

# FEDERAL COURT OF APPEAL

BETWEEN:

**DR. GÁBOR LUKÁCS**

Applicant

and

**CANADIAN TRANSPORTATION AGENCY**

Respondent

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**RESPONDING MOTION RECORD OF THE  
PROPOSED INTERVENER,  
THE PRIVACY COMMISSIONER OF CANADA**

(Response to the Applicant's motion brought pursuant to Rules 91, 94, 96, and 97  
of the *Federal Courts Rules*)

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Examination No. 14-1010

Court File No. A-218-14

FEDERAL COURT OF APPEAL

B E T W E E N:

DR. GÁBOR LUKÁCS

APPLICANT

- and -

CANADIAN TRANSPORTATION AGENCY

RESPONDENT

\*\*\*\*\*

CROSS-EXAMINATION OF PATRICIA KOSSEIM on her Affidavit sworn October 14th, 2014, pursuant to an appointment made on consent of the parties, to be reported by Gillespie Reporting Services, on 23rd day of October, 2014, commencing at the hour of 12:01 in the afternoon.

\*\*\*\*\*

**ORIGINAL**

APPEARANCES:

Dr. Gábor Lukács,

for the Applicant

Ms. Jennifer Seligy and  
Mr. Thomas Brady,

for the Privacy Commissioner of Canada

This Examination was digitally recorded by Gillespie Reporting Services at Ottawa, Ontario, having been duly appointed for the purpose.

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(i)

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DATE TRANSCRIPT ORDERED: OCTOBER 23RD, 2014

DATE TRANSCRIPT COMPLETED: NOVEMBER 7th, 2014

1                    PATRICIA KOSSEIM, SWORN:

2                    CROSS-EXAMINATION BY DR. LUKÁCS:

3 1.                Q.    I understand that on October 14th, 2014 you  
4                    swore an Affidavit?

5                    A.    Yes, I have.

6                    DR. LUKÁCS:    Let's mark that as Exhibit Number 1.

7                    EXHIBIT NO. 1:    Affidavit of Ms. Kosseim, sworn on  
8                    October 14, 2014.

9 2.                Q.    I understand that you received the Direction  
10                    to Attend dated October 17th, 2014.

11                    A.    Yes, I did.

12                    DR. LUKÁCS:    Let's mark that as Exhibit Number 2.

13                    EXHIBIT NO. 2:    Direction to Attend, dated October  
14                    17, 2014.

15 3.                Q.    I understand that in response to item number  
16                    two of the Direction to Attend, you have produced an  
17                    excerpt from the 2007-2008 Report of the Privacy  
18                    Commissioner.

19                    A.    Yes, we did.

20                    DR. LUKÁCS:    Let's mark that as Exhibit 3.

21                    EXHIBIT NO. 3:    Excerpt of the Office of the  
22                    Privacy Commissioner of Canada's Annual Report to  
23                    Parliament on the Privacy Act for 2007-2008, pages  
24                    23 to 31, along with cover letter from the Privacy  
25                    Commissioner of Canada addressed to The Honourable

1 Peter Milliken, M.P., The Speaker, The House of  
2 Commons.

3 I understand this consists of pages 23 to 31.

4 A. Yes.

5 4. Q. And the cover letter of the Commissioner  
6 submitting it to Parliament.

7 A. Yes.

8 5. Q. Are there other documents in your possession,  
9 power or control that respond to item number two of the  
10 Direction to Attend?

11 MS. SELIGY: We are going to object to responding  
12 to that request. It's not relevant.

\*O\*

13 DR. LUKÁCS: Ms. Seligy, I am not sure if you  
14 heard my question. My question refers to item number two.

15 MS. SELIGY: Oh, I am sorry. Sorry.

16 DR. LUKÁCS: Yes.

17 MS. SELIGY: Maybe ask the question again, please.

18 DR. LUKÁCS:

19 6. Q. So my question was are there other documents  
20 in your possession, power, or control that respond to item  
21 number two of the Direction to Attend?

22 MS. SELIGY: This is all that we are producing in  
23 response to that item number two.

24 DR. LUKÁCS: I am sorry, Ms. Seligy, this was a  
25 question to the witness and now today Ms. Kosseim is the



1 witness and I have advised you in my letter, I object to  
2 you answering on behalf of the witness. It is  
3 inappropriate. So my question to the witness was and I  
4 would like to ask you do not feed answers to the witness  
5 because it is also inappropriate. So my question to Ms.  
6 Kosseim was,

7 7. Q. Are there other documents in your possession,  
8 power, or control that respond to item number two of the  
9 Direction to Attend?

10 A. No.

11 8. Q. Thank you. Now we move on to item number one  
12 and my question to you is, which documents are you  
13 producing in response to item number one of the Direction  
14 to Attend?

15 A. We are producing no documents.

16 9. Q. I asked you as a witness, Ms. Kosseim, which  
17 documents you are producing as a witness because you are  
18 here as a witness, not a party today. So, do you refuse  
19 to produce documents in response to item number one?

20 MS. SELIGY: Yes, we object to producing documents  
21 in response to item number one.

22 DR. LUKÁCS: Ms. Seligy, again this was a question  
23 to the witness. As you know, the witness has an  
24 obligation to produce documents. If you have an  
25 objection, the proper avenue to do it is through a motion

1 pursuant to Rule 94(2).

2 MS. SELIGY: Ms. Kosseim has answered your  
3 question and we have stated our position that we object to  
4 responding to your question on the grounds that it is not  
5 relevant and that is our position.

6 DR. LUKÁCS: Ms. Kosseim did not answer the  
7 question. My question to her was, whether she refuses to  
8 produce documents in response to item number one of the  
9 Direction to Attend.

10 THE WITNESS: On advice of counsel who has  
11 objected, I am not producing any documents in response to  
12 number one.

13 DR. LUKÁCS:

14 10. Q. All right. I am warning you that I will be  
15 seeking production of those documents and will be seeking  
16 that you re-attend the examination at your own personal  
17 cost.

18 Do you have any documents in your possession,  
19 power, or control that respond to item number one of the  
20 Direction to Attend?

21 MS. SELIGY: We are objecting to responding to  
22 that question on the grounds it is not relevant.

23 DR. LUKÁCS:

24 11. Q. Ms. Kosseim, I understand that the Privacy  
25 Commissioner is seeking leave to intervene in the present

\*O\*

\*O\*

1 application.

2 A. Yes.

3 12. Q. The Commissioner caused a motion record for  
4 leave to intervene to be served on me.

5 A. Yes, I believe so.

6 13. Q. How did the Office of the Commissioner obtain  
7 my home address?

8 A. I don't know.

9 MS. SELIGY: That information is a matter of  
10 public record, in the court record.

11 DR. LUKÁCS: So counsel, was that information  
12 obtained from the court record? Is that what you imply?

13 MS. SELIGY: I am merely just indicating that it  
14 is a matter of public record.

15 DR. LUKÁCS:

16 14. Q. In paragraph three of your Affidavit, you  
17 refer to "this application".

18 A. Yes.

19 15. Q. Have you read the Notice of Application?

20 A. Yes.

21 16. Q. How did the Office of the Commissioner obtain  
22 a copy of the Notice of Application?

23 MS. SELIGY: We are going to object to that  
24 question and I am instructing my counsel not to answer.  
25 It is not relevant to Ms. Kosseim's Affidavit or the

1 motion. And just to add to that, the Notice of  
2 Application is a matter of public record on the court  
3 record.

4 17. Q. When did the Office of the Commissioner obtain  
5 a copy of the Notice of Application?

6 MS. SELIGY: Again, this is -- again, we are  
7 objecting to that question. It is not relevant.

8 DR. LUKÁCS:

9 18. Q. When did the Office of the Commissioner first  
10 learn about the present application?

11 MS. SELIGY: Again, we are objecting. These  
12 questions -- this line of questioning is not relevant to  
13 Ms. Kosseim's Affidavit or the motion.

14 DR. LUKÁCS: Counsel, would you like perhaps to  
15 excuse the witness for a moment that we discuss the issue  
16 of relevance on the record. It may save some time and  
17 possibly a motion to the court. So, I would propose  
18 perhaps that the witness step out for a moment and...

19 MS. SELIGY: Yes.

20 (WITNESS LEAVES ROOM)

21 THE REPORTER: Okay.

22 DR. LUKÁCS: Counsel, as I am sure you realize,  
23 one of the issues on which a motion for leave to intervene  
24 can be denied and has been denied in the past, is failure  
25 to bring a motion for leave to intervene in a timely

\*O\*

\*O\*

1 manner. Therefore when and how the Office of the  
2 Commissioner learned about this application is highly  
3 relevant to the propriety of this motion. If you wish, I  
4 can provide you with case law on that if you would like to  
5 take a short break to review it. I do not want to  
6 unnecessarily waste the court's time with a motion but I  
7 can assure you that I found authorities speaking on that  
8 point. So, there is legal relevance to this issue and  
9 this question.

10 MS. SELIGY: Again, our position is that this  
11 question is not relevant to Ms. Kosseim's Affidavit or the  
12 issues on the motion. What you are raising is a legal  
13 question and that's a matter that is properly addressed in  
14 the hearing of the motion.

\*O\*

15 DR. LUKÁCS: I am asking facts --

16 MS. SELIGY: But not with respect to the facts  
17 that Ms. Kosseim has set out in her Affidavit.

18 DR. LUKÁCS: I am asking for facts that underpin  
19 one of the criteria. If you refer to the decision of  
20 Madam Justice Sharlow that I referred you to yesterday,  
21 relevance is determined with respect to the law. In this  
22 case in addition to those criteria set out in the decision  
23 also timely action is an issue here. Certainly this is  
24 something that involves both facts and the law. So I am  
25 asking your witness questions --

1 MS. SELIGY: Yes.

2 DR. LUKÁCS: -- that relate to whether the Privacy  
3 Commissioner acted in a timely manner and therefore it is  
4 relevant. It is a fact relevant to whether leave should  
5 be granted.

6 MS. SELIGY: Our position is that is it not  
7 relevant and at this point you are fishing for a response  
8 on this issue that we have already stated is not relevant.

9 DR. LUKÁCS: I guess this will then have to be  
10 raised through a motion but let's continue then the  
11 examination with Ms. Kosseim. Let's ask her to join us.

12 (WITNESS ENTERS ROOM)

13 DR. LUKÁCS: Okay.

14 19. Q. Did anyone at the Office of the Commissioner  
15 communicate with persons at the Canadian Transportation  
16 Agency about the present application?

17 MS. SELIGY: Again, object to that response -- to  
18 that question rather and I am instructing my counsel not  
19 to respond. It is not relevant.

20 DR. LUKÁCS: Instruct whom? I didn't hear you.

21 MS. SELIGY: My client.

22 DR. LUKÁCS:

23 20. Q. Ms. Kosseim, did you or others at the Office  
24 of the Commissioner know about the motion of the Canadian  
25 Transportation Agency to quash the application?

1                   A. I can only speak for myself and no, I don't  
2 know of that. I did not know of that and don't know of  
3 that.

4 21.               Q. Before coming for this examination, did you  
5 inform yourself about this matter?

6                   A. I prepared my review of the relevant  
7 documents, yes.

8 22.               Q. Did you also speak to your subordinates about  
9 information they may have relevant?

10                  A. With respect to what I have before me, yes, I  
11 discussed what I have before me with my subordinates.

12 23.               Q. Did you or anyone else at the Office of the  
13 Commissioner provide any assistance or advice, formal or  
14 informal, to the Canadian Transportation Agency in  
15 relation to the present application?

16                  MS. SELIGY: I am going to object to that  
17 question. I am instructing my client not to answer; not  
18 relevant.

19                  DR. LUKÁCS:

20 24.               Q. I understand that Mr. Daniel Therrien is the  
21 Privacy Commissioner of Canada.

22                  A. Yes, he is.

23 25.               Q. So, whenever you say "Privacy Commissioner" in  
24 your Affidavit, you refer to Mr. Therrien?

25                  A. It depends on the time frame. If I am

1 referring to the present Privacy Commissioner, yes. If I  
2 am referring to the Privacy Commissioner that may have  
3 been acting in that position prior to his appointment,  
4 then I am referring to the previous Privacy Commissioner.

5 26. Q. Hm-humm. You refer in paragraph 15 of your  
6 Affidavit to A.B. v Bragg Communications.

7 A. Yes.

8 27. Q. What was the length of the factum and the  
9 length of the oral argument that the Commissioner was  
10 allowed in that case?

11 MS. SELIGY: I would object to that question. I  
12 don't see the relevance of that question but I think Ms.  
13 Kosseim can answer and we will see where this goes.

\*O\*

14 THE WITNESS: I think we prepared a factum and our  
15 oral arguments in accordance with what we were afforded as  
16 an opportunity by the court. I can't remember exactly.  
17 It may have been 20 pages and 10 minutes of oral pleading.

18 DR. LUKÁCS:

19 28. Q. I suggest that it was actually only 10 pages.  
20 Do you agree with me?

21 A. Then it may have been 10 pages. I don't have  
22 the decision or the factum in front of me but we, as I  
23 said, we produced our factum and our oral argument in  
24 accordance with what we were allowed by the court.

25 29. Q. In paragraph 11 of your Affidavit, you state



1 that the Commissioner "has investigated numerous  
2 complaints from individuals regarding the disclosure of  
3 personal information by federal administrative tribunals  
4 via the Internet"; correct?

5 A. Yes, that is correct.

6 30. Q. Did you refer in paragraph 11 to the  
7 investigations summarized in Exhibit 3?

8 A. Yes, those are the complaints. I believe  
9 there were 23 of them that are referred in the annual  
10 report that we produced, or was produced as an Exhibit.

11 31. Q. Were all of these complaints and  
12 investigations in relation to disclosure of personal  
13 information on the Internet?

14 A. I believe so, yes.

15 32. Q. Does the present application involve  
16 disclosure of personal information on the Internet in any  
17 way?

18 A. Not to my knowledge, no.

19 33. Q. Please look at page 25 of Exhibit 3.

20 A. Yes.

21 34. Q. I see here several administrative tribunals  
22 listed on the page; correct?

23 A. Correct.

24 35. Q. Which of these boards conduct hearings in an  
25 adversarial manner?

1                   A. I can't answer that offhand. I would have to  
2 refresh my memory.

3 36.               Q. Would you like to take a break to do that?

4                   A. I think the description of the tribunal are  
5 indicated in the annual report, page 25.

6 37.               Q. My question is specifically about how those  
7 tribunals work, whether they are adversarial as two  
8 parties presenting arguments or more of a, I would say,  
9 single sided type of procedure where, for example, someone  
10 seeks a pension, I believe there is only the person  
11 appearing before the board. There is no adversary there.

12                   A. It may vary.

13 38.               Q. Well, my question is what each of those  
14 things, can you tell me whether it is adversarial or not.

15                   A. Offhand, no I can't tell you.

16 39.               Q. Well then, given that you said you informed  
17 yourself about these matters, apparently perhaps you may  
18 have omitted informing yourself about this, I would ask  
19 that perhaps we take a break and you look into this matter  
20 and you advise me on that or alternatively --

21                   MS. SELIGY: How these bodies work is a matter of  
22 public record. This is -- it is not relevant for Ms.  
23 Kosseim to provide a description of how each of these  
24 bodies work. This information is available publicly.

25                   DR. LUKÁCS: Well, given that the Commissioner

1 intends to rely on this, I believe that, and that Ms.  
2 Kosseim claims to have knowledge of these matters, I do  
3 believe that it is relevant.

4 MS. SELIGY: It is not relevant to ask her to  
5 testify as to how these other public bodies work.

6 DR. LUKÁCS: I guess we will have to agree to  
7 disagree there.

8 40. Q. So this Exhibit 3 is from 2007-2008; correct?

9 A. Correct.

10 41. Q. And Mr. Therrien was appointed on June 5th,  
11 2014; correct?

12 A. He was appointed in early June. I can't  
13 remember the exact date offhand, but yes, early June, yes  
14 in that time frame.

15 42. Q. 2014?

16 A. 2014, yes.

17 43. Q. So, Mr. Therrien did not conduct any  
18 investigations of complaints about disclosure of personal  
19 information prior to June, 2014, did he?

20 A. Not in his current capacity as Privacy  
21 Commissioner.

22 44. Q. Now please look at page 30 of Exhibit 3.

23 A. Yes.

24 45. Q. First, just to avoid misunderstanding, kindly  
25 please read into the record the paragraph below the

1 heading "Next Steps"?

2 A. "Under the *Privacy Act*, this is not a matter  
3 that we are empowered to bring before the courts for  
4 further guidance".

5 46. Q. What matter is being referred to here?

6 A. The matter that's referred to there are the  
7 matters that were raised in the complaints that are the  
8 subject of and described in the annual report.

9 47. Q. So do I understand it correctly that the  
10 Privacy Commissioner could not bring before the court the  
11 issue of disclosure of personal information by tribunals?  
12 That is what the report says, is that correct?

13 A. The Privacy Commissioner cannot bring before  
14 the court complaints that bear on either collection, use  
15 or disclosure of personal information. They can -- he can  
16 or she can bring to the court matters that deal with  
17 access to personal information.

18 48. Q. So, the reason that the Commissioner cannot  
19 bring this matter to the court is because the powers or  
20 jurisdiction of the Commissioner in terms of bringing  
21 matters before the court is confined to access to personal  
22 information and they don't include disclosure.

23 A. The Privacy Commissioner does not have  
24 jurisdiction to bring before the court matters that -- or  
25 complaints that deal with disclosure of personal

1 information.

2 49. Q. All right. Are you familiar with the Canadian  
3 Transportation Agency General Rules?

4 A. No, I am not other than -- no, I don't -- I am  
5 not familiar with the Rules of the CTA.

6 DR. LUKÁCS: Let's mark as Exhibit Number 4, Rules  
7 23 to 25 and 40.

8 **EXHIBIT NO. 4:** Canadian Transportation Agency  
9 General Rules, S.O.R./2005-35, Rules 23-25 and 40.  
10 First, please read Rule 23(1) into the record.

11 A. Rule 23(1) reads, "The Agency shall place on  
12 its public record any document filed with it in respect of  
13 any proceeding unless the person filing the document makes  
14 a claim for its confidentiality in accordance with this  
15 section."

16 50. Q. Did the Privacy Commissioner seek leave to  
17 appeal or otherwise challenge Rule 23(1)?

18 MS. SELIGY: I am going to object to that  
19 question. It's not relevant. I am instructing Ms.  
20 Kosseim not to answer.

\*O\*

21 DR. LUKÁCS: Counsel, just a word of explanation.  
22 This is relevant to the issue of collateral attack which  
23 the Commissioner may be engaging in which is not  
24 permitted. Do you maintain your objection?

25 MS. SELIGY: Yes.

1 DR. LUKÁCS: Okay.

2 51. Q. Are you familiar with the Canadian  
3 Transportation Agency Rules (Dispute Proceedings and  
4 Certain Rules Applicable to All Proceedings)?

5 A. No, personally, I am not familiar with the  
6 details of those Rules.

7 DR. LUKÁCS: Let's mark as Exhibit Number 5 the  
8 Canadian Transportation Agency Rules (Dispute Proceedings  
9 and Certain Rules Applicable to All Proceedings),  
10 specifically Rules 7, 18, 19, 31 and Schedules 5 and 6.

11 **EXHIBIT NO. 5:** Canadian Transportation Agency  
12 Rules (Dispute Proceedings and Certain Rules  
13 Applicable to All Proceedings) S.O.R./2014-104,  
14 Rules 7, 18, 19 31 and Schedules 5 and 6.

15 Please read Rule 7(2) into the record.

16 A. Rule 7(2) reads, "All filed documents are  
17 placed on the Agency's public record unless the person  
18 filing the document files, at the same time, a request for  
19 confidentiality under section 31 in respect of the  
20 document".

21 52. Q. Did the Privacy Commissioner seek leave to  
22 appeal or otherwise challenge Rule 7(2)?

23 MS. SELIGY: Again, I am going to raise an  
24 objection to that question. It is not relevant.

25 DR. LUKÁCS:

1 53. Q. Now, let's look at paragraph 21 of your  
2 Affidavit. What submissions does the Commissioner intend  
3 to make in this application?

4 A. The Commissioner will make submissions aligned  
5 with what we state in our Notice of Motion and my  
6 Affidavit.

7 54. Q. I am afraid that is not a proper answer. My  
8 question was, what are those submissions?

9 A. The submissions will be aligned with what we  
10 state we intend to do, both in the Notice of Motion and my  
11 Affidavit.

12 55. Q. Can you please point to me where in your  
13 Affidavit you are referring to?

14 A. Among other paragraphs, I would point you to  
15 paragraph 19, 20, 22, 23, 24.

16 56. Q. My question to you was what will be your  
17 submissions. You have identified a number of issues on  
18 which the Commissioner intends to make submissions but so  
19 far you haven't told me what will be the Commissioner's  
20 submissions on these issues?

21 MS. SELIGY: This question has been asked and  
22 answered already by Ms. Kosseim.

23 DR. LUKÁCS: My position, Ms. Seligy, is that the  
24 question has not been answered and therefore I am  
25 requesting a proper answer to my question.

1 MS. SELIGY: Again, the answer has been provided  
2 and I am not clear on the relevance of this question. Ms.  
3 Kosseim is not here to speak to the legal arguments that  
4 the Commissioner will be making beyond what is in the  
5 Affidavit and the motion.

6 DR. LUKÁCS: Well, Ms. Seligy, Ms. Kosseim makes  
7 explicit reference to the Commissioner's submissions in  
8 paragraph 21 and she claims to have knowledge of same so  
9 therefore certainly the submissions that a party seeking  
10 leave to intervene intends to make are highly relevant to  
11 whether leave to intervene should be granted.

12 MS. SELIGY: Again, Ms. Kosseim has answered the  
13 question so we would suggest moving on.

14 DR. LUKÁCS:

15 57. Q. Ms. Kosseim, how do you know that the  
16 Commissioner's submissions will be different than those of  
17 the Canadian Transportation Agency?

18 A. Because the Privacy Commissioner has had the  
19 opportunity to examine this question in accordance, in the  
20 context of several different administrative tribunals and  
21 therefore has examined the question and the issues from  
22 numerous different perspectives and this is a position and  
23 a value added that the Commissioner feels he can offer in  
24 this case.

25 58. Q. Ms. Kosseim, Commissioner Therrien did not



1 participate in those investigations in 2007 and 2008.

2 A. When I refer to the Privacy Commissioner, I  
3 refer to the Office of the Privacy Commissioner.

4 59. Q. But it is the Commissioner himself seeking  
5 leave to intervene in the present case, isn't it?

6 A. It is the Office of the Privacy Commissioner  
7 that is headed up by the Privacy Commissioner which is  
8 seeking leave to intervene in this case.

9 60. Q. How will the Commissioner's submissions differ  
10 from those of the Agency?

11 A. As I said, the Commissioner has had a unique  
12 opportunity to examine this question in the context of  
13 several different administrative tribunals, has examined  
14 the issue from multiple perspectives and different  
15 legislative regimes and therefore has value that it feels  
16 it can add to the discussion before the court.

17 61. Q. My question to you, Ms. Kosseim, was in what  
18 way the Commissioner's submissions will differ from the  
19 submissions of the Agency?

20 MS. SELIGY: Ms. Kosseim has answered that  
21 question already.

22 DR. LUKÁCS: Ms. Seligy, I am afraid that was not  
23 the case. I did not receive a proper answer and therefore  
24 I am seeking a clear explanation and answer as to in what  
25 way the submissions will be different. One of the

1 criteria, as you know, for leave to intervene is that a  
2 party has to make submissions different than -- or the  
3 intervener has to make submissions different than those  
4 made by a party. In this case, there is already the  
5 Canadian Transportation Agency which will be defending and  
6 opposing this application. So my question refers to how  
7 the Commissioner's submissions will differ, if it will  
8 differ in any way from the submissions of the Agency.  
9 Given that Ms. Kosseim testifies that the Commissioner  
10 will offer different submissions, I am entitled to know  
11 how this will be different.

12 A. The Privacy Commissioner's submissions will be  
13 different given its perspective on this issue from, in  
14 multiple contexts, its expertise in balancing the right to  
15 privacy with other countervailing issues, its objectivity  
16 in terms of looking at these issues as an impartial  
17 arbitrator in various contexts, in the context of the  
18 complaint investigations.

19 62. Q. Impartial arbitrator, can you elaborate on  
20 that please?

21 A. As an ombudsman.

22 63. Q. Ms. Kosseim, are you aware that the Federal  
23 Court held that the Privacy Commissioner has no  
24 specialized expertise in interpreting privacy legislation?

25 A. The courts have recognized the Privacy

1 Commissioner's expertise in certain decisions.

2 64. Q. My question to you was, are you aware that the  
3 Federal Court held that the Privacy Commissioner has no  
4 specialized expertise in interpreting privacy legislation?  
5 Are you aware of that; yes or no?

6 A. In the specific context of that case, yes.

7 65. Q. Of what that case are you referring to?

8 A. I can't remember offhand but I do recall that  
9 case.

10 66. Q. Justice Robert Mainville, I believe?

11 MS. SELIGY: Can I ask what decision it is that  
12 you are referring to?

13 DR. LUKÁCS: Yes, just give me a moment. It is  
14 State Farm Mutual Automobile Insurance Company v Privacy  
15 Commissioner of Canada, 2010 FC 736.

16 67. Q. So I am still not clear on this, Ms. Kosseim.  
17 You have given me a conclusion that you believe that the  
18 Commissioner's submissions will be different but you  
19 haven't told me yet in what way they will be different.  
20 My question is not what makes you believe that they are  
21 different but rather my question is, how will the position  
22 taken by the Commissioner in this proceeding differ from  
23 the position advanced by the Agency? In what point, to  
24 put things differently, what point will the Commissioner  
25 disagree or take a different position on the issues than

1 the Agency?

2 MS. SELIGY: Ms. Kosseim has answered this  
3 question several times now and I am going to suggest that  
4 we move on.

\*O\*

5 DR. LUKÁCS: I believe that I haven't received  
6 proper answers so I will therefore adjourn the examination  
7 of Ms. Kosseim pursuant to Rule 96(2) of the Federal  
8 Courts Rules for failure to produce documents and to  
9 provide proper answers to questions. Thank you very much.

10 THE WITNESS: Thank you.

11 THE REPORTER: Off record?

12 DR. LUKÁCS: Yes.

13 THE REPORTER: Okay, thank you.

14 DR. LUKÁCS: Thank you.

15

16 --THIS CROSS-EXAMINATION ADJOURNED AT 12:37 P.M.,  
17 ON THE 23RD DAY OF OCTOBER, 2014.

18

19 I HEREBY CERTIFY THAT the foregoing was  
20 transcribed to the best of my skill and ability,  
21 from digitally recorded proceedings.

22

23

.....  
*McCauley / GRS*  
.....  
G R S / M J A



By Fax (613) 952-7226

October 22, 2014

Administrator  
Federal Court of Appeal  
1st Floor  
90 Sparks Street  
Ottawa, Ontario  
K1A 0H9

Dear Madam/Sir:

**Re: Dr. Gabor Lukacs v. Canadian Transportation Agency  
Federal Court of Appeal File No.: A-218-14**

This is to advise that the Respondent, Canadian Transportation Agency, does not oppose the motion by the Privacy Commissioner of Canada for leave to intervene in the within proceedings.

Yours very truly,

A handwritten signature in blue ink, appearing to read 'Odette Lalumière'.

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Legal Services Branch  
Canadian Transportation Agency  
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# FEDERAL COURT OF APPEAL

BETWEEN:

**DR. GÁBOR LUKÁCS**

Applicant

and

**CANADIAN TRANSPORTATION AGENCY**

Respondent

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## WRITTEN REPRESENTATIONS OF THE PRIVACY COMMISSIONER OF CANADA

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### OVERVIEW

1. In his motion of November 14, 2014 (the “motion”) Dr. Gabor Lukacs (the “Applicant”) seeks to compel answers to a series of questions that are irrelevant to the issues raised in the Privacy Commissioner of Canada’s motion for leave to intervene or beyond the proper limited scope of cross-examination on an affidavit filed in support of an interlocutory motion in a judicial review application. The Applicant also seeks the production of documents that are irrelevant to the issue raised in the Privacy Commissioner’s motion and beyond the limited requirement to produce documents on cross-examination on an affidavit.

2. The Applicant’s motion should therefore be dismissed.

## PART I - STATEMENT OF FACTS

3. On April 22, 2014, the Applicant filed a notice of application for judicial review of a refusal of the Canadian Transportation Agency (CTA) to provide the Applicant with un-redacted copies of certain documents in the CTA's files, and concerning the CTA's practices related to the rights of the public to see documents filed with the CTA in the course of adjudicative proceedings before it.

Notice of Application for Judicial Review, April 22, 2014, **Applicant's motion record ("Applicant's Record")**, pp. 16-27.

4. The CTA brought a motion to quash the Applicant's judicial review application. The CTA's motion was dismissed by this Court on September 19, 2014, thereby confirming for the first time that the Applicant's judicial review application would be heard on its merits.

*Lukacs v. Canadian Transportation Agency*, 2014 FCA 205, **Applicant's Record**, pp. 183-191.

5. Following the dismissal of the CTA's motion to quash, the Privacy Commissioner of Canada (the "Privacy Commissioner") sought leave to intervene in the Applicant's judicial review application in order to assist the Court with the interpretation and application of provisions of the *Privacy Act* at issue in the Applicant's judicial review application.

Notice of Motion for Leave to Intervene, October 16, 2014, **Applicant's Record**, pp. 29-30.

6. The Privacy Commissioner is an Officer of Parliament charged with overseeing compliance with the *Privacy Act* R.S.C., 1985, c. P-21. In so doing, the Privacy Commissioner has acquired experience and expertise in the interpretation and application of the *Privacy Act*.

Kosseim Affidavit, paras. 6-13, **Applicant's Record**, pp. 33-35.



7. The Privacy Commissioner has frequently sought, and been granted, leave to intervene where proceedings in the courts involve the interpretation or application of the *Privacy Act*.

Kosseim Affidavit, paras. 14-16, **Applicant's Record**, p. 35.

8. The Applicant's judicial review application raises issues of public importance, among them the interplay between the *Privacy Act*, other legislation, and the open court principle. How these issues are resolved could impact federal government institutions subject to the *Privacy Act* and the legal framework the Privacy Commissioner applies when he carries out his mandate to oversee compliance with the *Privacy Act*.

Kosseim Affidavit, paras. 18-20, **Applicant's Record**, pp. 36-37.

9. Ms. Kosseim, Senior General Counsel and Director General, Legal Services, Policy, Research and Technology Analysis Branch for the Privacy Commissioner, swore an affidavit in support of the Privacy Commissioner's motion for leave to intervene on October 14, 2014.

Affidavit of Patricia Kosseim, October 14, 2014 ("Kosseim Affidavit"), **Applicant's Record**, pp. 32-38.

10. The CTA took no position on the Privacy Commissioner's motion for leave to intervene.

Letter from CTA to Federal Court, October 22, 2014, **Privacy Commissioner's Motion Record ("Privacy Commissioner's Record")**, Tab 2.

### **Cross-examination of Patricia Kosseim**

11. The Applicant served Ms. Kosseim with a "Direction to Attend" for cross-examination on her affidavit filed in support of the Privacy Commissioner's motion for leave to intervene. The Direction to Attend included a request that she produce:

(1) all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office; and (2) summaries of complaints referenced in paragraph 11 of your affidavit and the findings of the Privacy Commissioner in relation to these complaints.

Exhibit E to Affidavit of the Applicant, sworn November 12, 2014 (“Applicant’s Affidavit”), **Applicant’s Record, pp. 48-49.**

12. In an exchange of emails between counsel for the Privacy Commissioner and the Applicant, counsel for the Privacy Commissioner indicated to the Applicant the documents the Privacy Commissioner would provide in response to paragraph (2) of the Applicant’s Direction to Attend and referred the Applicant to the Privacy Commissioner’s website where the Applicant could also access electronic versions of those documents. The Privacy Commissioner further indicated to the Applicant that paragraph (1) of the Applicant’s Direction to Attend referred to documents that are not relevant to the issues raised in the Privacy Commissioner’s motion seeking leave to intervene or to Ms. Kosseim’s affidavit, and hence were not producible under Rule 91(2)(c) of the *Federal Courts Rules*.

Exhibit H to the Applicant’s Affidavit, **Applicant’s Record, pp. 58-59.**

13. The cross-examination of Ms. Kosseim took place on October 24, 2014.

14. In the cross-examination, Ms. Kosseim stated that, on the advice of counsel she would not be producing any documents in response to paragraph (1) of the Applicant’s Direction to Attend.

Transcript of Cross-Examination of Patricia Kosseim, October 24, 2014 (the “Transcript”), Question 9, pp. 4-5 of Transcript, **Privacy Commissioner’s Record, Tab 1.**

15. During the cross-examination, counsel for the Privacy Commissioner instructed Ms. Kosseim not to answer the following questions on the grounds of relevance:

- (i) Question 16: “How did the Office of the Commissioner obtain a copy of the Notice of Application?”
- (ii) Question 17: “When did the Office of the Commissioner obtain a copy of the Notice of Application?”
- (iii) Question 18: “When did the Office of the Commissioner first learn about the present application?”
- (iv) Question 19: “Did anyone at the Office of the Commissioner communicate with persons at the Canadian Transportation Agency about the present application?”
- (v) Question 50: “Did the Privacy Commissioner seek leave to appeal or otherwise challenge Rule 23(1)?”
- (vi) Question 52: “Did the Privacy Commissioner seek leave to appeal or otherwise challenge Rule 7(2)?”

Transcript, Questions 16-19 and Questions 50, and 52, pp. 6-9 and pp. 16-17 of Transcript, **Privacy Commissioner’s Record, Tab 1.**

16. During the cross-examination, the Applicant asked Ms. Kosseim a series of questions aimed at finding out the precise contents of what the Privacy Commissioner’s submissions would be if he were granted leave to intervene. Ms. Kosseim answered the initial questions as fully as was practical. The Applicant was dissatisfied with the responses and rephrased his questions several times, following which counsel for the Privacy Commissioner stated an objection that the question had been answered and suggested the Applicant move on to another question.

Transcript, Questions 53-57, 60-63, 67, pp. 18-23 of Transcript, **Privacy Commissioner’s Record, Tab 1.**

17. Following the receipt of the Transcript, the Applicant wrote to counsel for the Privacy Commissioner requesting answers to certain questions objected to at the cross-examination.

18. In response, counsel for the Privacy Commissioner communicated the Privacy Commissioner's position that Ms. Kosseim had provided proper answers to certain questions mentioned in the Applicant's email (questions 53-56,60-61, 67) and that the remaining questions were not relevant to either the Privacy Commissioner's motion for leave to intervene or Ms. Kosseim's affidavit. Subject to this position, counsel stipulated on behalf of the Privacy Commissioner that the answer to two questions (questions 50 and 52) regarding whether the Privacy Commissioner had sought "leave to appeal or otherwise challenge" Rules 7(2) and 23(1) of the CTA's General Rules was "no".

Exhibit N to Applicant's Affidavit, **Applicant's Record**, pp. 76-77.

19. Following this exchange of correspondence, the Applicant brought the present motion.

## **PART II - ISSUES**

20. The motion raises the following issues:

- (i) Whether Ms. Kosseim should be required to answer any of questions 16-19, 50, or 52 from the cross-examination on her affidavit;
- (ii) Whether Ms. Kosseim should be required to produce any of the materials referred to in paragraph (1) of the Direction to Attend;
- (iii) Whether Ms. Kosseim should be required to provide additional answers to any of questions 53-54, 56, 60-61, or 67 from the cross-examination on her affidavit; and

- (iv) What relief should be granted to the Applicant were it proper for Ms. Kosseim to have answered any of the questions referred to in his motion.

## **PART III – SUBMISSIONS**

### **Overview of submissions**

21. The Applicant's motion seeks to allow him to engage in wide-ranging questioning on matters not relevant to the Privacy Commissioner's motion for leave to intervene or that are beyond the proper scope of cross-examination on affidavits filed in support of interlocutory motions.
22. That scope is determined by the requirement in section 18.4(1) of the *Federal Courts Act* that judicial review proceedings be "heard and determined without delay and in a summary way".
23. The Applicant's questions 16-19 and his request for documents under paragraph (1) of his Direction to Attend are irrelevant and beyond the proper scope of cross-examination on an affidavit in the present circumstances. No answer to these questions or documents sought will assist in determining any factual or legal issues relevant to the disposition of the Privacy Commissioner's motion for leave to intervene.
24. Questions 50 and 52, though also irrelevant, have been answered in the interests of simplifying the issues before this Court and expediting the disposition of this motion. The Applicant's motion is thus moot in regard to these questions.
25. The remaining questions at issue in the Applicant's motion were properly answered.

## A. Scope of cross-examination on affidavits

26. It is firmly established that a cross-examination on an affidavit is far more limited in scope than an examination for discovery. This is particularly so where the cross-examination is on an affidavit filed in a judicial review application, which section 18.4(1) of the *Federal Courts Act* requires be heard “without delay and in a summary way”.

*Federal Courts Act*, RSC 1985, c F-7, s. 18.4(1); *Merck Frost Canada Inc. v. Canada (Minister of Health)* (1997), 80 C.P.R.(3d) 550 (F.C.T.D.) at para.4, aff'd (1999), 3 C.P.R.(4th) 286 (F.C.A); see also *Sivak v. Canada (Minister of Citizenship and Immigration)* 2011 FC 402 at paras.12-14, and *Simpson Strong Tie Company v. Peak Innovations Inc.* 2009 FC 392, at paras 19, 20, 24, aff'd 2009 FCA 266, at para 8.

27. Questions that are in the nature of a “fishing expedition” are improper and will be disallowed.

*Stanfield v. Canada (Minister of National Revenue)* 2004 FC 584 at paras. 18-22, 23, 26; *Sawridge Band v. Canada*, 2005 FC 865 (CanLII), at paras. 4 and 9.

28. In order for a question to fall within the proper scope of cross-examination, two conditions must be met. First, a question must be formally relevant in the sense that it “regards facts set out in the deponent’s affidavit”. Second, a question must be legally relevant, in the sense that it “regards a fact whose existence or non-existence could contribute to determining if the remedy sought can be granted or not”.

*Sam Lévy & Associés Inc. v. Canada (Superintendent of Bankruptcy)*, [2005] F.C.J. No. 768 at para. 13; See also *Merck Frosst Can. Inc. v. Canada (Min. of Health)*, [1997] F.C.J. No. 1847 at paras. 7-8, affirmed (1999) 249 N.R. 15 (Fed. C.A.).

29. Where an affidavit is adduced in an interlocutory proceeding, as is the present case with regards to Ms. Kosseim's affidavit in support of the Privacy Commissioner's motion for leave to intervene, cross-examination is limited to those matters that are relevant to the determination of the motion itself, and not the application on the merits: "Cross-examination on the affidavit should be limited to the issue raised by the motion to which the affidavit relates".

*Sawridge Band v. Canada*, 2005 FC 865 (CanLII) at para. 11; See also *Merck Frosst Can. Inc. v. Canada (Min. of Health)*, [1997] F.C.J. No. 1847, affirmed (1999) 249 N.R. 15 (Fed. C.A.).

#### **B. Procedure for objecting to produce irrelevant documents**

30. Rule 91(2)(c) of the *Federal Courts Rules* provides that a direction to attend may direct the person to be examined to produce for inspection at the examination "in respect of a cross-examination on an affidavit, all documents and other material in that person's possession, power or control that are relevant to the application or motion". This Rule, as it relates to an affiant, only requires the production of documents "in that person's possession, power or control *that are relevant to the application or motion.*" (Emphasis added).

*Federal Courts Rules*, SOR/98-106, s. 91(2)(c).  
*Simpson Strong Tie Company v. Peak Innovations Inc.* 2009 FCA 266, at paras. 5 and 8.

31. This Court has held that, Rule 91(2)(c) is precise with respect to production of documents for cross-examination on affidavits and is to be preferred over the more generally worded provision of Rule 94 dealing with oral examinations.

*Simpson Strong Tie Company v. Peak Innovations Inc.*, 2009 FC 392, at para. 26, aff'd 2009 FCA at para. 8; *Federal Courts Rules*, SOR/98-106, s. 94(2), **Applicant's Record**, p.154.

32. This Court has upheld the procedure whereby, when there is a disagreement as to whether a document requested in a direction to attend should be produced in accordance with Rule 91(2)(c), the party opposing the production states the objection at

or before the cross-examination. The party is not required to seek a motion under Rule 94 seeking relief from production.

*Simpson Strong Tie Company v. Peak Innovations Inc.* 2009 FC 392, at para. 26, aff'd 2009 FCA 266.

33. Accordingly, the Applicant's assertion that the person or party directed to produce documents in a direction to attend must apply under Rule 94(2) to seek relief from the Court from the production of documents is incorrect. A party objecting to a request for production of irrelevant documents is not obliged to use Rule 94.

**C. The questions objected to at the cross-examination were irrelevant, beyond the scope of proper cross-examination, or have been properly answered already**

**i) Questions 16-19 and documents sought in paragraph (1) of the Direction to Attend**

34. Any answers to questions 16-19 or documents sought in paragraph (1) of the Direction to Attend are irrelevant and beyond the proper scope of cross-examination of an affidavit in support of an interlocutory motion in a judicial review application. No answer to these questions or documents sought will assist in determining any factual or legal issues relevant to the disposition of the Privacy Commissioner's motion for leave to intervene.

35. As seen above, the scope of cross-examination on affidavits and the documentary production that can be requested on such cross-examinations is limited. It is not an examination for discovery.

36. Questions of when and how the Privacy Commissioner became aware of the Applicant's judicial review application (questions 16-18) are irrelevant to the issue of whether the Privacy Commissioner should be granted leave to intervene in the Applicant's judicial review application in accordance with Rule 109 of the *Federal Courts Rules*.



37. Rule 109 imposes no fixed time limit for seeking leave to intervene. It sets no specific stage in proceedings for when a party can seek leave to intervene. When or how a proposed intervener became aware of a proceeding available on the public record of the Court is not relevant in determining whether to grant leave to intervene.

38. Timeliness is assessed primarily in terms of whether permitting intervention at the time when it is sought would unduly disrupt or delay the proceedings. No answer to any of questions 16 to 18 would be relevant to this assessment. When or how the Privacy Commissioner became aware of the application will not assist the Court in determining whether allowing an intervention at the time it is in fact proposed would unduly delay or disrupt the proceedings. Undue delay or disruption to the proceedings, not the passing of any set period, will make an intervention untimely.

*Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 at para 32 (intervention sought “well” after filing of notice of appeal; granted when intervention would cause “only” three weeks delay in hearing of appeal), **Applicant’s Record, p. 200**; *Canada (Ministry of Citizenship and Immigration) v. Mugesera*, 2003 FCA 84, at paras 2, 4 (intervention sought after requisition for hearing filed and two years after appeal begun; allowing intervention would have unduly disrupted proceedings), **Applicant’s Record, p. 193**; *Canada (Attorney General) v. Siemens Enterprises Communications*, 2011 FCA 250, paras 3-5 (intervener filing motion one week before scheduled written hearing of merits of appeal, well after appeal books filed), **Applicant’s Record, p. 166**.

39. Whether the OPC had any contact with the CTA (question 19) or any documents between persons at the Office of the Privacy Commissioner and persons outside the Office (paragraph (1) of the Direction to Attend) are equally irrelevant to the timeliness issue. The timeliness of a proposed intervention is a matter of what stage in the proceedings it is brought, not when a proposed intervener may have learned of an application or who the proposed intervener may have communicated with prior to seeking intervention.

40. Moreover, the Applicant’s questions 16-19 and the request for documents in paragraph (1) of the Direction to Attend are a fishing expedition. In particular, the Applicant has not demonstrated how hypothetical contacts between the CTA and the

Privacy Commissioner might somehow demonstrate whether the Privacy Commissioner's motion for leave to intervene is timely.

41. Accordingly, Ms. Kosseim should not be required to answer any of questions 16-19 from the cross-examination on her affidavit, nor should she be required to produce documents of the nature requested in paragraph (1) of the Direction to Attend.

**ii) Questions 50 and 52 “collateral attack”**

42. Questions 50 and 52, although irrelevant, have been answered in the interests of simplifying some of the issues before the Court and expediting the disposition of this motion. The Applicant's motion is thus moot in regard to these questions.

Exhibit N to Applicant's Affidavit, **Applicant's Record p. 76.**

43. In any event, the Applicant's speculation that the Privacy Commissioner might seek to use its intervention as a vehicle for a “collateral attack” on the CTA's General Rules is not a proper basis for these questions. A “collateral attack” can only be made against a judgment or a decision of an adjudicative nature. The issuance of the CTA's General Rules is not such a decision. Moreover, nothing in Ms. Kosseim's affidavit or the Privacy Commissioner's motion for leave to intervene indicate any such intention whatsoever.

44. Accordingly, Ms. Kosseim should not be required to answer any of questions 50 and 52.

**iii) Questions 53-54, 56, 60-61, and 67 - Privacy Commissioner's intended submissions**

45. In this series of questions, the Applicant sought precise details of what submissions the Privacy Commissioner intends to make in the Applicant's judicial review application (questions 53-54 and 56) and how the Privacy Commissioner's submissions will differ from those of the CTA (questions 60-61 and 67). These questions were posed in a cross-examination held before either party to this judicial review application had filed its application record.

46. In her responses to these questions, Ms. Kosseim supplemented to the extent practicable the information on these points already set out in the Privacy Commissioner's Notice of Motion, her affidavit in support of it and the written representations filed in support of that motion. This material and Ms. Kosseim's responses on her cross-examination are sufficient to allow the Court to determine whether the Privacy Commissioner has met the relevant parts of the tests for permitting intervention.

Privacy Commissioner's Notice of Motion, paras. 3-5, **Applicant's Record, p. 30**;  
Privacy Commissioner's Written Representations, paras. 3-10, *ibid.*, **pp. 40-42**; Kosseim Affidavit paras. 3-5, 9-13, 17-21, *ibid.*, **pp. 32-37**.

*Canadian Airlines International Ltd. v. Canada (Human Rights Commission)* (F.C.A.), [2010] 1 FCR 226, at para. 8 (tests 4,5,6), **Applicant's Record, p. 175**; *Canada (Attorney General) v. Pictou Landing First Nation* 2014 FCA 21, at para. 11 (tests I,II, III, IV), **Applicant's Record, p. 200**.

47. A proposed intervener is not required to specify the nature of its submissions at the level of detail sought by the Applicant in the line of questioning set out in questions 53-54, 56, 60-61, and 67. On the contrary, this Court has not established a high threshold of detail for the statement of what a proposed intervener's position would be if it is granted leave.

*Canadian Airlines International Ltd. v. Canada (Human Rights Commission)* (F.C.A.), [2010] 1 FCR 226, at para. 8, **Applicant's Record, p. 175**.

48. Ms. Kosseim answered these questions with as much precision as possible in light of the fact that neither the Applicant nor the CTA had filed its submissions in the judicial review application. The degree of detail sought by the Applicant could only be provided if a proposed intervener prepared its intervener submissions in advance of the parties' own written arguments, based on speculation as to what these might contain, and in advance of knowing whether intervener status would be obtained. This level of specificity is not required.

*Canada (Attorney General) v. Pictou Landing First Nation* 2014 FCA 21, at para. 11, **Applicant's Record, p. 200.**

49. Accordingly, Ms. Kosseim should not be required to provide additional answers to any of questions 53-54, 56, 60-61, or 67 from the cross-examination on her affidavit.

#### **D. Remedy and costs**

##### **i) Remedy**

50. The Privacy Commissioner submits that the Applicant's motion should be dismissed.

51. The Privacy Commissioner submits that the Applicant should have 10 days from the date on which the Court disposes of this motion to serve and file his response to the Privacy Commissioner's motion for leave to intervene, in accordance with the period set out in Rule 369(2) of the *Federal Court Rules*.

52. Alternatively, should the Court consider that any of the questions in issue should be answered, the appropriate remedy in the circumstances would be to order Ms. Kosseim to answer those specific questions in writing, or alternatively, to re-attend for cross-examination on such questions.

53. The relief sought by the Applicant in paragraphs 1 and 2 of Part IV of his motion (dismissal of the Privacy Commissioner's motion for leave to intervene or striking of Ms.

Kosseim's affidavit) is excessive and disproportionate in the circumstances. Granting this relief in the current circumstances would be inconsistent with other cases where the Court has granted such relief.

*L.S. Entertainment Group Inc. v. Formosa Video (Canada) Ltd.*, 2005 FC 1347 (CanLII) (statement of defence struck out for failure to attend an oral examination); *Cherkassy (The) v. Far-Eastern Shipping Co.*, 1999 CanLII 9198 (FC) (statement of claim struck out where plaintiff ignored four court orders for production of documents); *Bayer AG v. Apotex Inc.*, 1998 CanLII 8327 (FC) at para. 11: "as a general rule, affidavits will be struck if the deponent does not appear for cross-examination".

### iii) Costs

54. The Applicant's motion should be dismissed and he should therefore not be awarded costs.

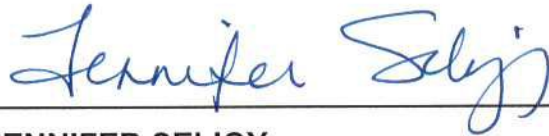
55. In particular, there is no basis for an award of costs personally against Ms. Kosseim. An affiant does not become personally liable for costs for following the reasonable advice of counsel as to whether a question should be answered on cross-examination.

## PART IV – ORDER SOUGHT

56. For the reasons set out above the Privacy Commissioner respectfully seeks the following orders:

- 1) an order dismissing the Applicant's motion;
- 2) an order that there be no costs of the motion;
- 3) such further or other order as shall seem just to this Honourable Court.

All of which is respectfully submitted this 24<sup>th</sup> day of November, 2014.

A handwritten signature in blue ink that reads "Jennifer Seligy". The signature is written in a cursive style and is positioned above a horizontal line.

**JENNIFER SELIGY**

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Legal Counsel for the Privacy Commissioner of  
Canada

## PART V – LIST OF AUTHORITIES

### STATUTES and REGULATIONS

<u>TAB</u>	
4-A.	<i>Federal Courts Act</i> , RSC 1985, c F-7, s. 18.4(1).
4-B.	<i>Federal Courts Rules</i> , SOR/98-106, s. 91(2)(c), 109, 369(2).

### AUTHORITIES

<u>TAB</u>	
4-C.	<i>Merck Frost Canada Inc. v. Canada (Minister of Health)</i> (1997), 80 C.P.R.(3d) 550 (F.C.T.D.), [1997] F.C.J. No. 1847, aff'd (1999), 3 C.P.R.(4th) 286 (F.C.A), (1999) 249 N.R. 15 (Fed. C.A.).
4-D.	<i>Sivak v. Canada (Minister of Citizenship and Immigration)</i> , 2011 FC 402.
4-E.	<i>Simpson Strong Tie Company v. Peak Innovations Inc.</i> , 2009 FC 392, aff'd 2009 FCA 266.
4-F.	<i>Stanfield v. Canada (Minister of National Revenue)</i> 2004 FC 584.
4-G.	<i>Sawridge Band v. Canada</i> , 2005 FC 865 (CanLII).
4-H.	<i>Sam Lévy &amp; Associés Inc. v. Canada (Superintendent of Bankruptcy)</i> , [2005] F.C.J. No. 768.
	<i>Canada (Attorney General) v. Pictou Landing First Nation</i> 2014 FCA 21. <b>Applicant's Record, p. 200.</b>
	<i>Canada (Ministry of Citizenship and Immigration) v. Mugesera</i> 2003 FCA 84. <b>Applicant's Record, p. 193</b>

	<p><i>Canada (Attorney General) v. Siemens Enterprises Communications</i> 2011 FCA 250.</p> <p><b>Applicant's Record, p. 166.</b></p>
	<p><i>Canadian Airlines International Ltd. v. Canada (Human Rights Commission)</i> (F.C.A.), [2010] 1 FCR 226.</p> <p><b>Applicant's Record, p. 175</b></p>
4-I.	<p><i>L.S. Entertainment Group Inc. v. Formosa Video (Canada) Ltd.</i>, 2005 FC 1347 (CanLII).</p>
4-J.	<p><i>Cherkassy (The) v. Far-Eastern Shipping Co.</i>, 1999 CanLII 9198 (FC).</p>
4-K.	<p><i>Bayer AG v. Apotex Inc.</i>, 1998 CanLII 8327 (FC).</p>



<p><b><i>Federal Courts Act, RSC 1985, c F-7, s. 18.4(1).</i></b></p>	<p><b><i>Loi sur les Cours fédérales, LRC 1985, c F-7, art. 18.4(1).</i></b></p>
<p><b>Hearings in summary way</b></p>	<p><b>Procédure sommaire d'audition</b></p>
<p><b>18.4 (1)</b> Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.</p>	<p><b>18.4 (1)</b> Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.</p>

<b><i>Federal Courts Rules, SOR/98-106, s. 91(2)(c), 109 and 369(2).</i></b>	<b><i>Règles des Cours fédérales, DORS/98-106, art. 91(2)(c), 109 et 369(2).</i></b>
<p>Direction to attend</p> <p>Production for inspection at examination</p> <p>91 (2) A direction to attend may direct the person to be examined to produce for inspection at the examination</p> <p>(c) in respect of a cross-examination on an affidavit, all documents and other material in that person's possession, power or control that are relevant to the application or motion</p> <p>Leave to intervene</p> <p><b>109.</b> (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.</p> <p>Contents of notice of motion</p> <p>(2) Notice of a motion under subsection (1) shall</p> <p>(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and</p> <p>(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.</p> <p>Directions</p> <p>(3) In granting a motion under subsection (1), the Court shall give directions regarding</p> <p>(a) the service of documents; and</p> <p>(b) the role of the intervener, including costs, rights of appeal and any other</p>	<p>Assignment à comparaître</p> <p>Production de documents pour examen</p> <p>91 (2) L'assignation à comparaître peut préciser que la personne assignée est tenue d'apporter avec elle les documents ou éléments matériels qui :</p> <p>c) sont en sa possession, sous son autorité ou sous sa garde et qui sont pertinents à la requête ou à la demande, dans le cas où elle est assignée pour subir un contre-interrogatoire concernant un affidavit.</p> <p>Autorisation d'intervenir</p> <p><b>109.</b> (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.</p> <p>Avis de requête</p> <p>(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :</p> <p>a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;</p> <p>b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.</p> <p>Directives de la Cour</p> <p>(3) La Cour assortit l'autorisation d'intervenir de directives concernant :</p> <p>a) la signification de documents;</p>

matters relating to the procedure to be followed by the intervener.

Motions in writing

**369.** (2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

*b)* le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

Procédure de requête écrite

**369.** (2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

*Indexed as:*

**Merck Frosst Canada Inc. v. Canada (Minister of Health)**

**Between**

**Merck Frosst Canada Inc. and Merck & Co., Inc., applicants,**

**and**

**The Minister of Health, the Attorney General for Canada,**

**Apotex Inc. and Apotex Fermentation Inc., respondents**

[1997] F.C.J. No. 1847

[1997] A.C.F. no 1847

146 F.T.R. 249

80 C.P.R. (3d) 550

1997 CarswellNat 2661

79 A.C.W.S. (3d) 609

Court File No. T-1273-97

Federal Court of Canada - Trial Division

Ottawa, Ontario

**Hugessen J.**

Heard: October 6, 9 and 10, 1997

Oral Judgment: October 10, 1997

(24 paras.)

*Practice -- Discovery -- Examination -- Objections to questions.*

This was an application by Merck to compel answers to questions asked at a cross-examination on an affidavit. The respondent Minister of Health issued a notice of compliance for a drug manufactured by the respondent, Apotex. There was a dispute as to whether the drug violated a patent held by Merck. Merck brought a breach of patent action against Apotex. It also sought

judicial review of the decision to issue the notice of compliance. Merck cross-examined Apotex's chairman and the Minister's director of the bureau of pharmaceutical assessment on their affidavits. Merck sought to compel the chairman and director to answer questions objected to during the cross-examination.

HELD: The application was granted. Apotex's chairman and the director of the bureau of pharmaceutical assessment were ordered to re-attend cross-examination to answer the questions. Merck was not entitled to compel answers in regard to non-compliance by the Minister with acts or regulations in respect of the issuance of the notice of compliance. However, Merck was entitled to enforce compliance by both Apotex and the Minister with regulations in regard to intellectual property rights which did not relate to public health and safety. Apotex and the Minister were directed to answer questions related to Apotex's drug submissions to the Minister, notices of withdrawal, deficiency, the impugned drug manufacturing process and product monographs.

**Statutes, Regulations and Rules Cited:**

Food and Drug Act.

Food and Drug Regulations, C.R.C., c. 870.

Patented Medicines (Notice of Compliance) Regulations, SOR/ 93-133, s. 7.

**Counsel:**

R. Charlton and L. Cresthol, for the applicants.

A. Lespérance and F. Couto, for the respondents, Minister of Health and the Attorney General for Canada.

H. Radomski and A. Brodtkin, for the respondent, Apotex Inc.

D. McCaffrey, Q.C., and J. Myers, for the respondent, Apotex Fermentation Inc.

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**1 HUGESSEN J.** (Reasons for Order, orally):-- The background to this litigation has been very recently and very thoroughly set out by my brother McKay J. in reasons delivered only a few days ago. Without apology, I set it out again in his words:

Apotex Inc. was granted a Notice of Compliance (NOC) under the Food and Drug Regulations, C.R.C., c.870, by the respondent Minister of Health in relation to Apo-lovastatin tablets on March 26, 1997. That drug product is a generic version of the Merck lovastatin medicine sold in Canada under the trade-mark MEVACOR[Registered] for which Merck had earlier obtained an NOC in 1988 for treatment of elevated levels of cholesterol, and subsequent NOC's for other treatments.

The NOC was granted to Apotex after the Court had dismissed an application by Merck for an order of prohibition under the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133 (the "Regulations"). The decision of my colleague Mr. Justice Rothstein, dated March 26, 1997, (Court file T-1305-93) was made following expiry of the 30 month statutory stay under s.7 of the Regulations. In accord with those Regulations Apotex had applied for an NOC and by notice of allegation had advised Merck that Apotex' generic product would not infringe Merck's patents in relation to its lovastatin product. Apotex had later issued a second notice of allegation, in relation to its application for an NOC, which led to a second application for a prohibition order by Merck under the Regulations, but Apotex subsequently withdrew the second notice of allegation in February 1997.

From subsequent inquiries, through access to information requests, and by requests to the Ministry of Health, it appeared to Merck that the product monograph for Apo-lovastatin, approved with Apotex' NOC on March 26, 1997, referred to the Apotex product utilizing a microorganism, *Aspergillus obscurus*, which is said by Merck to be essentially the same as that which is the subject of Merck's patents. Thereafter, the Health Department advised that the product monograph for Apo-lovastatin was in error, since the process by which the product was produced, at the time of the grant of the NOC, was one that utilized another microorganism, *Coniothyrium fuckelii*. The department indicated an amended product monograph would be issued correctly identifying the microorganism used by Apotex. On July 11, 1997 after this proceeding had commenced the Minister issued a letter to Apotex enclosing a new cover page and page 1 for the product monograph earlier approved, correcting what were considered clerical errors.

On June 12, 1997, the applicants Merck filed a statement of claim alleging infringement of their patents, for their lovastatin product, by Apotex in its production and sale of Apo-lovastatin. In that action (T-1272-97) the respondents Apotex are defendants. In that action Merck seeks various declaratory orders concerning infringement by Apotex, concerning the validity of Merck's patents, concerning unfair competition and passing off by Apotex, and also a permanent injunction against the defendants, delivery up of infringing product, damages or an accounting of profits, punitive damages, costs and interest. All forms of relief sought are directed against the defendants Apotex, and the Minister and the Attorney General, respondents in this proceeding, are not joined as parties or

intervenors in the action.

On the same day, June 12, 1997, this proceeding by originating notice of motion was filed by the applicants Merck against the respondent Ministers, and Apotex respondents were subsequently joined as parties. The application as filed seeks judicial review of the decision of the Minister of Health made on March 26, 1997 to issue the NOC to Apotex in respect of its Apo-lovastatin product. The application seeks four interim and interlocutory orders against the Minister of Health, directing, until final determination of this application, that the Minister revoke or suspend the NOC issued March 26, 1997 to Apotex, and also an order prohibiting him from issuing a new or amended NOC to Apotex for lovastatin until the Minister requires Apotex to file a new submission for that product and Apotex has sent a new notice of allegation to Merck in respect of lovastatin in accord with the Regulations. An order prohibiting review of any further or amended submission of Apotex until it has filed a new submission and complies with the Regulations is also sought, as is a permanent order revoking or suspending the NOC granted March 26, 1997, presumably after hearing of this application. Generally similar interim relief but directed to the Apotex corporations was sought by Merck in its action in T-1272-97 and by motion. Merck sought, in both this application and in its action, interim injunctive relief. That was denied by my colleague Mr. Justice Dubé, by Orders dated July 2, 1997.

Affidavits were filed, three by Merck in support of its application, one on behalf of the respondent Minister of Health by Mary Elizabeth Carman, Director of the Bureau of Pharmaceutical Assessment of the Therapeutic Products Directorate of Health Canada, and two on behalf of Apotex Inc. by Dr. Bernard Sherman, Chairman of that corporation. Apparently in the course of cross-examination of Ms. Carman, responses to questions and to requests for production of documents were extensive, and the Department of Health was prepared to be open and frank in its disclosure of matters related to the decision of March 26, here in question. From that and from cross-examination of Dr. Sherman on his affidavit, the Merck applicants believe there are additional facts which would strengthen their case. That development, and the form of their initial originating notice of motion, which, under grounds for the application, sets out a detailed statement of allegations of fact upon which Merck applicants rely, led Merck to move for leave to amend the originating notice of motion. The draft of the amendments proposed and Merck's applications, filed at the same time, for orders for the affiants Ms. Carman and Dr. Sherman to re-attend and answer further questions earlier refused or objected to, led to the respondents Apotex'

motion to convert these proceedings to an action. Two days after that motion was filed and the day before this application was heard, Merck filed an amended statement of claim in the action in file T-1272-97, as they were entitled to do, no defence having yet been filed by Apotex. Those amendments delete from the statement of claim, references in the earlier version which duplicated, or at least reflected, some of the matters dealt with in this application for judicial review.

2 McKay J. dismissed both Merck's motion to amend its application and Apotex's motion to convert the proceedings to an action.

3 I am now seized of the motions to compel answers to a large number of questions which were objected to during the cross-examinations of Ms. Carmen and Mr. Sherman, as well as for production of documents.

4 It is well to start with some elementary principles. Cross-examination is not examination for discovery and differs from examination for discovery in several important respects. In particular:

- a) the person examined is a witness not a party;
- b) answers given are evidence not admissions;
- c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
- d) production of documents can only be required on the same basis as for any other witness i.e. if the witness has the custody or control of the document;
- e) the rules of relevance are more limited.

5 Since the objections which have given rise to the motions before me are virtually all based upon relevance, I turn, at once, to that subject.

6 For present purposes, I think it is useful to look at relevance as being of two sorts: formal relevance and legal relevance.

7 Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.

8 Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted. (I leave aside questions aimed at attacking the witness's personal credibility which are in a class by themselves). Thus, to take a simple example, where a deponent



sets out his or her name and address, as many do, it would be a very rare case where questions on those matters would have legal relevance, that is to say, have any possible bearing on the outcome of the litigation.

9 I pause at this point to deal with an argument put forward by the applicants which seeks to draw a parallel between the disallowance of questions based on absence of legal relevance and interlocutory motions to strike out parts of affidavits on the same grounds. The case primarily relied on is the decision of the Court of Appeal in *Pharmacia Inc. v. Canada* (1994), 58 C.P.R. (3d) 209, which held that, with very few exceptions such interlocutory motions could not be allowed in an application for judicial review. The argument is made, if I understand it correctly, that objections based on absence of relevance of questions put in cross-examination on an affidavit fall into the same category as motions to strike the underlying parts of the affidavit itself and should, therefore, also be disallowed. I entirely reject this argument. There is indeed a parallel between motions to strike and objections taken on grounds of legal relevance but it is quite different from what the applicants suggest. The policy consideration underlying the decision in *Pharmacia*, supra, was based on the statutory admonition that applications for judicial review should be heard expeditiously and in a summary way; allowing interlocutory motions to strike allegations would defeat that policy. Equally, the same considerations militate strongly against allowing parties to waste their own and the Court's time and effort (to say nothing of money) in interminable questioning on matters that can have no conceivable impact on the outcome. I would only add that the fact that the opposite party, in answer to irrelevant allegations in an affidavit, files equally irrelevant allegation to counter them, does not make either set of allegations relevant.

10 Turning now to the specifics of the present case, it is my view that the law is clear that Merck, as a patentee and holder of an NOC for a medicine does not have any right to raise non-compliance by the Minister with the Food and Drug Act or the Regulations made thereunder in respect of the issuance or proposed issuance of an NOC to another drug manufacturer. Specifically, Merck does not have the right to object to the issuance of an NOC to Apotex for the same medicine for which Merck holds an NOC on the grounds of non-compliance with that Act and those Regulations by either Apotex or the Minister. I think that that proposition flows clearly and unequivocally from two decisions of the Court of Appeal confirming two decisions by Trial judges of this Court: *Glaxo Canada Inc. v. Canada* (1990), 31 C.P.R. (3d) 25, affirming (1987), 18 C.P.R. (3d) 206, and *Merck Frost Canada Inc. v. Canada* (1994), 55 C.P.R. (3d) 302, affirming (1994), 53 C.P.R. (3d) 368. There are other decisions of the Trial Division of this Court to the same effect. I am not persuaded that any of these decisions were given per incuriam.

11 Some of the cases have used concepts such as absence of standing and non-justiciability as a convenient shorthand to describe this limitation on the patentee's rights. Seizing on this the applicants argue, based on such cases as *Canada v. Finlay*, [1986] 2 S.C.R. 607, *Canada v. Borowski*, [1981] 2 S.C.R. 575 and *Operation Dismantle v. Canada*, [1985] 1 S.C.R. 441, that they do indeed have standing and that the issues that they raise are, in fact, justiciable. The argument mistakes the form for the substance. It is not lack of standing or justiciability in the strict sense of

those words which prevents the applicants from raising non-compliance with the health and safety concerns of the Food and Drug Act, and Regulations; it is simply that those matters are of no concern to them and cannot be raised by them in an attack on a decision of the Minister to issue an NOC. It is the Minister himself who is charged with the protection of the public health and safety and no private interest of the applicants arises from his alleged failure to perform his duties with respect to other persons.

**12** As an exception to the foregoing, however, the Patented Medicine (Notice of Compliance) Regulations - the "linkage" Regulations - do give the Merck applicants a right, at the very least by implication, to enforce compliance by both Apotex and the Minister with those Regulations and to object to the issuance of an NOC on the grounds of non-compliance therewith. The linkage Regulations, however, do not have the effect of incorporating into themselves the whole of the Food and Drug Act and Regulations so as to create any right for the applicants to enforce the latter. Their clear and evident purpose is to provide an additional patent protection to the patentee in respect of his intellectual property rights and they have absolutely nothing whatever to do with public health and safety.

**13** As I understand it, one of Merck's principal contentions in these judicial review proceedings is that there was non-compliance with the linkage Regulations as a result of the non-concordance or lack of sequence in the timing as between Apotex's new drug submissions and its notices of allegation and detailed statements made pursuant to the linkage Regulations. I make no comment as to the merit of that contention as a matter of law and it will fall to be determined by the judge who hears the application for judicial review. I do, however, for the reasons previously stated, think that Merck has the right to raise the point and that, accordingly, questions which go to establish the factual foundation for the argument have legal relevance.

**14** This brings me to the particular subject matter of these motions. The questions objected to and now sought to be answered are listed in Annexes 1 and 2 to the applicants' memorandum of fact and law. They are very numerous and many, if not most of them, are cast in too general terms and are too unfocused to be admissible as such. That is not, however, the basis on which they have been objected to and it would be unfair, in the circumstances, to simply disallow them on that ground. Indeed, on the basis of the categories under which the questions have been grouped and the very thorough argument which the parties have presented to me over the last three days, I think it is possible for me to give a ruling which will not only allow these cross-examinations (and any others which may be outstanding) to be completed in very short order, but also permit the establishment of a realistic timetable for the filing of application records well prior to the hearing date fixed for January 26, 1998.

**15** I take the categories as they are listed at pages 18 and following of the applicants' memorandum:

**16** 1) Apotex's first new drug submissions (1993)

Questions relating to and production only of those parts of Apotex's 1993 new drug submission (including any refiling or amendment thereof) for Apo-lovostatin which permit the identification of the micro-organism(s) intended to be used in the production process are allowed; likewise, witnesses must produce any notices of allegation and detailed statements filed or served by Apotex in respect of lovostatin and give the date of such filing and/or service;

**17** 2) Apotex's refiled new drug submission (1995)

The same question and productions are allowed with respect to the 1995 new drug submission save to the extent that such questions and documents have already been answered or produced under category 1) above;

**18** 3) Notices of Withdrawal, Deficiency or Non-compliance

While I fail to see the relevance of notices of deficiency or non-compliance, questions relating to the withdrawal of any new drug submission by Apotex respecting lovostatin or any part of such new drug submission and production of any documents giving effect to such withdrawal are allowed.

**19** 4) The micro organism *Aspergillus obcurus*

The micro organism *Aspergillus obcurus* not being part of the process for production of the drug for which an NOC was issued by the Minister to Apotex in March 1997, questions relating thereto are irrelevant. However, since Mr. Radomski has agreed to produce items 52 and 77 relating to the withdrawal of the process using *obcurus* that concession should be given effect to and those items answered;

**20** 5) Notifiable change

Questions relating to any "notifiable change" submitted regarding Apo-lovostatin and production of relevant documents only insofar as they pertain to the identification of the micro-organism intended to be used in the process are allowed. This will include Mr. Radomski's concession with respect to items 114 and 116;

**21** 6) Product Monographs for Apo-lovostatin

Questions relating to the product monograph(s) are irrelevant and are disallowed save insofar as such product monograph(s) may form part of the answers or productions previously ordered. In addition items 140 and 144 have

been conceded by Mr. Radomski and are allowed;

**22** 8) Minister's Involvement and Activities under the Act<sup>1</sup>

Most of the questions in this category are repetitive of matters already dealt with. To the extent that they are not, they seem to be based on an attempt either to show an apprehension of bias, a ground of review not invoked in these proceedings, or to demonstrate Apotex's bad character and general disregard for what Merck views as the spirit and letter of the Linkage Regulations. They are irrelevant and are disallowed;

**23** 11) Additional Indications

These questions are irrelevant to the decision to issue the notice of compliance which is under attack in these proceedings. They are disallowed.

**24** Before closing, I may say that I have the distinct impression that virtually all of the matters for which I have ordered answers or productions are already available to Merck and are in fact largely non contentious. That may have some bearing on the question of costs on which I invite submissions.

**ORDER**

Ms. Carmen and Mr. Sherman are ordered to re-attend and to answer the questions and make the productions detailed hereinabove.

The respondents having enjoyed a substantial measure of success and the applicants having sought costs on a solicitor and client basis, costs in the amount of \$3,000.00 are awarded to the respondent Apotex payable in any event of the cause.

HUGESSEN J.

<sup>1</sup> It will be noted that some of the categories have been dropped and accordingly the numeral sequence is incomplete.

*Indexed as:*

**Merck & Co. v. Canada (Minister of Health)**

**Between**

**Merck & Co., Inc., and Merck Frosst Canada Inc., appellants  
(applicants), and  
The Minister of Health, the Attorney General for Canada,  
Apotex Inc., and Apotex Fermentation Inc., respondents  
(respondents)**

[1999] F.C.J. No. 1536

[1999] A.C.F. no 1536

249 N.R. 15

3 C.P.R. (4th) 286

92 A.C.W.S. (3d) 1061

Court File No. A-718-97

Federal Court of Appeal  
Montréal, Québec

**Marceau, Desjardins and Létourneau JJ.**

Heard: September 22 and 23, 1999.

Oral judgment: September 23, 1999.

(4 paras.)

*Practice -- Appeals -- Appeal from interlocutory order.*

Appeal by Merck from the decision of a motions judge that certain questions were not required to be answered on the cross-examination of an affiant, and denying Merck standing to question the Minister of Health's decision to issue a Notice of compliance. On the cross-examination, the motions judge found that information concerning the exercise by the Minister of his duties in

assessing the safety and efficacy of a drug were not relevant to the proceedings.

HELD: Appeal dismissed. There was no basis for interfering with the motions judge's decision sustaining the objections raised to the cross-examination. By denying Merck standing to question the Minister's decision to issue the Notice of compliance, the motions judge followed the principles laid down in prior court rulings.

**Statutes, Regulations and Rules Cited:**

Food and Drugs Act, R.S.C. 1985, c. F-27.

Food and Drug Regulations, C.R.C., c. 870.

**Court Note:**

Appeal against an Order of the Trial Division rendered October 10, 1997, Trial Division File No. T-1273-97, [1997] F.C.J. No. 1847.

**Counsel:**

Robert P. Charlton and Leigh D. Crestohl, for the appellants.

Francisco Couto, for the respondent (Minister of Health and Welfare and the Attorney General of Canada).

Harry Radomski and David Scrimger, for the respondent (Apotex Inc.).

John A. Myers, for the respondent (Apotex Fermentation Inc.).

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The judgment of the Court was delivered orally by

**1 MARCEAU J.:**-- We are all of the view that the interlocutory decision of a motions judge in the Trial Division to sustain objections raised during the cross-examination of an affiant in a judicial review proceeding should not be disturbed. The grounds on which the objections were taken were that the documents requested and the information sought - which were all concerned with the exercise by the Minister of Health of his duties under the Food and Drugs Act, R.S.C. 1985, c. F-27, and the Food and Drug Regulations, C.R.C., c. 870, in assessing the safety and efficacy of a drug for which he issued a Notice of compliance under the authority of the Food and Drug Act - were not relevant to the proceedings.

**2** In our judgment, the learned motions judge was right in denying the appellant standing to question before the Court, in these proceedings, the validity of the Minister's decision to issue the

Notice of compliance on the sole basis that the Minister's findings as regard the safety and efficacy of the drug would have been reached in an unsatisfactory manner. By deciding as he did, the motions judge was simply abiding by principles set down by many rulings of this Court and based, in our opinion, on a proper understanding of the type of responsibilities assigned to the Minister by Parliament in this context, as well as the nature of the judicial process and the role of a court of law.

**3** As to the award of costs by the motions judge, we cannot say that the discretion granted to him by the Rules of the Court was exercised "unjudicially" in the circumstances of this case.

**4** The appeal can therefore only be dismissed with costs.

MARCEAU J.

*Case Name:*

**Sivak v. Canada (Minister of Citizenship and Immigration)**

**Between**

**David Sivak, Luci Bajzova, Monika Sivak, and Lucie Bajzova,  
Applicants, and**

**The Minister of Citizenship and Immigration, Respondent**

**And between**

**Milan Lasab, Milada Lasaboya, and Elvis Kulasic, Applicants,  
and**

**The Minister of Citizenship and Immigration, Respondent**

**And between**

**Miroslav Sarkozi, Andrej Balog, Zaneta Balogova, Galina  
Balogova, Viktor Sarkozi, Andrej Balog, Andrej Balog, Marie  
Balogova, and Lukas Balog, Applicants, and**

**The Minister of Citizenship and Immigration, Respondent**

[2011] F.C.J. No. 513

2011 FC 402

98 Imm. L.R. (3d) 308

29 Admin. L.R. (5th) 94

2011 CarswellNat 1066

387 F.T.R. 265

Docket IMM-5543-10

Federal Court  
Toronto, Ontario

**Russell J.**

Heard: February 11, 2011.

Judgment: March 31, 2011.



(51 paras.)

*Civil litigation -- Civil procedure -- Actions -- Availability -- Motions for orders that three judicial a review applications be converted into actions allowed -- Applicants were of Roma ethnicity who unsuccessfully asserted refugee claims against the Czech Republic -- Applicants claimed that the Board's reliance upon the Issue Paper, and the context in which it was produced, gave rise to an institutional bias -- Allegations of institutional bias raised could not be properly determined within parameters of a judicial review application but required the full panoply of a trial.*

Motions for orders that three judicial a review applications be converted into actions. The applicants were of Roma ethnicity who unsuccessfully asserted refugee claims against the Czech Republic. In each case, the Refugee Board relied upon an Issue Paper authored by the Board's Research Directorate. The applicants claimed that the Board's reliance upon the Issue Paper, and the context in which it was produced, gave rise to an institutional bias that affected their claims as well as those of other Roma claimants where adequate state protection findings were made that relied upon the Issue Paper. The applicants argued that the usual judicial review process had not served them well to date and they sought a more thoroughgoing approach that would allow them and the Court to examine whether the use of the Issue Paper and the full context in which it was produced gave rise to an institutional bias. The applicants also claimed that they had obtained inadequate document production from the respondent and thus sought the full discovery process available in an action.

HELD: Motions allowed. If these matters proceeded as judicial review applications, the Court would not have before it all that it needed to decide the principal issues. The applicants were not merely engaged upon a fishing expedition. The applicants' allegations of institutional bias could not be safely disregarded as mere speculation. The rules of cross-examination and document production as they pertained to the judicial review context had not yielded the evidence required to decide the issue of institutional bias. This case required the full panoply of a trial because it raised issues of the utmost importance to the integrity of, and public perception regarding, the immigration system. These issues could not be decided on the basis of the record that had been assembled or that could be assembled for judicial review.

**Statutes, Regulations and Rules Cited:**

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.4(1), s. 18.4(2)

**Counsel:**

Rocco Galati, for the Applicant.

Mary-Louise Wcislo and Prathima Prashad, for the Respondent.

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## **REASONS FOR JUDGMENT AND JUDGMENT**

RUSSELL J.:--

### **THE MOTIONS**

**1** I have before me three related motions that raise important procedural issues about how to deal with applications before the Court currently being pursued by Roma people from the Czech Republic.

**2** The common thread to the materials is that the cases involve claimants of Roma ethnicity who unsuccessfully asserted refugee claims against the Czech Republic and that, in each case, the RPD in rendering its decisions relied upon a document authored by the Research Directorate of the Immigration and Refugee Board (IRB). The document is called "Issue Paper, Czech Republic, Fact-Finding Mission Report on State Protection" (Issue Paper) and is dated June 2009.

**3** The Applicants feel that the RPD's reliance upon the Issue Paper, and the context in which it was produced, gives rise to an institutional bias (real or apprehended) that affects their claims as well as those of other Roma claimants where adequate state protection findings were made that relied, in whole or in part, upon the Issue Paper.

**4** Specifically, on file IMM-6306-09, the motion is for:

1. An order, pursuant to section 18.4 (2) of the *Federal Courts Act*, converting the within judicial review into an action and to be joined with the proceedings in IMM-5543-10 as well as joining the within proceeding(s) with any action for damages filed by the Applicants herein and/or in IMM-5543-10;
2. In the alternative to (1) above, an order compelling the Respondent's affiant, Mr. Gordon Ritchie, to answer the questions refused on cross-examination, and compelling production of the documents refused as part of the Tribunal Record;
3. Certification of the within proceedings, whether by way of action or judicial review, as a class-action proceeding with the following classes:
  - a. all Czech Roma claimants awaiting disposition of their RPD hearing whose hearing has not commenced prior to the issuance of the Issue Paper;
  - b. all Czech Roma claimants whose hearing commenced prior to the

- June, 2009 Issue Paper, but whose decision was not released until after the issuance of the June, 2009 Report;
- c. all Czech Roma claimants who received a negative RPD decision in which the RPD relied on the June, 2009 Issue Paper, in whole or in part, to render a negative decision and whose case is,
    - i. either before the Federal Court on judicial review; or
    - ii. no judicial review was filed;

but in either event in (i) or (ii), the claimants are awaiting a PRRA;

- d. all Czech Roma claimants who were denied by the RPD, based on the June, 2009 Issue Paper, and who have;
  - i. either filed a PRRA and are awaiting a decision; or
  - ii. have not filed a PRRA but are awaiting removal;

but in either event in (i) or (ii) have not yet been removed;

- e. all Czech Roma claimants, who were denied by the RPD, based on the June, 2009 Issue Paper, who are "removal ready" and may be legally removed;
- f. all Czech Roma, who were denied by the RPD, based on the June, 2009 Issue Paper, who have been removed.

- 4. Costs of this motion and such further relief as counsel may advise and this Court deems just.

5 On file IMM-5543-10, the motion is for:

- a. An order, granting oral argument on the within leave application, and the granting of leave, for special circumstances, as set out by the Federal Court in *Aguiar v Canada*, [1991] F.C.J. No. 181;
- b. An order that the within motion be heard at the same time as the motion proposed in *Sivak, et al. v Canada*, IMM-6306-09;
- c. In all other respects, order(s), *Mutatis Mutandis*, to those sought in *Sivak*,

*et al., v. Canada*, IMM-6306-09, and the motion record therein, to be heard concurrently with the within motion;

- d. Costs of this motion and such further relief as counsel may advise and this Court deems just.

6 On file IMM-6448-10, the motion is for:

- a. An order granting oral argument on the within leave application, and the granting of leave, for special circumstances, as set out by the Federal Court in *Aguilar v Canada*;
- b. An order that the within motion be heard at the same time as the motions proposed in *Sivak, et al. v Canada*, IMM-6306-09 and *Sarkozi et al. v. Canada*, IMM-5543-10;
- c. In all other respect, order(s), *Mutatis Mutandis*, to those sought in *Sivak, et al., v. Canada*, IMM-6306-09, d. Costs of this motion and such further relief as counsel may advise and this Court deems just.

7 While each motion is related to the central issue of institutional bias and the most just and expeditious way of dealing with applications before the Court that involve this concern, I think it is best to address each motion in turn rather than attempt a global assessment of what is at stake substantively and procedurally.

8 At the hearing of these motions before me in Toronto on February 11, 2011 counsel agreed and suggested to the Court that the motions be modified in the following ways:

- a. That the class action certification issue should be argued and dealt with at a separate hearing following my determination on the other issues raised. The time of that further hearing will be set following consultation with counsel;
- b. That instead of the Applicants in IMM-6448-10 and IMM-5543-10 seeking to have their leave applications determined following oral argument on the basis of special circumstances, I will personally review and decide these leave applications as a prelude to and as part of these motions.

The Court is in agreement with these modifications.

### **IMM-6306-09**

9 This motion is about how best to deal with the allegations of institutional bias arising from the Issue Paper in the case of these particular Applicants, as well as how to address numerous other applications by failed claimants who may feel they have been similarly mistreated.

10 The Applicants feel that the usual judicial review process has not served them well to date and

they are asking the Court to impose a more thoroughgoing approach that will allow them and the Court to examine whether the use of the Issue Paper by the RPD, and the full context in which it was produced, does give rise to an institutional bias, apprehended or otherwise.

**11** The Applicants have cross-examined Mr. Gordon Ritchie (the Director of the Research Directorate with the operations branch of the national headquarters office of the IRB) on the affidavit he swore on behalf of the Respondent, and they do not think that Mr. Ritchie has provided all of the answers and the documentation to which they feel they are entitled, or that the Court will need to decide this matter. Hence, they want the Court to either order Mr. Ritchie to answer the refused questions and produce the refused documents, or to convert their judicial review application to an action so that they can avail themselves of the full discovery process.

### **The Refused Questions**

**12** In my view, the Respondents are correct to emphasize that cross-examination during the course of judicial review differs significantly from examination for discovery. As Justice Hugessen made clear in *Merck Frosst Canada Inc. v Canada (Minister of Health)*, [1997] F.C.J. No. 1847, at paragraph 4:

It is well to start with some elementary principles. Cross-examination is not examination for discovery and differs from examination for discovery in several important respects. In particular:

- a. the person examined is a witness not a party;
- b. answers given are evidence not admissions;
- c. absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
- d. production of documents can only be required on the same basis as for any other witness i.e. if the witness has the custody or control of the document;
- e. the rules of relevance are more limited.

**13** I also agree with the Respondent that judicial review is a summary process and is not intended to involve the procedural thoroughness that comes with an action. This is why cross-examination on affidavits in judicial review proceedings is far more limited in scope than examination for discovery and, apart from questions going to a witness' credibility, is limited to relevant matters arising from the affidavit itself. See *Hoffmann-La Roche Ltd. v Canada (Minister of National Health and Welfare)*, [1997] 2 F.C. 681, 126 F.T.R. 21, 72 C.P.R. (3d) 362 (T.D.).

**14** Having reviewed the transcript of the cross-examination, it is my view that if the Court now orders Mr. Ritchie to answer the refused questions, the Court would in effect, be allowing the Applicants to treat their judicial review application as equivalent to an action by allowing cross-examination to become more like discovery. In my view, if something approaching discovery

is required before this dispute can be effectively adjudicated, then the Applicants should be required to satisfy the test under section 18.4(2) of the *Federal Courts Act* to have their judicial review application converted to an action, rather than distorting the summary process and creating some kind of hybrid. Section 18.4 (1) of the *Federal Courts Act* says that an application "shall be heard and determined without delay and in a summary way." This sounds peremptory to me. To order Mr. Ritchie to answer the refused questions and produce the refused documents would, in my view, change the nature of these summary proceedings. The only exception to section 18.4 (1) is specifically provided for in section 18.4 (2) of the Act:

The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

I will come to this subsection later but, for the moment, I think that, because of the range and depth of information that the Applicants are seeking through Mr. Ritchie, they should really have to satisfy the test for conversion rather than retain a summary procedure in conjunction with what would, in effect, be a substantial amount of discovery.

**15** Where I do part company with the Respondent on this first issue is with regard to the Minister's assertion that the refused questions are just not relevant. The fact that Mr. Ritchie has already answered almost 500 questions and voluntarily provided answers to six undertakings, which included another 600 additional pages of documents, does not render answers to the refused questions unnecessary or irrelevant. My review of the transcript and the questions refused suggests to me that they are all directly relevant to the issues surrounding institutional bias that are focused upon the Issue Paper and which the Applicants want the Court to assess.

**16** In effect, then, if this matter were to proceed as a summary judicial review application, it is my view that relevant information would be missing that is required for the Court to determine the central issue of institutional bias.

### **Access to Information**

**17** The Respondent also says that the type of information sought by the Applicants through the 13 refused cross-examination questions is available to them through an access to information request and, because the Applicants have not made such a request, they should not be entitled to the information through cross-examination of Mr. Ritchie.

**18** In fact, the Respondent goes so far as to say that the Applicants failure to make an access request "signifies their view that such information is not crucial or important to their case; if they really wanted such information, an access request could have been made when this litigation was commenced in December of 2009."

**19** I find neither of these arguments convincing. In my view, it is mere speculation to suggest that the Applicants could find out through an access request all of the relevant facts that Mr. Ritchie can

provide to the Applicants and the Court. An access request involves many pitfalls and contingencies that could result in an inadequate evidentiary base for this application. In any event, the Respondent has put forward Mr. Ritchie and the Applicants are entitled to cross-examine him. The right to cross-examine is not curtailed simply because the Applicants may be able to obtain relevant information from another source. In my view, the prime concern must be whether the Court can decide the issues raised in the application on the basis of the evidence that is now on the record.

**20** The suggestion that the Applicants do not really want this information because they did not initiate an access request in December of 2009 is not tenable. Mr. Ritchie swore his affidavit in June 2010. Given the issues raised in their application, I see nothing insincere in the Applicants attempting to obtain as part of these proceedings what they feel the Court will need to decide a crucial issue of their application.

### **Additional Documents**

**21** Similar issues arise under this topic as discussed above. The Respondent points out that the Applicants just will not accept that the obligation on the RPD to produce documents as part of the Certified Tribunal Record pursuant to Rule 17 of the Federal Court's *Immigration and Refugee Protection Rules* is far different from, and much more limited, than the onus upon a defendant in an action to locate, list and produce relevant documents.

**22** The record that the RPD is required to produce under Rule 17 is hardly likely, in my view, to assist the Court in a situation where there are allegations of bias on the part of the decision maker. The Respondent seeks to sidestep this problem on the grounds that the Applicants have produced no factual evidence of bias and are simply on a fishing expedition to find evidence that will support their bare allegations. In particular, the Respondent attacks the admissibility of the affidavit sworn by Ms. Amina Sherazee on behalf of the Applicants because it "suffers from exactly the same fatal defects and legal shortcomings as her affidavit filed in *Huntley*: it is speculative, fails to explain the basis for her beliefs or knowledge, contains argument and legal opinion and constitutes no more than an expression of her own unsubstantiated and argumentative conclusions."

**23** As the Respondent points out, if additional documentary disclosure is sought due to an allegation of some impropriety on the part of the tribunal, adequate facts to support the allegation of impropriety must be presented. As the Federal Court of Appeal confirmed in *Access Information Agency Inc. v Canada (Transport)*, 2007 FCA 224 at paragraph 21:

When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case. (Emphasis added)

**24** In *The Access Information Agency* case the Federal Court of Appeal was dealing with Rule 317 of the *Federal Court Rules*. Rule 17 may be even more restrictive in terms of what the RPD is compelled to produce, and the jurisprudence concerning the limits on cross-examination of a witness may well mean that very little emerges as part of the usual document production process that will help the Court in situations where bias is alleged. This does not mean, of course, that an applicant can make a bare allegation of bias and then be allowed to go on a fishing expedition to find evidence that will support that allegation. I do not believe, however, that this is the case before me.

**25** I have reviewed Ms. Sherazee's affidavit. It suffers from many of the faults mentioned by the Respondent, but it is not totally on a par with the inadmissible affidavit Ms. Sherazee swore in *Huntley*, and there are portions of her affidavit in this case that cannot be dismissed out of hand:

1. Ms. Sherazee represents Roma people on a regular basis and she has personal knowledge of this area of law and the conditions under which Roma people come to her for advice;
2. She refers to public statements made by the Minister of Immigration to the effect that refugee claims from the Czech Republic can be false or bogus;
3. She refers to the fact-finding mission to the Czech Republic that, in her experience, was unprecedented and that was intended to determine whether there was state protection for Roma refugees in the Czech Republic;
4. She cites and produces comments of the Minister of Immigration on the Issue Paper following its release and the imposition of visa restrictions on the Czech Republic;
5. She points to the statistics regarding overall acceptance rates for Czech Roma and their decline during the time when the Minister of Immigration was making his public comments and following the release of the Issue Paper.
6. She points out (and a large component of her legal practice involves Roma refugees) that, to her knowledge, nothing has happened to improve the plight of the Czech Roma between 2008 and the present that would account for the severe drop in positive acceptance statistics;
7. She also points out deficiencies in the Issue Paper and the way it was produced, and the extent to which it remains inexplicably silent about the vast majority of persecution suffered by the Czech Roma. In other words, she questions its methodology.

**26** It is possible to take issue with this affidavit and, possibly, to exclude portions of it for the reasons given by the Respondent, and there may well be justifiable explanations for the facts presented that will alleviate or dispel any concerns about bias. I am not in a position at this stage to assess the significance of what Ms. Sherazee has brought to the Court's attention through her affidavit. In my view, however, it contains sufficient acceptable evidence by someone who is



knowledgeable about Roma refugees to justify the request for further disclosure, whether that disclosure occurs as part of the judicial review process or as a result of conversion of this application to an action. It renders the Applicants' allegations of bias as something more than bald, unsupported, assertions.

### **Conversion to Action**

**27** In my view, the important question for the Court at this juncture is whether this application should be converted to an action under subsection 18.4 (2) of the *Federal Courts Act*.

**28** To begin with, I agree with the principles and accept the authorities dealing with conversion put forward by the Respondent.

**29** A judicial review application should only be converted to an action in those infrequent cases where the relevant facts cannot be satisfactorily established and weighed through affidavit evidence. The test is not whether trial evidence would be superior, but whether affidavit evidence is inadequate. See *Macinnis v Canada (Attorney General)*, [1994] 2 F.C. 464 (F.C.A.); and *Chen v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1573.

**30** I would like to point out, however, that in *Drapeau v Canada (Minister of National Defense)*, (1995), 179 N.R. 398 (Fed. C.A.), the Federal Court of Appeal made it clear that subsection 18.4(2) of the *Federal Courts Act* places no limits on those considerations which may be taken into account in deciding whether to allow a judicial review application to be converted into an action, but that the desirability of facilitating access to justice and avoiding unnecessary cost and delay are relevant factors.

**31** I would also like to point out that, in the more recent case of *Assoc. des crabiers acadiens inc. v Canada (Attorney General)*, 2009 FCA 357, the Federal Court of Appeal again set out the purpose and scope of conversion under section 18.4(2) of the *Federal Courts Act* at paragraphs 34-39:

34. Nonetheless, Parliament did provide an exception to judicial review at subsection 18.4(2) of the Act. This measure overrides the usual procedure and allows judicial review applicants to have their existing application for judicial review converted into an action.
35. The conversion into an action is not effected by operation of law. It is submitted to the Federal Court for review and must be justified. The Court is vested with the discretionary authority to accept an application for conversion "if it considers it appropriate."
36. The proceedings that citizens may use to challenge administrative decision, namely, the application for judicial review and its conversion into an action when judicial review is applied for in the Federal Court, are ultimately aimed at attaining and meting out administrative justice that is timely, efficient and equitable, both for citizens and the administration.

37. The courts have developed certain analysis factors that apply to an application for conversion so as to better frame the exercise of the discretion set out at subsection 18.4(2). It goes without saying that each case involving an application for conversion turns on its own distinct facts and circumstances. And, depending on those facts and circumstances, the individual or collective weight of the factors may vary. We will now go over those factors. [Emphasis added.]
38. The conversion mechanism makes it possible, where necessary, to blunt the effect of the restrictions and constraints resulting from the summary and expeditious nature of judicial review. These are, for example, far more limited disclosure of evidence, affidavit evidence instead of oral testimony, and different and less advantageous rules for cross-examination on affidavit than for examination on discovery (see *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1998), 146 F.T.R. 249 (F.C.)).
39. Therefore, conversion is possible (a) when an application for judicial review does not provide appropriate procedural safeguards where declaratory relief is sought (*Haig v. Canada*, [1992] 3 F.C. 611 (F.C.A.)), (b) when the facts allowing the Court to make a decision cannot be satisfactorily established through mere affidavit evidence (*Macinnis v. Canada*) [1994] 2 F.C. 464 (F.C.A.)), (c) when it is desirable to facilitate access to justice and avoid unnecessary cost and delay (*Drapeau v. Canada (Minister of National Defence)*, [1995] F.C.J. No. 536 (F.C.A.)) and (d) when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages (*Hinton v. Canada*, [2009] 1 F.C.R. 476. [Emphasis added.]

**32** I also note that my colleague, Mr. Justice Pinard, has recently looked at this issue in *Huntley v Canada (Minister of Citizenship and Immigration)*, 2010 FC 407 at paragraphs 7 and 8 and has noted that, in order to convert, the Court must find procedural or remedial inadequacies with the normal judicial review process and that conversion should only be granted "in the clearest of circumstances" and only on an exceptional basis when the Court "feels the case cries out for the full panoply of a trial."

**33** This is a case about institutional bias. It is also a case in which the Applicants are claiming damages. If this matter proceeds as a judicial review application I do not believe that the Court will have before it all that it needs to decide the principal issues, nor do I believe that, in this case, the Applicants are merely engaged upon a fishing expedition and that they are simply speculating that, if conversion occurs, hidden evidence will come to light.

**34** I do not believe that every institutional bias case requires conversion to an action and I am well aware that this Court and the Federal Court of Appeal have decided allegations of institutional bias in the past without the need to convert. See, for example, *Geza v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124.

**35** Looking at what has transpired to date in this application, however, I think the following have to be noted:

- a. For all of its faults, the Sherazee affidavit convinces me that the Applicants' allegations of institutional bias cannot be safely disregarded as mere speculation. Something significant happened around the time of the Issue Paper and there is some evidence to suggest that what happened could at least be perceived in full context as giving rise to a reasonable apprehension of bias. It is worth remembering that, in writing the reasons for the Federal Court of Appeal in *Geza*, Justice Evans acknowledged that he could not "point to a single fact which, on its own, is sufficient to establish bias" (paragraph 58), but he concluded that the apprehension of bias test was satisfied in that case "given the high standard of impartiality to which the Board is held in its adjudicative capacity...";
- b. The rules of cross-examination and document production as they pertain to the judicial review context have not, in my view, yielded the evidence that the judge who hears this matter will need to decide the issue of institutional bias. The Respondent has chosen to assert those rules - in my view appropriately - and has pointed out that cross-examination is not discovery. On the facts of this case, however, that means that the Court will not be able to decide the bias issue on the basis of affidavit evidence;
- c. If I were to order Mr. Ritchie to answer the refused questions and produce relevant documents required to decide this case in the context of judicial review, I would, in effect, be obscuring the important distinctions between cross-examination and discovery;
- d. In my view, this case "cries out for the full panoply of a trial" because it raises issues of the utmost importance to the integrity of, and public perception regarding, our immigration system, and I do not think these issues can be decided on the basis of the record that has been assembled, or that could be assembled, for judicial review

### **The *TeleZone* Decision**

**36** The Respondent says that the Applicants cannot claim damages in the same action as they are seeking to have their negative refugee decision subjected to administrative law remedies. The Respondent says that, if the Applicants wish to claim damages, then they have to commence a separate action. As authority for this position, the Respondent cites the recent Supreme Court of Canada decision in *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 and, in particular, paragraph 52 of that decision which reads as follows:

All of the remedies listed in s. 18(1)(a) are traditional administrative law remedies, including the four prerogative writs -- *certiorari*, prohibition,

*mandamus* and *quo warranto*-- and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.

**37** It is not entirely clear to me why the Respondent is raising this issue at this time. Presumably, if the Respondent's position is correct, then the judge who eventually hears and deals with this dispute will rule accordingly. At this stage, however, the Respondent appears to be suggesting that the Court should not convert this application to an action because the Applicants are seeking damages and so are required to commence separate proceedings if they want to claim compensatory relief, which they can do at any time. Hence, the Respondent argues, the judicial review application should continue without conversion and there are no remedial inadequacies to justify conversion because the Applicants can, and must, commence a separate action for their damages claim.

**38** In so far as it is necessary for me to consider this argument at this stage of the proceedings, it is my view that the Respondent is mistaken in reading *TeleZone* to say that separate proceedings in this Court are required in a case such as the one before me.

**39** In *TeleZone*, the Supreme Court of Canada was dealing with a case that had come out of an Ontario court. In the present case, I am dealing with proceedings that began in the Federal Court so that there are no Federal Court domain issues that stand in the way of this Court dealing with the traditional administrative law remedies as set out in section 18 of the *Federal Courts Act*, and where section 18.4(2) of the *Federal Courts Act* specifically allows conversion to an action where the Court feels it is appropriate.

**40** In *TeleZone*, the Supreme Court of Canada made it clear that plaintiffs in an action for damages in the courts of Ontario are not entitled to add a supplementary claim that will result in a trespass on the jurisdiction of the Federal Court.

**41** The Respondent concedes that there is no bar to the Applicants claiming damages in this Court. The section 18 relief they seek is the exclusive domain of this Court; and section 18.4 (2) specifically permits conversion to an action. Hence, in my view, there is no jurisdictional bar to allowing the Applicants to seek damages and section 18 relief in the same action.

**42** In the related Supreme Court of Canada case of *Parrish & Heimbecker Ltd., v Canada (Agriculture and Agri-Food)*, 2010 SCC 64, I think this position is made clear at paragraphs 17-18 and 21:

For the reasons given by Binnie J. in the companion decision of *Canada (Attorney General) v. TeleZone*, 2010 SCC 62, the Crown's arguments must fail.

Unlike in *TeleZone*, the Federal Court's jurisdiction is not at issue in this appeal. Parrish brought its action in the Federal Court. However, the correct procedure - action or application for judicial review - is at issue. Section 17 of the *Federal Courts Act* gives the Federal Court concurrent jurisdiction over claims for damages against the Crown. Section 18 of the *Federal Courts Act* does not derogate from this concurrent jurisdiction. There is nothing in ss. 17 or 18 that requires Parrish to be successful on judicial review before bringing its claim for damages against the Crown.

[...]

For the reasons given in *TeleZone*, the Federal Court should have decided Parrish's claim for damages without requiring it to first be successful on judicial review.

**43** In *Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 CarswellNat 1937, 2008, the Federal Court of Appeal made it clear that section 18.4 (2) addresses the procedural shortcomings of a judicial review application, but also the remedial ones, including the inability to claim damages on judicial review. Once an application for judicial review is converted to an action, a claim for damages can be advanced in that action. I see nothing in *TeleZone* that changes this authority. *TeleZone* does not say, in my view, that section 18 remedies and damages cannot be claimed in the same action in the Federal Court.

**44** I believe the following paragraphs from *Hinton* are instructive in this case:

49. I am not convinced that subsection 18.4(2) should be read narrowly so as to only apply to the procedural aspects of an action, such as discoveries, the admission of *viva voce* evidence, and the like. It is well recognized that the right to treat an application as if it were an action is to compensate for certain procedural inadequacies with the process underlying applications. In my mind, however, I think it may sometimes also be appropriate to consider the remedial inadequacies of an application for judicial review, as well. One problem with applications for judicial review is that a remedy for damages cannot be sought. In most applications for judicial review, this is not a major concern as the desired remedy will usually lie in the form of *mandamus*, *certiorari*, or a declaration. Where it is of concern, however, is when a totally separate action afterwards may be necessary in either Federal Court or a provincial court to advance a claim for damages: this is a potentially undesirable situation.
50. Sometimes, such as the case at bar, it may prove too cumbersome to initiate a

separate action for damages either concurrently with, or subsequent to, an application for judicial review. Instead of attempting a joinder, which is sometimes inevitable, employing subsection 18.4(2) of the *Federal Courts Act* to allow a claim for damages in a "converted" action should also be available. In cases such as this one, it may even economise on scarce judicial resources.

54. I conclude on this issue with one caveat. It would be an error to permit a claim for monetary relief to be decided prior to determining the underlying basis for liability - namely, the validity of the governmental decision, or in this case, the regulation. Indeed, this is the logical way in which other actions proceed. In patent infringement cases, the questions of the validity of the patent and infringement of the patent are considered before one explores the question of damages. Similarly, in tort law cases, liability is established before damages are addressed. In a case such as this one, although all the evidence on both issues may be heard together, *vires* ought to be decided first before the question of whether the class members are entitled to a partial refund is addressed.

### **Conclusions**

45 Notwithstanding various arguments advanced by the Respondent, I think the central issue for me to decide at this stage is whether the Applicants have satisfied the test laid out in the relevant jurisprudence for conversion to an action. For reasons given above, I believe that they have.

#### **IMM-5543-10**

46 As agreed by counsel at the hearing, there is no need for me now to consider whether the leave application in this case should be argued orally. I have reviewed the leave application and I have granted leave.

47 In my view, there is sufficient commonality between IMM-6303-09 and IMM-5543-10 in terms of legal and factual issues, parallel evidence and the likelihood that the outcome of one case will resolve the other to warrant joinder. See *Sivamoorthy v Canada (Minister of Citizenship and Immigration)*, 2003 CarswellNat 650, 2003 FCT 307. As I see nothing to distinguish this case from IMM-6306-09 as regards conversion to an action, I adopt my own reasons and determine that this application shall be converted to an action and joined with IMM-6306-09.

#### **IMM-6448-10**

48 As agreed by counsel at the hearing, there is no need for me now to consider whether the leave application in this case should be argued orally. I have reviewed the leave application and I have granted leave.

49 As I see nothing to distinguish this case from IMM-6306-09 and IMM-5543-10 as regards joinder and conversion to and an action, I adopt my own reasons and determined that this

application shall be converted to an action and joined with IMM-6306-09 and IMM-5543-10.

### **Class Action Certification**

**50** As counsel requested, and the Court has agreed, the class-action certification aspects of these motions will be dealt with at a further hearing following the decision on conversion, leave and joinder. The time will be set after consultation with counsel to address the certification issue and to decide costs issues on all of the motions. Following the issuance of these reasons and judgment counsel should provide the Court with availability dates or, if a brief case management conference is required, let the Court know when they could be available for that.

### **Certification of Questions**

**51** As regards the issues I have decided in this portion of the motions, I agree with the submissions of Respondent's counsel that no serious question for certification arises at this stage.

## **JUDGMENT**

### **THIS COURT'S JUDGMENT is that**

1. Leave to commence judicial review is granted in IMM-6448-10;
2. Leave to commence judicial review is granted in IMM-5543-10;
3. The judicial review applications in IMM-6306-09, IMM-6448-10, and IMM-5543-10 are converted to actions in accordance with section 18.4 (2) of the *Federal Courts Rules* and said actions shall be consolidated.

RUSSELL J.

*Case Name:*

**Simpson Strong-Tie Co. v. Peak Innovations Inc.**

**Between**

**Simpson Strong-Tie Company Inc., Applicant, and  
Peak Innovations Inc., Respondent**

**And between**

**Simpson Strong-Tie Company Inc., Applicant, and  
Peak Innovations Inc., Respondent**

[2009] F.C.J. No. 530

2009 FC 392

344 F.T.R. 217

Dockets T-1570-07, T-1571-07

Federal Court  
Toronto, Ontario

**Mandamin J.**

Heard: February 23, 2009.

Judgment: April 21, 2009.

(29 paras.)

*Intellectual property law -- Trade-marks -- Procedure -- Applications -- Discovery -- Documents -- Appeal by applicant from dismissal of a motion for production dismissed -- The parties were involved in trade-mark registration appeal proceedings -- The applicant sought extensive production of documents in relation to cross-examination of the respondents' affiants -- The Prothonotary found that the production sought overreached, and that no proper foundation for further production was laid in cross-examination -- The court ruled that the Prothonotary did not err in finding that Rule 91(2)(c) limited document production in cross-examination on affidavits to documents in the possession, power or control of the affiants -- Federal Courts Rules, Rule 91(2)(c).*

*Civil litigation -- Civil evidence -- Documentary evidence -- Affidavits -- Cross-examination on --*



*Appeal by applicant from dismissal of a motion for production dismissed -- The parties were involved in trade-mark registration appeal proceedings -- The applicant sought extensive production of documents in relation to cross-examination of the respondents' affiants -- The Prothonotary found that the production sought overreached, and that no proper foundation for further production was laid in cross-examination -- The court ruled that the Prothonotary did not err in finding that Rule 91(2)(c) limited document production in cross-examination on affidavits to documents in the possession, power or control of the affiants -- Federal Courts Rules, Rule 91(2)(c).*

*Civil litigation -- Civil procedure -- Production and inspection of documents -- Scope -- Production by non-parties -- Appeal by applicant from dismissal of a motion for production dismissed -- The parties were involved in trade-mark registration appeal proceedings -- The applicant sought extensive production of documents in relation to cross-examination of the respondents' affiants -- The Prothonotary found that the production sought overreached, and that no proper foundation for further production was laid in cross-examination -- The court ruled that the Prothonotary did not err in finding that Rule 91(2)(c) limited document production in cross-examination on affidavits to documents in the possession, power or control of the affiants -- Federal Courts Rules, Rule 91(2)(c).*

**Statutes, Regulations and Rules Cited:**

Federal Courts Rules, SOR 98-106, Rule 91(2)(a), Rule 91(2)(c), Rule 94, Rule 94(1), Rule 94(2)

Trade-marks Act, R.S.C. 1985, c. T-13, s. 56

**Counsel:**

Kenneth D. McKay, for the Applicant.

Paul Smith, for the Respondent.

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**REASONS FOR JUDGMENT AND JUDGMENT**

**1 MANDAMIN J.:**-- The Applicant, Simpson Strong-Tie Company Inc., appealed a decision of the Registrar of Trade-marks. In the course of the appeal proceedings, the Respondent, Peak Innovations Inc., filed certain affidavits. The Applicant served Directions to Attend on the affiants for cross-examination on their affidavits. The Directions sought extensive document production by the affiants. Neither the affiants nor the Respondent provided documents they considered beyond the scope of the affidavits. At the cross-examination, the affiants refused to answer Simpson Strong-Tie's questions about the documents requested in the Notice to Attend.

2 Simpson Strong-Tie then brought a motion before the case management Prothonotary for production of documents and re-attendance of the affiants to answer refused questions. The Respondent opposed the motion.

3 The case management Prothonotary dismissed the Applicant's motion. Simpson Strong-Tie now appeals the Prothonotary's Order dismissing its application for production of documents sought in the Direction to Attend and for answers to the questions refused in the cross-examination on affidavit.

### Decision Under Appeal

4 The Prothonotary observed the Directions to Attend and required the affiants to produce an extensive list of documents. He considered the majority of the Applicant's questions, for which answers were refused, to be about documents which Simpson Strong-Tie sought in its Directions to Attend. The Prothonotary considered the Applicant's remaining questions on cross-examination to be equally wide in scope. They were, in the Prothonotary's view, beyond the reach of the specific knowledge of the two affiants.

5 The Prothonotary noted that the Applicant's questions arose during cross-examination on affidavits rather than on examination for discovery.

6 The Prothonotary acknowledged the Applicant's submissions that witnesses are required to produce documents referred to in the Directions to Attend and that the *Federal Courts Rules*, SOR 98-106, contemplated that a witness in a proceeding may be compelled to produce documents reaching beyond the scope of the affidavit upon which they were cross-examined. However, he agreed with the Respondent's submission that the questions were not focussed on the affidavits and matters deposed therein, rather to efforts to obtain production of documents not within the possession, power or control of the affiants.

7 The Prothonotary considered Rule 91, and more particularly 91(2)(c), directly applicable to the issue in the motion. That Rule provides that a party intending to conduct an oral examination shall serve a Direction to Attend on the person to be examined. Rule 91(2)(c) is specific to cross-examination on affidavit and requires the documents to be produced are those documents "in **that** person's possession, power or control" (emphasis in Prothonotary's reasons) that are relevant to the application. He contrasted this wording with Rule 91(2)(a) which deals with examinations for discovery and refers to documents "in the possession, power or control **of the party** on behalf of whom the person is being examined" (emphasis added). The Prothonotary held that on a plain reading of Rule 91(2)(c) the documents to be produced are only those in the affiant's possession, power or control.

8 The Prothonotary concluded that a Direction to Attend which seeks "all documents" in the Respondent corporation's files are documents not necessarily in the possession, power or control of the affiants. He decided that in its Directions to Attend, the Applicant had overreached what the

affiants were required to produce.

9 The Prothonotary acknowledged that where a proper foundation was laid in cross-examination, a party could be required to obtain the production of additional documents. He found that the thrust of questions refused in the Applicant's cross-examinations on affidavit did not seek to lay a foundation to demonstrate the documents were in the possession of the affiants.

10 The Prothonotary ruled the questions arising from the Directions to Attend were not proper and need not be answered. Finally, he decided the remaining questions refused by Peak Innovations were questions to which argument was not directed or dealt with matters that were not relevant, were privileged, or exceeded the scope of the affidavits. On these, the Prothonotary decided that Simpson Strong-Tie was free to argue in the course of the proceeding that an adverse inference could be drawn against Peak Innovations for failing to produce those documents.

11 In result, the Prothonotary dismissed the Applicant's Motion for production of documents sought in the Direction to Attend and for answers to the questions refused in the cross-examination on affidavit.

### **Issue**

12 The issue in this appeal is whether the Prothonotary erred in holding that on cross-examination on an affidavit the production of documents and answers to questions thereto was governed by Rule 91(2)(c) and that the Rule limited document production in cross-examination on affidavit to documents in the possession, power or control of the affiants.

### **Standard of Review**

13 Discretionary orders of Prothonotaries ought not to be disturbed on appeal unless they are clearly wrong in the sense that the exercise of discretion was based on a wrong principle or misapprehension of the facts or that they raise questions vital to the final issue of the case. *Canada v. Aqua-Gem Investments Ltd.*, [1993] F.C.J. No. 103 (F.C.A.)

14 In *Merck & Co., Ltd. v. Apotex Inc.*, 2003 FCA 488, Justice Décary decided that a judge should first determine whether the question is vital to the final issue. Secondly, whether "the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts." *Merck* at para. 19.

### **Legislation**

15 Rule 91 of the *Federal Rules of Court* provides:

Direction to attend

91.(1) A party who intends to conduct an oral examination shall serve a direction to attend, in Form 91, on the person to be examined and a copy thereof on every other party.

Production for inspection at examination

(2) A direction to attend may direct the person to be examined to produce for inspection at the examination

(a) in respect of an examination for discovery, all documents and other material in the possession, power or control of the party on behalf of whom the person is being examined that are relevant to the matters in issue in the action;

(b) in respect of the taking of evidence for use at trial, all documents and other material in that person's possession, power or control that are relevant to the matters in issue in the action;

(c) in respect of a cross-examination on an affidavit, all documents and other material in that person's possession, power or control that are relevant to the application or motion; and

(d) in respect of an examination in aid of execution, all documents and other material in that person's possession, power or control that are relevant to the person's ability to satisfy the judgment.

**16** Rule 94(1) provides:

Production of documents on examination

94. (1) Subject to subsection (2), a person who is to be examined on an oral examination or the party on whose behalf that person is being examined shall produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230.

## Relief from production

- (2) On motion, the Court may order that a person to be examined or the party on whose behalf that person is being examined be relieved from the requirement to produce for inspection any document or other material requested in a direction to attend, if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.

## Analysis

**17** The underlying proceeding is an appeal by the Applicant, Simpson Strong-Tie, of the decision of the Registrar of Trade-marks (Opposition Board) of the Trade-marks Office. Simpson Strong-Tie had opposed the Respondent's application for registration of the trade-mark at issue: No. 1,205,529. This opposition was refused by the Opposition Board and the trademark has been registered. Simpson Strong-Tie appealed the decision pursuant to section 56 of the *Trade-marks Act*, R.S.C. 1985, c. T-13, by filing a Notice of Application in Federal Court seeking an order granting its appeal, an order setting aside the decision of the Registrar of Trade-marks, and an order directing the Registrar of Trade-marks to refuse the registration of the trademark.

**18** I begin by noting that the Prothonotary's decision refusing Simpson Strong-Tie's motion relates to an interlocutory matter and not to an issue vital to the final outcome. As such the Prothonotary's order ought not to be disturbed on appeal unless it is clearly wrong in the sense that the exercise of discretion was based on a wrong principle or misapprehension of the facts. *Merck, supra*.

**19** The Applicant submits that Rule 94(1) requires that the person or party to produce the documents required and that the onus was on the recipient to apply under Rule 94(2) to seek relief from the Court from the production of documents. Further the Applicant submits that Rule 91(2)(c) allows the person issuing the Direction to Attend to ask for production of "all documents and other material ... relevant to the application or motion." Simpson Strong-Tie submits the Prothonotary did not deal with its submission and instead put the onus on the Applicant contrary to Rule 94(2).

**20** The Applicant also submits the Federal Court Rules on the Direction to Attend provide for the production of all documents relevant to the application. It cited the decision of Justice Snider in *Sawridge Band v. Canada*, 2005 FC 865, specifically:

In my view, the most succinct statement of the current state of the law on the scope of cross-examination on an affidavit, in the context of an interlocutory motion such as this, is set out by Reed J. in *Castlemore Marketing Inc. v. Intercontinental Trade and Finance Corp.* [1996] F.C.J. No. 201, at para. 1:

An affiant is required to answer questions on matters which have been set out in the affidavit as well as any collateral questions arising from his or her initial answers. In *Bally-Midway Mfg. Co. v. M.J.Z. Electronics Ltd.* (1984), 75 C.P.R. (2d) 160, Mr. Justice Dubé stated that cross-examinations on affidavits are confined to "the issues relevant to the interlocutory injunction and/or all allegations contained in the affidavit". In [*Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (No. 2) (1972), 6 C.P.R. (2d) 169 (F.C.T.D.)], Mr. Justice Heald relied upon jurisprudence which held that a person cross-examining on an affidavit was not confined to the area within the four corners of the affidavit but could cover any matter relevant to the determination of the issue in respect of which the affidavit was filed. In addition to being relevant, the question of course must not be of such a general nature that it cannot be intelligently answered, and the Court will exercise its discretion and disallow any question which it considers in the nature of a "fishing expedition".

**21** I note that in *Sawridge*, Justice Snider was dealing with an interlocutory motion by which the plaintiffs sought an order that the defendant produce an alternative witness who was a more informed affiant than the paralegal who prepared the affidavit that listed certain documents. Justice Snider declined to grant the requested relief because, in addition to not specifying questions they wished to ask, the plaintiffs appeared to propose to cross-examine on the contents of the documents beyond the limited purpose for which they were put forward. Justice Snider held that such cross-examination would extend beyond the matters in respect of which the affidavit was filed.

**22** The Applicant also refers to decisions in *Bruno v. Canada*, 2003 FC 1281, and *Autodata Ltd. v. Autodata Solutions Co.*, 2004 FC 1361. *Bruno* dealt with a situation where the examining party failed to specify the production of documents in a Direction to Attend before examining a witness.

**23** In *Autodata*, Prothonotary Tabib was considering an application made in the course of an appeal under section 56 of the *Trade Marks Act* which is the same type of proceeding as the instant case. She was considering whether production and answers were required in a situation where an undertaking to produce documents had been given. She echoed the Federal Court of Appeal decision in *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 1847, where it was stated that cross-examination is not examination for discovery in that the deponent is not a party and the deponent can be required to produce only documents within his or her custody or control, and the rules of relevance are more limited.

**24** In my view, the three aforementioned decisions do not compel an interpretation of Rule 91(2)(c) different than the interpretation settled on by the Prothonotary. Rather, the decisions tend to support the Prothonotary's decision, especially *Autodata*. Prothonotary Tabib made the distinction between proceedings in an action and an application, the later involving a more restricted and summary procedure.

However, a cross-examination on affidavit is not a discovery, and an application is not an action. An application is meant to proceed expeditiously, in summary fashion. For that reason, discoveries are not contemplated in applications. Parties cannot expect, nor demand, that the summary process mandated for applications will permit them to test every detail of every statement made in affidavits or in cross-examinations against any and all documents that may be in the opposing party's possession. If a party is not required to "accept" a witness' bald assertion in cross-examination, it is however limited in its endeavours to test that assertion to the questions it may put to the witness and the witness' answers in the course of the cross-examination. To the extent documents exist that can buttress or contradict the witness' assertion, production may only be enforced if they have been listed, or sufficiently identified, in a direction to attend duly served pursuant to Rule 91(2)(c) (see *Bruno v. Canada (Attorney General)*, [2003] F.C.J. 1604). I reiterate: a cross-examination on an affidavit is the direct testimonial evidence of the witness, not a discovery of the party. (underlining added)

**25** The Applicant, Simpson Strong-Tie, proceeded in its appeal of the Registrar of Trade-marks decision by way of a Notice of Application. In choosing to proceed by application, it must observe the limitations that are attendant on application proceedings.

**26** I agree with the Prothonotary that Rule 91(2)(c) is directly applicable. The language of Rule 91(2)(c) is precise with respect to production of documents for cross-examination on affidavits and is to be preferred over more generally worded provision of Rule 94 dealing with oral examinations.

**27** The remaining matters the Applicant raises assume success in this application and deal with case management questions. Given the Applicant does not succeed in the central issue and given that case management is in the hands of the Prothonotary, I decline to address those issues. The Applicant should return to the case management Prothonotary for direction in respect of those matters.

### **Conclusion**

**28** I conclude that the Prothonotary's Order ought not to be disturbed since it is not clearly wrong in the sense that the exercise of discretion was based on a wrong principle or misapprehension of the facts.

**29** Costs are awarded to the Respondent, Peak Innovations Inc.

### **JUDGMENT**

#### **THIS COURT ORDERS AND ADJUDGES that:**

1. The application is dismissed.

2. Costs are awarded to the Respondent.

MANDAMIN J.

cp/e/qlccl/qlpxm/qlaxw/qlced



*Case Name:*

**Simpson Strong-Tie Co. v. Peak Innovations Inc.**

**Between**

**Simpson Strong-Tie Company Inc., Appellant, and  
Peak Innovations Inc., Respondent**

[2009] F.C.J. No. 1126

[2009] A.C.F. no 1126

2009 FCA 266

397 N.R. 201

180 A.C.W.S. (3d) 403

Docket A-196-09

Federal Court of Appeal  
Toronto, Ontario

**Sexton, Blais and Layden-Stevenson JJ.A.**

Heard: September 14, 2009.

Oral judgment: September 14, 2009.

(10 paras.)

*Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Objections and compelling production -- Appeal by Simpson Strong-Tie Co. from order upholding Prothonotary's dismissal of appellant's application for production of documents dismissed -- Appellant had sought production of documents in the direction to attend and for answers to the questions refused in the cross-examination on affidavit -- Issues raised in application were not vital to the final outcome -- No wrong principle was applied.*

Appeal by Simpson Strong-Tie Co. from an order upholding a Prothonotary's order dismissing the appellant's application for production of documents sought in the direction to attend and for answers

to the questions refused in the cross-examination on affidavit. The Prothonotary ruled that in its direction to attend the appellant had overreached as to what documents the affiants were required to produce. The Prothonotary also ruled that the appellant had failed to lay a proper foundation in cross-examination to demonstrate that the documents were in the possession of the affiants.

HELD: Appeal dismissed. The motion judge was correct in deciding that the issues raised by the appellant's application were not vital to the final outcome. The Prothonotary gave extensive reasons in dismissing the motion. The decision was not based upon a wrong principle or upon a misapprehension of the facts. The Prothonotary applied the correct principles regarding the scope of cross-examination as it related to the requirement to produce documents pursuant to a direction to attend.

**Statutes, Regulations and Rules Cited:**

Federal Courts Rules, Rule 91(2)

Appeal from an order of the Honourable Mr. Justice Mandamin dated April 21, 2009, in Docket No. T-1570-07, [2009] F.C.J. No. 530.

**Counsel:**

Kenneth D. McKay for the Appellant.

Paul Smith for the Respondent.

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The judgment of the Court was delivered by

**1 BLAIS J.A.** (orally):-- This is an appeal of an order by Justice Mandamin of the Federal Court (motion judge) dated April 21, 2009 upholding an order by Prothonotary Aalto dated December 31, 2008 whereby he dismissed the appellant's application for production of documents sought in the direction to attend (DTA) and for answers to the questions refused in the cross-examination on affidavit.

**2** To succeed, it must be demonstrated that the motion judge's decision was plainly wrong in the sense that it was based on an error of law or a misapprehension of the fact, pursuant to the decision of our Court in *Merck & Co., Inc. v. Apotex Inc.* [2004] 2 F.C.R. 459 , 2003 FCA 488 (*Merck*) whereby:

Discretionary orders of prothonotaries ought not to be disturbed on appeal to a

judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

3 We are of the view that the motion judge was correct in deciding that the issues were not vital to the final outcome.

4 Turning to the second element of the test established in *Merck*, above, the motion judge examined whether the prothonotary was clearly wrong in the exercise of his discretion.

5 In the instant case, in dismissing the motion, the case management prothonotary ruled that in its DTA, the appellant had overreached as to what documents the affiants were required to produce. Rule 91(2)(c) as it relates to an affiant only requires the production of documents "in that person's possession, power or control that are relevant to the application or motion."

6 Further, the prothonotary ruled that the appellant had failed to lay a proper foundation in cross-examination to demonstrate that the documents were in the possession of the affiants and hence obtain the production of additional documents (Order of Prothonotary Aalto dated December 31, 2008, pages 6-7).

7 The prothonotary gave extensive reasons in dismissing the motion. It was not based upon a wrong principle or upon a misapprehension of the facts. The motion judge did not err on this count.

8 Regarding the scope of cross-examination as it relates to the requirement to produce documents pursuant to a DTA, we are of the view that the prothonotary applied the correct principles discussed in *Merck Frosst Canada Inc. v. Canada* (1997), [1997] F.C.J. 1847 (F.C.T.D.) affirmed [1999] FCJ No. 1536 (F.C.A.). The motion judge did not find any error with respect to this issue. Neither do we.

9 In *j2 Global Communications, Inc. v. Protus IP Solutions Inc.*, (2009 FCA 41, 387 N.R. 135), Justice Evans explained that because of the discretionary and interlocutory nature of motions, appellants have a heavy burden to meet before the Federal Court of Appeal will overturn a decision (at para 5). He further stated:

Because of their intimate knowledge of the litigation and its dynamics, prothonotaries and trial judges are to be afforded ample scope in the exercise of their discretion when managing cases...since this Court is far removed from the fray, it should only intervene in order to prevent undoubted injustices and to correct clear material errors (at para 16).

10 This appeal will therefore be dismissed with costs.

BLAIS J.A.

*Case Name:*

**Stanfield v. Canada (Minister of National Revenue -  
M.N.R.)**

**Between**

**Hugh Stanfield, Greta Anderson, Robert Anderson, Donald Apolczer, Carol L. Apolczer, James C. Ayearst, Elizabeth Joan Ayearst, Christine Banville, Brent Beyak, David G. Blissett, James L. Brady, Keith Brooke, George Burden, Donald Carey, Patricia Carpenter, Alan Carpenter, Maria Clarke, Kenneth Clarke, Julia S. Cundliffe, Kate A. Davis, Larry Davis, Allan De Haan, Herb Demars, Terrance Dunford, Irvine J. Dyck, Norma Farenick, Stephan Fralick, Renee Gallant, Roy Gallant, Mary Gelpke, Paul Gelpke, Dianne Germain, Ben Goertzen, Martha Goertzen, Peter Graboski, Frank Graf, Gary H. Grueter, David R. Hackett, Eric R. Harrison, Kenneth Allan Hay, John A. Higgins, Geoffrey Hilliard, William Johnson, Peter Leger, Edna L. Lindal, Robert Lindal, Wayne Garry Martin, Ed MacIntosh, Robert McGinn, Terence Meadows, Robert Naber, Edith Nelson, Garth L. Nelson, Glenn Parker, John L. Parsons, Helen Parsons, Danny Pawlachuk, Joseph Pennimpede, Irene Pennimpede, Brenda Quattrin, Garry Reimer, Neil Reinhart, Glen Robbins, Luc Roberge, Joan Ellen Sabourin, Paul Wyatt Sabourin, Mark Sampson, Susan Scott, Philip Scott, Michael Slade, Kazik Smilowski, Frances Smilowski, Candice Stanfield, Seona Stephen, John G. Stephen, Gregory Stevens, Jennifer Stevens, Roger G. Stogre, Brian E. Stoutenburg, Lesley Suggitt, James H. Suggitt, Scott Thomson, Allan Tolsma, Tom Tolsma, Agnes Dorothy Tolsma, Andrew Trojner, Mary Trojner, Jim R. Trojner, George H. Wadsworth, Sharon Wadsworth, Glenys Whelan, Earl Wilkes, David J. Williams, Mildred Williamson, Kerry Wilson, Harvey Yarn, David Zevick, Preben Andersen, Daniel M. Arrigo, Robert P. Blair, Stephen P. Burke, Brent Carlson, Fiona Douglas-Crampton, Helen Fadden, Reid Frederick, Edgar Giesbrecht, John Gordon, Gary Hammer, John F. Heathe,**

**Judith A. Kostuk, Ron A. Krowchuk, Larry Ledoux, Penny Ledoux, Ernest Reimer, Laurie Reimer, Maxwell Thompson, applicants, and  
The Minister of National Revenue, respondent**

[2004] F.C.J. No. 719

[2004] A.C.F. no 719

2004 FC 584

2004 CF 584

255 F.T.R. 240

[2004] 3 C.T.C. 125

2004 D.T.C. 6419

130 A.C.W.S. (3d) 917

Docket T-1554-02

Federal Court  
Vancouver, British Columbia

**Hargrave, Prothonotary**

Heard: February 3, 2003.

Judgment: April 20, 2004.

(69 paras.)

*Civil procedure -- Discovery -- Production and inspection of documents -- Objections and compelling production -- Examination for discovery -- Range of examination -- Fishing expeditions -- Civil evidence -- Witnesses -- Examination -- Cross-examination -- Limitations -- Documentary evidence -- Affidavits -- Cross-examination on -- Compelling attendance by subpoena -- Subpoena duces tecum -- Taxation -- Income tax -- Enforcement -- Production of information -- Offences -- Tax evasion or avoidance.*

Application by Stanfield seeking production of additional documents on which to further cross-examine the Crown's deponent on her affidavit, as well as an order that the deponent re-attend for further cross-examination and be required to provide proper answers. In 2002, Stanfield received

a questionnaire and request for information from the Minister concerning currency and commodity transactions. He was also informed that while he was not under investigation, a criminal investigation regarding those types of transactions was being undertaken. Stanfield applied for a declaration that the letter requesting information was invalid, and for an order prohibiting the Minister from proceeding against him for failure to respond to the letter. The Crown's deponent worked in the audit, as opposed to investigation, section of the Canada Customs and Revenue Agency. In 2003, the deponent was cross-examined on her affidavit. Stanfield claimed that the deponent failed to adequately inform herself as to the nature for the request for information, or the predominant purpose of the investigation.

HELD: Application granted in part. The Crown's deponent was ordered to re-attend for further cross-examination, and was ordered to further inform herself on certain issues, and produce certain documents. There was no clear evidence indicating whether the predominant purpose of the investigation was to conduct an audit or a criminal investigation. Given the information he had received and the wording of the questionnaire, Stanfield was reasonably concerned that he may still be under investigation. Accordingly, the Crown's deponent was required to inform herself and produce documents for the purposes of cross-examination. While the request for documents made by Stanfield was too broad, certain documents requested were ordered produced. The principal file was ordered produced, since, though beyond the scope of the deponent's affidavit, it was indicative of the Minister's course of conduct. The minutes of meetings between the audit and investigative groups were also ordered produced, as were the directives issued to the audit group by the investigative group. The deponent was directed to provide proper answers to certain relevant questions.

**Statutes, Regulations and Rules Cited:**

Federal Court Rules, Rule 91, 94.

Income Tax Act, s. 231.1(1), 231.2(1).

**Counsel:**

Edwin G. Croft and Elizabeth Junkin, for the applicants.

Robert H. Carvalho, for the respondent.

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REASONS FOR ORDER

1 HARGRAVE, PROTHONOTARY:-- On 17 August 2002 the Minister of National Revenue (the "MNR"), had become concerned about what are characterized as "tax loss arrangements", being

in the nature of currency and commodity transactions, spanning a year end, upon which various taxpayers had claimed losses. The MNR therefore sent to the Applicant, Hugh Stanfield, demand in the form of a questionnaire under cover of a letter dated 27 August 2002, the letter containing the statement:

Please be advised that a criminal investigation regarding the promotion of transactions of the type claimed on your income tax return has been undertaken. You are not under investigation at the present time but we wish to advise you that any information submitted may be provided to our Investigations Division for review.

The letter did not say that the recipient would never be under investigation. This uncertainty concerned Mr. Stanfield, who wondered why he should hand over information to the Minister if he was in fact under investigation. He was concerned enough that he sought review of the Minister's demand.

**2** Mr. Stanfield, in due course, was joined by other concerned taxpayers who now make up the Applicants in this judicial review proceeding. The proceeding is for a declaration that the letter requesting information is invalid or unlawful and that the Minister be prohibited or restrained from taking any action or proceedings against the Applicants for failure to respond to the 27 August 2002 letter.

**3** The Applicants' position is based upon *Jarvis v. The Queen* [2002] 3 S.C.R. 757, the effect of which is summed up by Justices Iacobucci and Major, at pages 765-766:

Ultimately, we conclude that compliance audits and tax evasion investigations must be treated differently. While taxpayers are statutorily bound to co-operate with CCRA auditors for tax assessment purposes (which may result in the application of regulatory penalties), there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of an official's inquiry is the determination of penal liability. When the officials exercise this authority, constitutional protections against self-incrimination prohibit CCRA officials who are investigating ITA offences from having recourse to the powerful inspection and requirement tools in ss. 231.1(1) and 231.2(1). Rather, CCRA officials who exercise the authority to conduct such investigations must seek search warrants in furtherance of their investigation.

In essence, taxpayers must cooperate with Canada Customs and Revenue Agency (the "CCRA") audits for tax assessment purposes, even though the result may be a regulatory penalty, but an adversarial relationship crystallizes when the predominant purpose of the inquiry is the determination of a penal liability: when this line is crossed the CCRA no longer has recourse to inspection and requirement procedures under the Income Tax Act, but must obtain search warrants



in order to further their investigation.

**4** On the present motion the Applicants seek additional documents on which to cross-examine further on an affidavit sworn on behalf of the Crown and that the Crown's deponent re-attend for further cross-examination to answer questions already asked and to answer proper questions arising out of any additional documents which are ordered produced.

**5** The result of this motion, based upon the Jarvis case and the law is mixed success. In order to demonstrate the route to rulings for and against the Applicants I begin with background commencing in the spring of 1999, for there are many events, well before a formal delivery of a file by the Audit branch of the CCRA to the Investigations Division, which might bear on a crystallization of an adversarial situation and preclude information gathering under sections 231.1(1) and 231.2(1) of the Income Tax Act, forcing the CCRA Investigations to proceed by way of search warrant in order to gather information for prosecution purposes.

## BACKGROUND

**6** The submissions of the Applicants are based on events going back to tax loss arrangements in 1998. The involvement of the Respondent's witness, Ms. Deanna Pumple, the deponent of a 31 October 2002 affidavit which is relied upon by the Minister in opposing the judicial review application, is as an auditor. Ms. Pumple worked with the Tax Avoidance Division of the Verification and Enforcement Division of CCRA, which is apparently an audit section. The initial audit related to a 1998 tax loss arrangement referred to the Union Cal Trading Joint Ventures which were, as I have already indicated, currency and commodity transactions straddling a year end, are described by Ms. Pumple as vehicles to realize losses and defer recognition of income. She audited about three quarters of the Applicants.

**7** Apparently because of the connection between 1998 tax loss arrangements and 1999 tax returns, Ms. Pumple decided, sometime in the first part of 2000, to review the tax returns of those Applicants whom she was auditing, for the 1999 taxation year. This subsequently became a national project, rather than merely one done by Ms. Pumple in the Vancouver Island taxation services office. Thus other CCRA auditors also became involved in reviewing the 1999 tax returns of the Applicants.

**8** In April 2001 members of the CCRA Investigations Division met with the auditors from the Tax Avoidance Division, who included Ms. Pumple, to share information. As a result of a request by the Investigations Division Ms. Pumple referred various of her files to them and created a chronology for their assistance. At about this point the Investigations Division instructed the Tax Avoidance Division to cease auditing the 1998 and 1999 returns.

**9** The Investigations Division was involved for the purpose of evaluating whether the Applicants were involved in criminal activities. From time to time Ms. Pumple received requests for and forwarded additional information to the Investigations Division. This seems to have been an

ongoing process, with Ms. Pumple from time to time taking or seeking directions from the Investigations Division.

**10** Some time after April of 2001 a Mr. Kuhn, of Tax Avoidance in Vancouver, was seconded to work for the Investigations Division in Vancouver. He was a member of what was called the Global Prosperity Group Team in the Investigations Division, working directly with its members, although he held himself out as belonging to Tax Avoidance. From the transcript of the examination of Ms. Pumple it is clear that he at least acted as the liaison person between the Tax Avoidance and the Investigations groups.

**11** About a year after the Investigations group became involved, March 2002, the Investigations Division told the Tax Avoidance Division to recommence the audit for 1998, the result being a Notice of Reassessment for 1998.

**12** In July 2002 Investigations told Tax Avoidance to recommence auditing the Applicants for their 1999 and 2000 taxation years. This resulted in Ms. Pumple and various other Tax Avoidance officers sending out letters and attached questionnaires, the subject of the present judicial review application.

**13** Between June 2002 and September 2002 there was a regular exchange of information between Investigations and Tax Avoidance. Examples of the exchange of information show up in a series of emails from Mr. Kuhn, the liaison person between Investigations and Tax Avoidance, instructing CCRA officers as to the audit approach to be taken upon resumption of audit activities. As an example of the interrelationship of the two groups, at the time of the cross-examination of Ms. Pumple, in January of 2003, the tax returns of many of the Applicants were still in the possession of Investigations.

**14** The Applicants set out in the material that Ms. Pumple did not always have personal knowledge and this is reasonable enough given the magnitude of the project. To inform herself Ms. Pumple communicated with other Tax Avoidance officers. She determined where various of the tax returns were located. However she did not make any inquiries of the head office of the CCRA or speak with anyone at Investigations. Counsel for the Applicants goes on to make a case that Ms. Pumple had really only limited knowledge, for she knew nothing about internal communication within the CCRA, the communications path between head office and Investigations, the concept of a tax shelter, and the role of Investigations. She was unable to speak for Investigations. Further, Ms. Pumple did not prepare the letter or questionnaire at issue, although she did sign the letter. The discovery does indicate that Investigations had some input in drafting the letter, specifically I think the advice of the criminal investigation and that the recipient was not at that point under investigation. From the point of view of the Applicants, the evidence of Ms. Pumple and the documents that she brought with her to the cross-examination do not, in their view, make clear the predominant purpose of the investigation itself, the concept of predominant purpose demonstrating, in some instances, in the crystallization of an adversarial relationship. Thus the Applicants submit

they are unable to determine both whether an adversarial situation has crystalized and the clear line between provision of information in an audit setting and the right to refuse information, except as against a search warrant, in an investigation setting.

**15** Ms. Pumple also refused to answer a number of questions put to her on cross-examination as irrelevant.

**16** The result of the refusals as to documents and questions is the present motion. I will turn first to the general request for documents contained in the Direction, to Ms. Pumple, to Attend.

## CONSIDERATION

### Production of Documents by way of Direction to Attend

**17** The Applicants refer to a Direction to Attend pursuant to Rule 91, served on Ms. Pumple, which requests that she bring with her an exceedingly broad range of documents, including:

all documents and records, including but not limited to electronic documents, in the possession of the Respondent with respect to or mentioning any Applicant for the taxation years affected by this Application, including, but not limited to: ...

**18** The particular documents which are then outlined, but in very general terms, extend to virtually all documents related to this matter held by Canada Customs and Revenue Agency, including those held by the Investigations Division. Certainly, on its face, the Rule 91 Direction to Attend (as elaborated upon in Rule 94) is broad in that on cross-examination the witness must bring "... all documents and other material in that person's possession, power or control that are relevant ...". However, Rule 91 may not be used to expand production of documents on judicial review so that the process becomes similar to discovery of documents in an action. Certainly a court must have before it sufficient documents to provide an adequate factual record. It is in the interest of justice that production not be limited so as to handicap an applicant. However production of documents in a judicial review setting ought not to be such as to expand the intent of judicial review as a relatively speedy remedy. Rather, production is limited to what is required by relevancy, in the context of judicial review and as set out in the case law.

**19** By way of example, even in the case of an action, where there is full discovery of all relevant and produceable documents, such a broad request for documents, say that contain in a subpoena duces tecum, may come close to abusing the process of the Court.

**20** Examining further this concept of too broad a production of documents being abuse of process, I would refer to the views of Mr. Justice MacKay in *Merck & Co. Inc. v. Apotex Inc.* (1998) 80 C.P.R. (3d) 103 at 107-108. There it concerned Mr. Justice MacKay that by describing and seeking documents too generally and too broadly in the subpoena duces tecum, a party was in effect on a fishing expedition. This use of a subpoena duces tecum was inappropriate. In *Merck* Mr.

Justice MacKay quashed two subpoenas which sought a range of documents similar to the range sought this instance. He required the documents be both discreetly described and significant to the issues before the Court in order "... to avoid further 'sweeps' of the records" (page 108).

**21** Mr. Justice Pelletier, as he then was, in *Bristol-Myers Squibb Co. v. Canada* (Attorney General) (2002) 18 C.P.R. (4th) 353, a judicial review matter, was not about to allow the use of a Rule 91 Direction to Attend to expand production of documents beyond what was allowed pursuant to Rule 317, that is the documents from the tribunal.

**22** Just as in *Merck v. Apotex* a broadly worded subpoena duces tecum cannot be used to expand production of documents beyond all reason so may a Rule 91 Direction to Attend not be used in order to obtain documents beyond what is required on judicial review and all the more so given the reasoning and conclusion in *Bristol-Myers Squibb* (supra). In short, a Rule 91 Direction to Attend cannot be used to obtain full discovery of documents as is the clear intent in this instance. Of course, as Mr. Justice MacKay went on to point out in *Merck v. Apotex* (supra) that his denial of a general production of documents did not prevent the Plaintiff from making a further subpoena seeking documents described with greater particularity. Keeping in mind, as I have said, that production is limited to what is required by relevancy, determined in the context of judicial review and by the case law, the present denial of wholesale production of documents, by way of a Direction to Attend, does not bar the Applicants from making more limited and specific requests for documents.

#### Relevance and the Scope of Cross-Examination

**23** The concept of relevancy is more limited in judicial review than it is in an action. For this proposition and as a basic survey of the principles of cross-examination, I would refer to *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1997) 80 C.P.R. (3d) 550. In that case, at page 555, Mr. Justice Hugessen began with the proposition that cross-examination is not examination for discovery: it differs from examination for discovery in various particular aspects which he sets out as:

- a) the person examined is a witness not a party;
- b) answers given are evidence not admissions;
- c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
- d) production of documents can only be required on the same basis as for any other witness, i.e. if the witness has the custody or control of the document;
- e) the rules of relevance are more limited.

At issue in *Merck Frosst* was relevance, an important aspect in the present instance. Therefore it is useful to consider what Mr. Justice Hugessen went on to say:

Since the objections which have given rise to the motions before me are virtually

all based upon relevance, I turn, at once, to that subject.

For present purposes, I think it is useful to look at relevance as being of two sorts: formal relevance and legal relevance.

Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.

Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted.

Important principles arise out of these passages. First, formal relevance is based on issues of fact, defined by pleadings in an action and by affidavits in judicial review; second, Mr. Justice Hugessen pointed out that in his view, cross-examination on an affidavit "... is limited to those facts sworn to be the deponent and the deponent of any other affidavits filed in the proceeding.", in essence requiring a factual basis for cross-examination, obtainable from any filed affidavit; and third, legal relevance governs in determining whether the remedy sought is available.

**24** Whether cross-examination is strictly limited to the facts sworn to in the total of the affidavits filed in a matter is of interest. Certainly, Mr. Justice Muldoon, in *Swing Paints Ltd. v. Minwax Co. Inc.* [1984] 2 F.C. 521 at 530-531, took a more expansive view, citing sound authority. He felt that the deponent of an affidavit ought not to be able to hide behind skilfully sculpted evidence, but the cross-examination should extend beyond the four corners of an affidavit to encompass "Matters pertinent to the documentation of the issue in respect of which the affidavit was filed." (*ibid* page 531), that it should extend to collateral questions arising from answers and also matters upon which the witness could fairly be expected to have knowledge, relating to the principal issue in the proceeding, touched upon by the affidavit:

The person making the affidavit must submit himself to cross-examination not only on matters specifically set forth in his affidavit, but also to those collateral questions which arise from his answers. Indeed he should answer all questions,

upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principal issue in the proceeding upon which his affidavit touches if it does.

Also on point is *Monsanto Canada Inc. v. Novopharm Ltd.* (1996) 118 F.T.R. 92 where, at pages 93 and 94, Mr. Justice MacKay adopted a passage from a decision of Madam Justice Reed, in *Castlemore Marketing Inc. v. Intercontinental Trade and Finance Corporation et al.*, an unreported 16 February 1996 decision in file T-2498-95:

"The applicable tests to determine what questions should be answered on cross-examinations on affidavits are set out in *Upjohn Inter-American Corporation v. Canada (Minister of National Health and Welfare and Attorney General) et al.* (1987), 10 F.T.R. 37. See also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (No. 2)* (1972), 6 C.P.R. (2d) 169 (F.C.T.D.). An affiant is required to answer questions on matters which have been set out in the affidavit as well as any collateral questions arising from his or her initial answers. In *Bally-Midway Mfg. v. M.J.Z. Electronics Ltd.* (1984), 75 C.P.R. (2d) 160, Mr. Justice Dubé stated that cross-examinations on affidavits are confined to 'the issues relevant to the interlocutory injunction and/or all allegations contained in the affidavit'. In *Weight Watchers (supra)*, Mr. Justice Heald relied upon jurisprudence which held that a person cross-examining on an affidavit was not confined to the area within the four corners of the affidavit but could cover any matter relevant to the determination of the issue in respect of which the affidavit was filed. In addition to being relevant, the question of course must not be of such a general nature that it cannot be intelligently answered, and the Court will exercise its discretion and disallow any question which it considers in the nature of a 'fishing expedition'".

This clearly extends cross-examination not only beyond the four corners of the affidavit, but also to questions collateral to answers and to matters "relevant to the issue in respect of which the affidavit was filed": it is also in line with *Swing Paint (supra)*.

#### Obligations of the Witness to Inform Herself or Himself

**25** A further point which I should touch upon is whether the deponent of an affidavit may be required to inform herself or himself for the purpose of cross-examination. Certainly Mr. Justice Hugessen, in *Merck Frosst (supra)* was of the view that the person examined, being a witness and a party, could not be required to inform himself or herself. Yet in *Bland v. National Capital Commission* (1989) 29 F.T.R. 232 Mr. Justice Martin, after canvassing a large section of the case law, including contrary case law in *Laflamme Fourrures (Trois-Rivières) Inc. v. Laflamme Fourrures Inc.* (1986) 3 F.T.R. 48, a decision of Mr. Justice Walsh, did send the witness in *Bland* out to inform himself. This approach is consistent with that of Mr. Justice Nadon, as he then was, in

Merck & Co. v. Apotex Inc. (1996) 110 F.T.R. 155 that "... a deponent has a duty to inform himself on matters in issue which are within his knowledge or means of knowledge." (page 149).

**26** Moreover, and this still deals with a witness obtaining further information, the deponent of an affidavit may be required to produce documents, for cross-examination, in addition to those referred to in an affidavit, but with a limitation that cross-examination upon an affidavit will not be as free ranging as examination for discovery, nor will production of documents be as broad as on examination for discovery:

In my view, the cross-examination upon an affidavit in support of a motion for an interlocutory injunction ought not to be as wide-ranging as an examination for discovery. In the latter proceeding the witness must inform himself, provide answers and produce documents relevant to all the issues raised in the pleadings. The cross-examination upon an affidavit, however, must be confined to the issues relevant to the interlocutory injunction and/or all the allegations contained in the affidavit. In other words, the affiant must answer questions and produce documents relating to all the issues relevant to the interlocutory motion, plus questions on all the other statements he may have volunteered within the four corners of his affidavit. The cross-examiner cannot use the affidavit as a vehicle to obtain all the information and all the documents that might be useful at trial. (Bally-Midway Mfg. Co. V. M.J.A. Electronics Ltd. et al. (1983) 75 C.P.R. (2d) 160 (F.C.T.D.)) [Emphasis added]

Here I recognize that Bally-Midway involved cross-examination on an affidavit in a proceeding in an action, however it demonstrates that cross-examination on an affidavit can go to documents beyond the affidavit, although it is narrower than an examination for discovery.

**27** There are differences in the approach taken to cross-examination and the breadth of production of documents on cross-examination in many of the reported cases. It may well be that from time to time the nature of the proceeding will mandate slightly fuller production of documents and of answers: here I have in mind particularly where the witness is really an agent of a party. To elaborate, to allow a lower echelon witness, who has very little knowledge of concepts, of what happened and of what is at stake, to hide behind a narrow affidavit, is improper. To allow such would encourage litigants, who in effect are relying upon the witness as agent, to produce a marginal witness. For example corporate and government litigants might be encouraged to produce as a deponent a witness with limited knowledge and involvement. To countenance such would not only foster injustice, but also waste the time and money of all concerned, including litigants, the public and the Court. However I shall now turn to a current decision which has expanded the scope of cross-examination on an affidavit.

**28** The final case to which I shall refer, as to the scope of cross-examination and production of documents, is Stella Jones Inc. v. Mariana Maritime S.A., [2000] F.C.J. No. 2033, a 6 December

2000 decision of the Federal Court of Appeal, docket A-52-00. At trial the judge took a very limited approach to cross-examination on an affidavit and production of documents, essentially limiting such to cross-examination within the affidavit and to a consideration of only the documents which were attached to the affidavit. The Court of Appeal held that previous dealings were relevant and that the deponent might be cross-examined on information which he could have obtained from a co-defendant. The Court of Appeal also required the production of booking notes and bills of lading with respect to previous shipments which, on a reading of the trial decision, unreported 21 January 2000 in docket T-1942-98, were not mentioned in the affidavit material and production of which was denied by the Motions Judge. In essence what the Court of Appeal has done in *Stella Jones* is not only to broaden cross-examination on an affidavit so that it may extend to relevant matters well beyond the four corners of the affidavit, but also to broaden production of documents by requiring production of material related to previous dealings, being relevant documents clearly outside of the affidavit material itself. The Court of Appeal was of the view that it was not open to the motions judge to exclude the possibility that previous dealings might shed relevant light. Of course cross-examination and document production arising out of cross-examination are bounded by what is relevant, including relevance as discussed by Mr. Justice Hugessen in *Merck Frosst* (supra) and by the Court of Appeal in *Stella Jones Inc.* (supra).

**29** I put emphasis on the Court of Appeal decision in *Stella Jones Inc.* because I do not accept the argument of Crown that in requiring answers or documents I should not go back in time beyond the 27 August 2002 letter, or perhaps not earlier than 6 June 2002, when there was both some sort of decision apparently made, by the Investigations Division, that the audit process ought to be recommenced, for to take a more limited approach would deny the consideration of all relevant factors as mandated by the Supreme Court in *Jarvis* (supra). I also note that in June of 2002 the CCRA contemplated a form of the 27 August 2002 letter. Further, the evidence on this motion indicates that at the time of the cross-examination of Ms. Pumple, in January of 2003, material related to some of the Applicants had not been returned to the Audit Division, but was still with the Investigations Division.

#### Minister's Predominant Purpose

**30** Before turning to the requests for individual documents, answers to specific questions and the matter of re-attendance for further cross-examination, I should consider the nature of the predominant purpose test referred to in *Jarvis* (supra). The propriety of a requested document or answer may depend on their relevancy in the context of the predominant purpose test. More specifically, the Supreme Court of Canada has suggested an open-ended list of factors which may go to indicate whether the line, between a cooperative audit for tax assessment purposes and the crystallization of an adversarial relationship when the predominant purpose of an investigation is a determination of penal liability, has been crossed.

**31** In *Jarvis* the Supreme Court of Canada speaks of the necessary balance required between the principle against self-crimination and the need to make all evidence available in order to do



fundamental justice, in essence a tension between privacy and state interest (see pages 795 and 797). In *Jarvis*, just as in the present instance, a liberty issue is at stake, there being no presumption of confidentiality, for once an auditor has information or documents, that material may go to the Investigations Division.

**32** The predominant purpose test is not satisfied by a mere suspicion raised by minor contact between auditor and investigator: that does not signify a cross of the Rubicon between the section 231 requirement that documents be produced to an auditor and a clear adversarial relationship between the taxpayer and the Minister.

**33** *Jarvis* teaches that there is no crystallization until there has been a formal referral of a file to the Investigations Division, however in the present instance, there was such a referral followed by a return of the file to the Audit Division, where upon the Audit Division sent out the 27 July 2002 letter to which was attached the very pointed investigation type questionnaire, raising more than a mere suspicion relating to the predominant purpose.

**34** Certainly, applying *Jarvis*, where a file has been sent to the Investigations Division, that is a factor going to define the relationship between the taxpayer and the CCRA, just as is the reason for the return of the file from the Investigations Division to the Audit Division. As the Supreme Court of Canada observed at page 806 in *Jarvis*, one must consider whether the return of the file is because the Investigations Division has declined to take part on the basis there should merely be an audit, or because there is another agenda, that of allowing the Audit Division to use their easy entry into the taxpayer's records to obtain evidence to support a later prosecution and penal liability. Included in the factors to examine which may bear on determination of the one dominant purpose of the CCRA are:

- (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
- (b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- (c) Had the auditor transferred his or her files and materials to the investigators?
- (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
- (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
- (f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's mens rea, is the evidence relevant only to the taxpayer's penal liability?
- (g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal

investigation?

[Jarvis at 806-807]

This list contains a broad range of factors and moreover is, as I have said, open-ended.

**35** If a question or a document might be relevant and proper on cross-examination, using my earlier analysis, and might reasonably go to establishing the predominant purpose of the Minister's inquiry, such questions are answerable and such documents are produceable. Relevant and produceable questions and documents may, on the basis of the Federal Court of Appeal decision in *Stella Jones Inc.* (supra), include those which bear on the earlier dealings or relationships between the Applicants and the Minister and also the relationship, from time to time, between the Investigations Division and the Audit Division.

**36** Just as there may be no clear and absolute line between a CCRA investigation and a CCRA audit there is, in the present instance, no clear and absolute evidence indicating whether the predominant purpose has gone from an initial audit intent, to an investigative and penal intent and whether it reverted to an audit purpose when the file subsequently went from the Investigations Division to the Audit Division, for there is no clear indication that the audit process will be the final disposition. As I read the transcript of the cross-examination of Ms. Pumple, who signed the 27 August 2002 letter, it is, as set out in that letter, that the Applicants are not presently under investigation, although "... a criminal investigation regarding the promotion of transactions of the type claimed on your income tax return has been undertaken.". The 27 August 2002 letter is thus far from an assurance that the Applicants are not at risk of a very real criminal investigation. Moreover, the cross-examination of Ms. Pumple establishes that she had no direct personal knowledge that the Applicants were not under criminal investigation and that she had made no inquiries of the Investigations Division personnel who might have personal or direct knowledge as to what the Investigations Division intended of the criminal investigation.

**37** Here I accept various indicia, as submitted by counsel for the Applicants, that those individuals reasonably believed that they had been and perhaps continue to be under investigation by the Investigations Division for a number of reasons including:

1. The files of the Applicants went to the Investigations Division in April of 2001.
2. From that time until at least January of 2003 there was regular contact between the Audit Division and the Investigations Division as to the 1998 through 2001 taxation years.
3. An Audit Division's employee, Mr. Kuhn, worked with the Investigations Division for some time, although still maintaining, or holding himself out as a member of the Audit Division.

4. In March 2002 the Investigations Division instructed the Audit Division to recommence gathering information for the 1998 taxation year.
5. In July of 2002 the Investigations Division instructed the Audit Division to recommence gathering information in respect of the 1999 and 2000 taxation years and at that point the Audit Division sent out letters and questionnaires, the questionnaire being a point to which I will shortly return.
6. Between June of 2002 and September of 2002 there was a regular exchange of information and emails between the Investigations Division and the Audit Division as to the approach to be taken on resumption of audit activities.

All of this reasonably raises alarm, on the part of the Applicants, that they may still be under investigation, or at least that there may be a clearly contemplated investigation and that for practical purposes there has been a crystallization of an adversarial relationship between the applicant taxpayers and the tax officials, with the predominant purpose of the inquiry being the determination of penal liability, once documents have been gathered from the Applicants by the Audit Division through the so-called cooperative approach with the taxpayers.

**38** Counsel for the Applicants urged a thoughtful reading of the questionnaire sent out by the CCRA with the 27 August 2002 letter. The letter itself calls upon the taxpayers to produce a very thorough and comprehensive package of documents and information. In effect it is a letter requesting books and records: the questionnaire clearly goes far beyond being a request for books and records, but seeks a good deal of information which either was clearly not covered in the extensive production request in the letter and indeed, looks for information which one might be hard pressed to justify merely on the basis of an audit. A thoughtful reading of the questionnaire can easily lead one to the conclusion that the questionnaire was not something dictated by the needs of and drafted by the Audit Division, but rather is a far more pointed and searching request for information which could well have bearing on the criminal investigation. Finally, and this has direct bearing on the provision of answers and production of documents well before June of 2002, Ms. Pumple did agree, in cross-examination, that the review by the CCRA of the 1998 taxation year was connected to an ongoing review of the taxation years 1999 through 2001, and that investigations undertaken by the CCRA dealt not only with the 1998 taxation year, but also with the 1999 through 2001 taxation years. Indeed, it is fair to say that investigations as to the 1998 taxation year were relevant to the subsequent three taxation years, all being a part of one investigation over a number of years.

#### Applicants' Requests for Documents

**39** Question 50 in the 13 January 2003 transcript of the cross-examination of Ms. Pumple refers to a so-called principal file sought by way of the Direction to Attend. As I have indicated, the request in the Direction to Attend is too broad. The result could, in itself, be both a fishing

expedition and a part of a full discovery of documents. However the cross-examination then proceeded, with the marking of a document at question 53 called "Unioncal Trading Joint Venture Binder Index", a document prepared by Ms. Pumple which describes what is contained in the principal file. The Defendant has refused to produce the principal file, even though acknowledging that the principal file is relevant to the extent of the 1999 and 2000 taxation years, but denying its relevance with regard to the 27 July 2002 letter.

**40** Either the document is relevant or it is not: one does not measure relevance in degrees along a scale. The file described by the index which has been produced may well provide background and a basis for the development of and the actual letter of 27 July 2002, information by which to test the predominant purpose of the actions of the Minister as carried out by the CCRA. Moreover, the file requested is apparently in Ms. Pumple's filing cabinet. Its production, as a relevant bundle of documents is justified, for while it may be outside of the four corners of Ms. Pumple's affidavit, it certainly would be indicative of a course of conduct on the part of the Minister and may well have bearing on the issue the Applicants bring to the Court, including the predominant purpose of the CCRA inquiries. The so-called principal file, referred to in question 50 and following, is to be produced.

**41** Question 58 of the 20 January 2003 transcript is the culmination of answer 52, a babbled and somewhat incomprehensible answer by a discombobulated witness unsure of both what she knew and whether she should tell what she knows. The answer at question 52 certainly establishes a meeting by Ms. Pumple with the Investigations Division in April of 2001. Counsel for the Respondent says the result was a cease and desist direction to the Audit Division by the Investigations Division, which continued until June 2002.

**42** However, answer 52 also raises the likelihood that a taxpayer, involved in one of the tax loss arrangements had, with her lawyer, come to the Investigations Branch: Q So Investigations asked you to refer to them. Do you know how Investigations became aware of this project?

A I have some -- I have some knowledge.

Q Can you please tell us about that?

A I hope I'm allowed to say -- I mean I don't know, it -- as far as I understand it, two things probably precipitated their involvement. But the one thing that I actually have direct knowledge of is that an individual who was involved in one of the Unioncal Trading Joint Ventures came forward with her lawyer to -- to Investigations. And so this woman was involved in -- in one of the Unioncal Trading Joint Ventures, and that was the tie-in that -- enough of a tie-in -- I'm speculating on what -- what Investigations did there, so I probably shouldn't say that. But that's -- that precipitated them finding that, oh, right, Victoria has some Unioncal Trading Joint Ventures files, and -- and so does Penticton. I think those were the two. And then -- then Investigations said after they looked at what they

got, I assume -- I mean I'm assuming all sorts of things here. But it's logical to assume that they looked at the information that was provided to them, saw a connection and said, right, we had -- we had a meeting and they said, write up what you know.

The reference to "Unioncal Trading Joint Ventures" is apparently what the CCRA called the present grouped tax loss arrangements.

**43** There are minutes of the April 2001 meeting, Ms. Pumple having a copy but not producing it. While at this point there is nothing to indicate that there were grounds to lay charges, the action of transferring the files to the Investigations Division does fall within one of the factors to consider suggested by the Supreme Court of Canada in Jarvis.

**44** Production of this material was initially denied on the grounds that Ms. Pumple was not required to produce anything or to inform herself of anything. However, on the case law, that is not the situation (supra, paragraphs 25 through 29) and all the more so in that Ms. Pumple has the minutes in her possession. On the basis of the case law which I have canvassed, including as to production of material relating to previous dealings, the minutes should be produced.

**45** Question 67 of the 20 January 2003 transcript involves a write up of what Ms. Pumple thought she knew when she transferred the audit files to the Investigations Division. I do not see that some sort of a covering memorandum, clearly given by a witness who, from her testimony, seems to have little or no idea what was going on, is anything more than a fishing expedition, for the Applicants have established that the files were, at that point, transferred from the Audit Division to the Investigations Division. Moreover, Ms. Pumple's view of what might or might not be happening has no relevance as to the intent of the Minister evidenced by whatever Investigations Division decided to do. The referral document, question 67, need not be produced.

**46** Questions 114, 128 and 136, from the 20 January 2003 transcript, deal with so-called green light memoranda, being memoranda from the Investigations Division to the Audit Division, if I understand it correctly, to go ahead with an audit and the issuance of various letters. Some of that material apparently relates to the carrying forward of losses, however this line of questioning leads toward and culminates in question and answer 136, establishing that various audits and notices of reassessment being sent to Mr. Stanfield.

**47** Here we have a situation specifically touched upon by the Supreme Court of Canada in Jarvis, the apparent return of the files from the Investigations Division to the Audit Division. The directives from the Investigations Division could conceivably show an intent by the investigators to use the auditors as their agents in the collection of material. This is a reasonable possibility given the pointed and searching request for information which, I have already noted, could well have bearing on the criminal investigation. It is material which should be examined in order to go toward the determination of the predominant purpose of the Minister. What I will refer to generally as the directives of the Investigations Division to the Audit Division to proceed, referred to in questions

114, 128 and 136, are to be produced.

**48** Question 595 of the 20 January 2003 transcript refers to chronologies prepared by various auditors of the Applicants, early in 2001, being information, judging from the lead up to question 595, which might relate to the investigation by the Investigations Division. This material is similar to that sought and which I have denied, in question 67. It need not be produced.

**49** At question 793 of the 20 January 2003 transcript at issue is discussion of a meeting of 16 January 2003 and the production of minutes or other documents relating to that meeting. The essence of the objection to production is that a 16 January 2003 meeting cannot possibly shed any light on the 27 August 2002 letter and that the meeting was to discuss an upcoming statutory bar. The second branch of the objection may have some validity. However the Supreme Court, in *Jarvis*, intends that one look at all of the surrounding factors and it may be that the meeting did deal with information being collected by the Audit Division and again I refer to the probing questionnaire sent out by the Audit Division, indeed a questionnaire which would seem to taint what has taken and is taking place. The question 793 material is to be produced.

#### Applicants' Request for Answers

**50** All of the questions to which the Applicants seek answers arise out of the 20 January, 2003 transcript.

**51** Questions 53 to 55 deal with a meeting with the Investigations Division at their request, in April 2001. At issue is the date of the meeting. I have considered the submissions of counsel and have re-read the passages at issue and the questions leading there. I do not see either formal relevance or legal relevance, as discussed by Mr. Justice Hugessen in *Merck Frosst Canada* (supra). The actual date of the April 2001 meeting is immaterial and need not be provided.

**52** Question 69 deals with a different aspect of the April 2001 meeting. From the questions and answers leading up to that question, which is whether anyone from head office was involved in the meeting, it is clear that counsel for the Applicants had become frustrated by the apparent lack of knowledge of Ms. Pumple and of her professed ignorance as to what her job was, and therefore finally asked whether there was anyone from head office present, someone who perhaps could give a more lucid account of what the meeting was about. Thus the request for the name of someone who was at the meeting who might actually know what happened.

**53** There has certainly never been any property in witnesses and that is the tenor of Mr. Justice Berger's discussion as to naming witnesses in *Ansley v. Ansley* [1973] 5 W.W.R. 181, the historic aspects of decision being interesting in that the decision predates the codification of the point in the British Columbia Rules of Practice. There is a similar codification in Federal Court Rule 240 requiring the provision of names and addresses of witnesses on examination for discovery. But of course Rule 240 applies only to examination for discovery in actions, not cross-examination on affidavits.

**54** Somewhat more relevant is the decision of Mr. Justice Rothstein, as he then was, in *Merck Frosst Canada Inc. v. Canada* (1994) 75 F.T.R. 97 at 99, where he adopts the view that cross-examination on an affidavit must be relevant, must be fair and that "There must be a bona fide intention of directing the question to the issue in the proceeding or the credibility of the witness." (page 99). It may well be that counsel for the Applicants is, in this instance, trying to test the credibility of the witness who, while in attendance, seems to have no idea what happened at the meeting in April of 2001. To the contrary, counsel for the Respondent says that this is a fishing expedition. However the question goes beyond that. Counsel for the Applicants is merely trying to find out what happened at a meeting about which the witness can recall little. It is clear from the discussion of counsel, at question 69, that there is a testing of the witness going on, the witness having said that she made appropriate inquiries, but a reading of the transcript demonstrates it is increasingly less likely that she had done so. The witness does, in subsequent questions, set out who in fact was at the meeting. However, the simple, proper and relevant question is whether anyone from head office was involved and that should be answered.

**55** Questions 147 and 148 raises the issue of when the witness believed the 1999 audits had commenced. Counsel for the Applicants has the best answer he is going to obtain, from the witness, as to when she believes the audit commenced, at questions 163 and 164. There the witness confirms that the audit was ongoing in the year 2000. The questions need not be further answered.

**56** At question 181 the issue is whether the department had made a decision to issue reassessments for the 1999 and 2000 taxation years. Counsel has an answer to that at question 182, being a negative answer.

**57** At questions 187 and 188 the issue is whether, there being an upcoming time bar, from the context I think for the 1999 taxation year, seeking waivers from the taxpayers has been considered. Here I question the relevance of the inquiry. However the witness does volunteer that no waiver has been requested. Thus the answer has already been provided.

**58** At question 199 at issue is whether the Tax Department has considered levying penalties for the 1999 year. Again, that has been answered, in the negative, at question 201.

**59** Question 207 is quite speculative, the issue being whether there was any reason why penalties would not be levied for the 1999 year. The answer by the witness is that no decision has been made. I do not see the relevance of exploring something that has not come about and seems not to be directly connected to the predominant intent, or any other aspect of this proceeding. The question need not be answered.

**60** Question 239 asks the date at which Mr. Kuhn, of the Audit Division, went over to Special Investigations. This deals with the secondment of Mr. Kuhn to the Investigations Division. Counsel for the Crown agrees, in the transcript, to provide a date for the secondment, or at least a date as close as possible. Thus an answer to the question is pending.

**61** At question 540 at issue are the names of 60 or 70 Applicants the cases of whom Mr. Kuhn might have been involved with. Here there is no relevance unless the taxpayers involved in those cases are also Applicants in the present proceeding. Counsel for the Crown goes on to agree to provide that information, to the extent that the Crown's witness is required to inform herself. All of this bears on the general conduct of the CCRA and whether it was consistent with a criminal investigation, whether an auditor was acting as an agent for the Investigations Division and bears on a conclusion as to whether the compliance audit has in reality become a criminal investigation. The question is to be answered.

**62** At question 792 counsel asks, whether at the meeting on 16 January 2003, there was any discussion as to the passage of information from the Audit Division to the Investigations Division, with the response being to the effect that whatever happened in January of 2003 is irrelevant. Yet if, for example, that topic had come up, it would certainly be relevant within the framework set out by the Supreme Court in Jarvis. Counsel for the Respondent suggests that this is a fishing expedition. However, it is clearly an element that would fall within Jarvis and is needed in order to determine the predominant purpose of the inquiry. The question is to be answered.

**63** At question 793 the issue is whether the subject of Ms. Pumple's cross-examination was discussed in the course of the 16 January 2003 meeting. Counsel for the Crown makes the point that he has not coached or discussed the cross-examination with Ms. Pumple and that I accept. I do not see the relevance of discussion by the witness, with others in her department, as to what is going on in the legal proceedings. There is a lack of relevance. The question need not be answered.

**64** At question 862 at issue is whether Ms. Pumple had any communication, as a member of a group of CCRA people dealing with the files of the Applicants, about any different path that might have been followed, as opposed to that set out in Exhibit 4, being material prepared by a Mr. Makeno. Here I see neither formal nor legal relevance. All the more so in that the question deals with a decision as to penalties which has not been made. The question need not be answered.

**65** The thrust of question 1142 is whether the names of the Applicants, all of whom are being audited for the 1999 and 2000 taxation years, came to the Audit Division by way of the Investigations Division: counsel objects to the question as irrelevant. However, counsel does get an answer at questions 1142 through 1145 to the effect that the Investigations Division, or as it is called in this instance, "Special Investigations", did not furnish any of the names of the Applicants to the Audit Division for auditing. There need be no further answer to question 1142.

## CONCLUSION

**66** Success has been mixed. However it is appropriate in this instance that Ms. Pumple re-attend for further cross-examination, informing herself where that is required, for as I have pointed out a witness can neither hide behind an overly carefully drafted affidavit, nor be a proper witness, in the sense of being an agent for a large entity, without making reasonable inquiries so as to become informed. Ms. Pumple will therefore answer questions as required in these reasons and all proper



questions arising both from those answers and from the documents produced.

**67** In a complex cross-examination on an affidavit, just as in the case of a complex discovery, there is often need for a re-attendance, almost as a matter of course. That should not necessarily be equated with the situation involving a contrary witness, who often must re-attend at his or her own expense, although being an uninformed witness can approach that situation. All of the circumstances considered, the costs of re-attendance will be costs in the cause.

**68** Success having been mixed, the costs of this motion will also be in the cause.

**69** Time for the filing of the Applicants' Record is extended until 20 days after the further cross-examination has been completed.

HARGRAVE, PROTHONOTARY

cp/e/qw/qlaim/qlhcs

*Case Name:*

**Sawridge Band v. Canada**

**Between**

**Sawridge Band, plaintiff, and  
Her Majesty the Queen, defendant, and  
Native Council of Canada, Native Council of Canada  
(Alberta), Non-status Indian Association of Alberta and  
native Women's Association of Canada, interveners**

**And between**

**Tsuu T'ina First Nation (formerly the Sarcee Indian  
Band), plaintiff, and  
Her Majesty the Queen, defendant, and  
Native Council of Canada, Native Council of Canada  
(Alberta), Non-status Indian Association of Alberta and  
Native Women's Association of Canada, interveners**

[2005] F.C.J. No. 1087

[2005] A.C.F. no 1087

2005 FC 865

2005 CF 865

140 A.C.W.S. (3d) 242

Dockets: T-66-86A, T-66-86B

Federal Court  
Ottawa, Ontario

**Snider J.**

Heard: In writing.

Judgment: June 17, 2005.

(13 paras.)

*Civil evidence -- Witnesses -- Examination -- Cross-examination -- Civil procedure -- Applications and motions.*

Motion by Sawridge Band for an order compelling the Crown to produce an informed witness to respond to Sawridge's cross-examination on affidavit. The Crown filed a motion to determine whether witnesses proposed to be called by Sawridge could have offered admissible and relevant information. In support of its motion, the Crown filed an affidavit attaching several documents relied on by the Crown. The affidavit made no mention of the documents. Sawridge sought to cross-examine the affiant. Sawridge claimed the affiant did not have sufficient knowledge about the documents to be cross-examined.

HELD: Motion dismissed. Sawridge's request was of a general nature. Sawridge did not provide the court with a list of proposed questions. It made no attempt to cross-examine the affiant before bringing the motion. The documents were related to the main action. Cross-examination on affidavit was not the appropriate procedure to raise questions about the main litigation. The documents had no relevance to the Crown's underlying motion. The proposed cross-examination extended beyond the matters in respect of which the affidavit was filed.

**Statutes, Regulations and Rules Cited:**

Federal Court Rules Rule 369

**Counsel:**

No counsel mentioned.

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REASONS FOR ORDER AND ORDER

**1 SNIDER J.:**-- The genesis of this motion by the Plaintiffs is an interlocutory motion by the Defendant, Her Majesty the Queen (the "Crown"). The Crown, in her motion, seeks to determine whether some of the witnesses whom the Plaintiffs propose to call at trial can offer relevant and admissible testimony on the matters in issue in the actions. In support of her motion, the Crown includes the affidavit of Lana Dolezal. The first part of Ms. Dolezal's affidavit consists of an account of events related to the motion. The second part of the affidavit attaches copies of documents (the "Documents") which are relied upon by the Crown, in her Written Representations. Ms. Dolezal makes no statements or comments about the Documents but merely attaches them to her affidavit.

**2** In the motion before me, made in writing pursuant to Rule 369 of the Federal Court Rules, the

Plaintiffs seek an order instructing the Crown to produce an informed witness to respond to the Plaintiffs' cross-examination on the affidavit, as submitted in the Plaintiffs' letter dated January 12, 2005. The relevant portion of that letter is as follows:

First, I wish to cross examine on the affidavit filed by the Crown sworn January 6, 2005 in support of their recent motion... .

The affidavit was sworn by a paralegal in the Edmonton Regional office of the Department of Justice named Lana Dolezal. Much of the affidavit provides background material most of which is non contentious. However, in the affidavit beginning at paragraph 13 there are attached a number of documents concerning federal government policy on self government; the implementation of the inherent right of aboriginal self government; agreements between Her Majesty the Queen and the Sawridge Band; and a discussion paper with respect to the Sawridge Band government negotiations which was apparently prepared by the Department of Indian Affairs dated July 7, 1989. I wish to cross examine with respect to these paragraphs and documents.

I want to say at the outset that I do not believe that a paralegal is the correct person to answer the kinds of questions that I intend to ask with respect to these documents and I am going to ask the Crown to produce an informed person who can answer questions. For example, my preference would be to ask those who prepared and are responsible for these policies procedures and documents to be produced to answer questions. The Crown has chosen to rely on these documents. I believe it is only fair that someone who can answer questions in relation to them be produced... .

**3** As noted, the requested relief is that I order the Crown to produce a different person to respond to questions about the Documents. However, the first issue to be determined is whether the Plaintiffs have any right to compel answers of the deponent, Ms. Dolezal. This is a threshold question. If the Plaintiffs cannot compel the chosen deponent to respond, it follows that another person should not be compelled to answer the questions.

**4** In my view, the most succinct statement of the current state of the law on the scope of cross-examination on an affidavit, in the context of an interlocutory motion such as this, is set out by Reed J. in *Castlemore Marketing Inc. v. Intercontinental Trade and Finance Corp.* [1996] F.C.J. No. 201, at para. 1:

An affiant is required to answer questions on matters which have been set out in the affidavit as well as any collateral questions arising from his or her initial answers. In *Bally-Midway Mfg. Co. v. M.J.Z. Electronics Ltd.* (1984), 75 C.P.R.

(2d) 160, Mr. Justice Dubé stated that cross-examinations on affidavits are confined to "the issues relevant to the interlocutory injunction and/or all allegations contained in the affidavit". In [Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (No. 2) (1972), 6 C.P.R. (2d) 169 (F.C.T.D.)], Mr. Justice Heald relied upon jurisprudence which held that a person cross-examining on an affidavit was not confined to the area within the four corners of the affidavit but could cover any matter relevant to the determination of the issue in respect of which the affidavit was filed. In addition to being relevant, the question of course must not be of such a general nature that it cannot be intelligently answered, and the Court will exercise its discretion and disallow any question which it considers in the nature of a "fishing expedition".

5 The Plaintiffs relied on many cases to support their position on this motion. However, none of those cases reach conclusions or express views that are in disagreement with the foregoing extract from Castlemore Marketing.

6 Applying these principles to the case before me, I would dismiss this motion.

7 The first difficulty with the motion before me is that the Plaintiffs' request is of a general nature making it impossible for any meaningful response. The Plaintiffs have not provided any information on the specific nature of its proposed cross-examination. All we have are general statements that the Plaintiffs want to ask questions about the Documents.

8 To support their motion, the Plaintiffs referred me to a number of cases where deponents were compelled to respond to questions or to inform themselves in order to respond. However, I find this jurisprudence to be unhelpful since, in all of those cases referred to, particular questions or lines of question had been identified by the moving party. In this case, the Plaintiffs have made no attempt to question Ms. Dolezal before bringing this motion and, thus, could not bring to this Court any evidence that particular questions had been refused. Nor have they set out a list of proposed questions. Further, the Plaintiffs have not provided me with any jurisprudence where this or any Court compelled an affiant to inform himself about and answer questions that were not specified or were described in general terms such as are before me.

9 A party attempting to reply to a motion to compel answers to questions or to compel production of an affiant who can respond must surely be able to clearly understand what information is being sought by the moving party. In this case, both the Crown and this Court are left in the dark, having to speculate as to the questions that are to be posed. In effect, the Plaintiffs seek to conduct a "fishing expedition". On this basis alone, the motion should be dismissed.

10 Further, even if I speculate or infer, from the filed motion materials, the specifics of the intended questions, I would still dismiss the motion. It appears that the Plaintiffs wish to examine Ms. Dolezal, or others, on the background and contents of a series of documents related to a matter that may or may not be part of the main litigation. In my view, cross-examination on this particular

affidavit is not the appropriate vehicle for raising questions related to the pleadings themselves.

**11** The Plaintiffs submit that the Crown has chosen to rely on the Documents and that "it is only fair" that they be allowed to cross-examine on those Documents. I am not persuaded that the Crown has relied on the Documents in the broad manner suggested by the Plaintiffs. The Crown has put forward the Documents for a limited purpose, that being to show that negotiations between the Crown and the Plaintiff Sawridge Band pursuant to the Crown's self-government policy were conducted on a "without prejudice" basis. Thus, it would be improper to allow the Plaintiffs to cross-examine on the content of the Documents; the content of the Documents is not a matter in respect of which the affidavit was filed. Cross-examination on the affidavit should be limited to the issue raised by the motion to which the affidavit relates. In my view, any questions that go beyond the question of whether the negotiations were privileged or other matters specifically addressed in the Crown's motion would have no impact on the outcome of the underlying motion of the Crown and should, thus, be disallowed.

**12** Given that the Plaintiffs have not persuaded me that I should compel Ms. Dolezal to respond to any questions posed on cross-examination as are suggested (but not specifically set out), it follows that I am not prepared to compel the Crown to produce a person to respond. In any event, the Plaintiffs provided me with no authority, within the Federal Court Rules or elsewhere, which requires a party to produce an informed deponent in place of the person who swore the affidavit.

**13** In summary, I decline to grant the requested relief on the basis that:

1. The Plaintiffs have not identified with any specifics the questions they wish addressed by Ms. Dolezal or any other affiant;
2. If the Plaintiffs propose to cross-examine on the contents of the Documents beyond the limited purpose for which they are put forward by the Crown in her motion, such cross-examination would extend beyond the matters in respect of which the affidavit was filed.

#### ORDER

This Court orders that the motion is dismissed with costs payable forthwith.

SNIDER J.

cp/e/qlspg

\*\* Translation \*\*

*Case Name:*

**Sam Lévy & Associés Inc. v. Canada (Superintendent of  
Bankruptcy)**

**Between**

**Sam Lévy & Associés Inc. and Samuel S. Lévy, trustee,  
applicants, and  
Alain Lafontaine, respondent**

[2005] F.C.J. No. 768

[2005] A.C.F. no 768

2005 FC 621

2005 CF 621

Docket T-1616-04

Federal Court  
Montréal, Quebec

**Blanchard J.**

Heard: April 25, 2005.

Judgment: May 4, 2005.

(26 paras.)

*Civil evidence -- Documentary evidence -- Affidavits -- Cross-examination on -- Application to  
overrule objections raised by the deponent of an affidavit on a cross-examination allowed in part --  
Questions that were relevant were allowed and the objections raised against such questions were  
set aside.*

Application by Sam Levy & Associates Inc. for an order to overrule objections of the respondent Superintendent of Bankruptcy -- Levy was a trustee in bankruptcy -- It was investigated to determine if its activities violated the Bankruptcy and Insolvency Act and whether a hearing was justified -- Superintendent in May 2001 directed Levy to take six conservatory measures -- Purpose of these measures was to preserve the assets under its administration -- Levy applied for judicial review after the Superintendent in February 2004 refused to lift or amend the measures -- Superintendent was cross-examined on his affidavit and raised the objections that were the subject of this application -- Objections pertained to the relevance of the questions that were asked and related to two issues -- Issues were whether Levy could cross-examine on every paragraph of the affidavit and whether it could cross-examine on the paragraphs related to the investigation -- HELD: Application allowed in part -- Levy could cross-examine on the facts set out in the affidavit provided that the questions were legally relevant -- Subject of the judicial review application was the February 2004 decision and not the original May 2001 decision that imposed the measures -- Questions about the measures and the February 2004 decision were allowed and the objections raised against them were overruled -- Questions regarding the facts that surrounded the issuance of the measures in May 2001 were not legally relevant -- Questions about them were disallowed and the objections raised against them were sustained.

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 14.01(1), s. 14.03

Canadian Bill of Rights, s. 1(a), s. 2(e)

Federal Court Rules, SOR/98-106, s. 83

**Counsel:**

Daniel Des Aulniers, for the applicants.

Robert Monette, for the respondent.

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**REASONS FOR ORDER AND ORDER**

BLANCHARD J.:--

***INTRODUCTION***

**1** This is a motion to obtain an order overruling the objections raised by the respondent during a



cross-examination on affidavit.

- 2 By means of this motion, the applicants ask this Court to
  - (1) allow the motion;
  - (2) allow the applicants to cross-examine the respondent on all paragraphs of his affidavit and, more specifically, on the reasons for and circumstances surrounding the conservatory measures issued on May 10, 2004;
  - (3) grant the applicants an extension of time to file their record at a later date to be determined by the Court; and
  - (4) make no order as to costs, unless contested.

### **BACKGROUND**

3 The respondent is acting in his capacity as a delegate of the Superintendent of Bankruptcies. The applicants are trustees in bankruptcy. On July 14, 2000, the respondent instructed Michel Leduc to investigate the applicants' activities and prepare a report to determine if breaches of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the BIA) justified holding a hearing into the trustees' conduct.

4 On May 10, 2001, the respondent, pursuant to the authority granted to him by the BIA, directed the applicants to take six distinct conservatory measures. These measures were primarily aimed at preserving the assets under the applicants' administration.

5 On January 16, 2004, the applicants asked the respondent to lift or amend the conservatory measures, which the respondent refused to do on February 12, 2004. The applicants are therefore applying for judicial review of this decision.

6 On February 17, 2005, the respondent was cross-examined on his affidavit. Respondent's counsel raised several objections. The applicants are asking this Court to overrule those objections.

### **ANALYSIS**

7 The right to cross-examination on affidavit is provided for under section 83 of the *Federal Court Rules*, SOR/98-106, as amended by SOR/2002-417 and SOR/2004-283 (the Rules).

#### **83. Cross-examination on affidavits**

A party to a motion or application may cross-examine the deponent of an affidavit served by an adverse party to the motion or application.

\* \* \*

### 83. Droit au contre-interrogatoire

Une partie peut contre-interroger l'auteur d'un affidavit qui a été signifié par une partie adverse dans le cadre d'une requête ou d'une demande.

**8** The applicable case law has established a number of basic rules governing the scope of a cross-examination on affidavit.

**9** First of all, a cross-examination on affidavit should not be confused with an examination for discovery, since the former is much more restricted in its scope. Hugessen J.A., in *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 1847 (QL), named the most important points distinguishing the two proceedings:

It is well to start with some elementary principles. Cross-examination is not examination for discovery and differs from examination for discovery in several important respects. In particular:

- (a) the person examined is a witness not a party;
- (b) answers given are evidence not admissions;
- (c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
- (d) production of documents can only be required on the same basis as for any other witness i.e. if the witness has the custody or control of the document;
- (e) the rules of relevance are more limited.

**10** Hugessen J.A. added that, in the context of an application for judicial review, it is the affidavits filed by the parties that define the formal relevance of the issues. He wrote:

Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.

**11** Hugessen J.A. went on to explain that the questions asked on cross-examination must also meet the requirement of legal relevance:

Over and above formal relevance, however, questions on cross-examination must

also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted. (I leave aside questions aimed at attacking the witness's personal credibility which are in a class by themselves). Thus, to take a simple example, where a deponent sets out his or her name and address, as many do, it would be a very rare case where questions on those matters would have legal relevance, that is to say, have any possible bearing on the outcome of the litigation.

**12** The ability to object to questions is necessarily related to the scope of a cross-examination on affidavit and limited by the context of this proceeding. With reference to the scope of the cross-examination, the deponent is entitled to refuse to answer if the proper scope of the cross-examination is exceeded: *Global Television (Global Lethbridge, a Division of CanWest Global Communication Corp.) v. Communications, Energy and Paper Union of Canada*, 2002 FCA 376.

**13** In the case at bar, the respondent's arguments clearly indicate that the objections relate to relevance. Thus, according to the case law, to determine if an objection based on relevance has merit, we must

- (1) consider the question's formal relevance, that is, whether it regards facts set out in the deponent's affidavit or in another affidavit filed in connection with the case; and
- (2) consider the question's legal relevance, that is, whether it regards a fact whose existence or non-existence could contribute to determining if the remedy sought can be granted or not.

**14** The applicants submit that it is very important that the respondent be cross-examined on the way in which the investigations that led to the conservatory measures were carried out. The applicants are particularly concerned about the conduct of investigator Michel Leduc, the author of one of the reports which the respondent used as a basis for issuing the conservatory measures, for the following reasons:

- (1) on January 19, 2005, in a similar case, Superintendent Mayrand, the delegated authority, rendered a decision to the effect that investigator Michel Leduc should no longer be allowed to investigate the professional conduct of trustees;
- (2) the same investigator, Michel Leduc, investigated the present case, so it is therefore important, according to the applicants, to know how Mr. Leduc conducted his investigation; and
- (3) Michel Leduc was acting on behalf of the respondent.

**15** The applicants feel that they need to know the reasons and circumstances that led to the

conservatory measures in order to understand the decision to maintain those measures. They argue that prohibiting them from asking the respondent questions about the respondent's affidavit is contrary to the Rules and to the principle of a cross-examination on affidavit. The applicants say that, if the facts raised by the respondent cannot be contradicted or explained, they will be unable to file their records.

**16** In reply, the respondent submits that the 31 objections raised during his cross-examination on affidavit have merit. The respondent contends that the dispute before this Court with regard to the judicial review sought by the applicants consists in determining if there are grounds to review the respondent's February 12, 2004 decision to refuse to lift the conservatory measures.

**17** The respondent points out that the applicants chose not to contest the May 10, 2001 decision before this Court, even though this avenue was open to them. Therefore, they cannot try to do the same thing indirectly by means of judicial review.

**18** It is helpful to consider the remedy sought by the applicants in connection with their application for judicial review. They claim the following remedies:

- (1) allow the application for judicial review;
- (2) set aside the February 12, 2004 decision of respondent Alain Lafontaine upholding all of the conservatory measures issued against the applicants on May 10, 2001;
- (3) say and declare that there is no objective threat to the integrity of the assets administered by trustees Samuel S. Lévy and Sam Lévy & Associés Inc. as at February 13, 2004, and that consequently section 14.03 does not apply in the present case, and set aside for all intents and purposes the conservatory measures directions given on May 10, 2001, by the respondent Alain Lafontaine;
- (4) declare that upholding the conservatory measures issued pursuant to section 14.03 of the *Bankruptcy and Insolvency Act* violates paragraphs 1(a) and 2(e) of the *Canadian Bill of Rights*; and
- (5) declare the conservatory measures upheld by Alain Lafontaine in his February 12, 2004 decision to be null.

**19** It was agreed at the hearing that the questions and objections at issue in this motion raise two fundamental questions:

- (1) Can the applicants cross-examine on every paragraph of the affidavit?
- (2) Can the applicants cross-examine on the paragraphs relating to the investigation carried out by investigator Michel Leduc?

**20** With regard to the first question, I am of the opinion that the principles set out by Hugessen J.A. in *Merck Frosst, supra*, apply. The applicants may cross-examine on the facts set out in the affidavit, provided the questions are legally relevant.

**21** The legal relevance of the questions must be determined in light of the legal debate regarding the judicial review application before this Court, that is, whether there are grounds to review the respondent's February 12, 2004 decision not to set aside or amend the conservatory measures directions issued on May 10, 2001. That these measures are in dispute is not contested; in fact, the respondent concedes this point. At paragraph 15 of his affidavit, he states the following:

[TRANSLATION] At issue in this case are the conservatory measures that I issued on May 10, 2001, and my February 12, 2004 decision to have them remain in force; the disciplinary report, meanwhile, is currently before the Superintendent of Bankruptcies delegate, the Honourable Mr. Justice Fred Kaufman, retired, of the Quebec Court of Appeal. [Emphasis added.]

**22** However, the respondent does indicate in his affidavit that his decision to refuse to lift or amend the conservatory measures was in no way based on the interim report of investigator Michel Leduc; rather, it was based on the respondents' failure to provide explanations relating to their professional conduct.

[TRANSLATION]

17. The events subsequent to the issuance of the conservatory measures on May 10, 2001, show that, despite the numerous occasions when the trustees could have explained their conduct and in so doing have said conservatory measures lifted, the trustees deliberately avoided any sort of debate before a court of law or administrative tribunal that would allow them to explain their version of events and their actions as trustees in bankruptcy.
18. Thus, since May 10, 2001, the applicants have still not explained the misconduct upon which the conservatory measures are based or the acts mentioned in the disciplinary report.

...

31. To this day, the applicants have made no attempt to explain how I erred in my assessment of the facts set out at paragraph 23 of this affidavit or how my "reasonable grounds to believe" that the assets should be preserved were baseless.
32. I might very well have decided to lift the conservatory measures if I had been provided with satisfactory explanations for the omissions, irregularities and misconduct set out at paragraph 23 of this affidavit, thus avoiding the array of proceedings filed by the applicants in Superior Court,

the Quebec Court of Appeal and the Supreme Court of Canada, as well as with the delegate of the Superintendent of Bankruptcy and, now, before this honourable Court.

...

48. At any rate, and as mentioned in the preceding, the applicants never provided me with any explanation whatsoever for the deficiencies in their administration as set out at paragraph 23.

...

79. Rather than exercise their right to be heard and argue their position as provided for under subsection 14.01(1) of the BIA and possibly put an end to the conservatory measures by explaining their conduct, the trustees instead chose to initiate an array of proceedings aimed at avoiding this hearing, which could have taken place as early as 2002.

...

92. I issued the conservatory measures, including those named in this application, on May 10, 2001, because I had reason to believe that the assets administered by the applicants were at risk, given the applicants' conduct and, more specifically, the facts set out at paragraph 23 of this affidavit. Since that time, two avenues have been open to the trustees to lift or terminate the conservatory measures. On the one hand, the trustees could have marshalled supporting evidence to demonstrate to the undersigned that the grounds on which said measures were issued were erroneous, in which case the undersigned would have gladly considered lifting them. On the other hand, in proceeding with the hearing on their professional conduct, they would have had an excellent opportunity to explain to delegate Kaufman why the allegations upon which the conservatory measures were based were incorrect.
93. Neither of these avenues was taken by the trustees, such that, to this day, there are still reasonable grounds to believe that action on my part was required to preserve the assets, and there is nothing to warrant making any changes in this regard.

**23** It is important to note that the applicants did not contest the May 10, 2001 decision to issue conservatory measures. The subject of judicial review is the February 12, 2004 decision not to lift or amend the conservatory measures. These measures, which are set out at paragraph 23 of the respondent's affidavit, are thus still in force.

**24** To meet the requirement of legal relevance, the applicants, in conducting their cross-examination on affidavit, must ask questions about facts whose existence or non-existence can help determine if the remedy sought can be granted or not. In this case, these facts concern the February 12, 2004 decision and the conservatory measures still in force, but not the issuance of those measures, which arose out of the May 10, 2001 decision. The latter decision is not the subject of the judicial review in this case.

**25** Consequently, and subject to the ultimate ruling of the reviewing judge, the questions concerning the conservatory measures themselves and the February 12, 2004 decision not to lift or amend them are allowed, and the objections raised against them are overruled. The questions concerning the facts surrounding the issuance of the conservatory measures on May 10, 2001, are not legally relevant; therefore, those questions are disallowed, and the objections raised against them are sustained.

**26** More specifically, the objections sustained include, but are not limited to, those raised by the respondent to the questions posed by the applicants with regard to the following facts:

- (a) the respondent's authority to intervene to have legislative provisions amended;
- (b) the training offered to investigator Michel Leduc;
- (c) the respondent's professional history;
- (d) the name of the person who decided to appeal delegate Kaufman's decision to postpone the disciplinary hearing;
- (e) whether investigator Michel Leduc met with one of the applicants;
- (f) whether the respondent collaborated with other individuals in issuing the conservatory measures;
- (g) other cases under the respondent's responsibility;
- (h) the events that occurred after the conservatory measures were issued and that are the subject of a dispute before the Quebec Superior Court; and
- (i) whether the respondent stated that delegate Kaufman would not be assigned any more cases.

In my view, these questions have no legal relevance, in that they could not have any bearing on the outcome of the dispute. These objections are sustained.

### **ORDER**

#### **THE COURT ORDERS:**

1. The motion is granted in part.
2. The questions regarding the conservatory measures themselves and the February 12, 2004 decision not to lift or amend them are allowed, and the objections to them are overruled. The questions regarding the facts surrounding the issuance of the conservatory measures on May 10, 2001, are not legally relevant and will not be allowed. The objections against them are therefore sustained.
3. More specifically, the objections sustained include, but are not limited to, those raised by the respondent to the questions posed by the applicants with regard to the following elements of the affidavit:
  - (a) the respondent's authority to intervene to have legislative provisions amended;
  - (b) the training offered to investigator Michel Leduc;
  - (c) the respondent's professional history;
  - (d) the name of the person who decided to appeal delegate Kaufman's decision to postpone the disciplinary hearing;
  - (e) whether investigator Michel Leduc met with one of the applicants;
  - (f) whether the respondent collaborated with other individuals in issuing the conservatory measures;
  - (g) other cases under the respondent's responsibility;
  - (h) the events that occurred after the conservatory measures were issued and that are the subject of a dispute before the Quebec Superior Court; and
  - (i) whether the respondent stated that delegate Kaufman would not be assigned any more cases.
4. An extension of time is granted to the applicants so that they may file their record at a time agreed upon by the parties in accordance with a schedule to be drawn up jointly by the them and filed with the Court within 15 days following the date of this order.
5. There is no order as to costs.

Certified true translation : Michael Palles

cp/e/qw/qlccl



*Case Name:*

**L.S. Entertainment Group Inc. v. Formosa Video (Canada)  
Ltd.**

**Between**

**L.S. Entertainment Group Inc. China Star Pictures  
Limited, Film City (Hong Kong) Limited, Flea Market  
Production Limited, Foreign Exchange Films Limited,  
Imperial International Limited, Long Shong Pictures  
(H.K.) Ltd., One Hundred Years of Films Company Limited  
and Win's Entertainment Ltd., plaintiffs, and  
Formosa Video (Canada) Ltd., Shun Po Chan and Mandy Hui  
Mei Chen, defendants**

[2005] F.C.J. No. 1643

[2005] A.C.F. no 1643

2005 FC 1347

2005 CF 1347

281 F.T.R. 99

48 C.P.R. (4th) 401

142 A.C.W.S. (3d) 1031

Docket T-1795-01

Federal Court  
Vancouver, British Columbia

**Gibson J.**

Heard: In writing.

Judgment: September 30, 2005.

(81 paras.)

*Intellectual property law -- Copyright -- Infringement -- Remedies -- Damages -- Seizure -- Video store ordered to pay damages and deliver up copies of copyrighted films to copyright holder -- Copyright Act, R.S.C. 1985, c. C-42, s. 34(1), s. 38.1.*

*Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- False, frivolous, vexatious or abuse of process -- Motion to strike Statement of Defence for non-attendance of defendant at examination for discovery, and for failure to disclose an arguable defence, allowed -- Federal Court Rules, Rule 221(1).*

*Civil procedure -- Costs -- Special orders -- Increase in scale of costs -- Costs above ordinary scale ordered where defendants acted in bad faith prior to and during legal proceedings -- Copyright Act, R.S.C. 1985, c. C-42, s. 34(3).*

Motion by LS Entertainment and several other companies for an order striking Statements of Defence filed by Formosa, Chen, and Chan, and granting LS summary judgment. LS was a British Columbia corporation which claimed ownership of the copyright in 158 Asian-language films. The other plaintiff companies were Hong Kong corporations that also claimed copyright ownership for the films. LS was the wholesale distributor of the films in Canada and the only active plaintiff in the action. LS claimed Formosa and Chen, the manager of Formosa, had infringed its copyright. Chan was Chen's spouse. Formosa was a chain of retail video stores which distributed, rented, and sold copies of the films over which LS claimed copyright. Formosa claimed it sold the films with the written, implied, or oral permission of the plaintiff companies. Pursuant to an Anton Piller order, copies of 14 films were seized from Formosa. LS had made a prior motion to strike Formosa's Statement of Defence, resulting in an order that Chen attend examinations in Toronto. Neither Chen nor any other Formosa representative attended on the scheduled date, but LS consented to an extension of time for Chen to attend for examination. On the new date, Chen again failed to attend, and the court ordered Chen and Formosa to pay LS's costs for this adjournment. Cheques forwarded by Formosa to satisfy the costs judgment were dishonoured. Two brief notes from Chen's doctor were presented as evidence she was too sick to attend either examination.

HELD: Motion allowed. Chen and Formosa were ordered to pay LS damages of \$14,000, or \$1,000 per film seized, and were ordered to deliver up to LS all infringing material. They were ordered to pay costs of \$17,500 and disbursements of \$3,450. The doctor's notes provided by Chen were inadequate. Chen's failure to attend justified striking her Statement of Defence. Formosa's Statement of Defence was also struck, because it was too vague to demonstrate there was a serious question of law to be argued. Because Chen and Formosa acted in bad faith both before and during the proceedings, they were ordered to pay costs above the ordinary scale. LS's action against Chan was dismissed.

**Statutes, Regulations and Rules Cited:**

Copyright Act, R.S.C. 1985, c. C-42, ss. 5, 34(1), 34(3), 36(2), 38.1, 38.1(1), 38.1(2), 38.1(3),

38.1(4), 38.1(5), 39, 41(1), 53(2)

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 36, 37

Federal Courts Rules, 1998, SOR/98-106, Rules 4, 96, 97, 97(d), 124, 125, 210, 221(1), 369, 369(4), 397

**Counsel:**

Gary J. McCallum, for the plaintiffs.

Bruce M. Green, for the defendants.

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REASONS FOR DECLARATION, ORDER AND JUDGMENT

GIBSON J.:--

INTRODUCTION

**1** These reasons arise out of a motion filed on behalf of the Plaintiffs on the 16th of September 2004 seeking an order:

1. Striking out the statement of defence of Formosa Video (Canada) Ltd. ("Formosa") and Mandy Hui Mei Chen ("Chen") and granting default judgment to the plaintiff [sic] with respect to these two defendants.
2. Costs of the within motion, costs of aborted attendance at examinations for discovery, and costs of the action to the plaintiffs calculated at the highest scale.
3. And for such further and other relief as to this Honourable Court may seem just.

**2** The Plaintiffs sought a hearing date for the motion "... on a date and at a time and place to be determined by the Administrator."

**3** By a Supplementary Motion Record filed the 14th of December 2004, the Plaintiffs requested that the motion be dealt with in writing pursuant to Rule 369 of the Federal Courts Rules, 1998<sup>1</sup>.

**4** Counsel for the Defendants replied by motion record filed the 17th of January 2005, urging that the Plaintiffs' motion be dealt with by this Judge, as case management judge, and that it be dealt with in open hearing and not in writing. Counsel also briefly urged against the merits of the motion

based on three affidavits in reply.

**5** Counsel for the Plaintiffs filed written representations in reply on the 18th of January 2005.

**6** Counsel for the Plaintiffs filed a further Supplementary Motion Record, dealing with the issues of damages and costs, on the 25th of February 2005. This latter document was responsive to an Order of this Court dated the 24th of January 2005, providing a timetable for further filings. In addition to the further filing on behalf of the Plaintiffs, the Court's Order contemplated the filing of responsive materials on behalf of the Defendants by the 18th of March 2005. The Order further provided that, in the exercise of the Court's discretion under Rule 369(4), the Plaintiffs' motion would be disposed of in writing after the 18th of March 2005.

**7** By letter dated the 11th of March 2005, the Court was advised by counsel for the Defendants that counsel were withdrawing from representation of the Defendants. Counsel advised that there would be a Notice of Intention to Act in Person forthcoming from the Defendants. No such notice has been received by the Court. Further, no further submissions have been received from the Defendants or from anyone purporting to represent the Defendants.

**8** Against the foregoing, the Court belatedly turns to consideration of the Plaintiffs' motion.

## BACKGROUND

### a) The Statement of Claim

**9** In their Statement of Claim, the Plaintiffs allege that they are, individually, the owners in Canada of the copyright in 158 scheduled Asian-language "films" (the "films in issue") described as films of television programs and motion pictures. They further allege that L.S. Entertainment Group Inc. ("L.S. Entertainment") is, amongst other things, a wholesale distributor of Asian-language video products for the home-viewing market in Canada, including the films in issue, and possesses in Canada a right, title and interest, protected by the Copyright Act<sup>2</sup> in the films in issue that belong to the other Plaintiffs. They note that L.S. Entertainment is "... the active plaintiff in these proceedings; the other plaintiffs [being] parties pursuant to section 36(2) of the Copyright Act [who] do not intend to take part in the proceedings as copyright owners."

**10** L. S. Entertainment is a British Columbia corporation with its registered office located in Richmond, British Columbia. The other plaintiffs are alleged to be Hong Kong corporations that carry on the business of film production or film distribution or both.

**11** The Plaintiffs allege that the Defendants have infringed copyright in the Asian-language films in issue in respect of each of which the copyright has been registered in the Copyright Office of Canada with certificates of copyright registration having been duly issued.

**12** The Plaintiffs plead and rely on the presumptions set out in subsection 53(2) of the Copyright

Act which reads as follows:

53.(2) A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.

\* \* \*

53.(2) Le certificat d'enregistrement du droit d'auteur constitue la preuve de l'existence du droit d'auteur et du fait que la personne figurant à l'enregistrement en est le titulaire.

**13** The Plaintiffs further allege that Formosa Video (Canada) Ltd. ("Formosa") is a privately held British Columbia corporation with its registered office located in Burnaby, British Columbia, and with three (3) principals, each of whom was, at the relevant time, an officer or director or both of Formosa. They allege that Formosa carried on a business consisting of a chain of four (4) retail video stores located in and around Vancouver, British Columbia, from which it distributes, rents and sells, among other things, Asian-language motion pictures in VHS video-cassette tape format and VCD and DVD formats, amongst others, to members of the general public for the purpose of home viewing. They allege that the defendant Mandy Hui Mei Chen, is the spouse of Shun Po Chan and is the manager of Formosa.

**14** In addition to very substantial damages including exemplary damages, or, alternatively, an accounting of profits, the Plaintiffs claim a declaration that copyright subsists in the films in issue, that one or another of the Plaintiffs is the copyright owner of each of the films in issue and that L. S. Entertainment possesses a right, title and interest, protected by the Copyright Act, in the copyright in the films in issue belonging to the other plaintiffs. They seek injunctive relief, an Anton Piller Order providing for the custody and preservation of any seized infringing copies of the films in issue, delivery up at the Defendants' expense of infringing copies and related materials, equipment and records, pre-judgment and post-judgment interest and costs.

b) The Anton Piller Order and Its Execution

**15** On the 15th of October 2001, following an ex parte hearing and based upon a five (5) volume motion record filed the 10th of October 2001, an Anton Piller Order herein, extending to fifteen (15) pages plus schedules, issued in favour of the Plaintiffs against premises of Formosa at 4819 Kingsway, Burnaby, British Columbia "... and such other business premises, locations, motor vehicles, and other places and things located within the Province of British Columbia, as may be owned, occupied, or used for the operation of [Formosa's business] by the Defendants or by their respective directors, officers, employees, servants, agents, successors or assigns or by any corporation associated or affiliated with the Defendants ...". The Order extended to "... certain Asian-language motion pictures in VHS video-cassette tape format, the titles of which are set out in Schedules A through I annexed [to the Order] and for which L. S. Entertainment Group Inc. ... owns the exclusive Canadian rights ... ". The extensive terms of the Order appear under the following

headings: Commencement & Duration of Order, Subject of Order: The Films, Premises, Authorized Persons, Functions of Authorized Persons, Rights of Defendants, Obligations of Defendants, Obligations of Plaintiffs, Disposition of Things & Materials Seized, Hours of Entry, Interim Prohibitory Injunction, Motion Ex Parte & In Camera, Sealing of Documents, Plaintiffs' Undertaking, Dispensing with Compliance with Certain Rules, Terminology & Interpretation, and Costs.

**16** The Statement of Claim earlier referred to and forming part of the materials that were before the Court on the Motion for the Anton Piller Order was filed on the 19th of October 2001.

**17** The Anton Piller Order was executed at Formosa's premises at 4819 Kingsway, Burnaby, British Columbia, on the 8th of November 2001. Five (5) persons attended at the premises on behalf of the Plaintiffs, a solicitor, a bailiff, two (2) representatives of L. S. Entertainment and an interpreter. A "Report to the Court made pursuant to the Anton Piller Order" was filed with the Court on the 15th of November 2001 in support of a Motion, filed the 14th of November 2001, seeking a review of the execution of the Anton Piller Order. According to that report, during the course of the execution, as the attending solicitor attests, the defendant Mandy Hui Mei Chen was in attendance, a solicitor on behalf of the Defendants was contacted and consulted and the full contents of the Anton Piller Order were explained to those in attendance. Thirty six (36) VCR video-tapes of fourteen (14) titles (the "seized films") and ten (10) "back-up" computer discs containing rental records, client lists and lists of customers who then had videos under rental were seized and carried away.

**18** As earlier noted, by motion filed the 14th of November 2001, the Plaintiffs sought a review of the execution of the Anton Piller Order, as required by that Order. Hearing of the review motion has on five (5) separate occasions been adjourned by this Court, the last such adjournment order being dated the 27th of May 2002 when the motion was adjourned sine die "pending settlement discussions between the parties". By the same adjournment order, a motion filed on behalf of the Defendants on the 2nd of April 2002 "... for, inter alia, an order setting aside the ex parte Anton Piller Order ... dated October 15, 2001 ..." was also adjourned sine die.

**19** The materials seized during the execution of the Anton Piller Order presumably remain in the possession or control of the Plaintiffs or their solicitor.

c) The Statement of Defence

**20** On the 8th of January 2002, a Statement of Defence was filed on behalf of the Defendants. Following a number of paragraphs reflecting specific denials of allegations in the Statement of Claim, the substance of the Statement of Defence concludes with the following paragraphs:

13. In reply to paragraph 18 of the Statement of Claim, the Defendants say and the fact is that the activities complained of at all times were done with the consent and licences of the Plaintiffs, whether written, implied or oral.

14. In reply to the Statement of Claim as a whole, the Defendants deny that the Films are protected by copyright in Canada and deny that the Plaintiffs or any of them are the owners of copyright in Canada in the Films.
  15. More particularly, the Defendants deny that the Films are original works or are proper subject matter for copyright protection. The Defendants further deny that the author or maker of the Films are qualifying authors or makers under section 5 of the Copyright Act or that the first publication occurred in a treaty country.
  16. The Defendants further deny that any authors of the Films were employed by any Plaintiff under a contract of service and deny that the Films were made in the course of their authors' employment. Further, the Defendants deny that any Plaintiff has obtained a valid assignment of copyright or any exclusive rights in the Films, in which copyright exists, which is denied.
  17. In further reply to the Statement of Claim as a whole, having regard to paragraphs 15, 16 and 17 [sic] above, any registration of copyright in the Films relied on by the Plaintiffs is invalid, void and of no effect.
  18. Further in reply to the Statement of Claim as a whole, the Defendants say, and the fact is, that they were not aware of the subsistence of copyright in the alleged works, which copyright is denied, and had no reasonable ground for suspecting the subsistence of copyright in the alleged works. The Defendants say that the Plaintiffs are not entitled to any remedy, but if they are is [sic], then in view of s.39 of the Copyright Act the Plaintiff is [sic] not entitled to any remedy other than an injunction.
  19. The Defendants plead that the claims of the Plaintiffs are barred by subsection 41(1) of the Copyright Act. The Defendants further plead that the Plaintiffs are barred by laches and acquiescence from pursuing any claim.
- 21** In the result, the Defendants seek the dismissal of the Plaintiffs' action with costs.

d) Relevant Interlocutory Orders

**22** Two (2) earlier motions to strike the Statement of Defence were filed on behalf of the Plaintiffs. The first was adjourned sine die. With respect to the second motion to strike and grant default judgment against Formosa and Mandy Hui Mei Chen, I, then acting as case management judge, recited the following findings in an Order dated the 8th of January 2004:

THE COURT being satisfied that the written answers to written questions on the examination for discovery of Mandy Hui Mei Chen as agreed to on the oral examination for discovery of Ms. Chen at Vancouver, British Columbia, on the 20th of December, 2002 are, as alleged on behalf of the Plaintiffs, "... so devoid of meaningful content as to be tantamount to a complete refusal to answer the questions";

AND THE COURT further noting that the material filed herein on behalf of the Defendants simply fails to respond to the Plaintiffs' allegation that the Defendants "... undertook during the oral examination for discovery to provide copies of Formosa's computer records with respect to the Films that are the subject of this action, and then subsequently refused to do so";

I then denied the Plaintiffs' motion on the following terms:

...

2. The Defendant Chen shall attend to be further examined for discovery on behalf of herself and Formosa at Toronto, at their own expense and at a time to be agreed upon by counsel but in any event no later than sixty (60) days from the date of this order, to answer all proper questions asked in the written examination dated the 15th of January, 2003 and all proper questions deriving from answers given.
3. Formosa and Chen shall, within sixty (60) days from the date of this order, comply with the undertaking given by Chen in response to question 124 on her oral examination for discovery above referred to, as that undertaking is amplified by questions 123 and 125 on the said examination and notwithstanding the caveat placed on the record with respect to such undertaking by counsel for Chen and Formosa in response to question 127 on such examination for discovery.
4. The Plaintiffs are entitled to their costs of this motion, calculated on the ordinary scale, and payable by the Defendants in any event of the cause.

**23** By further order dated the 5th of March 2004, following consultation with counsel, I put in place a Dispute Resolution Conference to be held in Vancouver, British Columbia on a day during the week of the 14th of June 2004, to commence at 9.30 a.m., Vancouver time, and to continue for not more than one (1) day.

**24** By further order of the 5th of March 2004, I amended my order of the 8th of January to substitute for the sixty (60) day period referred to in the first substantive paragraph quoted above from that Order a date of the 30th of April 2004 for Mandy Hui Mei Chen's attendance at Toronto for further examination for discovery on behalf of herself and Formosa.

**25** By order dated the 6th of April 2004, the Dispute Resolution Conference fixed for a day in the week of the 14th of June 2004, was more specifically fixed for Thursday the 17th of June 2004 to commence at 9.30 a.m., Vancouver time, and to continue for not more than one (1) day. On that day, counsel for the Plaintiffs and a representative of the Plaintiffs with full authority on behalf of the Plaintiffs to agree to any negotiated settlement attended at the time and place fixed, together with counsel for the Defendants who was without full authority to agree to a settlement on behalf of



the Defendants. Neither Mandy Hui Mei Chen nor anyone else with full authority on behalf of the Defendants attended. No notice that Mandy Hui Mei Chen or another person having full authority would not attend was provided to the Court or to the Plaintiffs. In the result, on the same date, I ordered:

The Dispute Resolution Conference herein scheduled for this day is adjourned sine die with costs of the day, fixed at Seven Hundred and Fifty Dollars (\$750.00) payable by the Defendants to the Plaintiffs forthwith and in any event of the cause.

The Defendants may take no further step in this proceeding, other than a step previously ordered by this Court to be taken or a step responsive to a step hereafter taken on behalf of the Plaintiffs until evidence satisfactory to the Court of payment of the costs, hereby ordered to be paid, is filed with the Court.

No evidence of payment of the costs so ordered has, to this date, been filed with the Court.

#### THE PLAINTIFFS' SUBMISSIONS IN SUPPORT OF THE MOTION NOW BEFORE THE COURT

**26** Counsel for the Plaintiffs urges in support of this motion to strike the Defendants' Statement of Defence and enter default judgment against the Defendants, Formosa and Mandy Hui Mei Chen ("Chen") that they have failed to comply with three (3) orders of this Court, namely, my order of the 8th of January 2004 regarding re-attendance by Chen in Toronto for continuance of her examination for discovery, as that order was amended, my order of the 5th of March 2004, as supplemented, regarding attendance at a Dispute Resolution Conference in Vancouver on the 17th of June 2004 and my order of the 17th of June 2004 requiring payment of costs of that day by the Defendants to the Plaintiffs, forthwith and in any event of the cause.

**27** With respect to the first order, Chen not having attended in Toronto by the 5th of March 2004, on request on her behalf, the time for such attendance was extended first, to the 30th of April 2004. By agreement of the parties, attendance was scheduled for the 29th of April 2004 but, due to circumstances impacting counsel for the Plaintiffs that were unquestionably beyond his control, time for compliance was further extended to the 31st of May 2004, this time at the request of the Plaintiffs. The Plaintiffs served on Chen and Formosa a direction to attend for further examination for discovery on the 31st of May 2004. Chen subsequently advised the Plaintiffs, through counsel, that she was unavailable on that date because she was purportedly in Taiwan. In the result, the Plaintiffs consented to an extension of time for Chen's attendance on the examination until the 11th of June 2004. On that date, the Plaintiffs and their counsel attended at the fixed time and place but, without explanation, neither Chen nor her counsel attended. The Plaintiffs submit that they incurred out-of-pocket costs as a result of the adjournment on the 31st of May and Chen's non-attendance on the 11th of June, which costs the Defendants have refused to pay.

**28** As earlier noted, following consultation with counsel, the Court, by order, fixed the 17th of June 2004 as the date for a Dispute Resolution Conference to be held at a specified time and location in Vancouver. The Plaintiffs attended represented by counsel and an officer of L. S. Entertainment who had authority to bind the Plaintiffs. While counsel for Chen attended, Chen did not herself attend. Counsel provided a medical certificate that, in the view of counsel for the Plaintiffs, a view shared by the Court, was entirely too vague to justify Chen's non-attendance. Since that date, no further or better medical certificate has been provided.

**29** Finally, once again as earlier noted, the Court by order fixed costs of the day for the 17th of June, 2004, payable forthwith by the Defendants to the Plaintiffs. Two (2) and perhaps three (3) cheques were written by one or another of the Defendants in the amount fixed. Although the cheques written were delivered to the Plaintiffs, they were dishonoured when presented.

**30** Counsel for the Plaintiffs concludes his written submissions in this regard in the following terms:

This failure [that is to say the provision of cheques in payment of costs of the day on the 17th of June, 2004 that were subsequently dishonoured] substantiates the Plaintiffs' submission that Chen's conduct in May and June [of 2004] had little to do with her health and everything to do with an arrogant and contemptuous refusal to abide by court orders.

#### RESPONDING SUBMISSIONS ON BEHALF OF THE DEFENDANTS

**31** Counsel for the Defendants submits that the Plaintiffs themselves were complicit in the failure of the parties to comply with this Court's order that Chen attend for discovery in Toronto by the 31st of May 2004 in that they agreed to waive strict compliance with that Order by agreeing to re-schedule the examination for the 11th of June 2004. Counsel further submits that Chen was unable to attend on the rescheduled date "due to health reasons", which allegation is supported by an affidavit of a solicitor for Formosa and Chen, not counsel for Formosa and Chen on this matter.

**32** With respect to the non-attendance of Chen at the Dispute Resolution Conference on the 17th of June 2004, counsel submits that the non-attendance was satisfactorily addressed by the Court's "costs penalty" order issued on that date.

**33** Finally, counsel submits that the non-payment of the costs order "... was not intentional but, at least in the case of the third cheque, likely resulted from the delay in presentation of the cheque, since other cheques written at the same time cleared."

#### THE ISSUES

**34** In a Supplementary Motion Record Re: Damages & Costs filed the 25th of February 2005, counsel for the Plaintiffs wrote:

Given that these representations are made without an oral hearing the Plaintiffs are waiving their claim for a declaration. The Anton Piller Order was granted. Damages for conversion are no longer granted under the Copyright Act. An interlocutory injunction was granted and the Plaintiffs are seeking a permanent injunction. The Plaintiffs are not pursuing their claim for exemplary damages; to the extent that the defendants' conduct during the course of these proceedings may warrant censure, that fact will be discussed below in the representations on costs. The Plaintiffs are not seeking an accounting of profits.

The Plaintiffs are seeking the pleaded relief for a permanent injunction, statutory damages rather than general damages, delivery-up, interest, costs, and GST as applicable.

**35** In the result, the following issues remain on this motion: first, whether or not an order striking out the Statement of Defence and granting default judgment as against Formosa and Chen is justified; secondly, whether or not a disposition of the claim as against the defendant Shun Po Chan is appropriate; and thirdly, assuming that the Statement of Defence is struck out as against Formosa and Chen and that default judgment is granted against them, whether the reliefs now claimed against Formosa and Chen are justified, those reliefs being a permanent injunction, statutory damages, delivery up which the Court assumes includes forfeiture of the seized films and related back-up records, interest on statutory damages, and costs in favour of the Plaintiffs, inclusive of Goods and Services Tax.

**36** Finally, and somewhat peripherally, confidentiality in respect of aspects of the Court's file and the status of counsel for the Defendants before the Court given the letter of the 11th of March 2005 from counsel for the Defendants indicating that he and his firm are withdrawing from representing the Defendants in this action, particularly in light of the fact that no notice of intention to act in person has since been filed on behalf of all or any of the Defendants, remain to be briefly dealt with.

#### ANALYSIS

**37** By order of the then Associate Chief Justice of the Federal Court of Canada, now the Chief Justice of the Federal Court, dated the 3rd of June 2003, I was designated as Case Management Judge in this matter. In the result, I have had a close association with this file since that date, and indeed, for some weeks prior to that date. The materials, including affidavits, filed on the motion here under consideration are, in some respects, rather sketchy. Thus, once again in some respects, I will rely on my general knowledge of the file as Case Management Judge and, in particular, on my recorded notations of dealings with counsel for the Plaintiffs and for the Defendants and, more particularly, on those notations as they relate to Orders that I have issued on this file.

- a) Striking Out of the Statement of Defence as Against Formosa and Chen and Default Judgment

**38** Rule 221(1) of the Federal Court Rules, 1998<sup>1</sup> (the "Rules") reads as follows:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

- (a) discloses no reasonable cause of action or defence, as the case may be,
- (b) is immaterial or redundant,
- (c) is scandalous, frivolous or vexatious,
- (d) may prejudice or delay the fair trial of the action,
- (e) constitutes a departure from a previous pleading, or
- (f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

\* \* \*

221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

- a) qu'il ne révèle aucune cause d'action ou de défense valable;
- b) qu'il n'est pas pertinent ou qu'il est redondant;
- c) qu'il est scandaleux, frivole ou vexatoire;
- d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
- e) qu'il diverge d'un acte de procédure antérieur;
- f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

**39** It is trite law that *Hunt v. Carey Canada Inc.*<sup>3</sup> stands for the proposition that, in circumstances such as those enumerated in Rule 221(1), the test in Canada to strike out a pleading is whether it is plain and obvious that the pleading discloses no cause of action or defence. This proceeding, despite the length of time it has been before the Court, has not proceeded to a stage where it is possible to say with any degree of confidence that the Defendants' Statement of Defence discloses no reasonable defence. Thus, the Plaintiffs cannot succeed with the relief of striking the Statement of Defence as against Formosa and Chen on the basis of Rule 221.

**40** But that is not the end of the matter. The opening words of Rule 97 of the Rules and paragraph (d) of that Rule read as follows:

97. Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may

...

- (d) dismiss the proceeding or give judgment by default, as the case may be;

...

[emphasis added]

\* \* \*

97. Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut :

...

- d) ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;

...

[je souligne]

The reference to Rule 96 in the opening words of Rule 97 is inapplicable on the facts of this matter.

**41** As earlier noted in these reasons, this Court ordered Chen to re-attend for examination for discovery on behalf of herself and Formosa at Toronto, and at their own expense, at a time eventually extended by further order to the 31st of May 2004. Efforts to negotiate a date and time for re-attendance within the time provided proved unsuccessful. In the result, counsel for the Plaintiffs made an appointment at the official examiner's office for the 31st of May 2004 and served a direction to attend. Chen alleges she was in Taiwan on that date. In the result, without consultation with the Court, the deadline of the 31st of May 2004 was extended so that the examination for discovery could be resumed in Toronto on the 11th of June 2004. Counsel for the Plaintiffs attended at the agreed time and at the agreed place. Neither Chen nor her counsel appeared. Counsel for the Plaintiffs was later advised that Chen's failure to attend was due to ill health.

**42** Whether by failure to agree to a date for re-attendance before the end of May 2004 or by failure to attend, without notice, on the 11th of June 2004, or both, I am satisfied that Chen, on behalf of herself and Formosa, breached an order of the Court within the contemplation of Rule 97.

**43** By letter dated the 16th of June 2004, counsel for the Defendants advised the Court and, by copy, counsel for the Plaintiffs as follows:

I am informed through Ms. Chen's Mandarin-speaking counsel, John Mao, that for medical reasons, on her doctor's recommendations, Ms. Chen is unfortunately unable to attend the Dispute Resolution Conference scheduled for tomorrow. She is apparently under medication and cannot attend either in person or by telephone. Last Friday, June 11, 2004 Ms. Chen was scheduled to attend the continuation of her examination for discovery in Toronto and I learned that morning that she had not attended for health reasons. I have been provided this morning by Mr. Mao with a doctor's note, copy attached, prepared in respect of June 11, 2004 and Mr. Mao has this morning been advised that her doctor is providing a further report today on her condition and her inability to attend tomorrow, which I will forward to the Court on receipt. Unfortunately, there is no other officer or manager to represent Formosa Video (Canada) Ltd. at tomorrow's Conference.

The doctor's note referred to in the foregoing quotation is in the following terms:

To Whom It May Concern:

For health reasons Ms. Chen could not go to Toronto June 11, 2004.

A similar note dated the 16th of June 2004 simply provides:

For medical reasons she [Ms. Chen] could not attend medical [sic] proceedings tomorrow June 17, 2004.

**44** Counsel for the Plaintiffs urges that the medical certificates or notes provided are entirely inadequate. Counsel for the Plaintiffs, by letter dated the 24th of June 2004, requested more detailed reports. No written response was received. In a telephone conversation with counsel for the Defendants, counsel for the Plaintiffs was apparently advised that more detailed information was forthcoming. In the material before me, an officer of L. S. Entertainment attests that no more detailed report was ever received.

**45** I share the view of counsel for the Plaintiffs that the medical notes received were entirely inadequate. In addition, they were both received too late to prevent inconvenience and expense being incurred.

**46** While this Court's order fixing the date, time and place of the Dispute Resolution Conference is not directly within the contemplation of Rule 97, I am satisfied that its effect was to create a situation directly analogous to the first situation contemplated by Rule 97 and, as urged on behalf of the Plaintiffs, I am prepared to rely on Rule 4 of the Rules to treat breach of the Order fixing the Dispute Resolution Conference as tantamount to a breach of an Order to attend an oral examination.

**47** Once again, as earlier indicated in these reasons, at the aborted Dispute Resolution Conference, I ordered the Defendants to forthwith pay costs of the day to the Plaintiffs in the fixed amount of seven hundred and fifty dollars (\$750.00). The Plaintiffs allege that two (2) cheques in payment of such costs were sequentially provided by the Defendants, both of which were dishonoured. The Defendants urge that three (3) cheques were sequentially provided and that the Plaintiffs should have been more assiduous in pursuing the cashing of at least the last of the cheques.

**48** I reject the position of the Defendants and determine that the conduct of the Defendants in response to the costs order was contemptuous of an order of this Court. That being said, the costs order is not an order within the contemplation of Rule 97.

**49** In *Kuzmich v. Canada (Minister of Citizenship and Immigration)*<sup>4</sup>, Justice McGillis noted that the authority granted by Rule 97(d) to dismiss a proceeding or give judgment by default is discretionary. On the facts before her, she exercised her discretion to dismiss an application for judicial review. I determine to exercise my discretion in a similar manner and will strike out the Statement of Defence against the Defendants Formosa and Chen by reason of the failure of Chen to comply with an order requiring her, on her own behalf and on behalf of Formosa, to re-attend for further examination for discovery. In doing so, I also rely on Chen's failure to attend, without adequate excuse or timely notice, at the Dispute Resolution Conference scheduled for the 17th of June 2004, in contravention of an Order of this Court that I regard as creating a situation analogous to the situations that are directly within the contemplation of Rule 97. I arrive at this conclusion taking into account the failure of the Defendants to comply with the costs order earlier referred to and taking into account the general conduct of Chen, on behalf of herself and Formosa, as it has come to my attention during the time when I have been Case Management Judge of this proceeding and as reflected in the materials before me on this motion. I also take into account Chen's affidavit that is before me on this motion in which she describes herself as the Manager of Formosa and the notation in a letter dated the 16th of June 2004 from counsel for the Defendants to the Court in which it is indicated that there is no other officer or manager of Formosa to attend the Dispute Resolution Conference. I extrapolate from this statement and from the conduct of Chen throughout the proceeding that she is the sole person with authority to speak for Formosa in respect of this proceeding and has throughout acted and spoken for Formosa, or failed to act and speak for Formosa, as well as for herself, without adequate notice and evidence of supportable reason.

**50** Rule 210 reads as follows:

210. (1) Where a defendant fails to serve and file a statement of defence within the time set out in rule 204 or any other time fixed by an order of the Court, the plaintiff may bring a motion for judgment against the defendant on the statement of claim.
- (2) Subject to section 25 of the Crown Liability and Proceedings Act, a motion under subsection (1) may be brought ex parte and in accordance with rule 369.
- (3) A motion under subsection (1) shall be supported by affidavit evidence.
- (4) On a motion under subsection (1), the Court may
- (a) grant judgment;
  - (b) dismiss the action; or
  - (c) order that the action proceed to trial and that the plaintiff prove its case in such a manner as the Court may direct.

\* \* \*

210. (1) Lorsqu'un défendeur ne signifie ni ne dépose sa défense dans le délai prévu à la règle 204 ou dans tout autre délai fixé par ordonnance de la Cour, le demandeur peut, par voie de requête, demander un jugement contre le défendeur à l'égard de sa déclaration.
- (2) Sous réserve de l'article 25 de la Loi sur la responsabilité civile de l'État et le contentieux administratif, la requête visée au paragraphe (1) peut être présentée ex parte et selon la règle 369.
- (3) La preuve fournie à l'appui de la requête visée au paragraphe (1) est établie par affidavit.
- (4) Sur réception de la requête visée au paragraphe (1), la Cour peut :
- a) accorder le jugement demandé;
  - b) rejeter l'action;
  - c) ordonner que l'action soit instruite et que le demandeur présente sa preuve comme elle l'indique.

Here a statement of defence was filed which will now be struck as against Formosa and Chen. I am satisfied that, in such circumstances, default judgment is available both under Rule 97(d) and under Rule 210 against Formosa and Chen since the effect of striking the Statement of Defence, as against them, is tantamount to no defence having been filed on their behalf.

**51** Allied Colloids Ltd. v. Alkaril Chemicals Ltd.<sup>5</sup> appears to stand for the proposition that default judgment should not be invoked where serious questions of law can be argued, or the facts are not clear and undisputed. Here, by their Statement of Defence, the Defendants put into issue the questions of existence of copyright in the films in issue, ownership of copyright in the films in issue



and the rights of L. S. Entertainment in Canada in relation to the films in issue. That being said, those issues, which are clearly serious issues, are put into play by the Statement of Defence in only the most general of terms and nothing further of substance, since the Statement of Defence, has been put forward by the Defendants with respect to those issues.

**52** By contrast, on the application for an Anton Piller Order herein, very extensive evidence was put before the Court as to the existence of copyright, ownership of copyright and the rights in Canada of L. S. Entertainment in respect of the films in issue. Certificates of registration of copyright in each of the films in issue, in each case indicating L. S. Entertainment Group Inc. as the owner for all purposes in Canada, were put before the Court. Subsection 53(2) of the Copyright Act provides as follows:

53.(2) A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.

\* \* \*

53.(2) Le certificat d'enregistrement du droit d'auteur constitue la preuve de l'existence du droit d'auteur et du fait que la personne figurant à l'enregistrement en est le titulaire.

**53** A judge of this Court was satisfied on the application for issuance of the Anton Piller Order that, at least on a prima facie basis and on an ex parte application, the evidence of the existence of copyright and of ownership and related rights in Canada was sufficient to justify the issuance of an Anton Piller Order.

**54** In light of the foregoing, particularly, the generality of the allegations in the Statement of Defence, the extensive evidence put forward by the Plaintiffs on the application for the Anton Piller Order, including the certificates of registration, and the conclusion of a judge of this Court that issuance of an Anton Piller Order was justified, I am satisfied that the Defendants have not met the threshold test stated in *Allied Colloids Ltd.*, supra, by demonstrating that there is here a serious question of law to be argued or facts that are unclear and substantially disputed.

**55** This Court, on a not infrequent basis, grants default judgment and a declaration, injunctive relief and damages in circumstances where a statement of claim has been filed, an Anton Piller Order has been issued and executed and the defendant or a defendant fails to appear on the hearing of a motion for review of the execution of the Anton Piller Order and fails to file a statement of defence within the time provided. Assuming the foregoing practice to be warranted, and I make that assumption, as a matter of principle, it is not in the interests of justice to encourage persons against whom an Anton Piller Order is executed, to obstruct and ignore the process of this Court for personal gain, and I am satisfied that that is what has happened here. In the result, I am prepared to not only grant judgment against Formosa and Chen, but also to grant significant relief.

b) Disposition of this Proceeding as Against Shun Po Chan

**56** The material before the Court on this motion is silent with respect to Shun Po Chan ("Chan"). No relief is sought against him on the motion here before the Court. A review of the totality of the material before the Court indicates that he has not been active in the proceeding and that the Plaintiffs have not pursued the proceeding against him. In light of my determination to strike the Statement of Defence and to grant default judgment as against Formosa and Chen, and in light of my foregoing brief comments with respect to Chan and my experience as Case Management Judge on this matter, I will dismiss this proceeding as against Chan. If, in the view of counsel for the Plaintiffs, such a result in respect of Chan is inappropriate within the contemplation of Rule 397, I remain prepared to reconsider this aspect of my declaration, order and judgment given the fact that it is being taken on my sole initiative and in the absence of submissions from either party.

c) Reliefs Against Formosa and Chen

i) A Declaration and a Permanent Injunction

**57** The indication earlier referred to that the Plaintiffs are waiving their claim for a declaration is, in the view of the Court, to some extent inconsistent with the indication that the Plaintiffs continue to seek a permanent injunction as against Formosa and Chen. In the Court's view, a finding of the existence, as between the Plaintiffs and Formosa and Chen, of copyright in the Plaintiffs in the films in issue is a condition precedent to a permanent injunction and, as well, to statutory damages and delivery up. In the result, the Court will treat the submission on behalf of the Plaintiffs that they are waiving their claim for a declaration as a waiver only in respect of a declaration in rem.

**58** I regard a declaration of validity and ownership of copyright, as between the Plaintiffs on the one hand and Formosa and Chen on the other, as a condition precedent to the granting of a permanent injunction as against Formosa and Chen. Also, as earlier indicated in these reasons, I am satisfied that, on the evidence before the Court, such a declaration is justified. Further, an interlocutory injunction has now been in place for almost four years. Against the foregoing, a declaration as between the Plaintiffs and Formosa and Chen will issue, and a permanent injunction will issue against Formosa and Chen with respect to the films in issue, substantially in the form proposed on behalf of the Plaintiffs.

ii) Statutory Damages

**59** Section 38.1 of the Copyright Act provides as follows:

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for

which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

- (2) Where a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award to less than \$500, but not less than \$200.
- (3) Where
  - (a) there is more than one work or other subject-matter in a single medium, and
  - (b) the awarding of even the minimum amount referred to in subsection (1) or (2) would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement, the court may award, with respect to each work or other subject-matter, such lower amount than \$500 or \$200, as the case may be, as the court considers just.
- (4) Where the defendant has not paid applicable royalties, a collective society referred to in section 67 may only make an election under this section to recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just.
- (5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including
  - (a) the good faith or bad faith of the defendant; (b) the conduct of the parties before and during the proceedings; and
  - (c) the need to deter other infringements of the copyright in question.

\* \* \*

- 38. (1) Sous réserve du paragraphe (2), le titulaire du droit d'auteur peut, comme s'il en était le propriétaire, recouvrer la possession de tous les exemplaires contrefaits d'oeuvres ou de tout autre objet de ce droit d'auteur et de toutes les planches qui ont servi ou sont destinées à servir à la confection de ces exemplaires, ou engager à leur égard des procédures de saisie avant jugement si une loi fédérale ou une loi de la province où sont engagées les procédures le lui permet.

- (2) Un tribunal peut, sur demande de la personne qui avait la possession des exemplaires et planches visés au paragraphe (1), de la personne contre qui des procédures de saisie avant jugement ont été engagées en vertu du paragraphe (1) ou de toute autre personne ayant un intérêt dans ceux-ci, ordonner la destruction de ces exemplaires ou planches ou rendre toute autre ordonnance qu'il estime indiquée.
- (3) Le tribunal doit, avant de rendre l'ordonnance visée au paragraphe (2), en faire donner préavis aux personnes ayant un intérêt dans les exemplaires ou les planches, sauf s'il estime que l'intérêt de la justice ne l'exige pas.
- (4) Le tribunal doit, lorsqu'il rend une ordonnance visée au paragraphe (2), tenir compte notamment des facteurs suivants :
  - a) la proportion que représente l'exemplaire contrefait ou la planche par rapport au support dans lequel ils sont incorporés, de même que leur valeur et leur importance par rapport à ce support;
  - b) la mesure dans laquelle cet exemplaire ou cette planche peut être extrait de ce support ou en constitue une partie distincte.
- (5) La présente loi n'a pas pour effet de permettre au titulaire du droit d'auteur de recouvrer des dommages-intérêts en ce qui touche la possession des exemplaires ou des planches visés au paragraphe (1) ou l'usurpation du droit de propriété sur ceux-ci.

**60** Section 38.1, as enacted by S.C. 1997, c. 24, came into force on the 1st of October 1999, with application to proceedings commenced after that date and where the infringement to which the proceedings relate occurred after that date. There is thus no question that it is applicable on the facts of this matter. There is little case law annotated under the section.<sup>6</sup> That being said, there is no dispute that section 38.1 is modelled closely on equivalent American legislation that has been the subject matter of a significant range of case law cited on behalf of the Plaintiffs.

**61** Turning to subsection 38.1(1), the Plaintiffs' election here was clearly made before final judgment. The Plaintiffs seek statutory damages in the amount of \$1,000 for each of the fourteen (14) seized films, an amount toward the lower end of the range provided in subsection 38.1(1).

**62** Counsel for the Plaintiffs urges that subsection 38.1(2) is inapplicable on the facts of this matter. In support of this submission, counsel cites the affidavit of Michael Leung sworn the 28th of September 2001 and filed in support of the application for an Anton Piller Order herein. More particularly, counsel refers to paragraphs 27 to 39 of that affidavit wherein Mr. Leung details the manner in which the Plaintiffs' alleged copyrights in the films in issue were brought to the attention of the Defendants. This evidence remains uncontradicted in substance on the material before the

Court. I accept counsel's submissions in this regard.

**63** Subsection 38.1(3) provides for circumstances in which the minimum award of statutory damages may be reduced. Counsel for the Plaintiffs urges that the Court not exercise its discretion under this subsection. Once again, I accept counsel's submission in this regard.

**64** Subsection 38.1(4) is clearly not applicable on the circumstances of this matter.

**65** I turn then to the factors to be considered by a court in exercising its discretion regarding the award of statutory damages. Subsection 38.1(5) details three factors: the good faith or bad faith of the Defendants; the conduct of the parties before and during the proceedings; and the need to deter other infringements of the copyrights in question, while noting that a court should consider all relevant factors. I have accepted that the Plaintiffs' claimed copyrights in the films in issue were brought to the attention of the Defendants. The Defendants nonetheless continued to display and rent out copies of the films in issue and would appear to have also made copies of the films in issue without the authorization of the Plaintiffs. I am satisfied that, in advance of the commencement of these proceedings, the Defendants acted in bad faith. Further, as discussed earlier in these reasons, I am satisfied that the conduct of the Defendant Chen, both on her own behalf and on behalf of Formosa, during the course of these proceedings, has been reprehensible. Finally, given the nature of the business in which the Defendants are engaged and the nature of the films in issue and other films and like material in which the Plaintiffs claim copyright, I am satisfied that deterrence is a significant factor.

**66** In *Wing v. Van Velthuis*<sup>7</sup>, Justice Nadon, then of this Court, wrote at paragraph [74] of his reasons:

In my opinion, statutory damages should be granted. The infringement in this case was blatant; the Respondent reproduced the Diary in its entirety. Although the Respondent was not publishing the Diary in bad faith from the start, she was warned several times that her conduct was infringing the Applicants' copyright. She refused repeatedly to cease infringing the copyright and attempted to sell "her" copyright to the Applicants for the sum of US \$125,000. In my opinion, as of the moment she received notice of her infringement, her conduct was reprehensible. In addition, with regard to the third criteria [sic], and considering the Respondent's behaviour, there is a definite need to deter further infringement of the copyright in question. ...

With the exception of the reference to the Defendant or Respondent there herself claiming copyright and attempting to sell "her" copyright, I am satisfied that all of the foregoing is equally applicable here. Justice Nadon reduced the amount of statutory damages claimed by half, to \$10,000 for infringement of a single copyrighted work. I am satisfied that the amount claimed here, \$1,000 in respect of each of the fourteen (14) seized films in issue, some or all in multiple copies, is entirely reasonable. I will award statutory damages in favour of the Plaintiffs and against the Defendants

Formosa and Chen, jointly and severally, in the aggregate amount of \$14,000.

iii) Delivery Up

**67** Subsection 34(1) of the Copyright Act specifically contemplates the remedy of delivery-up. That subsection reads as follows:

34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

[emphasis added]

\* \* \*

34. (1) En cas de violation d'un droit d'auteur, le titulaire du droit est admis, sous réserve des autres dispositions de la présente loi, à exercer tous les recours -- en vue notamment d'une injonction, de dommages-intérêts, d'une reddition de compte ou d'une remise -- que la loi accorde ou peut accorder pour la violation d'un droit.

[je souligne]

**68** As noted earlier in these reasons, certain films and back-up computer records were seized on behalf of the Plaintiffs and taken into their possession or control, or that of their counsel, during the execution of the Anton Piller Order issued herein at Formosa's premises at 4819 Kingsway, Burnaby, British Columbia. Those films and back-up computer records will be ordered forfeited to the Plaintiffs, to be disposed of as they see fit.

**69** Once again in *Wing v. Van Velthuisen*, supra, Justice Nadon wrote at paragraphs [75] and [76] of his reasons:

The Applicants are entitled to delivery up according to subsection 34(1) of the Act. I will repeat the passage from *Canada v. James Lorimer and Co.*, [1984] 1 F.C. 1065, supra, at p. 1073, on the issue of delivery up:

It likewise follows that, where the infringing work is found to include any substantial part of a work in which copyright subsists, the copyright owner is to be deemed owner of all copies of the infringing work and all production plates and is prima facie entitled to the assistance of the Court in gaining possession of them. The onus is on the infringer to establish grounds upon which the Court may properly exercise its discretion against

granting such relief.... Those grounds must lie in the conduct of the copyright owner, not in the conduct or motives of the infringer.

In my opinion, delivery up of all infringing material should be granted. The Respondent has not established any reason why this relief should not be granted. The Respondent might not stop selling or distributing any copies that she has in her possession.

**70** Once again, I am satisfied that the same might be said here. Delivery up of all copies of the films in issue, in the possession or under the control of either Formosa or Chen, will be ordered.

iv) Interest

**71** Sections 36 and 37 of the Federal Courts Act<sup>2</sup> provide that, in respect of a cause of action arising in a province, the laws relating to pre-judgment interest and post-judgment interest in proceedings between subject and subject that are in force in the province apply to proceedings such as this. I am satisfied that this cause of action arises entirely within the province of British Columbia.

**72** Counsel for the Plaintiffs has provided no submissions on the question of interest thus, apparently, leaving it to the Court to determine the applicable laws and the resulting formulation for pre-judgment and post-judgment interest. The Court declines to accept this responsibility. There will be no award of pre-judgment or post-judgment interest.

v) Costs and Goods and Services Tax

**73** By contrast to the want of submissions regarding interest, counsel for the Plaintiffs provides extensive submissions on the issue of costs indicating that the actual amount of fees incurred in this proceeding, on behalf of the Plaintiffs, has been \$51,500 and that the total of disbursements and goods and services tax on disbursements amounts to \$3,467.98. Counsel goes on to request an award approximating one-third of actual fees, that is to say \$17,500, and actual disbursements and goods and services tax on disbursements.

**74** Subsection 34(3) of the Copyright Act provides that the costs of all parties in any proceeding in respect of the infringement of a right conferred by that Act shall be in the discretion of the court. This accords with the general rule regarding costs reflected in the Rules of this Court.

**75** I am satisfied that an award of costs above the ordinary scale is justified in this proceeding, given the conduct of the Defendants, Formosa and Chen. Further, I am satisfied that a lump sum award is appropriate to avoid the difficulties that one can anticipate would be encountered in securing a formal assessment of costs. In the result, an award of costs will go in favour of the Plaintiffs against the Defendants Formosa and Chen, jointly and severally, in the amount of \$17,500 for fees, an amount that, in the Court's view, is entirely reasonable, and in the rounded amount of \$3,450 in respect of disbursements and goods and services tax on disbursements.

## PERIPHERAL MATTERS

### a) Confidentiality

**76** The Court file in respect of this matter was originally opened under the style of cause "Confidential v. J. Outtrim", presumably with a view to preserving confidentiality with respect to the application for an Anton Piller Order and, on the issuance of that Order, to continue the confidentiality pending execution of the Order. Those objectives appear to have been fulfilled. It is not in the least evident to the Court, at this stage, why any element of confidentiality in respect of the Court file should continue to be maintained and indeed, the Anton Piller Order itself indicates the confidentiality has been lifted. That reality is not noted on the file. The Court's judgment and order herein, in the interest of open access to proceedings before this Court, will lift all aspects of confidentiality with respect to the Court's file.

### b) Status of Counsel for the Defendants

**77** Early on in these reasons, the Court noted that counsel for the Defendants wrote to the Court on the 11th of March 2005 to advise the Court that "we", that is to say the firm of solicitors representing the Defendants, are "...withdrawing from representing the Defendants in this action." The letter continues by indicating that it is understood that the Defendants will be self-represented and that a Notice of Intention to Act in Person will shortly be filed. There is no evidence that any such Notice has been filed or otherwise received by the Court.

**78** Rules 124 and 125 provide that a party may change or remove its solicitor of record or appoint a solicitor of record by serving and filing a notice in a particular form and that a solicitor of record may seek an order of the Court ordering his or her removal from the record. Neither of the methodologies for removal of the solicitors of record for the Defendants have been followed. A mere letter from counsel advising the Court that he or she is withdrawing from representing a party is insufficient. In the circumstances, the firm of Oyen Wiggs Green & Mutala remains of record for the Defendants in this proceeding.

## SUMMARY

**79** This action will be dismissed as against the Defendant Chan.

**80** The statement of defence herein will be struck out as against the defendants Formosa and Chen and judgment by default will go in favour of the Plaintiffs against Formosa and Chen declaring that, as between the Plaintiffs and Formosa and Chen, copyright in the films in issue subsists in favour of the Plaintiffs, enforceable in Canada by the Plaintiff L.S. Entertainment, providing a permanent injunction against the Defendants Formosa and Chen from infringing the Plaintiffs' copyright in the films in issue, granting statutory damages in the amount of \$14,000 in favour of the Plaintiffs, jointly and severally as against the Defendants Formosa and Chen, providing for forfeiture to the Plaintiffs of the seized films and back-up computer records and for



delivery up to the Plaintiffs by the Defendants Formosa and Chen of all copies of the films in issue that are under their possession or control, and for costs in favour of the Plaintiffs, jointly and severally against the Defendants Formosa and Chen, in the aggregate amount of \$20,950 inclusive of fees, disbursements and goods and services tax.

**81** All aspects of confidentiality in respect of the Court file in this matter will be lifted. The firm of Oyen Wiggs Green & Mutala remain solicitors of record for the defendants to the date of judgment.

GIBSON J.

cp/e/qw/qlklc/qlhcs

1 S.O.R./98-106.

2 R.S., 1985, c. C-42.

1 S.O.R./98-106.

3 [1990] 2 S.C.R. 959.

4 [1998] F.C.J. No. 1655 (F.C.T.D.).

5 (1990), 34 C.P.R. (3d) 426 (F.C.T.D.).

6 See: Canadian Copyright Act Annotated, Carswell, 2002, looseleaf, to release 3, editors-in-chief, Richard, Carrière, Léger, Robic, Nahabedian and Grenier; and Hughes on Copyright & Industrial Design, 2nd edition, Butterworths.

7 (2001), 9 C.P.R. (4th) 449 (F.C.T.D.).

2 R.S.C. 1985, c. F-7.

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# Cherkassy (The) v. Far-Eastern Shipping Co., 1999 CanLII 9198 (FC)

Date: 1999-12-15

Docket: T-891-94

Citation:Cherkassy (The) v. Far-Eastern Shipping Co., 1999 CanLII 9198 (FC),  
<<http://canlii.ca/t/1j1lh>> retrieved on 2014-11-23

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**Date: 19991215**

**Docket: T-891-94**

**Action in rem against the vessel "*Cherkassy*" and the vessel "*Anadyr*"  
(a sister ship) and in personam against the owners and charterers  
of the vessel "*Cherkassy*"**

**BETWEEN:**

**PIONEER GRAIN COMPANY LTD.,  
M/S SAMPAT INDUSTRIAL AND CONSTRUCTION  
CO. LTD., ALL OTHERS HAVING AN INTEREST  
IN THE CARGO LADEN ON BOARD  
THE VESSEL "*CHERKASSY*",**

**Plaintiffs,**

**- and -**

**FAR-EASTERN SHIPPING CO. (FESCO),**

**THE OWNERS AND CHARTERERS OF THE**

**VESSELS "*CHERKASSY*" AND "*ANADYR*"**

**AND THE VESSELS "*CHERKASSY*" AND "*ANADYR*",**

**Defendants.**

### **REASONS FOR ORDER**

**MR. JOHN A. HARGRAVE,**

**PROTHONOTARY**

[1] These reasons arise out of a motion to strike out a statement of claim for cargo damage by reason of breaches of our successive Orders for the production of specific relevant available documents. The motion is successful because the breach in this instance constitutes conduct amounting to abuse.

[2] In more detail, the action itself involves a claim for wetting damage to a portion of a cargo of dried peas carried from Vancouver to Bombay and discharged at Mumbai, India. There is no doubt that some of the peas became wet during ocean carriage, however the Defendant, Far Eastern Shipping Co., quite properly, wished to be certain as to the actual amount of damages suffered once all of the cargo had been sold. After a series of requests, motions, and partial discoveries, the Defendant was unable to obtain from M/S Sampat Industrial and Construction Co. Ltd. (also referred to as "Sampat") the production of documents ordered by the Court. Thus this motion to strike out the Statement of Claim, not, as might have been argued, on the basis of delay and lack of interest on the part of the Plaintiffs, as was the case in *Trusthouse Forte California Inc. v. Gateway Soap & Chemical Co.* (1999), 1998 CanLII 8897 (FC), 86 C.P.R. (3d) 28 (F.C.T.D.), but on the basis of a breach of a series of specific orders from the Court for production of documents. This result is a drastic one, but the result reflects the circumstances. However, the result is not a reflection upon counsel for the Plaintiffs, or upon the co-Plaintiff, Pioneer Grain Company Ltd., or upon subrogated underwriters.

[3] Beginning with some relevant procedural events, the Defendant has not been able to obtain production of a certain and specific run of computer-produced documents from the Plaintiff, M/S Sampat Industrial and Construction Co. Ltd., of Bombay, documents acknowledged by Sampat to exist, in storage near Calcutta. The documents, being clearly relevant, for they consist of original computer printouts, including invoices, prepared for tax purposes, are documents by which the Defendant might test the damages claimed: the

relevance of such material is clearly set out in *Redpath Industries Ltd. v. The Cisco*, 1993 CanLII 3025 (FCA), [1994] 2 F.C. 279 (F.C.A.). In *The Cisco* the Plaintiff sugar refiner blended small amounts of damaged raw sugar with undamaged sugar, sharply reducing the damage claim. Here the Defendant wishes to explore, by the discovery process, a similar possibility.

[4] Turning to the prosecution of the claim, this action for some \$350,000 (US) was commenced in April of 1994, about a year after the cargo was shipped. In due course, the action having apparently languished, the Court issued a Notice of Status Review, in effect a show cause request requiring the Plaintiffs to explain why the action ought not to be dismissed for delay. From the submissions to the Notice of Status Review it is clear that sound market value of the cargo on arrival was a contentious issue, that the Defendant had requested documents bearing on the sound market value, leading to the determination of the quantum of the claim and that the material by which to test the sound market value had not, in the Defendant's view, been produced. This brings us to a series of motions and orders for production of documents and for examinations for discovery.

[5] The Plaintiffs had, between the loss in 1993 and the production of their affidavit of documents nearly three years later, 14 February 1996, ample time to consider, learn about and understand their case and to determine what was required to prove that case. However, the Plaintiffs' affidavit of documents was demonstrably deficient for it contained little or no material as to sale, storage, handling or final disposition of the cargo of peas. Requests for that material were ineffective. As a result on 29 March 1999 the Defendant obtained an Order that the Plaintiffs provide a further and better affidavit of documents by the 19<sup>th</sup> of April, 1999, being an unsworn affidavit in view of the short time frame, for the Defendant wished to get on with examinations for discovery in India. The Order was fairly specific requiring production of documents by which to establish sound market value of the cargo:

1. The Plaintiffs shall provide an unsworn further and better affidavit of documents, by 19 April 1999, containing the type of documents set out in Schedule "A" to the motion, namely:

1. All of the Plaintiffs' claim documents including those upon which it intends to rely to establish sound market value of the cargo and all documents relating to the ultimate disposition of the cargo.

2. All documents of the Plaintiffs relating to the internal handling and or re-conditioning, warehousing, transport, contracts and invoices for sale showing the price obtained for all of the allegedly damaged cargo and for all of the sound cargo discharged from the vessel *Cherkassy*.

3. All documents of the Plaintiffs relating to the disposal and or destruction of any portion of the allegedly damaged cargo including truck and weight receipts, tally check sheets and government certificates.

The affidavit shall be sworn at the first reasonable opportunity;

2. The Plaintiffs shall produce the documents listed in the further and better affidavit by 19 April 1999;

[6] The Plaintiffs failed to comply with the Order by the 19<sup>th</sup> of April. Given the breach of the Order and the apparent lack of cooperation, the Defendant obtained a second Order, 20 April 1999, requiring the Plaintiffs to produce a witness from Sampat, a representative of the surveyor who attended at the discharge of cargo and, again, all of the documents ordered on the 29<sup>th</sup> of March.

[7] The Plaintiffs ignored this second Order, although the witness from Sampat, Mr. Kothari, said that all of the specific original documents and invoices sought by the Defendant were located in a warehouse in Gauhati, north of Calcutta.

[8] The Plaintiffs, failing to produce the requested documents during the next dozen weeks, the Defendant brought a motion in July, 1999, seeking, among other things, to strike out the Statement of Claim or, as one of several alternatives, a further order for a further and better affidavit of documents and that the next trip to India, to complete the discovery of Mr. Kothari, be at the Plaintiffs expense. I decided that the motion to strike out, in view of failure to comply with previous Orders, came perilously close to success however, because it would be a Draconian remedy, the Plaintiffs ought to have another opportunity to produce documents and thus another specific Order as to what must be produced, including the documents said to be at the Gauhati warehouse, with the Plaintiffs paying the costs and disbursements of Defendant's counsel and court reporter for their second attendance in India. Production was to be accomplished on or before 20 September 1999.

[9] The Plaintiffs were apparently unable to provide the documents within the required time. They thus brought a motion before Associate Chief Justice Richard, as he was then, to obtain further time for production. They succeeded on that motion, for while the Associate Chief Justice required production of the documents as previously ordered, he extended the time for production until 10 a.m. on 3 November 1999, with examinations for discovery in India to be completed by the 5<sup>th</sup> of November 1999. Here I would note and this is not contradicted, that there was an statement by Plaintiffs' counsel, to the Associate Chief Justice, that if documentation were not produced the action must be dismissed. This brings us to the present motion and the events leading up to it.

[10] The Defendant has established, on discovery, that the original computer printouts, which were done for tax purposes, are in a warehouse at Gauhati, in eastern India, where the actual records of the Bombay operation of M/S Sampat Industrial and Construction Co. Ltd. are kept. Counsel for the Defendant also established that the discovery witness knew that there were, as of the November 1999 discovery, four outstanding Federal Court Orders for production of specific documents, but reasoned that similar material might be reproduced by computer and thus it was not necessary to produce the earlier specific material. Moreover, the witness said that to go to Gauhati and bring the documents back would cost a lot of money. The witness suggested that counsel was most welcome to travel to Gauhati and search for the documents himself. Here one notes a certain lack of interest in the whole proceeding by the Plaintiffs' witness, but probably M/S Sampat Industrial and Construction Co. Ltd. had already been paid out by their subrogated underwriters. Indeed, the witness deposed, at page 135 of the discovery transcript, through counsel, that:

The invoices for all the sales exist in a ledger, in a book, and they've been marked, but these cannot be produced, they have to keep them, so what they've done is from their

computer, they've produced an exact same copy of the invoices.

Thus, in the view of the witness produced by Sampat, there was no need to produce the documents from Gauhati.

[11] Finally, that witness, Mr. Kothari, said, on the 5 November 1999 discovery in India, that Sampat had checked its files in Gauhati and the material in those files was the same as the computer in Bombay would produce and thus: "... there was no point in bringing the same documents from Gauhati to here." (Page 164 of the transcript). In effect Mr. Kothari, in the face of four Court Orders, seemed to be making some decision as to the relevance both of a small bundle of documents and of the Court's Orders.

[12] Counsel for the Plaintiffs, doing the best that he might for his clients, sought to rationalize the failure to produce as a cultural misunderstanding and an error on the part of counsel who did not realize that while the original invoices generated for tax purposes were in Gauhati, that material was in fact computer generated, with the original information being in the computer. That is putting the best possible light on the matter, but it does not explain the failure to produce accessible specific documents in the face of four clear and specific Court Orders.

[13] Nor did the Plaintiffs seek to mitigate the situation by offering, either by affidavit or even by letter produced in the Plaintiffs' motion brief, to bring the documents from Gauhati. Indeed, given the lead time on the present motion it would have been a simple matter for M/S Sampat Industrial and Construction Co. Ltd. to have the documents brought from Gauhati to Bombay and delivered or faxed to counsel for the Defendants. Alternately, given the large amount at stake, someone could have been sent from Canada to Gauhati to bring the documents, for Sampat says, through its witness, that it knows exactly where the documents are located. Instead, near the very end of the hearing of the present motion, when it became fairly obvious that things were not going well for the Plaintiffs, counsel for the Plaintiffs offered to try to bring the documents from Gauhati. This was far too late given the past history of the Plaintiffs ignoring the Orders of the Court for production.

[14] Despite various submissions by counsel for the Plaintiffs, including that the original document is in the computer and all else is a copy, at issue here is not the nature of information stored electronically in a computer, information which Mr. Kothari desposed, on discovery, that he could immediately print out 50 times if asked. Certainly a document includes any material which is capable of being read, computer preserved records being no exception, so long as it is established that there was no improper use of the computer and that it was operating properly. But that is not the issue here.

[15] At issue is the breach of four Court Orders, with some rationalization, but without any excuse. Now a court will not generally strike out a claim when production of documents does not comply with a court order, for that is a drastic remedy. Yet orders are meant to be obeyed so long as it is reasonably possible to do so. When the failure to comply is conduct amounting to an abuse an action will be terminated and here I would refer to *Smith Packing Corporation v. Gainvir Transport Ltd.* (1992), 46 F.T.R. 62, a decision of Mr. Justice MacKay. In *Smith Packing* the plaintiffs sought to strike out a defence because a list of documents filed by the defendant, pursuant to Court Order, did not comply either with the

Court's Order or with the *Federal Court Rules*. Mr. Justice MacKay noted that:

The relief sought, striking the defence, is a very drastic remedy for procedural failure and it ought not to be provided except where it is very clear that the defendant party's conduct constitutes an abuse of the process of the Court. (Page 70)

[16] In the present instance there is a clear abuse by a Plaintiff who has ignored four Court Orders for production of documents, even though the documents are, by the Plaintiffs' own admission, in existence and available. The Defendants are entitled to see that specific set of documents. They have been frustrated time and again by a Plaintiff who seems to have no interest in producing the documents and who is prepared to run the risk associated with ignoring four specific Court Orders. The action is thus dismissed by reason of abuse of process.

[17] Counsel for the Defendants sought costs on an enhanced scale. To do so might be justified in order to bring home a point to a wayward litigant. However, in the present instance the sanction of having a large claim struck out is sufficient. Costs, mid-range in Column III are sufficient to go toward the Defendants' costs.

(Sgd.) "John A. Hargrave"

Prothonotary

December 15, 1999

Vancouver, British Columbia

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-891-94

STYLE OF CAUSE: PIONEER GRAIN COMPANY LTD., M/S SAMPAT INDUSTRIAL AND CONSTRUCTION CO. LTD., ALL OTHERS HAVING INTEREST IN THE CARGO LADEN ON BOARD THE VESSEL "*CHERKASSY*"

v.

FAR EASTERN SHIPPING CO. (FESCO), THE OWNERS AND CHARTERERS OF THE VESSELS "*CHERKASSY*" AND "*ANADYR*" AND THE VESSELS "*CHERKASSY*" AND "*ANADYR*"

PLACE OF HEARING: VANCOUVER, B.C.  
DATE OF HEARING: December 6, 1999  
REASONS FOR ORDER OF MR. JOHN A. HARGRAVE, PROTHONOTARY  
DATED: December 15, 1999

APPEARANCES:

Mr. Jean-Francois Bilodeau for the Plaintiffs  
Mr. Thomas Hawkins for the Defendants

SOLICITORS OF RECORD:

Sproule Castonguay Pollack

Montréal, PQ for the Plaintiffs

Campney & Murphy

Vancouver, BC for the Defendants

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# Bayer AG v. Apotex Inc., 1998 CanLII 8327 (FC)

Date: 1998-08-21

Docket: T-35-96

Other 82 CPR (3d) 452; 154 FTR 229

citations:

Citation: Bayer AG v. Apotex Inc., 1998 CanLII 8327 (FC), <<http://canlii.ca/t/49zn>> retrieved on 2014-11-23

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Date: 19980820 Docket: T-35-96 and T-591-96

BETWEEN:

BAYER AG and BAYER INC

Applicants.

AND

APOTEX INC. and THE MINISTER OF NATIONAL HEALTH AND WELFARE

Respondents.

REASONS FOR ORDER

ROTHSTEIN,J.:

[1] In court files T-35-96 and T-591-96 Apotex moves to strike a replacement and reply affidavit filed by Bayer on the grounds that Apotex' agreement to the filing of the affidavit and the consent court order allowing it were obtained by misrepresentation.'

<sup>1</sup> [There is](#) no right to file a reply or a replacement affidavit. A court order authorising such filing is required.

Page: 2 [2] The relevant facts are these. These are prohibition applications under the *Patented Medicines (Notice of Compliance) Regulations* in respect of the medicine Ciprofloxacin. One of Apotex' allegations was that Bayer's patent was invalid because it was obtained without disclosure to the Canadian Patent Office of prior Chilean patent

proceedings covering Ciprofloxacin, and because the Chilean patent application was filed more than one year before the Canadian patent application. To address this issue Bayer filed the affidavit of Ramon Leiva, a Chilean lawyer and patent attorney. In response, Apotex filed the affidavit of Vladimir Garcia Huidoboro, also a Chilean lawyer and patent attorney.

[3] It appears that although cross-examination on his affidavit would be required and he would be asked to file a reply affidavit to the affidavit of Mr. Huidoboro, Mr. Leiva did not want to participate further in the proceedings. Bayer was informed by its Chilean agent that Mr. Leiva's reason for not wishing to participate further was on account of severe heart disease in June, 1996, after the filing of his original affidavit. Bayer advised Apotex of this information. Because illness was the reason for Mr. Leiva not being able to participate further, Apotex agreed that the Leiva affidavit could be withdrawn and that a reply affidavit of Santiago Larraguibel Zavala, a Chilean lawyer and patent attorney, could be utilized by Bayer both in reply and in replacement for the Leiva affidavit. The Zavala affidavit would be both a replacement for the Leiva affidavit and a reply to the Huidoboro affidavit. Nadon, J. granted a consent motion by Bayer to file the Zavala affidavit.'

' The actual sequence of events was that Bayer applied to file a reply affidavit. The affidavit contained evidence which was in replacement for the Leiva evidence. After the affidavit was filed Apotex did not object to the replacement portion of that evidence because of the representation made to it relative to Mr. Leiva.

Page: 3 [4] Through its contacts in Chile, Apotex subsequently ascertained that the story regarding Mr. Leiva's ill health in June of 1996 may have been untrue. Apotex conducted an investigation and found out that Mr. Leiva had not been ill at that time. Indeed Apotex obtained an affidavit from Mr. Leiva himself to that effect. In this affidavit Mr. Leiva states that he advised Bayer when he signed his first affidavit that he did not wish to be involved further and that his refusal to provide a further reply affidavit was based on his original stated intention not to participate further, and not on any subsequent ill health.

[5] Apotex now says it would never have agreed to the Zavala affidavit had the alleged ill health of Mr. Leiva not been represented to it and that it would have simply moved to strike the original Leiva affidavit if Mr. Leiva did not appear for cross-examination. As a result of Mr. Leiva not participating further and the misrepresentation which was the basis for the Zavala replacement evidence, Apotex says that both the Leiva and Zavala affidavits should be struck.

[6] While there is some dispute as to exactly who said what to whom and when in the affidavit evidence and cross-examinations, I find as a fact, on a balance of probabilities, that Mr. Leiva did represent to Bayer's Chilean agent that he did not wish to participate further because of ill health and that such representation was made only after he had been asked to file a responding affidavit. The other alternative, that Bayer's representative in Chile made up the story about Mr. Leiva's ill health is not likely. Indeed the ill health story was based on heart disease which Mr. Leiva admits, although he says he had a heart attack a few years

Page: 4 earlier and was in good health in June of 1996. It would be a strange coincidence that the details of Mr. Leiva's health problems would be known to Bayer's agent unless they

were told to him by Mr. Leiva. In addition there is correspondence at the relevant time between Bayer's Chilean agent and Mr. Leiva that is only consistent with Mr. Leiva's ongoing participation, or at least Bayer's honest belief that Mr. Leiva would continue to participate. Had Mr. Leiva refused to participate immediately after signing his first affidavit, this subsequent correspondence would not logically follow.

[7] Apotex points to some lapses and inconsistencies in the cross-examination of Bayer's Chilean agent but I do not consider them material. In the circumstances I am satisfied with the truth of Bayer's account of the facts.

[8] What occurred, however, still amounts to what I would refer to as an innocent misrepresentation by Bayer which led Apotex to agree to the replacement aspect of the Zavala affidavit. While analogies must be made with care, the circumstances here suggest to me a parallel to an innocent misrepresentation in the context of contract law which could give rise to rescission of the contract. Here this might ground an argument by Apotex that since Apotex agreed to Leiva's affidavit being withdrawn because he did not appear for cross-examination and Zavala's replacement evidence being substituted on the basis of an innocent misrepresentation by Bayer, that the Leiva affidavit, the replacement Zavala evidence and Apotex' reply evidence to the Leiva evidence should be struck. This solution would take account of Mr. Leiva's failure to appear for cross-examination and the misrepresentation

Page: 5 giving rise to the Zavala replacement evidence. In other words only the Huidoboro evidence, to the extent it was not in response to Leiva's initial evidence, and the Zavala evidence, only to the extent it replied to Huidoboro's independent evidence, should remain.

[9] However, there are two difficulties with this solution. First Apotex refuses to withdraw any portion of Huidoboro's evidence, i.e. that portion which is in response to the Leiva affidavit as well as that portion which is independent of the Leiva evidence. It seems somewhat inconsistent for Apotex to insist that Bayer's original and replacement evidence be struck but that Apotex' evidence in reply to the struck evidence should remain. More significantly, however, there is a practical problem of segregating the response and independent evidence of Huidoboro and the replacement and reply evidence of Zavala. Indeed, there has already been cross-examination on both affidavits and it would seem unrealistic to try to segregate the cross-examinations as between what should be struck and what should remain. The hearing on the merits of the prohibition application is scheduled for October 5, 1998 and the filing of new affidavits and engaging in new cross-examinations of deponents in Chile, including motions for same, is not a practical alternative.

[10] In the circumstances, while the initial Leiva affidavit should be struck because he did not appear for cross-examination, as the Huidoboro affidavit will remain in its entirety, the Zavala evidence should also remain. While Apotex has been the victim of an innocent misrepresentation, I think this minimizes the prejudice (if

limited proceedings. Apotex has had the opportunity to cross-examine Mr. Zavala and it is

y) and disruption in these time-

Page: 6 fully open to Apotex to argue on the merits of Bayer's position with respect to

Chilean Patent Law and proceedings in support of its allegation that Bayer's Canadian patent for Ciprofloxacin is invalid. I am satisfied that while this result is not perfection, it is adequate.

[11] In procedural disputes such as this one in which the Court is required to exercise its discretion having regard to fairness and the expedition of proceedings, each case will turn on its own facts. However, it is important to note that, as a general rule, affidavits will be struck if the deponent does not appear for cross-examination and replacement affidavits will not be allowed if there are not justifiable grounds.

[12] Apotex' motion to strike the original Leiva affidavit is granted. Its motion to strike the Zavala affidavit and cross-examination is dismissed. Apotex' alternative relief, that Leiva's second affidavit relating to his ill health be admitted as part of the record is dismissed. Its usefulness in the proceedings on the merits has not been established.

[13] It was the innocent representation made by Bayer that has given rise to these proceedings. Although Bayer has been successful on this motion, there will be no award of costs.

Toronto, Ontario August 21, 1998

"Marshall Rothstein"

Judge

FEDERAL COURT OF CANADA Names of Counsel and Solicitors of Record

COURT FILE NO.: T-35-96 and T-591-96

STYLE OF CAUSE: BAYER AG and BAYER INC v.

APOTEX INC. and THE MINISTER OF NATIONAL HEALTH AND WELFARE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FRIDAY, AUGUST 21 , 1998

REASONS FOR

ORDER BY: ROTHSTEIN, J.

DATED: FRIDAY, AUGUST 21, 1998

APPEARANCES: Mr. Neil Belmore

REPRESENTING BAYER AG, et al

Mr. Harry Radomski Mr. Andrew Brodtkin

REPRESENTING APOTEX INC., et al

SOLICITORS OF RECORD:

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FOR APOTEX INC., et al

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# FEDERAL COURT OF APPEAL

BETWEEN:

**DR. GÁBOR LUKÁCS**

Applicant

- and -

**CANADIAN TRANSPORTATION AGENCY**

Respondent

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**RESPONDING MOTION RECORD OF THE  
PROPOSED INTERVENER,  
PRIVACY COMMISSIONER OF CANADA**

(Response to the Applicant's motion brought pursuant to Rules  
91,94, 96, and 97 of the *Federal Courts Rules*)

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