Clerk's Stamp:

COURT FILE NUMBER	1201 15430
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	STANLEY EISENBERG, BRENDA EISENBERG, JACK EISENBERG, LYNN EISENBERG and EISENBERG'S PROPERTIES LTD.
DEFENDANT	910234 ALBERTA LTD., RANDY CALMUSKY, THERESA CALMUSKY, KYLE CALMUSKY, CALE HUMENIUK, JORDAN RINTOUL AND RYAN CALMUSKY
DOCUMENT	**BENCH BRIEF**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This following is the Bench Brief of Grant Thornton Limited. in its capacity as Receiver-Manager ("**Receiver**") of 910234 Alberta Ltd. ("**910**") in respect of an Application to be heard on February 28, 2014 before the Honourable Madam Justice B. E. C. Romaine.

2. In the Application, the Receiver seeks direction that it may attach (by way of garnishment or otherwise) the sum of $45,000.00 currently held in the trust account of counsel for Theresa Calmusky, Gary Calmusky and Mary Calmusky (the "**Calmuskys**") in respect of amounts which those individuals have been directed to repay to the estate of 910 as well as costs awarded against them. An application by the Calmuskys seeking a declaration that the same funds are held as a retainer has also been filed, and the Receiver opposes that application.

II. RELEVANT FACTS

3. On October 3, 2013, the Honourable Mr. Justice G. C. Hawco made an Order directing that proceeds of a mortgage to Trickle Creek Homes Ltd. ("**Trickle Creek**") were property of 910 and that interest of approximately $97,000.00 previously paid to the Calmuskys in respect of that mortgage were to be repaid by those individuals to the Receiver. Justice Hawco also awarded costs, (which were later set in the amount of $5,000.00) to the Receiver. He further directed that the Receiver was authorized to make a $1,000,000.00 interim distribution to investors of 910.

Order granted by the Honourable Justice G. C. Hawco
on October 3, 3013 (the "**October 3, 2013 Order**")

Order granted by the Honourable Justice G. C. Hawco on November 8, 3013

4. Theresa Calmusky also became subject to another costs Order in respect of a previous application before the Honourable Madam Justice K. M. Horner in the amount of $3,000.00.

Order granted by the Honourable Madam Justice K. M. Horner on October 28, 2013

5. The Calmuskys appealed the October 3, 2013 Order and on October 15, 2013, sought a stay of that Order pending the appeal. The stay was granted on condition that the Calmuskys provide an undertaking in damages, and security in support of that undertaking in the amount of $45,000.00.

Order granted by the Honourable Justice B. K. O'Ferrall
on October 15, 3013 (the "**October 15, 2013 Order**")

6. On October 23, 2013, counsel for the Calmuskys advised counsel for the Receiver that the sum of $45,000.00 had been received and was held in trust as security for the undertaking in damages. No further or alternate proposed use of the funds was disclosed at that time.

Affidavit of Simone Assailly sworn January 31, 2014
(the "**Assailly Affidavit**"), Exhibit 3

7. The appeal was dismissed on January 17, 2014. Following the dismissal, counsel for the Receiver advised counsel for the Calmuskys that the Trickle Creek proceeds were being released to the Receiver. Counsel for the Receiver also inquired as to whether the $45,000.00 in respect of the security for the undertaking could be released to the Receiver as a partial pay down of the amount owing for interest and costs by the Calmuskys.

Assailly Affidavit, Exhibit 4, p. 1

8. In response to the Receiver's request, counsel for the Calmuskys inquired as to whether this would mean that the Receiver was not seeking further damages in respect of the appeal. Counsel for the Receiver indicated that he would need instructions, but that this would seem to be a reasonable compromise in exchange for the partial payment of the interest and costs award. At no time in this communication did counsel for the Calmuskys indicate that the funds were not available for a partial payment because they were held as a retainer.

Assailly Affidavit, Exhibit 4, p. 2

9. Subsequently, upon further inquiry by counsel for the Receiver, in furtherance of a negotiated pay down of the interest and costs award, counsel for the Calmuskys again requested a confirmation that no further damages would be sought. Again, there was no mention of a retainer. Upon counsel for the Receiver indicating that the requested confirmation would be an acceptable compromise in exchange for the payment, counsel for the Calmuskys, for the first time, indicated that the funds were held as a retainer against current and future legal fees. Accordingly, it became apparent that counsel for the Calmuskys had not sought the concession by the Receiver in respect of damages as part of a negotiation for the pay down of the interest and costs award, but rather, as a simple concession which would enable him to keep the funds.

Assailly Affidavit, Exhibit 4, p. 3 onward

10. The Calmuskys filed an Application returnable February 28, 2014, for a direction that the funds held in the trust account of counsel for the Calmuskys are held as a retainer. In support of the Application, the Calmuskys filed an Affidavit of Simone Assailly, who is the legal assistant to

Rinus de Waal, counsel for the Calmuskys. The Calmuskys did not file any Affidavits of their own. With respect to the Affidavit, the Receiver notes:

(a) Ms. Assailly swore the Affidavit on the basis solely on information obtained from a "review" of the file" and discussions with Rinus de Waal. Nowhere in the Affidavit did Ms. Assailly indicate a belief in the truth of that information; and

(b) Ms. Assailly attached a number of uncontroversial documents, such as Court Orders and communications between counsel. However, in respect of the ability of the Calmuskys to pay legal fees and the agreement that the funds held in trust would serve as a retainer (in the event that they were not used in respect of damages), no documentation was attached (though she stated that such documents existed) and no source of the information was identified.

Assailly Affidavit, paras. 2, 7, 8 and 10

11. In Questioning on her Affidavit, Ms. Assailly deposed:

(a) Her "review" of the file for the purposes of the Affidavit was a review of documents provided by Mr. de Waal. Ms. Assailly could not recall reviewing the documents which were referred to in the Affidavit, but not attached thereto;

Transcript from the Questioning of Simone Assailly held February 12, 2014 (**"Assailly Transcript"**), pp. 7, 8, 19 and 20

(b) Ms. Assailly had not spoken with the Calmuskys prior to or after swearing the Affidavit;

Assailly Transcript, p.6

(c) Ms. Assailly did not understand the nature of the Application in which the Affidavit was to be used;

Assailly Transcript, p. 8

(d) Ms. Assailly was not aware of the source of the funds which were deposited into the trust account in respect of the condition of security (and an undertaking on that point was refused). Ms. Assailly did provide an undertaking response to advise as to how the bank drafts for $45,000.00 were delivered and who delivered them;

Assailly Transcript, pp. 12-14

(e) All of the information relating to the ability of the Calmuskys to pay legal fees came from Rinus de Waal. Ms. Assailly made no independent inquiries as to the ability to pay legal fees and Mr. de Waal did not advise her of how he obtained that information;

Assailly Transcript, pp. 15-17

(f) The advice of Mr. de Waal to Ms. Assailly, upon receipt of the $45,000.00 was that it was for deposit into trust as security pursuant to an Order. He also mentioned that Theresa Calmusky had an outstanding account receivable. He advised her of this information so that the account receivable would not be paid with the bank drafts, but rather that they would be held in trust as security;

Assailly Transcript, pp. 16-18

(g) While the Affidavit refers to correspondence evidencing a retainer arrangement which were not attached to the Affidavit due to privilege, Ms. Assailly did not actually see any correspondence in that regard; and

Assailly Transcript, p. 20

(h) Ms. Assailly's understanding that the $45,000.00 was being held to secure payment for damages.

Assailly Transcript, p. 21

12. During the Questioning, counsel for the Calmuskys objected to questions relating to the source of the deposited trust funds and further objected to any undertakings to inquire of Theresa Calmusky with respect to where the funds came from.

13. On Sunday, February 23, 2014, counsel for the Calmuskys provided the responses to Undertaking of Simone Assailly. The Undertakings disclosed that the funds in question were deposited on October 23, 2013. While descriptions and amounts were redacted, there is also an indication that at least two subsequent cheques were delivered in respect of the Calmuskys' file.

Response to Undertakings of Simone Assailly from the Questioning held February 12, 2014 (the "**Assailly Undertaking Response**") No. 1

14. The bank drafts for $45,000.00 came from Randy Calmusky, the husband of Theresa Calmusky and the principal of 910.

Assailly Undertaking Response No. 4

15. While not a part of the Undertaking request, Ms. Assailly decided to attach two emails which indicated that the $45,000.00 was to be held in trust as security for the general undertaking as to damages ordered on October 15, 2013. In one of the emails, counsel for the Calmuskys indicated that, if the funds "became available" after the appeal, "they <u>may</u> be held and applied against our invoices for work done for you" [emphasis added]. There is no indication that the funds were required to be held in that regard or that no other use of the funds was permitted. There was also no indication as to what was meant by the funds "becoming available" after the appeal. Interestingly, the email was copied to counsel for Randy Calmusky, apparently since the funds were delivered by Randy Calmusky.

Assailly Undertaking Response No. 4

16. In the Receiver's Ninth Report dated February 24, 2014 (the "**Ninth Report**"), the Receiver advises that:

(a) The Receiver has filed Writs of Enforcement in respect of the $97,000.00 owed by the Calmuskys for interest as well as the two costs awards referred to above;

Ninth Report, paras. 19-23

(b) The Receiver has discovered that Gary Calmusky and Mary Calmusky appear to have no exigible assets in Alberta; and

Ninth Report, para. 24

(c) When the $45,000.00 was deposited into trust, there was no indication that the funds were not going to be available as assets of the Calmuskys. Had there been any indication that the funds were attached as security for legal fees of counsel for the Calmuskys, the Receiver could have, and would have made a further application for security for costs, and potentially for the judgment itself.

Ninth Report, paras. 26-27

III. ISSUES

17. The Application raises the following issues:

(a) Whether the funds held by counsel or the Calmuskys can be characterized as a true retainer given the circumstances in which they were deposited; and

(b) Whether the Calmuskys are estopped from making a claim that the funds are held as a retainer.

18. A preliminary issue exists as to the admissibility of portions of the Affidavit of Simone Assailly.

IV. LAW AND ARGUMENT

Admissibility of Affidavit Evidence

19. As mentioned above, the sole evidence relied upon by the Calmuskys in support of their claim is the Affidavit of Simone Assailly, the legal assistant to Rinus de Waal. This type of affidavit is discouraged by the courts.

Desoto Resources Ltd. v. Encana Corp., [2009] ABQB 572, at para. 12 **[Tab 1]**

20. The Application by the Calmuskys seeks final relief with respect to the nature of the funds held in trust. This is not interlocutory relief. Accordingly, an Affidavit based on "information and belief" is not appropriate.

Alberta *Rules of Court* 13.18(3) **[Tab 2]**

21. Even if the Calmuskys' Application could be considered to be interlocutory in nature, an affidavit in support of the application must be filed on the basis of both information <u>and</u> belief pursuant to Rule 13.18(1)(b). Where a source of information is disclosed, but there is no statement as to belief, the relevant portion of the Affidavit should be struck.

Franssen v. Thule Towing Systems LLC, [2012] ABQB 657 (CanLII) **[Tab 3]**

Mikisew Cree First Nation v. Canada, [2002] CarswellAlta 603 (CA) at para. 6-12 **[Tab 4]**

22. The Courts have also indicated that affidavits based on information and belief might not be acceptable, for example, where better evidence is available, even in interlocutory applications.

Crouser v. 493485 Alberta Ltd., [1996] CarswellAlta 1611, at para. 23 **[Tab 5]**

Lee v. Oh, [2002] ABQB 253 (CanLII), at para 26 **[Tab 6]**

23. Master Funduk has commented generally in respect of the difficulty in using affidavits sworn by students and legal assistants in *Meier v. Honda Motor Co.*, as well as the requirement for belief in the evidence (as opposed to mere grounds and source).

Meier v. Honda Motor Co., [1991] CarswellAlta 460 at paras. 26-72 **[Tab 7]**

24. It is submitted that the portions of the Affidavit wherein Ms. Assailly simply attaches correspondence between counsel and other documents such as Court Orders are not objectionable. However, paragraphs 7 and 8 of the Affidavit, wherein Ms. Assailly deposes to substantive information about the Calmuskys' finances and the alleged agreement for a retainer, the evidence is entirely hearsay or double hearsay. Further, the information is provided without any belief as to its truth by the affiant. Accordingly, it should be deemed inadmissible and discounted in respect of this Application.

25. It should be noted that it was not at all difficult for the Calmuskys to provide a proper affidavit by a party to this Application, since Theresa Calmusky resides in Calgary. It is submitted that the logical conclusion to be drawn from this is that there is a reluctance to subject Theresa Calmusky

to questioning on the substantive matters before the Court and that her evidence would not have been helpful to the Calmuskys' claim.

Nature of the Funds Held in Trust

26. It seems to be without controversy that the funds held in trust were to be primarily held as security for the undertaking in damages provided by the Calmuskys. The question is whether the funds can have a secondary alternative purpose of a retainer.

27. It is conceded that a "true retainer" cannot be attached by way of garnishment. However, the courts have been careful to point out that only "true" retainers have this quality. The fact that funds are held in a trust account of a solicitor does not automatically mean that they are exempt from execution.

Gervais v. Yewdale, [1993] CarswellBC 374, at paras. 5, 6 and 11 **[Tab 8]**

Toronto Dominion Bank v. Cooper, Sandler, West and Skurka, [1998] OJ No. 846 (ONSC) **[Tab 9]**

Re: Mearns, [2000] CarswellAlta 655, at para 18 **[Tab 10]**

28. It is submitted that a "true" retainer has a single primary purpose, namely, to secure payment of legal fees. It therefore cannot be held for other superior purposes. In *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.*, the Court described the purpose of a true retainer as follows:

> Clearly, the retainer was paid to ensure that the respondent would be in a position to assert its legal rights and to guard against the possibility that it might be deprived by attachment of the funds which it required for that purpose.

Capozzi Enterprises Ltd. v. Tower Enterprises Inc., 1983 CanLII 631 (BC SC), at para 8 **[Tab 11]**

29. In this case, there is no way that the funds deposited into trust could be said to "ensure" payment of legal fees, since they would not be available if they were used to satisfy the undertaking in damages. In other words, counsel for the Calmuskys could not rely upon those funds in the way it could with respect to a true retainer.

30. It is further submitted that the correspondence attached to Undertaking Response No. 4 of Ms. Assailly (which correspondence was not requested as part of the Undertakings) do not indicate a true retainer. First, the email communication requests confirmation that the funds "may" be used to satisfy unpaid accounts if they are not used in respect of the undertaking in damages. It does not state that they shall be used in that fashion. Further, the language in the email of October 23,

2013 between Mr. de Waal and Ms. Calmusky does not clearly indicate a retainer because Mr. de Waal indicates that the funds "may" be used in respect of invoices if they "become available" after the hearing of the appeal of the October 3, 2013 Order. It is not clear whether this means that the funds would be available upon a successful appeal (which did not occur), or that the funds might be unavailable due to reasons such as garnishment.

31. It is therefore submitted that a true retainer is typically evidenced in much more precise fashion by counsel and that the documentation (which is not properly in evidence in any event) does not disclose a true retainer at all.

32. The communications from counsel for the Calmuskys to counsel for the Receiver further do not support a claim of a retainer:

(a) When counsel for the Calmuskys first advised counsel for the Receiver that the funds were being held, he only mentioned they were being held as security for the undertaking of damages. There was no mention of a retainer claim.

(b) Upon inquiry by counsel for the Receiver as to a potential use of the funds for a pay down of the outstanding amounts owing by the Calmuskys, counsel for the Calmuskys did not simply reply that the funds would be unavailable because they were held as a retainer. This would have been a simple and straight forward assertion of a claim of a retainer, but it was not made at that time.

(c) A similar communication was made on January 22, 2014, where counsel for the Calmuskys against refrained from claiming the funds as a retainer, but rather simply inquired as to any potential claim for damages.

33. It is submitted that the foregoing communications are supportive of the proposition that the funds were held in trust as security for damages and not as a true retainer.

Estoppel

34. In the alternative to the foregoing, it is submitted that the Calmuskys are estopped from claiming the funds deposited in trust are a retainer. Estoppel by representation is established where there is a representation as to facts and the party to whom the representation is made takes steps (or does not take steps) as a result of the representation in question. It is not necessary that the representation be positive. Even silence can constitute a representation.

Solara Exploration Ltd. v. Richmond Petroleum Ltd., [2008] ABQB 596 (CanLII) at paras. 100-103 **[Tab 12]**

35. In this case, there was a representation made to the Receiver to the effect that the funds held in trust were being held as security for damages. There was no mention of any other purpose for

which the funds were held, including that of a retainer. Accordingly, it was a fair assumption that the funds were not otherwise attached. The Receiver's evidence is that it acted to its detriment in reliance on the existence of that asset and did not pursue security for costs or for the Judgment under appeal.

36. While it is true that silence can only constitute a representation giving rise to estoppel where there is a legal duty to speak or disclose information, in this case there was not complete silence, but rather a partial representation, which withheld a key purported fact. Further, as judgment debtors, the Calmuskys were under an obligation to disclose their assets to the Receiver. Further, the Calmuskys were under an obligation under the October 15, 2013 Order to advise counsel for the Receiver as to the deposit of the funds as security and, in so doing, should have advised as to any other conditions attached to that deposit.

V. CONCLUSION

37. In summary:

(a) The substantive portions of the Affidavit of Simone Assailly which contain information and not simply attached documents should be struck;

(b) The funds deposited as security for damages cannot be a "true" retainer since they were not held primarily for the purpose of securing or ensuring that legal accounts would be paid;

(c) The documentation supporting the alleged retainer does not clearly state that the funds were deposited as a retainer nor that the funds were no subject to attachment or other uses;

(d) The representations of counsel for the Calmuskys between October 24, 2013 and January 22, 2014, do not support the claim of a retainer; and

(e) In the alternative, the Calmuskys are estopped from claiming that the funds are held as a retainer due to the representation made that they were deposited as security and their failure to mention the retainer.

VI. RELIEF REQUESTED

38. The Trustee respectfully requests an Order:

(a) Permitting the Receiver to attach, by way of garnishment or otherwise, the funds held in trust by counsel for the Calmuskys;

(b) Granting costs of the Application as against the Calmuskys; and

(c) Such further and other relief as counsel may seek at the time of the Application.

Submitted this 25th day of February, 2014.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

FIELD LLP

Per: ______________________________

Douglas S. Nishimura, solicitors for the Receiver, Grant Thornton Limited

TABLE OF AUTHORITIES

TAB

1. *Desoto Resources Ltd. v. Encana Corp.*, [2009] ABQB 572

2. Alberta *Rules of Court* 13.18(3)

3. *Franssen v. Thule Towing Systems LLC*, [2012] ABQB 657 (CanLII)

4. *Mikisew Cree First Nation v. Canada*, [2002] CarswellAlta 603 (CA) (excerpt)

5. *Crouser v. 493485 Alberta Ltd.*, [1996] CarswellAlta 1611

6. *Lee v. Oh*, [2002] ABQB 253 (CanLII)

7. *Meier v. Honda Motor Co.,* [1991] CarswellAlta 460

8. *Gervais v. Yewdale*, [1993] CarswellBC 374

9. *Toronto Dominion Bank v. Cooper, Sandler, West and Skurka*, [1998] OJ No. 846 (ONSC)

10. *Re: Mearns*, [2000] CarswellAlta 655

11. *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.*, 1983 CanLII 631 (BC SC)

12. *Solara Exploration Ltd. v. Richmond Petroleum Ltd.*, [2008] ABQB 596 (CanLII) (excerpt)

TAB 1

2009 ABQB 512
Alberta Court of Queen's Bench

Desoto Resources Ltd. v. EnCana Corp.

2009 CarswellAlta 1376, 2009 ABQB 512, [2010] A.W.L.D. 328, [2010] A.W.L.D. 335, 180 A.C.W.S. (3d) 200

Desoto Resources Limited (Plaintiff) and Encana Corporation and Pan Canadian Petroleum Limited (Defendants)

B.E. Romaine J.

Heard: August 25, 2009
Judgment: September 9, 2009
Docket: Calgary 0401-09040

Counsel: Brian E. Silver for Plaintiff / Appellant
Chad Babiuk for Defendants / Respondents

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Adjournments

Defendant was granted summary judgment by master — Plaintiff appealed — Plaintiff brought application for adjournment of appeal and for order directing production of two witnesses for examination pursuant to either R. 266 or R. 200 of Alberta Rules of Court — Application granted in part — Appeal was adjourned — Plaintiff had prima facie right to adduce new evidence on appeal subject to limitations and requirements of R. 200 or R. 266 — Appeal from master was de novo and new evidence could be adduced by either side — Plaintiff did not breach requirement of R. 500(2) as its appeal was filed and initially made returnable within reasonable time.

Civil practice and procedure --- Discovery — Examination for discovery — Procuring attendance of person to be examined — Application for order for examination — General principles

Defendant was granted summary judgment by master — Plaintiff appealed — Plaintiff brought application for adjournment of appeal and for order directing production of two witnesses for examination pursuant to either R. 266 or R. 200 of Alberta Rules of Court — Application granted in part — Application for order directing defendants to produce witnesses for examination pursuant to R. 266 or R. 200 suffered from at least two deficiencies and was premature — Rules were two very different rules with different implications for evidence derived from their use — Plaintiff's choice of rule it intended to rely on had implications relating to who should receive appointment to examine and whether use of rule in circumstances was permissible — Affidavit filed by plaintiff in support of application was affidavit from legal assistant which should be discouraged — Question of whether witnesses had relevant information for purpose of appeal of summary judgment order was addressed by way of double hearsay in legal assistant's affidavit — Plaintiff was given leave to take procedural steps necessary under either Rule for production of witnesses it wished to examine.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Armstrong v. Esso Resources Canada Ltd. (1992), 10 C.P.C. (3d) 343, 1992 CarswellAlta 332 (Alta. C.A.) — followed

Calf Robe v. Canada (Attorney General) (2006), 2006 ABQB 652, 2006 CarswellAlta 1158, 405 A.R. 366, 35 C.P.C. (6th) 353 (Alta. Q.B.) — referred to

Desoto Resources Ltd. v. Encana Corp. (2009), 2009 ABQB 337, 2009 CarswellAlta 818 (Alta. Master) — referred to

K. v. K. (E.) (2003), 2003 ABQB 500, 2003 CarswellAlta 806, 35 C.P.C. (5th) 98, 347 A.R. 255 (Alta. Q.B.) — considered

Richardson v. Honeywell Ltd. (1996), 1996 CarswellAlta 230, 47 C.P.C. (3d) 49, 181 A.R. 247, 116 W.A.C. 247 (Alta. C.A.) — followed

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 200 — considered

R. 209 — referred to

R. 266 — considered

R. 500(2) — considered

APPLICATION by plaintiff for adjournment of appeal and for order directing production of two witnesses for examination pursuant to either R. 266 or R. 200 of *Alberta Rules of Court*.

B.E. Romaine J.:

1 This is an application brought in morning chambers relating to an appeal of an Order of Summary Judgment granted by Master Mason on June 2, 2009 [*Desoto Resources Ltd. v. Encana Corp.*, 2009 CarswellAlta 818 (Alta. Master)]. The Plaintiff/ Appellant issued a Notice of Appeal dated June 5, 2009.

2 Originally, the appeal was scheduled to be heard on August 12, 2009. Counsel for the Appellant, Mr. Silver, advised counsel for the Respondents, Mr. Babiuk, by e-mail of July 1, 2009 that he was taking two weeks of holiday and that on his return he wished to examine certain present and former employees of Encana prior to the appeal. In the e-mail, Mr. Silver asked if two current employees of Encana would be produced for examination and notes that, if not, he would have to make an application. Mr. Silver also advised that he would have to make a Rule 209 application to obtain documents from third parties for the appeal. He commented that he was concerned that these examinations and applications would result in a need to postpone the appeal.

3 Mr. Popowich on behalf of the Defendants/Respondents replied by letter dated July 13, 2009 refusing, in effect, to produce the witnesses, at least until the Appellant filed material for the appeal. He also advised that he would not agree to adjourn the August 12 appeal, and asked that future communications be directed to him. Mr. Silver apparently received the letter on July 29, 2009 and advised Mr. Popowich by e-mail on that date that the August 12 appeal had already been adjourned with the consent of his office. He set out the reasons he disagreed with Mr. Popowich's letter and advised of his intention to bring an application under Rule 266 if Mr. Smith, one of the current employees of Encana, was not produced. He listed further people that he wished to examine, and noted that he expected that the appeal then scheduled for September 22, 2009 would have to be adjourned.

4 Mr. Silver filed the application that was before me in chambers on August 20, 2009, returnable on August 25, 2009. He applies for an adjournment of the appeal and an order directing the production of Mr. Smith and a former employee of Encana

for examination pursuant to either Rule 266 or Rule 200. The application is opposed by the Respondents, with Mr. Babiuk appearing on their behalf.

5 I was advised that arrangements had been made to allow the Appellant to cross-examine the deponent for the Respondents on the application for summary judgment, Ms. Luther, prior to September 22, 2009.

6 My initial reaction to the application in chambers was erroneous, and I was concerned, incorrectly on review, that the application may need to be referred to the judge who would be assigned the appeal. I reserved to read the filed materials and the authorities that were provided to me by counsel and to review the court file, which was not available in morning chambers and had apparently been temporarily misplaced in the clerk's office.

7 Having now reviewed the file and the authorities provided, it is clear that Mr. Silver is correct that the Appellant has a prima facie right to adduce new evidence on the appeal, subject to the limitations and requirements of Rule 200 or Rule 266: *Armstrong v. Esso Resources Canada Ltd.*, [1992] A.J. No. 822 (Alta. C.A.); *Richardson v. Honeywell Ltd.* (1996), 181 A.R. 247 (Alta. C.A.).

8 As indicated by the Court of Appeal in *Armstrong*, an appeal from a Master is *de novo* and new evidence may be adduced by both sides. While undue delay may result in the loss of a right to adduce new evidence, the Court in *Armstrong* makes it clear that the time to lead such evidence commences when the appeal from the Master is filed. While this may be frustrating to the Respondents, given the Appellant's failure to cross-examine Ms. Luther on her affidavit or adduce the evidence it now suggests it needs prior to the application before the Master, this is the result of the *de novo* nature of an appeal from the Master. Although it appears that in *Armstrong*, the request to cross-examine would not have delayed the appeal if the Respondent had agreed to it, and the intention to adduce new evidence in this appeal will necessarily have that result, the delay in prosecuting this appeal has certainly not been lengthy at this point.

9 The Appellant has not breached the requirement of Rule 500 (2) as its appeal was filed and initially made returnable within a reasonable time. Rule 500 (2) does not preclude adjournment of a return date for appeal if good reason exists to grant the adjournment. It is noteworthy that, even without the examination of witnesses under Rules 200 or 266, the appeal would likely have to be delayed to allow the Appellant to cross-examine Ms. Luther.

10 However, the Appellant's application for an order directing the Respondents to produce Mr. Smith and a former employee for examination "pursuant to Rule 266 or Rule 200" suffers from at least two deficiencies and is premature.

11 First, these are two very different rules, with different implications for the evidence derived from their use: *Richardson*, supra at para. 4. There may be issues as to whether the Appellant is entitled to use either or both rules for the purpose of adducing evidence to oppose a summary judgment application, and the information before me on this application is insufficient to determine those issues. Both rules contemplate that an appointment to examine be served as a first step. Although the failure to serve such an appointment may not be fatal to the application in certain circumstances (*K. v. K. (E.)*, 2003 CarswellAlta 806 (Alta. Q.B.) at para. 14), in this case, the Appellant's choice of the rule it intends to rely on has implications relating to who should receive the appointment and whether the use of the rule in the circumstances is permissible. The Respondent or the proposed witness, depending on what Rule is chosen and the identity of the witness, may challenge the use of the Rule, either on grounds of relevance or abuse of process.

12 Secondly, the affidavit filed by the Appellant in support of the application is an affidavit from a legal assistant, which, as the Respondents rightly note, should be discouraged: *Calf Robe v. Canada (Attorney General)*, [2006] A.J. No. 1109 (Alta. Q.B.) at para. 11. The question of whether these witnesses have relevant information for the purpose of the appeal of the summary judgment order was addressed by way of double hearsay in the legal assistant's affidavit. This is unacceptable.

13 The issue, therefore, is whether the Appellant should be afforded a reasonable opportunity to take the procedural steps necessary under either Rule for the production of the witnesses it wishes to examine. Given the procedural history of this matter, and in particular the fact that the Appellant was required to move quickly to apply for a timely adjournment of the appeal in the face of the refusal of the Respondents to produce the witnesses, I am prepared to allow the Appellant leave to take these

steps so that the issues can be properly framed on any subsequent application before this Court, subject to such steps being taken without undue delay.

14 I therefore allow the Appellant's motion for an adjournment of the appeal scheduled for September 22, 2009. I dismiss the application to direct the Respondents to produce witnesses at this time, but direct that the Appellant have until September 22, 2009 to take the proper procedural steps to compel attendance of the witnesses it wishes to examine. Either party or a designated witness may bring a further application relating to whether the Rule thus designated by the Appellant is appropriate in the circumstances of this appeal.

15 The issue of costs of this application is reserved to be dealt with when the appeal is heard on the merits. To prevent further delay, I confirm that I am not seized with any continuation of the application.

Application granted in part.

End of Document

TAB 2

Subdivision 2
Form and Contents of Affidavits and Exhibits

Types of affidavit

13.18(1) An affidavit may be sworn

(a) on the basis of personal knowledge, or

(b) on the basis of information known to the person swearing the affidavit and that person's belief.

(2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.

(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

Information note

Under section 28(1)(ll) of the *Interpretation Act*, references to affidavits and to sworn statements permit a person to make a solemn affirmation or solemn declaration instead of an affidavit.

Requirements for affidavits

13.19(1) In addition to complying with rule 13.13 *[Requirements for all filed documents]*, an affidavit under these rules must comply with all of the following:

(a) be in Form 49,

(b) state, on the front page, the full name of the person swearing the affidavit and the date the affidavit was sworn,

(c) state the place of residence of the person swearing the affidavit,

(d) be written in the first person,

(e) be divided into consecutively numbered paragraphs, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer,

(f) be signed or acknowledged and sworn before a person empowered to administer oaths, whether that person prepared the affidavit or not,

(g) contain a statement of when, where and before whom the affidavit was sworn, and

(h) be signed by the person administering the oath.

(2) An affidavit is not invalid or otherwise improper just because it was sworn before a commencement document was filed.

AR 124/2010 s13.19;163/2010

TAB 3

Court of Queen's Bench of Alberta

Citation: Franssen v. Thule Towing Systems LLC, 2012 ABQB 657

Date: 20121025
Docket: 1001 18895
Registry: Calgary

Between:

Mark Franssen and Deanna Franssen

Plaintiffs

\- and -

Thule Towing Systems LLC, Hyundai Motor America, Valley Hyundai LLC, Valley Hyundai LLC operating as Longs Peak Hyundai, Longs Peak Hyundai and John Doe

Defendants

Editorial Notice: On behalf of the Government of Alberta **personal data identifiers** have been removed from this unofficial electronic version of the judgment.

Memorandum of Decision
of
K.R. Laycock, Master in Chambers

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[1] The plaintiffs filed a statement of claim on December 29, 2010.

[2] On December 6, 2011 Master Breitkreuz granted an order allowing the plaintiffs until March 6, 2012 to serve the statement of claim and gave the plaintiffs leave to serve, ex-juris, a copy of the Statement of Claim and Notice to Defendants upon the defendants at their corporate

offices located in the United States of America. The application was supported by an affidavit sworn by Jennifer J. Locke.

[3] The affidavit of Jennifer J Locke states:

> 1. I am a student-at-law at the firm Chatwin LLP, who are counsel for the plaintiffs named in the above noted action, and as such have a personal knowledge of the matters herein deposed to, except where stated to be based on information and belief, in which case I verily believe it to be true.
>
> 2. This action arises out of a fire loss which occurred at [...] Rearview Circle SE, Calgary, Alberta ("the Premises") on February 27, 2009. The fire emanated from the 2008 Hyundai Veracruz owned by the plaintiff, Mark Franssen. The Hyundai caught fire while parked in the garage of the Premises, and resulted in extensive damage to the Premises and the Plaintiffs' Personal property. It is alleged that the fire resulted from a faulty converter module, or, in the alternative, from the installation of the converter module. I do verily believe these facts to be true.
>
> 3. The Hyundai was manufactured by Hyundai Motor America and was bought in Colorado from Valley Hyundai LLP operating as Longs Peak Hyundai. The defendants referred to in the within paragraph will be hereafter referred to as the "Hyundai defendants".
>
> 4. The Converter Module and associated wiring installed was manufactured and distributed by Thule Towing Systems LLC and/or Hyundai Motor America. Thule Systems LLC manufactures and distributes product in North America. Attached hereto and marked as "Exhibit A" is a page from the website of Thule Towing Systems LLC which states its involvement in production and sales in North America.
>
> 5. I believe that the Hyundai Defendants manufacture and distribute automobiles with the knowledge that they will be disseminated North America wide.
>
> 6. The Statement of Claim in the within action was filed on December 22, 2010.
>
> 7. I am informed and do verily believe there is a real and substantial connection between Alberta and the facts on which this claim is based under *The Alberta Rules of Court* s. 11.25 (3) for the following reason(s):
>
> a) The claim relates to a tort committed in Alberta;
>
> b) The foreign Defendants all manufactured and distribute products which they knew would be sold or disseminated throughout North America, including Alberta.

8. I make this affidavit in support of serving a commencement document outside of Canada, and in support of an Affidavit to extend the time for service of the Statement of Claim.

[4] Hyundai Motor America applies to strike paragraphs 2-5 and 7 of the affidavit of Jennifer J. Locke, for an order setting aside the order granted by Master Breitkreuz and for a declaration that no further steps can be taken against any of the defendants in this action as a statement of claim was served upon them when it had expired.

[5] On July 3, 2012, the legal department for Hyundai Motor America received a copy of the statement of claim and court order. On December 27, 2011, the registered agent for the Valley Hyundai defendants received a copy of the statement of claim and court order. There is no evidence of service upon Thule Towing Systems LLC.

[6] The defendant relies upon rule 13.18 with respect to the application to strike out the bulk of the Locke affidavit. The rule states:

(1) An affidavit may be sworn

(a) on the basis of personal knowledge, or
(b) on the basis of information known to the person swearing the affidavit and that person's belief.

(2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.

(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of personal knowledge of the person swearing the affidavit.

Affidavit Paragraph 2

[7] The defendant argues that Ms. Locke did not have personal knowledge of any of the facts she deposed. She must have been relying on information and belief from an unidentified source. The defendant refers to only a few of the huge array of cases that deal with the sufficiency of affidavits and the need to have either personal knowledge or disclose the source of information: ***Patel v. Friesen***, 2002 ABQB 112; ***Mikisew Cree First Nation v. Canada*** 2002 ABCA 110 at para. 12; ***Murray v. Tarrabain***, 2005 CarswellAlta 2134 at para. 24.

[8] The plaintiffs argue that paragraph 2 merely states what is alleged in the statement of claim and Ms. Locke is not swearing to facts upon which she has personal knowledge.

[9] A mere reference to the pleading is not enough: ***Rieckmann Estate v. Rieckmann***, 1991 CarswellAlta 693, 121 A.R. 141 at para.10.

[10] Unless Ms. Locke was standing at the residence at the time of the fire on February 27, 2009, she could not have had personal knowledge of the facts deposed to in paragraph 2 of her affidavit. Without an expert report or other report, she would not have known that the fire resulted from a faulty converter module or from the faulty installation of the converter module. To merely repeat the unfounded allegations contained in the statement of claim provides no facts to support an application for service ex juris. The whole paragraph is therefore struck out. Repeating allegations found in the statement of claim does not provide any factual evidence to the court.

Affidavit Paragraph 3

[11] The plaintiffs argue that this statement is not based on information and belief and also that the defendant failed to examine on the affidavit to determine whether the deponent had first-hand knowledge of these facts. While it may be possible for the deponent, by physical examination of the vehicle to determine that it was manufactured in the United States, I doubt that the deponent left her office and went out and examined the fire ravaged motor vehicle two years after the fire occurred. I further doubt that she had first-hand knowledge of the fact that the vehicle was purchased in Colorado from Valley Hyundai. Unless she was present at the time of the sale, someone, who was not identified, has provided her with this information. If she viewed the original sales documents, those documents should have been attached as an exhibit. Since there is no source of information or belief in the information, paragraph 3 is struck out.

Affidavit Paragraph 4

[12] The plaintiffs argue that the statements in paragraph 4 are not based on information and belief. They argue that, in part, the facts are based on a page from the website of Thule Towing Systems LLC. The exhibit attaching a short six line blurb merely describes the company as a manufacturer of load carrier systems for motor vehicles with production and sales locations in North and South America, Europe, Africa and Asia. The exhibit may support the information contained in the second and third sentences of paragraph, but it is not the source of information for the first sentence. It is not believable that the deponent has the personal knowledge of the information contained in the first sentence. The first sentence of paragraph 4 is struck out because there is no source of the information and no statement that the deponent beliefs the information.

Affidavit Paragraph 5

[13] This sentence starts out by declaring that the deponent believes the facts but there is no source of the information. Because the deponent failed to disclose the source of the information paragraph 5 is struck out.

Affidavit Paragraph 7

[14] The deponent swears that the facts contained in the paragraph are based on information but she does not disclose the source of the information. The defendant also objects to the paragraph being argument, legal opinion or conclusion which is highly improper to include in an affidavit. See ***Renfrew Insurance Ltd. v. Donald***, 2012 ABQB 228 at para. 14; ***Alberta Treasury Branches v. Leahy*** (1999), 234 A.R. 201 at para. 84.

[15] In addition, the allegation in paragraph 7(b) is not supported by any facts and is merely an unsupported conclusion. For all of these reasons paragraph 7 is struck out.

Extend Time for Service

[16] The issue is whether there is sufficient evidence left in the affidavit to support the plaintiffs' application to extend time for service pursuant to rule 3.26. The rule states:

> (1) A statement of claim must be served on the defendant within one year after the date the statement of claim is filed unless the Court, on application filed before the one-year time limit expires, grants an extension of time for service.
>
> (2) The extension of time for service under this rule must not exceed 3 months.
>
> (3) Rule 13.5 does not apply to this rule or to an extension of time ordered under this rule.

[17] The evidentiary requirements for an application to extend time for service under the former rule 11(6) were considered by the Alberta Court of Appeal in ***Oberg v. Foothills Provincial General Hospital*** (1999), 232 A.R. 263. The rule stated:

> Every application under subrule (2) shall be supported by an affidavit stating that one or more defendants have not been served and setting forth the reasons for the lack of service.

[18] The Court of Appeal stated at paragraph 14:

> In my view, Rule 11(6) merely requires that an applicant provide enough information from which it can be inferred that the application for renewal is not

> simply a delay tactic. An inference that the extension is more than a stalling tactic is sufficient. Keeping in mind that the Rule is for the benefit of plaintiffs, that interpretation provides an appropriate balance between fairness, efficiency and expediency.

[19] The Court contrasted the rule in existence prior to the 1992 amendment and concluded that both rules serve the same purpose. The court stated in paragraph 10 and 16:

> 10. .... The Rule is designed to provide an extended period for service of a statement of claim where needed. At the same time, it seeks to eliminate the potential for protracted and unnecessary litigation delays created by extensions. Thus, there is a need to balance the ease of meeting a plaintiff's needs with the prevention of undue delay.
>
> 16 In summary, the affidavit discloses the following: first, there was a change of solicitors; second, the defendants had not been served; and third, the plaintiffs required an extension of time. These facts support an inference that the extension was required to allow the new solicitors time to serve, and that the application was not for delay only. **There is no need to serve earlier than the one-year limitation, so the reasons need not address why it was not served earlier. This is unlike the old Rule where the application can be served outside the initial one-year period**. In that case there was a need to establish a "sufficient reason"for not serving within the year.

[20] Prior to 1992 the rule required "sufficient reasons" in order to obtain a renewal and prejudice was always a factor to consider. After the 1992 amendment that rule merely required "reasons". At paragraph 12 the Court of Appeal concluded that the prior higher standard as to the reasons for renewal was not essential.

[21] The defendant argues that, while rule 3.26 does not state that an affidavit is required in support of an application for extension, there must be some evidence for the court to exercise a judicial discretion in considering the application. It is argued that the same evidentiary burden must be met under the current rule as was required under the former rule.

[22] This issue has been addressed by Master Breitkreuz in ***Gangl v. Burns*** [2010] A.J. 1501, 2010 ABQB 822. The defendant applied to set aside an order the Master granted permitting the plaintiff to serve substitutionally and to extend time for service. The affidavit in support of the ex-parte order referred to attempts at service made between June 7, 2010 and June 24, 2010. When the application was made on July 7, 2010 the Master was advised that the statement of claim expired the next day.

[23] The Master noted in the decision that the thrust of the defendant's argument was that there was nothing in the affidavit to support an inference that an extension for time was required.

The Master agreed with plaintiff's argument that there was no requirement that the affidavit must specifically refer to a request for an extension of time.

[24] The Master, after referred to the highlighted part of para. 16 in the ***Oberg*** decision noted above, stated:

> 13 It is apparent from this that the court is not entitled to know the reason the statement of claim hasn't been served. All the court needs to know is that the statement of claim hasn't been served, (which must be fairly obvious in an application to extend the time for service) and an order is requested to serve within the three additional months required.
>
> 14 This is not a case were I had to draw an inference that there was no delay. ***Oberg*** says so. If no reasons are required then no inference is required.

[25] The plaintiff argues that the effect of this decision is that the mere appearance of counsel in court asking for an extension is sufficient for the court to infer that service has not been affected. Therefore, it is argued that upon such an appearance, an order to extend time for service should be granted.

[26] Master Smart also considered this issue in ***Wardell v. Peebles***, 2012 ABQB 303. The defendants applied to set aside the Master's order, granted ex parte, to extend time for service of the statement of claim. The affidavit in support of the application gave evidence of the attempts by a process server to serve the statement of claim. The Master recognized that under rule 3.26 there was no express requirement for an affidavit in support of the application.

[27] After reviewing ***Gangl*** and ***Oberg*** and considering the comments contained in the Alberta Law Reform Institute, The Rules Project, with respect to the prior rule 11, the Master concluded at paragraph 10:

> I see nothing in the new Rule that suggests the reasoning in ***Oberg*** ought not to continue to apply. The threshold remains low. Despite Master Breitkreuz's conclusion in ***Gangl***, in my view providing an explanation for not serving although not mandatory would be desirable when asking the court to exercise its discretion. In this case the affidavit in support is poorly drafted, lacking particularity and provides slim evidence to support the application for an extension of time. The threshold may be low but the cavalier approach often taken is dangerous when considering the consequences of failing to effect service in time.

[28] The Master concluded that the evidence indicated, firstly, that attempts at service had been made in relation to one defendant and information had been obtained regarding the whereabouts of the other defendant, and secondly, that service could be affected within time if an

extension was granted. He concluded the delay was not inappropriate and the defendants in their motion did not allege prejudice.

[29] Master Smart accepted the argument that an order to extend time for service should not be granted in a perfunctory way because the court order requires an exercise of discretion. The court's discretion can only be exercised with evidence. Evidence in an interlocuatory application can only be presented in the form of an affidavit.

[30] I disagree with the plaintiff's argument that an order to extend time for service can be made without any affidavit evidence. Firstly, some rules specifically require an affidavit in an application: see for example rules 11.25(2) (service ex juris) and 11.28(2) (substitutional service). Many rules do not specifically provided for affidavit evidence when making an application to the court. For example, an application to amend pleadings pursuant to rule 3.62(1)(b)(I) requires the court's permission. The rule does not state that an affidavit is necessary, however the case law makes it clear that evidence is required unless the amendment is trivial, obvious or clerical: ***Wong (Guardian and Trustee of) v. Al-Hassan*** 2003 ABCA 366; ***Hodge v. Carey Industrial Services Ltd*** (1997) 202 A.R. 154; ***Firemaster Oilfield v. Safety Boss*** 37 Alta. L.R. (3d) 317. A few of the other rules that do not mention affidavits include: rules 2.15 and 2.16(3) (appointing a litigation representative), 3.5 (transfer an action), 4.22 (security for costs), 4.31 (dismiss for delay where prejudice), 4.33 (dismiss for long delay), 5.11 (order to produce a record), 5.12 (failure to file affidavit of records). All of these applications would also require affidavit evidence. In ***Lock v. Tussman*** 2001 ABQB 83, Master Funduk quote the Court of Appeal in ***Crown Life Assurance Co. v. A.E. LePage (Ontario)***, C.A. 8803-0459 A.C. October 3, 1989, "no evidence-no order".

[31] Secondly, the rule requires an application to the court, so the plaintiff does not get an extension as of right. Should the Rules Committee have wanted plaintiffs to have 15 months to serve the statement of claim, the rule would be different. Should the Rules Committee have wanted the matter to be perfunctory, a clerk could have been designated to grant an extension.

[32] Thirdly, any application to the court requires the exercise of judicial discretion. As the court stated in ***Oberg***, it is a low threshold but nonetheless facts must be presented for the court to exercise its discretion.

[33] It is not sufficient for counsel to merely advise the court that service has not been effected in order to obtain an extension. It is also not sufficient for the deponent of the affidavit to merely state that they are applying for an order to extend time for service. The underlying purpose of the requirement to obtain leave of the court to extend time for service remains, as described by the Court of Appeal in ***Oberg*** in paragraph 10 (supra), "a need to balance the ease of meeting a plaintiff's needs with the prevention of undue delay". I agree with Master Smart that the test remains the same as stated in ***Oberg***. I disagree with Master Breitkruez's conclusion in ***Gangl*** that it is enough to know that service has not been effected.

[34] Returning to the affidavit of Jennifer J. Locke, there is little factual material left. Paragraph 1 merely identifies the deponent of the affidavit. What is left of paragraph 4 tells us that the defendant Thule Towing Systems LLC manufactures and distributes products in North America. Paragraph 6 notes that the statement of claim was filed December 22, 2010. Paragraph 8 states that the affidavit is in support of serving commencement documents outside of Canada and to extend time for service.

[35] Other than disclosing when the statement of claim was filed and asking for an order to extend time for service, there are no material facts contained in the affidavit to support the application to extend time for service. There is no evidence upon which the court can rely in granting an extension of time for service. Therefore, the provision in the order of the Master, granted December 6, 2011, to extend time for service of the statement of claim is struck out.

[36] Therefore the statement of claim was served upon the Hyundai defendants after the time for service had expired. Rule 3.28 provides that "no further proceeding may be taken in an action against a defendant who was not served in time". Therefore the Hyundai defendants are entitled to a declaration that the plaintiff may take no further steps against them.

Proportionality and Prejudice

[37] The plaintiffs argue that their order should be saved based on comments made by the court in ***Tarrabain v. Murray*** [2006] A.J. No. 834, 2006 ABQB 514. In that case the motor vehicle injury action was commenced Alberta and the statement of claim was served in California. In the first **Tarrabain** application, Justice Murray set aside an order for service ex juris granted by a Master for deficiencies in two affidavits. The plaintiff then filed a further affidavit and applied for an order *nunc pro tunc* declaring service to be good and sufficient. The statement of claim had been served within one year of its issuance.

[38] Justice Veit stated that the case illustrates the problem where a technical failure to comply with the rule would deprive the litigant of substandard rights. Since there was clear evidence before the court that the tort had been committed within Alberta and that the action was one which the Alberta court's should assume jurisdiction, the plaintiff should not lose his cause of action which was a punishment out of all proportion to the error. She also noted that there is no evidence of prejudice suffered by the defendant.

[39] The proportionality and prejudice argument was advanced by the plaintiffs. In ***Tarrabain*** there was, eventually, sufficient evidence to satisfy the test for granting an order for service ex-juris. On this application the affidavit is insufficient and no application has been filed by the plaintiffs requesting an order to extend time for service *nunc pro tunc*. With no application and no evidence, issues of proportionality and prejudice can not be considered.

[40] Furthermore rule 3.26(1) requires the application for extension be made before the year has expired. Counsel could provide no cases where the court has considered or granted an extension order *nunc pro tunc*.

Service Ex-Juris

[41] Since the plaintiffs can take no further steps against the Hyundai defendants it is unnecessary to consider all of the arguments and case authorities with respect to the application to set aside the order for service ex-juris.

Further evidence

[42] The plaintiffs' argument that they can remedy any error or deficiency in the affidavit by filing a further affidavit to support their application will be left for another day when they actually file a further affidavit.

Costs

[43] The applicants have been successful and will be entitled to their taxable costs of this application.

Heard on the 16th day of October, 2012.
Dated at the City of Calgary, Alberta this 25th day of October, 2012.

K.R. Laycock
M.C.C.Q.B.A.

Appearances:

Codie L. Chisholm
Bennett Jones LLP
for the Defendant Hyundai Motor America

Kathleen Kenny
Chatwin LLP
for the Plaintiffs

TAB 4

2002 ABCA 110
Alberta Court of Appeal

Mikisew Cree First Nation v. Canada

2002 CarswellAlta 603, 2002 ABCA 110, [2002] A.W.L.D. 373, [2002] A.J. No. 596, 273 W.A.C. 43, 2 Alta. L.R. (4th) 1, 303 A.R. 43

CHIEF ARCHIE WAQUAN ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MIKISEW CREE FIRST NATION (Respondents / Plaintiffs) and HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA (Appellants / Defendants)

Côté, Russell, Costigan JJ.A.

Heard: February 28, 2002
Judgment: May 6, 2002 *
Docket: Calgary Appeal 01-00071, 01-00096

Proceedings: reversing in part [2001] A.W.L.D. 235 (Alta. Q.B.)

Counsel: *V.M. May, Q.C., J.R.W. Rath*, for Respondents
P. Hodgkinson, for Appellant, Her Majesty the Queen in Right of Canada
E. Bunnell, Q.C., A. Argento, for Appellant, Her Majesty the Queen in Right of Alberta

Subject: Civil Practice and Procedure

Headnote

Practice --- Pleadings — Amendment — Grounds for amendment — To raise new cause of action or defence — General

Native band brought land claim against federal and provincial Crowns — Claim was based on breach of fiduciary duties, negligent misrepresentation and breach of Treaty — Proposed new statement of claim reorganized prayer for relief and added five new clauses — Amendments expanded allegations of misrepresentation, added new heads of damages, and relied on new facts — Band's application to further amend amended amended statement of claim was granted in part — Applications judge disallowed some paragraphs as they were not necessary to determine real question among parties and allowed some paragraphs because they clarified and particularized triable issues — Applications judge allowed paragraphs which might raise new causes of action and allowed consequential amendments to prayer for relief — Applications judge held that issue of limitations could only be decided at trial — Crowns appealed — Appeals allowed in part — Whether evidence existed to support proposed amendments was considered — Most of contested amendments lacked any evidentiary foundation — Most were plainly new causes of action, first raised outside time limit for suing and lacked any ground to bypass expired limitation period — To defer either question to trial judge was not warranted — Most of contested amendments were disallowed.

Table of Authorities

Cases considered:

Crown Life Assurance Co. v. A.E. LePage (Ont.) Ltd., [1989] A.U.D. 152 (Alta. C.A.) — considered

Dench v. Albertan Publishing Co., [1931] 2 W.W.R. 116, 25 Alta. L.R. 326, [1931] 3 D.L.R. 260, 1931 CarswellAlta 16 (Alta. C.A.) — considered

Empire Financiers Ltd. v. Nance, [1920] 1 W.W.R. 694, 16 Alta. L.R. 109, 51 D.L.R. 231, 1920 CarswellAlta 63 (Alta. C.A.) — considered

Luscar Ltd. v. Pembina Resources Ltd. (1994), 24 Alta. L.R. (3d) 305, (sub nom. *Luscar Ltd and Norcen v. Pembina Resources Ltd.)* 162 A.R. 35, 83 W.A.C. 35, [1995] 2 W.W.R. 153, 1994 CarswellAlta 251 (Alta. C.A.) — considered

Madill v. Alexander Consulting Group Ltd., 1999 CarswellAlta 688, 20 C.C.P.B. 283, 237 A.R. 307, 197 W.A.C. 307, 71 Alta. L.R. (3d) 50, 176 D.L.R. (4th) 309, 41 C.P.C. (4th) 72 (Alta. C.A.) — considered

McLean v. Canadian Pacific Railway, 10 W.W.R. 949, 12 Alta. L.R. 61, 28 D.L.R. 550, 1916 CarswellAlta 60 (Alta. C.A.) — considered

Opron Construction Co. v. Alberta, 100 A.R. 58, 71 Alta. L.R. (2d) 28, 1989 CarswellAlta 176 (Alta. C.A.) — considered

Paquin v. Gainers Inc. (1989), 71 Alta. L.R. (2d) 74, [1990] 2 W.W.R. 378, 101 A.R. 290, 64 D.L.R. (4th) 735, 41 C.P.C. (2d) 97, 1989 CarswellAlta 183 (Alta. C.A.) — considered

Pelican Oil & Gas Co. v. Northern Alberta Natural Gas & Development Co., [1918] 1 W.W.R. 957, 14 Alta. L.R. 172, 1918 CarswellAlta 85 (Alta. C.A.) — considered

Sterling Trusts Corp. v. Postma (1964), [1965] S.C.R. 324, 48 D.L.R. (2d) 423, 1964 CarswellOnt 74 (S.C.C.) — considered

Syncrude Canada v. Canadian Bechtel Ltd., 16 Alta. L.R. (3d) 153, [1994] 4 W.W.R. 397, (sub nom. *Syncrude Canada Ltd. v. Canadian Bechtel Ltd.)* 149 A.R. 54, (sub nom. *Syncrude Canada Ltd. v. Canadian Bechtel Ltd.)* 63 W.A.C. 54, 1994 CarswellAlta 17 (Alta. C.A.) — considered

Udovitch Estate v. Helm Estate, 2001 CarswellAlta 1074, 2001 ABCA 187, 286 A.R. 185, 253 W.A.C. 185, 92 Alta. L.R. (3d) 226 (Alta. C.A.) — considered

Wil-ton Construction Ltd. v. Amerada Minerals Corp. of Canada, 69 Alta. L.R. (2d) 285, 35 C.L.R. 113, 98 A.R. 296, 61 D.L.R. (4th) 360, 1989 CarswellAlta 142 (Alta. C.A.) — considered

Statutes considered:

Crown Liability Act, R.S.C. 1970, c. C-38
s. 24 — referred to

Indian Act, Act to amend the, R.S.C. 1985, c. 32 (1st Supp.)
Generally — referred to

Limitation of Actions Act, R.S.A. 1980, c. L-15
Generally — considered

Limitations Act, S.A. 1996, c. L-15.1
Generally — considered

s. 2 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — considered

R. 141 — considered

R. 192(1) — considered

R. 192(2)(b) — considered

R. 192(3) — considered

R. 192(6) — considered

R. 214(1) — considered

R. 305 — considered

Treaties considered:

Treaty No. 8, 1899
Generally — referred to

APPEALS by federal and provincial Crowns from judgment reported at 2000 ABQB 899, 2000 CarswellAlta 1392, 278 A.R. 375 (Alta. Q.B.), granting in part band's application to further amend amended amended statement of claim.

***The Court*:**

A. Introduction

1 The issue here is applying well-settled rules of discovery and evidence to a request for significant amendments to a Statement of Claim.

B. Facts

2 The plaintiffs are the chief and members of the Mikisew Cree First Nation in Alberta. The Statement of Claim was issued on December 20, 1996, and contents were added to it and subtracted from it three times in 1997. After close of pleadings, discovery of records, and after examinations for discovery of the defendants were virtually complete, the plaintiffs filed a Notice of Motion. In this May 19, 2000 motion, they sought further extensive amendments to the Statement of Claim. The chambers judge allowed some amendments, denied others, and deferred the question of others to the trial judge. See(2000), 278 A.R. 375 (Alta. Q.B.).

3 The two defendant governments appeal many of the amendments allowed, and all the amendments deferred. There is no cross appeal respecting the amendments which the chambers judge refused.

4 How did the Statement of Claim stand before the order appealed from? In 50 paragraphs, it pled

(a) the negotiation and signing of Treaty #8,

(b) alleged oral promises and fraudulent misrepresentations and nondisclosure at the time of signing by the Government of Canada,

(c) a right to more land based on those promises and misrepresentations,

(d) Alberta's 1930 assumption of certain obligations of the Government of Canada,

(e) a 1986 contract between the plaintiffs and the Government of Canada, but which it alleged that the plaintiffs did not really agree to,

(f) that the duty to give more land under Treaty #8 had not been performed, and

(g) brief complaints of changes to water, and a national park.

5 The further amended Statement of Claim authorized by the chambers judge has 72 paragraphs. About 48% of its body and prayer are new, being added or amended in this version.

6 The only evidence to support the amendments was two affidavits by a legal assistant employed by co-counsel for the plaintiffs. She claimed no personal knowledge. Her first affidavit was brief and very vague, and referred to examination for discovery transcripts and exhibits, without citations or details.

7 Her second affidavit contained similar brief words. Then it merely deposed repeatedly to the same formula of words. In each case, it was that in respect of certain amendments, lead counsel for the plaintiffs had told her (and she believed) that "the amendments set out material facts on which the Plaintiffs rely for their claim, such facts further defining the issues to be tried . . ." and that certain documents "reflect some of the evidence by which the Plaintiffs intend to prove the material facts upon which they rely." There was no evidence at all tendered about some of the amendments proposed. The assistant also deposed to who had been examined for discovery from the defendants' side, and that both defendants had filed Affidavits of Records.

8 No one raised the topic of counsel's appearing in court on his or her own evidence, though that counsel appeared for the plaintiffs in chambers and on this appeal.

9 Not surprisingly, no one attempted to cross-examine the legal assistant on her affidavit.

10 The plaintiffs or their counsel decided to avoid proffering anyone with any real knowledge or any claim to it. So there was no evidence of the usual sort. The legal assistant added nothing really: she merely identified pieces of papers. She passed on unsworn contentions by the plaintiffs' counsel.

11 The respondents try to argue necessity, without giving any evidence of necessity. But many of the proposed amendments are about what the plaintiffs knew or did not know, or were told or were not told. The latter is equally within the plaintiffs' knowledge, and the former is more in the plaintiffs' knowledge than anyone else's. We see no excuse for not offering evidence of their own, if there is any factual basis for these amendments.

12 It is likely that all this is inadmissible. Rule 305 allows an affidavit on information and belief only if the affidavit "contain[s] statements as to the belief of the deponent . . ." This is a serious requirement, not a technical one. What no one believes in, is not evidence. And the words quoted above in substance do not show belief in any facts. They show what someone will argue, not what anyone knows or even believes. The argument here is circular.

C. The Law on Discovery as Evidence

13 The Government of Canada's reply affidavit makes it plain that none of the examination for discovery answers by Alberta's officer or by its two ex-employees are evidence given by the Government of Canada. It also says that many of the documents

TAB 5

1996 CarswellAlta 1611
Alberta Court of Queen's Bench

Crouser v. 493485 Alberta Ltd.

1996 CarswellAlta 1611, [1996] A.J. No. 967

BETWEEN. TAD CROUSER Applicant and - 493485 ALBERTA LTD. Respondent

Veit J

Judgment: November 5, 1996
Docket: 9603 12867

Counsel: J.R. McClelland for the applicant
R S. Woods for the respondent

Subject: Public

THE HONOURABLE MADAM JUSTICE JOANNE B. VEIT:

1. Background

10 Tad Crouser issued an originating notice of motion in which he asks for an injunction restraining the respondent from dealing with Crouser's shares in 493485 Alberta Ltd., and for related relief including a direction that the respondent deliver up to Crouser the minute book and other corporate documents and statements.

11 The originating notice was supported by two affidavits, one sworn by Mr. Crouser, and one sworn by his lawyer.

12 The affidavit from Mr. Crouser states, among other things, that, in 1993, he became an 8% shareholder in the respondent company as a result of doing "delimbing" work on logs. Mr. Crouser stopped working with the company in November, 1994 He swears that he never signed a document in which he disposed of his shares in 493485 Alberta Ltd.

13 The affidavit filed by Mr Crouser's lawyer contains much of the same material contained in Mr. Crouser's affidavit: Exs. E. F, G, H. 1 of the lawyer's affidavit are also exhibited to the Crouser affidavit.

14 The affidavit filed by Mr. Crouser's lawyer exhibits letters that he sent to the respondent:

1 - he sent a letter to the respondent's lawyer asking for confirmation that the company still existed and that Mr. Crouser still owned shares in the company, and for the company's minute book;

2 - he received a reply from the respondent's lawyer stating that Mr. Crouser had ceased to be a shareholder and director of the company in November, 1994;

3 - he wrote to the respondent's solicitor, referring to the response received and asking: "How could this happen?". The solicitor's letter goes on to say:

> My client informs me that he never signed or agreed to sign any documents selling or transferring his shares in the above company. He never has received Notices of any Shareholders' Meeting of the above Company. In fact, he informs that he has never received any Notice or other documentation that informed him that his Shares were being dealt with in any way.
>
> I am advised by my client that he paid valuable consideration for the Shares in the above company.

This is notice to you and your client that unless my clients Share Certificates and the Minute book of the above Company are produced to our offices by November 27, 1995, I am instructed to proceed immediately under Part 18 of the *Alberta Business Corporations Act* against the above Company and your client.

4 he was told by the lawyer for the respondent company that the latter would not be delivering any minute book to him;

5 - he personally delivered a letter to the lawyer for the respondent asking for the minute book and undertaking to return the minute book to him by June 6, 1996;

6 - he was told by the lawyer for the respondent company that the latter would not be delivering any minute book to him;

7 - he received the results of a corporate registry search done on June 4, 1996, showing that Mr. Crouser was not a shareholder in the respondent company.

15 The respondent company has filed an affidavit from one of its directors stating that, on November 7, 1994, Mr. Crouser executed an assignment of his 100 Class A Common Voting shares of the company to the company, which document is exhibited to the affidavit, and that the company has offered to redeem Mr. Crouser's preferred shares for the issue price of $1.00 per share, but that Mr. Crouser has refused this offer.

2. Legal ethics of giving evidence for one's own client

16 Part 10 of the Alberta Professional Code of Conduct for lawyers - a part entitled "Lawyer as Advocate" - includes Rule #10:

A lawyer must not act in any proceeding in which it is likely that the lawyer will give evidence that will be contested.

17 Mark Orkin states in his textbook on legal ethics:

So far as Canada is concerned, the burden of the older cases was that while the practice [of a lawyer giving evidence for his own client] is not one which should be encouraged, yet there is no law barring counsel for either party to an action from giving evidence either in support of his client's case or gainst the other party to the suit and it is said to have been permitted time and again in both Canadian and English Courts. Arsenault, V.C., while expressing this opinion in ... felt, however, that it was more ethical for counsel not to do so.

/The more modern Canadian view is that it is improper for counsel to give evidence at trial ....

It is likewise improper for a solicitor to give evidence by way of affidavit to establish the facts of his clients case; if he does so it should only be as to matters of procedure and where no other course is possible.

Nevertheless, although the appearance of counsel as a witness on behalf of his client is "irregular and contrary to practice" and has been considered to be grounds for granting a new trial and is universally condemned. yet the fact remains that there is no rule "but only an urgent judicial reprobation" forbidding the practice... Accordingly. in *Stanley v Douglas*, [1951] 4 D.L.R. 689, Cartwright J, after reviewing the authorities, came to the conclusion that the evidence is legally admissible.

18 In *Meier*, Funduk M. cited the following comments of Addy J. in *Lex Tax Canada*:

The present case illustrates clearly and dramatically the impropriety of having the solicitor of any party to a legal proceeding take an affidavit or testify orally on behalf of his client regarding any cause or issue as to which he has been consulted. The rule has long been recognized by common law Courts but of late, seems to have fallen into disuse to some extent, in interlocutory matters in any event, largely because it is so much more convenient for the solicitor to take such affidavits.

Whatever might be the motive for doing so, it is completely improper and unacceptable for a solicitor to take an affidavit even in an interlocutory matter where he attests to matters of substance and might therefore expose himself to being cross-examined on matters covered by solicitor-and-client privilege. In the case at bar, counsel for the defendant quite candidly stated that it was precisely in order to avoid answering questions on certain aspects of the case as to which any other representative of the defendant might be cross-examined, that a decision was made to have the affidavit taken by the solicitor. This of course, brings into focus all the more clearly the fundamental injustice which might result from the practice.

Where, as in the present case, there is a refusal on the part of the solicitor to answer on the grounds of solicitor-and-client privilege resulting in a denial of the other party's right to full and complete cross- examination on all matters raised in the affidavit, the Court has no alternative but to reject all of the evidence of that witness. In the case at bar this involves the solicitor's affidavit and its exhibits. Since this is the only evidence tendered, the motion must necessarily fail.

19 Funduk M. also noted:

It is correct that generally a counsel should not also be a witness. In Chambers Practice and Advocacy, v. 1 (LESA 1983) Stevenson J.A. suggests:

Where affidavit evidence is employed the most serious breach of general principles relating to affidavits is the use of counsel's own affidavit. This is a practice which should be discouraged. If we applied the strictures of the Supreme Court of Canada a good many counsel would be disqualified from arguing motions.

20 Funduk M. continues:

Of course there may be situations where it would be proper for counsel to be a witness, although he should definitely not appear as counsel on the application.

If there is an issue between counsel about what happened between them who better to testify on that than counsel? Should we still force the litigants to give evidence based on information and belief, being information they receive from counsel?

If a counsel wants to put in evidence letters that he has received should we force the litigant to give evidence putting the letters in evidence?

21 Funduk M. goes on to hold that the impugned evidence must be analyzed to determine whether a lawyer's affidavit is improper.

22 Funduk M. also issued the decision in *Duffy* in which he records concerns relative to the filing of affidavits by the party's own solicitor.

23 The Alberta Appeal Court stated, in *Kennett*:

The affidavit 'in support of the application was of the appellant's solicitor. While this was not objected to, it is our duty to point out that such an affidavit was improper. While affidavits on information and belief are permitted in chamber matters it does not follow that they may be used in all circumstances. They should not be used when the evidence is the evidence of the person making the application and no other evidence is tendered. In such cases, the party making the application should himself take the affidavit. Among other reasons why this type of affidavit should not be used is because it would deprive the opposite party of effective cross- examination on the affidavit, if such were desired

24 In summary, then, the authority of case law and of academic commentary is that lawyers should not give evidence except on merely formal matters. Rule 10 of Part 10 of the Alberta Professional Code of Conduct is not framed in the same way as the older commentaries; however. its intent is, clearly, the same. In this context, "contest" includes cross-examination.

25 Funduk M.'s opinion in *Meier* that lawyers who give evidence on formal matters should not appear as counsel on any application relating to those matters was probably restricted to those few situations where a matter, expected to be uncontested, becomes contested. Otherwise, it appears to me that neither the Professional Code of Conduct nor the other authorities prevent a lawyer who has filed a merely formal affidavit from appearing on a motion in the proceedings.

3. What happens when lawyers give evidence for their own clients

26 While the case law holds that it is improper for lawyers to give evidence for their clients, it does not state what may be done to an offending lawyer when this occurs. One supposes that the party opposite may complain to the Law Society and that the Law Society will then take whatever action it deems fit.

27 The courts also have a role in this matter. As in other aspects of the conduct of litigation, the court may use its costs power to sanction inappropriate behaviour. In the worst case, where a lawyer gives evidence for the client on more than merely formal matters, while admitting the evidence, the court could prevent the lawyer who has become a witness from continuing to act as a lawyer.

4. Application of the law to this case

a) Is Mr. Crouser's lawyer's affidavit limited to formal matters?

28 No, the lawyer's affidavit is not limited to formal matters. Much of the information sworn to by the lawyer relates to letters sent and received by him on purely formal matters. I agree with Funduk M.'s comments that it would be pointlessly formalistic to have some other person - the lawyer's student or secretary - swear to such matters. It is appropriate for the lawyer himself to swear to the state of the correspondence between the lawyers.

29 Even in this context, however, I must note that part of the lawyer's affidavit deals with telephone conversations rather than letters. This is giving evidence, albeit not on the merits of the proceedings. If the content of the conversations were contested, the lawyer would be forced to ceased to act because he would be required to give evidence. In the circumstances here, it may not be contested that the conversations' were limited to a refusal by the respondent to provide the minute book and other corporate documents Therefore, I do not take this portion of the affidavit into account in determining whether the motion should be successful.

30 The main problem with Mr. Crouser's lawyer's affidavit is that, in part, it incorporates by reference correspondence that deals with the merits of the proceeding. This is precisely what a lawyer should not be giving evidence about.

b) Can Mr. Crouser's lawyer be cross-examined on his affidavit?

31 Certainly, Mr. Crouser's lawyer can be cross-examined on his affidavit. One of the problems that will arise is how effective the cross-examination can be when the lawyer's affidavit is, in part, based on information received from his client A more difficult issue may arise in that context about whether the swearing by the lawyer of the affidavit in question has an impact on solicitor-client privilege. It is premature to determine those issues on this motion.

c) Should Mr. Crouser's lawyer be forbidden to act?

32 It is premature to prevent Mr. Crouser's lawyer to act in this proceeding. The court has the power to make such an order, but it should not do so until the full ramifications of the lawyer's affidavit are known. These ramifications will only become known once the responent has decided whether it will cross-examine the solicitor on his affidavit and the cross-examination has taken place.

5. Procedure on the motion

33 Mr. Crouser says that the respondent should file an affidavit pointing out which aspects of his lawyer's affidavit are contested. I do not agree that an affidavit on this issue is usually necessary. Whether a lawyer's affidavit will be contested will usually be made plain from the affidavit itself. The issues about which a lawyer can swear are identified by Funduk M. in *Meier*. Other issues, any issues going to the merits, are potentially contestable. It is not necessary for the party opposite to

identify these in an affidavit; a review of the pleadings and of the other material filed will normally identity the issues that are likely to be contested.

6. Costs

34 Although the respondent has not been successful on this motion, it should have costs of the application since it was the decision by Mr Crouser's lawyer to file his own affidavit, and to include in it matters of information and belief, that required this motion to be brought forward.

End of Document

TAB 6

Lee v. Oh, 2002 ABQB 253

Date: 20020305
Action No. 9903 10534

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

KWANG YOURL LEE

Plaintiff

- and -

NAOMI OH

Defendant

REASONS FOR DECISION
of
M. FUNDUK, Master in Chambers

APPEARANCES:

W. G. Patrick
Patrick & Patrick
for the Plaintiff

P. F. Mahoney
Lawson Glod
for the Defendant

"A piece of paper alone cannot give opinion evidence.":
[*Warren v. Camrose (City)*, (1989) 92 A.R.338 (C.A.) para. 12]

[1] This is an application by the Defendant for an order excluding the Plaintiff from the Defendant's examination for discovery.

Pleadings

[2] The lawsuit started as a simple debt lawsuit. The Plaintiff alleges that in December 1996 he lent $50,000 to the Defendant, that it was to be repaid in 6 months and that it has not been repaid. He claims $50,000 and interest.

[3] The Defendant delivered a statement of defence and counterclaim. In her defence she denies that she is indebted to the Plaintiff, and then goes on to allege:

> 3. In response to the whole of the Statement of Claim, the Defendant states that she and the Plaintiff entered into a partnership to establish a business for selling air cooler equipment, pursuant to which the Plaintiff contributed the sum of $50,000.00 in or about December, 1996. These funds were not a loan to the Defendant, but instead represented the Plaintiff's contribution to the said partnership.
>
> 4. In the alternative, the sum of $50,000.00 was provided to the Defendant as a gift.

In the counterclaim the Defendant referentially incorporates the defence and goes on to allege.

> 7. The Plaintiff by Counterclaim states that in furtherance of the said partnership, the Defendant by Counterclaim made representations and agreed to provide a letter of credit in order to ensure cash flow for the said business.
>
> 8. As a result of the Defendant by Counterclaim's representations and pursuant to their agreement, the Plaintiff by Counterclaim entered into a lease for business premises and purchased tools and other equipment for the operation of the said business, in or about April, 1997.
>
> 9. In breach of the agreement and contrary to his representations, the Defendant by Counterclaim thereupon refused to provide a letter of credit or to participate in any other aspect of the said business, as a result of which the Plaintiff by Counterclaim has suffered a loss of opportunity and has also incurred expenses and losses in an amount as may be proven at trial.

She then claims $50,000 damages for "loss of opportunity" and also claims special damages.

[4] The Defendant then delivered a statement of defence to the counterclaim denying:

(1) a partnership;

(2) that he agreed to provide a letter of credit;

(3) that the Defendant suffered any damages.

[5] The Defendant then amended her statement of defence and counterclaim. Her amended defence adds the following pleas:

> 4. In response to the whole Statement of Claim, the Defendant states that in May of 1996, the Plaintiff approached the Defendant and revealed that he had known her in Korea, before she move to Canada. The Plaintiff made overtures of romantic interest in the Defendant, expressing his desire to form a spouse-like relationship with her. These overtures by the Plaintiff ultimately culminated in his committing an act of sexual assault and battery upon the Defendant in May 1996.
>
> 5. Out of what the Defendant can only suppose was guilt stemming from the above noted assault and battery, on December 18, 1996, the Plaintiff delivered a Christmas card to the Defendant with a $50,000.00 cheque enclosed indicating that the Defendant could use the money as she wished. The Defendant did not want the money and attempted to return it to the Plaintiff who refused its return.
>
> 6. The Plaintiff operates a business which manufactures special pressure fittings for the oil, gas and energy industry and other industrial purposes, in Edmonton. The Plaintiff told the Defendant that he wished to move to Calgary and diversify into the condenser tube and finning supply business. The parties agreed that the $50,000.00 would be used to purchase equipment and lease a suitable premises, and the Plaintiff was to provide an additional USD $150,000.00 in the form of letters of credit to further fund the venture. It was the Plaintiff's plan that the Calgary business be operated under the name of the Defendant, in order that he might escape the tax implications of owning such assets and hide the transactions from his wife.
>
> 7. In January of 1997 the Defendant, on the Plaintiff's instructions, used the above noted $50,000.00 in funds to declare a trade name, rent a warehouse in the industrial district of the City of Calgary, and purchase machinery and tools for the relocation and expansion of the Plaintiff's business as noted above.
>
> 8. However, when the time came, the Plaintiff did not provide the promised letters of credit which were needed to continue the business enterprise and

purchase inventory. The Defendant was ultimately forced to terminate the lease, move all the machinery into storage and allow the trade name to lapse.

9. The Plaintiff then insisted that the Defendant agree to marry him and he would "forgive" the $50,000.00 sum, but if she refused, he promised to ruin her financially and socially within the Calgary Korean community, and alienate her from her closely knit family.

10. The funds were not a loan to the Defendant, but instead represented an attempt by the Plaintiff to make amends for his objectionable conduct of May 1996. When they were refused, the Plaintiff then hoped to relocate and expand his business to a more profitable location, and enjoy the tax and other benefits which would flow from an arrangement with the Defendant which attributed few or none of the business assets to his name. Representations were made by the Plaintiff that he would forward further cash infusions to help launch that business. At no time did the Defendant spend the funds in question in any way other than consistent with the wishes and instructions of the Plaintiff.
11. In the further alternative, the sum of $50,000.00 was provided to the Defendant as a gift.

[6] In the amended counterclaim the Defendant referentially incorporates the amended statement of defence and again makes allegation about the alleged partnership. She claims damages of $100,000 for the assault and also for special damages, the latter presumably being for the claim based on the partnership.

[7] The Plaintiff has delivered an amended defence to the counterclaim which among other defences denies the assault.

[8] The pleadings are closed. Each party has delivered an affidavit of records. The Defendants producible documents are all business documents.

[9] Counsel tell me that there have not yet been any examinations for discovery.

[10] In support of the present application is an affidavit by a legal assistant to the Defendant's lawyer Mr. Mahoney. He says:

1. I am the Legal Assistant to Patrick Mahoney and as such have personal knowledge of the matters hereafter deposed to except where stated to be made on information or belief in which case I believe the same to be true.

2. Attached to this my Affidavit and marked as Exhibit "A" is a copy of a report received from May Wong, Chartered Psychologist, here in the City of Calgary, in the Province of Alberta.

> 3. I am informed by Counsel for the Defendant, Naomi Oh, that a request has been made that the Plaintiff not attend her Examination for Discovery and that copy of the report referred to above was supplied to Counsel for the Plaintiff. I am further informed that counsel for the Plaintiff has refused the request.

[11] The "report" is a letter by the psychologist to Mr. Mahoney. In the report the psychologist says that the Defendant told her that the Plaintiff had "raped her on two separate occasions". The psychologist gives her opinion about the Defendant's mental condition and opines that the Defendant should not "face Mr. Lee at the present time".

[12] This quick and cheap method of having an expert give an opinion without testifying is a state of affairs not unknown in chambers applications, but is highly unsatisfactory.

[13] Paragraph 3 of the legal assistant's affidavit is not in dispute.

[14] However, Mr. Patrick, for the Plaintiff, says that the "evidence" is not satisfactory. He categorizes it as hearsay. He says that there is not evidence which meets the basic test for possible exclusion.

[15] Other than paragraph 3, the legal assistant's "evidence" has no value. He is just a mailman delivering to the Court a copy of the letter by the psychologist to Mr. Mahoney. It is no better than if the psychologist had just "copied" the Court. That is certainly not evidence.

[16] It is not necessary in this case to get into a great debate about the law. Many of the cases deal with more than two parties and the asked for exclusion is based on a suggestion that exclusion would reduce if not eliminate the possible tailoring of evidence between parties who have a common position. For today's purposes the law is that discussed in ***Lambert v. Lomore***, 57 Alta. L.R. (3d) 110 (C.A.) where the Court says, paras. 29-30:

> The purposes of an examination for discovery are enumerated by Trainor, J. in ***Ontario (Bean Producers' Marleting Board) v. W.G. Thompson & Sons Ltd.*** (1981), 32 O.R. (2d) 69 (Ont. H.C.) affd. (1982), 35 O.R.(2d) 711 (Ont. Div. Ct.) in reliance upon the decision of Hollingworth, J. in ***Bowen v. Klassen*** (1980), 30 O.R. (2d) 15 at 25, 115 D.L.R. (3d) 167 at 178 (Ont. H.C.), at p. 72:
>
> > (a) to enable the examining party to know the case he has to meet;
> >
> > (b) to procure admissions to enable one to dispense with formal proof;

> (c) to procure admissions which may destroy an opponent's case;
>
> (d) to facilitate settlement, pre-trial procedures and trials;
>
> (e) to eliminate or narrow issues;
>
> (f) to avoid surprise at trial.
>
> The presence of the parties at such examinations facilitates and promotes some of the enumerated objectives. That having been said, the object and purpose of an examination for discovery may, in some circumstances, be defeated unless an exclusion order is made. The onus is on the applicant seeking such an order to establish the factual underpinnings that would justify exclusion. There must be an evidentiary showing that persuades a chambers judge that an order for exclusion is necessary to ensure that the examination for discovery process will be meaningful. Put another way, the chambers judge must be satisfied, *on the evidence,* that exclusion is necessary for the fair and proper judicial conduct of the action. That onus is discharged when the chambers judge is satisfied, *on the evidence*, that there is a reasonable apprehension that the object and purpose of an examination for discovery will be defeated unless the order goes.

[17] Mr. Mahoney relies on ***Kuefler v. Barene Investments (1988) Ltd.***, (2000) 242 A.R. 353 (Q.B.) and ***F. (K) v. White***, 2000 Carswell Ont. 856, Mar. 22, 2000 (Ont. S.C.J.. (Mr. Mahoney is apparently not aware that the second case went to the Ontario Court of Appeal: 3 C.P.C. (5th) 189, but the relevant issue was not considered on appeal).

[18] In ***Kuefler*** the plaintiff sought to exclude a husband while his wife was being examined. The plaintiff deposed that she had known the couple for 12 years, that it was her "observation" that the husband is a domineering person, that the wife is afraid to disagree with her husband, that it was her "observation" that the wife expressed her views more freely when the husband was not present and that if the husband was present when the wife was examined the wife's evidence would be influenced by the presence of her husband.

[19] The wife testified to the opposite.

[20] The chambers judge held that the plaintiff had not made out a case for exclusion. As I understand Mr. Mahoney's submissins, he relies on paragraph 12 of the decision, which says:

> If Irene Kuefler was in fact dominated by her husband, Rolland Kuefler, and more able to speak freely about the evidence when her husband is not in the room, this could lead to admissions and facilitate settlement more readily and thus support objectives of the Examination for Discovery.

It is not uncommon for trial courts to opine about what the result might be with different evidence. However, such opining has no precedential value as to the law. The test is that set out in ***Lambert***.

[21] The cause of action in ***F.(K)*** was based on a criminal assault by the defendant on the plaintiff. The defendant was convicted by a jury where the plaintiff, the defendant and others testified. An appeal by the defendant was dismissed.

[22] The plaintiff then sued the defendant, the cause of action being the criminal assault. The defendant defended and counterclaimed for malicious prosecution and defamation. The chambers judge (or motions court judge as they are known in Ontario) gave the plaintiff summary judgment on the issue of liability, dismissed the counterclaim, directed that the lawsuit proceed only on the issue of damages and directed that the defendant not be present when the plaintiff and her two children were examined for discovery.

[23] As to the last direction, the chambers judge says, paras. 40-43:

> In *Crowe*, the Court ordered that the defendant be excluded from attending the discovery of the plaintiff. The action involved childhood sexual abuse, for which the defendant was charged and convicted. The Court acknowledged the *prima facie* right of a defendant to be present during discovery, but held that given the facts of the case, it was readily understandable why the plaintiff would not want her assailant present. In addition, the Court noted that there was less reason for the defendant to be present since he had heard the plaintiff's testimony at the preliminary inquiry.
>
> This case involves virtually the same circumstances that faced the court in *Crowe* and I adopt that Court's reasons for exclusion. In addition, while it may be open to question whether a matrimonial case and the accompanying emotions and stress provide a sufficiently real and substantial cause to limit a party's right to be present, a case involving sexual assault - for which the party has been criminally convicted is categorically different. The type of stress, emotion, intimidation and trauma a victim facing the offender, provides, in my opinion, sufficiently exceptional circumstances to order exclusion.
>
> Moreover, sufficient evidence has been presented in the materials filed to satisfy me that in this case, the defendant ought not to be present during each of the plaintiffs' examinations for discovery on the question of damages. The plaintiff's victim impact statement indicates she has suffered significant physical, emotional and psychological trauma as a result of the sexual assault, and still feels unsafe: Motion Record Vol. II, Tab 11, Exhibit 31, at 687. She has installed an alarm system because of this fear: Motion Record, Vol. II, Tav 11, Exhibit 31, at 689. The information from the records of the assault indicates a

> strong possibility of intimidation. Under these circumstances, I consider it appropriate to exercise my discretion and order that the defendant not be present during the examinations for discovery for the plaintiffs.
>
> The plaintiffs Jo. and Ja. F. are the minor children of the plaintiff and are currently 12 and 7 years old respectively. The plaintiff's victim impact statement describes how her oldest child needed help to cope with the assault and its aftermath: Motion record, Vol. II, Exhibit 31 at 687. Given the young age of these plaintiffs, I find it appropriate to exercise my discretion and order that the defendant not be present during their examinations for discovery.

The first sentence in paragraph 42 really says it all. There was "sufficient evidence" before the chambers judge to make out a case for exclusion.

[24] As Mr. Patrick points out, none of that is present in the lawsuit before me. There is no criminal charge, no prosecution, no conviction and no evidence by the Defendant. All that exists is her allegations in her pleadings, which of course are not evidence, and what she supposedly told the psychologist about the alleged assaults, without any evidence by the psychologist about that.

[25] The copy of the letter is offered as evidence of the truth of the matters stated in it - that the Plaintiff assaulted the Defendant, that she is emotionally distressed and that she should not have to "face the Plaintiff". It is interesting to note the sequence of facts as alleged by the Defendant, an assault, a payment and a business partnership between the two after the assault.

[26] Even on interlocutory motions the Court may refuse to rely on information and belief: ***Kenneth v. Gill***, (1969) 71 W.W.R. 1 (Alta. S.C.A.D.); ***Schaffhauser Kantonalbank v. Ulrich Chmiel Montenero International Co.***, (Calgary, C.A. 10023-25, April 13, 1988) where the Court says in part:

> As to the adequacy of the affidavit, it is true that an affidavit based on information and belief in an interlocutory proceeding is admissible but it is also true that, when it is based on hearsay, the court may refuse to rely upon it.

Here the legal assistant's "evidence" is not evidence in any meaningful sense.

[27] There cannot be a linking of the facts and the law when there is no evidence.

[28] See also ***John Doe No. 1 et al v. Catholic Archdiocese of Grouard-McLennan,*** 204 D.L.R. (4^{th}) 80 (Alta. C.A.), para. 32, and ***Lister v. Calgary (City),*** (1997) 193 A.R. 218 (C.A.), para. 9.

Decision

[29] The application is dismissed with costs to the Plaintiff on column 2, the payment to be stayed until the conclusion of the lawsuit.

HEARD on the 28th day of February, 2002.

DATED at Edmonton, Alberta this 5th day of March, 2002.

M. FUNDUK
M.C. C.Q.B.A.

TAB 7

1991 CarswellAlta 460
Alberta Master [in Chambers]

Meier v. Honda Motor Co.

1991 CarswellAlta 460, [1991] A.W.L.D. 320, 113 A.R. 241

Karl-Heinz Adolf Meier, Plaintiff v. Alberta Government Telephones, Honda Motor Company Limited, Honda Research and Development Limited, Honda Research of America, Honda Canada Inc. (otherwise known as Honda Motor Company of Canada Limited), American Honda Motor Company Inc., Honda of America Manufacturing Inc., American Honda, and Westwind Ford Sales Limited (now known as Westwind Ford Mercury Sales Limited), Defendants

Master Funduk [in Chambers]

Judgment: March 19, 1991
Docket: Edmonton No. 8703-19876

Counsel: *Brownlee Fryett* , for the Defendants Honda.
Emery Jamieson , for Northern.

Subject: Evidence; Civil Practice and Procedure

Headnote

Evidence --- Affidavits — Who may swear out

Problems with evidence created.

Plaintiff bought an all-terrain vehicle which he alleged was defective and unsafe. Plaintiff was riding the vehicle when he lost control of it, crossed a bicycle path, hit a concealed electrical box and sustained injuries. Plaintiff brought an action against manufacturer, H. Co., against dealer, and against telephone company that was alleged owner of the electrical box. Telephone company pleaded that it was not the owner of the box and the action was discontinued against it. After learning that N. Ltd. was the true owner, H. Co. applied for an extension of time for filing and serving the third party notice. The evidence filed in support of the application was an affidavit of a student-at-law in the firm of counsel for H. Co. Held, the application was allowed. Difficulties arose because of the use of the affidavit made by the student-at-law. Counsel should not have appeared in an application both as counsel and as witness. This could not be evaded by using a student-at-law from counsel's office. The quality of the evidence when it came to matters of which counsel did not have a personal knowledge was also a concern. There were various problems with the evidence given in the affidavit. However, to reject the evidence in total because of the refusal to produce counsel's file which the student had reviewed would be a breach of practice and procedure, nor was it possible to dismiss H. Co.'s application for contempt of court.

Practice --- Third party procedure — Practice — Instituting third party proceedings — Time for bringing in third party — Prejudice or delay

Time for filing extended.

Plaintiff bought an all-terrain vehicle which he alleged was defective and unsafe. Plaintiff was riding the vehicle when he lost control of it, crossed a bicycle path, hit a concealed electrical box and sustained injuries. Plaintiff brought an action against manufacturer, H. Co., against dealer, and against telephone company that was alleged owner of the electrical box. Telephone company pleaded that it was not the owner of the box and the action was discontinued against it. Counsel for

H. Co. was not aware of the discontinuance and started a third party procedure against telephone company. H. Co. then learned of the discontinuance and that the true owner of the box was N. Ltd. H. Co. applied 3 months later for an extension of time for filing and serving the third party notice. Held, the application was allowed. H. Co. clearly wanted to claim over against N. Ltd. because of what plaintiff alleged in his pleadings and thought that they did when they claimed over against telephone company. Reliance on plaintiff's pleading turned out to be misplaced through little or no fault of H. Co. Such circumstances made it appropriate to allow H. Co. to add N. Ltd. as a third party. The delay in filing the third party notice did not cause prejudice to N. Ltd., nor had the limitation period for H. Co. to claim over against N. Ltd. run out.

Availability.

The plaintiff was injured when his all-terrain vehicle hit an electrical box allegedly owned by A.G.T. He sued the vehicle manufacturers and A.G.T., claiming the vehicle was defective and the box was concealed. The plaintiff subsequently discontinued the action as against A.G.T., having been convinced by A.G.T.'s statement of defence, which claimed N. Ltd. owned the box. The vehicle manufacturers, apparently unaware of the discontinuance, filed a R. 77 notice against A.G.T. in August 1989. A.G.T. disclaimed ownership of the box, and enclosed a copy of the discontinuance. Several days before the expiry of the six-month limitation period for filing a third party notice, the manufacturers learned from an insurance adjuster that N. Ltd. owned the box. In March 1990 they applied for an order to extend the time for delivering the third party notice. An articling student in the law firm of the manufacturers' counsel deposed he had reviewed counsel's file containing the letters from A.G.T. and the insurance adjuster, and believed there was a good and reasonable claim for indemnity from the third party. On cross-examination the student was instructed not to answer certain questions, on the basis of privilege. *Held*, application to extend time allowed. A lawyer should not appear on an application as both counsel and witness. Neither should counsel give evidence on substantive matters about which he has no personal knowledge. The same strictures apply to counsel's articling students or legal assistants. However, there is no absolute ban on lawyers being witnesses, for that assumes privilege would prevail, when it could be waived. Moreover, rejecting all the affidavit evidence would breach Alberta practice and procedure. A witness who refuses to produce documents can have his objections dealt with directly on a motion for production. Failure to comply could result in civil contempt. Here, asking the Master to reject the evidence was to request a de facto finding of contempt. That would be premature without first adjudicating the merits of the objections. Moreover, a Master in chambers has no jurisdiction to cite in contempt. The affidavit evidence as to N. Ltd.'s ownership of the box was defective because it did not provide evidence as to belief with source as required by R. 305(3). It referred to the third party notice, but a proposed pleading cannot be the grounds and source for the belief advanced. It was evident, however, that the manufacturers wanted to claim against N. Ltd. because of what the plaintiff alleged in his pleadings. That, combined with the clear steps the manufacturers took to ensure the box remained in the picture - by claiming against A.G.T. - created appropriate circumstances to allow the manufacturers to third party N. Ltd. N. Ltd.'s claims about delay were groundless, since the delay was at most a few months and the limitation period for the manufacturers' claim against N. Ltd. had not run. N. Ltd. could not complain of an "air of unreality" to the claims, because it could not guarantee that the trial judge would not find that the box contributed to the accident.

M. Funduk :

1 This action has been discontinued against some of the Hondas and A.G.T.

2 The remaining Hondas apply for an order allowing them to issue a third party notice against Northern Cablevision Ltd.

Pleadings

3 The Plaintiff alleges that in 1984 he bought an all terrain vehicle from the Defendant Westwind, which he says was designed or manufactured or tested or marketed or sold by the Hondas.

4 The Plaintiff alleges that the vehicle was defective and unsafe and that he was injured in an accident. The Plaintiff says that he was riding the vehicle when he lost control of it, crossed a bicycle path and hit a concealed electrical box. This happened on August 24, 1985.

5 The Plaintiff started the action on August 18, 1987. At that time he thought that the owner of the electrical box was A.G.T. The Plaintiff sued A.G.T., the Hondas and Westwind.

6 A.G.T. filed a statement of defence on September 9, 1988. It pleads this in part:

> 6. This Defendant specifically denies that the Plaintiff struck an electrical box or other equipment owned by this Defendant. The Plaintiff, after losing control of the all-terrain vehicle, struck a pedestal box owned and maintained by Northern Cablevision which was located in an open, unconcealed area and evident to anyone maintaining a proper lookout. ...

7 The evidence does not disclose if A.G.T.'s statement of defence came to the attention of counsel for the Hondas. Of course the Rules do not require A.G.T. to deliver a copy of its defence to the co-defendants.

8 It appears that counsel for A.G.T. was able to convince counsel for the Plaintiff that A.G.T. was not the owner of the electrical box. The Plaintiff discontinued the action against A.G.T. in November 1988. The conclusion I would reach from the subsequent steps is that counsel for the Hondas was not aware of the discontinuance of the action against A.G.T.

9 The Hondas filed a statement of defence in June 1989, which they amended two months later. When the defence was filed in June the Hondas also filed a Rule 77 notice against A.G.T. and Westwind.

10 Rule 77 is a truncated third party procedure between co-defendants which can be used by a defendant against a co-defendant in limited situations: *Wurtz v. Nobis* , (1981) 15 A.L.R. (2d) 1 (M); *Strang v. Cheney* , (1981) 31 A.R. 399 (C.A.) .

11 As the Plaintiff had discontinued the action against A.G.T. some time before, Rule 77 was not available to the Hondas in June 1989. A.G.T. was not a co-defendant at that time. The situation here is the reverse of that in *Wurtz* .

12 The necessary conclusion I draw is that the Hondas wanted to third party the owner of the electrical box and that they thought they were doing that in June 1989. The procedure used is irrelevant and would have been proper if A.G.T. was still a co-defendant at that time.

13 I would also conclude that the Hondas' counsel was not aware that the Plaintiff had discontinued the action against A.G.T. Counsel for the Hondas is an experienced counsel and I have no doubt that he knows the scope of Rule 77.

14 The evidence is that in August 1989 counsel for A.G.T. wrote to counsel for the Hondas telling him that A.G.T. was not the owner of the electrical box and providing him with a copy of the discontinuance of the action against A.G.T. The letter is not in evidence so I do not know if it went further and said who the owner was.

15 The evidence is that in December 1989 an insurance adjuster told counsel for the Hondas that the owner of the electrical box was Northern. That letter is just a few days shy of the six month period for filing a third party notice: Rule 66(4). It might have been possible for the Hondas to have filed a third party notice against Northern within the time given by the Rule and so have avoided the present dispute.

16 If the August letter by counsel for A.G.T. said who the owner was then the Hondas had loads of time to file a third party notice against Northern.

17 Counsel for the Hondas says that an ex parte application was made in February 1990 for an order extending the time for filing and serving a third party notice. Counsel says that the Master told the Hondas that they must apply on notice to Northern. The lesson given by *E.S.M. Transport v. Western Mack Truck (Edmonton)*, 59 Alta. L.R. (2d) 115 (C.A.) took hold.

18 On March 21, 1990 the Hondas launched an application, returnable March 26, for an order extending the time to deliver a third party notice. This is three months *after* the adjuster's advice. This is certainly a casual approach by counsel for the Hondas.

19 In any event, the application was adjourned, there was a cross-examination of the Hondas' witness in October 1990 and the application was heard in January 1990.

20 The delay since March 1990 does not play a part in this application.

21 To complete the action history, A.G.T. applied in July 1990 to strike out the Hondas' Rule 77 notice and the Hondas then discontinued their claim against A.G.T.

22 Counsel for the Hondas says that there have not yet been any examinations for discovery or discovery of documents. The action has not gone beyond the pleadings stage.

23 The evidence in support of this application is an affidavit by a student-at-law in the law firm of counsel for the Hondas. He testifies in part:

> 2. That I have reviewed the file and based upon this do verily believe that the following is an accurate summary of the conduct of this action to date:
>
> > (various steps as shown in the *Court file*)
>
> 3. That I have reviewed the file and by way of letter dated August 3, 1989, K.F. Bailey, Q.C., of the firm of Parlee McLaws, solicitors for Alberta Government Telephones, provided our office with a copy of the Partial Discontinuance of Action filed on November 23, 1988 and further informed our office that Alberta Government Telephones was not the owner of the electrical box referred to in paragraphs 14 and 16 of the Amended Statement of Claim.
>
> 4. That I have reviewed the file and by letter dated December 13, 1989 from Geo H. Neilson of Neilson Craig Patterson Lazaniak Adjusters Ltd., it was confirmed that Northern Cablevision Ltd. was the true owner of the electrical box referred to in the Amended Statement of Claim.
>
> 5. That I do verily believe that these Defendants have a good and reasonable claim for indemnity or contribution against Northern Cablevision Ltd., as indicated in the form of Third Party Notice addressed to Northern Cablevision Ltd., which is attached hereto and marked as Exhibit" A" to this my affidavit, as Northern Cablevision Ltd. is believed to be the true owner of the electrical box in question.
>
> 6. That I do verily believe that should the application, in support of which this affidavit is made, be granted, no material prejudice will be suffered by Northern Cablevision Ltd. or by the Plaintiff.
>
> 7. That I do verily believe that Northern Cablevision Ltd. is a proper and necessary party for the determination of all issues that will be before the Court.

24 The file which the student reviewed was *the counsel's file* . One does not have to be too astute to see what would probably happen on cross-examination. It did.

25 The following is from pp. 3-7 of the cross-examination

> Q And is it correct that your only knowledge of this matter arises from review of the file?
>
> A Yes.

Q With respect to paragraph four of the affidavit, did your review of the file disclose any information which might suggest that the Defendant, or Defendants Honda, had any information that Northern Cable Vision was the owner of the box in question, prior to December 13th, 1989?

MR. HICKS: Don't answer that question.

MS. TICOLL: On what grounds?

MR. HICKS: I think what you're asking him to do is reveal our file contents. I think you'd agree that the contents of our file would be privileged.

MS. TICOLL: Haven't you raised your file in the affidavit?

MR. HICKS: We've raised in paragraph four, a letter dated December 13th, 1989, from George Neilson.

MS. TICOLL: Well, the entire affidavit is based on review of the file, and the implication from this paragraph is that they're — certainly seen to be trying to raise an implication that this was the manner in which, or the time at which you learned that Northern Cable Vision Ltd. was the owner of the electrical box.

MR. HICKS: Ask that question, then.

Q. MS. TICOLL: From your review of the file, can you confirm that the letter dated December 13th, 1989 from George H. Neilson, of Neilson Craig Patterson Lazaniak Adjusters Ltd., confirming that Northern Cable Vision Ltd. was the true owner of the electrical box referred to in the amended Statement of Claim, was the first knowledge that the Defendants had that Northern Cable Vision Ltd. was in fact the owner of the electrical box?

A Yes.

Q Now, in paragraph five of your affidavit, you state that you verily believe that the Defendants have a good and reasonable claim for indemnity or contribution against Northern Cable Vision Ltd. Do you have any basis for that belief?

A Yes.

Q Can you state what that basis is, please.

A The basis is as stated in the Third Party Notice, Exhibit A.

Q Well that's very circular, because that's what you're saying that the claim is. Do you have any basis to believe that there is any truth to the statements in that, made in that Third Party Notice?

MR. HICKS: Are you asking here for —

Q MR. TICOLL: Do you have any basis for your statement that, in paragraph 3(a) of your Third Party Notice, to support a conclusion that — to support the allegation that the cable box was in fact camouflaged?

A I believe that in paragraph 16 of the amended Statement of Claim there is reference to a camouflaged electrical box.

Q And that is the only basis for your belief; that is the only basis on which you believe that the electrical box in question was camouflaged?

MR. HICKS: I think we're getting off the topic here. I don't think there's anywhere in the affidavit where it's indicated that he verily believes that the electrical box is camouflaged.

• MS. TICOLL: Well, he states that he verily believes that the Defendants have a good and reasonable claim for indemnity as indicated in the form of Third Party Notice. That's what's indicated in the Third Party Notice.

MR. HICKS: That's correct. Whether or not he believes that what's plead in the Third Party Notice constitutes a good and reasonable claim for indemnity doesn't necessarily require him to verily believe that the electrical box referred to in paragraph 3(a) of the Third Party Notice was in fact camouflaged.

MS. TICOLL: Well then maybe you can tell me on what basis you do believe that the facts in the Third Party Notice are that the, or that the allegations in the Third Party Notice gives you a good and reasonable claim for indemnity or contribution?

A I'm sorry, could you repeat the question, please.

Q Well, your counsel has stated that your belief that the Defendants have a good and reasonable claim for indemnity, as indicated in the form of Third Party Notice addressed to Northern Cable Vision Ltd., is not — that that statement does not mean that you adopt the Third Party Notice; is that correct, first of all?

MR. HICKS: Hold on, I don't think I said that.

MS. TICOLL: What did you say?

MS. TICOLL: Maybe we can go off the record for a moment.

(OFF RECORD DISCUSSION).

Q MS. TICOLL: Is the only basis for your belief, then, that the Defendants have a good and reasonable claim for indemnity or contribution against Northern Cable Vision Ltd., on the basis that these matters, that certain of these matters were pleaded in the Statement of Claim?

A No.

Q Can you tell me, then, what is the basis for your belief?

A Well, these are also referred to in the other pleadings, such as the draft Third Party Notice and, I am sorry, I can't remember whether you said the Statement of Claim, but they're also contained in the amended Statement of Claim, which is attached to my affidavit as part of the Third Party Notice.

Q Your belief, then, that the Defendants have a good and reasonable claim for indemnity or contribution against Northern Cable Vision Ltd., is based entirely upon the pleadings?

A No.

Q What other basis, then do you have, other than the pleadings?

A Well, it would be, if I understand your question, it would be on my knowledge of the law taken, applied to, rather, what is contained in the pleadings.

Q I'm asking about your factual basis, though, not your knowledge of the law.

Okay, I take it that you will not answer any question about any information that you may have in your file that would or would not support your conclusions, on the grounds of privilege?

MR. HICKS: That's right.

26 I am reminded of the dialogue between a counsel and a law lord. The issue was the propriety of a clerk in the solicitor's office giving affidavit evidence. The law lord suggested that perhaps every solicitor's office should have at least two clerks, one to be the informing clerk and the second to be the informed clerk. The first clerk would inform the second clerk who would then swear an affidavit based on what he had been informed of by the first clerk.

27 Perhaps every law firm should have a student-at-law whose duties would include being informed directly or indirectly by counsel and who would then swear an affidavit based on what he had been informed of.

28 Of course if a law firm does not have a student-at-law counsel can always resort to that age old standby, his secretary.

29 I might note that the affidavit evidence was first by a "legal assistant" in counsel's office who also "reviewed the file" and was "informed" by a student-at-law (not the same one) in counsel's office.

30 Some months later the affidavit by the student-at-law was filed and this is the evidence both counsel proceed on. At least this student-at-law is not" informed" by the other student-at-law. The law lord might then smugly say that each law firm should have at least two students-at-law, one to be the informer and the second to be the witness.

31 Be that as it may, counsel for Northern submits that the order should not be granted because:

(1) the evidence is defective;

(2) there is no "air of reality" to the proposed claim;

(3) Northern is prejudiced by the delay.

Inadequacy of evidence

32 Counsel for Northern says that the affidavit evidence is" defective" because it is by a student-at-law and that a meaningful cross-examination could not be done because of the claim of privilege for counsel's file.

33 Counsel for Northern submits that the evidence should be rejected in total because of the refusal to produce counsel's file. That is what happened in *Lex Tex Canada v. Duratex*, 13 C.P.C. 153 (Fed. Ct. T.D.) .

34 In that case the defendant applied to strike out the statement of claim. The evidence was by the solicitor for the defendant. On cross-examination the solicitor refused to answer many of the questions put to him on the ground of solicitor and client privilege.

35 This is what Addy J. says, pp. 154-55:

> The right of the party to fully cross-examine a witness called by the opposite party on all matters relevant to his testimony and to have those questions answered, is one of the most fundamental principles of our system of justice. An equally fundamental right which, if anything, has been even more jealously guarded by our Courts is that enjoyed by every person to complete protection against the divulging of any communication with his solicitor pertaining to any legal cause or matter.
>
> The present case illustrates clearly and dramatically the impropriety of having the solicitor of any party to a legal proceeding take an affidavit or testify orally on behalf of his client regarding any cause or issue as to which he has been consulted. The rule has long been recognized by common law Courts but of late, seems to have fallen into disuse to some extent, in interlocutory matters in any event, largely because it is so much more convenient for the solicitor to take such affidavits.
>
> Whatever might be the motive for doing so, it is completely improper and unacceptable for a solicitor to take an affidavit even in an interlocutory matter where he attests to matters of substance and might therefore expose himself to being cross-examined on matters covered by solicitor-and-client privilege. In the case at bar, counsel for the defendant quite candidly stated that it was precisely in order to avoid answering questions on certain aspects of the case as to which any

> other representative of the defendant might be cross-examined, that a decision was made to have the affidavit taken by the solicitor. This of course, brings into focus all the more clearly the fundamental injustice which might result from the practice.
>
> Where, as in the present case, there is a refusal on the part of the solicitor to answer on the grounds of solicitor-and-client privilege resulting in a denial of the other party's right to full and complete cross-examination on all matters raised in the affidavit, the Court has no alternative but to reject all of the evidence of that witness. In the case at bar this involves the solicitor's affidavit and its exhibits. Since this is the only evidence tendered, the motion must necessarily fail.
>
> During argument counsel for the defendant, although stating that his client was not waving his solicitor-and-client privilege, invited the Court to order the solicitor to answer certain questions which he had refused to answer on those grounds and the answers to which the Court might feel would be relevant to determining the issue of the propriety of the pleadings objected to. Any such order, in my view, would not only be completely improper but would be illegal and unenforceable since the privilege is absolute and is worthy, in my view, of the same degree of protection as the independence of the judiciary itself, since it is equally as fundamental to our system of justice.

36 I have difficulty with the approach taken in the penultimate paragraph, which I will deal with in a moment.

37 It is correct that generally a counsel should not also be a witness. In Chambers Practice and Advocacy, v. 1 (LESA 1983) Stevenson J.A. suggests:

> Where affidavit evidence is employed the most serious breach of general principles relating to affidavits is the use of counsel's own affidavit. This is a practice which should be discouraged. If we applied the strictures of the Supreme Court of Canada a good many counsel would be disqualified from arguing motions.

38 Here we are not dealing with a situation where the counsel appearing for the Hondas is also the witness. The two are different, although both are from the same law firm which is acting for the Hondas.

39 I do not think that any general principle that counsel should not be a witness is an absolute principle. As with any general principle there can be exceptions.

40 The ultimate stricture is that counsel should not be appearing on an application both as counsel and as witness.

41 The second stricture to counsel being a witness goes to the quality of the evidence when it comes to matters that the counsel does not have personal knowledge of. An example is *Province of Alberta v. Duffy* , (1981) 31 A.R. 560 (M). *Lex Tex* falls into that category. To make it worse, in *Lex Tex* it was admitted by counsel for the defendant that a conscious decision had been made to put forward the solicitor as the witness to stifle any cross-examination. That kind of problem is also commented on in *Kennett v. Gill* , (1970) 71 W.W.R. 1 (Alta. C.A.) .

42 Usually the counsel has no personal knowledge about the substantive issues in the action. He should not then give evidence about substantive matters. He must rely on "information and belief". As *Lex Tex* points out, it is not proper for counsel to swear an affidavit just because it is "much more convenient for the solicitor to take such affidavits". Any litigant who is concerned about the inconvenience and the cost of litigating has a choice. The law does not force anyone to litigate. Defendants do not have to defend if they think that it is too inconvenient or expensive. Defendants do not have to bring third party proceedings if they think that it is too inconvenient or expensive.

43 If it would not be proper for counsel to give evidence that stricture cannot be evaded by counsel putting forward as a witness a student-at-law or legal assistant or secretary from his office. That patent facade would be an insult to one's intelligence.

44 Of course there may be situations where it would be proper for counsel to be a witness, although he should definitely not appear as counsel on the application.

45 If there is an issue between counsel about what happened between them who better to testify on that than counsel? Should we still force the litigants to give evidence based on information and belief, being information they receive from counsel?

46 If a counsel wants to put in evidence letters that he has received should we force the litigant to give evidence putting the letters in evidence?

47 The problem I have with the result in *Lex Tex* (which is what counsel for Northern relies on) is that it jumps to the end result without regard to what should be the proper steps, at least in this province.

48 First, the *assumption* appears to be that the claim for solicitor and client privilege would prevail. That is not necessarily a valid assumption. If there is a solicitor and client privilege it can be waived in particular cases by what the litigant raises or does.

49 An example is Western Canada's answer to Dicken's immortal Jarndyce v. Jarndyce, *Rogers v. Bank of Montreal* referred to in *Alberta Wheat Pool v. Estrin*, 49 Alta. L.R. (2d) 176 (Q.B.) .

50 Another example, closer to the facts before me, is *Atkins v. Huynh* (Edmonton, C.A. 8903-0150-AC, Jan. 16, 1990). This is the Court's disposition:

> The Administrator of the Motor Vehicles Branch, had undertaken the defence of the defendant in the interest of the Unsatisfied Judgment Fund, and had opposed an application to set this action down for trial, and had relied upon an affidavit sworn by his solicitor alleging inconsistencies between a surveillance report obtained by the Administrator and an earlier medical report. The application was broadened to grant the Administrator the right to a second medical examination. The plaintiff then demanded production of the surveillance report on the basis that it was no longer privileged. Both the Master and the Chambers judge held that the privilege of the surveillance report had not been waived in these circumstance.
>
> We do not agree with the reasoning of the Master or of the Chambers judge. The Administrator relied on the surveillance report to oppose an Order setting down the action for trial and also in support of its own application for an additional medical examination "because of inconsistencies between the surveillance report" and the earlier medical report. In our view the Administrator thereby waived whatever privilege the surveillance report enjoyed. Accordingly it must be produced. The appeal is allowed accordingly.

51 Second, simply jumping to the end result reached in *Lex Tex* would breach our practice and procedure. What is advocated is really a collateral attack on the refusal to produce documents, being counsel's file.

52 If a witness refuses to produce documents that the examiner thinks are producible the remedy is to apply for an order requiring that the documents be produced. The merits of the objections are then dealt with directly.

53 If an order is granted directing that the documents be produced they will be produced or they will not be produced. If it is the first counsel then has the documents she wants to see.

54 If it is the second (still refusing to produce the documents) the remedy is to make an appropriate application under Rule 703. If the Court finds someone in civil contempt it can then apply any of the sanctions spelled out in Rule 704, and probably more.

55 In a fact situation such as that before me the Court could stay the Hondas' application or even dismiss it for contempt of Court. It could probably also order that the evidence given by the student-at-law be" rejected", which is what happened in *Lex Tex* .

56 By saying that I should reject the evidence because of the objection taken on the cross-examination I am being asked to make a de facto finding that the witness is in contempt of Court. I cannot do that for three reasons.

57 First, it is the practice of the Court not to automatically jump in and find a person in contempt of Court for refusing to answer questions or to produce documents. The merits of the objections are first adjudicated on. A mandatory order then flows to answer the questions or produce the documents.

58 If it was otherwise witnesses would object at their risk. That is not the way of the Court. The Court does not grant orders just to teach someone a lesson: *R. v. Cutforth* , (1988) 81 A.R. 213 (C.A.) . There should first be a mandatory order requiring that the documents be produced.

59 Second, cases such as *Skoye v. Bailey*, [1971] 1 W.W.R. 144 (Alta. C.A.) ; *250242 Alberta v. Sohal*, 25 Alta. L.R. (2d) 382 (C.A.) ; *Kulyk v. Wigmore*, 53 Alta. L.R. (2d) 44 (C.A.) and *Wood v. 277887 Alberta* , (1984) 55 A.R. 144 (Q.B.) indicate the scrupulous care the Court requires of a contempt proceeding. It should not be done indirectly.

60 Third, a Master in Chambers does not have jurisdiction to find someone in contempt of Court: s. 9(2)(d) Court of Queen's Bench Act. I cannot do it directly and I cannot do it indirectly.

61 The student's evidence breaks down into three categories.

62 First, there is the evidence about the steps as disclosed in the court file: para. 2 of affidavit. That kind of evidence is just useless paper filler. The Court never needs a witness to tell it what the Court file discloses. The Court can take notice of its own records and of the proceedings contained in them: *Foy v. Foy*, 12 C.P.C. 188 (Ont. C.A.) at 203.

63 This "evidence neither adds or detracts from the Hondas' case.

64 Second, there is the evidence about the two letters to counsel for the Hondas, which the student clearly relies on to establish Northern as the owner of the electrical box.

65 Those letters would be admissible in evidence and I would not see anything wrong in their being put in evidence by the student or even by the counsel. No useful purpose would be served by requiring that these letters be put in evidence by an employee or officer of the Hondas.

66 However, there are still two problems with how this evidence comes before the Court.

67 The first problem is that the letters have not been put in evidence. We have the witness saying that there are these letters and saying what the letters allegedly say.

68 The letters are documents. The existence of documents is proved by their being *produced* in evidence, not by a witness saying that the documents exist (a "take my sworn word for it" approach).

69 Second, the student is interpreting those letters when he testifies about what they allegedly say. He does not even quote from them. The letters should be before the Court so it can see what they say. What the student thinks that the letter says may not be what the Court concludes that they say.

70 There is a substantive defect in the affidavit evidence about Northern being the owner of the electrical box. Assuming, without deciding, that this is not a substantive motion evidence as to belief with source (commonly called hearsay evidence) may be tendered: Rule 305(3).

71 What the subrule allows is "belief" with the "grounds and source" for the belief. Belief alone is not admissible. Grounds and source alone is not admissible: *Fabricated Plastics v. Scott*, 25 C.P.C. 198 (Alta. M) ; *Meir v. C.B.C.*, 19 C.P.C. 315 (B.C.S.C.) .

72 In paragraphs 3 and 4 the student does not say that he believes what the authors of the letters say about the ownership of the electrical box. Paragraphs 3 and 4 are "grounds and source" only.

73 Is paragraph 5 of the student's affidavit a belief by him that Northern is the owner of the electrical box? The student does not say that he believes that Northern is the owner of the electrical box. He says that Northern" is believed to be the true owner of the electrical box". Believed by who? That evidence is not satisfactory. That belief could be by anyone. That is not what the subrule is about. The belief must be *belief by the witness* .

74 The belief in the opening part of the paragraph does not establish a belief about the ownership of the electrical box because it hinges to the proposed third party notice. There is *no* allegation in the proposed third party notice that Northern was the owner of the electrical box. Even if the student is swearing that he believes the facts alleged in the third party notice he comes full circle. The grounds and source for a belief cannot be the proposed third party pleading. A proposed pleading cannot be the grounds and source for the belief that is put forward to get the proposed pleading. That would be straight bootstrapping.

75 What is even the point about the ownership of the electrical box when the proposed third party notice does not even allege that it was owned by Northern?

76 The third category of evidence by the student is that supposedly going to facts that might be a foundation for a claim over against Northern.

77 The evidence about the ownership can be discounted because the proposed third party notice does not advance any claim over, direct or vicarious, based on ownership.

78 What is the basis (grounds and source) for the student's belief that the Hondas might have a foundation for a claim over against Northern? That brings the matter down to the allegations of fact in the proposed third party notice. The problem in the student's evidence is brought out in the cross-examination. What facts does he testify to, even if they are belief based on grounds and source? That is what the examiner narrowed in on. The student went around in circles, instead of facing the matter squarely as he and counsel for the Hondas should have done.

79 The student and counsel for the Hondas just went on a song and dance routine on the cross-examination. The cross-examination speaks for itself.

80 What is wrong with coming right out and saying that what the Plaintiff says in his pleading about the electrical box is the source and grounds for a belief that the Hondas *might* have a claim over against Northern (joint tortfeasors).

81 Having said all that it is evident that the Hondas want to claim over against Northern because of what the Plaintiff alleges in his pleading. The Plaintiff alleges that he struck the electrical box, that it was camouflaged, that it did not have any markings, that it constituted a trap and that there was negligence in that. He sued the person that he thought was responsible for that.

82 The Hondas clearly wanted to claim over against whoever was responsible for the electrical box. They thought they did that when they claimed over against A.G.T. That reliance on the Plaintiff's pleading turned out to be misplaced, through little or no fault of the Hondas.

83 I do not think that it was unreasonable for them to claim over against A.G.T. based on the Plaintiff's pleading.

84 The fact that the Plaintiff has discontinued the action against A.G.T. does not mean that his allegations that he ran into the electrical box, that it was camouflaged and that it did not have any markings on it are also discontinued. Claims against defendants are discontinued. Facts are not" discontinued". Those allegations continue to exist. It is just that the Plaintiff fingered the wrong person for the electrical box and it is now too late for him to advance a claim against Northern. Those facts if true continue to exist.

85 The Hondas might have tried to get evidence from the Plaintiff, either by way of affidavit or an examination under Rule 266. I seriously doubt that the Plaintiff would be co-operative. It would not be in his best interests to so be.

86 If there is a case where the window left open in *Crown Life Assurance Co. v. A.E. LePage (Ontario)* , (C.A. Edmonton 8803-0459 A.C., Oct. 3, 1989) is available I think this is it.

87 That was a case of a proposed amendment, not an application to extend the time for delivering a pleading, where the Court says:

> The application was supported by the affidavit of a legal secretary which exhibited the proposed amendment but said nothing about the circumstances justifying the amendment. In effect, the only material was the proposed amendment.
>
> We were inclined to dispose of this appeal by quoting the trenchant judgment of Dea J. in a chambers decision which reached this court a few years ago: "No evidence-no order". *We accept, however, that there are circumstances in which an application to amend could be granted upon a perusal of the proposed amendment* .
>
> We do not propose any analysis of the grounds for amending in the absence of any material. The chambers judge could not have dealt with the kinds of questions raised by cited authorities without any material other than the amended statement of claim. There was no suggestion that counsel agreed to providing material informally. (emphasis mine)

88 I see no logical reason why there could not be circumstances fitting within the emphasized part for third party proceedings.

89 In the case before me I think that what the Plaintiff advances in his pleading about the electrical box and the clear steps taken by the Hondas to ensure that the electrical box remains in the picture (by claiming over against A.G.T.) creates circumstances where it would be appropriate to allow the Hondas to third party Northern. The Hondas are victims of the circumstances.

90 Counsel for Northern says that Northern would be prejudiced by the delay. But the delay does not run from the time of the accident. The Hondas had six months from the time they filed their defence to file a third party notice. The delay is at most a few months (probably three). I do not see how *that* delay has caused serious prejudice to Northern.

91 There is *no* evidence by Northern to establish that the few months delay has caused it prejudice.

92 Counsel for Northern *concedes* that the limitation period for the Hondas to claim over against Northern has not run. If that is the case (I make no comment on the accuracy of that concession) are we not then into the principle apparently adopted in *A.G.T. v. Arrow Excavators and Trenchers* , (1990) 99 A.R. 25 (C.A.) . If the limitation period has not run can a litigant or prospective litigant talk about prejudice caused by delay?

93 Some of the decisions on Rule 66 apply the *McAlpine* test: *Edmonton and Rural Auxiliary Hospital and Nursing Home District v. Bittorf-Holland* , (1982) 33 A.R. 60 (Q.B.) . I might say to counsel for Northern that this decision (which was cited and relied on) was reversed on appeal.

94 If the limitation period has not run is there any practical point in forcing the Hondas into a separate proceeding? A third party procedure benefits both the Hondas and Northern. There are the usual benefits of third party proceedings, including the fact that Northern can defend the Plaintiff's claim against the Hondas.

95 If Northern successfully resists being a party to this action it still might be bound by the result between the Plaintiff and the Hondas: *Director of Soldier Settlement v. Registrar Land Titles*, 17 Alta. L,D. (2d) 351 (M).

96 Counsel for Northern says that there is no "air of reality" to the claim. The problem is that this is an attack on the Plaintiff's claims about the electrical box.

97 I do not see how I can investigate his claims and then apply that against the Hondas for the purpose of this application. The Plaintiff's claims about the electrical box remain. It would be possible for the Court to find that the electrical box contributed to the accident. Northern cannot guarantee that the trial judge could not arrive at that conclusion.

Decision

98 There will be an order allowing the Hondas to file a third party notice within 15 days after entry of the formal order flowing from this decision and serving it within 30 days after it has been filed.

99 Costs of this application will be in the cause.

End of Document

TAB 8

1993 CarswellBC 374
British Columbia Supreme Court

Gervais (Guardian ad litem of) v. Yewdale

1993 CarswellBC 374, [1994] 3 W.W.R. 601, [1994] B.C.W.L.D. 078, 6 P.P.S.A.C. (2d) 62, 86 B.C.L.R. (2d) 374

DARREN GERVAIS, by his Guardian Ad Litem LORNE GERVAIS v. MURIEL YEWDALE

Huddart J.

Heard: November 26, 1993
Judgment: December 6, 1993
Docket: Doc. Vancouver B912046

Counsel: *A. Wade* and *M. Gropper*, for plaintiff.
D.A. Hobbs, for garnishee and defendant.

Subject: Insolvency; Property; Corporate and Commercial

Headnote

Creditors and Debtors --- Garnishment by creditor — Attachability — Proceeds of litigation — Solicitor retainer

Creditors and debtors — Garnishment — Debts and liabilities subject to garnishment — Solicitors' retainer — Retainer in hands of judgment debtor's solicitor not attachable.

A judgment creditor is not entitled to attach a retainer in the hands of the judgment debtor's solicitor. A true retainer must be protected. Otherwise, in a debt action or after judgment and pending appeal, a defendant might find the balance of his or her solicitor's retainer attached, thereby preventing the defence or appeal from being presented. However, to the extent that funds held by the judgment debtor's solicitor are not a true retainer, they are subject to garnishment as funds "accruing due" to the judgment debtor.

Table of Authorities

Cases considered:

Capozzi Enterprises Ltd. v. Tower Enterprises Inc. (1983), 50 B.C.L.R. 100, 3 D.L.R. (4th) 751 (S.C.) — *applied*

Johnson & Higgins Willis Faber Ltd. v. Mayo Helicopters Ltd., [1978] 6 W.W.R. 206, 8 C.P.C. 94 (B.C.S.C.) — *applied*

Smith v. Hamelin (1992), 75 B.C.L.R. (2d) 360, [1993] 3 W.W.R. 285 (S.C.) — *considered*

Statutes considered:

Court Order Enforcement Act, R.S.B.C. 1979, c. 75

s. 4(1)*referred to*

s. 18*pursuant to*

s. 59*referred to*

Personal Property Security Act, S.B.C. 1989, c. 36 — *considered*

Application for summary determination of liability of garnishee under Court Order Enforcement Act, R.S.B.C. 1979, c. 75, s. 18.

***Huddart J.*:**

1 This is an application by the plaintiff judgment creditor under s. 18 of the *Court Order Enforcement Act* for summary determination of the liability of a garnishee to the judgment debtor, Muriel Yewdale. The plaintiff seeks an order directing the garnishee, Mrs. Yewdale's solicitors, Hobbs & Leigh, to pay the unearned portion of their retainer from Mrs. Yewdale into court and for a further order that those monies be paid out in partial satisfaction of the judgment he obtained against Mrs. Yewdale in this action on September 10, 1993.

2 The application requires me to consider whether the enactment of the *Personal Property Security Act* affects the protection from garnishment accorded to a solicitor's retainer since the decision of Mr. Justice Dryer in *Johnson & Higgins Willis Faber Ltd. v. Mayo Helicopters Ltd.*, [1978] 6 W.W.R. 206 (B.C.S.C.).

3 The solicitors say that the retainer of $50,000 being held by them is not a "debt" within the meaning of s. 4(1) of the *Court Order Enforcement Act*. They say that they received the retainer in three payments (September 30, October 8, October 29) to pay for legal services to be given with regard to the enforcement and appeal of the judgment in this action and with regard to a proposed action in negligence against her previous solicitors.

4 Counsel agree that the extent to which the funds being held by Hobbs & Leigh are a "true retainer" is to be determined, if necessary, on a further hearing at which further evidence may be presented.

5 It seems clear from these words of Mr. Justice Dryer that, to the extent that the funds being held by Hobbs & Leigh are a true retainer, they are not subject to garnishee as a debt (*Johnson & Higgins*, supra, at pp. 207-208):

> However, even the part that is money still to be earned is something in which the lawyer has an interest and is not, therefore, solely the property of the client. If the relationship of solicitor and client is terminated before the money is earned, then, in appropriate circumstances, the money must be returned to the client; but, until then, the lawyer is entitled to keep it as security for the payment of his fees earned and to be earned. That is the purpose (unless shown to be otherwise) for which the money was paid to him. I say "unless shown to be otherwise". I have in mind here that a different purpose might be proven either directly or indirectly by the circumstances as a whole, e.g., if the amount paid to the lawyer were very large in relation to the work to be done. If some other purpose were shown, different results might follow ...
>
> ... but a retainer ... paid to a solicitor which may never become repayable or be repaid and, in most cases, probably will never become repayable or be repaid to the client, cannot be said to be "accruing due" to the client ...
>
> It has not been shown to me that part, much less than whole, of the sum paid to the garnishee is a "debt due" to the defendant ...

6 Mr. Justice Macdonald applied this reasoning to protect a significantly larger retainer in *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.* (1983), 50 B.C.L.R. 100 (S.C.), saying (at p. 103):

> The true retainer must be protected. Otherwise, in a debt action or after judgment and pending appeal, a defendant might find the balance of his solicitor's retainer attached, thereby preventing his defence or his appeal from being presented. If the unearned balance of this retainer is attachable, what is to prevent the petitioner from attaching any further retainer which the remaining directors of the respondent may raise and pay from their personal resources in order to continue the

work of the garnishee on its behalf? Counsel for the respondent properly characterized the question of fact to be answered on this application: was this a bona fide retainer?

In both of these cases the retainer was given before judgment. Because the retainer in this action was given after judgment and because of its size, I consider that a hearing with evidence given by affidavit is necessary to determine that question of fact. The question of the extent of the interest of the solicitors in the funds should not be decided on the basis of counsel's statements as to the nature and terms of the retainer and its purpose.

7 My decision is governed by these authorities unless the enactment of the *Personal Property Security Act* has changed the law applicable to solicitor's cash retainers. In *Smith v. Hamelin* (1992), 75 B.C.L.R. (2d) 360 [[1993] 3 W.W.R. 285] (S.C.), Mr. Justice Shaw decided that act governed the priorities as between a solicitor's "security interest in share certificates and seizures by way of execution on judgments". The plaintiff says that his reasoning should be extended to cover a solicitor's cash retainer.

8 Were the issue before me one of priorities I would agree. The P.P.S.A. does not distinguish between shares and money when it defines "collateral" and "security" and "security interest". Clearly, a retainer agreement can create a security interest in money as well as shares. Money securing payment for professional services is not exempt from the provisions of the P.P.S.A. Thus, the P.P.S.A. will apply to govern priorities as between a security interest in money, whether or not perfected, and the interest of a person who causes the money to be garnished.

9 However, I am of the view that the issue before me is not about priorities, but about the nature of the relationship between the solicitors and their client. The *Personal Property Security Act* does not transform a solicitor-client relationship into a debtor-creditor relationship, a retainer into a debt. The issue is the true nature of the alleged retainer and whether that retainer can be legally garnisheed, not the priorities between a security interest in money and the interest of a garnisher in the same money. The *Personal Property Security Act* does not turn collateral into debt and thus create the right to garnishment where no debt existed by agreement or otherwise at common law or equity. Nor do I think such a conclusion can be inferred from the reasoning in *Smith v. Hamelin.*

10 In *Smith v. Hamelin* the execution proceedings were found to have been carried out validly by the sheriff acting under a Writ of Seizure and Sale in accordance with s. 59 of the *Court Order Enforcement Act*. Implicit in that conclusion was the finding of fact that the shares were the personal property of the judgment debtor. There is no suggestion in the report of the decision of Mr. Justice Shaw that anyone suggested that the shares belonged to the solicitors or that the solicitors had anything other than a security interest in them. This view of the interest created by the retainer agreement was confirmed by the fact that the judgment debtor did not direct the solicitor to complete the blank powers of attorney and to transfer the shares to the solicitor in payment of the law firm's accounts until after the Notice of Seizure had been served on the transfer agent.

11 A comparable conclusion as to the validity of the execution process cannot be reached on the facts of this case to the extent the retainer is a true retainer. The judgment creditor is not entitled to garnish a true retainer. That proposition is settled for this court by the authorities to which I have referred. In so far as the funds in the hands of Hobbs & Leigh are a true retainer, the plaintiff has not become a person with an interest in them. To the extent the funds are not a true retainer they are subject to garnishment as funds "accruing due" to Mrs. Yewdale. I do not think there would be any issue of priority with regard to any such funds. Thus, there are no priorities to determine and the *Personal Property Security Act* is not relevant.

12 It may be that counsel will be able to reach agreement as to the extent to which the funds are a true retainer. If not they may set the matter for hearing before me at a mutually agreeable time. At that time the matter of costs may be addressed.

Order accordingly.

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TAB 9

Re Toronto-Dominion Bank and Cooper, Sandler, West & Skurka

[Indexed as: Toronto-Dominion Bank
v. Cooper, Sandler, West & Skurka]

37 O.R. (3d) 729
[1998] O.J. No. 846
No. 588/96

Ontario Court (General Division)
Divisional Court
Steele, Keenan and Caswell JJ.
February 23, 1998

Debtor and creditor -- Garnishment -- Property subject to garnishment -- Solicitor's client a judgment debtor -- Moneys held in solicitor's trust account as true retainer for legal services -- True retainer not subject to garnishment nor to execution -- Execution Act, R.S.O. 1990, c. E.24, s. 19(1) -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 60.08(1).

Professions -- Barristers and solicitors -- Retainer -- Solicitor's client a judgment debtor -- Moneys held in solicitor's trust account as true retainer for legal services -- True retainer not subject to garnishment nor to execution -- Executions Act, R.S.O. 1990, c. E.24, s. 19(1) -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 60.08(1).

Where a client is a judgment debtor, moneys held in his or her lawyer's trust account as a true retainer for legal services are not subject to garnishment under rule 60.08(1) of the Rules of Civil Procedure nor to execution pursuant to s. 19(1) of the Execution Act.

Cases referred to

Bank of Montreal v. Chantry & Chantry, [1979] 5 W.W.R. 470 (Sask. Dist. Ct.); Bel-Fran Investments Ltd. v. Pantuity Holdings Ltd., [1975] 6 W.W.R. 374, 62 D.L.R. (3d) 140 (B.C.S.C.); Canadian Imperial Bank of Commerce v. Campbell, [1976] 1 S.C.R. 341, 20 C.B.R. (N.S.) 205, 7 Nfld. & P.E.I.R. 179, 57 D.L.R. (3d) 272, 4 N.R. 71; Capozzi Enterprises Ltd. v. Tower Enterprises Inc. (1983), 50 B.C.L.R. 100, 3 D.L.R. (4th) 751 (S.C.); Dimovski v. Director of Support & Custody (1991), 5 O.R. (3d) 499, 85 D.L.R. (4th) 375, 3 C.P.C. (3d) 206, 37 R.F.L. (3d) 282 (Div. Ct.); Gero (Re), [1980] 1 F.C. 69, 103 D.L.R. (3d) 310, 7 B.L.R. 148, 5 E.T.R. 131 (T.D.); Gervais v. Yewdale (1993), 86 B.C.L.R. (2d) 374, [1994] 4 W.W.R. 601 (S.C.); Johnson & Higgins Willis Faber Ltd. v. Mayo Helicopters Ltd. (1978), 8 C.P.C. 94, [1978] 6 W.W.R. 206 (B.C.S.C.); National Trust Co. v. Lorenzetti (1983), 41 O.R. (2d) 772, 148 D.L.R. (3d) 575, 48 C.B.R. (N.S.) 317 (H.C.J.); Ontario (Attorney General) v. Royal Bank of Canada, [1970] 2 O.R. 467, 11 D.L.R. (3d) 257 (C.A.); Papdopoulos (Re) (1979), 17 B.C.L.R. 193, 108 D.L.R. (3d) 71, [1980] 2 W.W.R. 438, 8 B.L.R. 143, 32 C.B.R. (N.S.) 258, 6 E.T.R. 43 (C.A.), revg 93 D.L.R. (3d) 621, [1979] 2 W.W.R. 203, 5 B.L.R. 277, 29 C.B.R. (N.S.) 295 (B.C.S.C.); Sandy v. Yukon Construction Co. (1960), 33 W.W.R. 490, 26 D.L.R. (2d) 254 (Alta. C.A.); Stratton v. Jantree No.15 Limited Partnership (1991), 4 C.P.C. (3d) 200 (Ont. Gen. Div.); Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd. (1981), 38 B.C.L.R. 30, 13 B.L.R. 89, 10 E.T.R. 34 (S.C.)

Statutes referred to

Court Order Enforcement Act, R.S.B.C. 1979, c. 75
Execution Act, R.S.O. 1960, c. 126, s. 16(2)
Execution Act, R.S.O. 1990, c. E.24, s. 19(1)
Law Society Act, R.S.O. 1990, c. L.8, s. 14(3)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 60.08(1)

APPEAL from an order of Dambrot J. (1996), 139 D.L.R. (4th) 83, 6 C.P.C. (4th) 183 (Gen. Div.), determining the rights and liabilities under a notice of garnishment and a notice of seizure.

Allan Sternberg and Laurel Broten, for appellant.
Mark J. Sandler, for respondent.

The judgment of the court was delivered by

CASWELL J.: -- The Toronto-Dominion Bank (the "bank") appeals from the order of Dambrot J. dated August 28, 1996 [reported 139 D.L.R. (4th) 83, 6 C.P.C. (4th) 183] wherein he held that a retainer held by Cooper, Sandler, West & Skurka (the "law firm") was not a debt owing to the judgment debtor and therefore not subject to garnishment pursuant to rule 60.08(1) of the Rules of Civil Procedure. Dambrot J. also held that the retainer did not belong to the judgment debtor; hence it was not subject to execution pursuant to s. 19(1) of the Execution Act, R.S.O. 1990, c. E.24. Accordingly the law firm was not required to comply with the notices of garnishment and/or seizure. The costs awarded are also in issue on this appeal.

Leave to appeal, if necessary, is granted.

Facts

The facts in this matter are not in dispute between the parties.

On November 10, 1995, Morris C. Orzech ("Orzech") retained the law firm to represent him in defence of criminal charges involving three counts of fraud over $5,000 and two counts of criminal breach of trust. Orzech paid the law firm $15,000 as a retainer and these funds were deposited in the law firm's trust account. It is common ground that the retainer is a true retainer; without it the law firm would not have been prepared to represent Orzech. On December 15, 1995 the bank obtained a judgment against Orzech in the amount of $242,878.61. On April 18, 1996 the solicitors for the bank served a notice of garnishment on the law firm. On April 26, 1996 the law firm issued an interim account for services rendered to Orzech in the amount of $3,623.56; transferred these moneys to its general account, leaving $11,376.44 in the trust account to Orzech's credit. On May 7, 1996 the law firm filed a garnishee statement stating that it was not indebted to Orzech. On May 17, 1996 a notice of seizure was served on the law firm; to date the law firm has not complied with the notice.

On July 30, 1996 the bank brought a motion to determine the rights and liabilities of the law firm and Orzech and to compel the law firm to comply with the notice of garnishment and the notice of seizure.

Judgment Appealed From

In his reasons in the context of rule 60.08(1) of the Rules of Civil Procedure and s. 19(1) of the Execution Act, Dambrot J. considered three British Columbia cases: Johnson & Higgins Willis Faber Ltd. v. Mayo Helicopters Ltd. (1978), 8 C.P.C. 94, [1978] 6 W.W.R. 206 (B.C.S.C.); Capozzi Enterprises Ltd. v. Tower Enterprises Inc. (1983), 50 B.C.L.R. 100, 3 D.L.R. (4th) 751 (S.C.); and Gervais v. Yewdale (1993), 86 B.C.L.R. (2d) 374, [1994] 4 W.W.R. 601 (S.C.) (the trilogy). He found that the moneys paid as a retainer to the law firm were paid partly as security for services yet to be rendered. The law firm continues to have an interest in the moneys and neither the part earned, nor the part yet to be earned, is subject to garnishment as a debt owing to the client pursuant to rule 60.08(1). Dambrot J. also concluded that the retainer did not belong to the client, even that part yet to be earned. As a result the moneys were not exigible by the sheriff pursuant to s. 19(1) of the Execution Act. In addition, Dambrot J. dealt with the policy considerations underlining the payment by a client to a law firm [at p. 86]:

It is desirable that litigants, particularly accused persons in criminal cases, should not have their ability to assert their legal rights thwarted by the garnishment of genuine retainers, at least when they are provided prior to the underlying judgment being rendered.

Analysis

Rule 60.08(1) states:

60.08(1) A creditor under an order for the payment or recovery of money may enforce it by garnishment of debts payable to the debtor by other persons.

Section 19 of the Execution Act states:

19(1) The sheriff shall seize any money or banknotes, including any surplus of a former execution against the debtor, and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities for money belonging to the person against whom the execution has been issued, and, subject to the Creditors' Relief Act, shall pay or deliver to the party who sued out the execution the money or banknotes so seized, or a sufficient part thereof, and hold such cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities for money as security for the amount directed to be levied, or so much thereof as has not been otherwise levied or raised, and the sheriff may sue in his or her own name for the recovery of the sums secured thereby.

In Johnson & Higgins Willis Faber Ltd. v. Mayo Helicopters Ltd., supra, the defendant had paid moneys to its solicitors, the garnishee, as a retainer. Dryer J. dismissed the plaintiff's motion to direct the solicitors to pay the retainer into court. He held that the plaintiff was unable to show that the moneys paid to the garnishee was a debt due to the defendant. The court commented as follows at p. 95:

The very fact of retainer (in the sense of the act of retaining) entitles the solicitor to something if only for the fact that he is no longer free to accept a retainer in the same matter from others.

And further:

> However, even the part that is money still to be earned is something in which the lawyer has an interest and is not, therefore, solely the property of the client. If the relationship of solicitor and client is terminated before the money is earned, then, in appropriate circumstances, the money must be returned to the client; but, until then, the lawyer is entitled to keep it as security for the payment of his fees earned and to be earned.

In Capozzi Enterprises Ltd. v. Tower Enterprises Inc., supra, Macdonald J. cited Johnson, supra, with approval and stated at p. 103:

> The true retainer must be protected. Otherwise, in a debt action or after judgment and pending appeal, a defendant might find the balance of his solicitor's retainer attached. thereby preventing his defence or his appeal from being presented. If the unearned balance of this retainer is attachable, what is to prevent the petitioner from attaching any further retainer which the remaining directors of the respondent may raise and pay from their personal resources in order to continue the work of the garnishee on its behalf? Counsel for the respondent properly characterized the question of fact to be answered on this application: was this a bona fide retainer? I have concluded that it was.

In addition, Macdonald J. rejected the argument that the retainer is analogous to a term deposit which has not yet matured and thus susceptible to being attached by garnishment: see Bel-Fran Investments Ltd. v. Pantuity Holdings Ltd., [1975] 6 W.W.R. 374, 62 D.L.R. (3d) 140 (B.C.S.C.). The court stated at p. 103:

> There is an essential difference between a term deposit and a true retainer. The former will ultimately become payable when the conditions of deposit are satisfied. The retainer may never become repayable.

In Gervais v. Yewdale, supra, a solicitor held a retainer for both the enforcement and appeal of the actual judgment in which the garnishment was being sought, and for a proposed action in negligence against the debtor's previous solicitor. Huddart J. followed Johnson, supra, and Capozzi, supra, and held that a judgment creditor is not entitled to garnish a true retainer. To the extent that funds held by the judgment debtor's solicitor are not a true retainer, they are subject to garnishment as funds accruing due to the judgment debtor.

Authorities were cited to this court, which held that in the circumstances, the parties were debtor and creditor. As a result the moneys held were available for garnishment. See the following:

(1) A term deposit which had not yet matured: Bel-Fran Investments Ltd. v. Pantuity Holdings Ltd., supra.

(2) Payments under a building contract where an architect's certificate was required prior to payment: Sandy v. Yukon Construction Co. (1960), 33 W.W.R. 490, 26 D.L.R. (2d) 254 (Alta. C.A.).

(3) The balance of moneys held in a solicitor's trust account as proceeds of sale of the debtor's property, after the solicitor's fees and disbursement had been deducted: Bank of Montreal v. Chantry & Chantry, [1979] 5 W.W.R. 470 (Sask. Dist. Ct.), and also Canadian Imperial Bank of Commerce v. Campbell, [1976] 1 S.C.R. 341, 20 C.B.R. (N.S.) 205.

(4) Moneys held in an R.R.S.P.: Re Gero, [1980] 1 F.C. 69, 103 D.L.R. (3d) 310 (T.D.).

In Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd. (1981), 13 B.L.R. 89, 38 B.C.L.R. 30 (S.C.), Fulton J. declined to follow Re Gero, supra, and followed Re Papdopoulos (1979), 8 B.L.R. 143, 6 E.T.R. 43, [1980] 2 W.W.R. 438, 17 B.C.L.R. 193, 32 C.B.R. (N.S.) 258 (C.A.), reversing 5 B.L.R. 277, [1979] 2 W.W.R. 203, 29 C.B.R. (N.S.) 295, 93 D.L.R. (3d) 621 (S.C.). Fulton J. held that the relationship between the debtor and the trustee is not analogous to that of a debtor and creditor, but rather is a trust relationship. Thus the funds could not be garnisheed. However, pursuant to the Court Order Enforcement Act's broad definition of property, the funds were subject to seizure and sale by execution.

In each of these cases, the moneys never lost the inherent characteristic of being owed to the judgment debtor by a third party, even when subject to certain conditions. The judgment debtor could demand and expect repayment in due course. These funds are really in the pocket of the judgment debtor and thus available to the garnishee. This is not the case with respect to the true retainer; a solicitor continues to have an interest in the funds.

In Stratton v. Jantree No. 15 Limited Partnership (1991), 4 C.P.C. (3d) 200 (Ont. Gen. Div.), Rosenberg J. held that a judgment debtor, on the facts, could not demand the G.I.C. funds from the bank which had been pledged as part of a general hypothecation. These funds were placed in the debtor's bank account on a rotating basis, subject to successive purchases of G.I.C.'s.

At p. 203:

> In my view, this motion turns on that argument. Could the customer in fact demand the funds in the bank account at the moment that they are there before they are taken out to purchase a new GIC? In my view the customer could not. Whether or not the documentation perfectly describes in every detail the transaction, it is clear what the intention of the parties was at all times. That is that the GIC originally in the amount of $165,000 pledged to the bank would, on each maturity date, be reinvested in a new GIC.

And further:

> The respondent has argued that the position taken by the creditors is the "epitomy of technicalities" and I agree. The transaction contemplated by the debtor and the garnishee is clearly acknowledged and substantiated by the documents and should not be defeated by the creditors when the debtor

itself could not demand the money from the bank. The application is dismissed.

In Dimovski v. Director of Support & Custody (1991), 5 O.R. (3d) 499, 85 D.L.R. (4th) 375 (Div. Ct.), Rosenberg J., for the court, held that a judgment creditor could not enforce a garnishment against a joint bank account (at p. 503):

> The effect of the joint account agreements is to create an indebtedness by the bank to the joint account holders jointly with respect to the credit balance in the account.

In my view, Dambrot J. was correct when he followed the reasoning in the B.C. trilogy. The purpose of the retainer is to secure the services of the lawyer on an on-going basis. As a result, service of the notice of garnishment does not operate to change the relationship of client and lawyer to one of creditor and debtor, even with respect to the unearned part of the retainer.

With respect to whether the retainer funds in this instance constituted property belonging to the judgment debtor and available for execution, this court has considered a number of cases.

In Ontario (Attorney General) v. Royal Bank of Canada, [1970] 2 O.R. 467, 11 D.L.R. (3d) 257 (C.A.), Brooke J.A. found that s. 16(2) of the Execution Act, R.S.O. 1960, c. 126 (now s. 19(2)) encompassed a bank account as a chose in action in the term "goods and chattels". Therefore moneys standing to the credit of the customer in the bank account were liable to execution. At p. 471:

> Section 16(2) was intended to provide for seizure of incorporeal things which at common law were generally thought not to be the subject of seizure by way of writ of execution. The provisions of the legislation in question are clear, they are not limited in application to a particular class of chose in action or book debt, nor is liability to seizure limited by the condition of the existence in the hands or control of the judgment debtor of documents as evidence of his right.

Courts have also held that trust moneys such as those held in R.R.S.P.s are also liable to execution: see National Trust Co. v. Lorenzetti (1983), 41 O.R. (2d) 772, 148 D.L.R. (3d) 575 (H.C.J.), Vancouver Drive-In, supra.

In my view, as long as the moneys in the solicitor's trust account can be classified as a true retainer they do not belong to the client and are not subject to execution. The fact that the account rendered by the law firm to Orzech notes that the moneys are "standing to the credit of" the client is not sufficient to change their inherent nature.

The Law Society Act, R.S.O. 1990, c. L.8, s. 14(3), states:

> 14(3) Trust money is money received by a member that belongs in whole or in part to a client or that is to be held on the client's behalf or to the client's or another's direction or order, and includes money advanced to a member on account of fees for services not yet rendered or money advanced on account of disbursements not yet made.

This provision recognizes that the solicitor may hold moneys in a trust account as bare trustee, as well as a retainer. Moneys in a solicitor's trust account, depending on the facts, could be available for garnishment and/or execution. However, on these facts, the retainer is subject neither to garnishment nor to execution.

Conclusion

While the relationship of solicitor and client is extant, the solicitor continues to have an interest in the retainer for services rendered. Once the relationship is terminated by either party, for whatever reason, then depending on the circumstances, the balance of the funds may be owing to the client and subject to garnishment. On termination, the balance may also be encompassed by the broad definition of exigible property. Service of the notice of garnishment and/or seizure does not operate to terminate the relationship between the solicitor and client and the funds do not become available to the judgment creditor as a result of such service only. On the other hand, moneys in a solicitor's trust account are not invariably immune from the assault of judgment creditors. Only the true retainer that will benefit both solicitor and client is protected. However, that protection is very broad and is wide enough to encompass matters within the contemplation of the parties at the time that the retainer is given.

I find no error in Dambrot J.'s reasons; the appeal is therefore dismissed.

Since the bank has not been successful on this appeal, Dambrot J.'s order as to costs is upheld.

Costs to the respondent are fixed at $2,500 as agreed between the parties.

Appeal dismissed.

TAB 10

2000 ABCA 189
Alberta Court of Appeal

Mearns, Re

2000 CarswellAlta 655, 2000 ABCA 189, [2000] 10 W.W.R. 195, [2000] A.W.L.D. 639, [2000] A.J. No. 775, 189 D.L.R. (4th) 71, 21 C.B.R. (4th) 116, 225 W.A.C. 168, 261 A.R. 168, 84 Alta. L.R. (3d) 1

Andrew Cuthbertson, Trustee in Bankruptcy of William Lawrence Mearns, Appellant and Vanden Brink & Elgersma, Barristers & Solicitors, Respondent

Côté, Russell, Berger JJ.A.

Heard: June 8, 2000
Judgment: June 30, 2000
Docket: Edmonton Appeal 9803-0573-AC

Proceedings: reversing (1999), 231 A.R. 318 (Alta. Q.B.); reversing (1998), 64 Alta. L.R. (3d) 349 (Alta. Master)

Counsel: *M.J. McCabe*, for Appellant.
B.J. Willis, for Respondent.

Subject: Insolvency

Headnote

Bankruptcy --- Property of bankrupt — Property exempt from execution under provincial statutes — General

Bankrupt sold two vehicles owned by him and deposited proceeds of sale in trust with law firm as retainer for future legal services — Receiving order was subsequently issued and trustee of bankrupt's estate was appointed — Trustee applied to registrar for order directing law firm to deliver money held in trust as retainer to trustee — Order was granted — Law firm's appeal allowed — Chambers judge held that wording of s. 67(1)(b) of Bankruptcy and Insolvency Act included both statutory law and common law, as context or purpose of statute did not dictate otherwise — Chambers judge found, under common law of province, retainer moneys held by law firm were exempt from execution or seizure — Trustee appealed — Appeal allowed — Funds held as retainer moneys in lawyer's trust account were not exempt from execution, as retainer could be terminated at any time by client or anyone stepping into his shoes — Lawyers were retained on matters relating to client's bankruptcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(b).

Bankruptcy --- Property of bankrupt — Trust property — General

Bankrupt sold two vehicles owned by him and deposited proceeds of sale in trust with law firm as retainer for future legal services — Receiving order was subsequently issued and trustee of bankrupt's estate was appointed — Trustee applied to registrar for order directing law firm to deliver money held in trust as retainer to trustee — Order was granted — Law firm's appeal allowed — Chambers judge held that wording of s. 67(1)(b) of Bankruptcy and Insolvency Act included both statutory law and common law, as context or purpose of statute did not dictate otherwise — Chambers judge found, under common law of province, retainer moneys held by law firm were exempt from execution or seizure — Trustee appealed — Appeal allowed — Funds held as retainer moneys in lawyer's trust account were not exempt from execution as retainer could be terminated at any time — Law firm entitled to fees and disbursments reasonably earned from receipt of money to receipt of notice of receiving order from trustee — Trustee entitled to balance of funds on estate's account — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(b).

Table of Authorities

Cases considered:

Capozzi Enterprises Ltd. v. Tower Enterprises Inc. (1983), 50 B.C.L.R. 100, 3 D.L.R. (4th) 751 (B.C. S.C.) — distinguished

Gervais (Guardian ad litem of) v. Yewdale (1993), 86 B.C.L.R. (2d) 374, [1994] 3 W.W.R. 601, 6 P.P.S.A.C. (2d) 62 (B.C. S.C.) — distinguished

Johnson & Higgins Willis Faber Ltd. v. Mayo Helicopters Ltd., [1978] 6 W.W.R. 206, 8 C.P.C. 94 (B.C. S.C.) — distinguished

Smith, Re (1975), (sub nom. *Canadian Imperial Bank of Commerce v. Smith (Trustee of))* [1976] 1 S.C.R. 341, (sub nom. *Canadian Imperial Bank of Commerce v. Campbell)* 20 C.B.R. (N.S.) 205, 4 N.R. 76, 57 D.L.R. (3d) 272, 7 Nfld. & P.E.I.R. 179 (S.C.C.) — considered

Toronto Dominion Bank v. Cooper, Sandler, West & Skurka (1996), 139 D.L.R. (4th) 83, 6 C.P.C. (4th) 183, 11 O.T.C. 235 (Ont. Gen. Div.) — distinguished

Toronto Dominion Bank v. Cooper, Sandler, West & Skurka (1998), 157 D.L.R. (4th) 515, 37 O.R. (3d) 729, 108 O.A.C. 56, 19 C.P.C. (4th) 91 (Ont. Div. Ct.) — distinguished

Toronto Dominion Bank v. Cooper, Sandler, West & Skurka (May 21, 1998), Doc. CA M22142 (Ont. C.A.) — distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — considered

s. 67(1)(b) [renumbered 1992, c. 27, s. 33] — considered

Civil Enforcement Act, S.A. 1994, c. C-10.5
Generally — referred to

Exemptions Act, R.S.A. 1980, c. E-15
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 483 — considered

R. 554(1) — considered

R. 554(3) — considered

R. 620(2) — considered

R. 620(3) — considered

R. 621 — referred to

R. 643 — referred to

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
Generally — referred to

R. 3 — considered

Regulations considered:

Civil Enforcement Act, S.A. 1994, c. C-10.5
Civil Enforcement Regulation, Alta. Reg. 276/95

s. 39(2)

APPEAL by trustee in bankruptcy from judgment reported at(1998), 70 Alta. L.R. (3d) 415, [1999] 11 W.W.R. 131, 12 C.B.R. (4th) 264, (sub nom. *Mearns (Bankrupt), Re)* 231 A.R. 318 (Alta. Q.B.), allowing appeal from judgment reported at (1998), 64 Alta. L.R. (3d) 349, [1999] 5 W.W.R. 276, 5 C.B.R. (4th) 276, 227 A.R. 393 (Alta. Master), directing law firm to deliver retainer moneys held in trust for bankrupt to trustee.

***Per curiam*:**

1 On August 30, 1995, the County of Red Deer issued a petition in bankruptcy against Mr. Mearns, part of it alleging that he had been their comptroller and had embezzled from the County over $600,000.00. The bankruptcy file contains an affidavit of service showing that the petition in bankruptcy was served on him personally the next day, August 31.

2 On September 11, 1995, Mr. Mearns sold to a car dealership two vehicles which he owned, for about $28,000.00. After deduction for a transaction with his son involving another vehicle, that left $20,500.00. The car dealership issued a cheque for that sum payable to Mr. Mearns and to his lawyers, Vanden Brink and Elgersma. The cheque reached the law firm and they cashed it. Before us, counsel agreed to assume that the cheque reached that law firm very speedily.

3 On the next day, September 12, 1995, the court made a receiving order putting Mr. Mearns into bankruptcy. It appointed the present appellant as his trustee in bankruptcy.

4 The bankrupt swore and filed a statement of affairs shortly thereafter. In it, he admits these sales and the transfer of the balance of the proceeds of the vehicles to the lawyers. The bankrupt filed a brief affidavit in this matter. In it, he describes the purpose for the $20,500.00 payment to his lawyers, as follows:

> 3. At the time that we consulted with Mr. Vanden Brink this was a continuation of legal services already being provided by Ms. Waines. We anticipated requiring legal advice regarding opposing an anticipated civil claim, regarding opposing anticipated bankruptcy proceedings and regarding any future bankruptcy discharge application, among other legal issues and matters. The retainer was required to secure these legal services and was not a gift nor settlement, nor was it paid with the intent to defeat creditors.

He also said that the funds were also paid with respect to another petition in bankruptcy against his wife, which was ultimately stayed.

5 On September 15, 1995, three days later, the solicitor for the trustee in bankruptcy faxed a letter to the lawyers who had received the $20,500.00. Omitting formal parts, the text of that letter is as follows:

> Please be advised that I have been consulted by the Trustee in Bankruptcy for William Lawrence Mearns in connection with a deposit of monies to your office during the last week. It is assumed that such monies are being held in trust by your office on account of or on behalf of the Bankrupt. The Trustee takes the position that pursuant to ss.67 and 71 of the Bankruptcy and Insolvency Act that any interest of the Bankrupt in such funds vests in the Trustee. In the event these monies were deposited with your firm as and by way of a retainer against future fees we require that you submit your account for fees and disbursements to date and immediately pay the balance of such funds held in trust to the Trustee herein.
>
> In addition to the above we shall require a full and complete accounting with respect to all monies received and disbursed herein and which relate to the affairs of the Bankrupt.
>
> Under the circumstances I shall require your immediate attention to the above failing which I am instructed to obtain such Orders of the Court as may be required to obtain compliance with the above demand.
>
> Trust you will find the above in order.

6 On application by the trustee, a master in chambers basically granted the request found in that letter. The law firm appealed to a judge in chambers who held that the $20,500.00 was an exempt retainer which would never pass to the trustee in bankruptcy. (No formal order of either master or judge was taken out.) The trustee in bankruptcy appeals to us.

7 The trustee in bankruptcy does not attempt to unravel events all the way back to September 11, 1995, and concedes that any work done by the lawyers under the retainer up to the end of September 12, should be paid for at reasonable rates. But the trustee does ask to have any monies not consumed up to September 12 refunded to him. The lawyers have rendered no account so far.

8 Counsel for the law firm now complains of several years' delay by the trustee in moving to get the money back from the law firm. In view of the very prompt notice given by the letter quoted above, we cannot see that the law firm had any reason to think that the matter had died. Nor had they any reason to have acted on such a view after receiving the letter on September 15. We also have considerable doubts that the doctrine of *laches* would apply to this situation.

9 On the other hand, we do not think that it would be fair to require the law firm to forego any fees and disbursements reasonably earned from September 12 until receipt of the faxed letter on September 15, whatever might otherwise have been the legal position. The letter of September 15 asks for "fees and disbursements to date" to be billed, and only asks for the "balance". That clearly means any monies not earned up to the time of receipt of the letter on September 15. It is fair to assume that for a long time the law firm has conducted itself on the basis that, at worst, it would be able to bill for work reasonably done until receipt of the letter on September 15. There could be prejudice to the law firm if one were now to roll back the date to September 12.

10 Therefore, we will not examine the question of whether the payment was void *ab initio*, or whether the trustee in bankruptcy has the right to go back and claim the monies effective September 11 or 12. That means that a number of the matters argued before us need not be considered, such as the section in the *Bankruptcy and Insolvency Act* which invalidates transactions effective the date of bankruptcy, which is deemed to be the date of filing the petition. Nor need we consider the exact scope of the statutory exceptions to those rules (which were also argued at length before us).

11 We assume that the retainer of the law firm was done in good faith, and that providing the cheque had no colorable motive. No contrary oral argument was made to us.

12 We now recite the remaining argument of the trustee in bankruptcy. By operation of bankruptcy, all assets are vested in him. Any asset exempt from seizure under provincial law must be returned, and any other asset must be distributed among the creditors according to the usual scheme under the *Bankruptcy and Insolvency Act*. Though the trustee may not have invoked that right with respect to any monies earned before the letter was received on September 15, he has from that moment on. In

matters having to do with property, he steps into the shoes of the bankrupt and can terminate legal retainers; or at the very least, he can cut off the use of funds for such retainers. So argues the trustee.

13 In our view, the law firm has no more right *vis-à-vis* the trustee in bankruptcy than it did *vis-à-vis* its client, where the issues involve property or litigation over property. What if the client had earmarked this money specifically for certain legal work, and what if he had given an express charge on those monies (and there is no evidence of that here)? If there had been no bankruptcy, the client could still have terminated that arrangement at any time. The lawyer would have been able to bill the client for work done and disbursements reasonably incurred to that point, but any excess would have to be refunded.

14 The lawyer could not tell the client that he had a contract to work, and that he intended to carry out all the work and bill the full sum. That is not the way that retainers of lawyers work in Alberta, with respect. The client can dismiss his lawyer at any time, without leave or consent: see R. 554(1), (3). A contract between them which forbids that, or makes the client wait until the end of the retainer, is void: R. 620(3). Even if the contract between them purports to require the solicitor's consent to drop or settle a proceeding, it is void: R. 620(2). (We cannot find any Bankruptcy Rules on these topics, and ordinary provincial procedure applies where Bankruptcy Rules are silent: C.R.C. 1978, c. 368, R. 3.)

15 We are satisfied that the matters for which these lawyers were retained all related to property, or litigation over property, and so are within the proper scope of bankruptcy. So for those purposes, the trustee in bankruptcy was able to step into the shoes of his client, at least to the extent of stopping the use of retainers or other security for future legal work and disbursements. Had the retainer been for matters which would not be covered by bankruptcy, such as criminal charges, defamation, divorce, or something of that sort, then it might well be different. It might be then that the trustee in bankruptcy would not be able to stop the work or stop the use of the retainer. However, that is not the situation before us, and we express no final conclusion on that point.

16 What would be the proper status of a retainer in respect of a routine bankruptcy application for discharge is a thorny question, but here counsel for the trustee said that a reasonable sum for that could be proper. He was not sure of the amount, but thought that it was somewhere around $1,000.00 to maybe $1,500.00. The respondent law firm did not really argue or lead evidence on that point, but the fair thing to do, while avoiding further proceedings, is to act on the concession.

17 If the law firm is still retained by the bankrupt and is willing to hold a sum up to $1,000.00 in trust for use in routine bankruptcy discharge proceedings, and for no other purpose, it may file an election to that effect with the clerk of the bankruptcy court and hold such sum. (I will call such sum the "discharge holdback".)

18 It was also suggested that the $20,500.00 was exempt from seizure under provincial law, and so could not be distributed among the creditors. We do not agree. It is possible that, at the time in question, Alberta law of garnishment was confined to debts due or accruing due, and so would not have covered retainer monies in a lawyer's trust account. However, that is not because it is exempt from all forms of execution. Garnishment was a very narrow and technical kind of execution. A debtor cannot render all his cash exempt from execution by having it held in his lawyer's trust account, with or without instructions to use it for all future legal work and disbursements. See *Re Smith* (1975), [1976] 1 S.C.R. 341, 57 D.L.R. (3d) 272, 4 N.R. 76 (S.C.C.).

19 Alberta's *Exemptions Act* (as it then existed) and certain other legislation (such as that on certain pensions), exempted certain assets from all forms of execution. Those are the kind of exemptions referred to in s. 67(1)(b) of the *Bankruptcy and Insolvency Act*. Similarly, Alberta law has long said that a certain portion of an employee's wages is exempt from attachment from garnishment (then R. 483, now Reg. 276/95 s. 39(2)). That is also a true exemption.

20 However, at common law, before the *Civil Enforcement Act* was enacted, different types of execution had to be used for different types of property. (These events occurred before the *Civil Enforcement Act*.) Very often, the wrong type of execution would not work against a certain type of property. That did not mean that the property was exempt from execution or seizure; it only meant that one had to use a different method of execution. In those days, one method of execution available was a receiver by way of equitable execution. We have no doubt that in an appropriate case, that could have been used to levy execution against the unused portion of a retainer fund held in a lawyer's trust account. We know of no rule of common law or statute which renders such property truly exempt. Given what we have said about the ability of the client or anyone stepping into his

shoes to terminate the receiver and ask for a refund of the unused security or retainer, we cannot think of any possible policy reason for creating such a new blanket exemption from seizure. (Again we leave aside issues such as criminal law retainers.)

21 The chambers judge relied upon *Toronto Dominion Bank v. Cooper, Sandler, West & Skurka* (1996), 139 D.L.R. (4th) 83 (Ont. Gen. Div.). It did not involve bankruptcy or any termination of the retainer (and distinguished another case on the latter ground). Part of the reasoning in the *Toronto Dominion Bank* case was that there was no debt from lawyer to client, and so garnishment was impossible. The retainer was for criminal work. That decision merely follows *Johnson & Higgins Willis Faber Ltd. v. Mayo Helicopters Ltd.*, [1978] 6 W.W.R. 206, 8 C.P.C. 94 (B.C. S.C.), which says that a retainer is not a debt accruing due, and expressly distinguishes the case where the retainer is terminated. The *Toronto Dominion Bank* case also follows *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.* (1983), 3 D.L.R. (4th) 751, 50 B.C.L.R. 100 (B.C. S.C.), which also follows the *Johnson* case, and also stressed that the retainer was not terminated. The *Toronto Dominion Bank* case expressly distinguishes execution by means other than garnishment. The *Johnson* case also says that one cannot garnish moneys payable only on a contingency. The *Toronto Dominion Bank* case also cites *Gervais (Guardian ad litem of) v. Yewdale* (1993), [1994] 3 W.W.R. 601, 86 B.C.L.R. (2d) 374 (B.C. S.C.), which merely follows the *Johnson* case. None of these cases is on bankruptcy. The Ontario Divisional Court affirmed the *Toronto Dominion Bank* case, on much the same reasoning: (1998), 108 O.A.C. 56 (Ont. Div. Ct.), leave denied (May 21, 1998), Doc. CA M22142 (Ont. C.A.), 1998 CarswellOnt 2040.

22 Therefore, all those cases are readily distinguishable here. The facts recited above do not raise any doubt, and any contested or doubtful facts would not affect the legal result.

23 Accordingly, we think that the remedy sought by the trustee in bankruptcy is correct. We allow the appeal and order the law firm forthwith to render to the trustee in bankruptcy an account for reasonable fees and disbursements incurred from receipt of the cheque (somewhere around September 11) until the time that the faxed letter was received on September 15. Any portion of the $20,500.00, plus any interest which may have been earned on the same, which is more than is necessary to pay the account so rendered, and is beyond the discharge holdback referred to above, will be paid forthwith to the trustee in bankruptcy on the account of the estate of Mr. Mearns. The trustee in bankruptcy, if not satisfied, will have the usual rights to tax that account: see Rr. 621, 643. If, by any chance, it is taxed down, then there will be an order for a refund of the excess to the trustee. Similarly, the trustee must be given an opportunity to see and to tax any accounts which are proposed to be paid in part or whole out of the discharge holdback referred to above. Any portion of that discharge holdback not properly so used is payable to the appellant trustee. Either party may apply to the bankruptcy court from time to time for consequential directions.

24 The respondent provided to us the key case (which is reported) only in a computer printout with no page numbers, no paragraph numbers, and no bold faced type or other devices to help one read or cite it. Counsel should not do that. They should provide a photostat from a law report, or a more modern type of computer printout with paragraph numbers or page numbers and better type styles. They should also note whether a case has gone to appeal, as did the *Toronto Dominion Bank* case.

Appeal allowed.

End of Document

TAB 11

Supreme Court of British Columbia
Capozzi Enterprises Ltd. v. Tower Enterprises Inc.
Date: 1983-12-22

J. D. Flannigan, for petitioner.

B. M. Davies, for respondent and garnishee.

(Kelowna No. 811/83)

[1] 22nd December 1983. MACDONALD J.:— The question at issue on this motion is the extent to which a judgment creditor can protect its cash assets from attachment by delivering them to its solicitors as a retainer.

[2] In 1981 the respondent purchased ten acres of land near Kelowna from the petitioner for $550,000. The terms were $50,000 cash, with the balance secured by a first mortgage back to the petitioner. The principal was due in five annual instalments of $100,000 each. No principal payment was ever made. This action seeks to foreclose the respondent's equity of redemption in that land. An order nisi of foreclosure made herein during October 1983 included a personal judgment on the mortgage covenant to pay in favour of the petitioner against the respondent for an amount in excess of $530,000.

[3] In September 1983 the respondent consulted the garnishee, a firm of solicitors, to advise it in connection with this action; the proceedings to cancel an agreement for sale on land and buildings adjoining the ten acres which the respondent had purchased from Kelowna House of Carpets Ltd. at the same time; and certain suggested rights of action against two former directors of the respondent who were also associated with the two vendors and with the major tenant of the building on the adjoining land. The suggestion was that alleged breaches of duty by those two former directors might be actionable and have some impact upon this action and the proceedings to cancel the agreement for sale.

[4] Tower had funds in a bank account and a term deposit totalling approximately $20,000. It paid those funds to the garnishee in September, well aware that the order nisi in this action would be coming before the court within a few weeks. The garnishee was instructed to consider possible defences to the foreclosure and cancellation proceedings and to investigate and advise the respondent regarding possible courses of action arising out of the alleged actions of the two former directors. When the petitioner applied for its order nisi herein, the garnishee sought, on behalf of the respondent, to have an issue tried arising out of the alleged breaches of fiduciary duty by the common directors. That attempt was unsuccessful. The order nisi was granted in the usual form, including personal judgment. The petitioner immediately issued garnishing orders against the respondent's

tenants and its banks. When those steps revealed that the respondent's bank accounts were empty, the petitioner issued a further attachment on 24th October 1983 directed to the garnishee.

[5] In response to the garnishee's refusal to pay all or any part of its retainer into court in response to that garnishing order, the petitioner now applies, pursuant to s. 18 of the Court Order Enforcement Act, R.S.B.C. 1979, c. 75, for an order that the liability of the garnishee be determined summarily; that it be directed to pay the retainer, or so much thereof as had not been earned in fees at the date of service of the garnishing order, into court; and for a charging order against that portion of the retainer which was unearned at the time of service of the garnishing order. At the conclusion of argument on that application, I ordered that it be dismissed with costs and agreed to file written reasons.

[6] The issue is resolved by the decision of my brother Dryer in *Johnson & Higgins Willis Faber Ltd. v. Mayo Helicopters Ltd.,* [1978] 6 W.W.R. 206, 8 C.P.C. 94 (B.C.S.C). There, the plaintiff attempted to garnishee funds held by a firm of solicitors as a retainer. In the circumstances of that case, the retainer was characterized as money partly earned and partly to be earned as services were rendered. Such was the case here. At p. 207, Dryer J. says:

> However, even the part that is money still to be earned is something in which the lawyer has an interest and is not, therefore, solely the property of the client. If the relationship of solicitor and client is terminated before the money is earned, then, in appropriate circumstances, the money must be returned to the client; but, until then, the lawyer is entitled to keep it as security for the payment of his fees earned and to be earned. That is the purpose (unless shown to be otherwise) for which the money was paid to him. I say "unless shown to be otherwise". I have in mind here that *a different purpose might be proven either directly or indirectly by the circumstances as a whole, e.g., if the amount paid to the lawyer were very large in relation to the work to be done.* If some other purpose were shown, different results might follow. (The italics are mine.)

[7] In *Johnson & Higgins* the amount involved was $200. Here, we are considering a retainer of almost $20,000. Is that amount so large in relation to the work to be done as to suggest that the payment of these funds to the garnishee is a device to shelter these funds from attachment? I have concluded that such is not the case here in the sense intended by Dryer J. in *Johnson & Higgins.*

[8] The retainer was paid before the personal judgment in this action was granted. At that point, the defence of two actions and the commencement of a third were under consideration. The latter might well involve substantial disbursements for accounting

services. The affidavit filed in opposition to this application by the new president of the respondent deposes that at the time of payment of the retainer, it was advised that those funds might not be sufficient to finalize all proceedings which might have to be defended or commenced in relation to the matters in question. Clearly, the retainer was paid to ensure that the respondent would be in a position to assert its legal rights and to guard against the possibility that it might be deprived by attachment of the funds which it required for that purpose. But that secondary purpose does not taint the legitimate aspect of the retainer. I find that in the circumstances here the amount was not so large in relation to the anticipated work as to establish that this retainer was paid to the garnishee for a purpose other than as security for the payment of fees to be earned.

[9] The true retainer must be protected. Otherwise, in a debt action or after judgment and pending appeal, a defendant might find the balance of his solicitor's retainer attached, thereby preventing his defence or his appeal from being presented. If the unearned balance of this retainer is attachable, what is to prevent the petitioner from attaching any further retainer which the remaining directors of the respondent may raise and pay from their personal resources in order to continue the work of the garnishee on its behalf? Counsel for the respondent properly characterized the question of fact to be answered on this application: was this a bona fide retainer? I have concluded that it was.

[10] One additional argument raised by the petitioner requires comment. It was submitted that the unearned portion of the retainer was analogous to a term deposit which has not yet matured. In *Bel-Fran Invt. Ltd. v. Pantuity Holdings Ltd.,* [1975] 6 W.W.R. 374, 62 D.L.R. (3d) 140 (B.C.S.C), it was held that such a term deposit was attachable because the garnishing order was tantamount to a request by the depositor for withdrawal. Here, the petitioner submits, the garnishing order is tantamount to a decision on the part of the respondent to terminate the retainer and request that the unearned portion be refunded. I disagree. There is an essential difference between a term deposit and a true retainer. The former will ultimately become payable when the conditions of deposit are satisfied. The retainer may never become repayable. Furthermore, the distinction between the type of "demand" necessary to trigger early payment of a term deposit and that required to terminate a solicitor's instructions is substantial. The *Johnson & Higgins* decision, supra, is directly on point and I prefer that approach when a solicitor's retainer is in issue.

[11] The application is dismissed with costs.

Application dismissed.

TAB 12

Court of Queen's Bench of Alberta

Citation: Solara Exploration Ltd. v. Richmount Petroleum Ltd., 2008 ABQB 596

Date: 20080926
Docket: 0601 12188
Registry: Calgary

Between:

Solara Exploration Ltd.

Plaintiff

- and -

Richmount Petroleum Ltd.

Defendant

Reasons for Judgment
of the
Honourable Madam Justice S.L. Martin

I. Introduction

[1] Two sophisticated parties entered into a farmout agreement in relation to the drilling and possible development of a particular oil and gas play. The purpose of such agreements is to share the risks and rewards in what is known to be a speculative venture. In this case the defendant, Richmount Petroleum Ltd. ("Richmount"), farmed out a portion of its interest to the predecessor of the plaintiff, Solara Exploration Ltd. ("Solara"), under a negotiated and signed agreement (the "Farmout Agreement"). For Solara's predecessor, as farmee, to earn the specified interest in the subject lands, it was required to pay its proportionate share of the expenses until the "completion, abandonment or capping" of the relevant well. In this case, Richmount was both farmor and operator under the Farmout Agreement and it would inform the farmee about what work it proposed, detail such work in a technical document and, under separate cover, request payment for the costs of the proposed activities. This process is common in the industry and involves Authorizations for Expenditure ("AFE").

[2] Solara's predecessor paid a land equalization fee and provided the funds requested in two AFEs in a total amount of over $200,000.00. When requested, it chose not contribute for the work contemplated in the third AFE because the test results showed an uneconomic well. At the time the farmee chose not to contribute, it believed the well was "complete", meaning that it had already earned its interest in the subject lands and could elect to "go penalty". Going penalty allows the farmee to pay an elevated amount in the nature of a penalty later rather than paying its

proportionate share at the time the AFE issues. A farmee can "go penalty" only if it has earned its interest. The farmee wrote Richmount in January 2006, suggesting that the proposed operations were post-completion activities, called "independent operations", and indicating that it was electing to go penalty. It heard nothing from Richmount until June 2006 when Richmount communicated its position that the farmee's failure to contribute to the third AFE disqualified it from claiming an interest in the subject lands. Richmount conducted the activities contemplated in the third AFE, as well as taking other steps, and the test well in question is now producing gas in commercially viable quantities. In addition, a second well has been completed on the subject lands.

[3] Solara asserts an interest in the subject lands and in both wells. Richmount denies that any interest has been earned on the basis that Solara's predecessor withdrew its financial contribution before the well had been completed.

II. Facts

[4] Few facts are in dispute and credibility is not a major issue. The parties submitted a Statement of Agreed Facts, attached as Appendix A and incorporated herein, and an Agreed Book of Exhibits.

[5] Solara called four lay witnesses at the trial: Jason Dagenais (former President and CEO of Dyno Energy Ltd. ("Dyno")), James Scott Thomson (former Vice President Land at Dyno), Lawrence Frederick (former Engineer at Dyno) and Donald Roy Holding (President and CEO of Solara). Richmount called Lawrence Urichuk (President of Richmount). There were also three expert witnesses: Mr. O'Byrne for Solara and Mr. Nelson and Mr. Macdonald for Richmount. The parties agreed that all expert witnesses were qualified to give expert opinion evidence in the areas set out in their respective Rule 218.1 expert statements.

A. The Parties

[6] Solara, an Alberta company, is the amalgamation successor to Solara Holdings Inc. and Dyno. Dyno was founded by Mr. Dagenais and incorporated in May 2005. Dyno's philosophy was to pursue low to moderate risk oil and gas plays. As Dyno was the named party in the Farmout Agreement, it will be referred to throughout in this judgment.

[7] Richmount is also an Alberta company. It is an oil and gas exploration and development company which has been operating only in Alberta for approximately 13 years.

[8] Dyno and Richmount worked together previously on another matter and this led to negotiations over a play concerning the Farmout Lands and the Test Well, both as hereinafter defined.

B. The Farmout Agreement

there was no completion because production estimates were low and stimulation was the only chance of obtaining commercial quantities from this formation. Before this Court, Richmount argued that fracing was necessary for completion because the Test Well was not economic at the rates tested.

[93] I leave for another day the extent to which Article 3 is informed by or incorporates economic considerations. Richmount's evidence that fracing was necessary for completion remains largely uncontradicted and untouched by cross-examination. That would suggest that the evidence of Richmount's experts would prevail on this point. However, the conduct of the parties may also be relevant in determining whether there had been completion. How they characterized their activities could also be relevant in assessing the necessity of fracing for completion in an individual case. For a full analysis on this second aspect of the definition of completion, there would need to be a consideration of the factors addressed herein in respect of estoppel. The impressions a party's documents and conduct create might reasonably be considered relevant in an appropriate case. Richmount's experts did not consider these factors, but focussed on the time and content of the activities. Nevertheless, as stated above, I do not consider it necessary in this case to undertake this analysis for this purpose.

B. Did Richmount breach any of its obligations as Operator under the Farmout Agreement?

[94] No breach of contract has been established that would lead to a declaration that Dyno has earned an interest. Witnesses for Dyno admitted Richmount fulfilled its contractual obligation to drill, test and complete the Test Well. While the timing of completion may have arisen as an issue in respect of Dyno's lack of participation in AFE 512003, it was not raised in respect of breach of contract in the pleadings, evidence or argument. Nor has it been established that any breach alleged would have given rise to the remedy pursued.

[95] The contractual obligations owed by Richmount under the Farmout Agreement and the underlying mutuality that exists between these parties are, however, relevant in relation to the estoppel argument.

C. Is Richmount prevented or estopped from denying that the Test Well was complete and that Dyno had earned an interest in the subject lands?

1. Legal principles of estoppel

[96] Solara pleads in its Amended Statement of Claim that "as a result of [Richmount] failing to respond to [the January 13, 2006 Letter], [Richmount] is estopped from taking the position that [Dyno] has failed to earn an interest in the Test Well in the Farmout Lands."

[97] Richmount argues that the pleadings are insufficient to support a claim of estoppel. I do not accept that argument. Unlike *Beaucage v. Grand & Toy Ltd.* (2001), 19 B.L.R. (3d) 196 (Ont. S.C.J.) the pleadings in the case at bar are sufficiently detailed and achieve the required

level of specificity. Richmount can understand from the pleadings that Dyno asserts estoppel in relation to its choice not to respond to the January 13, 2006 Letter. To the extent the claim relies or builds upon other facts that were plead, it does not go beyond the Amended Statement of Claim in an impermissible manner.

[98] The essence of Dyno's argument is that Richmount should be estopped from denying that Dyno has earned its interest under the Farmout Agreement. Specifically, Dyno asserts that by virtue of Article 4.1 of the Farmout Agreement and industry norm, Richmount had an obligation to disclose information which would impact on Dyno's ability to earn its interest. It submits that Richmount's silence reasonably can and should be interpreted as a representation to Dyno that its understanding expressed in the January 13, 2006 Letter was correct, especially given that the letter specifically solicited any concerns or comments. Dyno's claim is thus that by failing to respond to the January 13, 2006 Letter, Richmount represented that the condition of completion had been met and that Dyno had earned. The case at bar therefore involves estoppel by representation relating to a condition precedent and not promissory estoppel.

[99] A condition precedent either is met or is not. In law it can be met two ways: *de facto* compliance with the condition (in this case, the Test Well was completed) or deemed or *de jure* compliance (in this case, the conditions are such that Richmount is estopped from denying that the Test Well is completed or that Dyno has earned). Estoppel by representation involves statements of fact. Promissory estoppel is a separate branch and form of estoppel and involves a promise which is unsupported by consideration. Many of the authorities cited to me involve promissory estoppel but Richmount made no promise that could be said to trigger the application of this form of estoppel.

[100] Steven Waddams in his book, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at para. 193 [*Waddams*] states that "[t]he basic concept of estoppel is that a person is precluded from retracting a statement upon which another has relied." He cites the well recognized definition for estoppel:

> ... where one person ('the representor') has made a representation to another person ('the representee') in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

[101] The requirements for estoppel are:

a) conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation was made;
b) an act or omission by the person to whom the representation is made

which results from the representation;

c) detriment to such person as a consequence of the act or omission.

[102] A representation need not have only one source or manifestation and can arise from a course of conduct.

[103] At one time, it was thought that silence could not be a representation, but the case law has since evolved. Where the relationship between the parties is such that one has a duty to disclose information, choosing to remain silent may amount to a representation. According to *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 26 O.R. (2d) 459 (C.A.) at para. 23, "Silence is sometimes as cogent as speech".

[104] Before assessing whether the above requirements have been established, I note that Richmount's experts opined on the ultimate issue of whether Dyno had earned. I have not accepted their opinions on this particular question. Understandably, given their role and expertise, neither considered the principles of estoppel and their conclusions are limited as a result. They directed their minds only to whether there had been completion under the CAPL definition in fact, not whether Richmount's conduct raised an estoppel. However, the testimony of each establishes and supports aspects of the estoppel alleged.

[105] I am influenced by the observations and expertise of Mr. Nelson, one of Richmount's experts, who was knowledgeable, helpful to the Court and even-handed. He testified that Richmount as operator had an obligation to communicate clearly with Dyno. In commenting on proper industry practice, he said he would have responded to the January 13, 2006 Letter, he explained that the activities in AFE 512003 were not workover and he stated that he would have issued a supplementary completion AFE, rather than AFE 512003.

2. Was there a Representation?

[106] This turns on what Richmount knew when it chose not to respond to the January 13, 2006 Letter; on the nature of the relationship between Richmount and Dyno and on their communications and conduct.

a. Richmount Knew Dyno Believed it Had Earned

[107] Dyno communicated its understanding of the parties' legal relationship in the January 13, 2006 Letter. Dyno thought it had earned its interest and all of its actions are consistent with its expressed belief. For example, the reasons provided by Mr. Frederick as to why Dyno chose not to participate in AFE 512003 were intended to preserve open communication with a company with which Dyno believed it continued to share a joint venture. Dyno also waited until the end of the information black-out period prescribed by the CAPL Operating Procedure before it asked for further information and reports on the Test Well.

[108] It is clear that Richmount knew that Dyno believed it had earned its interest. Richmount

admits that Dyno "thought" the Test Well was complete when it sent the January 13, 2006 Letter, but makes much of the fact that Dyno did not follow industry custom and send what is called an "earning letter". In such a letter, the farmee asserts it has earned under a farmout agreement and requests a formal transfer of its interest. Mr. Thomson, as Vice President Land at Dyno, was aware of this industry custom and had followed it in his prior employment when acting for a farmee, but no such letter was sent in the case at bar.

[109] Nevertheless, despite the form of the January 13, 2006 Letter, Richmount knew that Dyno thought that the Test Well was complete and that it had earned its interest. The January 13, 2006 Letter clearly spells out that Dyno believed the fracture stimulation was an independent operation, that it chose to go penalty rather than participate in AFE 512003 and that it invited any comments and concerns.

[110] All witnesses for Richmount eventually conceded in cross-examination that they understood fully from the January 13, 2006 Letter that Dyno believed it had earned its interest. That is because people in the industry know that an "independent operation" arises only after completion and earning and that a farmee cannot go penalty until it has earned its interest. When Dyno used that term and said it was going penalty, Richmount knew it was also saying it had earned its interest. Richmount admits that is the only reasonable assumption, construction and inference from the January 13, 2006 Letter.

[111] There is no evidence to suggest that if Dyno had sent an earning letter it would have made any difference to Richmount's understanding of Dyno's position or that Richmount would have responded differently or more quickly. So while the form of the correspondence chosen by Dyno may not have met best practice, it is clear Richmount knew Dyno was asserting that it had already earned its interest in January 2006.

[112] The principals of Richmount said that after they received the January 13, 2006 Letter they sought advice and then came to the conclusion sometime in March or April, 2006 that Dyno had failed to earn an interest. However, Richmount did not communicate with Dyno until June 5, 2006. At that time Richmount sent a letter and then told Dyno that it had forfeited its interest by not contributing to the fracing operation.

[113] Therefore, there were effectively two periods of silence from Richmount: one when it was considering its position and a further period after March/April 2006 when it knew its position but did not disclose it to Dyno.

b. The nature of the parties' relationship

[114] Richmount argues that Dyno has not plead or proven that Richmount owed it a fiduciary obligation or a tort obligation in respect of representations. Regardless, this does not prevent Dyno from asserting an estoppel against Richmount.

[115] Dyno and Richmount have a contractually-based relationship in which Richmount was

the operator under the Farmout Agreement, as well as being the farmor. Many legal consequences flow from Richmount's chosen position. All contracts involve exchange and the Farmout Agreement has an obvious mutuality: Dyno is to pay until completion and Richmount is to complete. Thus, at one level, Richmount is obliged to create the circumstances in which Dyno may earn its interest. That does not necessarily mean that Dyno will earn, but only that it cannot earn without Richmount. There is no doubt that when Richmount proposed the Completion Program and AFE 512003 it did so, in part, to comply with its contractual obligation to complete the Test Well.

[116] Richmount, as operator, was in control of the operations conducted on the Test Well. It decided what needed to be done, created all documents concerning proposed activities, controlled their presentation, timing and order, and selected what it considered to be the appropriate label for each activity it proposed.

[117] All witnesses, including Richmount's experts, agreed that in addition to its contractual obligations, an operator like Richmount is obliged to communicate clearly and to deal fairly with a party in Dyno's position.

[118] Mr. Nelson, Richmount's expert, admitted in cross-examination that he would have responded to the January 13, 2006 Letter and told Dyno that it had not earned and would not earn unless it paid its share of AFE 512003. In his written report, Mr. Nelson said that the five-month period it took Richmount to respond was "not good administrative practice on the part of Richmount". However, he went much further and testified that Richmount, as operator, owed an obligation of frank communication with Dyno and that he personally would have sent a letter to Dyno right after he had received the January 13, 2006 Letter explaining that he did not share Dyno's view that it had earned.

[119] Based on this evidence, the nature of the parties' relationship was such that Richmount was obliged to respond to Dyno's assertion that it had earned. This is especially so in light of Richmount's other conduct that helped induce that belief.

c. Communications and Conduct

[120] Richmount's communications and conduct were responsible, in part, for Dyno's belief that it had earned an interest in the Farmout Lands.

[121] The starting point in assessing the legal impact of any such communication and conduct is to recognize that Richmount was the "originator" of both the work programs and the AFEs. As operator, Richmount controlled the content, structure and timing of the work program and the structure and content of the AFEs. It created the forms it used to communicate with Dyno. It constructed the categories of work activity in the boxes in the AFE and it ticked off those that it believed applied. Richmount sometimes elected to label and describe the project activity. It did not do so in its initial drilling AFE, but in the two subsequent AFEs it chose to insert a line item called "Project Type" and it characterized the activities proposed. It selected the terms to