APPEAL NO. 1203-0230-AC
Q.B. NO. 1103 14112

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")

Between:

ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

APPELLANTS
(Respondents)

-AND-

PUBLIC TRUSTEE OF ALBERTA

RESPONDENT
(Applicant)

-AND-

SAWRIDGE FIRST NATION, MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY and MAURICE STONEY

INTERESTED PARTIES
(Interested Parties)

Appeal from the Order of
The Honourable Justice D.R. Thomas
Dated the 12th day of June, 2012
Filed the 20th day of September, 2012

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Case Name:

R. v. Caron

Between
Her Majesty the Queen, Respondent, and
Gilles Caron, Applicant/Appellant, and
Her Majesty the Queen, Respondent, and
Pierre Boutet, Applicant/Appellant

[2011] A.J. No. 1563

2011 ABCA 385

515 A.R. 304

Docket: 1003-0016-A, 1003-0017-A

Registry: Edmonton

Alberta Court of Appeal

J.E.L. Côte J.A.

Heard: November 23, 2011.
Judgment: December 21, 2011.

(110 paras.)

Criminal law -- Rights of accused -- State-funded counsel -- Application by accused for state-funded counsel for appeal allowed in part -- Appeal had gone far beyond issues raised by accused's traffic violation, becoming challenge to validity of all of Alberta's unilingual legislation -- Voluminous materials were already filed -- Accused had ability to continue earning income, but some health problems -- Accused chose not to permit intervenors and co-appellant to control litigation -- Little preparation was needed to continue appeal, and province's resources were not to be spent lightly -- Funds of $11,600 were loaned to accused -- Criminal Code, s. 684.

Application by Caron for state-funded counsel for his appeal from a conviction for a traffic violation. The issue on appeal was not whether or not Caron had made an illegal turn, but the validity of all of Alberta's unilingual legislation. To the time of the application, 89 days of trial time had been occupied with Caron's case. There were two intervenors and another appellant involved in the ap-

peal. The intervenors seemed to have funds, and there was no evidence about the resources of Caron's co-appellant. Caron did not want these other parties to take control of the litigation. He was unemployed at the time of the application, but had skills in the trades and intended to seek employment. He had some health problems. He sought funding for two lawyers, totaling approximately $80,000.

HELD: Application allowed in part. Caron was loaned funding for one lawyer, capped at a maximum of $11,600. Full state funding was not appropriate, where Caron had a choice to allow others to take the lead with the litigation, where the case had already taken an exorbitant amount of time and court resources, and where Alberta was in a deficit position. Given the slow pace of the litigation, it was likely that Caron would be able to fund it on a reasonable scale with his earnings from his next position. His health problems created the risk that funding the litigation might strip him of many of his assets. The hours Caron's counsel suggested they would need for the appeal were unnecessary, given the amount of material already filed. The award was based on one day of argument by senior counsel before the Court of Appeal, with the assistance of a student, with minimal preparation time.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 684

Languages Act, S.A. 1988, c. L-7.5,

Manitoba Act 1870,

N.W.T. Act 1875,

N.W.T. Act 1886,

N.W.T. Act 1891,

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M.C. Doucet, Q.C. F.J. Lerocque, for l'Association Canadienne-Française de l'Alberta.

Reasons for Decision

A. Background

1 The biggest issue here is ordering the respondent to fund the appellant's appeal to the Court of Appeal.

2 The present litigation is the 5th round of attempts to have all the legislation in the three "Prairie" provinces (old Rupert's Land) written and published in English and French. And this litigation in effect seeks to render all the existing provincial legislation void in the meantime.

3 M. Bilodeau partly succeeded in the first attempt in Manitoba in 1986, as the *Manitoba Act* 1870 expressly called for bilingual legislation. But the existing legislation was held valid in the interim, because of the necessity doctrine. See ***A-G Man v Bilodeau***, [1986] 1 S.C.R. 449 and ***Ref re Man Language Rts***, [1985] 1 S.C.R. 721.

4 Second, Father Mercure brought a similar challenge in Saskatchewan. Saskatchewan (and Alberta), unlike Manitoba, had no legislation of their own on the topic. But there was a section in the old *N.W.T. Acts* 1875, 1886 and 1891 providing for bilingual legislation. N.W.T. legislation was held still in force, but not constitutionally entrenched, so it could be repealed by the successor province: ***R v Mercure***, [1988] 1 S.C.R. 234. The same was held for Alberta: ***R v Paquette***, [1990] 2 S.C.R. 1103.

5 Third, Alberta passed an Act (in both languages) repealing any need for bilingual legislation: *Languages Act* 1988, c L-7.5. (Saskatchewan did so in qualified terms.)

6 Fourth, that new Alberta legislation was then challenged by M. Lefebvre, but was upheld: ***Lefebvre v R***(1993) 135 AR 338 (CA).

7 Fifth, M. Caron resisted his 2003 traffic violation ticket under Alberta legislation on traffic safety. He began by objecting that the ticket was written only in English, but the litigation then turned into a challenge to any Alberta legislation which was not bilingual, i.e. to all Alberta legislation. M. Caron now relies on two or three documents respecting the admission of Manitoba and the Northwest Territories (Rupert's Land) into Canada.

8 That is this litigation.

9 I had every intention of issuing this decision in both official languages. Having written it in English, I had inquiries made to the usual secure federal government translators about the time and money which would be involved to produce a French version. The estimated time was about three weeks (14-15 business days), which would be presumably four or five weeks given Christmas holidays. The money estimate was about $9000 to $10,000, though that was a cautious figure, and it might be less. For reasons which will become self-evident in this decision, I find the cost of translation here totally disproportionate. This is a decision on a procedural matter, not on the merits. Different considerations might well apply to a decision on the merits. Also distressing is the amount of time which translation would consume, given the deadlines agreed upon for factums.

10 There is no good solution to this distressing dilemma. After thought, I have decided that the lesser of two evils is to issue unilingual reasons. Needless to say, this is not a reflection on any of the parties concerned, nor on the careful, thoughtful, clear, well-articulated arguments which I heard.

B. Facts

11 I recite below the bare-bones history of this ***Caron***case, including previous funding applications.

> Application for costs and interim costs: 2006 ABPC 278, 416 AR 63 (Aug 2)
> Second application for state-funded counsel: (PC) 2006 CarswellAlta 2052 (Nov 7) Appeal re costs and state-funded counsel: 2007 ABQB 262, 413 AR 146
>
> Award of interim costs: 2007 ABQB 632, 424 AR 377

Merits at trial: 2008 ABPC 232, 450 AR 204

Crown's application for stay of interim funding order: 2008 ABCA 111, 429 AR 79

Appeal from interim costs order: 2009 ABCA 34, 446 AR 362

Merits on appeal: 2009 ABQB 745, 476 A.R. 198

Leave to appeal to Supreme Court of Canada: (2009) 400 N.R. 391

Merits (leave to appeal to Court of Appeal): 2010 ABCA 343, 493 A.R. 200

Appeal from Court of Appeal re interim costs: 2011 SCC 5, [2011] 1 S.C.R. 78, 411 N.R. 89

C. Evidence and Procedure

12 M. Caron seeks a grant of litigation funding by the Crown in Right of Alberta.

13 It would not have been economical or prompt to hear oral evidence on the present motion. No one asked for that, and this Court does not really do that when hearing motions under s 684 of the *Criminal Code.*

14 I received and weighed a new set of evidence. It was not the evidence heard five years ago in Provincial Court or the Court of Queen's Bench for funding, and facts have changed since then. The Supreme Court of Canada's 2011 ***Caron***decision (*supra*) says that

> funding orders ... should be carefully fashioned and reviewed over the course of the proceedings ... [to be] balanced against the need to encourage the reasonable and efficient conduct of litigation ... (para 47)

15 All parties agreed that I should sit alone under R 516, treating all topics before me as matters incidental to an appeal. And the Court of Appeal's jurisdiction was objected to (by the Crown) only as to the costs' amount (whether confined to the amounts in Schedule C).

D. Postponing Deadline

16 M. Caron wished the deadline to file his factum, authorities, and extracts of key evidence postponed to a date in March. The Crown and proposed interveners had no objection, and I ordered that.

E. Two Interventions

17 Two bodies moved to be allowed to intervene in this appeal to the Court of Appeal: l'Association Canadienne-Française de l'Alberta, and l'Assemblée Communautaire Fransaskoise. They had intervened in the courts below (and *de facto* on the leave motion). No one objected to this proposal. The two bodies in question have much experience in the field, and able counsel who file thorough, useful materials. They represent the interests (and probably the outlook) of broader classes or groups.

18 I give each group the right to intervene but not to adduce more evidence (which they do not propose to do). They must stick to the topics on which leave was granted (as must the parties). The length of oral argument (if any) will be up to the hearing panel.

F. Basic Approach to Funding

19 The reasons below relate to the big contested issue before me: funding (called "advance costs").

20 The three ***Okanagan***tests approved by the Supreme Court of Canada most recently in its 2011 ***Caron***decision are as follows:

1. "genuinely cannot afford to pay for the litigation, and no other realistic option exists ... "
2. "claim ... is *prima facie* meritorious ... "
3. "issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases"

(***R v Caron***, 2011 SCC 5, [2011] 1 S.C.R. 78, 99-100 (para 39, follg. ***Okanagan IB v Min of Forests***, 2003 SCC 71, [2003] 3 S.C.R. 371, 313 N.R. 84).

21 The tests are subject to a fourth overriding test: the case is "sufficiently special" that it would be unjust "to deny the advance costs ... or consider other methods ..." (*ibid.*).

22 I will spend some time below (in Parts L to O) discussing #1. I defer that for a moment, so that I need discuss the evidence only once and need not repeat the same discussion under two different topics.

23 Test #2 requires less discussion here. In all funding cases, it is tempting to go quite far in discussing the strength of case of the party seeking funding. But that is not test #2 in the ***Okanagan***case. No chambers judge can or should get to the bottom of the merits at a preliminary stage, even for the limited purpose of funding. And here another chambers judge has given leave to appeal on two issues, which he found arguable. Finally, the Provincial Court judge and the Queen's Bench judge differed on these topics. So the case of M. Caron is arguable. The fact that this is an appeal (and probably an intermediate one) may be relevant to quantum, but is not enough to depart from the previous findings as to #2 in this ***Caron***case. The previous courts hearing M. Caron's funding matters have held #2 to be satisfied. They found enough arguable merit.

24 Much the same can be said about test #3.

25 Test #4 is not specifically further discussed by the Supreme Court of Canada in ***Caron*** (probably because the discussion there of #s 2 and 3 would largely have to be repeated.)

26 One might assume that the answer to a request for advance ***Okanagan***funding for a suit or appeal would have to be an unqualified yes or no. The only question would be whether the three (or four) ***Okanagan***criteria were met or not. But it is not quite that simple, I respectfully suggest.

27 There is no doubt that this type of funding is supposed to be very exceptional, and so the courts cannot and should not water down the Supreme Court of Canada's tests by giving funding (even partial funding) for a near miss, or as a consolation prize. The tests (as modified) must all be met in order to get any money at all.

G. Proportionality and Economy

28 But the converse does not hold. If the ***Okanagan***tests are all met, it does not follow that the automatic or invariable answer is full funding for all of the suit at every stage. Still less does it necessarily mean full funding for the most exhaustive and lavish effort that can be planned, using the best possible means and the fullest resources in Canada (or on the globe).

29 Why is that?

H. Law on Degree of Funding

30 First, the Supreme Court of Canada says so.

31 The court asked to fund should sign no blank cheque, should craft terms carefully, and be mindful of all options: ***Okanagan***, *supra*, para 41; ***Little Sisters v Commr of Nat Rev***, 2007 SCC 2, [2007] 1 S.C.R. 38, 356 N.R. 83 (paras 40-43, 94, 112); ***Caron***2011, para 47.

32 The Supreme Court of Canada also tells courts not to create a new Legal Aid scheme, and the Legal Aid Society of Alberta usually pays a good deal less than the applicant suggests now.

33 Considerations of proportionality and due economy call for partial or strictly restricted funding in many cases.

34 There is not much Canadian authority on this topic of restraint in quantum of funding. But I see some analogy for this precise aspect of funding, in Supreme Court of Canada authority on a different topic. I mention it because the law here is not yet fully formed. Where the relevant factors show entitlement to spousal support, they also impact on its quantum. Support need not produce equalization of the resources on both sides, and the court must look at all the relevant factors, and at practical and policy considerations in individual cases. See ***Bracklow v. Bracklow*** [1999] 1 SCR 420, 448-49, 450, 451, 236 NR 79 (paras 50, 53, 54).

35 The Supreme Court of Canada has set strict criteria to get advance costs (funding) for litigation. So surely the funding should be given only to the extent necessary to meet those criteria. The fact that the litigation or the defence is important but could not exist without funding, does not logically mean that the funding must be unlimited.

36 Here too in funding cases, the aim is allowing the possibility of litigation, not achieving equality of resources (***Little Sisters***, *supra*, paras 5, 43).

I. Competing Demands and Limited Revenue

37 In constitutional funding litigation (including judges' salaries), financial exigencies are to be taken into account. Alberta has some exigencies, as its deficit figures show. The Alberta *Hansard* of February 24, 2011 shows that the Crown tabled with the Legislature part of its Budget called Fiscal Overview. Page 10 says that "[t]he deficit for 2011-2012 is expected to be larger, at $3.4 billion, and a balanced budget is not forecast until 2013-2014 ... revenue is forecast to be $1.7 billion lower in 2011-2012 ... than expected in *Budget 2010*." Details follow there. A $3.4 billion annual deficit is about $1,000 for each man, woman and child in Alberta, or several thousand dollars for each household, each year.

38 So the choice is to borrow still more to fund this litigation, or to cut back on competing claims on government spending, especially for health care and education. (I single them out because other budget documents say that these two items will consume 64% of the Alberta government's

spending.) Canada does not score very well internationally on health care wait times, and Alberta does not score significantly better than most of Canada. Other competing constitutionally-protected funding calls on the government include legal aid for poor people facing jail or loss of their children, and possibly some financial assistance to the handicapped. Choices must be made.

J. Less Necessary Work to Do Now

39 Given the Provincial Court and Queen's Bench ***Caron***decisions on the merits, this is M. Caron's third go around. (And arguably the fifth or sixth, if one includes previous people's suits, as described above.) Surely most of the work should have been done already. M. Caron's counsel are already familiar with the record.

40 I have examined, and been impressed by the size and scope of, the briefs already filed on appeal on the merits in the Court of Queen's Bench. I note especially how full and detailed is M. Caron's "Memoire de l'Intimé" filed December 22, 2008. And I note how many authorities and historical documents are now made easily available to all parties by all the briefs filed there by all concerned.

41 Presumably there was also careful argument in Provincial Court, as the length of the Provincial Court judge's judgment on the merits (2008 ABPC 232) would suggest.

42 No new evidence was to be adduced in the Court of Queen's Bench, and no party or intervener proposes to adduce any in the Court of Appeal. (Given the terms of the *Criminal Code* and the order for leave to appeal, that is not surprising.) So this appeal to the Court of Appeal will be the third time that this very record and these issues have been argued by the same parties, indeed probably by the same counsel.

43 Indeed the issues and work should be simpler this time, as leave to appeal to the Court of Appeal was granted only on two questions of law. The *Criminal Code* (incorporated into provincial legislation) compels that limit.

44 Counsel suggested to me that they must review the whole record of 89 days of trial in Provincial Court. But they must have done that two times before: in Provincial Court and in the Court of Queen's Bench. So have counsel for their opponent the Crown. All the evidence which either side thought relevant enough to mention is already cited in the various Court of Queen's Bench briefs.

45 It is doubtful that a large volume of new relevant case law has been decided on this rather special topic since early 2009 when the last Court of Queen's Bench briefs were filed. And it should not take long to see whether the cases which were relied on in the Court of Queen's Bench and are still relevant in the Court of Appeal have since been judicially considered. Computers do that task quickly.

46 A few hours' discussing and thinking about the topic afresh, and rearranging the order of arguments, would possibly be useful. But I doubt that anything much needs to be built from scratch.

47 M. Caron's Court of Queen's Bench "Memoire de l'Intimé" filed December 22, 2008 was obviously prepared on a computer, so revising it should be easy. Little rekeyboarding and no wholesale proofreading should be needed.

48 And the Court of Appeal is likely but a temporary bus stop, as the Supreme Court of Canada may well give leave to appeal.

K. Signs of Lack of Restraint

49 The proof of the pudding is in the eating.

50 I can also detect some signs of insufficient economy and restraint in this litigation to date, quite apart from the percentage of the litigation which has been about funding itself.

51 This litigation has hypertrophied (in size and range of issues) since it first got funding. Eighty- nine days of trial seems suspiciously long for an undisputed traffic offence, even though the real defence point is constitutional reliance on three or so additional documents.

52 To get copies of the briefs of argument in the Court of Queen's Bench, it was necessary to access the Court of Queen's Bench file in Edmonton. That "file" already consists of 14 cardboard cartons.

53 If the government pays both sides, and no expense is spared, and neither side finds an answer especially urgent, why would the litigation ever end? What would the accused or his supporters have to lose by exhaustive litigation? Alberta experience shows that even at comparatively low Legal Aid rates, a criminal trial sometimes can take months, even years. Admitting one piece of evidence can take a day of trial time. *A fortiori* if the funding is enough to pay higher hourly rates, almost market, for most lawyers. Many judicial inquiries are notorious for taking years.

54 The influence of supply and demand is no more popular than the influence of gravity, but despite that, supply and demand still exert a steady widespread pull.

L. Resources Already Available

55 There is another issue. Even using a standard of funding subject to proportionality and due economy, sometimes not even all of that should be funded. Why?

56 Take the simplest example. What if it would take (say) $30,000 to prosecute economically some desirable and publicly very important court proceeding, and the three tests from ***Okanagan***are met? If such an applicant does not now have $30,000, and cannot get any more financial help from anyone, should he or she be granted $30,000? That depends. If he or she has nothing (beyond subsistence needs) and never will have anything, then the answer may well be yes.

57 But if the applicant will likely get the needed $30,000 within a year or two, then his or her problem is one of financing, not of lack of resources. At most, he or she needs a $30,000 loan or credit. Even a suitable barrister who would give credit for a year or two (earning interest in the meantime) might suffice.

58 What if that hypothetical applicant (litigant) has already been able to assemble or get $12,000 for the proposed litigation? Then he or she does not need $30,000; his or her need is only for $18,000 funding. Similarly, if such an applicant had nothing now, but was likely soon to get $12,000 elsewhere, then the funding should not exceed $18,000.

M. Degree of Need in this Case

59 Such considerations are especially apt in the present case.

60 In evidence are M. Caron's affidavit, and the transcript of his cross-examination on it.

61 What do they show about need? First, in November 2011, M. Caron became unemployed in Alberta. Yet he has two trades in the construction industry, which is now very healthy in Alberta. He had a steady work history, earning quite adequate pay, though nothing lavish. He appears to have no dependents, and mentions no spouse or partner. So money was tight at the time he swore

his affidavit, but future earnings and employment seemed likely. His counsel told me that he plans to get work.

62 Second, M. Caron provides some very brief information which suggests that he has a type of muscular dystrophy, that of the region of the eyes and the pharynx (upper throat). The only result which is in evidence is this. He says that he fatigues more easily than normal. Presumably that might imply a need for shorter work hours and more holidays (though no evidence actually says that). He does not suggest that he cannot work, or cannot work at his two trades. Indeed he worked at both trades until very recently, six months after the medical letter relied upon. He stopped for seasonal or adventitious reasons, not medical ones.

63 I have read and reread M. Caron's affidavit, and his cross-examination on it. On a very quick reading, the affidavit seems to say more than a more careful second reading actually reveals. It often hints but does not come out and state. Many contrary facts were brought out in his cross-examination. I found a number of his answers on cross-examination argumentative rather than helpful or informative.

64 The best that I can conclude about his finances, in favour of his application, is this. His cash is temporarily tight, but he has a number of solid assets which show every prospect of advancing in value. He has (maybe pardonably) leveraged his investments at present, but that will benefit him so long as assets rise in value in the longer term, which seems likely. And he has good employment prospects. As noted, he intends to get more employment.

65 Therefore, M. Caron could raise much or all of the necessary funds in the medium run, but probably not immediately. And in the past he has got some funding: $60,000 (in two tranches) from the Court Challenges Fund. The evidence is not entirely clear what stage that was for. And then he got $6,000 from the public (with the fund-raising help of one of the interveners).

N. Other Possible Sources of Funding

66 M. Caron has not sought Legal Aid since 2005. There are other possible avenues of assistance not fully explored (and maybe not at all); some monetary, some non-monetary.

67 For example, M. Caron's co-litigant, M. Boutet, Legal Aid, and the two interveners.

68 I have no evidence about M. Boutet's financial condition, but he had counsel present for the financing application (who made but one brief submission on another procedural topic). And M. Boutet took part in the Court of Queen's Bench, where his counsel filed a brief on the merits. He is said to be "waiting in the wings" should M. Caron flag. That is a striking fact.

O. Interveners

69 The two groups who argue (with evidence) that this issue is vital, have not contributed any cash. (They did help M. Caron raise the $6,000 from the public.)

70 The two intervener Associations show no signs that they operate on a shoestring. For example, the Court of Queen's Bench brief of L'Assemblée Communautaire Fransaskoise Inc. is 24 pages long, and discusses the law and even offers statistics. There is a good deal of information about the interveners in the various pieces of evidence. The inference that they have funds flows from virtually all of it. And they willingly took an extensive part in this litigation in the two courts now under appeal (and again *de facto* on the leave application).

71 Since the two interveners are evidently so keen, able, and experienced, and so familiar with M. Caron's case and well funded, I wondered why they could not simply take the major role, with M. Caron more or less riding their coattails. After all, at this stage the issues now have become entirely legal. There never was any issue about M. Caron's left turn, and that is not what occupied 89 days of trial. No court is likely to find that M. Caron is subject to different law than all other Albertans or all other Franco-Albertans. So far M. Caron and the interveners have argued more or less the opposite. Furthermore, as the *Criminal Code* and the Alberta legislation on provincial offences procedure dictate, the appeal to the Court of Appeal is confined to defined questions of law alone. Much issue-driven multi-party litigation works very satisfactorily by some variant on the coattails method.

72 Why will the coattails method or something similar not suffice here? During oral argument, counsel for M. Caron did not suggest that it would be impossible. He said instead that M. Caron refuses to let either intervener enjoy such a role. M. Caron firmly desires to remain in control himself, said his counsel. Having read M. Caron's cross-examination on affidavit, I can see that that is clearly M. Caron's approach.

73 That is the right of any litigant paying for his or her own lawyer. Maybe it might sometimes be the right of a litigant with publicly-important interests still at play which are distinct from the interests of other parties or interveners (though that tends to conflict with some of the ***Okanagan***tests). And having his own solicitor to **advise** him might be the right of such a party. (For example, any prudent private defendant whose liability insurance limits are at least ostensibly exceeded by the claim gets independent advice.) But I have trouble seeing that the taxpayers should fund expenses which arise simply from M. Caron's desire to remain at the wheel of this appellate vehicle, and to leave the interveners in the passengers' seats or driving their own vehicles.

74 In my considered view of the balance of probabilities, and looking at alternative calculations, M. Caron has enough assets and savings to finance and fund this present appeal (not on a lavish scale, but on a reasonable scale). That is especially true over a few years. I say that after allowing for his house mortgage and the loan from his sister. I so conclude that after estimating a reasonable budget to run this appeal (on which see further Part Q below).

75 If M. Caron were in full health, the decision on funding would be simpler. One possibility would have been giving him only some assistance in getting credit or financing.

76 But M. Caron's health condition also must be weighed. It conflicts with much of what is discussed above. On balance, I have concluded that I should give some significant weight to the risk of permanently stripping him of many of his assets (or making him drop his appeal to avoid that risk), given his potential of somewhat diminished ability to work.

77 I would probably not assist him on these facts if I concluded that M. Caron were merely the cat's paw of some other solvent person or organization. (For example, it is remarkable how often a public-interest litigant in the last decade has been a newly-incorporated single-issue society.) But the evidence here does not demonstrate such artificial manipulation.

P. Terms and Conditions

78 Now it is necessary to turn to what limits and restrictions should be placed on this funding.

Q. Controlling Costs

79 Members of the Supreme Court of Canada have spoken publicly of the danger to society of unbridled litigation expenses. Most notably, the Chief Justice of Canada has several times given widely-publicized speeches warning the legal profession that the middle classes are becoming unable to afford litigation.

80 That choice of the middle classes as the problem area is significant. Thirty years ago, wealthy parties were the ones who felt the burden of huge litigation (civil or criminal) which never ended. Back then, stipulating for time records and a set hourly rate was the only common method of controlling legal bills. Then large American companies began to control their legal bills, a practice which has spread very widely across North America to steady consumers of legal services.

81 Today, corporate in-house counsel often see controlling legal expenses paid to outside law firms as a very important part of their job. And they use a considerable array of devices to do so, as publications for Canadian lawyers have repeatedly discussed in the last 20 or so years. Now it is far less common for such a large sophisticated legal consumer simply to agree to buy however many billable hours its outside lawyers decide to devote to a certain lawsuit. Such big clients use many devices, though some devices (such as competitive bidding or tendering) would not be appropriate in the present litigation.

82 Recent electronic journals for house counsel are full of suggestions on this topic, and suggest that their use is widespread. These journals seem too ephemeral to make citing them very useful. (The common terms which would be useful to search seem to be "alternative fee arrangements", "alternative billing", or "flat fees".) But an article in a traditional journal which has a brief discussion of these topics, with a few citations, is Menkel-Meddow (1994) 44 Case W Reserve L Rev 621, 660-61. Other more practical (less academic) articles are Reed (1989) 15 Legal Economics (#6) 18; Krocheski and Malone (1994) 20 Law Practice Management (#3) 22; Snyder (1998) 24 Law Practice Management (#3) 25; Hall (2009) 35 Law Practice (#4) 52; Bayley (2010) 36 Law Practice (#6) 32.

83 Those steady clients' aim is to put some sort of regulator on the flow of what before often gushed like a fire hydrant with an open pipe. One of their aims was to give both the litigant and their outside counsel some incentive to balance effective advocacy and research against proportionality and overall social costs.

84 The magazine *Canadian Lawyer* surveys corporate counsel annually. Its latest issue reports its latest survey, and says that the survey shows that exactly half of the billing arrangements of companies with their primary outside law firm are on a basis other than pure hourly rates (Nov/Dec Issue, p 41).

85 It has long been the custom in Alberta when giving legal assistance under s 684 of the *Criminal Code* to use the Legal Aid tariff to set the rate.

86 The reasoning above is general, and there is no ground to confine it to commercial or industrial clients. It is just as apt for government or non-profit organizations.

87 In May 2007, the office of the federal Auditor General tabled an audit of Justice Canada entitled "Managing the Delivery of Legal Services to Government - Department of Justice Canada". There had been an audit in 1993, and one of the issues identified then was poor management of the hiring of external legal agents.

88 On April 8, 2008, the House of Commons Standing Committee on Public Accounts held a hearing on the audit tabled in May 2007. The audit examined whether the Department of Justice was effectively managing delivery of legal services. The Deputy Minister told the committee that the department had completed actions to improve basic information regarding work arrangements and monitoring ongoing costs.

89 In the present litigation, two simultaneous senior expensive lawyers here seem excessive, even if they will work for half their usual rates.

90 In principle, I have no objection to the hourly rates which M. Caron's counsel propose actually to charge (half their usual ones). I say that after noting that the federal government's usual rates for outside counsel seem lower. But (as noted below) I would not allow for two counsel at once for any significant periods. And if times (total hours) get long, then some work should be done by someone much more junior than either of these two counsel.

91 Instead, my big problem is with the number of hours contemplated. Any bill (account) should be taxed (reviewed) by the court's taxing officer if the Crown disputes its amount. Evidently taxation of legal agents' accounts is the standard policy of the federal government: see Department of Justice Canada, Agent Affairs Program, *Policies, Guidelines and Reference Documents* (June 2008) at http://canada.justice.gc.ca/min-la/ConPolPolCon/conpol-polcon- eng. asp. Of course, M. Caron will not be funded for arguing topics not material to the two questions on which leave has been granted.

92 There is a temptation to try here a more innovative blended approach of a kind in the literature cited. But I have decided to stick fairly closely to the only control method mentioned in argument. Counsel for M. Caron suggested hourly billing (at a set hourly rate) but subject to a "cap" (total dollar limit). (Earlier the Court of Queen's Bench had put some cap on hours funded in the trial process.)

93 So I will also impose a cap (maximum). To give more flexibility and choice to M. Caron and his counsel in choosing methods and means, I will make it a dollar cap, not a cap on the number of hours. And similarly I will only set one total cap, not caps for each stage to come. Counsel for M. Caron suggested in oral argument an $80,000 cap.

94 But at the hourly rate which he himself suggests actually charging for this appeal ($200), that would be 400 hours further work on this appeal. At the rate which his associate counsel suggests charging ($150), that would be over 533 hours. (It would be a little less if one deducts a few disbursements.) If one counsel did some of the work and the other the rest, the number of hours would be somewhere between 400 and 533 hours.

95 In light of all the comments above, I find those very excessive amounts of time.

R. Calculating the Cap

96 The record is already paid for and at hand.

97 It will not take two counsel to argue this appeal orally, especially as the usual time limit for one party is 45 minutes, and no appeal ever takes over a day to argue, even with multiple parties. Someone in court to assist senior counsel by taking notes and handling and finding the papers would be useful; but a junior, even an able student, could do that. His or her usual hourly rate would be less than $300/hour. So even adding something for travel time, the actual oral argument of the appeal should not cost more than about $3500 in fees.

98 As noted, the factum needs comparatively little fresh writing. Large chunks of it can come right from the previous Court of Queen's Bench brief after some re-editing and further thought. If a few more hours of more picky work prove necessary, the most senior counsel need not do all that. And once the factum is complete, what papers to put into the Extracts will be comparatively easy to see. Running them down to photocopy should not take senior counsel, given the previous Queen's Bench appeal and its briefs. *A fortiori* for the book of authorities.

99 It is not customary to charge any fee for the non-legal clerical staff who do keyboarding, photocopying, collating, binding, or shipping.

100 So I conclude that preparing, filing and serving the appellant Caron's factum, books of authorities, and book of extracts should cost no more than $4500 in fees. One should add a little more for preparation for oral argument, and notionally calculate a maximum of $5200 in fees for all types of preparation before oral argument.

101 That is a maximum of $8700 in fees.

102 I expect M. Caron's counsel to cooperate with all the other counsel on both sides to try to avoid reproducing the same evidence or authorities more than once, unless the duplication is very brief.

103 There will be a good deal of photocopying of the factum and extracts. I would allow $800 for that, plus another $1000 for travel and miscellaneous disbursements. (I have allowed there for a longer factum than usual, just to be safe.)

104 The subtotal maximum so far is $10,500.

105 I will increase that by about 10% for unforeseen contingencies or minor incidental correspondence and services. That boosts the total to $11,600. That is the only maximum (cap) which I fix.

106 It may be thought that the 10% margin for error allowed above is not enough. The unexpected can cost more than 10%. However, the evidence before me showed that M. Caron pledged to donate $1000 of his own money permanently to this cause (litigation), and that $5000 has been left over unspent from the previous $60,000 funding. I have deducted none of that unspent $6000 (which is not the same $6000 as the public donations). This unspent sum will serve as a further reserve against cost overruns. It is many times the 10% which I expressly added.

S. Loan Not Grant

107 Alberta Legal Aid ordinarily makes loans, not outright grants, though of course many are not actually repayable in the result because of want of assets.

108 Much of M. Caron's need is temporary, or medium-term. Therefore, I will not order an out-and-out permanent grant to him, but rather a loan under contract.

109 All sums paid out under today's order to M. Caron or his counsel must be repaid by M. Caron, with 3% per year interest compounded annually, but only at $200 per month, beginning April 1, 2012, and on the first of each month after. I give power to the Registrar or her designate to rule (in the event of dispute) on reasonableness of terms of the loan contract, which will be drafted in the first instance by the Crown. No sums will be advanced until the loan contract is settled and signed. I refer to the Registrar or her designate later from time to time the power to hear evidence, and to recommend to a judge whether to postpone payments in part or whole (whether on terms or

otherwise), on proof of M. Caron's inability to pay or serious hardship. That will be done only on application by M. Caron.

T. Costs of Present Motions

110 Each party or intervener will bear its own costs for the joint motion for delayed factum, intervention, and funding, especially because success on the big funding issue was mixed.

J.E.L. CÔTÉ J.A.

cp/e/qlcct/qljxr/qlcas

Case Name:

Tsilhqot-in Nation v. British Columbia

Between
Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot-in Nation, plaintiffs, and
Her Majesty the Queen in Right of the Province of British Columbia, the Regional Manager of the Cariboo Forest Region, and the Attorney General of Canada, defendants

[2004] B.C.J. No. 937

2004 BCSC 610

240 D.L.R. (4th) 547

[2004] 3 C.N.L.R. 356

131 A.C.W.S. (3d) 818

Victoria Registry No. 90 0913

British Columbia Supreme Court
Victoria, British Columbia

Vickers J.

Heard: April 21, 22 and 23, 2004.
Judgment: May 6, 2004.

(53 paras.)

Counsel:

D.M. Rosenberg, P.S. Rosenberg and P. Hutchings, for the plaintiffs.
P.G. Foy, Q.C. and R.J. Deane, for the Regional Manager of the Cariboo Forest Region and Her Majesty the Queen in Right of the Province of British Columbia.
B. McLaughlin, C.J. Tobias and J.L. Ott, for the Attorney General of Canada.

VICKERS J.:--

Nature of Application

1 This is a matter remanded by the Supreme Court of Canada for reconsideration of an interim costs order (the "funding order").

The Funding Order/Current Situation

2 On November 27, 2001 I made the funding order directing the defendants to share equally in the payment of the plaintiffs' future costs. The order called for the payment of all reasonable disbursements as agreed upon by the defendants or as approved on taxation. Interim legal fees were to be paid as increased costs at 50% of special costs: Nemiah Valley Indian Band v. Riverside Forest Products Ltd., [2001] B.C.J. No. 2484, 2001 BCSC 1641. An appeal to the Court of Appeal was dismissed: Xeni Gwet'in First Nations v. British Columbia, [2002] B.C.J. No. 1652, 2002 BCCA 434. An appeal was then filed in the Supreme Court of Canada. That Court remanded the matter on January 12, 2004 in the following terms:

> This appeal is remanded to the British Columbia Supreme Court to be dealt with in accordance with the reasons of this Court in British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 2003 SCC 71.
>
> (Tsilhqot'in Nation v. Canada Attorney General, [2002] S.C.C.A. No. 295

3 The parties have consented to three other orders relating to the funding order. On February 28, 2002 I made an order directing an interim payment to plaintiffs' counsel from each defendant with liberty to apply for further directions if there was no agreement on the amounts to be paid under the funding order.

4 On July 19, 2002 an order was made that the Registrar hearing the assessment of the appropriate hourly rates for work done for the plaintiffs by Woodward & Co. be seized of any further applications required to settle hourly rates for the purpose of calculating advances under the funding order. Finally, on November 3, 2003 an order was made that any party could apply to the court to change the percentage of increased costs ordered at 50 per cent of special costs on the basis that the intent of the funding order was not being met.

5 As I noted in my reasons for judgment concerning the publication of accounts information, William et al v. HMTQ et al, [2004] B.C.J. No. 834, 2004 BCSC 549, in January 2002 the parties entered into Confidentiality Agreements relating to confidential information that would necessarily have to be disclosed prior to the payment of costs pursuant to my order. The Confidentiality Agreements contemplated that the parties would negotiate and enter into an Accounts Administration Agreement setting out procedures for the administration of accounts to be submitted from time to time by counsel for the plaintiffs. Such an agreement was concluded and is currently in operation.

6 The parties do not agree as to when the Accounts Administration Agreement will expire. It will expire when the maximum funding level is reached (Art. 1.1.01(2)) and therein lies the disagreement. Costs counsel for the defendants estimates that the agreement will expire sometime in May 2004. The defendants have advised they do not intend to renew the agreement.

7 The motion for a funding order, on remand from the Supreme Court of Canada, was assigned to me as the trial judge by Brenner C.J. on March 26, 2004. The first issue I must decide is the nature of the remand.

Nature of Remand

8 Counsel for the plaintiffs argued that the issue on remand was whether the funding order, made on November 27, 2001, was consistent with the principles set out in British Columbia (Minister of Forests) v. Okanagan Indian Band, supra. In his submission, that should be the first stage of the court's inquiry. At a second stage the court could review the order in the light of present day circumstances. Counsel for the defendants argued against a two stage process and urged the court to reconsider the matter taking into account the circumstances as they now exist.

9 In British Columbia (Minister of Forests) v. Okanagan Indian Band, supra, the trial judge had declined to make an order for costs in advance. British Columbia (Minister of Forests) v. Okanagan Indian Band, [2000] B.C.J. No. 1536, 2000 BCSC 1135. An appeal to the Court of Appeal was allowed. British Columbia (Minister of Forests) v. Okanagan Indian Band (2001), 208 D.L.R. (4th) 301; 2001 BCCA 647. On December 12, 2003 the judgment of the Supreme Court of Canada was released. At paragraph 40, Lebel J., for the majority, said:

> With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
>
> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial - in short, the litigation would be unable to proceed if the order were not made.
> 2. The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

10 At paragraph 45 of the majority judgment Lebel J. said:

> It is unnecessary to send this case back to the chambers judge to apply the criteria set out here, because it is apparent from his reasons that, had he done so, he would have ordered interim costs in favour of the respondents. Sigurdson J. found as a fact that the Bands were in extremely difficult financial circumstances and could not afford to pay for legal representation. The only alternative which he suggested might be available for funding the litigation was a contingent fee arrangement, which, as I have stated, was not feasible. He found the Bands'

> claims of aboriginal title and rights to be prima facie plausible and supported by extensive documentary evidence; although the claim was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit. Finally, Sigurdson J. found the case to be one of great public importance, raising novel and significant issues resolution of which through the trial process was very much in the interests of justice. He even went so far as to urge the executive branches of the federal and provincial governments to provide funding so that the respondents' claims could be addressed.

11 In this case the Supreme Court of Canada could not, from the record before it, determine whether costs were warranted based upon the principles it had just set out. That is all I take from the remand order.

12 I think it proper to treat the remand order as a rehearing of the original matter before me, taking into account the new material filed by the parties. Metzner v. Metzner (2000), 190 D.L.R. (4th) 366, 2000 BCCA 474. That is the proper procedure for two reasons. First, the defendants have indicated they do not intend to seek recovery of costs already paid. As a result there is no need to decide if the original order was properly made based upon the new set of principles. Second, the action is different than what it was in November 2001. Riverside Forest Products Ltd. is no longer a defendant and substantial amendments have been made to the Statement of Claim. Nemiah Valley Indian Band v. Riverside Forest Products, [2003] B.C.J. No. 361, 2003 BCSC 249. In these circumstances I propose to consider this a rehearing of the original matter taking into account all the material filed by counsel for the purpose of this hearing.

New Material/Motion for Costs Information by Plaintiffs

13 The matter is now at trial and has already consumed in excess of 100 trial days over a period of 1.5 years. There has been a substantial expenditure for legal fees and disbursements by all parties. The plaintiffs' costs are far in excess of those originally estimated. Some of the affidavits filed for this hearing contain material critical of counsel. Portions of the affidavit material are argumentative and to that extent they are not helpful and could not be considered as evidence. Despite the criticisms and arguments contained in the affidavit material, counsel, during their arguments, did not invite the court to reach conclusions about the litigation strategy of any party. For the purposes of this remand hearing and at this stage in the proceedings, I conclude that counsel have been cost effective and efficient in the manner in which the case has been presented and defended.

14 In reaching my decision on whether the funding order should be terminated or revised, I have not taken into account the fees and disbursement already paid to plaintiffs' counsel as set out in the Thayer affidavit filed in support of the application to terminate the funding order. On motion by the defendants, I made an order on April 20, 2004 that costs counsel for the Province and Canada were at liberty to disclose the total amount advanced by the Province and Canada from time to time to the plaintiffs or their counsel for fees and disbursements pursuant to the costs order and the Accounts Administration Agreement, the information set out in the Thayer affidavit. William et al v. HMTQ et al, 2004 BCSC 549.

15 As a consequence of the information contained in the Thayer affidavit, the plaintiffs sought a comparable order requiring the defendants to provide similar information relating to the fees and disbursements they have incurred in these proceedings. Counsel for the plaintiffs points out that the information concerning the total fees and disbursements paid under the funding order is before the

court to allow the defendants to argue for cost efficiencies and for a cap on funding. In his submission it is not possible to address these questions in the absence of similar information from the defendants. He says that if the court were to fix a cap then the court ought to have the information on what the proceedings have cost the defendants to date. In the same way, an assessment of whether the actions of the plaintiffs' advisors have been cost effective would be more usefully carried out with the additional knowledge of what has been spent in the defence of the action. He points out the defendants are fully funded, while the plaintiffs are only reimbursed a portion of their legal accounts.

16 The defendants did not consent to the production of this information. I conclude that the information concerning the total fees and disbursements paid by the defendants in the defence of this action cannot be disclosed because it is protected by solicitor client privilege. Maranda v. Richer (2003), 232 D.L.R. (4th) 14, 2003 SCC 67.

17 Counsel for the plaintiffs acknowledges that the information is privileged and not subject to production. He says that if the material is not forthcoming, by consent, then the figures of what has been paid to counsel for the plaintiffs should not be used by the court on a reconsideration of the funding order.

18 I conclude the information sought to be disclosed is not relevant to the issues before me on a reconsideration of the funding order. As the material sought to be disclosed is not relevant, and is in any case subject to solicitor client privilege, the motion is dismissed.

Positions of the Parties

19 Taking into account all of the information, the defendants say the funding order made in November 2001 should be terminated. In the alternative, they argue that it should be amended so as to reduce the financial obligations and attach conditions designed to promote the reasonable and efficient conduct of the litigation. The plaintiffs say the funding order should be continued but amended to provide for payments at 100% of special costs.

Criteria Considered

20 Lebel J, for the majority in British Columbia (Minister of Forests) v. Okanagan Indian Band, supra, concluded that the inherent jurisdiction of the courts to grant interim costs to a litigant must only be exercised in "rare and exceptional circumstances" and subject to "stringent conditions" and the "observance of appropriate procedural controls" (para. 1). I propose to bear those directions in mind and consider whether each of the criteria set out by Lebel J. is met in this case.

21 The first criterion is whether the plaintiffs:

> genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial - in short, the litigation would be unable to proceed if the order were not made. (para. 40)

22 On November 27, 2001 I said the following at paragraphs 7 and 8 of my judgment.

> [7] The plaintiffs have invested substantial sums of time, effort and money in these proceedings to date. However, I conclude they lack the financial resources to proceed further. But for success on this application they will be

> unable to continue with these proceedings. To continue to trial requires the commitment of substantial financial resources. Disbursements alone are estimated to exceed $125,000.
>
> [8] The principal claim advanced by the plaintiffs is for declaratory relief relating to the Trapline Territory and the Brittany Triangle. Even if the plaintiffs succeed, there is unlikely to be a fund of money available for the payment of legal fees on a contingency basis. As well, the claims for declarations of aboriginal rights and title are claims to a collective right. If successful, the plaintiff will not acquire assets that can be disposed of to satisfy legal fees earned under some form of contingency arrangement. Apart from the fact that the plaintiffs' solicitors have declined to enter into a contingency arrangement, I conclude the nature of the claims advanced in these actions makes them singularly unsuitable for such an arrangement. Given the nature of the claims, the time already invested by the plaintiffs' solicitors and the impending trial date, it is no answer to this application to say that the plaintiffs should enter into a contingency agreement with solicitors who are prepared to do so.

23 Counsel for the defendants argue that the situation today is altered because on December 23, 2003, the Ministry of Forests offered to enter into a Forest and Range Agreement with the Tsilhqot'in National Government (TNG). The plaintiff, Roger William, is Chief of the Xeni Gwet'in, one of six bands of aboriginal people which has formed the TNG. The offer would have provided $1.544 million annually and a licence to cut approximately 167,000 cubic metres of timber annually for a 5 year term. On February 13, 2004, the Tribal Chairman of the TNG, Chief Ervin Charleyboy, declined to accept the offer. In his letter he said, in part:

> ... We remind you again that the Tsilhqot'in Nation has never ceded, surrendered, or given away - or indeed in any way compromised - our assertion of sovereignty to our traditional land base. We certainly do not intend to do so at this time either.
>
> We reaffirm this position now with the realization that your government takes the position that the Crown has legal right and jurisdiction to rule our lands by the mechanisms of law, regulation, and delegated civil servant procedures for alienating our land and resources. Recent statements from various sectors of your civil service have reaffirmed that your government has taken the position that the accommodation principle of Aboriginal Title will not apply until it is proven in court. Again, we remind you that that process of proving aboriginal title is now underway in your Supreme Court with a good likelihood of success.
>
> We therefore will not be party to any agreements that have the agenda of diminishing or in any way compromising the sovereignist position that has been the consistent Tsilhqot'in position in relation to Crown intrusions into our territory. Your proposed Forest and Range Revenue Sharing Agreement, although putting

> forth some money and forest tenures, is in fact a pittance compared to the compensation package that will come our way in due course when our aboriginal title to our territory is confirmed by your court system - which you are beholden to abide by.

24 I conclude the references to court proceedings in that letter are to these proceedings and to a second action commenced in this Court in December 2003 by the Tsilhqot'in people making specific claims to what they consider are Tsilhqot'in lands not included in the land that is the subject of these proceedings.

25 The defendants say the proposed agreement indicates the presence of a sufficient fund of money to pay for legal fees and disbursements in this case. Secondly, they say the reference by the TNG to a large "compensation package" to "come their way in due course" means that the TNG expects to acquire an asset which can be used for paying legal fees and disbursements.

26 The Chiefs of the TNG are very wary in all of their negotiations with the Province. As the letter indicates, they appear distrustful of provincial officials and take the position that any logging activity on their traditional lands can only proceed with their approval. Specifically, the Xeni Gwet'in, through a process of five community votes over an extended period of time, directed their leadership not to enter into agreements with the Province, which would have seen some logging in the Brittany Triangle, unless control of that process was retained by the Xeni Gwet'in. The new agreement proposed by the Province does not restrict logging to the Brittany Triangle, nor does it say that is necessarily where the logging will take place. It is clear, however, that the TNG will not consent to logging on what they consider are Tsilhqot'in traditional lands without some recognition of the rights they allege.

27 I find that matters have not changed since November 2001. In the letter setting out the proposed Forest and Range Revenue Sharing Agreement the Regional Manager for the Southern Interior Forest Region says "at this point I expect that the revenue benefit may be available starting in April 2005." If the offer were accepted, there would be no immediate revenue stream that could be used to satisfy legal fees and disbursements. This trial cannot be postponed further to some unspecified future date when the revenues might be expected to arrive. As well, the proposed agreement provides that revenue offered is to be used to enable the Tsilhqot'in to meet their consultation obligations. It is not clear whether payments now made by the Province to assist in consultation obligations would be discontinued or renewed.

28 The letter from the TNG makes reference to a fund of money at the end of the day. While the Amended Statement of Claim seeks damages from the Province for any unjustifiable infringement of Tsilhqot'in aboriginal title and Xeni Gwet'in aboriginal rights, the Xeni Gwet'in have been successful for over a decade now in preventing logging in the claim area. I have not heard any evidence as to the extent of the damages sought and at this point in the proceedings it is not possible to say there will be a fund of money arising out of the claims advanced in these proceedings. The primary claims advanced are for declarations of rights and title and unjustified infringement of rights and title, with secondary claims advanced for consequential relief. There is no claim against Canada for monetary relief. Insofar as I am aware, the second action has not advanced beyond the filing of a writ of summons in December 2003.

29 The statement by the TNG in the letter is more political than factual. In these proceedings a declaration of rights and title and a declaration of infringement of rights and title will not provide a "compensation package."

30 I conclude, as I did in November 2001, that the plaintiffs lack the financial resources to proceed further. But for success on this application they will be unable to continue with these proceedings. Counsel for the plaintiffs is not prepared to enter into a contingency fee agreement. For the reasons set out in my earlier judgment a contingency agreement is not appropriate. It would be particularly inappropriate to require the plaintiffs to seek counsel who would be prepared to enter into a contingency fee agreement at this stage in the proceedings.

31 I conclude the plaintiffs cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial. The litigation would be unable to proceed further if the order were not made.

32 The second criterion is whether the claim is "prima facie" meritorious. Is the claim:

> at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means?"

(British Columbia (Minister of Forests)
v. Okanagan Indian Band,
supra at para. 40)

33 On November 27, 2001 at paragraphs 30 to 33 of my judgment I said:

> [30] In Okanagan Indian Band, supra, the aboriginal people purported to log Crown lands without authorizations under provincial legislation. The action commenced by the Crown sought to stop these activities. In that context claims were advanced placing in issue aboriginal rights and title. In this case the Ministry of Forests granted certain forest licences to private companies and the plaintiffs commenced these proceedings to ensure no forest related activities took place on land over which they claim aboriginal rights and title. In the first case aboriginal activities with chain saws provoked the action by the Crown. In this case Crown activities, namely the issuing of forest licences, provoked the action by the plaintiffs. In this context, who brings the matter before the court, and the mechanism that triggers the action, are not proper grounds to distinguish these cases.
>
> [31] This case is every bit as important as the Okanagan Indian Band case. In fact, if matters proceed as planned it will be the first post Delgamuukw land claims trial. The same important issues that arose in the Okanagan Indian Band case arise in this case. In addition, this will be the first trial involving an aboriginal trapping right since the test for proving aboriginal

activity rights was set out by the Supreme Court of Canada in R. v. Van der Peet, [1996] 2 S.C.R. 507. The Province has also advanced a defence that the rights of the plaintiffs have been extinguished by the creation of reserves and that the plaintiffs' rights, if any, lie in seeking compensation from the federal Crown. It is in this context that the Attorney General for Canada is joined in these proceedings.

[32] For all of these reasons, there are exceptional and unique circumstances in this case. I have no difficulty in concluding it is a case of great public importance. The public interest is not served if the plaintiffs are required, from lack of funds, to abandon these proceedings. The public interest is served by seeing this action go to trial.

[33] I am unable, in any principled way, to distinguish this case from the Okanagan Indian Band case. If anything, this case appears far more advanced and stands poised on the eve of trial.

34 After the trial commenced the plaintiffs filed a motion to amend the pleadings. On February 14, 2003 I made an order allowing the amendments. Nemiah Valley Indian Band v. Riverside Forest Products, [2003] B.C.J. No. 361, 2003 BCSC 249. In the amended pleadings as they now stand the reserve creation defence is no longer an issue. There are no private forest company defendants against whom specific acts of infringement are alleged. A motion by the Province to strike out the Amended Statement of Claim under the provisions of Rule 19(24) was argued at the same time as the plaintiffs' motion to amend. After setting out the arguments advanced by the parties I said the following at paragraphs 59 to 66:

[59] I have concluded that the pleadings disclose a real and not merely hypothetical dispute.

Accordingly, British Columbia's motion must fail.

[60] I agree with counsel for the plaintiff that the parties take quite different views on the issues before the court. In my view, the pleadings allege a past, present and threatened infringement of rights and title. I do not accept the proposition that specific and discrete infringements are required for the plaintiff's action to proceed. To reach such a conclusion might cause a claimant to conclude that civil disobedience was required in order to advance a discrete incidence of infringement to trial.

[61] Past infringement is alleged, and if British Columbia requires particulars of this activity before it files a statement of defence, or in preparation for trial, it need only make an appropriate demand for particulars.

[62] In Haida Nation v. British Columbia (Minister of Forests), [2002] B.C.J. No. 1882, 2002 BCCA 462, Lambert J.A. said at paragraph 87:

> What then is the position of Weyerhaeuser? It is unquestionably a party to every one of the Crown's infringements except the passing of the Forest Act. [Emphasis added.]

Again, at paragraph 91, he said:

> The provincial Crown may infringe on the aboriginal title and aboriginal rights of the Haida people if it can justify the infringement. The infringement would consist in establishing a legislative and administrative scheme under the Forest Act, granting Weyerhaeuser an exclusive right to harvest timber in the area covered by T.F.L. 39, renewing the issuance of T.F.L. 39, transferring T.F.L. 39 to Weyerhaeuser, approving management plans, and issuing cutting permits, all in the furtherance of the same legislative scheme, and all in violation of the aboriginal title and aboriginal rights of the Haida people. The provincial Crown may justify its actions by meeting the tests for justification. Among the tests is a requirement that the Haida people be consulted before the infringement actions are taken. In this case, the Crown provincial did not consult the Haida people in any effective way at any stage of the furtherance of the legislative and administrative scheme, and so is in breach of its obligation of consultation at every stage where a justification test would require effective consultation. That conclusion responds to the provincial Crown's obligation with respect to consultation as dealt with in the original reasons.

[63] The observations of Lambert J.A. leave open the argument that the establishment of the legislative and administrative scheme under the Forest Act may be an infringement. If, after a full trial, such a conclusion were reached, it would then be necessary to determine if the infringement was justified.

[64] On November 22, 2002, the Chief Forester published a document relating to the William Lake TSA, entitled "Rationale for Allowable Annual Cut (AAC) Determination". This document is said to be effective January 1,

2003. At page 41 it reads:

> Respecting aboriginal title, from an analysis of the information regarding aboriginal interests available to me, it is unclear over how much of the land base and exactly where the assertions of aboriginal title may be shown to exist.
>
> Based on all of this information and my related considerations, I conclude that the nature, scope, and geographical location of potential aboriginal rights and title within the Williams Lake TSA remain inconclusive. Consequently, I am uncertain as to whether those interests would logically extend to an impact on the AAC [Allowable Annual Cut]. Therefore, I will make no adjustments to the projected timber supply respecting First Nations' issues at this time. If further information becomes available indicating the existence and location of a sound title claim, I can re-examine my determination and consider this information that may lead to an area being excluded from contributing to the timber supply. Similarly, if the court action by the Xeni Gwet'in reaches conclusion during the term of this determination, and the outcome warrants, I will evaluate my AAC determination prior to the five-year deadline for the next determination under the Forest Act.

[65] By these words, the Chief Forester is saying that for the present he does not intend to remove all or part of the claim area from the Williams Lake TSA. He is unable to make such a decision on the evidence presently available to him. The plaintiffs say that if the Trapline Territory and the Brittany Triangle remain in the Williams Lake TSA there is a continuing threat to their aboriginal rights and title. They rely on an historical record of infringement and say that the root of the problem lies in the legislative and administrative scheme under the Forest Act and Regulations. That is an issue to be determined by the court after a full trial on the merits.

[66] Despite the removal of Riverside from these proceedings, I conclude that the Statement of Claim, as amended, does disclose a cause of action. It is not a moot or theoretical claim but raises live issues between the parties that must be resolved. The language of Rowles J.A. in Tsilqot'in Nation v. Canada (Attorney General), supra, applies equally to the claims of the plaintiff as presently disclosed by the amended Statement of Claim. In considering the claims in an historical context, she said at paragraph 133:

> ... it makes no sense to describe the Xeni Gwet'in's actions as being a means to gain a strategic bargaining advantage. It seems to me that a description more consistent with events and the steps they have taken is that the Xeni Gwet'in are simply attempting to protect what they see as their interests, and, in view of the history, it is unsurprising that the Xeni Gwet'in would fear that decisions have or will be made that will impact their asserted aboriginal rights and title. The Xeni Gwet'in are not required to wait until irreparable harm has been done to their trapping area before commencing an action.

35 In my view my earlier remarks address the second criterion. I conclude that "the claim to be adjudicated is prima facie meritorious." It is "at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means."

36 I turn now to the third criterion. In considering whether this is one of those "rare and exceptional" cases warranting a funding order the court is required to consider whether:

> the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases."

(British Columbia (Minister of Forests)
v. Okanagan Indian Band,
supra at para. 40)

37 The defendants reluctantly acknowledge that I have already decided there is a case to be tried. But on this third criterion they raise similar arguments on this motion to those raised by the Province on the motion to quash the Amended Statement of Claim under Rule 19(24). In the submission of the defendants' counsel all the same issues must be considered once again in the context of whether public funding should be available for a case of this nature. In their submission, the criteria set out by the Supreme Court of Canada go beyond whether there is a proper case to proceed. The Court's emphasis on the efficient conduct of litigation dictates that cases qualifying for public funding must be narrowly focused, raise a live controversy and not be excessively abstract. They argue that the issues raised in this case do not get beyond the individual interests of the plaintiffs and do not raise issues of public importance.

38 In Ktlodééche First Nation v. Canada, [2004] 1 C.N.L.R. 155, 2003 NWTSC 70, Vertes J. said at paragraph 30:

> While there may be some merit to having a mechanism whereby First Nations could obtain advisory opinions defining the scope of their rights, the reality is that, at present, if they come to court then the court must still apply Canadian legal norms. This was a point made by the Supreme Court in a number of cases. For example, in Van der Peet, in discussing the need to assess a claim to an aboriginal right by taking into account the perspective of aboriginal people themselves, the Court noted (at para. 49) that the "perspective must be framed in terms cognizable to the Canadian legal and constitutional structure." Thus a claim to an Aboriginal right cannot be framed in broad general terms. It must be specific. It

must be framed in the context of a substantive issue, not abstractions. And, the pleadings, since that is part of how our civil system functions, must reflect those specifics.

39 In this case the land over which declarations of rights and title are sought, the Brittany and Trapline Territory, is a part of the Williams Lake Timber Supply Area. (TSA). The Amended Statement of Claim pleads several unjustified infringements of rights and title. The prayer for relief includes, inter alia, the following:

a) Declarations that the Tsilhqot'in have existing aboriginal title to the Brittany and the Trapline Territory;
b) Declarations that these aboriginal title lands are not Crown lands as defined in the Forest Act and Forest Practices Code of British Columbia Act (as amended) and that this legislation does not authorize the inclusion of the Brittany and Trapline Territory in the Williams Lake TSA or the issuance of Forest Licences or Authorizations and the granting of interests in forest resources on aboriginal title land in the Brittany and Trapline Territory;
c) Declarations that the Xeni Gwet'in has an existing right to carry on trapping activities in the Brittany and Trapline Territory;
d) Declarations that the issuance of the Forest Licences, the Authorizations, and any Forest Development Activities carried out pursuant to the Authorizations unjustifiably infringes the Tsilhqot'in's aboriginal title and the Xeni Gwet'in's aboriginal rights in the Brittany and Trapline Territory and are of no force and effect;
e) An injunction restraining the Regional Manager or his delegates from issuing Authorizations for Forest Development Activities in the Brittany and Trapline Territory;
f) Damages from British Columbia for unjustifiable infringement of Tsilhqot'in aboriginal title and Xeni Gwet'in aboriginal rights;
g) Damages for breach of fiduciary duty by British Columbia.

40 In summary, the Amended Statement of Claim alleges that the Province's forestry legislation has been, and continues to be, an unjustifiable infringement on the Tsilhqot'in aboriginal title and Xeni Gwet'in aboriginal rights. It is pleaded that the forestry legislation does not "authorize the inclusion of aboriginal title lands in the Williams Lake TSA, the issuance of Forest Licences or Authorizations for Forest Development Activities on aboriginal title lands..." and accordingly, the licences and authorizations are inapplicable and invalid to the extent that they purport to affect the Brittany and Trapline Territory. In the alternative the plaintiffs plead that the forestry legislation is "constitutionally inapplicable" to the extent that it authorizes the issuance of Forest Licences and Authorizations for Forest Development Activities which infringe the aboriginal rights of the Xeni Gwet'in or the aboriginal title of the Tsilhqot'in.

41 In the further alternative the plaintiffs plead that if there is the requisite statutory authority, then the powers granted by the forestry legislation have been exercised in a manner that interferes with aboriginal rights and title.

42 The jurisprudence informs us that aboriginal title is a right in land and is more than a right to engage in specific activities: Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 66 B.C.L.R. (3d) 285 at paragraph 111. The aboriginal rights that collectively result in aboriginal title are not absolute. Rights and title can be infringed if that infringement is justifiable: Delgamuukw v. British Columbia, supra at para. 160.

43 I must ask what is "rare and exceptional" about this case that warrants public funding. How will this case advance the jurisprudence? What is unique about this case that moves it into the category of "rare and exceptional?" The fact that it has survived in excess of 100 trial days does not by itself move it into that category.

44 What makes this case rare and exceptional is that it calls into question forestry legislation, seeking a declaration that this provincial legislative scheme does not apply to land in the Brittany and Trapline Territory. The case envisioned by Lambert J.A. in Haida Nation v. British Columbia (Minister of Forests), supra as to whether the legislative scheme might be an infringement is squarely raised by the Amended Statement of Claim in this case. Surely that is an issue of great public importance in a province whose economy relies so heavily on the forest industry.

45 I note in passing that in Gitxsan First Nation v. British Columbia (Minister of Forests), [2002] B.C.J. No. 2761, 2002 BCSC 1701, Tysoe J. concluded in paragraph 79 that "the Haida decisions go further than holding that a transfer of a forest tenure licence (or the equivalent change of control of the licence holder) is a prima facie infringement of aboriginal title or rights." He too noted the views of Lambert J.A. concerning the "potential infringement extend[ing] to the passing of the Act and the issuance of the tree farm licence."

46 We already know that if the legislative scheme were to unjustifiably infringe on rights and title in any specific situation then it would not be applied. On a case specific basis these kinds of decisions appear to be made on a regular basis. See: Husby Forest Products Ltd. v. British Columbia (Minister of Forests), [2004] B.C.J. No. 185, 2004 BCSC 142; Halfway River First Nation v. British Columbia (Ministry of Forests) (1999), 64 B.C.L.R. (3d) 206 (C.A.); Lax Kw'Alaams Indian Band et al v. Minister of Forests & West Fraser Mills Ltd. et al, [2004] B.C.J. No. 747, 2004 BCSC 420. It is undoubtedly helpful in specific situations to have these case specific decisions. But they do not and cannot go beyond the case specific situation. They will continue, at increasing public and private expense, so long as aboriginal rights and title claims remain unresolved. A declaration, either way, as to whether the provincial forestry legislation is an unjustifiable infringement on aboriginal rights and title over the land that is the subject of these proceedings would be of great public importance. Such a declaration would make unnecessary the need for the continual expense of individual decisions by forestry officials followed by requests for judicial review.

47 There is another aspect which gives public importance to the issues framed in the Amended Statement of Claim. Their determination would provide the guidance and direction to provincial officials that the Chief Forrester seems to seek. In his rationale, quoted above, he notes the current inconclusive state of affairs. He acknowledges his uncertainty as to the impact of aboriginal rights and title in the Williams Lake TSA on the Annual Allowable Cut. If the legislative scheme is an unjustifiable infringement and if his inclusion of the Brittany and the Trapline Territory in the Williams Lake TSA is an unjustifiable infringement such a declaration would remove any uncertainty he might have and consequently be of great public importance. If the forestry legislation does apply to the Brittany and Trapline Territory, a decision as to the nature and extent of aboriginal title and rights in that territory would likewise clarify matters for administrative decision-makers.

48 The determination of all of the issues relating to past, present and future unjustifiable infringements occasioned by the alleged application and alleged threatened application of the provincial legislative scheme would be of value to the plaintiffs and would serve the public interest. Determining whether the actual application of that scheme by the inclusion of the subject lands in the Williams Lake TSA is an unjustifiable infringement would advance the state of the jurisprudence and settle a long standing issue. Settling that dispute would be in the public interest.

49 I conclude the case does raise issues that "transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases." While the issues are no doubt of great importance to the plaintiffs they also raise issues of public importance beyond those already decided by the jurisprudence. A decision that the legislative scheme or the application or threatened application of the scheme is or is not an infringement, with or without justification, is site specific in the sense that it would apply to the Brittany and the Trapline Territory but it would advance the jurisprudence to affect the resolution of similar disputes in other areas. In my view it is a "rare and exceptional" case. Accordingly I have concluded that the funding order of November 27, 2001 must be continued.

Terms of Continued Order

50 The making of an interim costs order must be subject to "stringent conditions" and the "observance of appropriate procedural controls." The questions of public importance ought to be tried as expeditiously as possible. There is no need to spend another one to two years in the proof of this case if an issue or issues can be framed which will advance issues of aboriginal rights and title in the Brittany and Trapline Territory. Accordingly, I am directing counsel to frame an issue of law or fact, or partly of law and partly of fact, pursuant to Rule 33 of the Rules of Court. If that cannot be achieved by consent I will hear submissions on whether the court should order a special case under that rule and the nature of that special case. If a special case is framed, the funding order will be limited to the preparation and argument of that case.

51 I will retain jurisdiction to review the application of the funding order from time to time, but in the interests of administrative efficiencies I urge the parties to reach another agreement on accounts administration that meets their needs.

52 The material before me does not warrant any change in the existing orders. If a new agreement is not reached, counsel are at liberty to renew applications for a different method or level of funding. I should say that my initial impression is that using the scales of cost would cause undue additional costs and fail to result in adequate funding for a case of this nature. At the same time, I do not think that costs in advance should necessarily be fixed as 100% of special costs. One solution to this issue may be for the court to refer the matter to the registrar for a recommendation. Counsel are invited to consider such a process if they are unable to reach an appropriate agreement.

Summary

53 In summary, the motion for disclosure of fees and disbursements paid by the defendants in these proceedings is dismissed. The funding order dated November 27, 2001 is continued without variation.

VICKERS J.

cp/i/qw/qlrds/qlsnv/qlbrl

COURT FILE NO.: CV-09-377556
DATE: 2009/11/12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Barbara Jane Farlow and Timothy Farlow	Barbara Jane Farlow and Timothy Farlow, representing themselves
Plaintiffs	
- and -	
	Wendy Whelan for the Hospital for Sick Children
Hospital for Sick Children, Michael Jonathan Weinstein and Christopher Sushil Parshuram	
	Sarah W. Corman and Kasia Czajkowski for Michael Jonathan Weinstein and
Defendants	Christopher Sushil Parshuram
	HEARD: May 7, 2009; June 1, 2009; June 22, 2009; October 2, 2009.

HERMAN J.:

[1] The defendants have brought a motion to transfer this action from Small Claims Court to Superior Court and, once transferred, to exempt the action from simplified procedure.

[2] This is a medical malpractice action arising from the treatment and death of the plaintiffs' daughter, Anne Farlow (Annie), at the Hospital for Sick Children. Annie was born

with a congenital genetic disorder. She was 2 ½ months old at the time of her death, on August 12, 2005.

Issues and the Parties' Positions

[3] There are three issues: whether the action should be transferred to Superior Court; if it is transferred, whether the action should be exempt from simplified procedure; and whether the Farlows should receive interim costs or immunity from a future costs order.

[4] The parties first appeared on May 7, 2009. They made submissions on whether the action should be transferred to Superior Court. The Farlows were given an opportunity to provide further evidence by way of affidavit, with an opportunity for the defendants to cross-examine. The parties were also given an opportunity to make oral submissions on the further evidence.

[5] On June 22, 2009, the Farlows indicated that, because of recent events, they had changed their position. They agreed that the action should be dealt with in Superior Court. However, they would only proceed if they could be guaranteed that there would be no costs awards against them in the future. If they did not receive costs immunity, they would not proceed with the action in either Small Claims Court or in Superior Court.

[6] It was agreed that the parties would provide written submissions on whether I had the discretion to make an award that would immunize the Farlows against a future costs award; and, if I did, whether I should exercise that discretion. In their written submissions, the Farlows also asked for interim costs.

[7] At the last day of the hearing, on October 2, 2009, the Farlows indicated that they would only agree to transfer the action to Superior Court if they could receive either interim costs or costs immunity. If neither order was granted, they wanted to proceed in Small Claims Court.

[8] The defendants' position is that the action should be transferred to Superior Court. They oppose the Farlows' request for costs immunity. They submit that the court should not consider the Farlows' request for interim costs because the parties had previously agreed that the submissions would be on the issue of costs immunity and there was no formal motion for interim costs.

The Claim

[9] Annie was born on May 25, 2005, with a genetic disorder known as Trisomy 13. She passed away on August 12, 2005, at the Hospital for Sick Children in Toronto.

[10] The Farlows' action is against the Hospital for Sick Children and two of Annie's physicians, Dr. Michael Jonathan Weinstein and Dr. Christopher Sushil Parshuram.

[11] The Farlows claim that the Hospital and the physicians were negligent and in breach of their professional obligations in that they:

(a) failed and/or refused to provide appropriate testing and diagnostic information about Annie which would have permitted them to give informed consent to treatment decisions;

(b) failed and/or refused to offer necessary palliation during Annie's gradual asphyxiation;

(c) placed a Do Not Resuscitate (DNR) order on Annie without consent which hastened her death;

(d) provided medications to Annie which hastened her death;

(e) disregarded the Farlows' right to decide to pursue medical treatment for Annie;

(f) denied the Farlows the appropriate opportunity to consider an autopsy and learn what caused Annie's death;

(g) practised a policy of non-treatment for infants with serious genetic disorders; and

(h) were negligent in creating and maintaining medical records including those for drug administration.

[12] The Farlows claim that as a result of the defendants' negligence and professional malpractice, they watched their daughter die and suffer needlessly.

[13] They seek general damages for emotional distress in the amount of $10,000 plus pre- and post-judgment interest and costs.

[14] The defendants deny the allegations.

[15] In the Farlows' written submissions on the issue of costs, they indicated that the most important outcome for them was remedies or recommendations. Their desire to seek various remedies through the civil action was heightened when the Human Rights Tribunal dismissed their human rights complaint. The Tribunal did so on the basis that the Farlows had initiated a civil action in which they had raised the same allegations.

[16] During the hearing of the motion, Mrs. Farlow said that she and Mr. Farlow wanted to seek orders against the Hospital to require: mandatory education for physicians on the law of consent; a requirement that there be a written DNR order; a more secure narcotic dispensing system; and transparent policies on the allocation of treatment for children. None of these remedies are reflected in their Small Claims Court claim.

[17] I appreciate that for the Farlows this case is not about money but is about systemic change. However, the remedies that Mrs. Farlow articulated in court represent a significant broadening beyond the $10,000 sought in the existing claim. The Farlows' position has changed during the course of this motion. It is necessary, both in the interests of fairness to the defendants and clarity, that I limit myself to the pleading that is before the court.

1. Transfer from Small Claims Court to Superior Court

General Principles

[18] A judge of a superior court has the inherent power to transfer a matter from the Small Claims Court to the Superior Court in appropriate circumstances (*Vigna v. Toronto Stock Exchange*, [1998] O.J. No. 4924 at para. 7 (Gen. Div.)). It is, however, a discretion that should be rarely exercised (*Crane Canada Co. v. Montis Sorgic Associates Inc.*, [2006] O.J. No. 1999 (C.A.)).

[19] The decision as to whether the court should transfer an action involves the balancing of various factors.

[20] Courts have considered the following factors in deciding that a transfer may be warranted: (i) the complexity of the issues; (ii) the importance of expert evidence to a determination of the case; (iii) the need for discovery; (iv) whether the case involves issues of general importance; and (v) the desire for a just and fair determination (*Vigna v. Toronto Stock Exchange*; *Livingston v. Ould*, [1976] O.J. No. 953 (H.C.J.); *Crane Canada Inc. v. Montis Sorgic Associates Inc.*, [2005] O.J. No. 6247 at para 8 (Sup. Ct.), aff'd [2006] O.J. No. 1999 (C.A.)).

[21] Balanced against these factors is the principle that the court should rarely exercise its discretion to transfer a case. In general, if a litigant chooses to pursue a case in Small Claims Court, that choice should be respected. Of particular concern in this case is the potential that the transfer to a higher court may increase the costs for the litigants and have a negative impact on access to justice (*Livingston v. Ould*; *Crane Canada Co. v. Montis Sorgic Associates Inc.*).

Factors

(i) Complexity of the issues

[22] The defendants submit that the Farlows' claim raises complex issues which will require the analysis of lengthy medical records and medication charts as well as evidence from a number of experts on issues of standard of care, causation and damages. Evidence will also be required regarding the causes of Annie's death.

[23] The physicians maintain that they will require evidence about the standard of care including: the diagnosis of various conditions associated with Trisomy 13; the prognosis and options for treatment; the decisions regarding which procedures were clinically indicated; a review of the diagnostic tests and investigations undertaken and not undertaken; Annie's

treatment plan; Annie's prognosis at different points in time; the palliation care provided; and the nature and content of informed consent discussions.

[24] The Farlows contend that the case is less complex than the defendants suggest. They produced an affidavit from Dr. Paul A. Byrne, a neonatologist and pediatrician, from Oregon, Ohio. Dr. Byrne states that he believes the only medical issue of life-threatening concern was related to Annie's respiratory issue.

[25] However, Dr. Byrne refers to indications that began on the fifth day of Annie's birth and continued to her death. During that period of time, Annie was seen by a number of health care providers and received various treatments at the Hospital for Sick Children and elsewhere. I note, for example, in paragraph 13 of the Farlows' claim, that when Annie was discharged on July 6, 2005, her plan included follow-up appointments with cardiology, genetics, ENT, pediatric clinic, chest clinic and endocrinology.

[26] Furthermore, even if there were only one medical issue of life-threatening concern as maintained by Dr. Bryne, the Farlows raise various issues in their claim including: the provision of medications which hastened Annie's death; the failure to provide them with appropriate information; the failure to offer the necessary palliation; the placement of a DNR order without consent; and negligence in the creation and maintenance of medical records, including the records for drug administration. These claims raise complex issues and would require evidence from a number of professionals.

(ii) Importance of expert evidence

[27] Expert evidence is generally key to the determination of a medical malpractice claim. In order to succeed in a negligence claim, the plaintiff must establish that: the defendant owed the plaintiff a duty of care; the defendant breached the standard of care established by law; the plaintiff suffered an injury or loss; and the defendant's conduct was the cause of that injury or loss (Ellen J. Picard and Gerald B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed., (Toronto: Thomson Carswell, 2007) at pages 211-212).

[28] Judges do not have medical expertise. They therefore rely on expert evidence. In particular, they rely on experts to describe the appropriate standard of care that applies to the physician and the circumstances in question. The court then considers the physician's conduct as against that standard of care (*Suserski v. Nurse*, [2006] O.J. No. 4839 at para. 26 (Sup. Ct.)).

[29] The *Rules of the Small Claims Court*, O. Reg 258/98 provide that, at least 14 days before the settlement conference, each party shall serve and file a copy of any document to be relied on, including an expert report (Rule 13.02 (2)). They also provide that a document that has been served at least 30 days before the trial date shall be received in evidence unless the trial judge orders otherwise. This includes an expert report. If the author of the report is going to give expert evidence, a summary of his or her qualifications must be appended to the report.

[30] The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, governing the Superior Court, set out a more arduous procedure. Rule 53.03 requires that a party who intends to call an expert witness must serve a report from that expert no less than 90 days prior to the commencement of trial. A party who intends to call an expert witness to respond must also serve a report, no later than 60 days before trial. The expert witness is not allowed to testify with respect to an issue unless the substance of that issue is set out in that expert report.

[31] The defendant Hospital states that it will have to retain experts in paediatrics, genetics and pharmacology. The defendant physicians anticipate that they will call two to four experts. This would not appear to be an unreasonable number given the nature of the allegations and the different types of professionals involved in Annie's treatment and care.

(iii) Need for Discovery

[32] There is no examination for discovery in Small Claims Court. The Rules provide for the service and filing of documents that the parties intend to rely on at trial (Rules 13.03 (2) and 18.02). This applies to various kinds of documents, including a hospital record or medical report made in the course of care and treatment.

[33] The Superior Court has a detailed procedure and rules for the discovery of documents and examinations for discovery (Rules 30 and 31).

[34] The Farlows agree that discovery would be helpful to them but they are willing to waive discovery in return for the increased access to justice that they would get in Small Claims Court. They argue that the lack of availability of discovery would be more disadvantageous to them than to the defendants because most of the documents and witnesses will be provided by the defendants.

[35] I agree that, on its face, the Farlows stand to lose more from the lack of discovery than the defendants. That does not, however, detract from the defendants' legitimate interest in being able to fully defend the claim. The defendants want to obtain information through the discovery process including: information regarding Annie's care that is not contained in the clinical records; and information from the plaintiffs regarding the circumstances surrounding the issue of informed consent. Their experts will need the evidence obtained on discovery in order to properly formulate their opinions.

(iv) Issues of General Importance

[36] The defendants submit that the issues that the Farlows have raised are of general importance. The action involves a well-respected hospital for children. If the Farlows' claims can be substantiated, it would be a matter of general importance to the community and to parents who rely on the hospital. The Farlows claim, for example, that the Hospital had a policy of non-treatment for infants with serious genetic disorders.

[37] The Farlows initially submitted that this action did not involve matters of general importance. They submitted, in particular, that the case did not involve a novel point of law.

[38] However, in their submissions on costs, the Farlows stated that their primary concern was with remedies and recommendations and that the case involved issues of public interest. They indicated that one reason for the change in their position was that, with the dismissal of the human rights complaint, the civil action became the only route to pursue broader issues.

[39] In my opinion, allegations in the claim relating to the policies and practices of the Hospital are matters of general importance.

(v) Just and fair determination

[40] In the Farlows' submission, there would be no unfairness in proceeding in Small Claims Court: the lack of formality and discovery would apply to them as well as to the defendants. However, the fact that the procedures would apply equally to all the parties does not necessarily lead to the conclusion that there would be a just and fair determination of this case.

[41] The fact that the Farlows have only claimed $10,000 is not an indication of the gravity of the claim. The allegations that the Farlows have raised are serious. The reputations of the hospital and the individual defendants are at stake. The defendants are entitled to an opportunity to make a full answer and defence. The existence of oral discovery and the framework for the use of expert evidence in the Superior Court will increase the likelihood that the court's ultimate disposition is based on a full and proper airing of all the evidence.

[42] Another concern is the inability to obtain continuous trial dates in Small Claims Court. This problem was referred to in the Small Claims Court case of *Khadivi v. Vaziri*, [2005] O.J. No. 5991 (Sup. Ct.). In that case, the defendant tried to introduce a document prepared by a dentist on proposed treatment. She did so on the second day of the trial, which occurred one month after the first day. The Deputy Judge indicated that he was not prepared to open up the trial for the introduction of new evidence, noting that it would have involved an adjournment for a number of weeks or perhaps months because the Small Claims Court does not sit on continuous days.

[43] The defendants estimate that at least three weeks of hearing time will be required, with complex evidence, several experts and multiple parties conducting cross-examinations. In these circumstances, it is preferable that the trial be scheduled for consecutive days.

(vi) Access to Justice

[44] Weighing against the factors in favour of transferring the case to Superior Court is the potential that such a transfer could adversely affect the Farlows' access to justice.

[45] The Farlows submit that transferring this case to Superior Court will effectively deny them an avenue in which to pursue their claim. They have stated that, absent an order for

advance costs or costs immunity, the only way they can seek justice is in Small Claims Court – that "imperfect justice is better than no justice at all."

[46] The very features that make the Superior Court more attractive to the defendants – formal rules of evidence, discovery, a detailed procedure for expert reports – make that court costlier and less accessible for self-represented parties. The Farlows argue that the Small Claims Court procedures would place them at the same disadvantage as the defendants – they, too, would be faced with lack of discovery, lack of a formal procedure for expert evidence and lack of continuous days of hearing.

[47] The *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 25 provides that:

> The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience.

[48] The Small Claims Court is often referred to as the "people's court" (The Honourable Coulter A. Osborne, *Civil Justice Report Project: Summary of Findings and Recommendations*, 2007). The Honourable Coulter A. Osborne provided the following description at page 15 of his report:

> The Small Claims Court is hospitable to litigants who are not represented by counsel. Its procedures are straightforward. Twenty-one rules govern an action from commencement to trial and enforcement. Costs related to Small Claims Court matters are significantly lower than is the case in the Superior Court. The court is geared to, and does, dispense justice quickly.

[49] The lack of formality, rules and procedures means that cases can make their way through the system more quickly than in Superior Court. The Small Claims Court is well suited to cases which can be dispensed with in a summary way, cases in which the evidence and legal issues are fairly straightforward.

[50] Proceedings in Small Claims Court are also less costly than proceedings in Superior Court. There are no examinations for discovery. There is a limit on costs awards (*Courts of Justice Act*, s. 29).

[51] In their affidavit in response to this motion, the Farlows indicated that the costs of proceeding in Superior Court would likely mean they could not proceed. They were given an opportunity to provide further evidence in support of this assertion. The defendants cross-examined both Mr. and Mrs. Farlow on their affidavit.

[52] The Farlows currently have six children living at home, five of whom are in school full-time.

[53] Mr. Farlow has been employed full-time as a financial controller of a private corporation for the last six years. In the cross-examination on his affidavit, Mr. Farlow stated that he was unwilling to disclose the name of the corporation without speaking with the president first. He was also unwilling to answer questions about his salary, benefits or bonuses.

[54] Mrs. Farlow is not employed outside of the home, except for some part-time tutoring. Her focus in the last four years has been on issues related to Annie.

[55] Mrs. Farlow, in her cross-examination, agreed that her family was financially stable. They are able to take family trips. The municipal property assessment in 2009 for the Farlows' home indicated an assessment of $664,750.00. Mrs. Farlow would not answer whether there was a mortgage on the home.

[56] The Farlows have had counsel at various times. In their joint affidavit, dated May 27, 2009, the Farlows stated that they had spent $35,612.65 on legal and consulting fees thus far. The Small Claims Court claim was initiated in August 2007 and was prepared by counsel. It appears that the Farlows were no longer represented by counsel in this action as of around February 2008. The Farlows were represented by counsel before the Human Rights Tribunal.

[57] Mrs. Farlow was asked in her cross-examination whether she would pursue the case in Superior Court if she were able to receive representation from a *pro bono* lawyer. She indicated that, "if legal services were provided, the decision to go forward for five years would be a very complex one ... So, as for achieving that goal [of effecting change] and with all of the associated non-monetary expenses involved, including the complexity of what we feel morally driven to do, it's a very difficult question and no clear answer on that."

[58] Mrs. Farlows' reference to non-monetary expenses was to the time and difficulty for her family that would result from proceeding in Superior Court. She indicated that she did not have the same concerns with proceeding in Small Claims Court because there would be a speedier resolution.

[59] In these circumstances, it is difficult to determine whether the access to justice issue is about the costs to retain legal counsel, the potential for an adverse costs award or the time and energy that would be required to pursue a claim in Superior Court.

Balancing of factors

[60] If I were to consider only the factors of general importance, complexity, the need for discovery and the importance of expert evidence, I would conclude that this action would more appropriately be dealt with in Superior Court. The allegations are serious. The factual issues are complex. Evidence from several experts will be required in order to determine the case. Discovery would be of great benefit. While I appreciate the Farlows' desire for speedy justice, the complexity of the case does not lend itself to being dealt with in a summary fashion.

[61] However, these factors must be weighed against the significant issue of access to justice. The Farlows submit that they will be denied access to justice if the case is transferred to Superior Court and no advance costs or costs immunity order is made.

[62] I do not doubt that proceeding in Superior Court would be more costly and time-consuming. There are few people in this province who would not be affected financially by the cost of litigation in Superior Court. I accept, as well, that the defendants likely have more legal resources at their disposal than the Farlows.

[63] However, in determining how much weight to give to the issue of access to justice, I need to assess the extent to which the Farlows will be denied access if the case is transferred. In order to do so, I need to consider the evidence.

[64] The Farlows have not provided a full picture of their financial situation. Mrs. Farlow was not sure whether she would be willing to be represented by *pro bono* counsel in view of the non-monetary costs of pursuing an action in Superior Court. In these circumstances, I am unable to determine whether the Farlows would, indeed, be denied access to justice if the case were transferred to Superior Court. While I appreciate the non-financial toll that a proceeding in Superior Court can take, the complexity of the allegations in the case are not well-suited to a summary proceeding.

[65] In weighing the factors – the nature of the claim which points to proceeding in Superior Court; and access to justice which points to Small Claims Court – I therefore conclude that the action should be transferred to Superior Court.

2. Exemption from Simplified Procedure

[66] In addition to seeking a transfer of the action to the Superior Court, the defendants also ask that the case be exempted from simplified procedure so that there can be discovery.

[67] In *Baker v. Chrysler Canada Ltd.*, [1998] O.J. No. 1709 (Gen. Div.), the defendants sought an exemption from the simplified procedure in an action with 50 plaintiffs, each of whom had a claim for $25,000 or less. The defendants submitted that it would only be just if they had the benefit of discovery. Farley J. did not grant them leave, observing that the cut-off for simplified procedure was purely a monetary one; it was not based on complexity, credibility or any other reason.

[68] In *Gibbons v. York Fire & Casualty Insurance Co.*, [1997] O.J. No. 4125, (Gen. Div.), the plaintiff instituted a claim under the simplified procedure. The defendant moved to have the action exempted from simplified procedure so that it would have full rights of discovery and cross-examination. McDermid J. dismissed the motion, noting that the removal of discovery from certain claims is exactly what was intended by the simplified procedure rule. He expressed his opinion that "the policy underlying the simplified procedure rules is sound and ought not to be rendered impotent by creating so many exceptions to its application that these rules are left without any force or effect" (at para. 8).

[69] None of these cases were ones in which the action had been transferred from Small Claims Court. The court in *Vigna v. Toronto Stock Exchange* granted both a transfer to Superior Court and exemption from the simplified procedure. Having decided that the issues were of such a nature and complexity that the procedures in the Small Claims Court were insufficient for a just and fair determination, the court went on to say at paragraph 7: "It follows from what we have said that the simplified procedure available under Rule 76 is also inappropriate for the particular issues here raised." The court added that cases should only be exempted from that rule in rare circumstances but that this was such a case.

[70] I note that the amendments to the *Rules of Civil Procedure* which will take effect on January 1, 2010 will permit each party in a simplified procedure case up to two hours of examination for discovery in total for all witnesses (Rule 76.04 (2)). This is in contrast to the seven hours of examination for discovery that will be allowed under the regular procedure (Rule 31.05.01(1)), with the possibility that the time could be increased either on consent or with leave of the court.

[71] Given the reasons for transferring this case to the Superior Court, that is, the complexity and seriousness of the allegations, the need for discovery and the number of potential expert witnesses, it is my opinion that it is preferable to exempt the case from simplified procedure.

3. Costs Issues

[72] The Farlows seek an order for interim costs and costs immunity.

[73] On June 22, 2009, the parties agreed to provide submissions on the question of whether I can or should order that the Farlows be immunized from a future costs award. Although this may be putting the cart before the horse in that, absent a transfer to Superior Court, I have no authority to make a costs order, we agreed that the approach made sense given the Farlows' position that the case should proceed in Superior Court. The Farlows stated that if the court declined to grant such an order, they would not proceed in either this court or Small Claims Court.

[74] Since the hearing on June 22, 2009, the Farlows' position changed in two ways: they now also seek interim costs; and, if they receive neither interim costs nor costs immunity, they want to proceed in Small Claims Court.

[75] I have now determined that the case will be transferred to Superior Court. Although there is no formal motion before me from the Farlows seeking immunity from costs, I am prepared to deal with it. The parties have had a full opportunity to provide both written and oral submissions on the matter. As well, if such an order were provided, the Farlows have indicated that they would consent to the transfer to Superior Court. I will, therefore, consider the Farlows' request for costs immunity.

[76] I decline, however, to consider the interim costs issue at this time. The Farlows indicated that they did not raise the issue of interim costs earlier because they were not aware

that such a possibility existed until they did their research on costs immunity. However, in the absence of either a formal motion seeking interim costs or an agreement on the part of the parties that I deal with the matter, I am not prepared to address it.

Court's jurisdiction to grant costs immunity

[77] The courts' broad discretion to order costs has long been recognized (*British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371). In Ontario, this discretion is recognized in s. 131 (1) of the *Courts of Justice Act* and Rule 57.01 of the *Rules of Civil Procedure*.

[78] It is the traditional rule that costs follow the cause, that is, that costs are intended to indemnify the successful party for some of the legal expenses that party has incurred. It follows that the determination of costs generally occurs after the conclusion of the proceeding (the trial or the motion) because it is only then that the successful party can be identified and the amount of costs can be determined.

[79] It has, however, also been recognized that costs may serve purposes other than the indemnification of the successful party: to encourage settlement; to deter frivolous actions and defences; and to discourage unnecessary steps (*1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.). Costs awards can be a powerful tool for ensuring that the justice system functions fairly and efficiently (*Okanagan* at para. 26; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue*, [2007] 1 S.C.R. 38 at para. 34).

[80] There have been several exceptions to the general rule that costs follow the cause and that costs can only be determined at the conclusion of the proceeding. A losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs. In exceptional cases, the successful party may have to pay the costs of the losing party (*B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315). Interim or advance costs may be awarded prior to the conclusion of the proceeding. Access to justice may be a factor to be taken into consideration (*Okanagan*; *Little Sisters*).

[81] I was not, however, referred to any Ontario cases in which a party has been immunized from a costs award prior to trial. There are some cases in which courts have referred to the possibility of a costs immunity award. In *Little Sisters*, the Court referred to different kinds of costs mechanisms that should be considered as an alternative to an order for interim or advance costs (at para. 40). The example the Court gave was an award of adverse costs immunity.

[82] In *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, the Ontario Court of Appeal considered whether costs could be awarded in favour of *pro bono* counsel. Feldman J.A. noted at para. 47 in *obiter*:

> Where a case is brought to assert a *Charter* claim or other matter of general public importance, different considerations may apply when deciding whether to award costs in favour of the *pro bono* party. In those cases, for example, it may be appropriate for the court to consider potentially insulating the *pro bono* party from exposure to costs, or limiting the party's exposure, in order to facilitate the resolution of an important public issue by the court. The principles that will be applied in this type of litigation will also develop as the cases arise [underlining added].

[83] In *A. (W.). v. St. Andrew's College* (2008), 58 C.P.C. (6th) 350, [2008] O.J. No. 352 (Sup. Ct.), a motion was brought to substitute an individual as a representative plaintiff in a class action, but only on the condition that that person would be immune from liability for costs. The motion for certification had not yet been heard.

[84] In considering the motion, Lax J. noted that, while there was no precedent for the order, the court had a broad discretion regarding costs. She nonetheless denied the request. She concluded that a costs immunity award would distort the balance under the *Class Proceedings Act, 1992*, S.O. 1992, C. 6; and the *Law Society Amendment Act (Class Proceedings Funding)*, 1992 S.O. c. 7. It would also fetter the discretion of the common issues trial judge. In the context of the proposed class proceeding, such an order would not only be contrary to well-established principles for awarding costs but would also be unfair.

[85] In England, there is a limited practice of granting costs immunity orders, referred to as "protective costs orders". Such an order could include capping a future costs award. The English Court of Appeal has indicated that such an order may be appropriate in exceptional circumstances where the court is satisfied that:

(i) The issues raised are of general public importance;

(ii) The public interest requires that those issues should be resolved;

(iii) The applicant has no private interest in the outcome of the case;

(iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order;

(v) If the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. (*R. (on the application of Corner House Research) v Secretary of State for Trade and Industry*, [2005] 4 All E.R. 1 (C.A. (Civ. Div.)).

[86] In a more recent case, the House of Lords has raised the possibility that a protective costs order may be granted where the applicant has a private interest in the case (*MO (Nigeria) v. Secretary of State for the Home Department*, [2009] 3 All E.R. 1601).

[87] I note, as well, that there are two Canadian jurisdictions in which there are specific provisions for granting a costs immunity order. The *Civil Procedure Rules of Nova Scotia* provide as follows:

> 77.04 (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.

[88] The *Newfoundland and Labrador Rules of the Supreme Court, 1986* (under the *Judicature Act,* RSNL1990 C. J–4) also provide for such an award if certain conditions are met:

> 7.19 (1) Any person who lacks the financial means to commence or defend a proceeding may apply to the Court to be exempt from the payment of all or any of the costs and fees which may be payable by that person as a party in the proceeding.
>
> (2) When an applicant under rule 7.19 (1) has satisfied the Court that
>
> > (a) the applicant has complied with the legal aid regulations of the provincial plan providing legal aid or similar services, with respect to commencing or defending a proceeding thereunder; or
> >
> > (b) the applicant is entitled to the exemption applied for even though the applicant has not complied with the legal aid regulations; and
> >
> > (c) the applicant files with the Court a legal opinion that sets out the material facts in issue in the proceeding and establishes that the applicant has reasonable grounds for commencing or defending the proceeding;
>
> the Court may
>
> > (d) exempt the applicant from the payment of all or any of the costs and fees in the proceeding;
> >
> > (e) assign a solicitor or counsel, or both, to assist the applicant; or

(f) grant such other order as is just.

In addition to providing an exemption from court fees, this rule may be used to limit a party's exposure to an adverse costs award (*Thompson v. Seabright*, 2008 NLTD 82 at para. 1).

[89] No such provision exists in Ontario. However, a review of the more recent cases, in particular, the references by the Supreme Court and the Ontario Court of Appeal to the availability of a costs immunity award, as well as a consideration of the court's broad costs discretion, leads me to conclude that the granting of costs immunity, while exceptional, may be considered in an appropriate case.

[90] There is limited guidance as to what an appropriate case might be. In referring to different kinds of costs mechanisms, like adverse costs immunity, Bastarache and LeBel JJ. in *Little Sisters*, noted that a "creative costs award" is an exceptional one, to be granted in special circumstances (at para. 40).

[91] The criteria that the Supreme Court established for granting advance or interim costs may be of some assistance. In *Okanagan*, the Court set out the following conditions (at para. 40):

> (i) the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial;
>
> (ii) the claim is *prima facie* meritorious; it would be contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means; and
>
> (iii) the issues are of public importance and have not been resolved in previous cases.

[92] These criteria were further refined in *Little Sisters* at paras. 39 to 44 as follows:

> (i) The injustice that would arise if the application is not granted must relate to both the individual applicant and to the public. This does not mean, however, that every case of interest to the public will satisfy the test.
>
> (ii) An advance costs award must be an exceptional measure. The applicant must be able to demonstrate attempts to obtain private funding and, if not impecunious, must commit to making a contribution. The court should also consider different kinds of cost mechanisms.
>
> (iii) There would be no injustice if the issue could be settled or the public interest satisfied without an advance costs award.
>
> (iv) If an advance costs order is made, the litigant must relinquish some control over how the litigation proceeds.

[93] A consideration of these criteria, adapted to the situation of costs immunity, as well as the criteria in the U.K., Nova Scotia and Newfoundland and Labrador suggest the following.

[94] The first proposition is that the granting of a costs immunity award is exceptional. The fact that I was not referred to any Ontario case in which it has been awarded, is testament to this proposition.

[95] Other factors that may be taken into account include: whether the applicant's financial circumstances are such that the applicant would probably not proceed absent such an order; the extent to which the public has an interest in the issues being litigated; and the potential impact of such an award on the other parties.

[96] A costs immunity order raises the risk that the party that has been immunized from a costs order may fail to be accountable for the time and money expended on the case. However, this risk could be addressed by requiring that the litigant relinquish some control over the litigation process, as was proposed in the *Little Sisters* case.

[97] I turn now to the circumstances of this case.

[98] Firstly, the Farlows submit that without costs immunity, they could not afford to risk litigating this case in Superior Court. Such a statement should, however, be supported by evidence. The Farlows have not provided a full picture of their financial situation. In the circumstances, I cannot determine whether the risk of an adverse costs award is a significant impediment to them proceeding with this case.

[99] Secondly, there is the issue of the impact of a costs immunity award on the defendants. The defendants are not the government, as is the case in *Charter* litigation. I do not know what impact such an order would have on the Hospital, a public sector institution, and the two physicians, who are private litigants. There is no estimate of the costs involved except for Mrs. Farlow's statement in her cross-examination that her costs could be around $600,000. This motion alone has taken place on four separate hearing days and has included cross-examinations on affidavits and lengthy written submissions. The Farlows have indicated that they want to amend and significantly broaden their claim.

[100] Finally, I cannot conclude that the public interest portion of the claim warrants a costs immunity order. I accept that any case involving the treatment of a child at the Hospital for Children may well be of interest to the public. However, that is not the same as concluding that there would be an injustice to the public if it did not proceed.

[101] The Farlows seek a monetary remedy. The claim does not seek a change to a law, policy or practice, as is often the case in a *Charter* challenge. The one aspect of the claim that goes beyond the treatment given to Annie is the reference to "a policy of non-treatment for infants with serious genetic disorders".

[102] The Farlows have indicated that they want to broaden their claim to address systemic issues at the Hospital and seek broad-ranging remedies. I cannot prejudge whether any such amendments would be granted or be sustainable. At this point, I am limited to the claim as drafted.

[103] These circumstances do not, in my opinion, provide a basis for making an exceptional order at this stage. I therefore decline to grant costs immunity.

Conclusion

[104] This case arises from one of the most tragic circumstances imaginable – the death of a child. I appreciate that the Farlows and their family have gone through a very difficult time. I appreciate, as well, that in bringing this matter to court, Mr. and Mrs. Farlow's primary aim is not to obtain financial compensation but to achieve changes to a system which they feel has failed them and their daughter. I am, however, constrained by the four corners of the claim that is before me.

[105] In addition to the issues that underlie the Farlows' claim, they have also raised the important issue of access to justice. I am, however, unable to determine whether the Farlows would, indeed, be denied access to justice given the evidence before me.

[106] In these circumstances and after weighing the factors for and against transferring the case to Superior Court, I conclude that the action should be transferred. Given the nature of the case, it should be exempted from the simplified procedure.

[107] I decline the Farlows' request for a costs immunity order. I have not considered their request for interim costs. This decision is without prejudice to any costs orders the Farlows may seek in the future.

[108] All of the parties have indicated that they will not seek costs of this motion. There will therefore be no order as to costs.

Herman J.

Released: November 12, 2009

COURT FILE NO.: CV-09-377556
DATE: 2009/10/21

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

BARBARA JANE FARLOW and TIMOTHY FARLOW

Plaintiffs

- and -

HOSPITAL FOR SICK CHILDREN, MICHAEL JONATHAN WEINSTEIN and CHRISTOPHER SUSHIL PARSHURAM

Defendants

REASONS FOR JUDGMENT

Herman J.

Released: October 21, 2009

Half Moon Lake Resort Ltd. v. Strathcona (County), 2001 ABCA 50

Date: 20010227
Docket: 9903-0412-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE McCLUNG
THE HONOURABLE MADAM JUSTICE HUNT
THE HONOURABLE MR. JUSTICE BERGER

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1;

AND IN THE MATTER OF THE *LAND TITLES ACT*, R.S.A. 1980, c. L-5

AND IN THE MATTER OF THE LANDS WITHIN THE SOUTH EAST QUARTER OF SECTION 6, TOWNSHIP 52, RANGE 21, WEST OF THE FOURTH MERIDIAN, AND WITHIN THE BOUNDARIES OF STRATHCONA COUNTY

BETWEEN:

HALF MOON LAKE RESORT LTD.,
APPLE AUCTION LTD., and BRIAN LOVIG

Appellants (Respondents)

- and -

STRATHCONA COUNTY

Respondent (Applicant)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE J. A. AGRIOS
Dated June 29, 1999
Filed September 3, 1999

Docket: 0003-0132-AC/0003-0133-AC

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1;

AND IN THE MATTER OF THE *LAND TITLES ACT*, R.S.A. 1980, c. L-5

AND IN THE MATTER OF THE LANDS WITHIN THE SOUTH EAST QUARTER OF SECTION 6, TOWNSHIP 52, RANGE 21, WEST OF THE FOURTH MERIDIAN, AND WITHIN THE BOUNDARIES OF STRATHCONA COUNTY

BETWEEN:

STRATHCONA COUNTY

Appellant (Applicant)

- and -

HALF MOON LAKE RESORT LTD., APPLE AUCTION CORPORATION OPERATING A BUSINESS UNDER THE FIRM NAME AND STYLE APPLE AUCTION LTD., and BRIAN LOVIG

Respondents (Respondents)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MADAM JUSTICE M. T. MOREAU
Dated March 10, 2000
Filed April 3, 2000

Docket: 0003-0296-AC

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1;

AND IN THE MATTER OF THE *LAND TITLES ACT*, R.S.A. 1980, c. L-5

AND IN THE MATTER OF THE SALE OF LANDS WITHIN THE SOUTH EAST QUARTER OF SECTION 6, TOWNSHIP 52, RANGE 21, WEST OF THE FOURTH MERIDIAN, AND WITHIN THE BOUNDARIES OF STRATHCONA COUNTY

BETWEEN:

HALF MOON LAKE RESORT LTD., and BRIAN LOVIG

Appellants (Respondents)

- and -

STRATHCONA COUNTY

Respondent (Applicant)

- and -

APPLE AUCTION LTD., OPERATING A BUSINESS UNDER THE FIRM NAME AND STYLE APPLE AUCTION LTD.

Not Party to the Appeal

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE K. G. RITTER
Dated May 11, 2000
Filed June 14, 2000

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE HUNT
CONCURRED IN BY THE HONOURABLE MR. JUSTICE McCLUNG
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE BERGER

COUNSEL:

M. J. McCabe
K. L. Becker
For the Appellants

B. A. Sjølie
J. S. Grundberg
For the Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE HUNT

[1] A company owned a large tract of land which, for several decades, was operated as a campground. The company advertised an event at which it proposed to auction individual campsites pursuant to a form of contract. The local municipality obtained an interim injunction restraining the holding of the auction because the company had not obtained permission to subdivide its property. The company then developed two additional forms of contract pursuant to which it proposed to dispose of interests in its property. This appeal concerns the validity of the contracts in light of s. 95(1) of the *Land Titles Act*, R.S.A. 1980, c. L-5 ("*LTA*"). It also raises questions about the interaction between s. 95(1) and Part 17 of the *Municipal Government Act*, S.A. 1994, c. M-26.1 ("*MGA*").

[2] I conclude that all three contracts are invalid but that the first chambers judge should not have awarded solicitor-client costs against the company. Thus I would allow the appeal in part.

BRIEF BACKGROUND

[3] Although four appeals were filed, oral argument focussed on the two that concern the validity of the contracts and whether solicitor-client costs should have been awarded against the Appellants in the first decision considered here (Appeal 9903-0412). Since the parties agreed that the matters raised in the other two appeals (0003-0132/0003-0133) were moot or would be rendered moot by this Court's decision, these Reasons concentrate on the former issues. There is a thorough examination of the facts in the second chambers decision considered here (Appeal 0003-0296): [2000] A.J. No. 615.

[4] The Appellant Lovig is the president of the Appellant Half Moon Lake Resort Ltd. ("Half Moon"). Half Moon owns about 139 acres ("the Lands") located in Strathcona County ("County"), which Lands are subject to the jurisdiction of the Respondent County. Under the relevant land use by-law, permitted uses for the Lands include campsites, outdoor amusement establishments and outdoor participant recreation. The Lands contain over 200 campsites and have been operated as a campground and dude ranch for several decades. Amenities such as boating, equestrian and miniature golf facilities are found on the Lands.

[5] Half Moon advertised a public auction at which it proposed to dispose of interests in the Lands pursuant to a form of contract ("the First Contract"). In its advertising, Half Moon claimed to have obtained subdivision approval. This was not true, but Half Moon had registered a plan of survey at the Land Titles Office.

[6] The County obtained an interim injunction which, among other things, prohibited sales under the First Contract. Half Moon then provided individuals with the opportunity to acquire interests in the Lands pursuant to another form of contract ("the Second Contract").

[7] In cross-examination on an affidavit during this litigation, Lovig was asked about the purpose of registering the survey plan at the Land Titles Office. He said at A.B. 39-41 that it was "[t]o provide a record of definition of particular lot areas" and that it was to be used in conjunction with or for reference to the sale of the lots under the First and Second Contracts.

[8] In the first decision under appeal, a permanent injunction was granted prohibiting the Appellants from entering into agreements in the form of the First and Second Contracts. In his brief Reasons, the chambers judge adopted the County's arguments, saying at A.B. 130 (9903-0412) that this was "clearly an attempt to do indirectly what cannot be done directly. ... It is clearly a colourable attempt to create a subdivision. ... This scheme would subvert both the Land Titles Act and the Planning Act."

[9] He awarded solicitor-client costs against the Appellants, stating at A.B. 135 that there had been an attempt to flaunt the spirit and intent of the interim injunction order. In his view, the Second Contract was virtually the same as the First, the use of which had been prohibited by the interim injunction. He considered that the Appellants had ignored the interim injunction through a colourable attempt to accomplish with the Second Contract what they had been enjoined from accomplishing with the First. He ordered the Registrar of Land Titles to cancel the plan of survey registered by the Appellants.

[10] In the second decision under appeal, *supra*, a chambers judge considered yet another form of contract ("the Third Contract"). He concluded that, while purporting to be a 35-year lease, the Third Contract actually involved a sale of lots and was invalid due to s. 95(1) of the *LTA*.

[11] At para. 19, he set out some of the factors that a court should take into account in determining whether or not a purported lease is really a sale. In this case, the significant matters included the involvement of 229 parcels of land; the Appellants, as "lessors", retained virtually no control over the property; rights relating to development of the land had been transferred to the lessees; not all development concerns had been dealt with; the lessees and proposed lessees were individuals rather than corporations; and there had been two previous unsuccessful attempts to convey interests in the property to individual owners.

[12] He concluded that the Third Contract thwarted the purposes of the *LTA* and the *MGA*, those purposes being "the security and certainty of title and the promotion of orderly and efficient development of land" (para. 26). He granted an order declaring the Third Contract invalid, void and illegal and permanently enjoining the Appellants from leasing interests in the Lands under such contracts.

LEGISLATION

s. 95(1), (3)(a) *LTA*

95(1) No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until a plan creating the lots has been registered.

(3) No party to a sale or agreement for sale is entitled in a civil action or proceeding to rely on or plead the provisions of this section

(a) if the plan of subdivision by reference to which the sale or agreement for sale was made is registered when the action or proceeding is commenced

s. 616(m), (s), (u), (ee), 617, 652(1) *MGA*

616. In this Part,

(m) "lot" means

(i) a quarter section ...

(iv) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in the certificate of title other than by reference to a legal subdivision, or

(v) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in a certificate of title by reference to a plan of subdivision

(s) "parcel of land" means the aggregate of the one or more areas of land described in a certificate of title or described in a certificate of title by reference to a plan filed or registered in a land titles office

(u) "plan of subdivision" means a plan of survey prepared in accordance with the *Land Titles Act* for the purpose of effecting a subdivision

(ee) "subdivision" means the division of a parcel of land by an instrument and "subdivide" has a corresponding meaning

[Emphasis added.]

617. The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted

> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
>
> (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,
>
> without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.
>
> 652(1) A Registrar may not accept for registration an instrument that has the effect or may have the effect of subdividing a parcel of land unless the subdivision has been approved by a subdivision authority.

s. 16(d) *Planning Act*, R.S.A. 1970, c. 276 ("1970 *Planning Act*")

> 16. Land shall not be subdivided unless
>
> (d) the proposed subdivision complies in all respects with this Act and The Subdivision and Transfer Regulations, and is approved in the manner prescribed by those regulations

THE FIRST AND SECOND CONTRACTS ("Contracts")

[13] The First and Second Contracts, both titled "Contract of Purchase and Sale" (9903-0412 A.B. 204 and 212), are similar. The Purchaser agrees to purchase an undivided interest in Half Moon's Lands, coupled with another interest. Under the First Contract, the additional interest is called an Exclusive Use Area; under the Second, it is a Leased Area. In each case, the two interests together are referred to as "the Property".

[14] Under the Contracts, the Exclusive Use Area and the Leased Area are specified by reference to an attached survey document. It is common ground that the survey document is the same as that registered by the Appellants at the Land Titles Office and cancelled by order of the first chambers judge.

[15] The Contracts grant the Purchaser of the Property exclusive use of the Exclusive Use Area or the Leased Area, according to attached terms and conditions. One term is that the Purchaser shall be entitled to vacant possession of the Property unless provided otherwise in the Contract.

[16] Details about the Exclusive Use Area and the Leased Area are set out in agreements attached to the Contracts (A.B. 208, 216). The terms of the attachments are also similar. They give the Purchasers "the exclusive right to occupy, use, improve and enjoy" the Exclusive Use or Leased Areas. Any improvements constructed thereon belong to the Purchaser.

[17] Each Contract contemplates the establishment of an association having powers similar to those of a corporation under the *Condominium Property Act*, R.S.A. 1980, c. C-22, as amended. The Association has the power to approve improvements on the Leased or Exclusive Use Areas.

[18] The main difference between the First and Second Contracts is the nature of the interest that accompanies the undivided interest. Under the First, the rights are said to be interests in land that can be protected by caveat (A.B. 208). Under the Second, the lease is for three years and can be renewed for three years (A.B. 216). Effectively, the lease is renewable perpetually since each Second Contract is automatically renewed by the renewal of a single lease held by any Purchaser.

THE THIRD CONTRACT

[19] The Third Contract (0003-0296 A.B. 89) is titled Lease Agreement. It recites that Half Moon, the Lessor and owner of the Lands, has designated 229 areas as reflected on an attached Leasehold Survey. Again, it is common ground that this is the same survey referenced in the first two contracts. The Lessee agrees to lease one of those areas for a prepaid lump sum in return for the exclusive right to occupy, use, improve and quietly enjoy the Leased Area for 35 years. The Lessee agrees to pay a pro rata share of the property taxes for the Land and the Common Areas (being all the Land except the Leased Areas). A Tenants' Association will be established to set rules and regulations for the use of the Leased and Common Areas. Lovig is a co-covenantor under the Lease Agreement and undertakes to ensure that Half Moon performs its covenants. In fact, Half Moon's sole covenant, also made by the Lessee, is not to assign the lease unless a successor in interest promises to be bound by it. The Lessee undertakes not to file a caveat with respect to its interest.

[20] Under the attached Terms and Conditions, improvements to the Leased Areas can be made only with the consent of the Tenants' Association. The document is silent as to ownership of improvements. A Management Committee representing the Association is empowered to supervise the enforcement of the Agreement. The Lessee agrees to comply with municipal by-laws.

THE VALIDITY OF THE CONTRACTS

The First and Second Contracts

[21] Counsel for the Appellants stated during oral argument that if the Third Contract is invalid, so too are the First and Second. Since I conclude below that the Third Contract is invalid, little needs to be said about the First and Second.

[22] The First and Second Contracts breach s. 95(1) of the *LTA* because the additional interests they convey (the Exclusive Use Area and the Leased Area) constitute the sale of a lot

absent the registration of a subdivision plan. Such a contract is illegal: ***Boulevard Heights* v. *Veilleux***, [1915] 52 S.C.R. 185.

[23] The County concedes that the conveyance of an undivided interest in the Lands under the Contracts is unobjectionable because the sale of an undivided interest is not prohibited by s. 95(1). In my opinion, however, the conveyance of the additional interests constitutes the prohibited sale of a lot. To explain why, it is necessary to examine the nature of an undivided interest.

[24] In order to create a tenancy in common, unity of possession must exist between the tenants, all of whom "are equally entitled to possession of the whole; their respective shares remain *undivided* during the currency of the relationship": B. H. Ziff, *Principles of Property Law*, 3rd ed. (Toronto: Carswell, 2000) at 304. Having an undivided interest and unity of possession in the whole parcel, no tenant in common can claim a greater right of possession to any part than could be claimed by any of the undivided owners: ***Kasha* v. *Bye***, [1998] A.J. No. 697, Quinn M. Tenants in common share the right to possession of all the property so that their shares are undivided in the sense that no boundary has been demarcated. E. H. Burn, *Cheshire's Modern Law of Real Property*, 14th ed. (London: Sweet & Maxwell, 1988); R. E. Megarry and H. W. R. Wade, *The Law of Real Property*, 6th ed. (London: Butterworths, 2000), chapter 9 at 480.

[25] Through the conveyance of the additional interests, the Contracts purport to grant an undivided owner the exclusive right of possession in perpetuity to part of the Lands. This is offensive to the nature of an undivided interest and can be seen in no other light than the sale of part of the Lands in contravention of s. 95(1).

[26] This result is obvious as regards the Exclusive Use Area under the First Contract, which conveys a fee simple interest to a delineated portion of the Lands. The conveyance of the Leased Area under the Second Contract is slightly less objectionable on its face.

[27] But an examination of the substance of the second transaction reveals the same result. Although it purports to convey a three-year leasehold interest, that interest is effectively renewable in perpetuity and has the hallmarks of a fee simple interest. For example, clause 2 of the Terms and Conditions attached to the Lease Agreement forming part of the Second Contract provides that the undivided interest and the lease interest "shall be deemed to be created concurrently and shall not be separated for any purpose whatsoever except where expressly authorized by this Agreement" (9903-0412 A.B. 218). The so-called lease interest has no elements typical of a leasehold interest, such as a real limited term or a lessor's right of re-entry for breach of a condition. In substance, the Second Contract grants exclusive rights in perpetuity to part of the Lands, absent an approved subdivision plan. It also breaches s. 95(1) and is illegal.

The Third Contract

[28] To determine whether the Third Contract is valid, it is necessary to explore more fully the prohibition in s. 95(1) of the *LTA* and its relationship to Part 17 of the *MGA*. An understanding of Alberta's earlier planning laws, as interpreted by the courts, is also important.

[29] The term "lot" is not defined in the *LTA*. The same term in a predecessor provision has been held to be capable of many meanings: ***Andersen* v. *Sinclair*** (1976), 2 Alta. L.R. (2d) 69 at 71 (S.C.T.D.). A common usage is "[a] portion or parcel of land; any piece of land divided off or set apart for a particular use or purpose": ***Town of Westmount* v. *Montreal Light, Heat and Power Co.***, [1911] 44 S.C.R. 364 at 377.

[30] Subsection 616(m) of the *MGA* defines "lot" partly by reference to the term "plan of subdivision". The latter is defined in the same section as "a plan of survey prepared in accordance with the [*LTA*] for the purpose of effecting a subdivision". Since the only provision in Alberta law for creating a subdivision is found in Part 17 of the *MGA*, there is obviously a close link between the two statutes.

[31] It is not necessary in this case to decide the precise extent to which the definition of "lot" in the *MGA* affects the same term in s. 95(1). It is sufficient to say that a "lot" in s. 95(1) refers to a piece of land that has been set apart for a particular use. At the least, this definition is compatible with the use of the term in the *MGA*.

[32] The Appellants suggest that the Third Contract creates no "lot". I disagree. Each area to be leased is identified by reference to the same survey document which, according to Lovig's own testimony, was intended to define lot areas under the First and Second Contracts. This makes it apparent that the Third Contract creates pieces of land set apart for a particular use and involves lots as the term is used in s. 95(1).

[33] The Appellants argue next that the Third Contract is not a "sale" but simply a lease that is not contrary to s. 95(1). They also assert that the Third Contract does not subdivide the Lands. They say that, in contrast to earlier legislation, there is now no prohibition against the subdivision of land absent planning approval, but only against registration at the Land Titles Office of an instrument having such an effect. Since they do not intend to use the Land Titles system, they claim the Third Contract is valid because it breaches no law. A response to these interrelated arguments requires an analysis of past planning law and how the *LTA* and Part 17 of the *MGA* interact.

[34] Earlier planning legislation, as exemplified by s. 16 of the 1970 *Planning Act*, specifically prohibited subdivision without authority. Because this express prohibition is not found in the present *MGA*, a leading authority on municipal law in Alberta concludes that the *MGA* "does not purport to prohibit parties from entering into an unapproved transaction that has the effect of subdivision." F. A. Laux, *Planning Law and Practice in Alberta*, 2nd ed., looseleaf (Toronto: Carswell, 1996). The paragraph in which his observation is made, however, also states

that "except for contracts for the sale of lots created in an unregistered plan which are expressly made illegal and unenforceable between the parties by s. 95 of the *Land Titles Act*, transactions between parties amounting to an unapproved subdivision are probably not *ipso facto* rendered void by the *Municipal Government Act*."

[35] The sale of a lot is obviously a subdivision, so at least to this extent the Appellants are mistaken to assert that there is no longer a prohibition against unauthorized subdivision. In determining whether a transaction is the sale of a lot, the courts ought to analyse its substance and not just its form. Earlier cases decided under provisions other than s. 95(1) have done just that and are helpful in determining the real effect of the Third Contract. Three are of interest.

[36] In ***Otan Developments Ltd.* v. *Kuropatwa*** (1978), 7 Alta. L.R. (2d) 274 (S.C.A.D.), a caveat protecting a lease was ordered removed because the Court concluded the lease had the effect of subdividing property without planning authority. The parties had entered into an agreement for the sale of the property, with the purchase price fully paid. When the owner failed to obtain subdivision approval, he leased part of the parcel to the purchaser for a term of 49 years at an annual rental of $1.

[37] Haddad J.A. concluded at 277 that the parties intended to give the appellant "virtually the same control over the one acre as he would have had by becoming the registered owner of that portion if that result could have been achieved." He underscored at 278 that not every lease would have the effect of subdividing land. Rather, in each case, the purpose and effect, or possible effect, of the lease must be examined.

[38] Morrow J.A. (Prowse J.A. concurring) came to the same conclusion for different reasons. The contract provided that the lease would terminate as soon as a registerable transfer was obtained for the unsubdivided parcel to which it pertained. He viewed this as an attempt to achieve the same effect as if subdivision approval had been procured. He noted that it would be possible to lease part of a parcel for a considerable period of time for parking or hay or grazing purposes without infringing the planning legislation. But in this case the parties were "attempting to obtain the benefits of a subdivision under the guise of a ... lease ... without having to comply with the applicable legislation within the foreseeable future" (at 286). The transaction was colourable and attempted to thwart the object of the legislation.

[39] On the other hand, in ***Knowlton* v. *Registrar of Land Titles*** (1982), 19 Alta. L.R. (2d) 31 (Q.B.), Miller J. concluded that the registration of a caveat protecting a lease ought not to be refused because the lease did not effect a subdivision. While McDonald's lease was lengthy (40 years with an option to renew for 10 years), it had a *bona fide* commercial rationale in that the building to be constructed on the premises would require a substantial capital investment. The building would revert to the lessor at the end of the lease, with the lessee entitled to remove only trade fixtures. Although pre-payment of the rent in the amount of approximately a half-million

dollars was suggestive of a purchase, Miller J. noted at 39 that it might only represent the discounted present value of the rental to be paid over the lease's term.

[40] Unlike in ***Otan***, there was no attempt to circumvent the planning legislation. There was neither a prior unsuccessful attempt to subdivide nor any indication that the lease was intended to accomplish such a result. There was no undertaking by the landlord to try to obtain subdivision approval. Subdivision approval already obtained for the whole shopping centre permitted the construction of a building of the type contemplated by McDonald's. The lease contained such typical provisions as the need for the lessor's approval prior to assignment of the lease or the erection of signs. It also gave the lessor the right to enter the premises under certain circumstances.

[41] ***Robinson* v. *Guthrie*** (1984), 51 A.R. 356 (C.A.) involved an application for a declaration that the appellant was a tenant under a 99-year lease covering part of a quarter section. The lease provided for rental by way of a lump sum and payment of one-half the entire quarter section's annual taxes. There was no effort to obtain subdivision approval. Regardless of whether this transaction might be colourable, the Court of Appeal held that it violated the prohibition against unauthorized subdivision in s. 16 of the 1970 *Planning Act* because of its long term and the fact that the single advance payment approximated the cost of a fee simple parcel. At para. 9, Stevenson J.A. said that the transaction was intended to result in the division of the parcel for a long period of time, with all the other incidents of ownership.

[42] These cases make it clear that each transaction must be examined to determine its true character and set out some of the appropriate factors to consider in that process. Do the essential elements of the Third Contract make it a real lease or is it in fact the "sale" of a lot prohibited by s. 95(1)?

[43] The Appellants concede that, in answering this central question, the second chambers judge considered some relevant factors, including the length of the lease and the payment method. They complain, however, that he took account of inappropriate matters, including the existence of the First and Second Contracts, the fact that the Lessees were individuals rather than corporations, and a brochure prepared by the Appellants to explain why they were utilizing a 35-year lease. Even if some of these criticisms are valid, the totality of rights in the Third Contract suggests that it ought to be characterized as an invalid sale.

[44] Neither the lengthy term of the lease nor payment of the rent by way of a lump sum, by themselves, would necessarily lead to the conclusion that the lease is really a sale. The critical point is that the Lessor retains virtually no control over the Lands. By implication, it may have a reversionary right to the Lands at the end of 35 years. In the meantime, however, the Lessor's common law right to re-enter for a breach has been delegated to the Lessees because the Tenants' Association has been granted rights to enforce the contract. Through the Association, the Lessees also have the right to approve improvements. Not only has the owner parted with

possession of the Lands for the term of the lease, it has relinquished virtually all its rights to the property for that period.

[45] Since s. 95(1) is directed, in part, at preventing unauthorized subdivision, the matter of planning mischief is relevant to its application. The Appellants assert that this transaction involves no planning mischief, since the Lands will continue to be used the same way as they have for several decades. The County contests this. Regardless of which view of the facts is correct, the Lessor's total relinquishment of control over the Lands to the Lessees for the next 35 years could pose enforcement problems for planning authorities in the interim. Although the Lessees have covenanted in the Third Contract to comply with municipal laws, if they do not, the recourse of the County would be to the Lessor. The evidence is that the County would deal with the registered owner, namely Half Moon (A.B. 36). But Half Moon has delegated its rights to the Tenants' Association, which does not own the Lands. Such a problem does not arise in the case of a condominium association (after which the Association is patterned) because such an association is itself an owner which is obligated to comply with planning laws. Most leases do not delegate the enforcement of their provisions to the lessees themselves. Thus, contrary to the Appellant's argument, there may be a degree of planning mischief in the Third Contract. This is an additional reason for characterizing it as a sale prohibited by s. 95(1).

[46] I recognize that owners may deal with their property as they see fit, subject to valid legislation. Indeed, this principle is enshrined in s. 617 of the *MGA*, which describes the purpose of its planning provisions. Not every long-term lease of property will be characterized as the sale of a lot. But wherever lies the line between a lease and the sale of a lot, for the above reasons it has been crossed by the Third Contract. The second chambers judge correctly concluded that the contract breaches s. 95(1).

SOLICITOR-CLIENT COSTS

[47] In my opinion, the first chambers judge erred in awarding solicitor-client costs against the Appellants. Costs orders are discretionary and will be interfered with on appeal only if there is a clear, palpable and overriding error: ***Westersund* v. *Westersund*** (1993), 157 A.R. 276 at 278 (C.A.). Notwithstanding this broad discretion and the necessity for appellate deference, it is appropriate to interfere if the trial or chambers judge has committed such a serious error: ***Sidorsky et al.* v. *CFCN Communications Ltd. et al.*** (1997), 206 A.R. 382 (C.A.).

[48] It is clear from the authorities that solicitor-client costs are to be awarded only in rare and exceptional circumstances. ***Jackson and Parkview Holdings* v. *Trimac Industries*** (1993), 138 A.R. 161 at para. 12 (Q.B.). The first chambers judge concluded that solicitor-client costs were justified because of his view that, by employing the Second Contract, the Appellants were flaunting the intent of the interim injunction.

[49] But the terms of the interim injunction order were appropriately precise, prohibiting only the use of the First Contract which was attached as an exhibit (A.B. 123-24). Indeed, this is exactly what the County had sought in its Notice of Motion. The order did not prohibit the use of a contract similar to the First Contract. The County complains, in part, that the Appellants neglected to inform it that they intended to employ a different form of contract. But the injunction order did not require this. Nor does any general legal principle.

[50] While I agree with the first chambers judge that the Second Contract is illegal, there are differences between the two contracts that make the legality of the Second at least marginally more arguable than the First. The Appellants did not act wrongly in testing the limits of s. 95(1) by drafting the Second Contract in terms somewhat different than the First. They were entitled to order their affairs as they saw fit, risking the possibility that a later legal assessment of the Second Contract would characterize it as being contrary to s. 95(1). They flaunted neither the letter nor the spirit of the interim injunction. Thus, they were not guilty of misconduct or blameworthiness to justify an award of solicitor-client costs.

SUMMARY

[51] All three contracts breach s. 95(1) of the *LTA*. Solicitor-client costs, however, should not have been granted by the first chambers judge. Therefore, I would allow the appeal in part.

[52] Although the County sought solicitor-client costs on the appeal, I reject its assertion that the appeal was without merit. The issues raised are complex and important. Therefore, the County should receive only party-and-party costs under the appropriate column on the appeal.

APPEAL HEARD on NOVEMBER 28, 2000

REASONS FILED at EDMONTON, Alberta,
this 27th day of FEBRUARY, 2001

_____

HUNT J.A.

I concur: _____

McCLUNG J.A.

I concur: _____
BERGER J.A.

Alberta Court of Queen's Bench
Jackson v. Trimac Industries Ltd.
Date: 1993-03-17

A.D. Hunter, Q.C., and M.L. Sigurdson, for plaintiffs.

D.R. Haigh, Q.C., V.M. May, Q.C., and B.W. Conway, for defendants.

(Doc. Calgary 8901-16051)

March 17, 1993.

[1] HUTCHINSON J.:– At the conclusion of my Reasons for Judgment in this action [6 Alta. L.R. (3d) 225, [1992] 2 W.W.R. 209], I stated that costs should be settled before entry of the judgment and may be spoken to. Counsel have now appeared before me and have spoken to costs. This was also an opportunity for counsel to clear up one matter that was left outstanding concerning the possibility of a set off of $250,000 from the $7,212,375 judgment awarded to Jackson. A draft in the amount of $250,000 was tendered by Jackson to Industries on December 16, 1987 in payment for 2,500 shares of Industries. In my judgment I speculated that Jackson may have regained the use of such money. The parties agree that Jackson did not obtain the use of such money free of any claim by Trimac. The $250,000 in question was dealt with pursuant to an agreement in writing between counsel for the parties dated April 8, 1988 (Ex. 1 – Document 2267) as follows:

> DKJ will deposit with Stikeman, Elliott, on *an entirely without prejudice basis*, the uncashed bank draft of $250,000 which was forwarded to Trimac Industries at the time DKJ exercised his option to purchase 2,500 Trimac Industries shares. The said funds will be held in our trust account, in an interest bearing form, pending either our mutual agreement in writing, or the determination of any legal proceedings which may be commenced concerning DKJ's rights, if any, with respect to the said option.

[2] I have held that the option to purchase additional shares of Industries was properly exercised by Jackson and that he was accordingly entitled to purchase the 2,500 shares of Industries. Therefore the monies tendered by Jackson became the property of Industries which, together with the accumulated interest thereon, should now be paid to Industries. In the result there will be no off-set against the amount ordered to Jackson on the sale of his 13.5% interest in Industries to Trimac for fair market value which I found to amount to $7,212,375.

[3] Turning to the issue of costs, I find that, broadly speaking, the main issue between the parties as to costs comes down to whether the plaintiff's should be awarded costs on an indemnity basis in the form of solicitor-client costs or on a party and party basis as provided in

Sched. C of the *Rules of Court.* There the appropriate column would be col. 6 with a multiple to be selected given such factors as the length of the trial, the complexity and importance of the issues and the amounts involved. The question as to whether solicitor-client costs represent an indemnity will be discussed later.

[4] Counsel for the plaintiff argued that his client should be indemnified on a solicitor-client basis or at the very least on a party-party basis at five times col. 6. In order to gain a perspective on the amounts involved, I requested counsel for the plaintiff to produce a draft Bill of Costs calculated on col. 6 of Sched. C which he has now supplied. It is understood that the draft Bill of Costs does not have the approval of counsel for the defendants who has had no opportunity to consider it. It is anticipated that many of the items will not present a problem. The draft Bill of Costs calculated on the basis of single col. 6 discloses total fees of $114,325 plus GST amounting to $6,038.20. Disbursements total $152,598.01. Five times col. 6 applied to fees would therefore amount to $571,625 plus GST at 7% bringing the total to $611,638.75 plus disbursements as may be agreed upon or allowed on taxation. Fees and disbursements requested by the plaintiff at five times col. 6 as an alternative to solicitor-client costs could therefore total in the neighbourhood of $750,000. Solicitor-client fees are normally considered to be higher than Sched. C costs. This, of course, depends upon the multiplier. I did not ask for disclosure of the plaintiffs' solicitor-client costs.

[5] Counsel for the defendants argues for party and party costs with a multiple of 2 1/2 or possibly three times col. 6 as a proper award. In the event of an award of either solicitor-client or party-party costs, he says that a formal taxation would follow if the parties were unable to agree on any of the specifics involved in calculating fees. The reasonableness of certain items of disbursements may also require further direction in the event that the parties are unable to agree. The disbursements which may be in dispute encompass such items as the $52,160.35 fee, including disbursements and GST, for the expert's report compiled by Mr. Scott of Ernst & Young on behalf of the plaintiffs calculating the losses claimed by the plaintiffs. The defendants say that Mr. Scott's report proceeded on a wrong assumption, namely that of a going concern scenario through 1986 and 1987 with a closing with CIL in March of 1987. The defendants say that Mr. Scott's report was not usable. Also open to question is the Stikeman and Elliott account totalling $24,034.08. The defendants question whether that account represents an appropriate expense of the cost of the trial.

[6] Counsel for the defendants does not take issue with the inclusion of GST, second counsel fees, including attendance at examinations for discovery, daily transcript costs including computer diskettes or photocopying fees. The level of the fees, including rates and time spent on matters relating to the trial, remain of concern if solicitor-client costs were to be entertained.

[7] Apart from the main issue, counsel for the defendants identified certain subsidiary concerns, that is, whether the Court should exercise its discretion to apportion the cost of certain "issues" or "matters" brought into play in the trial by the plaintiffs in the presentation of the plaintiffs' case. These concerns include the following; firstly the plaintiffs' opening where counsel for the plaintiffs argued that on the basis of the pleadings certain matters were the subject of issue estoppel or were an abuse of process or were res judicata having regard to the previous litigation between Trimac and CIL and also between CIL and Trimac, Laidlaw Transportation Limited and Jackson. Secondly, the plaintiffs request that certain documents be produced for discovery where solicitor-client privilege and without prejudice settlement privilege had been claimed by the defendants. Thirdly, the plaintiffs' attempt to introduce collateral facts in their cross-examination of McCaig and Bailey. The plaintiffs did not succeed on any of these three issues or matters raised on their behalf. Counsel for the defendants calculates that the first item occupied 2 1/4 days of trial time, item 2 occupied 6 days of trial time and item 3 occupied 1 1/4 days of trial time for a total of 9 1/2 days out of the 56 days taken up by this trial.

[8] Other items of concern identified by counsel for the defendants were what level should costs be set assuming party-party costs and whether this case was a "rare and exceptional" case in which solicitor-client costs, however defined, should be awarded. These latter two issues are really folded into the main issue to which I have already referred.

[9] Counsel for the plaintiffs submitted that if party-party costs are to be awarded, there should be an additional lump sum allowance made for written arguments that were prepared throughout the trial for which no allowance is made in Sched. C as well as an allowance for the preparation of computer assisted charts and chronologies relating to the evidence and documents. A lump sum of $20,000 was suggested in this regard.

[10] Returning to the main issue there is no dearth of law on the subject of costs emanating from this Court and the Alberta Court of Appeal. I have been referred to the following cases:

Max Sonnenberg Inc. v. Stewart, Smith (Canada) Ltd., [1987] 2 W.W.R. 75 [48 Alta. L.R. (2d) 367], (Veit J.) Nov. 21, 1986

Sturrock v. Ancona Petroleums Ltd., 111 A.R. 86 [75 Alta. L.R. (2d) 216], (Lomas J.) Aug. 23, 1990

Pharand Ski Corp. v. Alberta, 122 A.R. 395 [81 Alta. L.R. (2d) 304, additional reasons 122 A.R. 395 at 398, 83 Alta. L.R. (2d) 152, [1992] 1 W.W.R. 501], (Mason J.) Oct. 2, 1991

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 50 Alta. L.R. (2d) 1 [[1987] 3 W.W.R. 160], (Wachowich J.) Feb. 6, 1987

Mobil Oil Canada Ltd. v. Canadian Superior Oil, [1980] 1 W.W.R. 453, (Kirby J.) Oct. 5, 1979

McCarthy v. Calgary Roman Catholic Separate School District No. 1, [1980] 5 W.W.R. 524, (Sinclair C.J.Q.B.) June 24, 1980

Wenden v. Trikha, 1 Alta. L.R. (3d) 283, (Murray J.) Mar. 6, 1992

Fleck v. Stewart, 80 Alta. L.R. (2d) 334, (McBain J.) May 15, 1991

Olson v. New Home Certification Program of Alberta, 44 Alta. L.R. (2d) 207, 209, (Lutz J.) Apr. 11, 1986

Calbar Securities Ltd. v. Toole Feet Co., 30 Alta. L.R. (2d) 286 (C.A.), (McGillivray C.J.A.) Mar. 5, 1984

Nathu v. Imbrook Properties Ltd., 4 Alta. L.R. (3d) 149 [[1992] 6 W.W.R. 373] (C.A.), Sept. 1, 1992

Petrogas Processing Ltd. v. Westcoast Transmission Co., 73 Alta. L.R. (2d) 246 [[1990] 4 W.W.R. 461], (O'Leary J.) Apr. 2, 1990

Reese v. Alberta, 5 Alta. L.R. (3d) 40 [[1993] 1 W.W.R. 450], (McDonald J.) Aug. 28, 1992

Nova, An Alberta Corp. v. Guelph Engineering Co., 60 Alta. L.R. (2d) 366, (Brennan J.) Jul. 20, 1988

[11] Insofar as it is possible to distil general principles from the foregoing cases and also from the other Canadian and English cases referred to therein, and bearing in mind s. 19 of the *Court of Queen's Bench Act*, R.S.A. 1980, c. C-29, and the *Alberta Rules of Court*, R. 600, 601 and 605, there can be no doubt that a trial judge has a very wide discretion when awarding costs provided that such discretion is exercised judicially. The cases themselves

exhibit a diversity in the exercise of the Court's discretion and are bound to be influenced by their own particular facts.

[12] The general rule is that costs follow the event. The defendants do not dispute that the defendants are obliged to pay costs, it is the method of calculating such costs which is in issue. Another undisputed general principle is that "it must be a rare and most exceptional case in which costs will be awarded on a solicitor and client basis rather than on a party-party basis". This is a statement made by Freedman J.A. at p. 570 of *Evaskow v. B.B.F.* (1969), 71 W.W.R. 565 (Man. C.A.), quoted by Kirby J. in *Mobil Oil* (supra), at p. 456. In the same *Mobil Oil* case, Kirby J. quoted Keith J. in *Vanderclay Development Co. v. Inducon Engineering Ltd.*, [1969] 1 O.R. 41, 1 D.L.R. (3d) 337 (H.C.), at p. 344 [D.L.R.] as follows:

> Keith J., at p. 343, points out that while the court does have discretion to award solicitor-and-client costs, such discretion should be exercised most carefully. He continued, at p. 344:
>
> "... one must be extremely cautious in departing from the general rule that costs awarded to a successful litigant are to be taxed as between party and party on the basis of an authoritative and well recognized tariff. If this principle were departed from, other than in exceptional cases, it is not difficult to visualize the indirect harm that could well be done by inhibiting prospective litigants from bringing to the attention of the Courts matters which they have every right to have put into litigation."

[13] The general principles are also clearly stated by McDonald J. in *Reese* (supra) at pp. 44-45, paras. 7, 8 and 9, where he says:

> While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. It is traditionally accepted in Canada's common law provinces that as a general rule the successful party recovers its costs from the unsuccessful party. However, such recovery is normally on a party-and-party basis. That is, the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees (Sched. C in Alberta's *Rules of Court*), plus reasonable disbursements. It is not intended that the successful party receive full indemnification of those fees and disbursements which it would be charged by its counsel. In England the degree of indemnification appears to be considerably higher than is normal in Canada. In almost all jurisdictions of the United States of America the rule is that no costs are recoverable by the successful party.
>
> The Canadian practice reflects an attempt to balance two conflicting interests. On the one hand, it is argued that if a party is successful and *there are no circumstances constituting blameworthiness in the conduct of the litigation by that party*, it is unfair to require the successful party to bear any costs incurred by his counsel in prosecuting or defending the action. On the other hand, it is argued that if the unsuccessful party is required to bear all the costs of the successful party, citizens will be unduly hesitant to sue to assert their rights (even valid ones) or to defend their rights when sued. The

partial indemnity practice as it exists in Canada is a compromise intended to give some scope in practice for each of the conflicting policy considerations.

When the case is of considerable magnitude and complexity, the practice in Alberta contemplates that the court may order the unsuccessful party to pay a multiple of the fees that are fixed by Sched. C. But even then it is not intended that there be full indemnity, except in extraordinary circumstances. (emphasis added)

[14] In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (supra), Wachowich J. (as he then was) discussed the options available to him in awarding costs following a lengthy application. At p. 4 he said:

Essentially, there are four options available to me.

1. I may disallow costs and order that the participants, although successful, are to pay their own costs.

2. I may award costs on a party-party basis.

3. I may award costs on a solicitor-client basis.

4. I may award a gross sum in lieu of, or in addition to, taxed costs (R. 601(1)(*a*)).

[15] And at pp. 5 and 6, Wachowich J. set out the general principles when deciding whether costs should be awarded on a party-party basis or on a solicitor-client basis in the following words:

The next issue to be resolved is whether costs should be awarded on a party-party basis or a solicitor-client basis. The general rule is set out in *McCarthy v. Calgary R.C. Sep. Sch. Dist. No. 1 Bd. of Trustees*, [1980] 5 W.W.R. 524 at 525, 17 C.P.C. 115, 30 A.R. 208 (Q.B.):

"... the general rule is that costs are awarded on a party-and-party basis against the unsuccessful litigant. An award of costs on this basis does not serve to completely indemnify the successful party but is viewed as a reasonable apportioning of the expense of the litigation between the parties."

The rationale behind this rule is explained by Dubin J.A. in *Foulis v. Robinson* (1979), 21 O.R. (2d) 769, 8 C.P.C. 198 at 207, 92 D.L.R. (3d) 134 (C.A.):

"The expense of litigation is a matter of concern for all those interested in the administration of justice, but one must have regard for the burden which such costs place on all parties. Generally speaking, an award of costs on a party-and-party scale to the successful party strikes a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser. *There are, of course, cases in which justice can only be done by a complete indemnification for costs*, but, in my respectful opinion, this is not such a case." (emphasis added)

[16] In *Wenden* (supra), Murray J. discusses the plaintiff's proposal in that it be allowed a multiple of three of col. 6 plus fees for certain items listed in Sched. C. Costs on an indemnity basis were not being sought by any of the successful parties. At p. 307, Murray J. said:

> The position in Alberta is set out in the decision of O'Leary J. in the case of *Petrogas Processing Ltd. v. Westcoast Transmission Co.*, 73 Alta. L.R. (2d) 246, [1990] 4 W.W.R. 461, 105 A.R. 384 (Q.B.), and Wachowich J. in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 50 Alta. L.R. (2d) 1, [1987] 3 W.W.R. 160, 64 C.B.R. (N.S.) 9, 76 A.R. 271 (Q.B.). We do not indemnify successful parties for the expense incurred by them in prosecuting or defending an action. Rather, the fees prescribed by Sched. C represent what is considered to be a reasonable amount to be paid for each designated step or stage in the proceedings. These amounts are approved by the government, the present Sched. C items and amounts having come into effect on April 18, 1984. This court has the power by virtue of R. 601 to increase the amounts of these items in the proper case.

[17] Madam Justice Veit makes the following observation in the *Sonnenberg* case (supra) after ruling that the plaintiff in that case was entitled to costs on an indemnity basis. She identifies the three scales of costs recognized by Sinclair C.J.Q.B., in *McCarthy* (supra), as party-party, solicitor-client and solicitor and his own client. She adopts the meaning of solicitor and his own client costs provided by Lerner J. in *Re Seitz* (1974), 6 O.R. (2d) 460 (H.C.), at p. 465 as the costs as would "provide complete indemnity to [the client] as to costs essential to, and ... 'arising within the four corners of litigation.' " At p. 79, Veit J. also agrees "with the suggestion made by Megarry V.C. in *EMI Records Ltd. v. Ian Cameron Wallace Ltd.*, [1983] Ch. 59 ... to the effect that when a judge wishes to indemnify a party in a costs award the phrase 'indemnity basis' should be preferred to 'solicitor and his own client'." Veit J. was of the view that R. 601(1) provides the authority to award costs to a successful party on an indemnity basis.

[18] Madam Justice Veit identifies an important difference between solicitor-client costs and solicitor and his own client costs, the latter which she equates to an indemnity basis. At pp. 78 and 79, she explains:

> By identifying a scale of costs as "solicitor and his own client", courts have invested that scale with application in litigation other than between a solicitor and his own client. The effect of the award of the scale as between general parties means only that the scale to be used is the scale that might be used by a solicitor against his resisting client. This concept has added significance in Alberta, where lawyers are entitled to act on a contingency basis. Thus, where the scale is "solicitor and his own client", if the solicitor's contract with his own client is that he will be paid for his work at the rate of $300 per hour or on the basis of 35 per cent of the recovery, it is that fee which can be recovered against an unsuccessful defendant. All work requested to be done on a particular file and all work reasonably connected to the proceedings can be recovered on this scale.
>
> Because of the suggestion that the solicitor-client scale allows only the recovery of reasonable fees, and because of the possibility that in specific cases "reasonable" will not be equivalent to "contractual", I adopt, for the purposes of this decision, the meaning attributed by Lerner J. in *Re Seitz* to the term "solicitor and his own client".

[19] At p. 80, Veit J. addresses the question as to whether costs on an indemnity basis should be awarded in the case before her. There she says:

> The third issue is, of course, whether such an award should be made in this case. Departure from the general rule of party-and-party costs requires extreme caution and should occur only in rare and exceptional cases: *Mobil Oil Can. Ltd. v. Can. Superior Oil Ltd.*, [1980] 1 W.W.R. 453, 14 C.P.C. 101, 105 D.L.R. (3d) 355, 20 A.R. 111 (Q.B., Kirby J.).
>
> Having adopted the *Mobil Oil* test, presumably for an award of solicitor-client costs, much more care and concern must be exercised before awarding solicitor and his own client costs.
>
> Costs and damages should not be confused. I subscribe to the views expressed in much jurisprudence, of which *Olson v. New Home Certification Program of Alta.* (1986), 44 Alta. L.R. (2d) 207, 69 A.R. 356 (Q.B., Lutz J.), is an example, that costs deals with the conduct of the litigation and that damages deals with the conduct of the parties giving rise to the cause of action.
>
> Even a successful litigant is normally left to pay a portion of the cost of taking an issue to court in recognition of the fact that there was objectively an issue of fact or law that had to be determined by the court.
>
> In concluding that the plaintiff should not contribute at all to the cost of these proceedings, I have taken into account the evidence that the plaintiff did nothing to hinder, delay or confuse the litigation and that it was apparent to me at the end of the trial that there was no serious issue of fact or law which required these lengthy, expensive proceedings.

And at p. 81, she comes to grips with the question whether an award of punitive damages would exclude the imposition of costs on an indemnity basis. She has this to say:

> I am bound to say, however, even though there appears to be authority for these positions, that positive misconduct itself is better considered in the context of punitive damages. *What is undoubtedly unarticulated in the jurisprudence is that findings of such positive misconduct are then taken into account one more time on the costs issue in determining whether the positively misconducting party was "contemptuous", to use the Vorvis expression, of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his.*
>
> Different considerations apply on this issue in criminal and civil proceedings. In a criminal matter, no person, even if found guilty, should be punished more harshly because he insisted on a full trial. In a civil matter, where a party positively misconducts himself, and requires a full trial, there is no reason to ignore that litigation on the issue of costs. (emphasis added)

[20] In the *Olson* case (supra), Lutz J. cites the *Mobil Oil* case (supra), decided by Kirby J., and says this at p. 229:

> It is not necessary to repeat that which I detailed earlier respecting the distasteful conduct of the defendant's operations manager, Gordon Hoult. It is appropriate in the circumstances to exercise my discretion in favour of the plaintiff by awarding costs. That

solicitor-client costs can be awarded is clear from the Court of Queen's Bench decision in *Mobil Oil Can. Ltd. v. Can. Superior Oil Ltd.*, [1980] 1 W.W.R. 453, 14 C.P.C. 101, 105 D.L.R. (3d) 355, 21 A.R. 111. It is clear from that decision that the plaintiff must establish that there was an attempt to deceive the court and defeat justice.

This is a case which I think justifies a departure from the general rule that restricts an award of costs to a party-party basis for there was in my view an attempt to delay, deceive and defeat justice: see *Fiege v. Cornwall Gen. Hosp.* (1980), 30 O.R. (2d) 691, 117 D.L.R. (3d) 152, 4 L. Med. Q. 124 (H.C.); and see *Fort Smith v. Berton* (1983), 54 A.R. 367 (N.W.T.S.C).

The conduct of the defendant that this court found particularly abhorrent and which should not be tolerated was the requirement imposed upon the plaintiff to prove major structural defects and other facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiff and failing to produce material documents in a timely fashion.

[21] Lomas J. in *Sturrock* (supra) deals with costs at p. 114, para. 88 as follows:

The general rule is to award a party against his opponent only party-and-party costs (see Stevenson and Côté *Civil Procedure Guide* (1989), at p. 1204 and the cases referred to therein). But, as noted in Stevenson and Côté at pp. 1205 and 1206, there are numerous cases where the court has found sufficient grounds to give an opposite party solicitor-and-client costs. In *Drusick* [sic] *v. Newton* (1984), 51 B.C.L.R. 217 (S.C.), Meredith, J., awarded costs on a solicitor-and-client basis where the defendants were guilty of positive misconduct. His reasons were that others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order for costs. In *Davis v. Davis* (1981), 9 Man. R. (2d) 236, Kraft, J., awarded solicitor-and-client costs against defendants found to be acting fraudulently and in breach of trust, although no damages were awarded. Orkin in *The Law of Trust* (2nd Edition) at pp. 2-65 notes that costs have been awarded on a solicitor-and-client basis where the defendant had committed a fraud. In *Kepic v. Tecumseh Road Builders et al.* (1987), 23 O.A.C. 72; 18 C.C.E.L. 218 (C.A.), the Ontario Court of Appeal increased an award of costs from a party-and-party basis to a solicitor-and-client basis in view of the defendants' fraudulent conduct in inducing a breach of conduct and in presenting a deceptive statement of accounts to the court at trial.

And at para. 89 Lomas J. said:

In view of the fraudulent conduct of the defendants Ancona and Clare costs will be awarded against them on a solicitor-and-client basis.

[22] In the case of *Dusik v. Newton* (1984), 51 B.C.L.R. 217 (S.C.), mentioned by Lomas J. in *Sturrock* (supra) and referred to in Stevenson and Côté's *Civil Procedure Guide*, Meredith J. held at p. 219:

I hold Dusik entitled to costs against both defendants as between solicitor and client. In *Winnipeg Mtge. Holdings Ltd. v. Allard* (1980), 20 B.C.L.R. 179 (S.C.), I cited recent cases supporting the proposition that costs should be awarded on this basis where the defendants are guilty of positive misconduct. The reason is that others should be deterred from like conduct and that the defendants should be penalized beyond the

ordinary order for costs. In this case the defendants are guilty of misconduct which, if they had succeeded, would have bilked Dusik of over $1 million. That money was rightfully his and the defendants knew it. Surely this is misconduct deserving of the solicitor-client cost order. Mr. McGivern points out that Mr. Gooderham's fault is that he simply tripped at the last minute. Be that as it may, the trip resulted from a serious conscious misstep which was calculated to have most serious detrimental consequences to Dusik. Gooderham implemented the intention of his client.

[23] At pp. 355 and 356 of his judgment in *Fleck* (supra), McBain J. discusses costs as follows:

> A claim is made by the plaintiffs by counterclaim for solicitor-client costs on an indemnity basis.
>
> Solicitor-client costs may be awarded as this court has a general and discretionary jurisdiction to award costs to a successful party as between solicitor and client: see *McCarthy v. Calgary Roman Catholic Separate School District No. 1*, [1980] 5 W.W.R. 524, 17 C.P.C. 115, 30 A.R. 208 (Q.B.). An award of solicitor-client costs is to be made to express a court's disapproval of the conduct of the litigation by a party to it. The general rule is party-party costs, and departure from that general rule requires cogent justification.

[24] McBain J. places emphasis on the conduct of the litigation at p. 358 where he mentions the fact that "Mr. Low in argument argues that a distinction must be made between punitive damages and an award of solicitor-client costs, the latter apparently going to the conduct of the action." McBain J. then said that "I am not satisfied that the particulars here justify an award of solicitor-client costs, and I shall make no such award." He did, however, award punitive damages.

[25] In *Pharand* (supra), Mason J. awarded the successful plaintiff costs on a party and party basis rather than on an indemnity basis. At pp. 397-98 in para. 6 through to para. 7 he said:

> Further, although the action arose out of a confidence relationship which is a cousin of the trust relationship, it is far from the fiduciary relationship recognized by the case authorities necessary to justify the award of costs other than on the scale of party and party costs.
>
> The conduct of this litigation was straightforward. There was no attempt to delay or hinder the proceedings on the part of the defendant, nor was there any evidence whatsoever of an attempt to deceive or defeat justice. There was no issue of fraud or untrue or scandalous charges or any of the other recognized bases for an indemnity scale award of costs.

[26] Mason J. then went on to discuss party-party costs at p. 399, para. 19 as follows:

> Costs on a party and party scale can, in theory, totally indemnify the successful party. See *N.P.P. and M.E.P. v. Regional Children's Guardian (Calgary)* (1989), 98 A.R. 77; 68

Alta. L.R. (2d) 394 and 398. However, in principle, costs on a party and party scale are awarded on the basis of a reasonable apportioning of the litigation expenses incurred by the successful party, having regard to such factors as:

(a) the difficulty and complexity of the issues;

(b) the importance of the case between the parties and/or the community at large;

(c) the length of the trial;

(d) the position and relationship of the parties and their conduct prior to and during the course of the trial; and

(e) other factors which may affect the fairness of an award of costs.

[27] Mason J. then awarded costs at three times col. 6 plus an additional unallocated gross sum of $75,000 for taxable fees with disbursements as requested by the plaintiff on the basis of certain difficulties faced by the plaintiff identified as follows:

> While this was not a rare or unusual case in many respects, it arose under unusual circumstances and the relationship between the parties was materially affected by difficult political complications. Also, the basis of the action, breach of confidence, is a developing area of the law involving conflicting legal theories of characterization, application and remedy. A breach of confidence action is clearly a cousin to a breach of fiduciary obligation. Trust and confidence are involved in a breach of confidence action and both factors were present to a substantial degree in this case. Further, the action was prosecuted in effect by private citizens against Provincial Government on a *contingency fee basis* because the breach of confidence, proven at trial, virtually destroyed their modest asset base and the financial commitments promised for the success they should have achieved.
>
> In addition, although not an appropriate measure of damages, the ultimate saving by the Provincial Government as a result of the confidential information obtained from the plaintiff saved many millions of dollars in capital costs. Finally, the Government dismissed the claims by the plaintiff for recognition and recompense without carefully examining its position and the record of its involvement with the plaintiff.

[28] The plaintiffs are seeking indemnification from the defendants for the cost of the lawsuit initiated by them to recover monies which they claim were rightfully payable to them. Indemnification in this instance is equivalent to solicitor and his own client costs and not solicitor-client costs, adopting the meaning found by Veit J. in *Sonnenberg* (supra). In order for costs to be awarded on an indemnity basis or even on a solicitor-client basis, as opposed to a party-party basis, the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case. Examples from the above cited cases resulting in the identification of a rare and exceptional case include:

1. circumstances constituting blameworthiness in the conduct of the litigation by that party (*Reese*);

2. cases in which justice can only be done by a complete indemnification for costs (*Foulis v. Robinson*);

3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (*Sonnenberg*);

4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (*Olson*);

5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (*Dusik v. Newton*);

6. defendants found to be acting fraudulently and in breach of trust (*Davis v. Davis*);

7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (*Kepic v. Tecumseh Road Builder* et al.),

8. fraudulent conduct (*Sturrock*);

9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (*Pharand*).

[29] Mention of Stevenson J.A. and Côté J.A. unleashes a plethora of cases involving the application of R. 601(1) referred to in that work at pp. 1414 to 1417 inclusive (1992 edition). Approximately 100 examples are given where sufficient grounds exist or do not exist for awarding party and party costs on a solicitor and client basis. This demonstrates that a careful analysis has to be made of the facts in each case and also illustrates the wide discretion to be exercised by the trial judge who had the benefit of seeing and hearing the witnesses and distilling the essence of the lawsuit.

[30] Two major propositions appear to mitigate against an award of solicitor-client costs. The first is that it is the conduct of the action and not the conduct of the party that gives rise to

the action that determines an award of solicitor-client costs. Secondly, punitive damages or damages should not be confused with a costs award.

[31] Madam Justice Veit appears to agree with the above propositions but goes on to decide that positive misconduct gives the court reason to take such conduct into account [p. 81] "one more time on the costs issue in determining whether the positively misconducting party was 'contemptuous' ... of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his."

[32] Where the positive misconduct of the party which gives rise to the action is so blatant and is calculated to deliberately harm the other party, then despite the technically proper conduct of the legal proceedings, the very fact that the action must be brought by the injured party to gain what was rightfully his in the face of an unreasonable denial is in itself positive misconduct deserving of indemnification whether punitive damages are awarded or not. Such positive misconduct must be taken into account one more time on the costs issue to use the words of Madam Justice Veit in *Sonnenberg.*

[33] In the present case, I have found that the plaintiffs were entitled to receive payment for their 13.5% interest in Industries valued at $7,212,375. To this amount interest is to be added, calculated in accordance with s. 2.6(d) of the Management agreement (Ex. 1, Document 969) at the Royal Bank of Canada prime rate commencing 30 days following Jackson's resignation from Industries on December 29, 1987. Accordingly interest has been accumulating for over 5 years and will represent a considerable sum by itself. The issue of punitive damages was never seriously argued by counsel for the plaintiffs and in view of the eventual size of the judgment based on the value of the Tricil shares which had escalated to $91 million by December 29, 1987, it seemed to me to be unnecessary to award punitive damages to the already sizeable judgment particularly where interest was payable. I do not view the issue of costs to have been determined by the fact that punitive damages were not awarded in this case. The issue of costs is still a live issue and is influenced by the reasons which gave rise to this lawsuit in the first instance.

[34] I find that this lengthy trial came about as a result of the fault of one man within the Trimac organization, the man who held the ultimate power and who refused to recognize a commitment which he had personally given to the plaintiff Jackson. The commitment was documented and other executives within the organization recognized the commitment and were working towards its fulfilment when it was derailed by J.R. McCaig (JR). Such was the

authority of JR, as the dominant force behind the control block shareholders of Trimac, that no one within the Trimac organization was in a position to prevail against JR or dared to cross him when it came to a showdown between himself and Jackson. JR determined to deny Jackson the benefits accruing to him either to enhance the value of his own 15% interest in Trimac or, alternatively, JR simply did not wish to see Jackson reap the benefits of his entrepreneurial skills because of the unexpectedly high reward. Ironically, it was Jackson's skill and farsightedness which created the auction atmosphere between CIL and Laidlaw which in turn caused the value of Tricil to escalate. The enhanced value of Trimac's interest in Tricil was a major contributing force to the salvation of Trimac, then admittedly very low in the water as JR himself described it. Jackson's reward was to be denied the benefits previously promised to him by JR.

[35] I find JR's conduct to have been calculated to force Jackson to exhaust the legal proceedings to obtain that which was obviously his. Jackson did indeed have to decide whether to accept JR's second unilateral revision to the Industries' proposal or sue and quit the Trimac organization. Jackson knew that he would be pitted against the significant resources of the Trimac organization and that the cost of a protracted lawsuit would be very expensive, drawing on his own experience in the CIL lawsuit. JR was contemptuous of Jackson's rights. In addition, I have found that JR's evidence given during the trial was unreliable. This is as charitable a view as I can place on JR's testimony. It affected the conduct of the action.

[36] I find that JR was guilty of positive misconduct in inducing Industries to breach its contract with Jackson. This was done in the face of what JR had previously personally promised to Jackson and contrary to that which I have found to be reflected in the agreements.

[37] I find that this is a proper case to award costs on an indemnity basis against the defendants adopting the meaning of that phrase attributed to Lerner J. in Veit J.'s decision in *Sonnenberg.* There that meaning is described as the costs as would "provide complete indemnity to [the client] as to costs essential to, and ... 'arising within the four corners of litigation' ". I do not take this to be a complete carte blanche so that a successful party can charge an unlimited amount. The contractual arrangement between the solicitor and client must be established and some check is necessary in order to justify the time spent and hourly

rates which were presumably contracted for by Mr. Jackson. The key words are "essential to ... and 'arising within the four corners of litigation' ".

[38] In this later connection the defendants have challenged the apportionment of the cost of certain "issues" or "matters" brought before the court in the presentation of the plaintiffs' case. The defendants say that these issues took up 9 1/2 days of trial time. The cases sometime refer to an award of "selective costs" where the plaintiff has failed to prove an issue.

[39] In *Calbar Securities Ltd. v. Toole Peet Co.* (supra), McGillivray C.J.A. said at p. 288:

> We do not think that costs should be affected by the particular disposition of any issues that arise in the course of a trial. On the whole case, the court held that the plaintiff should not have been in court.

[40] In *Nathu* (supra), the issue was whether it was a proper case to deny the respondent, who was largely unsuccessful on the appeal, her trial costs as they related to the calculation of damages. The damages awarded at trial of $465,000 were reduced on appeal to $233,000 as a result of the assessment of profit margins being substantially reduced. At p. 151, the Court said:

> While costs routinely follow the event, all costs are not dictated by the bottom line of recovery. Sensibly the expense of litigating unsuccessful issues may not be recoverable, or may even be awarded to the successful opponent, notwithstanding the fact that the plaintiff succeeds on other issues. It must and does lie within the court's discretion: the *Court of Queen's Bench Act*, R.S.A. 1980, c. C-29, s. 19; R. 601, *Rules of Court.*
>
> Within the case law, the award of selective costs was recognized as long ago as 1893: see *Forster v. Farquhar*, [1893] 1 Q.B. 564 (C.A.). It was recently affirmed in *Herman v. Miller*, [1988] 2 W.W.R. 72, 64 Sask. R. 71 (Q.B.), where Gerein J. ruled [p. 75 W.W.R.]:
>
> "In short, the plaintiff put forth a serious and very substantial claim which is notoriously difficult to prove. The defendants of necessity had to resist and they did so successfully. It would be grossly unfair were the successful defendants still required to indemnify a party who had been unsuccessful in pursuing a claim and had expended large sums of money in such pursuit.
>
> "As I see it, the plaintiff obtained a part of what he sought and having been successful in the broad sense he is entitled to taxable costs as I ordered in my judgment. However, in this instance he should not be permitted to include in those taxable costs any tariff items or disbursements which relate to witnesses tendered on behalf of a losing cause."
>
> A similar result calls for similar relief here. The plaintiff-respondent, Mrs. Nathu, will recover the costs of the trial to be taxed under col. 6 of Sched. C with no restrictive rule to apply. That was the trial direction. But having failed, in the outcome, on damages, the

plaintiff will not be allowed to tax as tariff items fees or disbursements pertaining to her witnesses on the calculation of damage issue.

[41] At p. 152, the Court said:

> We are not forgetful that the respondent, Mrs. Nathu, was partially successful on the appeal (on the issue of liability), but the respondent will, at least, be adequately compensated overall in that we have not limited her counsel fees for the extended trial although it is obvious that a substantial portion of that time was occupied in the litigation of an issue in which she eventually failed.

[42] I note that the restriction was only placed on tariff items relating to witness or disbursements in the calculation of damages which is far less than what the defendants are requesting here. The defendants ask that they be allowed to tax the costs of the unsuccessful "issues" raised by the plaintiffs during the trial against the plaintiffs as an off-set to the plaintiffs' taxable costs.

[43] The cases of *Forster v. Farquhar* (supra) and *Reid, Hewitt & Co. v. Joseph*, [1918] A.C. 717 (H.L.), considered Order LXV, R. 1. This rule is explained by Viscount Haldane in *Reid, Hewitt* (supra) at pp. 738-39 as follows:

> The effect of the earlier part of the order is to repeal the old law and to put costs in the discretion of the Court or judge, but from this principle a departure is made by the proviso that "where any action, cause, matter, or issue, is tried with a jury," the costs are to follow the "event" unless the judge who tries the case, or the Court, shall for good cause otherwise order. This departure from the general principle is aggravated by r. 2 of the same order, which applies to all issues in law or fact, whether tried with a jury or not, and provides that the costs, unless otherwise ordered, shall follow the event. It goes on to say that an order giving a party costs, except so far as they have been occasioned or incurred by or relating to some particular issue or part of the proceedings, shall be read and construed as excluding only the amount by which the costs shall have been increased by such issue or proceedings; but the Court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment only of a proportion. *It might well, my Lords, have been better to have adhered to the simple principle of placing the whole of the costs in the discretion of the judge or Court, and to have left to them the duty of disposing of the whole of them by definite direction to be inserted in the judgment.* But that course has not been taken, and we have to interpret the application of the order as we find it. Now it is plain that, as the language stands, the bare result stated in the judgment is not to be taken as conclusive. If an issue is disposed of separately and has an "event" in some judgment in the action, the costs will automatically follow that "event," unless the judge for good cause provides by his order otherwise. (emphasis added)

[44] In that case as well as in *Forster v. Farquhar* it became important to define the meaning of the words "event" and "issue". It was argued that the use of the word "event" got rid of all questions as to specific issues arising from the "event" as opposed to reading the

word "event" distributively as applying to more than one issue. The latter interpretation found favour. At p. 741, Viscount Haldane said:

> It is on the material extent to which by the verdict and judgment the plaintiff's claim was successfully met and cut down that I lay stress in the present case. I think that there has been an event following on the trial of an issue distinctly and separately raised by the defence.

[45] At p. 742, Viscount Haldane defined the meaning of issue as follows:

> For the reasons I have indicated I have arrived at the conclusion that an issue which has a direct and definite event in defeating the claim to judgment in whole or in part is within the meaning of the rule, and that in the case under consideration such an issue was raised by the pleadings and decided.

[46] There is no similar rule to the English Order LXV, R. 1 and 2 to be found in the *Alberta Rules of Court* where the trial judge's discretion as to costs is unfettered. This might have pleased Viscount Haldane who had the task of deciding how the words "event" and "issue" arising from the English Order were to be applied in *Reid, Hewitt.* The defendants argue, however, that there is an analogy to be drawn in the present case where a judge "for good cause" should apportion costs between parties to an action where the defendant is successful in meeting or defeating an issue raised by the plaintiff.

[47] A rule similar to the English rule is found in the British Columbia, *Supreme Court Rules*, O. 65, R. 2, quoted in part as follows:

> 2. When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall follow the event, unless the Court or Judge shall for good cause otherwise order...

[48] The British Columbia rule was applied in the case of *Ireton v. Heizer*, [1971] 3 W.W.R. 77 (B.C.S.C), decided by Seaton J. in Chambers on December 4, 1970. Seaton J. referred to Bowen L.J.'s decision in *Forster v. Farquhar* at p. 569 of that decision found at p. 79 of Seaton J.'s reasons for judgment:

> *Forster v. Farquhar*, supra, dealt with a similar situation and I respectfully adopt the language of Bowen L.J. at p. 569:
>
> "Serious expense, however, was occasioned at the trial by reason of the plaintiff having put forward a claim under a head of damage which he failed, in the opinion of the jury, to make good. The expert witnesses called by the defendants to rebut this untenable head of damage cost money and time ... But why should any burden in respect of this portion of the plaintiff's claim be cast upon the defendants? It is said by the plaintiff that the various items of damage claimed do not create separate issues in the pleader's sense, nor for purposes of taxation. That is perfectly true; but it is a mere technicality of pleading and of the taxing office, which has survived to us from the time when pleadings

were more accurate and when the term 'issue' had a recognised meaning with respect to them. The real controversy in the present action was as to the damage suffered, and the question as to damage, though not an issue in the pleader's sense of the word, was a matter in controversy and one which could be split up into separate heads, each involving a different class of evidence. For all purposes of justice these separate heads of controversy were different issues, though not different issues, nor even issues at all, in the sense in which pleaders use the term. Why should the defendants, whose defence has succeeded on the most expensive and most important of these heads of controversy bear the cost of litigating it? If by making a special order as to costs the judge could apply distributively to these heads of controversy the maxim that he who loses pays, was it not fair and reasonable so to direct? It seems to us that it was. So far from thinking that Cave, J., had no good cause for making the order he did, what he has directed appears to us, on the contrary, to be an exact and admirable instance of the way in which, in the hands of a competent and accurate judge, the rule as to good cause can usefully be applied."

[49] At p. 80, Seaton J. concluded that he had good cause within the rule and said:

> The appropriate order here, in view of the various competing factors, would be to allow the plaintiff to tax as though the trial had lasted one day, with the plaintiff and her general practitioner the only witnesses. She is thus not able to tax for three days of the trial, or with respect to a number of medical witnesses. The defendants should tax and recover the disbursements they incurred with respect to medical examinations and witnesses.

[50] I note that this award was not an off-set award to the defendants but was a reduction in the plaintiff's taxable costs only.

[51] The same British Columbia rule had previously been considered in *Canada Rice Mills Ltd. v. Morgan* (1934), 49 B.C.R. 202 (S.C.), decided by Murphy J. on November 9, 1934. There he adopted the meaning of "issue" as defined by Buckley L.J. in *Howell v. Bering* (1914), 84 L.J.K.B. 198 (C.A.), found at p. 203 of that report as follows:

> An issue is that which, if decided in favour of the plaintiff, would in itself give a right to relief, or but for some other consideration would in itself give a right to relief.

[52] Murphy J. found that but for the language of the contract as to the effect of final payment, the plaintiff would have obtained judgment on the issue of the determination of the question of defective roof construction. He held that his finding on this issue in favour of the plaintiff to be an "event" and apportioned costs on a 60-40 basis, that is the defendant recovered 60% of the amount taxed as a whole as if no question of separate issues had arisen. In other words, Murphy J. found good cause for otherwise ordering that the costs should follow the event and relieved the plaintiff from paying 40% of the defendant's taxed costs.

[53] The cases involving the interpretation of the English Order LXV, R. 1 and 2, and the British Columbia O. 65, R. 2, revolve around discussions of what constitutes a separate "issue" in an "event" where costs generally follow the event except where a judge can "for good cause" award costs against the party who unsuccessfully advances an "issue" which is found to be an "event". Our Court of Appeal in the recent case of *Nathu* applied the reasoning in *Forster v. Farquhar* (supra) where an award of "selective costs" was recognized 100 years ago. However, in *Forster v. Farquhar*, Order LXV, R. 1 and 2 authorized the departure from the general principle that costs are to follow the event. In Alberta no such rule has to be relied on or is indeed available having regard to the wide discretion as to costs which normally rests with the trial judge.

[54] Counsel for the plaintiff in his opening address identified 30 or so paragraphs in the defendant's pleadings which he claimed ought not to be considered by the court on the grounds of issue estoppel, res judicata and abuse of process arising out of the previous CIL litigation where presumably these matters had been decided. If this was a motion to strike out a portion of the defendants' pleadings, I declined to intervene and directed that the trial proceed on the issues identified in the pleadings.

[55] I cannot say that my decision gave the defendants a right to relief or that the matters which were raised on behalf of the plaintiffs were issues which had a direct and definite event in enabling the defendants to defeat the plaintiffs' claim to judgment in whole or in part. It was a part of the trial process just as the admissibility of certain documents had to be decided for which the defendants claimed privilege. I also had to rule on the scope of the cross-examination of certain witnesses who were being cross-examined by counsel for the plaintiffs. There I rule that certain questions were disallowed under R. 255 as being vexatious and not relevant to the matters pleaded by the plaintiff in the action. These were not severable issues which formed an event where costs would normally follow.

[56] I decline to exercise my jurisdiction to apportion the costs between the plaintiffs and the defendants on the basis of the success or failure of the parties on the procedural matters raised during the trial as to the pleadings or the admissibility of the evidence or the propriety of questions being put to the witnesses on cross-examination by counsel. I do not believe that any of such matters went to the issues of liability or the quantification of damages which were the real issues in dispute in this lawsuit. To again use the analogy in the English and British

Columbia cases mentioned above, I find no good cause for apportioning costs or awarding costs on a selective basis arising out of the determination of an event.

[57] In my reasons for judgment, I stated that I found both the appraisals prepared by Mr. Scott for the plaintiffs and by Mr. Clark for the defendants to have been helpful. They both proceeded on assumptions given to them by their respective clients which I did not use in coming to my decision on damages. It would have been negligent for the plaintiffs not to have produced some basis for the plaintiffs' estimate of damages and it was difficult, if not impossible, to second guess the final determination by the Court. Both appraisals were useful counterpoints in identifying the issues and illustrating methods of computing the plaintiffs' losses.

[58] In the result the plaintiffs are to be indemnified for their costs arising out of the lawsuit and there is to be no apportionment of the costs or award of selective costs.

[59] The plaintiffs' costs are subject to taxation if required in order to justify the time spent and hourly rates contracted for or otherwise by Jackson which were essential to and arising within the four corners of this litigation. The plaintiffs are also entitled to tax against the defendants, their reasonable disbursements which will include those disbursements relating to Mr. Scott's report.

Order accordingly.

Case Name:

Young v. Young

Irene Helen Young, Appellant;
v.
James Kam Chen Young, Respondent, and
W. Glen How, Respondent, and
Watch Tower Bible and Tract Society of Canada, Respondent,
and
The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of British Columbia, the Law Society of British Columbia and the Seventh-day Adventist Church in Canada, Interveners.

[1993] S.C.J. No. 112

[1993] A.C.S. no 112

[1993] 4 S.C.R. 3

[1993] 4 R.C.S. 3

108 D.L.R. (4th) 193

160 N.R. 1

[1993] 8 W.W.R. 513

J.E. 93-1766

34 B.C.A.C. 161

84 B.C.L.R. (2d) 1

[1993] R.D.F. 703

18 C.R.R. (2d) 41 p

49 R.F.L. (3d) 117

1993 CanLII 34

1993 CarswellBC 264

43 A.C.W.S. (3d) 410

EYB 1993-67111

File No.: 22227.

Supreme Court of Canada

1993: January 25, 26 / 1993: October 21.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Family law -- Custody -- Access -- Best interests of the child -- Access parent insisting on instructing children on religion -- Custodial parent and children objecting to religious instruction -- Court ordering that access parent discontinue religious activities with children -- Scope of "best interests of the child" -- Whether or not "best interests of the child" equivalent of absence of harm -- Whether or not restriction on access in best interests of the children.

Family law -- Children -- Best interests of the child -- Access parent insisting on instructing children on religion -- Custodial parent and children objecting to religious instruction -- Court ordering that access parent discontinue religious activities with children -- Scope of "best interests of the child" -- Whether or not "best interests of the child" equivalent of absence of harm -- Whether or not restriction on access in best interests of the children.

Family law -- Property and financial awards -- Lump sum payment -- Family debts -- Principles governing reallocation of property.

Constitutional law -- Charter of Rights -- Freedom of religion -- Freedom of expression -- Divorce Act requiring that orders concerning children only take into account "the best interests of the child" -- Access parent insisting on instructing children on religion -- Custodial parent and children objecting to religious instruction -- Court ordering that access parent discontinue religious activities with children -- Whether or not access restriction infringing freedom of religion -- Whether or not access restriction infringing freedom of expression -- Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), ss. 16(8), 17(5) -- Canadian Charter of Rights and Freedoms, s. 2(a), (b).

Courts -- Costs -- Principles governing awards of costs on solicitor-client basis.

Torts -- Maintenance -- Religious society carrying cost of action -- Common religious action -- Whether or not tort of maintenance.

Appellant's and respondent's separation was marked by a protracted series of court battles. Appellant was awarded custody of the couple's three daughters and respondent was granted access subject to court imposed restrictions arising from appellant's objection to his religious activity with the children. Respondent was ordered not to discuss the Jehovah's Witness religion with the children, take them to any religious services, canvassing or meetings, or expose them to religious discussions with third parties without appellant's prior consent. Organized religion was not important to appellant although she wanted the children to be raised within the United Church.

The two older daughters liked their father but came to dislike his religious instruction to the extent that it was damaging his relationship with them and was contributing to the stress the children were experiencing in adjusting to their parents' separation.

The trial judge also made orders for the distribution of property and for costs. The respondent's interest in the matrimonial home was ordered transferred to the appellant because any remaining interest in the house, after respondent paid what was already owing to appellant, was to be transferred in the form of lump sum maintenance. Respondent was found responsible for debts incurred by the appellant for the support of herself and the children pending maintenance and for a debt made to a family corporation. Costs were awarded on a solicitor-client basis against respondent, his lawyer and a religious society not a party to the proceedings.

Respondent appealed. The Court of Appeal set aside the limitations on religious discussion and attendance, on the ground that it was in the best interests of the children that they come to know their non-custodial parent fully, including his religious beliefs, unless the evidence established the existence of or the potential for real harm or the child did not consent to being subject to the access parent's views or practices. The Court of Appeal also altered the division of property and the awards of costs made by the trial judge. Appellant appealed these rulings to this Court.

Four constitutional questions queried (1) whether ss. 16(8) and 17(5) of the Divorce Act (requiring that judicial decisions regarding custody and access be made "in the best interests of the child") denied the Charter guarantees of freedom of religion, of expression and of association (s. 2(a), (b), and (d)), and if so, (2) were they justified under s. 1; (3) whether ss. 16(8) and 17(5) violated the equality guarantee of the Canadian Charter of Rights and Freedoms (s. 15(1)), and (4) if so, were they justified under s. 1. The Court considered the requirements of the "best interests of the child" and whether this standard infringed the guarantees of freedom of religion and expression under the Charter. A main consideration was unrestricted access by a non-custodial parent and the conditions necessary to curtail that access.

Held (L'Heureux-Dubé J. dissenting in the result): The appeal should be allowed in part.

The issues should be decided as follows:

1. The test regarding access is the best interests of the child (L'Heureux-Dubé J., La Forest and Gonthier JJ., and Iacobucci and Cory JJ.). McLachlin J. suggests that in cases such as this harm is usually an important element in determining the best interests of the child. Sopinka J. would recognize a threshold element of harm.

2. Sections 16(8) and 17(5) of the Divorce Act do not violate ss. 2(a), (b), (d) or 15(1) of the Charter. L'Heureux-Dubé J. (and La Forest and Gonthier JJ.) found the Charter to be inapplicable. McLachlin J. found the impugned legislation did not violate the Charter. Cory and Iacobucci JJ. agreed that there was no Charter violation. Sopinka J. found that the Charter applied and could only be overridden in limited circumstances.

3. The restrictions on access should be removed (L'Heureux-Dubé J. and La Forest and Gonthier JJ. dissenting).

4. The judgment dealing with property and financial matters and the award of costs should be varied (L'Heureux-Dubé J. dissenting).

Best Interest of the Child, Charter Considerations and Access

Per L'Heureux-Dubé J.: The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child's best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being. The non-custodial parent retains certain residual rights over the child as one of his or her two natural guardians.

Child placement decisions should safeguard the child's need for continuity of relationships, reflect the child's (not the adult's) sense of time, and take into account the law's inability to supervise interpersonal relationships and the limits of knowledge to make long-range predictions. This need for continuity generally requires that the custodial parent have the autonomy to raise the child as he or she sees fit without interference with that authority by the state or the non-custodial parent. A custody award is a matter of whose decisions to prefer, as opposed to which decisions to prefer. Courts cannot make the necessary day-to-day decisions which affect the best interests of the child. Once a court has determined who is the appropriate custodial parent, it must presume that that parent will act in the best interests of the child.

Decisions are made according to the best interests of the child without the benefit of a presumption in favour of either parent. The Act envisages contact between the child and each of his or her parents as a worthy goal which should be in the best interests of the child. Maximum contact, however, is not an unbridled objective and must be curtailed wherever the welfare of the child requires it.

The right to access is limited in scope and is conditioned and governed by the best interests of the child. The legislation makes it quite explicit that only the best interests of the child as it is comprehensively understood should be considered in custody and access orders. The role of the access parent is that of a very interested observer, giving love and support to the child in the background. He or she has the right to know but not the right to be consulted. Access rights recognize that the best interests of the child normally require that the relationship developed with both parents prior to the divorce or separation be continued and fostered. The right to access and the circumstances in which it takes place must be perceived from the vantage point of the child. Wherever the relationship to the non-custodial parent conflicts with the best interests of the child, the furtherance and protection of the child's best interests must take priority over the desires and interests of the parent.

As the ultimate goal of access is the continuation of a relationship which is of significance and support to the child, access must be crafted to preserve and promote that which is healthy and helpful in that relationship so that it may survive to achieve its purpose. Sources of ongoing conflict which threaten to damage or prevent the continuation of a meaningful relationship should be removed or mitigated. Notwithstanding a general concern about the vulnerability of access rights to the caprices of a vengeful custodial parent, courts should not be too quick to presume that the access concerns of the custodial parent are unrelated to the best interests of the child. Courts should also not be blind to issues, such as financial support, which form part of the broader context in which these rights are exercised. The access parent has no obligation to exercise those rights and cannot be forced to comply with such an order even if that contact has been determined to be in the child's best interest.

Where there is a genuine problem with access, the non-custodial parent is not without recourse in any case. This stems from the statutory directive to facilitate access where it is in the child's best interests and the role of the judge as the arbiter of those interests in the case of a dispute between the parents. Generally, courts will grant liberal access to the non-custodial parent and usually this is consistent with the best interests of the child. Parents will also normally respect their children's wishes and best interests with regard to access. When disagreements between parents do reach the courts, the judge must always draw the line in favour of the best interests of the child, from a child-centred perspective.

The best interests of the child cannot be equated with the mere absence of harm: it encompasses a myriad of considerations. Courts must attempt to balance such considerations as the age, physical and emotional constitution and psychology of both the child and his or her parents and the particular milieu in which the child will live. One of the most significant factors in many cases will be the relationship that the child entertains with his or her parents. Since custody and access decisions are pre-eminently exercises in discretion, the wide latitude under the best interests test permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. What may constitute stressful or damaging circumstances for one child may not necessarily have the same effect on another.

The most common presumption now governing the best interests test is the primary caregiver presumption. It explicitly restores the values of commitment and demonstrated ability to nurture the child and recognizes the obligations and supports the authority of the parent engaged in day to day tasks of childrearing.

The order of the trial judge is not subject to the Charter. Even if it were, the best interests test is nevertheless value neutral and does not, on its face, violate any Charter right. Its objective, the protection of a vulnerable segment of society, is completely consonant with the Charter's values. Broad judicial discretion is crucial to the proper implementation of the legislative objective of securing the best interests of the child. Such discretion in a legislative provision does not of itself give rise to an inference of Charter infringement. It cannot be considered in the absence of an examination of the legislative objectives and must be rationally tied to those objectives.

The standard for finding a legislative provision unconstitutional because of vagueness is high. The provisions need only permit the framing of an intelligible legal debate with respect to the objectives contained in the legislation. The best interests test is not so uncertain as to be incapable of guiding a consideration of the factors relevant to custody and access determinations. The fact that it must be applied to the facts of each case does not militate in favour of its unconstitutionality.

The vagueness of a legislative provision cannot be examined in the abstract but must be considered within the context of the particular legislative objectives in question, bearing in mind that some objectives will require a panoply of judicial remedies for their meaningful fulfilment. Among the factors with which courts should be concerned when the vagueness of a law is at issue are: (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist.

The custodial parent need not show harm in order to restrict access to the children by the non-custodial parent. There is no rationale for defining the best interests of the child with the absence of harm. Nothing in the Act mandates or even suggests that "real danger of significant harm to the child" be the sole consideration in matters of custody and access. Indeed, the harm test would require courts to ignore the very factors which are set out in the Act and invert the basic focus of the inquiry into custody and access. The welfare of children is put at considerable risk if the prospect of harm becomes the sole prerequisite for restrictions on access. The best interests of the child is not simply the right to be free of demonstrable harm; it is the positive right to the best possible arrangements in the circumstances of the parties. The harm test cannot meet the legal system's primary goal in divorce situations -- minimizing the adverse effects of children. This goal requires a vision of the best interests of the child that is more than neutral to the conditions under which custody and access occur. Judges must exercise their discretion to prevent harm to the child rather than merely identify or establish its presence after the damage is done.

Expert evidence should not be routinely required to establish the best interests of the child. Expert testimony, while helpful in some circumstances, is often inconclusive and contradictory because such assessments are both speculative and may be affected by the professional values and biases of the assessors themselves. Experts are not always better placed than parents to assess the needs of the child. The person involved in day to day care may observe changes in the child that could go unnoticed by anyone else and normally has the best vantage point from which to assess the interests of the child. The custodial parent, therefore, will often provide the most reliable and complete source of information to the judge on the needs and interests of that child. The importance of the evidence of children in custody and access disputes, too, must be emphasized.

Restrictions on access do not necessarily prevent children from coming to know their parents in meaningful ways. Interpreting the goal of maximum contact as requiring unrestricted access may defeat the Act's objective if the pre-eminence of unlimited "knowledge" results in the ultimate destruction of the relationship. In this case, the purpose of the restrictions was to ensure that the children will continue to know their father "at all".

Freedom of religion and freedom of expression are public in nature and encompass the freedom of the individual from state compulsion or restraints. The state's role in custody and access decisions does not transform the essentially private character of parent-child interchanges into activity subject to Charter scrutiny. Legitimate questions may arise about the role of the state, and hence the application of the Charter in regulating other aspects of family law. A valid purpose can hardly be served, however, by importing the discourse of freedom of expression and religion into orders made in the resolution of custody and access disputes. Once the best interests test itself has been found to accord with Charter values, the trial judge's order itself is not subject to further constitutional review, as the necessary state infringement of religious rights required to sustain a Charter challenge

is not present. The principles enunciated in Dolphin Delivery apply as custody and access matters are essentially private in nature and there exists no state action to be impugned.

Decisions regarding custody and access must not be based on the parents' faith. The religion of the parties, however, may be relevant as one of the circumstances to be assessed in the determination of the best interests of the child. Where there is conflict over religion, the court is not engaged in adjudicating a "war of religion" and the religious beliefs of the parties themselves are not on trial. Rather, it is the manner in which such beliefs are practised together with the impact and effect they have on the child which must be considered. In all cases where the effects of religious practices are at issue, the best interests of the child must prevail.

Ordinarily, the exposure of a child to different religions or beliefs may be of value to the child. Where religion becomes a source of conflict between the parents or is the very cause of the marriage breakdown, it is generally not in the best interests of the child and may in some circumstances be very detrimental for the child to be drawn into the controversy over religious matters. Where there is conflict over religion, courts must secure the longstanding authority of the custodial parent to make decisions over religious activities. This ensures that stress occasioned by such issues does not become a continuing and ultimately destructive feature in the life of the child after divorce.

Freedom of religion is not an absolute value. Here, powerful competing interests must also be recognized, not the least of which, in addition to the best interests of the children, are the freedoms of expression and religion of the children themselves.

Respondent's religious beliefs and practices and his general rights of access were not threatened. The restrictions were aimed at reducing the area of conflict which had arisen on account of the respondent's behaviour with his children during access and the effects of that behaviour on their best interests. Much of the stress the children were experiencing was related to their resistance to becoming involved in their father's religious practices. The restrictions were to further the best interests of these children by removing the source of conflict, particularly as the ultimate purpose of the restrictions was to preserve the relationship between the respondent and his children. Evidence supported the conclusion that the respondent would not respect the wishes of the children without an order to do so.

Per La Forest and Gonthier JJ.: Agreement was expressed for the reasons of L'Heureux-Dubé J. holding that access be determined on the basis of what is in the best interests of the child and for her resolution of the constitutional issue.

Per Iacobucci and Cory JJ.: The best interests of the child standard does not violate in ss. 2(a), (b), (d) and 15 of the Canadian Charter of Rights and Freedoms substantially for the reasons given by L'Heureux-Dubé and McLachlin JJ. No opinion was expressed on the questions of whether a Charter infringement, if found, would be so trivial as not to warrant Charter protection and of whether or not the Charter applies to judicial orders made in custody or access proceedings.

For many of the reasons advanced by L'Heureux-Dubé J., access to children should be determined on the basis of what is in the best interests of the child. Expert evidence, while sometimes helpful, is not always necessary to establish the best interests of the child; that question can be determined normally from the evidence of parties themselves and the testimony, where appropriate, of the children concerned.

The matters of the children's attending religious services with the respondent and accompanying him on his proselytizing activities were resolved by the respondent's undertaking to respect his children's wishes in this regard. The order forbidding the respondent from discussing his religion was not supported by a proper application of the best interests of the child test. Indeed, curtailment of explanatory or discursive conversations between a parent and his or her child should only be rarely ordered.

Per McLachlin J.: The Divorce Act mandates that, on matters of access, the ultimate test in all cases is the best interest of the child. This is a positive test, encompassing a wide variety of factors, including the desirability of maximizing contact between the child and each parent if compatible with the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access -- what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. The judge must act not on his or her personal views but on the evidence.

The legislative provision for the "best interests of the child" does not limit and therefore does not violate the Charter right to religious and expressive freedom. Religious expression not in the best interests of the child is not protected by the Charter because the guarantee of freedom of religion is not absolute and does not extend to religious activity which harms or interferes with the parallel rights of other people. Conduct not in the best interests of the child, even absent the risk of harm, amounts to an "injury" or intrusion on the rights of others and is clearly not protected by this Charter guarantee. "Injure" in this context is a broad concept. To deprive a child of what a court has found to be in his or her best interests is to "injure", in the sense of not doing what is best for the child. A child's vulnerability heightens the need for protection and any error should be made in favour of the child's best interests and not in favour of the exercise of the alleged parental right. An additional factor which may come into play in the case of older children is the "parallel right" of others to hold and manifest beliefs and opinions of their own.

The ambit of freedom of expression is broader than that of freedom of conscience and religion because even harmful expression may be protected. Some forms of harmful expression, however, are not constitutionally protected: violence or threats of violence or a direct attack on the physical integrity and liberty of another. Criminal conduct is an indication, although not a conclusive one, that expressive conduct is constitutionally unprotected.

A prima facie case for protection under the guarantee of freedom of expression can be made out here. The expression challenged does not take the form of the non-protected categories of expression. The harm done, if any, is of a psychological nature.

A purposive approach to Charter interpretation requires that associated rights -- religious freedom and freedom of expression -- be interpreted in a consistent and coherent manner. The ambit of a particular right or freedom, moreover, cannot be defined in the abstract but rather should be defined in the context of the particular activity in question.

The teaching of religious beliefs and practices to one's children, while it has an expressive aspect, is predominantly religious. In seeking to reconcile the rights of freedom of religion and freedom of

expression in this context, it is the religious aspect which must dominate. Reading the two guarantees together, the limits of the guarantee of freedom of expression should govern in the context of religious instruction of children.

The custodial parent does not have the "right" to determine limits on access. The only question to be considered, where limitation of access is in issue, is what is in the best interests of the child. The custodial parent's obligation to make certain basic decisions as to how the child is educated (which may extend to religious matters) does not automatically mean that religious contacts with the access parent of a different faith are to be excluded. The failure of the child to consent to instruction on the part of the access parent does not necessarily preclude such instruction's being in the child's best interests.

The benefits which might enure to the children from coming to know their father as he was -- as a devoutly religious man devoted to the Jehovah's Witness faith -- were not considered at trial and no reference was made to Parliament's instruction that a child have as much contact with both parents as is compatible with his or her best interests. The question of whether there was any evidence of a risk of harm to the children which might offset the benefit of full access to their father's values, including those related to religion, was not adequately considered. While access may be limited in some circumstances on grounds unrelated to harm, where the issue is whether entirely lawful discussions and activities between the access parent and the child should be curtailed, the judge should enquire into whether the conduct poses a risk of harming the child. The evidence did not establish that harm was being caused to the children.

The order restricting respondent's access was unnecessary given his undertaking and the order enjoining him from preventing blood transfusions was unnecessary from a practical point of view. Parents should not make disparaging comments about the other parent's religion, but the matter might best be left to the parents' good sense.

Per Sopinka J.: While the "best interests of the child" test is the ultimate determination in deciding issues of custody and access, it must be reconciled with the Charter. General language in a statute which, in its breadth, potentially confers the power to override Charter values must be interpreted to respect those values. Here, the best interests test must be interpreted to allow the Charter right to freedom of religious expression to be overridden only if its exercise would occasion consequences that involve more than inconvenience, upset or disruption to the child and incidentally to the custodial parent.

The long-term value to a child of a meaningful relationship with both parents is a policy that is affirmed in the Divorce Act. Each parent, therefore, can engage in those activities which contribute to identify the parent for what he or she really is. The access parent is not expected to act out a part or assume a phony lifestyle during access periods. The policy favouring activities that promote a meaningful relationship is not displaced unless there is a substantial risk of harm to the child.

The best interests of a child are more aptly served by a law which recognizes the right of that child to a meaningful post-divorce relationship with both parents. The "rights" must be distributed between the custodial and the access parent so as to encourage such a relationship. The traditional notion of guardianship giving the custodial parent the absolute right to exercise full control over the child, even when the other parent is exercising his or her right of access, is at odds with this concept.

"Harm", in this context, connotes an adverse effect on the child's upbringing that is more than transitory. The impugned exercise by the access parent must be shown to create a substantial risk that the child's physical, psychological or moral well-being will be adversely affected. Exposure to new experiences and ideas may upset children and cause them considerable discomfort but these experiences are not necessarily in the long-term best interests of the child. Similarly, conflict between parents on many matters including religion is not uncommon, but in itself cannot be assumed to be harmful unless it produces a prolonged acrimonious atmosphere.

Risk of substantial harm must be shown if religious expression is to be restricted in applying the best interests of the child test. The statutory test in s. 16(10) of the Divorce Act does not constitute a limitation on freedom of religious expression. This freedom does not extend to protect conduct which is harmful to others. However, the concept of harm should not be expanded to reach the conclusion that anything which is not in the best interests of the children is injurious within the meaning of s. 2(b) and thus not protected by the Charter.

Financial Considerations and Costs

Per McLachlin J.: A judge, to fix lump sum maintenance, must fix it in a sum certain with reference to the principles applicable to such an award. The goal of conveying the entire interest in the matrimonial home to the wife did not support an award of lump sum maintenance; more was required. There was ample basis here for an order under s. 51 of the Family Relations Act awarding appellant a greater portion of the family assets because respondent, for a considerable time, paid little or nothing for the support of the family. The debts incurred during this period can serve as a consideration supporting reduction of respondent's interest in the family property. The equity in the home was not substantial and respondent was permitted to retain other assets.

The trial judge, in effecting a de facto reapportionment of the interest in the family assets to do justice, as was permitted on the facts and the law, did not expressly allude to the factors for reallocation. This omission should not result in a new trial being ordered because of the length and cost of the current litigation. The result achieved by the trial judge should be endorsed because the evidence was capable of supporting an order for reallocation of the parties' interest in the family assets to the extent required to give the appellant the entire interest in the matrimonial home.

The money owed by the family's jewelry corporation was not, in law, a debt for which respondent was personally liable. Only the corporation was liable. The debt appellant incurred to support herself and the children before she applied for maintenance is similarly unenforceable against respondent as a debt, although it could be taken into consideration in an order for reduction of his interest in the family assets.

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. The facts that an application has little merit and that part of the cost of the litigation may have been paid for by others do not justify awarding solicitor-client costs.

No order for costs should have been made against respondent's barrister. Costs are awarded as compensation for the successful party, not to punish a lawyer. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which he or she was involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. The courts have jurisdiction to make such an award, often under statute and as part of their inherent jurisdiction

to control abuse of process and contempt of court. The proceedings here, despite their length and acrimonious progress, did not fall within these characterizations. Courts, moreover, must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her profession.

Since the Society did not appear as a party, the costs awarded against it must be taken to be the equivalent of an award for the tort of maintenance. A person must intervene "officiously or improperly" to be liable for the tort of maintenance. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and improperly stirs up litigation and strife. The society's support was "out of charity and religious sympathy" and so did not constitute maintenance. It did not put forward respondent in an attempt to escape liability for costs. Its interest in the constitutional issue was insufficient to distinguish it from interveners who appear on constitutional cases and who have never been liable for costs.

Per La Forest and Gonthier JJ.: The reasons of McLachlin J. were agreed with on the property and monetary issues and on the principles governing costs.

Per Iacobucci and Cory JJ.: The reasons of McLachlin J. were agreed with on the property, monetary and costs issues.

Per L'Heureux-Dubé J. (dissenting): The reasons of the trial judge on the issues of maintenance, division of property and costs were agreed with.

Cases Cited

By L'Heureux-Dubé J.

Distinguished: Hockey v. Hockey (1989), 21 R.F.L. (3d) 105; referred to: Anson v. Anson (1987), 10 B.C.L.R. (2d) 357; Andrews v. Andrews, B.C.S.C., June 9, 1983, unreported; Brown v. Brown (1983), 39 R.F.L. (2d) 396; DeLaurier v. Jackson, [1934] S.C.R. 149; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; In re Agar-Ellis, [1883] Ch. D. 317; R. v. De Manneville (1804), 5 East. 221, 102 E.R. 1054; Re Orr, [1933] O.R. 212; Talsky v. Talsky, [1976] 2 S.C.R 292; Re Moores and Feldstein, [1973] 3 O.R. 921; Kruger v. Kruger (1979), 25 O.R. (2d) 673; Baker v. Baker (1979), 8 R.F.L. (2d) 236; C.(G). v. V.-F.(T.), [1987] 2 S.C.R. 244; Dussault v. Ladouceur (1987), 14 R.F.L. (3d) 185; Gunn v. Gunn (1975), 24 R.F.L. 182; Benoit v. Benoit (1972), 6 R.F.L. 180 (Ont. Prov. Ct.), rev'd (1972), 10 R.F.L. 282 (Ont. C.A.); Charlton v. Charlton (1980), 15 R.F.L. (2d) 220; Hewer v. Bryant, [1970] 1 Q.B. 357; Clarke v. Clarke (1987), 7 R.F.L. (3d) 176; McCahill v. Robertson (1974), 17 R.F.L. 23; Fougere v. Fougere (1987), 77 N.B.R. (2d) 381; Dipper v. Dipper, [1980] 2 All E.R. 722; Keyes v. Gordon (1985), 45 R.F.L. (2d) 177; Droit de la famille -- 316, [1986] R.D.F. 651; Moge v. Moge, [1992] 3 S.C.R. 813; Pierce v. Pierce, [1977] 5 W.W.R. 572; Gubody v. Gubody, [1955] O.W.N. 548; Sudeyko v. Sudeyko (1974), 18 R.F.L. 273; Frame v. Smith, [1987] 2 S.C.R. 99; Tocco v. Tocco (1977), 4 R.F.L. (2d) 174; Racine v. Woods, [1983] 2 S.C.R. 173; In re McGrath (Infants), [1893] 1 Ch. 143; King v. Low, [1985] 1 S.C.R. 87; Beson v. Director of Child Welfare (Nfld.), [1982] 2 S.C.R. 716; M. (B.P.) v. M. (B.L.D.E.), (1992), 97 D.L.R. (4th) 437; R. v. Swain, [1991] 1 S.C.R. 933; R. v. Beare, [1988] 2 S.C.R. 387; Baron v. Canada, [1993] 1 S.C.R. 416; R. v. Morales, [1992] 3 S.C.R. 711; R. v. Morgentaler, [1988] 1

S.C.R. 30; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123; R. v. Keegstra, [1990] 3 S.C.R. 697; Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892; Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139; Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69; R. v. Butler, [1992] 1 S.C.R. 452; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; R. v. LeBeau (1988), 41 C.C.C. (3d) 163; R. v. Khan, [1990] 2 S.C.R. 531; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Tremblay v. Daigle, [1989] 2 S.C.R. 530; B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554; Re Bennett Infants, [1952] O.W.N. 621; Delvenne v. Nabbie (1977), 4 R.F.L. (2d) 21; Irmert v. Irmert (1984), 64 A.R. 342; Harvey v. Lapointe (1988), 13 R.F.L. (3d) 134; McQuillan v. McQuillan (1975), 21 R.F.L. 324; Struncova v. Guay (1984), 39 R.F.L. (2d) 298; Sullivan v. Fox (1984), 38 R.F.L. (2d) 293; Droit de la famille -- 955, [1991] R.J.Q. 599; Droit de la famille -- 353, [1987] R.J.Q. 545; Zummo v. Zummo, 574 A.2d 1130 (1990); Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; Adams v. McLeod, [1978] 2 S.C.R. 621; Novic v. Novic, [1983] 1 S.C.R. 696.

By McLachlin J.

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By Sopinka J.

Referred to: Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

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S.
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Act to amend the Law relating to the Custody of Infants (Talfourd's Act) (U.K.),
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Canadian Charter of Rights and Freedoms, ss. 1, 2(a), (b),
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Civil Code of Quebec, arts. 543, 569, 570, 647.
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Art. 3(1).
Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), ss. 15(2),

16(1), (2), (4), (5), (6), (8), (9), (10), 17(5).
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APPEAL from a judgment of the British Columbia Court of Appeal (1990), 50 B.C.L.R. (2d) 1, 75 D.L.R. (4th) 46, allowing an appeal in part from a judgment of Proudfoot J. (1989), 24 R.F.L. (3d) 193. Appeal allowed in part, L'Heureux-Dubé J. dissenting in the result. Sections 16(8) and 17(5) of the Divorce Act did not violate ss. 2(a), (b), (d) or 15(1) of the Canadian Charter of Rights and Freedoms.

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W. Glen How, Q.C., and Sarah E. Mott-Trille, for the respondent James K. C. Young.
Gordon Turriff, for the respondent W. Glen How.
John M. Burns and Linda How, for the respondent Watch Tower Bible and Tract Society of Canada.
Brian Evernden, for the intervener the Attorney General of Canada.
Michel Y. Hélie, for the intervener the Attorney General for Ontario.
Monique Rousseau and Isabelle Harnois, for the intervener the Attorney General of Quebec.
Shawn Greenberg, for the intervener the Attorney General of Manitoba.
Written submission only for the intervener the Attorney General of British Columbia.
Gerald D. Chipeur and Karnick Doukmetzian, for the intervener the Seventh-day Adventist Church in Canada.

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Solicitors for the respondent W. Glen How: Douglas, Symes and Brissenden, Vancouver.
Solicitors for the respondent Watch Tower Bible and Tract Society of Canada: W. Glen How & Associates, Halton Hills (Georgetown), Ontario.
Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.
Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.
Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.
Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.
Solicitors for the intervener the Law Society of British Columbia: Blake, Cassels & Graydon, Vancouver.
Solicitors for the intervener the Seventh-day Adventist Church in Canada: Milner, Fenerty, Edmonton.

The reasons of La Forest and Gonthier JJ. were delivered by

1 **LA FOREST J.**:-- I have had the advantage of reading the reasons of my colleagues. I am in agreement with the reasons of Justice L'Heureux-Dubé that the issue of access should be determined on the basis of what is in the best interest of the child. I also agree with her on the constitutional issue.

2 On the property and monetary issues, I am in agreement with the reasons of Justice McLachlin. I also agree with her on the principles that should govern costs and accordingly with the order of the Court of Appeal respecting the costs at trial. However, since the appellant was largely successful in the final result, I would allow her costs on this appeal and the Court of Appeal.

3 Accordingly, I would allow the appeal and restore the order of the trial judge on all matters except the monetary issues, which I would dispose of in the manner proposed by McLachlin J. I would award the appellant her costs at trial as set forth by the Court of Appeal, as well as costs on a party and party basis in this Court and in the Court of Appeal.

The following are the reasons delivered by

4 L'HEUREUX-DUBÉ J. (dissenting in result):-- I have had the advantage of reading the opinion of my colleague, Justice McLachlin. With great deference, I disagree both with her reasons and the result she has reached. Since I do not characterize the issue quite as my colleague does, I will pursue my own analysis.

5 The main issue in this case, in my view, concerns access by a non-custodial parent to his children whose custody was granted to the other parent. More precisely, this Court must determine whether curtailment of access is warranted in the circumstances of this case. The focus of the inquiry is the standard applicable to such a determination. According to the Court of Appeal, the test is one of harm to the children. I disagree. In my view, the only applicable test is the best interests of the children, assessed from a child-centred perspective, a test which is mandated by the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) (the "Act"), as well as provincial legislation and which is universally applied and constitutionally sound. While the respondent, the father in this case, raises the issues of freedom of religion and expression and the infringement of his guarantees under s. 2(a) and (b) of the Canadian Charter of Rights and Freedoms (the "Charter") due to the trial judge's order restricting access to his children, these questions simply do not arise in the circumstances of this case. If they do, I agree with my colleague that there is no infringement of the Charter.

6 On the related issues of maintenance, division of property and costs, I agree with the trial judge for the reasons that she expressed at length, given her privileged vantage point and her findings of fact. Accordingly, I will deal only with the main issue: access.

Facts and Judgments

7 Since the facts leading to the dispute between the parties have been set out by my colleague, I will only point out those most relevant to my subsequent discussion.

8 The parties, who had two children when they first separated in February, 1987, resumed cohabitation and finally separated in August, 1987, shortly after the birth of their third child. It appears from the evidence that the breakdown of their marriage was due, to a great extent, to religious differences between the parties. The respondent became involved, unbeknownst to the appellant, in the

as suggested above. I agree with Southin J.A., at p. 39, that "[t]he court cannot make a spouse jointly liable to a creditor for a debt of the other spouse, no matter for what purpose it was incurred, or, in the absence of some contractual foundation, make one spouse liable to indemnify the other, either in whole or in part, for a liability of the latter." Accordingly, the paragraphs of the order making Mr. Young liable for one-half of these debts must be struck out.

C. Costs

1. Costs Against the Respondent

249 The trial judge ordered solicitor-client costs against the respondent. This award was made on the basis that the custody claim had "little merit", that the respondent attempted to mislead the court, that the respondent was recalcitrant on matters of custody and maintenance and, finally, on the basis that unnecessary proceedings had resulted. The trial judge also referred to the fact that someone else was promoting and paying for the legal action and that repetitive and irrelevant evidence was tendered.

250 The Court of Appeal, per Cumming J.A., upheld the imposition of solicitor-client costs for four days of the trial and for four days of the interlocutory proceedings concerned with financial issues, on the basis of the husband's non-disclosure of financial information. Otherwise, costs against the respondent were reduced to party-and-party costs.

251 The Court of Appeal's order was based on the following principles, with which I agree. Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs; nor is the fact that part of the cost of the litigation may have been paid for by others. The Court of Appeal meticulously considered all the proceedings in the light of these principles to arrive at its conclusion that only partial solicitor-client costs were justified.

252 Finding no error in the reasoning or conclusion of the Court of Appeal on this question, I conclude that its order for costs should remain, save to the extent different conclusions on the merits in this Court require that an adjustment be made. As I have made clear, the only respect in which I would vary the order of the Court of Appeal is that instead of ordering lump sum maintenance and a moratorium on the sale of the matrimonial home, I would restore the trial judge's order that the entire interest in the home be conferred on the wife. In my view, this difference does not warrant altering the award of costs against the respondent made below.

2. Costs Against the Respondent's Counsel

253 The trial judge ordered solicitor-client costs against counsel for the husband, Mr. How. For the reasons recited above in connection with costs against the respondent, she concluded that the proceedings had been unnecessarily lengthened. She also referred, at p. 216, to the fact that "[c]ounsel for the respondent had a forum and a cause to pursue. Unfortunately, what was in the best interests of the children, their welfare, was totally lost by the respondent and his counsel in these protracted proceedings. . . . The court was subjected to unwarranted abuse, criticism and insult." She made no finding, however, that Mr. How had been in contempt of court.

254 The Court of Appeal held that no order for costs should have been made against Mr. How. There is no need to repeat that entirely satisfactory analysis. The basic principle on which costs are

Case Name:

Strategy Summit Ltd. v. Remington Development Corp.

Between
Strategy Summit Ltd., Plaintiff, and
Remington Development Corporation, Defendant

[2012] A.J. No. 84

2012 ABQB 61

56 Alta. L.R. (5th) 102

2012 CarswellAlta 120

[2012] 4 W.W.R. 832

Docket: 0601 01094

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

G.A. Verville J.

Heard: January 19, 2012.
Judgment: January 24, 2012.
Released: January 26, 2012.

(37 paras.)

Counsel:

Graham McLennan, Q.C., for the Plaintiff, Defendant by Counterclaim.

Grant Vogeli, for the Defendant, Plaintiff by Counterclaim.

Memorandum of Decision

G.A. VERVILLE J.:--

Introduction

1 In May 2005, Strategy Summit Ltd. ("Strategy") offered to purchase from Remington Development Corporation ("Remington") a portion of unsubdivided land. Strategy paid a $25,000 deposit upon acceptance of the offer. The offer was contingent upon Remington obtaining subdivision approval and a phase III environmental report. Remington failed to obtain either within the time contemplated in the offer and refused in December 2005 to grant an extension.

2 Strategy registered a caveat on the title to the unsubdivided lands and claimed specific performance or in the alternative damages. Remington asserted that the caveat prevented it from developing, selling, financing or otherwise dealing with the lands and claimed resulting damages by way of counterclaim.

3 Following the trial of this action I issued Reasons for Judgment (***Strategy Summit Ltd v. Remington Development Corporation***, 2011 ABQB 549), dismissing both Strategy's claim against Remington for specific performance or damages and Remington's counterclaim for damages.

4 The parties submitted written arguments with respect to costs and subsequently made oral submissions. Randy Remington, the president of Remington, and Brad Ferguson, the president of Strategy, filed affidavits in support of the costs application. Both provided a draft Schedule C Bill of Costs on Column 5 which were relatively similar in amount.

5 Each side argues that it is entitled to solicitor client costs, or in the alternative substantial party and party costs, because: it was substantially successful in the lawsuit (or at least more successful than the other party), high costs were reasonably incurred, and the other side unsuccessfully alleged bad faith.

Positions of the Parties

6 Remington submits that solicitor client costs, or in the alternative a costs award providing 40% to 50% indemnity or more in the form of a lump sum, are warranted for the following reasons:

1. Strategy maintained its allegation that Remington acted in bad faith until the end of trial;
2. Remington was justified in retaining its usual Calgary counsel although the trial was heard in Edmonton;
3. Strategy attempted to conceal its efforts to flip the lands in question and other information in the possession of its real estate broker, Avison Young;
4. Strategy's failure to produce the listing agreement and other Avison Young documents delayed the litigation;
5. Strategy had to obtain leave to withdraw an admission made six years before trial;
6. Strategy put up the second deposit of $475,000 six years after the fact;
7. Strategy refused to admit its claim for specific performance had no merit because it was trying to sell the land when it listed it for sale with Avison Young;

8. The caveat filed by Strategy prevented Remington from developing or selling the lands for six years;
9. Strategy rejected Remington's offer, made the day before trial, to settle the claim and counterclaim on the basis of a discontinuance without costs to any party; at that time, Remington's Schedule C costs were well over $150,000;
10. Remington took steps to shorten the proceedings;
11. Remington incurred total legal fees of $1,145,000 defending the action, and total expert and other witness fees of $116,725;
12. The property in question is valued at $10,000,000;
13. The action was complex;
14. Shortly before the originally scheduled trial date, Strategy changed lawyers, resulting in delay, duplication of trial preparation work, and additional legal costs.

7 Strategy responds to Remington's arguments and submits that if any party is entitled to solicitor client costs it is Strategy, its fall back position being that each party should bear their own costs for the reasons set out below:

1. The contractual dispute between Strategy and Remington required Strategy to present its case on the basis that Remington did not act in good faith;
2. Strategy's alternative claim for damages was for $2.5 million; Remington filed a Statement of Defence and Counterclaim claiming damages of $25 million, thereby raising the stakes considerably;
3. Strategy attempted to have reasonable discussions with Remington in order to resolve the legitimate dispute between the parties, but Remington refused;
4. Remington maintained throughout the proceedings an allegation of malice on the part of Strategy, and slander of title and damages for wrongfully filing a caveat under s 144 of the *Land Titles Act*;
5. Remington hired Calgary counsel, when it knew the trial would take place in Edmonton, where the land was located;
6. Strategy did not have a copy of the Avison Young Listing Agreement, and had forgotten about it until it was discovered on the Avison Young file; when it was found, Strategy followed legal advice; Avison Young most certainly communicated the essence of whatever it was doing on behalf of Strategy to Remington; Remington chose not to call a principal of Avison Young as a witness at trial;
7. There was significant evidence at trial that Strategy intended to develop this unique property for a specific purpose, whereas Remington persisted in an allegation that Strategy had no real interest in, or even financial capacity, to purchase the property when it knew full well the principals of Strategy are well known and successful businessmen;
8. Remington agreed to an adjournment of the trial from January to May of 2011; neither party was ready to proceed in January 2011 as Remington had not provided rebuttal expert reports;

9. The Court found that Strategy did not cause any substantial financial harm to Remington;
10. Remington is no stranger to litigation whereas Strategy has been involved only in this dispute with Remington, and therefore Remington's reputation has not been adversely affected by the litigation;
11. Remington wanted to win the litigation at any price, and hopes to financially cripple Strategy with a costs award;
12. The Court found that Strategy had a reasonable belief that a caveat may be reasonably filed, that its interpretation of the wording of the offer was not unreasonable and that malice on its part had not been established
13. Strategy took steps to shorten the proceedings and made a reasonable formal offer demonstrating willingness to compromise; Strategy's withdrawal of an admission had no impact of any significance on the trial;
14. Remington raised the issue of the second deposit for the first time at the start of trial; this point was not pled, nor was it the subject of any examination for discovery; at law there was no continuing obligation for Strategy to fulfil its further contractual obligations until a court ordered specific performance;
15. Given that Remington's counterclaim was for more than ten times Strategy's claim, costs should be awarded in favour of Strategy for successfully defending the counterclaim; alternatively, the parties should bear their own costs.
16. Strategy has incurred legal fees and disbursements in advancing its claim and defending the counterclaim in the approximate amount of $665,000.

Factors

8 Under Rule 10.33, when making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;
(b) the amount claimed and the amount recovered;
(c) the importance of the issues;
(d) the complexity of the action;
(e) the apportionment of liability;
(f) the conduct of a party that tended to shorten the action;
(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

9 Further, in deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;
(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;
(f) a contravention of or non-compliance with these rules or an order;
(g) whether a party has engaged in misconduct.

10 The parties cite a number of authorities which provide guidance as to when solicitor and client costs should be awarded, what matters should be considered when there is a counterclaim, and when Schedule C Costs should be increased, including: ***Mahe v. Boulianne***, 2010 ABCA 74 at para 6, ***Phinny v. MacAulay***, 2009 CanLII 13614 (ON SC) at paras 19 and 21, ***Evans v. The Sports Corporation***, 2011 ABQB 616, ***Cope v. Morton***, 2004 BCSC 1726, paras 9-11 and ***Jawanda v. Jawanda***, 2005 BCSC 1721 at paras 22 and 23; ***Conway v. Zinkhofer***, 2007 ABQB 2, ***Hamilton v. Open Window Bakery Ltd.***, 2004 SCC 9, [2004] 1 SCR 303, ***Buchanan v. Lamoureux***, 2011 ABQB 256, ***Trizec Equities Ltd v. Ellis-Don Management Services Ltd.***, 1999 ABQB 801, ***LSI Logic Corp of Canada Inc v. Logani***, 2001 ABQB 968, ***Calgary (City) v. Alberta (Minister of Municipal Affairs)***, 2008 ABQB 433, M Orkin, *The Law of Costs*, 2d ed (Aurora, Ont. : Canada Law Book, 1987-), ***Dwyer v. Fox*** (1996), 181 AR 223 (CA), ***Johnston v. Law Society of PEI*** [1987] P.E.I.J. No. 89, (1987), 206 APR 52 (PEI CA), ***Waterous Investments Inc v. Liberton Holdings Ltd*** (1996), 183 AR 229 (QB), ***Jackson v. Trimac Industries Ltd*** (1993), 138 AR 161, 8 Alta LR (3d) 403 at paras 28-37 (QB), costs orders affirmed 155 AR 42, 20 Alta LR (3d) 117 (CA), and ***Medway Oil & Storage Company Ltd v. Continental Contractors Ltd***, [1929] AC 88. I have also reviewed ***College of Physicians and Surgeons of the Province of Alberta v. JH***, 2009 ABQB 48.

11 I should mention that none of these cases is on all fours with the facts in this case and some only provide guidance on a particular point. Further, some are more relevant than others regarding the issue of costs. Finally, I am mindful that this Court has considerable discretion when awarding costs.

Solicitor-Client/Solicitor and his own Client Costs

12 Graesser J in ***College of Physicians and Surgeons of the Province of Alberta*** at paras 4-23, 468 AR 101 summarized some of the factors which militate in favour of a court exercising its discretion to award solicitor-client costs due to party misconduct:

- the conduct of a party has been reprehensible, scandalous or outrageous
- the conduct occurred during the course of the litigation
- solicitor and client costs might suffice to satisfy the objectives of deterrence and punishment that would otherwise be served by a punitive damage award
- the case is rare and exceptional or unusual
- allegations of morally reprehensible conduct by such party are held to be groundless by the trier of fact

- there was no reasonable basis on which to commence, or continue, litigation.

13 In ***Jackson v. Trimac***, Hutchinson J set out the rare and exceptional circumstances which might justify solicitor and his own client costs:

- circumstances constituting blameworthiness in the conduct of the litigation by that party;
- cases in which justice can only be done by a complete indemnification for costs;
- where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
- an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion;
- where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs;
- defendants found to be acting fraudulently and in breach of trust;
- the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial;
- fraudulent conduct;
- an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges.

See also ***Evans*** (*supra*).

Analysis

14 Counsel on both sides of this case conducted themselves in an exemplary fashion throughout the course of the trial. They were at all times cooperative. While at times they were tough and probing in cross examination they were all times civil and professional. Clearly there was a level of animosity which existed between the principals of both parties and a level of distrust. With respect to matters which would elevate a cost award to that of solicitor-client or beyond, I have considered below the principles summarized in ***Jackson*** and ***College of Physicians*** in light of each party's assertions (paras 6 & 7 *supra*) that the other acted in bad faith.

Against Strategy

15 With respect to Remington's assertions against Strategy, I note that Strategy did not expressly allege bad faith against Remington in its Amended Statement of Claim. It asserted that Remington breached its covenant of good faith. However this allegation was in the context of the wording of the offer the parties entered into, which provided in part:

> 13.2 ... In the event the Purchaser requests an extension or a variance to any of the time periods set out in this Agreement, the Vendor agrees to in good faith consider the request for such extension or variation and within two (2) days of receiving such request advise the Purchaser of whether the Vendor is in agreement with such a request ...
>
> (emphasis added)

16 Allegations that Remington was not acting in good faith were required by Strategy to advance its claim that it was entitled to an extension, and this was the context within which the lawsuit was fought. This was a matter of contractual interpretation against the backdrop of legal principles, and then application of the provision - as interpreted by the Court - to the facts of the case. Paragraphs 154 to 202 of the trial judgment contain a fulsome discussion of this issue with the conclusion being, after a consideration of the case law and evidence, that Strategy did not establish that Remington failed to consider in good faith its request for an extension.

17 In my view Remington's submission on this point reduced to its simplest is that Strategy should never have alleged that Remington failed to consider in good faith its request for an extension as once it did so it exposed itself to solicitor client costs. I disagree.

18 Remington's complaint with respect to Strategy's slow production of the listing agreement with Avison Young is that Strategy persisted in maintaining its caveat and tying up the land for five years when it knew its chance of obtaining specific performance was minimal. It says that it was only after obtaining the listing agreement that it filed its counterclaim. After oral argument, counsel for Strategy provided a letter (copied to counsel for Remington) which clarified the time frame as to when the counter claim was in fact filed. The letter advised that the Avison Young listing agreement was provided to Remington no later than February 1, 2008 whereas the amendment by Remington to add a counterclaim was done on December 9, 2008 the same date the Statement of Claim was amended.

19 In my view Strategy's slow production of the listing agreement did not have a significant impact on the litigation. Remington was aware that Strategy was involved in listing the property. It had a close business relationship with Avison Young. Further, as noted above it obtained a copy of the listing agreement in early 2008.

20 Remington further asserts that it suffered lost opportunity costs as well as direct out of pocket costs of around $2,000,000 because of the subdivision. In my view, Remington was simply rearguing in the costs application, a portion of the case it lost at trial. There is another forum for this type of submission. As to the $2,000,000 incurred because of the subdivision, this was as a result of the contract, not the lawsuit, and it was Remington that decided it would not grant the extension requested by Strategy.

21 The Court of Appeal in ***Strategy Summit Ltd v. Remington Development Corp***, 2009 ABCA 30 overturned a decision by a chambers judge which affirmed an earlier master's decision granting Remington summary Judgment and dismissing Strategy's claim for specific performance Watson J.A. for the court stated:

> 6 In our view, there were a considerable number of matters of fact that needed to be resolved by trial in this dispute. The finding by the chambers judge that the appellant only intended the land for a commercial profit on a quick re-sale was disputed and it could not be made without a trial (or perhaps a summary trial): see ***Diegel v. Diegel***, [2008] A.J. No. 1261 (QL), 2008 ABCA 389 at paras. 18 to 19. It was in error for him to make a finding on such conflicts in the evidence and examinations. The chambers judge's error in this respect was overriding because it influenced him to believe that the situation before him was one where the appellant's position to justify specific performance was "exceedingly difficult" under ***Walton***, [2007] A.J. No. 1260, supra at para. 5.
>
> 7 The chambers judge proceeded on the premise that the onus was upon the appellant to show that the land was "unique" within the meaning of the case law, and that the appellant had fallen short of proving this characteristic of the property. The chambers judge did not refer to Mr. Ferguson's evidence as to why the alleged alternative locations did not meet the project needs. Rather, he said that the appellant had to prove they were unavailable [at para. 12], even though the respondent's "best foot forward" was that he did not know if they were available or not at the time. The conclusion of uniqueness also required a trial. The chambers judge's conclusion is also, with respect, a victim of palpable and overriding error - possibly being a product of the stringent test that he imposed. We cannot agree that the evidence as set out before him failed to establish a workable argument that the property was unique both from its own position and against alternatives. There was a body of evidence which, arguably, went beyond showing that the appellant was pursuing a "business opportunity" (***Walton***, supra at para. 8) or wanted to acquire the property "strictly for resale or development" or "investment purposes" (***Walton***, supra at para. 10) compensable by damages. The present case differs from ***Walton***. The appellant offered evidence that the specific project had a variety of characteristics making it unique and to the benefit of large sectors of the community, as and where planned.
>
> 8 In our respectful conclusion, this was not a situation where there was "no genuine issue" or "no real chance of success" or a "non-existence of material issues" to justify summary judgment dismissing the appellant's entire lawsuit. The appeal is accordingly allowed, the summary judgment is set aside and the case is returned to the Court of Queen's Bench.

22 Further with respect to the caveat filed by Strategy, I made the following finding:

> [208] I am satisfied that Strategy had a reasonable belief at the material time that it had an interest in the property, and that a caveat may reasonably be filed. Although I have found that Remington did not breach its obligation under the Offer to consider in good faith Strategy's request for a further extension, Strategy's interpretation of the wording of the Offer in the context, while not correct, was not unreasonable. Further, although the Arena Concept was somewhat up in the air in December 2005, I find that Strategy had not given up on the project. In the circumstances, I find that Strategy reasonably believed that it had a sufficient inter-

> est in land at the time it filed the caveat. Further, in my view, malice on the part of Strategy has not been established.

23 In ***Evans***, Graesser J. noted:

> 67 Solicitor and client costs are also routinely sought after trial, often without any proper basis or foundation. I am reluctant to see the costs process become another trial after the trial, revisiting every strategic decision, paragraph in pleadings, application, position, question on direct and question on cross-examination, looking for misconduct. Such a process would seem to run afoul of the foundational rule 1.2 relating to proportionality, economy and efficiency, although this process does appear to be invited by Rule 29.33.

24 In my view the types of arguments raised by Remington are precisely what Graesser J. was referring to in ***Evans***, namely revisiting each step Strategy took in the litigation..

25 I find taking into consideration the nature of this lawsuit, that Strategy's conduct does not fall within the rare and exceptional case where solicitor and client costs are warranted. I therefore dismiss Remington's application for solicitor-client costs.

Against Remington

26 Although Remington may have taken a hard nosed approach in this action, I am not satisfied that it did anything which could be categorized as circumstances constituting blameworthiness in the conduct of the litigation. Further, I am not satisfied that there were any other circumstances where there was conduct by Remington which would warrant solicitor and client costs.

27 In my view, the trial itself proceeded in an expeditious fashion and was shortened by perhaps a few days when Remington decided it was unnecessary to call two witnesses it initially indicated it would call. Strategy unsuccessfully submitted in argument that an adverse inference should be drawn against Remington for failing to call these witnesses (Paras 140-146, Reasons for Judgment).

28 In the circumstances of this case, I find that Strategy is not entitled to solicitor-client costs.

Increased Schedule C Costs

29 In ***Trizec Equities***, Mason J. considered factors relevant to an increase in costs, including the following:

- the time for preparing and organizing documents for the purposes of production;
- the preparation time required in relation to examinations for discovery;
- the utilization of technology and computers to prepare immediate court records;
- the inordinate efforts involved in collating testimony and thousands of pages of exhibit documents in order to prepare written submissions following trial;
- the fact that these trials consume counsels' time for many months to the exclusion of any other work

- given the magnitude of the damages sought some defendants without the benefit of adequate insurance coverage had little choice but to defend against the claims, a task which, by itself, had the potential to bankrupt both parties.

30 Strategy in its Amended Statement of Claim sought *inter alia* an order declaring that its caveat was validly registered against the lands, specific performance or in the alternative judgment in an amount not less than $2,500,000. Remington in its Amended Amended Statement of Defence and Counterclaim sought damages in excess of $25,000,000, asserting that Strategy committed slander of title by filing the caveat. Randy Remington testified at the trial that Remington made a profit of $22,000,000 when it developed adjacent lands referred to as the Eastern Block and sold the development to a pension fund (Para. 67). This testimony was supported by that of a chartered account and chartered business valuator who gave expert testimony on behalf of Remington.

31 The trial, absent oral argument, took 25 half days. Three ordinary witnesses were called on behalf of Strategy and five on behalf of Remington. In addition each party called three expert witnesses.

32 This was an "electronic" trial in that almost five hundred documents some of which consisted of numerous pages were listed on an XL spread sheet. A significant number of these documents were referred to during the course of the trial. The spread sheet gave each document a number, identified the type of document, the title of the document, the author and the recipient. Simply clicking on the document number on the spread sheet produced the document in PDF on a number of screens. A program was available for the convenience of the Court which permitted notes or highlighting to be made on these documents while in electronic PDF form solely on my screen as well as for them to be copied into WordPerfect. This elaborate undertaking was undertaken by counsel for Strategy with the full cooperation of counsel for Remington.

33 In my view the trial proceeded in an expeditious manner. Prior steps taken in the litigation including proceeding to the Court of Appeal were not unreasonable. The stakes were high.

34 There was evidence of some effort on the part of Strategy to settle prior to trial, and what I would characterize as a half-hearted offer by Remington at the 11th hour to allow both parties to walk away from the litigation.

35 In the end result both parties were left in the same position they were in prior to engaging in the litigation, except that they had both expended significant amounts in legal and related fees. Strategy's claim for specific performance or alternatively damages was dismissed as was Remington's much larger counterclaim for damages. In the end both parties lost. I agree with the submission of counsel for Strategy that the counterclaim which was roughly ten times the amount of the Strategy damages claim considerably increased the stakes (***Phinny*** *supra*). Although dismissed, it was a serious claim.

36 While this was a case where after taking into consideration some of the factors referred to in ***Trizec,*** a winner might have been entitled to a costs award providing 40% to 50% indemnity or more in the form of a lump sum, it is my view that there was no winner. In the circumstances of this case, I find that each party should bear their own costs.

Summary of Conclusions

37 I find that:

1. The applications of the parties for solicitor and client costs are dismissed as are the applications for increased party and party costs.
2. Each party should bear its own costs.

G.A. VERVILLE J.

cp/e/qlcct/qlvxw/qlhcs/qlhcs/qlana

Alberta Court of Queen's Bench
Max Sonnenberg Inc. v. Stewart, Smith (Canada) Ltd.
Date: 1986-11-21

A. T. Murray, Q.C., and J. McGinnis, for plaintiff.

J. Hustwick, and J. A. Moffat, for Tomenson Saunders Whitehead Limited and Vern Chapman.

D. I. Brenner, for insurers.

J. P. Brumlik, Q.C., and P. J. McAllister, for Pacific Adjusters Alberta Limited and Steve W. Barrett.

C. A. Walls, for R. L. Rasmussen.

L. W. Olesen, and J. J. Kueber, for Stewart, Smith (Canada) Limited, Robert d'Arcy and Stewart Wrightson Limited.

(Edmonton No. 8203-25412)

November 21, 1986.

[1] VEIT J.:—

1. INTEREST

[2] On any analysis of the plaintiff's recovery, interest should be allowed.

[3] Interest is payable in equity. On a breach of fiduciary duty the person whose interests have been infringed has a right to the payment of interest. Interest should be paid on converted funds. In negligence, the measure of damages is what the plaintiff would have had, had the defendant acted properly.

[4] Based on the evidence, the rate of interest should be prime plus 2 per cent, compounded semi-annually. From the calculations of D. Aarsteinsen, this amount is $497,321.76 to 31st March 1986 and a per diem of $438.32 from that date onward.

[5] Because of my decision that the plaintiff should also be compensated for loss of economic opportunity, there is no need to make American calculations.

[6] It is argued that there was a late claim for interest; the jurisprudence indicates that interest may be awarded even where it is not specifically claimed at all. It is argued that there is no evidence of investment loss; the jurisprudence indicates that interest

may be awarded on a basis that approaches judicial notice, i.e., if a party (at least a party who is in business and has the capacity to invest) had had the money, investments would have been available to provide a reasonable rate of return. It was argued that the plaintiff should not be able to recover more than it paid out to its bankers in interest; that ignores the loss of economic opportunity to the plaintiff. It is argued that proper legal arguments were advanced to support the defence that the insurance moneys were not unjustly withheld; the evidence does not support the legal arguments.

2. PUNITIVE DAMAGES

[7] The plaintiff's claim for punitive damages is not allowed against the unsuccessful insurance broker defendants but is allowed against the defendant Rasmussen.

[8] As against the defendant Rasmussen, there is no excuse tendered for the false representation made to the insurer; as phrased by the plaintiff, this decision should at least affirm the maxim that tort should not pay.

[9] Insofar as the defendants Stewart, Smith (Canada) Limited and Robert d'Arcy are concerned, the plaintiff characterizes their conduct as a high-handed, arrogant, reckless gamble that funds would be made available to make their scoop of the funds good. I agree with that description. However, their conduct, while reckless, was not malicious or vindictive or criminal. Indeed, a comparison of their conduct with that of Rasmussen illustrates the difference in quality of act required before punitive damages can be imposed.

3. COSTS

a) *Power to award other than party-party costs*
Appropriate Scale-Appropriate Column

[10] The plaintiff is entitled to costs on an indemnity basis.

[11] In Alberta, the rules allow a trial judge great discretion in awarding costs: Rule 601(1). Alberta jurisprudence, of which *McCarthy v. Calgary R.C. Sep. Sch. Dist. No. 1*

Bd. of Trustees, [1980] 5 W.W.R. 524, 17 C.P.C. 115, 30 A.R. 208 (Q.B. — Sinclair C.J.), is an example, recognizes three scales of costs: party-party, solicitor-client, solicitor and his own client.

[12] The first issue is the proper definition of these various scales, and particularly, the last scale. In Alberta, at least, the jurisprudence is not uniform: *Vegreville & Dist. Savings & Credit Union Ltd. v. Rurka* (1978), 7 Alta. L.R. (2d) 390, 15 A.R. 347 (Dist. Ct. — Stevenson D.C.J.); *Kalke v. 213156 Hldgs. Ltd.* (1983), 47 A.R. 215 (Q.B. — McDonald J.); *Den Boon v. Wall,* 19 Alta. L.R. (2d) 240, [1982] I.L.R. 1040 (Q.B. — Dixon J.); *Ferris v. Rusnak* (1984), 54 A.R. 319 (Q.B. — McDonald J.).

[13] Research indicates that ambiguity with respect to the meaning and potential application of the "solicitor and his own client" scale to general litigation is not limited to Alberta. Lerner J., in *Re Seitz* (1974), 6 O.R. (2d) 460, 53 D.L.R. (3d) 223 (H.C.), at p. 465, interpreted the "solicitor and his own client" award as allowing those costs as would "provide complete indemnity to the client as to the costs essential to, and arising within, the four corners of litigation".

[14] By identifying a scale of costs as "solicitor and his own client", courts have invested that scale with application in litigation other than between a solicitor and his own client. The effect of the award of the scale as between general parties means only that the scale to be used is the scale that might be used by a solicitor against his resisting client. This concept has added significance in Alberta, where lawyers are entitled to act on a contingency basis. Thus, where the scale is "solicitor and his own client", if the solicitor's contract with his own client is that he will be paid for his work at the rate of $300 per hour or on the basis of 35 per cent of the recovery, it is that fee which can be recovered against an unsuccessful defendant. All work requested to be done on a particular file and all work reasonably connected to the proceedings can be recovered on this scale.

[15] Because of the suggestion that the solicitor-client scale allows only the recovery of reasonable fees, and because of the possibility that in specific cases "reasonable" will not be equivalent to "contractual", I adopt, for the purposes of this

decision, the meaning attributed by Lerner J. in *Re Seitz* to the term "solicitor and his own client".

[16] Because of the confusion in the jurisprudence, I agree with the suggestion made by Megarry V.C. in *EMI Records Ltd. v. Ian Cameron Wallace Ltd.,* [1983] Ch. 59, [1982] 3 W.L.R. 245, [1982] 2 All E.R. 980 (Ch. D.), to the effect that when a judge wishes to indemnify a party in a costs award the phrase "indemnity basis" should be preferred to "solicitor and his own client".

[17] The second issue is whether, as between litigants other than a solicitor suing his own client for fees, there is authority to award costs to a successful party on an indemnity basis. I am of the view that R. 601(1) provides that authority and that nothing in RR. 613-626 derogates from it. Because of the broad authority in the empowering rule, clear, specific language would be required to cut down the discretion. Not only is that type of language absent in the latter group of rules, those rules appear to apply only to a dispute between a solicitor and his client concerning the solicitor's fees. The framework of English rules and orders relating to costs is, understandably, different from our own. As the *EMI* case indicates, even where the language is much more pointed and appears to prevent an indemnity award in general litigation, the courts have found that such awards are not prohibited.

[18] *Vorvis v. I.C.B.C.* (1984), 53 B.C.L.R. 63, 4 C.C.E.L. 237, 9 D.L.R. (4th) 43 (C.A.), is an example of Canadian jurisprudence suggesting that the "solicitor and his own client" scale may not be awarded in general litigation. Those decisions depend in part on specific rules and some contain a mix of comment relating to the existence of the scale and to the propriety of applying the scale.

[19] The third issue is, of course, whether such an award should be made in this case. Departure from the general rule of party-and-party costs requires extreme caution and should occur only in rare and exceptional cases: *Mobil Oil Can. Ltd. v. Can. Superior Oil Ltd.,* [1980] 1 W.W.R. 453, 14 C.P.C. 101, 105 D.L.R. (3d) 355, 20 A.R. 111 (Q.B. — Kirby J.).

[20] Having adopted the *Mobil Oil* test, presumably for an award of solicitor-client costs, much more care and concern must be exercised before awarding solicitor and his own client costs.

[21] Costs and damages should not be confused. I subscribe to the views expressed in much jurisprudence, of which *Olson v. New Home Certification Program of Alta.* (1986), 44 Alta. L.R. (2d) 207, 69 A.R. 356 (Q.B. — Lutz J.), is an example that costs deals with the conduct of the litigation and that damages deals with the conduct of the parties giving rise to the cause of action.

[22] Even a successful litigant is normally left to pay a portion of the cost of taking an issue to court in recognition of the fact that there was objectively an issue of fact or law that had to be determined by the court.

[23] In concluding that the plaintiff should not contribute at all to the cost of these proceedings, I have taken into account the evidence that the plaintiff did nothing to hinder, delay or confuse the litigation and that it was apparent to me at the end of the trial that there was no serious issue of fact or law which required these lengthy, expensive proceedings.

[24] Insofar as the defendant Rasmussen is concerned, the jurisprudence indicates that solicitor-client costs have been awarded against a party guilty of positive misconduct: *Dusik v. Newton* (1984), 51 B.C.L.R. 217 (S.C.). The evidence in this case establishes that Rasmussen knowingly filed a fraudulent proof of loss, without any excuse.

[25] The defendants Stewart, Smith (Canada) Limited and Robert d'Arcy also committed grave positive misconduct. They were fiduciaries insofar as the plaintiff was concerned. They were not only negligent in failing to consult their files, where the information concerning the plaintiff's status could easily and clearly have been found, they positively misconducted themselves in unilaterally designing and implementing a unique reporting-to-underwriter system which they must have known might lead to the

underwriter being misled as to who was entitled to recovery on a loss and to the failure to pay loss payees.

[26] I am bound to say, however, even though there appears to be authority for these positions, that positive misconduct itself is better considered in the context of punitive damages. What is undoubtedly unarticulated in the jurisprudence is that findings of such positive misconduct are then taken into account one more time on the costs issue in determining whether the positively misconducting party was "contemptuous", to use the *Vorvis* expression, of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his.

[27] Different considerations apply on this issue in criminal and civil proceedings. In a criminal matter, no person, even if found guilty, should be punished more harshly because he insisted on a full trial. In a civil matter, where a party positively misconducts himself, and requires a full trial, there is no reason to ignore that litigation on the issue of costs.

[28] On the specific question of conduct of the litigation, in addition to these general observations, I must add that the defendant d'Arcy, an employee of the defendant Stewart, Smith (Canada) Limited, produced only during the trial, although painstakingly requested at discovery, a coil telephone notebook which included a note of two telephone conversations which were extremely material on the central question of the actual knowledge of those defendants of the plaintiff's position as a loss payee.

[29] All three of the unsuccessful defendants, having committed positive misconduct, were then contemptuous of the plaintiff in requiring the plaintiff to go to trial to get its money. Moreover, insofar as the broker-defendants were concerned there was conduct in the trial process which was deserving of sanction by a costs award.

[30] A separate factor to take into account in awarding costs against the defendant broker is its position as a fiduciary relative to the plaintiff.

[31] A review of the jurisprudence indicates that courts have been reluctant to award solicitor-client costs on breaches of fiduciary duty of professionals other than

lawyers: *B.C. Auto Assn. v. Mfrs. Life Ins. Co.* (1979), 14 B.C.L.R. 237 at 260-61 (S.C). However, where the conduct of the defendant is "extraordinary" or "unreasonable", that award has been made against fiduciaries other than lawyers.

[32] In the *B.C. Auto Assn.* case, Hutcheon J. stated [p. 261]:

> [The application of adjectives such as "unreasonable" or "extraordinary"] is one of impression and not subject to great elaboration. I have taken as determinative the inference, which is open on the facts, that Pudney was satisfied that no damage would be suffered by B.C.A.A. from the alteration of the funding method to one which was less secure but nevertheless realistic.

[33] No such generous assessment of the unsuccessful defendants' conduct can be made here. Indeed, the only inference that can be drawn from their conduct is that they knowingly took the plaintiff's money, hoping to be reimbursed by Rasmussen. That cannot be called realistic treatment of a loss payee.

[34] Finally, this is not a situation where another remedy for the inappropriate conduct of the defendants might be available to the plaintiff. If the plaintiff is to obtain redress it must be in these proceedings.

[35] It may well be that it is not possible to protect the plaintiff from taxation (RR. 638 and 6`14, except perhaps by the award of a gross sum under R. 601(1)(*a*)), but any taxation should allow the plaintiff all costs, disbursements, expenses and fees reasonably connected to these proceedings.

[36] With respect to costs other than lawyers' fees, after the adoption of the new tariff, col. 6 should be applied for the reasons I recently gave in *Madgett.* Before that amendment, because of the complexity of the trial, five times col. 5 should be applied.

4. SANDERSON ORDER

[37] As the plaintiff had good grounds for joining the successful defendants as parties, there is no good cause for depriving the successful defendants of their costs, and among the co-defendants the unsuccessful defendants were wholly responsible for

the action; therefore, the successful defendants shall recover their costs direct from the unsuccessful defendants.

[38] 11th December 1986. Addendum.

PUNITIVE DAMAGES

[39] The evidence established that, insofar as the defendant Rasmussen was concerned, there was no excuse for the misrepresentation concerning the ownership of the plaintiff's aircraft. There was no suggestion in the evidence of any particular financial emergency facing Shirley Air Services Ltd. at the time of the misrepresentation. The evidence did establish that money was being made available to Shirley Air Services Ltd. from other sources at the time of the misrepresentation.

[40] In these circumstances, the award of punitive damages against the defendant Rasmussen shall be in the amount of $150,000.

Order accordingly.

Court of Queen's Bench of Alberta

Citation: Chrystian v. Topilko, 2010 ABQB 456

Date: 20100708
Docket: 0803 09995
Registry: Edmonton

Between:

Marie Chrystian

Plaintiff

- and -

Rosie Topilko, Elsie Achtemichuk, Dorothy Hanson, Randy Misyk and Richard Misyk

Defendants

Reasons for Judgment of the Honourable Mr. Justice R.P. Marceau on application by the Defendants for solicitor-client costs against the Plaintiff

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[1] Orest Ehner Misyk, born August 14, 1945, died on the 19th of October, 2007. The deceased's pilot's license and the handwritten will were alleged to have been found by a friend of the deceased who was going through documents at the deceased's farm along with the Plaintiff's family which include herself, her husband, and her son Kyle. This will (which I will call "the envelope will" because it was written on the back of an envelope) along with the pilot's license which all agreed was signed by the deceased was taken to a lawyer in Wetaskiwin, Mr. Deckert, by the Plaintiff. The will is dated April 27, 2007 and was found on October 22, 2007.

[2] Later on, from the evidence, probably around the 26th or 27th of May, 2008, a second will written on the back of the Duplicate Certificate of Title to the S.E. 33-47-15-W4 in the name of

Orest Misyk (the "DCT will") dated the 4th of January, 2007, and was delivered to Mrs. Chrystian's new solicitor, Ms. Henderson-Lypkie. In hand printing similar to the envelope will, the January 4, 2007, DCT will gives the farm (2 quarter sections of land) to Kyle and Babe Kostantine, the son and grandson of the Plaintiff. Gas wells and minerals are given to sister Marie (the Plaintiff) and the acc (probably to stand for account) "spit" (sic) Marie, Ross, Els and Rick. The only sibling not mentioned is Randy Misyk.

[3] The envelope will gave Kyle the deceased's airplane. Then it says that Lisa, Kyle and Babe Chrystian keep 2 1/4's of "my Misyk farm" "must farm it and keep for him" "WS bank acct = spit (sic) Marie Rose Else and Rick." In both wills, Marie is to look after the "business" which is probably a sufficient appointment of an executor.

[4] On the 6th of May, 2008, two of the siblings, Elsie Achtemichuk and Rosie Topilko applied for a grant of administration. On May 8, 2008, Marie Chrystian applied to prove in solemn form the will of Orest Misyk dated 27 April 2007.

[5] There were other court applications and court orders but on June 17, 2008, Justice Read of this court directed the trial of an issue as to whether Orest Ehner Misyk prepared a holograph will in the fall of 2007 (the word "fall" is probably an error as the only will in question in early May 2008 was the will dated 27 April 2007).

[6] The parties were to be as in the style of cause, i.e. Marie Chrystian as Plaintiff; all of the other siblings of the deceased as Defendants with Notice to the Public Trustee with respect to Kostantine Ethan Chrystian (the person named in the will as "Babe"), a minor. It is common ground the deceased left no parents, children, wife or adult interdependent person so if the will(s) are invalid, there is an intestacy and the Plaintiff and Defendants share the estate equally.

[7] The matter proceeded in accordance with the orders and eventually the trial was set to commence before me starting on June 14th, 2010 for a period of two weeks.

[8] Shortly before the trial date, new counsel for the Plaintiff, Field & Co., notified the Defendant's counsel that they wished to apply to discontinue the Statement of Claim. This amounts to a concession the Plaintiff is not able to prove the envelope will of 27 April 2007 was wholly in the handwriting of the deceased. The onus is on the Plaintiff to prove the will and it cannot satisfy that onus. Taken by itself the application for a discontinuance does not mean the Plaintiff is guilty of any wrongdoing in commencing the proceedings nor in the manner the proceedings were conducted. I allowed the discontinuance and declared the will not to be the valid last will of the deceased. However, having heard the evidence, especially that of the handwriting expert Mr. Peace, I find the will was in fact a forgery.

[9] The only matter before the court is the matter of costs of the proceedings to the time of discontinuance and the costs of this cost hearing which went on for 3 days and an additional 3 hours of argument. The Plaintiff's position is that all costs should come from the estate, and the Plaintiff should have party and party costs out of the estate.

[10] The Plaintiff also says that the Defendants have not proved to the standard required that the Plaintiff is guilty of conduct which would justify punitive costs. ***Polar Ice Express Inc. v. Arctic Glacier Inc*** 2009 ABCA 20 is clear authority for the proposition that solicitor-client costs should not be awarded for misconduct prior to the litigation or which caused the litigation but punitive costs are an appropriate remedy for misconduct in the course of litigation. In this case, the forgery of the will is misconduct prior to the action but the attempt to convince Mr. Purdy that the will was that of the deceased by supplying Mr. Purdy, but not Mr. Peace (until just before the date set for trial), a number of other forged documents was misconduct throughout the litigation which merits an award of solicitor-client costs. Of course, persisting in the course of litigation in attempts to prove a forged will (which the Plaintiff knew was forged) was valid is also misconduct in the course of the action.

[11] The Defendants seek solicitor-client costs against the Plaintiff throughout.

[12] Counsel for the Defendants claimed the initiation of the efforts of the Plaintiff to prove the will through to the discontinuance was based on a forgery of the Plaintiff in preparing the envelope will, supporting documents and the DCT will all to ensure that her son and grandson would inherit the farm and anything on the farm which was practically speaking, the entire estate. Obviously, if there is no will, the estate will be divided among the six siblings of the deceased including the Plaintiff.

[13] The alternative to the Plaintiff having conceived and acted on the fraudulent will is that someone other than the Plaintiff forged some or all of the documents, but the Plaintiff was an active participant in the scheme. If not an active participant in the scheme, the Plaintiff was willfully blind and should have known from the start the wills and supporting documents were fraudulent and solicitor-client costs should follow.

[14] For the reasons which follow, I find the Defendants have failed to prove that the Plaintiff actually performed the forgeries. I find, however, that there are too many coincidences which must have happened for the Plaintiff not to have been an active participant in that although she may not have prepared the documents, she knew they were fraudulently prepared to divert the lion's share of the estate to her son, his wife and her grandson. Hers was not willful blindness, it was knowledge and complicity.

[15] The Defendants argued at some length that the lawyers were at fault in not recognizing sooner that the documents principally relied upon by the Plaintiff were false. In argument, I indicated that all lawyers or firms acting for the Plaintiff, in my opinion, acted most professionally. So long as there were two handwriting experts who had differing views of the validity of the envelope will, it was the professional duty of the Plaintiff's lawyers to seek to prove the envelope will. Once it was apparent the Plaintiff's expert could not give evidence that the will was valid, the solicitors for the Plaintiff sought instructions to discontinue and made the necessary application. I cannot see how any of the Plaintiff's lawyers should be tarred with the broad sweep of the Defendants' brush. I will deal with the fact that these allegations against the

lawyers, in my opinion, increased the length of the hearing by reducing the award of costs of this hearing.

Chronology of Events and Documents Examined by Handwriting Experts and their Opinion

[16] November 19, 2007, Mr. Stephens, solicitor for the Defendants, sent to Leslie Peace, Forensic Document Examiner, the following documents:

1. Exhibit C - a reproduction of a six-page Alberta Right-Of-Way Agreement document describing the terms of an agreement between Orest Misyk and Burlington Resources Canada Ltd., dated February 9, 2005, bearing in several locations specimen handwritten signatures and initials purportedly written by Orest Misyk.

2. Exhibit D - a digitally-scanned facsimile reproduction of a Canada Revenue Agency form titled "Authorizing or Cancelling a Representative", completed in the name of Orest E. Misyk, dated April 21, 2007, bearing a specimen signature purportedly written by Orest Misyk.

3. Exhibit E - a digitally-scanned facsimile reproduction of a Canada Revenue Agency form titled "Information Return For Electronic Filing Of An Individual's Income Tax and Benefit Return", completed in the name of Orest E. Misyk, dated April 21, 2007, bearing a specimen signature purportedly written by Orest Misyk.

[17] December 17, 2007, Mr. Peace personally attended at the office of the then-Plaintiff's solicitor and obtained:

1. Exhibit A - a white business envelope; and

2. Exhibit B - a Transport Canada Licence Validation Certificate.

[18] January 8, 2008, Documents received at Mr. Peace's office:

1. Exhibit K1 - nine (9) cancelled cheques drawn on the personal account of Orest Misyk at the Bank of Nova Scotia, Camrose, Alberta, bearing various dates between Sept. 4, 2001 and Oct. 23, 2001, each purportedly written and signed by Orest Misyk.

2. Exhibit K2 - eleven (11) Visa and MasterCard credit card sales slips issued in the name of Orest E. Misyk, bearing various dates between 96/05/13 and 01/10/11, each purportedly signed by Orest Misyk.

3. Exhibit K3 - a Ukraine Customs Declaration form completed in the name of Orest Ehner Misyk, dated June 6, 2006, purportedly written and signed by Orest Misyk.

4. Exhibit K4 - a reproduction of a Rediform Work Invoice No. 207256 dated January 4, 2003, completed in favour of Morris Komarnisky, bearing handwritten and hand printed notations purportedly written by Orest Misyk.

5. Exhibit K5 - a reproduction of a Transfer of Land document, Form 11, dated February 10, 2006, describing the terms of a land transfer from Orest Misyk to Ducks Unlimited Canada, bearing a specimen signature purportedly written by Orest Misyk.

6 Exhibit K6 - five (5) Alberta Water Well Drilling Report forms bearing various dates between May 12, 2005 and May 30, 2005, each bearing a number of handwritten and handprinted notations, plus a signature, all purportedly written by Orest Misyk.

7. Exhibit K7 - carbon copies of five (5) Blueline Repair Order forms bearing various dates between May 25, 2005 and July 7, 2005, each completed in the name of New Park Environmental, bearing a number of handwritten and handprinted notiations purportedly written by Orest Misyk.

8. Exhibit K8- reproductions of three (3) Blueline Statement forms dated May 24, 2005, each prepared in the name of Brian Hejnar, bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

9. Exhibit K9 - a reproduction of a Blueline Repair Order form dated May 12, 2005, completed in the name of New Park Environmental, bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

10. Exhibit K10 - carbon copies of two (2) Canadian Firearms Safety Course Reports dated August 24, 2002, each completed in the name of Orest Ehner Misyk, each bearing a number of handwritten notations and a signature purportedly written by Orest Misyk.

11. Exhibit K11(1-2) - carbon copies of two (2) Blueline Sales Order forms Nos. 140151 and 140152, dated in January and February of 2006, bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

12. Exhibit K11(3-6) - four (4) original Blueline Sales Order forms Nos. 140153, 104054, 140155 , and 140156, two of which are dated "2007" and each bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

13. Exhibit K12 - a Blueline DC101 book of numbered Statement forms containing carbon copies of twenty-five (25) partially-completed or fully-completed statements dated between Nov. 15, 2003, and No. 01, 2006, each bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

14. Exhibit K13 - a Rediform 5M062 book of numbered Counter Sales forms containing carbon copies of thirty-two (32) partially-completed or fully-completed invoices dated between Jan. –, 2002, and Dec. 27, 2002, each bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

15. Exhibit K14 - the front and back covers from a Hilroy spiral-ring Science Note Book bearing a number of handwritten and handprinted notations pertaining to equipment descriptions, purportedly written by Orest Misyk.

16. Exhibit K15 - two (2) attached sheets of treated paper, each bearing a hand-drawn sketch and handwritten land descriptions produced in the form of facsimile memoranda from Orest Misyk of Misyk Drilling to "1-78–427-1214", purportedly written by Orest Misyk.

17. Exhibit K16 - three (3) attached sheets of steno-pad paper and ruled notepaper, each bearing various handwritten and handprinted work notations and cost estimates, purportedly written by Orest Misyk.

18. Exhibit K17 - a cancelled cheque drawn on the account of Orest Misyk at the Bank of Nova Scotia, Camrose, Alberta, dated "Nov. 93", payable to Edmonton Opera in the amount of $90.00, purportedly written and signed by Orest Misyk.

19. Exhibit K18 - a cancelled cheque drawn on the account of Orest Misyk at the Bank of Nova Scotia, Camrose, Alberta, dated "Jan 94", payable to Edmonton Opera in the amount of $35.00, purportedly written and signed by Orest Misyk.

[19] In his report dated February 7, 2008, Mr. Peace said that the purpose of his examination was:

> (1) To examine and compare the questioned hand printed notations and "Orest E Misyk" signature on Exhibit A with the specimen writing, printing, and signatures in Exhibits B, C, D, E. and K1 through K13, all purportedly written by Orest Misyk.
>
> (2) To determine whether or not the questioned "Orest E Misyk" signature on Exhibit A was written by the person who produced the specimen signatures in Exhibits B, C, D, E, and K1 through K13, purportedly Orest Misyk.
>
> (3) To determine whether or not the hand printed notations in the body of Exhibit A were written by the person who produced the specimen writing and printing in Exhibits B, C, D, E, and K1 through K3, purportedly Orest Misyk.

[20] His conclusion was "There is a high probability that the questioned "Orest E Misyk" signature on Exhibit A was not written by the person who produced the specimen signatures in Exhibits B, C, D, E, K1, K2, K3, K5, K6, K8, and K10, purportedly Orest Misyk." Added as remarks on Page 6 of his opinion is the following:

> "(1) The above observations and recommendations should not be construed as formal forensic opinions, as they are primarily derived from a PRELIMINARY REVIEW AND APPRAISAL of the documents submitted for analysis. These observations are not intended for courtroom presentation in their present form, and must be supported by a more detailed study of the documents if testimony or Affidavits are required at some time in the future."

[21] I have set out this disclaimer because much was made in argument by the Plaintiff about the tentative nature of the opinion.

[22] On the 14th of May, 2008, Dan C. Purdy, Forensic Document Examiner, wrote an opinion to Kyle Chrystian (the Plaintiff's son) headed "Personal and Confidential". Mr. Purdy stated in his letter of opinion that:

> "We have been retained by you to examine certain documents related to the above matter and to provide an opinion supported by the evidence with respect to the authorship of a signature and hand printing on an envelope. Specifically, you wish to know if the questioned signature and hand printing was written by Orest Misyk or whether these entries were written by someone else.
>
> The following documents were received at this laboratory from you personally on 22 April 2008: See Appendix A.

[23] Mr. Purdy's conclusion was as follows:

> "The questioned hand printing and signature on item Q-1 were probably written by the writer (Orest Misyk) of the specimen material on items K-1 through K-108."

[24] The conclusion of the opinion was communicated to solicitors for the Defendants. Mr. Peace recommended that an application be made to send the documents to an ink specialist who could date the documents. This happened in mid-2009, but the ink chemist reported the ink was too old to date, so nothing turns on that.

[25] The Substance of Opinion Statement, Rule 218.1 of Dan C. Purdy is dated February 16, 2010 and was served very shortly thereafter upon solicitors for the Defendants.

[26] Mr. Peace was then consulted. He realized that he did not have many of the documents which had been forwarded to Mr. Purdy. He obtained the documents that Mr. Purdy had seen and then wrote his opinion of April 7, 2010. I am attaching as Appendix B, the description of documents received by Mr. Peace on March 8, 2010, from Simons & Stephens, received from solicitor for the Plaintiff, Greg A. Harding Q.C. on March 10, 2010, and those received on March 25, 2010, by electronic file transmission from the solicitors for the Defendants and finally additional exhibits received March 25, 2010 by electronic file transmission from the account of Roger C. Stephens.

[27] At this point, the conclusions and opinions of Mr. Peace on April 7, 2010, are:

> "(1) The hand printed notations on Exhibit Q-1 were not written by the person who produced the various examples of specimen handwriting and hand printing in the "Misyk Sample", purportedly Orest Misyk.
>
> (2) There is a high probability that the "Orest E Misyk" signature on Exhibit Q-1 was not written by the person who produced the various specimen signatures in the "Misyk Sample", purportedly Orest Misyk."

[28] A significant aspect of the investigation by Mr. Peace was that until March of 2010, he had not seen the totality of the documents. In March 2010, he had many, many documents signed by the deceased and he challenged several of the documents which had been held by the Plaintiff or their counsel and although they had been seen by Mr. Purdy had not yet been seen by Mr. Peace. The most significant finding, however, was a number of the documents, such as the envelope will, were produced by the Plaintiff or her family and in Mr. Peace's opinion, some of these documents were not written by the deceased (the notes to self,) some were partly written by the deceased but signed by some else (some of the hotel receipts), or were written by someone else (probably the hotel desk clerk) but signed in the deceased's name by someone else (some of the hotel receipts).

[29] I will deal specifically with certain of the documents which were challenged by Mr. Peace. These were in the possession of Mr. Purdy until they were obtained by Mr. Peace.

[30] Q-1 is the envelope will. It was seen by Mr. Peace before his first report as was the signature on the pilot's license and the signature on some old cheques.

[31] P-1 is described by Mr. Peace as the notations on the back of a legal invoice. In fact it appears to be page 1 of the airfare invoice for his September 2007 trip to the Ukraine. The document is undated. It is in pencil in part and in ink in part. It is made to look like notations made by the deceased. It is also made to look somewhat like the bad handwriting in the challenged will. The significant aspect is that we know the deceased travelled to the Ukraine on September 7, 2007, and returned September 25, 2007. This document is made to appear as though the deceased is preparing for departure and is relying on the Plaintiff and Kyle. One notation says "Marie get land tax pd yet" and "#1 did Kyle off work to take me and B WC leave truck at his--". And in another place "will have tickets Monday".

[32] P-2: All the document including the signature is excluded as not being in the deceased's handwriting and the signatures challenged as not being that of the deceased. The receipt itself is made out to Orest Misyk and relates to the sale of a Ford truck December 20, 2001. In different ink at the bottom is the signature "Orest Misyk".

[33] This is one of many documents which on their face appear authentic, but the signature is false. In my view, since I accept Mr. Peace's conclusion the challenged signatures were forgeries, this signature was placed there by someone who wanted to create a paper trail of alleged specimen signatures of the deceased for comparison to the signature on Q-1. Otherwise, why would one go to the trouble of finding documents as old as 2001 and forging on it the deceased's signature?

[34] P-3 is of little significance. The Tri-Bit Service invoice was written by someone other than the deceased, but it was signed by the deceased.

[35] P-4: Mr. Peace found cheque no. 167 had the hand printed portions done by the deceased, i.e. "200" and "cash" as the payee. The endorsement on the reverse was that of the deceased, but the signature as drawer of the cheque was a forgery, not unlike the signature on Q-1. Of the close to 200 cancelled cheques examined by Mr. Peace, this was the only challenged signature as drawer. There was follow up. A photocopy of the cheque as it was cleared at the bank was obtained and it showed no signature of the drawer. There is almost only one inference to be made. After the death, someone seeking to provide signatures that would look like they were that of the deceased would be in among other authentic signatures, but forged. Mr. Peace speculated that because the ink on the details and the ink on the drawer's signature was often different when the payee was "cash", the deceased had the habit of writing out a cheque for cash but prudently not signing it till he was at the bank. In the case of cheque 167, he probably forgot to sign the face of the cheque. This strengthens Mr. Peace's theory.

[36] P-101 - the DCT will. All of the handwriting is challenged. It is made up out of the whole cloth. There are two reasons to create a second forgery. First, it expresses the same intention as the other (though not first) will Q-1. It also appears to have similar signature to Q-1. Although Mr. Peace was not asked to compare the two signatures, to myself, a layman, they appear to be similar signatures and if I had been duped into believing both signatures were authentic, I would have likely opined that the deceased had a fixed intention to give most of his estate to his grandnephew, his wife and their child because the same intention is evidenced in a document January 4th and another April 27th of the same year, the year of his death.

[37] P-102. The undated document is like P-1, an attempt to show the deceased had trouble writing at times. This document is also not made in any part by the deceased but it is meant to serve the interests of the Plaintiff's son. This is found on the back of the travel itinerary document for the trip September 7 to 25 September 2007.

> "Thank you Yonika for leter – hand two sore to write back – call her at 10 nite let her know what time we get in from airport".

[38] These are meant to convey the evidence (which I heard from the Plaintiff) that the "gout" in the deceased's hands was so bad he could sometimes not write.

[39] The next notations are :

> "Need to get pills from Dr. before me off – Go to farm and get tickets from Kyle – Kyle Royal Bank me insurance – What size is Babe for UK cloths ask Lisa."

[40] This is the third reference to "Babe". Finding out about the size of Babe from his mother is meant to convey closeness of the deceased to Babe which explains the will. Of course, an intention to purchase clothes in UK for the child is also evidence of the closeness of the child to the deceased which was the testimony of the Plaintiff. No clothes purchased in the UK for the child was placed in evidence.

[41] At the top of the document was a reference to "put up no trespass signs". The Plaintiff testified that the deceased did this before going to the Ukraine.

[42] In the top printing, there are signs of shakiness not found in all his documents, but there are signs of same in the other forged documents, i.e. the two wills.

[43] P-103 is a currency exchange slip with a Ukranian stamp. The signature over the stamp appears unnecessary and is not that of the deceased.

[44] P-104 is a hotel receipt not made out by the deceased, but signed "O Misyk". That is a forgery.

[45] P-105 is a receipt similar to P-104 but on this one, the printed name at the top is printed by the deceased. The signature on the bottom is a forgery.

[46] P-106 is again a hotel receipt where the name at the top was written by the deceased, but the signature at the bottom is a forgery.

[47] P-107 is another hotel receipt where the top details and charges are not those of the deceased (looks like the hotel clerk). The three letter signature is a forgery.

[48] P-104, 105 and 106 are all signed in the same black ink, are remarkably the same. I am led to the conclusion that these documents were found in the deceased's possession after death as he had returned from the Ukraine less than a month earlier. The obvious intent is to create "authentic signatures" that are contemporary to authenticate the will.

[49] P-108 is a forged signature on a customs declaration. I conclude the same as for P-105, 106 and 107.

[50] P-109 is a forgery dated October 12, 2007. I place no significance on this document as he may have asked someone to make a deposit for him in the last days before he died.

[51] I make mention of a red herring in the evidence. There is a transmission verification facsimile report which on its face sends a copy of the DCT will to fax number 1403 3265826 on 01/05/2007 at 08:58. This fax number is that of Parlee McLaws, a law firm, for their Calgary fax. Although the practise is to record all incoming faxes, they are sometimes not recorded and the law firm had no record of this transmission. The second document produced was in bad handwriting but similar to the forged wills "FAX 402 265 263 Kanne" ??? (The question marks are mine as I cannot be sure of the spelling).

[52] I suppose the suggestion was that the deceased, several months before his death, had faxed a copy of his DCT will to his law firm. The law firm was unable to confirm they ever did any legal work for the deceased. No one went to the "Cooperators" whose name appeared at the top of the fax transmission to find out whether one of their branches sent out a fax at 01/05/2007, 08:58 to Parlee McLaws. I have a suspicion this was just another attempt to show the DCT will actually existed before the death of the deceased but I do not place much reliance on these two documents.

[53] My conclusion is that Kyle or the Plaintiff and maybe others in the immediate Chrystian family organized a plot to place before Mr. Purdy signatures that would appear to be authentic and be recent signatures remarkably like that on the two wills in order to get Mr. Purdy to believe the signatures on the other documents were those of the deceased and then to find the signatures on the wills were also that of the deceased. In that, at least initially, they succeeded.

[54] I came to the conclusion the Plaintiff was privy to the fraud partially based on her and her son having control and "finding" most of the documents submitted to Mr. Purdy.

[55] Besides the fact there was a blatant attempt to fool the handwriting experts, I also take into account:

1. Where it is true or not (and I think it probably is true) the Plaintiff was able to show a closer connection of her family to the deceased than the other siblings.

2. The will(s) would have given her son, wife and child, the bulk of the estate, in fact practically all of the distributable estate.

3. The evidence of the Plaintiff that the deceased's gout was so bad he could hardly write yet not one authentic document of the deceased reasonably contemporary to his death was produced that confirmed an inability to write. No medical evidence was presented. On the contrary, there are documents (water well drilling report - p113) which showed that he was able to write legibly in 1977 (not print). His cheques even in 2007 are well signed.

[56] I make these findings notwithstanding the fact Mr. Peace was not asked to further investigate to determine if all the forged signatures were from the same source. Specimens of handwriting were not obtained from Kyle and the specimen of handwriting from the Plaintiff was not of a kind that Mr. Peace could make use of as an authentic writing for comparison purposes.

[57] In making my ruling on costs I am cognizant of the authorities submitted by the parties. I cite the English case of ***Mitchell v. Gard*** (1863) 164 E.R. 1280 (Probate Court) where the Court held that costs will be awarded against an unsuccessful party in estate litigation in the following context. " First where the cause of the litigation originates in the fault of the testator or of those interested in the residue, costs may be properly paid out of the estate..." That has no application here as the testator did not cause any confusion leading to litigation and, of course, it is those interested in the residue who were successful. I agree that costs are more frequently ordered payable out of the estate even where a claim of fraud has been made but unproven (by those interested in an intestacy).

[58] Those general rules apply except in exceptional circumstances and the bar is high. However, in this case, my finding that the wills were created, then attempts made by producing the forgeries to authenticate the signature on the wills is extreme conduct, certainly as extreme in civil law as it can be before other authorities of the state take interest. My findings support an order for full indemnity costs.

Conclusion

[59] Having concluded the Plaintiff was complicit in the attempt to perpetrate a fraud upon the court and upon her relatives to benefit her family, the Defendants shall have their costs of all the proceedings, including the applications in court prior to the filing of the Statement of Claim until the discontinuance on a full indemnity basis.

[60] With respect to the cost of the proceedings with respect to costs, I am of the view that too much time was spent by the Defendants in pursuing wrongdoing by the Plaintiff's lawyer(s) and the case could have been presented in a much more succinct manner by the Defendants. On this aspect, the Defendants will have costs against the Plaintiff for two days of proceedings only at 2 times column 2 of Schedule C. The Defendants will not have any costs from the estate for the other day and 3 hours of proceedings.

[61] The Plaintiff is not awarded any costs against the estate.

Heard on the 21st, 22nd, 23rd, 24th, and 25th days of June, 2010.
Dated at the City of Edmonton, Alberta this 8th day of July, 2010.

R.P. Marceau
J.C.Q.B.A.

Appearances:

Gregory A. Harding, Q.C.,
and Jon Faulds Q.C., Field LLP
for the Plaintiff

Roger C. Stephens, Simons & Stephens
for the Defendants

Appendix A

Item K-1: One (1) torn computer generated Gaede Fielding Rostad & Syed Barristers, Solicitors statement bearing specimen hand printing on the reverse side reportedly written by Orest MISYK.

Item K-2: One (1) Blueline receipt numbered 333025, dated 20 December 2001 and bearing a specimen signature reportedly written by Orest MISYK.

Item K-3: One (1) carbon copy Tri-Bit Services Ltd. invoice numbered 5358, dated 19 June 1996 and bearing a specimen signature reportedly written by Orest MISYK.

Items K-4 to K-100: Ninety-seven (97) cancelled checks numbered, dated and in the amounts as follows bearing specimen signatures and handwritten face details reportedly written by Orest MISYK. Those items followed by an asterisk (*) contain handwritten face details that were not written by Mr. Misyk.

Item	Number	Date	Amount
K-4	167	23 December 2005	$ 200.00
K-5	169	27 December 2005	$ 17.90
K-6	170	27 December 2005	$ 133.75
K-7	171	27 December 2005	$ 376.11
K-8	174	27 December 2005	$ 100.00
K-9	176	28 December 2005	$ 68.14
K-10	172	2 January 2006	$ 100.00
K-11	173	3 January 2006	$ 109.00
K-12	178	3 January 2006	$ 125.00
K-13	168	4 January 2006	$ 73.09
K-14	166	10 January 2006	$ 100.00
K-15	165	15 January 2006	$ 300.00
K-16	160	16 January 2006	$ 223.52
K-17	164	28 January 2006	$ 100.00

K-18	163	31 January 2006	$ 64.90
K-19	199	31 January 2006	$ 100.00
K-20	198	1 February 2006	$ 150.00
K-21	161	4 February 2006	$ 82.34
K-22	192	11 February 2006	$ 181.09
K-23	197	11 February 2006	$ 100.00
K-24	196	12 February 2006	$ 100.00
K-25	191	21 February 2006	$ 300.00
K-26	193	28 February 2006	$ 500.00
K-27	194	28 February 2006	$ 500.00
K-28	195	28 February 2006	$ 500.00
K-29	204	1 March 2006	$ 119.15
K-30*	180	3 March 2006	$ 68.27
K-31*	181	3 March 2006	$ 70.63
K-32	189	4 March 2006	$ 84.91
K-33	203	7 March 2006	$ 200.00
K-34	182	10 March 2006	$ 178.81
K-35	187	10 March 2006	$ 614.17
K-36	188	14 March 2006	$ 200.00
K-37	190	14 March 2006	$ 100.00
K-38*	186	17 March 2006	$ 75.00
K-39	243	22 March 2006	$ 500.00
K-40*	244	28 March 2006	$1,824.36
K-41*	246	29 March 2006	$ 321.00
K-42*	247	29 March 2006	$ 85.60
K-43	185	30 March 2006	$ 100.00
K-44	241	30 March 2006	$ 67.54

K-45	249	30 March 2006	$ 500.00
K-46	250	30 March 2006	$ 181.22
K-47	183	1 April 2006	$ 100.00
K-48	184	2 April 2006	$ 100.00
K-49	240	4 April 2006	$ 200.00
K-50	242	4 April 2006	$ 71.48
K-51	262	9 April 2006	$ 60.63
K-52	245	11 April 2006	$1,700.00
K-53	248	14 April 2006	$5,000.00
K-54	256	21 April 2006	$ 500.00
K-55*	257	24 April 2006	$ 224.70
K-56	251	26 April 2006	$ 103.25
K-57*	282	27 April 2006	$3,000.00
K-58	255	28 April 2006	$3,856.31
K-59	252	30 April 2006	$ 767.70
K-60	253	1 May 2006	$6,337.18
K-61	259	4 May 2006	$ 71.26
K-62	162	5 February 2006	$ 100.00
K-63*	283	5 May 2006	$ 571.00
K-64	254	6 May 2006	$6,630.26
K-65	258	12 May 2006	$ 66.36
K-66	280	14 May 2006	$10,000.00
K-67	281	14 May 2006	$ 357.61
K-68*	286	16 May 2006	$1,037.29
K-69	291	19 May 2006	$ 500.00
K-70	299	4 July 2006	$ 81.23
K-71	298	5 July 2006	$ 38.30

K-72	871	7 July 2006	$ 500.00
K-73*	875	24 July 2006	$ 45.54
K-74	873	27 July 2006	$ 712.43
K-75	872	31 July 2006	$ 133.84
K-76	874	4 August 2006	$ 58.89
K-77	876	8 August 2006	$ 100.00
K-78	877	9 August 2006	$ 500.00
K-79	878	25 August 2006	$ 900.00
K-80	260	27 August 2006	$ 77.34
K-81	261	30 August 2006	$ 78.80
K-82	263	31 August 2006	$ 500.00
K-83	879	1 September 2006	$ 239.34
K-84	267	27 September 2006	$ 681.01
K-85	269	29 September 2006	$ 500.00
K-86	268	1 October 2006	$ 477.25
K-87	266	2 October 2006	$ 137.92
K-88	270	3 October 2006	$ 250.00
K-89	264	4 October 2006	$ 65.67
K-90	275	4 October 2006	$ 68.16
K-91	265	6 October 2006	$ 42.76
K-92*	274	10 October 2006	$6,782.71
K-93	277	24 October 2006	$ 98.55
K-94	279	26 October 2006	$ 551.61
K-95	300	30 October 2006	$ 500.00
K-96	271	31 October 2006	$ 405.56
K-97	272	31 October 2006	$ 229.12
K-98	278	31 October 2006	$ 596.75

K-99*	301	7 November 2006	$ 556.00
K-100	302	22 November 2006	$ 19.61

Item K-101: One (1) Duplicate Certificate of Title from North Alberta Land Registration district dated 11 August 1967 bearing a specimen signature and hand printing reportedly written by Orest MISYK.

Item K-102: One (1) Expedia.ca travel itinerary from Edmonton to Kiev on September 7/8 bearing specimen hand printing on the reverse side reportedly written by Orest MISYK.

Item K-103: One (1) receipt dated 9 September 2007 bearing a specimen signature reportedly written by Orest MISYK.

Item K-104 to K-107: Four (4) hotel receipts each bearing a specimen signature reportedly written by Orest MISYK.

Item K-108: One (1) Ukranian Customs Declaration form dated 24 September 2007 bearing a specimen signature and hand printing reportedly written by Orest MISYK.

Appendix B

2. DESCRIPTION OF DOCUMENTS:

(1) The following specimen exhibits were received at this office on March 08, 2010, via Purolator Courier Service, from the office of Roger C. Stephens, of the firm Simons and Stephens, Barristers and Solicitors, Edmonton, Alberta:

Exhibit B - a reproduction of a Transport Canada *"Licence Validation Certificate"* No. 250636, issued on June 15, 1990, in the name of Orest Ehner Misyk, bearing a specimen signature purportedly written by Orest Misyk. *(Note: The original of this document was examined on December 17, 2007, at the offices of Deckert Allen Cymbaluk Genest LLP, in Wetaskiwin, Alberta.)*

Exhibit C - a reproduction of a six-page *"Alberta Right-Of-Way Agreement"* document describing the terms of an agreement between Orest Misyk and Burlington Resources Canada Ltd., dated February 9, 2005, bearing in several locations specimen handwritten signatures and initials purportedly written by Orest Misyk.

Exhibit D - a facsimile reproduction of a Canada Revenue Agency form titled *"Authorizing or Cancelling a Representative"*, completed in the name of Orest E. Misyk, dated April 21, 2007, bearing a specimen signature purportedly written by Orest Misyk.

Exhibit E - a facsimile reproduction of a Canada Revenue Agency form titled *"Information Return For Electronic Filing Of An Individual's Income Tax and Benefit Return"*, completed in the name of Orest E. Misyk, dated April 21, 2007, bearing a specimen signature purportedly written by Orest Misyk.

..... Continued on Page 3

2. DESCRIPTION OF DOCUMENTS: Cont'd.

Exhibits K-1(1-9) - nine (9) cancelled cheques drawn on the personal account of Orest Misyk at the Bank of Nova Scotia, Camrose, Alberta, bearing various dates between Sept. 4, 2001, and Oct. 23, 2001, each purportedly written and signed by Orest Misyk. *(Note: A more detailed description of these specimen cheques, listed in approximate chronological sequence, is attached to this report as Table 1, Appendix "C".)*

Exhibits K-2 (1-11) - eleven (11) Visa and MasterCard sales slips issued on the accounts of Orest E. Misyk, bearing various dates between 96/05/13 and 01/10/11, and each purportedly signed by Orest Misyk.

Exhibit K-3 - a *"Ukraine Customs Declaration"* form completed in the name of Orest Ehner Misyk, dated June 6, 2006, purportedly written and signed by Orest Misyk.

Exhibit K-4 - a reproduction of a *"Rediform"* work invoice No. 207256 dated January 4, 2003, completed in favour of Morris Komarnisky, bearing handwritten and handprinted notations purportedly written by Orest Misyk.

Exhibit K-5(1-2) - a reproduction of a *"Transfer of Land"* document, Form 11, with attached *"Acceptance"*, dated Feb. 10, 2006, describing the terms of a land transfer from Orest Misyk to Ducks Unlimited Canada, bearing two specimen signatures purportedly written by Orest Misyk.

Exhibit K-6(1-5) - five (5) *"Alberta Water Well Drilling Report"* forms bearing various dates between May 12, 2005, and May 30, 2005, each bearing a number of handwritten and handprinted notations, plus a signature, all purportedly written by Orest Misyk.

Exhibit K-7(1-5) - carbon copies of five (5) Blueline *"Repair Order"* forms bearing various dates between May 25, 2005, and July 7, 2005, each completed in the name of New Park Environmental, bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

Exhibit K-8(1-3) - reproductions of three (3) Blueline *"Statement"* forms dated May 24, 2005, each prepared in the name of Brian Hejnar, bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

Exhibit K-9 - a reproduction of a Blueline *"Repair Order"* form dated May 12, 2005, completed in the name of New Park Environmental, bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

Exhibit K-10(1-2) - carbon copies of two (2) *"Canadian Firearms Safety Course Reports"* dated August 24, 2002, each completed in the name of Orest Ehner Misyk, each bearing a number of handprinted notations and a signature purportedly written by Orest Misyk.

Continued on Page 4

2. DESCRIPTION OF DOCUMENTS: Cont'd.

Exhibit K-11(1-2) - carbon copies of two (2) Blueline *"Sales Order"* forms Nos. 140151 and 140152, dated in January and February of 2006, bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

Exhibit K-11(3-6) - four (4) original Blueline "Sales Order" forms Nos. 140153, 140154, 140155, and 140156, two of which are dated "2007", and each bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

Exhibit K-12 - a Blueline DC101 book of numbered *"Statement"* forms containing carbon copies of twenty-five (25) partially-completed or fully-completed statements dated between Nov. 15, 2003, and Nov. 01, 2006, each bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

Exhibit K-13 - a Rediform 5M062 book of numbered *"Counter Sales"* forms containing carbon copies of thirty-two (32) partially-completed or fully-completed invoices dated between Jan. --, 2002, and Dec. 27, 2002, each bearing a number of handwritten and handprinted notations purportedly written by Orest Misyk.

Exhibit K-14 - the front and back covers from a Hilroy spiral-ring *"Science Note Book"* bearing a number of handwritten and handprinted notations pertaining to equipment descriptions, purportedly written by Orest Misyk.

Exhibit K-15(1-2) - two (2) attached sheets of treated paper, each bearing a hand-drawn sketch and handwritten land descriptions produced in the form of facsimile memoranda from Orest Misyk of Misyk Drilling to "1-780-427-1214", purportedly written by Orest Misyk.

Exhibit K-16(1-3) - three (3) attached sheets of steno-pad paper and ruled notepaper, each bearing various handwritten and handprinted work notations and cost estimates, purportedly written by Orest Misyk.

Exhibit K-17 - a cancelled cheque drawn on the account of Orest Misyk at the Bank of Nova Scotia, Camrose, Alberta, dated "Nov. 93", payable to Edmonton Opera in the amount of $90.00, purportedly written and signed by Orest Misyk.

Exhibit K-18 - a cancelled cheque drawn on the account of Orest Misyk at the Bank of Nova Scotia, Camrose, Alberta, dated "Jan 94", payable to Edmonton Opera in the amount of $35.00, purportedly written and signed by Orest Misyk.

Continued on Page 5

2. DESCRIPTION OF DOCUMENTS: Cont'd.

(2) The following additional exhibits were received at this office on March 10, 2010, via Federal Express Courier Service, from the office of Greg A. Harding,Q.C., of the firm Field LLP, Edmonton, Alberta:

Exhibit Q-1 - a soiled white business envelope bearing, on the face, the typewritten address "Orest Misyk Box 175 Bruce, Alberta T0B 0R0", and bearing, on the reverse, a handwritten notation which commences "April 27, 2007 1 my body ash then plant me with Dad", and concludes with the handwritten and handprinted signature *"Orest E Misyk"*.

Exhibit P-1 - a torn sheet of white paper bearing portions of a computer-generated invoice to Harry Misyk from Gaede Fielding Rostad & Syed Barristers, Solicitors, bearing on the reverse side a number of unsigned handprinted notations purportedly written by Orest Misyk.

Exhibit P-2 - a Blueline DC-91 sales receipt No. 333025, dated Dec. 20, 2001, issued in the name of Orest Misyk, and signed *"Orest Misyk"*

Exhibit P-3 - the carbon copy of a "Tri-Bit Services Ltd." invoice No. 5358, dated Jun. 19, 1996, issued in the name of Misyk Drilling, and bearing a signature appearing to be the name *"O Misyk"*.

Exhibits P-4 to P-100 - ninety seven (97) cancelled cheques drawn on the personal account of Orest Misyk at the Bank of Nova Scotia, Camrose, Alberta, bearing various dates between Dec. 23, 2005, and Nov. 22, 2006, each purportedly written and/or signed by Orest Misyk. *(Note: A more detailed description of these specimen cheques, listed in approximate chronological sequence, is attached to this report as Table 2, Appendix "C".)*

Exhibit P-101 - a Duplicate Certificate of Title issued to Orest Misyk on August 11, 1967, bearing on the reverse a handprinted notation dated January 4, 2007, commencing *" - put me next to dad"*, and concluding with the phrase and signature *" - Help with doctor Orest Misyk"*.

Exhibit P-102 - a two-page Expedia.ca travel itinerary listing for Orest Misyk and Brian Hejnar travel from Edmonton to Kiev, printed on August 25, 2007, bearing, on the reverse of Page 1, a number of undated handprinted notations and a short handprinted letter purportedly written by Orest Misyk.

Exhibit P-103 - a currency exchange receipt form dated Sep. 09, 2007, bearing a signature appearing to be the name *"O E Misyk"*.

.....Continued on Page 6

2. DESCRIPTION OF DOCUMENTS: Cont'd.

Exhibit P-104 - a *"Hotel Service"* receipt form issued in the amount of *"120.00$"*, bearing a signature appearing to be the name *"O Misyk"*.

Exhibit P-105 - a *"Hotel Service"* receipt form issued in the amount of *"240.00$"*, bearing a signature appearing to be the name *"O Misyk"*.

Exhibit P-106 - a *"Hotel Service"* receipt form issued in the amount of *"300.00$"*, bearing a signature appearing to be the name *"O Misyk"*.

Exhibit P-107 - a *"Hotel Service"* receipt form issued in the amount of *"300.00$"*, bearing a signature appearing to be the name *"O E M"*.

Exhibit P-108 - a document bearing foreign-language commercial printing and purporting to be a Ukrainian Customs Declaration, completed in the name of Orest Ehner Misyk, dated Sep. 24, 2007, bearing a series of handprinted notations and a signature appearing to be the name *"Orest E Misyk"*.

Exhibit P-109 - a Scotiabank *"Business Account Deposit"* form completed in the name of Orest Misyk, dated " Oct 12", bearing handprinted details and a signature appearing to be the name *"O Misyk"*.

Exhibit P-113 - an *"Alberta Water Well Drilling Report"* form dated July 07, 2005, bearing a number of handwritten and handprinted notations, plus a signature, all purportedly written by Orest Misyk.

Exhibit P-114 - a Co-operators *"General Alteration Endorsement"* form dated May 22, 1986, completed in the name of Orest Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-115 - a Co-operators *"General Alteration Endorsement"* form completed in the name of Orest Misyk, dated May 17, 1984, bearing a signature purportedly written by Orest Misyk.

Exhibit P-116 - the carbon copy of a Holiday Rent-A-Car *"Rental Agreement"* dated Jan. 30, 1975, bearing two signatures purportedly written by Orest Misyk.

Exhibit P-117 - a sheet of white ruled notepaper bearing a handwritten bill of sale pertaining to the purchase of a 1977 Chevolet, dated February 5, 1997, bearing a signature purportedly written by Orest Misyk.

Continued on Page 7

2. DESCRIPTION OF DOCUMENTS: Cont'd.

Exhibit P-118 - the carbon copy of an Alberta *"Application For Vehicle Registration"* completed in the name of Orest Elmer Misyk, dated Apr. 29, 1985, bearing a signature purportedly written by Orest Misyk.

Exhibit P-119 - the carbon copy of an Alberta *"Application For Vehicle Registration"* completed in the name of Orest Misyk, dated Feb. 08, 1985, bearing a signature purportedly written by Orest Misyk.

Exhibit P-120 - an Alberta *"Vehicle Registration Certificate"* for Licence No. 435323, issued on Oct. 08, 1992 in the name of Orest Elmer Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-121 - an Alberta *"Vehicle Registration Certificate"* for Licence No. 030513, issued on Feb. 26, 1988 in the name of Orest Elmer Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-122 - a partial Alberta registration certification for a 1974 Cadillac DeVille, Licence No. GJM262 expiring on Feb. 28, 1986, bearing a signature purportedly written by Orest Misyk.

Exhibit P-123 - an Alberta *"Vehicle Registration Certificate"* for Licence No. 00E833, issued on Apr. 01, 1996 in the name of Orest Elmer Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-124 - a partial Alberta registration certification for a 1967 Chev Impala, expiring on Mar. 31, 1980, bearing a signature purportedly written by Orest Misyk.

Exhibit P-125 - an Alberta *"Vehicle Registration Certificate"* for Licence No. 44G471, issued on Feb. 28, 1997 in the name of Orest Elmer Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-126 - an Alberta *"Vehicle Registration Certificate"* for Licence No. 01F489, issued on Feb. 28, 1996 in the name of Orest Elmer Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-127 - an Alberta *"Vehicle Registration Certificate"* for Licence No. 44G470, issued on Feb. 28, 1997 in the name of Orest Elmer Misyk, bearing a signature purportedly written by Orest Misyk.

..... Continued on Page 8

2. DESCRIPTION OF DOCUMENTS: Cont'd.

Exhibit P-128 - an Alberta *"Vehicle Registration Certificate"* for Licence No. KWS921, issued on Apr. 18, 1990 in the name of Orest Elmer Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-129 - an Alberta *"Temporary Vehicle Registration Certificate"* for Licence No. 76E379, issued on Apr. 15, 1991 in the name of Orest Elmer Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-130 - a one page typewritten memorandum addressed to the Alberta Energy and Utilities Board in relation to Burlington Resources Canada Ltd., dated February 9, 2005, bearing a signature purportedly written by Orest Misyk.

Exhibit P-131 - a *"Goods And Services Tax / Harmonized Sales Tax Return"* completed in the name of Orest Misyk, dated Mar. 20, 2003, bearing a signature purportedly written by Orest Misyk.

Exhibit P-132 - a Caltech Surveys Ltd. Well Site blueprint for Title No. 187F226, dated Apr. 10, 2002, bearing a signature purportedly written by Orest Misyk.

Exhibit P-133 - a partial Alberta registration certification for a 1970 Mercury Cougar expiring on Mar. 31, 1980, bearing a signature purportedly written by Orest Misyk.

Exhibit P-134 - an Alberta *"Vehicle Registration Certificate"* for Licence No. 00E833, issued on Oct. 08, 1992 in the name of Orest Elmer Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-135 - a cheque drawn on the account of Orest Misyk at the Bank of Montreal, Tofield, Alberta, dated Sep. 05, 1986, bearing handwritten details and a signature purportedly written by Orest Misyk.

Exhibits P-136 to P-215 - seventy-nine (79) cancelled cheques drawn on the personal account of Orest Misyk at the Bank of Nova Scotia, Camrose, Alberta, bearing various dates between Jun. 04, 1996, and Sep. 03, 2007, each purportedly written and/or signed by Orest Misyk. *(Note: A more detailed description of these specimen cheques, listed in approximate chronological sequence, is attached to this report as Table 3, Appendix "C".)*

Exhibits P-216 to P-219 - four (4) Visa sales slips issued on account No. 4560906741573, bearing various dates between 97/01/02 and 97/07/07, and each purportedly signed by Orest Misyk.

Continued on Page 9

2. DESCRIPTION OF DOCUMENTS: Cont'd.

Exhibit P-220 - the final page of a Lease agreement between Orest Misyk and Edwin Leckner, dated Mar. 31, 1980, bearing two signatures purportedly written by Orest Misyk.

Exhibit P-222 - a Scotiabank *"Business Account Deposit"* book containing carbon copies of fifty (50) separate deposit forms which bear bank stamps dated from Jan. 05, 2005, to Oct. 12, 2007, also bearing handwritten and/or handprinted notations, plus initials or signatures, purportedly written by Orest Misyk.

Exhibit P-223a - a manilla-coloured envelope postmarked at Holden, Alberta on Dec. 09, 1998, bearing the handprinted address *"FLoyd McVIG Box 2 BRUCE T0B 0R0"*, and a handprinted return address purportedly written by Orest Misyk.

Exhibit P-223b - a sheet of white paper bearing a handwritten letter dated Dec. 5, 1998, commencing *"Dear Floyd McVig ...."*, and concluding with the handprinted notation *"Orest Misyk Box 175 Bruce T0B 0R0"*, purportedly written by Orest Misyk.

Exhibit P-226 - a *"Bill Of Sale"* document describing the terms of a motorcycle sale by Orest Misyk to Mike MacNeil, dated May 25, 1995, bearing handprinted notations and a signature purportedly written by Orest Misyk.

Exhibit P-227 - a typewritten *"Cash Lease Agreement"* describing the terms of an agreement between O.E. Misyk and R. Korbyl, dated July 01, 1991, bearing a handprinted name and a signature purportedly written by Orest Misyk.

Exhibit P-228 - a reproduction of a two-page *"Transfer Of Land"* document describing the terms of a land agreement between Orest Misyk and Ducks Unlimited Canada,, dated Feb. 10, 2006, bearing in several locations signatures purportedly written by Orest Misyk. *(Note: Some sections of this document have been previously listed and described as Exhibit K-5).*

Exhibit P-229 - a reproduction of a Swan City Realty *"Exclusive Listing Agreement"* completed in the name of "Orest Misak", dated Apr. 27, 2005, bearing a signature purportedly written by Orest Misyk.

Exhibit P-230 - a reproduction of a *"Dual Agency Disclosure Statement"* completed in the names of Orest Misyk and Duck Unlimited Canada, bearing an undated signature purportedly written by Orest Misyk.

Continued on Page 10

2. DESCRIPTION OF DOCUMENTS: Cont'd.

(3) The following additional exhibits were received at this office on March 25, 2010, via electronic file transmission (digital file attachment to e-mail) from the account of Roger C. Stephens, of the firm Simons and Stephens, Barristers and Solicitors, Edmonton, Alberta:

Exhibit P-110 - a scanned reproduction of an Alberta *"Vehicle Registration Certificate"* for Licence No. 1X4813, issued on June 30, 1984 in the name of Orest Misyk, bearing a signature purportedly written by Orest Misyk.

Exhibit P-111 - a reproduction of a handwritten bill of sale dated May 18, 1983, describing the terms of an agreement between Orest Misyk and Bruce Weber, bearing a signature purportedly written by Orest Misyk.

Exhibit P-112 - a reproduction of the signature page from Canadian Passport No. MJ742084 issued in the name of Orest Ehner Misyk on Apr. 09, 2003, bearing a signature purportedly written by Orest Misyk.

Exhibit P-224 - a reproduction of a diabetes I.D. card completed in the handprinted name *"Orest Misyk"*, purportedly written by Orest Misyk.

Exhibit P-225 - a reproduction of a Department of Transport *"Student Pilot Permit"* No. XDX-250636, issued on Nov. 25, 1977 in the name of Orest Ehner Misyk, bearing a specimen signature purportedly written by Orest Misyk.

(4) The following additional exhibits were received at this office on March 25, 2010, via electronic file transmission (digital file attachment to e-mail) from the account of Roger C. Stephens, of the firm Simons and Stephens, Barristers and Solicitors, Edmonton, Alberta:

Exhibit K-19 - a microfilm reproduction of a *"Customs Declaration Card"* completed in the name of Orest E. Misyk, bearing an illegible date stamp, and bearing a signature purportedly written by Orest Misyk.

Exhibit K-20 - a microfilm reproduction of a *"Customs Declaration Card"* completed in the name of Orest E. Misyk, appearing to be date stamped in June 2007, bearing a signature purportedly written by Orest Misyk.

Exhibit K-21 - a microfilm reproduction of a *"Customs Declaration Card"* completed in the name of Orest E. Misyk, date stamped "Sep 25, 2007", bearing a signature purportedly written by Orest Misyk.

Continued on Page 11

2. DESCRIPTION OF DOCUMENTS: Cont'd.

(5) The following additional exhibit was received at this office on March 26, 2010, via electronic file transmission (digital file attachment to e-mail) from the account of Roger C. Stephens, of the firm Simons and Stephens, Barristers and Solicitors, Edmonton, Alberta:

Exhibit P-221 - a reproduction of various pages from the duplicate cheque book of Orest Misyk, including copies of twenty (20) cheques dated from April through August of 2001, each apparently bearing handwritten and/or handprinted entries, plus a signature, purportedly written by Orest Misyk. *(Note: A number of these cheques include handwritten / handprinted entries not produced by Orest Misyk, and in most cases, the signature is not fully visible due to an opaquing security pattern on the duplicate cheque.)*

Court of Queen's Bench of Alberta

Citation: Koerner v. Capital Health Authority, 2011 ABQB 191

Date: 20110322
Docket: 0803 01510
Registry: Edmonton

Between:

Lisa Koerner

Plaintiff/Respondent

- and -

Capital Health Authority, Royal Alexander Hospital, University of Alberta Hospital, Grey Nuns Community Hospital, Missericordia Community Hospital, Dr. Walter Yakimets, Dr. Todd Mcmullen, Dr. Doug Davey, Dr. D. San Agustin, Dr. Kata Matic, Dr. G. Sandha

Defendants/Applicants

Corrected judgment: A corrigendum was issued on March 30, 2011; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Madam Justice D.L. Shelley

I This Application

[1] This application is the latest of many I have heard in the course of case management of this action.

[2] The Defendants apply for:

a. a declaration that Ms. Koerner is in contempt,
b. an order dismissing her action, and

c. costs of this application on a solicitor and own client basis, payable immediately.

[3] If I strike Ms. Koerner's claim, the Defendants also ask for an order requiring her to seek leave to commence any new action in relation to these matters so as to avoid re-litigating them.

[4] The grounds for the Defendants' application are that Ms. Koerner has failed to meet the deadlines set by Court Order for attending to complete the Defendants' Questioning of her and for producing psychological and psychiatric records.

II Background

[5] Ms. Koerner's Statement of Claim is for damages arising from alleged malpractice by the Defendant Doctors and Hospitals. In general, Ms. Koerner's Claim alleges the following:

1. Dr. Yakimets and Dr. McMullen failed to remove her gallbladder during a gallbladder surgery on October 11, 2006 and to obtain proper consents to perform the surgery;
2. The University of Alberta Hospital, Dr. Agustin, Dr. Matic, Dr. Sandha and Dr. Davey refused to provide treatment or testing for the personal injuries she suffered as a result of the failed gallbladder removal;
3. University of Alberta Hospital, Dr. Agustin, Grey Nuns Hospital, Royal Alexandra Hospital, and Dr. Matic refused to read MRIs relating to the failed gallbladder removal obtained by Ms. Koerner at American Hospitals;
4. Royal Alexandra Hospital and Dr. Bailey refused to provide a biopsy of cysts or a blood transfusion due to elevated bilirubin and a blood disorder;
5. University of Alberta Hospital, Grey Nuns Hospital, and the Royal Alexandra Hospital were liable for misdiagnoses relating to elevated liver enzymes and globular red blood cells and other undisclosed particulars;
6. Defamatory statements made by Dr. Davey describing the Plaintiff's need for psychiatric help.

[6] The Claim initially named the "Queen in right of Alberta as represented by the Minister of Health" as a party, but I dismissed the action against the Crown on June 19, 2009. Ms. Koerner appealed that order, but her appeal was struck as abandoned.

[7] Striking a claim on the basis of contempt is an extreme remedy. Therefore it is important to understand the background of this case management file. Ms. Koerner claims that she is extremely ill and must seek health care outside Canada because the Canadian medical system has failed to assist her. Her claims raise serious allegations of malpractice and negligence. She says she would like to have a lawyer but is self-represented because she alleges that the doctors have convinced the lawyers not to act for her.

[8] I note that on the date originally set for this application, Ms. Koerner apparently collapsed at the Law Courts immediately before the application was to proceed. She was taken to the Royal Alexandra Hospital, and I adjourned the application for two days. She was released from the Hospital after a few hours and appeared at the re-scheduled application. The Hospital's chart notes were provided to me.

[9] As a self-represented litigant, Ms. Koerner has struggled with the litigation process. The Court has endeavoured to explain appropriate procedures and practice, both in case management meetings, in correspondence, and in written decisions. She has been told on numerous occasions that, if she disagrees with a court order, it must be appealed; that affidavits must contain facts in either her personal knowledge or based on information she has received and that she believes; that exhibits in affidavits must be appropriately identified; that printed internet pages do not constitute expert evidence; and that medical evidence in support of an application for an adjournment (because she repeatedly, usually on the eve of a scheduled application or case management meeting, submits she is too sick to continue) must consist of more than partial copies of unattributed lab results.

[10] Ms. Koerner's affidavits, notices of motion, and oral argument use extreme and emotional language, are often disparaging of the Defendants and Defendants' counsel, and have often reflected a lack of respect for this Court.

[11] Her affidavits make broad allegations of fact without support. For example, Ms. Koerner's affidavit sworn August 27, 2010 stated:

> 2. Justice Shelley has endangered my life for over two years.
>
> ...
>
> 5. August 12/2010 letter from Provincial Health minister Fraudulently Stating he can't intervene in committees. The Charter gives him Complete control over provincial matters.
> The Power and Authority Act see Exhibit C
>
> ...
>
> Dr. Martin Cole report stating surgery options but this option is never offered to me. I am left to die.
> Report of Dr GC Andrew confirming DIVERTICULUM.
> Diverticulum disease can be life threatening.
> May 16/2006 report Dr. G D Sterling trivial insignificant tricuspid insufficiency.
> IS IS LIFE THREATENING AND NEEDED TO BE MONITORED
> DEFINITION OF Tricuspid Insufficiency" is a leakage of blood backwards
> through the tricuspid valve each time the right ventricle contracts.
> How can this be trivial? These Alberta doctors are frightening!
> ECG NOV 19/07CONFIRMS Heart disease. See Exhibit H.

Attached to this affidavit were a number of lab reports and letters from doctors to referring doctors. The letters indicate either normal or insignificant results and the lab results, in the absence of an expert interpretation, have no foundation.

[12] There have been several notable applications in this action. These include:

2010 ABQB 518: Ms. Koerner applied for an order for "out of country tests, cancer treatments and surgeries," alleging that Alberta had failed to provide her with adequate medical care and that the Court should order someone to pay for her out-of-country health care expenses. She alleged among other things that:

a. The Health Minister has illegally washed his hands of her life, and that he has the authority to override any decision regarding Alberta health care;
b. The Out-of-Country Health Services Committee (OOCHSC) refused to read her appeal (of its decision to refuse to pay for out of country health care);
c. Her right to life has been taken from her and she has been left to die several times and other countries had the humanity to save her life;
d. What the medical system has done to her is beyond cruel, and she has been denied pain killers for four years by doctors;
e. She has a life threatening blood disorder, and her liver and kidneys are now in failure because she never received blood transfusions;
f. While in the hospital she repeatedly asked for pain killers and was refused;

I refused the applications since neither the OOCHSC nor or the Minister of Health and Wellness were parties to this action, and because, even if her motion was tangentially related to the original action, she was effectively seeking damages before her case was proven at trial.

[13] **2010 ABQB 557**:

The Defendants applied to have Ms. Koerner found in contempt for failing to complete her examinations for discovery (as the process was then called) by the deadline, a deadline which had already been extended, with only two of the nine desired examinations completed. Ms. Koerner submitted that she was physically unable to continue discoveries. I noted that Ms. Koerner had been told on numerous occasions in the course of case management that, if she was too ill to meet timelines, she was required to provide evidence of illness. In her affidavit, she included such things as: miscellaneous portions of medical test reports and medical images, without any information as to the source of these documents or expert medical evidence interpreting them; assorted pages from the internet describing various ailments and illnesses; and copies of newspaper, magazine and journal articles regarding various health related issues. In my reasons, I reiterated what she had been told on other occasions: that these documents do not constitute admissible evidence and that expert evidence is required to establish that she is too ill to proceed.

Ms. Koerner continued to argue that she was entitled to payment of out of country health expenses and, that if I did not order them, I should step down as case management justice; that I had allowed counsel for the defendant doctors to "blatantly perjure herself"; that I should appoint a lawyer to represent her while she was outside Canada seeking medical care; that it was not a breach of a court order if the court order in question is unfair or the person in breach is not able to comply; and that I, as case management justice, was in contempt of Court.

I found that Ms. Koerner was in contempt for failing to comply with the Court's Orders, but noted that there were a range of penalties available for civil contempt. I did not strike Ms. Koerner's Statement of Claim, noting that her examination of the Defendants was not crucial to the Defendants' ability to defend. Instead, I ordered that Ms. Koerner's examinations were deemed complete and that she had forgone the right to examine any other of the Defendant doctors or employees of the Defendant hospitals. I also ordered solicitor-client costs for the application.

[14] **2010 ABQB 590**:

The Defendants applied (under then Rule 217) to have Ms. Koerner attend for an independent medical examination (IME) by a psychiatrist and a psychologist. The Defendants also applied for an order requiring Ms. Koerner to produce records related to her treatment by psychologists, psychiatrists, and other mental health professionals. The Defendants argued that the pleadings and the records produced to date placed Ms. Koerner's mental health in issue. They relied on an expert report by a psychiatrist, who had reviewed Ms. Koerner's records and concluded that there was a significant probability that Ms. Koerner suffered from a psychiatric disorder.

Ms. Koerner argued that it was "illegal" for the Defendants to have shown their expert her records, that the Court cannot force her to see a doctor she is not comfortable with (citing the *Mental Health Act*), that her intelligence is completely irrelevant, and that tests by psychologists are "completely illegal" and "completely unethical". She accused the Defendants of "fraudulence" and said that all the records were lies in a corrupt medical system. She attempted to rely on a report by the Privacy Commissioner to say that she had no psychiatric condition. In regards to the production of mental health records, Ms. Koerner argued that she had never received a diagnosis of mental illness and therefore her mental health records were irrelevant; that psychologists cannot legally make a diagnosis; and that she had never seen some of the doctors mentioned in the records.

I determined that a psychiatric assessment was necessary to determine, among other things, whether somatization was a cause of Ms. Koerner's reported symptoms. It would also be relevant to Ms. Koerner's claim that she has been defamed. I further concluded that there was nothing inappropriate in releasing the records to the Defendants' expert; and that the Privacy Commissioner's report did not determine that Ms. Koerner did not have a psychiatric condition, only that there were no psychiatric reports in the records of the Child and Family Services Agency (Area 6). I also noted that the Court has an obligation to ensure that all relevant evidence is available for trial and that it has the authority to order an independent medical examination. If

Ms. Koerner chose not to attend the IME, the Court might then dismiss her claim because the Defendants would then be denied the opportunity to answer and defend the claims against them.

I also ordered that, since Ms. Koerner's psychiatric status was central to the action, the records of all previous consultations by psychiatrists and psychologists were relevant and material and therefore producible. I ordered Ms. Koerner to request production of the complete records of her attendances with the psychiatrists and psychologists, and to produce either the requests for the records, or the records themselves if she had them in her possession, within one week of my decision.

[15] **2010 ABQB 753**:

Ms. Koerner applied for an order "dismissing" my previous order regarding service of documents; an order "dismissing" my order to provide "irrelevance reports" (the psychiatric and psychological reports ordered to be produced); an order that the IME assessments be videotaped; and an order to change the order of testing.

Ms. Koerner argued that the service Order[1] placed an unfair burden on her when she left the country for medical care, that a court could grant an adjournment until further notice, and that the action should not proceed until she returns. I refused the application to vary the order regarding service, noting that her remedy, if she was unhappy with the order, was to appeal. I further noted that Ms. Koerner had been told on numerous occasions that an adjournment for ill health is not automatic, and that she must apply for it and support the application with appropriate evidence. I noted that such evidence could include an affidavit "sworn by a doctor who is or is proposing to treat her, confirming the timing of treatment and where it will be done, and providing a date when she will have completed the proposed treatment and be available to continue with her obligation to pursue her action."

Ms. Koerner argued that the psychiatrists' and psychologists' reports I ordered produced were irrelevant, would violate her children's privacy rights, and was in violation of Rule 40 (*Alberta Rules of Court*, Alta. Reg. 390/1968). I noted that Ms. Koerner had not appealed the Order and that I had no jurisdiction to reverse the Order, but that, with the Defendants' consent, the Order could be varied to permit redaction of personal information regarding her children. I ordered that that any record that contained references to her children be submitted to the Court within a specified time frame for any necessary redaction before forwarding to the Defendants.

Ms. Koerner directed much of her argument towards the alleged bias of the psychiatrist who was going to conduct the IME, because she felt he improperly relied on a report of another psychiatrist. She suggested that this report would not stand up at trial because it was inconsistent,

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[1] The Order provided that Ms. Koerner must advise the Defendants in advance if she was leaving the country and provide the name and phone number of a contact person in the Edmonton region. The Defendants could then serve Ms. Koerner by leaving a voice mail at that phone number advising that documents were available for pick-up; this would constitute adequate service.

contradictory, and raised a somatoform diagnosis without a factual basis. She further suggested that expert reports are biassed because they are selected by the parties. I noted that question of the validity of expert's reports was a question for trial, and that at trial she would be able to introduce her own expert witnesses, raise concerns about the validity and fairness of tests, and concerns about the actual interview with the psychiatrist.

In regards to video-taping, I had granted Ms. Koerner's application to have her interview with the psychiatrist video-taped; she also wished to have the psychological testing by the psychologist video-taped and wanted to be able to expand upon her answers and explain them. She cited the decision in ***R. v. Mohan***, [1994] 2 S.C.R. 9, to challenge the testing by the psychologist, suggesting that the case is intended:

> "... to protect people from the basic evaluation of the norm... if you want to dispute the other party's expert witness, you can apply to the courts for this hearing before trial and dispute, and um... this is one of the tests that is very commonly disputed, this MMPI test and therefore the courts, ***Mohan*** was put in place, like I said by the one quote I used, I know for a fact, it was definitely on the website, says "Mohan kept the door open to novel science, rejecting the general acceptance" so basically they're giving you the opportunity to state this test should not be included and because it is evaluated on the norm and again what doctor can state what is the norm.".

The Respondents noted that there were copyright issues and concerns about variations to the administration of the tests invalidating the results. The Defendants further indicated that they were not opposed to Ms. Koerner having an interview with the psychologist in addition to the standardized testing. I sought further submissions on this issue.

[16] **2010 ABQB 761**:

This was a continuation of the previous application and addressed the questions of whether the psychologist's tests could be administered orally, whether Ms. Koerner could expand upon her answers in the standardised testing, whether the tests could be video-taped, and whether the raw data from the testing could be released to Ms. Koerner.

Ms. Koerner submitted an affidavit that consisted primarily of argument, and which attached a number of documents that were not sourced and were incomplete. On the basis of this affidavit, she attempted to attack the validity of one of the tests proposed for the IME, the Minnesota Multiphasic Personality Inventory (MMPI), saying that it has "high fake bad scores", is evaluated by the "norm" which fluctuates according to personal views and economic status, and that two Florida judges have barred the test. She further argues that the courts are obligated to "go by proven facts, not scientific opinion" and that many people are wrongfully diagnosed because psychologists can evaluate any way they want to. She further argued that only relevant information should ever be disclosed, and that it is illegal for the defence to use another doctor's report as evidence, and that only the expert has a right to view her personal reports, not the

defence. She argued that the defence is not entitled to any previous reports. She further asserted that "All Albertans are allowed all Psychologists reports, accrual test by law," and that a psychologist cannot prove information on hearsay. If she is not given copies of the tests, she will obtain them through the Privacy Commissioner. She accused the psychologist of being "fraudulent" when he said that the MMPI was copyrighted, because she was able to find a copy on the internet.

I noted that Ms. Koerner's concerns about the reliability of the MMPI were not relevant at this point in the proceedings, and that the Order to undergo testing had not been appealed and remained in effect. Relying on the psychologists expert evidence filed by the Defendants, I concluded that the test procedures and protocols must be followed to ensure the test's validity and that therefore the administration of the tests could not be video-taped. Further, raw date and test protocols may only be released to a Registered Neuropsychologist or Registered Psychologist. In light of the Defendants' agreement that there be an additional interview, I indicated Ms. Koerner could explain her answers to the psychologist and that that interview could be video-taped.

III This Application

A. The Defendants' submissions

[17] The basis of the Defendants' application for a Declaration that Ms. Koerner is in civil contempt is that she has:

a. refused, absent medical evidence, to attend the completion of her Questioning as per this Court's Order that Questioning be completed by December 15, 2010. That deadline was extended by consent of the parties to January 26, 2011;

b. refused or otherwise failed to comply with this Court's Order that she produce to the Court copies of all records of her prior attendances with psychologists and psychiatrists by, at the latest, December 6, 2010.

[18] The Defendants noted that I had ordered the Defendants to complete Examinations for Discovery (now referred to as Questioning) within three months after the Plaintiff completed her examination of the Defendants' witnesses. I had also ordered that Ms. Koerner was deemed to have completed her examinations on August 5, 2010. The parties consented to an Order that Questioning of Ms. Koerner be completed by December 15, 2010, and the parties scheduled dates by consent to complete Questioning within this time period.

[19] At the November 29, 2010 Questioning, Ms. Koerner advised counsel for the Defendants that she would not be able to attend the dates set for Questioning during the week of December 13, 2010, because she expected to be leaving the country and would be unavailable for medical reasons. Therefore the parties agreed, at Ms. Koerner's request, to schedule dates during the week of January 24, 2011 to complete Questioning. The Defendants expressly indicated that they

would not consent to any further extensions unless Ms. Koerner provided evidence that she was unable to attend for medical reasons. This agreement and limitation appear on the record at the conclusion of the November 29, 2010 Questioning.

[20] On January 19, 2011, Ms. Koerner sent counsel for the Hospital Defendants an email advising that she would not be attending the scheduled Questioning, saying she was critically ill. Ms. Koerner's initial email states (attached as an Exhibit in the Affidavit of the Defendant, Dr. Yakimets), in part:

> I am unable to attend the up coming discoveries.
> I have again attempted medical help in Alberta and was abused and lied to.
> I am now researching other options.
> I am nearly bedridden.
> My heart is in critical shape. There is a very good possibility I may have a heart attack.
> Today I passed out in my bathroom and I am not willing to have that happen in your office.
> My country is denying me medical treatment I am entitled to by law and therefore I am forced to reach out to other countries.
> This abuse will come out in court.

[21] A further email continues:

> I want to inform you that I did infact want to continue with Case Management but am unable to.
> I want my Justice more than anyone can imagine. I was thinking the next doctor I approach in Alberta would not have been a monster! Unfortunately for me he was, no surprise. He refused to review my reports...
> Yes please get the courts direction, since Justice Shelley has made it clear, she can't force any doctor to help me.
> She can rule out of country evaluation, at the expense of Alberta.
> If I die I would not want to be any of you including Justice Shelley.
> I hope that Justice Shelley does the right thing this time, before I die.

[22] Ms. Koerner indicated in her email that she would be open to continuing the Questioning by teleconference. Counsel for the Defendant Hospitals was not prepared to agree to a teleconference because it would not be feasible, given how document intensive the Questioning was. Counsel for the Defendant Hospitals asked for medical evidence to support Ms. Koerner's request for a further extension. Ms. Koerner's email response was:

> I don't have any new reports or, consults because I don't have the money.
> No I don't want an indefinite adjournment. I want to live.
> I can't force any doctor to help me but God help them when they don't!

> If Justice Shelley would have had humanity she would have appointed me a lawyer until, I was able to continue.

[23] The Defendants further note that by Order granted September 1, 2010, Ms. Koerner was directed to produce the following:

a. complete records of her attendances with psychologists Dr. J.A. Hammond, Dr. Richard Abidin, and Dr. Theodore Milton (the Psychological Records) to counsel for the Defendants no later than September 22, 2010;

b. complete records of her attendances with psychiatrists, Dr. Klaus Gendemann, Dr. Penelope Sullivan, and Dr. Yakov Shapiro (the Psychiatric Records) to counsel for the Defendants no later than September 22, 2010; and

c. complete records of any other attendances with psychiatrists, psychologists or other mental health professionals (further Mental Health Records).

[24] A further Order (granted November 29, 2010) directed that the Psychiatric records and the Psychological records that identified Ms. Koerner's children be produced to the Court no later than December 6, 2010, so that the Court could redact any references that identified Ms. Koerner's children.

[25] Ms. Koerner has never produced complete, unaltered copies of the Psychiatric, Psychological, or Further Mental Health records.

[26] In oral argument, Defendants' counsel pointed out that, even at this late date, when document production has been ostensibly completed, further documents, that the Defendants have never seen, have been included in Ms. Koerner's most recent affidavit. For example, Exhibit H to Ms. Koerner's affidavit includes a letter from Dr. Zhu, a hematologist, describing an attendance by Ms. Koerner. In Questioning, Ms. Koerner had denied seeing a hematologist. The Defendants argue that they have no confidence that all relevant records have been produced, and that they have been prejudiced by this most recent evidence of non-production.

[27] The Defendants further note that the expert report by Dr. Urness, the psychiatrist who undertook the IME, cannot be completed until Questioning is complete because his report will be based, in part, on the transcripts of the Questioning.

B. The Plaintiff's submissions

[28] Ms. Koerner filed a an application in response to the Defendants', entitled:

> APPLICATION FOR CIVIL CONTEMPT UNJUSTIFIED. PLAINTIFF COMPLIED WITH ALL ORDERS

APPLICATION FOR ALBERTA HEALTH TO PAY FOR EMERGENCY MEDICAL TREATMENTS AND MEDICAL TESTS.

[29] In her application, Ms. Koerner seeks a declaration that she is not in contempt. The application goes on to say that she is critically ill; that two Alberta doctors have lied by saying that her blood was fine, when there are many medical records that indicate that her blood is not fine and further investigations are warranted; that no Alberta doctor will be honest; and that she has thalassemia, which United States hospitals recognize as serious, but Canada has not. She further indicates that she is prepared to continue Questioning, but is too weak to stand or sit for long periods of time without falling or blacking out. She is not in contempt because she offered another solution - teleconferencing.

[30] Ms. Koerner goes on to ask the Court to postpone discoveries to a later date or order a phone conference. She says that she must go out of country for medical help, and again asks the Court to order out of country medical help. She argues that there is sufficient medical evidence to substantiate her allegations and that her affidavit filed in support documents her attempts to reach out to Canadian doctors who say she must be referred to them by a family physician, while American doctors will see her without a referral.

[31] As grounds for her application, Ms. Koerner says that she has two or more life threatening conditions. She asserts that she has thalassemia, which causes organ failure, and pancytopenia, which results in bone marrow failure and death. In addition, Ms. Koerner says she has a stenosised bile duct filled with undiagnosed cysts, gall stone blockage, chronic pancreatitis, jaundice, hip problems, ear problems (including temporary deafness at times), mild scoliosis, several gastrointestinal problems, reflux, irritable bowel syndrome, esophageal tumor, large stomach mass, digestive problems, bruising, constant infections, breast cancer, pelvic cancer, liver cancer, pancreatic cancer, kidney failure, a liver working at 30% capacity, Fanconi anemia, tumors, scattered osteomas, factors indicating multiple myeloma, as well as other symptoms. She insists that every time she has asked for an adjournment, she has provided medical evidence of her condition. She contends:

> Court orders must be followed unless there is a justified reason. If a person is physically unable to proceed until a later date, that is their constitutional right.

[32] Ms. Koerner's application further states that she is not in contempt for refusing to produce her mental health records, noting that at the last case management meeting the defence stated on the record that it was not necessary to produce the records until a later date. She further argues that she has produced all her diagnoses to the defence in discoveries, and that the law requires all physicians to protect their clients' privacy. Moreover, she asserts that, since neither of the Defendants' counsel are doctors, they have no entitlement to her personal information. She indicated that she authorized Dr. Mrazik, the psychologist who conducted the IME testing, to obtain any educational or medical records he needed, and he is the only person other than the trial judge who has a "legal right to invade my [her] privacy".

[33] Ms. Koerner's affidavit in support of her application attaches a number of exhibits. I will review them in detail as they are similar to the kinds of attachments she has included in other Affidavits.

Exhibit A: an appointment confirmation with Dr. Sawisky and a letter of complaint by Ms. Koerner to "his superiors". The complaint letter is lengthy and includes a complaint that Dr. Sawisky said all her lab work was normal, when doctors in Mexico and at Mount Sinai Hospital in New York made diagnoses of serious illnesses. The affidavit does not include either the Mexican or Mount Sinai diagnoses. Other complaints include that she told him she also had kidney failure, but he said her kidneys were 'great"; she told him she had a small bowel blockage and he replied that she could not have or she "would be on the floor screaming in pain"; she told him that she said that she had cysts on her bile duct which could be malignant, and he replied that it is not necessary to remove cysts and they might not be malignant.

Exhibit B: Email to and response from Seattle Cancer Care Alliance that it does not have financial assistance programs for patients outside of Washington state.

Exhibit C: email to Massachusetts General Hospital seeking medical assistance; Ms. Koerner deposed that the hospital never responded.

Exhibit D: Email to American Cancer Society, who responded that financial assistance is usually dependent upon a three month residency in the United States.

Exhibit E: Email to Fanconi Canada, in which Ms. Koerner suggests that she has pancytopenia, which she says raises a strong possibility that she has Fanconi Anemia. She asks where she can be tested for the disorder. The Exhibit has a handwritten response, apparently purporting to be the email response from the President of Fanconi Canada. According to Ms. Koerner this response was that if she was unable to get the necessary expertise from a hospital in Calgary, she could approach the Vancouver General Hospital or the Princess Margaret Hospital in Toronto. Ms. Koerner deposes that in the past she attended at Vancouver General and was assaulted, and further that she cannot afford to go back and forth to Vancouver.

Exhibit F: Email to Dr. Yigal Dror, Associate Professor of Paediatrics, Division of Hematology/Oncology , The Hospital for Sick Children, the University of Toronto. Ms. Koerner's email states, among other things: "I have many serious health problems...I have passed 240 gallstones and as a result my Bile Duct is stenosised and filled with undiagnosed cysts...I have chronic pancreatitis and jaundice...I have confirmed Thalassemia trait, although I was told if you have an absence of Iron, this will obstruct a diagnosis of Thalassemia beta. I had a bone marrow biopsy which confirmed pancytopenia." There follows a lengthy list of other symptoms and complaints. Dr. Dror responded by email that if she wanted to be tested, she would have to contact the doctor

who is treating her. Mr. Koerner complains in her affidavit that Dr. Dror should not have turned her away and should have tested her.

Exhibit G: CT Scan Report from Diagnostic Imaging at the University of Alberta hospital. The report lists as the Reason for Exam: "METASTIC TUMOR CA STAGING TUMORS ON KIDNEY, LIVER ESOPHAGUS BOWELS, OVARY". The findings in the report state that the chest and abdomen are normal. Ms. Koerner's affidavit states that CT scans from other countries "show tangible evidence" and that "Either the Alberta radiologist is incompetent or the scanner at the university hospital is faulty."

Exhibit H: Letter from Dr. Zhu (referred to earlier in these reasons) in which Dr. Zhu noted an "Antithrombin level "slightly above the normal cutoff", which the doctor concludes is "clinically not significant." The report goes on to say that the physical exam revealed no abnormalities. Ms. Koerner, in her affidavit, insists that this constitutes "negligence at its best" because the doctor ignored the blood elevation. She goes on to refer to a report from the Mount Sinai Hospital, also included in the exhibit, a note in which states: "Hgb A2 levels may be decreased in iron deficiency states". A further note in the report states: "This may obscure the diagnosis of beta thalassemia". Ms. Koerner then refers to a report from Ramathibodi Hospital that she says states that she has 0% Iron and this could have obstructed the correct diagnosis of Thalassemia Beta.

[34] In her oral submissions, Ms. Koerner said that she had already provided all the records in her possession to the Defendants. Further, Dr. Zhu's report could not be relied on because she told Ms. Koerner that she could not have sickle cell anemia because she was white and refused to re-test her blood. She indicated that she was doing the best she could, but was critically ill and waiting for someone to save her life.

[35] Ms. Koerner went on to indicate that she would have problems providing out of country records, such as those from Holland, because they only send them by registered mail and, if she is too ill to pick them up or is out of country, Canada Post will just send them back.

[36] As to the Psychiatric and Psychological Records, she authorized Dr. Mrazik to obtain her records. Further, she insisted that she has a right to keep her personal information private by law, and the Defendants are not entitled to it. She argued further that there is no Dr. Milton, and therefore she cannot get a record from him.

[37] Ms. Koerner noted that she has proved in her affidavits that she is critically ill. In particular she notes that hospitals in other countries have admitted her, and that this proves her illness.

[38] Ms. Koerner indicated that her time at the Royal Alexandra Hospital following her collapse on the day originally scheduled for this application was "horrific", as she spent four hours in the waiting room with paralysed legs. While I will limit my reliance on the Hospital's charts, in the absence of expert evidence interpreting them, I do note that the chart only refers to

leg weakness, not paralysis. She indicated that it was scientifically impossible for her blood reports to come back normal (which is what is indicated in the Hospital Records), since she is in liver and kidney failure. Therefore, she concluded the fact that reports came back normal is proof of fraud. She said that she pleaded with the doctors for a full body CT scan, but the doctor refused. She was upset that the woman in the bed next to her received an ultra-sound that day, but she had to return the next day for one.

IV Analysis

A. Civil Contempt Principles

[39] R. 10.52 of the new Rules (*Alberta Rules Of Court*, Alta. Reg. 124/2010) provides:

> 10.52 (3) A judge may declare a person to be in civil contempt of Court if
>
> (a) the person, without reasonable excuse,
>
> (i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,

[40] I discussed the nature and purpose of the Court's civil contempt powers in 2010 ABQB 557 (at paras. 30-32) dealing with the old Rules, which provided:

> 703 (1) Every person is in civil contempt who
>
> (a) fails, without adequate excuse, to obey any order of the court, other than an order for the payment of money

[41] In my view, there is no appreciable difference between the new and old Rules dealing with civil contempt, at least as it relates to the failure to obey a Court Order.

[42] At para. 30 of 2010 ABQB 557, I noted that the purpose of a court's civil contempt power is to achieve compliance with court orders and to uphold the court's authority ***(Dreco Services Ltd. v. Wenzel***, 2004 ABQB 517 at para. 66; ***S.W. v. K.T.***, [2005] A.J. No. 479 (A.B.Q.B.) at para. 17; ***McInroy v. Burnstad***, 2010 ABQB 375 at para. 11. I noted:

> The central idea is that courts have a right to protect the dignity of their own proceedings, and they are entitled to discipline any conduct that they feel tarnishes, undermines, or impedes the court's role in society as administrator of justice. The Court of Queen's Bench has an inherent power to find a person in contempt of court if they feel the proceedings are being disrespected.

[43] The requirements for finding civil contempt were outlined in ***Point on Bow Development Ltd. v. William Kelly & Sons Plumbing Contractors Ltd.***, 2006 ABQB 775, 405 A.R. 1, where Rooke J. (as he then was) noted (at para. 19) that there must be:

1. An existing requirement of the court;
2. Notice of the requirement to the person alleged to be in contempt; and
3. An intentional act (or failure to act) that constitutes a breach of the requirement. This should be without adequate excuse, in accordance with Rule 703(1)(a).

[44] A judge must be satisfied beyond a reasonable doubt that each of these elements have been met in order to make a finding of contempt. Moreover, the decision to find a party in contempt is within the court's discretion (***Metropolitan Life Insurance Co. v. Hover***, 1999 ABCA 123 at para. 10).

[45] I noted in 2010 ABQB 557 (at para. 35) that lack of compliance is often coupled with a lack of respect for the proceedings, but intention to disrespect the court is not required for a court to find contempt.

[46] R. 10.53 of the *Rules of Court* outlines the penalties available to a court for civil contempt. It is essentially the same as the penalties set out in Rule 704 of the old Rules. The Rule provides:

> 10.53(1) Every person declared to be in civil contempt of Court is liable to any one or more of the following penalties or sanctions in the discretion of a judge:
>
> (a) imprisonment until the person has purged the person's contempt;
>
> (b) imprisonment for not more than 2 years;
>
> c) a fine and, in default of paying the fine, imprisonment for not more than 6 months;
>
> (d) if the person is a party to an action, application or proceeding, an order that
>
> (i) all or part of a commencement document, affidavit or pleading be struck out,
>
> (ii) an action or an application be stayed,
>
> (iii) a claim, action, defence, application or proceeding be dismissed, or judgment be entered or an order be made, or

(iv) a record or evidence be prohibited from being used or entered in an application, proceeding or at trial.

(2) The Court may also make a costs award against a person declared to be in civil contempt of Court.

(3) If a person declared to be in civil contempt of Court purges the person's contempt, the Court may waive or suspend any penalty or sanction.

(4) The judge who imposed a penalty or sanction for civil contempt may, on notice to the person concerned, increase, vary or remit the penalty or sanction.

B. Is Ms. Koerner in contempt?

[47] There is no doubt that Ms. Koerner is in contempt. This Court's Orders clearly set out that Questioning was to be completed by December 15, 2010. The Defendants, at Ms. Koerner's request, agreed to extend the time to the week of January 24, 2011. I do not fault the Defendants for this breach. They were attempting to accommodate Ms. Koerner and avoid the necessity of returning to Court. Review of the Questioning transcript for December 13, 2010, makes it clear that the parties placed on the record their agreement to extend the Defendants' time to complete Questioning until January 26, 2011, "subject to any medical evidence provided by Ms. Koerner that she requires a longer extension."

[48] Ms. Koerner did not provide any medical evidence to the Defendants to justify a longer (or any) extension. This is confirmed in her email to Defendants' counsel, wherein she advised that she did not have "any new reports or consults." Nor is the evidence provided in Ms. Koerner's affidavit sufficient to establish that she was unable to continue the Questioning. Ms. Koerner has been told in correspondence, in court, and in written reasons by this Court, what constitutes adequate evidence to establish that she is too ill to continue. For example, in 2010 ABQB 753, this Court noted that appropriate evidence could include (at para. 10):

> ... an affidavit sworn by a doctor who is or is proposing to treat her, confirming the timing of treatment and where it will be done, and providing a date when she will have completed the proposed treatment and be available to continue with her obligation to pursue her action.

[49] Ms. Koerner knew that what she had provided was not sufficient. In the previous contempt application, 2010 ABQB 557, I noted (at paras. 24-25):

> In response to the Applicants' submissions, Ms. Koerner said that she was physically unable to continue. Ms. Koerner has repeatedly asserted that her health has prevented her from complying, but despite repeatedly having been informed by this Court that she must provide evidence that she is too ill to meet her

deadlines, she has not done so. She has, however, filed affidavits that attach as exhibits:

a. miscellaneous portions of medical tests and medical images without adequate information as to the source of these documents, or evidence identifying the documents, or expert medical evidence interpreting them;

b. assorted pages from the internet describing various ailments and illnesses; and

c. copies of newspaper, magazine and journal articles regarding various health related issues.

I must reiterate for Ms. Koerner that these are not properly admissible or relevant evidence of anything if they are not appropriately attached as exhibits with a declaration as to their source, if they are not complete, and if they are not accompanied by expert evidence that interprets them.

[50] I reiterate again - lab reports, without expert evidence to interpret them, are not proof of illness. As Ms. Koerner has repeatedly noted, I am not a doctor and I am not qualified to interpret lab reports. Moreover, incomplete and partial records have questionable weight, and internet pages are not admissible as expert evidence of symptomology and diagnosis.

[51] I note also that many of the exhibits Ms. Koerner relied on indicate that she is, in fact, well and that her test results are normal. Ms. Koerner does not believe these are accurate, but she has not provided any admissible evidence that contradicts these reports.

[52] The evidence is even stronger in relation to the failure to produce the Psychiatric Records and Psychological Records. Ms. Koerner relies on Defendants' counsel's statement in the November 25, 2010 case management meeting. At that time, I had not yet issued my reasons in relation to production of records that referenced Ms. Koerner's children (2010 ABQB 753, Reasons released November 29, 2010). In that context, Ms. Roberts, counsel for the Defendant doctors, noted that Ms. Koerner had not yet provided the Psychological and Psychiatric Records and was still maintaining her opposition to doing so. Ms. Roberts noted (Transcript, p. 13, ll. 32-40):

Ms. Roberts:	...She's currently in contempt of that portion of your order, but we have asked you to give us some advice as to whether you think you are the appropriate person –
The Court:	That will be dealt with in the order that I am hopeful will be ready by tomorrow, depending on what happens today.
Ms. Roberts:	So perhaps we'll just set that aside for the moment.

[53] It is clear from the entire context of this exchange that Ms. Roberts was not suggesting that the records need not be produced, but that the Defendants would not pursue contempt proceedings until after my decision dealing with the records that referenced Ms. Koerner's children.

[54] Further, Ms. Koerner continued to make the same arguments in this application as she had in the previous two applications dealing with production of these records – that the Defence had no right to see her personal information, that she had a constitutional right to not produce them, and that there was no Dr. Milton. I rejected those arguments and she did not appeal that decision. The Order clearly required her to produce those records that referenced her children to the Court for redaction by December 6, 2010, and all other records were to be produced or sought within seven days of that September 15 decision – September 22, 2010. She did not do so.

[55] Ms. Koerner's assertion that she has produced all her diagnoses to the Defence in the course of Questioning is irrelevant. The Order was not to provide diagnoses, but to provide all records of attendances with specific psychiatrists and psychologists and any other mental health professionals. While all physicians are required to protect their clients' privacy, plaintiffs whose claims raise serious questions regarding mental health must provide consent for their release and produce these kinds of records so that the Defence can fully defend against the action. If plaintiffs refuse, they run the risk that their claim will be dismissed.

[56] Further, there is no merit in the argument that, since neither of the Defendants' counsel are doctors, they have no entitlement to her personal information. Nor is there any basis for refusing to obey the Order because she authorized Dr. Mrazik to obtain any educational or medical records he might require in connection with his testing.

C. What is the appropriate remedy?

[57] The Defendants ask that I dismiss Ms. Koerner's action. A number of cases have addressed when it is appropriate to dismiss an action as a remedy for civil contempt. In ***Jervis v. Nendze***, 2002 ABQB 673, 318 A.R. 293, Veit J. refused to strike out the plaintiff's claim because the disclosure was not crucial to the defendant's ability to defend. In ***Michel v. Lafrentz***, 1998 ABCA 231, 219 A.R. 192, the Court of Appeal refused to strike the appeal, because the failure was the result of inadvertence, misunderstanding, or simple neglect, and because by the time of the application, the contempt had been purged.

[58] Here, the Defendants cannot properly defend the action if they cannot complete their Questioning of Ms. Koerner. I agree with the Defendants that in this case teleconferencing is not an adequate alternative. There are many documents that Ms. Koerner will be questioned about. Ms. Koerner has not numbered her production, and the process of identifying which documents are being referred to would be unduly cumbersome and time-consuming.

[59] I am most concerned by Ms. Koerner's failure to provide (or request records where she is not in possession of them) the Psychiatric and Psychological Records. The Defendants are asserting that Ms. Koerner's damages are not caused by their actions, but by a mental illness. These records are essential to pursuing that defence. Ms. Koerner's continuing response is that she does not have to produce them because she has a privacy interest in the records. This is not a case of inadvertence, misunderstanding, or simple neglect. She has repeatedly refused to produce them despite this Court's Orders.

[60] This is not the first time that Ms. Koerner has failed to comply with Court Orders in this action. Despite numerous opportunities to produce records and to attend to the Questioning of the Defendants, she repeatedly failed to do so. In the latter instance I declined to strike her claim. Her failure to Question the Defendants did not impede their ability to defend the action. Instead, I terminated Ms. Koerner's ability to schedule any further Questioning of the Defendants or their representatives. However, Ms. Koerner's continuing failure to fully produce relevant records and to allow the Defendants to complete their Questioning of her does seriously impede their ability to defend the action.

[61] I therefore dismiss the Plaintiff's action against all the Defendants.

D. Out-of-country health funding

[62] As this action has now been dismissed, it is not necessary to address Ms. Koerner's application that the Court order Alberta Health to pay for out-of-country health care. In any event, I have already refused a similar application (2010 ABQB 518), because Alberta, Alberta Health, and the Minister of Health are not parties to this action.

E. Costs

[63] The Defendants have sought solicitor and own-client costs (otherwise known as full indemnification costs), rather than solicitor-client costs.

[64] Lee J., in ***Georgia Pacific Canada Inc. v. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local Lodge No. D513,*** 1999 ABQB 182, 243 A.R. 219, pointed out that solicitor-client costs are routinely awarded in civil contempt proceedings, but are not punishment for the contempt (at para. 226):

> As stated in ***Zelazo (No. 1)***, *supra*, at page 333, "[t]he costs merely serve to indemnify the . . . plaintiff for expenses which he has incurred coming to court. They are not really punishment as such." This same point is made again in ***Zelazo v Masson (No. 2)*** (1992) 129 A.R. 388 (Q.B.), at pages 391 and 392, where it is noted that "[n]ot to award such costs would be to punish the plaintiff".

[65] Solicitor and own-client costs are, however, different and are awarded only in exceptional circumstances. In ***Jackson v. Trimac Industries Ltd. (1993),*** 8 Alta. L.R. (3d) 403,

138 A.R. 161 (QB) Hutchinson J. noted (at p. 417 of Alta. L.R.):

> In order for costs to be awarded on an indemnity basis or even on a solicitor-client basis, as opposed to a party-party basis the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case. Examples from the above cited cases resulting in the identification of a rare and exceptional case include
>
> 1. circumstances constituting blameworthiness in the conduct of the litigation by that party;
> 2. cases in which justice can only be done by a complete indemnification for costs;
> 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
> 4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion;
> 5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs;
> 6. defendants found to be acting fraudulently and in breach of trust;
> 7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial,
> 8. fraudulent conduct;
> 9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges.
>
> (Citations omitted)

[66] Kenny J., in ***Belzil v. Bain***, 2002 ABQB 388, commented favourably on this summary, noting that the list was not exhaustive, but provided a good framework (at para. 12).

[67] I do not find that Ms. Koerner's conduct of this action falls at the extreme end of this framework. She was not deliberately delaying the action; she wanted to get to trial. Nor did she attempt to deceive the Court. She was undoubtedly misguided in what she considered to be the law and often exaggerated and embellished her statements to the Court, but she was not acting fraudulently. I do not find that this is an appropriate situation in which to award solicitor and own-client costs, and instead order solicitor-client costs.

F. Order to seek leave before commencing another action

[68] At this time, I decline to grant the Defendants' application for an order requiring Ms. Koerner to seek leave of this Court before commencing any new action in relation to these matters. The Defendants raised this request in oral argument. It was not included in their Application materials and Ms. Koerner had no notice of it.

[69] Given Ms. Koerner's history of attempting to re-litigate the same matters before this Court, the Defendants' request is not unreasonable. However, an application for this type of remedy ought to be brought on proper notice.

V. Conclusion

[70] I dismiss Ms. Koerner's claim against all the Defendants and order that she pay solicitor-client costs immediately.

[71] The Defendants are at liberty to bring an application for an Order requiring Ms. Koerner to seek leave of this Court before commencing any new action in relation to matters already dealt with in this action, upon providing appropriate notice to her.

Heard on the 18th day of February, 2011.
Dated at the City of Edmonton, Alberta this 21st day of March, 2011.

D.L. Shelley
J.C.Q.B.A.

Appearances:

Lisa Koerner
Self-represented Plaintiff

S. Roberts
J. Janz
for the Defendants

Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice D.L. Shelley

The year in the citation line has been changed from 2010 to 2011 as follows:
Koerner v. Capital Health Authority, 2011 ABQB 191