Sangha, Kashmir Sangha and Enterprise Leasing Company dba Enterprise Rent-A-Car be awarded costs in the cause.

**Facts**

**2**  On September 7, 2002, Rajbir Singh Sangha ("Rajbir") was driving a vehicle owned by Enterprise Leasing Company ("Enterprise") and rented to Kashmir Sangha ("Kashmir"). Rajbir proceeded northbound on Knight Street in Vancouver before turning left at the 60th Avenue intersection, where his vehicle collided with a southbound vehicle driven by Kamaljit Leihl ("Kamaljit"). Kamaljit's mother, Jagdev Leihl ("Jagdev") and her father, Mohinder Leihl ("Mohinder") were passengers in the Leihl vehicle. Jagdev owned the Leihl vehicle.

**3**  The accident was witnessed by Tejpal Sangha, who was a passenger in the Enterprise vehicle, and Ravinderjit Shergill, another driver.

**4**  Rajbir and Tejpal Sangha reside in the state of Washington.

**5**  Jagdev, Mohinder and Kamaljit have each commenced separate actions against Rajbir, Kashmir and Enterprise. In each action, these defendants have alleged that the Kamaljit was at fault for the accident. In the Jagdev and Mohinder actions, these defendants have alleged that Jagdev and Mohinder were contributorily negligent for failing to wear seatbelts.

**6**  Some of the key liability facts in contention are:

1. whether Kamaljit pulled out and changed lanes from behind a vehicle stopped in the middle of three southbound lanes just before the intersection of Knight Street and 60th Avenue; and
2. whether Kamaljit Leihl, travelling in the southbound curb lane, passed stopped vehicles in the two lanes to her left as she entered the intersection of Knight Street and 60th Avenue.

**7**  The eye witness Ravinderjit Shergill has provided a statement affirming the positive of the facts set out in paragraphs 2.5(a) and (b). Rajbir has provided examination for discovery testimony affirming the positive of 2.5(b).

**8**  Kamaljit provided discovery testimony indicating the negative of the facts set out in paragraph 2.5(a) and (b). Jagdev and Mohinder have provided affidavit evidence affirming the negative of paragraph 2.5(a).

**The Jagdev Action**

**9**  Jagdev is represented by David Robinson. Jagdev commenced BC Supreme Court New Westminster Registry Action No. M87461 (the "Jagdev Action") on July 27, 2004 and is claiming damages for bodily injury and other losses from,

1. Rajbir (defended by Glen Boswall);
2. Kashmir (defended by Glen Boswall);
3. Kamaljit (defended by Kari Goldin); and
4. Enterprise (defended by William Fritz then Glen Boswall).

**10**  Regarding third party proceedings,

1. Rajbir and Kashmir issued third party proceedings against Kamaljit; and
2. Enterprise issued third party proceedings against Rajbir and Kashmir but discontinued those proceedings when Glen Boswall took over the defence of Enterprise.

**11**  Regarding examinations for discovery,

1. Kamaljit was examined on December 21, 2005;
2. Rajbir was examined on December 21, 2005;
3. Jagdev was examined on December 21, 2005, April 24, 2006 and June 19, 2006.

**12**  Counsel for Rajbir, Kashmir and Enterprise have been unable to get available dates from plaintiff counsel for Kamaljit to complete the discovery of Kamaljit.

**13**  Regarding trial, the possible dates begin in,

1. January, 2008;
2. February, 2008;
3. January, 2009; or
4. February, 2009.

**The Mohinder Action**

**14**  Mohinder is represented by David Robinson. Mohinder commenced BC Supreme Court New Westminster Registry Action No. M87463 (the "Mohinder Action") on July 27, 2004 and is claiming damages for bodily injury and other losses from:

1. Rajbir (defended by Glen Boswall);
2. Kashmir (defended by Glen Boswall);
3. Kamaljit (defended by Kari Goldin); and
4. Enterprise (defended by William Fritz then Glen Boswall).

**15**  Regarding third party proceedings,

1. Rajbir and Kashmir issued third party proceedings against Kamaljit; and
2. Enterprise issued third party proceedings against Rajbir and Kashmir but discontinued those proceedings when Glen Boswall took over the defence of Enterprise.

**16**  Regarding examinations for discovery,

1. Kamaljit was examined on December 21, 2005;
2. Rajbir was examined on December 21, 2005.
3. Mohinder was examined on April 18, 2006.

**17**  Counsel for Rajbir, Kashmir and Enterprise have been unable to get available examination dates from plaintiff counsel for Kamaljit to complete the discovery of Kamaljit.

**18**  Regarding trial, the possible dates begin in,

1. January, 2008;
2. February, 2008;
3. January, 2009; or
4. February, 2009.

**The Kamaljit Action**

**19**  As a plaintiff, Kamaljit is represented by Bableen Rana. Kamaljit commenced BC Supreme Court New Westminster Registry Action No. M87465 (the "Kamaljit Action") on July 27, 2004, claiming damages for bodily injury and other losses. The following persons are defendants or third parties or both.

1. Rajbir (defended by Glen Boswall);
2. Kashmir (defended by Glen Boswall); and
3. Enterprise (defended by William Fritz then Glen Boswall).

**20**  Enterprise issued third party proceedings against Rajbir and Kashmir but discontinued those proceedings when Glen Boswall took over the defence of Enterprise.

**21**  Regarding examination for discovery,

1. Rajbir was examined by on December 21, 2005 but it appears this was only done officially in the Jagdev and Mohinder actions;
2. Kamaljit was discovered by Bill Fritz who had taken out an appointment in the Kamaljit action; and
3. counsel for Rajbir, Kashmir and Enterprise has been unsuccessful in getting available dates from plaintiff counsel for Kamaljit to complete the discovery of Kamaljit.

**22**  Regarding trial, counsel for Rajbir, Kashmir and Enterprise has been unsuccessful in getting available dates from plaintiff counsel for Kamaljit.

**23**  In a nutshell, vehicle A, driven by Kamaljit collided with vehicle B driven by Rajbir. Jagdev and Mohinder were passengers in vehicle A. Jagdev has sued everyone except Mohinder, alleging certain injuries. Mohinder has sued everyone excluding Jagdev injuries different from Jagdev's injuries. Kamaljit has sued everyone associated with vehicle B. Liability is denied throughout, with each driver pointing at the other as being liable for the motor vehicle accident. Although liability is also denied in the Jagdev action and the Mohinder action, they were passengers and the essential issue relates more to the contributory ***negligence*** regarding seatbelts and the like; one of the drivers will be found liable for the collision or there will be apportionment of liability as between the drivers. Jagdev and Mohinder have agreed to accept the findings of liability, as between the drivers, as found in the Kamaljit action.

**24**  The only common issue involved in these three actions is that they arise from the same motor vehicle accident. Primary liability is to be determined as between the two drivers; the liability issue regarding the plaintiff in the other two actions is completely distinct from that finding. Those two plaintiffs have agreed to be bound by the liability determination in the action between the drivers. The injuries of the two passengers are significantly different; there will be no significant duplication of medical evidence or expert witnesses in their actions. The same can be said about the injuries suffered or alleged by Kamaljit in her action; they will not result in a duplication of expert witnesses if the matters remain separate. No trial dates have yet been set but all proposed dates are well into 2008 or even 2009. Counsel for the applicants indicates that his estimate for trial time is well in excess of 10 days, probably in the range of 15-19 days. All three plaintiffs indicate that they are preparing materials to proceed by Rule 18A and there is a mediation set for May 2007.

**25**  In my view, there is no clear reason, at this time, that these matters must be heard at the same time. There appears to be little if anything to be gained in terms of court time or process. There is no danger of inconsistent findings especially with the plaintiff's admission that they will all accept the liability finding in the Kamaljit action. At best this application is premature. The application is adjourned generally in order to allow the mediation to proceed and the plaintiff's to address the potential of their intended Rule 18A applications. I will remain seized of the continuation of this application in the event that it is reset for a future date.

**26**  The plaintiffs in the three applications are entitled to their costs as against the applicants.

MASTER CALDWELL

**End of Document**

[***Leiper v. Kooner, [2006] B.C.J. No. 539***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23V4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.D. Wilson J.

Heard: February 20 - 24, 2006.

Judgment: March 10, 2006.

Vancouver Registry No. M031556

**[2006] B.C.J. No. 539** | 2006 BCSC 390 | 147 A.C.W.S. (3d) 419

Between Karen Leiper, plaintiff, and Kamalijit Kooner, defendant

(38 paras.)

**Case Summary**

**Damages — General damages — For personal injuries — Non-pecuniary damages, including pain and suffering — Action by Leiper for damages for personal injuries suffered in motor vehicle accident allowed in part — Leiper, who suffered temporary soft tissue strain after being rear-ended, awarded non-pecuniary damages of $15,000.**

**Damages — Special damages — Medical expenses — Action by Leiper for damages for personal injuries suffered in motor vehicle accident allowed in part — Leiper's 31 chiropractic treatments were not prescribed by a physician and were of such frequency as to make the expense unreasonable.**

**Tort law — *Negligence* — Motor vehicles — Evidence and proof — Action by Leiper for damages for personal injuries suffered in motor vehicle accident allowed in part — Leiper not a credible witness and Leiper did not adduce sufficient evidence to support her claim of continuing disability — Opinions expressed in medical reports tendered by Leiper were given no weight, as they were dependent on Leiper's statements and post hoc reasoning — Leiper failed to call physiotherapist to testify about allegedly embellished report and Leiper's condition — Leiper failed to tender into evidence log books showing number of hours worked to support claim for loss of earnings.**

|  |
| --- |
| Action by Leiper for damages for personal injuries suffered in motor vehicle accident -- Kooner rear-ended Leiper -- Leiper was long-distance truck driver -- Leiper consulted family doctor, who stated Leiper had soft tissue strain in neck and shoulder -- Leiper attended 31 chiropractic treatments and physiotherapy for four weeks -- Physiotherapist's report stated that Leiper's injury was resolved and that she was functional match for her work -- Leiper resumed work as truck driver -- Leiper claimed she continued to suffer pain three and a half years after accident -- In years between accident and action, Leiper obtained several medical opinions confirming that she was not partially disabled -- Leiper also sought to retrain and obtained medical opinion stating she could not drive due to partial disability -- At trial, Leiper presented four medical reports -- Leiper claimed physiotherapy report was not accurate and that physiotherapist lowered standards to allow Leiper to pass test -- HELD: Action allowed in part -- Opinions expressed in medical reports tendered by Leiper were given no weight, as they were dependent on Leiper's statements and post hoc reasoning -- Leiper not a credible witness and did not adduce sufficient evidence to support her claim -- Leiper's medical history indicated a history of seeking medical opinions to suit ulterior objectives -- Leiper failed to call physiotherapist to testify about the allegedly embellished report and Leiper's condition -- Leiper failed to tender into evidence log books showing number of hours worked to support claim for loss of earnings -- Leiper's chiropractic treatment was not prescribed by a physician and was of such frequency as to make the expense unreasonable -- Leiper awarded non-pecuniary damages of $15,000 and damages for past wage loss. |

**Counsel**

Counsel for the Plaintiff: M.A. Kozlowski and K.E. Munro

Counsel for the Defendant: K.B. Routley

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| --- |
| **R.D. WILSON J.** |

I.

**1**  The front end of a car driven by the defendant collided with the rear end of a car driven by the plaintiff. The defendant admits fault for the collision. The plaintiff claims compensation for losses and expenses said to have been incurred as a result of the collision.

**2**  At the material time, the plaintiff was a long haul truck driver. Her driving duties were performed in a "team" arrangement. The driving duties were shared between the plaintiff and her domestic partner, Mr. Cherot.

**3**  At the material time, the plaintiff was forty-two years of age.

**4**  Following the collision, the plaintiff consulted her family physician, Dr. Hsu. He diagnosed the plaintiff as presenting with soft tissue strain in the neck and left shoulder.

**5**  In the months following the collision, the plaintiff's treatment consisted of anti-inflammatory medication, chiropractic and physiotherapy. The plaintiff attended an active rehabilitation physiotherapy program for four weeks. She was discharged from that program on 26 November 2002. Among other things, the discharge form, prepared by the physiotherapist, reported as follows:

Objectively and subjectively Ms. Leiper's cervical injury has resolved. She has a minor supraspinatus tendonitis that is resolving. Ms. Leiper is a functional match for her work. I have advised her to continue with her exercise program until her left shoulder has completely resolved. I do not feel she will require further physiotherapy. ...

**6**  In late November 2002, Dr. Hsu advised the plaintiff to attempt a graduated return to work.

**7**  On 29 November 2002, the plaintiff resumed her job, with her partner, as a long haul truck driver.

**8**  On 2 January 2003, Dr. Hsu opined that the plaintiff suffered a total disability period of eleven weeks, ending 1 December 2002; and a partial disability period of approximately twelve weeks, ending 1 March 2003.

**9**  The defendant does not dispute her liability to compensate the plaintiff for her loss and reasonable expenses for that period.

**10**  The controversy arises because the plaintiff now asserts that she has suffered a permanent partial disability. The plaintiff contends that three years and five months after the event, she continues to suffer chronic neck and shoulder pain. Dr. Chu, with a specialty in physical medicine and rehabilitation, has described the plaintiff's condition as "myofascial pain syndrome". On that contention, the defendant takes issue.

II.

**11**  The governing principal for the resolution of this dispute is:

... there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose[**1**](#Forward_fnref_fnr-1).

**12**  Reports and oral testimony from four doctors, consulted by the plaintiff, were tendered at the trial. They were:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Dr. David H.J. Hsu |  | General Practitioner and Family Physician |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Dr. Ansel L. Chu | Consulting Specialist in |  |
|  |  | Physical Medicine & |  |
|  |  | Rehabilitation |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Dr. Richard L. Loomer |  | Independent Medical Examination - Orthopaedic Surgery; and |  |
|  | Dr. Olli M. Sovio |  | Independent Medical Examination - Orthopaedic Surgeon |  |

**13**  The opinions expressed in those reports and testimony about the issue in dispute, are dependent upon statements by the plaintiff and post hoc reasoning. As such, I accord them no weight in the resolution of that dispute.

**14**  The plaintiff was not a credible witness. Her testimony was not consistent with the surrounding circumstances. These conclusions are based upon the following reasons.

**15**  First, an active physiotherapy program was conducted at Twin Rinks Physiotherapy & Sports Injury Clinic. In the discharge form, referred to above, the author of the report recited the objective findings, on the discharge, as follows:

1. Full cervical range of motion
2. Cervical muscle tone normal
3. Normal joint mobility of cervical spine
4. Full left shoulder range of motion with slight pain at end range of flexion and abduction
5. Some tightness of posterior capsule of left shoulder
6. Slight pain with resisted shoulder abduction but full strength

**16**  The physiotherapist's report was led in evidence as proof of the truth of the facts recited therein.

**17**  The plaintiff took issue with the report. She said that she had failed one of the tests designed to test her ability to lift a set of tire chains. She said that the physiotherapy clinic lowered the standards so that she could obtain a positive report.

**18**  The plaintiff called no evidence from the clinic to demonstrate that the report of 26 November 2002 was anything other than what it purported to be on its face.

**19**  Notwithstanding the apparently successful physiotherapy program, the plaintiff told Dr. Loomer that she had attended physiotherapy "for several visits but found this was really not beneficial".

**20**  Second, following her return to work, said the plaintiff, she was reduced to part-time hours; and that she was unable to perform all of the necessary tasks associated with her duties as a long haul team driver. She was asked on cross-examination if she had worked ten-hour days. She responded that she would have to check her logbooks to answer that question.

**21**  The plaintiff is advancing a claim for loss of earnings, due to the reduced ability to perform her duties, during the periods when she did return to work. The logbooks, which would be the best evidence of the hours worked over these periods, were not tendered in evidence.

**22**  The defendant has raised this loss of earnings after the return to work as a controversial issue. The logbooks would be the best evidence of any alleged loss of earnings. I draw the inference that if the logbooks had been tendered in evidence, they would not have supported the plaintiff's claim.

**23**  Third, the plaintiff did return to work, as a long haul truck driver, teamed with her partner, Mr. Cherot, on 29 November 2002. She continued through to 2 March 2003. On that latter date, the team broke up, because the plaintiff had a quarrel with Mr. Cherot. It is more probable than not that the plaintiff's employment came to an end by reason of the quarrel with her partner; not because she was medically unable to perform her duties.

**24**  Fourth, the plaintiff then drew regular employment insurance benefits from 20 April 2003 to 30 August 2003. The plaintiff had received medical employment insurance benefits from 15 September 2002 to 30 November 2002. She knew the difference, therefore, between medical benefits and regular benefits. During the period she was collecting regular benefits, she declared herself actively seeking work.

**25**  The plaintiff returned to work in late September with a different team driver. However, that team was not compatible and did not survive the end of September 2003.

**26**  By November 2003, the plaintiff had reconciled her differences with her partner, Mr. Cherot. She resumed team driving with Mr. Cherot on 5 November 2003 and continued through to 28 April 2004. There was a further falling out between the plaintiff and Mr. Cherot on 28 April 2004, which again terminated the team driving partnership. It is more probable than not that the plaintiff's loss of her position was as a result of the falling out with Mr. Cherot; not by reason of a medical disability.

**27**  The plaintiff then drew regular employment insurance benefits from 16 May 2004 to 18 September 2004.

**28**  Fifth, on 1 September 2004, the plaintiff consulted Dr. Hsu for a driver's medical examination. Dr. Hsu conducted that examination, and completed a report to the office of the Superintendent of Motor Vehicles. In that report, he stated, among other things, that the plaintiff did not have a condition that may affect driving.

**29**  Sixth, sometime in the autumn of 2004, the plaintiff decided on a course of retraining. She sought financial assistance from Human Resources Canada to fund that retraining program.

**30**  Prior to becoming a long haul truck driver, the plaintiff pursued a vocation in the field of accounting and business administration. She had obtained public financing to re-qualify as a long haul truck driver. Human Resources Canada would not repeat that financial assistance because the plaintiff had already been retrained once. Only if the retraining was medically required, would public funding be made available. Accordingly, the plaintiff consulted Dr. Hsu on 8 December 2004 to obtain the necessary report from a medical doctor that would facilitate the financial assistance application. In a prescription note dated 8 December 2004, Dr. Hsu reported, for the plaintiff:

Patient cannot drive due to injury to left shoulder causing chronic pain. This condition will likely last for extended period of time.

**31**  The plaintiff testified that there had been no change in her medical condition between the time the driver's medical certificate was given on 1 September 2004, and the note of 8 December 2004.

**32**  Seventh, the plaintiff commenced a retraining program in January 2005, funded by a student loan. The position the plaintiff sought to attain required that she be in good health. Accordingly, on 7 March 2005, she consulted Dr. Hsu and sought a further report from him that she was in "good health". Dr. Hsu was not sure what was meant by "good health" and he asked the plaintiff to get further particulars of what it was that the plaintiff required to satisfy the health conditions in question. The particularization was apparently provided and, on 6 June 2005, Dr. Hsu gave a "note" to the plaintiff. That note was not tendered in evidence, but it is more probable than not that it was to the effect that the plaintiff was not suffering from any partial disability.

**33**  Again, there had been no change in the plaintiff's report of her medical condition between 8 December 2004 and 6 June 2005. The plaintiff tailors her symptoms to the then current objective.

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| --- | --- | --- |
|  | III. |  |

**34**  The plaintiff suffered neck and shoulder soft tissue strain. In result, she endured a period of total disability from 6 September 2002 through 28 November 2002; and continuing discomfort, or partial disability, to 1 March 2003.

**35**  During the period of total disability, the plaintiff attended thirty-one chiropractic treatments, which were said to alleviate, somewhat, her pain symptoms. This form of passive treatment was not prescribed by her attending physicians. It appears to be a form of self-directed treatment. Given the frequency and duration of these treatments, I am not persuaded that the expense of them is a reasonable charge against the defendant as having been caused by the defendant's fault.

**36**  The plaintiff has proved out-of-pocket expenses of $29.11 and a net wage loss, to date of trial, of $5,932.50.

**37**  Accordingly, I assess the plaintiff's loss and expenses as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $15,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past wage loss | $ 5,932.50 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Special damages | $ | 29.11 |  |

**38**  Absent developments of which I am not aware, the plaintiff will have her costs.

R.D. WILSON J.

[**1**](#Backward_fnref_fnr-1) Maslen v. Rubenstein [*(1993), 83 B.C.L.R. (2d) 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MF-00000-00&context=) (B.C.C.A.) at page 136, paragraph 15.1.

**End of Document**

[***LeMoine v. Great West Life Assurance Co., [2002] B.C.J. No. 710***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0TT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Clancy J.

Heard: March 6, 2002.

Judgment: April 10, 2002.

New Westminster Registry No. S067444

**[2002] B.C.J. No. 710** | 2002 BCSC 520 | 100 B.C.L.R. (3d) 343 | 17 C.C.E.L. (3d) 101 | 41 C.C.L.I. (3d) 118 | 112 A.C.W.S. (3d) 1074 | [2002] B.C.T.C. 520

Between Catherine Helen LeMoine, plaintiff, and The Great West Life Assurance Company, defendant

(47 paras.)

**Case Summary**

**Labour law — Industrial relations — Collective agreement, civil action — Jurisdiction.**

|  |
| --- |
| Application by the defendant insurer to dismiss LeMoine's claim for lack of jurisdiction. The insurer denied the plaintiff benefits. The plaintiff claimed that she was totally disabled from the operation of a glass crushing machine and possible environmental exposure to mold. The plaintiff was an employee of the Liquor Distribution Branch. The Province retained the insurer as its claims-paying agent. The plaintiff was subject to a collective agreement that set out a grievance procedure. She argued that the collective agreement did not apply because the insurer was not a party to it.  HELD: Application allowed.  The insurer was an agent of the Province, and was therefore not a stranger to the collective agreement. The essential character of the dispute arose from the interpretation, application, administration or violation of the collective agreement. The arbitral process provided the plaintiff with effective redress. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A.

Labour Relations Code, 1996, ss. 9.1, 82, 84, 89.

Long Term Disability Plan Regulation, ss. 2.1(c), 2.13(a).

Public Service Benefit Plan Act, 1996, ss. 2(1), 2(4), 7(2)(c).

**Counsel**

J.M. Prodor, for the plaintiff. J. Marquardt, for the defendant.

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| --- |
| **CLANCY J.** |

**1**   Ms. LeMoine was an employee of the Liquor Distribution Branch (the "LDB") of the Province of British Columbia. Alleging that she was permanently disabled as of June 8, 2001, she applied for long term disability benefits. Ms. LeMoine attributes her alleged total disability to the operation of glass crushing machines and possible environmental exposure to mold. Her application for benefits was denied by the defendant, Great West Life Assurance Company ("Great West Life"), which was retained by the LDB as its claims-paying agent.

**2**  Ms. LeMoine brings this action against Great West Life for damages. Great West Life applies pursuant to Rule 18A to dismiss the plaintiff's claim on the basis that this Court has no jurisdiction over the claim.

**3**  All employees of the LDB were bound by the terms of the collective agreement made between the Government of the Province of British Columbia (the "Province") and the B.C. Government and Service Employees Union (the "Union").

**4**  In her amended statement of claim, Ms. LeMoine states that she is "totally disabled", as that term is defined in the collective agreement. She pleads that Great West Life, without any valid reason, denied her disability benefits. She alleges that Great West Life acted arbitrarily, unfairly, and unreasonably, and breached its duty to act in good faith.

**5**  Under the heading AGGRAVATED DAMAGE, Ms. LeMoine's amended statement of claim reads as follows:

1. Further letters written by the Plaintiff's Medical advisors, confirming "Total Disability" have been supplied to the Defendant by the Plaintiff, through Counsel, however the Defendant, well knowing the Plaintiff's mental, emotional and financial situation, has continued to wrongfully deny the Plaintiff benefits, in consequence of which the Plaintiff has sustained additional mental and emotional stress, anxiety, worry, upset, economic hardship and now pecuniary loss, in having to retain Legal Counsel and incur Legal expense to obtain benefits lawfully due to the Plaintiff, all in consequence of the Defendant's Bad Faith and wrongful conduct, which conduct has materially aggravated the Plaintiff's circumstances;

**6**  Paragraph 12.1 of the amended statement of claim reads:

|  |  |  |  |
| --- | --- | --- | --- |
| 12.1 |  | In consequence of the matters aforesaid, the Plaintiff has sustained damage in denied L.T.D. benefits, loss and expense, including the cost of legal representation. |  |

**7**  The Amended Statement of Claim goes on to claim that the decision of Great West Life was made to provide an economic benefit for the employer and was made jointly with the Province as a policy decision, in an attempt to lessen losses by denying valid claims.

**8**  Ms. LeMoine claims for damages for ***negligence***, mental distress and bad faith, and for punitive, exemplary, aggravated and special damages.

**9**  The medical information provided by Ms. LeMoine makes no reference to emotional distress arising out of the denial of benefits. It is fair to say that the medical reports are all directed to her disability claim.

**10**  In her affidavit, Ms. LeMoine deals at some length with her claim for disability benefits. Her only reference to emotional distress is found in the following paragraph:

1. THAT the delay in the Defendant not authorizing the payment of my Disability Benefits has caused me extreme financial hardship, mental and emotional stress, anxiety, worry and upset; I also understand that the earliest this matter can be set for Trial is April, 2003, and there is extreme urgency in my receiving my disability benefits long past overdue;

The Statutory Framework

**11**  LDB employees were covered by insurance. The contract was authorized under the Public Service Benefit Plan Act (the "PSBPA"), [*R.S.B.C. 1996, c. 386, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F27X-60V7-00000-00&context=):

1. The minister, on behalf of the government, may insure or cause to be insured any or all employees to whom this Part applies and members of the Legislative Assembly.

...

1. A contract under subsection (1) may be a contract under which the insurer or insurers assumes the risk, or under which the government assumes the risk and under which the insurer disburses benefits and generally manages a scheme of insurance on the government's behalf.

**12**  Section 7(2)(c) of the PSBPA authorizes the Lieutenant Governor in Council to make regulations "establishing the terms and conditions of a benefit or a benefit plan in respect of which the risk is not borne by an insurer or insurers."

**13**  The Long Term Disability Plan Regulation (the "Regulation"), B.C. Reg. 409/97, was deposited on December 5, 1997. It provides in s. 2.1(c) that "coverage under the plan is a condition of employment." Section 2.13 reads:

1. Long Term Disability claims will be adjudicated and paid by a claims-paying agent to be appointed by the employer. In the event a covered employee disputes the decision of the claims-paying agent regarding a claim for benefits under this plan, the employee may arrange to have the claim reviewed by a Claims Review Committee composed of three (3) medical doctors; one (1) designated by the claimant, one (1) by the employer, and a third agreed to by the first two. Written notice of a disputed claim or an appeal under this plan shall be sent to the Plan Administrator.

**14**  The collective agreement incorporates the provisions of the Regulation for long term disability coverage. A disputed decision of Great West Life may therefore be appealed to a medical review panel, the Claims Review Committee (the "CRC"). A memorandum of understanding between the Province and the Union provides guidance as to the operation of the CRC. It specifically states that the purpose of the memorandum is "to provide assistance to Claims Review Committees ("CRC's") established under Section 2.13 of Appendix 4 of the Master Collective Agreement...."

**15**  The contract for insurance coverage for employees was a group policy of disability insurance. As stated, Great West Life was appointed the claims-paying agent for the Province. It reviewed, adjudicated and denied the claim of Ms. LeMoine by letter dated August 17, 2001. Her counsel advises that she has applied for a review of that decision by a CRC but has not pursued that review. She chose instead to bring her action against Great West Life. Great West Life is not a party to the collective agreement.

**16**  The collective agreement sets out a grievance procedure under which Ms. LeMoine could have grieved a decision of the CRC. If her grievance had not been addressed, she was entitled to go to arbitration.

**17**  Section 9.1 of the collective agreement provides for arbitration as is required by s. 84 of the Labour Relations Code (the "Code"), R.S.B.C. 1996, c. 244. Section 9.1 reads:

... either of the parties may, after exhausting the grievance procedure in Article 8 - Grievances, notify the other party within 30 days of the receipt of the reply at the third step, of its desire to submit the difference or allegations to arbitration.

**18**  Section 84 of the Code provides:

1. Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.

**19**  Section 89 provides:

89 For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may

1. make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value.

**20**  Additionally, s. 82 provides:

82(1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.

1. An arbitration board, to further the purpose expressed in subsection (1), must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.

Discussion

**21**  Ms. LeMoine concedes that if this were a dispute between herself and her employer she would be bound, under the terms of the collective agreement, to pursue her remedies under the grievance and arbitration procedures provided. She argues, however, that the provisions of the collective agreement only apply to differences "arising between the parties relating to the interpretation, application or administration of the agreement." Since Great West Life is not a party to the collective agreement, there is no privity of contract between Great West Life and herself. Therefore, if Great West Life has an independent duty of good faith to insured claimants, she says that she has an independent cause of action against that company.

**22**  That argument must take into account the fact that Great West Life is only the appointed claims-paying agent of the Province. Under s. 2(4) of the PSBPA the Province assumes the risk of the insurance contract. Great West Life disburses benefits and manages the scheme of insurance on the Province's behalf. Great West Life did not assume any risk; it had no obligation to pay benefits. By definition, Great West Life is the agent of the Province.

**23**  The argument advanced by Ms. LeMoine is that, since Great West Life is a stranger to the collective agreement, it is not bound by the Code, nor by the provisions of the collective agreement. She cites H.E.U. v. Health Employers Assn. of British Columbia [*(2000), 75 B.C.L.R. (3d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X08M-00000-00&context=); [*2000 BCCA 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X08M-00000-00&context=) as authority for the proposition that an arbitration board has no jurisdiction over strangers. I have found, however, that Great West Life is an agent of the Province. As the agent of the employer it was not a stranger to the collective agreement.

**24**  Counsel for Ms. LeMoine argued that an independent duty of good faith is owed by an agent of a principal to a third party. For example, in Spiers v. Zurich Insurance Co. [*(1999), 45 O.R. 3d 726*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4K2-00000-00&context=) (Ont. S.C.J.) it was held that insurance adjusters owe a duty of good faith to an insured. Whether that conclusion is applicable in an employer-employee setting is not an issue before me. I am concerned with the jurisdiction of this Court.

**25**  Similarly, Ms. LeMoine has pleaded that the Province and Great West Life were engaged in a joint venture. There are American authorities which hold that each party to a joint venture is an agent for the other and has joint and several liability for acting in bad faith: Farr v. Transamerica Occidental Life Insurance Co. of Calif., 145 Ariz. 1, 699 P. 2d 376 (App. 1984); Wohlers v. Bartgis, 114 Nev. 1249, 969 P. 2d 949 (1998).

**26**  Accepting without deciding that Great West Life, either as the agent of the Province or as a joint venturer, owed an independent duty of good faith to Ms. LeMoine, it does not necessarily follow that she has an independent cause of action against that company.

**27**  Ms. LeMoine contends that her action falls outside the normal scope of employer-employee relations. She says the exclusive jurisdiction of an arbitrator does not extend to her claim for damages, because her claim for breach of the duty to act in good faith is totally independent of the collective agreement. The court therefore retains jurisdiction over the dispute.

**28**  The courts' jurisdiction in labour matters was recently canvassed by the B.C. Court of Appeal in Haight-Smith v. Neden, [*[2002] B.C.J. No. 375*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HV-00000-00&context=); [*2002 BCCA 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HV-00000-00&context=). At paras. 28-30 the Court held:

The Supreme Court of Canada in Weber v. Ontario Hydro, [*[1995] 2 S.C.R. 929*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3JV-00000-00&context=), decided that if the "essential character" of a dispute arises from the interpretation, application, administration or violation of the collective agreement, then the dispute must be dealt with by the dispute resolution process provided in the collective agreement and labour relations statutes and not by litigation in the courts. The "exclusive jurisdiction" approach to labour disputes was affirmed in Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, [*[2000] 1 S.C.R. 360*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44H-00000-00&context=).

In both of these cases, the Supreme Court made it clear that to determine whether a dispute arises out of a collective agreement, two elements must be considered: the nature of the dispute and the ambit of the collective agreement... . The legal characterization of the dispute (as a claim in tort, for example) is not determinative of jurisdiction. If the dispute arises under the collective agreement, the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it... .

The courts retain jurisdiction, however, over disputes which do not expressly or inferentially arise out of the collective agreement ... and where a remedy is required that an arbitrator is not empowered to grant, in order to avoid a "real deprivation of ultimate remedy" ... .

At para. 33, the Court continued:

All of the authorities make it clear that the principles enunciated in Weber must be applied analytically to the particular facts of the case before the court. It is that factual analysis which gives rise to apparently conflicting decisions.

**29**  Because of the need to apply the principles in Weber to the particular facts of any case, other court decisions are not determinative. Some reference to other authorities is, however, helpful in determining how to characterize the plaintiff's claims in this case.

**30**  In Blanco-Arriba v. British Columbia [*(2001), 96 B.C.L.R. (3d) 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M3YN-00000-00&context=); 2001 B.C.S.C. 1557, C.L. Smith J. considered an action where the plaintiff made numerous allegations, including the infliction of mental suffering. The plaintiff was a social worker who was put on medical leave and ultimately dismissed because of mental health concerns. C.L. Smith J. concluded that the plaintiff's claims were not within the Court's jurisdiction because the essential character of the claims was a labour relations dispute.

**31**  In Maynard v. Arvin Ride Control Products [*(2000), 49 C.C.L.T. (2d) 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-F27X-618F-00000-00&context=) (Ont. S.C.J.), the plaintiff had commenced an action raising allegations of intentional infliction of mental suffering. The Court declined jurisdiction after holding that the substance of the claim arose out of matters in the workplace.

**32**  Again, in Bhaduria v. Toronto Board of Education [*(1997), 39 O.T.C. 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD11-JJ6S-6474-00000-00&context=) (Gen. Div.), varied [*(1999), 173 D.L.R. (4th) 382*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD61-JWJ0-G208-00000-00&context=) (Ont. C.A.), the plaintiff brought an action alleging, inter alia, the infliction of mental suffering and defamation. At trial, the Court allowed the defamation action to proceed but declined jurisdiction over the other claims. On appeal, the Court dismissed the defamation claim as well. Leave to appeal to the Supreme Court of Canada was refused: [*[1999] S.C.C.A. No. 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FCK4-G30C-00000-00&context=).

**33**  There are however, authorities where the court did assume jurisdiction.

**34**  In Piko v. Hudson's Bay Co. [*(1999), 167 D.L.R. (4th) 479*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1PN-00000-00&context=) (Ont. C.A.), leave to appeal to S.C.C. refused, [*[1999] S.C.C.A. No. 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FCK4-G2RM-00000-00&context=), the allegations against the defendant stemmed from criminal charges brought against the plaintiff. Since claims of that nature were not covered by the collective agreement, the Court found the dispute was no longer a labour relations dispute and allowed the plaintiff to maintain her tort claim against the defendant.

**35**  In Fording Coal Ltd. v. USWA Local 7884 [*(1999), 65 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M32W-00000-00&context=) (C.A.), the Court held that a defamation action could proceed in the courts on the basis that the collective agreement did not contemplate adjudicating upon the freedom of speech rights of the union's president. McEachern C.J.B.C. held that the dispute fell outside the normal scope of employer-employee relations and that the context of the collective agreement was not broad enough to exclude recourse to the courts. (In Haight-Smith, supra, however, the court found that allegations alleged to be defamatory that were made within the context of the employer-employee relationship were within the exclusive jurisdiction of the arbitrator.)

**36**  In Campbell v. Baldwin Agency Security & Investigations Inc., [*[1999] O.J. No. 4552*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-JTNR-M3V4-00000-00&context=) (S.C.J.) the Court allowed a claim of inducing breach of contract to proceed. It was held that the claim could not have arisen from or out of the employment contract.

**37**  In I.W.A. Forest Industry Long Term Disability Plan (Trustees of) v. Audia, [*[1994] I.L.R. 1-3061*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JBM1-M1HH-00000-00&context=) (B.C.S.C.), aff'd [*(1995) 5 B.C.L.R. (3d) 341*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M27S-00000-00&context=) (C.A.), the trustees of a disability plan which provided benefits for union employees were allowed to maintain an action. They were not involved in the collective agreement and were neither employer nor employee.

**38**  Guidance on how to approach the analysis is found in Pleau v. Canada (Attorney General) [*(1999), 182 D.L.R. (4th) 373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F1WF-M2N6-00000-00&context=) (N.S.C.A.). There, the Nova Scotia Court of Appeal considered Weber and found that there are three considerations the court must take into account. At pp. 381-382 the Court held:

The first consideration relates to **the process** for resolution of disputes. Where the legislation and the contract show a strong preference for a particular dispute resolution process, that preference should, generally, be respected by the courts. While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so.

If the legislature and the parties have shown a strong preference for a dispute resolution process other than the court process, the second consideration must be addressed. It concerns the **sorts of disputes** falling within that process. ... The answer given by Weber is that one must determine whether the substance or, as the Court referred to it, the "essential character", of the dispute is governed, expressly or by implication, by the scheme of the legislation and the collective agreement between the parties. Unlike the first consideration which focuses on **the process** for resolution of disputes, the second consideration focuses on **the substance** of the dispute. Of course, the two are interrelated. The ambit of the process does not exist in the abstract, but is defined by the nature of the disputes to be submitted to it.

The third consideration relates to the practical question of whether the process favoured by the parties and the legislature provides **effective redress** for the alleged breach of duty. Generally, if there is a right, there should also be an effective remedy. [emphasis in original]

**39**  That analysis is undoubtedly correct. As to the first consideration, on the facts before me, the statutory framework and the collective agreement show a strong preference for a dispute resolution process. Having determined that Great West Life is the agent of the Province and that the dispute is therefore essentially between Ms. LeMoine and the Province, the clear language of the scheme dictates that this Court should decline jurisdiction.

**40**  As to the second consideration, I am satisfied that the "essential character" of the dispute arises from the interpretation, application, administration or violation of the collective agreement. The substance of the dispute arises from the rejection of Ms. LeMoine's application for long term disability benefits available under the collective agreement.

**41**  Even if Great West Life owes an independent duty of good faith to Ms. LeMoine, or if am incorrect in finding that Great West Life is the agent of the Province and therefore bound by the provisions of the collective agreement, there is authority for finding that persons not covered by the collective agreement may still be subject to the arbitral process. In Haight-Smith, supra, the Court referred with approval to Giorno v. Pappas [*(1999), 170 D.L.R. (4th) 160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1SX-00000-00&context=) (Ont. C.A.), where the Court dealt with a party who had no managerial responsibility and was not an employee covered by the collective agreement. The passage cited by Levine J.A. in Haight-Smith at para. 47 is as follows:

Despite this, given that this dispute arises under the collective agreement the principle in Weber applies. As Laskin J.A. said in Piko, supra, at para. 13:

Where an employee has sued another employee for a workplace wrong, this court has held that bringing an action against a person who is not a party to the collective agreement will not give a court jurisdiction if the dispute, "in its essential character", still arises under the collective agreement.

Laskin J.A. was referring to the endorsement of this court in Ruscetta v. Graham, [*[1998] O.J. No. 1198*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-JSRM-62VR-00000-00&context=) (C.A.), [reported at [*36 C.C.E.L. (2d) 177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-JSRM-62VR-00000-00&context=)], leave to appeal to the Supreme Court of Canada refused October 15, 1998, [reported [*[1998] S.C.C.A. No. 220*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-JFKM-608H-00000-00&context=)], and Dwyer v. Canada Post, [*[1997] O.J. No. 1575*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD11-DXHD-G4KV-00000-00&context=) (C.A. [summarized 70 A.C. (3d) 816].

These decisions simply reflect the principle in Weber. Where, as here, the essential character of the dispute is covered by the collective agreement, the arbitration process allows the employee to seek an appropriate remedy. While the remedy at arbitration may be against the employer rather than the fellow employee, the remedy is nonetheless real.

To preclude the employee from suing another employee for the workplace wrong in such circumstances does not deprive the employee of an ultimate remedy for that wrong. Rather, it prevents the undercutting of the dispute resolution process that is given exclusive statutory jurisdiction over disputes that arise under the collective agreement.

**42**  The essential character of the dispute before me arises under the collective agreement. Even if Ms. LeMoine is owed an independent duty of good faith, or if Great West Life is not the agent of the Province, she has a remedy against her employer if she has been improperly deprived of benefits. The dispute resolution process adopted under the collective agreement should not be undercut by allowing the matter to proceed in the courts.

**43**  The third consideration of whether the resolution process provides effective redress for the alleged wrong is resolved by the provisions of s. 89 of the Code.

**44**  To repeat, that section provides:

89 For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may

1. make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value.

**45**  In Haight-Smith, supra, at para. 41 Levine J.A. again cited Goudge J.A. in Giorno, where he commented on the power of the arbitrator to award damages as follows:

It is of no moment that arbitrators may not always have approached the awarding of damages in the same way that courts have awarded damages in tort. In Weber, at p. 958 S.C.R., p. 603 D.L.R., McLachlin J. made clear that arbitrators are to apply the same law as the courts.

**46**  I find that the arbitral process provides effective redress for the claims made by the plaintiff in her amended statement of claim. She has an effective remedy within the dispute resolution process.

Conclusion

**47**  I conclude that this Court is without jurisdiction to hear the claim of the plaintiff. She has the right to take her dispute through the grievance procedure to an arbitration board, which has the necessary authority to provide a final and conclusive settlement of her dispute. Her action is dismissed. Great West Life is entitled to its costs on Scale 3.

CLANCY J.

**End of Document**

[***Liu v. Huang, [2018] B.C.J. No. 258***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RRK-9081-JCBX-S0G6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.D. Burnyeat J.

Heard: December 15, 2016.

Judgment: February 16, 2018.

Docket: S106279

Registry: Vancouver

**[2018] B.C.J. No. 258** | 2018 BCSC 227

Between Wen Yan Liu, Jiangning Chen, Plaintiffs, and Ivy Huang also known as Rui Huang, May Ma also known as Fengqin Ma, Rainbow Bridge Human Resources Co. Ltd., Defendants

(24 paras.)

**Case Summary**

**Commercial law — Agency — Relationship of principal and third person — Liability of principal to third person — Agent's torts — Misrepresentation — Ruling on vicariously liability of individual defendant for M's misrepresentations — Action was dismissed against M on consent and M testified for defence about certain statements she allegedly made in defendant's presence or directly to plaintiffs — While res judicata prevented finding of joint liability for M's torts, M and individual defendant were each other's agents, so defendant could be found vicariously liable to extent M's statements were found to be misrepresentations.**

**Tort law — Fraud and misrepresentation — Fraudulent misrepresentation — Specific elements — Known falsity — Inducement — Ruling on vicariously liability of individual defendant for M's misrepresentations — Action was dismissed against M on consent and M testified for defence about certain statements she allegedly made in defendant's presence or directly to plaintiffs — While res judicata prevented finding of joint liability for M's torts, M and individual defendant were each other's agents, so defendant could be found vicariously liable to extent M's statements were found to be misrepresentations.**

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| Ruling on the vicarious liability of the individual defendant for M's misrepresentations. The action was dismissed against M on consent, and M testified for the defence about certain statements she allegedly made in the individual defendant's presence and directly to the plaintiffs. The individual defendant could be vicariously liable if these statements amounted to misrepresentations in furtherance of a common unlawful actions, for her silence if she knew about the statements, or if M was her agent. The common object in this case was obtaining funding for a scheme whereby workers from China would be available for temporary work in Canada.  HELD: Individual defendant could be found vicariously liable as M's agent.  Nothing about the scheme was unlawful, so the individual defendant was not vicariously liable even if the statements were for a common cause. The individual defendant and M both encouraged the plaintiffs to invest in the project. There was no fiduciary relationship between the plaintiff and individual defendant such that the plaintiff relied on the defendant for investment advice, so any silence by the individual defendant had to be a tacit confirmation of what she knew to be false. A review of what was said in the individual defendant's presence or copied to her did not demonstrate that she knew the statements to be false and was obligated to correct them. While res judicata prevented a finding of joint liability for any tort of M, M and the individual defendant were agents of each other, and, if M's statements amounted to misrepresentation, the individual defendant could be found vicariously liable. |

**Counsel**

Counsel for the Plaintiffs: J.W. Ryan.

Counsel for the Defendants: R.R. Lee.

**Ruling (Misrepresentations Made)**

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| **G.D. BURNYEAT J.** |

**1**   May Ma also known as Fengqin Ma ("May") was a Defendant in these proceedings. Prior to Trial, a Consent Dismissal Order was filed so that all claims against her were dismissed as if heard at Trial.

**2**  At Trial, May appeared as a witness for the Defendant, Ivy Huang also known as Rui Huang ("Ivy"). During her direct examination as well as during her cross-examination, May testified regarding certain statements that it is alleged that she made sometimes in the presence of Ivy, sometimes directly to the Plaintiffs when Ivy was not present, and sometimes in email transmissions directly to the Plaintiffs.

**3**  Ivy can be liable to the Plaintiffs if representations she made amounted to misrepresentations. As well, Ivy can be vicariously liable for representations made by May if those representations fall into any of three recognized categories:

1. Ivy can be vicariously liable for any misrepresentations made by May if Ivy and May agreed on an unlawful common course of action and the misrepresentations made by May were in furtherance of that common unlawful action;
2. Ivy can be liable for her silence in the face of misrepresentations that were made by May while Ivy was present or in the face of misrepresentations that were made by May in writing to the Plaintiffs if Ivy received copies of the writing; and
3. Ivy will be liable if it can be shown that May was her agent and, in the scope of her authority. made statements which amounted to misrepresentations.
4. **Unlawful Common Course of Action?**

**4**  Where two or more parties agree on a common course of action, Canadian decisions have restricted this category of potential liability to situations where the common object was wrongful or unlawful. In *Fullowka v. Pinkerton's of Canada Ltd.*, [*2010 SCC 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1H4-00000-00&context=), Cromwell J., on behalf of the Court, outlined the basic test to found joint liability:

As for the law, concerted action liability may be imposed where the alleged wrongdoers acted in furtherance of a common design: see, e.g., *Botiuk v. Toronto Free Press Publications Ltd.*, [*[1995] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K6-00000-00&context=), at para. 74, citing with approval J. G. Fleming, *The Law of Torts* (8th ed. 1992), at p. 255. While the required connection between the common design and the tort actually committed has been expressed in different ways in the authorities, the cases relied on by the appellants stand for the proposition that the tort, in this case the murders, must be committed in direct furtherance of the common design. As Fleming expressed it, this means that all participants must act in furtherance of the wrong: *Botiuk*, at para. 74; *Newcastle (Town) v. Mattatall* [*(1987), 78 N.B.R. (2d) 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW61-JWBS-602T-00000-00&context=) (Q.B.), aff'd [*(1988), 87 N.B.R. (2d) 238*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW61-K054-G068-00000-00&context=) (C.A.), at paras. 27-43; *The Koursk*, [*[1924] P. 140*](https://iclr.co.uk/pubrefLookup/redirectTo?ref=1924+P.+140) (C.A.); *Mainland Sawmills*, at paras. 167-81; G. H. L. Fridman, *The Law of Torts in Canada* (2nd ed. 2002), at pp. 888-89; L.N. Klar, *Tort Law* (3rd ed. 2003), at p. 488.



(at para. 154)

**5**  In *I.C.B.C. v. The Corporation of the City of Vancouver*, [*2000 BCCA 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1W2-00000-00&context=), McEachern C.J.B.C., on behalf of the Court, made this statement:

But counsel argue that in these circumstances, the two officers were acting in concert and the ***negligence*** of one becomes the ***negligence*** of both. In my view, this part of the appeal is governed by the principles discussed in the decision of the Supreme Court of Canada in *Cook v. Lewis*, [*[1951] S.C.R. 830*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0H9-00000-00&context=) where Cartwright J., writing for the majority, found at 841 that parties acting together in a lawful pursuit generally have no reason to anticipate that the other will act negligently. It would be otherwise if both actors were engaged in an unlawful activity, or were both negligent, or if one encouraged the other to do something unreasonable and dangerous, but none of those circumstances exist here. In fact counsel for the City advise that there was no reason for Smitas to anticipate that Oleskiw would point his gun at Mr. Keeling since regulations prohibit pointing a gun until a decision has been made to use deadly force and these officers never got close to making that decision.

I note in most of the cases when joint liability was found, the parties were either carrying out some unlawful purpose, or were encouraging or assisting one or the other to do so before one person's tort would be imputed to another.

(at paras. 15-16)

See also, *General Accident Insurance Company v. Newcastle (Town) (1988)*, [*52 D.L.R. (4th) 356*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW61-K054-G068-00000-00&context=) (N.B.C.A.) and *Bains v. Hofs* [*(1992), 76 B.C.L.R. (2d) 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4GK-M2M0-00000-00&context=) (S.C.).

**6**  If May and Ivy agreed to embark on an unlawful course of action and May made statements which amounted to misrepresentations in direct furtherance of that unlawful aim, then Ivy will be jointly liable for misrepresentations made by May.

**7**  The "common object" here was obtaining funding for a scheme whereby workers from China would be available to work on a temporary basis in Canada. While there may well have been "common design", nothing which occurred can be described as May and Ivy being engaged in an unlawful activity. I cannot conclude that a scheme to bring workers from China or the solicitation of funding for such a scheme can be described as an unlawful activity.

**8**  Accordingly, I am satisfied that Ivy cannot be vicariously liable for any misrepresentations made by May even if I concluded that the misrepresentations made by May were in furtherance of a common cause.

**(b) Silence of Ivy when Misrepresentations Were Made by May?**

**9**  If May made a false representation to one or both of the Plaintiffs in the presence of Ivy and Ivy remained silent, the Court can consider the silence of Ivy as a representation by Ivy if it amounted to a tacit confirmation or adoption of what Ivy knew to be false. Similarly, if May made a false representation in correspondence to one or both of the Plaintiffs, if Ivy received a copy of the correspondence, and if Ivy remained silent, I can consider the silence of Ivy as a representation by her that amounted to a tacit confirmation or adoption of what Ivy knew to be false.

**10**  However, the general rule is that silence is not enough and that there must be a "positive assertion". In this regard, Finch J.A., (as he then was) in *Sidhu Estate v. Bains* [*(1996), 25 B.C.L.R. (3d) 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1NV-00000-00&context=) (C.A.), made this statement on behalf of the Court:

... As a general rule, mere silence cannot found a cause of action, but active concealment can: see *Peek v. Gurney* (1873), L.R. 6 (H.L.) 377 at 403; and *Leeson v. Darlow*, [*[1926] 4 D.L.R. 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-DYMS-62TY-00000-00&context=) (Ont. C.A.). Mr. Bains's duty to disclose the truth did not arise from a fiduciary relationship to Ms. Sidhu, or from a relationship calling for the utmost good faith on his part. The duty to correct the false information conveyed by Mr. Bhandar to Ms. Sidhu arose on Mr. Bains's part because by remaining silent Mr. Bains tacitly confirmed the false information as true.

The circumstances required for silence to be actionable misrepresentation are articulated in Spencer Bower & Turner, *The Law of Actionable Misrepresentation*, 3d ed. (London: Butterworths, 1974) at 101:

A misrepresentation may be made by silence, when either the representee, or a third person in his presence, or to his knowledge, states something false, which indicates to the representor that the representee either is being, or will be, misled, unless the necessary correction be made. Silence, under such circumstances, is either a tacit adoption by the party of another's misrepresentation as his own, or a tacit confirmation of another's error as truth.

(at paras. 30 and 31)

**11**  If May made misrepresentations, it is necessary to ask if Ivy was aware that the statements made were false and, then, if her silence amounted to tacit adoption or confirmation of the misrepresentation. To be actionable, the representation must meet the test for either negligent misrepresentation established in *Queen v. Cognos Inc.*, [*[1993] 1 S.C.R. 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609G-00000-00&context=) or fraudulent misrepresentation established in *Bruno Appliance and Furniture, Inc. v. Hryniak*, [*2014 SCC 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X253-00000-00&context=).

**12**  There is sparse authority about the obligation to correct where a third party has made a misrepresentation and whether silence will meet the threshold set in *Sidhu, supra*. One factor is the relationship between the person said to be making the misrepresentation and the person who failed to correct what was said.

**13**  The purpose of what was said and the correspondence forwarded was to allow May to introduce Ivy to Liu, to encourage Liu to invest in the foreign worker project, to acquaint the Plaintiffs about the project, and to obtain financial participation in the project. May and Ivy were both encouraging Liu to invest in the project which would see foreign workers come to Canada.

**14**  I cannot conclude that there was a fiduciary relationship between Ivy and Liu such that Liu was relying on Ivy for investment advice so that could be said that Ivy owed a fiduciary duty or their relationship was such as to require the upmost good faith. Accordingly, the question which arises is whether any silence by Ivy amounted to a tacit confirmation or adoption of which Ivy knew to be false.

**15**  In *Halton (Regional Municipality) v. Rezaizadeh*, [*[2004] O.J. No. 3311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-F65M-642X-00000-00&context=) (Ont. S.C.J), Murray J. stated that the relationship between the two representors factored into whether the plaintiff reasonably construed any silence as a representation:

... The "failure to correct" is stated to be the equivalent of making a false representation to the plaintiff. I disagree. The plaintiff's counsel relied on the case of *Sidhu Estate v. Bains*, [*[1996] B.C.J. No. 1246*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1NV-00000-00&context=) to establish that silence in the face of a false representation can lead to liability for deceit. ...

While I do not dispute that silence in the face of a false representation by another (as in the *Sidhu Estate* case) can lead to liability for deceit, it is not clear in this case that the silence of the daughter, Farnoosh, at meetings when her mother made false representations would be tantamount to misrepresentation by Farnoosh because of a failure to correct. As a practical matter, her situation as a child (albeit an adult child) is very different from a person who as shareholder, director and president of a corporation stays silent in the face of false representations designed to induce investment by an investor. I am not prepared to find that the silence of the defendant Farnoosh Rezaizadeh is sufficient to amount to false or negligent misrepresentation. There would have to be facts asserted (other than the relationship of mother and daughter) that would establish that the plaintiff could reasonably construe silence as a misrepresentation. ...

(at paras. 18 and 19)

**16**  After reviewing what it is alleged was said in the presence of Liu by May and in the correspondence by May to the Plaintiffs with copies to Ivy, I cannot conclude that Ivy knew or ought to have known that statements being made by May were misrepresentations. I cannot conclude that Ivy can be liable for statements made by May because Ivy should have known or did know that the statements were misrepresentations. As well, I cannot conclude that there was an obligation on Ivy to correct the statements that were being made by May. To hold otherwise could convert the limited rule in *Sidhu, supra*, into a general duty to disclose or correct that could drastically increase the scope of liability.

1. **May as the Agent of Ivy?**

**17**  In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [*2001 SCC 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M491-00000-00&context=), Major J., on behalf of the Court, stated that there are strict controls on the scope of vicarious liability:

Vicarious liability is not a distinct tort. It is a theory that holds one person responsible for the misconduct of another because of the relationship between them. Although the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed, the most common one to give rise to vicarious liability is the relationship between master and servant, now more commonly called employer and employee.

In general, tort law attempts to hold persons accountable for their wrongful acts and omissions and the direct harm that flows from those wrongs. Vicarious liability, by contrast, is considered to be a species of strict liability because it requires no proof of personal wrongdoing on the part of the person who is subject to it. As such, it is still relatively uncommon in Canadian tort law. ... (at paras. 25 and 26)

**18**  The Court went on to consider the theoretical bases for vicarious liability, pointing out that liability flows from the power that the principal or employer has to control, authorise or supervise the agent. Since an agent or employee has no authority over their principal or employer, there is nothing to impute responsibility on them for the actions of their principal or employer. The same cannot be said regarding misrepresentations made by an agent on behalf of a principal.

**19**  As well, it is possible for two parties to be the agent of the other and therefore vicariously liable for torts committed within the scope of authority of the other. Partners, for example, are deemed each other's' agents for the purposes of the partnership business: *Partnership Act*, [*R.S.B.C.1996, c. 348, s. 7*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JPGX-S03Y-00000-00&context=).

**20**  In the context of these pleadings, it is alleged that Ivy and May acted as principals. As a result of the Consent Dismissal Order so that no further claim is maintained against May, the question which arises is whether May could be the agent of Ivy despite the fact that no allegation is set out in the Claim that this was the case and that no direct claim remains against May.

**21**  While I am of the view that the Consent Order resulted in a settlement of all claims that the Plaintiffs might have against May in her personal capacity, the terms of the Consent Order did not affect the role of May as an agent of Ivy and the potential claim that the Plaintiffs have against Ivy as a result of any misrepresentations made by May in her capacity as the agent of Ivy and within the scope of her authority as such.

**22**  If May was the agent of Ivy and, to the extent that May made misrepresentations whether or not Ivy was present at the time, Ivy can be found liable for those misrepresentations made by May. While I am satisfied that *res judicata* prevents the Plaintiffs from establishing joint liability for any tort of May: *South American and Mexican Co., Ex Parte Bank of England*, [1895] 1 Ch. 37 at 50 (C.A.), cited most recently in *Bankirk Developments Ltd. v. Orca Estates Ltd.*, [*2006 BCCA 238*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B26W-00000-00&context=), the order dismissing the action against May does not eliminate the possibility that Ivy will be found liable for misrepresentations made by May as her agent.

**23**  As between Ivy and May, I conclude that they were the agent of each other. What was done by May in words and in action may establish vicarious liability of Ivy for what was said or done by May if what was said or done amounts to misrepresentations.

**24**  To the extent that I can find that what was said and done by May amounted to misrepresentations, I can conclude that vicarious liability of Ivy for those misrepresentations is established.

G.D. BURNYEAT J.

**End of Document**

[***Lomax v. Weins, [2004] B.C.J. No. 1651***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X0FS-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

D.M. Smith J.

Heard: June 8 and 9, 2004.

Supplementary judgment: August 4, 2004.

Kamloops Registry No. 26714

**[2004] B.C.J. No. 1651** | [*2004 BCSC 1051*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1D0-00000-00&context=) | [*33 B.C.L.R. (4th) 368*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1D0-00000-00&context=) | [*133 A.C.W.S. (3d) 649*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1D0-00000-00&context=)

Between David Lee Lomax, plaintiff, and Larry Martin Weins, defendant

(80 paras.)

**Case Summary**

**Civil procedure — Interest — Post judgement interest — Damages — General damages — Investment management fees — Assessment — Income tax implications — Measure of Damages — Deductions — Insurance law — Automobile insurance — Accident benefits — Total disability — No fault regimes — Statutory interpretation — Statutes — Construction — Ordinary meaning — Tort law — *Negligence* — Motor vehicles.**

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| This was a hearing to determine a number of ancillary matters that arose from a motor vehicle accident. The plaintiff, Lomax was involved in a motor vehicle accident with the defendant, Weins. He was awarded damages in excess of one million dollars in a tort action between the parties. Lomax was an American citizen. He was insured through State Farm. His only connection to British Columbia was the location of the accident. A determination regarding whether certain deductions were to be made from his damage award had to be made such as whether the total temporary disability benefits payable would be deducted from the damage award, whether the Social Security Disability Benefits received after the accident should be deducted from the damage award, whether the damage award should be given in a lump sum or by structured settlement, whether he should be awarded a management fee and what amount of pre and or post-judgment interest should be added to the award.  HELD: State Farm admitted liability for any total temporary disability payments which Lomax was entitled to.  Any amount payable to State Farm was to be deducted from the tort award. The statutory interpretation of the legislation only authorized deductions of CPP benefits and not Lomax's Social Security Benefits. Lomax's Social Security Benefits were a form of wage replacement not income replacement. They fell within the private insurance exception to the rule against double recovery and were therefore not deductible from the damage award. A structured settlement was not required in this case as Lomax was a responsible individual. There was no concern that he would squander his award and become a charge on society. Lomax was entitled to management assistance and investment advice as a result of his ongoing and permanent disability. Lomax was entitled to pre-judgement interest on his special damages awards. He was awarded post-judgment interest on the award from the date it was made to the date of payment. |

**Statutes, Regulations and Rules Cited:**

[*B.C. Reg. 447/83 ss. 2.1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC81-FD4T-B276-00000-00&context=), 2.1(b), 2.1(b)(i), 80, 80(1), 80(1)(a), 80(1)(a)(b), 80(1)(b)(iii), 86, 86(2), 86(5).

Court Order Interest Act, [*R.S.B.C. 1996, c. 79, ss. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-JCBX-S1FM-00000-00&context=)(1),1(2).

Insurance Act, [*R.S.B.C. 1996, c. 226*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B0DY-00000-00&context=).

Insurance (Motor Vehicles) Act, *R.S.B.C. 1996, c. 231*. ss. 25, 25(2), 52, 52(b), 53, 54, 55, 55(1), 55(1)(a), 55(1)(b), 55(1)(b)(i), 55(1)(b)(ii), 148.1.

Law and Equity Act, *R.S.B.C. 1996, c. 253*.

Law and Equity Act Regulation (B.C.) Reg. 352/81)

Worker's Compensation Act, *R.S.B.C. 1996, c. 492*.

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Counsel for the defendant: J. Broadway & E. Hughes

Counsel for State Farm Insurance: J. McAfee

[Editor's note: Original reasons for judgment were released by the Court September 5, 2003. See [*[2003] B.C.J. No. 2082*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20RS-00000-00&context=).]

[Editor's note: An erratum was released by the Court August 5, 2004; the correction has been made to the text and the erratum is appended to this document.]

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| **D.M. SMITH J.** |

**1**   On September 5, 2003, the plaintiff, David Lee Lomax, was awarded damages in excess of one million dollars in a tort action between the parties arising out of a motor vehicle accident that occurred on January 6, 1998, at Spences Bridge, B.C. ("the accident"). See Lomax v. Weins, [*[2003] B.C.J. No. 2082*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20RS-00000-00&context=), [*2003 BCSC 1354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20RS-00000-00&context=). As a result of the accident Mr. Lomax was rendered permanently disabled. He was awarded damages for pain and suffering, special damages, past income loss, cost of future care and loss of future earning capacity.

**2**  Mr. Lomax is an American citizen. At the time of the accident he was a resident of the state of Alaska. The motor vehicle he was operating was insured through State Farm Mutual Automobile Insurance Company ("State Farm"). His only connection to British Columbia was the location of the accident.

**3**  The parties have agreed the following amounts must be deducted from the award of damages as set out in the entered order of February 23, 2004:

1. $46,390 for payments in advance made by the defendant as set out in paragraph 2 of the order;
2. $5,000 paid by Allstate Insurance to be deducted pursuant to s. 25 of the Insurance (Motor Vehicle) Act *R.S.B.C. 1996 c. 231* ("the Act");
3. $74,841 paid by State Farm towards the special damages and cost of future care, to be deducted pursuant to s. 25 of the Act;
4. Post trial advances paid by the defendant to be deducted from the past income loss award:

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| --- | --- | --- | --- | --- |
|  | (i) | Advance paid on November 13, 2003 | $50,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (ii) | Advance paid on December 15, 2003 | $20,000 |  |

**4**  Following the damages award, a further hearing was held to determine a number of ancillary matters arising out of the tort claim. The issues in that subsequent hearing may be summarized as follows:

1. The amount of total temporary disability benefits ("TTD benefits") payable pursuant to ss. 80 and/or 86 of Part 7 of the Revised Regulation (1984) under the Act, [*B.C. Reg. 447/83*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5J1-JJ1H-X0F6-00000-00&context=) (the "Revised Regulation"), to be deducted from the damages award pursuant to s. 25 of the Act;
2. The amount of income tax payable on the past income loss award, to be deducted from the damages award pursuant to s. 54 of the Act;
3. Whether the U.S. federal Social Security Disability Benefits ("SSD benefits") received by Mr. Lomax post accident should be deducted from the damages award pursuant to s. 25 of the Act;
4. Whether the damages award should be paid out in a lump sum or by a structured judgment pursuant to s. 55 of the Act;
5. Whether Mr. Lomax should be awarded a management fee to be added to the damages award; and,
6. The amount of any pre- and/or post-judgment interest payable pursuant to the Court Order Interest Act, *R.S.B.C. 1996, c. 79*, to be added to the damages award.

**5**  State Farm has admitted liability for any TTD payments to which Mr. Lomax may be found entitled pursuant to Part 7 of the Act. The parties agree that any amount the court finds is payable by State Farm shall be deducted from the tort award pursuant to s. 25 of the Act. The parties have also agreed that counsel for State Farm could appear in this action to make submissions on this issue and State Farm has agreed to be bound by the court's decision in that regard.

**6**  At the conclusion of the hearing, I forwarded a memorandum to counsel in which I stated that I had concluded it was not in the plaintiff's best interests that the damages award be structured. I indicated that I would provide written reasons for this decision along with my written reasons in regard to the other ancillary orders being sought.

1. THE AMOUNT OF TTD BENEFITS PAYABLE BY STATE FARM

**7**  Section 25(2) of the Act provides for the following deductions to be made after an assessment of damages:

After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the Court, and taken into account, or if the amount of benefits has not been ascertained, the Court must estimate it and take the estimate into account, and the person is entitled to enter judgment for the balance only.

**8**  The statutory scheme for no fault TTD benefits provides for coverage up to 104 weeks before trial and for a period beyond 104 weeks in prescribed circumstances. These amounts are subject to deductions for benefits paid by certain specified programs or plans of disability coverage. Section 2 of Schedule 3 states that the maximum benefits payable under s. 80 are $300 per week.

**9**  It is agreed that the amount of TTD benefits to which Mr. Lomax is potentially entitled is $118,128.11. This amount is calculated as follows:

1. Payments for the first 104 weeks from the date of the accident, at $300 a week, for a total of $31,200 (the "Initial TTD benefits"): s. 80 of the Revised Regulation; and,
2. Payment of TTD benefits beyond 104 weeks for a total of $86,928.11 (the "Ongoing TTD benefits"): s. 86 of the Revised Regulation.

**10**  The issues to be determined in regard to the TTD benefits are two-fold:

1. Were Mr. Lomax's gross earnings in the 12 months prior to the accident sufficient to qualify him to receive the Initial TTD benefits?
2. If the answer to this question is yes, should the amount of SSD benefits he received after the accident pursuant to the U.S. federal Social Security Act be deducted from the Ongoing TTD benefits?
3. Were Mr. Lomax's gross earnings 12 months before the accident sufficient to qualify him to receive the Initial TTD benefits?

**11**  Section 80 of the Revised Regulation under the Act provides as follows:

Disability benefits for employed persons

80(1) Where, within 20 days after an accident for which benefits are provided under this Part, an injury sustained in the accident totally disables an insured who is an employed person from engaging in employment or an occupation for which the insured is reasonably suited by education, training or experience, the corporation shall, subject to section 85, pay to the insured for the duration of the total disability or 104 weeks, whichever is shorter, the lesser of the amounts determined under paragraphs (a) and (b):

1. the applicable amount of disability set out in section 2 of Schedule 3;
2. in respect of an accident that occurred
3. on or after January 1, 1991, an amount per week calculated by taking 75% of the insured's gross earnings for the 12 month period immediately preceding the accident and dividing by the number of weeks and fractions of weeks actually worked during that period.

**12**  It is agreed that Mr. Lomax was an "employed person" and is now a "disabled person" within the meaning of s. 80.

**13**  At [paragraph]13 of Lomax, I found that Mr. Lomax's taxable employment income for 1997 was $19,490 USD or $26,035 CAD at the conversion rate specified in the reasons. At [paragraph]26, I found that Mr. Lomax's net income before taxes, from all sources for 1997, was $19 US or $26.04 CAD. In 1997, Mr. Lomax was in receipt of employment income from a carpentry job. He was also in receipt of business income from the rental of certain recreational properties. The latter source of income permitted him to write off rental losses in accordance with Alaska tax laws thereby reducing his net taxable income. His gross business income before deductions was significantly greater than his gross employment income.

**14**  State Farm submits that Mr. Lomax's 1997 gross earnings for the purpose of his entitlement to Initial TTD benefits under s. 80, was his net taxable income at $19 US. At this amount Mr. Lomax would not qualify for Initial TTD benefits. The defendant who was insured by I.C.B.C. submits that Mr. Lomax's 1997 gross earnings was his gross employment income of $19,490 US, or alternatively a combination of his gross employment income and his gross business income (before deductions), both of which would qualify him for the maximum Initial TTD benefits pursuant to s. 80.

**15**  The term "gross earnings" in the Revised Regulation of the Act is not defined. However, a dictionary definition of "gross earnings" in Black's Law Dictionary, 7th ed., s.v. "gross earnings" defines the term as "total income and receipts of a person or business before deductions and expenses". This definition suggests that "gross earnings" should not be adjusted for business losses or expenses for the purposes of the s. 80 qualifying formula.

**16**  Applying a contextual interpretation of "gross earnings" in s. 80 also supports this conclusion. Specifically, s. 80(1) applies to "employed persons" who have, by virtue of injuries sustained in an accident, been prevented, "from engaging in employment or an occupation for which the insured is reasonably suited by education, training or experience ...". This wording suggests the section is intended to replace income lost by employed persons.

**17**  This interpretation is supported by the decision of Bradley v. Insurance Corporation of British Columbia [*(1990), 42 B.C.L.R. (2d) 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-21CG-00000-00&context=) (C.A.). In Bradley, Seaton J.A., for the court, addressed the purpose of s. 80. At p. 326 he stated:

The purpose of the provision does offer guidance. It was to provide "disability benefits for employed persons" according to the marginal note. Section 80 read within the context of neighbouring provisions is to provide the income that would have been earned through employment or engaging in an occupation. The amount to be paid is based on the weekly net lost earnings. The regulation does not contemplate recovery for persons who lost neither wages nor profits.

**18**  Subsequent decisions of this court have adopted this interpretation: see Prato v. Insurance Corporation of British Columbia, [*[2003] B.C.J. No. 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4XG-00000-00&context=), [*2003 BCSC 76*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4XG-00000-00&context=); Lancaster v. Insurance Corporation of British Columbia, [*[2001] B.C.J. No. 1431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63TR-00000-00&context=), [*2001 BCSC 927*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63TR-00000-00&context=).

**19**  Applying a purposive interpretation to s. 80, which Bradley has described as the replacement of lost earnings, I am satisfied that Mr. Lomax's management of his financial affairs before the accident, by minimizing his taxable income, does not alter the fact that he had gross earnings from his employment to qualify him for Initial TTD benefits. It is not the effect of what one does with employment income which determines entitlement under s. 80. Rather, it is the actual loss of employment income that must be considered when determining the issue of entitlement.

**20**  Accordingly, I have concluded that Mr. Lomax's "gross earnings" for the period before the accident were sufficient to qualify him for the statutory maximum Initial TTD benefits of $300 per week.

1. Are the SSD benefits received by Mr. Lomax pursuant to the U.S. Social Security Act deductible from the Ongoing TTD benefits?

**21**  Mr. Lomax has been in receipt of SSD benefits retroactive to July, 1998. In that regard, he receives a monthly amount of $1,196 USD or $1,638.88 CAD. In total he has received approximately $87,976.10 USD or $120,553.65 CAD to date. Deductions have been taken from his employment earnings to fund this U.S. social security program. At issue is whether these benefits should be deducted from his Ongoing TTD payments.

**22**  Section 86(1) continues the Initial TTD benefits payable under s. 80, beyond the initial 104 weeks until the insured is no longer disabled or reaches the age of 65. Section 86(2) further provides:

Disability beyond 104 weeks

86(2) Where benefits are payable under the Canada Pension Plan ... to an insured during the period and in respect of a disability for which benefits are payable to the insured under this section, the amount payable each month under this section shall be reduced by an amount not exceeding the amount of the first regular monthly benefit cheque received by the insured under the Canada Pension Plan ... after the insured becomes eligible for benefits under this section, and that amount shall continue to be deducted notwithstanding that amount payable to the insured under the Canada Pension Plan ... may be increased during the time the insured remains eligible for benefits under this section, but if the amount payable to the insured under the Canada Pension Plan ... decreases, the benefits payable under this section shall be increased accordingly.

...

1. Where an insured who is an employed person returns to work but, because of injuries suffered in the accident, is incapable of earning the amount of his present disability benefits, the corporation will pay the difference between his disability benefits and the amount the insured is presently earning through his employment.

**23**  Thus, s. 86(2) mandates a reduction of Ongoing TTD benefits payable under s. 86(2) by the amount of any CPP benefits received by an insured. Payments to an insured person under the Canada Pension Plan ("CPP") are only deducted from Ongoing TTD benefits and not Initial TTD benefits.

**24**  Mr. Lomax's SSD benefits appear very similar to CPP benefits in terms of their eligibility criteria and duration. As with CPP, SSD benefits last for the duration of a person's disability and do not require the disability to have occurred in the course of the person's employment. Both are mandatory wage replacement schemes that require contributions from an employee and/or employer. However, while s. 86(2) expressly provides for a deduction of CPP benefits, it does not expressly provide for the deduction of similar benefits payable under another program.

**25**  State Farm submits that a broad and purposive approach should be taken in interpreting this section and that because Mr. Lomax's SSD benefits are similar to CPP benefits, which are in the nature of private insurance, they should also be deductible. See Hayre v. Walz, [*[1992] B.C.J. No. 985*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M0SC-00000-00&context=) (C.A.) at p. 3. It refers to the many occasions in which the Supreme Court of Canada has endorsed the application of the modern principle of statutory interpretation as enunciated by Elmer Driedger in The Construction of Statutes, 2nd ed., 1983 (see: Rizzo & Rizzo Shoes Ltd. (Re), [*[1998] 1 S.C.R. 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3X1-00000-00&context=) at [paragraph] 21; R. v. Sharpe, [*[2001] 1 S.C.R. 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46S-00000-00&context=), [*2001 SCC 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46S-00000-00&context=) at [paragraph] 33; Bell Express Vu Limited Partnership v. Rex, [*[2002] 2 S.C.R. 559*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4CN-00000-00&context=), [*2002 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4CN-00000-00&context=) at [paragraph] 26; and, Re Application under s. 83.28 of the Criminal Code, [*[2004] S.C.J. No. 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGN1-F5KY-B00N-00000-00&context=), [*2004 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B11M-00000-00&context=)). The principle was described by Driedger at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

**26**  The modern approach requires the court to look at the plain words of the legislation in concert with the context in which the impugned section appears and the purpose of the section in order to provide an interpretation consistent with legislative intent.

**27**  The defendant submits there is no ambiguity regarding the words used in s. 86(2) and that based on their plain and ordinary meaning there is no legislative provision for deducting any benefits other than CPP. He submits that statutory interpretation must be based on the premise that legislation is presumed to be accurate and well-drafted.

**28**  The Revised Regulation does include provisions which expressly provide for the deductibility of benefits provided under a "similar plan of another jurisdiction" in addition to those expressly provided for in the section. For example, s. 148.1, which deals with underinsured motorist protection, includes as a "deductible amount" (at sub-section (h)) sums paid under a policy of insurance issued under the Insurance Act, [*R.S.B.C. 1996, c. 226*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B0DY-00000-00&context=). Similarly, s. 82 provides for the deduction of payments made under the Workers Compensation Act, *R.S.B.C. 1996 c. 492*. Each of those sections also provides for the deduction of any similar benefit that is paid pursuant to "... a similar law of another jurisdiction ...". This terminology would clearly permit Mr. Lomax's U.S. SSD benefits to be deductible from the Ongoing TTD payments.

**29**  However, s. 86(2) does not contain this additional phrase that was included in ss. 148.1 and 82. The defendant submits the wording of s. 86(2) is clear and concise; where no ambiguity arises from the wording of the section the plain and ordinary meaning of the words must be given effect, whether or not that effect seems reasonable. He relies on the principles of statutory interpretation as outlined in Sullivan and Driedger on the Construction of Statutes, 4th ed. (Vancouver: Butterworths, 2002), at p. 138, which lists only two instances in which a court has jurisdiction to fill in legislative gaps:

1. when it is necessary to the operation of the legislative scheme; or
2. when it is necessary to remedy an intolerable legislative absurdity flowing from the gap.

Neither of these circumstances are created by the wording of s. 86(2).

**30**  There are limits on the application of the "contextual" approach to statutory interpretation. To accept State Farm's submission would require this court to read in the words "... or similar plan of another jurisdiction ..." when it would appear the legislature intentionally omitted those words in s. 86(2) when contrasted to their inclusion in ss. 148.1 and 82.

**31**  The language of s. 86(2) is clear and concise in spite of the apparent discriminatory application of its provision. In my view, in the absence of any ambiguity, the court does not have the jurisdiction to read into or rewrite the section in a manner which might provide greater consistency in its application. As was noted by Lamer C.J. in R. v. McIntosh, [*[1995] 1 S.C.R. 686*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3H9-00000-00&context=) at [paragraph] 26:

The contextual approach allows the courts to depart from the common grammatical meaning of the words where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" as particular meaning that they may be interpreted contextually .... The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function.

**32**  And at [paragraph]34:

... where, by the use of clear and unequivocal language capable of only one meaning ... it must be enforced however harsh or absurd or contrary to common sense the result may be.

**33**  The Supreme Court of Canada reiterated this warning against the intentionally rewriting of legislation where it stated in R. v. Hinchey, [*[1996] 3 S.C.R. 1128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3SX-00000-00&context=) at [paragraph] 36:

... I repeat that judges should not attempt to rewrite a statute under the guise of interpreting it.

**34**  While State Farm's submission in regard to the application of the contextual approach to statutory interpretation might produce a more consistent approach to the application of s. 86(2) that would not favour an out-of-country insured, in my view, to adopt that interpretation would be tantamount to assuming a legislative rather than a judicial role.

**35**  Accordingly, I have concluded that as s. 86(2) only authorizes the deduction of CPP benefits and not Mr. Lomax's SSD benefits, the latter are not deductible from the damages award.

1. THE AMOUNT OF INCOME TAX PAYABLE ON THE AWARD FOR PAST INCOME LOSS

**36**  Sections 52 to 54 of the Act outline the requirements for the deduction of income tax on awards for past income loss.

**37**  Section 54 directs that a person who suffers a loss of income as a result of an accident is entitled to recover as damages for the income loss suffered after the accident and before the first day of trial, not more than the net income loss that the person suffered in that period.

**38**  Section 52(b) defines what net income loss is for a person who is not resident in B.C. and did not earn income in B.C.:

... the gross income that the person lost in that period less the following amounts calculated in accordance with the regulations under this Act:

1. the amount that would have been payable as taxes on that gross income according to the tax laws in the jurisdiction in which the person is liable to pay tax on income, as those laws read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, calculated with reference to deductions and tax credits prescribed under this Act;

**39**  Section 2.1 of the Revised Regulation states:

Net income loss

2.1 The deductions, tax credits and premiums for the purposes of "net income loss" in section 52 of the Act are

...

1. for the person referred to in paragraph (b) of the definition of "net income loss", any deductions, tax credits and premiums that apply to the person in respect of whom the calculation of net income is being made
2. in the jurisdiction in which the person is liable to pay tax on income, ...

**40**  At issue is whether income tax to be deducted on Mr. Lomax's award for past income loss should be calculated as if his gross income between the date of the accident and the date of trial had been earned all in the year immediately preceding the award, as of December 31, 2002, (the "lump sum method"), or whether it should be pro rated to the specific calendar years in which the court's assessment calculated it would probably have been earned (the "pro rated method").

**41**  In this case, Mr. Lomax's past income loss was calculated by averaging his gross income from all sources between 1993 and 1997, after deducting his tax deductible expenses, and multiplying this average ($33,891 per year) by the number of years of income loss. The total for the 5.33 years was calculated as $180,639 USD or $247,529.62 CAD.

**42**  Expert opinion evidence was provided in the hearing regarding Mr. Lomax's income tax liability based on both the lump sum method and the pro rated method. In addition there was evidence that Mr. Lomax was permitted by the law of the jurisdiction where he resided to carry forward his income tax losses for the years 1998 and 1999 and to deduct those losses in the calculation of his net income, resulting in Mr. Lomax paying no tax in 1998, $276 USD only in 1999, and no tax for the first eight months of 2003.

**43**  A further issue raised in determining Mr. Lomax's net income loss was what income should be included in the calculation. Mr. Lomax's expert did not include Mr. Lomax's SSD benefits or his wife's income in the calculation. Mr. Lomax and his wife are required to file a joint income tax return and therefore those additional sources of income were reflected in Mr. Lomax's income tax return. However, they did not form part of the past income loss award. The defendant's expert included Mr. Lomax's taxable income from all sources as reflected in his income tax returns.

**44**  A strict reading of s. 54 would limit the calculation of Mr. Lomax's net income loss to that of his gross income only, which was lost over the period between the date of the accident and the date of trial, with the prescribed deductions and tax credits permitted to him by the laws of the jurisdiction in which he resides. It does not refer to any additional income an insured might receive from other sources such as SSD benefits. Those benefits are wage replacement income, which is not the same as lost employment or business income as contemplated by the past income loss award.

**45**  I have therefore concluded that the Mr. Lomax's gross income must be based on Mr. Lomax's past income loss as determined at trial, being $180,639 USD or $247,529.62 CAD.

**46**  The expert evidence in the hearing established that Mr. Lomax's income tax liability based on a single lump sum method ranges between $39,547 USD or $54,191.25 CAD (as calculated by his expert) and $53,485 USD or $73,290.50 CAD (as calculated by the defendant's expert). In comparison, his income tax liability based on the pro-rata method ranges between $7,540 USD or $10,332.06 CAD (as calculated by his expert) and $35,794 USD or $49,048.52 CAD (as calculated by the defendant's expert). In calculating Mr. Lomax's income tax liability, the defendant's expert included the earnings of Mr. Lomax's wife and his SSD benefits thereby increasing his past income to $224,375 USD from the past income loss award of $180,639 USD.

**47**  While s. 52 sets out the deductions to be made from gross income when calculating "net loss", it provides no guidance as to when the income is considered to have been earned for the purpose of applying tax laws. The only reported decision on this issue is the detailed analysis of Pitfield J. in Hudniuk v. Warkentin, [*[2003] B.C.J. No. 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=), [*2003 BCSC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=). In Hudniuk, the jury did not allocate the past income loss award to any particular time but simply awarded a lump sum at the conclusion of the trial.

**48**  In addressing this issue, Pitfield J. at [paragraph]36 described the quantification of past income loss as an assessment rather than a mathematical calculation. He stated that past income loss is made as a gross determination at the conclusion of the trial and past income loss is not allocated to any specific calendar year.

**49**  He then provided a detailed analysis of s. 54. At [paragraph] 37 and 38 he stated:

[37] There is nothing in s. 54 or the definition of net income loss that directs any allocation of pro-ration of the gross amount to any month or calendar year. Indeed, the definition of net income loss refers to net income for a period and makes no reference to parts of a period. Had an allocation to parts of a period on any basis been intended, it would have been easy for the legislature to have said so.

[38] An added difficulty with respect to the definition of net income loss is the reference to a calculation of income tax by reference to provisions of the Income Tax Act or the Income Tax Act of Canada as read "on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined". If the gross income loss assessed by a trier of fact is to be allocated to the calendar years ending in the period commencing with the date of the accident and ending with the first day of trial, there would be no reason to apply the rules of an earlier taxation year to the calculation of income in the specific calendar year.

...

**50**  At [paragraph] 40 he concluded:

In my opinion, the reasonable interpretation of s. 54 of the Act and the definition of net income loss consistent with the underlying substance of a jury award which is an assessment of damages and not a mechanical calculation, is that the Act requires a determination of tax on the award determined as if the past income had all been earned at the effective date of the jury's assessment namely, the first day of trial. As that determination occurs before a calendar year end, and therefore quite possibly in advance of finalization of income rules for that year, tax is computed on that amount in accordance with the provisions of the Income Tax Act of British Columbia, the Income Tax Act of Canada or the Employment Insurance Act of Canada applicable to the calendar year ending before the year of assessment.

**51**  An appeal was filed in Hudniuk but subsequently abandoned.

**52**  Mr. Lomax submits Hudniuk is distinguishable as it was based on a jury award. However, Pitfield J.'s analysis of s. 54 was followed in Tong v. Ip, [*[2004] B.C.J. No. 1326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X01J-00000-00&context=), [*2004 BCSC 861*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X01J-00000-00&context=), which was a judge alone trial. At [paragraph] 33 of Tong, Curtis J. commented:

The law now requires that an award for wage loss made in a motor vehicle accident claim such as this one must be net of income tax and Employment Insurance Act, [*S.C. 1996, c. 23*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB31-F4NT-X50F-00000-00&context=), premiums. The case of Hudniuk v. Warkentin [*(2003), 9 B.C.L.R. (4th) 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=) (S.C.), holds that under the legislation, ss. 52 and 84 of the Insurance (Motor Vehicle) Act, *R.S.B.C. 1996, c. 231*, a claimant's net loss is to be calculated by deciding the amount of tax that would be payable as though the entire loss for the period was taxable in one year at the rates in existence December 31 of the year preceding the trial. I accept Pitfield J.'s interpretation of the legislation, however it seems to me this interpretation unduly benefits the defendant because putting the loss of income for a 5-year period all into one year results in a much higher rate of taxes and does not put the plaintiff in the position he would have been had the collision not occurred. The legislation, however says, "Despite my other enactment or rule of law ...". The net wage loss shall be calculated according to the principles set forth in the Hudniuk case.

**53**  Neither does the classification of past income loss as an award of special damages, thereby attracting calculation of interest pursuant to the Court Order Interest Act based on past income loss over six month increments, assist Mr. Lomax. No such provision is included in s. 54 and a strict reading of s. 54 requires the calculation to be made on December 31 of the year immediately preceding the award.

**54**  While this interpretation of s. 54 may be artificial and contrary to how Mr. Lomax's income tax liability was calculated during this period, I am bound by judicial comity to follow the considered decision of Hudniuk regarding the interpretation of s. 54. See Re Hansard Spruce Mills Ltd., [*[1954] 4 D.L.R. 590*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2JF-00000-00&context=) (B.C.S.C.).

**55**  For these reasons I would apply the lump sum method of calculating Mr. Lomax's net income loss based on his gross income alone as determined at trial. From his gross past income loss of $180,639 USD or $247,529.62 CAD must be deducted his income tax liability of $39,547 USD or $54,191.25 CAD.

1. THE DEDUCTIBILITY OF MR. LOMAX'S SSD BENEFITS

**56**  Mr. Lomax applied for and has received U.S. SSD benefits in the following amounts:

1. $34,368 from July, 1998 to November, 2000
2. $1,246.70 per month thereafter until June, 2004, for a total of $53,608.10

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL: | $87,976.10 USD or $120,553.65 CAD |  |

**57**  At issue is whether these benefits should be deducted from the damages award in the tort claim. Central to the issue is whether the SSD benefits are characterized as in the nature of private insurance, such as CPP, and therefore not deductible, or as a universal social security benefit, such as social assistance, and therefore deductible. Mr. Lomax submits it is the former; the defendant submits it is the latter.

**58**  It is well established that CPP disability benefits are not deductible from a tort award because they are in the nature of private insurance and therefore fall within the private insurance exception to the general rule against double recovery: C.P.R. v. Gill, [*[1973] S.C.R. 654*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B04B-00000-00&context=); Cunningham v. Wheeler, [*[1994] 1 S.C.R. 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CD-00000-00&context=). In M.B. v. British Columbia, [*[2002] B.C.J. No. 390*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1JF-00000-00&context=), [*2002 BCCA 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1JF-00000-00&context=) at [paragraph] 138 and 149, appeal allowed on other issues, [*[2003] 2 S.C.R. 477*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=), [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=), the Supreme Court of Canada distinguished social assistance payments, which are publicly funded, from CPP benefits, and held that the former should be deducted from a tort award as not to do so would result in double recovery to a plaintiff.

**59**  For the reasons already stated, I am of the view that Mr. Lomax's SSD benefits are a form of wage replacement and not income replacement. As such, they are more akin to CPP benefits than social security or assistance benefits and, in my view, fall within the private insurance exception to the rule against double recovery. They are, therefore, not deductible from the damages award.

1. STRUCTURED JUDGMENT

**60**  As previously stated, I have concluded the defendant has not established that a structured judgment is in the best interests of Mr. Lomax. Section s. 55(1)(a) of the Act sets out the requirements for a structured judgment:

55(1) The court must order that an award for pecuniary damages in a motor vehicle action be paid periodically, on terms the court considers just,

1. if the award for pecuniary damages is, after s. 25 has been applied, at least $100,000 and the Court considers it to be in the best interest of the Plaintiff, or
2. if
3. the plaintiff requests that an amount be included in the award to compensate for income tax payable on income from investment of the award, and
4. the court considers that the order, that the award be paid periodically, is not contrary to the best interest of the plaintiff.

**61**  Mr. Lomax's damages award was over $100,000. He is not seeking an income tax gross up on any income he may realize from investment of the award. Therefore, the court must be satisfied it would be in his best interests to have a structured settlement before making such an order under s. 55(1)(a).

**62**  In Townsend v. Kroppmanns, [*[2004] 1 S.C.R. 315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B10G-00000-00&context=), [*2004 SCC 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B10G-00000-00&context=), Deschamps J., on behalf of a unanimous court, referred to three principles in fixing an award of damages in a tort action. At [paragraph]18 she summarized these principles as follows:

1. first, the principle that damages are assessed and not calculated;
2. second, the principle of finality, to which courts award a one-time lump sum of damages; and,
3. third, the principle that the plaintiff has property over the award.

**63**  In regard to the third principle, Madam Justice Deschamps stated at [paragraph] 21 that this was the "most important principle" of the three. She continued:

The plaintiff is free to do whatever he or she wants with the sum of money awarded: Andrews, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=), at pp. 246-47. ... As Dickson J., as he then was, wrote in Andrews, supra, at pp. 246-47:

It is not for the Court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it. That is not something which ought to be allowed to affect a consideration of the proper basis of compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes.

**64**  Section 55(1)(a) permits the court to interfere with this "most important principle" only if it is in the best interest of the plaintiff to do so. Presumably, this would be in cases where there is evidence that a plaintiff might dissipate his award and thereby become a charge on society.

**65**  There is no such evidence in this case. Mr. Lomax is married with a child. He appears to be in a stable and loving relationship. He is enrolled in university in order to obtain a teaching certificate. He and his wife own a home the purchase of which he negotiated. He has consulted an investment counsellor with respect to how he can best invest his award and in that regard anticipates a reputable trustee will be appointed to provide him with ongoing investment advice.

**66**  In short, there is no evidence to dislodge the most important principle that Mr. Lomax has property over his award. For these reasons, I decline to order a structured judgment.

1. MANAGEMENT FEES

**67**  In Lomax, the court concluded that Mr. Lomax's injuries from the accident resulted in him continuing to suffer from a chronic pain disorder, ongoing and permanent cognitive difficulties which included a mild traumatic brain injury, and increased psychological distress that included symptoms of depression and anxiety. Mr. Lomax was awarded $483,603 CAD for loss of future earning capacity and $68,515 CAD for cost of future care. The court further concluded that Mr. Lomax would likely only be able to work at 50% of full time employment, leaving him with a residual earning capacity of $10,000 USD per annum over the 26 years remaining in his working life. Assuming a past annual earning capacity of $33,891 USD, Mr. Lomax must manage his award in such a manner so as to realize $23,891 USD per year over the next 26 years if he is to maintain the standard of living he had before the accident. He must also manage the award for his cost of future care over the period of his life expectancy. At issue is whether he is able to do this on his own without the assistance of an investment adviser or if not, what level of assistance he will require.

**68**  The seminal decision on the circumstances in which an award for management fees should be made is Mandzuk v. I.C.B.C., [*[1988] 2 S.C.R. 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23MJ-00000-00&context=). At [paragraph] 2 Sopinka J. stated:

The issue in this appeal is whether or not in serious personal injury cases an amount for an investment-counselling fee should be awarded the plaintiff. This is essentially a question of fact in each case. The only principle that appears to be applicable is that the defendant must take the plaintiff as he finds him, including his state of intelligence. Whether this is low by reason of the injuries complained of or its natural state, a management fee or an investment counselling fee should be awarded if the plaintiff's level of intelligence is such that he is either unable to manage his affairs or lacks the acumen to invest funds awarded for future care so as to produce the requisite rate of return.

**69**  At [paragraph] 6 Sopinka J. also gave some guidance as to the evidentiary burden a plaintiff must satisfy to secure an award for management fees:

Plaintiffs seeking to recover either a management fee or an investment counselling fee should provide a factual basis to the trier of fact, including:

1. evidence that management assistance is in fact necessary;
2. evidence that investment advice is in fact necessary in the circumstances;
3. evidence as to the cost of such service.

**70**  Evidence of all three criteria was presented by the plaintiff.

**71**  The Law and Equity Act, *R.S.B.C. 1996, c. 253*, Law and Equity Act Regulation ([*B.C. Reg. 352/81*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5K1-F5KY-B027-00000-00&context=)) mandates a compound discount rate of return of 2.5% and 3.5% per annum. The issue is whether Mr. Lomax requires a management fee to invest his fund of $552,118.52 in order to realize the rate of return mandated by the Law and Equity Act for the period of time the fund is required.

**72**  In Townsend, supra, Deschamps J. favourably cited the landmark 1994 report of the Law Reform Commission of British Columbia: Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages (the "LRC report"). The LRC report outlined four levels of need:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Level 1 |  | The plaintiff requires only a single session of investment advice and the preparation of an investment plan at the beginning of the period the award is to cover. |  |
|  | Level 2 |  | The plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award. |  |
|  | Level 3 |  | The plaintiff will need management services in relation to custody of the fund and accounting for investments on a continuous basis. |  |
|  | Level 4 |  | The plaintiff will require full investment management services on a continuous basis, including custody of the fund, accounting, and discretionary responsibility for making and carrying out investment decisions. Such a plaintiff is likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs. |  |

**73**  The LRC report further proposed "Standardized Tables" based on the level of care required, the size of the fund available, and the management period for the fund.

**74**  As a result of Mr. Lomax's ongoing and permanent disability, I am satisfied that he requires management assistance and investment counselling advice. Given the degree of his disability I am of the view that Level 3 investment counselling is necessary in order for him to secure the requisite return on his fund of $552,118 CAD. Applying the standardized tables, I am satisfied that he should receive a management fee of $32,000.

1. INTEREST

**75**  Mr. Lomax's award of damages was granted on September 5, 2003. Pursuant to s. 1(2) of the Court Order Interest Act pre-judgment interest must be ordered on awards that are characterized as special damages, calculated at six month intervals in which the special damages were accrued to the date of judgment. In this case, those awards include Mr. Lomax's award for special damages and his award for past income loss.

**76**  Section 1(1) of the Court Order Interest Act also directs the court to add to a pecuniary judgment an amount of interest to be paid from the date of the judgment. Section 7(2) provides that a pecuniary judgment bears simple interest from the later of the date the judgment is pronounced or the date the money is payable under the judgment.

**77**  At issue is whether the judgment of September 5, 2003, is a pecuniary judgment in the absence of the court's decision on the ancillary orders sought regarding the deductions to be calculated pursuant to s. 25(5) of the Act. In particular, the defendant submits that given the outstanding issue of whether the award should be structured or paid in lump sum, the decision of September 5, 2003, was not a pecuniary judgment and therefore post-judgment interest is not owed.

**78**  With respect I find this submission to be utilitarian. Mr. Lomax was awarded the sum of $1,016,744.93 on September 5, 2003. This award is subject to deductions for any advance payments, deductions required by ss. 25(5) and 54 of the Act, and additions for management fees and interest. These deductions and additions which may change the exact final amount of the award do not change the character of the award from a pecuniary to a non-pecuniary award. If that were the case no award for damages that required calculations under the Act could be characterized as a pecuniary award.

**79**  Moreover, the date of the award, September 5, 2003, is the date when money that is owed under the judgment is payable, subject to any additions and deductions. That date may be varied if the Court within its judgment orders the monies to be payable on some other date, but that was not ordered in this case.

**80**  For these reasons, I am satisfied that Mr. Lomax is entitled to post-judgment interest on the award from September 5, 2003, to the date of payment.

D.M. SMITH J.

\* \* \* \* \*

ERRATUM

Released: August 5, 2004.

J. McAfee appeared on behalf of State Farm Insurance and should be included on the front page of my Supplemental Reasons for Judgment.

**End of Document**

[***M.M. v. Vancouver School District No. 39, [2000] B.C.J. No. 2235***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G27H-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Bennett J.

Heard: August 8 and 10, 2000.

Judgment: November 7, 2000.

Vancouver Registry No. C974755

**[2000] B.C.J. No. 2235** | 2000 BCSC 1597 | 82 B.C.L.R. (3d) 125 | 100 A.C.W.S. (3d) 805

Between M.M., plaintiff, and P.M. and Board of School Trustees of School District No. 39 (Vancouver), defendants

(71 paras.)

**Case Summary**

**Equity — Fiduciary or confidential relationships — What constitutes a fiduciary relationship.**

|  |
| --- |
| Appeal by the plaintiff M from the dismissal of his action against P and a Board of School Trustees for damages for sexual assault. M was a student of P in 1982 and 1983 when he was in grade seven. The Board was P's employer. M claimed that the assaults commenced in 1982, when he was 13 years old, and that P forced him to drink alcohol and to have sexual relations with her. He ended the relationship in 1986. P claimed that M was the instigator of the relationship. She described a loving relationship between them. She admitted that she had a sexual relationship with M but claimed that it commenced around 1984. The sexual contact did not occur on school property. The situation came to the attention of the school authorities in 1995 and P was suspended in 1996. She was acquitted of criminal charges. She was 11 years older than M. M argued that P had a fiduciary obligation not to have sexual relations with him, regardless of consent. A jury found that P did not have sexual contact with M in 1982 and that he gave genuine consent to the sexual acts after he turned 14. On appeal, M argued that it was the trial judge who should have made the necessary findings of fact regarding fiduciary duty.  HELD: Appeal dismissed.  If the events occurred during 1982 and 1983, there was no defence of consent available to P. By 1984, M was not vulnerable to or at the mercy of P, he was pursuing her. The jury found that P did not use her authority to exploit M in order to have sexual relations with him. Based on the jury's findings, P had no fiduciary duty towards M. If she did, she did not breach that it when she had sexual relations with him. Nothing, other than providing a meeting place, connected the acts of P and M to the Board. The Board did not owe M a fiduciary duty regarding his conduct with P. M had no claim against the Board. |

**Counsel**

D. Stewart, for the plaintiff. A. Vertlieb, for the defendant, P.M. J. Dowler and M. Apprill, for the defendant, Board of School Trustees.

|  |
| --- |
| **BENNETT J.** |

**1**   This case arises out of events that occurred in 1984, and ended, at the latest, in 1986. The plaintiff, M.M., was a student of the defendant, P.M., in 1982-83. He alleged that she sexually assaulted him commencing in the Fall of 1982.

**2**  P.M. testified that she did have a sexual relationship with M.M. She said it commenced around the Fall of 1984.

**3**  In 1982, the plaintiff was a grade seven student in an elementary school. The defendant was his teacher. The defendant School Board was her employer.

**4**  Other than agreeing on the fact of sexual relations for a period of time, the evidence of the plaintiff and the defendant was diverse.

**5**  The situation came to the attention of the school authorities in 1995. P.M. was suspended from teaching in June, 1996. She faced criminal charges in 1998. She was acquitted of these charges.

**6**  The issues in this case came before a jury in May-June, 2000. Prior to the jury trial, I severed one issue. I held that the equitable remedy available for a breach of a fiduciary duty was appropriately decided by a judge and not a jury.

**7**  I decided that the questions for the jury in the trial would establish the factual foundation for this claim.

**8**  This approach was taken by Vickers J. in Mustaji v. Tjin, [*[1995] B.C.J. No. 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0R6-00000-00&context=) (S.C.). He states at para. 32:

Before a breach of fiduciary duty can be found, the scope of the fiduciary obligations must be determined. Because of the difficulty inherent in articulating fiduciary obligations, the scope of the fiduciary obligation and its breach were reserved for determination by the trial judge. In that regard, I relied on the authority of Ruttan J. in Coodin v. Hodgkinson et al [*(1983), 49 B.C.L.R. 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F956-S0F8-00000-00&context=). In my opinion, those issues in equity could not be left with the jury.

**9**  On appeal, counsel argued that it was the trial judge who should have made the findings of fact that were needed to find a fiduciary duty, and the questions should not have been left with the jury. Hinkson J.A., speaking for the Court said, at para. 24:

The trial judge appreciated that the claim for breach of a fiduciary duty raised complex issues of fact and law. It might have been more satisfactory to leave this issue to be dealt with by the judge as contended by counsel for the defendants. However, in my opinion that course was foreclosed by the position taken by counsel at trial. [See Mustaji v. Tjin, [*[1996] B.C.J. No. 1376*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1VM-00000-00&context=).]

**10**  In Dopf v. Royal Bank of Canada [*[1998] B.C.J. No. 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1BT-00000-00&context=), the issue of leaving fiduciary duty with the jury was again reviewed by the Court of Appeal. Goldie J.A., speaking for the majority, said:

Here, the complainant is an employee whose occupational concerns would normally be governed by existing statutes and common law principles of what used to be called the law of master and servant. She, however, seeks remedies beyond the contract of employment based on equitable principles for what she says is an actionable civil wrong.

There are strong policy reasons for maintaining that the responsibility for administering such remedies should be left to the judge alone. Juries traditionally played little part in the courts of equity.

**11**  The appellate court does not appear to have endorsed the course of conduct taken by Vickers J. in Mustaji, nor has the court found it to be necessarily wrong.

**12**  Each case will depend on its own circumstances. The determination whether there is a fiduciary duty and whether such a duty has been breached is the obligation of the trial judge. It will depend on the evidence and the position of the parties whether the factual foundation for such a finding is best left with the jury or the trial judge.

**13**  A trial judge may be required to make additional factual findings in some circumstances. However, the judge is normally bound by express and implied factual implications of the jury verdict. [See for example, R. v. Brown [*(1991), 66 C.C.C. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-603S-00000-00&context=) (S.C.C.).]

**14**  In this case, no special questions were left with the jury to ascertain whether there was a breach of fiduciary duty. The issues before the jury raised the same factual questions.

**15**  I concluded at trial that the approach taken by Vickers J. in Mustaji was also most suitable to be taken in this trial.

**16**  The plaintiff testified that the acts commenced in the Fall of 1982, when he was thirteen years old and was a Grade seven student at elementary school. The defendant P.M. taught the plaintiff during the school year of 1982-83. The sexual contact continued between the two for several years, according to M.M. M.M. said he ended the relationship in the Fall of 1986. P.M. said the sexual relationship lasted approximately one year. She said they continued to see each other on occasion until the Fall of 1986. She said that she ended the relationship at this time.

**17**  P.M. described M.M. as the initial pursuer. She said he began calling her and showing up at places where he knew she would be. She described a loving relationship between them. She testified that she loved him.

**18**  He described a sexual assault commencing when he was thirteen years of age. He described forced acts of oral sex and sexual acts with bottles and candles. He said that the defendant insisted he urinate on her and use handcuffs during sexual acts. He also testified to drug use, at her insistence. P.M. denied all of these acts.

**19**  If the events occurred during 1982-83, there was no defence of consent available to P.M. Further, the plaintiff and defendant had an admitted teacher-student relationship.

**20**  As noted above, the defendant P.M. testified that the events occurred in 1984, some two years later. The plaintiff was 14 years old, and turned 15 years in October, 1984.

**21**  At the time the relationship started, according to the defendant, she was helping the plaintiff with his English. She did this for no remuneration.

**22**  The jury had to grapple with the significant credibility issues which arose from this testimony. The jury also had to address the issue of whether the plaintiff "genuinely consented" to acts which occurred after he turned 14 years of age.

**23**  The jury was asked the following questions:

1. Do you find that P.M. had sexual contact with M.M. in the fall of 1982 when M.M. was 13 years old?

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | ANSWER | YES | NO | X |  |

If your answer is no, proceed to question 4.

1. If the answer to question one is yes, did the sexual contact commence at [name of the elementary school].

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | ANSWER | YES | NO |  |

No answer was provided

1. If your answer to question one is yes, do you find that M.M. ever gave genuine consent to the sexual contact after he turned fourteen years of age?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | ANSWER | YES | NO |  |

No answer was provided.

1. If your answer to question one is no, do you find that M.M. gave genuine consent to the sexual contact which commenced when he was 14 years old.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | ANSWER | YES | X | NO |  |

If your answer to question 4 is yes, then you will conclude your deliberations.

**24**  Counsel agreed that if the jury found that there was genuine consent, then the jury need not decide the issues of damages or the vicarious liability of the School Board.

**25**  The decision of the jury was a majority of 6 out of 7. One juror was excused early on when the trial lasted longer than originally estimated.

**26**  I conclude that the jury found that the sexual contact commenced as and when described by the defendant, P.M. She testified that it first occurred in her apartment in North Vancouver. M.M. was at her apartment to obtain assistance with his reading.

**27**  The jury also found that M.M. genuinely consented to the sexual contact. The following definition was given to the jury on the issue of consent. [I do not have a transcript of the main charge, and rely on my notes. What is reproduced below may not be verbatim. I ordered a copy of the re-charge on this issue, and produce it as well.]

**28**  First, the Main Charge:

In this trial, the defendant introduced evidence that the plaintiff consented to the alleged assault. Since the defendant raises the issue of consent, the burden of proof is on the defendant to prove that the plaintiff did consent to the alleged acts of sexual contact. If you are satisfied that the plaintiff did in fact consent to the assault, the plaintiff's claim must be dismissed. But, if you find that the plaintiff did not consent to the alleged assault then you should go on and assess damages which the plaintiff suffered as a consequence of the conduct of the defendant.

In order for consent to be valid, the person must have the capacity to consent. A person under the age of fourteen years does not have the capacity to consent to sexual acts. If you are satisfied that it is more likely than not that the sexual acts commenced when the plaintiff was under the age of fourteen years, there can be no valid consent, for at least that time period.

If you find that it was more likely that the sexual contact occurred after the plaintiff was fourteen years, then you must determine if there was genuine consent by the plaintiff.

In this case there is evidence that there was a teacher-student relationship for one year, and a tutoring relationship afterwards. In order to assess whether there was a genuine consent, you will go through a two-step process. First, examine all of the circumstances relating to the relationship between these two people. Was there an imbalance of power in the relationship between these two people? You must determine whether [P.M.] dominated and influenced the plaintiff. If so, the second step is to ascertain whether she exploited that dominant position to induce [M.M.] to consent to a sexual relationship? Thus, the two steps to review are 1) was there an imbalance of power in the relationship in which [P.M.] could dominate and influence [M.M.] and 2) did [P.M.] exploit this position of authority to cause [M.M.] to consent to the sexual relationship? If you find both of these things occurred, then there is no genuine consent.

Once again, the defendant must establish that it was more likely than not that there was genuine consent.

If you find, for example, that there was no consent either because [M.M.] was 13 years old at the time of the events or because of other evidence, but at some point you find there was evidence of consent, you will ask yourself whether this is genuine consent or an acquiescence to the inevitable.

**29**  The following is a re-charge in response to a question asked the second day of deliberations:

THE COURT: Thank you, ladies and gentlemen. I'm afraid I have disintegrated a bit since yesterday, so you'll have to bear with me as I go through this. [This is reference to a bad cold.] Madam Clerk, may I have the question, please? Thank you.

So I understand, ladies and gentlemen, that you wish me to provide a definition and further clarification on the instructions with respect to genuine consent; is that correct?

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|  | THE FOREMAN: | That's correct. |  |

THE COURT: All right. This is the instruction that I started with yesterday morning, so what I am going to do is review that with you again and give a bit further instruction, and if you find that that's not sufficient and you need more, or have a specific question, then just let me know, all right?

Now, the other thing is I don't propose to review the evidence on this point with you unless you wish me to do that, and I am happy to do that if you want me to go over that.

So this case involves the intentional tort of assault...[definition of assault is provided].

Now, in this trial, the defendant introduced evidence that the plaintiff consented to the alleged assault. Since the defendant raises the issue of consent the burden of proof is on the defendant to prove that the plaintiff did consent to the alleged acts of sexual contact. If you are satisfied that the plaintiff did, in fact, consent to the assault the plaintiff's claim must be dismissed, but if you find the plaintiff did not consent to the alleged assault then you should go on and assess damages which the plaintiff suffered as a consequence of the defendant.

If you find that it is more likely that the sexual contact commences after the plaintiff was 14 years old, then you must determine if there was genuine consent by the plaintiff. In this case there was evidence that a teacher/student relationship existed between the two for one year, and a tutoring relationship existed for a period afterwards.

In order to assess whether there was genuine consent on the part of M.M. you will go through a two-step process. First, examine all of the circumstances that you have found existed in the relationship between these two people. Was there an imbalance of power in the relationship between these two people either as a result of the earlier teacher/student relationship, or for any other reason. So you must first examine whether there was an imbalance of power. An imbalance of power is characterized - and you will determine whether P.M. dominated and influenced the plaintiff, so there is an imbalance of power where one person dominates and influences the other. If so, the second step is to ascertain whether she exploited that dominant position to induce M.M. to consent to the sexual relationship. If you find that she was in a dominant position then you must ask yourself whether she used that position to induce him to consent to sexual contact.

So let me just review those two steps again. Was there an imbalance of power in the relationship in which P.M. could dominate and influence M.M. and, if so, did P.M. exploit this position of authority to cause M.M. to consent to the sexual relationship? If you find that both of these things occurred, then there is no genuine consent. Once again, it is the defendant that must establish that it is more likely than not that there was genuine consent.

THE COURT: Now, does that assist? Should I review them one more time? Yes? Okay. Just the two steps again or the whole thing.

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|  | THE FOREMAN: | The whole thing. |  |

THE COURT: The whole thing again. All right, no problem. As I said, if you go back and discover there is a specific point you want clarification on, don't hesitate to set it out.

Let me summarize what assault is in this way. Assault is the application of force without consent...

The burden is on [P.M.] to demonstrate that there was consent, and therefore, there was no assault. And the burden on her is the regular burden: on a balance of probabilities is it more likely than not that there was consent? The issue of genuine consent arises because of the initial student/teacher relationship, and you must assess if that affected consent in the way that I have described to you, and I am going to repeat it one more time. All right?...

So what I will do is I will read this to you one more time and see if that helps, and then if you have a further question, just send it out. We'll all stay nearby, all right...[Discussion of what constitutes assault].

In this trial the defendant introduced evidence that the plaintiff consented to the alleged assault. Since the defendant raises the issue of consent, the burden of proof is on the defendant to prove that the plaintiff did consent to the alleged acts of sexual contact. If you are satisfied, on a balance of probabilities, that the plaintiff did, in fact, consent to the assault, the plaintiff's claim must be dismissed. But if you find that the plaintiff did not consent to the alleged assault, then you should go and assess damages which the plaintiff suffered as a consequence of the conduct of the plaintiff. If you find that it was more likely that the sexual contact commenced after the plaintiff was 14 years, then you must determine if there was genuine consent by the plaintiff.

In this case, there is evidence that there was a teacher/student relationship for one year - that was the 82-83 year - and a tutoring relationship afterwards. In July of 1983 there was paid tutoring, and then [P.M.] said she helped [M.M.] with his reading, I think starting around the spring of 1984, or perhaps it was the summer of '84. But that was for no remuneration, that was just, she said, as a friend.

In order to assess whether there was genuine consent on the part of [M.M.] you will go through a two-step process. First, examine all of the circumstances that you find proved relating to the relationship between these two people. You will ask yourself, was there an imbalance of power in the relationship between these two people as a result of the earlier teacher/student relationship, or for any other reason. Now, the time you are examining is the time the sexual contact commenced. When the sexual contact commenced, was there an imbalance of power at the time either as a result of the earlier teacher/student relationship or for any other reason you find on the evidence.

You must determine whether at that time, [P.M.] dominated and influenced the plaintiff. If so, the second step is to ascertain whether she exploited that dominant position to induce [M.M.] to consent to a sexual relationship. Thus, the two steps to review are: one, was there an existing imbalance of power in the relationship in which [P.M.] could dominate and influence [M.M.] and, if so, two: did [P.M.] exploit this position of authority to cause [M.M.] to consent to the sexual relationship. If you find both of these things occurred, then there is no genuine consent. Once again, the defendant must establish that it was more likely than not that there was genuine consent.

**30**  In addition, the jury was told that there was an imbalance of power between a grade 7 student and a teacher. Their task included ascertaining if that imbalance still existed at the time of the sexual acts.

**31**  Taking into account the evidence, the questions, the answers to the questions and the instructions to the jury, I find the following facts consistent with the verdict of the jury.

**32**  The sexual contact between P.M. and M.M. began in August or September, 1984. M.M. was fourteen, almost fifteen years of age. P.M. was still a school teacher, but had only taught the plaintiff in the school year 1982-83. The plaintiff was still a student in Vancouver, a school system operated by the defendant Board of School Trustees. The defendant, P.M., was still a teacher employed by the defendant, Board of School Trustees. P.M. taught in a different school than that attended by M.M. P.M. was an elementary school teacher and would not be teaching the plaintiff in the future.

**33**  The sexual contact did not occur on school property as alleged by the plaintiff. Peter Fast, principal of the elementary school did not walk in on the plaintiff and the defendant, P.M., when they were allegedly involved in sexual touching.

**34**  The defendant, P.M., was giving the plaintiff reading instruction when the sexual contact first occurred. She was not paid for providing this instruction. She was on friendly terms with the plaintiff, and was helping him as a friend.

**35**  The defendant, P.M., was almost 26 years old when the sexual contact began. She was therefore eleven years older than the plaintiff.

**36**  The finding within the jury verdict that the plaintiff genuinely consented to sexual relations leads to the conclusion that the defendant was not in a position of power or authority with respect to the plaintiff. If she was in a position of power or authority, she did not use or exploit her position to extract the plaintiff's consent to sexual contact. The plaintiff's consent was "genuine". It was given freely and voluntarily.

**37**  The question at this juncture is whether, based on those facts, a fiduciary duty existed between the plaintiff and the defendant, P.M. If so, has she committed a breach of the fiduciary duty.

**38**  The second issue is the liability of the defendant, the Board of School Trustees.

FIDUCIARY DUTY

P.M.

**39**  It is clear that a teacher/student relationship is usually a fiduciary relationship [R. v Audet, [*[1996] 2 S.C.R. 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3PS-00000-00&context=); Frame v. Smith, infra]. The question is how long does such a relationship exist?

**40**  The jury was told that there was an imbalance of power on the part of P.M. when M.M. was her student. The jury was instructed, applying the test for consent in Norberg v. Wynrib, [*[1992] 2 S.C.R. 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607N-00000-00&context=), that they had to approach the issue of consent in two steps. The first step was whether there was an imbalance of power between the two persons. Did P.M. dominate and influence M.M.? If so, then they were instructed to consider the second step, and that is whether P.M. exploited her dominate position to induce M.M. to consent to the sexual relationship.

**41**  With hindsight, it would have been better for the jury to answer questions in relation to each of the steps. The question provided the ultimate answer, and that is there was genuine consent. It may be accurately inferred that the jury found that P.M. did not use her dominant position (if it existed), to induce M.M. to consent to a sexual relationship.

**42**  The plaintiff argues that P.M. was still in a fiduciary relationship. Further, he submits that it doesn't matter whether she used her position to induce M.M. to consent to a sexual relationship. She was the fiduciary, and she had an obligation not to have sexual relations with M.M. By doing so, regardless of consent, she breached her fiduciary duty.

**43**  It is important not to confuse the test for "genuine consent" with the test in ascertaining whether someone has a fiduciary duty. Some elements overlap, but they do not entirely coincide.

**44**  In R. v. Audet, supra, the majority held that, in most cases, teachers would be in a position of trust or authority vis-à-vis their students. Audet was charged under the s. 153 (Sexual Explotation) of the Criminal Code. He had sexual relations with a female student shortly after school ended. She would have been his student again the next fall. The majority held that the accused was in a position of trust or authority. The Court held that, for the purpose of the Criminal Code, it did not matter that the incident occurred outside school hours. The Court made the point that off-the-job conduct may amount to misconduct.

**45**  There is no defined list of who is a person in authority or trust. The Court left open the possibility of even an active teacher not being in a position of trust.

**46**  In Frame v. Smith, [*[1987] 2 S.C.R. 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23F8-00000-00&context=), Wilson J., dissenting, held that the requirements for a fiduciary obligation are:

1. the fiduciary has scope for the exercise of some discretion or power;
2. the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiaries legal or practical interest; and
3. the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

**47**  As noted in Critchley, infra, [at para. 80], this definition has been approved in subsequent decisions. [See Lac Minerals Ltd. v. International Corona Resources Ltd., [*[1989] 2 S.C.R. 574*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=).]

**48**  In applying this definition to the facts in this case, I find the following: P.M. had the scope for the exercise of some discretion or power over M.M., by virtue of her age and their previous relationship. I find that the jury accepted P.M.'s evidence regarding how this relationship began, and the terms under which it transpired. For example, P.M. testified that M.M. was the aggressor in the relationship. She said they had a "loving relationship". M.M.'s evidence is that she forced him to drink alcohol and forced him to have sexual relations with her. The jury clearly rejected M.M.'s evidence. I find that P.M. could not unilaterally exercise that power or discretion so as to affect M.M.'s legal or practical interest. P.M. was no longer his teacher nor would she ever be his teacher again. She did not teach in the same school or the same level of school. She had no authority over him vis-à-vis his education. Finally, M.M. was, by 1984, not vulnerable to or at the mercy of P.M.

**49**  Had the jury found the acts commenced when she was his teacher, then she clearly would have had a fiduciary relationship with him. By 1984, he was no longer subject to her authority. He was pursuing her.

**50**  The jury, by its verdict, clearly found that P.M. did not use any authority to exploit M.M. in order to have sexual relations with him. Given the burden is on the defendant to establish the factors for genuine consent, it is reasonable to assume that the jury accepted the evidence of P.M.

**51**  In summary, in the circumstances of this case, based on the findings of the jury, P.M. had no fiduciary duty to M.M. If she did, she did not breach this duty when she had sexual relations with him.

**52**  It is questionable whether this claim can lie at all once the tort claim has been dismissed. This point was not fully argued and I say nothing further about it.

BOARD OF SCHOOL TRUSTEES

**53**  The plaintiff argues that the Board of School trustees is liable to him on two bases. One, that the Board had a fiduciary duty to him and breached that duty. Second, that the Board is vicariously liable for the breach of a fiduciary duty by the defendant, P.M.

**54**  On the first point, the Board of School Trustees argues that they did not owe the defendant a fiduciary duty in the context of this claim. If they did, the test established in C.A. v. Critchley, [*[1998] B.C.J. No. 2587*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M0YH-00000-00&context=), is a complete defence to the claim.

**55**  The plaintiff argues that he was, at all times, a student in the Vancouver school system. He submits that the Board had notice that he was a vulnerable child because of his background circumstances. The Board was alive to the risk of its employees sexually assaulting children. P.M. claims the plaintiff was not properly trained or supervised by the Board.

**56**  The plaintiff and the defendant met on school property. She was his teacher for one year. The jury clearly found that nothing untoward occurred between the two during this time.

**57**  I conclude that the jury rejected the plaintiff's evidence regarding these events. The defendant, P.M., testified that any contact between the two was off school property. The defendant began calling her and following her around. Her voluntary tutoring had no connection to the Board of School Trustees.

**58**  M.M.'s mother and older sister were aware of the contact between the two, but they did not bring it to the attention of the Board of School Trustees.

**59**  There is nothing, other than providing a meeting place, that connects the acts of P.M. and M.M. to the Board of School Trustees. [Jacobi v. Griffiths [*(1999), 174 D.L.R. (4th) 71*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42N-00000-00&context=) at 92 (S.C.C.).]

**60**  The fact that the plaintiff was a student in the Vancouver school system and the defendant, P.M. was an employee at a different school, is not in this case enough to establish a fiduciary duty.

**61**  I conclude, applying the test for a fiduciary noted above, in these circumstances, the School Board did not owe the plaintiff a fiduciary obligation in relation to his conduct with P.M.

**62**  In any event, I conclude that if the Board of School Trustees did owe the plaintiff a fiduciary duty, on the authority of Critchley, supra, the plaintiff has no claim against the Board. In Critchley, McEachern C.J.C. brought some certainty to the law of fiduciaries in British Columbia.

**63**  Critchley operated a wilderness retreat under contract with the provincial government. The residents were unmanageable youths between the ages of 14-16, who were either under government care or sent by the courts. Critchley pleaded guilty to sexual assaults on 16 youths in his care. At issue on the appeal was the liability of the Crown as owing a fiduciary duty.

**64**  After reviewing the law, the Chief Justice said this at paras. 83-85:

...I note that in all the above cases, except Guerin, [*[1984] 2 S.C.R. 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233X-00000-00&context=), the defendants personally failed to discharge a legal duty for their own benefit. In Lac the defendants betrayed their proposed partner; in Canson, [*[1991] 3 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6052-00000-00&context=), the lawyer failed to disclose the "flip" to his client; in Norberg the physician betrayed his patient; in M.(K.) v. M.(H)., [*[1992] 3 S.C.R. 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-608J-00000-00&context=), a father violated his daughter; and in Hodgkinson, [*[1994] 3 S.C.R. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3FN-00000-00&context=), the advisor failed to disclose his personal interest. In each of these cases the defendant was guilty of something more than ***negligence*** or battery.

Thus, only in Guerin was the defendant held to have breached a fiduciary duty without personal wrongdoing beyond possible carelessness or ***negligence***. Guerin may be regarded as a case where a fiduciary disobeyed the instructions of the beneficiary, although even on that basis, there was no personal advantage accruing to the fiduciary. Guerin, however, was a special case where the aboriginal right in question was said to be unique. In that respect Guerin is obviously a case that should be confined to its particular facts and we should not be timid just because one case does not fit a useful pattern. Experience, rather than logic, governs the development of the law.

Applying this approach, I conclude that it would be a principled approach to confine recovery based upon fiduciary duties to cases of the kind where, in addition to other usual requirements such as vulnerability and the exercise of discretion, the defendant personally takes advantage of a relationship, trust or confidence for his or her direct or indirect personal advantage. This excludes from the reach of fiduciary duties many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty. In effect, this redirects fiduciary law back towards where it was before this experiment began but with much broader remedies, such as damages, when fiduciary duties are actually breached.

**65**  Applying this analysis, the Board of School Trustees cannot be said to have breached any fiduciary duty in these circumstances.

**66**  I am alive to the argument that McEachern C.J.B.C., did not mention the decision of the Blueberry River Indian Band v. Canada, [*[1995] 4 S.C.R. 344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3M8-00000-00&context=), in which the Supreme Court of Canada found a breach of a fiduciary duty where there was no self-dealing. I am not convinced this decision would have affected the analysis, as the Chief Justice does refer to the decision in Guerin, [*[1984] 2 S.C.R. 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233X-00000-00&context=). In any event, I am bound by the decision in Critchley. [See M.B. v. British Columbia, [*2000 BCSC 735*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61DP-00000-00&context=), [*[2000] B.C.J. No. 909*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61DP-00000-00&context=), at para. 125.]

VICARIOUS LIABILITY

**67**  I have found that the defendant, P.M., is not liable for a breach of a fiduciary duty. Therefore, the Board of School Trustees is equally not vicariously liable.

**68**  Having no need to decide whether the Board of School Trustees would be liable in these circumstances, it is better not to wander into the law in this area. The law is unfolding and uncertain. There are few, if any, cases where a Board of School Trustees has been held to be vicariously liable for the acts of its employees.

**69**  As it is not necessary to consider the issue, it would, in these circumstances, be inappropriate for me to do so.

CONCLUSION

**70**  The plaintiff's action against the defendants based on the equitable principle of fiduciary duty is dismissed.

**71**  Outstanding is a motion for judgement and costs.

BENNETT J.

**End of Document**

[***Moulton Contracting Ltd. v. British Columbia, [2010] B.C.J. No. 665***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62S6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.E. Hinkson J.

Heard: January 7, 8 and March 15, 2010.

Judgment: April 15, 2010.

Docket: S067611

Registry: Vancouver

**[2010] B.C.J. No. 665** | [*2010 BCSC 506*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7D-TK01-JW5H-X0HK-00000-00&context=) | [*[2010] 4 C.N.L.R. 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7D-TK01-JW5H-X0HK-00000-00&context=) | [*188 A.C.W.S. (3d) 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7D-TK01-JW5H-X0HK-00000-00&context=) | [*2010 CarswellBC 889*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7D-TK01-JW5H-X0HK-00000-00&context=)

Between Moulton Contracting Ltd., Plaintiff, and Her Majesty the Queen in Right of the Province British Columbia, Sally Behn, Susan Behn, Richard Behn, Greg Behn, Rupert Behn, Lovey Behn, Mary Behn, George Behn, Chief Liz Logan, on Behalf of Herself and all other Members of the Fort Nelson First Nation and the said Fort Nelson First Nation, Defendants, and Her Majesty the Queen in Right of the Province of British Columbia, Third Party

(143 paras.)

**Case Summary**

**Aboriginal law — Aboriginal status and rights — Aboriginal rights — Duties of the Crown — Fair dealing and consultation — Consultation and accommodation — Application by plaintiff and Crown to strike out portions of statement of defence of Behn defendants allowed — Application by Crown to strike out third party notice allowed — Plaintiff logging company sued defendants for interference with plaintiff's right to harvest timber under licenses and road permit — Defendants alleged breach of duty to consult and breach of Treaty rights — Defendants had no standing to raise defence of duty to consult or Treaty rights — Doctrine of interjurisdictional immunity inapplicable to invalidate the licences and road permit — Treaty rights could not absolve the defendants of tortious conduct.**

**Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Application by plaintiff and Crown to strike out portions of statement of defence of Behn defendants allowed — Application by Crown to strike out third party notice allowed — Plaintiff logging company sued defendants for interference with plaintiff's right to harvest timber under licenses and road permit — Defendants alleged breach of duty to consult and breach of Treaty rights — Defendants had no standing to raise defence of duty to consult or Treaty rights — Doctrine of interjurisdictional immunity inapplicable to invalidate the licences and road permit — Treaty rights could not absolve the defendants of tortious conduct.**

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| --- |
| Application by the plaintiff and the Crown to strike out portions of the statement of defence of the Behn defendants. Application by the Crown to strike out the third party notice filed by the defendant First Nation for contribution and indemnity from the Crown. The plaintiff was a logging company that obtained two Timber Sale Licenses and a Road Permit from the defendant Crown after the Ministry of Forests decided to amend the Small Business Forest Enterprise Program Forest Development Plan for the Fort Nelson Timber Supply Area. The plaintiff alleged that the Behn defendants and others blockaded the only access road to the licences and the road permit, as an intentional interference with the plaintiff's business relations. The defendant First Nation was a signatory to a Treaty which applied to the geographic area of the plaintiff's licences and road permit. The Behn defendants, members of the First Nation, were licensed to trap in the territory within the Treaty territory. They argued that the plaintiff's licences and road permit were invalid and conveyed no rights to the plaintiff because they were issued in breach of the Crown's duty to consult and infringed treaty right to hunt and trap. Crown argued the Behn defendants had no standing to raise the impugned defences without the express approval of the First Nation membership. The plaintiff argued that the defence should be struck out as the alleged defences were not available in a civil action for intentional interference with contractual or business relations and conspiracy, and that the pleadings were scandalous, embarrassing, and an abuse of process, and should thus be struck out.  HELD: Crown's application allowed.  Plaintiff's application allowed in part. Since the constitutionality of the enabling legislation was not challenged, this action was not the vehicle by which the defendants could raise the validity of the licences and the road permit. The granting of licences or other rights by the Crown to non-aboriginal third parties must be assumed to be valid unless a Court found otherwise. The Behn defendants did not have standing to raise the impugned defences of duty to consult or treaty rights. The Behn defendants had not demonstrated that their family had been charged with the authority to deal with the Crown in relation to the Treaty rights. The impugned portions of the defence dealing with interjurisdictional immunity were struck as disclosing no reasonable defence. The rights granted to First Nations under the Treaty were subject to the rights of the government to make regulations and to take up land. The doctrine of interjurisdictional immunity could not apply to invalidate the licences and road permit. Treaty rights could not absolve the defendants of any tortious conduct in intentionally preventing plaintiff from harvesting under the licences. Resorting to self-help remedies and then relying on those remedies as part of a defence to a claim in tort for damages that flowed from those actions amounted to embarrassing or scandalous pleadings that should be struck. The portions of the defence dealing with self-help were struck out. The defendants were not entitled to a remedy for breach of duty to consult by the Crown against a party other than the Crown. The choice of the defendants not to avail themselves of the remedies of either judicial review or injunctive relief with respect to the grants of the licences and the road permit rendered their attempt to defend the case against them in tort by alleging a procedural right, an abuse of process. As the issue of appropriate consultation by the Crown with the Fort Nelson First Nation must be the subject of judicial review; it could not be the basis of a third party claim in these proceedings and was struck out. |

**Statutes, Regulations and Rules Cited:**

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 91(24)

Indian Act>, [*R.S.C. 1985, c. I-5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB61-JJD0-G4F3-00000-00&context=),

Rules of Court, Rule 19(24), Rule 19(24)(b), Rule 19(24)(c), Rule 19(24)(d)

**Counsel**

Counsel for the Plaintiff: Charles F. Willms, Katey Grist.

Counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia: Keith J. Phillips, Joel J. Oliphant.

Counsel for the Defendants, George Behn, Sally Behn and Susan Behn: Karey M. Brooks.

Counsel for the Defendants, Chief Liz Logan and the First Nelson First Nation: Allisun Rana.

[Editor's note: A corrigendum was released by the Court June 8, 2010; the corrections have been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

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| **C.E. HINKSON J.** |

**1**   The plaintiff, ("Moulton"), is a logging company that obtained two Timber Sale Licenses numbered A66572 and A66573 ("the TSLs"), and a Road Permit, No. 15359 (the "Road Permit") from the defendant, Her Majesty the Queen in Right of the Province of British Columbia, (the "Crown"). The TSLs and the Road Permit were valid for the period of one-year, and expired on June 26, 2007.

**2**  The Fort Nelson First Nation is an Indian Band as defined by the ***Indian Act***, [*R.S.C. 1985, c. I-5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB61-JJD0-G4F3-00000-00&context=). It is a signatory to Treaty 8 which is a treaty within the meaning of section 35 of the ***Constitution Act, 1982***. Chief Liz Logan was the Chief of the Fort Nelson First Nation from August of 2006 until August of 2008. The geographic area of the two TSLs and the Road Permit is a part of the lands to which Treaty 8 applies.

**3**  George Behn, Sally Behn, Mary Behn, Rupert Behn, Greg Behn, Richard Behn and Lovey Behn ("the Behn defendants"), are all related to each other and are members of the Fort Nelson First Nation who are licensed to trap in what is known as the Behn Family Territory. That territory is within the Treaty 8 territory of the Fort Nelson First Nation.

**4**  In its amended statement of claim Moulton alleges that a representative of the provincial Ministry of Forests wrote to Chief Logan and to the defendant, George Behn, on more than one occasion prior to the granting of the two TSLs and the Road Permit in question, to advise them of proposed amendments to the Small Business Forest Enterprise Program Forest Development Plan for the Fort Nelson Timber Supply Area (the "FDP"), which amendments resulted in the granting of the two TSLs and the Road Permit.

**5**  Moulton's claim against the Behn defendants is for conspiracy with intent to commit unlawful conduct and intentional interference with its contractual or business relations. The claim is premised on an allegation that these defendants and others blockaded the only access road to the TSLs and the Road Permit, as an intentional interference with those business relations.

**6**  Moulton's claim against the Fort Nelson First Nation and Chief Logan is set out in paragraphs 60 and 61 of its amended statement of claim:

1. The Blockade is located on or near the Sierra High Grade Road. Moulton, along with other members of the public, had the right to use the Sierra High Grade Road. The willful actions of the Behns and other members of the [Fort Nelson First Nation] in obstructing, interrupting or interfering with Moulton's lawful use, enjoyment or operation of the Sierra High Grade Road, the TSLs or the [Road Permit] contravened s. 430 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 (the "Unlawful Conduct").
2. From on or about October 2, 2006, the Behns and members of the [Fort Nelson First Nation], combined or conspired with each other with intent to commit the Unlawful Conduct or the Tortious Conduct. The conduct of these Defendants in furtherance of their conspiracy was unlawful and was directed towards Moulton, and they knew, or ought to have known, that loss, damage, and expense would be suffered by Moulton as a result of the Unlawful Conduct or the Tortious Conduct. By reason of the said conspiracy, Moulton has suffered, and will suffer loss, damage and expense.

**7**  In argument, counsel for Moulton clarified that Moulton's pleadings make no allegation of vicarious liability against the Fort Nelson First Nation or Chief Logan for the activities of the Behn defendants.

**8**  There are two applications before me to have portions of the pleadings struck out. The first is the application by Moulton to strike out paragraphs 26, 27, 29, 30, 31, 32, 33, 35(a), 38, 40(b), 41(a) and 42 of the amended statement of defence of the Behn defendants. Those paragraphs provide as follows:

1. As a result of the Crown's breach of the duty to consult, TSL A66572, TSL A66573 and the Road Permit were issued unlawfully and convey no rights to the Plaintiff which could be exercised so as to interfere with the Treaty 8 rights of the Fort Nelson First Nation, George Behn or Sally Behn.
2. Further, the two TSLs were subject to variance or suspension by the Timber Sales Manager upon a determination by the courts that the activities or operations under the two TSLs would unjustifiably infringe a treaty right. The Plaintiff knew or ought to have known that consultation with aboriginal groups regarding the issuance of the two TSLs was subject to review by the courts. The Plaintiff did not take any steps to determine what efforts were made by the Province in that regard.
3. TSL A66572, TSL A66573 and the Road Permit, in the context of the existing interferences with the exercise of Treaty 8 rights in the Behn Family Territory and the territory of the Fort Nelson First Nation, constitute interferences with the ability of the Fort Nelson First Nation to exercise its rights pursuant to Treaty 8 of such severity that they cannot be authorized as merely "taking up" land within the meaning of Treaty 8. Instead these authorizations each constitute an infringement of the Treaty 8 rights. In particular, the exercise of the rights provided for in the relevant authorizations would effectively deny the Behn Family and other members of the Fort Nelson First Nation a meaningful opportunity to exercise their Treaty 8 rights.
4. The legislative power to authorize infringements of Treaty 8 rights is reserved exclusively to Parliament pursuant to s. 91(24) of the *Constitution Act, 1867.*
5. Furthermore, Parliament has provided that provincial laws which interfere with treaty rights are not incorporated into Federal law by operation of s. 88 of the *Indian Act* but are instead made specifically subject to such treaty rights.
6. As such, as the relevant authorizations constitute infringements of the Treaty 8 rights of the Fort Nelson First Nation they impermissibly intrude into the exclusive legislative jurisdiction of Parliament and are therefore of no force and effect by application of the doctrine of interjurisdictional immunity.
7. Additionally, the relevant authorizations constitute an unjustifiable *prima facie* infringement of Treaty 8 rights and are therefore of no force and effect.
8. The mischief provisions of s. 430(1) of the *Criminal Code of Canada* have no application to the activities of the [sic] George Behn and Sally Behn or any person, as:
9. There are no lawful rights created by the Road Permit;
10. For the reasons outlined above, s. 54(1) of the *Forest and Range Practices Act*, s. 11 of the *Forest Service Road Use Regulation* and s. 62 of the *Transportation Act* have no application to the actions in issue in this proceeding as the alleged road has not been lawfully authorized.
11. The tort of conspiracy does not arise as:
12. The purpose of the actions taken by George and Sally Behn is to exercise and protect their rights under Treaty 8[.]
13. George Behn, Sally Behn and Susan Behn deny that the tort of Interference with Contractual Relations has any application to the facts of this cases [sic] because:
14. There was no lawful contract between the Plaintiff and British Columbia for the reasons outlined above, namely that there has been a failure to consult with the Fort Nelson First Nation and the forestry activities authorized by British Columbia are of no force and effect by virtue of the doctrine of interjurisdictional immunity[.]
15. Furthermore, to the extent that the alleged tort can be made out, the Plaintiffs have suffered no damages on account of the alleged tort as the contract created no rights to harvest timber which could be lawfully exercised by the Plaintiff for the reasons described above.

**9**  Moulton's application is supported in its entirety by the defendant, the Crown. The Crown also submitted that the impugned provisions of the amended statement of defence should be struck because the Behn defendants lack standing to raise the defences set out in them.

**10**  The defendants Chief Logan and the Fort Nelson First Nation oppose Moulton's motion insofar as it relates to paragraphs 26, 27 and 41(a) of the Behn defendants' amended statement of defence, which they refer to as "the consultation defence", but take no position with respect to the motion as it relates to paragraphs 29, 30, 31, 32, 33, 35(a), 38, 40(b) and 42 of the amended statement of defence.

**11**  Moulton's application is opposed in its entirety by the Behn defendants.

**12**  The second application is by the Crown to strike out the third party notice filed by Chief Logan, on behalf of herself and all other members of the Fort Nelson First Nation, that seeks contribution and indemnity from the Crown, in the event that liability is found against her and the Fort Nelson First Nation for Moulton's claim.

**13**  The third party notice alleges that in the event that Chief Logan and the Fort Nelson First Nation defendants are found liable to Moulton:

... The alleged actions resulted from the Crown's failure to consult with the Fort Nelson First Nation with respect to the FDP Amendment, TSL A66572, TSL A66573 and Road Permit No. R1539 (as described in the Statement of Claim).

The facts on which the [Fort Nelson First Nation] rely are set out in the Statement of Defence.

**14**  This second application is opposed by Chief Logan and the Fort Nelson First Nation. The Behn defendants and Moulton took no position with respect to this application.

**Background**

**15**  These are the second and third applications to strike pleadings in these proceedings. In the decision on the first application to strike pleadings in the action, indexed as [*2009 BCSC 913*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0D2-00000-00&context=), the genesis of this litigation was summarized by Mr. Justice Slade at paragraphs 1-3:

By license agreement dated June 27, 2006, Timber Sale License A66572 ("TSL"), British Columbia granted Moulton Contracting Ltd. the right to harvest Crown timber from a designated area of land. Moulton was also granted the right to enter the designated area for the purpose of exercising its rights under the TSL.

In a Statement of Claim dated November 23, 2006, Moulton alleges that the Behn defendants and other members of the Fort Nelson First Nation ("FNFN"), or some of them, blockaded the only access road to the designated harvest area and prevented Moulton from exercising its harvest rights under the TSL.

In this action, Moulton claims relief as against British Columbia and the individuals said to have blocked access to the harvest area.

**16**  Slade J. also described the basis for Moulton's claim of its right to harvest timber at paragraphs 6-9:

Moulton sets out, as the basis for its right to harvest timber, the following:

1.00 Grant of Rights and Term

1.01 Subject to this License, the Licensee

1. may during the term of this License harvest Crown timber from the areas of land designated for harvest on the map attached as Exhibit "A" to this License (the cutting authority area), and
2. for the purpose of exercising the rights under this License may enter into these areas

(Statement of Claim, para. 9)

1.02 Subject to paragraph 1.03, the Licensee may harvest all species and grades of timber situated on the cutting authority area in accordance with this License and Road Permits issued in association with this License.

In paragraph 11 of its Statement of Claim, Moulton refers to a Crown grant of a road permit, on the following terms:

1.00 Grant of Rights

1.01 In consideration of the Permittee's right to harvest timber under License *A66573* and to provide access to that timber, subject to all Ministry of Forests legislation and regulations as amended from time to time, the Ministry Official grants to the Permittee a non-exclusive right to enter on and construct within the Permit Area a road, including such landings, gravel/sand pits, rock quarries and waste areas as are necessary for construction of the road or for access to the timber and the right to use and maintain that road, or to use and maintain a road, within the Permit Area described in paragraph 2.01, in accordance with the conditions/specifications described in the attached Schedules.

There is, for the purposes of this application, no issue over the inclusion of the licensed harvesting area in the territory encompassed by Treaty 8.

There is nothing in the TSL or the road permit that would subordinate the rights granted to Moulton to rights assured and protected by Treaty 8. The TSL does, however, provide for the following:

9.00 Aboriginal Rights, Aboriginal Title, Treaty Rights

9.01 Notwithstanding any provision of this License, if a court of competent jurisdiction

1. determines that activities or operations under or associated with this License will unjustifiably infringe an aboriginal right or title, or a treaty right,
2. grants an injunction further to a determination referred to in subparagraph (a), or
3. grants an injunction pending a determination of whether activities or operations under or associated with this License will unjustifiably infringe an aboriginal right or title, or a treaty right,

the Timber Sales Manager, in a notice given to the Licensee, may vary or suspend this License, in whole or in part, or refuse to issue a Road Permit or other permit given to the Licensee, to be consistent with the court determination.

**17**  On the evidence before me the first notice to the Fort Nelson First Nation of any proposed amendment to the FDP under which the TSLs were authorized was by a letter from representatives of the Ministry of Forests, dated August 11, 2004. The letter was accompanied by a map showing the areas of proposed cutbacks, including the cutbacks that became the TSLs.

**18**  By letter dated September 16, 2004, Mr. Phipps, a British Columbia Timber Sales ("BCTS") Planning Forester, notified the defendant, George Behn, that an amendment to the FDP was proposed. The letter was accompanied by a map showing the areas of proposed cutbacks including those that became the TSLs. It was pursuant to this proposed amendment that the TSLs and the Road Permit were subsequently authorized.

**19**  On November 22, 2004, representatives of BCTS went to the band offices of the Fort Nelson First Nation to discuss the proposed FDP amendments. The representatives of BCTS were asked to obtain Archaeological Impact Assessments ("AIAs") in relation to the TSLs by the Fort Nelson First Nation.

**20**  On March 11, 2005, representatives of the Fort Nelson First Nation, representatives of BCTS and the defendant George Behn went on a helicopter survey of the proposed cutbacks. A representative of BCTS asked for information from the representative of the Fort Nelson First Nation on any concerns about the adequacy of the AIAs for the proposed FDP amendment; but received no response.

**21**  In July 2005, BCTS forwarded the AIAs requested by the Fort Nelson First Nation to its representatives.

**22**  On October 5, 2005, BCTS wrote to the Fort Nelson First Nation describing the FDP management practices that were to be employed pursuant to the AIAs and asked for any outstanding concerns that the Fort Nelson First Nation had in relation to the amended FDP.

**23**  On June 28, 2006, a representative of the Ministry of Forests wrote to the defendant George Behn to advise him that the two TSLs had been awarded to Moulton, that they were within his licensed trapping area, and that he should contact Moulton to confirm the dates for commencement of its harvesting operations so that he could move his traps and caches from within the block areas to be harvested.

**24**  By letter of July 17, 2006, the Ministry of Forests advised the defendant George Behn that harvesting by Moulton in the area of the two TSLs was to commence on August 1, 2006, and reaffirmed that the TSLs were within his trap line area.

**25**  On August 31, 2006, the defendant George Behn wrote to the Ministry of Forests, but not to Moulton, requesting the cancellation of the two TSLs, and seeking consultation. The letter stated in part:

In order to proceed with these Timber Sales, the Ministry of Forests must complete an assessment of the cumulative impacts of previous work, plus a complete and detailed assessment of the additional impacts on our rights that this timber Sale would create, so that you know, and can explain fully to me and my family, the degree of infringement you are contemplating.

Until these studies are completed, and the agreement negotiated, myself and my family take the position that our Aboriginal and Treaty Rights are being infringed. We could now apply for an injunction to stop the work, since there has been no effort from government to show that the Ministry of Forests was attempting to accommodate our Aboriginal and Treaty Rights.

**26**  Moulton was notified by the Ministry of Forests that there was "a potential problem" with the defendant George Behn on September 25, 2006. The Ministry of Forests asked Moulton not to harvest in TSL A66573 and to move to TSL A66572. Moulton replied that it could not accommodate those requests because of its commitments to its mills to deliver the timber from TSL A66753.

**27**  It is alleged by Moulton that on or about October 2, 2006, and from time to time thereafter, up to the issuance of its statement of claim, the Behn defendants and other members of the Fort Nelson First Nation blockaded the only access road to the two TSLs and the Road Permit, thereby preventing Moulton from accessing the areas of land designated for harvest under the TSLs and for road construction under the Road Permit.

**28**  On October 13, 2006, counsel for Moulton wrote to the defendants George Behn and Sally Behn demanding that the blockade be removed, asserting Moulton's professed right to harvest timber under the two TSLs. Six days later, counsel for the Fort Nelson First Nation responded to Moulton's counsel advising that her client was reviewing its options, including the possibility of commencing a judicial review of the amendments that resulted in the two TSLs and the Road Permit.

**29**  In this judgment, while I refer to judicial review as the appropriate forum for the Behn defendants to seek their remedies, clearly, I mean that they are to exhaust their options through the available remedies set out in the ***Forest Act***, *R.S.B.C. 1996, c. 157*, ultimately resulting in judicial review. For ease of reference, I will refer to this process as "judicial review".

**30**  No judicial review of the amendments of the FDP that resulted in the issuance of the TSLs or the Road Permit was ever brought by the Behn defendants, Chief Logan, or the Fort Nelson First Nation.

**31**  These proceedings were commenced November 23, 2006.

**Statutory and Case Authorities**

*Standing*

**32**  While aboriginal and treaty rights are exercised by individuals, such rights are collective rights and are neither possessed by nor reside with individuals: ***Delgamuukw v. B.C.***, [*[1997] 3 S.C.R. 1010*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WT-00000-00&context=) at para. 115. The assertion of a claim by an individual member of an aboriginal group to assert collective treaty or other collective aboriginal rights on behalf of an aboriginal community was held by Mr. Justice Davies to be unsupported at law in ***Komoyue Heritage Society v. British Columbia (A.G.)***, [*2006 BCSC 1517*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1SN-00000-00&context=) at para. 35.

**33**  Similarly, in ***Te Kiapilanoq v. British Columbia***, [*2008 BCSC 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207Y-00000-00&context=) at para. 25, with reference to a number of authorities, Mr. Justice Parrett concluded that "[t]he collective nature of [Aboriginal rights and title] rights requires an authority from the people who are, in this case, collectively represented by their elected council."

**34**  In ***Canadian National Railway Co. v. Brant*** [*(2009), 96 O.R. (3d) 734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-22PM-00000-00&context=) (S.C.J.), Mr. Justice Strathy dealt with an action by the plaintiff railway against the defendant after he blockaded a railway line interfering with the plaintiff's business operations. The defendant counterclaimed on the basis that the railway line trespassed on Mohawk territory thus violating his Aboriginal rights as a member of the Mohawk Nation. The railway applied to strike the counterclaim on the basis that the defendant lacked standing to bring a personal claim for the alleged breach of collectively held aboriginal rights.

**35**  Relying upon the reasoning of Parrett J. in ***Te Kiapilanoq***, Strathy J. allowed the motion, finding at paras. 50-51:

Aboriginal title, treaty rights and Aboriginal rights are a right held by Aboriginal people in common and they cannot be asserted by individual members of the community. To put it in the words used by Prothonotary Hargrave in *Wahsatnow v. Canada (Minister of Indian Affairs and Northern Development)*, [*[2002] F.C.J. No. 1665*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M491-JWBS-608K-00000-00&context=), [*2002 FCT 2012*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M491-JWBS-608K-00000-00&context=), the claims in this case are not a right that the defendants themselves may claim. If the right exists, it is a right that belongs to the Band and can only be asserted by its lawful representatives or in a representative action.

There is good reason for this. If, as the statement of defence alleges, the Tyendinaga Mohawk Nation has Aboriginal title to the lands in question, any claims for trespass to those lands should be enforced by the authorized representatives of that Nation and not by individuals who may or may not represent its will.

*Striking the Pleadings*

**36**  Rule 19(24) provides that:

At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

1. it discloses no reasonable claim or defence as the case may be,
2. it is unnecessary, scandalous, frivolous or vexatious,
3. it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
4. it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**37**  The test under Rule 19(24) (a) is whether it is "plain and obvious" that the pleadings disclose no reasonable cause of action or defence: ***Hunt v. Carey Canada Inc.***, *[1990] 2 S.C.R. 959* at para. 28.

**38**  The general principles dictating when pleadings should be struck were canvassed in ***Dempsey v. Envision Credit Union***, [*2006 BCSC 750*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B25Y-00000-00&context=). At paragraph 17, Madam Justice Garson, as she then was, summarized the reasons to strike a pleading as follows:

1. the pleadings are unintelligible, confusing and difficult to understand;
2. the pleadings do not establish a cause of action and do not advance a claim known in law;
3. the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time;
4. the pleadings are not bona fides, are oppressive and are designed to cause the Defendants anxiety, trouble and expense [citation omitted];
5. the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants.

[Above citations omitted.]

**39**  If there is any doubt as to whether or not a reasonable defence is disclosed, it should be resolved in favour of permitting the pleadings to stand: ***McGauley v. B.C.*** [*(1989), 39 B.C.L.R. (2d) 223*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B09P-00000-00&context=) (C.A.).

**40**  If the pleadings in a statement of defence fail to disclose a defence available in law, as opposed to a separate claim for relief, they cannot stand: ***Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games v. Roadtrips Inc.***, [*2009 BCSC 1441*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B24W-00000-00&context=) at para. 15; ***Lasik Vision Inc. v. TLC Vancouver Optometric Group Inc.***, [*2000 BCSC 1203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22PS-00000-00&context=); and ***British Columbia Attorney General v. Malik***, [*2009 BCSC 595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M27T-00000-00&context=).

**41**  The criteria to strike pleadings under Rule 19(24) (b) and (c) were discussed by Mr. Justice Romilly in ***Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*** [*(1999), 36 C.P.C. (4th) 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1HH-00000-00&context=) (B.C.S.C.), where at para. 47 he found the following:

1. Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc.* [*(1987), 17 B.C.L.R. (2d) 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X17B-00000-00&context=) (B.C.S.C.).
2. An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd.* [*(1985), 62 B.C.L.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61X7-00000-00&context=) at 147 (B.C.C.A.).
3. An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: *College of Dental Surgeons (British Columbia) v. Cleland* (1968), 66 W.W.R. 499 (B.C.C.A.).
4. A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan*, [*[1992] B.C.J. No. 86*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61FJ-00000-00&context=) (December 2, 1991), Doc. Vancouver C913631 (B.C.S.C.).
5. A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: *Lutz v. Canadian Puget Sound Lumber Co.* [*(1920), 28 B.C.R. 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6P1-F30T-B1Y4-00000-00&context=) (B.C.C.A.).
6. A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd.*, [*[1992] B.C.J. No. 1567*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S0YN-00000-00&context=)
7. 3, 1992), Doc. Prince George 20714 (B.C. Master).

**42**  In McLachlin & Taylor, *British Columbia Practice*, 3rd ed. (Markham: LexisNexis Butterworths, 2006) at 19-60, the authors say that the terms "embarrassing" and "scandalous", while found in different subrules of Rule 19(24), tend to be treated as synonymous terms. For example, in ***Keddie v. Dumas Hotels Ltd.*** [*(1985), 62 B.C.L.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61X7-00000-00&context=) at 147 (C.A.), Mr. Justice Hutcheon, for the Court, adopted the definition of "embarrassing" from ***Mayor of City of London v. Herner*** (1914), 111 L.T. 512 at 514:

... ["embarrassing" means] that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues. In order that allegations should be struck out from a defence upon that ground ... their irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence.

**43**  Under Rule 19(24) (d) a pleading may be struck if it constitutes an abuse of process.

*Treaty 8 Rights, "Taking Up" land, and the Duty to Consult*

**44**  Moulton argued that the hunting, trapping and fishing rights of the Behn defendants and other members of the Fort Nelson First Nation under Treaty 8 are not unlimited. Moulton referred to a portion of page 12 of the Treaty as reprinted from the Queens Printer and Controller of Stationary, Ottawa, 1966:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

**45**  The Crown's right to take up land under Treaty 8 for forestry purposes was confirmed by the British Columbia Court of Appeal in ***Halfway River First Nation v. British Columbia (Ministry of Forests)***, [*1999 BCCA 470*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G11R-00000-00&context=) [***Halfway River***]. There, despite finding that a cutting permit issued by a District Manager under the ***Forest Act***, *R.S.B.C. 1996, c. 157* and the ***Forest Practices Code*** was a *prima facie* infringement of the Treaty 8 right to hunt, the Court held that the question was whether, in the circumstances, the infringement was justified; it concluded that it was not.

**46**  At paras. 131 - 136, Mr. Justice Finch, as he then was, considered Treaty 8 and of the right to hunt and held:

The appellants say the learned chambers judge erred in holding, at para. 101, that: "... That any interference with the right to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights" and further erred in holding (at para. 114) that the issue was to be considered from the petitioners' "holistic perspective", and that the approval of C.P.212 denied the petitioners "their preferred means ... to hunt ... in an unspoiled wilderness in close proximity to their reserve lands." The appellants assert the Crown's independent right under the Treaty to require or take up lands as described above in these reasons.

I begin by observing that earlier cases involving the interpretation of the proviso in Treaty 8 (e.g. ***R. v. Badger***, supra) or similar language in other treaties (e.g. ***R. v. Horse***, [*[1988] 1 S.C.R. 187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23H1-00000-00&context=), supra) are of limited assistance ...

A second observation I would make is that prior to the enactment of s. 35 of the ***Constitution Act, 1982***, parliamentary sovereignty was not limited or restricted by treaties with aboriginal peoples, and the federal government had the power to vary or repeal treaty rights by act of parliament: see ***R. v. Sikyea***, [*[1964] S.C.R. 642*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X3BY-00000-00&context=), and ***Daniels v. White***, [*[1968] S.C.R. 517*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22T3-00000-00&context=) where the ***Migratory Birds Convention Act*** was held to supersede Indian treaty rights.

The third observation I would make is that the Indians' right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in ***R. v. Sundown***, [*[1999] S.C.J. No. 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-JG02-S0Y9-00000-00&context=) at paras. 42 and 43. The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless. Such a position cannot be asserted in conformity with the Crown's honour and integrity. So even before the enactment of s. 35 in 1982, a balancing of the competing rights of the parties to the Treaty was necessary.

Fourth, the enactment of s. 35 in 1982 has improved the position of the petitioners. Their right to hunt, and other treaty rights, now have constitutional status. They are therefore protected by the supreme law of Canada, and those rights cannot be infringed or restricted other than in conformity with constitutional norms.

I am therefore of the view that it is unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction on the Indians' right to hunt. In either case, however, the Crown's right qualifies the Indians' rights and cannot therefore be exercised without affecting those rights.

**47**  The reasoning in ***Halfway River*** was not fully endorsed by the Supreme Court of Canada in ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, [*2005 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B15G-00000-00&context=) [***Mikisew***]. There, the Court considered the Minister's approval of a 23 square kilometre winter road through Treaty 8 Territory. The road tracked the boundary of the Mikisew Cree First Nation reserve, and the Mikisew Cree First Nation objected to the approval, arguing that it would impact upon their right to hunt and trap in the area of the road, as well as impacting on their traditional lifestyle. They challenged the decision of the Minister, and sought judicial review.

**48**  The Court determined that not every "taking up" by the Crown will constitute an infringement that must be justified pursuant to the reasoning in ***R. v. Sparrow***, [*[1990] 1 S.C.R. 1075*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-654R-00000-00&context=). At paras. 31-32, Mr. Justice Binnie, for the Court held:

I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect *on Halfway River First Nation v. British Columbia (Ministry of Forests)* [*(1999), 178 D.L.R. (4th) 666*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G11R-00000-00&context=), [*1999 BCCA 470*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G11R-00000-00&context=). In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the Constitution Act, 1982" (para. 144 (emphasis in original)) which must be justified under the Sparrow test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed. [Emphasis in original.]

**49**  At para. 48, Binnie J. addressed the issue of the extent to which a "taking up" of land would remove a meaningful right to hunt:

... The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over its traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a Sparrow justification, would be a legitimate First Nation response.

**50**  Binnie J. went on at paragraph 56 to explain that the duty to consult a First Nation does not necessarily imply that a treaty right has been breached, and that where there has been a "taking up" the Court must first consider the process by which it is planned and whether that process is compatible with the honour of the Crown.

**51**  Where there is a *prima facie* infringement, the Court is to apply the justification test set out in ***R. v. Sparrow***, [*[1990] 1 S.C.R. 1075*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-654R-00000-00&context=). In ***R. v. Badger***, [*[1996] 1 S.C.R. 771*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3P0-00000-00&context=) at 812, the Supreme Court of Canada applied the "***Sparrow*** test" because the right to hunt under Treaty 8 was raised, and provincial conservation laws were in issue.

*Interjurisdictional Immunity*

**52**  In ***Canadian Western Bank***, [*2007 SCC 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B190-00000-00&context=), a majority of the Supreme Court of Canada discussed the constitutional doctrine of interjurisdictional immunity. This is an interpretive doctrine that confines provincial legislation to the Province's jurisdiction. It is engaged when a provincial statute is valid with respect to most applications of the law, but in some applications, it impairs a vital or essential part of a federal undertaking, person, or thing, or an exclusive federal head of power: ***Canadian Western Bank*** at paras. 42 and 48-49. Where interjurisdictional immunity applies, the result is that the impugned law is not held to be invalid, but simply inapplicable to the federal undertaking, person or thing; it is limited in application to matters within the jurisdiction of the Province by reading down the legislation: ***Paul v. British Columbia (Forest Appeals Commission)***, [*2003 SCC 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YD-00000-00&context=) at para. 15 [***Paul***].

**53**  In ***Delgamuukw*** at para. 181, Chief Justice Lamer held that s. 91(24) of the ***Constitution Act, 1982*** protects a federal core of power of "Indianness" from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity. However, in ***Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)***, [*2002 SCC 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4C9-00000-00&context=) at para. 75, the Supreme Court of Canada found that, in that case, it was not established that the impugned provisions of a provincial law affected "the essential and distinctive core values of Indianness", and that they did not "engage the federal power over native affairs and First Nations in Canada".

**54**  In ***Paul***, the Court determined that notwithstanding exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians", a provincial Forest Appeals Commission could properly consider questions relating to aboriginal rights arising in the execution of its valid provincial mandate respecting forestry resources. The Court concluded in that case that interjurisdictional immunity did not apply. Under the doctrine of incidental effects, it is constitutionally permissible for a provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament as long as it does not *impair* the core head of federal power.

**Analysis**

1. **The Challenged Paragraphs in the Statement of Defence of the Behn defendants**
2. **Standing**

**55**  Before I discuss Moulton's arguments under Rule 19(24), I will deal with the Crown's argument to strike the pleadings on the basis that the Behn defendants do not have standing to raise the impugned defences set out in their amended statement of defence.

**56**  The Crown argued that the communal nature of the Treaty 8 rights is asserted by the Fort Nelson First Nation in its pleadings and acknowledged by the Behn defendants in their amended statement of defence. Although the Behn defendants assert that the Fort Nelson First Nation "traditionally ordered themselves so that the rights to hunt and trap set out in Treaty 8 were exercised in tracts of land associated with different extended families", the Crown argued that they did not go so far as to assert that their family was charged with the responsibility and authority to deal with the Crown in relation to those rights.

**57**  The Crown argued that as the treaty rights under Treaty 8 are possessed communally, the Behn defendants have no standing to raise a consultation defence or a treaty defence without the express approval of the Fort Nelson First Nation membership, and that such a claim cannot be asserted against Moulton in any event. The Crown further argued that if the Behn defendants had such standing or approval, the membership of the Fort Nelson First Nation would then be bound on the resolution of those defences by the outcome of the proceeding against the Behn defendants.

**58**  In answer to these submissions, the Behn defendants argued that any person may raise the question of the constitutionality of a law relied upon in a prosecution, citing ***R. v. Big M Drug Mart Ltd.***, [*[1985] 1 S.C.R. 295*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-236F-00000-00&context=) as authority for that argument.

**59**  In this case, however, the Behn defendants are not challenging the constitutionality of a law. Rather, what they are challenging is the decision and the decision making process of the Ministry of Forests to amend the FDP, which resulted in the grating of the TSLs and the Road Permit. As I will discuss below, in this case such an argument should be resolved through the judicial review process and not in a civil action.

**60**  The Behn defendants argued that it would be odd to accept that George Behn is a holder of a hunting right but then find that he cannot assert that right if he is sued in relation to the manner in which he exercised his right. I do not accept that this argument is of assistance with respect to the issues to be resolved on Moulton's application. It is not George Behn's hunting rights that he is relying on. Granted he and his family have pled that their hunting rights have been infringed, but the action against him, and the defence to it, is not with respect to any exercise of his hunting rights; rather, it is with respect to his blockade, along with others, of the access of Moulton to areas "taken up" by the Crown and licensed to Moulton .

**61**  The Behn defendants argued, as well, that they could pursue their pleadings as representatives, citing ***Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.***, [*[1999] B.C.J. No. 2459*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1XM-00000-00&context=) (S.C.). There, Mr. Justice Vickers determined that to be a representative plaintiff for a First Nation, one did not have to be a Chief. In my view, this case does not assist the Behn defendants, where the leadership of their First Nation is a party to the proceedings, and has chosen the position that is to be advanced on behalf of the members of that First Nation.

**62**  I conclude that the Behn defendants do not have standing to raise the impugned sections of their amended statement of defence. Treaty rights are collective rights dealt with on behalf of the aboriginal community. The Behn defendants have not demonstrated that their family has been charged with the authority to deal with the Crown in relation to those rights, and, in this case, the leadership of the Fort Nelson First Nation is a separate party to the proceedings, advancing a position on behalf of their First Nation. In the event that I am incorrect in my conclusion, I will go on to consider Moulton's claims to strike sections of the Behn defendants' amended statement of defence under Rule 19(24).

1. **Rule 19(24) Arguments**

**63**  The area described as the Behn Family Territory covers an area of at least 79,000 hectares. The thrust of the impugned pleadings is that the two TSLs and Road Permit are invalid, therefore, they convey no rights to Moulton for two reasons: (i) first, the two TSLs and the Road Permit were issued in breach of the Crown's duty to consult; and (ii), second, the two TSLs and the Road Permit had such an impact on the Behn Family Territory and the territory of the Fort Nelson First Nation that their treaty right to hunt and trap has been infringed.

**64**  Moulton argued first, that sections of the pleadings should be struck out pursuant to Rule 19(24)(a) as a matter of law, as they assert defences that are not available in a civil action for intentional interference with contractual or business relations and conspiracy; and second, that the pleadings are scandalous, embarrassing, and an abuse of process, and should thus be struck out pursuant to Rule 19(24) (b), (c), or (d).

1. **Rule 19(24)(a) No Reasonable Claim or Defence**

**65**  Moulton submits that it is plain and obvious that there is no reasonable claim or defence for two reasons: (i) the duty to consult is a procedural right, the breach of which cannot lead to an invalidation of the TSLs and the Road Permit except on judicial review; and (ii) the doctrine of interjurisdictional immunity does not apply because Treaty 8 authorizes the Crown to "take up" lands for logging purposes; therefore, if treaty rights are breached, a ***Sparrow*** analysis must follow.

**66**  With respect to paragraphs 26, 27, and 41(a) of the amended statement of defence of the Behn defendants, Moulton argued that any failure of the duty to consult is a procedural matter that cannot invalidate the TSLs or the Road Permit, except on judicial review.

**67**  In this regard, Moulton relied upon the statement of the Supreme Court of Canada in ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage***), [*2005 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B15G-00000-00&context=) at para. 57:

... Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well. [Emphasis in original.]

**68**  The Crown pointed out that the Behn defendants have not challenged the constitutionality of the provincial legislation independently of their challenge to the TSLs and the Road Permit, and thus argued that the Behn defendants cannot challenge the statutory approval of those grants other than pursuant to the ***Judicial Review Procedure Act***, *R.S.B.C. 1996, c. 241*.

**69**  Indeed, in ***Halfway River***, at para. 52, Finch J.A. said:

Review of administrative decisions is traditionally challenged by way of judicial review: ***Judicial Review Procedure Act***, [*R.S.B.C. 1996, c. 241, s. 2(a)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JC0G-61TM-00000-00&context=). The Halfway River First Nation was a party in the consultation process contemplated under the ***Forest Practices Code*** and by Ministerial policy guidelines. It brought a petition for certiorari, seeking to quash the District Manager's decision. Such proceedings are usually decided on affidavit evidence.

**70**  This observation was, however, qualified by the conclusion that the court possessed the discretion to order a trial of the issue in that case.

**71**  Moulton also argued that there is no pleading by the Behn defendants that the TSLs or the Road Permit are void *ab initio*, and that such an assertion cannot be made, as the TSLs and the Road Permit were validly issued under the ***Forest Act***, and thus a "taking up" for logging purposes as authorized under Treaty 8. Moulton's position was that the only means available to quash the TSLs and the Road Permit was by way of seeking *certiorari* in a judicial review, and not by way of a defence in this tort action.

**72**  In this case, where the constitutionality of the enabling legislation is not challenged, this action is not the vehicle by which to raise the validity of the TSLs and the Road Permit in issue, as I will explain below.

**73**  Contrary to the submission of the Behn defendants, I am unable to agree that there is no presumption that in aboriginal cases the actions of the Crown, or those relying upon impugned Crown authorizations, are lawful. No authority for the absence of such a presumption was offered by the Behn defendants, and such a proposition would mean that no grant of any right or licence to a third party could ever be relied upon until a court pronounced on its validity. In my view, the granting of licences or other rights by the Crown to non-aboriginal third parties must be assumed to be valid unless a Court finds otherwise.

**74**  Moulton's second argument with respect to Rule 19(24) (a) is that because Treaty 8 authorizes the Crown to "take up" lands for logging purposes, the constitutional doctrine of interjurisdictional immunity cannot apply. Rather, it argues that a ***Sparrow*** analysis is required in order to determine if the granting of the TSLs and the Road Permit will prevent the Behn defendants and the Fort Nelson First Nation from meaningfully exercising their treaty rights to hunt or trap. As a result, Moulton argues that the impugned sections of the Behn defendants' statement of defence which deal with interjurisdictional immunity, should be struck because they disclose no reasonable defence.

**75**  Some of the impugned sections of the Behn defendants' amended statement of defence assert that because the Crown's authorization of the TSLs and Road Permit violated their Treaty 8 rights, that authorization is invalid under the doctrine of interjurisdictional immunity. The essence of their argument is that the Crown has no power to directly or indirectly infringe treaty rights because treaty rights fall within a "core" of a Federal head of power -- Indians and Lands reserved for Indians -- under s. 91(24) of the ***Constitution Act, 1982***; therefore, any provincial law which impairs these matters is not applicable.

**76**  I agree with the submission of Moulton with respect to the applicability of the doctrine of interjurisdictional immunity to the facts of this case. Treaty 8 specifically permits the provincial Crown to "take up" lands for logging purposes. Unlike the Douglas Treaties discussed in ***R. v. Morris***, [*[2006] 2 S.C.R. 915*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B186-00000-00&context=), the rights granted to First Nations under Treaty 8 are subject to the rights of the government to make regulations and to take up land; therefore, the doctrine of interjurisdictional immunity cannot apply to invalidate the TSLs and the Road Permit.

**77**  Because of the government conduct expressly permitted by the terms of Treaty 8, federal exclusivity does not arise.

**78**  I therefore conclude that the impugned sections of the Behn defendants' amended statement of defence which deal with interjurisdictional immunity (paragraphs 29, 32, 33) should be struck as they disclose no reasonable defence to Moulton's claim.

1. **Rules 19(24) (b) and(c): Unnecessary, Scandalous, or Embarrassing Pleadings**

**79**  In their statement of defence, with respect to the tort of conspiracy to commit unlawful conduct, the Behn defendants argued that their actions of blockading were justified as an attempt to protect their treaty rights. They asserted that they were not acting in wilful disregard of the law to advance a cause, rather, they were acting to protect their rights against actions that they will show were unlawful, i.e. the Crown's authorization of the TSLs and Road Permit to Moulton. The Behn defendants further reiterated that there is no presumption in this case that the Crown's actions and those relying upon the Crown authorizations are lawful.

**80**  I have already dealt with the latter argument and I am unable to agree that there is no presumption that in aboriginal cases the actions of the Crown or those relying upon impugned Crown authorizations should be presumed to be lawful for the reasons set out earlier in these Reasons.

**81**  Moulton submits that treaty rights cannot absolve the Behn defendants and members of the Fort Nelson First Nation of their conduct in intentionally preventing Moulton from harvesting under the TSLs.

**82**  The torts of conspiracy to commit unlawful conduct and unlawful interference with contractual relations, as well as the defences to them, have not been thoroughly fleshed out by Canadian courts: Lewis Klar, *Tort Law*, 4th ed. (Toronto: Thomson Canada Ltd., 2008) at 711-12. However, in this case, I find that the treaty rights guaranteed by the s. 35 of the ***Constitution Act, 1982*** do not provide for civil immunity for unlawful tortious conduct. Unlike in other cases where treaty rights have been alleged as defences to regulatory prosecutions (see for example, ***R. v. Sappier***, [*2006 SCC 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B181-00000-00&context=) and ***R. v. Morris***, [*[2006] 2 S.C.R. 915*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B186-00000-00&context=)) the defendants here are not alleging constitutional invalidity of the statutory provisions where the offence is set out. Instead, they are attempting to use treaty rights to justify tortious conduct.

**83**  My conclusion is supported by the reasoning in ***Thomas v. Norris***, [*[1992] 2 C.N.L.R. 139*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7D-TJY1-FJDY-X077-00000-00&context=) (B.C.S.C.) where aboriginal defendants were sued for false imprisonment, assault, and battery occurring in the course of an initiation ceremony on a reserve. Among the defences argued was that the ceremony was a protected aboriginal right pursuant to s. 35 and s. 52 of the ***Constitution Act, 1982***. Mr. Justice Hood found that that defence failed and concluded at 162: "[p]lacing the Aboriginal right at its highest level it does not include civil immunity for coercion, force, assault, unlawful confinement or any unlawful tortious conduct on the part of the defendants ...".

**84**  I therefore accept the submission of Moulton that treaty rights cannot absolve the Behn defendants and the members of the Fort Nelson First Nation of any tortious conduct in intentionally preventing Moulton from harvesting under the TSLs.

**85**  Moulton also argued that self-help remedies, such as the creation and maintenance of a blockade, are inconsistent with the principle of reconciliation and the requirement to consult in good faith, and that the proper course to have been followed by the Behn defendants was to take the steps necessary to enable them to seek judicial review, or injunctive relief. Moulton argued that allowing these defences to stand will involve the parties in an unnecessary expense on an issue that is irrelevant to whether the Behn defendants and members of the Fort Nelson First Nation intentionally interfered with contractual relations or conspired to commit unlawful conduct.

**86**  Moulton relied upon ***Haida Nation v. British Columbia (Minister of Forests)***, [*2004 SCC 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B12R-00000-00&context=) at para. 42 where, Chief Justice McLachlin discussed the reciprocal nature of the duty of good faith in the context of consultation:

At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [*[1999] 4 C.N.L.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7D-TJY1-FGJR-204T-00000-00&context=) (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* [*(2003), 19 B.C.L.R. (4th) 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B01X-00000-00&context=) (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

**87**  The reciprocal onus between the Crown and members of a First Nation in terms of consultation was also highlighted in ***Mikisew*** at para. 65. Certainly, these authorities sound loudly against the justification for a self-help remedy such as the blockading of access to areas that are the subject of licences and permits granted by the Crown to third parties. See also ***R. v. Manuel***, [*2008 BCCA 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1F8-00000-00&context=) at para. 62:

The appellants testified that they were familiar with *Delgamuukw* and the concept of aboriginal law and aboriginal title. As such, they must be taken to be aware of the attendant uncertainties and the processes for reconciliation of aboriginal and common law perspectives on land ownership, and that none of those processes includes blockades of highways. Such "self-help" remedies are not condoned anywhere in Canadian law, which includes aboriginal, common, and criminal law, and they undermine the rule of law.

**88**  As a result, Moulton argued that resorting to self-help remedies and then relying on those remedies as part of a defence to a claim in tort for damages that flow from those actions amounts to embarrassing or scandalous pleadings that should be struck. They also argued that to rely on the justification of a self-help remedy in this case would be an abuse of process under Rule 19(24) (d).

**89**  I agree with Moulton that the defence of self-help as a defence to a claim in tort for damages amounts to embarrassing or scandalous pleadings that will involve the parties in an unnecessary expense on an irrelevant issue. Therefore, the impugned section of the Behn defendants' amended statement of defence which deals with a self-help remedy (paragraph 40(b)) should be struck pursuant to Rule 19 (24) (b) and (c).

**c) Rule 19(24) (d) Abuse of Process**

**90**  Moulton argued that it is an abuse of process to seek a remedy provided under the ***Judicial Review Procedure Act*** by civil action because that act abolishes the common law remedy of *certiorari*.

**91**  Relying on the decision of Mr. Justice Drossos in ***Berscheid v. Ensign***, [*[1999] B.C.J. No. 1172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G48N-00000-00&context=) (S.C.), Moulton argued that *certiorari* is a remedy that is available only on application for judicial review under the ***Judicial Review Procedure Act***, and not available in a civil action. In ***Berscheid***, Drossos J. held at para. 48:

Procedurally, section 12 of the Judicial Review Procedure Act abolishes common law writs of mandamus, prohibition and certiorari and replaces them with the judicial review procedure. Section 2(1) of the Act provides that such judicial review must be brought by petition. Section 14 of the Act mandates that the grounds on which the application is made must be set out. In addition, on a petition for judicial review, the court is not permitted to consider fresh evidence or to reweigh the evidence and substitute its own view of the facts for that of the administrative bodies concerned ...

**92**  Drossos J. continued at paras. 50-51:

It should be noted that there is a valid distinction between a judicial review and other types of proceedings which, for policy reasons, ought to be maintained: O'Reilly et al v. Mackmin et al, [1983] 2 A.C. 237 (H.L.). As our Court of Appeal has recognized, it would be a retrograde step to sublimate the process of judicial review with civil litigation: Lawson v. British Columbia [*(1992), 63 B.C.L.R. (2d) 334*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61D8-00000-00&context=) (C.A.).

As a result of this distinction between judicial review and civil litigation, a party cannot seek a remedy statutorily provided for by judicial review through civil proceedings. Such an evasion of the judicial review process is known as a collateral attack and is prohibited. Where the legislature clearly intends to confer jurisdiction on an appeal tribunal to hear and determine certain matters, the court lacks the jurisdiction to do so: R. v. Consolidated Maybrun Mines Ltd., [*[1998] 1 S.C.R. 706*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3Y6-00000-00&context=). It is only after the complainant has completed the statutorily imposed administrative process that the avenue of judicial review becomes available and, it should be noted, such judicial review is only available in limited circumstances.

**93**  Had the appropriate recourse of judicial review been pursued, the grant of the TSLs and the Road Permit would have been resolved in the appropriate framework: ***Cosens Bay Property v. Canada (Minister of Environmental Land and Parks)***, [*[1993] B.C.J. No. 1061*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3BW-00000-00&context=) at para. 16 (S.C.), applied in ***Malahat Indian Band v. British Columbia (Minister of Environment, Lands and Parks)***, [*[1998] B.C.J. No. 2798*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M195-00000-00&context=) (S.C.).

**94**  In response to Moulton's arguments, the Behn defendants argued that they are not asking the court for any prerogative relief and that they did not choose the forum; rather, it was Moulton that chose the forum and they should be able to address the lawfulness of the TSL and Road Permit authorizations as part of their defence.

**95**  The Behn defendants referred to the decision of the Ontario Court of Appeal in ***TeleZone Inc. v. Canada (Attorney General***), [*2008 ONCA 892*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64RM-00000-00&context=) [***TeleZone***]. The decision disposed of four separate appeals respecting the jurisdiction of the Ontario Superior Court. The Behn defendants argued that Ontario Court of Appeal confirmed that even though the lawfulness of decisions made by Federal agencies fell within the exclusive jurisdiction of the Federal Court, the Ontario Superior Court nonetheless had jurisdiction to consider the correctness of those decisions where they were the basis for relief sought in a civil proceeding.

**96**  I am unable to accept that that discussion stands for such an intrusion into the exclusive jurisdiction of the Federal Court, or that it supports the argument advanced by the Behn defendants that they should be permitted to resolve the matter of the validity of the grant of the two TSLs and the Road Permit at issue in this action.

**97**  The Behn defendants, Chief Logan and the Fort Nelson First Nation all relied on the case of ***Keewatin v. Ontario (Ministry of Natural Resources)*** [*(2003), 66 O.R. (3d) 370*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M3MC-00000-00&context=) (S.C.J.) to support their argument that judicial review is not the appropriate forum to deal with the arguments brought up in the impugned sections of the Behn defendants' amended statement of defence, and therefore it is not an abuse of process to raise them as a defence in a civil action.

**98**  In ***Keewatin***, a First Nation applied for judicial review seeking declarations that the Minister of Natural Resources had no jurisdiction to permit activities that impaired their treaty rights and that it had no authority to "take up" lands within the meaning of the treaty. The court found that rather than attacking the decision of the Minister, the First Nation's pleadings were in fact attacking the constitutional validity of the powers conferred on the Minister, generally.

**99**  ***Keewatin*** dealt with the issue of whether a judge of the Ontario Divisional Court had the jurisdiction to quash an application for judicial review on the ground that the relief sought was beyond the jurisdiction of the Divisional Court. The Superior Court of Justice found the Divisional Court was correct to quash the application for judicial review because, as the constitutionality of legislation was raised, the matter was more appropriate for an action, and not a judicial review.

**100**  This case is distinguishable from ***Keewatin***. First, ***Keewatin*** could only help the defendants' argument with respect to those portions of the Behn defendants' amended statement of defence that deal with interjurisdictional immunity, not the portions that deal with the duty to consult. This case is distinguishable because unlike the court in ***Keewatin***, I do not characterize the relief sought in the Behn defendants' amended statement of defence to essentially concern a constitutional issue, namely, which level of government has the authority to issue a forestry licence. This is not a case where the constitutionality of the legislation is challenged; rather, the focus of the Behn defendants' amended statement of defence is with respect to a specific decision of the Minister to authorize the amendments of the FDP, which resulted in the granting of the TSLs and the Road Permit.

**101**  The defendants Chief Logan and the Fort Nelson First Nation argued that it is not necessarily an abuse of process to seek a remedy in a civil action that could be provided for under the ***Judicial Review Procedure Act***, relying on a sentence found in paragraph 58 of the decision of Mr. Justice Sigurdson in ***Williams v. College Pension Board of Trustees***, [*2005 BCSC 788*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0PM-00000-00&context=) [***Williams***]:

... Although the defendants rely on the decision of *Berscheid v. Ensign*, [*[1999] B.C.J. No. 1172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G48N-00000-00&context=) (S.C.), that decision merely says that judicial review must be brought by way of petition; it does not decide the point here.

**102**  In that case, Sigurdson J. was considering an application for certification of a class action pursuant to the ***Class Proceedings Act***, *R.S.B.C. 1996, c. 50*. The sentence relied upon by Chief Logan and the Fort Nelson First Nation is preceded by two sentences that place the comment relied upon by Chief Logan and the Fort Nelson First Nation in context:

The question, at this stage, is not what is the preferable procedure, but whether it is plain and obvious that there is no cause of action because there is a decision that must be first set aside before a damage claim can be advanced. The defendants and intervenors have not provided me with any authority stating that where there is a private law claim for damages that might also be characterized as conduct reviewable by judicial review, that the proceeding must first be brought by way of judicial review. This action is not a forum where those issues can or should be resolved.

**103**  Sigurdson J. did not purport to suggest that a remedy required to be sought by way of judicial review could be sought by way of a civil tort action; he merely observed that such a requirement did not resolve the issue before him as to which potential forum was to be preferred.

**104**  ***Williams*** was overturned on appeal, indexed as [*2007 BCCA 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61P5-00000-00&context=). Although the Court's primary basis for overturning the trial judgment hinged on what was found to be an improper reference to case authority in a paragraph after the one cited by the defendants Chief Logan and the Fort Nelson First Nation, the Court did repeat the quote relied on by them from paragraph 58 of the trial judgment when discussing their reasons for overturning the judgment.

**105**  Chief Logan and the Fort Nelson First Nation also argued that paragraph 59 of the decision in ***Mikisew*** supports their position that a First Nation may be entitled to a remedy on the basis of a breach of the duty to consult. In that paragraph, Mr. Justice Binnie said:

Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights. [Emphasis in original.]

**106**  While I accept that that paragraph supports the argument that a First Nation may be entitled to a remedy for the breach of the duty to consult by the Crown, the passage does not suggest that the remedy is available against a party other than the Crown.

**107**  Chief Logan and the Fort Nelson First Nation also argued that the decision of the Ontario Court of Appeal in ***Frontenac Ventures Corporation v. Ardoch Algonquin First Nation***, [*2008 ONCA 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64HF-00000-00&context=), confirmed that the duty to consult may be involved as a defence against a private proponent. I am unable to find support for such a proposition in the decision in that case.

**108**  In that case, the plaintiff was conducting a campaign of exploratory drilling for uranium on lands that the Ardoch Algonquin First Nation claimed were within its traditional territory. The defendants, in contempt of court orders, engaged in a peaceful protest and blockade, which prevented Frontenac Ventures from engaging in drilling, and were thus sentenced for their contempt. In addressing the jurisdiction of the Court of first instance to provide injunctive relief to the plaintiff against the First Nation defendants, Mr. Justice MacPherson, for the Court, stated at para. 43:

In my view, the stage at which the comprehensive and nuanced description of the rule of law expressed in *Henco* must be considered is when a court is requested by a private party to grant an injunction and where doing so might have an adverse impact on asserted aboriginal and treaty rights affirmed in s. 35 of the *Constitution Act, 1982*. Such cases demand a careful and sensitive balancing of many important interests in assessing whether to grant the requested injunction and on what terms.

**109**  In that context, the passage relied upon by Chief Logan and the Fort Nelson First Nation does not support the duty to consult as a defence in a tort action by a third party against members of a First Nation. It merely confirms that when injunctive relief is sought against a First Nation, or one or more of its members, a Court must consider whether injunctive relief will have an adverse impact on the asserted aboriginal and treaty rights when considering the competing rights of the parties.

**110**  Chief Logan and the Fort Nelson First Nation also argued that the decision of Madam Justice Satanove in ***Relentless Energy Corporation v. Davis***, [*2004 BCSC 1492*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0F5-00000-00&context=) [***Relentless Energy***] supports the proposition that "courts have affirmed the ability of First Nations to question the legitimacy of Crown-issued permits in the context of a defence to a civil claim". Like ***Williams***, ***Relentless Energy*** was a decision that examined whether or not injunctive relief should be ordered. In that case, the plaintiff had permits from the Oil and Gas Commission allowing it to enter onto Crown land, harvest trees, and construct a 15 metre-wide road. The defendants were members of the Blueberry River Indian Band, beneficiaries under Treaty 8, and holders of a trapline registered under the ***Wildlife Act***, *R.S.B.C. 1996, c. 488*. The Band had filed a request with the Oil and Gas Commission to review a number of its permits granted to the plaintiff, including the ones at issue, and was awaiting the result. In the interim, band members had set up a hunting and trapping campsite at the point where the construction on the road was to begin. Satanove J. was asked to grant an injunction to restrain the defendant Davis and others from obstructing, interrupting, or interfering with the lawful use, enjoyment, or operation of their proposed permanent access road.

**111**  It is apparent that Satanove J. was not asked, and did not purport to find that the Band's application for a review of the permits issued would take place before the Court. Rather the review was to be conducted by the appropriate authority that had issued the grants. I am unable to accept that that decision supports the proposition that First Nations have the ability to question the legitimacy of Crown-issued permits in the context of a defence to a civil claim. Instead, it appears that the defence is available in a civil action only if their legitimacy is rejected by the appropriate authority.

**112**  Further support for this conclusion can be found in the decision in ***Paul*** at para. 32, where the Supreme Court of Canada held that the Forest Appeals Commission was competent to hear and deal with the plaintiff's claim of rights and his claim that those rights had been unjustifiably infringed:

A person accused of violating the Code should not be able to oust the Commission's jurisdiction relating to forestry simply by raising a particular defence and thereby highlighting a constitutional dimension of the main issue. In any event, constitutional law doctrines aside, I think it would be most convenient for aboriginal persons to seek the relief afforded by their constitutionally protected rights as early as possible within [page 608] the mechanisms of the administrative and judicial apparatus.

**113**  It is apparent from the material before me that the defendant George Behn was aware that injunctive relief was a potential remedy for the resolution of whether the TSLs and the Road Permit ought to have been granted as early as August 31, 2006, when he wrote to Bill Warner, the Regional Executive Director of the Northern Interior Forest Region of the Ministry of Forests and Range, and stated that until cumulative impact assessments were undertaken, he and his family would take the position that their Aboriginal and Treaty rights were infringed and that they could apply for an injunction to stop any work under the TSLs.

**114**  By October 19, 2006, the defendant George Behn must be taken to have been aware that judicial review was another means by which to have his concerns addressed by the Court, as that avenue was then raised by the defendant, Fort Nelson First Nation. His choice, and that of the other Behn defendants, was advertent; they cannot now be permitted to attack the contractual rights of a third party's by challenging them in these proceedings. To allow them to do so, in the circumstances, would amount to an abuse of process: ***Shuswap Lake Utilities Ltd. v. Mattison***, [*2008 BCCA 176*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X413-00000-00&context=) at para. 59.

**115**  I accept the submission of Moulton that the choice of the Behn defendants not to avail themselves of the remedies of either judicial review or injunctive relief with respect to the grants of the TSLs and the Road Permit renders their attempt to defend the case against them in tort, by alleging a procedural right, an abuse of process.

**116**  Moulton also argued that to permit the Behn defendants to challenge the TSLs and the Road Permit would be to permit an inappropriate collateral attack.

**117**  The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or an administrative tribunal by attempting to challenge the validity of a binding order in the wrong forum: ***Toronto (City) v. Canadian Union of Public Employees, Local 79***, [*2003 SCC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=). The doctrine is concerned with "ensuring finality, preserving the integrity of decision making processes and requiring parties to pursue the most appropriate avenue of challenge": ***Braithewaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*** [*(1999), 176 N.S.R. (2d) 173*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F1H1-20WS-00000-00&context=) at para. 58 (C.A.). Not all collateral attacks are offensive: ***Toronto (City) v. Canadian Union of Public Employees, Local 79*** [*(2001), 55 O.R. (3d) 541*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1KW-00000-00&context=) at para. 48 (C.A.), aff'd in [*2003 SCC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=).

**118**  In ***Telezone*** Borins J. A. said the following at para. 98:

I agree with the following comments of Morawetz J. about collateral attack at para. 82 of *TeleZone*:

In my view, TeleZone's claims against the Crown do not necessarily constitute a collateral attack on decisions of a federal board or tribunal. The collateral attack doctrine applies when a litigant is seeking to challenge the legal force of a prior court order, or judicial or quasi-judicial decision of an administrative tribunal, in subsequent proceedings. In its pleading, TeleZone is not challenging the decision of the Minister. It is not seeking to set aside the licences that have been granted. It is not seeking a licence for itself. It is seeking damages as a result of alleged breach of contract and ***negligence*** and the collateral attack doctrine has no application. Phrases like "challenge to the lawfulness of a decision" and "impugning a federal agency's decision" must be used with care in this context in order to be consistent with the Supreme Court of Canada's jurisprudence on the doctrine of collateral attack. A claim should only be struck as a collateral attack if it seeks to affect a decision's legal validity.

**119**  The Behn defendants argued that the doctrine of collateral attack has no application to this case because they are not bringing what amounts to a judicial review application and they do not seek any relief (beyond costs) from Moulton.

**120**  I am unable to agree. I am satisfied that the doctrine of collateral attack applies in this case. The Ministry of Forests made a decision to amend the FDP, which resulted in the authorization of the TSLs and the Road Permit. The appropriate means to challenge this authorization is by way of judicial review. The Behn defendants knew that this was an available option, but neither they nor the representatives of the Fort Nelson First Nation specifically chose to challenge the validity of the TSLs and the Road Permit through that means. I conclude that the attempt by them to do so in these proceedings is, in effect, a collateral attack to the avenue and means that is intended to resolve the validity of that which they purport to challenge in these proceedings.

**121**  Just as the defendants did in ***Relentless Energy***, the Behn defendants should have pursued their claims of invalidity in the appropriate forum, and cannot be permitted to avoid doing so by introducing the issue into these proceedings for determination.

**iii) Conclusion with respect to striking out sections of the Behn defendants' statement of defence**

**122**  As I found earlier, paragraphs 29, 32, and 33 of the Behn defendants' amended statement of defence should be struck as they disclose no reasonable defence, pursuant to Rule 19(24)(a). Paragraph 40(b) should be struck pursuant to Rule 19(24)(b) and (c).

**123**  Because the relief sought in paragraphs 26, 29, 32, 33, 35(a), 38, 40(b), 41(a), and 42 must be brought by petition for judicial review, and as that has not occurred, the attempt to introduce the subject matters pled in those paragraphs cannot be permitted, and they will be struck from the Behn defendants' statement of defence.

**124**  Paragraph 27 of the Behn defendants' statement of defence contains pleadings of fact. To the extent that it pleads facts and makes no legal assertion, I do not consider that it should be struck. It may well be that the inclusion of that paragraph will have no consequence in the absence of the paragraphs that I have struck, but I am unable to reach that conclusion on the applications before me, and will thus not order that they be struck out.

**125**  Insofar as paragraphs 30 and 31 of the Behn defendants' statement of claim are concerned, these paragraphs make legal assertions that, standing alone may be of no consequence in the absence of the paragraphs that I have struck, but I am unable to reach that conclusion on the applications before me, and thus will not order that they be struck out.

1. **The Third Party Notice of Chief Logan and the Fort Nelson First Nation**

**126**  The Crown asserts three bases for striking the third party notice of Chief Logan and the Fort Nelson First Nation:

1. The notice is incompatible with the statement of defence of Chief Logan and the Fort Nelson First Nation, and is thus an abuse of process. This assertion is premised upon the argument that the third party notice will oblige these defendants to argue that they participated in a blockade due to the Crown's failure to consult them, which is inconsistent with their position that they did not participate in the blockade at all.
2. The outcome of the Behn defendants' case will nullify the third party notice, as in the absence of a claim for vicarious liability, there can be no finding against Chief Logan and the Fort Nelson First Nation, unless they are found to have conspired with the Behn defendants, in which case there is no basis for the third party claim.
3. The third party claim is based upon an alleged failure by the Crown to consult Chief Logan and the Fort Nelson First Nation, and cannot be brought by other than a petition for judicial review under the ***Judicial Review Procedure Act.***

**127**  In ***McNaughton v. Baker*** [*(1988), 25 B.C.L.R. (2d) 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-6050-00000-00&context=) at 20-21 (C.A.), McLachlin J.A., as she then was, observed:

Third party proceedings are a form of pleading by which a defendant asserts a claim against someone other than the plaintiff in the event the defendant is found liable to the plaintiff. Originally, the claim was confined to contribution or indemnity: see *Australian Newsprint Mills Ltd. v. Can. Union Line Ltd.* (No. 2) [*(1952), 6 W.W.R. (N.S.) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F06F-223W-00000-00&context=). The type of claims that could be raised by third party proceedings was broadened in 1961 by amendments, confirmed in the present R. 22(1). In addition to claims for contribution and indemnity, third party proceedings may be brought for claims for relief or a remedy relating to or connected with the original subject matter of the action, and in cases where the proposed third party claim involves a question or issue substantially the same as a question or issue arising in the claim between the plaintiff and defendant: see *Webber v. Lowrie* [*(1978), 8 B.C.L.R. 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62DN-00000-00&context=), [*90 D.L.R. (3d) 682*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62DN-00000-00&context=) (C.A.).

Third party pleadings function as a special type of statement of claim. Indeed, the claim they embody could be brought by separate action. But to avoid a multiplicity of proceedings, the rules permit the claim to be made in the action which has been commenced against the defendant. The object of permitting third party proceedings to be tried with the main action is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. The avoidance of a multiplicity of proceedings is fundamental to our rules of civil procedure. This has been the case since the reforms effected by the Judicature Acts in the nineteenth century. As Cotton L.J. stated in *Searle v. Choat* (1884), 25 Ch. D. 727: "The whole tenor of the *Judicature Acts* is to require all proceedings as far as possible to be taken in one action."

**128**  Does the third party notice in this case disclose a reasonable cause of action?

**129**  It is not "plain and obvious" to me that the third party notice discloses no reasonable cause of action. This pleading is contingent and premised upon there being a finding that Chief Logan and members of the Fort Nelson First Nation conspired with the Behn defendants to blockade the access to the TSLs and the Road Permit areas. While such a conspiracy is denied by Chief Logan and the Fort Nelson First Nation, it is if, but only if, such a finding of such a conspiracy is made that the third party proceedings will be relevant.

**130**  In that eventuality, Chief Logan and the Fort Nelson First Nation allege that their actions resulted from the Crown's failure to consult with the Fort Nelson First Nation with respect to the FDP amendments: TSL A66572, TSL A66573, and Road Permit No. R1539.

**131**  The Crown argued, and I accept, that Chief Logan and the Fort Nelson First Nation bear the evidentiary and legal burden of establishing a connection between the blockade if they are found to have conspired in its creation or continuance, and a failure on the part of the Crown to have engaged in appropriate consultation with them. At this stage of the proceedings, I cannot and should not attempt to reach any conclusion as to whether such a burden can be met. I am only to determine if it is plain and obvious that it cannot.

**132**  Such a defence is not plainly and obviously doomed to failure, so long as it can be advanced in these proceedings as a cause of action. That issue is the third basis that the Crown relies upon in its application, but if the Crown were to fail on the third issue, then Chief Logan and the Fort Nelson First Nation's proposed defence might have merit.

**133**  The Crown went further on the first basis that it raised; it asserted that if it was in breach of its duty to consult in this case, damages cannot arise from that breach, as it was the blockade that will give rise to a claim for damages, and not the breach of any duty to consult. The Crown argued that because the duty to consult is a procedural obligation, as opposed to a substantive right, the breach of it cannot give rise to a claim for damages. I am unable to agree that the issue is so clear.

**134**  If it is found that the Crown breached its duty to consult with Chief Logan and the Fort Nelson First Nation, that it was that failure that caused Chief Logan and members of the Fort Nelson First Nation to participate in the blockade and that that blockade caused or contributed to the damages claimed in these proceedings by Moulton, then it is open to those defendants to raise that situation as a defence in these proceedings. As a result, the claim for indemnity cannot, in my view, be seen as plainly and obviously destined to fail.

**135**  In my view, if Moulton were to succeed in recovering damages against Chief Logan and members of the Fort Nelson First Nation, the analysis of the Supreme Court of Canada in ***Mikisew*** does not preclude them from seeking indemnity against the Crown if they can establish a causal relationship between the basis for the award of damages against them and a breach of duty by the Crown that led to the conduct that gave rise to those damages.

**136**  In ***Little Salmon/Carmacks First Nation v. Yukon (Department of Energy, Mines and Resources)***, [*2008 YKCA 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5XR8-3VX1-JG02-S1B0-00000-00&context=) at para. 88, Madam Justice Kirkpatrick, for a unanimous Court, recognized that "there can be no doubt that the duty to consult is recognized as a constitutional duty."

**137**  In ***Guerin v. Canada***, [*[1984] 2 S.C.R. 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233X-00000-00&context=) [***Guerin***], the Court awarded damages based upon a breach of fiduciary duty. Madam Justice Wilson with whom Mr. Justice Ritchie and Mr. Justice McIntyre concurred, stated at 362:

In this case the Band surrendered the land to the Crown for lease on certain specified terms. The trial judge found as a fact that such a lease was impossible to obtain. The Crown's duty at that point was to go back to the Band, consult with it, and obtain further instructions. Instead of doing that it went ahead and leased the land on unauthorized terms. In my view it thereby committed a breach of trust and damages are to be assessed on the basis of the principles enunciated by Mr. Justice Street. The lost opportunity to develop the land for a period of up to seventy-five years in duration is to be compensated as at the date of trial notwithstanding that market values may have increased since the date of breach. The beneficiary gets the benefit of any such increase. It seems to me that there is no merit in the Crown's submission that "if a trustee is under a duty to alienate land by lease or otherwise, the date to assess compensation for breach of that duty is the date when the alienation should have taken place not the date of trial or judgment". Since the lease that was authorized by the Band was impossible to obtain, the Crown's breach of duty in this case was not in failing to lease the land, but in leasing it when it could not lease it on the terms approved by the Band. The Band was thereby deprived of its land and any use to which it might have wanted to put it. Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee (see *McNeil v. Fultz* [*(1906), 38 S.C.R. 198*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-K0BB-S0JJ-00000-00&context=),) so also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract it would have been necessary for the Band to prove that it would have developed the land; in equity a presumption is made to that effect: see Waters, *Law of Trusts in Canada*, at p. 845.

[Emphasis in original.]

**138**  In my view, the reasoning in ***Guerin*** creates the potential for a claim for indemnification in even a non-fiduciary situation. The potential for such a claim cannot be said to be plainly and obviously unreasonable. I would not strike the third party notice in this case based upon the Crown's first alleged basis.

**139**  The second basis for the Crown's application similarly ignores the possibility of a finding that the Behn defendants, Chief Logan and the Fort Nelson First Nation members could be found to have conspired with each other to obstruct Moulton's access to the areas of the TSLs and the Road Permit, but to have done so due to a failure by the Crown to properly consult with the appropriate representatives of the Fort Nelson First Nation.

**140**  Again, I am unable to find that the Crown has made out that it is plain and obvious that the outcome of the Behn defendants' case will nullify the third party notice. Just as the first basis for the Crown's application assumes that the only vehicle by which the resolution of the assertion that the Crown failed to properly consult the Fort Nelson First Nation is by way of petition for judicial review, if that assumption is incorrect, then there may be a basis for the third party claim against the Crown.

**141**  In the event that Moulton succeeds against the Behn defendants, because they are not permitted to raise adequacy of consultation as a defence to the claim against them (or because they lack standing to raise a consultation defence or a Treaty defence without the express approval of the Fort Nelson First Nation membership), that does not necessarily preclude Chief Logan and the Fort Nelson First Nation from raising that defence, if they can do so in these proceedings.

**142**  I have, however, already resolved the third basis for striking the third party notice with respect to the application by Moulton referred to above, and for the same reasons, I find that the same result must apply on the Crown's application. As the issue of appropriate consultation by the Crown with the Fort Nelson First Nation must be the subject of judicial review; it cannot be the basis of a third party claim in these proceedings, and thus must be struck out.

**Conclusion**

**143**  In the result, I conclude the following:

1. Paragraphs 26, 29, 32, 33, 35(a), 38, 40(b), 41(a), and 42 of the Behn defendants' amended statement of defence shall be struck on the basis that the Behn defendants lack standing to raise the impugned defences set out in those paragraphs.
2. Moulton's application to strike sections of the Behn defendants' amended statement of defence pursuant to Rule 19(24) is granted in part: paragraphs 26, 29, 32, 33, 35(a), 38, 40(b), 41(a), and 42 of the Behn defendants' amended statement of defence shall be struck, but paragraphs 27, 30, and 31 shall remain.
3. The Crown's application to strike the third party notice filed by Chief Logan on behalf of herself and the Fort Nelson First Nation is granted.

C.E. HINKSON J.

\* \* \* \* \*

Corrigendum

Released: June 8, 2010

[1] My Reasons for Judgment dated April 15, 2010 are amended at paragraph 143 as follows.

In the result, I conclude the following:

1. Paragraphs 26, 29, 32, 33, 35(a), 38, 40(b), 41(a), and 42 of the Behn defendants' amended statement of defence shall be struck on the basis that the Behn defendants lack standing to raise the impugned defences set out in those paragraphs.
2. Moulton's application to strike sections of the Behn defendants' amended statement of defence pursuant to Rule 19(24) is granted in part: paragraphs 26, 29, 32, 33, 35(a), 38, 40(b), 41(a), and 42 of the Behn defendants' amended statement of defence shall be struck, but paragraphs 27, 30, and 31 shall remain.
3. The Crown's application to strike the third party notice filed by Chief Logan on behalf of herself and the Fort Nelson First Nation is granted.

C.E. HINKSON J.

**End of Document**

[***Narvey v. Tuazon, [2002] B.C.J. No. 2382***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60GJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

McEwan J.

Heard: October 7 - 9, 2002.

Judgment: October 22, 2002.

Vancouver Registry No. M002453

**[2002] B.C.J. No. 2382** | 2002 BCSC 1448 | 117 A.C.W.S. (3d) 419

Between Allen Simon Narvey, plaintiff, and Gary Abundo Tuazon and Lolita Abundo Tuazon, defendants

(22 paras.)

**Case Summary**

**Torts — *Negligence* — Motor vehicle, rules of the road — Driving to left of centre — Motor vehicle, evidence and burden of proof - Failure to avoid situation created by other driver — Damages — General damages — General damages for personal injury — Pain and suffering, loss of amenities and other nonpecuniary damages — Future care and treatment — Business loss — Damages awards — Injury and death — Bodily injuries — Abdomen — Chest (incl. lungs and ribs) — Back, aggravation of pre-existing condition.**

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| Action by Narvey for damages for personal injury from a motor vehicle accident. Tuazon's vehicle suddenly crossed the centre line and collided with Narvey's vehicle. Narvey suffered rib fractures, abdominal trauma and soft tissue injuries to his neck and back. Narvey was 71 years old and had some pre- existing lower back pain. He ran his own business doing television and small appliance repair, and although it was losing money before the accident, he continued to run the business because he enjoyed it. He stated he had intended to move the business towards vintage radio repair. He lost some revenue for several months after the accident but returned to work full time within a few months and had recovered from the accident relatively quickly. Tuazon argued that Narvey was at least partially liable for the accident because he failed to keep an adequate lookout and take appropriate evasive action.  HELD: Action allowed.  There was no credible evidence that Narvey was in any way at fault for the accident. Narvey suffered significant direct injuries that resolved relatively quickly, but the collision also worsened processes that were ongoing and symptomatic but not disabling. There was no loss of opportunity or loss of income-earning capacity. Damages for pain and suffered were assessed at $30,000, and damages for loss of revenue amounted to $8,000. Narvey was also awarded $500 for non-prescription medication, physiotherapy or massage. |

**Counsel**

G.J. Collette, for the plaintiff. H.A. Walford, for the defendants.

[Quicklaw note: A Corrigendum was released by the Court November 1, 2002. The correction has been made to the text and the Corrigendum is appended to this document.]

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| **McEWAN J.** |

**1**   On June 15, 1999 the plaintiff was operating a motor vehicle westbound on East 41st Avenue in Vancouver, when an eastbound motor vehicle operated by the defendant Gary Tuazon crossed the centre line and collided with him. The collision took place near the intersection of East 41st Avenue and Killarney Street where the defendant had intended to turn left. He offered no explanation for moving to his left and crossing into the lane of oncoming traffic as he did. Both the defendant and the plaintiff say the accident happened "fast" or suddenly. The defendant has nevertheless put liability in issue, specifically in that he alleges that the plaintiff failed to keep an adequate lookout and to take appropriate evasive action.

**2**  The evidence of the witnesses and the photographs of the scene leave no doubt that the collision took place in the plaintiff's lane of travel. There is no credible evidence to support the defence contention. The defendant said his incursion into the westbound lane "happened so fast" he did not notice whether the plaintiff's or other motor vehicles were moving out of the way.

**3**  Debbie Lee Hong, a witness travelling westbound on East 41st behind the plaintiff's Corsica in the inside or centre line, said the plaintiff's vehicle appeared to be travelling about 50 kph, or about the same speed she was going. She saw the plaintiff's vehicle reach the crest of a rise on East 41st at the Killarney Street intersection and estimated that the defendant's vehicle was about five car lengths away from the plaintiff's vehicle when she first saw it. She saw the plaintiff's brake lights come on. In the aftermath, she checked the traffic, moved over into the curbside lane and called 911.

**4**  Another witness, Sue Wong was travelling eastbound on East 41st in the curb lane approaching the Killarney Street intersection when she saw the defendant's vehicle go by her in the centre lane and continue over into the centre of the westbound lane. She said she was going about the speed limit or 50 or 60 kilometres per hour, and that the plaintiff had to be going somewhat faster, although he did not seem to be accelerating. She thought some of the approaching westbound cars may have moved over into the westbound curb lane.

**5**  In the aftermath of the accident she went over to the plaintiff's vehicle and noticed that he was wearing his seatbelt.

**6**  Ms. Wong said she was surprised at seeing the defendant's vehicle go over into the westbound centre lane. She agreed that the collision happened suddenly, that she was taken aback, and that it was hard to react with things happening that quickly.

**7**  When a person in his own proper lane of travel is struck by a vehicle that has crossed into his path, the duty to keep a proper lookout and to take reasonable precautions to avoid an accident must be assessed in light of the ordinary expectation that such things will not, as a matter of course, happen. Road travel would be impossible if one could not assume that other drivers would generally respect the rules of the road. Situations where, despite a clear right-of-way, drivers are found to be liable for failing to avoid an accident, usually involve some marked insistence on that right or heedlessness in the face of some manifest danger. Nothing of the kind is present here. All of the evidence is of a sudden and unexpected hazard which left the plaintiff little opportunity to react. He cannot be faulted in the circumstances, and the defendant is fully liable for the collision that occurred.

**8**  Following the accident Mr. Narvey was taken by ambulance to Vancouver General Hospital. He remained there until June 23, 1999. His condition was summarized by Dr. Robert A. Bluman, his family physician, on February 1, 2000:

In summary, Mr. Narvey suffered a significant chest contusion resulting in R[ight] rib fractures, a pleural effusion as well as milder abdominal trauma and a soft tissue musculoligamentous injury to his neck, upper back and low back regions as a result of the June 15, 1999 motor vehicle accident. He has made a good recovery from all this (sic) injuries although he continues to be bothered by his ongoing neck and slight low back discomfort. His main limitation right now appears to be in prolonged sitting or standing or doing reaching activities of the R[ight] arm with overhead lifting.

**9**  In the same report, Dr. Bluman had begun by describing Mr. Narvey's immediate post-accident symptoms in the following terms:

At the time of his first examination in my office, Mr. Narvey complained of ongoing R[ight] sided chest pain of the anterior and lateral aspect that was slowly improving. He also mentioned occasional sharp R[ight] upper anterior chest pain which would last from a few minutes to an hour. He further was suffering from R[ight] sided neck pain that was radiating to his R[ight] forearm with associated paresthesias. This pain was constant but variable in intensity. He also complained of some R[ight] upper back pain and L[eft] low back pain that was radiating to his L[eft] buttock and L[eft] posterior thigh. His bowels at this time were functioning normally. Prior to this accident, Mr. Narvey had had episodes of low back pain dating back to an injury many years before but had been essentially asymptomatic over the previous year. Mr. Narvey stopped work following this accident and was thinking about closing his business as an electronics repairman. Physical examination in my office at this visit revealed him to have tenderness over the R[ight] lower anterior and lateral chest wall which was increased with chest compression. His chest was clear to auscultation. There was no significant tenderness on palpation of his neck, mid or low back region although he was slightly sensitive in the L[eft] buttock region. He had a reasonable range of motion of the cervical spine. He was somewhat limited on L[eft] lateral flexion, R[ight] lateral flexion, and with rotation of his low back. He was able to extend his low back 10 degrees and bend forward with his fingers reaching to 6 inches off the floor. The deep tendon reflexes were all +2 in the upper and lower extremities. He had negative straight leg raising to 85 degrees bilaterally. He was diagnosed as having suffered a R[ight] chest contusion with rib fractures and a pleural effusion. He also suffered a soft tissue musculoligamentous sprain of his R[ight] upper back, low neck and L[eft] low back region. He was advised to increase his activities as tolerated and continue with range of motion exercises for his low back and neck region. He was advised to use mild analgesics as necessary and refrain from driving for at least two more weeks and follow-up with me in four weeks or sooner if necessary.

**10**  The observation that "Mr. Narvey had had episodes of low back pain dating back to an injury many years before, but had been essentially asymptomatic over the previous year" was demonstrated on cross-examination to be quite inaccurate. Dr. Bluman's clinical notes recorded a number of references to back pain in the year leading up to the accident. Mr. Narvey had been involved in a motor vehicle accident on July 14, 1988, following which he has specifically complained of back and neck pain.

**11**  Going back even further through Mr. Narvey's records the "episodes of low back pain" Dr. Bluman referred to have clearly been persistent for many years.

**12**  Dr. J. Thomas Ritchie, an orthopaedic surgeon who conducted a medical examination at the request of the defence, summarized Mr. Narvey's history in these terms:

Past history reveals a very lengthy history of low back problems dating back, according to x-rays available, to 1988 but the patient states he has even had some low back pain and left hip pain going back to the 60's.

Mr. Narvey was also involved in a motor vehicle accident in May of 1998 when his vehicle was rear-ended. He states that he had neck pain from that accident but by this accident of June 15, 1999, he did not have "too much pain by this one".

**13**  Mr. Narvey is 71 years old. He has for most of his working life been involved in his own business as a television and small appliance repairer. He frankly acknowledges that this business is on the way out. Technological developments and market realities have meant, over the years, that repairs have become more complicated and costly while outright replacement of damaged or broken equipment has become cheaper. Mr. Narvey acknowledges that demand for the sort of work he does has significantly fallen off. He nevertheless enjoyed what he did and went to his small shop near Metrotown every day, even though in the last several years it was a money losing proposition. He suggested that he was planning to develop a niche in the repair of vintage radios and equipment when he was injured in the motor vehicle accident. He closed out his business at the end of March 2000.

**14**  Mr. Narvey's business losses over the years back to 1995 may be summarized as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | YEAR | SALES | LOSS/PROFIT |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Oct. 1/99-Mar. 31/00 (windup) | $ 169.90 | -$1,389.25 |  |
|  | Sept. 1/98-Aug. 31/99 | 6,712.90 | -9,340.63 |  |
|  | Sept. 1/97-Aug. 31/98 | 14,858.00 | -452.01 |  |
|  | Sept. 1/96-Aug. 31/97 | 13,145.40 | -1,574.30 |  |
|  | Sept. 1/95-Aug. 31/96 | 19,662.02 | -320.00 |  |
|  | Sept. 1/94-Aug. 31/95 | 18,926.09 | -1,319.61 |  |

**15**  Having heard the evidence of both Dr. Bluman and Dr. Ritchie and Mr. Narvey's account of his own difficulties - recognizing that in some relatively minor respects he was sometimes shown to be unreliable - I think a fair summary of his condition is that of Dr. Bluman from his January 31, 2002 Report:

In summary, Mr. Narvey has made a reasonable recovery from all his injuries sustained in the June 15, 1999 motor vehicle accident except for residual low back pain of a mechanical nature with underlying degenerative disease of the lumbar spine and a not fully defined change of the L-3-4 disc space. As well, he has significant degenerative disease of the cervical spine but he is not too symptomatic in this area. He is cautious in his activities to avoid exacerbating any discomfort in his neck or low back by not doing any heavy lifting, significant overhead work and tries to exercise good body posture and mechanics. He is also doing some stretching exercises on a regular basis. It is likely that he will have some variable symptomatology related to his neck and low back due to his underlying degenerative disease in the future. To some degree this would have been exacerbated by his motor vehicle accident and there is evidence that his low back degenerative changes are now much worse than there (sic) were prior to this motor vehicle accident.

**16**  This is to say that I find that the rather violent collision of June 15, 1999 which involved direct contact between Mr. Narvey's chest and the steering wheel, had the effect of significantly exacerbating his pre-existing pain condition, particularly in his back. He was not asymptomatic in the period leading up to the accident, and in this regard Dr. Bluman's first report is inexplicable. Dr. Bluman acknowledged as much in giving evidence. I accept that Mr. Narvey took some time after his release from hospital to regain his previous level of function and that to a degree, given his age and pre-existing conditions, he cannot be quite as well now as he was immediately before the accident. On the other hand, Dr. Bluman was unable to say to what degree, if any, the acceleration of the degenerative changes in Mr. Narvey's spine were related to the accident. There was no other evidence that was helpful on this point. I am of the view, on the basis of all the evidence, that Mr. Narvey suffered significant direct injuries in the motor vehicle accident that resolved relatively quickly, but that the collision also worsened processes that were ongoing and symptomatic but not disabling. I think that at this point, more than three years after the accident, he is in about the same condition functionally as he was before the accident, although I accept that he likely feels a little worse than he used to. He is not getting younger and the trauma was significant.

**17**  As far as the business losses Mr. Narvey claims, I do not think he has established anything more than that for a brief period of time following the accident he may not have been in a position to offset his ongoing losses by quite as much revenue as he would have been able to generate had he not been injured. This is not possible to accurately quantify by reference to a date. The table I have included in paragraph 13 above shows that Mr. Narvey had sales of a little over $1,000 per month in his last two years up to August 31, 1998 and that thereafter they dropped off rather significantly. I think it fair to note that Mr. Narvey had not, before the accident, taken any particularly aggressive steps to shore up his business, or to go into the vintage repairs specialty, although if that were prudent, the indications that he should do so had been evident for many years. Except for some estimate of the direct loss of revenue associated with his injuries, therefore, I do not think there is any claim for loss of opportunity. Because I find that he has functionally returned to his pre-accident condition, I also cannot find that there is any ongoing loss of income earning capacity. Mr. Narvey's persistence in a losing business over the years was primarily related to his love for the work itself. I think the interference in the business he suffered as a result of his injuries is to some extent the loss of an amenity and I have accounted for it as such.

**18**  Accordingly, I assess damages for pain and suffering and loss of amenities at $30,000. I assess damages for loss of revenue in his business at $8,000.

**19**  I dismiss the claims for loss of income earning capacity and loss of opportunity.

**20**  Special damages are allowed as counsel have advised are agreed. Should there be any issue about this there shall be liberty to apply.

**21**  I further accept that Mr. Narvey may, as a result of the modest change in his ongoing condition occasioned by this accident, require a little more non-prescription medication, physiotherapy or massage than he might otherwise have needed, and allow $500 for that aspect of the claim.

**22**  The plaintiff is entitled to costs.

McEWAN J.

\* \* \* \* \*

CORRIGENDUM

Released: November 1, 2002

[1] It has been brought to my attention that in my Reasons for Judgment issued October 22, 2002 in this matter counsel for the defendants was incorrectly shown as K. Jamieson when, in fact, counsel appearing for the defendants was H.A. Walford. The said Reasons for Judgment are, accordingly, amended to reflect this change and a new page 1 is attached hereto for substitution purposes.

[2] My apologies to counsel for this oversight.

McEWAN J.

**End of Document**

[***New World Expedition Yachts, LLC v. F.C. Yachts Ltd., [2011] B.C.J. No. 91***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2TN-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.M. Myers J.

Heard: January 10 and 12, 2011.

Judgment: January 25, 2011.

Docket: S107233

Registry: Vancouver

**[2011] B.C.J. No. 91** | 2011 BCSC 78 | 196 A.C.W.S. (3d) 1008 | 2011 CarswellBC 98

Between New World Expedition Yachts, LLC, Plaintiff, and F.C. Yachts Ltd., P.R. Yacht Builders Ltd., and Ron Rayburn and Paul Rayburn carrying on business as Rayburn Yachts a.k.a. Rayburn Custom Yachts, Defendants

(35 paras.)

**Case Summary**

**Alternative dispute resolution — Binding arbitration — Voluntary binding arbitration — Agreement to arbitrate — Validity and enforceability — Practice and procedure — Pleadings — Res judicata and estoppel — Motion by the defendants to strike the fraud action as an abuse of process allowed — The plaintiff contracted with the defendants for the construction of a yacht — The construction agreement included an arbitration clause which the plaintiff submitted did not encompass the issue of whether the contract had been vitiated by fraud — However, even if the contract had been vitiated by fraud, the arbitration agreement was still valid and the dispute was captured by the arbitration clause — Moreover, as every element of the current claim had already been advanced at arbitration, the matters were res judicata.**

**Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — False, frivolous, vexatious or abuse of process — Res judicata — Motion by the defendants to strike the fraud action as an abuse of process allowed — The plaintiff contracted with the defendants for the construction of a yacht — The construction agreement included an arbitration clause which the plaintiff submitted did not encompass the issue of whether the contract had been vitiated by fraud — However, even if the contract had been vitiated by fraud, the arbitration agreement was still valid and the dispute was captured by the arbitration clause — Moreover, as every element of the current claim had already been advanced at arbitration, the matters were res judicata.**

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| Motion by the defendants to strike the fraud action as an abuse of process. The plaintiff New World Expedition Yachts entered into a contract with the defendant PR Yacht Builders (PRYB) to have PRYB build a yacht for the plaintiff. The construction agreement included an arbitration clause which stated that any dispute arising from the agreement would be submitted to arbitration. PRYB sub-contracted the labour to the defendant FC Yachts. Both of the defendant corporations were owned or controlled by the Rayburns. The plaintiff's fraud action was the latest of numerous actions related to the construction of the yacht. In the within action, the plaintiff alleged that it was the victim of a fraudulent scheme orchestrated by the Rayburns. The defendants took the position that the disputes raised in the current litigation were covered by the arbitration clause. The defendants further submitted that all the matters in the current litigation had already been canvassed in prior arbitrations and were therefore res judicata. The plaintiff took the position that the arbitration clause was not wide enough to encompass the issue of whether or not the contract had been vitiated by fraud and that the disputes raised were not res judicata.  HELD: Motion allowed.  There was no allegation or evidence that there was any fraud with respect to the arbitration agreement itself. As a result, even if the contract had been vitiated by fraud, the arbitration agreement was still valid. Furthermore, the question of whether the contract had been vitiated by fraud was a dispute arising from the agreement, as without the agreement there would have been no relationship between the parties and no dispute. Accordingly, the dispute was captured by the arbitration clause. Moreover, every element of the current claim had already been advanced at arbitration, just under different guises. Consequently, the matters were res judicata and the plaintiff's claim was an abuse of process. |

**Statutes, Regulations and Rules Cited:**

International Commercial Arbitration Act, [*RSBC 1996, CHAPTER 233, s. 8*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5SF6-0161-JP4G-622R-00000-00&context=), s. 16(1)

Rules of Court, Rule 9-5(1)(d)

**Counsel**

Counsel for the Plaintiff: R. Shore, B. Promislow.

Counsel for F.C. Yachts Ltd. and Ron Rayburn: C.J. Giaschi.

Counsel for P.R. Yacht Builders Ltd. and Paul Rayburn: W.G. Wharton.

**Reasons for Judgment**

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| **E.M. MYERS J.** |

**I. INTRODUCTION AND BACKGROUND FACTS**

**1**  The defendants seek to strike this fraud action under Rule 9-5(1)(d) as an abuse of process. The basis for the motion is that the action re-litigates matters which were or could have been the subject of arbitration between the parties. In the alternative the defendants seek, pursuant to an amendment which I granted at trial, a stay of the proceeding because it is subject to further arbitration.

**2**  This action, commenced on October 29, 2010, is the latest of several actions that have been commenced in this Court and the Federal Court with respect to the construction of a yacht. In addition there has been a series of completed arbitrations. As will be discussed further below, the plaintiff New World Expedition Yachts, LLC ("New World") signed a contract with the defendant P.R. Yacht Builders Ltd. ("PRYB") for PRYB to build a yacht for the plaintiff. PRYB sub-contracted the labour to F.C. Yachts Ltd. ("FCY"). The defendants Ron and Paul Rayburn - father and son - own or control the defendant corporations.

**3**  One of the prior proceedings was a petition commenced on June 15, 2010, in which New World sought to set aside several arbitral awards on the grounds of bias. I dismissed the petition on October 25, 2010: [*2010 BCSC 1496*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B316-00000-00&context=). The background facts in that judgment are equally applicable to this motion and I set them out again, in part, here:

[3] The underlying commercial dispute concerns the construction of a 95 foot yacht by P.R. Yacht Builders Ltd. ("PRYB") pursuant to a 2008 contract between it and New World. I will refer to that contract as the "Yacht Construction Agreement". In turn, by way of an oral agreement, PRYB engaged the co-respondent, F.C. Yachts Ltd. ("FCY") to provide labour for the vessel's construction.

[4] The ultimate purchaser of the vessel was Mr. Olsen, a U.S. citizen. He was not a party to the arbitrations, and I was not told about the contractual arrangements between him and, presumably, New World. I only mention him now because he figures in to one of the allegations of bias that I will deal with later.

[5] A dispute arose between PRYB and New World during the time the vessel was being constructed. On April 14, 2009, PRYB served a notice to arbitrate, as it was entitled to do under the Yacht Construction Agreement. Mr. McIntyre was appointed as arbitrator.

[6] It was eventually agreed that the PRYB-New World arbitration would be conducted in stages:

1. Phase 1 would determine whether PRYB was in fundamental breach of the Yacht Construction Agreement because it sub-contracted the construction to FCY.
2. Phase 2 would determine which of the parties was in breach of the Yacht Construction Agreement.
3. Phase 3 would assess damages.

[7] Because payments were not made by PRYB to FCY, on April 16, 2009, FCY commenced an *in personam* and *in rem* action in federal court against PRYB and the vessel and arrested the vessel.

[8] On July 17, 2009, Mr. McIntyre rendered a decision on Phase 1 of the PRYB-New World arbitration. He determined that PRYB had not breached the Yacht Construction Agreement by sub-contracting the construction to FCY.

[9] Phase 2 of the PRYB-New World arbitration proceeded from July to September 2009.

[10] In September 2009, New World, PRYB and FCY agreed to have Mr. McIntyre mediate an agreement between them to obtain the release of the vessel from arrest. ...

[11] During the period from November 16, 2009, to January 13, 2010, counsel for New World, PRYB and FCY negotiated an agreement for the release of the vessel from arrest which was signed on January 13, 2010 (the "Security Agreement"). Under it, New World was to obtain a letter of credit to secure the claims of PRYB, FCY and other suppliers to the vessel. The letter of credit was eventually issued by Scotiabank.

...

[13] On February 2, 2010, FCY, PRYB and New World agreed to arbitrate the FCY claim and any issues of priority before Mr. McIntyre (the "FCY-PRYB-New World arbitration"). The agreement, among other things, gave New World the right to challenge the entitlement and amount of compensation due to FCY by PRYB. New World also had the right to present evidence, cross-examine witnesses and make submissions.

[14] Evidence was presented at the FCY-PRYB-New World arbitration during the month of February, 2010.

[15] On March 8, 2010, Mr. McIntyre issued an interim decision relating to the payment of suppliers to the vessel, including FCY.

[16] On April 30, 2010, Mr. McIntyre issued his decision in the FCY-PRYB-New World arbitration. He held that FCY was entitled to an award in the amount of $1,289,784 plus interest. He further held that the claim of FCY was a valid *in rem* claim.

[17] Another issue arose which Mr. McIntyre was asked to decide. GST would be refundable when the vessel was exported from Canada, and Mr. McIntyre was asked to determine who was entitled to the refund. New World recognised that this was a separate issue from the other arbitrations, its counsel stating in an email to Mr. McIntyre: "The GST Refund issue is entirely unrelated to the Arbitrations and is a matter relating exclusively to the Agreement re Security."

[18] On May 3, 2010, Mr. McIntyre released his decision in Phase 2 of the PRYB-New World arbitration. He held that New World was in breach of the Yacht Construction Agreement since March 13, 2009, for failing to fund the labour and materials account.

[19] This petition was filed on June 15, 2010. On June 16, 2010, I heard an application by New World for a stay of the ongoing arbitration proceedings and for an injunction restraining the arbitrator from drawing on the letter of credit. The application was dismissed on terms that the arbitrator could draw on the letter of credit but the funds were to be held in trust pending further order of the court.

**4**  The arbitration clause in the Yacht Construction Agreement stated:

1. GOVERNING LAW; ARBITRATION
2. This Agreement shall be interpreted, administered and enforced under the laws of the Province of British Columbia and the laws of Canada applicable therein.
3. The parties shall submit to arbitration any dispute arising out from [*sic*] this Agreement. Either party may initiate arbitration by sending written notice to the other of election of the right of arbitration and specifying the dispute to be arbitrated.
4. The arbitration shall be conducted in accordance with the rules of the British Columbia International Commercial Arbitration Centre before a single arbitrator, and the arbitration hearings shall be held at a place designated by the arbitrator in Vancouver, Canada. The parties shall advance on an equal basis any arbitration costs, such as reporter's fees and arbitrator fees. The prevailing party shall be entitled to recover as part of the award all such advanced costs and reasonable, not actual, attorney's fees and costs, including expert witness fees and costs, and any other reasonable costs, fees or expenses of the arbitration.

**5**  In addition to the prior proceedings which I have mentioned, there are two further related proceedings:

1. an action commenced on September 13, 2010, in which Mr. Olsen alleged that the letter of credit was tainted by fraud. Mr. Justice Bowden currently has an application to prevent the funds held in trust from being released to FCY; and
2. an action by New World's former counsel for payment of his legal fees and a counterclaim by New World for ***negligence***.

**II. THE PLAINTIFF'S CLAIM**

**6**  The plaintiff claims that it was the victim of a fraudulent scheme orchestrated by the Rayburns. The notice of civil claim is 37 pages in length. The essence of the fraudulent scheme is set out in the summary section, part of which is as follows:

1. The Defendants Ron Rayburn and Paul Rayburn (the "Rayburns"), utilizing their various corporations, implemented a scheme, said scheme, with variations, having been implemented in the past against other wealthy Americans.
2. Ron Rayburn and Paul Rayburn (father and son respectively) have engaged in an ongoing and continuing pattern of conduct wherein they undertake the following:
3. Contract with a boat purchaser (typically a wealthy American) for the construction of a luxury motor yacht with one of the Rayburns' alter ego corporations;
4. Advise the purchaser that the yacht should be titled in the name of one of the Rayburns' alter ego corporations so as to avoid tax;
5. Have mortgages implemented so as to provide comfort and security for the owner's deposit and progress payments (millions of dollars) made towards the yacht (the Rayburns then dispute these very same mortgages as being invalid, after the owner has paid millions of dollars into the yacht).
6. the yacht construction becomes a dispute between the Rayburns and the boat owner;
7. the Rayburns then seize the yacht;
8. the Rayburns (through their alter ego corporation) make extortionist, oppressive and abusive demands for security to stand as replacement for the vessel so as to place the owner in an impossible situation.
9. The Rayburns' scheme has been refined and modified over time based upon the prior experiences of Ron Rayburn and Paul Rayburn.
10. The Rayburns' scheme has many facets, the foundation and corner stone of the Rayburns' scheme is the Yacht Construction Agreement which creates the basis for the other facets of the scheme to be implemented. The Yacht Construction Agreement is the written contract executed between one of the Rayburns' alter ego corporations and the yacht purchaser's corporations. The misrepresentations made by the Rayburns to have the yacht purchaser enter into the yacht construction agreement are fundamental to the Rayburns' scheme. The damages to the yacht purchaser flow from and derive directly from the yacht construction agreement.
11. The facets of the Rayburns scheme include, but are not limited to:
12. Creating and utilizing alter ego corporations;
13. The Rayburns' making face to face oral in person misrepresentations to the purchaser and the purchaser's agent;
14. Making untrue representations as to which corporation will undertake the work and has the facilities and man power to undertake the work,
15. Making representations on the Rayburns' website;
16. Advising the purchaser to title the yacht in the name of one of the Rayburns' companies during the course of construction so as to avoid tax;
17. Promising to construct the yacht in a workman like manner;
18. Having the yacht purchaser and the Rayburn alter ego corporation execute the Yacht Construction Agreement which is the foundation of the Rayburns scheme;
19. In certain instances, including, an arbitration clause in the Yacht Construction Agreement;
20. Promising in the Yacht Construction Agreement to defend and protect the title to the vessel, then failing to do so;
21. Implementing a mortgage and a General Security Agreement so as to provide comfort and security for the millions of dollars the purchaser pays towards the construction of the yacht, then subsequently, after millions of dollars have been paid, attacking the validity of the very same mortgages and the very same security;
22. failing to provide proper accounting;
23. improper and sham manufacturing techniques;
24. obtaining credit from third party suppliers that are not paid;
25. After receiving millions of dollars, alleging that the purchaser breached the Yacht Construction Agreement;
26. Seizing the yacht, by utilizing another one of the Rayburns' alter ego corporations;
27. Having one Rayburn alter ego company purport to attack the other Rayburn alter ego company. In the instant case, Ron Rayburn's (the father) company purport to attack the title to the yacht and having the son's company cooperate with the attack;
28. In the instant case, making misrepresentations so as to have NWEY enter into an Agreement Re Security;
29. In the instant case, misrepresenting the percentage completion of the yacht so as to defraud the purchaser into making very substantial payments based on misrepresentations;
30. In the instant case, utilizing sham manufacturing so as to fraudulently obtain payments from the purchaser;
31. Litigating in British Columbia Supreme Court, Federal Court and in some instances, also undertaking arbitration; *and*
32. Demanding unfounded and extortionist amounts of money from the yacht purchaser.

**7**  The notice of civil claim details the facts the plaintiff says fits into the above scheme. Needless to say, the Rayburn companies it alleges were involved in the scheme are the two defendant companies. It alleges that the transactions between them - namely the supply of and payment for labour - were sham transactions.

**8**  The following paragraphs give the flavour of what the plaintiff pleads is the legal basis of its claim:

1. The Yacht Construction Agreement was founded on fraud and was the basis for numerous further facets of the Rayburns scheme, including the arbitration, which would have never occurred had the Rayburns not made misrepresentations to have NWEY enter into the Yacht Construction Agreement. Further, the Federal Court proceedings would have never occurred, had the Rayburns not made misrepresentations so as to induce NWEY to enter into the Yacht Construction Agreement. NWEY has suffered damages as a result of the misrepresentations made regarding the Yacht Construction Agreement.
2. The Yacht Construction Agreement was the foundation and the cornerstone of the Rayburns' scheme and formed the basis for the following facets of the scheme which included utilizing alter ego corporations, making untrue representations, having the yacht titled in the name of one of the Rayburns' companies, misrepresenting the corporations functions and capabilities, undertaking the critical step of having a Yacht Construction Agreement executed, failing to provide a proper accounting, misrepresenting the percentage completion of the yacht, undertaking sham manufacturing, making misrepresentations to have the Agreement Re Security executed, undertaking arbitration based upon the Yacht Construction Agreement which was founded on fraud, undertaking litigation which was pursuant to the Yacht Construction Agreement, said agreement founded on fraud, demanding extortionist amounts of money for the release of the yacht and acting in a continuing and multifaceted manner so as to defraud NWEY, Gary Olsen and RS&I.

**9**  The only remedies sought are damages for fraud, tracing and an accounting. There is no claim to the right of rescission or that the Yacht Construction Agreement was vitiated by fraud, presumably because the plaintiff and Mr. Olson do not want to return the boat.

**III. THE POSITION OF THE PARTIES**

**10**  The defendants say that the arbitration clause is wide enough to cover the disputes raised in the current litigation and that all of the matters have, in fact, been canvassed in the prior arbitrations. Therefore this action should be struck because it is *res judicata*.

**11**  The plaintiff's interpretation of the arbitration clause is that it is not broad enough to encompass the issue of whether the contract exists; in other words, whether it has been vitiated by fraud. It argues that all of the issues it seeks to canvass in this litigation were not canvassed in the arbitration. Further, the plaintiff says that it has discovered fresh evidence of fraud and that the case should be re-considered, not by the arbitrator, but by this Court.

**IV. THE APPLICABILITY OF THE ARBITRATION CLAUSE**

**12**  The plaintiff first argues that it would not have entered into the contract were it not for the fraudulent scheme of the defendants which is the subject of his action. It argues that "fraud unravels everything"; if it can show that the contract is vitiated by fraud, the arbitration clause falls with the contract. It should therefore not prevent the plaintiff from bringing the claim in this Court.

**13**  I do not accept that argument. Even if a contract is vitiated by fraud, the arbitration clause within it is not necessarily invalid. This conclusion was reached by Wedge J. in *James v. Thow*, [*2005 BCSC 809*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0V1-00000-00&context=), in which she adopted the judgment of the House of Lords in *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Col Ltd.*, [1993] E.W.J. No. 450, [1993] I Lloyd's Law Reports 455. She took that case to stand for the proposition that:

[92] ... an allegation of fraud does not put the matter outside an arbitration agreement if the allegation does not directly impeach the arbitration agreement itself. The doctrine of separability requires that the arbitration clause be analyzed as a separate contract. That being the case, the allegation of fraud must relate directly and specifically to the arbitration agreement rather than to the contract as a whole.

**14**  This approach is also mandated by s. 16(1) of the *International Commercial Arbitration Act*, *R.S.B.C. 1996, c. 233*, which is the applicable statute for the arbitration:

16 (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

1. an arbitration clause which forms part of a contract must be treated as an agreement independent of the other terms of the contract, and
2. a decision by the arbitral tribunal that the contract is null and void must not entail ipso jure the invalidity of the arbitration clause.

**15**  There is no allegation, and no evidence, that there was any fraud with respect to the arbitration agreement itself. The expression "fraud unravels everything" is no answer to this.[**1**](#Forward_fnref_fnr-1)

**16**  The plaintiff's next argument deals with the construction of the arbitration clause. It submits that the arbitration agreement is not drafted widely enough to cover a claim which seeks to avoid a contract on the ground of fraud, because that is not, to quote the arbitration clause, "any dispute arising out from this agreement".

**17**  In my view, the wording of the arbitration clause is wide enough to encompass the question of whether the contract was vitiated by fraud. That is a dispute arising out of the agreement: were it not for the agreement there would be no boat-building contract or arrangement, no relationship between the parties for the building of the vessel and no dispute. If the plaintiff was correct, in order for the arbitrator to have jurisdiction, the arbitration clause would have had to include words along the lines of: "... including a dispute as to the validity of this agreement." I do not think that is necessary.

**18**  The plaintiff relies heavily on *Cut & Run Holdings v. Booze Bros. Holdings*, [*2005 BCSC 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S16C-00000-00&context=). However each arbitration clause must be construed on in its wording. Unlike the case at bar, *Cut & Run* involved an operating agreement for a store that did not govern the shareholder rights or status of the parties, which was the dispute before the court.

**19**  I conclude that the arbitration clause is valid and extant and is applicable to the issues raised in this action.

**20**  Having reached this conclusion on the above basis, I need not address the further issue of whether the plaintiff has affirmed the contract together with the arbitration clause within it. As I pointed out above, the plaintiff participated and completed several arbitrations, it has the vessel which it does not seek to return, it has relied on the contract in its claim for reimbursement of overpayments and it has not claimed the right to rescission.

**V. *RES JUDICATA***

**21**  The conclusion I have reached with respect to the applicability of the arbitration clause would ordinarily result in an order for a stay of this proceeding under s. 8 of the *International Commercial Arbitration Act*. However, in this case the defendants claim that these matters were addressed in arbitrations that have already taken place and therefore the defendants go further and seek a declaration that the matters in this action are *res judicata*. If they are correct, that would result in a striking of the action, because it would be an abuse of process.

**22**  Given the applicability of the arbitration clause, this raises the question as to whether I should consider this matter at all, a point not raised by any of the parties. I have concluded that since this is an action in this Court, I should determine whether the action should be struck on the basis of *res judicata* and abuse of process without making a declaration which might be seen to bind the arbitrator. In other words, I am addressing the issue only as it affects the proceedings in this Court.

**23**  In *Chapman v. Canada (Minister of Indian and Northern Affairs)*, [*2003 BCCA 665*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TH-00000-00&context=) at para. 17, the Court of Appeal reiterated its earlier statement of the doctrine of *res judicata* in *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* [*(1980), 19 B.C.L.R. 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F361-M02B-00000-00&context=). That in turn applied the principles set out in the 1843 decision of Vice-Chancellor Wigram in *Henderson v. Henderson* (1843), 3 Hare 100 at 114-15, 67 E.R. 313 at 319. Two key points made in that decision are germane to the case at bar. First, as stated by Vice-Chancellor Wigram:

... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from ***negligence***, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

**24**  Second, as stated in *Lehndorff*:

The maxim *res judicata* does not apply to distinct causes of action, but it does apply where the second action arises out of the same relationship, and the same subject matter, as the adjudicated action, although based upon a different legal conception of the relationship between the parties. It also applies not only to points on which the court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The principle of *res judicata* would also apply if the issue in the present action was one of several issues essential for the determination of the whole of the first case, though merely a step in that decision rather than the main point of it. [Internal citations omitted.]

**25**  This action attempts to do what the doctrine of *res judicata* prevents. Every element of the claim at bar was advanced by the plaintiff at the arbitrations.[**2**](#Forward_fnref_fnr-2) This includes the allegations with respect to the arrest of the vessel in the Federal Court action. That was an action between FCY and PRYB in which FCY arrested the vessel. The plaintiff sought to intervene in the action, but the motion was never heard because of the agreement to arbitrate the matters in dispute in that litigation.

**26**  In the arbitrations, the plaintiff may not have characterised the defendants' conduct as amounting to fraud, but the same conduct was at issue under different guises. For example, much of the conduct now alleged to be fraudulent was, at the arbitrations, alleged to have amounted to fundamental breach or misrepresentations. Even if I am wrong, and some of the elements of the current claim were not argued and decided at the arbitrations, all the elements are, as I have said, subject to the arbitration clause and could have been raised. This includes whether the contract was vitiated by the alleged fraudulent scheme. They are therefore also *res judicata*.

**27**  The plaintiff argues that it has discovered new evidence with respect to fraudulent conduct. It argues that evidence in prior litigation with respect to work done by another Rayburn-owned company, North Border Management Ltd., on another vessel, the *Splash,* for another buyer, did not come to its attention until after the litigation. That argument must be rejected on the facts: the evidence discloses that the plaintiff's former counsel examined the court file with respect to that action prior to or during the arbitrations and the affidavits it now seeks to rely on were in the file. The arbitrator canvassed the *Splash* litigation in his reasons. Even if the plaintiff did not fully canvass the *Splash* litigation in the arbitration, or research the facts thoroughly, it could have done so through the exercise of reasonable diligence.

**28**  Furthermore, the plaintiff's characterization of the evidence that it obtained from the court file (the only "new" evidence brought forward) is inaccurate. In the *Splash* proceedings, Ron Rayburn swore an affidavit stating that:

1. In order to construct vessels, FCY rents space and rents or buys goods, services and licenses [*sic*] and intellectual property.
2. North Border commonly provides goods and services to companies other than FCY and has recently agreed to supply goods and services to another company to construct a yacht without use of the "Rayburn" name, molds or other intellectual property associated with the "Rayburn" name.

The plaintiff says that this amounts to a statement by Mr. Rayburn that, contrary to the evidence the defendants presented at the arbitration, it was North Border that supplied the labour to construct the yacht and not FCY. However, the affidavit does not mention labour and, in any event, it speaks in general, non-exclusive terms about the relationship between FCY and North Border.

**29**  In its oral argument, the plaintiff alluded to its ability to re-litigate the matter in this Court on the basis of freshly discovered evidence. That is something that has not been pled but, in any event, the argument has no merit since it hinges on the same evidence that I just addressed.

**30**  In short, in this action the plaintiff seeks to re-litigate the matters that were or could have been decided in the arbitrations. As with the petition based on bias that I heard and dismissed, this action seeks to avoid the arbitration results not through the mechanism contemplated by the *International Commercial Arbitration Act* (which is strictly limited) but, rather, by collateral attack.

**31**  There is one further point to deal with, which I raised with the parties on the first day of the hearing, giving them an opportunity to return with any authority they wished to argue on the second day. Scattered throughout the notice of civil claim are references to misrepresentations made to the arbitrator by the defendants. There is no allegation of manufactured documents and these allegations must be taken to refer to oral evidence. Witnesses are protected from claims for giving false evidence in prior proceedings. As Southin J.A. explained in *Workum v. Olnick*, [*2006 BCCA 528*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S47J-00000-00&context=):

7 The question for the Court is whether the pleas of the plaintiff now before it are such as are within the rule - a rule of public policy - that no action will lie for the giving of false testimony in any legal proceeding, generally called the "witness immunity" rule. The rule includes conspiring to give false evidence. It does not preclude an action for planting evidence which is subsequently put before the court, or manufacturing documents, whether those documents are or are not adduced in evidence. See *Cabassi v. Vila* (1940), 64 C.L.R. 130 (H.C.A.); *Darker v. Chief Constable of the West Midlands Police*, [2000] H.L.J. No. 44, [2001] 1 A.C. 435 (H.L.); *Surzur Overseas Ltd. v. Koros*, [1999] E.W.J. No. 690, [1999] 2 Lloyd's L.R. 611 (C.A.); and, in this Court, *Hung v. Gardiner*, [*13 B.C.L.R. (4th) 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X32C-00000-00&context=), [*2003 BCCA 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X32C-00000-00&context=).

**32**  That aspect of the claim must also be struck.

**VI. CONCLUSION**

**33**  The plaintiff's claim is struck as being an abuse of process.

**34**  The defendants are entitled to their costs.

**35**  As I indicated at the hearing, I have seized myself of all matters in dispute between the parties, whether the subject of current actions or not. Obviously this does not include the injunction application currently under reserve by Bowden J.

E.M. MYERS J.

[**1**](#Backward_fnref_fnr-1) This phrase was quoted by the Supreme Court of Canada in *Farah v. Barki*, [*[1955] S.C.R. 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0WP-00000-00&context=) at 115 from *May v. Platt*, [1900] 1 Ch. 616 at 623.

[**2**](#Backward_fnref_fnr-2) The plaintiffs prepared several tables matching the issues in this litigation to those dealt with in the arbitration proceedings or pleadings. I do not set these out here.

**End of Document**

[***T.O. v. J.H.O., [2006] B.C.J. No. 759***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1RJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Stromberg-Stein J.

Heard: February 27 - March 1, 2006.

Judgment: April 7, 2006.

Victoria Registry No. 05-0202

**[2006] B.C.J. No. 759** | 2006 BCSC 560 | 266 D.L.R. (4th) 209 | 39 C.C.L.T. (3d) 134 | 148 A.C.W.S. (3d) 817 | 2006 CarswellBC 863

Between T.O., plaintiff, and J.H.O., defendant

(70 paras.)

**Case Summary**

**Damages — For torts — Affecting the person — Sexual assault — Action by TO for damages for sexual battery allowed — Plaintiff awarded general damages of $40,000 for violation of personal autonomy and dignity — Defendant was liable to the plaintiff for the full extent of the damage that his actions actually caused — He was not required to compensate plaintiff for debilitating effects of the other wrongful act that would have occurred anyway — No punitive damages awarded as there was no evidence that defendant acted vindictively or maliciously, and defendant was under age of criminal liability at time of conduct.**

**Tort law — Trespass — To person — Sexual assault — Action by TO for damages for sexual battery allowed — Plaintiff awarded general damages of $40,000 for violation of personal autonomy and dignity — Defendant was plaintiff's brother — Defendant had intent required for tort of battery and had at least some understanding of the quality of the acts he initiated — Plaintiff under age of consent at time.**

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| --- |
| Action by TO for general and punitive damages for sexual battery by defendant JHO, TO's oldest brother -- Plaintiff alleged that defendant sexually abused him between 1965 and 1973 when plaintiff was between ages of four and 12 years -- Defendant did not deny sexual activity with plaintiff but claimed that it was consensual -- Defendant claimed sexual contact was infrequent, lasted less than one year and stopped before defendant turned 12 -- Plaintiff alleged defendant used threats and bribes to continued activities -- Plaintiff engaged in self-destructive behaviour as a teenager and sexually assaulted a girl at age 13 -- In a correctional centre, plaintiff was physically and sexually abused by a counselor -- Plaintiff became homophobic, engaged in criminal activity and abused drugs and alcohol -- Plaintiff was presently self-employed and in a stable relationship -- Plaintiff claimed he suffered from depression and continued to have significant negative dreams about his family and abuse -- HELD: Action allowed in part -- Plaintiff awarded nominal damages of $40,000 for general damages -- Plaintiff established prima facie case of sexual battery -- Defendant had intent required for tort of battery and had at least some understanding of the quality of the acts he initiated -- Criminal age of consent applied in civil actions for sexual battery -- Plaintiff under age of consent throughout relevant time and was therefore incapable of giving legally valid consent to any sexual contact with defendant -- Considering that defendant was oldest sibling and enjoyed a position of influence over plaintiff, that influence alone was sufficient to vitiate any apparent consent -- Defendant was liable to the plaintiff for the full extent of the damage that his actions actually caused -- He was not required to compensate plaintiff for debilitating effects of the other wrongful act that would have occurred anyway -- Abuse plaintiff suffered at correctional center not related to abuse suffered due to defendant's conduct -- No evidence to link plaintiff's current troubles to childhood battery -- No evidence linking defendant's abuse to plaintiff's criminality -- Plaintiff thus only entitled to nominal damages of violation of personal autonomy and dignity -- No punitive damages awarded as there was no evidence that defendant acted vindictively or maliciously, and defendant was under age of criminal liability at time of conduct. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, [*R.S.C. 1985, c. C-46, s. 150.1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X05-G8P1-JGPY-X0TC-00000-00&context=)

Criminal Code, R.S.C. 1970, c. C-34, s. 140

**Counsel**

Counsel for the plaintiff: D. Berntsen

Counsel for the defendant: R. Scott

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| **STROMBERG-STEIN J.** |

**INTRODUCTION**

**1**  T.O., the plaintiff, claims general and punitive damages for sexual battery by his oldest brother, J.H.O.. The plaintiff was born November 4, 1961. The defendant was born August 31, 1957. The brothers are separated in age by 4 years and 2 months.

**2**  The pleadings allege that between 1965 and 1973, in Fernie, B.C., when the plaintiff was between the ages of four and twelve, and therefore the defendant was between the ages of eight and sixteen, the plaintiff suffered sexual abuse including non-consensual masturbation, fellatio, and anal intercourse.

**3**  The plaintiff's evidence at trial differed from his pleadings in that he testified that the sexual contact began after the family moved to Parsons, B.C., when he was five or six, and the defendant was nine or ten. The plaintiff maintains that it continued until the defendant moved away from home when he was sixteen and the plaintiff was twelve. The plaintiff claims that the defendant used bribes, threats, and force to continue the sexual contact between them.

**4**  The defendant does not dispute that he had sexual contact with the plaintiff, including mutual masturbation, fellatio, and an experimental attempt at anal penetration. However, the defendant claims that the sexual activity was consensual. He describes it as innocent pre-pubescent sexual experimentation between two brothers. The defendant denies ever offering bribes, making threats, or using force of any kind. He maintains that the sexual contact lasted less than one year, when he was ten or eleven years old, with infrequent occurrences. The defendant says that he did not understand that what he was doing was wrong until he was twelve years old and in grade seven, by which time the sexual contact had stopped.

**BACKGROUND**

**5**  The parties grew up in a rural, semi-secluded area of British Columbia. Their father was a millwright; their mother was a homemaker until she began working as a tree planter. There is a dispute about the age of the children when the mother began working outside the home. There are five boys in the O. family: J.H.O., M., T.O., G., and R.. The defendant, the oldest, is approximately ten years older than the youngest. The plaintiff is the middle child.

**6**  The plaintiff and the defendant remember enjoying positive relationships with their parents during their childhood, although the plaintiff recalls being afraid of his father when his father had been drinking. Both remember good relationships amongst the brothers, with the exception of some acrimony between the plaintiff and M.. The plaintiff testified that M. hated him, and the two often had physical fights. There is evidence that, except for the defendant, all of the brothers fought one another at times, but there were few injuries.

**7**  The boys were taught to be tough, self-sufficient, and to stand up for themselves. They learned to fish, hunt, and pick berries to provide food for the family. They were taught to use firearms. The plaintiff says they were taught that boys don't cry. Although the defendant disputes this, he remembers that all the boys were scrawny, and their father wanted them to be strong. The defendant remembers their father telling them: "If you think you're right, stand your ground". G. recalls it being a tough existence.

**8**  The witnesses disagree about which parent was the primary disciplinarian. The evidence from the brothers is consistent that in addition to "time outs" in the boys' room, they were sometimes slapped or hit with a stick that the misbehaving child had to get from a tree in the yard. If the stick was not big enough, the child was sent back for a bigger stick.

**9**  Once a week, the parents went to town for groceries. This was a time when the boys settled any scores that lay between them. During the week, the older boys, J.H.O. and M., would threaten: "Just wait til Mom and Dad go to town". He said he lived in dread of those shopping trips because the defendant was left in charge. The defendant denies that he was left in charge before he was twelve or thirteen years old. While he agrees that his role as the oldest child was to keep an eye out for the others, he denies that he ever exercised any power or authority over any of his brothers.

**10**  When the sexual contact occurred, all five boys slept in one room that had two bunk beds. The plaintiff slept in the middle bunk on the bunk bed that had three bunks. The defendant slept on the top bunk of this bunk bed.

**11**  The plaintiff remembers fifteen or twenty sexual incidents, beginning with fondling and masturbation, escalating to fellatio, and ultimately to an attempt at anal intercourse where there was some penetration. The plaintiff says he was scared and did not want to participate in any of these activities, but the defendant would always reassure him that it was alright, and later would either bribe or threaten him. He recalls the defendant telling him that it was okay, that everyone did it, and that it would not hurt if it was done right. During the attempt at anal intercourse, the plaintiff says his brother pushed his face into a pillow when the pain caused him to scream. After that, when he tried to refuse his brother's advances, the defendant told him that it was okay not to do that and he would let the plaintiff just do "hand jobs" and "blow jobs" instead.

**12**  The plaintiff testified that he did not complain to his parents about the sexual contact because he was scared of what the defendant would do to him if he told. The plaintiff was also afraid of his father's reaction because his father was sometimes violent. The plaintiff explained that he never discussed the sexual activity with his younger brother G., with whom he felt closest, because he thought it was happening to G., too.

**13**  The defendant admits that he initiated the sexual contact the plaintiff described, including some anal penetration on one occasion. However, he denies both the frequency and the duration alleged by the plaintiff. According to the defendant, the sexual contact occurred over less than a year, when the defendant was either ten or eleven years old and the plaintiff was six or seven. He testified that it began when he saw the plaintiff masturbating in his bunk and the defendant asked to join him. The defendant recalls he probably told the plaintiff that if they did it together everything would be alright.

**14**  The defendant insists that the sexual activity was consensual. He claims that he never used force, threats, or bribes to make the plaintiff comply. The defendant testified that the first time they experimented with anal intercourse, he had the plaintiff take the dominant position first, but this did not work because the plaintiff "wasn't able to". When they tried it again a few weeks later with the defendant in the dominant position, the plaintiff did not scream but only whimpered, and the defendant stopped right away. The defendant denies ever pushing the plaintiff's face into a pillow. Contrary to the plaintiff's evidence, the defendant testified that he never ejaculated during any of the contact with his brother because he did not reach puberty until he was fourteen.

**15**  The defendant explained that he did not realize that the sexual activity was wrong until he entered grade seven when he was twelve years old. He said that it had already stopped by that time. When asked whether he ever felt any guilt or embarrassment about it, the defendant answered that he did not feel guilty or embarrassed until he was served with the plaintiff's statement of claim in this action.

**CREDIBILITY OF WITNESSES**

**16**  This case raises many troubling issues, not least of which is the reliability of witness testimony about events that occurred almost forty years ago. All of the witnesses had difficulty remembering events from these childhood years. Not unexpectedly, there are many discrepancies in the evidence, including disputes about the brothers' ages at the relevant time, disputes about the level of violence and alcohol use in the home and, most importantly, disputes about the frequency, duration, and circumstances under which the sexual contact occurred.

**17**  Both the plaintiff and the defendant made an honest attempt to remember and recount the events to the best of their abilities. Both the plaintiff and defendant appear to be credible witnesses. However, I find that their recollection of incidents that occurred so long ago when they were so young is not entirely reliable. While their mother's and younger brother G.'s testimony is useful in that it provides a general picture of the boys' childhood family life, these witnesses were unable to shed light on the discrepancies in the evidence regarding key events. Both testified that they did not know about the sexual contact and doubted that it could have happened without their knowledge. Yet the defendant admits that such contact did happen.

**18**  The defendant does not dispute that he initiated the sexual contact on the first occasion and that he was the initiator each time the sexual conduct escalated in nature or degree. There is no suggestion in the evidence that the plaintiff initiated any of the instances of sexual contact described by either of the parties.

**ISSUES**

**19**  As a result of the defendant's admissions, there is no doubt that he committed the sexual acts of his own volition. The issues that remain to be determined are the following:

1. whether, due to the defendant's age at the time of the sexual contact, the defendant can be held liable for sexual battery;
2. whether the defendant has established that the plaintiff genuinely consented to the sexual activity;
3. whether, due to the plaintiff's age, the plaintiff was capable of giving a legally valid consent; and
4. what damages, if any, ought to be awarded.

**LIABILITY**

1. **Civil liability of children**

**20**  Unlike the criminal law, which absolves children under the age of twelve from criminal liability, there is no age limit under which children are automatically excused from civil liability for intentional torts. A child's age may be a factor in determining liability, but age is only relevant if it demonstrates that the child was not capable of forming the intent required to commit an intentional tort: ***Pollock v. Lipkowitz*** [*(1970), 17 D.L.R. (3d) 766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DD1-FG68-G29N-00000-00&context=), [*[1970] M.J. No. 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DD1-FG68-G29N-00000-00&context=) (Man. Q.B.). A.M. Linden explained in his text, ***Canadian Tort Law***, 7th ed. (Markham: Butterworths Canada Ltd., 2001) at p. 38:

Youth in itself is not the significant factor, but rather how it affects the defendant's capacity to form the requisite intention for liability. Children may be excused from liability for intentional torts if they are incapable of forming the specific intent required to commit the tort in question, but they will be held liable if they are capable.

**21**  There are cases where children have been excused from civil liability, where the courts have found that the children were too young to have acted with intention: ***Walmsley v. Humenick***, [*[1954] 2 D.L.R. 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B23C-00000-00&context=) (B.C.S.C.); ***Tillander v. Gosselin***, [*[1967] 1 O.R. 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-JK4W-M431-00000-00&context=), [*60 D.L.R. (2d) 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-JK4W-M431-00000-00&context=) (Ont. H.C.J.).

**22**  Thus, the real issue in this case is whether the defendant was capable of forming the intent required for an action in battery. If the evidence demonstrates that he acted with the requisite intent, it does not matter whether the sexual contact continued until the defendant was sixteen, as the plaintiff alleges, or whether it ended before the defendant turned twelve, as the defendant asserts. At either age, the defendant may be held liable for battery if all of the elements of that tort have been established.

**(ii) The level of intent required for the tort of battery**

**23**  To succeed in his action for battery, the plaintiff must prove that he suffered an intentional infliction of harmful or offensive contact. Any contact beyond the trivial contact that is expected in the course of ordinary life (such as being jostled on a crowded bus, or tapped on the shoulder by a person seeking to draw one's attention) is *prima facie* offensive if it is non-consensual. Sexual touching is therefore harmful and offensive as a matter of law unless the defendant can prove that the plaintiff genuinely consented: ***Sansalone v. Wawanesa Mutual Insurance Co*.,** [*[2000] 1 S.C.R. 551*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44Y-00000-00&context=), [*2000 SCC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44Y-00000-00&context=) at paragraph 18 (*sub. nom.* ***Non-Marine Underwriters, Lloyd's of London v. Scalera***).

**24**  The courts have struggled with the question of what level of intent ought to be required for the contact to be considered "intentional". Very early common law cases dealing with trespass to the person applied a strict rule that conduct was intentional if it was the act of a conscious mind, acting under its own volition: ***Scott v. Shepherd*** (1772), 2 Black. W. 892, 96 E.R. 525 (Eng. K.B.).

**25**  In later years, some courts moved away from this strict definition of "intention", and excused defendants who, because of their age or mental capacity, were incapable of appreciating the nature and quality of their actions: see ***Tillander***, a case involving a three-year-old defendant; and ***Canada (Attorney General) v. Connolly*** [*(1989), 41 B.C.L.R. (2d) 162*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-216K-00000-00&context=), [*64 D.L.R. (4th) 84*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-216K-00000-00&context=) (S.C.) and ***Lawson v. Wellesley Hosp***. [*(1975), 9 O.R. (2d) 677*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JBM1-M471-00000-00&context=), [*61 D.L.R. (3d) 445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JBM1-M471-00000-00&context=) (C.A.), cases involving defendants who suffered from mental illness.

**26**  The Supreme Court of Canada in ***Sansalone*** favoured the stricter, traditional rule. In finding that this rule remains appropriate in the modern law of Canada, the court emphasized that the purpose of the tort of battery is to protect an individual's right to personal autonomy and physical inviolability. The court held that liability is based on proof of a violation of those rights; it is not based on the defendant's level of culpability. As McLachlin C.J. explained at paragraph 10:

To base the law of battery purely on the principle of fault is to subordinate the plaintiff's right to protection from invasions of her physical integrity to the defendant's freedom to act: see R. Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987), 19 Ottawa L. Rev. 533, at p. 546. Although I do not necessarily accept all of Sullivan's contentions, I agree with her characterization, at p. 551, of trespass to the person as a "violation of the plaintiff's right to exclusive control of his person." This right is not absolute, because a defendant who violates this right can nevertheless exonerate himself by proving a lack of intention or ***negligence***: *Cook, supra* [*Cook v. Lewis*, [*[1951] S.C.R. 830*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0H9-00000-00&context=), [*[1952] 1 D.L.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0H9-00000-00&context=)], at p. 839, per Cartwright J. Although liability in battery is based not on the defendant's fault, but on the violation of the plaintiff's right, the traditional approach will not impose liability without fault because the violation of another person's right can be considered a form of fault.

**27**  This analysis is consistent with the many cases of medical battery where a doctor who performs a medical procedure without the patient's valid consent may be found liable despite having no intention to cause injury or harm. Plaintiffs are entitled to compensation for the harm they suffer when their right to personal autonomy is violated whether or not the defendant intended to cause them any harm.

**28**  Based on this traditional approach, the plaintiff need only prove direct physical interference with his body to establish a *prima facie* case of battery. He is not obligated to prove that the defendant was also at fault: ***Sansalone*** at paragraph 15.

**29**  The defendant admits that he voluntarily and deliberately initiated sexual contact with his brother. His admission demonstrates that he acted with the intent required for the tort of battery. Because liability for battery is not based on the defendant's level of culpability, it is immaterial whether the defendant was too young to understand the nature and consequences of his actions or to know that his actions were wrong.

**30**  Even if these factors were taken into consideration, the evidence demonstrates that the defendant did have at least some understanding of the nature and quality of the acts he initiated. There is no question that the defendant understood that these acts were sexual in nature and that he had some awareness of what sex was all about. He explained at trial that before he initiated the sexual contact with his brother, he had seen farm animals "doing it" and had masturbated to arouse himself. He agreed that a friend had left a sexually explicit comic book in his possession, even though he denied having read a pornographic novel as the plaintiff suggested. He used and understood the meaning of sexual slang terminology such as "hand job" and "blow job". Further, the defendant knew that if his father learned of his sexual activities he would be in trouble. All of this indicates that the defendant, at a young age, was already highly sexualized and understood the nature or quality of the sexual conduct he was initiating, although at the time he may not have appreciated the harm that it could cause the plaintiff.

**31**  I conclude that the plaintiff has established a *prima facie* case of sexual battery. Therefore, the defendant will be held liable unless he is able to excuse his actions by proving on a balance of probabilities that the plaintiff genuinely consented to the sexual activity.

1. **A child's capacity to consent to sexual contact**

**32**  The ***Criminal Code***, [*R.S.C. 1985, c. C-46, s. 150.1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X05-G8P1-JGPY-X0TC-00000-00&context=), establishes the legal age of consent as fourteen years old, except that a child between the ages of twelve and fourteen is considered capable of consenting to sexual contact with a person between the ages of twelve and sixteen as long as that person is no more than two years older, and is not in a position of trust, support, or authority. If any of these conditions are not met, and in particular, if the sexual partner is more than two years older than the twelve or thirteen-year-old child, the consent will not be valid.

**33**  The ***Criminal Code***, R.S.C. 1970, c. C-34, s. 140, which would have been the law in effect at the time the sexual contact occurred, was substantially similar but did not include the exception for children aged twelve and thirteen. It stated simply:

Where an accused is charged with an offence under section 146, 149 or 156 in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge.

**34**  In ***M.(M.) v. M.(P.)*** [*(2000), 82 B.C.L.R. (3d) 125*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G27H-00000-00&context=), [*2000 BCSC 1597*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G27H-00000-00&context=) (*sub. nom.* ***M.M. v. Vancouver School District No. 39***), the criminal age of consent was applied in a civil trial involving claims of sexual battery and breach of fiduciary duty against a teacher. Bennett J. instructed the jury that "a person under the age of fourteen years does not have the capacity to consent to sexual acts". In subsequent reasons for judgment on the appropriate remedy for breach of fiduciary duty, Bennett J. stated that if the events occurred when the plaintiff was less than fourteen years old, "there was no defence of consent available".

**35**  In ***Harder v. Brown*** [*(1989), 50 C.C.L.T. 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B064-00000-00&context=), [*16 A.C.W.S. (3d) 347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RG1-FCSB-S0F9-00000-00&context=), (B.C.S.C.) the apparent acquiescence of a ten-year-old girl involved in a seven-year sexual relationship with an elderly friend of her family's was deemed to be legally invalid.

**36**  As with the issue of child liability, some cases have implied that the validity of a child's consent is related to the child's capacity to understand the nature and consequences of the conduct. This is consistent with the jurisprudence dealing with a child's capacity to consent to medical treatment: ***Van Mol (Guardian ad litem of) v. Ashmore*** [*(1999), 58 B.C.L.R. (3d) 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2XB-00000-00&context=), [*1999 BCCA 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2XB-00000-00&context=). However, this principle has only been applied in sexual battery cases involving children over the legal age limit of fourteen: ***Lyth v. Dagg*** [*(1988), 46 C.C.L.T. 25*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F7G6-62TJ-00000-00&context=) (B.C.S.C.), ***M.(M.). v. K.(K.)*** [*(1987), 11 B.C.L.R. (2d) 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7G6-62FG-00000-00&context=), [*35 D.L.R. (4th) 222*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7G6-62FG-00000-00&context=), rev'd on other grounds [*(1989), 38 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B03T-00000-00&context=), [*61 D.L.R. (4th) 392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B03T-00000-00&context=) (C.A.).

**37**  In my view, there is no reason to depart from Bennett J.'s analysis in ***M.(M.) v. M.(P)***. It is appropriate to apply the criminal age of consent in a civil action for sexual battery. The age of consent, set at fourteen, is a matter of public policy to protect children from sexual exploitation. That public policy can dictate the law with respect to the legality of consent was confirmed in ***Norberg v. Wynrib***, [*[1992] 2 S.C.R. 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607N-00000-00&context=), [*92 D.L.R. (4th) 449*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607N-00000-00&context=) at para. 34, where the Supreme Court of Canada commented:

... in certain situations, principles of public policy will negate the legal effectiveness of consent in the context of sexual assault. In particular, in certain circumstances, consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely.

**38**  Because of their relative immaturity and susceptibility to influence, young children are in an inherently weak position vis-à-vis an older initiator of sexual contact. For that reason, children must be protected by a clear rule of public policy setting an age limit under which any apparent consent is not legally valid.

**39**  Both the criminal and civil law share the common goal and responsibility of protecting children from sexual exploitation. The tort of battery is particularly suited to further that purpose because, as Chief Justice McLachlin emphasized in ***Sansalone*** battery is a tort that is focused on the child's right to physical inviolability and personal autonomy. It would introduce an odd inconsistency in the law if children were considered legally incapable of consenting to sexual activity for the purposes of the criminal law, but were capable of giving such consent in a related civil action.

**40**  The plaintiff was only six or seven years old when the sexual activity began. Whether it lasted a single year, as the defendant says, or continued until the plaintiff was twelve, as the plaintiff alleges, he was under the age of consent throughout the relevant period. The plaintiff was therefore incapable of giving a legally valid consent to any sexual contact with the defendant.

**41**  In any event, there are indications in the defendant's own testimony that the plaintiff resisted his brother's sexual advances. According to the defendant, the contact began when he saw the plaintiff masturbating and wanted to join him. The defendant testified: "I probably told him if we did it together everything would be alright". This type of reassurance would not have been necessary if the plaintiff had expressed no reluctance to do as his brother asked. That reluctance is clearer in the defendant's testimony regarding his wish to attempt anal intercourse. He testified that he "convinced" his brother to try it.

**42**  The defendant, who was more than four years older than the plaintiff, and the oldest sibling in the family, enjoyed a position of influence, if not power, over the plaintiff. Younger siblings naturally look to older ones for guidance, protection, and love. Even if the plaintiff had been old enough to consent, that influence alone is enough to vitiate any apparent consent.

**43**  Because the defendant is unable to excuse his conduct on the basis of age or consent, the plaintiff is entitled to damages for sexual battery.

**DAMAGES**

**44**  The plaintiff claims general and punitive damages. He did not advance his claim for special damages.

**45**  The assessment of damages in this case is complicated by the plaintiff's history subsequent to his brother's battery.

**46**  The plaintiff's parents separated when the plaintiff was twelve or thirteen years old. The defendant, who was sixteen, had moved out of the family home a short time before the separation. For the next two years, the plaintiff lived with his mother at Eight Mile Creek. During this time, he engaged in self-destructive behaviour. He had poor relationships with other children; he misbehaved at school; and he got into trouble with the police. He did not complete grade eight.

**47**  When the plaintiff was thirteen, he sexually assaulted a girl he was babysitting. Shortly after this incident, he was made a ward of the court because his mother felt he was too much for her to handle.

**48**  At sixteen, the plaintiff was sent to Monashee Mountain Correctional Centre, a wilderness camp. He was physically, emotionally, and sexually abused by an adult counsellor. The plaintiff received bribes, such as extra food or fewer chores, for his participation in sexual acts. If he refused, he was beaten or whipped. His peers taunted him about what his abuser was doing to him. His abuser taunted him about what his brother had done to him. His life was threatened. At one point, the plaintiff was transferred to an even more remote camp with his abuser. He ran away but returned to suffer worse abuse.

**49**  During this time, his self-destructive behaviour continued. His mother recalled an attempt to have the plaintiff come home to spend Christmas with the family, although she was uncertain of the year. As soon as the plaintiff got off the bus, he robbed a lady of her purse and spent the holiday in jail.

**50**  The plaintiff returned to his mother's home when he was seventeen or eighteen years old. He was homophobic. He rebelled against authority. He abused drugs and alcohol and engaged in criminal activity.

**51**  In 1991, during an argument with his mother about his own misconduct, the plaintiff finally told her about the sexual battery his brother had inflicted. She did not believe him. During that incident, the plaintiff picked up a knife. There is conflicting evidence about whether he threatened to plunge the knife into his own heart, as he recalls, or into hers, as she testified. The result was that his mother disowned him. At trial, she testified that she remains terrified of him. Although she enjoys a close relationship with her other four sons, she has had no contact with the plaintiff for several years.

**52**  The plaintiff's relationship with his father ceased when the plaintiff was jailed in 2001 for sexually abusing his stepdaughter.

**53**  The plaintiff has lived cut-off from every member of his family for several years. He longs to have a relationship with his family; particularly to reconcile with his mother.

**54**  The plaintiff is now forty-four years old. He has three children from two relationships, but he has no contact with any of his children. He has successfully established a common law relationship with a woman who is aware of his past abuse and who remains committed to making the relationship work, despite the difficulties they have experienced due to the plaintiff's emotional instability and controlling behaviour. Since the spring of 2004, the plaintiff has attended regular counselling sessions with a counsellor trained in dealing with issues common to men who have been sexually abused. His partner often attends as his spouse and primary support person.

**55**  While the plaintiff claims to lack ambition, he has demonstrated a solid work ethic. He is currently self-employed as a tree faller and makes enough money to support himself and his partner when he works. However, the plaintiff claims to suffer from insomnia and to have difficulty concentrating, which affects his high-risk employment. He suffers from depression, for which he takes anti-depressant medication. He says he continues to have significant negative dreams about his family and abuse.

**56**  The plaintiff filed a medical-legal report from Dr. Robert Haymond, a registered psychologist. The report is not particularly helpful as it is based on invalid test results and hearsay. Dr. Haymond diagnosed the plaintiff's mental condition as Depersonalization Disorder. The doctor's opinion is that the plaintiff remains at risk for self-harm and will require life-long professional counselling to deal with the effects of his multiple victimizations at Monashee Mountain Correctional Centre, which were severely exacerbated by the problems he experienced in childhood.

**General Damages**

**57**  Battery is an intentional tort that is actionable without proof of damage. Some amount of compensation must be awarded for the violation of the plaintiff's right to personal autonomy, whether or not he suffered any provable injury as a result: ***Norberg*** at paragraph 53; Cooper-Stevenson, ***Personal Injury Damages in Canada***, 2nd ed. (Toronto: Carswell, 1996) pp. 99-100. Where the plaintiff establishes that he suffered injury caused by the battery, compensation for the extent of that injury will be due. Unlike in an action for ***negligence***, the defendant's liability is not limited to foreseeable consequences, but extends to all of the consequences caused by the intentional conduct: ***Norberg*** at paragraph 53.

**58**  The award of damages should reflect the nature and impact of the battery. The substantial body of jurisprudence that has developed with respect to sexual battery indicates that this type of battery often inflicts serious, lasting emotional and psychological injury, including feelings of intense shame, worthlessness, and misplaced guilt. Sexual battery inflicts humiliation and indignity on a plaintiff, which are aggravating factors that must be taken into account. Therefore, because of its nature, sexual battery has a greater impact than non-sexual battery: ***Norberg*** at paragraph 54.

**59**  There is no doubt that the plaintiff's life has been severely affected by the many incidents of sexual battery he has suffered. The difficulty in this case is that the evidence does not demonstrate what effects the defendant's actions caused and what effects were caused by the abuse the plaintiff suffered at the Monashee Mountain Correctional Centre. No evidence was led to establish that the plaintiff's childhood battery contributed to his incarceration at the Monashee Mountain Correctional Centre and to the abuse he suffered there. Without such evidence, the court must treat the two wrongs as distinct, and assess damages accordingly.

**60**  In ***Blackwater v. Plint***, [*[2005] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=) at paragraph 74, the Supreme Court of Canada recognized that "[u]ntangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong". The defendant is liable to the plaintiff for the full extent of the damage that his actions actually caused. He is not required to compensate the plaintiff for "the debilitating effects of the other wrongful act that would have occurred anyway": ***Blackwater*** at paragraph 80. The plaintiff should receive neither more nor less compensation from his brother because the abuse at the Monashee Centre occurred.

**61**  In ***C.H. v. M.H.*** [*(2005), 264 Sask.R. 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-FG68-G45R-00000-00&context=), [*2005 SKQB 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-FG68-G45R-00000-00&context=), the plaintiff suffered multiple sexual batteries by her adoptive brother and father. The court took the approach of determining the plaintiff's total entitlement to damages, and then determining the portion for which the defendant, her adoptive brother, was liable. The court found the defendant liable for 35% of the total damages of $124,000, which included $80,000 in general damages.

**62**  This court has tended to follow a different approach, assessing damages separately against each defendant so as to take into account the particular circumstances involved in each relationship: See ***Russ-Essandoh v. Russ and Collison***, [*(2002) 116 A.C.W.S. (3d) 301*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-2065-00000-00&context=), [*2002 BCSC 1275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-2065-00000-00&context=), and ***Flotre v. Dickson*** [*(2004), 135 A.C.W.S. (3d) 1178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0NB-00000-00&context=), [*2004 BCSC 1712*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0NB-00000-00&context=).

**63**  In ***G.T. v. Griffiths***, [*[1995] B.C.J. No. 2370*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B264-00000-00&context=) (S.C.), reversed on the issue of vicarious liability of an employer [*(1997), 31 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21WF-00000-00&context=) (C.A.), affirmed [*[1999] 2 S.C.R. 570*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42N-00000-00&context=), the court set out a list of factors to be considered in assessing damages in sexual assault and battery cases. Those factors are as follows:

1. the number or frequency of assaults;
2. the nature of the sexual assaults;
3. the age of the complainant at the time;
4. the vulnerability of the complainant;
5. the relationship between the parties;
6. the force or violence used;
7. the effect and consequences on the victim; and
8. whether aggravated damages are included.

**64**  Despite the conflicts in the evidence, it is clear that the plaintiff suffered multiple sexual assaults beginning at a very young age. Those assaults gradually escalated in nature to include anal penetration. While the activity may have begun as simple childhood sexual curiosity, as the defendant claims, it progressed far beyond anything that could be characterized as innocent exploration of sex and sexuality. On all the evidence, and in light of the plaintiff's change in behaviour around the age of twelve or thirteen, I find it more probable that the incidents of sexual contact continued at least sporadically for six or seven years until the defendant left the home around the age of sixteen. The plaintiff was then eleven or twelve. The battery did not involve significant force or violence, but the evidence indicates that the defendant, as the older brother, exercised persuasive influence over the plaintiff, although the relationship did not involve the kind of breach of trust that is common in cases involving parents, teachers, or other guardians.

**65**  Unfortunately, due to the lack of expert evidence, I am unable to determine which, if any, of the plaintiff's current troubles are attributable to the childhood battery. The effect and consequences of that battery may be irretrievably mingled with the effect of the Monashee abuse. The court cannot presume that the defendant's actions caused specific injuries. As a result, because the plaintiff did not prove on a balance of probabilities that his brother's actions caused his misconduct that led to the Monashee abuse and his subsequent criminality, and that the effects he now suffers were caused by the defendant's actions, this court can only award nominal damages for the violation of personal autonomy and dignity inherent in the battery itself.

**66**  In ***S.Y. v. F.G.C.*** [*(1996), 26 B.C.L.R. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61BF-00000-00&context=), [*[1997] 1 W.W.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61BF-00000-00&context=), the Court of Appeal reviewed many damage awards in cases of sexual battery, and noted that general damage awards have tended to increase from a range of $40,000 to $65,000 before 1990 to the $100,000 to $175,000 range in 1996. This increase is perhaps reflective of society's greater understanding of the nature of sexual battery and the lasting harm it may cause. However, comparisons with past authority are of limited usefulness in assessing an appropriate quantum of damages precisely because of the nature of sexual battery, the vast variety of circumstances in which it may occur, the many factors that affect the potential for lasting injury in any individual case, and the variation in the evidence that is made available to the court.

**67**  Had the plaintiff established that some of his current problems were caused by the childhood battery and not by the Monashee abuse, a higher award would be warranted. However, on the available evidence, and taking into account all of the circumstances of this case, an award of $40,000 is appropriate compensation for the sexual battery and consequent violation of personal dignity and autonomy that the plaintiff suffered at the hands of his brother.

**Punitive Damages**

**68**  Unlike general damages, which are awarded to compensate the plaintiff for his suffering, punitive damages are awarded to punish the defendant, to express society's condemnation of his conduct, and to deter future occurrences of such conduct. Because the function of tort law is primarily compensatory, punitive damages should be awarded only in circumstances where the defendant's conduct is so extreme that it cries out for punishment because of its harsh, reprehensible, vindictive, or malicious nature: ***Norberg*** at paragraph 53; ***Vorvis v. Insurance Corporation of British Columbia***, [*[1989] 1 S.C.R. 1085*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23P9-00000-00&context=) at paragraph 27, [*58 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23P9-00000-00&context=).

**69**  While the defendant's conduct in this case was reprehensible, there is no evidence that he acted vindictively or maliciously. Although he was in a position of influence, he was not in a position of authority or trust akin to those mentioned by the Supreme Court of Canada in ***Norberg***. The defendant's age and maturity level at the time the battery occurred must also be considered with respect to the need for punitive damages to denounce and deter. I share the reluctance expressed by Chicoine J. in ***C.H. v. M.H*** at paragraph 52, to assess punitive damages against a child who was under the age of criminal liability at the time the battery began and for a significant part, if not all, of its duration. In all the circumstances of this case, an award of punitive damages is not warranted.

**COSTS**

**70**  In light of the outcome, the plaintiff is entitled to costs at Scale 3.

STROMBERG-STEIN J.

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