No. S-224444
Vancouver Registry

THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CANADIAN DEHUA INTERNATIONAL MINES GROUP INC., WAPITI COKING COAL MINES CORP., AND CANADIAN BULLMOOSE MINES CO., LTD.

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Animal Welfare International Inc. v. W3 International Media Ltd.,* 2016 BCCA 372

Date: 20160916
Docket: CA42294; CA43142

Docket: CA42294

Between:

Animal Welfare International Inc.

Respondent
(Plaintiff)

And

W3 International Media Ltd.

Appellant
(Defendant/Plaintiff by Counterclaim)
(Defendant by Counterclaim)

And

**Animal Welfare International Inc.,
Natale Mark Perissinotto, Steven Perissinotto,
Global Dispatch Services Pty. Ltd.,
Pet Supplies (U.S.A.) Inc., VetShopAustralia Pty. Ltd.,
Ani Welf Int Pty. Ltd., and Pavillion International Ltd.**

Respondents
(Defendants by Counterclaim)

And

**Pet Supplies (U.S.A.) Inc. and
Pavillion International Ltd.**

Respondents
(Plaintiffs by Counterclaim)

- and -

Docket: CA43142

Between:

Animal Welfare International Inc.

Respondent
(Plaintiff)

And

W3 International Media Ltd.

Respondent
(Defendant/Plaintiff by Counterclaim)
(Defendant by Counterclaim)

And

Animal Welfare International Inc., Natale Mark Perissinotto, Steven Perissinotto, Global Dispatch Services Pty. Ltd., Pet Supplies (U.S.A.) Inc., VetShopAustralia Pty. Ltd., Ani Welf Int Pty. Ltd., and Pavillion International Ltd.

Respondents
(Defendants by Counterclaim)

And

Pet Supplies (U.S.A.) Inc. and Pavillion International Ltd.

Respondents
(Plaintiffs by Counterclaim)

And

Myfanwy Wong

Appellant

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Garson
The Honourable Mr. Justice Savage

On appeal from: Orders of the Supreme Court of British Columbia, dated October 1, 2014 and September 3, 2015 (*Animal Welfare International Inc. v. W3 International Media Ltd.*, 2014 BCSC 1839 and 2015 BCSC 1580, Vancouver Docket S093691).

Counsel for the Appellant (CA42294), W3 International Media Ltd.: M. G. Armstrong, Q.C.

Counsel for the Appellant (CA43142), Myfanwy Wong: S. G. Cordell

Counsel for the Respondents
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Pet Supplies (U.S.A.) Inc., VetShopAustralia Pty. Ltd.,
Ani Welf Int Pty. Ltd., and Pavillion International Ltd.: R. A. Millar

Place and Date of Hearing: Vancouver, British Columbia
April 14 and 15, 2016

Place and Date of Judgment: Vancouver, British Columbia
September 16, 2016

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Garson
The Honourable Mr. Justice Savage

Summary:

Appeal from dismissal of a counterclaim alleging that Animal Welfare International Inc. ("AWI") dishonestly and in breach of contract secretly imposed a markup on goods supplied to W3 International Ltd. ("W3") for online retail sales in a joint venture. The contract provided for equal division of profits; W3 alleged that the markup resulted in a distortion of the profit sharing to 80/20 rather than 50/50, and damages of US$1.4 million were claimed. W3 argued that the trial judge erroneously interpreted "wholesale cost" to mean the cost AWI determined it to be, rather than the actual cost from suppliers, and the error led to the refusal of the counterclaim. W3 and its principal, Myfanwy Wong, appeal from an award of special costs against W3, to which Myfanwy Wong was made jointly and severally liable. The costs are estimated at $650,000. Held: the appeal on the counterclaim is dismissed. The trial judge rejected the expert evidence presented by W3 in proof of the markup for cogent reasons and her view of the evidence must be given deference. The issue of contract interpretation did not affect the result. The award of special costs against W3 was not reasonable and an order of ordinary costs was substituted. It follows that the joint and several liability of Myfanwy Wong must fall. In addition, the award of costs against a non-party was contrary to principle and precedent.

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[1] This appeal addresses two problems: the interpretation and performance of a contract and the award of special costs against W3 International Media Ltd. ("W3") and its principal, Myfanwy Wong.

[2] In a profit sharing agreement, Animal Welfare International Inc. ("AWI") was to be reimbursed for the wholesale cost of goods and for their packaging and shipping before splitting the profit equally with W3 on the retail sale of veterinary supplies. W3's counterclaim alleged that AWI put a secret markup on the cost of goods and shipping which wrongly distorted the profit distribution from the agreed 50/50 split to 80/20 in AWI's favour. The trial judge dismissed the counterclaim on an interpretation of the reimbursement clause that "wholesale cost" in the agreement meant what AWI represented it to be. The trial judge rejected W3's expert evidence offered in proof of the alleged overcharge affecting W3's share by approximately US $1.4 million.

[3] The trial judge found that W3's principal, Myfanwy Wong, engaged in reprehensible pre-litigation and litigation misconduct and made her jointly and severally liable for a special costs award against W3. Those costs are estimated to be in the neighbourhood of $650,000.

[4] W3's central argument on the liability appeal (CA42294) is that the trial judge's interpretation amounted to a commercial absurdity. AWI responds that it is defensible on the evidence of the surrounding circumstances. Ms. Wong contends in the costs appeal (CA43142) that the costs award against her personally is contrary to legal principle and based on a misapprehension of the evidence. AWI's position is that the award conforms to the law and is justified by the evidence.

[5] In the reasons that follow, I would dismiss the appeal on the counterclaim, but I would set aside the order of special costs against W3 and Myfanwy Wong.

Background

[6] In 2005, AWI and W3 began a joint venture for the sale and distribution of animal health products in North America. AWI had the products and W3, the capacity to market and sell the products online. They were to divide the profits from retail sales equally after deducting certain expenses from gross revenue.

[7] AWI was incorporated in the British Virgin Islands for this venture and formed part of a family of companies based in Australia under the control of the brothers Natale Mark Perissinotto, a veterinarian, and Steven Perissinotto, a solicitor, which included Global Dispatch Services Pty. Ltd. and VetShopAustralia Pty. Ltd. This group did business in Australia under the name of VetShop.

[8] W3 was a Vancouver company with proprietary software designed for online shopping. Its principal was Myfanwy Wong. W3's role in the venture was to operate a website to be known as CanadaVet.com ("CanadaVet"), on the retail end, by advertising the products, taking orders, receiving payments and distributing the funds. Orders were passed on to VetShop which shipped the product from its warehouse in Australia to the customer in North America. The website went live in August 2005 pursuant to this arrangement and a more formalized written agreement entered into on 12 September 2006.

[9] A useful description of the mechanics of this enterprise can be found in an expert report prepared by Lorna Goertz, CGA, of Wolrige Mahon dated 23 November 2012 (the Goertz report):

> 5.04 Pursuant to the Agreement, VetShop was responsible for identification of the best products to sell, product procurement, warehousing, packaging, postage, shipping, order management, customer service, veterinary advice, marketing and promotions support and funding of the agreed start up costs. The Agreement stated that products were to be procured on the best terms/prices and cost was to be reimbursed at VetShop's cost without mark-up.
>
> 5.05 W3 was responsible for supplying W3's proprietary software, the initial design work and customization of the application for CanadaVet, ongoing design work, customization and updates for CanadaVet, creating a client base using its marketing expertise, provision of servers, managing the domain name, email addresses and mailboxes,

> setup and maintenance of e-commerce merchant credit card accounts and provision of online processing and maintenance of a US dollar bank account for depositing CanadaVet funds.
>
> 5.06 VetShop supplied and shipped products for various online animal health product websites, including VetShopAustralia.com.au, VetShopOnline.com, CanadaVet.com and CanadaVetDirect.com during the period from August 2005 through April 2009….
>
> 5.07 Customers purchasing pet products from CanadaVet either visited its website or called its call centre and selected products to purchase. The sales were made in US dollars. The customer's information and transaction details were captured on the servers maintained by W3, which automatically generated an order form. That order form was downloaded by VetShop in Australia. VetShop filled the order from the inventory in its warehouse and arranged for it to be shipped to the customer. VetShop was entitled to be reimbursed at wholesale cost for the products and at cost for shipping and packaging costs. For the most part, products, shipping and packaging were purchased using Australian dollars.

[10] A crucial fact in this process is that VetShop determined and reported the wholesale price and shipping costs to W3 through the CanadaVet database from time to time, and reimbursement was calculated on the basis of those figures:

> 5.08 VetShop advised W3 of the costs of the products for which it was to be reimbursed by entering or causing W3 to enter cost amounts into the CanadaVet database and stated that the cost information in that database was maintained in US dollars. VetShop periodically advised W3 of the shipping and packaging costs per order. W3 calculated the amount to be paid to VetShop based on the volume of filled orders for the period. For the period October 2008 through April 2009, W3 calculated the shipping and packaging cost reimbursement at US$ 4.70 per shipment rather than at the US$ 6.25 per shipment rate provided by VetShop. Amounts owing to VetShop for products, shipping and packaging were remitted to VetShop from the US$ account containing the proceeds of the sales.
>
> * * *
>
> 7.01 VetShop advised W3 of the costs of the products for which it was to be reimbursed by entering or causing W3 to enter cost amounts in US dollars into the CanadaVet database. VetShop had access to the database for this purpose and was able to update the cost information whenever it chose to do this. During the period of the Agreement, August 2005 through April 2009, the total product costs were $US 11,335,650, based on the prices that VetShop provided for the database.

[11] The Goertz report found that there was a significant markup in both wholesale and shipping costs. It was Mark Perissinotto who calculated the price list. The explanation at trial of his approach to the calculation will be examined after the relevant parts of the written agreement are set out.

[12] Under clause 1 of the agreement, which describes the respective responsibilities of the parties, those relating to product procurement, and packaging and shipping are:

> 1.1 Responsibilities of VetShop
>
> VetShop will be responsible for the following (at its own cost except as provided):
>
> …
>
> (b) Procurement of product - best terms/prices, number of sources/purchasing interstate to ensure continuity of supply, packaging materials (cost of product is an Expense as set out below and is to be reimbursed at wholesale cost).
>
> …
>
> (d) Packaging of orders - downloading of orders, appropriate packaging, comply with relevant postal & customs requirements, inserting of promotional materials, appropriately trained staff (Cost of packaging and postage/shipping of orders is an Expense as set out below).
>
> (e) Posting/Shipping of goods - arrange dispatching of orders, most appropriate/cost effective methods (Cost of packaging and postage/shipping of orders is an Expense as set out below).
>
> [Emphasis added.]

Profits are determined according to the following:

> 2.1 How Profit is Shared
>
> Profits of CanadaVet will be shared 50% to W3 and 50% to VetShop for the term of this agreement as set out below.
>
> 2.2 How Profit is Calculated
>
> For the purpose of the profit share:
>
> (a) “Profits” will be calculated by deducting from the “Revenue” received from the sale of products on CanadaVet the “Expenses” of CanadaVet.
>
> (b) “Revenue” is the actual amount received from customers from the sale of products through the CanadaVet website (and, if a call centre is established, through the call centre to CanadaVet customers). Revenue includes any amounts received on account of postage and handling and insurance.

(c) "Expenses" are:

1. …
2. The wholesale cost of the products;
3. The cost of postage/shipping, packaging and insurance of orders;

… [various other operating costs incurred by both sides are listed]

Expenses does not include the costs associated with the items listed in clause 1.1 or 1.2 above except to the extent the parties have expressly agreed that such costs will be reimbursed and treated as Expenses….

2.3 Incurring Expenses

No party can incur an Expense without the prior approval of both parties.

Where a party incurs an approved Expense, it will be reimbursed before Profit is calculated.

[Emphasis added.]

[13] Steven Perissinotto agreed in cross-examination there was to be no markup on the wholesale cost:

Q Mr. Perissinotto, is it correct that the profit sharing arrangement between AWI and W3 calls for product to be purchased from wholesalers and then shipped to the AWI's customers without any mark-up, a complete flow-through without mark-up?
A I believe that's a correct characterization of the agreement, My Lady.

[14] How then did AWI arrive at the wholesale price list sent to the CanadaVet database? This is Mark Perissinotto's explanation excerpted from his testimony in chief:

Q And did you develop a cost of goods list for VSO.com?
A Yes, I did.
Q Can you describe to the Court as fully as you can what was involved in that process and what was created?
A I would determine a cost of goods price in U.S. dollars to upload into the back end [the administration side of the website] so that I could then determine the appropriate retail price, and then I knew what the margin was, the difference between the retail price and the U.S. dollar price. But because we were obtaining our product from Australia and because we were buying product from a number of different suppliers, rather than constantly change and up[date] that, I would first develop a price list and determine an appropriate Australian dollar price, taking into a number of different factors -- taking into account that the different suppliers were supplying to us at different prices and different amounts of product. So I'd develop an Australian dollar price and convert that to a U.S. dollar price. Because when we placed that price into the system and I wasn't prepared to be constantly, you know, changing or up[dat]ing that price, I would factor in a conversion

> rate that I felt would be robust enough to go forward to take into account variances in exchange rates that are constantly changing. And from that U.S. dollar price, I'd determine a retail price with a fixed mark up, and I would end up with two columns.

In cross-examination, he said:

> Q And you didn't write down at the time what formula you adopted for arriving at this price list, did you.
> A There was no formula, My Lady, except how I explained why -- my method of doing the calculation.
> Q But you didn't document that in any way, did you.
> A No, there's no documentation of any formula or methodology.
> Q Did you create some sort of a document or methodology or formula at the time you did the price list?
> A The methodology was a methodology that I'd used previously. It was -- the exercise that I did in my mind, I took into account the same factors in coming up with this price list, but, My Lady, there was no fixed formula that I used.
> Q Did -- did you have a piece of paper in front of you when you were doing it, or a computer screen so you could do the calculations; to record the calculations you did.
> A Yes, I -- I -- I had my invoices laid out on my -- on my desk with my pad of paper and my computer screen in front of me with the price list. I'd go down and I'd write a price factored in to account the different factors, and then I put that into a spreadsheet and did the other calculations from that.
> Q So the spreadsheet would show the calculations you had done and how you arrived at the prices in the end.
> A Most of the calculations on a per item -- sorry -- a per item by per item basis was from the -- having a look at the different invoices and price lists and making assessment of where I thought I could get that product from, and then I'd write that figure down. So -- so the calculation of that on an individual basis was done in my head.

[15] What emerges from his evidence is that he purported to apply a kind of averaging among different suppliers, for different amounts at different times, and hedged against price increases and currency fluctuations. W3 argues that a genuine averaging process could not have produced differentials, on average, of 21% over the costs represented by supplier invoices.

[16] By late 2008, the relationship had become complicated with other ventures VetShop started in Canada, some service problems developed on W3's end, and W3 delayed payments to AWI. W3 misapplied CanadaVet funds to pay for amounts owed by VetShop for W3's work on other VetShop ventures; they were repaid but it

nevertheless influenced the judge's decision on special costs. On 30 April 2009, AWI issued notice of termination of the agreement. It filed a claim in May 2009 and after trial obtained judgment for the following items (in US dollars):

Accounting to April 2009	$251,809.79
Wrongful retention of customer list	$20,000.00
Lost Profits	$236,666.00
Breach of Copyright	$20,000.00

[17] The trial judge found that W3 was owed $8,048.38 for amounts owing on invoices.

[18] Special costs were awarded against both W3 and Myfanwy Wong. The trial judge found that W3 did not present a proper evidentiary foundation to advance allegations of fraud and conspiracy against the principals of AWI; the real claim was one of breach of contract. The claims of dishonesty prolonged the trial.

[19] The trial judge found that AWI was entitled to costs jointly and severally against W3 and Myfanwy Wong personally. The judge's reasons for assessing personal liability include her diverting funds in breach of trust, her role in W3 as the mind and will of the company, and carrying the burden of the fraud and conspiracy allegations through her testimony, which was rejected.

Issues

[20] The issues to be decided are:

1. Did the trial judge err regarding the interpretation of the agreement?
2. Were the representations of wholesale and shipping costs false or in breach of contract?
3. If the answer to question 2 is "yes", what are the damages that flow therefrom?
4. Were the awards of special costs unreasonable?

Discussion

Contract Interpretation

[21] At trial, W3 argued that the agreement limited AWI's reimbursement for actual costs of acquisition and shipping. The trial judge took that position as requiring justification of each expense on an item-by-item basis and rejected it as unrealistic and incompatible with the way VetShop conducted its business. Instead, the trial judge chose to adopt the version of events advocated by AWI, namely, the agreement meant that the wholesale and shipping costs were those represented by AWI on its price list.

[22] The key passage from the trial judgment is as follows:

> [383] AWI submits that the contract must be construed as a whole. AWI notes that, pursuant to clause 1.3(c), product range and pricing are shared decisions of the parties and that, pursuant to clause 2.3, where a party incurs an approved expense, it will be reimbursed before profit is calculated. AWI submits that pursuant to its responsibilities as set out in clause 1.1, Mark prepared a cost of goods list that was supplied to W3 for review and approval pursuant to clause 1.3. W3 signified its approval by uploading the list into the database, where it served as the wholesale cost of goods for which AWI was entitled to be reimbursed as an expense pursuant to clause 2.3.
>
> [384] AWI submits that therefore the meaning of "the wholesale cost of goods" was the price charged to the project by AWI as the cost of goods. AWI submits that this meaning is consistent with the definition of wholesale cost provided by *Black's Law Dictionary*.
>
> [385] I have concluded that the proper construction of the Profit Sharing Agreement is as submitted by AWI. In my view, that is the construction that is consistent with the language of the agreement read as a whole. It is also consistent with the surrounding circumstances.
>
> [386] W3 submits that it would never have agreed to such an open-ended system. However, I agree with the submission of AWI that W3's focus from the outset was on the markup between the wholesale cost of goods and the retail price. In addition, Ms. Wong made no reference to what she asserts is the true construction in any of the documents addressing contractual terms.
>
> [Emphasis added.]

[23] W3 alleges the following error in its factum:

> A. The trial judge erred in interpreting the Profit Sharing Agreement ("PSA"), in a commercially unreasonable manner wholly inconsistent with its unambiguous wording and the parties' objective intentions. This interpretation was the basis for dismissal of the PSA-based counterclaims

> and the conclusions that W3 had breached the PSA by underpaying AWI and AWI validly terminated the PSA.

[24] As the trial judge's reasons indicate, W3 objected to the open-endedness of the interpretation of wholesale cost. It was said to enable AWI to charge whatever it chose regardless of the actual cost of the goods. For the trial judge to find that was the common intention of the parties was, argues W3, commercially unreasonable.

[25] I do not accept that the counterclaim failed because of the interpretation the trial judge placed on "wholesale cost". W3's position on appeal accepted that AWI could estimate the cost of goods (rather than attempt a precise costing according to specific invoices) and that so long as the estimation reasonably corresponded to the product and shipping costs actually incurred, AWI was entitled to reimbursement on the basis of the estimation within the meaning of the contract. Both parties asserted that there was to be no markup. AWI could arrive at its product and shipping costs by a process of averaging, hedging and currency conversion but the figure must bear a reasonable relationship to the actual costs and they cannot amount to a markup. The trial judge accepted AWI's version of the contract on costs of goods as a "reasonable equivalent": see para. 9(d) of AWI's notice of claim.

[26] The problem for W3 in the counterclaim is not in the interpretation of the contract – it did not contemplate a markup – but whether AWI honestly and fairly represented its wholesale and shipping costs. W3 bore the burden of proof that AWI dishonestly, or in breach of the agreement, applied a markup and it failed to discharge the burden.

[27] I find it unnecessary to deal with the many arguments advanced by W3 on contract interpretation as it did not lead to the dismissal of the counterclaim.

False Misrepresentation and Breach of Contract

[28] Turning to the question of fraud and breach, the alleged error is framed by W3 in its factum in this way:

> B. The trial judge erred in imposing incorrect burdens and standards of proof on W3 and, in particular, failing to find that product acquisition and

> shipping costs represented to W3 were consistently and substantially overstated, and that the excess amounts paid to VetShop from CVet revenues, in purported reimbursement of expense under the PSA, were contrary to any entitlement of VetShop in contract, tort, and equity.

[29] W3 assembled a body of expert evidence from Hay & Watson, Chartered Accountants (CanadaVet's accountant), and from Wolrige Mahon, Chartered Accountants (the Goertz report), to estimate the markup on the costs of the products, packaging and shipping supplied by AWI.

[30] Hay & Watson analysed samples selected by W3 to determine whether a markup pattern could be discerned. It did not purport to look at the entire history of the transactions between the parties. That was the task of the Goertz report, which examined material for the period August 2005 through April 2009.

[31] Each of the reports compared supplier invoices provided by AWI with the cost of goods as presented on the CandaVet database. They also examined the shipping charges: Hay & Watson, selectively; Goertz, comprehensively. Both experts found that product and shipping costs were overstated significantly.

[32] The trial judge discussed the reports at length and gave a detailed explanation for her rejection of them. The trial judge found the Hay & Watson report unreliable because of its selective nature:

> [334] Hay & Watson conducted its analysis based upon a selection of products. The report does not identify which invoices were selected, who selected them or on what basis. Ms. Benbaruj [the author] states that the analysis is not scientific or statistical because the documentation is neither complete nor random.

[33] The trial judge questioned the use of the database emanating from W3, rather than the price list issued by AWI, as the source of the comparison between actual cost represented by supplier invoices and the cost of goods claimed by AWI for reimbursement.

[34] This was found to be a fatal defect in the Goertz report not only because of the risk of tampering by W3, but because of the way in which W3 extracted

information from the database for analysis by the expert. This is how the trial judge saw it [Ms. Huang did the extraction for W3]:

> [339] Further, neither Ms. Huang nor anyone else provided testimony or evidence that the Sales Reports included all relevant data required to be analyzed to determine the total sales and total cost of goods. Indeed, the Sales Reports produced do not correlate with the backend pharmacy administrator reports for CVT relied upon by the parties and Hay & Watson. For example, the Wolrige Mahon Expert Report shows a total cost of goods sold of $12,450,927.00, while the Sales Reports data shows a total cost of goods of $11,355,650.00, a discrepancy of 9.6%.
>
> [340] AWI submits that Ms. Wong's exercise in running reports, adding figures back into calculations, and estimating cut-off dates without a solid basis for doing so, which she described in her testimony, is a "self-serving attempt at information manipulation", and that it is hardly surprising that Ms. Wong, after adding back certain figures which she determined appropriate, came to figures which were in her view "close enough". AWI also notes that there are serious concerns regarding the chain of custody of these documents and whether they have been altered. The most concerning example of which is the metadata for these files, which states that they were last modified in September 2012, while earlier iterations of the files have a last modified date of October 2010. It appears, on its face, that these files have undergone some modification, the nature of which is impossible to determine.
>
> [341] Further, neither Ms. Benbaruj nor Ms. Goertz reviewed any part of the CVT database firsthand, electing instead to accept extracts provided by Ms. Wong.
>
> [342] As noted earlier, I admitted the Database Discs over objection. That is not to say however, that there is not a cloud of doubt with respect to the database. Responsibility for that cloud rests squarely at the feet of W3. The data in the database is susceptible to change and manipulation. After the termination, W3 retained the database. Despite the rules of court and orders of the court, W3 did not provide what is asserted to be a complete copy of the database to AWI until the eve of trial.

[35] The trial judge gave little weight to the expert evidence because of concerns over the integrity of the source data. She rejected W3's principal theory of liability:

> [352] With respect to the issue of the alleged "secret profit" related to goods, I am not able to conclude from the analysis that there was a difference between the actual wholesale cost of goods and the cost charged to the project.
>
> [353] W3 has not persuaded me that there was a "secret profit" at all, let alone of the magnitude alleged. In that regard, I note that reference was made in the evidence to instances in which the CVT cost price was in fact less than the "wholesale" invoice price. Mark's explanation was that this reflected the practice of purchasing from a number of sources and developing

> a notional price. It is certainly not consistent with the systematic marking up of cost alleged by W3.

[36] On the question of shipping costs, the trial judge found that both reports proceeded on incorrect assumptions regarding the average weight and size of packages, discounts, and reshipment costs of lost or damaged goods, all of which made the analyses unreliable.

[37] W3 argues that the trial judge arrived at her conclusions having misapprehended the evidence. None of the instances cited, which I regard as minor in significance, could affect the trial judge's broad conclusions about the defective proof of the overcharge. W3 says that AWI had access to the database and could have identified any inaccuracy, omission or manipulation, but it left the matter at the level of suspicion and the trial judge wrongly decided the case on that basis. To that submission, I repeat that the onus was on W3 to prove falsehood and default. I add that it is for the trial judge to find the facts on the weight that she assigns to the evidence. It is not for this Court to reweigh the evidence. W3 argues that even if there were flaws in the reports, the opinions revealed a consistent pattern of charges well above actual wholesale and shipping costs, and W3's case was made out.

[38] It was W3's choice to use its database rather than AWI's price list for analysis and they thereby ran the risk that its source material would be discredited. W3's primary witness was not believed. While it could be said that the expert reports raise a question about reimbursement for the cost of goods expenses, in the end the evidence had to satisfy the trial judge and it did not. Unless we were to retry the case, which we are not permitted to do, the result must stand.

Costs

[39] The trial judge found W3 engaged in reprehensible conduct deserving of special costs: pre-litigation, by a breach of trust in diverting CanadaVet funds; and, within the litigation, by its pursuit of allegations of fraud and dishonest behaviour, which failed. The trial judge made Myfanwy Wong jointly and severally liable because she found that the fraud was based on her testimony, which was not

accepted, and, as the principal of W3, she was in a position to know the fraud claim was groundless and thus was the perpetrator of W3's reprehensible conduct.

[40] With respect, the trial judge was, in my view, clearly wrong in the award of special costs against W3:

1. the breach of trust was given exaggerated importance; and
2. the fraud allegations were not without some foundation.

[41] In my judgment, the trial judge was wrong in assessing special costs against Myfanwy Wong personally because:

1. her conduct did not rise to the level requiring the court's rebuke; and
2. the principal allegation of fraud, that AWI's expenses were overstated, depended not on her testimony but on the analysis of experts.

[42] The breach of trust came about in this way. VetShop created a new venture in Canada known as CanadaVetDirect ("CVD") and involved Ms. Wong in some of its operations although she held no ownership interest in CVD. At one point, Steven Perissinotto contacted Ms. Wong and said that his credit card was "maxed out" and asked her if she could help with CVD's advertising expenses. She diverted some CanadaVet funds, approximately $149,000, for this purpose. As this was at the time the relationship was starting to break down, the diversion of funds was questioned, along with a general concern about W3's bookkeeping. W3 engaged Hay & Watson to perform a reconciliation. This generated a report in the nature of an accounting between the parties and which in particular pointed out the improper transfer of funds. Ms. Wong acknowledged that it was wrong for her to divert the funds and she borrowed US$65,000 from her parents to pay VetShop for its share.

[43] While the impugned transaction is correctly understood as a breach of trust, it carries none of the moral opprobrium often associated with the phrase:

1. the diversion was to assist another VetShop entity;
2. it was in response to an entreaty from one of the VetShop principals;

3. there was no stealth or self-dealing – it was an error of judgment;

4. Ms. Wong admitted the error and made substantial restitution.

This does not amount to the kind of dishonest conduct requiring the condemnation of the court.

[44] The fraud claim had two aspects. The first was an allegation that AWI misrepresented its intentions in negotiating the agreement, that is, it would charge actual costs for reimbursement when it actually intended to apply a markup. The second aspect, and for me the real issue of substance in the case, is that AWI, through VetShop, misrepresented the expenses through the life of the agreement. The first aspect went to the surrounding circumstances at the time the agreement was formed and, on this score, the trial judge accepted the Perissinottos' testimony where it differed from Ms. Wong's testimony. So W3 lost the claim that AWI had to justify each expense on an item-by-item basis. But even if it had won the point, the question remained whether AWI actually overstated its expenses. If it did not, then whether the contract stipulated actual item-by-item expenses or a rough but fair estimation did not matter; W3 could demonstrate no measureable loss either way.

[45] The case turned on the claim of overstatement. Here, W3's case was on the expert evidence and did not depend on Ms. Wong's testimony.

[46] Special costs are an appropriate rebuke to allegations of fraud that are baseless, motivated by spite, vindictiveness, or other forms of ill-will. This is not such a case. At a certain point in Hay & Watson's work on the reconciliation, they requested invoice backup from VetShop, and met with resistance. This, and W3's concern about foreign exchange conversions by AWI, led to a suspicion on W3's part that AWI's claimed expenses may not be right. As the dispute deepened, W3 asked Hay & Watson to analyse samples of the transactions to determine whether there was any markup in the cost of goods and shipping. Hay & Watson reported there was. Only then did W3 advance the fraud claim – it engaged Wolrige Mahon to perform a comprehensive analysis. The Goertz report confirmed the Hay & Watson opinion that there was indeed a pattern of markup.

[47] The implications of fraud from the reports are plain: it was common ground there was to be no markup, but the magnitude of the overstatements and the consistency of the pattern go well beyond carelessness; it had to be deliberate and involve the Perissinottos and their corporate family, doing business under the VetShop name.

[48] The trial judge said that W3 prolonged the litigation by persisting in the fraud claim when the case was really one of breach of contract. I disagree. Had the expert evidence been accepted, the overstatements would have vastly exceeded even the flexible interpretation the trial judge gave to the contract, and the evidence would have established that AWI was dishonest in its performance of the contract.

[49] In *Cimolai v. Hall*, 2007 BCCA 225 at para. 68, the Court relied on the decision of Mr. Justice Joyce in *Hung v. Gardiner*, 2003 BCSC 285:

> [16] In order to justify an award of special costs, it is not sufficient simply to establish that the plaintiff's allegations of bad faith and malice were not proven. It is necessary to show that the plaintiff acted improperly in making or maintaining the allegations in this proceeding or otherwise acted improperly in the manner in which she conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice. The matter must be considered from the point of view of the plaintiff at the time she made or maintained the allegations (see *Native Citizens Fisheries et al. v. James Walkus*, (July 10, 2002) 2002 BCSC 1030).

[50] I refer also to *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, where Mr. Justice Walker canvassed the law on this point:

> [16] Unproven allegations of fraud and dishonesty can amount to reprehensible conduct, particularly where they are made against a professional: *Bronson v. Hewitt*, 2011 BCSC 102 at para. 118; *Startup v. Blake*, 2001 BCSC 8 at para. 112. Where the reputation of a professional is "falsely assailed, the court's reproof should be felt": *Bronson* at para. 118; *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2009 BCSC 1049; *SeaQuest (1993) Adventurecraft Inc. v. Gray Line of Victoria Ltd.*, 2008 BCSC 1219.
>
> [17] Allegations of fraud or conspiracy must be based on something more than belief and speculation: *McLean* [*McLean v. Gonzalez-Calvo*, 2007 BCSC 648] at para. 24; *Pocuca v. Gutiu*, 2007 BCSC 490; *Kouwenhoven Estate v. Kouwenhoven*, 2001 BCSC 1402.

> [18] At the same time, an unproven fraud claim does not always result in an order for special costs because special costs should not be used to "chill" parties in proper circumstances from pursuing perceived wrongful conduct. Special costs are awarded when "examination of all circumstances show the allegations of fraud were unwarranted and completely unfounded": *Chaplin v. Sun Life Assurance Company of Canada*, 2004 BCSC 116 at paras. 25-28 and *Young v. Young* (1990), 50 B.C.L.R. (2d) 1 at paras. 63-64 (C.A.).
>
> [19] In *Chaplin*, Mr. Justice R. Holmes relied on *Ip v. I.C.B.C.* (1994), 89 B.C.L.R. (2d) 251 (S.C.) and, at para. 26, wrote that a "litigant making [claims of dishonesty, immorality, or fraud] must do so only after careful consideration and on the basis of the existence of a *prima facie* case. Special costs are available as chastisement against those who ignore the pre-requisite foundation to serious allegations of fraud and dishonesty."
>
> [Emphasis added.]

[51] The expert reports supported an arguable but, in the end, not a winning case of fraud. The reports were prepared by qualified professionals on a substantial body of commercial records. They were not found to be trumped up or bogus opinions, neither were they found to be instruments of malice or mere speculation. The trial judge was entitled to act on her misgivings about the reports and found them unpersuasive after a full trial, but that is a different matter from the question whether they formed a reasonable basis for a claim.

[52] In the result, I would substitute an order of ordinary costs against W3.

Special Costs – Myfanwy Wong

[53] I would set aside the special costs order against Myfanwy Wong for the same reasons given for quashing the special costs order against W3. The order against her was based on the proposition that as the directing mind of W3 and its chief witness at trial, she was responsible for W3's reprehensible behaviour in committing the breach of trust and pressing the fraud claim. Since I have found that neither element attracts the sanction of the court in relation to W3, it follows that the order against her must fail.

[54] The order also reaches well past the authorities which govern punishing non-parties with special costs.

[55] In *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771, Hall J.A., for the Court, relied at para. 24 on comments in the case of *Kerr & Richard Sports Inc. v. Fulton* (1992), 10 C.P.C. (3d) 382 (Alta. Q.B.), quoting from the judgment of Veit J. (as she then was) at 386:

> The court has a broad discretion in imposing costs. A court could, in exceptional circumstances, order costs against a person who is not a litigant. Of such orders, some are made against lawyers; that is an exercise of the court's jurisdiction over officers of the court. Some such orders are made against the real litigants, even though such persons are not named parties; courts of equity recognized a court's jurisdiction over those persons who put up "men of straw". The jurisdiction, as broad as it is, does not extend to making orders for costs against principals of incorporated companies if the principals have not done something equivalent to fraud. … In my view, the result is that orders for costs may not be made against the principals of corporations if the only evidence is that those principals directed the operations of the corporation. Our system recognizes the legitimacy of corporations as legal entities; one legitimate purpose of such vehicles is to shield its principals from personal liability.

[56] The record does not support that, as the principal of W3, Ms. Wong did anything more than direct its actions. The trial judge did not find that she practised a fraud upon the court or even that she lied in her evidence; the trial judge was content to leave it in her reasons for judgment on the substantive issues that she found the Perissinottos more credible.

[57] *Anchorage* was considered in *Perez v. Galambos*, 2008 BCCA 382, which succinctly sets out the applicable test:

> [17] The court does have jurisdiction to order costs against a non-party: *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230 (C.A.). However, an award of costs against a non-party is unusual and exceptional, and should only be made in "special circumstances": *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771, 72 B.C.L.R. (3d) 389, at para. 21.
>
> [18] "Special circumstances" have been held to include situations where the non-party has engaged in fraudulent conduct, an abuse of process, or gross misconduct in the commencement and/or conduct of the litigation, or when the non-party is the "real litigant": *Anchorage*.

[58] In my judgment, the trial judge wrongly exercised her discretion in awarding any costs against Myfanwy Wong. The *Perez* test was not met in this case. There were no special circumstances that warranted a costs order against a non-party.

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Savage"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gichuru v. Smith,*
2014 BCCA 414

Date: 20141029
Docket: CA040987

Between:

Mokua Gichuru

Appellant
(Plaintiff)

And

Howard Smith and Howard Smith Personal Law Corporation
both doing business as "Howard Smith & Company"

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Goepel

On appeal from: Orders of the Supreme Court of British Columbia,
dated May 22, 2013 (*Gichuru v. Smith,* 2013 BCSC 895,
New Westminster Registry S123626) and dated September 10, 2013
(*Gichuru v. Smith*, 2013 BCSC 1818, New Westminster Registry S123626).

The Appellant appeared in person

Counsel for the Respondents:	R.S. Anderson, Q.C. & J.K. Yamashita
Place and Date of Hearing:	Vancouver, British Columbia September 16, 2014
Written submissions from Appellant:	September 29 and October 20, 2014
Written submissions from Respondents:	October 2, 2014
Place and Date of Judgment:	Vancouver, British Columbia October 29, 2014

Written Reasons by:
The Honourable Mr. Justice Harris and
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Madam Justice Stromberg-Stein

Summary:

Mr. Gichuru commenced an action against his former employer for unjust dismissal and breach of fiduciary duty. Mr. Gichuru worked as an articled student for Mr. Smith's law firm. The trial judge found just cause. She dismissed the breach of fiduciary duty claim. She summarily ordered lump-sum special costs against Mr. Gichuru.

Held: *Appeal dismissed with respect to the employment issues. The judge's findings were supported by the evidence and her analysis of credibility. The findings were made in respect of factual issues that were properly before her and there was no unfairness in the trial or arising from the respondents' argument on appeal.*

The special costs order is set aside on the ground that there was no evidence before the court permitting a summary assessment. The Court comments on, and rejects, the practice of assessment of special costs in the absence of evidence of legal fees incurred and rejects the so-called "rough and ready" method of assessing special costs.

Reasons for Judgment of the Honourable Mr. Justice Harris and the Honourable Mr. Justice Goepel:

Introduction

[1] This appeal arises out of the dismissal of Mr. Gichuru's claim for unjust dismissal as an articled student employed by Howard Smith Personal Law Corporation. The trial judge concluded that the employer had established just cause to terminate Mr. Gichuru's employment. She also rejected Mr. Gichuru's allegation that Mr. Smith, his effective principal, owed him fiduciary obligations.

[2] The trial judge went on to summarily order lump sum special costs against Mr. Gichuru to rebuke him for recklessly pursuing allegations impugning Mr. Smith's conduct and to avoid an unnecessary but likely protracted hearing before the registrar.

[3] For the reasons that follow, we would not accede to the appeal as it relates to the employment issues and the award of special costs. We would, however, set aside the assessment of special costs and, unless the parties can otherwise agree as to the amount, refer the assessment of costs to the registrar.

Background

[4] The reasons for judgment are lengthy and contain a detailed analysis of the evidence as well as comprehensive findings of fact. We propose to set out only sufficient background to set the issues on appeal in an appropriate context.

[5] One of the issues at trial was whether the employment contract was entered into by Mr. Smith personally or by his professional corporation. The judge concluded the contract was between Mr. Gichuru and the corporation, and not Mr. Smith personally. Although, Mr. Gichuru alleges on appeal that this conclusion is in error, as a practical matter, nothing turns on who the employer was. The respondents have given assurances both at trial and in this Court that if there is liability, the judgment will be paid regardless of who is liable. Accordingly, we have concluded that it is not necessary to address this issue. Throughout these reasons we will, for convenience, refer interchangeably to Mr. Smith or Howard Smith & Company without intending to detract from the judge's conclusion about the parties to the contract.

[6] In early 2002, Mr. Gichuru, who had graduated from law school the previous year, was looking for articles. He sent a letter to Howard Smith & Company inquiring about articles in late January 2002. He was offered and accepted an articling position with the firm. He began working at Howard Smith & Company in early February 2002 as a legal assistant because the Law Society had not yet approved his articles.

[7] In early March 2002, when his articles were approved, he began to work at the law firm as an articled student. Effectively, although not officially, Mr. Smith acted as his principal. Mr. Gichuru worked under Mr. Smith's direction and supervision.

[8] The trial judge characterized the employment relationship at para. 164. She said:

> [164] Mr. Gichuru was hired to work at HS&C as an articled student. He was not hired in some other capacity, although Mr. Smith agreed that Mr. Gichuru could begin work in February 2002, even though Mr. Gichuru's application for admission to the articling program had not yet been approved. Both sides refer to the Articles Agreement and the employment agreement as

> separate agreements, and they are. However, Mr. Gichuru's obligations as an articled student overlap his obligations as an employee. Whatever work he was doing as an articled student, he was also doing as an employee of the firm. For example, as an articled student, Mr. Gichuru was obligated "to observe strictly all confidences of the principal or of others in the principal's firm." He owed the same obligation in his capacity as an employee in HS&C. This is a necessary aspect of accepting a position in a law firm. As an articled student, Mr. Gichuru was obligated to accept assignments, direction and supervision from Mr. Smith. When Mr. Smith decided that he wanted Mr. Gichuru to do work for other lawyers in the office, Mr. Gichuru was obliged to accept and do those assignments, in addition to whatever he was doing specifically for Mr. Smith. Mr. Gichuru's obligations as an employee were the same.

[9] The trial judge made certain critical findings of fact that underlay her conclusion that Mr. Gichuru was in breach of his employment contract:

> [166] I find that Mr. Gichuru was insubordinate. He did not accept that Mr. Smith had the right to determine how HS&C and the business of the firm were to be conducted. When Mr. Smith told Mr. Gichuru what he expected in terms of Mr. Gichuru's availability to do the work Mr. Gichuru was hired to do, Mr. Gichuru rejected it as unreasonable and unfeasible and expected Mr. Smith to justify what he was asking Mr. Gichuru to do before Mr. Gichuru would do as instructed. But it was not for Mr. Smith to justify work terms to Mr. Gichuru.
>
> [167] I find that Mr. Gichuru was in fact given work assignments by Mr. Murphy, that the assignments were appropriate assignments for an articled student at HS&C but that, instead of completing the assignments, he argued with Mr. Murphy and expected Mr. Murphy to justify the work before Mr. Gichuru would take it on. I reject Mr. Gichuru's evidence that he did not receive work from Mr. Murphy and that it is "absolutely false" that he refused to do work for Mr. Murphy. I also find that Mr. Gichuru was given work by Ms. Barkwell-Blake and that he did not do what he had been asked by her to do.
>
> [168] I find that these issues were brought to Mr. Gichuru's attention at Mr. Gichuru's meeting with Mr. Smith on April 18, 2002. At that meeting, Mr. Smith again raised his own difficulties concerning Mr. Gichuru's availability and told Mr. Gichuru what Mr. Smith expected. When Mr. Smith stated his concerns and expectations for Mr. Gichuru, Mr. Gichuru's response (by, on his own evidence, indicating that he was only five minutes away and could not see what the problem was) was to deny there was a problem and require his boss to justify why things had to be the way Mr. Smith wanted, as opposed to the way that Mr. Gichuru wanted.
>
> [169] I conclude that Mr. Gichuru is probably mistaken about the further discussions about "lunch" he relates he had with Mr. Smith at the end of the week of April 22, 2002. He did not put this evidence to Mr. Smith during Mr. Smith's cross-examination, and I think it more likely that these were among the matters canvassed during the meeting on April 18, 2002. There

> was nothing in Mr. Smith's evidence to suggest that, after the Abbotsford courthouse incident he had a change of heart concerning Mr. Gichuru.
>
> [170] I find that, by the end of the meeting on April 18: Mr. Gichuru had been informed by Mr. Smith about what Mr. Smith expected; he had been warned by Mr. Smith that his conduct was unacceptable; and he recognized that his continued employment at HS&C was in jeopardy unless he changed. Based on Mr. Gichuru's own evidence, the April 18 meeting was a "big deal," and concerned him to the extent that he took the step of documenting what had happened. I also accept Ms. Enair's evidence that Mr. Gichuru contacted the Law Society around this time and spoke to her. However, as his "no-names" discussion with Ms. Enair confirms, Mr. Gichuru was not prepared to change. His view remained that what Mr. Smith required was unreasonable and unacceptable to him.
>
> [171] Although I conclude that Mr. Gichuru is most probably mistaken about the date, and that this discussion probably also occurred at the April 18 meeting, based on Mr. Gichuru's evidence regarding a further discussion about "lunch" with Mr. Smith while they were in Abbotsford, Mr. Gichuru in essence communicated to Mr. Smith that Mr. Smith's way of running his firm was unacceptable to Mr. Gichuru and he was not staying. Mr. Gichuru said he felt relieved.
>
> [172] I have also concluded that an incident probably occurred at the Abbotsford courthouse where Mr. Gichuru spoke disrespectfully in a loud voice to Mr. Smith. The event itself is not something a person in Mr. Smith's position is likely to forget, even though some details have faded from memory after ten years. Ms. Barkwell-Blake's evidence on cross-examination supports Mr. Smith's evidence that an incident occurred. I conclude that Mr. Gichuru is mistaken in his recollection of events at the Abbotsford courthouse on April 22 and 23, 2002.
>
> [173] Despite having been warned at the April 18 meeting that his conduct was unacceptable, apart from April 19 (when he stayed at the office, "feeling miserable"), I find that Mr. Gichuru did not alter his behaviour. Mr. Gichuru does not dispute this. When Mr. Smith again attempted to reach Mr. Gichuru over lunchtime, he could not. Although it was a very serious step, I find that, at that point, Mr. Smith was justified in terminating Mr. Gichuru's employment. In my view, Mr. Gichuru had demonstrated quite clearly by his conduct that he found the working conditions Mr. Smith set for him to be unacceptable and that he would not accept them. I conclude that Mr. Gichuru's behaviour was such that the employment relationship could no longer viably subsist.

[10] In light of her conclusion on just cause, the trial judge did not proceed to analyze issues connected to notice, damages or consequential damages.

[11] The trial judge did, however, reject Mr. Gichuru's allegation that Mr. Smith owed him a fiduciary duty arising out of Mr. Smith's status as his effective principal. The nub of her reasoning follows:

[180] *Ad hoc* fiduciary relationships must be established on a case-by-case basis. Vulnerability alone is insufficient to support a claim that a fiduciary duty is owed. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake. For an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship (as described by Wilson J. (dissenting) in *Frame v. Smith*, [1987] 2 S.C.R. 99): (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. See *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 28, 31, 33 and 36.

[181] The relationship between an articled student and his or her principal is not a *per se* fiduciary relationship. Mr. Gichuru acknowledges that, to succeed on this aspect of his claim, he must make out the elements of an *ad hoc* fiduciary relationship.

[182] Neither side has been able to locate any cases where a principal has been found to be in a fiduciary relationship with the principal's articled student in relation to the student's articles. I do not find that at all surprising. This is because a lawyer's primary duty is to the lawyer's clients, to whom, and without any doubt, the lawyer owes fiduciary obligations. The idea that, by taking on an articled student, a lawyer gives an undertaking (either express or implied) to act in the articled student's best interests, is incompatible with the lawyer's existing fiduciary obligations to the lawyer's clients. To paraphrase McLachlin C.J. at para. 44 in *Alberta v. Elder Advocates*, imposing such a burden on a lawyer is inherently at odds with the lawyer's duty to act in the best interests of the lawyer's clients. [Emphasis in original.]

[183] I find that Mr. Smith did not in fact give Mr. Gichuru any undertaking to act in Mr. Gichuru's best interests, nor could he. The clients' interests came first. This is sufficient to dispose of Mr. Gichuru's breach of fiduciary duty claim, because, on the facts, Mr. Gichuru is unable to establish an essential element of the relationship; it does not exist. Moreover, Mr. Smith did not in fact control whether or not Mr. Gichuru completed articles and was called to the bar. Mr. Gichuru himself had the ability to terminate the relationship and reassign his articles to any other lawyer qualified to act as a principal. Mr. Gichuru was never "vulnerable," in the sense required to establish an *ad hoc* fiduciary relationship, to Mr. Smith's control.

[184] Of course, a lawyer acting as principal to an articled student has important responsibilities to the student, and also has important responsibilities to the Law Society. But the principal's responsibilities and obligations to the student are not fiduciary obligations, nor is the lawyer in a fiduciary relationship with the student.

On Appeal

[12] Mr. Gichuru accepts that the trial judge relied on the correct legal test to determine when an employer has just cause to dismiss an employee. Reduced to its essentials, just cause exists where the employee's conduct, in breach of the employment contract, is such that the employment relationship can no longer viably exist: see *McKinley v. BC Tel*, 2001 SCC 38 at para. 29. The employer bears the burden of proving just cause. Moreover, Mr. Gichuru concedes that the facts found by the trial judge support the finding of just cause. His contention on appeal is that the trial judge erred in her findings of fact. In substance, he argues that the trial judge made palpable and overriding errors in reaching her findings of fact.

[13] As we understand it, Mr. Gichuru's argument about palpable and overriding error focuses on two principal contentions. First, he argues that the trial judge's conclusion that just cause existed depended critically on her finding that he was not available at lunchtime on April 26 and 29, 2002, when Mr. Smith said he had tried to contact him. He argues that there was no evidence that he was not available at those times and, accordingly, the judge's findings were made in the absence of any evidence. Second, he attacks the trial judge's finding that he was in breach of his employment contract before April 18, 2002, when he had lunch with Mr. Smith to discuss issues and concerns about his employment at the firm. These findings and the findings about the events at the Abbotsford courthouse on April 22, 2002, set out above, he contends, were based on palpable and overriding errors in the trial judge's assessment of credibility.

[14] We are, with respect, unable to discern any merit in these submissions. The trial judge recognized the importance of credibility to the facts she was required to find in deciding the case. She noted at para. 132 that "the degree and frequency of the conflicts between Mr. Gichuru's evidence, on the one hand, and the evidence of other witnesses who worked at HS&C, on the other, is striking". She gave examples of conflicts in the evidence relating to a number of important issues in the trial. She explained how she intended to assess credibility, relying on seminal authority in this

province: see paras. 129 and 130. The trial judge considered the arguments the parties advanced to justify their views of what credibility conclusions the judge should reach. She analyzed credibility issues both from a general perspective and, importantly, in relation to specific factual questions, such as: whether Mr. Gichuru was asked to do work that he did not do, or do adequately; what occurred at the lunch meeting on April 18, 2002; and whether he was subsequently available by telephone to Mr. Smith in late April 2002.

[15] The trial judge did not find Mr. Gichuru's evidence on a catalogue of important matters to be reliable unless it was independently supported. She preferred the evidence of other witnesses to Mr. Gichuru's where the evidence conflicted. She gave detailed reasons explaining her credibility findings and how they related to her findings of fact. In undertaking that analysis, it is evident that the trial judge properly applied the burden of proof. We see no merit in Mr. Gichuru's criticism of the trial judge's assessment of credibility. The analysis was undertaken carefully with painstaking attention to detail and to a consideration of the submissions on credibility advanced by both parties, but particularly by Mr. Gichuru. Mr. Gichuru has not demonstrated any error in principle in the way in which the trial judge assessed credibility. To the contrary, his argument on appeal does not rise above an attempt to reargue his case and suggest that the trial judge, in reaching her conclusions on credibility, should have weighed matters differently.

[16] In our view, a review of the evidence at trial demonstrates that there was ample evidence supporting each of the findings of fact made by the trial judge. By way of example, Mr. Gichuru contested the trial judge's finding that Mr. Murphy had asked him to do work that he did not do. But that was exactly what Mr. Murphy said had occurred. In short, Mr. Murphy had attempted unsuccessfully to enlist Mr. Gichuru's assistance on a number of personal injury files, but found the experience so frustrating that he gave up and did the work himself. The trial judge was entitled to find the facts as she did, having seen the witnesses and assessed their evidence against the probabilities and the relevant circumstances.

[17] Similarly, we are satisfied that the trial judge's finding that Mr. Gichuru was unavailable to Mr. Smith when he attempted to call him on April 26 and 29, contrary to instructions he had received, is supported by the evidence. Mr. Gichuru testified that he was always available to be contacted at lunchtime by telephone and that if he did not answer his cell phone, it would have been because he was in court or driving to court. He testified that he never missed a call. Specifically, he disputed that he might have missed calls when he went home for lunch and was listening to music. He said he was no more likely to miss a call in his apartment than in the office.

[18] On cross-examination, it was suggested to Mr. Gichuru that he had missed a call from Mr. Smith on April 30 at lunchtime (this suggestion was consistent with some evidence Mr. Smith had previously given at a Human Rights Tribunal hearing). Mr. Gichuru explained that he had attended court in Maple Ridge at 1:30 p.m. that day and that he would have left for Maple Ridge at about 12:30 p.m. He would have turned his phone off while he was driving. He was also asked whether he had missed calls from Mr. Smith in the morning and evening of April 29. This evidence needs to be set in context. Mr. Gichuru was being cross-examined on cell phone records. It is apparent from a review of the transcript that the initial premise of the cross-examination was that the cell phone records disclosed calls made to Mr. Gichuru's phone. As the evidence developed, it became clearer that the calls reflected Mr. Gichuru phoning to retrieve voicemail messages that had been left earlier. Accepting that, the cell phone records disclosed Mr. Gichuru phoning his voicemail first thing on the morning of April 29, which was a Monday, and then phoning his voicemail again in the evening of April 29 to pick up a message left earlier in the day. Mr. Gichuru testified that, on those occasions, a caller who had gone to voicemail had not left a message.

[19] Mr. Smith was clear that he had attempted unsuccessfully to reach Mr. Gichuru at lunchtime on April 26 and April 29, 2002. He explained how he had been able to identify those particular days and why he had been mistaken in his evidence before the Human Rights Tribunal in identifying April 30 as the date when

he attempted to contact Mr. Gichuru. Mr. Smith explained the sequence of events that had triggered him dictating his termination letter on April 26, but then holding it over the weekend. He had refreshed his memory from notes of a call that he had made to the Law Society on April 26 advising that he would be terminating Mr. Gichuru. He also referred to some records that he had located during trial that showed Mr. Gichuru's expenses for attending court in late April. Those records did not disclose any claim for expenses on April 26 or April 29, although they did do so for April 30 when Mr. Gichuru attended court in Maple Ridge.

[20] Mr. Smith testified that at lunchtime on April 26 he had called Mr. Gichuru's cell phone and not received an answer. The call went to voicemail, but he did not leave a message. He then checked with his office to determine if Mr. Gichuru's whereabouts were known and was advised that he had left the office. That was the last straw and Mr. Smith dictated a termination letter over the phone, but decided to leave it over the weekend. At lunchtime on April 29, he called again, principally to check whether Mr. Gichuru would answer the phone. He did not. Once again the call went to voicemail but Mr. Smith did not leave a message. Mr. Smith's evidence that the call went to voicemail but he did not leave messages on April 26 (a Friday) and April 29 is consistent with Mr. Gichuru's cell phone records disclosing Mr. Gichuru's call to pick up messages on the morning and evening of April 29.

[21] Mr. Gichuru cross-examined Mr. Smith on his evidence that he had called at lunchtime on both April 26 and April 29. Mr. Smith confirmed his evidence.

[22] Mr. Gichuru gave rebuttal evidence arising from the records of his expenses that had been disclosed after he had given evidence in his case. He did not give any evidence in rebuttal explaining whether he was available to receive calls at lunchtime on April 26 and 29, 2002.

[23] In our view, it is clear that there was evidence before the trial judge from which she could draw the conclusion not only that Mr. Smith had attempted to reach Mr. Gichuru by cell phone at lunchtime on those days but also that Mr. Gichuru had not been available to take the calls as he should have been. It is, respectfully, a

complete misapprehension of the state of the evidence to suggest, as Mr. Gichuru does, that there was no evidence before the court to support a finding of fact that he was not available, or failed, to take calls from Mr. Smith at the time he was required to receive them. Mr. Gichuru has not demonstrated any palpable or overriding error in the findings of fact made by the trial judge.

[24] It is, of course, trite law that this Court owes deference to findings of fact made by a trial judge if they are supported by the evidence. Assessing credibility and finding facts based on that assessment are peculiarly the province of the trial judge. In this case, Mr. Gichuru's argument fails to demonstrate any legal error made by the trial judge in the assessment of the evidence and credibility. On this aspect of the appeal, Mr. Gichuru simply attempts to reargue his case at trial. He invites us to reweigh the evidence – something we should not do. We would not accede to Mr. Gichuru's contention that the trial judge committed palpable and overriding errors in reaching her findings of fact.

[25] Mr. Gichuru goes further than suggesting that the trial judge made findings of fact in the absence of evidence that established just cause. He submits that it was improper for the judge to make those findings because he did not have proper notice by way of the pleadings or other notice that he was alleged not to have been available on those particular days.

[26] Mr. Gichuru contends that he understood that the allegation he faced was that he had not been available to receive a call at lunchtime on April 30, 2002. He based that understanding on evidence that Mr. Smith had given earlier at a Human Rights Tribunal hearing explaining what had precipitated his decision to terminate Mr. Gichuru's employment. Further, there was no specific pleading that he had not been available on April 26 and 29, 2002, and at the beginning of his evidence, he had requested that any alleged facts relied on to justify termination be put to him in his evidence so that he would have an opportunity to respond to them. He argues that it was not suggested to him in his cross-examination that he had been

unavailable on those dates. Accordingly, the judge erred in making findings of fact about those dates, since the issue was not properly joined between the parties.

[27] We do not find Mr. Gichuru's argument persuasive.

[28] In his Notice of Civil Claim, Mr. Gichuru alleged that he had been wrongfully dismissed on April 30, 2002. In the Response to Civil Claim, amongst other alleged breaches of the contract of employment, the defendants alleged that Mr. Gichuru had breached express terms of the contract of employment, including his obligation to "obey the reasonable and lawful directions" of Mr. Smith. They pleaded:

> … Often, the only time in a work day available for the Defendant Smith and the Plaintiff to communicate was over the lunch hour because of the Defendant Smith's busy court schedule, and for this reason, the Plaintiff was specifically requested to be capable of telephone contact over that time. Notwithstanding repeated requests and admonitions that the Plaintiff make himself available over the lunch hour, the Plaintiff refused to be available over this time period and accordingly compromised his use to the Defendant Smith because of strategic communication breakdown caused by his absence …

[29] The defendants go on to plead that Mr. Gichuru was warned of this breach of his employment contract and that if the breach was not remedied, he would be dismissed. They then pleaded:

> On a third occasion, the Plaintiff again neglected to answer his mobile phone, at a time that he was required on a pressing matter. On account of failed efforts by the Defendant Smith and support staff to contact the Plaintiff on this day, and due to the Plaintiff[']s] failure to accede to the Defendant Smith's repeated warnings, a notice of dismissal was forwarded to the Plaintiff on account of his breach of the employment contract.

[30] There is no issue that the "third occasion" referred to in the pleading is an alleged event occurring after the lunch meeting on April 18, 2002. It is, accordingly, clear that the defendants were relying as justification of just cause on Mr. Gichuru's failure to be available by telephone on a day between April 18 and April 30, 2002, when the termination letter was provided to the appellant.

[31] The pleadings, therefore, raise the factual issue of whether Mr. Gichuru had been unavailable by phone immediately prior to his dismissal and it was, as a pleadings matter, entirely proper for the trial judge to make findings of fact in relation

to it. It may have been open to Mr. Gichuru to request particulars of the specific date or dates on which it was alleged that he had not been available by telephone. It does not appear that was done. Regardless, the pleading as it stands is sufficient to raise properly the issue for the purposes of trial.

[32] In our view, Mr. Gichuru places inappropriate weight on the fact that Mr. Smith had testified earlier at a Human Rights Tribunal hearing that what had precipitated his decision to terminate Mr. Gichuru's employment was his inability to reach Mr. Gichuru by phone on April 30, 2002. That evidence was given in a hearing dealing with different issues and it is difficult to see that the date on which Mr. Smith had attempted to contact Mr. Gichuru was relevant to the issues in that hearing. In any event, Mr. Gichuru was not entitled to rely on that evidence of the specific date as if it were a pleading, or particulars of pleadings, that formally defined the issues between the parties for the purposes of trial. The specific date was not, in that sense, a formal allegation of material fact. The gravamen of the formal allegation is that after being warned that he had to be available to Mr. Smith at certain times, within very short order, he disobeyed the instructions he had received. The specific time he was unavailable is less significant, although, of course, as a matter of trial fairness, Mr. Gichuru was entitled to know when it was said he was unavailable and to have the opportunity to address that issue in his evidence. In our view, he did receive that opportunity.

[33] At trial, as has already been alluded to, Mr. Smith explained not only that he was mistaken in saying that he had tried to call Mr. Gichuru on April 30, but he also explained how he had reconstructed the timeline using documents that he had not consulted before giving evidence at the Human Rights Tribunal. Unfortunately, some of those documents had been located during the course of the trial, after Mr. Gichuru had testified.

[34] We have already canvassed the scope of Mr. Gichuru's evidence, both in direct and on cross-examination. There was clearly some confusion as the evidence unfolded about what the cell phone records disclosed about calls made to his phone.

As discussed, it appears the evidence eventually established that Mr. Gichuru had called for messages in the morning and evening of April 29, and it was suggested in cross-examination that Mr. Gichuru had been unavailable on April 29, although it was not put to him that he had failed to answer a call from Mr. Smith at lunchtime.

[35] Mr. Gichuru, it will be recalled, gave evidence that he did not miss calls and that if he had been phoned, he would have answered the call, unless he was in court or driving. He was cross-examined generally about his availability to take calls and whether he might have missed some, but he was not confronted with the specific allegation that he had been unavailable to receive cell phone calls on April 26 or lunchtime April 29, 2002.

[36] As already noted, when Mr. Smith gave his evidence, he pinpointed those dates as the dates he had attempted to contact Mr. Gichuru and explained how it was that he was now able to identify those as the specific dates. Mr. Gichuru was, by then, well aware of when it was said he had not been available to Mr. Smith. Mr. Gichuru cross-examined Mr. Smith on this evidence but did not receive answers that assisted his case.

[37] Mr. Gichuru then had the opportunity to give rebuttal evidence. Indeed, he did give rebuttal evidence related to the document that showed the expenses he claimed for driving to court at the end of April. This was one document that Mr. Smith had relied on to refresh his memory of the dates on which he attempted to call Mr. Gichuru but it was not the only one. Mr. Smith also refreshed his memory by referring to a Law Society document that recorded his April 26 call to the Law Society in which he explained that he would likely be terminating Mr. Gichuru's employment and the reasons why. This document is clear evidence that corroborates Mr. Smith's evidence that he failed to reach Mr. Gichuru on April 26. More importantly, for current purposes, the document was available before trial and should have alerted Mr. Gichuru to the fact that there was evidence that he had been called on that date. Nonetheless, Mr. Gichuru did not give, or attempt to give,

any evidence in rebuttal to explain why he would not have been able to receive telephone calls at lunchtime on April 26 or 29, if Mr. Smith had tried to reach him.

[38] In all of these circumstances, we do not think there was anything improper or unfair in the trial judge accepting that Mr. Smith had tried unsuccessfully to contact Mr. Gichuru on those dates and that Mr. Gichuru had been unavailable to receive those calls, without a reasonable excuse. By the time Mr. Smith had given his evidence about these calls and been cross-examined on them by Mr. Gichuru, Mr. Gichuru must have recognized what amounts to a very minor shift in the case. That shift amounted to little more than that Mr. Smith had tried to contact Mr. Gichuru on two days after the April 18, 2002, lunch meeting and that one of those days was April 29 rather than April 30, 2002.

[39] What happened here is the kind of situation that arises regularly in trials. A witness corrects mistaken evidence during trial. The opposing party has the opportunity to address the issue but, as in this case, does not do so. In our opinion, it is not open to him now to say that the trial was unfair or that the trial judge had no proper basis on which to make findings of fact about April 26 and April 29, 2002.

[40] We turn now to two further arguments advanced by Mr. Gichuru concerning the finding of just cause. First, Mr. Gichuru, in his factum at least, misinterprets the relationship between the trial judge's findings of fact and her conclusion that his employer had just cause to terminate his employment. Mr. Gichuru argues that the finding of just cause was based on his unavailability on April 26 and 29, 2002.

[41] The trial judge's statement that Mr. Smith had just cause to terminate Mr. Gichuru's employment at that point has to be read in a wider context. The trial judge had found that Mr. Gichuru was in breach of his employment contract before the lunch meeting on April 18, 2002. At that lunch meeting, Mr. Gichuru was warned that unless his conduct changed, his employment was in jeopardy. The trial judge concluded that the events after that April 18 meeting were, in effect, culminating events demonstrating that Mr. Gichuru would not alter his behaviour and that, as a result, just cause existed to terminate his employment.

[42] Second, Mr. Gichuru alleges one specific legal error in the trial judge's contractual analysis. He contends that the law does not permit an employer to rely on reasons for termination that were not provided to an employee at the time of termination, unless the employer learned of the relevant facts subsequent to the termination.

[43] In our view, it is unnecessary to comment on whether this view of the law has any merit. This is so because the alleged legal principle does not arise on the facts of this case. Mr. Gichuru relies on the wording of the letter that he received on April 30, 2002, terminating his employment. In relation to the reasons for termination, that letter simply said:

> … I should also add, to be fair to you, that your attitude is not pleasing and the idea of what would constitute your work hours is also not pleasing.
>
> … I will report to the Law Society. I do not intend to report that there is anything unsatisfactory [about] your work ability. …
>
> I am sorry that this happened, but cannot be convinced that your continued Articles in my law firm will be a benefit to us. …

[44] The reality is, as the trial judge found, that Mr. Gichuru was well-informed, before he was terminated, of the concerns his employer had about his performance and attitude. He could have been in no doubt about why his articles were terminated and the defendants did not rely on reasons to justify cause not known to Mr. Gichuru. More specifically, Mr. Smith had spoken to Mr. Gichuru about his availability as early as March 2002. The lunch meeting on April 18, 2002, canvassed the critical problems. Mr. Gichuru called the Law Society on April 18 and discussed the reasons why his employment was at risk. The trial judge found that a serious incident had occurred on April 22 at the Abbotsford courthouse and that Mr. Gichuru knew that Mr. Smith took a very serious view of what had occurred then.

[45] We turn finally to the suggestion that the trial judge erred in finding that Mr. Smith, as effective principal, did not owe fiduciary duties to his articled student, Mr. Gichuru. The trial judge assessed the case against the well-known test for finding that an *ad hoc* fiduciary duty exists, which requires:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[46] The trial judge found that Mr. Smith did not give an undertaking to act in Mr. Gichuru's best interests, nor could he have, because to have done so would be incompatible and in conflict with Mr. Smith's fundamental fiduciary duties that he owed to his clients. Moreover, she also concluded that Mr. Gichuru was not in the requisite sense "vulnerable" to Mr. Smith's control. Mr. Gichuru contends these conclusions are in error. First, he says, the alleged duty is not incompatible or in necessary conflict with the acknowledged fiduciary duties owed to clients. The two duties can jointly co-exist without contradiction. Secondly, he argues that he was "vulnerable" and that vulnerability was not dissipated because he could seek articles elsewhere. By way of example, he drew our attention to the fact that a lawyer's client can terminate a retainer and seek other representation without that undermining the existence of a fiduciary duty. In the result, Mr. Gichuru asks for an order remitting the matter of the existence of a fiduciary duty and any alleged breaches back to trial.

[47] We note that the trial judge found as a fact that Mr. Smith had not given an undertaking to act in Mr. Gichuru's best interests. Certainly, Mr. Smith took on obligations to Mr. Gichuru both in his capacity as an employer (through his law corporation) and as Mr. Gichuru's effective articling principal. But taking on those obligations does not imply that in doing so he was undertaking to act in Mr. Gichuru's best interests in the sense necessary to create a fiduciary duty. The trial judge's analysis that Mr. Smith could not give such an undertaking without creating a necessary conflict with his primary fiduciary duties owed to clients may very well be entirely correct, but it is not necessary to decide the question for the purposes of deciding this appeal. The trial judge's finding as a fact that Mr. Smith gave no such undertaking in the circumstances of this case is sufficient to dispose of the claim. No basis has been demonstrated to undermine her finding of fact. Accordingly, we would not accede to this ground of appeal.

[48] We turn finally to two matters that have arisen since the hearing of the appeal. On September 29, 2014, Mr. Gichuru wrote to the Court Registry. In his letter, he raised a number of matters. First, he requested that the Division recuse itself on the ground that a reasonable apprehension of bias arose from the conduct of the hearing. Second, he asserted that the respondents had raised new arguments on the appeal relating to the April 26 and 29, 2002, calls. He said that those arguments caught him by surprise and that he did not have sufficient time in reply (which he timed at four minutes) to respond to them. He requested that the Division not consider those arguments or, alternatively, that he be given an opportunity at a further oral hearing to respond to them or, failing that, that he be permitted to provide written submissions. Finally, Mr. Gichuru argued that the suggestion advanced by the respondents that this Court award party and party costs on a summary basis, if we were not inclined to uphold the order awarding special costs, was also a new argument to which he ought to be permitted to respond in a brief written submission.

[49] Through the Registry, we informed Mr. Gichuru that the Division would not recuse itself and that we would not receive any further submissions except a brief written submission dealing with the costs issue.

[50] Turning to the issue of a reasonable apprehension of bias. The issue arose because each member of the Court strongly encouraged Mr. Gichuru to move off his argument that the trial judge erred in finding that his employment contract was with the law corporation and not Mr. Smith personally. Mr. Gichuru says he was prevented from making his argument and that a reasonable and informed observer, viewing the matter realistically and practically, would conclude that he did not receive a fair hearing by an impartial court.

[51] There is no merit in this submission. Mr. Gichuru was encouraged or directed to move on to other aspects of his appeal because the issue he was addressing was of no practical significance to the outcome of the appeal. The respondents had committed on the record to pay a judgment, if there was liability, regardless of which defendant was liable. Spending time on who was the party to the contract wasted

the time available to Mr. Gichuru to advance his argument that the trial judge had erred in her finding that his employment had been terminated for cause. A reasonable and informed observer would conclude that the Division was assisting Mr. Gichuru by directing him to focus on issues that might materially affect the practical outcome of the appeal to his benefit and not detriment.

[52] Turning to the new argument issue. Mr. Gichuru argued in his factum that the trial judge made findings of fact about the phone calls on April 26 and 29, 2002, in breach of principles of natural justice because the respondents had not put those alleged facts to him in cross-examination. The substantive issues on this matter have been canvassed above. He submits, however, that the respondents did not respond to this argument in their factum and that their response to it in oral submissions was a new argument of which he did not have notice.

[53] Mr. Gichuru is correct in saying that the respondents did not directly respond to the specific paragraphs in his factum raising this ground of appeal, but they did take the position in their factum that the issue of just cause was properly pleaded and was before the court. They also submitted that the finding of just cause rested on multiple and cumulative reasons and that the findings of fact made by the trial judge were supported by the evidence. The evidence in support of that argument, including the evidence bearing on the April 26 and 29 phone calls, was referenced in the respondents' factum. They also devoted pages of their factum to correcting factual statements made by Mr. Gichuru in his factum. Specifically, the factum references the cross-examination of Mr. Gichuru on Mr. Smith's attempts to call him after April 18, 2002, and Mr. Smith's attempt to call him on April 26 and 29. In substance, the factum does contest the factual basis of Mr. Gichuru's argument.

[54] In our view, in their oral submissions, the respondents elaborated properly on their factum and responded appropriately to Mr. Gichuru's oral submissions. In their oral submissions, the respondents did not raise new points of law, rely on any authorities not already before the Court, or take the Court in any material way to evidence not already referred to in the factum. It must be remembered that

Mr. Gichuru carried the burden of establishing that the record demonstrated facts capable of supporting his argument. The respondents' oral submissions highlighted for the Court how the evidence unfolded at trial. In substance, their submission consisted of explaining the record. In doing so, they relied almost exclusively on references to the record included in their factum. In our view, this was entirely proper. In considering the merits of Mr. Gichuru's argument, the Court was entitled to know, for example, that Mr. Gichuru had cross-examined Mr. Smith on those particular phone calls and had not availed himself of an opportunity to give evidence about them in reply. For the purposes of the appeal, Mr. Gichuru ought to have anticipated the relevance of these matters and been prepared to deal with them. An appellant does not acquire a right to submit further submissions in reply by not thinking about obvious objections to the argument he or she is advancing or by being unprepared to deal with matters in the record relevant to the ground of appeal being advanced.

[55] Mr. Gichuru complains also that he had, he contends, only four minutes in reply and that he was deprived of a fair opportunity to respond. The court record suggests that Mr. Gichuru spent nearly 10 minutes in reply. Mr. Gichuru received the entire morning to make his argument. He also had time for reply. Mr. Gichuru was given significantly more than half of the time available to the court for oral submissions. Mr. Anderson reluctantly acquiesced in that allocation of time, although he stated a preference for a more equal allocation, given that he anticipated, quite accurately, that he would need to spend time referring in detail to the evidence. Mr. Gichuru chose to use the time he was allocated in the way that he saw fit. In our view, Mr. Gichuru had ample time to deal with these issues either in his principal submissions or in reply to explain his position.

[56] In our view, there was nothing unfair in the hearing of the appeal. We see no basis on which we should have agreed to refuse to consider whether the trial judge breached a principle of natural justice in making certain findings or to receive additional oral or written submissions on the matter.

Costs

[57] Following delivery of the trial reasons, the parties made submissions on costs. The trial judge's reasons on costs are indexed at 2013 BCSC 1818.

[58] At the costs hearing Mr. Gichuru argued that each side should bear their own costs, or alternatively, that Mr. Smith recover only 25% of his assessed costs. He submitted Mr. Smith should be deprived of his costs because of misconduct on his part and his counsel's part.

[59] Mr. Smith sought special costs. Alternatively, and on the basis of an offer to settle, he sought an order that he recover costs assessed on a party and party basis on Scale B up to September 13, 2012 and double costs thereafter.

[60] The trial judge dealt first with Mr. Gichuru's application. She noted that pursuant to R. 14-1(9) of the *Supreme Court Civil Rules* (the "*Rules*") costs of a proceeding must be awarded to the successful party unless the court otherwise orders. The trial judge reviewed in detail Mr. Gichuru's various complaints about the conduct of Mr. Smith and his counsel, but ultimately concluded that Mr. Gichuru had not met the burden on him to displace the usual rule that costs follow the event. She dismissed Mr. Gichuru's application in regard to costs.

[61] She then turned to Mr. Smith's application. She dealt first with the offer to settle. She found that it had been made too close to trial. In the circumstances, she was not prepared to find that the offer was one that Mr. Gichuru ought reasonably to have accepted. On that basis, she was not prepared to exercise her discretion and make an order for double costs.

[62] In regard to special costs, she noted that such an award is intended to chastise a party for reprehensible, scandalous or outrageous conduct and that unproven allegations of fraud or dishonesty may attract an award of special costs since such allegations are serious and potentially very damaging to those accused of deception. She noted that Mr. Gichuru had made serious allegations of dishonesty against Mr. Smith. She found that he had not proven the allegations of dishonesty at

trial nor had he proven any breach of fiduciary duty. She noted that Mr. Smith had put Mr. Gichuru on notice in advance of the trial that the allegations of misconduct had no evidentiary foundation and that he would seek special costs.

[63] After a detailed review of the allegations, pleadings and evidence, the trial judge concluded that an award of special costs was justified. She summarized her views as follows:

> [76] Mr. Gichuru's attacks on Mr. Smith's professional integrity and honesty were persistent and maintained over a period of years. They were maintained after Mr. Smith warned Mr. Gichuru of the consequences, something Mr. Gichuru should have appreciated even without any warning. A lawyer relies on his reputation for integrity. When that reputation is falsely assailed, the court's reproof should be felt.
>
> [77] As I noted above, alleging (and failing to prove) fraud or dishonesty will not necessarily result in an award of special costs. Here, however, there is something more, namely: Mr. Gichuru's recklessness in making such allegations and in stubbornly refusing to abandon them, maintaining them over a period of years, and through to closing submissions at the trial. In my view, based on Mr. Gichuru's reckless allegations of fraud and dishonesty against Mr. Smith, an award of special costs is justified.

[64] The trial judge then turned to the issue of how costs were to be assessed. Mr. Smith sought to have costs, including disbursements, assessed summarily pursuant to R. 14-1(15). Mr. Gichuru opposed such an assessment. He said that regardless of whether special costs or party and party costs were ordered he was entitled to have costs and disbursements assessed by the registrar and to have the ability to challenge the amounts claimed.

[65] The trial judge held that it was appropriate to assess costs summarily. In reaching this decision she took into account that Mr. Gichuru had no current ability to pay a judgment in respect of costs, whatever the amount, and as such had nothing at stake in forcing Mr. Smith to incur the time and expense of a formal assessment. She saw no good reason why Mr. Smith should be subject to an assessment. She noted that judicial resources are scarce and need to be used efficiently and effectively. In her view making an order that required an assessment before the registrar was not compatible with the economical use of judicial resources.

[66] The trial judge then went on to assess costs. In regard to the approaches to the quantification of special costs she said:

> [86] There are three common approaches to the quantification of special costs: one is to award costs equal to the actual legal costs incurred by the party to whom costs are being awarded; a second is to fix costs at a percentage of actual legal costs, often on 80 or 90 percent of the actual legal costs; and a third is what is sometimes referred to as a "rough and ready" approach, based on $5,000 per half day plus taxes and disbursements. See *Clare's Cove Marina Ltd. v. Salmon Arm (City)*, 2013 BCSC 912, at para. 32.

[67] She then noted that in this case Mr. Smith had asked to have costs determined on the basis of the rough and ready approach which on his calculations using a multiplier of $6,000 per half day would lead to a costs award of $108,000.

[68] Mr. Smith did not put before the trial judge any evidence of his actual legal fees. He did submit a draft party and party bill of costs which showed various tariff items that with taxes totalled $29,629.60. In addition the bill of costs showed disbursements of $16,490.63 leading to a total party and party bill of $46,120.23.

[69] The trial judge indicated that the draft bill provided some guidance in determining costs on a rough and ready approach. She considered the factors set out in R. 14-1(3)(b) and noted that given the importance of the litigation to Mr. Smith, the scandalous allegations that had been made against him and the successful outcome, he was entitled to a substantial costs award. She assessed costs inclusive of disbursements and taxes at $90,000. Her reasoning in that regard was:

> [90] I would not increase the per-half-day amount to $6,000, as requested by the defendants, although I appreciate that it has been done in other cases cited to me in argument. In *Bradshaw*, the court's assessment was based on $5,000 per half day, and the total amount of the award after a 51-day trial included disbursements and taxes. That basic approach commends itself to me.
>
> [91] Therefore, on the "rough and ready" approach, and under Rule 14-1(15), I fix the defendants' costs of this action, including disbursements and taxes, at $90,000. This is roughly double the amount presented in the draft bill of costs, which included disbursements and taxes. Although, since it includes disbursements and taxes, it represents somewhat less than $5,000 per half day, I have concluded that it represents appropriate compensation by way of special costs in this action.

Issues On Appeal

[70] Mr. Gichuru now challenges both the award of special costs and the summary assessment of those costs. While acknowledging that a judge's decision on costs will generally be insulated from appellate review, Mr. Gichuru notes that an appellate court may and should intervene where it finds the trial judge has misdirected himself or herself as to the applicable law or made a palpable error in the assessment of the facts: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43.

[71] Mr. Gichuru suggests that the trial judge erred by finding that he had made reckless allegations of fraud and dishonesty. He submits the trial judge ordered him to pay special costs of the entire proceeding even though there was already an order in place in relation to a payment of party and party costs for certain interlocutory applications that had been made in the course of the action.

[72] Mr. Gichuru further submits that this was not an appropriate case for special costs to be assessed summarily. He submits that parties who are impecunious should not be treated differently than more affluent parties. He notes that one of the trial judge's stated reasons for a summary assessment was the stubbornness he had shown in litigating the action including his appeal of Madam Justice Bruce's interlocutory orders. Mr. Gichuru points out that he in fact succeeded on several issues on that appeal: *Gichuru v. Smith*, 2010 BCCA 352.

[73] Mr. Gichuru challenges the validity of an assessment made in the absence of evidence of the actual legal fees incurred by Mr. Smith. Mr. Gichuru also challenges the use of a fixed fee "rough and ready" calculation to assist in determining special costs. He notes that this Court in *Bradshaw v. Stenner*, 2013 BCCA 61 at para. 16 [*Bradshaw Review*] had suggested that the suitability of a fix fee rough and ready calculation may require resolution in this Court.

[74] Mr. Smith asks this Court to uphold the special costs assessment. He submits that in the circumstances the award of special costs was justified and there are no grounds to interfere with the trial judge's exercise of her discretion.

[75] Mr. Smith cites several cases in the trial division that have made rough and ready summary assessments. He says the authority for such assessments is *Interclaim Holdings Limited v. Down*, 2002 BCCA 632.

[76] Mr. Smith submits that a bill of special costs is not a prerequisite to a summary assessment. In support he cites the trial decision in *Bradshaw v. Stenner*, 2012 BCSC 237 [*Bradshaw*]. Mr. Smith suggests that he should not be put through the time and costs of a registrar's hearing. At the hearing of this appeal his counsel advised that if the summary assessment was reversed, he would prefer this Court summarily assess costs on a party and party basis, as per the draft bill of costs, rather than go through the costs and expenses of a registrar's hearing.

Discussion

A. Award of Special Costs

[77] The award of costs, including the appropriate scale of costs, involves the discretion of the trial judge. This Court should not interfere with that discretion unless the trial judge made an error in principle or the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[78] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, where Lambert J.A., speaking for the Court, after an extensive review of the authorities, concluded:

> ... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[79] A party who alleges serious misconduct against another in a civil lawsuit must be prepared to prove such allegations or reap the consequences in the form of an order for special costs: *Kurtakis v. Canadian Northern Shield Insurance Co.* (1995), 17 B.C.L.R. (3d) 197 (C.A.). In this case, Mr. Gichuru's pleadings made serious allegations against Mr. Smith, including the following:

> 20. Smith provided false and misleading information to the Law Society with respect to the circumstances surrounding the termination of the plaintiff's articles.
>
> 21. Smith falsely informed the Law Society the plaintiff insisted on taking a 60 minute lunch away from the office and that the plaintiff never worked after 5:30 p.m.
>
> 22. Smith failed to inform the Law Society that he had promised to hire another person as an articled student to replace the plaintiff.
>
> 23. Smith falsely informed the Law Society that Beuhler had consented to the correspondence providing the alleged reasons for the termination of the plaintiff's employment.
>
> 24. In or about May 2003, as a result of the correspondence received from Smith, the Law Society refused to allow the plaintiff admission in the Law Society Admission Program.
>
> 25. In or about May to June 2003, as a further result of the correspondence received from Smith, the Law Society required the plaintiff to provide personal medical information and undergo an independent psychiatric evaluation.

[80] The trial judge found that Mr. Gichuru did not prove any of his allegations. A lawyer relies on his reputation for integrity. While not every accusation against a lawyer will lead to special costs, when a lawyer's reputation is falsely assailed, the court's reproof should be felt: *Patriquin v. Laurentian Trust of Canada Inc.*, 2002 BCCA 6 at paras. 27 and 29; *Bronson v. Hewitt*, 2011 BCSC 102 at para. 118; *Startup v. Blake*, 2001 BCSC 8 at para. 112.

[81] In the circumstances of this case it was open to the trial judge to make an award of special costs. Mr. Gichuru has not established that she misdirected herself as to the applicable law or made any error in her assessment of the facts. We would not accede to this ground of appeal.

B. Assessment of Special Costs

i. Overview

[82] This aspect of the appeal raises several issues of general importance which need be considered before turning to the assessment made in this case. The issues include: the power of a judge to assess costs and the source of that power, when a judge should assess costs, and, if a judge does decide to assess costs, how that assessment is to be carried out. The third issue raises several additional issues. These include: whether a judge's method of assessment can differ from that of a registrar, whether a judge can assess special costs absent evidence of the actual legal fees incurred, and whether a judge can use the rough and ready method to assess special costs.

[83] To address these issues it is first necessary to consider the purpose of special costs, the civil rules governing special costs and how these rules have evolved over time. We will next discuss the powers of a judge to assess costs and various factors that should be considered in determining whether such an assessment should be carried out summarily. We will then consider the ways that costs can be assessed and consider the validity of the rough and ready method of assessment. That discussion will also involve the question as to whether an account is a pre-condition to a special costs assessment. Finally we will turn to the assessment made in this case and whether it has to be reconsidered.

ii. The Rules – Present and Past

[84] Rule 14-1 of the *Supreme Court Civil Rules* sets out the present rules governing costs. The *Rules* recognize two categories of costs: party and party costs and special costs. A trial judge cannot impose cost sanctions that are not authorized by the *Rules*: *Kurtakis; A.E. v. D.W.J.*, 2009 BCSC 505 at paras. 48-50, aff'd 2011 BCCA 279 at paras. 12, 39.

[85] Party and party costs are assessed in accordance with Appendix B of the *Rules*. On an assessment of special costs a party is entitled to those fees that were proper or reasonably necessary to conduct the proceeding.

[86] For the purpose of this appeal the following provisions of the present *Rules* are of particular import:

> **Rule 14-1 - Costs**
>
> **How costs assessed generally**
>
> (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
>
> (a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;
>
> (b) the court orders that
>
> (i) the costs of the proceeding be assessed as special costs, or
>
> (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
>
> (c) the court awards lump sum costs for the proceeding and fixes those costs under subrule (15) in an amount the court considers appropriate;
>
> (d) the court awards lump sum costs in relation to an application, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
>
> ...
>
> **Assessment of party and party costs**
>
> (2) On an assessment of party and party costs under Appendix B, a registrar must
>
> (a) allow those fees under Appendix B that were proper or reasonably necessary to conduct the proceeding, and
>
> (b) consider Rule 1-3 and any case plan order.
>
> **Assessment of special costs**
>
> (3) On an assessment of special costs, a registrar must
>
> (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and
>
> (b) consider all of the circumstances, including the following:

(i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;

(ii) the skill, specialized knowledge and responsibility required of the lawyer;

(iii) the amount involved in the proceeding;

(iv) the time reasonably spent in conducting the proceeding;

(v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;

(vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;

(vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;

(viii) Rule 1-3 and any case plan order.

Assessment officer

(4) The officer before whom costs are assessed is a registrar.

Disbursements

(5) When assessing costs under subrule (2) or (3) of this rule, a registrar must

(a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and

(b) allow a reasonable amount for those disbursements.

...

Costs arising from improper act or omission

(14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order

(a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or

(b) that the party pay the costs incurred by any other party by reason of the act or omission.

Costs of whole or part of proceeding

(15) The court may award costs

(a) of a proceeding,

(b) that relate to some particular application, step or matter in or related to the proceeding, or

(c) except so far as they relate to some particular application, step or matter in or related to the proceeding

> and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.
>
> ….
>
> **Form of bill in certain cases**
>
> (30) A bill for special costs or a bill under the *Legal Profession Act* may be rendered on a lump sum basis.
>
> **Description of services**
>
> (31) A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.
>
> **Evidence of lawyer**
>
> (32) A party to an assessment of costs or a review of a lump sum bill may put in evidence the opinion of a lawyer as to the nature and importance of the services rendered and of the matter involved and the reasonableness of the charges made, but a party must not put in evidence the opinions of more than 2 lawyers, and a lawyer giving an opinion may be required to attend for examination and cross-examination.
>
> …

[87] The foundation of the present cost rules can be traced back to the initial *Supreme Court Rules*, 1880 (the "1880 *Rules*"). While the language and terminology has evolved over time, the principles governing costs have remained fairly constant.

[88] The 1880 *Rules* set out that fees and costs as between party and party or solicitor and client should be allowed only according to the schedule in Appendix H (MR 385). Costs were to be determined by a taxing officer; in regard to costs to be paid by another party, no costs were to be allowed which appeared to the taxing officer "to have been incurred through over-caution, negligence, or mistake, or merely at the desire of a party" (MR 391).

[89] The distinction between "party and party" and "solicitor-client" costs recognized in the 1880 *Rules* continues to the present day. The *Supreme Court Civil Rules,* 1990 (the "1990 *Rules*") introduced the term special costs in place of solicitor-client costs.

[90] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young*, [1993] 4 S.C.R. 3 at 134-138. Special costs may also be ordered in circumstances where there has been no wrongdoing. Such orders may arise from the terms of a statute, (*Laye v. College of Psychologists of British Columbia* (1998), 114 B.C.A.C. 201; *Campbell River Woodworkers v. British Columbia (Minister of Transportation and Highways*), 2004 BCCA 27) or a contract (*Johal v. Virdi*, 2012 BCSC 450). Parties in estate litigation are often entitled to special costs (*Leung v. Chang*, 2014 BCSC 1243), as are those in committee proceedings (*Vieira (Re),* 2013 BCCA 420). A successful public interest litigant may be entitled to special costs: *Victoria (City) v. Adams*, 2009 BCCA 563.

[91] Special costs are usually intended to indemnify a successful litigant, fully or at least substantially: *Everywoman's Health Center Society (1988) v. Bridges* (1991), 54 B.C.L.R. (2d) 294 (C.A.) at 297; *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2005 BCCA 107 at para. 45 [*Lee*]. While special costs are usually awarded for the whole proceeding, it is open to a judge to make a partial award if of the view that it would be disproportionate to award special costs for the entire proceeding: *Muncaster v. Nunnenmacher* (1996), 76 B.C.A.C. 211; *Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1772; *A.S.P. v. N.N.J.*, 2013 BCSC 2377.

[92] The power of a judge to award costs directly first arose in the *Supreme Court Rules*, 1890, which allowed a judge to fix a lump sum in lieu of taxation in interlocutory applications (MR 765).

[93] A judge's powers to fix costs were expanded in the *Supreme Court Rules,* 1906. Marginal Rules 998 and 998a read respectively:

> 23. In interlocutory proceedings the court or judge may fix a lump sum of costs.
>
> 23(A) Where the cause or matter is tried at any other place other than: Victoria, Vancouver, New Westminster, Nanaimo, Nelson, Rossland, Greenwood, Grand Forks, Vernon or Kamloops, the court or judge may fix a lump sum for costs of the whole proceedings, and may on any case, wherever tried, fix such sum with the consent of all parties.

[94] A judge's ability to fix a lump sum in interlocutory proceedings was removed in the *Supreme Court Rules*, 1925. Judges continued to have the power, except in certain registries, to fix sums for the whole proceeding and to have that power in any case where the parties consented. Those *Rules* were changed in 1961. Pursuant to the 1961 *Supreme Court Rules*, a judge could fix lump sum costs of a whole proceeding only with consent.

[95] The judge's power to fix costs with consent continued through the 1977 (R. 57-6) and 1990 (R. 57-13) *Supreme Court Rules*. In January 1992, R. 57-13 was amended to give the court the additional power upon application by a party or by consent to fix a lump sum as the costs of a motion. In May 2002, R. 13.1 was adopted. Pursuant to R. 13.1, the court could award lump sums of an interlocutory application and either fix those costs, inclusive or exclusive of disbursements, or order that costs be in accordance with Schedule 3 of Appendix B and fix the scale of those costs pursuant to the terms of the Appendix.

[96] Rule 14-1(15) of the present *Rules* has expanded the role of the court. A judge who awards costs of a proceeding may now fix the amount of costs including the amount of disbursements.

[97] Prior to the adoption of the present *Rules* and other than for a period of years in specific registries, a judge did not have the power under the *Rules* to fix the amount of costs absent the consent of the parties. Even so, a judge could still fix costs pursuant to inherent jurisdiction: *Harrington (Guardian ad litem of) v. Royal Inland Hospital*, (1995) 69 B.C.A.C. 1; *Graham v. Moore*, 2003 BCCA 497; *Buchan v. Moss Management Inc.*, 2010 BCSC 121 at paras. 15-22 [*Buchan*], aff'd 2010 BCCA 393 at paras. 11-32 [*Buchan Appeal*]. While these cases recognized the court's jurisdiction to assess costs, they all cautioned that it was a jurisdiction to be exercised sparingly.

[98] The cases concerning the court's inherent jurisdiction to fix costs all pre-date the introduction of the present *Rules*. In *Lines v. Gordon*, 2009 BCCA 107, this Court summarized the scope of a court's inherent jurisdiction at paras. 23-25. While a

court has the inherent power to regulate its own procedure, it cannot adopt a practice or procedure inconsistent with the rules of court as set down by statute or adopted by ancient usage. Inherent jurisdiction is invoked where there is a gap in the statutory regime. This was the case under the previous *Rules*, as reviewed above. Under the present *Rules*, there is no longer a gap in regard to a judge's power to assess costs that requires invoking the court's inherent jurisdiction: see *Lines* at para. 26. The power to award costs now comes from and must be considered in the context of the *Rules.*

iii. When and How Should a Judge Assess Costs

[99] While R. 14-1(15) authorizes a judge to assess costs, the *Rules* are silent as to when and how a judge should exercise that authority. These questions are inter-related and should be dealt with together.

[100] At the outset, it is important to emphasize that in exercising the power to fix costs a judge cannot act arbitrarily or capriciously. He or she must act in a manner consistent with the *Rules* and the principles that have long governed such awards. In *Stiles v. B.C. (W.C.B)* (1989), 38 B.C.L.R. (2d) 307 (C.A.) at 310, Lambert J.A. articulated the limits on a judge's power to award costs:

> …Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230,[1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e. not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.

[101] The principle governing cost assessments under the *Rules* is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant

to a final judgement or interlocutory application. This principle follows from the plain and ordinary meaning of the *Rules* and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily.

[102] The *Rules* specifically set out two scales of costs: party and party and special costs. In an award of special costs, R. 14-1(3)(a) requires a registrar to allow only those fees that were proper or reasonably necessary to conduct the proceeding. Rule 14-1(3)(b) sets out a non-exhaustive list of factors for a registrar to consider in determining whether fees were proper and reasonably necessary. While a judge when fixing costs under R. 14-1(15) may not necessarily follow the same procedure as a registrar, the ultimate award of costs must be consistent with the award that a registrar would make in similar circumstances. Thus, in making a determination of special costs a judge must consider the non-exhaustive list of factors in R. 14-1(3)(b). The quantum of the award should not depend on the identity of the assessor.

[103] When a judge has assessed costs in place of a registrar it has often been done in a summary manner. The *Rules* do not mandate that a judge assess costs summarily. In many cases, the rules of natural justice would suggest that a summary proceeding is not appropriate: *Williston Navigation Inc. v. BCR Finav No. 3 et al.,* 2007 BCSC 190 at paras. 49-58 [*Williston*]. Absent consent, natural justice requires a certain level of procedural fairness. In the typical case, this means providing an opportunity for the party against whom costs are being awarded to test the reasonableness of the fees underlying the award, which reflects the basic costs principle that cost awards are meant to be an indemnity for fees incurred rather than to provide a windfall.

[104] As we explained above, the principle underlying R. 14-1 is that parties are only entitled to their objective reasonable legal costs as determined by the precise

scale of costs they were awarded. In order to determine if a legal fee is reasonably objective, it is often necessary to know the particulars of what the lawyer did to accrue it. As noted by Kirkpatrick J., as she then was, in *Canadian National Railway Co. v. A.B.C. Recycling*, 2005 BCSC 1559 at para. 28 [*A.B.C.*], it is difficult to conceive that a proper examination of a party's incurred legal costs can take place without disclosure of the other side's file and an examination of the other side's lawyers in respect of the file and the matters arising therefrom.

[105] The fact that a lawyer has billed a certain sum does not necessarily make the fee reasonable. This is of particular importance when the other party to the litigation is paying the bill. As noted by Seaton J.A. in *Royal Trust Corporation of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 (C.A.) at 88:

> …The party who made that arrangement, the successful party in the litigation, might have made a very poor bargain. The bill rendered pursuant to the agreement might be justifiable between the solicitor and his client but thoroughly unjustifiable to impose on another. The client might have demanded more work to be done than was appropriate in the circumstances, or more lawyers and more expensive lawyers to be retained than were appropriate in the circumstances. Of course, at the taxation, if the other litigant is paying the bill the client will be particularly pleased to see that the bill is as high as possible.

[106] Whether a judge should determine the quantum of costs as authorized under R. 14-1(15) is a matter of judicial discretion. It is a discretion that must be exercised in light of Rules 14-1(2) (for party and party costs) and 14-1(3) (for special costs). It is a discretion which should be exercised sparingly: see *Buchan Appeal* at para. 13. There is good reason for that approach. The court officer best placed to determine if the fees billed by a lawyer are objectively reasonable is usually the registrar. The registrar's extensive knowledge and experience assessing legal bills is seldom matched by that of a trial judge.

[107] An exception to that general proposition can arise in cases when the judge is intimately familiar with the litigation, or the time and costs of a registrar's hearing cannot be justified. In this regard, the words of Southin J.A. in *Interclaim* are often cited:

> [27] As this division is also the division which heard the appeals mentioned in paragraph 13, we are substantially familiar with what happened below. I have in mind also that these litigants have taken unto themselves, from the pool of judicial resources available in this Province, more than can be said to be their fair share. They are not alone in doing such things but litigants must be encouraged to be economical of judicial time.
>
> ...
>
> [38] I accept the submission of Mr. Willms that this is a proper case for the exercise of the power to fix a sum to be paid in lieu of taxation. This litigation has already consumed, as I have already indicated, far too much of the public resource of judicial time as it is. To send the claim to taxation will engage a large amount of the time of a taxing officer whose decision might be appealed and matters will go on and on. Among other things, the taxing officer would have to learn about this litigation all that we already know, a duplication of effort which does no one any good. ...

[108] However, the fact the judge has heard the trial does not necessarily lead to the conclusion that the assessment be done summarily or that the best use of judicial resources is for the judge to embark on the assessment of costs. The time the judge spends on the assessment is time the judge does not have for other matters.

[109] A related concern is that the party who might have to pay the costs will prolong any assessment by requiring microscopic review of the services undertaken by counsel for the successful party: *Buchan* at para. 25. This concern must be weighed against the right of a party to challenge the reasonableness of the opposing party's proposed costs. This right derives from the rules of natural justice: see *Williston* at para. 53.

[110] It is true that a more detailed review may be tedious and expensive. That does not mean such a review is unfair to the successful litigant, particularly given that significant amounts may be in issue. While R. 1-3(1) sets out that the object of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on the merits, R. 1-3(2) mandates that the proceedings be conducted in a way that is proportionate to the amounts involved in the proceeding, the importance of the issue in dispute and the complexity of the proceeding. The amount

involved may be an important consideration in determining whether a summary procedure is appropriate.

iv. The Need for an Account

[111] As indicated above, the right of a party to challenge the reasonableness of the opposing party's proposed costs derives from the rules of natural justice. Where a court elects to make a summary assessment of costs, the party facing a costs order must have a meaningful opportunity to challenge the reasonableness of the fees allegedly incurred by the other party; this opportunity is denied where there is insufficient evidence as to the scope and nature of the actual legal fees: *Williston* at para. 53. Assessing special costs on a summary basis absent sufficient evidence of the objective reasonableness of those fees is an error of principle, contrary to both natural justice and to the *Rules*.

[112] Several cases, including the case before us, have proceeded with a summary assessment absent a bill of special costs. In *Bradshaw*, the Court held that the failure to produce a bill of special costs should not bar a judicial assessment. At the time of the assessment in *Bradshaw* the case was under appeal. The judge was concerned that the production of a bill would lead to a loss of solicitor-client privilege because the defendant would relentlessly insist upon detailed information about subjects discussed with counsel and advice and instructions given.

[113] This same situation existed in *A.B.C.* There Kirkpatrick J. recognized that the assessment of special costs would require a waiver of privilege. One of the main purposes of special costs is to indemnify the successful party for the actual legal costs they have incurred. Absent a bill or other evidence of the legal fees incurred there is no way of knowing the amount of those costs. While the disclosure of the legal account may result in a waiver of privilege, that is the price that a party may have to pay if it seeks to recover special costs.

[114] It is difficult to conceive how a proper examination of a party's reasonably incurred legal fees can be made without disclosure of the party's file: see *A.B.C.* at para. 28 and *Williston* at para. 53. A simple presentation of the client's bill to the trial

judge together with counsel's submission would not usually allow a party to challenge the reasonableness of the legal costs nor would it allow for an objective determination of the reasonableness of those costs. In *A.B.C.*, Kirkpatrick J. considered that the prejudicial effect of disclosure could be minimized or eliminated by deferring the assessment until both parties had exhausted or waived their rights of appeal.

[115] In *Buchan*, an objection was made that there was not a proper "bill of special costs before the court". In that case the successful party had filed the affidavit of a legal assistant exhibiting the law firm's statements of account. Bauman C.J.S.C., as he then was, agreed with the comments in Fraser, Horn & Griffin, *The Conduct of Civil Litigation in British Columbia*, 2d ed. (Markham: LexisNexis, 2007) that a bill for special costs is presented in the same form as a bill between a solicitor and client under the *Legal Profession Act*. Importantly, he did not suggest that an assessment should take place in the absence of any bill.

[116] The need for a bill of a lawyer to tax his account against a client has been long recognized. In the absence of a bill a registrar does not have jurisdiction to conduct a review of a solicitor's account: *Kelly v. McMillan and Harbottle & Co.*, 2003 BCSC 307.

[117] The *Rules* clearly indicate the need for an account. Since 1961 taxing officers have had the power to assess a solicitor-client bill in the form permitted for lump sum charges by the *Legal Profession Act* (MR 983a). Marginal Rule 983b required that every lump sum bill should contain a description of the nature of the services and of the matter involved as would in the opinion of the taxing officer afford any solicitor sufficient information to advise a client on the reasonableness of the charges made. Marginal Rule 983c allowed any party to a taxation of a lump sum bill to put into evidence the opinion of a solicitor as to the nature and importance of the services and the reasonableness of the charges.

[118] The provisions in the 1961 *Rules* have been carried forward and are found today in Rules 14-1(30), 14-1(31) and 14-1(32). Rule 14-1 (30) sets out that a bill for

special costs may be rendered on a lump sum basis. Rule 14-1(31) sets out that a party is entitled to a sufficient description of the nature of the services provided so that another lawyer can advise on the reasonableness of the charges. Absent a bill there is nothing to advise on. Rule 14-1 (32) allows a party to an assessment to put into evidence the opinion of a lawyer as to reasonableness of the charges made. Absent a bill there is nothing to opine on.

[119] A party seeking an assessment of special costs must tender evidence of the legal fees incurred and a sufficient description of the nature of the services and of the matter involved to afford any lawyer sufficient information to advise a client on the reasonableness of the charge made. This will usually be provided in the same form as a bill between a solicitor and client under the *Legal Profession Act*. Those cases, such as *Bradshaw*, that have held that a court can assess special costs absent evidence of actual legal costs were wrongly decided and should not be followed.

[120] Where a party is claiming its legal accounts are privileged, it can elect to waive privilege, wait until all appeals are exhausted before having its costs assessed or choose to abandon its claim to special costs.

v. How Should a Judge Quantify Special Costs

[121] In this case, the trial judge stated that there were three common approaches to the quantification of special costs. The first was to award costs equalling the actual legal costs incurred by the party to whom costs were being awarded. The second was to fix costs at a percentage of actual legal costs. The third was to use the rough and ready approach based on $5,000 per half day plus taxes and disbursements. A similar incantation can be found in several recent cases: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914; *Clare's Cove Marina Ltd. v. Salmon Arm (City)*, 2013 BCSC 912 [*Clare's Cove*]; *Hundal v. Border Carrier Ltd.*, 2012 BCSC 2196; *Nomani v. Tan*, 2014 BCSC 78; *Leung, supra*. Other cases that have adopted the rough and ready method calculation include: *Johal*, *supra*;

Morriss v. Prism Properties Inc., 2011 BCSC 615; *King v. TD Canada Trust*, 2013 BCSC 2283.

[122] The close relationship between actual legal fees and special costs is well documented in the jurisprudence. In *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309, aff'd [1992] B.C.J. No. 1657, Bouck J. described the relationship at p. 319:

> As I understand the notion of Special Costs under Rule 57(3), they are meant to provide a much higher indemnity than Ordinary Costs where the circumstances warrant. They are assessed under paragraphs (a) to (g) of Rule 57 with a view to the relationship between the successful party and his or her own solicitor. But they are not necessarily the fees that the successful solicitor would recover from his or her client. Those fees arise from a review of a solicitor's bill under the *Legal Profession Act*, S.B.C. 1987 ch. 25, Part 10, as amended by the *Justice Reform Statutes Amendment Act*, 1989, s. 26; in force 1 September 1990; B.C. Reg. 267/90. Instead, Special Costs are the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill. On the other hand, fees payable by the client to the solicitor pursuant to a bill taxed under the *Legal Profession Act* represent fees for work done by that solicitor for that client. In the usual course of events, a bill taxed as Special Costs will be less than a bill taxed under the *Legal Profession Act*. This is because Special Costs still fall under the category of party and party costs, whereas fees due under the *Legal Profession Act* are assessed in a similar way to the old method of solicitor and own client costs.
>
> A taxation of Special Costs is objective in nature while a taxation under the *Legal Profession Act* is subjective. Put another way, a losing party should not have to pay for the cost of the most experienced and qualified lawyer if that kind of service was not necessary. However, in most instances, a bill for Special Costs will usually be about 80% or 90% of a similar bill assessed under the *Legal Profession Act*.

Rule 57(3) discussed in *Bradshaw Construction* is the present R. 14-1(3).

[123] In *A.B.C.*, Kirkpatrick J. noted that while special costs are not necessarily the fees that a successful solicitor would recover from his or her client there may well be circumstances in which special costs and a bill taxed under the *Legal Profession Act* would be equivalent. She noted the similarities between the provisions in the then R. 57(3) and s. 71(4) of the *Legal Profession Act* which a registrar must consider on a review of a lawyer's bill.

[124] This Court in *Lee* also noted the comparison between the special costs rule and the provisions of the *Legal Profession Act*. Both incorporate most of the factors in *Yule v. Saskatoon (City)* (1955), 16 W.W.R. 305 (Sask. Q.B.). In *Lee,* K. Smith J.A., writing for the Court, noted that in *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 2 B.C.L.R. (3d) 13 (C.A.), this Court had approved the formula suggested by Bouck J. in *Bradshaw Construction* that special costs will "in most instances" be less than a bill assessed under the *Legal Profession Act*.

[125] The Court went on to note, however, that the rule of thumb approach of a deduction from legal fees is merely an aid to a proper assessment and each case will turn on what is proper or reasonably necessary in the particular circumstances within the meaning of the words in R. 57(3). Smith J.A. concluded his discussion at para. 49:

> In my view, the legislative intention is clear that special costs under Rule 57(3) are in their nature to resemble closely the reasonable fees that would be charged by a lawyer to his or her own client. It may be that, in some cases, they will be equal in amount. However, special costs and lawyers' reasonable fees are not identical.

[126] The rough and ready approach pursuant to which special costs are set at a fixed sum has a much shakier legal foundation. It is based on the comments of Southin J.A. in *Interclaim* where she said at para. 40:

> Taking it all in all, I consider that justice will be done in this case if this Court adopts the rough and ready old-fashioned method of determining the sum to be awarded under s. 197(2) at a sum per half day, which sum will cover also a reasonable award for preparation, but not including in those days those spent arguing the issue of champerty before Brenner J. Five thousand dollars per half day or less seems right to me.

[127] Madam Justice Southin's comments must be placed in their proper context. *Interclaim* was a complex bankruptcy proceeding which began with the petitioner's *ex parte* application for an interim receiving order and other ancillary relief. The proceedings were subsequently characterized as involving the most extraordinary use of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], ever seen in Canada.

[128] In due course the trial judge had to deal with the costs of the proceeding. His reasons are found at 2001 BCSC 1303. At the outset he had to determine whether the court should fix lump sum costs. He noted that the reason underlying the usual practice of referring such matters to the registrar was that, in customary litigation, much of the pre-trial proceedings are conducted outside of the purview of the trial judge. Pre-trial discoveries and interlocutory steps may go on for several years before the case ultimately comes to the trial judge who renders the final trial judgment, which usually includes a costs disposition. He found this proceeding was different. He had heard the initial *ex parte* application and then all subsequent proceedings related to the efforts to set aside the *ex parte* orders. Because of this he had as much detailed knowledge about the nature of the case, including its novelty and complexity, as anyone was ever likely to have, and because of his knowledge of the proceeding it was his view that costs ought not be referred to the registrar and he should fix the costs in a lump sum.

[129] While the proceedings had been brought under the *BIA* it was recognized that the tariff for costs set out in the *BIA* was hopelessly out dated. All parties agreed that the trial judge was not bound by the tariff amounts. He assessed costs based on the provisions of the 1990 *Supreme Court Rules*.

[130] At that time the *Rules* included not only party and party and special costs but also increased costs. Increased costs could be awarded where a court determined that for any reason an award of ordinary costs would lead to an unjust result. Increased costs were often given in the circumstances where there was a considerable discrepancy between an award of party and party costs and special costs.

[131] The main parties who were seeking to recover costs were the Downs Group and the Renoir Group. Fasken Martineau DuMoulin (“Fasken”) was lead counsel for the Downs Group. Their legal fees totalled $1,299,199.10. The Renoir Group’s counsel, Shapray Cramer & Associates, had legal accounts totalling $149,952.50.

[132] The trial judge awarded the Downs Group 60% of their legal fees and the Renoir Group 80% of their fees. In dollar terms the Downs Group was entitled to recover $779,519 while the Renoir Group would recover $119,962.

[133] When the matter came on for appeal, Southin J.A. found that the applications had been misconceived because the proceedings were under the *BIA*. She held the costs provisions found in the *Rules* had no application and that counsel had led the judge below down the wrong road. At the hearing, no one suggested that if the Court concluded that the *Rules* were irrelevant, that they should send the matter back for reconsideration.

[134] Southin J.A. was of the view that the award to the Downs Group could not be justified because they had mounted a full frontal attack on many issues when the matter could have been resolved more economically. It was in this context that Southin J.A. made her comments concerning the rough and ready calculation. In a subsequent hearing, the reasons of which are found at 2003 BCCA 201, Southin J.A. fixed the number of half days for the purpose of assessment of costs at 80 which led to an assessment of $400,000. That sum represented but 30.79% of Faskens' fees (an award closer in amount to a party and party costs award). We would also note Southin J.A. saw no problem with the award that had been made to the Renoir Group and she upheld the trial decision awarding them 80% of their actual legal fees.

[135] As noted above, there have in recent years been numerous trial decisions which have purported to follow Southin J.A.'s rough and ready method. None of the decisions have discussed the context in which Southin J.A. made her award. None have noted that *Interclaim* was not a case about special costs, or that the award in *Interclaim* was but 30% of the actual legal fees incurred.

[136] It was not until 2008 that a judge was asked to consider a rough and ready assessment. In *Insurance Corp. of British Columbia v. Eurosport Auto Co.*, 2008 BCSC 935, the rough and ready approach suggested an amount of $390,000. The actual legal fees incurred however were but $291,297, a difference of almost

$100,000. The judge considered the various factors set out in the R. 57(3) and awarded as special costs the actual legal fees incurred.

[137] In *Buchan,* counsel referred Bauman C.J.S.C. to Southin J.A.'s comment in *Interclaim.* Bauman C.J.S.C. reproduced a table provided by counsel at para. 27:

> The Moss defendants also note that in many cases an award for special costs will be made in the range of 75% to 90% of the actual costs charged. Counsel then produces this table:

1. Actual Legal Costs	The actual legal fees were $286,878.00. Fees plus disbursements and taxes total $364,663.94.
2. The rough-and-ready ($5,000 per half day) approach	The $5,000 per half day approach leads to $240,000.00 for fees based on a 24 day trial. Alternatively, using all 28 days of court appearances, this approach leads to $280,000.00. Taxes and disbursements would be added to these amounts.
3. The percentage of actual legal costs approach	Actual legal fees were $286,878.00. Thus 75% equals $215,158.50. 90% equals $258,190.20. Taxes and disbursements would be added to these sums.

[138] He then proceeded at para. 28 to make his award:

> In my view a special costs award of $240,000.00 plus taxes and disbursements in this matter is an award that represents an inherently reliable assessment of the value, on a special costs basis, of the work performed on this file by counsel for the Moss defendants.

[139] It is important to note that in making the award the Chief Justice did not purport to adopt the rough and ready method. The award that he did make was 83.66% of the actual legal fees.

[140] In *Morriss*, the trial judge applied the rough and ready calculation to assess special costs. She noted that *Interclaim* had been decided in 2002 and that the value

of $5,000, adjusted to inflation, was now $5,800. She used that figure to make awards of special costs in the amount of $104,400 for one defendant and $69,600 for the other defendant. The judgment does not provide any information concerning the actual legal fees incurred.

[141] In *Mayer*, the trial judge assessed special costs for five successful parties. In regard to the approaches for assessing lump sum awards for special costs, he said:

> [101] In *Buchan*, Bauman C.J.S.C. described three different approaches to assessing a lump sum award for special costs:
>
> (a) actual legal costs;
>
> (b) a percentage of actual legal costs (often 80% to 90% of actual legal fees incurred as assessed);
>
> (c) $5,000 per half day, plus disbursements and taxes, also known as the "rough and ready" approach.
>
> [102] The first two approaches have been affirmed by the Court of Appeal in *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2005 BCCA 107 at paras. 38-40, 46-49 and *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 2 B.C.L.R. (3d) 13 at para. 16. The third, or "rough and ready" approach, has been adopted in *Interclaim* and in *Morriss v. Prism Properties Inc.*, 2011 BCSC 615.

[142] On the facts in *Mayer* the use of the rough and ready approach led to significantly different results for the five parties, summarized at para. 140 of the reasons:

> Applying the rough and ready approach would result in the following assessments of the legal fees portion of special costs, exclusive of the special costs hearing:
>
> (a) Richard Mayer group of defendants - $385,000 (the amount claimed is $475,133.40);
>
> (b) Mr. Furnemont - $265,000 (the amount claimed is $161,246);
>
> (c) Mr. Seccombe - $5,000 (the amount claimed is $21,899);
>
> (d) Gina Mayer and Rita Webb - $395,000 (the amount claimed is $236,630); and
>
> (e) Bhora Mayer - $395,000 (the amount claimed is $218,259).

[143] For three of the parties an assessment based on the rough and ready approach would have led to awards far in excess of the amount of legal fees paid. In regard to the other main party, the rough and ready approach led to an award approximately $100,000 less than the legal fees incurred. In the result, the trial judge awarded three of the parties their actual legal costs while the other two parties were given an award based on the rough and ready calculation. That sum worked out to 81.03% and 20.83% of actual legal fees.

[144] In *Bradshaw*, as already discussed, the judge proceeded in the absence of any legal account. The parties were seeking $465,000 based on the $5,000 per half day which the judge indicated had been accepted in *Interclaim* and applied in *Buchan*. The judge ultimately awarded special costs of $465,000 but did so inclusive of $24,000 in disbursements. The trial judge in this case purported to follow *Bradshaw* and also made the award inclusive of disbursements.

[145] We should note that leave to appeal was sought in *Bradshaw*. Leave was refused in reasons found at 2012 BCCA 481. The chambers judge was aware that the trial judge had not commented on the fact that the award of costs in *Interclaim* had been made pursuant to the *BIA* and the recovery in *Interclaim* was less than one-third of the actual solicitor-client costs. However, he did not feel in all the circumstances that the application by the trial judge of the rough and ready guide was a compelling enough basis upon which leave to appeal should be granted.

[146] An application was then brought to reconsider the leave decision. Those reasons are found at 2013 BCCA 61. The division hearing the reconsideration matter acknowledged that the question of the necessity of a legal account and the uncritical application of the half day fees may be issues for resolution by this Court. However, the particular circumstances of the case were not found to rise to the level that warranted leave being granted. An important factor in the decision to refuse leave was that the appellant, in the trial court, had not pursued the need for evidence of the fees charged and had proceeded on the basis that $465,000 represented full indemnity.

[147] In *Hundal* actual legal fees were $180,658. Using the $5,000 per day rough and ready approach from *Interclaim* would have led to fees of $225,000. The judge set the fees at $144,526, representing 80% of the fees incurred.

[148] In *Clare's Cove* legal costs totalled $351,636. The trial judge noted that $5,000 in 2002 when *Interclaim* was decided is the equivalent of $6,250 today. He awarded special costs based on $6,000 per half day which came to $168,000 which represented 47.7 % of actual legal fees.

[149] In *King,* following a proceeding that lasted three half days, the trial judge awarded special costs of $18,000 based on the rate of $6,000 used in *Clare's Cove*. There is nothing in the reported decision to indicate that the trial judge had information concerning the actual legal fees incurred.

[150] The purpose of this analysis has been to consider the legal underpinning for using the rough and ready approach in summary assessments of special costs. *Mayer* is the only case in which a judge has attempted to justify using the rough and ready approach:

> [137] In my opinion, given the circumstances of this case, and having regard to the interests of the applicants and Mhinder Mayer, assessing costs using the rough and ready approach of $5,000 per half day, as a purposeful guide, is the most fair and appropriate manner in which to assess special costs. I say that because this approach:
>
> (a) obviates concerns expressed by Mhinder Mayer regarding variations in hourly rates, potential duplication of effort, potential failure to always delegate work to the lawyer with the most appropriate hourly rate, and inadequacies in some of the materials submitted in support of the legal fees claimed;
>
> (b) obviates Mhinder Mayer's concerns about unnecessary or unnecessarily prolonged legal research, because the rough and ready figure of $5,000 per half day incorporates preparation time;
>
> (c) addresses the concerns expressed by Levine J. in [*Genesee Enterprises Ltd. v. Abou-Rached*, 2001 BCSC 1172] about the size of accounts;
>
> (d) avoids the difficulty faced in assessing actual fees billed in the absence of the lawyers' entire files; and

> (e) avoids disclosure of privileged file material at this stage of the litigation, where the dispute between Mhinder and Bhora Mayer remains extant (the trial is scheduled to proceed in September 2011) and in the face of Mhinder Mayer's outstanding appeals from my previous reasons for judgment.

[151] While considerations such as the above may explain why judges have been attracted to the rough and ready approach, they are not factors that are relevant to an assessment of special costs. Under R. 14-1(3) special costs are limited to the fees that are proper and reasonably necessary to conduct the proceeding. If a judge intends to assess special costs he or she must consider all of the circumstances, including but not limited to those set out in R. 14-3(b), and then allow those fees that were properly or reasonably necessary to conduct that particular proceeding. The rough and ready method is the antithesis of that process. It sets a fixed fee based on the number of hearing days regardless of the actual circumstances of the litigation or the expense incurred in conducting it.

[152] The cases show that the relationship between the rough and ready method and actual legal fees is completely capricious. In some cases, the rough and ready amount reaches an amount well in excess of the actual fees incurred; in others considerably less. It sets a fee without any reference as to whether or not the services that were provided were proper or reasonably necessary. The comments of Saunders J.A. in the *Bradshaw Review* as to the precedential value of *Interclaim* are apposite:

> [17] ... Obviously *Interclaim* does not impose a rule or principle dictating the amount to assess as special costs for a half day. It could not do so, nor did it purport to do so. An assessment is required to be case specific and must respond to the language of Rule 14 of the *Supreme Court Civil Rules*. It seems to me that *Interclaim* is simply a case in which, in the interests of efficiency, in proceedings that had consumed a vast amount of court resources with legal accounts that exceeded well over a million dollars, this court made an assessment. That assessment was made with appreciation of the nature of the issues and positions taken below, the degree to which the services were provided in relation to the litigation and for the party entitled to costs, and the enthusiastic engagement of all the parties in the full blown extenuated litigation. Not much more can be said about it than that.

[153] We adopt her comments. *Interclaim* does not impose a rule or principle dictating the amount to assess as special costs. The rough and ready approach based on a fixed fee per half day should not be used to assess special costs. Those cases that have applied the rough and ready assessment are, in our respectful opinion, wrongfully decided and should not be followed.

vi. Summary of General Principles

[154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.

[155] When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While a judge need not follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).

[156] A special costs assessment, whether before a judge or a registrar, cannot proceed in absence of evidence of the amount of legal fees incurred. Usually this will be provided in the same form as a bill between a solicitor and client under the *Legal Profession Act*. This is necessary to allow a court to inquire as to the objective reasonableness of the fees claimed by a litigant, as the fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. Where production of a bill of special costs would lead to a loss of solicitor-client privilege, the party seeking special costs must either waive privilege or can elect to preserve privilege by having its costs assessed after all appeals are exhausted.

vii. Assessment in This Case

[157] Having set out and considered the principles that apply to a special costs assessment, we return to this case. In making her assessment the trial judge made two fundamental errors of principle. First, she assessed the costs in the absence of any evidence as to the legal fees actually incurred. Second, she used the rough and ready method to determine the amount of costs. In fairness to the trial judge, she is one of many to make these mistakes.

[158] In these circumstances the assessment of costs cannot be sustained. If Mr. Smith wishes to enforce his special costs order he will have to have those costs assessed by the registrar. The assessment will be at large and the registrar will be free to assess a sum which may be more or may be less than that set by the trial judge. We note that Mr. Gichuru in his supplemental written submissions advises that if the special costs award is upheld he would consent to special costs being assessed in the amount of $38,000.

[159] In the course of submissions, Mr. Smith requested that if we did not uphold the trial judge's assessment, we should summarily assess his party and party costs based on the draft bill which was put before the trial judge. The stated reason for the request was that Mr. Smith wanted to avoid the costs of a registrar's assessment given the strong possibility that the costs award may prove to be uncollectable.

[160] Mr. Gichuru opposes a summary assessment of the draft bill of party and party costs. He notes that the draft bill is not supported by affidavit evidence and that Mr. Smith has claimed the maximum or close to the maximum number of units for several items. He also submits that there are serious problems with several of the disbursements that are claimed. He does advise that if he is unsuccessful on every ground of appeal other than the awarding of special costs he would consent to party and party costs being fixed by this Court in the amount of $34,000.

[161] We agree with Mr. Gichuru that we should not summarily assess Mr. Smith's party and party bill. The difficulty with that suggestion is that many of the tariff items in the draft party and party bill contain a range of units. Pursuant to s. 3(3) of Appendix B when there is a maximum and minimum number of units provided for an item the registrar has a discretion in determining the appropriate number and in exercising his discretion the registrar must have regard for the following principles:

> (a) one unit is for matters in which little time should ordinarily have been spent;
>
> (b) the maximum number of units is for a matter in which a great deal of time should ordinarily have been spent.

[162] These are matters that we cannot decide summarily in an evidentiary vacuum. Similarly there is no evidence before us concerning the disbursements claimed in the draft bill. We cannot accept on faith the amounts claimed. If Mr. Smith elects to limit his costs award to party and party costs those costs will still have to be assessed by the registrar. We do note that the taxation of a party and party bill is a much simpler process than the taxation of a bill of special costs.

Conclusion

[163] In the result, we would dismiss Mr. Gichuru's appeal save and except the assessment of special costs is set aside. Mr. Smith can elect to have his special costs fixed at $38,000. Alternatively he can elect to present for assessment before the registrar a bill of special costs or a bill of party and party costs.

[164] Mr. Gichuru's appeal has been largely unsuccessful. The only issue upon which he has had some success is in regard to the manner in which costs are to be assessed. For that reason, we would award Mr. Smith 80% of his costs of the appeal.

"The Honourable Mr. Justice Harris"

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

Date: 19981209
Docket: CA023159
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

GORD HANNIGAN

PLAINTIFF

AND:

IKON OFFICE SOLUTIONS INC./BUREAU-TECH IKON, INC., doing business under the name and style, IKON OFFICE SOLUTIONS, PRIME COPY OFFICE SYSTEMS LTD., and PEMBERTON LEASING CORPORATION

DEFENDANTS

AND:

XEROX CANADA LTD.

APPLICANT
(RESPONDENT)

AND:

W. ROSS ELLISON

APPELLANT

Before: The Honourable Chief Justice McEachern
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Hall

Richard R. Sugden, Q.C.	Counsel for the Appellant, W.R. Ellison
Richard J. Olson	Counsel for the Respondent, Xerox Canada Ltd.
Place and Date of Hearing	Vancouver, British Columbia November 10, 1998
Place and Date of Judgment	Vancouver, British Columbia December 9, 1998

Written Reasons to follow by:

The Honourable Chief Justice McEachern

Concurred in by:

The Honourable Madam Justice Rowles
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Chief Justice McEachern:

[1] A judge in Chambers set aside two subpoenas returnable on a Rule 18A trial, and directed that special costs be paid personally by the lawyer issuing the subpoenas. This appeal, brought with leave, is against that order for costs, particularly the latter part of the order.

[2] At the conclusion of counsel's submissions, we upheld the order for special costs, set aside the direction that such costs be paid by the lawyer, and said we would give reasons for our decisions in due course.

[3] Although I regard this as a case close to the line, I would not interfere with the decision of the learned Chambers judge to award special costs to Xerox: ***Garcia v. Crestbrook Forest Industries Ltd.*** (1993), 9 B.C.L.R. (3d) 242 (B.C.C.A.). I would not, however, characterize Mr. Ellison's conduct as reprehensible, and I would put it no higher than mildly deserving of reproof. Nevertheless, I agree that the judge was entitled to conclude that Xerox ought not be out of pocket by reason of the issuance of the subpoenas in this case. That company, of course, was fully indemnified by the order for special costs. As already mentioned, I have reached a different conclusion from the judge on the question of requiring the solicitor to pay those costs personally.

[4] The original action was for damages for wrongful dismissal. The plaintiff-employee sued his former employer. In an affidavit sworn 21 January 1997, the plaintiff deposed that he was unemployed. On the same day his lawyer filed an application for a Rule 18A trial on 27 March 1997. The plaintiff's list of documents, delivered 21 February 1997, did not disclose any efforts on the part of the plaintiff to mitigate his damages.

[5] On 3 March, the defendant-employer learned that five of its key employees were leaving its employment to work with the plaintiff in a new business he was starting. A supplementary list of documents was delivered 14 March that did not disclose such facts. On his Examination for Discovery on 18 March, however, the plaintiff gave evidence that he had commenced discussions about a new business arrangement with Xerox, a competitor of the defendant-employer, as early as 17 December 1996, the day after his alleged dismissal, and that he had, by the date of his examination, acquired the exclusive right to sell Xerox products in several Greater Vancouver communities. The plaintiff also said he had no business plan or budget that would permit a calculation of his likely remuneration beyond an arrangement for a 15% commission on sales of Xerox products. These matters were, of course, relevant to the question of damages in the wrongful dismissal action.

[6] With a trial date imminent, Mr. Ellison on 21 March wrote to the two Xerox officials identified by the plaintiff as persons he dealt with, requesting relevant information and enclosing subpoenas returnable at the trial.

[7] The solicitor for Xerox (who was not counsel on the appeal) on 24 March faxed a letter to Mr. Ellison advising that the proceedings scheduled for 27 March were a Rule 18A application, not a trial (which I do not understand), and that "…we know of no authority for the issuance of a subpoena for such an application." He added that he considered the issuance of subpoenas was improper and requested confirmation that the Xerox witnesses would not be required to attend. He closed by saying that failing such confirmation, Xerox would seek "…special costs payable forthwith <u>against your client</u>" (emphasis added). The material before us does not disclose if counsel later sought an order that the costs be paid personally by Mr. Ellison or whether this was the judge's initiative.

[8] There followed an unfortunate exchange of fax messages between solicitors, about the fact that the Xerox officers would not meet with Mr. Ellison or furnish the requested information, and about Xerox's demand that the subpoenas be withdrawn. For his part, Mr. Ellison assured his friend that the witnesses would not be required to attend if the required information were furnished.

[9] What clearly seems to have happened was that Mr. Ellison had not noticed or had overlooked the 1992 amendment to Rule 40 that precluded the right to issue subpoenas for Rule 18A trials without an order. I, too, overlooked such amendment. Unfortunately, the solicitor for Xerox in his correspondence did not bring this specifically to Mr. Ellison's attention.

[10] It must be remembered that the subpoenas were delivered by fax on 21 March, and the blizzard of correspondence and telephone calls between solicitors, comprising at least six letters, began just three days before the date set for the Rule 18A trial which the plaintiff's solicitor had not agreed to adjourn. Portions of many of these letters are quoted in the Reasons for Judgment of the learned Chambers judge and need not be repeated here.

[11] As the matter developed, Xerox's solicitors were intending to bring an application for short leave to quash the subpoenas, and Mr. Ellison filed an application under Rule 28 to have the evidence of the Xerox witnesses taken by that procedure.

[12] Mr. Ellison's last letter, however, was entirely conciliatory. He wrote:

> As to your intended application for short leave to bring on a Motion to quash the subpoenas, as I said in my letter yesterday, I think it highly unlikely that your clients would be required tomorrow in light of the fact that our Rule 28 Application is proceeding tomorrow. I confirm that you can tell your clients that they need not be in Court tomorrow

> provided they are generally available in the very unlikely event that the trial proceeds and they are required.
>
> It is regrettable that these events have all happened so quickly and I regret any inconvenience to your clients but unfortunately it was only recently disclosed to us that Mr. Hannigan was involved with Xerox and in light of the Rule 18A Application that was set by his lawyer for March 27, 1997, there was considerable urgency to getting this very relevant evidence from Xerox. While it is certainly unusual to issue a subpoena to a witness for a Rule 18A trial, there is certainly precedent for it and I have had witnesses called to testify at Rule 18A Applications. For example, I refer to Rule 52(8)(e) of the Rules of Court wherein on an application in Chambers, evidence shall be given by affidavit but the Court may permit other forms of evidence to be adduced. As I said, in the past I have had Judges call witnesses to give *viva voce* evidence in Rule 18A Application.
>
> I believe however this to be a moot point in light of the fact that I am only asking your clients to be generally available tomorrow in the unlikely event that the 18A proceeds.
>
> In any event, I have formally requested from Mr. Hannigan's lawyers an adjournment of the 18A Application because of my Motion pursuant to Rule 28 and we are awaiting a response from Mr. Hannigan's lawyers to that request. May I suggest, therefore, that you not go to the trouble of making a short leave application to have the subpoenas quashed. We will consent to your making that application tomorrow morning without your having to get short leave.

[13] What really seems to have been in issue between the parties at the end of this exchange was Mr. Ellison's failure to formally withdraw the subpoenas, even though he made it clear that the witnesses need not attend unless the course of the proceedings made their evidence necessary.

[14] After recognizing that caution must be exercised when considering an order that a solicitor personally pay special (or any) costs, the Chambers judge nevertheless ordered Mr. Ellison to pay special costs. He seems to have based this on two grounds. First, he held that the use of subpoenas in these circumstances:

> ...can only be regarded as a means of attempting to intimidate non-parties or to circumvent the requirement that court orders be obtained before documents or statements could be compelled from a non-party other than in the course of a trial.

[15] Second, the Chambers judge held that Mr. Ellison should pay special costs personally because he "…knew or ought to have known" that subpoenas were no longer available in Rule 18A proceedings without an order.

[16] With respect, the evidence does not support the first ground relied upon by the judge. There was no possibility that Xerox, a very large corporation, would be intimidated by subpoenas in these proceedings where Xerox itself was not at risk in any way. Xerox clearly was not intimidated. Instead, as must have been expected, that company referred the matter to a solicitor who took immediate steps to deal with the problem. As already mentioned, the most Xerox could suffer was some legal expense for which it was completely indemnified by the order made by the judge for special costs.

[17] Thus, with great respect, I do not feel constrained by the findings of the Chambers judge on this important part of the case.

[18] Counsel for Xerox cited ***Guilford Industries Ltd. v. Hankinson Management Services Ltd. et al.*** (1973), 40 D.L.R. (3d) 398 (B.C.S.C.); ***O.E.X. Electromagnetic Inc. v. Coopers and Lybrand*** (1995), 6 B.C.L.R. (3d) 302 (B.C.C.A.), and other cases, but the impugned conduct in those cases was truly reprehensible. By comparison, Mr. Ellison's mistake, particularly in the light of his subsequent conciliatory conduct, appears to be very minor indeed.

[19] In addition, counsel for Xerox argued the order could be supported on the ground that Mr. Ellison had an ulterior motive in issuing unauthorized subpoenas when his real purpose was to obtain evidence that could only properly be obtained by an application under Rule 28. With respect, Mr. Ellison's only motive was to obtain relevant information from Xerox and a simple procedural error cannot justify the order under appeal.

[20] No useful purpose will be served by reviewing the numerous cases that were cited by Mr. Sugden as it will be sufficient to say that the authorities are clear that very serious misconduct is required before counsel will be required to pay costs personally. I agree with Mr. Sugden who submitted that an award against a solicitor should only be made in very special

circumstances, and should not be made on the basis of mistake, error in judgment or even negligence.

[21] I would dismiss the appeal on the issue of special costs, but I would set aside the order that Mr. Ellison pay those costs personally.

[22] As the order for personal costs was at the heart of this appeal, Mr. Ellison is entitled to the costs of the appeal.

"The Honourable Chief Justice McEachern"

I AGREE: "The Honourable Madam Justice Rowles"

I AGREE: "The Honourable Mr. Justice Hall"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hy's North Transportation Ltd. v. Yukon Zinc Corporation,* 2014 BCSC 2291

Date: 20141204
Docket: S50453
Registry: Kamloops

Between:

Hy's North Transportation Ltd.

Plaintiff

And

Yukon Zinc Corporation

Defendant

Before: The Honourable Madam Justice Donegan

Reasons for Judgment re Costs

Counsel for the Plaintiff:	R. Lammers
Counsel for the Defendant appearing by teleconference:	P.J. Reardon
Counsel for the Receiver, Ernst & Young, appearing by teleconference:	H.L. Williams
Counsel for HSBC Bank Canada appearing by teleconference:	V.L. Tickle
Place and Date of Hearing on Costs:	Kamloops, B.C. July 29, 2014
Written submissions filed by the Defendant:	August 25, 2014
Written submissions filed by the Receiver:	August 26, 2014
Written submissions filed by the Plaintiff:	September 3, 2014
Place and Date of Judgment:	Kamloops, B.C. December 4, 2014

Contents

1. INTRODUCTION

[1] On July 29, 2014, I dismissed the plaintiff's application for an injunction. The plaintiff sought to prohibit the defendant from paying out money owing to Ernst & Young Inc., a court appointed receiver (the "Receiver") of the assets of Maple Leaf Loading Ltd. ("Maple Leaf"). The defendant and the Receiver both seek costs of the application in the form of special costs, on a full indemnity basis. In the alternative, the defendant seeks party and party costs in any event of the cause.

[2] For the reasons that follow, I award special costs to be assessed to both the defendant and the Receiver.

2. BACKGROUND FACTS

a) Key Players and Their Relationships

[3] The defendant, Yukon Zinc Corporation ("Yukon"), is a large mining company that owns and operates, among other things, Wolverine Mine, a mine located in the Yukon.

[4] Maple Leaf is a transportation company which owned and operated a fleet of heavy hauling equipment for transportation of ore concentrate.

[5] Maple Leaf and Yukon entered into a written contract for the transportation of ore concentrate from Wolverine Mine. This contract permitted Maple Leaf to subcontract some of its carrying services.

[6] The plaintiff, Hy's North Transportation Ltd. ("Hy's"), is a trucking company that hauls goods throughout North America. Hy's transported materials between Wolverine Mine and the Vancouver ship yards for a period of time. Hy's standard practice was to invoice Maple Leaf for these services. No written contract existed between Hy's and Maple Leaf.

[7] These business relationships broke down as a result of Maple Leaf's insolvency in and around June of 2014.

b) Receivership of Maple Leaf

[8] As a result of a petition filed in Vancouver Action No. S144996 by HSBC Bank Canada against Maple Leaf and others, on June 27, 2014, Ernst & Young Inc. was appointed as Receiver of all assets, undertakings and properties of Maple Leaf (the "Receivership Property") by order of Madam Justice Gray (the "Receivership Order").

[9] At approximately the same time, Maple Leaf stopped providing services to Yukon, a step which Yukon viewed as a breach of contract by Maple Leaf.

[10] The Receivership Order authorizes the Receiver to receive and collect monies owing to Maple Leaf. It also empowers the Receiver to settle, extend or compromise any indebtedness owing to Maple Leaf. Among the Receivership Property is listed accounts receivable from Yukon. Yukon withheld these payments from Maple Leaf following Maple Leaf's breach of contract in order to set off the payments against damage suffered by Yukon as a result of the breach.

[11] The Receivership Order provides for a stay of proceedings against Maple Leaf or the Receivership Property. Paragraph 7 of the Receivership Order provides:

> 7. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court; provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph and provided that no further step shall be taken in respect of Proceeding except for service of the initiating documentation on the Debtor and the Receiver.
>
> [the "Stay Order"]

[12] The Receivership Order further provides that funds collected by the Receiver, including the collection of accounts receivable, are to be held by the Receiver and paid only in accordance with the Receivership Order or further order of the court.

[13] When Maple Leaf stopped providing services to Yukon, Yukon was faced with possible suspension of its operations at Wolverine Mine. To prevent or mitigate this potential loss, Yukon engaged in considerable negotiations with the Receiver. On or about July 25, 2014, Yukon entered into an asset purchase and settlement agreement with the Receiver, subject to court approval. Included in this agreement was the settlement of all accounts payable by Yukon to Maple Leaf (the "Settlement Agreement").

c) Hy's Injunction Application

[14] Hy's alleges that invoices it rendered to Maple Leaf for carrying services to Wolverine Mine between April 23, 2014 and June 26, 2014 remain unpaid. In this litigation, Hy's does not sue Maple Leaf for payment. Rather, it takes the position that these unpaid invoices, amounting to nearly $600,000.00, are the sole obligation of Yukon. In other words, Hy's claims that Yukon's account listed as Receivership Property is actually a debt Yukon owes to Hy's, not Maple Leaf. Hy's asserts that Maple Leaf was merely a freight forwarder or broker in Hy's dealings with Yukon, acting as agent between Hy's and Yukon. Alternatively, Hy's claims that it had a contractual relationship, directly or indirectly, with Yukon. Yukon denies such a contractual or other relationship with Hy's, asserting that its only contractual relationship was with Maple Leaf.

[15] Aware of the impending application for court approval of the Settlement Agreement, Hy's acted quickly. It filed both its notice of civil claim against Yukon and its injunction application on Friday, July 25, 2014.

[16] It is not in dispute that Hy's was aware of the Receivership Order and all of its terms when it filed the injunction application. It is also undisputed that Hy's did not seek the consent of the Receiver or leave of the court to do so.

[17] Hy's first sought to obtain the injunction prohibiting Yukon from paying out any amount owing to the Receiver on an *ex parte* basis on the same day as filing. Mr. Justice Dley declined to hear the application on an *ex parte* basis and ordered Hy's to serve both Yukon and the Receiver with the application. Short leave was granted and the application was scheduled to be heard on Tuesday, July 29, 2014.

[18] Counsel for Hy's served the application materials on counsel for Yukon later that same day. Although aware the Receiver also had counsel, counsel for Hy's served the Receiver directly, again later that same day. As a result, counsel for the Receiver did not receive the materials until the following day, Saturday, July 26, 2014.

[19] On Sunday, July 27, 2014, counsel for the Receiver wrote to counsel for Hy's expressing the Receiver's position that the application, affecting Receivership Property contrary to the Stay Order, was inappropriately brought on an *ex parte* basis. After urging a course of action that would not put Hy's in breach of the Stay Order, the Receiver made its position on costs, should the application proceed, very clear. Counsel wrote:

> …If your client does not withdraw the application as it affects the Receiver and the assets of Maple Leaf, we will oppose. Given the complete disregard of the Receivership Order, and that the other creditors of Maple Leaf ought not to be prejudiced, we will be seeking costs on a full indemnity basis.

[20] Yukon and the Receiver each filed application responses and affidavits opposing Hy's application for an injunction. Counsel for Yukon and counsel for the Receiver were both permitted to appear at the half-day hearing on July 29, 2014 by telephone. Counsel for HSBC Bank Canada also appeared by telephone and made brief submissions, but filed no response and seeks no costs.

[21] Following the hearing, I dismissed the plaintiff's application, finding the strength of Hy's *prima facie* case questionable and the balance of convenience resting heavily with Yukon.

3. ISSUES AND POSITIONS OF THE PARTIES

[22] Entitlement to costs and, if entitled, the appropriate award are the issues for my determination. All counsel have provided thorough written and oral submissions. In summarizing their positions, it is not my intention to detract from their fulsome arguments, which I have considered in their entirety.

[23] The Receiver seeks "full indemnity costs". I take this to mean special costs, assessed as actual legal costs. Yukon adopts these submissions and, alternatively, seeks party and party costs in any event of the cause. Both the Receiver and Yukon submit that Hy's brought this application, directly affecting Receivership Property, with full knowledge and in violation of the Stay Order. The unmeritorious application was bound to fail. It required unnecessary expenditure of resources by the Receiver and Yukon, as well as interference with the Receiver's work and increased

receivership costs, depleting Receivership Property to the detriment of all creditors. In these circumstances, Yukon and the Receiver say the jurisprudence supports an award of full indemnity costs.

[24] Hy's takes the position that costs to Yukon should be in the cause and no costs ought to be awarded to the Receiver. Hy's submits that the Receiver is not a party. Its only role in this application was to inform the court of the receivership proceedings in the best interests of all parties. If entitlement is found, Hy's conduct falls far short of justifying an award of special costs.

4. DISCUSSION

Issue #1 - Entitlement to Costs

a) Rule 14-1 of the Supreme Court Civil Rules

[25] The Rules governing costs are set out in Rule 14-1 of the *Supreme Court Civil Rules* [*Civil Rules*]. A trial judge cannot impose cost sanctions that are not authorized by the *Civil Rules*: *Gichuru v. Smith*, 2014 BCCA 414 at para. 84.

[26] The following provisions of Rule 14-1 are relevant to this application:

> **How costs assessed generally**
>
> (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
>
> (a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;
>
> (b) the court orders that
>
> (i) the costs of the proceeding be assessed as special costs, or
>
> (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
>
> …

Assessment of special costs

(3) On an assessment of special costs, a registrar must

(a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and

(b) consider all of the circumstances, including the following:

(i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;

(ii) the skill, specialized knowledge and responsibility required of the lawyer;

(iii) the amount involved in the proceeding;

(iv) the time reasonably spent in conducting the proceeding;

(v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;

(vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;

(vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;

(viii) Rule 1-3 and any case plan order.

…

Costs of applications

(12) Unless the court hearing an application otherwise orders,

(a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and

(b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

When costs payable

(13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

…

Costs of whole or part of proceeding

(15) The court may award costs

> (a) of a proceeding,
>
> (b) that relate to some particular application, step or matter in or related to the proceeding, or
>
> (c) except so far as they relate to some particular application, step or matter in or related to the proceeding
>
> and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

b) Non-parties

[27] No case authorities were specifically provided by counsel on this topic, but non-party entitlement to costs has been discussed in a number of decisions. Those authorities make it clear that non-parties who have had notice of the proceedings and have taken steps in the proceedings, or prepared to do so, may recover costs: *Manufacturer's Life Insurance Company v. Dahl Estate,* 2005 BCSC 1800; *Martel v. Wallace*, 2008 BCSC 436 and *Krafta v. F.L.E.X. Excavating Ltd.*, 2012 BCSC 616.

[28] In *Krafta*, Mr. Justice Armstrong discussed the above and other authorities at para. 20. He wrote:

> [20] Mr. Linton relies on several authorities including:
>
> (a) *Martel v. Wallace*, 2008 BCSC 436, which involved a credit union non-party to the proceedings in a matrimonial action that was granted costs of attendance on a motion. In *Martel*, the credit union had been served as a person with an interest in the proceedings.
>
> (b) *Manufacturers Life Insurance Company v. Dahl Estate*, 2005 BCSC 1800, a case where it was found possible to award costs against a non-party.
>
> (c) *Tirling Sheet Metal Ltd. v. Troutman Estate*, 2010 BCSC 958, where creditors opposed a plaintiff's application for money owing due to a purported equitable assignment of sale proceeds. It was held that the creditors had a clear economic interest because if the application succeeded there would be insufficient funds to pay their outstanding claims.
>
> (d) *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, where a non-party successfully obtained special costs. The court said at para. 83:
>
> Bhora Mayer did not stand as a volunteer (as suggested by Mhinder Mayer) or akin to an intervener (as was argued in *Re*

> *Pacifica Papers Inc.*, 2001 BCCA 464). I accept Mr. Fraser's submission that Bhora Mayer is entitled to special costs in respect of VA S907716 even though he was not a named defendant in that action because:
>
> (a) he had special knowledge that was necessary to put before the Court (e.g., the Bhagwan Mayer action, the Bhagwan Mayer Settlement Agreement, and Mhinder Mayer's proposed amendments concerning the Brothers' Trust);
>
> (b) many of the allegations made and some of the proposed amendments sought to be made in VA S097716 were the same or similar to those sought in VA S073324; and
>
> (c) Bhora Mayer was successful in having abusive or meritless claims made against him barred and successful in resisting all but one of Mhinder Mayer's proposed amendments because they were abusive or without merit.

[29] Non-party entitlement to costs was addressed by Mr. Justice Hall in *Pacifica Papers Inc. (Re)*, 2001 BCCA 464. In making such an award, Hall J.A. held at para. 7:

> [7] It appears to me that it can fairly be said that here Norske Skog occupied a position more vitally involved in the issue before the Court than would normally be the case with an intervener. Norske Skog had entered into an agreement, (requiring subsequent approvals), to acquire the equity of Pacifica with a view to Pacifica becoming a subsidiary of Norske Skog. In these circumstances, Norske Skog had a clear economic interest in seeing the proposed arrangement proceed to completion. It was no doubt legally possible for it to stand aside from and take no part in these proceedings but it is wholly understandable that Norske Skog would feel it was appropriate for it to participate in and lend assistance to the successful petitioner, Pacifica. I believe its participation in the Chambers proceedings in both courts was quite appropriate. It might well have sought status as a party but there was no particular necessity for it to do so since it had already been served with process and was undoubtedly an interested party with a stake in the outcome of the proceedings. Given its interest in the outcome of the proceedings, it seems doubtful that a court would refuse to hear submissions from Norske Skog.

[30] In *Pacifica Papers*, the court awarded the non-party, Norske Skog, costs, but only two-thirds of its costs and full disbursements. Full costs were not awarded because the petitioner had carried the main burden of the application, making it less necessary for Norske Skog to make extensive submissions.

c) Analysis

[31] The purpose of a court-appointed receiver is to:

> …preserve and protect the property in question pending resolution of the issues between the parties… In most cases, the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors.

Frank Bennett, *Bennett on Receiverships*, 3d ed. (Toronto: Thomson Reuters, 2011) at 6.

[32] A stay order is common in receivership orders. It prohibits the commencement of any proceedings against the debtor or receivership property unless consent of the receiver or leave of the court is obtained. The purpose of requiring leave has been described as a:

> …procedural safeguard set up to protect the receiver from frivolous and vexatious actions or claims without merit or foundation.

Frank Bennett, *Bennett on Receiverships*, 3d ed. (Toronto: Thomson Reuters, 2011) at 905.

[33] Hy's injunction application specifically targeted Receivership Property. The Receiver and Yukon both had notice of the application and were required to take steps to defend it. I do not agree with Hy's characterization of the Receiver's role in this application as only "…to act in a fiduciary role to the Plaintiff, a creditor of Hy's, and to assist the Court with a fulsome discussion of the circumstances of Maple Leaf's insolvency."

[34] As no consent by the Receiver or leave of the court was sought or obtained by Hy's, the Receiver was forced to respond directly to the application along with Yukon. Hy's application was clearly brought in violation of the Stay Order.

[35] In my view, the Receiver had a clear obligation to participate in and oppose Hy's injunction application not only because it was brought in contravention of the Stay Order, but because it had the potential to derail the Settlement Agreement, to the detriment of other creditors of Maple Leaf. To borrow the words of Hall J.A. at para. 7 in *Pacifica Papers*, the Receiver "occupied a position more vitally involved in the issue before the Court than would normally be the case with an intervener. … I believe its participation in the Chambers proceedings … was quite appropriate."

[36] I have no hesitation in concluding the Receiver and Yukon are both entitled to costs. The central issue for my determination is the appropriate award.

Issue #2 - Award of Costs

[37] The Receiver seeks special costs and asks that I assess them as full indemnity costs. In short, it submits that Hy's conduct in bringing an unfounded application, contrary to the Stay Order, is reprehensible conduct deserving of rebuke. The Receiver was forced to expend resources to the detriment of all of Maple Leaf's creditors, a result that the Stay Order was intended to prevent. It argues that those expenditures ought to be borne by the party who brought the unmeritorious claim, Hy's. Yukon adopts these submissions.

[38] Hy's submits its claim was not frivolous because the "proper debtor for this account is not yet decided". Armed with knowledge of the Receivership Order and the pending application for court approval of the Settlement Agreement, Hy's says that it could not stand idly by while Yukon purported to negotiate away Hy's property. Its conduct was not "reprehensible" such that an award of special costs is required.

a) Special Costs

[39] Party and party costs is the standard costs award. These costs are awarded on a principle of partial indemnity, using Scales A, B or C of Appendix B of the *Civil Rules*.

[40] The other costs award is special costs. Special costs are usually intended to indemnify a successful litigant fully or at least substantially: *Gichuru* at para. 91.

[41] In *Gichuru*, the court traced the foundation of the present cost rules, noting that the distinction between "party and party" and "solicitor-client" costs recognized in the original *Supreme Court Rules*, continues to the present day. The 1990 *Supreme Court Civil Rules* introduced the term "special costs" in place of "solicitor-client" costs: *Gichuru*, paras. 87-89.

[42] An award of special costs should be made where the conduct of the party required to pay costs was "reprehensible, scandalous or outrageous": *Young v. Young*, [1993] 4 S.C.R. 3 at 134.

[43] Special costs may be appropriate where a litigant has engaged in reprehensible conduct. The term "reprehensible" is a word of wide meaning. It includes not only scandalous or outrageous conduct, but also milder forms of misconduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17.

[44] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, Mr. Justice Walker summarized the law of special costs. He then set out a non-exhaustive list of circumstances that may attract such an award, at para. 11:

> [11] Special costs may be ordered in the following circumstances:
>
> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
>
> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
>
> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
>
> [(f)] where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;

> [(g)] where a party brings a proceeding for an improper motive;
>
> [(h)] where a party maintains unfounded allegations of fraud or dishonesty; and
>
> [(i)] where a party pursues claims frivolously or without foundation.
>
> See: *Garcia* at 748; *International Hi-Tech* at paras. 7-13; *Webber v. Singh*, 2005 BCSC 224 at para. 28; *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 at paras. 26, 29; *Buchan v. Moss Management Inc.*, 2008 BCSC 1286 at paras. 11-12; and *Edwards v. Bell*, 2004 BCSC 399 at paras. 12, 43-45.

[45] In *Dawson v. Dawson*, 2014 BCSC 44, Mr. Justice Barrow described that an award of special costs generally serves two purposes, writing at para. 58:

> …first, it compensates the party in whose favour the award is made, usually to the point of indemnifying that party for the legal expenses incurred; and second, it serves to sanction the party whose conduct gives rise to the award.

b) Receivers

[46] In respect of the specific issue of costs payable to a receiver, several authorities provide guidance, although I note that none involve costs payable to a receiver outside of the actual receivership litigation.

[47] In *Naramalta Development Corporation v. Therapy General Partner Ltd.*, 2012 BCSC 191, Mr. Justice Kelleher was called upon to decide whether the costs of a receiver should be borne by one of the parties. Although in a different context, the court's general observations regarding receivership costs as a result of improper interference with the receiver, are instructive. In this regard, Kelleher J. wrote at para. 44:

> [44] Generally speaking, court ordered receivers are officers of the court and as such as are entitled to be paid out of the property they are managing. However, as between the parties involved, one may be entitled to indemnity for the costs of the receiver if the other's conduct interferes with the receiver or otherwise causes a depletion of the assets of the enterprise.

[48] In reaching this conclusion, Kelleher J. relied upon an Ontario decision, *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. C.J.), writing at para. 49:

> *…MacPherson* stands for the principle that a party who exacerbates receivership costs by disputatious proceedings and interference with the receiver should indemnify the innocent parties in the enterprise.

[49] Similarly, in *Royal Bank of Canada v. Komtech Enterprises Limited*, 2014 ONSC 3647, the court dealt with the issue of costs where the party required to pay costs was found to have engaged in conduct that disregarded a stay of proceedings order contained within a receivership order. The court awarded elevated costs, writing at para. 34:

> [34] I award the Receiver its full indemnity costs of $12,529.46 set out on its Costs Outline, payable by Surgenor to the Receiver within 30 days of the date of this order. Elevated costs are justified on this motion because of the "reprehensible" conduct[3] of Surgenor in removing the Truck from the possession of the court-appointed Receiver without the Receiver's consent or the approval of this Court. Parties which disregard the standard stay of proceedings contained in receivership orders must expect that their resort to illegal self-help most likely will expose them to an award of elevated costs.
>
> [Footnotes omitted]

[50] In *Pinnacle Capital Resources Limited v. Kraus Inc.*, 2013 ONSC 674, the receiver was awarded "substantial indemnity costs" where one of the stakeholders in the insolvency proceedings brought what was found to be an irrelevant, unreasonable, and unmeritorious application that the receiver was required to answer. The court concluded that the applicant stakeholder, and not the other stakeholders involved in the insolvency proceeding, should bear the brunt of the receiver's cost in defending the application: para. 10.

c) Analysis

[51] In the case at bar, Hy's was aware of the Receivership Order and all of its terms when it sought an injunction that clearly targeted Receivership Property. To do so without seeking consent of the Receiver or leave of the court is a clear violation of the Stay Order. Such an action, on its own, is reprehensible conduct deserving of rebuke. This violation was exacerbated by Hy's initial attempt to obtain this extraordinary remedy without notice to either Yukon or the Receiver. A costs award must serve to sanction this conduct.

[52] Hy's application was unsuccessful. I could not conclude that Hy's *prima facie* case was strong, and found that even if it was, the application overwhelmingly failed the balance of convenience test. To have the costs incurred by the Receiver in responding to such an unmeritorious application deplete the assets of Maple Leaf to the detriment of all of its creditors, would defeat the purpose of the Receivership Order and the very purpose of the appointment of the Receiver. A costs award must serve to compensate Yukon and the Receiver for these unnecessary expenses.

[53] In these circumstances, I find an award of special costs to both the Receiver and Yukon is appropriate.

[54] The Receiver and Yukon have asked that I assess these special costs on a "full indemnity" or "actual legal cost" basis. No evidence has been provided regarding those costs.

[55] Historically, lump sum awards for special costs have been assessed using three different approaches:

1) Full indemnity basis (full recovery of actual legal expenses);

2) Substantial indemnity basis (a percentage - usually 80 - 90% of actual legal costs; or

3) The so-called "rough and ready approach".

Buchan v. Moss Management Inc., 2010 BCSC 121 at para. 27; *Dawson* at para. 64

[56] This third approach has now been clearly rejected by our Court of Appeal in *Gichuru*. The court stressed that regard must be had to the governing principle of costs assessments, writing:

> [101] The principle governing cost assessments under the *Rules* is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant to a final judgement or

interlocutory application. This principle follows from the plain and ordinary meaning of the *Rules* and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily.

[57] The court summarized general principles at paras. 154 - 156:

> [154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.
>
> [155] When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While a judge need not follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).
>
> [156] A special costs assessment, whether before a judge or a registrar, cannot proceed in absence of evidence of the amount of legal fees incurred. Usually this will be provided in the same form as a bill between a solicitor and client under the *Legal Profession Act*. This is necessary to allow a court to inquire as to the objective reasonableness of the fees claimed by a litigant, as the fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. Where production of a bill of special costs would lead to a loss of solicitor-client privilege, the party seeking special costs must either waive privilege or can elect to preserve privilege by having its costs assessed after all appeals are exhausted.

[58] It follows then that I decline to assess the special costs award. Assessment will be conducted by the registrar in the ordinary course.

"S.A. Donegan J."

DONEGAN J.

1990 CarswellBC 1334
British Columbia Court of Appeal

Kent v. Thiesen

1990 CarswellBC 1334, [1990] B.C.J. No. 2615, [1991] B.C.W.L.D. 150, 24 A.C.W.S. (3d) 146

Jeffrey Kent, Plaintiff (Appellant) and Albert W. Thiesen, P & W Excavating Ltd., 118172 Holdings Ltd. and Suzanne Kopelman, Defendant (Respondent)

Cumming J.

Heard: October 19, 1990
Judgment: October 23, 1990
Docket: CA011890

Counsel: The Appellant in person.
Gordon A. Fulton, Esq., for Respondents (except Kopelman).

Subject: Civil Practice and Procedure
Headnote
Practice --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — General

***Honourable Mr. Justice Cumming* (In Chambers):**

1 This is an application by the plaintiff (appellant), for leave to appeal from the order of the Honourable Mr. Justice Lander pronounced December 15, 1989, dismissing the plaintiff's motion filed June 15, 1989 seeking costs of the action against I.C.B.C. on a solicitor and own client basis, and seeking, as well, an additional order that a fine be levied personally against the then defence counsel, Mr. Boyd Ferris, Q.C. and Miss Virginia Engel.

2 The action arose as a result of a motor vehicle accident which occurred in Kelowna, B.C. on July 14, 1982. The trial commenced September 6, 1988 before Mr. Justice Lander with a jury.

3 After some 7 days of trial, and as a result of differences which had arisen between the plaintiff and his then counsel, who thereupon withdrew from the case, Mr. Justice Lander ordered a mis-trial. The plaintiff subsequently retained new counsel. After a settlement conference the plaintiff's claim was settled for $325,000.00.

4 On October 14, 1988 a release was executed by the plaintiff in favour of the named defendants and I.C.B.C. releasing them from any and all obligations, including legal fees and disbursements, arising out of this accident and the action brought consequent thereon. It contains the following terms:

> WE ACKNOWLEDGE that the facts in respect of which this Release is made may prove to be other than or different from the facts in that connection known by any of the parties or one or more of them or believed by any of them to be true. We expressly accept and assume the risk of the facts being different and agree that all of the terms of this Release shall be in all respects effective and not subject to termination or rescission by any discovery of any difference in facts.
>
> . . . . .
>
> AND WE, the said Releasors do hereby authorize and instruct our solicitor, R. BARRY FRASER, ESQ., to consent to the dismissal of the said Action Nos. C841036 and C865983 as if a trial on the merits in these Actions had been held, with costs and disbursements to be taxed or agreed upon between the parties.
>
> . . . . .

> WE HAVE consulted with and been advised by our solicitor, R. BARRY FRASER, ESQ., before entering into the settlement herein contained and have read the foregoing Release and know the contents thereof, and we, the said Releasors, hereby sign the same as our own free act and fully understand the same, and warrant that we are of the full age and capacity and that we have not been influenced to any extent whatsoever in making this Release by any representations or statements regarding the said injuries or regarding any other matters made by the parties hereby released, or by an person or person representing them, or by any physician or surgeon by them employed.

5 On October 31, 1988 a consent dismissal order was entered in the following terms:

> THIS COURT ORDERS that this action be and the same is hereby dismissed with taxable costs payable to the plaintiff, less all costs that have heretofore been awarded in any event of the cause to the said Defendants.

6 By notice of motion returnable June 20, 1989, the plaintiff brought an application pursuant to Rule 57 of the Rules of Court for an order that:

> 1. Solicitor and own client costs be awarded in the above action with and the right to submit a lump sum amount.
>
> 2. An order for the maximum payment of $50,000 penalty to be paid by Mr. Ferris and Ms. Engel as a disciplinary action to penalize Counsel for their abuse of the Court and to deter other members from like behavior. "The Authority for such an award is found in the inherent jurisdiction of the court to discipline its officers, and it may also arise through the provisions of Rule 57(30). (Civil Procedures, The Continuing Legal Education)"

7 Argument on this application was heard on June 20 and 21 and on December 15, 1989 Mr. Justice Lander delivered written reasons for judgment dismissing the application. He said:

> The plaintiff seeks taxation of costs after settlement of an action on a solicitor and own client basis or a lump sum basis together with an order that the solicitor of record for the defendants bear these costs.
>
> It is not my intention to relate the history of this matter because the application does not warrant such an exercise. Mr. Kent, in his voluminous submissions filed, alleges misconduct on the part of the late Boyd Ferris, Q.C. and Ms. Virginia Engel, Mr. Ferris' junior counsel. At the outset I, as the trial judge sitting with a jury, found nothing objectionable in the conduct of Mr. Ferris or Ms. Engel in the course of the trial or otherwise. Mr. Ferris objected to the admission of evidence that he felt was legally inadmissible and, in so doing, he acted in the best interests of his client. What Mr. Ferris' client's non-legal representatives might have said or agreed to with Mr. Kent has no bearing on this matter. Mr. Ferris was in charge of and had the conduct of the case before the court and, while he was vigorous in his defence, he did nothing improper while before the court.
>
> Because of the difficulties that were presented during the course of the trial as between the present applicant and his then counsel, the jury was discharged and, thereafter, a settlement conference was held at which settlement was achieved. The plaintiff was then represented by an able new counsel. The settlement was obtained and the action was dismissed by consent, the plaintiff was awarded costs on a party and party basis to be taxed. The plaintiff-applicant received a substantial award of damages.
>
> This attack on Mr. Ferris and Ms. Engel can only be considered vindictive.
>
> I reiterate that this application does not warrant extensive consideration in minute detail of all the materials submitted by Mr. Kent. Albeit I have taken the necessary time to consider the materials filed by Mr. Kent. In the final analysis, there is no merit to his position whatsoever. The late Mr. Ferris and Ms. Engel are not subject to any form of condemnation by this Court for the conduct of the case. Once again, I say that the defence was properly conducted according to the rules and traditions of our trial system. The settlement determination as to costs shall not be altered.
>
> The application is dismissed. The respondents shall share their costs on a solicitor client basis.

8 I pause to observe that in the first paragraph of his reasons Mr. Justice Lander does not accurately describe the full nature of the motion before him but, in my view, this is simply a mis-description and nothing of consequence turns upon it.

Solicitor and Clients Costs Against I.C.B.C.:

9 In *McEvoy v. Ford Motor Company* (1990), 45 B.C.L.R. (2d) 363 (B.C.S.C.) *Hinds J.A.* said, at 364-366:

> The principles to be applied with respect to an award of solicitor-and-client costs have been considered in British Columbia in a number of decisions. In Stiles v. B.C. (W.C.B.) (1989), 38 B.C.L.R. (2d) 307, Lambert J.A. reviewed the historical basis for awarding costs and some of the more recent cases which dealt with solicitor-and-client costs. What he said commencing at p.310 bears repeating:
>
> > The power of a Supreme Court judge to award costs stems from s.3 of the Supreme Court Act which confirms that the judges of the Supreme Court have the inherent powers of a judge of a superior court of record. The power to award costs is governed by the laws in force in England before 1858 and by the enactments, including the Rules of Court, affecting costs made in British Columbia since 1858. Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See Oasis Hotel Ltd. v. Zurich Ins. Co., 28 B.C.L.R. 230, [1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e., not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.
> >
> > The principle which guides the decision to award solicitor-and-client costs in a contested matter where there is no fund in issue and there the parties have not agreed on solicitor-and-client costs in advance, is that solicitor-and-client costs should not be awarded unless there is some form of [illegible text] conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used. See Cominco v. Westinghouse Can. Ltd. (1930), 16 C.P.C. 19 at 22 (B.C.S.C.); Jackh v. Jackh (1981), 31 B.C.L.R. 309 at 312 (S.C.); Sussex Invt. Ltd. v. Leskovar (1981), 30 B.C.L.R. 373 at 378 (C.A.); and Doyle Const. Co. v. Carling-O'Keefe Breweries of Can. Ltd. (1988), 27 B.C.L.R. (2d) 81 C.A.).
>
> After reading the authorities referred to by Lambert J.A. in the Stiles [illegible text], and the British Columbia authorities referred to by counsel on this application, I conclude that solicitor-and-client costs should be awarded only in exceptional cases where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties deserving of chastisement.
>
> Counsel for the plaintiffs referred to a number of matters which occurred before the trial, and during the trial which, in his submission, constituted reprehensible, scandalous or outrageous conduct and therefore warranted the imposition of solicitor-and-client costs. He emphasized the difficulties encountered in obtaining from the defendants proper disclosure of documents. Indeed, he asserted that the defendants, particularly Ford, had concealed documents. After reviewing the relevant evidence I am unable to make that finding.
>
> In Columbia Trust Co. v. Drew (1988), 21 B.C.L.R. (2d) 384, Macdonald J., when referring to disputes concerning the production of documents, had this to say at p.390:
>
> > The Rules of Court provide for the resolution of such disputes. Counsel's refusal to provide such documents in these circumstances is perhaps a questionable tactic, but not an abuse of process. A refusal cannot be equated with a concealment.

> In this case it was open to the plaintiffs to insist upon full discovery of documents in accordance with the Rules of Court. That was not done in a timely manner or in a sufficiently determined manner. I do not consider the difficulties caused by the defendants with regard to the production of documents to have constituted reprehensible, scandalous or outrageous conduct.
>
> I have considered the other matters upon which counsel for the plaintiffs placed reliance to support his assertion of reprehensible, scandalous or outrageous conduct. I am satisfied that the defendants defended the action with uncompromising zeal. But the uncompromising and zealous defence mounted by the defendants in this case did not constitute reprehensible, scandalous or outrageous conduct warranting the imposition of solicitor-and-client costs.

10 The reasoning in this case applies here. The conduct of the defence did not constitute reprehensible, scandalous or outrageous conduct warranting the award of solicitor and client costs. Furthermore, the plaintiff arrived at a settlement, formalized by the release he executed with legal advice, which was all embrasive, and he ought not now, at this late stage, be permitted to reopen the issue to seek a special order as to costs.

Costs Against the Solicitors

11 I do not dispute the power of the courts in civil cases to visit costs on counsel for his conduct of a trial. That is a power which, because it may inhibit or prevent counsel representing his client fearlessly on the trial of the merits, is to be most sparingly exercised.

12 A solicitor has a duty to take any point which he honestly believes to be fairly arguable on behalf of his client, and it is the duty of the court to hear the point. As to the first branch of this proposition Lord Denning M.R. in *Abraham v. Jutson*, [1963] 2 All E.R. 402 (C.A.) said, at 404.

> Appearing, as the appellant was, on behalf of an accused person, it was, as I understand it, his duty to take any point which he believed to be fairly arguable on behalf of his client. An advocate is not to usurp the province of the judge. He is not to determine what shall be the effect of legal argument. He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court. Nothing of that kind appears here.

13 In *Holden & Co. (a firm) v. Crown Prosecution Service*, [1990] 1 All E.R. 368 (C.A.), Lord Lane C.J. said, at 372: 62

> Despite the dictum of Lord Atkin in Myers v. Elman cited earlier, it seems clear that the object of the order is primarily to reimburse a litigant for costs which he has incurred because of the solicitor's default (see Weston v. Courts Administrator of the Central Criminal Court, [1976] 2 All ER 875 at 883, [1977] QB 32 at 45, per Stephenson LJ). The costs which the solicitor will have to pay from his own pocket will be those, and only those, which his default has caused. There is nothing to be added to that figure to mark the disapproval of the court or by way of deterrence. To that extent the object of the jurisdiction is to compensate.

14 Before any such order could be made it must be shown that counsel has, in some way, failed to fulfil his duty to the court. See *Myers. v. Elman* (1940), A.C. 282 at 317-319, per Lord Wright. The conduct complained of must come close to, if not actually amount to contempt. It is not for the court, in such a case, to exercise the disciplinary powers which are the province of the Benchers of the Law Society.

15 In my view, for the reasons given by Mr. Justice Lander, counsel cannot be said to have failed in their duty to the court and there is therefore no basis for the order sought against them.

16 Mr. Kent also seeks to have set aside the order as to costs of the motion on a solicitor and client basis made against him. The learned judge said that the attack on counsel "can only be considered vindictive". His finding in this regard is supported by the evidence, and it was within his discretion to make the order he did.

17 For these reasons it is my view that the plaintiff's appeal, were it to proceed, would be bound to fail.

18 Leave to appeal is denied.

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nuttall v. Krekovic,*
2018 BCCA 341

Date: 20180905
Docket: CA44983

Between:

Robin Giles Nuttall

Respondent
(Plaintiff)

And

Harman Singh Dhillon

Respondent
(Defendant)

And

Arsen Krekovic

Appellant

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated November 30, 2017 (*Nuttall v. Insurance Corporation of British Columbia*, 2017 BCSC 2471, Vancouver Docket S131225).

Oral Reasons for Judgment

Counsel for the Appellant: G. Cameron

No one appearing on behalf of the Respondents

Place and Date of Hearing: Vancouver, British Columbia
September 5, 2018

Place and Date of Judgment: Vancouver, British Columbia
September 5, 2018

Summary:

The appellant, counsel for the plaintiff in the underlying action, appeals an order for special costs made against him personally. The action involved a hit and run accident in which the plaintiff was injured. After a police investigation yielded no results, the appellant took steps to investigate the identity of the driver. Eventually, he obtained an order adding the respondent as a defendant in place of John Doe. In doing so, he relied on information provided to him by counsel for another party. Shortly after serving the order on the respondent, the appellant learned that the information he had received was incorrect. He then took steps to discontinue the action against the respondent. The respondent made an application for an order for special costs to be payable by the appellant personally. The chambers judge granted the order. He found that the appellant failed to inform the application judge of all of the details of his investigation and considered this to be an abuse of process meriting an order for special costs. HELD: Appeal allowed. The appellant's conduct in making the application to add the respondent as a defendant did not approach the kind of reprehensible conduct required to justify an order for special costs against him as counsel. The chambers judge erred in principle in failing to consider the cautious approach that is required in making such orders as well as the kind of reprehensible conduct that would justify such an award. He also erred in concluding that the appellant's failure to disclose the entire circumstances of his investigation was in itself sufficient to justify an order for special costs.

[1] **FISHER J.A.**: This is an appeal with leave of an order for special costs made against Arsen Krekovic, counsel for the plaintiff in the action below, arising from an application to add the respondent, Harman Singh Dhillon, in place of an unidentified driver. The underlying action involves a hit and run accident that occurred on May 27, 2012, outside the Wheelhouse Pub in Surrey, British Columbia. After an investigation by the RCMP did not reveal the identity of the driver, Mr. Krekovic took steps to do so himself in order for his client to have access to third party liability insurance.

[2] In making the application, Mr. Krekovic relied on information he obtained from counsel for the Wheelhouse Pub (another party to the action) that Mr. Dhillon was the driver. That information turned out to be erroneous, and after Mr. Krekovic learned this, he discontinued the action against Mr. Dhillon.

[3] When Mr. Krekovic indicated that his client would pay costs when he obtained a settlement or damages award, Mr. Dhillon sought an order for special costs to be made payable personally by Mr. Krekovic. That application was heard and

determined on November 30, 2017. The chambers judge granted the order sought on the basis that Mr. Krekovic's conduct in making the application to add Mr. Dhillon constituted an abuse of process.

[4] Mr. Krekovic asserts that the chambers judge erred in law and principle and misapprehended the evidence.

[5] Mr. Dhillon did not respond to this appeal or appear at the hearing.

Background

[6] Mr. Krekovic's efforts to identify the driver of the other vehicle began in May 2014, and continued for over two years. He retained several private investigators, but the results of those investigations were inconclusive.

[7] In September 2014, after receiving some information from his client's brother, Mr. Krekovic asked two different investigators to determine whether the respondent Mr. Dhillon was the driver. At that time, he had information suggesting that Mr. Dhillon's birthdate was May 3, 1992, and one of the investigators (a Mr. Loncaric) had information suggesting the birthdate was in 1991. Shortly after this however, on October 17, 2014, Mr. Loncaric advised Mr. Krekovic that he had information from the ICBC Special Investigations Unit that Mr. Dhillon's birthdate was November 16, 1994. He also provided an address and B.C. Driver's License number.

[8] In November 2014, Mr. Krekovic received information from the other investigator (a Mr. Westman) suggesting that the driver was a different Mr. Dhillon, but the investigator was unable to obtain any firm information.

[9] In April 2015, Mr. Krekovic shared the information he had received from Mr. Westman with the RCMP and asked them to re-open their investigation. However, the RCMP were not able to obtain any further information and in June 2015, they considered that all avenues of investigation had been exhausted.

[10] In May 2016, Mr. Krekovic was advised by a lawyer at Dolden Wallace Folick LLP, counsel for the Wheelhouse Pub, that Mr. Loncaric had information on the hit and run driver. After trying for several months to contact Mr. Loncaric, Mr. Krekovic was advised that the investigator could no longer assist with finding the driver due to a conflict. Mr. Krekovic continued to make inquiries at Dolden Wallace Folick.

[11] Finally, on December 8, 2016, Mr. Folick advised Mr. Krekovic that his investigator had given him the identity of the driver but was not able to say how he obtained the information. Mr. Folick provided Mr. Dhillon's name, a birthdate of November 16, 1994, a residential address and a B.C. Driver's License number. All of this information was the same as that provided directly by Mr. Loncaric in October 2014.

[12] On February 8, 2017, Mr. Krekovic filed an application to add the respondent Mr. Dhillon to the notice of civil claim in place of John Doe. The affidavit in support of the application included the information provided by Mr. Folick, the fact that the RCMP had investigated without results, and that Mr. Krekovic had also retained investigators who had been unable to obtain any reliable information. The application was heard before Madam Justice Sharma on February 24, 2017. It was opposed by ICBC, whose position was that the evidence was insufficient and failed to explain how Mr. Folick obtained his information. Mr. Dhillon did not appear although duly served. The order was granted.

[13] In March 2017, Mr. Krekovic tried to obtain further information from Mr. Folick's office, in particular "a nexus" between Mr. Dhillon and the vehicle or the night in question. He was advised that their investigator had provided information that the driver was identified as "most likely" Mr. Dhillon, and two other individuals were identified as "possibly" being "correlated with the incident".

[14] The order of Madam Justice Sharma was entered on March 24, 2017 and was served on Mr. Dhillon on April 9, 2017. Meanwhile, Mr. Krekovic also passed along the information identifying Mr. Dhillon to the RCMP, requesting whether they

could investigate him. On April 24, 2017, he sent the RCMP his investigation file and requested that the investigation be reopened.

[15] On April 27, 2017, Mr. Krekovic received correspondence from counsel for Mr. Dhillon advising that he was not the driver. He passed this information along to Mr. Folick's associate, again seeking the evidence on which their investigator had identified Mr. Dhillon. On May 2, 2017, the associate advised him that the information they had provided was incorrect, as the Mr. Dhillon they had identified had a different birthdate of May 3, 1992. That same day, Mr. Krekovic advised Mr. Dhillon's counsel of the error and that he would discontinue the action. The notice of discontinuance was eventually filed on July 17, 2017.

[16] Mr. Krekovic deposed that the identity of the driver was important given the limits on insurance coverage in the circumstances and the value of his client's claim for damages, which he estimated to be between $2.5 and $4 million. He explained:

> [17] The decision to add Harman Singh Dhillon as a defendant in February 2017 was not made lightly. I made the decision to seek instructions to add Harman Singh Dhillon, as I thought it was my duty to pursue every reasonable avenue to obtain justice for my client. I did not seek those instructions with any malice or in bad faith. I sought those instructions after consideration of the available information at hand, while endeavoring to obtain every remedy available for my client.

The chambers judge's reasons

[17] The chambers judge considered that the naming of the respondent arose as a "case of mistaken identity", and that the question before him was

> [2] … who bears the blame for that mistaken identity and who bears responsibility for the cost the applicant was consequently put to as well as the degree of culpability for that step having been taken.

[18] His conclusion that Mr. Krekovic was responsible stems from the following finding:

> [13] There is no evidence of Mr. Krekovic in the course of that application having disclosed to the court any of the substance of the investigation that had taken place over the previous more than two years, including the fact that there were multiple suggested parties whose names had come forward as possibly being drivers and/or owners, and other information that would have

> tended to cast doubt on the likelihood of the applicant's involvement. He failed to disclose the inconsistent information as to the birth date of the applicant and the target of his investigation. Justice Sharma was given no reason to doubt or be concerned as to the validity of the positive identification of the applicant.

[19] The judge viewed this conduct as "indefensible and an abuse of process meriting sanction in the form of an order of special costs payable by him personally". Despite Mr. Krekovic's motivation to act in pursuance of his duty to his client, he considered the failure to disclose information about the history of the investigation to be in breach of his duty to the court to be forthright:

> [21] Mr. Krekovic, however, provides no explanation for his failure to disclose to Sharma J. the history of the investigation, including the multiple parties identified as possible targets, and particularly, the information in his possession as to the inconsistent birth dates. Had he done so, the application may very well have had a different outcome.
>
> [22] While it is true that Mr. Krekovic was conducting the application in pursuance of his duty to his client, Mr. Krekovic, as an officer of the court, was also under a duty to the court to be forthright in disclosing the entire circumstances of his investigation into the driver's identity. Chapter 2 of the *Code of Conduct* sets out the Canons of Legal Ethics. Section 2.1-2(a) of the Canons provides, "A lawyer's conduct should at all times be characterized by candour and fairness." That duty was breached.

[20] The chambers judge concluded that this finding alone was sufficient to justify an order for special costs, and that the fault was compounded by serving Mr. Dhillon "without further investigation to substantiate the hearsay evidence he had from Mr. Folick" (at para. 23). He held that Mr. Krekovic's conduct was of the nature contemplated by Rule 14-1(33) of the *Supreme Court Civil Rules* "and is deserving of reproach".

On appeal

[21] Mr. Krekovic asserts that the chambers judge erred in law and principle by

(a) inaccurately characterizing his conduct as an abuse of process and failing to apply the principle that the discretion to award costs against counsel must be exercised with restraint and only in rare and exceptional cases;

(b) proceeding on the basis that where counsel fails to bring to the Court's attention all possible theories or facts which are known to them and which are later found to be material, their conduct is *ipso facto* reprehensible and thus must attract the sanction of special costs; and

(c) applying an *ex parte* standard of disclosure on a contested application.

[22] He also asserts that the judge erred in misapprehending the evidence relating to the birthdate of Mr. Dhillon, which was a key issue underlining his finding of a breach of the duty of candour.

Standard of review of costs awards

[23] It is clear that awards of costs, being discretionary, are given a high degree of deference by this Court. A costs award should only be set aside on appeal if the judge below has made an error in principle or if the award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27. Applying these principles in *Yung v. Jade Flower Investments Ltd.*, 2013 BCCA 170, this Court stated that it will only interfere:

> [17] … "if there is misdirection or the decision is so clearly wrong as to amount to an injustice": *Agar v. Morgan*, 2005 BCCA 579 at para. 26, 47 B.C.L.R. (4th) 36. Misdirection may include making an error as to the facts, taking into consideration irrelevant factors, or failing to take into account relevant factors, all of which would amount to an error in principle: *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 24, 77 B.C.L.R. (4th) 142.

[24] It is also clear that findings of fact may only be reversed by an appellate court where there is a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10. A misapprehension of evidence will result in a reversible error only where it goes to the core of the reasoning process of the judge: see *Tambosso v. Holmes*, 2016 BCCA 373 at para. 30 and the cases cited therein.

Analysis

[25] It is my view that the chambers judge made several errors that warrant intervention by this Court.

[26] First, special costs have a punitive or deterrent element and are only appropriate where the conduct in issue is deserving of punishment or rebuke. This well-known principle stems from numerous cases, most recently enunciated in *J.P. v. British Columbia (Children and Family Development),* 2018 BCCA 325 at para. 28. The chambers judge erred in principle by failing to consider the cautious approach to an award of special costs against a lawyer personally, as well as the kind of reprehensible conduct that would justify such an award, mandated by the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3 and more recently in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26.

[27] In *Young* the court directed judges to be "extremely cautious" in awarding costs personally against lawyers given their duties to guard confidentiality of instructions and to bring forward with courage even unpopular causes:

> ... A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties or his or her calling.

[28] In *Jodoin*, the court confirmed that the threshold for exercising the power to award costs against lawyers is high, such that there must be a finding of reprehensible conduct by the lawyer. Reprehensible conduct "represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system" (at para. 27). Mr. Justice Gascon, for the majority, described the kind of conduct that would justify such an order at para. 29:

> [29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate...

[29] Consistent with these decisions, this Court has long held that such orders should be made only in "very special circumstances", and not on the basis of mistake, error in judgment or even negligence: see *Hannigan v. Ikon Office*

Solutions Inc. (1998), 61 B.C.L.R. (3d) 270 (C.A.); *Pierce v. Baynham*, 2015 BCCA 188 at para. 41.

[30] Second, the chambers judge erred in concluding that Mr. Krekovic's failure to disclose the entire circumstances of his investigation was in itself sufficient to justify an order for special costs. A special costs order is not justified only because counsel fails to disclose evidence that ultimately proves to be material or incorrect: see *Pierce* at para. 43. The chambers judge made no finding of dishonesty, accepting that Mr. Krekovic's motivation to bring the application was "in pursuance of his duty to his client". Given that, his failure to disclose more about his investigation does not constitute reprehensible conduct sufficient to justify an award of special costs. This is particularly so in the context of the evidence in the application that Mr. Krekovic clearly informed the court that his own investigation had not yielded any reliable information and he was relying only on information provided to him from another lawyer, the basis for which had not been disclosed.

[31] Moreover, I cannot agree that disclosure of further information would necessarily have yielded a different outcome in the application. The chambers judge placed considerable importance on "the discrepancy between the date of birth that he had given for the Mr. Dhillon identified by Mr. Folick, and the date of birth of the Mr. Dhillon whom his investigation had previously identified as a potential defendant". In fact, there was no discrepancy in the most recent date of birth provided by the investigator, Mr. Loncaric, and the date of birth later provided by Mr. Folick. The only discrepancy was with the earlier information Mr. Loncaric had given, which had not been confirmed. Had the application judge been informed of these or other details – such as the inconclusive information pointing to another Mr. Dhillon – the order may have nonetheless been granted. It is also important, in my view, that Mr. Dhillon did not attend himself to oppose the application. Instead, the application was opposed only by ICBC, who put the issue of the sufficiency of the information squarely before the court.

[32] Additionally, Mr. Krekovic's conduct after the order was granted demonstrates an effort to be prudent. He did not enter the order or serve the amended notice of civil claim without making further inquiries of Mr. Folick's office about the reliability of the information, and as soon as he learned that the information was in fact incorrect, he advised Mr. Dhillon's' counsel that the action would be discontinued against him.

[33] In my opinion, Mr. Krekovic's conduct was far from being characterized as reprehensible.

[34] Finally, the chambers judge referred to Rule 14-1(33) as allowing for an order for special costs. Rule 14-1(33) gives the court discretion to make various orders if it considers that a party's lawyer "has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault". One of those orders is that the lawyer "be personally liable for all or part of any costs that his or her client has been ordered to pay to another party".

[35] This rule, which does not distinguish between party and party costs and special costs, has expanded the scope of conduct which might support a costs order against a lawyer. As explained in *Nazmdeh v. Spraggs*, 2010 BCCA 131, there is no requirement for "serious misconduct" to justify an order that a lawyer pay party and party costs, but it is still necessary to find reprehensible conduct on the part of the lawyer to justify an order for special costs. Moreover, the lower standard mandated by Rule 14-1(33) must also be exercised with restraint, as the Court reasoned at paras. 103–104:

> [103] The power to make an order for costs against a lawyer personally is discretionary. As the plain meaning of the Rule and the case law indicate, the power can be exercised on the judge's own volition, at the instigation of the client, or at the instigation of the opposing party. However, while the discretion is broad, it is, as it has always been, a power to be exercised with restraint. All cases are consistent in holding that the power, whatever its source, is to be used sparingly and only in rare or exceptional cases.
>
> [104] The restraint required in the exercise of the court's discretion is not to be confused with the standard of conduct which may support its use. Care and restraint are called for because whether the unsuccessful party or his lawyer caused the costs to be wasted may not always be clear, and lawyer and client privilege is always deserving of a high degree of protection.

[36] In conclusion, it is my view that Mr. Krekovic's conduct in making the application to add Mr. Dhillon as a defendant did not approach the kind of reprehensible conduct required to justify an order for special costs against him as counsel.

[37] I would allow the appeal and set aside the order of the chambers judge that Mr. Krekovic personally pay the special costs of Mr. Dhillon. I would also award costs to the appellant of this appeal and for the application for special costs in the court below.

[38] **WILLCOCK J.A.**: I agree.

[39] **FENLON J.A.**: I agree.

[40] **WILLCOCK J.A.**: The appeal is allowed. The order for costs below is set aside and the appellant will have costs in this Court and on the application for special costs in the court below.

[Submissions by counsel]

[41] **WILLCOCK J.A.**: I do not know if you need an order dispensing with approval on form of order given that counsel did not appear, but in the event that any question arises in the registry, there will be an order dispensing with the approval on form of order.

"The Honourable Madam Justice Fisher"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pierce v. Baynham,*
2015 BCCA 188

Date: 20150501
Docket: CA041933

Between:

Brent Pierce

Respondent
(Plaintiff)

And

Rahim Jivraj and Mercer Gold Corporation (British Columbia)

Respondents
(Defendants)

And

Bryan G. Baynham, Q.C. and Daniel J. Reid

Appellants

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated May 28, 2014 (*Pierce v. Jivraj*, 2014 BCSC 926, Vancouver Docket No. S116400).

Counsel for the Appellants: M. Andrews, Q.C.

Appearing in Person and on behalf of Mercer Gold Corporation (B.C.): R. Jivraj

No one appearing on behalf of B. Pierce

Place and Date of Hearing: Vancouver, British Columbia
March 23, 2015

Place and Date of Judgment: Vancouver, British Columbia
May 1, 2015

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Harris

Summary:

Appellants are former counsel to Mr. Pierce, who sued the Respondent Mr. Jivraj for defamation relating to comments made in two online newsletters entitled "Fraud Alert". These referred to sanctions levied in the past against Mr. Piece by securities regulators and alleged he was now currently engaging in fraudulent and criminal conduct involving different companies . Appellants successfully applied for Anton Pillar order to assist in identifying publisher of the newsletters. Mr. Jivraj was identified by these means. However, chambers judge later set aside Anton Piller order on the grounds Appellants had not provided full disclosure relating to the past sanctions. Although chambers judge found counsel did not act dishonestly, he found their conduct, which resulted in the search of Mr. Jivraj's home, to be reprehensible. He ordered special costs against them.

***Held: Appeal allowed**. Special costs are not automatically justified where counsel fails to make full disclosure on an ex parte application unless such failure is reprehensible or very serious indeed. In this case, while previous sanctions were relevant and should have been disclosed in detail, counsel honestly believed they were not relevant to whether the allegations in the Fraud Alerts relating to Mr. Pierce's current conduct were defamatory. Anton Piller order would have been fully justified even if full disclosure had been made concerning the past sanctions. While Appellants had not fulfilled their duty to make full and frank disclosure, chambers judge erred in finding their conduct "reprehensible" in the circumstances. Counsel had become too focused on the allegations they perceived to be defamatory, forgetting that the chambers judge was coming 'cold' to the case and would need more information.*

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] As every litigation lawyer should know, counsel who seeks a court order *ex parte* is bound to make "full and frank disclosure" of all relevant facts to the court. The judge hearing the application must in turn exercise "the utmost scrupulosity and care". (See *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America (Canadian District) et al.* (1959) 18 D.L.R. (2d) 216 at paras. 5 and 3 respectively.) The usual consequence of counsel's failure to make full disclosure is the vacating of the *ex parte* order: see *Girocredit Bank Aktiengesellschaft der Sparkassen v. Bader et al.* (1999) 28 C.P.C. (4th) 264 (B.C.C.A.) at paras. 47-9.

[2] In the case at bar, experienced counsel were found not to have made full and frank disclosure in applying for an Anton Piller order *ex parte* and indeed were said have deflected a question of the Court as a "deliberate tactic to avoid reference to relevant and important information that would have been material to the determination of the application." In a later hearing, the Court found that counsel had not acted dishonestly, but that their conduct was "reprehensible and deserving of rebuke" in the form of an order that they pay special costs. Counsel, represented in this court by Mr. Andrews, appeal the special costs order.

Factual Background

[3] The facts of the case are rather complicated. In the deep background is a contractual dispute between Mr. Jivraj and a company controlled by him, Mercer Gold Corporation ("Mercer BC") on the one hand, and on the other, Mr. Pierce and a Nevada company in which he was involved, Tresoro Mining Corporation ("Tresoro"). Tresoro was formerly known as Mercer Gold Corp., or "Mercer Nevada". It appears that Mr. Jivraj was the CEO and President of Tresoro for about a year ending in the spring of 2011. He contends that during his tenure, he became aware of certain illegal share transactions carried out by Tresoro in contravention of rules of the U.S. Securities and Exchange Commission ("SEC").

[4] Mr. Pierce's past record as a businessman was not exemplary: in 1993, the Securities Commission of this province found he had filed false documents and improperly used funds from a public offering. The Commission imposed a 15-year trading ban on him and prohibited him from acting as a director. In 2009, an administrative judge in the U.S. issued an initial ruling ordering Mr. Pierce to cease violating certain sections of the *Securities Act of 1933* and the *Securities Exchange Act of 1934* relating to the unregistered distribution of shares in Lexington Resources Inc. The judge observed in his ruling:

> Pierce's conduct was egregious and recurrent. He sold 325,000 shares of Lexington stock acquired from the IMT Option Plan over a period of four months without filing a registration statement to cover the transactions. As a control person making unregistered sales, he deprived the investing public of valuable information. He took measures to evade the beneficial ownership reporting requirements under Section 16(a) of the *Exchange Act*, and ignored the reporting requirements of Section 13(d) of the *Exchange Act* for more than two years. Pierce's failure to make disclosures regarding his beneficial ownership also deprived the investing public of valuable information. Pierce's failure to give assurances against future violations or to recognize the wrongful nature of his conduct is underscored by his failure to appear in person and give testimony on these or any other topics. Although a finding of scienter is not required to find any of the violations of Section 16(a) of the *Exchange Act*, the record is replete with evidence that Pierce acted with a high degree of scienter in attempting to conceal his ownership of Lexington stock.

Mr. Pierce, who (the administrative judge noted) failed to appear at the hearing because he was also the target of a federal criminal investigation, was ordered to disgorge the sum of $2,043,362.33 to the SEC.

[5] Two years later, in July 2011, the SEC issued another decision, again in connection with Lexington Resources Inc. ("Lexington"). Among other things, Mr. Pierce was found to have used a company called Newport Capital Corp. ("Newport"), incorporated in Belize and domiciled in Switzerland, to conceal his illegal sale of shares in Lexington. Mr. Pierce's conduct on this occasion, which included providing misleading information and fraudulent concealment, was described as "relatively egregious, recurrent, and long-lasting". He was ordered to disgorge $7,247,635.75. I am not aware of whether he has complied with either of the disgorgement orders.

[6] Evidently, differences arose between the Jivraj and Pierce camps when the former purported to terminate an option agreement that had been entered into between Mercer BC and (then) Mercer Nevada in respect of a mining property located in Colombia. Counsel for Mercer BC sent a letter dated August 25, 2011 terminating the option agreement between Mercer BC and Mercer Nevada. He also stated various "concerns" of his client, including the following:

> By virtue of Mr. Pierce's beneficial ownership in Newport, Newport's position in the Optionee [Tresoro] exceeds or exceeded the 5% ownership reporting requirement of the SEC by way of schedule 13d. Additionally, this information was not disclosed to the public or the Optionor. This is but one actionable misrepresentation by the Optionee and its agents, including Brent Pierce, which induced Mercer BC to enter the option agreement, to its detriment.

[7] Counsel for Mr. Pierce replied by letter the same day, denying that the SEC had found Mercer Nevada was controlled by Mr. Pierce via Newport, that Mr. Pierce exercised "full control" over Mercer Nevada, or that he had made any actionable misrepresentation. The letter ended as follows:

> Please be advised that in the event further defamatory statements are made or the August 25 Letter is disseminated further Mr. Pierce may take legal action against your client and insofar as the above misinformation originated with Mr. Rahim Jivraj, against Mr. Jivraj personally.
>
> Finally, Mr. Pierce reserves all rights to pursue a claim for damages, the extent of which are presently unknown and depend, in part, on your response to this letter.

[8] As I understand it, a lawyer at a firm other than Mr. Baynham's was retained to act for Mercer Nevada, now Tresoro, in the resulting litigation against Mercer BC (S.C.B.C., Vancouver Registry No. 116184). Mr. Baynham, on the other hand, was retained by Mr. Pierce as "defamation counsel". He commenced an action for defamation against Mr. Jivraj and Mercer BC by amending the notice of civil claim already filed in the present proceeding (S.C.B.C., Vancouver Registry No. S116400). Mr. Pierce pleaded that the termination letter was defamatory, and that Mr. Jivraj had sent it to "at least 14" persons and posted it on the Mercer BC website. In addition, Mr. Pierce alleged that Mr. Jivraj had, by email to certain persons associated with a company called Mainland Resources, again defamed Mr. Pierce.

The termination letter, the email and another alleged statement were said to have injured him "in his character, credit and professional reputation".

[9] Various allegations and counter allegations were traded between the parties and the pleadings were amended and re-amended over the ensuing months. Eventually, the termination letter was removed from the Mercer BC website and Mr. Baynham was instructed to discontinue the allegations relating to that letter and then with respect to the email – in an effort, he later deposed, to "streamline, simplify and condense the issues set out in the pleadings". I note that the "regulatory history" of Mr. Pierce was not denied by him in his notice of claim; nor was it advanced by the defendants as supporting any of their defences as pleaded.

[10] The foregoing allegations, however, are not of central importance to the present appeal. Rather, it concerns the publication of two newsletters entitled "Fraud Alert" that were circulated publicly, allegedly by Mr. Jivraj or his company in 2012. The first was dated February 16, 2012. It purported to have been mailed to some 5,400 "market-related professionals." In a column on page 2 headed "Partial Regulatory offences of Brent Pierce", the newsletter stated that Mr. Pierce had been ordered by the SEC to disgorge funds (as described *infra*). The newsletter featured various quotations, not from the SEC decisions, in large print. These included "Accounting fraud committed by a Chartered Accountant by creating backdated documents and perjuring" and "There is criminal fraud and gross professional misconduct related to the activities at Tresoro."

[11] The chambers judge below described the other main components in the body of the first Fraud Alert as follows:

> It contains the following comments which are alleged to be defamatory. It starts with a heading "Public Company Fraud Alert", and then with reference to Brent Pierce says that:
>
> > He is offending still today and is suspected to have reaped hundreds of millions from innocent victims globally in his career.
>
> It goes on to say:

> Accounting fraud and gross professional misconduct and further conspiracy and concealment of securities offender Gordon Brent Pierce.
>
> …
>
> If you invested in Mercer Gold Corp., now called Tresoro Mining Corp., you have been defrauded by Pierce and his associates.
>
> …
>
> This company, among others, controlled by Pierce has committed notable civil regulatory and criminal frauds in areas including, but not limited to, accounting, corporate professional and fiduciary misconduct.

It recommends that the readers of the newsletter:

> Contact your local police and regulator now to report this fraud. If you have more information about Pierce, his associates, or his dealings, you are strongly encouraged to share with the authorities.

Within the body of the newsletter itself there is reference to the three actions that I have referred to. It is apparent from reading that correspondence that the comments were designed to be defamatory and the plain reading of the comments would provide a reader with the reasonable inference that Mr. Pierce and his associates were dishonest and fraudulent people. [At paras. 7-10.]

[12] The second "Alert", undated, was distributed on or about March 6, 2012. This time, the SEC orders and their background were described at greater length. Parallels were drawn between what had been found by the SEC to have occurred in 2009 and 2011 with respect to Lexington (characterized in the Fraud Alerts as "pump and dump" schemes) and what had occurred with respect to Tresoro. The March Alert stated:

> … that these knowingly committed acts by Pierce and his organization are criminal with the intent to profit from illicit gains through a network of corporate veils domiciled in tax havens for the purpose of evading tax liabilities associated to the financial gains.

Various other individuals associated with Tresoro were also implicated in the alleged "pump and dump" scheme, and photos of them, and of various lawyers who were acting for and against Mr. Pierce in the legal actions already extant, were featured.

[13] The chambers judge summarized the contents of this 'Alert' as follows:

> … Again there is a reference to Mr. Pierce. It repeats some of the allegations from the first newsletter such as "he is offending still today and is suspected to have reaped hundreds of millions from innocent victims globally in his career."
>
> There is reference to Mr. Thomas, an employee of the company [Mercer Nevada, or Tresoro], and the following is said:
>
> > Thomas clearly violated his duty of care and fiduciary obligations to the company and its shareholders through these knowingly committed acts, non-disclosure and fraud, which also include aiding and abetting the criminal act of money laundering. He continues to do so today as a co-conspirator of Pierce who seeks to profit from elicit gains through pump-and-dump schemes like Tresoro.
>
> In that newsletter there are various photographs and one column identifies the following people as "participating in Pierce's fraudulent activity"; Bill Thomas, CFO and director of Tresoro Mining Corp.; Gary Powers, president and director; Gary Jardine director Tresoro Mining Corp.; Thomas J. Deutsch, legal counsel for Tresoro Mining Corp., and J. Bradley Stafford, auditor for Tresoro Mining Corp.
>
> Also included in that newsletter are photographs depicting the counsel representing Mr. Pierce and the company. Those photographs are of Mr. MacInnis, Mr. Baynham, Mr. Reid and Mr. George. There is a column with photographs under the heading "Alleging Fraud," Rahim Jivraj, former president, director, Tresoro Mining Corp., and Carey Veinotte, litigator for Jivraj in all matters.
>
> Without repeating all of the comments contained in that newsletter it is similar to the first in the sense that the comments could be taken as being defamatory. [At paras. 11-15.]

[14] On behalf of Mr. Pierce, Mr. Baynham wrote to counsel for Mr. Jivraj on February 22, 2012 demanding that he "cease and desist" publishing the allegations in the Fraud Alerts and apologize to Mr. Pierce. Mr. Baynham enclosed a draft notice of civil claim in which the claim for defamation arising out of the first Alert was asserted. The proposed pleading sought injunctive relief, special damages and special costs. In reply, counsel for Mr. Jivraj denied that Mr. Jivraj had "anything to do whatsoever with the production or dissemination" of the publication. He made a similar denial again in April 2012.

[15] The defamation claim in respect of the two newsletters was pleaded as an amendment to the notice of claim in the present defamation action. I reproduce part of the Amended Notice:

29. In their natural and ordinary meaning, the words set out in the First Defamatory Newsletter meant and were understood to mean that the plaintiff:

    (a) Participated in "accounting fraud";
    (b) Is involved in a "conspiracy";
    (c) Has received "ill-gotten gains";
    (d) Is "offending still today";
    (e) Has "reaped $ 100's of millions from innocent victims globally in his career";
    (f) Has "defrauded investors in Tresoro Mining Corp.";
    (g) Has "has committed notable civil, regulatory and criminal frauds";
    (h) Poses a risk to the public, "requiring immediate intervention by the authorities to protect the public's interest";
    (i) Sanctioned fraud on the British Columbia Supreme Court;
    (j) Is part of a conspiracy to illicit financial gains through the manipulation of stock;
    (k) Participated in and directed criminal fraud and gross professional misconduct;
    (l) Exercises "hidden control" of a "manipulative pump-and-dump scheme" to manipulate stock for illicit financial gain;
    (m) Poses a risk to the public, necessitating actions to "protect the public by contacting the authorities".

30. In the alternative, the First Defamatory Pamphlet by way of innuendo or inferential meaning meant and was understood to mean that the plaintiff:

    (a) Is a criminal;
    (b) Is a fraudster;
    (c) Is dishonest;
    (d) Is not to be trusted;
    (e) Ought to be imprisoned;
    (f) Poses a risk to the public;
    (g) Sanctioned perjury;
    (h) Has stolen or is suspected of having stolen $ 100's of millions;
    (i) Has committed criminal, regulatory and civil fraud; and
    (j) Has committed securities fraud in respect of Tresoro Mining.

. . .

39. In their natural and ordinary meaning, the words set out in the Second Defamatory Newsletter meant and were understood to mean that the plaintiff:

    (a) "Continues to blatantly violate two SEC Administrative Orders;"
    (b) Is involved in a "conspiracy";
    (c) Has received "ill-gotten gains"'
    (d) Is "offending still today";
    (e) Has "reaped $ 100's of millions from innocent victims globally in his career";
    (f) "Knowingly committed" criminal acts "with the intent to profit from illigit gains through a network of corporate veils domiciled

in tax havens for the purpose of evading tax liabilities associated to the financial gains";
(g) Is committing "recurring and criminally fraudulent activity";
(h) Sanctioned or encouraged perjuries for the purpose of "fraudulent concealment";
(i) Has a "strong criminal element" in his "organization's schemes;"
(j) "launders money";
(k) Makes "illicit gains" and "evades tax";
(l) Is involved in "On-Going SEC Violations and Money Laundering";
(m) Commits "dishonest behavior";
(n) Is "involved in numerous pump and dump schemes happening even today";
(o) "blatantly continues to offend and harm the investing public";
(p) Should be subject to an injunction and criminal contempt proceedings;
(q) Is part of a "recurrent scheme", which includes "money laundering and securities fraud to reap illicit gain;"
(r) Participated in and organized a "knowingly committed and intended fraud", which is criminal in nature;
(s) "Will continue to offend and reap illicit gains until the authorities do something to stop it"; and
(t) The "investing public is at harm from his schemes."

The pleading does not assert that the SEC orders had not been made – only that the allegations of new or continuing illegal conduct were false and defamatory.

[16] Faced with Mr. Jivraj's denial of responsibility for the Fraud Alerts, Mr. Pierce and his counsel embarked on an effort to identify who had assembled the information in, and published, the newsletters. Eventually, Mr. Pierce applied to the Supreme Court to have Shaw Cable disclose the IP address and any other identifying information relating to an account from which someone had accessed various websites of law firms and lawyers named and pictured in the second newsletter. Mr. Justice Leask made the order on March 16, 2012, which by its terms was to be disclosed to Mr. Jivraj on March 30. On March 28, 2012, Mr. Baynham on behalf of Mr. Pierce brought an application before the chambers judge, *in camera* and *ex parte,* seeking an Anton Piller order.

The Anton Piller Hearing

[17] Mr. Baynham and a more junior lawyer in his firm, Mr. Reid, appeared before the chambers judge on March 28, 2012. Mr. Baynham began his oral submissions regarding the two Fraud Alerts by referring to the "business dispute" regarding the Colombia property between Mr. Pierce and Mr. Jivraj that had resulted in the two existing lawsuits. Mr. Baynham then began to review the subject matter of the newer pleadings – the Fraud Alerts and the allegedly defamatory statements contained therein. The judge interrupted to ask if Mr. Pierce had been fined $9.4 million "as stated". Mr. Baynham replied:

> There are – Mr. Reid can deal with that in more detail. There were fines assessed in the United States by the Securities and Exchange Commission.
>
> If I could turn to page 2 – I should say just in that respect, the defence in the defamation action – I will come to that in greater detail – is truth. It doesn't relate to these allegations; it relates to the earlier allegations which were of a similar – a similar nature, but much less broadly disseminated, and not in a public manner like this. [Emphasis added.]

As I read this comment, Mr. Baynham was here attempting to differentiate between the allegations involving the termination letter, the related email and the third statement that had led to the filing of the defamation action in October 2011, and the allegations in the newer pleading. The defence pleaded by Mr. Jivraj to the 2011 allegations of defamation was that the statements complained of were true. With respect to the Fraud Alerts, in contrast, Mr. Jivraj's defence was that he was not the publisher. (Evidently, he did not admit he had published the two newsletters until he was examined for discovery in September 2012.)

[18] After Mr. Baynham had spoken for some time regarding the circumstances that had led to the Anton Piller application, Mr. Reid explained to the Court how the IP logs of the various persons who had accessed the websites of the lawyers whose names and photos had been published, had led to the IP address Mr. Reid hoped to identify. Obviously, if the "owner" of that IP address could be identified, Mr. Pierce could hope to prove that that person was the author of the newsletters.

[19] Mr. Reid then reviewed the legal requirements for obtaining an Anton Piller order, with particular reference to *Celanese Canada v. Murray Demotion Corp*. 2006 SCC 36. One of the requirements established therein is the existence of a strong *prima facie* case. In *Grant v. Torstar* 2009 SCC 61, Mr. Reid noted, the elements of a defamation claim had been summarized:

> At paragraph 28 of that case the court just summarized the requirements for – to prove a case in defamation. The three things:
>
> > (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.
>
> And I'll pause there. Your Lordship had a question at the outset about were there fines actually levied against Mr. Pierce by the SEC. I will pause and address that at this point in time.
>
> First, that is but one of the allegations in there. So now our submission is that the allegations aren't just [that] there's been a fine levied. As Mr. Baynham went through, the allegations are incredibly serious that there is ongoing criminal account frauds and hundreds of millions of dollars stolen.
>
> But secondly, whether or not a matter is true doesn't change whether or not a *prima facie* case in defamation is made out. Truth is an affirmative defence. So something can be both defamatory and true. Our submission is on this hurdle, there is a strong *prima facie* case, not is there a potential defence to defamation being raised. So that addresses the issue of that fine.
>
> It's our submission that there is no question [indiscernible] these two newsletters is highly defamatory. There are allegations, and Mr. Baynham has gone over them, of a reaping hundreds of millions of dollars from innocent victims globally, allegations of notable civil regulatory and criminal frauds, an allegation that if you have invested in Mercer Gold Corp. you have been defrauded by Pierce and associates. The second newsletter refers to Mr. Pierce as a criminal, suggests that he is engaged in tax evasion and is perpetrating a fraud against investors. And I have set out again some of the material there … [Emphasis added.]

[20] The judge did not seek any further information regarding the SEC orders. He was persuaded at the end of the hearing that the criteria for the granting of an Anton Piller order had been met. In his analysis:

> An Anton Piller is an extraordinary remedy granted as an interlocutory order.
>
> It is done *ex parte* and *in camera*. The applicant must satisfy four conditions:
>
> 1. There must be a strong *prima facie* case;

> 2. The damage to the plaintiff of the alleged misconduct, potential or actual, must be serious;
>
> 3. There must be convincing evidence that the defendant has in its possession incriminating documents or other evidence; and
>
> 4. The applicant must show that there is a real possibility that the defendant may destroy the material before ordinary discovery process can accomplish disclosure: *Celanese Canada*, para. 35.
>
> Based on the wording of the newsletters, I am satisfied that there is a strong *prima facie* case with respect to the allegations of defamation made by the plaintiff.
>
> Secondly, the plaintiff is involved in this kind of business and the kinds of allegations that have been made would damage his reputation. That damage would be very serious.
>
> I am also satisfied that based on the disclosure made by Shaw and the linking of the IP address to Mr. Jivraj's residence, … the evidence is likely in his possession; that evidence being the newsletters. [At paras. 26-29.]

[21] The judge was also satisfied there was a "real possibility" Mr. Jivraj might destroy evidence in his possession before he could be examined for discovery. Again in the Court's words:

> There are two factors that I have taken into account in determining that there is a real possibility that Mr. Jivraj may destroy such evidence as it exists. One is that in the face of a demand by counsel for Mr. Pierce there was an outright denial. That denial seems to be at least questionable in light of the evidence provided by the IP address. Second, and most importantly, is the fact that there is an injunction in place prohibiting Mr. Jivraj from dealing or communicating in any way with Mercer Nevada's employees, consultants, investors and contractors.
>
> The evidence would indicate firstly with respect to the 5,400 distribution list of the February 2012 newsletter that this was a far and wide ranging publication. There is no specific number attached to the March 2012 publication, but based on comments contained in the February newsletter I am satisfied that it is reasonable to infer that the newsletter publication would have gone to consultants, investors and contractors.
>
> The prohibition against communicating with Mercer Nevada's consultants, investors and contractors was a court order. If that has been deliberately disobeyed then there is a real possibility that, absent a court order, Mr. Jivraj would likely pay little heed to his obligations to preserve and disclose relevant evidence.
>
> Accordingly, I am satisfied that this case is an appropriate case for an Anton Piller order to issue and the order will issue essentially on the terms as submitted. [At paras. 31-34.]

[22] The resulting order incorporated several specific terms usual in Anton Piller orders relating to the entry of Mr. Jivraj's premises by a "search party" under the supervision of an independent solicitor, the seizure of evidence, provision for persons in "apparent control" to seek legal advice, etc. The search and seizure were duly carried out on or about March 30, 2012.

[23] By October 11, 2012, Mr. Pierce had sufficient evidence to satisfy Madam Justice Loo in chambers that it was Mr. Jivraj who had published the Fraud Alerts. She ordered Mr. Jivraj and Mercer Gold (BC) to pay special costs to Mr. Pierce for costs incurred between February 22 and September 19, 2012 as a result of the defendants' "refusal to acknowledge authoring and publishing the two Public Company Fraud Alerts". Loo J. also ordered the defendants to pay $41,664 in respect of disbursements incurred by Mr. Pierce in connection with the Anton Piller order and the forensic analysis of the defendants' computers.

The Second Hearing: Reversal

[24] In September 2013, however, events took a different turn. Mr. Jivraj applied to the chambers judge who had made the Anton Piller order, to have it set aside on the basis that Mr. Pierce had not provided "full and frank disclosure" at the *ex parte* hearing.

[25] The chambers judge began his reasons (indexed as 2013 BCSC 1850) by reproducing the exchanges between counsel that I have set forth above, noting that they captured "the full extent to which counsel for Mr. Pierce addressed the court's inquiry regarding the fines referred to in the two newsletters." (Para. 15.) He then referred to the order made by the B.C. Securities Commission in 1993 against Mr. Pierce, and the two disgorgement orders of the SEC. These three decisions, he observed, had not been referred to or provided to the Court at the time of the Anton Piller application. (Para. 22.) In his analysis, they "paint an entirely different picture of Mr. Pierce than was urged upon this court during the *ex parte* application. Most troubling is the fact that the original picture was deceptive and misleading". (Para. 26.)

[26] Having seen this evidence, the chambers judge was of the view that Mr. Pierce could "no longer demonstrate that he has a strong *prima facie* case" or that he had "serious potential or actual damages." (Paras. 32-3.) In these circumstances, the first two conditions for the granting of the order were not met. The order was set aside.

[27] Under the heading "Full and Frank Disclosure", the judge went on to review case authority that requires full disclosure on an *ex parte* application. Applying this principle to this case, he continued:

> There is no dispute that both Mr. Pierce and his counsel were aware of the three regulatory sanctions. Mr. Pierce deliberately chose not to disclose those facts. It was not his function to decide what was or was not relevant material for the court to analyze. Whether something is or is not a material fact is for the court to determine.
>
> In his application for the Anton Piller Order there was a deliberate decision by Mr. Pierce to avoid reference to the regulatory decisions. The two SEC decisions set out the sanctions against Mr. Pierce and the reasons for them. The response to an inquiry from the court as to whether Mr. Pierce had been fined $9.4 million as set out in the newsletters was met with evasion at best. The manner in which the initial question was deflected to co-counsel and then subsequently brushed off causes me to conclude that this was a deliberate tactic to avoid disclosure of the sanctions. Counsel should have answered the simple question as to whether there had been a significant fine levied. The proper and responsive answer would have led to a further inquiry that undoubtedly would have resulted in a disclosure of the sanctions, which would not have assisted Mr. Pierce's application. The sanctions and the reasons for them were clearly relevant to the complaints being made by Mr. Pierce. The regulatory decisions were material facts.
>
> . . .
>
> This was not an innocent breach of the duty to disclose all material facts. It was a deliberate tactic to avoid reference to relevant and important information that would have been material to the determination of the application.
>
> It is particularly troubling in these circumstances where the court made a specific inquiry that would have alerted the applicant as to the materiality of the undisclosed facts. The courts rely on applicants in ex parte hearings to be cognizant of the duty to make full and frank disclosure. The courts expect a specific inquiry to be answered candidly. Failure to do so deprives the applicant of any benefit that might be granted in the case of an innocent breach.
>
> The failure to provide full and frank disclosure was particularly egregious given the specific inquiry that I made. The applicant cannot, under these

> circumstances, be permitted to gain any advantage. [At paras. 39, 40, 43-45; emphasis added.]

[28] Left for a later day was Mr. Jivraj's application for an award of special costs against Mr. Pierce and against Messrs. Baynham and Reid jointly and severally. Mr. Jivraj also sought the dismissal of execution proceedings taken with respect to the costs order of Loo J. in October 2012. (In order to enforce that order, Mr. Pierce had filed a claim of pending litigation and a garnishing order after judgment against Mr. Jivraj, and had registered a certificate of judgment against real property registered in his name.)

The Special Costs Application

Counsel's Affidavit Evidence

[29] The parties – Mr. Jivraj representing himself, and Messrs. Baynham and Reid, represented by Mr. Andrews – returned to the judge in chambers in February of 2014. Through Mr. Andrews, the two lawyers apologized to the Court for failing to disclose what was referred to as "Mr. Pierce's regulatory history". Both filed affidavit evidence in response to the application for special costs.

[30] In his affidavit, Mr. Baynham denied that Mr. Pierce had had any part in deciding what material had been put before the Court at the Anton Piller hearing. He acknowledged that with the benefit of hindsight, and having reviewed the chambers judge's reasons, he should have provided the judge with more information concerning Mr. Pierce's "historical involvement with public companies and the regulatory sanctions levied by the B.C. Securities Commission and the Securities and Exchange Commission". He apologized to the Court for failing to provide a more "fulsome" answer to the Court's question and for failing to amplify on Mr. Reid's submissions.

[31] In his affidavit, Mr. Baynham traced the history of his retainer by Mr. Pierce, which had commenced in December 2010 when *Stockwatch* had published a series of articles on-line and "persons unknown" had posted allegedly defamatory statements about Mr. Pierce in response. The *Stockwatch* articles themselves

referred to the July 2008 order of the SEC (confirmed in 2009 as seen above), and no complaint was made by counsel on that score. Rather, Mr. Baynham's concern had related to anonymous statements posted to the articles on the *Stockwatch* website. Eventually *Stockwatch* stopped accepting anonymous 'posts' and began to permit only persons who subscribed to *Stockwatch*, to post comments on its stories. Mr. Baynham's affidavit continued:

> Accordingly, from the outset of my retainer by Mr. Pierce, my focus was on the anonymous statements that were being made online. In my view, these and other posts were clearly defamatory and affected his ability to carry on business. In my mind the fact that he had a regulatory history with the BC Securities Commission and the Securities and Exchange Commission did not excuse these defamatory statements or render them any less actionable. The regulatory history would only go to the issue of quantum of damages if an action proceeded to trial. Put another way, past regulatory sanctions or other similar evidence of "bad character" did not give rise to a defence to new defamatory statements. Similarly, the regulatory sanctions, in my view, would not prohibit Mr. Pierce from seeking equitable relief from the Court such as a Norwich Order (to identify the source of defamatory statements) or an injunction (to prohibit further defamatory statements being made in the future). [At para. 19; emphasis added.]

[32] As we have seen, Mr. Pierce's regulatory history was referred to in the newsletters, but Mr. Baynham states in his affidavit that the publications "went much further than that." In his mind, the fact Mr. Pierce had been sanctioned by the SEC and the BC Securities Commission was "not legally relevant". It did not occur to him, he deposed, that these regulatory orders could "form the basis for a defence of the allegations of criminal wrongdoing, fraud, and tax evasion, found in the Fraud Alerts." His affidavit continued:

> As noted above, I thought that these allegations seriously harmed Mr. Pierce's ability to carry on business and earn a living. I also noted that Mr. Reid had identified a further basis to assert that the Fraud Alerts were causing serious damage, that being the blatant attempt to intimidate counsel representing Mr. Pierce.
>
> It did not occur to me at that time that Mr. Pierce's regulatory history might be considered relevant to the second element of the Anton Piller test. I was proceeding on the basis that there were potentially 5,400 of the Fraud Alerts in circulation, as asserted on the face of the Fraud Alerts. As I saw it, the allegation that Mr. Pierce was a criminal who was committing ongoing fraud more than established the requirement to show serious damage. Furthermore, my focus was on identifying the person responsible for

> publishing the Fraud Alerts and thereafter seeking the assistance of the Court in preventing further publication.
>
> It simply did not occur to me that the regulatory findings should be included in the materials in support of the Anton Piller order. Had it occurred to me I would certainly have included them in the materials. [At paras. 30-32; emphasis added.]

[33] Finally, Mr. Baynham deposed that when the chambers judge inquired about Mr. Pierce's being fined $9.4 million, his (Mr. Baynham's) answer was correct and truthful. Again, he said, it did not occur to him that the chambers judge was under any misapprehension in this regard. In his words:

> … In answering the question I was attempting to be responsive to the Court's unanticipated question. I had not reviewed the SEC decisions for several months and had only a general understanding of what was in issue before the SEC. All I recalled at the time was that the Securities and Exchange Commission had ordered Mr. Pierce to pay several millions of dollars. I had not looked into the underlying facts, the status of the proceedings before the Securities and Exchange Commission or whether or not the amounts ordered to be paid had been paid by Mr. Pierce. From my perspective, there was no need for me to look into these matters, since they did not affect the underlying defamation lawsuit nor did they form any part of the complaint that Mr. Pierce had about Fraud Alerts. Accordingly, Mr. Justice Dley's question did not cause me to appreciate that the findings of the Securities and Exchange Commission were relevant, or could be relevant, to the test for granting an Anton Piller Order. [At para. 33; emphasis added.]

[34] For his part, Mr. Reid, who is an associate at Mr. Baynham's firm, deposed that his "mindset" was that the new allegations of criminal accounting, perjury, fraud, etc. were "separate and distinct" from Mr. Pierce's regulatory history. He said he thought the chambers judge had understood from Mr. Baynham's response to his question that the SEC had indeed imposed sanctions totalling $9.4 million and that "pointing out that the Fraud Alert contained other, different, defamatory statements was a proper and responsive answer to the question." His affidavit continued:

> To the extent that the Judge might not see the same distinction as I saw between statements about the Regulatory Sanctions and statements about the other matters such as ongoing criminal fraud, and looked at the allegations in the Fraud Alerts as all connected, it seemed to me that there was a second point to be made. This was that truth or justification was an affirmative defence that did not need to be considered on this application. I had just cited the Supreme Court of Canada's decision in *Grant v. Torstar* 2009 SCC 61 for the elements that had to be proved to make out a case in

> defamation. These were made out. I believed that it was unnecessary, in order to establish a strong *prima facie* case of defamation, to address the possible defences such as justification that might be raised in regards to the statements contained in the Fraud Alert including the imposition of the Regulatory Sanctions.
>
> I now understand that this view is likely not correct and that it may be incumbent on an applicant in such a case to go further than establishing the elements of a *prima facie* case of defamation. But that was my understanding at the time I made the submission.
>
> I did not make these submissions to "brush off" the Court's question or as a deliberate tactic to avoid disclosure of the Regulatory Sanctions. I thought that the Court was aware that the Regulatory Sanctions had been levied and that I was providing legitimate and appropriate answers as to why that did not matter. It did not occur to me that the submissions I made in answer to the Court's question had given any false comfort or misled the Court in any fashion. I did not have the impression there was more information that needed to be provided to the Court in light of the Court's interest in the matter. Perhaps that should have occurred to me but it did not. [At paras. 34-36; emphasis added.]

[35] It appears that the affidavit evidence of Mr. Baynham, with its emphasis on drawing a line between the regulatory history of Mr. Pierce on the one hand and on the other, the allegations of fraud, criminal activity, perjury, etc., indicates a 'mindset' slightly different from that of his associate. Mr. Reid seems to have been anxious to include the allegations regarding Mr. Pierce's regulatory history in the allegedly defamatory material being complained of: thus his submission that "whether or not a matter is true doesn't change whether or not a *prima facie* case in defamation is made out." Yet it seems there is no doubt the regulatory history was true and thus the reporting of it could not have been defamatory. The fact that truth is a defence that must be made out by the defendant was mere quibbling in this context. At the same time, Mr. Reid's response to the chambers judge's question did suggest the regulatory history was true and thus could have signalled to the chambers judge that the answer to his question was 'Yes, Mr. Pierce was ordered to disgorge $9.4 million to the SEC.' Unfortunately, this did not happen.

[36] As I understand it, no application was made by Mr. Jivraj to cross-examine Mr. Baynham or Mr. Reid on their affidavits.

Special Costs Reasons

[37] In its reasons indexed as 2014 BCSC 926, the Court noted that Mr. Baynham had over 37 years at the bar and ought to have known that an Anton Piller application requires fastidious disclosure and that counsel be "profoundly fair" in presenting facts to the court. The consequences of the order had been very serious – Mr. Jivraj's expectation of and right to privacy and security in his own home had been breached. (Para. 31, citing *Girocredit Bank, supra.*) The judge then reasoned:

> Previous counsel's evidence states that they were aware of Mr. Pierce's regulatory sanctions, but did not think it relevant to the Anton Piller application. I have no reason to reject their evidence and, for the purposes of this decision, accept that previous counsel were not acting dishonestly.
>
> Previous counsel decided what evidence to place before the court at the Anton Piller application. Previous counsel determined what evidence was relevant and, in spite of an inquiry by the court that pointed to Mr. Pierce's regulatory history, previous counsel failed to address the issue. By deciding what evidence they thought was relevant, previous counsel did not discharge their duty at an *ex parte* hearing to fairly present all of the evidence whether favourable or not. Previous counsel did not enable the court to make an informed decision. In essence, counsel usurped the function of the court by deciding what evidence was material.
>
> Previous counsel succeeded in getting the court's endorsement and authority to enter and search Mr. Jivraj's home based on their representations at the *ex parte* hearing. Their representations were glaringly deficient, but the court only discovered the deficiencies after Mr. Jivraj's home was entered and searched.
>
> Previous counsel's failure to provide the court with fair disclosure at the *ex parte* hearing was reprehensible and deserving of rebuke. The level of deficient conduct by previous counsel was egregious. That is particularly so given the court was misled into authorizing entry into a citizen's home – a place where a person can expect to be secure against unlawful entry. Although the punitive aspect of special costs is a factor, the overriding focus on deterrence requires that special costs be granted in this case. [At paras. 37-40; emphasis added.]

[38] With respect to the remaining relief sought by Mr. Jivraj, the Court ruled that since Mr. Pierce had not participated in the impugned conduct, special costs should be awarded award against Messrs. Baynham and Reid only, and not against Mr. Pierce; that the award should include the $41,664 in disbursements incurred by Mr. Pierce; that a copy of Mr. Jivraj's computer hard drive should be returned to him, but that that order should be stayed for 60 days to permit appellate review; that the

execution proceedings taken against Mr. Jivraj pursuant to the costs order should be set aside; and that he and Mr. Pierce should bear their own costs of the application.

[39] It is from the order that the appellants personally pay Mr. Jivraj's special costs, costs of the appeal and costs of the hearing below, that Messrs. Baynham and Reid appeal.

On Appeal

[40] In this court, the two lawyers submit that the chambers judge below erred as follows:

> A. His Lordship misdirected himself in law and failed to take into account legally probative considerations, specifically:
>
> (a) He proceeded on the basis that where counsel decide what evidence to put before the Court on an *Anton Piller* application and leave out facts later found to be material they usurp the function of the Court;
>
> (b) He proceeded on the basis that where counsel fails to bring to the Court's attention on an *Anton Piller* application facts which are known to them and which are later found by the Court to be material, their conduct is *ipso facto* abusive of the process of the Court and reprehensible;
>
> (c) He failed to consider the explanation given by counsel as to why it did not occur to them that Mr. Pierce's Regulatory History was material to the application and failed to determine whether their conduct, *as so explained*, merited an award of special costs;
>
> (d) He ordered counsel to pay special costs on the basis of a need for deterrence, when there was no such need in this case;
>
> (e) Although he stated the principle that the discretion to award costs against counsel must be exercised sparingly, with restraint, and only in rare and exceptional cases, His Lordship did not apply it.
>
> B. Alternatively, His Lordship was clearly wrong in finding that counsel's conduct was reprehensible and warranted an order for special costs;
>
> C. His Lordship erred in law in varying [Loo J's] Costs Order.

In my view, the appeal can be decided on the second and most important ground – i.e., the assertion that the chambers judge erred in finding counsel's conduct was "reprehensible" and thus warranted an order for special costs against them.

[41] I begin, as the appellants' factum did, with the principle that an order of costs against a lawyer personally should be made rarely and only where serious misconduct has been shown. In *Young v. Young* [1993] 4 S.C.R. 3, McLachlin J., as she then was, stated:

> … courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in the situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [At 136.]

In a similar vein, Chief Justice McEachern in *Hannigan v. Ikon Office Solutions Inc.* (1998) 61 B.C.L.R. (3d) 270 (C.A.) stated:

> No useful purpose will be served by reviewing the numerous cases that were cited by Mr. Sugden as it will be sufficient to say that the authorities are clear that very serious misconduct is required before counsel will be required to pay costs personally. I agree with Mr. Sugden who submitted that an award against a solicitor should only be made in very special circumstances, and should not be made on the basis of mistake, error in judgment or even negligence. [At para. 20.]

[42] I also note at the outset that the chambers judge's reasons for the special costs order attenuated to some degree his earlier reasons at the 'set aside' hearing. In the earlier reasons, the statement that Mr. Pierce – not counsel – made a "deliberate decision" to avoid reference to the regulatory decisions, coupled with the suggestion that Mr. Baynham "deflected" the court's question to co-counsel as a "deliberate tactic to avoid disclosure of the [SEC] sanctions", would in my view have supported the conclusion that the lawyers did engage in very serious misconduct.

[43] However, in his reasons for granting special costs, the chambers judge did, as Mr. Andrews emphasizes, accept counsel's evidence that they did not think Mr. Pierce's regulatory record was relevant. As we have seen, the judge stated that Messrs. Baynham and Reid had not acted "dishonestly", but he was critical of

counsel for "deciding what evidence they thought was relevant". On such an application, counsel should, of course, err on the side of inclusion when deciding what evidence is to be brought to the Court's attention. I agree with Mr. Andrews, however, that it cannot be that in every case in which counsel wrongly leaves out evidence that ultimately proves to be material, a special costs order will be justified.

[44] The most important consideration in the chamber judge's analysis seems to have been that he felt he had been "misled into authorizing entry into a citizen's home" for purposes of enforcing the Anton Piller order. With respect, it seems to me that if counsel had been more complete in their response to the judge's question, they would have answered that yes, Mr. Pierce had been ordered to disgorge $9 million by the SEC, but that the SEC's findings could not be said to constitute findings of "criminal fraud and gross professional misconduct", the execution of a "manipulative 'pump and dump' "scheme in respect of Tresoro "for illicit financial gain", or apparently dishonest dealings with respect to the affairs of a company known as Westrock Land Corp. Arguably, the latter allegations, which related to different companies and purported to describe conduct in 2012, not between 2008 and 2011, went much farther than the allegations relating to the SEC orders.

[45] In these circumstances, I cannot agree that the Court was "misled" into making the Anton Piller order. To the contrary, it seems to me that had Mr. Baynham or Mr. Reid been more careful and complete about answering the judge's question, the Court likely would still have granted the order and Mr. Jivraj's premises would still have been the subject of the search that ultimately demonstrated that he had indeed published the two Alerts.

[46] While Mr. Pierce's regulatory history was not "irrelevant" to the later and fuller allegations made in the Fraud Alerts, one can appreciate how counsel in Mr. Baynham's position might not have appreciated the import of the chambers judge's question regarding the SEC orders. Mr. Baynham deposed that he did not believe the regulatory history or the penalties levied by the SEC against Mr. Pierce needed to be raised "because there was no connection between the relief sought

and the past misconduct by Mr. Pierce." A line could certainly be drawn, in that the SEC sanctions (which Mr. Baynham did acknowledge in his answer to the chambers judge) were known to be true as a matter of fact. Thus any reference to them could not ultimately be defamatory.

[47] Given the chambers judge's finding in his costs reasons that Messrs. Baynham and Reid were "not acting dishonestly", I cannot agree that their conduct was "reprehensible" in all the circumstances. There is no doubt that counsel were preoccupied with the more extreme allegations made in the Fraud Alerts against Mr. Pierce and with identifying who had published those allegations. It was careless on the part of Mr. Baynham in particular, but also of Mr. Reid, to fail to appreciate that the chambers judge had to be fully informed concerning exactly what allegations were alleged to be defamatory and which were admitted to be true. The trial of this action will likely be a long and complicated one that may turn on exactly where this line falls. But in my respectful view, counsel's unfortunate "focus" on those matters and failure to respond more fully to the judge's question did not rise to the level of "reprehensible" conduct that deserved rebuke by a special costs award against them. Indeed, counsel's mistake was a very common one in my experience – having spent many months on their file, they lost sight of the fact that the chambers judge was coming "cold" to the case, with no prior knowledge of even the broad outlines of the litigation.

[48] I would allow the appeal and set aside the order of the chambers judge that the appellants personally pay the special costs of the respondent. The effect of this order is also to leave undisturbed the order of Loo J. that Mr. Jivraj pay special costs in respect of the Anton Piller hearing, including the related disbursements of carrying out the order.

[49] I would also order that the parties should pay their own costs of the appeal and of the hearing below.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Harris"

HSBC Bank of Canada v. Deloitte & Touche Inc.

[Indexed as: Regal Constellation Hotel Ltd. (Re)]

71 O.R. (3d) 355
[2004] O.J. No. 2744
Docket Nos. C41258 and C41257

Court of Appeal for Ontario,
Laskin, Feldman and Blair JJ.A.
June 28, 2004

Real property -- Land titles -- Vesting order -- No automatic stay of vesting order -- Once vesting order registered on title under Land Titles Act, its attributes as conveyance prevail and its attributes as order are spent -- Registered vesting order cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under Land Titles system -- Appeal from a registered vesting order moot -- Land Titles Act, R.S.O. 1990, c. L.5.

Regal Pacific (Holdings) Limited ("Regal Pacific") was the 100 per cent shareholder of Regal Constellation Hotel Limited ("Regal Constellation"), the operator of a hotel near Pearson Airport in Toronto. The hotel had been in financial difficulties for some time and, in November 1991, HSBC Bank of Canada ("HSBC"), Regal Pacific's secured creditor, demanded repayment of its loan. As a result, Regal Pacific and Regal Constellation retained Colliers International Hotels ("Colliers") to market the hotel. In the fall of 2002, a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group at a purchase price of $45 million. The transaction did not close and litigation between Regal Pacific and the Orenstein Group followed.

With the failure of the Orenstein Group transaction, and on the application of HSBC in July 2003, Deloitte & Touche Inc. was appointed receiver, and the receiver and Colliers continued the efforts to market the hotel. In August 2003, 13 offers to purchase were submitted and, from these, HSBC and the receiver accepted an offer from 2031903 Ontario Inc. ("203"), subject to court approval (the "First 203 Offer"). The First 203 Offer was for the fourth highest purchase price. The highest bid was by Hospitality Investors Group LLC ("HIG"), whose bid was accompanied by a non-certified deposit cheque for $1 million. However, the receiver was advised that the cheque could not be honoured, and the offer was withdrawn by HIG, a company controlled by the Orenstein Group.

The First 203 Offer was approved by the court but it did not close. Ultimately, the transaction was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs. The search for a purchaser for the hotel resumed. Another offer was received from 203 (the "Second 203 Offer"). It was for $24 million, and it was buttressed by a $20 million credit facility provided by Aareal Bank A.G. ("Aareal"). With a purchase price of $24 million, HSBC would be suffering a shortfall of approximately $9 million.

On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order. The transaction closed on January 6, 2004, and the vesting order was registered on the title under the Land Titles Act. Aareal's $20 million loan was secured on the title based on the vesting order. Aareal registered a $20 million mortgage against the title of the property.

A few days later, Regal Pacific learned from a newspaper article that the hotel had been sold to the Orenstein Group. On January 15, 2004, on a motion before Farley J. to approve the receiver's conduct, Regal Pacific requested an adjournment but also submitted that the receiver's failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request and approved the receiver's conduct and accounts. Farley J. concluded that the identity of the

purchaser was not material. Regal Pacific appealed and sought to set aside the orders of Sachs J. and Farley J. In a separate motion, 203 sought to quash the appeal. 203 submitted that the appeal was moot because no stay of the vesting order had been obtained and, therefore, the registration of the vesting order on title extinguished the court's power to set aside the vesting order. The motion to quash was argued during the argument of the appeal on its merits.

Held, the motion to quash should be granted and the appeal otherwise dismissed.

A vesting order has a dual character. It is, on the one hand, a court order and, on the other hand, a conveyance vesting an interest in real or personal property in the party entitled under the order. Once a vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent. Any appeal from the order is therefore moot.

While a vesting order is in the ordinary course subject to appeal, in the absence of a stay, it remains effective and may be registered on the title under the Land Titles system. When no stay is obtained and the order is registered, the appeal rights are lost. Under the Land Titles Act, a vesting order upon registration is deemed to be embodied in the register and to be effective according to its nature and effect. When it is embodied in the register, it becomes a creature of the Land Titles system and subject to the dictates of that regime. Once a vesting order that has not been stayed is registered on title, it is effective as a registered instrument and its characteristics as an order are overtaken by its characteristics as a registered conveyance on title. It cannot be attacked except by the means that apply to any other instrument transferring absolute title and registered under the Land Titles system. This interpretation of the effect of a vesting order was consistent with the purpose of the Land Titles regime. Title had been effectively changed and innocent third parties were entitled to rely upon that change.

Assuming the appeal from the vesting order was not moot, the

appeal from it and from the approval orders should be dismissed on the merits. The fact that the Orenstein Group was involved in the 203 bid was not material to the sale process conducted by the receiver. Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, the facts of that transaction were of little more than historical interest in the context of the receivership sale. The circumstances of the HIG bid and its withdrawal did not assist Regal Pacific. There was no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

Cases referred to

Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634, 188 O.A.C. 201, 48 C.P.C. (5th) 56 (C.A.); Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 41 R.P.R. (3d) 1 (C.A.), supp. reasons (2001), 204 D.L.R. (4th) 744, 14 C.P.C. (4th) 7 (Ont. C.A.); Durrani v. Augier (2000), 50 O.R. (3d) 353, 190 D.L.R. (4th) 183, 36 R.P.R. (3d) 261 (S.C.J.); Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198 (C.A.); National Life Assurance Co. of Canada v. Brucefield Manor Ltd., [1999] O.J. No. 1175 (C.A.); R.A. & J. Family Investment Corp. v. Orzech (1999), 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (C.A.); Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1, 46 O.A.C. 321, 83 D.L.R. (4th) 76, 7 C.B.R. (3d) 1 (C.A.); Royal Trust Corp. of Canada v. Karenmax Investments Inc., [1998] A.J. No. 1160, 71 Alta. L.

R. (3d) 307 (Q.B.); Toronto-Dominion Bank v. Usarco Ltd. (2001), 196 D.L.R. (4th) 448, 24 C.B.R. (4th) 303, 17 M.P.L.R. (3d) 57 (Ont. C.A.), affg (1997), 50 C.B.R. (3d) 127, 40 M.P.L.R. (2d) 293 (Ont. Gen. Div.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100

Land Titles Act, R.S.A. 2000, c. L-4, s. 191

Land Titles Act, R.S.O. 1990, c. L.5, ss. 25, 57, 69, 78, 155-57, Parts IX, X

Rules and regulations referred to

Ontario Land Titles Regulations, O. Reg. 26/99, s. 4

Authorities referred to

Bennett, F., Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999)

Lamont, D., Lamont on Real Estate Conveyancing, 2nd ed., looseleaf, vol. 1 (Toronto: Carswell, 1991)

APPEAL from a vesting order of Sachs J., dated December 19, 2003, and an order of Farley J., dated January 14, 2004, approving the conduct and accounts of a receiver.

J. Brian Casey and John J. Pirie, for Deloitte & Touche Inc.

Robert Rueter and A. Chan, for Regal Pacific (Holdings) Limited.

Tim Gilbert and Sandra Barton, for 2031903 Ontario Inc.

James P. Dube, for Aareal Bank A.G.

The judgment of the court was delivered by

[1] BLAIR J.A.: -- Regal Pacific (Holdings) Limited is the 100 per cent shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership.1

[2] Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004,

Farley J. approved the payment of $23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

[3] This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of Regal Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

[4] In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

[5] For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

Facts

[6] The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003. It is thus an asset of declining value.

[7] At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed $33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

[8] Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was $45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

[9] When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order.

[10] The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for $25 million, subject to court approval (the "First 203 Offer").

[11] A summary of the 13 bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who

had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

[12] The First 203 Offer was for the fourth highest purchase price. It was accompanied by a $1 million deposit, as required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for $31 million. While the HIG bid was accompanied by a $1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

[13] HIG is a company controlled by the Orenstein Group. The withdrawal of its $31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

[14] Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same $25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

[15] On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

[16] At the receiver's request, Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined

above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

[17] The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the $2 million in deposit funds that had been submitted by 203. These proceedings were settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs.

[18] The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all 13 of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

[19] The Second 203 Offer was for $24 million. It was again unconditional and this time was buttressed by a $20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for $2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of $24 million, HSBC would be suffering a shortfall on its secured debt of approximately $9 million; in addition there are unsecured creditors of the hotel with claims exceeding $2 million. As the receiver had not been able to generate any other new offers at a price comparable to the $24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the $3 million i n deposits that 203 had previously forfeited, the receiver views

the purchase price as being the equivalent of $27 million.

[20] On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver $24 million and registered the vesting order on title. Aareal Bank's $20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by $20.5 million from the sale proceeds.

[21] A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.

. . . . .

> It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis--vis the Receiver and that duty, it does not

> appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

> [22] The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

[23] Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances -- particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

[24] In Soundair, at p. 6 O.R., Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of the parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

[25] In Soundair as well, McKinlay J.A. emphasized [at p. 19 O.R.] the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

[26] A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See Toronto-Dominion Bank v. Usarco Ltd. (2001), 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57 (Ont. C.A.), per Austin J.A. at paras. 28-31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in Toronto-Dominion Bank v. Usarco, supra, at p. 459 D.L.R.

[27] The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

Analysis

The vesting order and the motion to quash

[28] Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title -- no stay having been obtained -- its effect was spent, the court's power

to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

[29] In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

[30] Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its $20 million mortgage against the title to the hotel property following registration of the vesting order.

[31] In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[32] The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 51 O.R. (3d) 641 195, D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:

Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment

or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, Snell's Equity, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.

(Emphasis added)

[33] A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

[34] I reach this conclusion for the following reasons.

[35] In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system -- indeed, the land registrar is required to register it on a proper application to do so: see the Land Titles Act, R.S.O. 1990, c. L.5, ss. 25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement -- as there is in some other jurisdictions2 -- to show that no appeal is pending and that all appeal rights have terminated: see Ontario Land Titles Regulations, O. Reg. 26/99, s. 4.

[36] Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the

order has been registered?

[37] In answering that question I start with the provisions of ss. 69 and 78 of the Land Titles Act, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

69(1) Where by order of a court of competent jurisdiction . . . registered land or any interest therein is stated by the order . . . to vest, be vested or become vested in, or belong to . . . any person other than the registered owner of the land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,

(a) until an application to be registered as owner is made by or on behalf of the . . . other person in or to whom the land is stated to be vested or to belong; or

(b) until the land is transferred to the . . . person by the registered owner, as the case may be, in accordance with the order or Act.

. . . . .

78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

(Italics added)

[38] Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.'s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances.3 When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.

[39] Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

[40] This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the Land Titles Act. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

[41] Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, Lamont on Real Estate Conveyancing, 2nd ed., looseleaf (Toronto: Carswell, 1991), vol. 1 at p. 1-10, as follows:

The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.

No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset.

(Italics added)

[42] Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in Durrani v. Augier (2000), 50 O.R. (3d) 353, 190 D.L.R. (4th) 183 (S.C.J.). At paras. 40-42 she observed:

The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.

The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, Registration of Title to Land, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.

The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave, "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

[43] Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is

absolutely immune from attack. It simply means that any such attack must be made within the parameters of the Land Titles Act.

[44] That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected,4 in keeping with the motivating principles underlying the land titles system. It has been held that there is no jurisdiction to rectify the register if to do so would interfere with the registered interest of a bona fide purchaser for value in the interest as registered: see R.A. & J. Family Invest ment Corp. v. Orzech (1999), 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (C.A.); and Durrani v. Augier, supra, at paras. 49, 75 and 76.

[45] Vesting orders properly registered on title, then -- like other conveyances -- are not immune from attack. However, any such attack is limited to the remedies provided under the Land Titles Act and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order qua order has been spent.

[46] Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -- although not based upon the same reasoning -- in Royal Trust Corp. of Canada v. Karenmax Investments Inc. (1998), 71 Alta L.R. (3d) 307 (Q.B.). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any err [sic] in fact or law by the learned Master . . . .

[47] In a brief three-paragraph endorsement, this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in National Life Assurance Co. of Canada v. Brucefield Manor Ltd., [1999] O.J. No. 1175 (C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this backdrop", Catzman J.A. noted [at para. 2], "we agree with [the] submission that the order under appeal is spent".

[48] This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

[49] I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the Land Titles Act (Remedy of person wrongfully deprived of land), or the rules of professional

conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

[50] The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

The appeals on the merits

[51] Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts concerning the Orenstein Group's involvement in the failed $45 million share purchase transaction, which was followed by the receivership, the sudden withdrawal by HIG (also an Orenstein company) of its $31 million bid on September 2, 2003 -- just the day before the First 203 Offer for $25 million was submitted -- and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made, Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and ac cordingly the sale must be set aside.

[52] On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information,

but submits it was under no legal obligation to do so as, in its view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available at the time of their acceptance -- and, in the case of the Second 203 Offer, the only offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

[53] 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203, Mr. Gilbert argues in addition that 203 is a bona fide purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that $20 million has been advanced by Aareal Bank A.G. on the strength of the registered vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

[54] I do not accept the argument advanced by the appellant.

[55] In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

[56] Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the $45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel

and, as well, the acquisition of certain other assets. None of the 13 bids elicited by the receiver remotely approached a purchase price of $45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of t his earlier transaction to the sale process conducted by the receiver.

[57] I turn, then, to the $31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower $25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going forward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

[58] First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer -- and which had not been certified, as required by the court-approved bidding process -- could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary -- which was not the case here -- a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

[59] The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional $25 million First 203

Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were no other offers available apart from the $24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

[60] A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of $9 million. In addition, there are outstanding unsecured creditors with over $2 million in claims. No one except Regal Pacific has opposed the sale.

[61] There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything, to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted $45 million share purchase transaction.

[62] In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

[63] I would dismiss the appeals for the foregoing reasons.

Disposition

The appeals

[64] For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003, approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

Costs

[65] The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

[66] The receiver and 203 requested that costs be fixed on a substantial indemnity basis -- the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134 (C.A.). I would therefore award costs on a partial indemnity scale.

[67] Counsel provided us with bills of costs. Regal Constellation sought $57,123.25 on a partial indemnity basis if successful. The receiver asks for $61,919 and Aareal Bank requests $12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of $137,444.68. Such

an award is not justified and would simply not be fair and reasonable in the circumstances, in my view, given the nature and length of the appeal and the issues involved: see Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.).

[68] Costs are awarded, on a partial indemnity basis, as follows:

(a) To the receiver, in [the] amount of $40,000;

(b) To 203, in the amount of $40,000; and,

(c) To Aareal Bank, in the amount of $12,225.

[69] These amounts are inclusive of fees, disbursements and GST.

Order accordingly.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Walsh v. Muirhead,*
2020 BCCA 225

Date: 20200807
Docket: CA45291

Between:

Moira Eleanor Walsh

Respondent
(Plaintiff)

And

Stephen Kerry Walsh and Ronald Stewart Walsh, also known as Ronald Steward Walsh, Executors of the Estate of Lindsay Clinton Walsh, Lynda Gail Walsh, Stephen Kerry Walsh and Dana Leanne Miller

Respondents
(Defendants)

And:

Jacy Wingson

Respondent

And

Nathan Muirhead

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated April 17, 2018 (*Walsh v. Walsh*, 2018 BCSC 617, New Westminster Docket S138489).

Counsel for the Appellant (via videoconference):	J.S. Forstrom
Counsel for the Respondent Jacy Wingson (via videoconference):	V. Anderson
The Respondent Dana Miller, appearing in person (via videoconference)	D. Miller

Place and Date of Hearing:	Vancouver, British Columbia July 8, 2020
Place and Date of Judgment:	Vancouver, British Columbia August 7, 2020

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Harris

Summary:

The lawyer appellant was ordered to pay special costs after an application brought by his clients was dismissed as "unnecessary" and "misconceived". He appealed the order, submitting that it was procedurally unfair and that the chambers judge did not apply the correct legal test for special costs against a lawyer. Held: The appeal is allowed and the order is set aside. The judge made the order without notice to the appellant, unfairly depriving him of an opportunity to make submissions on whether he should be personally responsible for special costs. Rather than remit the issue back to the Supreme Court for reconsideration, it is in the interests of justice to order that costs for the dismissed application be paid by the appellant's clients on a party and party basis.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] The lawyer appellant, Nathan Muirhead, seeks to overturn an order that he pay special costs for an unsuccessful application brought by his clients in the context of acrimonious estate litigation.

[2] The appellant says the order was procedurally unfair. He also contends that the chambers judge erred in principle by failing to apply the correct legal test for special costs against a lawyer, including the requirement for a finding of "reprehensible" conduct.

[3] For the reasons that follow, I agree the order was procedurally unfair. On that basis, I would allow the appeal and set aside the special costs award.

Background

[4] It is not necessary to detail the history of the estate litigation.

[5] Instead, for purposes of this appeal, it is sufficient to note that the appellant acted as legal counsel for the executors of a contested estate in respect of which the parties reached a mediated settlement in 2013, resulting in a redistribution of benefits. Problems arose with execution of that agreement and, more importantly, with the completion of ancillary documentation and steps necessary to give effect to the settlement. Eventually, the death of one of the affected parties (the plaintiff spouse of

the deceased), disagreement on outstanding issues, and intransigence culminated in multiple court applications that proceeded together in Supreme Court chambers.

[6] One of these applications was brought by the executors of the estate and sought the destruction of certain affidavits. The respondents, Jacy Wingson Q.C., and Dana Miller (a contingent beneficiary under the estate) both attached copies of the executed settlement agreement to affidavits filed in support of requests for court-ordered relief relevant to implementation of the settlement. The executors took issue with the propriety of using the signed agreement for that purpose and wanted the impugned affidavits removed from the court file(s) and destroyed. If successful on their application, the executors sought costs against Ms. Wingson and Ms. Miller.

[7] Ms. Wingson represented the plaintiff spouse at the time of the mediated settlement. The context surrounding the application for the destruction of affidavits included an allegation that in her role as counsel, Ms. Wingson breached an undertaking to not "release" or "deal" with the settlement agreement except for the limited purpose of having the agreement executed by Ms. Wingson's client and Ms. Miller. In light of the undertaking, the executors took the position that attaching copies of the signed agreement to affidavits was improper.

[8] The executors' application was heard on September 1, 2016. By that time, Ms. Wingson had consented to destruction of the affidavit filed in the matter over which she had conduct. As such, the only relief sought in relation to Ms. Wingson was an order for costs. The executors asked to have Ms. Wingson pay those costs personally because her client (the plaintiff spouse) had passed away. Ms. Miller did not agree to destroy the affidavit filed in her application for relief. As such, whether she had an obligation to do so because of the undertaking remained a live issue in the executors' application.

[9] The chambers judge summarily dismissed the application for destruction, "with costs":

> THE COURT: … Mr. Muirhead, with respect, it seems to me your -- your whole submission rests here on a very, very fine point.

> Ms. Miller, you've conceded, could have attached to her affidavit a -- an unexecuted copy of the settlement agreement. She could have deposed in her affidavit that this settlement agreement reflected the settlement of all -- or the terms concluded by all parties that they'd agreed to, and she could have testified, "I have seen with my own two eyes an original of the settlement agreement signed by Stephen Walsh and Ronald Walsh." She could have done all that. So what does it matter that she actually attaches a copy of the document that demonstrates all those things?
>
> …
>
> THE COURT: Mr. Muirhead, I'm sorry. This application is misconceived, and I am dismissing the application with costs.
>
> [Emphasis added.]

[10] The chambers judge did not specify who would be responsible for those costs. In discussion with counsel, he described the undertaking said to have been breached as one that Ms. Wingson "never should have accepted". The undertaking was poorly drafted and had no end date. The judge thought the appellant should not have asked Ms. Wingson to agree to it. Furthermore, from the judge's perspective, the executors should not have taken formal action to enforce the undertaking. The judge found it "appalling" that they did so.

[11] Before the chambers judge, the appellant took personal responsibility for the undertaking, saying "It [was] entirely an error of judgment on [his] part". He also accepted that any breach of the undertaking by Ms. Wingson was "inadvertent". The judge noted that in advancing the application, the appellant did not allege fraud or dishonesty by Ms. Wingson.

[12] Following the September hearing, the parties to the various chambers matters provided written submissions on costs (over the lunch recess, they resolved the remainder of the substantive matters set for hearing that same day). Although they spoke to costs before the chambers judge, he asked the parties to provide a written summary of their respective positions and reserved his decision on costs pending receipt of those submissions.

[13] In April 2018 (after further developments and court appearances in the estate file), the chambers judge released his decision on costs, including costs specific to the

application for the destruction of affidavits. He determined that costs on that application, referred to in his reasons as the "Undertaking Application", would consist of special costs paid personally by the appellant.

Reasons of Chambers Judge

[14] The judge's reasons on costs are indexed as *Walsh v. Walsh,* 2018 BCSC 617. The rationale provided for special costs paid by the appellant is briefly stated:

> [22] In dismissing the Undertaking Application, I stated:
>
> > … Mr. Muirhead, the undertaking you put Ms. Wingson on ought never to have been accepted by her, because it was an undertaking that had no end date to it. On its face, it would still be in effect today. She would still require your consent to be dealing with the settlement agreement in any way. That can't possibly be right. That can't possibly be what was intended by her. It was an undertaking she never should have accepted, but at the same time, Mr. Muirhead, it was an undertaking you never should have put a fellow counsel under an obligation to accept. And it was never an undertaking you should have sought to enforce.
>
> I remarked that I was appalled by the attempt to enforce the undertaking and seek costs against Ms. Miller and against Ms. Wingson personally.
>
> [23] Mr. Muirhead apologized for the undertaking, saying that it was entirely an error of judgment on his part, for which he took full responsibility, and that it was through no fault on the part of his clients.
>
> [24] I find that the costs awarded to Ms. Wingson and Ms. Miller in respect of the Undertaking Application should be paid by Mr. Muirhead personally.
>
> [25] I further find that those costs should be assessed as special costs. Contrary to Ms. Wingson's submissions, I do not do so on the basis that the Undertaking Application, in seeking costs against her personally, was an attack on her professionalism. Clearly, the Undertaking Application sought costs against Ms. Wingson personally only because her client was deceased, and there was no other person to whom a costs order against the plaintiff could attach. Ms. Wingson had acted without instructions, putting herself in a position where she had to expect to be found personally responsible for costs, were the Walsh Defendants successful on the Undertaking Application.
>
> [26] I do find, however, that the allegation of breach of undertaking, and in particular the steps taken to enforce an undertaking that never should have been sought in the first place, is conduct deserving of rebuke. Mr. Muirhead's clients were not prejudiced in any manner by the executed 2013 Settlement Agreement having been attached to the affidavits. The application was entirely unnecessary and misconceived.
>
> [Emphasis added.]

[15] The special costs order reads as follows:

> Nathan Muirhead, counsel for the Walsh Defendants, shall personally pay to Jacy Wingson, Q.C. and Dana Leanne Miller, their costs of the notice of application filed on May 27, 2016, assessed as special costs.

Leave to Appeal

[16] The appellant sought leave to appeal the special costs award. Leave was granted on two issues: (1) the identity of the payor of costs; and (2) if the appellant should be liable to pay costs, whether the court below erred in granting special costs (*Walsh v. Muirhead,* 2018 BCCA 345).

[17] Although aware of the appeal, the executors did not participate in the application for leave. Nor have they participated in the appeal.

[18] Ms. Wingson and Ms. Miller both responded to the appeal. Ms. Miller represented herself. She prepared written submissions, and, although produced outside the prescribed timelines, the Court exercised its discretion to consider Ms. Miller's submissions to the extent that they addressed issues properly before the Court: Rule 52, *Court of Appeal Rules*, B.C. Reg. 297/2001.

Issues on Appeal

[19] The appellant challenges the special costs award on two bases: (1) he says it was procedurally unfair to order special costs against him without notice and without an opportunity to make submissions; and (2) in any event, the judge erred in principle by not applying the correct legal test for special costs against counsel, including the requirement for a finding of "reprehensible" conduct.

Standard of Review

[20] The parties agree that a costs award, including special costs, involves an exercise of discretion. As such, a deferential standard of review applies. However, where the process leading to the award was demonstrably unfair, the award resulted from an error in principle, or it is manifestly unjust, the appeal court may intervene: *Gichuru v. Pallai,* 2018 BCCA 78 at paras. 85–90; *Hollander v. Mooney,*

2017 BCCA 238 at paras. 22–23; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at para. 52 [*Jodoin*].

Discussion

Fresh Evidence Application

[21] The appellant applied to tender an affidavit in the appeal deposing that had he been aware of the possibility of a costs award against him, he would have retained legal counsel. The affidavit also attaches various documents relating to the undertaking at issue in the court below, a full transcript of the chambers hearing, and copies of the written submissions that were prepared post-hearing at the request of the chambers judge.

[22] Ms. Wingson opposes the fresh evidence application, except for the appellant's assertion that had he known he might be subject to an order for special costs, he would have retained legal counsel.

[23] In my view, the affidavit is admissible as fresh evidence. The contents, including the written submissions filed in the court below, are relevant to the issue of procedural fairness raised by the appellant and the integrity of the process followed by the chambers judge. In that specific context, the Court generally adopts a more flexible approach to the admissibility of fresh evidence: *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 194.

General Principles on Costs against Lawyers

[24] Superior courts unquestionably have the power to order that a lawyer personally pay the costs that flow from an unsuccessful application brought on behalf of their client(s).

[25] Indeed, Rule 14-1(33) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [the Rules], specifically authorizes this type of order:

> (33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay,

> neglect or some other fault, the court may do any one or more of the following:
>
> …
>
> (c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
>
> …
>
> [Emphasis added.]

[26] The predecessor to Rule 14-1(33) was considered by a five-member division of this Court in *Nazmdeh v. Spraggs*, 2010 BCCA 131. The Court held that what was then Rule 57(37) allowed for costs against counsel in the form of special costs or costs assessed on a party and party basis (at para. 42). Moreover, using substantially the same language as 14-1(33), the predecessor Rule "expanded" the scope of conduct that was previously available to justify a costs award against a lawyer:

> [101] Prior to the enactment of the Rules, the Supreme Court of British Columbia had power to make orders against lawyers to pay costs personally under the court's inherent jurisdiction. Such orders were generally made only in cases of "serious misconduct". The Rules, particularly Rule 57(30) and its successor Rule 57(37), have, however, expanded the scope of conduct which might support costs orders against lawyers. The Court now has a discretion to order a lawyer to pay costs where he has "caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault".
>
> [102] Under Rule 57(37), mere delay and mere neglect may, in some circumstances, be sufficient for such an order against a lawyer. …
>
> [Per Finch J.A.; emphasis added.]

See also *Nuttall v. Krekovic*, 2018 BCCA 341 at paras. 34–35.

[27] An order for costs against a lawyer who is not a party to an action is also available under a superior court's inherent authority to supervise the conduct of the lawyers who appear before it. As explained by Gascon J., writing for the majority in *Jodoin*:

> [16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 136) and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some

> other way bring the administration of justice into disrepute": *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629, at para. 35).
>
> [17] It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts (*Anderson*, at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman*, [1940] A.C. 282 (H.L.), at p. 319; M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 126.
>
> [18] There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers*, at p. 319; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, at p. 845; [*Attorney-General of Quebec et al. v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.)] at p. 448; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581 (Que. C.A.), at p. 587. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121).
>
> [Emphasis added.]

[28] It is not apparent from the reasons of the chambers judge whether he relied on Rule 14-1(33)(c) to order special costs against the appellant or the court's inherent authority. At the hearing of the appeal, the question arose as to whether Rule 14-1(33) has subsumed the common law on costs against a party's lawyer, thereby restricting a judge in civil cases to the specific orders enumerated therein (see, for example, the Court's comments in *Gichuru v. Smith,* 2014 BCCA 414 at para. 84).

[29] In my view, it is not necessary to resolve that question on the appeal. Under *both scenarios*: a judge must exercise restraint when ordering costs against a lawyer; the same test applies for imposing special costs; and the lawyer must receive notice of the potential for a personal costs award and be given an opportunity to be heard.

[30] In *Nazmdeh,* the Court described the power to order costs against legal counsel as one that must be used "sparingly":

> [103] The power to make an order for costs against a lawyer personally is discretionary. As the plain meaning of [now Rule 14-1(33)] and the case law indicate, the power can be exercised on the judge's own volition, at the instigation of the client, or at the instigation of the opposing party. However, while the discretion is broad, it is, as it has always been, a power to be exercised with restraint. All cases are consistent in holding that the power, whatever its source, is to be used sparingly and only in rare or exceptional cases.
>
> [per Finch J.A.; emphasis added.]

See also *Pierce v. Baynham,* 2015 BCCA 188 at paras. 41–42; *Young v. Young*, [1993] 4 S.C.R. 3 at p. 136.

[31] The need for "restraint and caution" was similarly emphasized in *Jodoin*, albeit in the context of a criminal proceeding:

> [26] The type of conduct that can be sanctioned [through an order for costs] was analyzed in depth in [*Attorney-General of Quebec et al. v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.)]. L'Heureux-Dubé J.A. concluded after reviewing the case law that the courts are justified in exercising such a discretion in cases involving abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice. She noted, however, that this power must not be exercised in an arbitrary and unlimited manner, but rather with restraint and caution. The motion judge in the case at bar properly relied on *Cronier*, and the Court of Appeal also endorsed the principles stated in it.
>
> [Emphasis added.]

[32] As a matter of settled principle, an order for *special costs* against a party's lawyer attracts a particularly stringent threshold. *Nazmdeh* makes clear that ordering counsel to personally pay special costs under Rule 14-1(33), as opposed to party and party costs, requires a finding of "reprehensible" conduct (at para. 102). Consistent with the rationale underlying the need for restraint in awarding costs against counsel, generally, the stringent test for special costs respects the duties of lawyers to protect the confidentiality of their clients and to advocate with courage (*Nuttall* at para. 27, citing *Young* at p. 136). It also takes into consideration the uniquely punitive nature of the award.

[33] In *Nuttall,* the meaning of "reprehensible" conduct in the context of special costs against a lawyer was explained through reference to the "high threshold" articulated for a costs award in *Jodoin.* There, Justice Gascon noted that:

> [29] … an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.
>
> [Emphasis added.]

[34] As such, in this province, a special costs award against a lawyer, whether grounded in Rule 14-1(33)(c) or the superior courts' inherent authority, requires a finding of "reprehensible" conduct that amounts to a "serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on [their] part, that is deliberate" (*Jodoin* at para. 29). An order for the personal payment of special costs cannot be justified on a "mistake, error in judgment or even negligence" (*Nuttall* at para. 29). Instead, there must be a "marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system" (*Jodoin* at para. 27, quoted with approval in *Nuttall* at para. 28).

Was the special costs order procedurally unfair?

[35] In this case, the appellant appropriately does not contest the power to order that a lawyer pay special costs. Instead, he complains that the manner in which the chambers judge exercised that authority was procedurally unfair.

[36] In support of his position, the appellant emphasizes the relationship between procedural fairness and the punitive nature of a special costs award. In *Gichuru v. Pallai,* the punitive aspect of special costs, even as applied against parties to an action, was held to raise procedural fairness concerns:

> [88] … the punitive nature of special costs demands some degree of procedural fairness. An opportunity to respond to a claim for special costs must generally be provided. This Court has already held that the assessment of

> special costs, absent consent, "requires a certain level of procedural fairness": *Smith* at para. 103. As Justices Harris and Goepel stated in *Smith*, this typically means providing the party against whom costs are awarded the opportunity to test the reasonableness of the fees underlying the award. I see no principled reason why the fairness that applies to the assessment of special costs should not apply to an award of the same.
>
> [Per Kirkpatrick J.A.; emphasis added.]

The appellant says that when special costs are contemplated to censure a lawyer's conduct, procedural fairness takes on even greater importance.

[37] Rule 14-1 explicitly embodies a procedural fairness requirement specific to costs ordered against counsel. Under Rule 14-1(35), an order that a party's lawyer be personally responsible for all or part of that party's costs, whether assessed as special costs or party and party, "must not be made unless the lawyer is present or has been given notice". In *Jodoin,* notice of the potential for a personal costs award against a lawyer was held to be necessary to enable the lawyer adequate opportunity to prepare a response, including calling evidence relevant to the issue where appropriate.

[38] In my view, the procedural fairness mandated by Rule 14-1(35) should be approached in a manner consistent with the fairness requirements at common law, discussed in *Jodoin.* Moreover, this should be the case whether the potential for a costs award against counsel arises before, during or after the proceeding at issue:

> [35] … a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards (Y.-M. Morissette, "L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant" (1984), 44 *R. du B.* 397, at p. 425). However, it is important that this process be flexible and that it enable the courts to adapt to the circumstances of each case.
>
> [36] Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against [them] and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.
>
> [Emphasis added.]

[39] The appellant says he did not receive notice of the potential for a special costs award, whether as contemplated by Rule 14-1(35) or *Jodoin*.

[40] On dismissal of the Undertaking Application, none of the parties sought costs against the appellant personally. Ms. Wingson concedes this point on the appeal. It is confirmed by a review of the record.

[41] At the September 2016 hearing, counsel for Ms. Wingson was asked by the chambers judge whether Ms. Wingson was "seeking special costs simply against the litigants or against Mr. Muirhead personally". Counsel responded, "Simply against the litigants". In his post-hearing submissions on the Undertaking Application, counsel for Ms. Wingson described the executors as "recklessly indifferent" to the deficiencies in the "misconceived application" and sought an award of special costs for their conduct. The written submissions for Ms. Miller sought special costs against the executors and other beneficiaries of the estate "personally". No mention was made of a possible award against the appellant.

[42] The appellant's post-hearing submissions evince an understanding on his part that costs on the Undertaking Application had been ordered against his clients and that the only issue left for him to address on the matter was whether those costs should be assessed as special costs or party and party. He argued in favour of party and party costs, assessed on Scale B:

> **Undertaking Application**
>
> - This application has been dismissed with costs against the Walsh Executors
> - Although the application was ill-conceived, it was brought in good faith in the context of litigation that has been hard fought on all sides
> - No allegation of fraud or dishonesty was made – there is an evidentiary basis to the allegation Ms. Wingson breached an undertaking through inadvertence
> - Costs should be at Scale B

[43] In my view, the appellant's understanding of what was required of him was reasonable in light of the fact that none of the parties sought costs against him personally. I also note that during an exchange with the chambers judge, the appellant

referenced the order for costs on the Undertaking Application as an award made against his clients and the judge did not take issue with that characterization:

> MR. MUIRHEAD: Well, you've already awarded costs against my client -- the executors --
>
> THE COURT: Yes.
>
> MR. MUIRHEAD: -- for the application they brought, and in my submission, those costs should be at Scale B. It was an error in judgment and an incorrect application, ultimately, that was not allowed, but in my submission, isn't the sort of reckless application that results -- that ought to result in an order of special costs.
>
> [Emphasis added.]

[44] Rule 14-1(35) and *Jodoin* make clear that lawyers facing a costs sanction in their role as counsel "should be given prior notice of the allegations … and the possible consequences" (*Jodoin* at para. 36). That did not occur here, and it rendered the process leading to the order for special costs against the appellant procedurally unfair. I reach this conclusion appreciating that, as noted in *Jodoin*, procedural fairness requirements are flexible and contextually applied. In deciding whether a procedure was unfair, relevant considerations might include: the type of costs at issue; the extent to which the potential for a personal award would have been apparent from the parties' materials or discussion before the presider; the nature and scope of the impugned conduct; the complexity of the litigation; and the circumstances surrounding the behaviour under review. These, as well as other factors not contemplated here, may logically inform the degree of notice and preparation reasonably required by the lawyer to respond to the potential for a personal costs award. Allowing context to inform the analysis invariably means that what might be required to ensure a fair process in one case will not necessarily be the same for another (*Jodoin* at para. 35).

[45] Because of the lack of notice, the appellant was deprived of an opportunity to make submissions on whether an order for costs (let alone special costs) should be made against him personally. Instead, he was left with the understandable impression that any additional submissions on costs specific to the Undertaking Application should focus on the difference between special costs and party and party costs *as they related to his clients.*

[46] Ms. Wingson contends that notwithstanding the way in which things unfolded at the hearing, the appellant ought to have realized that the chambers judge might contemplate an order that he pay special costs. The respondent Dana Miller makes a similar argument on the appeal. From their perspective, it was abundantly clear that the chambers judge had serious concerns about the manner in which the appellant advanced the Undertaking Application.

[47] With respect, on the record in this case, that contention is without merit. The chambers judge provided no indication that he was considering a personal award against the appellant; no one was asking for that type of an order; and, objectively, the appellant's take on the matter post-hearing was reasonable. This is the way the judge himself framed the outstanding issue on the Undertaking Application before sending the parties away to provide written submissions:

> THE COURT: Okay. So somebody help me here summarize the issues that I have to decide. It's the question, first, of Ms. Wingson seeking special costs against Mr. Muirhead's clients in respect of the application I dismissed this morning regarding the settlement agreement. …
>
> [Emphasis added.]

[48] Counsel for Ms. Miller subsequently clarified for the judge that his client was also seeking special costs on the Undertaking Application. However, in so doing, he did not ask that the judge consider anyone other than "Mr. Muirhead's clients" as the payors:

> Mr. JOSEPHSON [Counsel for Ms. Miller]: So with respect to the applications before Your Lordship, My Lord, the one forwarded by Mr. Muirhead, special costs in favour of Ms. Wingson for the reasons that have been described, special costs in favour of Ms. Miller for the reasons that have been described.
>
> THE COURT: So special costs in favour of Ms. Miller on Mr. Muirhead's application --
>
> MR. JOSEPHSON: Yes.
>
> THE COURT: -- and on your application?
>
> MR. JOSEPHSON: Exactly.

[49] In her factum, Ms. Wingson further contends that the costs outcome on the Undertaking Application was substantively fair, despite there being no notice of a potential order for personal payment. She says the issue of costs against legal counsel

was “front and centre” at the hearing because of the executors’ request for costs against Ms. Wingson. There was also discussion of the legal test for special costs, as Ms. Wingson and Ms. Miller both sought special costs against the executors on dismissal of the Undertaking Application, as well as in their applications for relief related to implementation of the settlement agreement. Ms. Wingson says that the hearing transcript makes it clear the judge understood that an order for special costs requires a finding of “reprehensible” conduct and that he would have brought this understanding to bear in reaching his determination vis-à-vis the appellant. Most importantly, the appellant was present at the hearing and “unconditionally took full responsibility” for the Undertaking Application. By doing so, he effectively “invited [the chambers judge] to make any costs award against him personally”.

[50] I do not find that submission persuasive. It is correct that there was discussion of principles relevant to a special costs award. However, the focus was not on how those principles might apply to the appellant’s personal conduct in respect of the undertaking, justifying an award against him as counsel. Furthermore, on my reading of the transcript, the appellant accepted responsibility for an “inappropriate” undertaking, describing it as an “error in judgment”. I agree with appellant’s counsel that he apologized to the chambers judge for *that* error. He did not accept responsibility for conduct sufficient to ground personal liability for special costs.

[51] An order that legal counsel pay special costs is a serious matter. The judge was understandably frustrated with the decision to advance the Undertaking Application. He thought the application was “unnecessary” and “misconceived”. It is also apparent from the transcript that he was concerned about intransigence among counsel, generally, and the aggressiveness of positions taken in respect of each other’s conduct. This included the appellant. At one point, the judge chided the lawyers for “slinging mud” at each other. In his reasons on costs, he expressed the view that counsel for all sides in the estate litigation may have lost sight of the bigger picture, becoming “too focused at times on asserting the technical correctness of their positions on matters of procedure”.

[52] Nonetheless, before deciding that the appellant should personally pay special costs, the judge was obliged to make him aware of the potential for that ruling in light of the significant consequences. The appellant was entitled to an audience on that issue and he was deprived of the opportunity. In the particular circumstances of this case, I find the failure to give the appellant notice of the potential for personal payment resulted in an unfairly imposed sanction.

Was there an error in principle?

[53] In light of my conclusion on the first ground of appeal, it is not necessary to determine whether the chambers judge applied the correct legal test for special costs against the appellant, as set out earlier in these reasons. The order cannot stand because it was procedurally unfair.

What is the appropriate remedy?

[54] Rule 14-1(33)(c) allows a lawyer to be held "personally liable for all or part of any costs that his or her client has been ordered to pay to another party" (emphasis added). Consistent with this language, and for the benefit of possible appellate review, a superior court that orders costs against legal counsel in a civil case should:

a) specify that there has been an order for costs in favour of one or more parties;

b) specify the nature of those costs (special or party and party); and,

c) if the payor of the costs will be a party's lawyer, identify the lawyer and indicate whether they are personally responsible for all or only part of the costs.

[55] To exemplify, this was the approach taken in *Hannigan v. IKON Office Solutions Inc./Bureau-Tech IKON Inc.* (1997), 70 A.C.W.S. (3d) 25 (B.C.S.C.). There, relying on his inherent jurisdiction (see *Nazmdeh* at para. 90), the chambers judge ordered that the defendant's lawyer pay special costs in a wrongful dismissal action for an application to set aside subpoenas. The judge granted costs to the applicants, directed that they be assessed as special costs, and then ordered that the defendant's lawyer be "personally liable for all such costs" (at para. 37). The special costs award was appealed. This Court upheld the special costs assessment. However, it determined

that the defendant's lawyer had been erroneously ordered to pay those costs and set aside that part of the order, leaving the remainder of the costs award intact: *Hannigan v. IKON Office Solutions Inc./Bureau-Tech IKON Inc.* (1998), 61 B.C.L.R. (3d) 270 (C.A.) at paras. 2, 21.

[56] Here, the order below provided only for special costs payable by the appellant. As a result, once that order is set aside, it leaves only the pronouncement at the September 2016 hearing that the Undertaking Application was dismissed, "with costs". There is no order designating the payor of those costs or directing that they be assessed as special costs.

[57] Both Ms. Wingson and Ms. Miller submit that if the appeal is allowed, the executors should be ordered to pay special costs, consistent with the positions these respondents advanced in their written submissions after the chambers hearing. They are each of the view that the executors have taken unreasonable positions in the estate litigation, have purposefully delayed the resolution of contested issues, and that as a result of their conduct, the affected parties have had to expend wasted resources. They contended below, and again in the appeal, that the Undertaking Application formed but one part of a long-standing pattern of obstructive tactics.

[58] As an alternative position, Ms. Wingson says the appellant should be ordered to pay special costs, based on his role as counsel in bringing the Undertaking Application and his admission of responsibility at the chambers hearing. Ms. Miller supports this position.

[59] Counsel for the appellant accedes that if the special costs award is set aside, this Court has jurisdiction to make its own assessment of the record and determine whether a special costs award is justified, against the executors or the appellant. By virtue of the appeal, the appellant has now had a full opportunity to respond to the possibility of a costs award against him. However, his counsel strenuously argues that at worst, the Undertaking Application reflected an error in judgment and did not come close to the type of conduct required to meet the test for reprehensibility. As a result, the only costs appropriately payable on the Undertaking Application are party and party costs against

the executors, consistent with what would ordinarily flow under the Rules with dismissal of their application.

[60] In my view, this Court should not stand as a court of first instance on the question of whether costs for the Undertaking Application should be assessed as special costs, and, if so, who should pay them. The executors did not participate in the appeal. Without their participation, the Court is deprived of the ability to fairly assess their role in advancing the Undertaking Application, its motivation, or whether the steps taken by the appellant in carrying out his instructions and his overall approach were consistent with the executors' intent. We do not have the benefit of an assessment or findings by the chambers judge on these or other potentially relevant issues.

[61] At the same time, I do not consider it in the interests of justice to remit this matter back to the Supreme Court for another hearing on costs. Doing so will further delay finality in the estate litigation and require the expenditure of additional resources by the affected parties. It is readily apparent from Ms. Miller's compelling submissions on the appeal that the litigation has taken both an emotional and financial toll on her. A further hearing on costs will only exacerbate that situation.

[62] Accordingly, I consider it appropriate that the Court exercise its discretionary authority under s. 9(1)(a) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, to make the order that, in the absence of a special costs assessment and a Rule 14-1(33)(c) determination, would have ordinarily resulted from dismissal of the Undertaking Application, namely, party and party costs payable by the executors.

Disposition

[63] For the reasons provided, I would admit the fresh evidence, allow the appeal and set aside the order for special costs against the appellant.

[64] Applying Rule 14-1(12) of the *Supreme Court Civil Rules*, I would order that costs on the Undertaking Application flow to Ms. Wingson and Ms. Miller, payable forthwith by the executors as party and party costs, assessed on Scale B.

[65] Finally, the appellant seeks his costs on the appeal. The chambers judge imposed the special costs award of his own initiative. Ms. Wingson and Ms. Miller did not seek that order. The order has been set aside for procedural unfairness, a matter not within their control. In light of the circumstances, I do not consider it appropriate that Ms. Wingson and Ms. Miller be responsible for the appellant's costs. As such, I would order that each party bear their own costs on the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

"The Honourable Chief Justice Bauman"

"The Honourable Mr. Justice Harris"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *West Van Holdings Ltd. v. Economical Mutual Insurance Company,* 2019 BCCA 110

Date: 20190405
Dockets: CA45020; CA45036

Between:

West Van Holdings Ltd. and West Van Lions Gate Dry Cleaners Ltd.

Respondents (Plaintiffs)

And

Economical Mutual Insurance Company

Appellant (Defendant)

And

Intact Insurance Company

Appellant (Defendant)

Before: The Honourable Mr. Justice Goepel
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated December 29, 2017 (*West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2017 BCSC 2397, Vancouver Docket S161179).

Counsel for the Appellant, Economical Mutual Insurance Company:	C. Rhone
Counsel for the Appellant, Intact Insurance Company:	J.M. Moshonas B.A. Meadow
Counsel for the Respondent:	N.J. Tuytel C.M. Tribe
Place and Date of Hearing:	Vancouver, British Columbia November 6, 2018

Place and Date of Judgment: Vancouver, British Columbia
April 5, 2019

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Dickson

Summary:

The appellant insurers appeal the chambers judge's order holding that they have a duty to defend the respondents in an underlying action claiming damages for migration of pollutants, and awarding the respondents costs on a full indemnity basis. Held: appeal allowed. The chambers judge erred in finding that the claims against the respondents fell within the initial grant of coverage on the basis that the pleadings in the underlying action alleged liability arising from a previous owner's conduct under s. 45(2) of the Environmental Management Act, S.B.C. 2003, c. 53. The pleadings contain no such allegation, and the policies do not include coverage for liability arising before the policy periods. The chambers judge further erred in finding that the exclusion clauses were ambiguous and did not oust coverage for the remainder of the claims in the underlying action. The cost award was an error in principle, as judges can only award costs as authorized by the Supreme Court Civil Rules. Further, there is no principled basis for awarding special or full indemnity costs to insureds who litigate to enforce an insurer's duty to defend where there is no reprehensible conduct.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This appeal raises two questions for determination. The first is whether the appellant insurers have a duty to defend the respondents in an underlying action for damages arising from the migration of pollutants. The insurers submit that the claims are excluded from coverage.

[2] The second concerns costs. The issue is whether an insured who successfully brings an application to compel an insurer to defend an underlying claim is entitled to recover their legal costs on a special costs or full indemnity basis notwithstanding an absence of reprehensible conduct on the part of the insurer. This issue arises as a matter of first instance in this Court.

[3] The chambers judge decided both issues in favour of the insured. The insurers now appeal. They ask this Court to find that because of the pleadings and the relevant exclusion clauses there is no duty to defend. In regard to the cost issue, they submit that absent a finding of reprehensible conduct, only party and party costs should be awarded.

BACKGROUND

[4] The respondent West Van Lions Gate Cleaners Ltd. has since March 1976 operated a dry cleaning business on a parcel of land in West Vancouver (the "West Van Lands"). The respondent West Van Holdings Ltd. has since October 1987 been the registered owner of the West Van Lands. The companies are related and will be referred to collectively as West Van.

[5] Between June 1998 and June 2002, the appellant Intact Insurance Company ("Intact") insured West Van under a commercial general liability insurance policy ("CGL"). The policy included coverage for property damage liability, but also contained a clause limiting coverage for property damage liability arising from pollutants.

[6] Between June 2002 and June 2012, the appellant Economical Mutual Insurance company ("Economical") insured West Van under a CGL. The policy included coverage for property damage liability, but similarly contained a clause limiting coverage for property damage liability arising from pollutants.

[7] While the wording of the CGL policies changed slightly from year to year, at all times they included a pollution or environmental exclusion clause ("Exclusion Clauses").

[8] On February 4, 2014, 8549737 Canada Inc. and 8428450 Canada Inc. filed a notice of civil claim ("NOCC") against West Van (the "Underlying Action"). The plaintiffs in the Underlying Action are the registered and beneficial owners of lands and premises situated at 1583 Marine Drive in West Vancouver (the "Lands"). The Lands are adjacent to the West Van Lands.

[9] The plaintiffs in the Underlying Action allege that since West Van's ownership of or operation on the West Van Lands, dry-cleaning chemicals and petroleum products (the "Contaminants") have been used, kept, disposed of, or treated on the West Van Lands in a manner that caused or allowed the Contaminants to be discharged or deposited into, or escape and enter the soils and groundwater of the

Lands, thereby damaging and contaminating the Lands. The action was pleaded in strict liability (*Rylands v. Fletcher*), negligence, nuisance, and a statutory cause of action under the *Environmental Management Act*, S.B.C. 2003, c. 53 [*EMA*].

[10] Intact and Economical refused to defend West Van on the basis that the Underlying Action was outside the scope of their policy coverage based on the Exclusion Clauses. In February 2016, West Van filed a notice of civil claim seeking declarations that Intact and Economical were required to defend them.

[11] There is no suggestion in this case that the insurers' decision to deny coverage breached their duty of good faith. There is no allegation that the insurers' conduct in the litigation was reprehensible or otherwise worthy of rebuke.

THE REASONS

[12] The matter was heard summarily. The chambers judge commenced her analysis by reviewing the principles applicable to the interpretation of insurance contracts and the duty to defend, as summarized at paras. 19–20 of *Co-operators General Insurance Company v. Kane*, 2017 BCSC 1720 [*Kane*].

[13] The chambers judge agreed with West Van that the Underlying Action raised four distinct sources of potential liability against them. In that regard, she said:

> [121] In light of s. 47(1) of the [*EMA*], as pled, the plaintiffs are correct that the Action raises four distinct sources of potential liability against them as described in paras. 73–74 of these *Reasons*:
>
> > … the plaintiffs say the Action will put them at risk of liability for remediation costs arising out of "occurrences" and "property damage" that may be found solely attributable to them; brought about by concurrent acts or omissions committed by them; contributory acts or omissions; and, "occurrences" and "property damage" that has resulted exclusively from the conduct of predecessor third parties, for which the plaintiffs are retroactively liable by virtue of their status as subsequent owners of, and/or operators on, the West Van lands.

[14] The chambers judge held that West Van had met its onus of showing that the claims in the Underlying Action fell within the initial grant of coverage. She reasoned

that the pleadings alleged "property damage" arising from an "occurrence", which brought the claim within the scope of coverage.

[15] On whether the Exclusion Clauses applied to oust coverage, the chambers judge cited *Progressive Homes Ltd. v. Lombard General Insurance Company*, 2010 SCC 33, for the proposition that Intact and Economical had to show that "coverage under the initial grant [was] 'clearly and unambiguously' precluded by the exclusion clauses" (at para. 131).

[16] The chambers judge held that the Exclusion Clauses did not clearly and unambiguously oust coverage for the property damage claim in the Underlying Action, because it was unclear whether they ousted coverage for property damage liability arising from pollutants that were used before West Van operated a business on and owned the West Van Lands. She reasoned:

> [135] In particular, it is not clear to me that the exclusions oust coverage for compensation, including remediation costs, arising from pollutants that may have been used *before* West Van and Lions Gate owned and/or operated on the West Van lands, but for which the plaintiffs are liable in some form because of deemed responsibility under the *Act.*
>
> [136] At the very least, there is a "mere possibility" that coverage for one or more claims made on this basis has not been carved out of the initial grant.

[17] In the result, she found the Exclusion Clauses to be ambiguous, and that they did not oust coverage for statutory retroactive property damage liability arising from migration of pollutants which may have been caused by previous landowners or operators.

[18] Intact and Economical relied on three cases involving insurance policies with similarly worded exclusion clauses. In those cases, the courts did not find the similar wording to be ambiguous, and as a result held that there was no duty to defend in those instances of property damage liability arising from pollutants. The trial judge found all of them to be distinguishable. The cases are *699982 Ontario Ltd. et al. v. Intact Insurance Company* (2011), 9 C.C.L.I. (5th) 325 (Ont. S.C.J.), aff'd 2012 ONCA 286; *Dave's K. & K. Sandblasting (1988) Ltd. v. Aviva Insurance Company of*

Canada, 2007 BCSC 791; and *Precision Plating Ltd. v. Axa Pacific Insurance Company*, 2015 BCCA 277, leave to appeal ref'd [2015] S.C.C.A. No. 317.

[19] The trial judge distinguished *699982 Ontario Ltd*. and *Dave's K. & K. Sandblasting* on the basis that the courts in those cases were not required to consider the potential of concurrent, contributory or retroactive liability based on contamination caused by a predecessor third party, but which "lay at the feet of the insured through a statutory cause of action" under the *EMA*, as alleged in the Underlying Action (at paras. 174, 186).

[20] The trial judge distinguished *Precision Plating* on the basis that the insured's alleged liability in that case did not rest on their "mere status as occupant or user of the leased premises, with statutorily deemed responsibility (and therefore liability) for the costs of remediation" (at para. 201).

[21] On the question of costs, the trial judge followed the decision in *Kane* and awarded West Van costs on a solicitor-and-own-client basis. In that regard, she said:

> [217] In *Kane*, Justice Fitzpatrick noted:
>
> > [88] There is British Columbia authority for the proposition that where an insured is required to litigate the issue as to whether his insurer is required to defend him, solicitor and own client costs may follow: *Gore Mutual Insurance Company v. Paterson* (30 September 2011), Vancouver S110676 (B.C.S.C.); *Williams v. Canales*, 2016 BCSC 1811. Both of these cases, and other authorities across Canada, were recently and extensively discussed and applied by Justice N. Brown in *Tanious v. Empire Life insurance Co.,* 2017 BCSC 85 at paras. 33-43.
> >
> > [89] The results in these cases were based on the unique nature of the insurance contract and in terms of fulfilling the objective under that policy. Simply put, where the policy intended full indemnity in relation to defence costs, it follows that any expenditure by the insured in enforcing that objective would, if successful, be followed by a costs award that similarly achieved that objective …
> >
> > [90] There is no need to find reprehensible conduct on the part of the insurer before such a costs award can be made, since such conduct is usually addressed by a special costs award: *Williams* at para. 27. [Emphasis added in 2017 BCSC 2397.]

> [218] Although Intact and Economical question the correctness of the *Kane* approach to costs (as well as the cases referenced therein), they both accept, for the purpose of this case, that I am bound to follow this line of authority on the basis of judicial comity.
>
> [219] Accordingly, in light of the findings I have made, the plaintiffs are entitled to recover their legal costs in enforcing the defendants' duty to defend on a solicitor and own client basis.

ON APPEAL

[22] On appeal, Intact and Economical challenge the chambers judge's analysis. They submit that she erred in finding the Exclusion Clauses were ambiguous and could not be relied on to avoid coverage. They further submit the chambers judge did not correctly analyze the pleadings in the Underlying Action. In that regard, they submit she erred in finding that in the Underlying Action a claim arose against West Van arising from pollutants that may have been used before West Van operated on or owned the West Van Lands. They further submit that even if such a claim could be found in the pleadings, it was not covered under the subject insurance policies because the policies only cover events that occurred during the term of the policy. They submit that the true nature and substance of the allegations contained in the Underlying Action is liability for the escape of pollutants, and those claims are clearly excluded from coverage. In their submission, the duty to defend was not triggered.

[23] The insurers also challenge the cost award. While they concede that the chambers judge was bound to follow Supreme Court precedent, they submit that there is no principled basis to award solicitor-and-own-client costs against the insurers. They submit as a matter of contractual interpretation that the court cannot imply a term into the insurance contract obliging the insurer to fully indemnify an insured for expenditures arising from a proceeding enforcing coverage. Further, they submit liability insurance policies are just like any other contracts. Courts do not order special costs against parties who unsuccessfully defend a breach of contract claim unless a defendant engages in reprehensible conduct deserving of judicial censure.

[24] West Van seeks to uphold the chambers judge's decision. They submit the chambers judge accurately stated and correctly applied settled principles which govern the interpretation of standard form policies drafted by insurers and their duty to defend insureds. They submit that under the policies, coverage extends to acts of third parties that occurred prior to the insurance coming into force.

[25] On the cost issue, West Van submits this Court should follow appellate authority in Ontario and Newfoundland, and decisions in the British Columbia Supreme Court that have held that when an insured successfully enforces a duty to defend, it is entitled to be fully indemnified for its legal costs. West Van says that the chambers judge did not err in following that authority.

DISCUSSION

A. Duty to Defend

i) Standard of Review

[26] The duty to defend issue concerns the interpretation of standard form insurance contracts. The interpretation at issue has precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process. The interpretation is properly characterized as a question of law subject to a correctness review: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37 at para. 24.

ii) General Insurance Principles

[27] In *Sabean v. Portage La Prairie Mutual Insurance Co*., 2017 SCC 7, the Court summarized the general principles of insurance policy interpretation:

> [12] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, this Court confirmed the principles of contract interpretation applicable to standard form insurance contracts. The overriding principle is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language: *Ledcor*, at para. 49; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 22; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC

> 24, [2000] 1 S.C.R. 551, at para. 71. Only where the disputed language in the policy is found to be ambiguous, should general rules of contract construction be employed to resolve that ambiguity: *Ledcor*, at para. 50. Finally, if these general rules of construction fail to resolve the ambiguity, courts will construe the contract *contra proferentem*, and interpret coverage provisions broadly and exclusion clauses narrowly: *Ledcor*, at para. 51.
>
> [13] At the first step of the analysis for standard form contracts of insurance, the words used must be given their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law": *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27.

[28] The legal principles governing the insurers' duty to defend are summarized in *Progressive Homes*:

> [19] An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim (*Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at pp. 810-11; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 28; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at paras. 54-55). It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend (see *Nichols*, at p. 810; *Monenco*, at para. 29).
>
> [20] In examining the pleadings to determine whether the claims fall within the scope of coverage, the parties to the insurance contract are not bound by the labels selected by the plaintiff (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 79 and 81). The use or absence of a particular term will not determine whether the duty to defend arises. What is determinative is the true nature or the substance of the claim (*Scalera*, at para. 79; *Monenco*, at para. 35; *Nichols*, at p. 810).

[29] Against this background I turn to the terms of the insurance policies and the claims raised against West Van in the Underlying Action.

iii) The Insurance Policies

[30] While the Intact and Economical policies were not identical, the basic features of the policies were the same. Each policy covered West Van for property damage which occurred during the policy period.

[31] Between June 1998 and June 2002, Intact insured West Van under a CGL.

[32] The June 1998 to June 1999 policy covered "Property Damage Liability" as follows:

> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages because of property damage caused by an occurrence.

[33] "Occurrence" was defined as "an accident, happening or event, including continuous or repeated exposure to conditions neither expected nor intended from the standpoint of the Insured".

[34] "Property damage" was defined as:

> 1) Physical injury to or destruction of tangible property which occurs during the policy period including the loss of use thereof at any time resulting therefrom, or
>
> 2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss is caused by an accident occurring during the policy period.

[35] For 1999 through to 2002, the Intact policies provided coverage for:

> ... sums that the Insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" ... which occurs during the Policy Period ... [and was] caused by an "occurrence" ...

[36] "Occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions".

[37] "Property damage" was defined as:

> (a) Physical injury to tangible property, including all resulting loss or use of that property; or

> (b) Loss of use of tangible property that is not physically injured.

[38] Between June 2002 and June 2012, Economical was the insurer. Economical's successive policies committed to pay:

> ... those sums that the Insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies ... This insurance applies only to "bodily injury" and "property damage" which occurs during the form period. The "bodily injury" or "property damage" must be caused by an "occurrence" ...

[39] "Occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions".

[40] "Property damage" was defined as:

> (a) Physical injury to tangible property, including all resulting loss of use of that property; or
>
> (b) Loss of use of tangible property that is not physically injured.

[41] Both the Intact and Economical policies contained Exclusion Clauses, which limited the scope of coverage for property damage related to pollutants. Attached as Appendix A is a chart identifying the policy in place at the material time; its period of coverage; and relevant portions of the impugned exclusions.

iv) Pleadings in the Underlying Action

[42] The pleadings in the Underlying Action are crucial in determining whether a duty to defend arises. The NOCC in the Underlying Action commences by setting out particulars of the parties. It then identifies the plaintiffs as the registered and beneficial owners of the Lands and West Van Holdings Ltd. as the registered owner of the West Van Lands which are identified in the NOCC as the "Adjacent Lands". The NOCC continues:

> 7. The Adjacent Lands have been owned by West Van Holdings since on or about October 21, 1987 and have been used for, among other things, a dry cleaning business and an automotive repair business. The dry cleaning business continues to be operated from the Adjacent Lands. The automotive repair business was operated from the Adjacent Lands until in or about 1999.

8. The dry cleaning business has, since in or about 1976, been operated by Lions Gate Cleaners.

D. Contamination

9. At all material times, dry cleaning chemicals and petroleum products (the "**Contaminants**") have been used, kept, disposed of, handled or treated on the Adjacent Lands in a manner that caused or allowed the Contaminants to be discharged or deposited into, or to escape and enter the soils and groundwater of the Adjacent Lands and Lands, thereby damaging and contaminating the Lands, including, without limitation, causing contamination of the groundwater of the Lands (the "**Contamination**").

10. Further, or in the alternative:

    (a) the use, handling, treatment, keeping and disposal of the Contaminants constituted non-natural use of the Adjacent Lands;

    (b) the Contaminants are a dangerous thing likely to cause harm; and

    (c) the Defendants failed to prevent the escape of the Contaminants from the Adjacent Lands to the Lands.

11. At all material times, West Van Holdings:

    (a) voluntarily leased premises on the Adjacent Lands to the operators of the dry cleaning and automotive repair businesses; and

    (b) knew or had a reasonable basis for knowing that the operators of those businesses planned or intended to, or did, use, keep and dispose of, handle, or treat the Contaminants in a manner that, in whole or in part, would cause the Contamination.

12. At all material times, groundwater has run or flowed under and within the soils of the Adjacent Lands and the Lands, and continues to do so.

13. During the course of the ownership, operation, maintenance, and control of the Adjacent Lands by West Van Holdings, Contaminants have migrated from the area in or about the Adjacent Lands to the soils and groundwater of the Lands.

14. During the course of the ownership, operation, maintenance, and control of the Dry Cleaner by Lions Gate Cleaners, Contaminants have migrated from the area in or about the Adjacent Lands to the soils and groundwater of the Lands.

15. As a result, some or all the Contaminants are present in the groundwater or other constituents of the Lands in excess of standards under the *Contaminated Sites Regulation*, B.C. Reg. 376/96 (the ***"CSR").***

16. Remediation is required to remove the Contamination in the groundwater of the Lands.

[43] Based on those facts, the plaintiffs in the Underlying Action sought the following relief:

> **Part 2: RELIEF SOUGHT**
>
> 1. The Plaintiffs claim against each of the Defendants as follows:
>
> (a) An Interlocutory or final Order directing each of the Defendants to forthwith stop the continuation of the Contamination and, in particular, the migration of the Contaminants to the Lands, by remediating the Adjacent Lands or otherwise taking steps to prevent further, ongoing damage to the Lands;
>
> (b) a Declaration and Order that the Defendants, and each of them, are persons responsible for remediation of the Lands within the meaning of the *Environmental Management Act,* S,B,C. 2003, 0. 53 *("EMA")*
>
> (c) judgment for the costs of the remediation of the Lands, pursuant to the *EMA*;
>
> (d) an Order allocating the costs of the remediation between and among the Defendants;
>
> (e) damages;
>
> (f) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;
>
> (g) costs; and
>
> (h) such further and other relief as this court may deem appropriate.

[44] Under the heading Legal Basis, the NOCC indicated that the claims were brought under the *EMA*, in negligence, nuisance and *Rylands v. Fletcher*. The pleading was as follows:

> **Part 3: LEGAL BASIS**
>
> **A. Environmental Management Act and Contaminated Site Regulation**
>
> 1. The Lands are a "contaminated site" within the meaning of *EMA* and the *CSR.*
>
> 2. Each of Lions Gate Cleaners and West Van Holdings is a "person responsible" for remediation of the Lands under s. 45(2)(a) of *EMA* and the *CSR.*
>
> 3. The Plaintiffs have incurred costs, and will continue to incur costs, in respect of the remediation of the Lands.

4. Each of the Defendants is absolutely, retroactively and jointly and severally liable to the Plaintiffs for the reasonably incurred costs of remediation of the Contamination under s. 47(1) of *EMA.*

B. Negligence

5. At all material times, Lions Gate Cleaners owed a duty of care to the Plaintiffs to ensure that its operations did not result in contamination to the Lands.

6. Lions Gate Cleaners failed to fulfill its duty of care to the Plaintiffs and its negligent acts or omissions cause or contributed to the Contamination on the Lands.

7. At all material times, West Van Holdings owed a duty of care to the Plaintiffs to ensure that the use of the Adjacent Lands did not result In contamination of the Lands.

8. West Van Holdings failed to fulfill its duty of care to the Plaintiffs and its negligent acts or omissions caused or contributed to the Contamination on the Lands.

9. As a consequence of the conduct of the Defendants, the Plaintiffs have suffered, and continue to suffer, loss and damage.

C. Nuisance

10. Further, or in the alternative, the conduct of the Defendants constitutes a private, or alternatively, a public nuisance, and the nuisance is continuing.

D. *Rylands v. Fletcher*

11. Further, or in the alternative, each of the Defendants is liable to the Plaintiffs for the escape of the Contaminants onto the Adjacent Lands.

v) Analysis

[45] In this case each insurance policy covers property damage which occurs during an individual policy period. The onus is on West Van to show that the pleadings fall within the initial grant of coverage: *Progressive Homes* at para. 29.

[46] West Van submits that the Underlying Action includes a claim under the *EMA*, which makes them absolutely, retroactively and jointly and separately liable for the costs to remediate the Lands, regardless of when the contamination took place. West Van submits that this claim clearly contemplates the possibility of contaminants being discharged and migrating to the Lands before West Van acquired the West Van Lands in 1987, or Lions Gate took over an existing dry cleaning operation in 1976. This liability would result from the conduct of predecessor third parties, for

which West Van is retroactively liable by virtue of their status as the subsequent owner of and/or operator on the West Van Lands.

[47] In support of its submission, West Van relies on ss. 45(2)(a) and 47(1) of the *EMA*. Those sections read:

> **Persons responsible for remediation of contaminated sites**
>
> **45** (2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation of a contaminated site that was contaminated by migration of a substance to the contaminated site:
>
> (a) a current owner or operator of the site from which the substance migrated;
>
> …
>
> **General principles of liability for remediation**
>
> **47** (1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

[48] The foundation of the submission is that West Van is exposed in the Underlying Action to a claim based on contamination caused by a predecessor third party. The difficulty with this submission is, however, that such a claim is not found in the NOCC. Paragraphs 7 and 8 of the NOCC reference West Van Holdings as owning the West Van Lands since October 1987 and Lions Gate operating a dry cleaning business on the West Van Lands since 1976. The NOCC makes no mention of a predecessor owner or operator.

[49] Paragraph 9 of the NOCC states “that at all material times” dry cleaning chemicals and petroleum products have been used and allowed to escape, thereby damaging and contaminating the Lands. Reading the pleadings as a whole, “at all material times” must refer to the time that West Van has owned or operated on the West Van Lands. There is no suggestion in the NOCC that a third party predecessor owner or operator contaminated the Lands. Absent such an allegation, there is no possibility that West Van is exposed to liability because of the actions of a third party. To the extent that this was the foundation of the chambers judge’s

determination that there was a duty to defend, the decision, with respect, cannot stand.

[50] Further, and in any event, even assuming that the pleadings could be read to contain such a claim, I find that such a claim does not fall within the grant of coverage. The exercise of interpretation should "avoid an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted": *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59 at para. 20, citing *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R 888 at 901 (*per* Estey J.).

[51] The CGL is an occurrence policy. The grant of coverage is for property damage which occurs during the policy period. The policy was not intended to provide coverage for events which took place long before it came into effect. It does not extend or cover property damage which arose at a prior point in time. Assuming without deciding that West Van could be liable under the *EMA* for such damage, it is not a risk that Intact and Economical insured under their policies. In the result, therefore, even assuming the NOCC could be read to include a claim based upon acts of a third party which took place prior to West Van commencing operations, such a claim is not covered under the policies and does not give rise to a duty to defend.

[52] The remaining claims under the *EMA*, in negligence, nuisance and *Rylands v. Fletcher* all allege property damage which occurred during the policy periods and fall within the initial grant of coverage. The issue is whether or not they are captured by the Exclusion Clauses.

[53] At the hearing of the appeal, counsel for West Van conceded that the remaining claims under the *EMA* and the claims in negligence, nuisance, and *Rylands v. Fletcher*, were all caught by the Exclusion Clauses. In correspondence written to the division following the hearing of the appeal, he resiled from that concession and advised that his position was that West Van was owed a defence

against those claims under those of the appellant's policies which did not expressly exclude "migration of pollutants".

[54] As set out in Appendix A, the language of the Exclusion Clauses is not identical. The Intact June 1998 – June 1999 policy and the Economical policies from June 18, 2002 to June 18, 2006 contain the following language:

> This insurance does not apply to:
>
> [**1. Pollution Liability**]
>
> a. "Bodily Injury" or "Property Damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
>
> 1) At or from premises owned, rented or occupied by an Insured;
>
> ("Exclusion #1")

[55] The balance of the Intact policies from June 18, 1999 to June 18, 2002 and the Economical policies from June 18, 2006 to June 18, 2012 use somewhat expanded language. The exclusion in those policies reads:

> This insurance does not apply to:
>
> **1. Pollution Liability**
>
> a. "Bodily injury" or "property damage" or "personal injury" [or "advertising liability"] arising out of the actual, alleged[, potential] or threatened spill, discharge, emission, [dispersal,] seepage, leakage, migration, release or escape of pollutants:
>
> (1) At, or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any… Insured;
>
> ("Exclusion #2")

[56] Exclusion #1 does not specifically refer to the migration of pollutants. West Van submits that in the circumstances of this case, the damage to the Lands was caused by the "migration" of pollutants from the West Van Lands to the Lands, and accordingly a duty to defend arises under those policies which are governed by Exclusion #1. In support of this submission they point to s. 45(2) of the *EMA*, which holds that liability for an adjoining owner arises because of the migration of the substance to the contaminated site. They submit that the absence of the word

migration in Exclusion #1 means that in those years the exclusion does not capture the claims made in the NOCC.

[57] With respect, I cannot agree. The policies that contain Exclusion #1 must be interpreted without reference to other policies that contain Exclusion #2. Exclusion #1 excludes all claims "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants." The phrase "arising out of" is broader than "caused by": *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at para. 21.

[58] In this case, the NOCC in the Underlying Action alleges that contaminants "have been used, kept, disposed of, handled or treated on the Adjacent Lands in a manner that caused or allowed the Contaminants to be discharged or deposited into, or to escape and enter the soils and groundwater of the Adjacent Lands and Lands". It is further alleged that the defendants failed to prevent the escape of the Contaminants. In my view, Exclusion #1 captures the allegations in the NOCC and clearly and unambiguously excludes those claims from coverage.

[59] To succeed, West Van must show the mere possibility that a claim falls within the insurance policies. I find that it is clear that the claims in the Underlying Action fall outside the policy, either because they do not come within the initial grant of coverage or are excluded by the Exclusion Clauses. Accordingly, there is no duty to defend.

[60] In the result, therefore, I find that the chambers judge erred in finding a duty to defend.

B. COSTS

i) Overview

[61] Given the above finding, it is not strictly necessary to deal with the cost issue, which has been raised on this appeal. However, given that the matter was fully

argued, and the importance of the issue for other cases, I think it is appropriate to determine the correctness of the cost ruling.

[62] I will begin with an overview of the guiding principles governing costs in British Columbia. I will then review and consider the authorities relied on by West Van in support of the cost ruling and other authorities which suggest a different result. I will then consider whether the cost award of the chambers judge is consistent with the guiding cost principles.

ii) General Principles

[63] The rules governing costs are set out in R. 14-1 of the *Supreme Court Civil Rules* (the "*Rules*"). The *Rules* recognize two categories of costs: party and party costs and special costs. Prior to the 1990 rule amendments, special costs were known as solicitor-and-client costs.

[64] Costs awards should be predictable and consistent across similar cases: *MacKenzie v. Rogalasky*, 2014 BCCA 446 at para. 82, leave to appeal ref'd [2015] S.C.C.A. No. 24. A trial judge cannot impose costs sanctions that are not authorized by the *Rules*: *Kurtakis v. Canadian Northern Shield Insurance Co*. (1995), 17 B.C.L.R. (3d) 197 (C.A.); *A.E. v. D.W.J*., 2009 BCSC 505 at paras. 48–50, aff'd 2011 BCCA 279 at paras. 12, 39; *Gichuru v. Smith*, 2014 BCCA 414 at para. 84, leave to appeal ref'd [2014] S.C.C.A. No. 547.

[65] Costs play an important role in civil litigation. They have a purpose beyond indemnification of the successful party in the litigation: *Catalyst Paper Corporation v. Companhia de Navegaçao Norsul*, 2009 BCCA 16 at para. 13.

[66] Party and party costs are the default option. They serve several functions. They partially indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation: *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 37 (C.A.).

[67] Party and party costs are assessed in accordance with Appendix B of the *Rules*. An award of party and party costs provides only a partial indemnity to a successful party. One purpose of a fixed tariff is to allow parties to forecast with some degree of precision what penalty they face should they be unsuccessful: *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave to appeal ref'd [1988] S.C.C.A. No. 200.

[68] Special costs are usually awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young*, [1993] 4 S.C.R. 3 at 134–135. While a special cost award, by its very nature, will provide a litigant with a greater degree of indemnity against its actual legal expenses, in the ordinary course "special costs are not compensatory; they are punitive": *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2017 BCCA 177 at para. 56. They are typically awarded to address conduct in the course of the litigation that is deserving of censure and rebuke: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106, leave to appeal ref'd [2012] S.C.C.A. No. 120. Pre-litigation conduct is not to be considered in determining whether special costs should be ordered: *Smithies Holdings* at para. 134.

[69] There are limited circumstances when special costs may be ordered where there has been no wrongdoing: *Gichuru* at para. 90. These situations include when the parties have made provision in a contract for special costs.

[70] Special costs are not a substitute for damages. They are not a remedy for breach of contract and should not be conflated with punitive damages. In *Marchen v. Dams Ford Lincoln Sales Ltd*., 2010 BCCA 29, this Court explained:

> [69] The judge conflated the analysis of punitive damages and costs. Punitive damages are a remedy for breach of contract that reflects the conduct of a party at the time of the breach. Costs reflect the results and conduct of parties leading to and in the course of litigation. They are not a remedy for breach of contract.

[71] On an assessment of special costs, a party is entitled to those fees that were proper or reasonably necessary to conduct the proceeding. While there may be a

close relationship between actual legal fees and special costs, they are not necessarily identical. In *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.), aff'd 73 B.C.L.R. (2d) 212 (C.A.), Mr. Justice Bouck explained the distinction at 319:

> As I understand the notion of special costs under R. 57(3), they are meant to provide a much higher indemnity than ordinary costs where the circumstances warrant. They are assessed under paras. *(a)* to *(g)* of R. 57 with a view to the relationship between the successful party and his or her own solicitor. But they are not necessarily the fees that the successful solicitor would recover from his or her client. Those fees arise from a review of a solicitor's bill under the *Legal Profession Act*, S.B.C. 1987, c. 25, Pt. 10, as amended by the *Justice Reform Statutes Amendment Act*, 1989, c. 30, in force September 1, 1990, B.C. Reg. 267/90. Instead, special costs are the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill. On the other hand, fees payable by the client to the solicitor pursuant to a bill taxed under the *Legal Profession Act* represent fees for work done by that solicitor for that client. In the usual course of events, a bill taxed as special costs will be less than a bill taxed under the Legal Profession Act. This is because special costs still fall under the category of party and party costs, whereas fees due under the *Legal Profession Act* are assessed in a similar way to the old method of solicitor-and-own-client costs.
>
> A taxation of special costs is objective in nature while a taxation under the *Legal Profession Act* is subjective. Put another way, a losing party should not have to pay for the cost of the most experienced and qualified lawyer if that kind of service was not necessary. However, in most instances, a bill for special costs will usually be about 80 to 90 per cent of a similar bill assessed under the *Legal Profession Act*.
>
> [Emphasis added.]

[72] The award of costs, including the appropriate scale of costs, is a matter of judicial discretion. This Court should not interfere with that discretion unless the trial judge made an error in principle or the cost award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[73] In exercising that discretion, a judge must act judicially. A judge cannot fix costs arbitrarily or capriciously. The judge must act in a manner consistent with the *Rules* and the principles that have long governed such awards. In *Stiles v. B.C. (W.C.B.)* (1989), 38 B.C.L.R. (2d) 307 at 310 (C.A.), Lambert J.A. articulated the limits on the judge's power to award costs:

> ... Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Ins. Co.*, 28 B.C.L.R. 230, [1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e., not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the *Rules of Court*. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.

[74] Many of the cases upon which West Van relies were decided in Ontario. The law of costs in British Columbia is similar but not identical to that in Ontario. In Ontario, the authority for awarding costs against a party originates in s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 and is further governed by R. 57 of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Ontario Rules").

[75] The Ontario Rules provide for three levels of costs: partial indemnity, substantial indemnity and full indemnity. Full indemnity costs are sometimes referred to as solicitor-and-own-client costs. In Ontario, the default rule is that the successful party is entitled to costs on a partial indemnity scale: *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia*, 2015 ONCA 732 at para. 12. This is similar to the situation in British Columbia.

[76] The Ontario Rules do not define full indemnity costs, but they are "generally considered to be a complete reimbursement of all amounts the client has had to pay his or her lawyer in relation to the litigation": *Davies v. Clarington (Municipality)*, 2009 ONCA 722 at para. 15. In this regard, the Ontario regime is different than British Columbia's, as special costs awards in this province do not necessarily lead to a full indemnity.

iii) West Van Case Authorities

[77] West Van cites numerous authorities to support the cost award. *Godonoaga (Litigation Guardian Of) v. Khatambakhsh* (2000), 50 O.R. (3d) 417 (C.A.), appears

to be the first Canadian decision that awarded full indemnity costs in the context of a duty to defend. The court said:

> [4] The appellants were entitled to a defence by their insurer without expense to them. Accordingly, that matter now having been determined in their favour, they should have their costs on a solicitor and his own client scale for the defence of the main action and cross-claims until such time as the respondent insurer serves and files a notice of change of solicitors and takes over the insurers' defence. Such costs would include the conduct of the third party proceedings and the motion before Pitt J. and this appeal. It would, of course, obviate the necessity of determining their party and party costs of this appeal as ordered by the court.

[78] The matter again came before the Ontario Court of Appeal in *E.M. v. Reed* (2003), 49 C.C.L.I. (3d) 57 (Ont. C.A.), leave to appeal ref'd [2003] S.C.C.A. No. 334 [*Reed*]. *Reed* concerned a cost order in a proceeding in which an insured had refused to defend the claim. The court ordered costs on a solicitor-and-client basis. It held that the entitlement to solicitor-and-client costs arose directly from the unique nature of the insurance contract which entailed a duty to defend at no expense to the insured. The court explained at para. 22:

> [22] Entitlement to solicitor-and-client costs in the third party proceeding flows directly from the unique nature of the insurance contract which entails a duty to defend at no expense to the insured. The obligation to save harmless the insured from the costs of defending the action is sufficiently broad to encompass the third party proceedings. It is the contractual basis for the claim to solicitor-and-client costs that justifies the award and therefore constitutes an exception to the usual rule that solicitor-and-client costs will not be awarded except in unusual circumstances.

[79] In *Markham General insurance Co. (Liquidator of) v. Bennett*, 23 C.B.R. (5th) 203 (Ont. S.C.J.), two insurers unsuccessfully applied for a declaration that they did not have to defend a claim brought against former directors and officers of a company. The insureds relied on *Reed* in seeking costs on a full indemnity basis. The insurers argued that the case was distinguishable because their conduct demonstrated good faith. They relied on *Gore Mutual Insurance Co. v. 1443249 Ontario Ltd.* (2004), 29 C.C.L.I. (4th) 126 (Ont. S.C.J.), in which Karakatsanis J. (as she then was) awarded only partial indemnity costs to the insured where the insurer had not acted capriciously or in bad faith in bringing an application to clarify whether

an excluded driver endorsement was valid. Cumming J. rejected the insurers' submission and awarded costs on a full indemnity basis. He reasoned:

> [15] The conduct of the insurers in the case at hand is exemplary, like that seen in *Gore Mutual Insurance Co. v. 1443249 Ontario Ltd*.. There was no breach of the contract by the insurers. I agree that the Application involved a relatively novel issue of importance in respect of the so-called "insured v. insured" exclusion. It was reasonable for the insurers to bring the Application for a determination as to how the policies were to be interpreted as a matter of law. Nevertheless, given the finding that the exclusion was inapplicable, and that the coverage applied to the respondent directors/officers, in my view, costs of the Application relating to the preliminary coverage issue are properly payable on a full indemnity basis. While the policies themselves (apart from the asserted exclusion provision) are not in the evidentiary record, it is not disputed that the insurers contractually agreed to indemnify the respondent director/officers from the cost of their defences up to the policy limits. For this reason, in my view, the insurers are contractually obliged to reimburse Goodman and Hicks on a full indemnity basis.

[80] *Reed* was followed by the Newfoundland Court of Appeal in *Lombard General Insurance Co. of Canada v. Crosbie Industrial Services Ltd*., 2006 NLCA 55 [*Crosbie*]. This case also involved a duty to defend. Considering this question, the court noted that the insurance contract was silent on the questions of costs where the duty to defend is disputed. In awarding solicitor-and-client costs, it said:

> [73] This language is specific regarding the costs of defending an action covered by the insurance contract, with particular attention to the fact that these costs are in addition to, and will not reduce, the monies available to indemnify the insured for a property damage claim under the policy. There is, however, no mention of costs where the duty to defend is disputed by the insurer. I have not been directed by either party to, nor have I identified, a provision in the insurance contract dealing with this issue.
>
> [74] While I was directed by counsel to very little relevant judicial authority, I am satisfied that, in the absence of a clear indication to the contrary in the insurance contract, the insured is entitled to full indemnity of its costs related to enforcing the insurer's duty to defend. The insurer's obligation with respect to costs in this context is broadly stated in the Reed decision (paragraphs 22 to 24 quoted above). A review of the insurance contract in that case (attached as an appendix to the decision of the lower court at (2000), 24 C.C.L.I. (3d) 229) reveals no provision in the contract that directly relates, or could be construed as indirectly relating, to costs incurred by the insured enforcing the duty to defend. In other words, the court's imposition of the requirement to pay solicitor and client costs for the third party proceedings does not arise from a specific provision in the insurance contract. Rather, it arises from the unique nature of that contract. As stated by the Ontario Court of Appeal in Reed, an order for solicitor and client costs in this context "constitutes an exception to the usual rule that solicitor-and-client costs will not be awarded

> except in unusual circumstances" (paragraph 22). (See also: Soloway v. Lloyd's Underwriters, [2005] O.J. No. 5465 (Ont. S.C.J.), at paragraph 8.)
>
> [75] I have not been directed to any authority that would lead me to a conclusion in this case different from that reached by the Ontario Court of Appeal in Reed. It follows that Crosbie Industrial is entitled to full indemnity for expenses it incurred in enforcing Lombard Insurance's duty to defend it against Ultramar's claim. Accordingly, Crosbie Industrial is entitled to its costs in respect of the summary trial, the costs application and this appeal on a solicitor and client basis.

[81] In *Hoang v. The Personal Insurance Co*., 2017 ONSC 4193, the trial judge relied on *Reed* in a case that did not concern a duty to defend. The judge held that when an insurance company denies coverage, and is then found to have done so wrongfully, even in circumstances where the insurers had in no way acted improperly, a plaintiff should be compensated on a full indemnity basis for the cost of enforcing its right to coverage. He reasoned as follows:

> [4] It is probably fair to say that every successful claimant in a civil action feels that he or she should not have had to sue to get what they deserved in the first place, and yet the courts do not routinely award full indemnity costs. The general policy is to award partial indemnity costs to successful parties: *Foulis v. Robinson* (1978), 21 OR (2d) 769, at para 16 (Ont CA). This typically applies unless there is an offer to settle that was rejected by the unsuccessful party, or some special circumstance or egregious conduct or unreasonable position taken by the unsuccessful party in the course of the litigation that prompts costs on a higher scale. Since none of those factors are present here, it is crucial to Plaintiffs' counsel's submissions that insured parties and insurance companies be considered in a different light than other litigants.
>
> [5] There is some authority for such special consideration. In *E.M. v. Father Francis Reed et al.*, 2003 CanLII 52150, at para 22, the Court of Appeal stated that, "Entitlement to solicitor-and-client costs in the third party proceeding flows directly from the unique nature of the insurance contract..." This court indicated in *Deloitte & Touche Inc. v. American Home Assurance Co*., 2006 CanLII 23263, at para 15, that once there is a finding that "coverage applied to the respondent [insured parties]...costs of the Application relating to the preliminary coverage issue are properly payable on a full indemnity basis". In *E.M*., *supra*, at para 23, Gillese J.A. drew some comfort from the observation that "English jurisprudence also appears to support the award of solicitor-and-client costs in such situations". She quoted approvingly from R. Merkin, *Colinvaux's Law of Insurance*, 7th ed. (London: Sweet & Maxwell, 1997) at 405, for the proposition that,
>
> > The assured is entitled to any costs reasonably incurred by him in resisting a claim, by way of damages, where the insurers wrongfully repudiate liability on the policy, and the insurers will face liability for

> any costs incurred by the assured in forcing the insurers to admit liability under the policy.
>
> [6] This view is both authoritative and logical. One purchases an insurance policy for coverage in the event of liability, and it is the premium payable under the policy that is the cost of that coverage. Insurance companies are by their nature constantly involved in litigation, and it would be unfair and burdensome to make their customers pay a premium plus legal fees in order to obtain the coverage they bought. The premium is presumed to reflect the insurance company's risk. If it chooses to attempt to reduce that risk by engaging in litigation over its obligation to provide coverage it should be made to fully compensate the successful party if it loses.

[82] The first British Columbia case that appears to have considered the issue is *Gore Mutual Insurance Company v. Paterson* (30 September 2011), Vancouver S110676 (B.C.S.C.) [*Paterson*], where Justice Leask awarded special costs. His brief reasons are as follows:

> [16] On the questions of cost, counsel for the insured referred me to several authorities, two cases from Ontario and one from Newfoundland, on somewhat analogous circumstances the courts have ruled that insured persons entitled to solicitor-client costs. Based on Mr. Hilliker's submission and the very fair reply made by Mr. McKnight, I am awarding Mr. Paterson what are now called special costs.

[83] In *Williams v. Canales*, 2016 BCSC 1811, Mr. Justice Blok reviewed the Ontario and Newfoundland authorities. He concluded the issue had not been dealt with in a binding manner in British Columbia and considered it a matter of first impression. He noted that in British Columbia, special costs were not limited to cases involving reprehensible conduct by an unsuccessful party that is deserving of reproof or rebuke. He stated he was persuaded by the reasoning in *Reed* and awarded the insured special costs.

[84] The question was again considered in *Tanious v. The Empire Life Insurance Company*, 2017 BCSC 85. The facts in *Tanious* were somewhat different. *Tanious* was not a claim arising out of a duty to defend, but rather under a claim for payment under a disability policy. There were no allegations of bad faith. In the trial reasons (2016 BCSC 110), Mr. Justice N. Brown awarded the plaintiff $15,000 in aggravated damages for mental distress, loss of peace of mind and of dignity as a person caused by the insurers' refusal to pay benefits to which the plaintiff was entitled.

[85] In his subsequent cost decision the judge reviewed the various authorities in detail. He held that in the particular circumstances of the case, it was fitting that he exercise his discretion by making an award for full indemnification in order to put the plaintiff in the position she would have been had she not been forced to retain counsel to enforce the contract through litigation. His reasons for making the award were based on the following considerations:

> [155] I am satisfied that in the particular circumstances of this case it is fitting that I exercise my discretion in making an award for full indemnification in order to put the plaintiff in the position she would have been in had she not been forced to retain counsel and enforce the contract through litigation. I come to this conclusion based on the following considerations:
>
> a) The plaintiff had a disability insurance contract with the defendant, the purpose of which was to provide her, in the event of a disability that rendered her unable to work, with a subsistence level amount of income with which to feed, clothe, and house herself while unable to work; and to provide her with the peace of mind that flows from the coverage.
>
> b) The plaintiff did in fact suffer a disability which rendered her unable to work and triggered the defendant's obligation to pay those subsistence level benefits, which it did not do.
>
> c) The plaintiff was required to commence litigation against the defendant or else forfeit the benefits to which she was entitled under the contract. The significant challenges caused by the plaintiff's disability also necessitated (and complicated) the assistance of counsel for virtually every aspect of that litigation.
>
> d) The legal costs the plaintiff reasonably incurred in obtaining her contractual benefits in this case substantially deprived her of the full benefit of the contract, leaving her with less than the necessary amount of income on which to obtain the basic necessities of food, clothing, and shelter.
>
> e) The coverage issue in the case at bar is not fundamentally different in principle than the coverage issues in third party proceedings cases where courts have awarded special or solicitor and client costs in addition to the insurance benefits payable under the terms of the policy. In both situations, fulfilment of the intention of the insurance coverage is the driving consideration. There is also case law to support the proposition that full indemnification is appropriate where a plaintiff has been forced to enforce a disability or other type of insurance contract through litigation, and ought to be put in the position they otherwise would have been in had the litigation not been required.

I note that *Tanious* is presently on reserve in this Court.

[86] In *Kane*, Justice Fitzpatrick followed the decisions in *Paterson*, *Williams* and *Tanious*. She awarded costs on a solicitor-and-own-client basis. The chambers judge in this case followed *Kane*.

[87] In *Blue Mountain Log Sales Ltd. v. Lloyd's Underwriters*, 2017 BCSC 1872, Justice Walker cited the decisions in *Tanious*, *Williams* and *Kane* and held that he was bound to follow those decisions. He ordered special costs in favour of the insured. I note that the *Blue Mountain* decision is presently on reserve in this Court. I am advised that the cost aspect of the decision was not subject to appeal.

[88] West Van submits that based on these authorities, it should be taken as settled law that it is entitled to be fully indemnified for the costs it has incurred in enforcing the duty to defend.

iv) Additional Authorities

[89] In *Hwang v. Axa Pacific Insurance Co*. (1998), 53 B.C.L.R. (3d) 119 (S.C.), rev'd on other grounds, 2001 BCCA 410, the judge, having held that the defendant had a duty to defend the plaintiff, refused to award special costs, noting that such costs require egregious conduct.

[90] In *Axa Pacific Insurance Co. v. Gilford Marquis Towers Ltd*., 2000 BCSC 197, *Precision Plating Ltd. v. Axa Pacific Insurance Company*, 2014 BCSC 602, rev'd on other grounds, 2015 BCCA 277, leave to appeal ref'd [2015] S.C.C.A. No. 317, *Gill v. Ivanhoe Cambridge I Inc./Ivanhoe Cambridge I Inc.*, 2016 BCSC 252, rev'd on other grounds, 2017 BCCA 351, and *Economical Mutual Insurance Company v. Optimum West Insurance Company Inc.*, 2018 BCSC 1116, judges awarded party and party costs after finding an insurer had a duty to defend. Similarly, in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, and *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30, leave to appeal ref'd [2015] S.C.C.A. No. 136, both of which like *Tanious* concerned a claim under a disability policy, the court awarded

party and party costs. All of the above cases post-date *Reed*. In none of the cases did the successful insureds seek special costs. The fact that the insureds did not even seek special costs strongly suggests that the law is not as settled as West Van would maintain.

[91] In *Coventree Inc. v. Lloyd's Syndicate 1211 (Millenium Syndicate) (Costs)*, 2011 ONSC 6660, varied on other grounds, 2012 ONCA 341, leave to appeal ref'd [2012] S.C.C.A. No. 276, an insured was successful in an application for a declaration as to rights under an insurance contract. The insured, relying on *Reed* and *Godonoaga*, then sought costs on a full indemnity scale. It submitted that only a full indemnity would put the insured in the same position it would have been in had the contract of insurance been performed. The judge rejected the submission. He reasoned that there "was a legitimate question with respect to the interpretation of the policy that the insurer should be able [to] raise without incurring an exposure to substantial indemnity costs" (at para. 4). On appeal the court found no reason to interfere with the application judge's findings on costs (at para. 49).

[92] The Ontario Court of Appeal in *Hector v. Piazza*, 2012 ONCA 26, dismissed an appeal in which the insurer had been ordered to defend a claim. It awarded costs on a partial indemnity basis.

[93] In *Godwin v. Desjardins Financial Security Investments Inc.,* 2018 BCSC 690, leave to appeal ref'd 2018 BCCA 278, the successful plaintiff in a disability claim sought an award of special costs on the basis of the decision in *Tanious*. Mr. Justice Saunders refused. He noted an order of special costs normally requires a finding of reprehensible conduct, of which there was none in *Tanious*, but that parties can contractually agree to special costs. He said absent a specific or implied contractual term such an award could not be made. He reasoned:

> [15] Given these governing authorities, in my respectful view a finding that special costs are necessary in order to fulfill the intentions of the parties to a contract of insurance that the assured be fully indemnified against loss, could only have a juridical basis in a finding of an implied contractual term to that effect. Such a finding would require not simply a determination of what contractual terms would be agreed upon by reasonable parties, but an inquiry

> into the actual intentions of the parties themselves: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 SCR 619, at paras. 27-29. No such implied term analysis was undertaken in *Tanious*.

v) Analysis

[94] The question for determination is whether an award of special costs in the absence of conduct deserving of rebuke *in* a duty to defend claim is consistent with the guiding principles upon which costs awards are made. Most of the cases that have made such awards have spent little time considering this question.

[95] I would at the outset note that in the British Columbia cases the judges in *Paterson*, *Williams* and *Blue Mountain* awarded special costs. The judges in the case at bar, *Tanious* and *Kane* awarded either a full indemnity or costs on a solicitor-and-own-client basis. As noted in para. 64 above, a judge cannot impose costs sanctions that are not authorized by the *Rules.* Full indemnity or solicitor-and-own-client costs awards are not authorized by the *Rules* and accordingly the costs awards in this case, *Kane* and *Tanious* are, at least to that extent, wrong in principle, as is West Van's submission that it is entitled to receive a full indemnity. The matter for determination is whether the insureds are entitled to an award of special costs.

[96] It is difficult from the authorities to understand the principled basis upon which the full indemnity or cost awards have been made against insurers. In *Reed*, the court suggests that an award of solicitor-and-client costs is justified on a contractual basis. What is troubling about that analysis is that the insurance contract in the case at bar is silent in regard to the cost of enforcing coverage. The contract is limited to the cost of defending an underlying action against an insured. The Economical policies contain the following provisions:

> **1. Insuring Agreement**
>
> We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damages" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A, B and D …We will have

> the right and duty to defend any "action" seeking those compensatory damages but:
>
> 3) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements...
>
> [Emphasis added.]

[97] Under the heading SUPPLEMENTARY PAYMENTS – COVERAGES A, B and D, is found the following:

> We will pay, with respect to any claim or "action" we defend:
>
> a. All expenses we incur.
>
> b. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
>
> c. All reasonable expenses incurred by the Insured at our request to assist us in the investigation or defence of the claim or "action", including actual loss of earnings up to $100 a day because of time off from work.
>
> d. All costs taxed against the Insured in the "action" and any interest accruing after entry of judgment upon that part of the judgment which is within the applicable limit of insurance.
>
> [Emphasis added.]

[98] The Intact policies contain similar but not identical wording. Similar language is also found in the policy considered in *Crosbie*.

[99] The amounts that the insurer has agreed to pay are clearly set out in the policy. The insurer agrees to pay the costs to defend until the limits of the policy are exhausted. The language in the policy cannot be extended to cover legal fees and expenses the insured may incur in attempting to enforce its contractual right to coverage.

[100] There is in the context of the insuring agreement no basis to imply a term that the insurer will pay special costs if it unsuccessfully resists a claim under the policy. In *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 S.C.R. 619, the Supreme Court of Canada set out the principles governing implied terms:

> [27] The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general

> principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1008, *per* McLachlin J.
>
> …
>
> [29] As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.
>
> [Emphasis in original.]

[101] There is no custom in the insurance industry by which insurers are expected to pay the full indemnity costs of a claimant enforcing coverage. An implied term is not necessary to give business efficacy to the contract. The terms of the contract are meticulously drafted. The contract sets out in precise detail what is and what is not covered. If the parties intended that the insurer would pay the costs of enforcing the insurance contract, the contract surely would have said so.

[102] The Newfoundland Court of Appeal in *Crosbie* did recognize the requirement to pay solicitor-and-client costs did not arise from a specific provision in the insurance contract. It held, rather, that the duty arose from the unique nature of that contract. Other cases have also suggested that different rules should apply to insurance contracts because of the special nature of such contracts.

[103] The law clearly recognizes the special nature of insurance contracts. A contract of insurance is one of *uberrimae fidei* — utmost or overriding good faith. An implied term of good faith and fair dealing is imported into every insurance contract: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.

[104] The obligation of good faith is separate from the obligation to compensate the insured for a loss under the policy, and a breach of the contractual duty of good faith constitutes an independent actionable wrong which can lead to an award of damages. If an insurer's failure to defend an insured or otherwise honour the terms of the insurance contract constitutes a breach of the duty of good faith, remedies are available to compensate the insured for any loss that may be forthcoming. Breach of an insurance agreement may also give rise to aggravated damages. This was the outcome in *Fidler* and *C.P*. Such an award was also made in *Tanious* and *Godwin*.

[105] The special nature of insurance contracts however does not justify the creation of a different costs regime governing all insurance claimants. This question was canvassed at some length in a recent article in the Canadian Journal of Insurance Law: James Steele, "Deterrence not Damages: the Punitive Rationale for Solicitor-Client Costs" (2018) 36 Can J Ins L 1. As detailed by Mr. Steele, there is no principled reason why a different scale of costs should apply to insureds who successfully enforce a contractual obligation than any other litigant who is forced to bring an action in order to obtain relief. Many such plaintiffs are surely as sympathetic. Why, for example, should an insured receive a full or near indemnity while the plaintiff in a personal injury lawsuit finds the award eroded because he or she is only entitled to a partial indemnity.

[106] In this regard, it is also important to recall the caution in *Marchen* that costs are not a remedy for breach of contract.

[107] Party and party costs are designed to only partially indemnify a litigant. While party and party costs offer some compensation to the successful party, they avoid unduly discouraging the bringing of legitimate proceedings out of fear of the potential costs consequences. An insurer faced with a difficult question as to whether a duty

to defend arises should be able to raise that defence without automatically incurring an exposure to special costs.

[108] The main purpose of special costs is to deter misconduct. If special costs are to be awarded regardless of conduct, there is no way to punish those unsuccessful parties who subject a successful party to an abusive proceeding. If a losing party faces full indemnity costs irrespective of their litigation conduct, the incentive for good conduct is correspondingly diminished.

[109] There is, in my respectful opinion, no principled reason to award costs in a duty to defend case in a manner different than other litigation. There already exist other suitable mechanisms to censure an insurer's wrongful conduct: *Smithies Holdings* at para. 134. If the insurer has breached its duty of good faith, or conducts itself in a manner that is worthy of rebuke, it will be sanctioned. If not, an insurer facing a duty to defend claim should be treated no differently than any other litigant who may breach a contract.

[110] With respect, the Supreme Court decisions in *Paterson*, *Williams*, *Kane* and *Blue Mountain* were all wrongly decided on the cost issue and should not be followed. They are not consistent with the *Rules* and the principles that have long governed cost awards. I say nothing further about the decision in *Tanious,* which is presently on reserve in this Court.

CONCLUSION

[111] In the result therefore, I would allow the appeal, set aside the order of the chambers judge and dismiss the action.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Dickson"

APPENDIX A

Intact and Economical Insurance Policies

Insurance Provider	Coverage Period	Wording of Exclusionary Clause
Intact Insurance Company	June 18, 1998 – June 18, 1999	**ENVIRONMENTAL LIABILITY EXCLUSION** It is agreed that this policy does not apply to: (i) "Bodily Injury" or "Property Damage" arising out of the actual, alleged or threatened discharge, disposal, release or escape of pollutants. 1) At or from premises owned, rented or occupied by an Insured; … 4) At or from any site or location on which an Insured or any contractors or subcontractors working directly or indirectly on behalf of an Insured are performing operations: A) If the pollutants are brought on or to the site or location in connection with such operations; … (ii) Any loss, cost or expense arising out of any governmental direction or request that an insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants. (iii) Fines, penalties, punitive or exemplary damages arising directly or indirectly out of the discharge, dispersal, release or escape of any pollutants. "POLLUTANTS" means any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste ….
Intact Insurance Company	June 18, 1999 – June 18, 2000	**COMMON EXCLUSIONS–COVERAGES A, B, C, D and E** This insurance does not apply to: **1. Pollution Liability** a. "Bodily injury" or "property damage" or "personal injury" or "advertising liability" arising out of the actual, alleged, potential or threatened spill, discharge, emission, seepage, leakage, migration, release or escape of pollutants: (1) At, or from any premises, site or location which is or was at any time owned or occupied by, or rented or

		loaned to any, Insured; … (4) At or from any premises, site, or location on which any Insured or any contractors or subcontractors working directly or indirectly on any Insured's behalf are performing operations; (a) if the pollutants are brought on or to the premises, site or location in connection with such operations by such Insured, contractor, or subcontractor; or … b. Any loss, cost or expense arising out of any request, demand or order that any Insured or others test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize or in any way respond to, or assess the effect of pollutants unless such loss, cost or expense is consequent upon "bodily injury" or "property damage' covered by this policy. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, odour, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.
Intact Insurance Company	June 18, 2000 – June 18, 2001	Same as 1999–2000 policy.
Intact Insurance Company	June 18, 2001 – June 18, 2002	Same as 2000–2001 policy.
Economical Mutual Insurance Company	June 18, 2002 – June 18, 2003	**COMMON EXCLUSIONS - COVERAGES A, B, C AND D** This insurance does not apply to: **1. Pollution Liability** a. "Bodily Injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants: 1) At or from premises owned, rented or occupied by an Insured; … 4) At or from any site or location on which an Insured or any contractors or subcontractors working directly or indirectly on behalf of an Insured are performing operations:

		(a) If the pollutants are brought on or to the site or location in connection with such operations; … b. Any loss, cost or expense arising out of any governmental direction or request that an Insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
Economical Mutual Insurance Company	June 18, 2003 – June 18, 2004	Same as 2002–2003 policy.
Economical Mutual Insurance Company	June 18, 2004 – June 18, 2005	Same as 2003–2004 policy.
Economical Mutual Insurance Company	June 18, 2005 – June 18, 2006	Same as 2004–2005 policy.
Economical Mutual Insurance Company	June 18, 2006 – June 18, 2007	**COMMON EXCLUSIONS–COVERAGES A, B, C AND D** This insurance does not apply to: **1. Pollution liability** A. "Bodily injury", "property damage" or "personal Injury" arising out of the actual, alleged or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of "pollutants": (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any Insured; … (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such Insured, contractor or subcontractor … …

		B. Any loss, cost or expense arising out of any: (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up. remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or (b) Claim or "action" by or on behalf of a governmental authority for "compensatory damages" because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants". However, this Section … does not apply to liability for "compensatory damages" because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "action" by or on behalf of a governmental authority. … "Pollutant" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, odour, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
Economical Mutual Insurance Company	June 18, 2007 – June 18, 2008	Same as 2006–2007 policy.
Economical Mutual Insurance Company	June 18, 2008 – June 18, 2009	Same as 2007–2008 policy.
Economical Mutual Insurance Company	June 18, 2009 – June 18, 2010	Same as 2008–2009 policy.
Economical Mutual Insurance Company	June 18, 2010 – June 18, 2011	Same as 2009–2010 policy.
Economical Mutual Insurance Company	June 18, 2011 – June 18, 2012	Same as 2010–2011 policy.

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Court of Appeal for British Columbia

BETWEEN:

IRENE HELEN YOUNG

PETITIONER (RESPONDENT)

AND:

JAMES KAM CHEN YOUNG

RESPONDENT (APPELLANT)

AND:

W. GLEN HOW

APPELLANT

AND:

BURNABY UNIT OF THE NEW WESTMINSTER CONGREGATION OF JEHOVAH'S WITNESSES

APPELLANT

REASONS FOR JUDGMENT

OF THE HONOURABLE

MADAM JUSTICE SOUTHIN

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Wood

Counsel for the Appellant,
James Kam Chen Young: W. Glen How, Esq.
Miss Joyce L. Dassonville

	Miss Sarah E. Mott-Trille
Counsel for the Appellants, W. Glen How and Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses:	Gordon N. Turriff, Esq. M. Ian Giroday, Esq.
Counsel for the Respondent, Irene Helen Young:	Lorne N. MacLean, Esq. David G.M. Nicol, Esq. Miss Linda A. Wong
Counsel for the Law Society of British Columbia, Intervenor in Appeal CA011865	Robert H. Guile, Esq., Q.C. Miss Joanne R. Lysyk
Place and Dates Heard:	Vancouver, British Columbia 13th-17th August, 1990
Place and Date of Judgment	Vancouver, British Columbia 25th October, 1990

I. INTRODUCTION

On the 11th December, 1989, in a proceeding under the Divorce Act, 1985 of Canada and the Family Relations Act, R.S.B.C. 1979, c. 121, the Supreme Court of British Columbia pronounced a judgment, the operative parts of which were as follows:

> [1] THIS COURT ORDERS that subject to Section 12 of the Divorce Act, the Petitioner, Irene Helen Young, and the Respondent, James Kam Chen Young, who were married at Vancouver, British Columbia on July 27, 1974 are divorced from each other, the divorce to take effect on the 31st day after the date hereof.
>
> [2] THIS COURT FURTHER ORDERS that the Petitioner, Irene Helen Young, shall have

sole custody and sole guardianship of the three infant children of the marriage, namely Adrienne Mun-Lai Young, born November 6, 1978, Natalie Mun-Kai Young, born September 11, 1980, and Erika Mun-Yee Young, born August 4, 1987.

[3] THIS COURT FURTHER ORDERS that the Petitioner will have the sole responsibility for the religious upbringing, health care and education of the three infant children of the marriage, namely Adrienne Mun-Lai Young, born November 6, 1978, Natalie Mun-Kai Young, born September 11, 1980, and Erika Mun-Yee Young, born August 4, 1987.

[4] THIS COURT FURTHER ORDERS that the Respondent shall have defined access to the three infant children of the marriage as follows:

a) On evening per week and one day each weekend;

b) Overnight visits be permitted upon the request of the children and in agreement by the Petitioner and Respondent;

c) Seven consecutive days during the summer vacation and five consecutive days during the Christmas seasons to be agreed upon by the Petitioner and Respondent.

[5] THIS COURT FURTHER ORDERS that the defined access by the Respondent to the three infant children of the marriage shall be subject to the following terms:

a) The Respondent shall not discuss the Jehovah's Witnesses religion with the children and shall not take any of the children to any religious services, canvassing or meetings without the written consent of the Petitioner and shall not expose the children to the religious discussions with a

third party or parties without the written consent of the Petitioner.

[6] THIS COURT FURTHER ORDERS that neither party shall make any adverse remarks with reference to the religious beliefs of the other party.

[7] THIS COURT FURTHER ORDERS that the Respondent is enjoined from preventing any of the three infant children of the marriage from having blood transfusions in the event blood transfusions are required.

[8] THIS COURT FURTHER ORDERS that the Respondent shall pay maintenance to the Petitioner for the Petitioner's benefit in the sum of $1,400.00 per month commencing January 1, 1990 and a like sum on the first day of each and every month thereafter.

[9] THIS COURT FURTHER ORDERS that the maintenance payable by the Respondent to the Petitioner for the Petitioner's benefit shall be reviewed on or near November 21, 1993.

[10] THIS COURT FURTHER ORDERS that the Respondent shall pay maintenance to the Petitioner for the benefit of the three infant children of the marriage in the amount of $400.00 per month for each of the three children commencing on January 1, 1990 and a like sum on the first day of each and every month thereafter.

[11] THIS COURT FURTHER ORDERS AND DECLARES that the following are family assets pursuant to Part 3 of the Family Relations Act, R.S.B.C. 1979:

a) The matrimonial home located at 10620 Anglesea Drive, Richmond, B.C. registered in the joint names of the Petitioner and Respondent;

b) The contents of the matrimonial residence including all

contents from the matrimonial residence that are in the possession of the Petitioner and Respondent;

c)The jewellery in the possession of the Petitioner and Respondent;

d)The 1977 Monte Carlo automobile.

[12] THIS COURT FURTHER ORDERS AND DECLARES that the R.R.S.P. registered in the name of the Respondent in the sum of $7,500.00 is not a family asset.

[13] THIS COURT FURTHER ORDERS AND DECLARES that the following are family debts pursuant to Part 3 of the Family Relations Act:

a)A debt owed by the Petitioner to the Petitioner's mother, Bernice Quintal, in the sum of $27,586.57 incurred after separation;

b)The sum of approximately $80,000.00 owed by the Petitioner and Respondent to Mrs. Bernice Quintal.

[14] THIS COURT FURTHER ORDERS that the jewellery owned by the Petitioner and Respondent shall be divided according to the proposal made by the Respondent; BY CONSENT.

[15] THIS COURT FURTHER ORDERS that the contents shall be divided as per the agreement reached between the Petitioner and Respondent; BY CONSENT.

[16] THIS COURT FURTHER ORDERS that the Petitioner and the Respondent are each entitled to a one-half interest in the matrimonial residence.

[17] THIS COURT FURTHER ORDERS that the Respondent's one-half interest in and to the matrimonial home shall be transferred forthwith to the Petitioner, provided that set off against the Respondent's

one-half interest will be the following:

a)any costs ordered payable by the Respondent to the Petitioner, that have already been taxed;

b)the sum of $13,793.28 being one-half the debt incurred by the Petitioner from Bernice Quintal after separation;

c)one-half the value of the 1977 Monte Carlo when that amount is ascertained;

d)arrears of maintenance as at the date of entry of the Judgment.

[18] THIS COURT FURTHER ORDERS that the balance of the Respondent's equity in the matrimonial home shall be transferred to the Petitioner in the form of lump sum maintenance.

[19] THIS COURT FURTHER ORDERS that the Respondent shall have sole ownership of the 1977 Monte Carlo, and further that the Petitioner's interest in the automobile shall be transferred to the Respondent.

[20] THIS COURT FURTHER ORDERS that the Petitioner and Respondent shall be liable each as to one-half to pay back the approximately $80,000.00 owing to Bernice Quintal.

[21] THIS COURT FURTHER ORDERS that the Respondent shall have sole ownership of the R.R.S.P. in the amount of $7,500.00 present registered in his name.

[22] THIS COURT FURTHER ORDERS AND DECLARES that the award of sole custody and guardianship of the three infant children to the Petitioner; including sole responsibility for the religious upbringing, health care and education of the said children; does not infringe the Respondent's right, pursuant to the Canadian Charter of Rights and Freedoms, to freedom of religion.

[23] THIS COURT FURTHER ORDERS AND DECLARES that the restriction placed upon the Respondent's exercise of access, being:

a)that the Respondent shall not discuss the Jehovah's Witness religion with the children and shall not take any of the children to any religious services, canvassing or meetings, without the written consent of the Petitioner and shall not expose the children to religious discussions with a third party or parties without the written consent of the Petitioner;

b)that the Respondent is enjoined from preventing any of the three infant children of the marriage from having blood transfusions in the event blood transfusions are required;

c)and that the Respondent shall not make any adverse remarks with respect to the religious beliefs of the Petitioner;

does not infringe the Respondent's right, pursuant to the Canadian Charter of Rights and Freedoms, to freedom of religion.

[24] THIS COURT FURTHER ORDERS that the costs of the entire action on a solicitor/client basis as set out in the Reasons for Judgment shall be awarded against the Respondent, James Kam Chen Young, the solicitor for the Respondent, W. Glen How, Q.C., and the "Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses".

[I have numbered these paragraphs for convenience.]

Paragraphs 1, 4, 8, 9, 10, 11, 12, 14, 15, 19, and 21 are not in issue before us.

Mr. Young appeals against all the other provisions save those portions of para. 24 awarding costs against Mr. How and the Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses.

For his part, Mr. How, who was counsel at the trial and counsel in some, but not all, of the interlocutory proceedings below, appeals, supported by the Law Society in the person of the Treasurer, Mr. Guile, against the award by para. 24 of solicitor-client costs against him.

At the hearing of the appeal, the Watch Tower Bible & Tract Society was, by consent, substituted in the judgment for the Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses, which had sought and failed to obtain leave to appeal from the order as to costs against it The Society seeks by way of review an order of the court giving it leave to appeal and, if leave be given, an order that the judgment below awarding costs against it be set aside.

II. MR. YOUNG'S APPEAL

A. The Orders Sought

Mr. Young seeks, as set out in his factum, these orders:

> 1. An Order that Mr. and Mrs. Young have joint guardianship of the three infant children of the marriage;
>
> 2. An Order that Mr. Young have reasonable and liberal access to the said three children with no restrictions;
>
> * * *
>
> 4. A Declaration that Mrs. Young's demands, as set out in paragraph C of her Motion and paragraph 24 of the Petition for Divorce, filed July 12, 1988, should have been struck from the record as violative of Charter rights of Mr. Young and children, as religious discrimination, as scandalous, frivolous, and vexatious, and as an abuse of the process of the court, pursuant to British Columbia Rules of Court, Rule 19(24);
>
> 5. A Declaration that the Orders of the Honourable Judge Scarth, pronounced 16 August 1988 and 17 October 1988, restricting Mr. Young's familial access, violated the rights of the children and Mr. Young under the Charter, pursuant to ss. 2(a), (b), (d), 7, 15(1), 27, and the Constitution Act, 1982, s. 52(1);
>
> 6. A Declaration that the Order of the Court below, pronounced 11 December 1989, restricting Mr. Young's familial access, violates the rights of the children and Mr. Young under the Charter, pursuant to ss. 2(a), (b), (d), 7, 15(1), 27, and the Constitution Act, 1982, s. 52(1);
>
> 7. A Declaration that ss. 16(1), (2),

(6), (8), and (10) of the Divorce Act, 1985, on their face and as construed and applied, are void; or, in the alternative, that the judicial discretion under said sections must be exercised in a manner compatible with the fulfilment of the constitutional rights of Mr. Young and the children;

8. An Order to vary the Order of the Trial Judge, pronounced 11 December 1989, to set aside the terms relating to . . . lump-sum maintenance of Mrs. Young, debts of Cedric's Jewellers Ltd., maintenance arrears, division of family assets and family debts, and transfer of the matrimonial home to Mrs. Young, and to substitute the following:

(a) a Declaration that the monies owed from Cedric's Jewellers Ltd. to Bernice Quintal are not family debts;

(b) an Order for the partition and sale of the matrimonial home, with joint conduct of sale, provided that Mr. Young have the sole authority to list the property for sale, and that the property remain listed until sold;

(c) an Order that the proceedings [sic] of the sale of the matrimonial home be used to pay all remaining family debts and to reimburse Mr. Young for family debts previously paid with the net equity to be divided equally between the parties;

(d) an Order that all arrears of maintenance to date of Judgment, including arrears both before and after the trial, be cancelled;

9. An Order to vary the Order of the Trial Court, pronounced 11 December 1989, to set aside the award of costs on a solicitor and client basis as against Mr.

> Young; and to substitute the following:
>
> (a)an Order that an award of costs be made as against Mrs. Young; or
>
> (b)an Order that each party pay its own costs;
>
> [The orders sought by paras. 2 and 3 were abandoned.]

The "demands" referred to in para. 4 were in these terms:

The Motion

> C. An Order that the Respondent have specified access as he has requested in the past 15 months since separation, being one visit per month, and that during access the Respondent not attempt to inculcate the three infant children with the teachings of Jehovah's Witness faith; nor shall take them to any functions of the church or have in the presence of the children any one of the Jehovah's Witness faith;

The Petition

> 24. The Petitioner is willing for the Respondent spouse to have access as has occurred in the last year, namely one visit per month, provided that he not attempt to convert the children to the Jehovah's Witness religion which he has recently adopted.

The order referred to in para. 5 (I am able to find

only one in the appeal book although para. 5 speaks of "Orders") was in part this:

> THIS COURT FURTHER ORDERS the following restrictions and terms on the said access to the Respondent:
>
> a)the Respondent will not take the said children of the marriage to the Respondent's church without the Petitioner's consent and if the Petitioner withholds consent, the Respondent may make application to this court;
>
> b)the Respondent will not suggest that the three children of the marriage will have to separate from the Petitioner if she does not convert to the Jehovah's Witnesses faith, or that the Petitioner will be punished by God for failing to adhere to that faith;
>
> c)the Respondent will not deprecate the Petitioner's religion in the presence of the three infant children of the marriage;
>
> d)the Respondent is enjoined from preventing the said infants from having blood transfusions in the event blood transfusions are required and the Petitioner shall be solely responsible for all health care decisions and choices relative to the said infant children of the marriage.
>
> THIS COURT FURTHER ORDERS that the Petitioner shall not deprecate the Respondent's religion, in the presence of the infant children of the marriage.

At the opening of the trial, the appellant brought a motion seeking orders essentially in the same terms as those sought by paras. 4, 5 and 7. Before the promulgation of the Canadian Charter of Rights and Freedoms, such an application would have been wholly without foundation in law as well as irregular under the Rules of Court.

The learned trial judge declined to determine the constitutional issues at that stage saying:

> THE COURT: I am going to take this approach. I have got your arguments noted, Mr. How, and certainly you will be given every opportunity and ultimately to argue all these points. I make that position clear but, at this stage, I think it's best that we get on with this case and try to dispose of it as quickly as possible to everybody's benefit but I don't want any misinterpretation that somehow or other I am getting rid of your arguments at this stage. No, I am not, Mr. How. you will be able to present them but I think they have to be presented in -- in a -- not in the vacuum that we are attempting at the moment. All Right? All right.
>
> MR. HOW:Only want to say that, since it's -- since this was involved in the pleadings I thought it proper to raise them at the beginning.
>
> THE COURT: Yes, and I have got that noted.

B.The Questions Arising on Paras. 2-7 inclusive and 22 and 23 of the Judgment

The facts of this case so far as they relate to these issues are relatively simple.

As the judgment discloses, Mr. and Mrs. Young were married in 1974 and of their union were born three little girls now aged eleven, ten and three.

Mr. and Mrs. Young separated in 1987, were briefly reconciled in the summer of that year and separated finally in August, 1987. Some years after the marriage, Mr. Young became a member of the Jehovah's Witnesses. Before then, neither party had given much thought to questions of religion and the children had not received anything much, if at all, in the way of religious education in the sense of being sent to Sunday School or following any regular family programme of religious instruction. Mrs. Young wanted no part of her husband's new found faith, nor did she wish the children to have any part of it. She has maintained that attitude to the present time.

Her attitude was characterized before us as "intolerant". I do not call it so because what one man may well call lack of tolerance, another will call deep conviction. It is the same difficulty with words as is exemplified by the old saw that statesmen are the leaders of

my party and politicians are the leaders of yours.

I prefer to say only that we have here a clash between opposing opinions neither of which can be scientifically demonstrated to be either wholly true or wholly false.

On 12th July, 1988, Mrs. Young brought her petition for divorce and at the same time launched a motion for interim custody of the three little girls. In that motion, she sought, as I have indicated, an order substantially the same as the order which is now clause 5 of the judgment. I do not propose to recount all the interlocutory proceedings concerning the children. Suffice it to say, that when the appeal from the order of the 16th August reached this Court on 30th May, 1989, I said, delivering the judgment of the Court:

> In my view, all the matters which have been alleged by counsel for the husband, most eloquently as one would expect, are matters which should be addressed by him to the learned presiding judge at the trial. Interim applications, and as I have said these matters have been treated by the parties as interim applications and these are therefore appeals from interim orders, are not suitable for the resolution on a permanent basis of issues of the kind raised here.
>
> It has been suggested that the interim orders will prejudice the fair trial of the action. I do not accept that. In my view the interim orders do not prejudice the trial either in matters

> of law, including matters of the Charter or in matters of fact. Nothing has yet been decided by the orders which have been made. There is no aspect to them of res judicata or issue estoppel. The learned trial judge, I am sure, whoever it may be, will bring to the matter an open mind and all the issues can then be resolved according to law and according to the Constitution.

On these issues, the learned judge below said in her reasons for the judgment now being appealed (24 R.F.L. (3d) 193 at 204-5):

> Initially when the trial commenced I stated very clearly that the religious beliefs and practices of the parties would not be on trial, that I would not choose one religion over the other, that I would not hear evidence that would force me into the position that such a preference and choice would have to be made. That would not be necessary to resolve the matter. I stated clearly and unequivocally that Mr. Young had the right to pursue whatever religion he chose, that he indeed had that right under the Charter of Rights. However that was not the issue. The issue simply put was who gets custody and guardianship of the children and what flows from that. Is the "right to determine a child's education, health care and religion vested in the parent entrusted with the custody and guardianship of the child" as enunciated by Scarth, Co.Ct J. in the case at bar and several other decisions?

After referring then to several decisions, the learned judge adopted the judgment of the Saskatchewan Court of Appeal in Brown v. Brown (1983), 39 R.F.L. (2d) 396, a

decision which, with respect, I do not find entirely satisfactory because I do not think it comes to grips with the question of whose religious freedom is being talked about in these disputes between parents over the religious upbringing of children.

She adopted as "totally applicable to the case at bar" a passage from the judgment of the Queensland Supreme Court in Kiorgaard v. Kiorgaard and Lange , [1967] Q.L.R. 162 at 167:

> The placing of a child in the custody of one parent and in effect giving that parent the sole responsibility for the religious upbringing of that child to the exclusion of the other parent involves no constitutional infringement. The parent so restrained is not in any way prevented from practising his or her own religion. When the child attains some degree of maturity he or she can make his or her own choice but in the meanwhile the Court is doing no more than endeavouring to ensure that the child is protected from actions, which, however well intentioned, are considered by the Court to be contrary to the best interests of the child.

When Hoare, J., with whom Sheehy, S.P.J. and Wanstall, J. concurred, spoke of "constitutional infringement" he was addressing an argument that an order concerning religious matters, similar in terms to that made here, contravened s. 116 of the Commonwealth Constitution:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

In the result, Madam Justice Proudfoot answered the question she posed "Yes".

The learned judge's determination having been appealed, we must now resolve the issues "according to law and according to the Constitution".

The relevant statutory provisions are these:

By the Divorce Act, 1985:

> 2. (1) In this Act,
>
> . . .
>
> "custody" includes care, upbringing and any other incident of custody;
>
> * * *
>
> 16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
>
> * * *

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

* * *

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Family Relations Act, 1978:

24. (1) Where making, varying, or rescinding an order under this Part, a court shall give paramount consideration to the best interests of the child and, in assessing these interests, shall consider these factors:

(a) the health and emotional well being of the child including any special needs for care and treatment;

(b) where appropriate, the views of the child;

(c) the love, affection and similar ties that exist between the child and other persons;

(d) education and training for the child; and

(e) the capacity of each person to whom guardianship, custody, or access rights and duties may be granted to exercise these rights and duties adequately;

and give emphasis to each factor according to the child's needs and circumstances.

. . .

25. (1) A guardian is both guardian of the person of the child and guardian of the estate of the child.

(2) Subject to this Act, a guardian of the estate of a child has all powers over the estate of the child as a guardian appointed by will or otherwise had on May 19, 1917 in England under Acts 12, Charles the Second, chapter 24, and 49 and 50 Victoria, chapter 27, section 4.

(3) Subject to this Act, a guardian of the person of a child has all powers over the person of the child as a guardian appointed by will or otherwise had on May 19, 1917 in England under Acts 12, Charles the Second, chapter 24, and 49 and 50 Victoria, chapter 27, section 4.

26. References to a guardian in this Division, except in sections 25 and

> 31, apply equally to a guardian of a person of a child or a guardian of the estate of a child.
>
> 27. . . .
>
> (2) Subject to subsection (4), section 28 and section 30, where the father and mother of a child are married to each other and are living separate and apart,
> (a)they are joint guardians of the estate of the child, and
> (b)the one of them who usually has care and control of the child is sole guardian of the person of the child unless a tribunal of competent jurisdiction otherwise orders.
>
> . . .
>
> (4) Where a tribunal of competent jurisdiction makes absolute a decree of divorce and a certificate has been or could be issued under the Divorce Act, 1985 (Canada) stating that the marriage was dissolved, or makes an order for judicial separation, or declares a marriage to be null and void, a person granted custody by order in the proceeding is sole guardian unless a tribunal of competent jurisdiction transfers custody or guardianship to another person.
>
> * * *
>
> 32. A guardian may apply to a court for directions concerning a question affecting the child and the court may make such order in this regard as it considers proper.

Thus, in every issue concerning children, whether it be custody, access or guardianship, the statutory criterion

is "best interests".

I shall have more to say about this distressingly protean concept later.

As Mr. Justice Wood says, the learned trial judge concluded, for all the right reasons, that an order for joint custody was impractical and that Mrs. Young should have custody. There remained then, the issue of access and what restrictions, if any, should be placed upon it.

By the Canadian Charter of Rights and Freedoms:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:
>
> Guarantee of Rights and Freedoms
>
> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> Fundamental Freedoms
>
> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

What effect, if any, does this section have on the

heretofore understood rule that the religious upbringing of a child is for the custodial parent with whose decision the court will not interfere and whose decision the access parent must respect?

In approaching this issue, I have attempted, and I believe succeeded, in considering it as if the dispute were between, on the one hand, a Roman Catholic and, on the other, an Anglican. Whatever the law is, it must be the same whether one of the antagonists adheres to a religious body outside what might be called the mainstream and the other adheres to a denomination thought suitable by the Establishment or the antagonists are both of traditional--albeit philosophically antithetical--denominations. Indeed, the law must be the same if one is an atheist and the other devoutly religious.

The judges have long tried to stay clear of religious disputes between parents and others arguing over the upbringing of a child.

In the course of his judgment in Lyons v. Blenkin, (1820-21) Jacob 245, 37 E.R. 842 at 844, Lord Eldon said on the first hearing: "I disavow any enquiries into the religious opinions of either party." On the second he said (at p. 845, E.R.):

> With the religious tenets of either party I have nothing to do, except so far as the law of the country calls on me to look on some religious opinions as dangerous to society.

And upon the third day in which the matter was mentioned to him, Lord Eldon said (at p. 846, E.R.):

> It is enough to say at present, that when it first came before me upon habeas corpus, I must have decided it on the same principles as a common law judge. After hearing so much about religious principles, it is proper for me to say that I cannot act upon those principles unless they be such as are contrary to the law of the land. The only view in which they are material is, that a father may permit his children to be brought up by other persons of a particular persuasion so as to make it difficult for the Court not to see that the happiness of the children must be affected, if interrupted in their course of education in those principles, and that their father would be the author of that suffering to them.

In In re McGrath (Infants), [1893] 1 Ch. 143 (C.A.), Lindley, L.J. said (at p. 149):

> This Court, judicially administering the law, cannot hold one religion to be better than another.

Although I have referred to the heretofore understood rule, it is necessary, before proceeding to the issues under

the Charter, to determine the effect of the applicable legislation, namely, the Divorce Act, 1985 and the Family Relations Act for it is logically impossible to determine if the legislation is inconsistent with the Charter unless one first determines the effect of the legislation.

For the purpose of the issue before the court, the crucial words are "custody" in the Divorce Act, and "guardian" in the Family Relations Act.

In seeking to determine whether the common understanding to which I have referred is sound in law (apart from the Charter), I have asked myself these questions:

1. Has the Supreme Court of British Columbia ever had or exercised any jurisdiction over the way in which parents, lawfully married and living together bring up their children who are living with them?

2. If not, why not?

3. Was the effect of an order for custody under the Divorce and Matrimonial Causes Act, 1857 to vest all parental powers, rights, and responsibilities in the custodial parent?

4.Whether it was or not, does a custody order under the Divorce Act, 1985, which, by virtue of s. 27(4) of the Family Relations Act makes the custodial parent the sole guardian, so invest the custodial parent?

As to the first and second of these questions (which I ask because the state of the law before a statute gives guidance as to its meaning), I cannot say that my researches have been exhaustive. But I can find no trace of the exercise of any such jurisdiction. That, in constitutional theory, such jurisdiction existed in the Court of Chancery representing the Sovereign who is parens patriae may be true, but, as late as 1883, it was not thought either to exist or be exercisable.

A passage from the speech of Lord Guest in J. v. C., [1969] 1 All E.R. 788 at 805-6, shows the then state of judicial thinking:

> The principle on which the Chancery Court acts is expressed by Lord Cranworth, L.C., in Hope v. Hope [(1854), 4 De G.M. & G. 328 at pp. 344, 345]:
>
> > The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up

> and educated; and according to the principle of our law, the Sovereign, as parens patriae, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects.

After an interval of some years there followed Re Agar-Ellis, Agar-Ellis v. Lascelles [(1883), 24 Ch.D. 317] where strong expressions as to the father's rights as to his child are to be found. Sir Baliol Brett, M.R., said [at p. 328]: "... the Court could not interfere ... except in the utmost need and in the most extreme case." Later he said [at p. 329] that the court "has no right to interfere with the sacred right of a father over his own children" (quoting Bacon, V.-C., in Re Plomley, Vidler v. Collyer [(1882), 47 L.T. 283 at p. 284]. Cotton, L.J. said [at p. 333], that the only cases where the court will interfere with the rights of a father over children are where he has shown by his conduct that he is extremely unfit in any respect to exercise his parental authority and duties as a father. Earlier in his judgment he had spoken [at p. 332] of the court interfering with "the discretion of the father". Bowen, L.J. spoke [at p. 337] of the right of family life being sacred, and referred to Kindersley, V.-C., in Re Curtis [(1859), 28 L.J.Ch. 458] with approval. This passage in the latter case read as follows [at pp. 459-60]:

> This Court does not exercise the jurisdiction in merely considering whether it would be for the benefit of the children that their custody should be with the father or with the mother, or with some other relative, or with strangers, simply because, upon the whole, it would be most for the benefit of the children that there should be that custody. I repudiate all

> such jurisdiction as belonging to this Court. If such a jurisdiction existed, I suspect that the peace of half the families in this country would be disturbed by applications showing, or attempting to shew, what, I am afraid might be shewn in a great many cases, that it was most for the interest of the children that they should be removed from the custody both of the father and of the mother; but happily there is no such jurisdiction. I need not cite cases upon this subject, but I will refer to one which has not been mentioned, with reference to the interference with a father's authority and parental rights as regards his children. I mean the case of Re Fynn [(1848), 2 De G. & Sm. 457] and I cite it merely for the purpose of shewing how the learned judge who decided that case (the present Lord Justice Knight Bruce, then Vice Chancellor) expressed what was the ground of the jurisdiction, the manner of exercising, and the principles on which the Court does exercise, that jurisdiction.

Bowen, L.J., continued [at pp. 337-8]:

> Those are as to the rights of family life. Then we must regard the benefit of the infant; but then it must be remembered that if the words "benefit of the infant" are used in any but the accurate sense it would be a fallacious test to apply to the way the Court exercises its jurisdiction over the infant by way of interference with the father. It is not the

> benefit to the infant as conceived by the Court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.
>
> (emphasis mine)

Those words were written before mothers were, in British Columbia by the Equal Guardianship of Infants Act, 1917, and in the United Kingdom by the Guardianship of Infants' Act, 1925, 15 and 16 Geo. V, c. 5, put on a footing of equality with fathers. To our legislation, I shall advert shortly.

I comment that I agree whole-heartedly with Bowen, L.J. when he says that as a rule parents know much better than courts of justice as to what is best.

The taking of the judicial oath does not invest Her Majesty's judges with the wisdom of Solomon.

In this context, I am reminded of something that happened in British Columbia many years ago. It was the custom of the late Mr. Justice Manson, a man of strong religious conviction, to require the petitioners to whom he had awarded custody of children to remain in court until the

conclusion of the divorce list. Thereupon, he lectured them on the virtues of religious education. On one memorable day, this exchange took place between a petitioner and Mr. Justice Manson:

> Petitioner:Judge, have I my divorce?
> Manson, J.:Yes.
> Petitioner:Judge, do I have custody of my kids?
> Manson, J.:Yes.
> Petitioner:In that case, Judge, you stick to judging and I'll raise my kids.

Whereupon, the petitioner departed the courtroom.

The significance of the judgment of Vice-Chancellor Kindersley lies in its being essentially contemporaneous with the Divorce and Matrimonial Causes Act (1857), 20 & 21 Vict., c. 85, which became part of the law of British Columbia by virtue of the introduction of English law to this Province on the 19th November, 1858. By s. 20 of that Statute:

> In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.

[Reproduced in R.S.B.C. 1948, c. 97.]

I digress here to point out that although English law came to British Columbia in 1858, the Supreme Court of British Columbia has never purported, so far as I am aware, and I consider myself fairly cognizant of the history of the law in British Columbia, to exercise the wardship jurisdiction of the Court of Chancery. (As to that jurisdiction, see 17 Halsbury, 2d ed., v. 17, p. 217 et seq.) The Supreme Court of British Columbia has never had any machinery by which a child could be "put under the protection of the Court". Many of the English authorities which embodied judicial decisions on the best interests of children arose in wardship cases and thus must be looked at with some scepticism as to their applicability here. It is arguable that the parens patriae jurisdiction can only be effectively exercised if a child is a ward of the court, and, therefore, the jurisdiction is incapable of exercise here so long as the necessary machinery, which is more than the provision of judges, is lacking.

If the Supreme Court of British Columbia as the direct descendant of the Court of Chancery has a parens patriae jurisdiction which it can and will exercise generally over infants, including children of a marriage living with their parents, why did the Legislature think it necessary to

require in 1876, that children be sent to school for six months of the year between the ages of seven to twelve (S.B.C. 1876, c. 2, s. 38) and to punish parents who did not send their children to school and in 1901 to empower a judge, including a judge of the Supreme Court of British Columbia, to order delivery of a child to a Children's Aid Society if the judge found,

> . . . that any child is neglected within the meaning of the next preceding section, or so as to be in a state of habitual vagrancy or mendicancy, or ill treated so as to be in peril of life, health or morality by continued personal injury, or by grave misconduct or habitual intemperance of the parents or guardians. . . . [Children's Protection Act, S.B.C. 1901, c. 9, s. 5]

To adapt the words of Lord Esher M.R. in The Queen v. Jackson, [1891] 1 Q.B. 671 at 684 to this case, I think that the passing of these acts is the strongest possible evidence to show that the Legislature had no idea that the Supreme Court of British Columbia had any "inherited" power to force parents to send their children to school or to take children from the custody of their parents because the children were neglected and this tends to show that it is not and never was the law of British Columbia that the Supreme Court had any power to interfere with the manner in which parents lawfully married raised their children.

Thus, subject only to the criminal law which prevented, for instance, parents from murdering their children, parental power over children within their physical custody was, at the time of the Divorce and Matrimonial Causes Act, 1857, absolute and parental power was, in law, paternal power.

It did not follow, however, that the court would exercise its power to issue the writ of habeas corpus to return a child to the father when the best interests of the child required that it not be so returned: see DeLaurier v. Jackson, [1934] S.C.R. 149, which was an application by the parents for a writ of habeas corpus and for custody. It is not necessary, in this case, to address the principles upon which the court acted in exercising that power.

I proceed next to the question of the effect of an order for custody under the Act of 1857, the introduction of which into British Columbia was not discovered, so to speak, until 1877: see S. v. S. (1877), 1 B.C.R. (pt. I) 25.

Curiously, it does not appear that any British Columbia court has ever addressed the question of the incidents of such an order.

But from D'Alton v. D'Alton (1878), 4 P.D. 87, I infer

that, in England, an order for custody was, at least, in 1878, thought to carry with it the right to determine the religious education of the child. The mother who had obtained a decree of judicial separation, applied for custody of the children, who were at a Protestant boarding school, so that they might be educated as Roman Catholics. She was a Roman Catholic but the father was not.

The learned judge having remarked that the only difference between the parties was the question of religion, went on and said this (at p. 88):

> If these parents had been of the same religion I should have given the custody of one, and possibly of both, of the children, at any rate for the present, to the mother, upon the principle that she ought not, by reason of the wrongful act of the father, to be deprived of the comfort and society of them. But as she avows that her main object is to bring them up as Roman Catholics, I have to consider, first of all, whether she has any right to insist upon this? and, secondly, whether it is for the interests of the children that she should so bring them up?
>
> With regard to the rights of the petitioner, the principle which guides the Court is, that the innocent party shall suffer as little as possible from the dissolution of the marriage, and be preserved, as far as the Court can do so, in the same position in which she was while the marriage continued--first, by giving her a sufficient pecuniary allowance for her support; and, secondly, by providing that she should not be deprived of the society of her children unnecessarily. As it has been put by one

> of my predecessors, "the wife ought not to be obliged to buy the relief to which she is entitled, owing to her husband's misconduct, at the price of being deprived of the society of her children." But it is to be remembered that if the marriage had continued undissolved, and the husband and the wife had continued to live together, she would not have been able to control the husband otherwise than by her example and influence, as to the religious education which should be given to their children. Does then the fact that a judicial separation has been granted to her confer upon her a new right in this respect? and does not the answer to that question afford the foundation for the judgment which I ought to pronounce?
>
> * * *
>
> . . . nor do I intend to give the husband the custody in the ordinary sense of the word, which would enable him to do what he pleased, under any circumstances, without reference to the wife.

Thereupon, he committed the custody of the children to the headmistress of the school with liberty to the father and mother to have access to them from time to time.

The judgment was sustained on appeal.

It is convenient at this point to look at the rule religio sequitur patrem.

Seton on Decrees, vol. II, 7th ed., published in 1912, has a long passage on the question of religious education of

children which begins thus (at pp. 999-1001):

> The rights of the father as to directing the religious education of his children are analogous to his right to the custody of their persons.
>
> Religio sequitur patrem; and except under very special circumstances the child must be brought up in the religious faith of the father: F. v. F., [1902] 1 Ch. 688; and this rule is not affected by the Guardianship of Infants Act, 1886: Re Scanlan, 40 Ch.D. 200; Re McGrath, [1892] 2 Ch. 496; [1893] 1 Ch. 143, C.A.; but inasmuch as the welfare of the infants is always the paramount consideration (Re W., W. v. M., [1907] 2 Ch. 557), the Court has jurisdiction in a proper case to deprive a father of the custody of his children, and to disregard his wishes as to their religious education; and where a Roman Catholic father allowed his two children by a deceased Protestant wife to be brought up in the Protestant faith until one of them was fifteen and the other eleven years of age, and had abdicated his parental rights, the Court refused to allow him to resume the control of their religious education: In re Newton (infants), [1896] 1 Ch. 740, C.A.
>
> The father cannot release this right (which the law gives him for the benefit of his children and not of himself), nor bind himself conclusively as to the exercise of it: Andrews v. Salt, 8 Ch. 636, Agar Ellis v. Lascelles, 10 Ch.D. 49, C.A.; Re Nevin, [1891] 2 Ch. 299, C.A.; Re McGrath, [1892] 2 Ch. 496, 507, 508; and although the Court having regard to the child's physical well-being, will not remove it during tender years (under the age of seven) from the mother's custody, the order may provide for the education of the child, when capable of receiving religious instruction, in the faith of its deceased father: Austin v. A., 4 D.J. & S. 717; 34 Beav. 257 . . . .

That the court would enforce the right of the father even after his death, is clear from certain forms of decree which can be found in Seton at pp. 992-3:

> 11. Mother having become a Roman Catholic removed from being Guardian.
>
> And S., the mother of the infants, by her counsel admitting that since &c., the date of the said order, she has adopted the Roman Catholic faith, Order that the said S. be removed from being guardian of the persons of said infants; And it is ordered that M. be appointed sole guardian of the persons of the said infants during their respective minorities, or until further order; And it is ordered that the said S., do deliver up the said infants to the said M.,; And it is ordered that the said S. do have reasonable access to the said infants, she by her counsel undertaking not to speak to them on religion or religious subjects.--Re Fell, V.-C.S., 22 Feb. 1870, A. 1289; adopted in F. v. F., [1902] 1 Ch. 688, by Farwell, J., at p. 691.

* * *

13. Infant to be brought up in the Church of England

"DECLARE that the Petrs, the infant Plts, ought to be brought up in the communion, doctrines, and worship of the Church of England as by law established, and that the said infants ought to attend the public worship of the said Church, and that they ought not to be taken to attend the chapel in the petition and in the affidavit of E. referred to; And order that the said E. be restrained from taking the said infants, or any of them, causing or procuring (or permitting) the said infants, or any of them, to be taken to the said chapel, or to any places or place of worship where worship is performed otherwise than according to the rites and ceremonies of the Church of England as by law established."--Bligh v. B., M.R. 4 Aug. 1836, A. 1091.

Some assistance on the incidents of "custody" may be derived from the judgment of Chitty, J. in Condon v. Vollum (1887), 57 L.T. 154, interpreting the words "custody and control" in a provision of the Infants' Custody Act 1873 that a separation deed should not be held to be invalid because of its providing that the father should give up the custody or control of a child to the mother.

In that case, an action had been brought by a husband for the execution of the trusts contained in the separation deed between himself and his wife. When the action had come on for trial in 1884 an order was made for the enforcement of the deed and also upon the mother undertaking not to bring up

the infant in any manner at variance with the principles of the Roman Catholic faith (the father being a Roman Catholic and the mother a Protestant) that she should have its custody until further order and upon the child attaining the age of seven, the parties should be at liberty to apply to the court as to its education and religious instruction.

Upon the child attaining seven years of age, the mother moved for an order asking for the exclusive control of the education, religious and otherwise, of the infant, she undertaking to maintain it and to pay the costs of its education.

Chitty, J. said that the words "custody or control" in that section were large enough to comprise all the rights which the father has over his children including that of directing their religious education. He ended his judgment by saying (p. 155):

> Without going into the question on the Guardianship of Infants Act 1886, I hold that the infant should be educated by the mother. I prefer to rest my judgment on the Infants' Custody Act 1873, and on that account it is unnecessary to decide the question on the Guardianship of Infants Act, 1886.

Although an agreement by the father giving up custody and control divested him of the right to determine the

religious education of the child, the right given by the Guardianship of Infants Act, 1886 to a mother to guardianship of her children, the father having died, did not give her, as Seton points out, the right to override the rule that children should be brought up in the religion of their father.

In In re McGrath (Infants) at pp. 147-8, Lindley, L.J., delivering the judgment of the court, said this upon a summons taken out under the Guardianship of Infants Act, 1886, and the Custody of Children Act, 1891 asking that the legal guardian of orphaned children be removed and that another be appointed in her place it being a matter of religion:

> The next point to consider is the duty of the Court towards a penniless child under the care of a legal guardian who is able and willing to maintain and educate the child at his own expense. The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.
>
> As regards religious education it is settled law that the wishes of the

> father must be regarded by the Court and must be enforced unless there is some strong reason for disregarding them. The Guardianship of Infants Act, 1886, which has so greatly enlarged the rights of mothers after their husbands' deaths, has not changed the law in this respect. This was decided by Mr. Justice Stirling in In re Scanlan, and is unquestionable. The consequence is that, notwithstanding that Act, a widow may still find herself compelled to bring up her child in a religion which she abhors.

To come then, on this paucity of authority, to the answer to the question of the effect of an order for custody under the Act of 1857, it appears to be that, if it did carry with it the right to determine the religious upbringing of a child, such an order would not be made if to do so would subvert the rule that the religion of a child was to be the religion of his father.

I proceed then to the last question which I posed earlier, namely, what is the effect of a custody order under the Divorce Act, 1985 when it is coupled with s. 27(4) of the Family Relations Act.

In order to answer that question, one must first determine the powers of the guardian of a child.

The word "guardian" is to be found in statutes going back to the reign of King Charles II, but none of them

expressly defines those powers.

I think, however, that the common understanding of the breadth of those powers can be deduced from the Equal Guardianship of Infants Act, S.B.C. 1917, c. 27, which in part was this:

> 3. Every guardian under this Act shall have all such powers over the estate and the person over the estate (as the case may be) of the infant as any guardian appointed by will or otherwise now has in England under the Act 12, Charles the Second, chapter 24, and 49 and 50 Victoria, chapter 27, section 4.
>
> 4. All disabilities of married women with respect to the guardianship of their minor children are hereby removed.
>
> 5. The husband and wife living together shall be joint guardians of their minor children with equal powers, rights, and duties in respect thereto, and there shall be no paramount right to either in connection therewith.
>
> * * *
>
> 11. If the husband and wife are living apart voluntarily, the guardianship of the infant children may be arranged by agreement in writing between them. In the absence of such an arrangement, or in case either party desires its termination, he or she may apply to the Court for an adjudication as to the guardianship under the circumstances. Pending such adjudication, the husband or wife who actually has the custody and control of their infant children, or any of them, shall retain said right of custody and control, and be entitled to the guardianship of such children.

12. In any case where a decree for judicial separation or a decree either nisi or absolute for a divorce shall be pronounced, the Court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent so declared to be unfit shall not be entitled as of right to the custody or guardianship of such children.

13. The Court may, upon the application of either parent of an infant, make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian.

14. The Supreme Court, or any Judge thereof, may, as the said Court or Judge sees fit, and upon being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act or otherwise, including the Official Guardian to the extent of his guardianship of such infant, and may, if it shall be deemed to be for the welfare of the infant, appoint another guardian in place of the one so removed: . . . .

15. Any parent, guardian, or any other person having the care or charge of a minor, or any charitable society authorized by the Lieutenant-Governor to exercise the powers conferred by this Act, and having the care or charge of a minor, may, with the minor's consent, if the minor is a male not under the age of fourteen years, or is a female not under the age of twelve years, and without such consent if he or she is under such age,

> constitute by indenture to be the guardian of the child any respectable trustworthy person who is willing to assume, and by indenture or other instrument in writing does assume, the duty of a parent towards the child; but the parent shall remain liable for the performance of any duty imposed by law in case the guardian fails in the performance thereof.
>
> 16. The guardian shall thereupon possess the same authority over the child as he or she would have were the ward his or her own child, and shall be bound to perform the duties of a parent toward such ward.
>
> 17. In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the Court for its directions, and the Court may make such order as may be deemed proper.
>
> * * *
>
> 23. In questions relating to the custody and education of infants the rules of equity shall prevail.
>
> 24. Nothing in this Act shall be construed to restrict the jurisdiction of the Supreme Court, or any Judge thereof, with respect to the appointment or removal of guardians of infants.
>
> (emphasis mine)

Concerning this statute, I note the following:

1. It did not provide that a spouse awarded custody upon a divorce was thereupon the sole guardian of the child. It did enable, by s. 11, an application to be made for

that purpose.

2.It did not expressly set aside the rule religio sequitur patrem but, notwithstanding s. 23, the rule did not survive the statute simply because its surviving would have defeated the whole purpose of the statute which was to put mothers in every respect upon a footing of equality with fathers.

3.It did empower the court where there was a dispute between guardians, including guardians who were the natural parents, to settle such dispute.

4.It equated, in ss. 7 and 16, the concept of guardianship with the authority and duty of parents.

5.But apart from conferring a power to determine a dispute between guardians, it conferred no power on the court to interfere with the way in which guardians or a sole guardian raised an infant in their, his or her physical custody.

Thus, I conclude that the powers of a guardian under the 1917 Act were understood to be the powers before that Act possessed by a father who had physical custody and those powers were absolute.

I can find nothing in the 1978 Act which warrants an inference that the Legislature intended by it to cut down the powers of guardians as those powers have long been understood. It follows that, if the order giving custody to Mrs. Young is sustained, she has under the Family Relations Act the full right to lay down the law concerning all matters relating to the children, even during the time they are with their father for the purpose of his exercise of access.

In my opinion, a guardian has the right to say what books the child shall read, where the child shall go, whom the child may see or, in other words, the plenitude of parental power and nothing in that statute intrudes upon that plenitude.

An order for access under that Act does not, in any way, limit that plenitude of power. A parent who has his child with him under an access order has, in my opinion, no greater right to disregard the injunctions of the custodial parent than does, for instance, an aunt or grandparent who has the child to visit.

Orders for access were not made at common law: see Blackstone, 18th ed. (1844) at 453. It was for the guardian to say who might and might not see the child. By statute the

court can give "access". But its doing so does not confer the rights and powers of the guardian whether that access is for two hours, two days or two weeks.

There is one last point which must be addressed before I address the Charter, namely, whether Parliament by any of the provisions of the Divorce Act, has, so to speak, subverted the concept of guardianship.

It is, I think, unfortunate that questions of custody and access are considered to be within the constitutional power of Parliament under s. 91(26) for it means that we have in matters of custody and access possibly two regimes--one for the children of parents who have been married but are divorced and another for the children of parents who have not been married and divorced.

For convenience I repeat the relevant subsections of s. 16:

> (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.
>
> * * *
>
> (10) In making an order under this section, the court shall give effect to the principle that a child of the

> marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Do the words of s-s. (6) confer an unlimited busybody power upon the Court which it does not possess in the exercise of its jurisdiction under the Family Relations Act?

Counsel did not address this question. In the absence of argument, I proceed upon the assumption that whatever powers are thereby conferred, the words are not intended to, and do not, intrude into the law of guardianship.

What then of s-s. (10)? What, precisely, Parliament meant by "contact" is not easy to determine . Does it mean staying with the other parent? Does it mean correspondence or telephone communication? Does it mean participating in whatever activities the access parent chooses? For that matter, the phrase "consistent with the best interests of the child" though hallowed by time, has lurking within it all manner of difficulties.

It is easy to say, for instance, that it is not in the best interests of a child to be taken out of school to spend

time with an access parent who lives across the country. But is it in the best interests of a twelve or thirteen year-old to be made to spend every weekend or every other weekend with the access parent?

Whatever this section means, it shows that Parliament wants children of divorced parents to have a continuing relationship with both parents. But does it contemplate that children should be confronted with two different sets of values? And should we infer that Parliament intended to subvert the concept of guardianship?

I do not think that it is possible to deduce what Parliament intended. Therefore, I fall back on the principle of statutory interpretation that if Parliament intends to set at naught a long-standing concept of the common law, it does so plainly and not by woolly words capable of more than one interpretation.

I conclude therefore that "contact" does not contemplate a right in the access parent or in any other person given access to disregard the determinations of the custodial parent.

Apart from that consideration there is this: If s-s. (10) is interpreted to mean that the access parent, or any

other person having access, during access does not have to defer to the custodial parent in such matters as religious education, political indoctrination and the like, the words in it "as is consistent with the best interests of the child" will impose upon the judiciary tasks which, at least since Lord Eldon's time, it has done its best to avoid. How could a court refuse, if one parent asserted that the philosophy of the other was "not in the best interests of the child" to listen to evidence on the competing religious or political philosophies of the parents or refuse to decide between them?

I, for one, consider that the courts ought not to be placed in such an invidious position.

It follows, therefore, that the common understanding to which I adverted on p. 23 is correct. That was the rule which the learned judge below applied and, apart from the question of the Charter, there is no foundation in law for our interfering with her exercise of her discretion.

Does s. 2 of the Charter affect this general rule as to the powers of the guardian? Do the fundamental freedoms of a person with a right of access require that, during periods of access, the powers of the guardian be deemed suspended if these powers interfere with the activities of that person with the child? To put it another way, upon the

assumption that my interpretation of the relevant paragraphs of the Family Relations Act and the Divorce Act is correct, are those statutes inconsistent with the Charter and, therefore, of no force and effect?

I have said "person with a right of access" and not "a parent with a right of access" because, by s. 35 of the Family Relations Act and by s. 16(4) of the Divorce Act, orders for access can be granted to any person.

The issue which I have posed can be expressed in yet another way. Does a person who, by a court order, has physical possession of a child for some period have the right as part of his fundamental freedoms of conscience and religion and of thought, belief, opinion, expression and association to teach the child anything he pleases, to give the child any reading material he chooses and to take the child with him wherever he thinks fit and the child may lawfully go?

I have put the matter so broadly because, while this case is concerned with religious observance, I do not understand that freedom of religion has any higher status under the Charter than does freedom of thought which I think includes the freedom to read and to give books to others.

Some parents think there should be no restrictions on what a child reads and would not bat an eye at a ten year-old reading Henry Miller. Others would be outraged. It is not for me to say which view is sound.

But if the person with access has the right as part of his fundamental freedom to determine during access the religious observance of a child so he or she must have the right to read the child Mein Kampf, whether for the purpose of demonstrating its perniciousness or for the purpose of inculcating Naziism. I have deliberately chosen an offensive example because I am unable to draw any distinction between political and religious freedom.

But is this a matter of the freedoms of a person with access? If that be so, then the power or right of parents living together to teach their children as they please is grounded in these fundamental freedoms. But I do not think it is. I think parental right is grounded in a concept much older than notions of freedom of religion and of thought. It goes back at least to Roman law: see Blackstone, v. 1, c. 16. It is not necessary to ask whether it is a matter of natural law, although Bowen, L.J. used that term in Agar-Ellis v. Lascelles, supra, at p. 28.

By s. 26, the guarantee of s. 2 is not to be construed

as "denying the existence of any other rights or freedoms that exist in Canada". Fundamental parental right is undiminished by the Charter and statutes which vest parental right in one person to the exclusion of others are not in themselves inconsistent with the Charter.

But s. 2 does have something to do with the children. By its terms, the Charter assures its rights and freedoms not merely to persons over the age of majority but to everyone.

I do not find it necessary to decide whether either the Divorce Act or the Family Relations Act by conferring powers upon a parent or a guardian, thereby authorizes an unconstitutional intrusion into the fundamental freedoms of the child or ward. If either does then, at least in the case of those below the age of discretion, the intrusion is justifiable in a free and democratic society.

If there is anything more conducive to the destruction of a democratic society than for the law, through the judges, to set children of tender years against their parents or those who stand in loco parentis, I do not know what it is. I am not, of course, addressing the judicial interference that is authorized in cases of abuse and neglect by, for instance, in British Columbia, the Family and Child Service

Act, R.S.B.C. 1979, c. 119.1.

But I do consider that a child has a right, although not a Charter right, to know any person to whom the court considers it appropriate to grant access. That is why access is granted. A child cannot know anyone unless the child can speak freely with that person. It seems to me impossible to supervise what a person having access says to a child.

Lest, however, that a guardian conceives the notion that he or she may make so many restrictive rules as to make access meaningless or a person having access should think that he or she may, by conversations with a child, subvert the authority of the guardian, each should be reminded that the court might well decide, in such a circumstance, that the best interests of the child in the long term require either a change of custody and guardianship or a restriction upon or cessation of access.

I come, finally, to the application of this opinion to the facts of this case.

From what I have said, it follows that Mrs. Young has the right to say that during access Mr. Young may not take the children to any religious observance just as she has the right to say, should the question arise, that he may not take

them to a political meeting or to the race-track. She does not have the right to control what conversations take place during periods of access between the children and their father.

If she disagrees with whatever he says on religious subjects or for that matter on any other subject, she will have to explain her own position to the children. That some conflict may thus arise in the children's minds is true. But intellectual conflict is part of life, and learning to deal with it is part of growing up. There comes a time, as Kekewich, J. wisely observed in In re W., W. v. M., [1907] 2 Ch. 557 at 562: ". . . when an inquisitive mind will no longer be restrained."

As to the paragraphs of the judgment below, I say this:

1. Paragraph 3 is unnecessary in the light of para. 2. For that reason it should be struck out.

2. Paragraph 5 should be struck out and there should be substituted for it: "THIS COURT FURTHER ORDERS that the Respondent shall not take the children to any religious service or have the children accompany him in any religious activity without the written consent of the

Petitioner."

3.Paragraph 6: This paragraph should be struck out simply because it is not capable of supervision by the court. Indeed, I do not know its precise effect.

4.Paragraph 7: This paragraph is unnecessary. It is the duty of Mr. Young, since he has access and not custody, to ensure that any question of medical care is decided by Mrs. Young and not by him.

5.As to paras. 22 and 23, they reflect the conclusion of the learned judge below, a conclusion from which I have not essentially differed, upon the motion brought at the opening of the trial. However, as a matter of drafting, and in accordance with the usual practice of the court, the proper order is simply that the motion be dismissed. Therefore, I would strike out the two paragraphs in question and substitute for them an order that the application of the respondent bearing date the 12th September, 1989, be dismissed.

But if I am wrong in my opinion that the rule applied by the learned judge is the law and remains unaffected either by the Divorce Act, 1985 or by the Charter, what must be faced is the argument which counsel for Mrs. Young sought to

advance below, namely, that for Mr. Young to be permitted to engage the children in his religious observances would be harmful to their well-being, that is say, contrary to their "best interests".

Because the learned judge ruled such evidence to be irrelevant, an opinion which she shared with the pre-trial conference judge, Madam Justice Huddart, she would not permit it to be adduced, although some of it crept in.

Earlier in this judgment, I spoke of "best interests" as a protean concept.

Do we mean what will make the child happy now and, if so, what is happiness? Do we mean what will lead a child to grow up decent, honourable and responsible? Do we, with Wordsworth, believe of duty that she is "Stern Daughter of the Voice of God" or prefer Ogden Nash "O Duty. Why hast thou not the visage of a sweetie or a cutie?"

About some things, I suppose, 90 per cent of Canadians would agree--for instance, that children are not the better in the short, or long run, for being cold, sick, hungry or physically abused, although if Lord Shaftesbury had not had a mean, miserable childhood, would he have become, to the immeasurable benefit of women and children in Victorian

England, the great reformer? Ought parents to take their lead in questions of upbringing from the book of Proverbs or Dr. Spock in either of his creations?

One of the troubling questions of our time is the nature of the relationship of men and women to each other and to society. To hold a Paulian or Knoxian view of that relationship is not unlawful. Such views have been held by many men and, I suppose, a few women of acute conscience and may, for all I know, be the will of God. But if I had children I would be violently opposed to such notions being preached to them whether in words or by the example set by the organization of a religious body which held such opinions.

I should say that since evidence of the teachings of Mr. Young's church was not before the learned judge, I have no idea what its position is on that issue.

Does "best interests" mean that no physical or psychological (whatever that is) damage will be done or does it encompass the notion that it is contrary to a child's best interests to be taught foolish things? Would it be in the "best interests" of a Canadian child to go to a church which taught (if such there be) that there was no Holocaust or that there is a moral duty on believers to exterminate non-

believers?

Even to speak of "foolish" things is to make a judgment or, if one prefers, to disclose that judges are tied by the invisible threads of their own convictions.

In my judgment, if restrictions of this kind can only be imposed where the "best interests" of the children require it, Mrs. Young is entitled to try to prove or perhaps more exactly, is entitled to try to persuade a judge (which is not quite the same thing since proof in a scientific sense is impossible) that being exposed to the religious observances of Mr. Young's faith is not in the "best interests" of these children. Not to give her that opportunity is contrary to fundamental justice.

C. The Questions Arising on Paras. 13, 16, 17, 18, and 20 of the Judgment

For convenience, I repeat part of the order sought by the appellant:

> 8. An Order to vary the Order of the Trial Judge, pronounced 11 December 1989, to set aside the terms relating to . . . lump-sum maintenance of Mrs. Young, debts of Cedric's Jewellers Ltd., maintenance arrears, division of family assets and family debts, and transfer of the matrimonial home to Mrs. Young, and to substitute the following:

> (a)a Declaration that the monies owed from Cedric's Jewellers Ltd. to Bernice Quintal are not family debts;
>
> (b)an Order for the partition and sale of the matrimonial home ...
>
> (c)an Order that the proceedings [sic] of the sale of the matrimonial home be used to pay all remaining family debts and to reimburse Mr. Young for family debts previously paid with the net equity to be divided equally between the parties;

1.Paragraphs 13 and 20

In brief, the evidence was, as to the sum of $27,586.57 mentioned in sub-para. (a) of para. 13, that, after separation in February, 1987, and before she obtained a maintenance order in August, 1988, Mrs. Young became indebted to her mother for moneys advanced and the value of food and lodging and, as to the $80,000 mentioned in sub-para. (b), that Cedric's Jewellers Ltd., the shares of which were owned by the petitioner and respondent and which had, unhappily, gone into bankruptcy had, at one time, obtained a loan from Mrs. Young's mother, Mrs. Quintal, of which this sum was the balance.

In her reasons for judgment, the learned judge put (at pp. 197-8) the Cedric's Jewellers matter thus:

> I will deal with the financial aspects first. In approximately 1978 the parties commenced a jewellery business--Cedric's Jewellers Ltd. To assist in getting this business started $160,000 was borrowed. The petitioner's mother, Mrs. Quintal, advanced the lion's share--$130,000, Mr. Quintal, $14,000. The respondent's mother, Mrs. Kwan, advanced $13,000 and Mrs. Chen, the respondent's sister, $3,000. Additional funds from time to time came from the parties to this action. The respondent testified that some $91,000 came from the latter source.
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> * * *
>
> There is apparently still some $80,000 or so outstanding to Mrs. Quintal. Some recovery was made through the bankruptcy; however, any further recovery is doubtful. I am satisfied that what remains outstanding is clearly a family debt. It was money loaned to a corporation owned by the petitioner and respondent. That corporation would operate the jewellery store and would provide an income for the family.

The appellant does not admit that he owes any money to Mrs. Quintal. He says that the loan to Cedric's Jewellers Ltd. did not impose any personal liability on either of the spouses and he says that he did not agree to Mrs. Young borrowing from her mother.

The thrust of the argument of counsel for the appellant on the Cedric's Jewellers' loan was set out thus in her factum:

> 5. The Family Relations Act gives the courts no authority to deal with the claim of third parties not seeking relief in their own right or to apportion liabilities and thereby effect [sic] the rights of third parties. Bernice Quintal was not a party to the divorce action, and her business losses were not a proper consideration when dividing family assets. There was no personal liability of Mr. and Mrs. Young to Bernice Quintal.

Whether there was or was not any personal liability to Mrs. Quintal could not be determined in this action.

There is not a single word in the Family Relations Act about "family debts". I appreciate that the phrase has come into common use but the Legislature has never created a form of liability known as a "family debt". The court cannot make a spouse jointly liable to a creditor for a debt of the other spouse, no matter for what purpose it was incurred, or, in the absence of some contractual foundation, make one spouse liable to indemnify the other, either in whole or in part, for a liability of the latter. Nor can the court determine in an action constituted such as this whether there is any personal liability on the part of either spouse for an amount apparently advanced to a corporation of which they were shareholders.

If the learned judge by para. 13 intended to determine Mrs. Quintal's rights against the Youngs, either jointly or

severally, on either or both of these alleged "debts", she could not for the issue is res inter alios acta. If she simply intended to hold that, as between the Youngs, if they are liable at all, they are both equally liable, she could not for the Act confers no such power, either expressly or by necessary intendment.

To so hold does not conclude the issue of whether debts of a spouse incurred for what might be called a family purpose can be taken into account under ss. 51 and 52. That question remains to be addressed.

These paragraphs should be struck out of the judgment below. It follows that, even as the court cannot declare something to be a "family debt", it cannot declare, as Mr. Young seeks, that something is not.

2. Paragraphs 16, 17 and 18

The combined effect of these paragraphs is to vest in Mrs. Young the whole of the matrimonial home and to discharge Mr. Young's liability to her for costs, arrears of maintenance, her share of the 1977 Monte Carlo, and his alleged share of the "debt owed by the petitioner to . . . Bernice Quintal . . . incurred after separation".

In the court below, counsel for the wife asked for a re-apportionment of the home under s. 51 in the petitioner's favour. The learned judge did not, in her reasons, address the considerations laid down in s. 51 and determine that re-apportionment was inappropriate nor did she address the question of whether the court had any power to make an order in the terms of these paragraphs.

There has been no cross-appeal by the wife from this part of the judgment. This is not surprising because it is, in fact, a substantial re-apportionment in the wife's favour.

The only possible foundation for para. 17 is the Family Relations Act, s. 52:

> 52. (1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 51, and may make orders which are necessary, reasonable or ancillary to give effect to the determination.
>
> (2) In an order under this section, the court may, without limiting the generality of subsection (1), do one or more of the following:
>
> (a) declare the ownership of or right of possession to property;
>
> (b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;

> (c)order a spouse to pay compensation to the other spouse where property has been disposed of, or for the purpose of adjusting the division;
> (d)order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;
> (e)order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;
> (f)order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property and may order that the spouse waive or release in writing any right, benefit or protection given by section 23 of the Chattel Mortgage Act or section 19 of the Sale of Goods on Condition Act; or
> (g)where property is owned by spouses as joint tenants, sever the joint tenancy.

But the whole purpose of s. 52 is to facilitate the division of family assets in accordance with ss. 43 and 51.

As to para. 17, there is nothing in s. 52 which authorizes the use of its powers to enforce a money judgment obtained by one spouse against the other save, perhaps, if that judgment is a compensation order under the section.

As to para. 18, the statutory foundation for orders

for maintenance is the Divorce Act, 1985, s. 15(2):

> A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, ...
>
> (emphasis mine)

The word "sum" is an ordinary English word which means in this Statute "a quantity or amount of money" (Shorter Oxford English Dictionary, v. I, p. 2185).

If the learned judge wished to fix lump sum maintenance, she was obliged to fix it in a sum certain and to fix it with reference to the principles applicable to such an award.

In my opinion, when this Court, upon an appeal, is confronted with an order unwarranted by law, it must, even if the appellant does not take objection on that ground, put matters right. If the court does not, there is a real risk of the error being perpetuated in other judgments.

The difficulty which then arises is that there has been no cross-appeal. If the appellant had objected to the paragraphs in issue as unwarranted by law, the respondent might well have brought a cross-appeal.

There are two courses open to remedy this difficulty.

One is to order a new trial on the issues arising under the Family Relations Act concerning the matrimonial home. In light of the appalling cost of this litigation to the parties to adopt such a course would not be in the interests of justice.

The other is to invoke the power conferred by s. 9 of the Court of Appeal Act:

> 9. (1) On an appeal the court may
> (a)make or give any order that could have been made or given by the court or tribunal appealed from,
>
> . . .

I adopt the latter course and ask myself what order ought to have been made. In doing so, I shall try to pay due regard to the considerations which moved the learned trial judge.

First then, ought there be a re-apportionment under s. 51?

By s. 51:

> 51. Where the provisions for

> division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to
> (a)the duration of the marriage;
> (b)the duration of the period during which the spouses have lived separate and apart;
> (c)the date when property was acquired or disposed of;
> (d)the extent to which property was acquired by one spouse through inheritance or gift;
> (e)the needs of each spouse to become or remain economically independent and self sufficient; or
> (f)any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
> the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

Is the division of s. 43; i.e., that the parties are tenants in common, unfair?

That unfairness must be judged as of the date of the triggering event which, in this case, took place upon the pronouncing of the decree nisi.

On the face of the judgment, the decree nisi was

pronounced on 11th December, 1989, that is, some considerable time after the evidence was given at trial. In this case, I shall assume that there were no changes of significant fact between the trial and the triggering event. I do so simply to prevent any further argument between these parties although, strictly speaking, there should be evidence as to whether the circumstances which relate to s. 51 still obtained as of the triggering event: see Norton v. Norton (1989), 19 R.F.L. (3d) 181 (B.C.C.A.).

Nothing arises on s-s. (a) to (e), which makes an unequal division unfair.

But worthy of consideration is her need to be economically self-sufficient and her "capacity" and "liabilities" which terms may include her alleged liability to her mother of $27,000 and the obligations she has for the care of the children.

I do not think it proper to give much, if any, weight to the liability to Mrs. Quintal.

Why the wife did not seek a maintenance order at any earlier time than August, 1988, I do not know. But apt to the question of what weight is to be given to this liability is a passage from a judgment of Denning, L.J., as he then

was, in an action in which a relative of a wife who had lent money to her during separation attempted to invoke the doctrine of agent of necessity:

> There is, however, a distinction between necessaries and money. At common law a wife only had authority to pledge her husband's credit for actual necessaries such as food and clothing and board and lodging. She had no authority to borrow money on his credit. That was only introduced in equity: see Deare v. Soutten [(1869), L.R. 9 Eq. 151; 21 L.T. 523; 34 J.P. 244; 27 Digest 205, 1773]. It is to be remembered, however, that equity only intervenes where there is no other adequate remedy. Nowadays there are remedies in magistrates' courts and in the High Court by which the husband can be made to pay maintenance to his wife. In all these courts, in assessing maintenance, regard is had to the earning power of the wife and to her means. It would be a remarkable thing if equity should disregard her means when all other courts take it into account. It cannot be supposed that a wife can get more out of her husband by borrowing from her relatives than by going to the courts. In my opinion, a loan to a wife will only be enforced in equity against the husband if it is needed to meet a present emergency and a court order for maintenance is inadequate, or not available in time, to meet the difficulty, and in every case the means of the wife must be taken into account. [Biberfeld v. Berens, [1952] 2 All E.R. 237 at 243]

As to her capacity to carry out her obligations to the children (even when there is a maintenance order, these obligations are a liability), the evidence discloses that she

is now 36 and he is 42. She has been trained as a jewellery engraver. What opportunities for employment at what salary are available in that trade, I do not know. While she could probably go out to work, as indeed many mothers of young children are forced to do these days and sometimes do by choice, I do not think the court should force such a course at present unless it is absolutely necessary. I say that not for the sake of the mother but for the sake of the children and especially for the youngest child who is barely three years old.

The learned judge found that the family home at the time of trial was worth approximately $215,000 and was encumbered by a mortgage of about $120,000 upon which the monthly payments were about $1,600. Counsel for Mrs. Young, in his factum, says that the balance due on the mortgage at time of trial was $129,000.

I do not understand that the learned trial judge in speaking of the balance of the mortgage was intending to make any precise finding.

I do not propose to search for the correct number. In rough terms, the value of his share at the time of the triggering event, in what is commonly called the equity, was between $43,000 and $47,500.

The learned judge said (at p. 200):

> Next I will deal with the matrimonial home which is clearly a family asset. While I agree that the home is expensive to retain, rental accommodation is very nearly as expensive. Of course, it would be preferable to have less expensive housing; however, with the present rental climate, I suggest that is not possible. Furthermore these children have had sufficient disruption in their lives. The home is in a stable, family-oriented neighbourhood and is ideal for children and pets. It is near their school and some of their activities. Whenever possible the court makes every effort to retain that stability in the lives of children. While the costs of operating the home are high, the petitioner has an ambitious plan to develop the basement. If that is completed the house will be manageable financially. The petitioner testified that this development could cost approximately $10,000 to $12,000 after which she would be able to obtain $600 to $750 per month revenue. She indicates the money to complete this renovation would come from the maintenance arrears when paid. The petitioner's plan is ambitious and, for the sake of the children, I hope it is successful. I make no order that the house be sold. I will deal with the disposition of the respondent's interest in the house in due course.

Thus, I think her purpose in making the order she did was to vest the family home in the wife so that she might carry out, for the sake of the children, this plan and become less dependent on him. Indeed, unless the wife substantially

improves her cash flow, she will not be able to maintain the house and feed and clothe the children, let alone pay her legal bills which must be enormous.

But I am not persuaded that these considerations are sufficient to order a re-apportionment in her favour, although I consider them sufficient to decline to accede to the request of the husband that the matrimonial home be sold: see Boeckler v. Boeckler (1987), 15 B.C.L.R. (2d) 134; 9 R.F.L. (3d) 375 (C.A.).

I turn then to the question of whether lump sum maintenance ought to be ordered. The Divorce Act lays down no criteria for such an order. But an order must be for the purpose of maintaining the spouse and children. It cannot be made for the purpose of redistributing assets. I see no statutory impediment to fixing lump sum maintenance in the sum of $12,500. If he pays it she will be able to improve the house as she intends and increase her cash flow. If, as and when the house is sold, some benefit will accrue to him. If, he does not pay it, she will be able to register, as against his one-half interest as tenant in common, this judgment, even as she is entitled to register against it, a judgment for the arrears of maintenance, a judgment for the costs which were referred to in para. 18 and a judgment for the costs which she is recovering in this action.

As to his liability to her arising from the vesting in him of the Monte Carlo motor car, the proper order is that he pay her by way of compensation whatever the value of her half is. Counsel must either agree on the amount so that it can be inserted in the judgment of this Court or speak to the question. That compensation order is also capable of registration as a judgment against his undivided one-half interest.

To sum up, the orders sought by the appellant as set out in para. 8 are refused, but paras. 13, 17, 18 and 20 of the judgment are struck out and an order is made for lump sum maintenance in favour of Mrs. Young in the sum $12,500.

D.The Question of Costs

I have had the privilege of reading in draft the reasons for judgment of Mr. Justice Cumming on this branch of Mr. Young's appeal. For the reasons he gives I would dispose of the question of costs in the manner proposed by him.

III. MR. HOW'S APPEAL

The problem posed by this appeal is simple and does not require consideration of the line of authority exemplified by Myers v. Elman, [1940] A.C. 282 (H.L.).

It is this: When, and under what circumstances, should the court visit costs upon counsel?

Although the profession is fused, there is a profound difference between what a lawyer does when he appears as counsel at a trial or upon any proceeding which determines the substantive rights of litigants and what he does the rest of the time.

In this case, Mr. How was engaged in determining the substantive--the constitutional--rights of his client. He had nothing to do with the monetary issues.

The independence of the bar must not be compromised for it is a bulwark of the liberty of the subject.

The awarding of costs against counsel can only have an in terrorem effect and such an order ought not to be made unless counsel has been found in contempt. Mr. How was not found in contempt.

It follows that his appeal must be allowed.

IV.THE APPEAL OF THE WATCH TOWER BIBLE & TRACT SOCIETY

Here again to my mind the issue is simple. Ought costs to be awarded against those who give financial assistance to a litigant to enable him to assert a constitutional right in which he has a real interest?

Mr. Justice Cumming has answered that question "no" and I agree with his disposition both of the application for review and of the appeal.

I do not rest my opinion on any consideration of American authorities. I rest my opinion on the simple proposition that there was no wanton or officious intermeddling by Mr. Young's co-religionists in this action.

I expressly concur with Mr. Justice Cumming when he says (at p. 69):

> I hasten to add that it does not follow that the resources of the Watch Tower Bible & Tract Society can be brought to bear in every dispute between a Jehovah's Witness' parent and a non-Jehovah's Witness' parent. Once an issue of constitutional law of the kind raised here is settled then, if further litigation on the point between other

> litigants is supported, another question might arise. It may be that the right to assist without facing an award of costs cannot itself be used by the rich and powerful, no matter how great their interest in the issue, as an instrument of the oppression of those who must fight their battles alone.

V.SUMMARY

The appeal of Mr. Young is allowed in part, the appeal of Mr. How is allowed, and the appeal of the Watch Tower Bible & Tract Society is allowed.

VI.COSTS OF THE APPEALS

I agree with the disposition of the costs of these appeals proposed by Mr. Justice Cumming.

"The Honourable Madam Justice Southin"

Judgment released: October 25, 1990

CA011864
CA011867
CA011865

Court of Appeal for British Columbia

BETWEEN:

IRENE HELEN YOUNG

PETITIONER (RESPONDENT)

AND:

REASONS FOR JUDGMENT

JAMES KAM CHEN YOUNG RESPONDENT (APPELLANT)	)	OF THE HONOURABLE MR. JUSTICE CUMMING
AND:	)	
W. GLEN HOW APPELLANT	)	
AND:	)	
BURNABY UNIT OF THE NEW WESTMINSTER CONGREGATION OF JEHOVAH'S WITNESSES APPELLANT	)	

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Wood

Counsel for the Appellant (J.K.C. Young)	W. Glen How, Esq. Miss Joyce L. Dassonville Miss Sarah E. Mott-Trille
for the Appellants (W.G. How and the "Congregation")	Gordon Turriff, Esq. M. Ian Giroday, Esq.
Counsel for the Respondent (I.H. Young)	Lorne N. MacLean, Esq. David G.M. Nicol, Esq., Miss Linda A. Wong
Counsel for the Intervenor (Law Society) in appeal CA011865	Robert H. Guile, Q.C. Miss Joanne R. Lysyk
Place and Dates of Hearing:	August 13, 14, 15, 16 and 17, 1990 Vancouver, British Columbia
Place and Date of Judgment:	October 25, 1990 Vancouver, British Columbia

I have had the advantage of reading in draft the reasons for judgment of Madam Justice Southin and of Mr. Justice Wood.

I agree with the dispositions of the property, maintenance and other financial questions proposed by Madam Justice Southin in Part II C of her judgment and with her reasons therefore.

With respect to the question of custody and access I agree with the judgment of Mr. Justice Wood.

I turn to the appeals from the special orders as to costs found in what Madam Justice Southin has numbered paragraph 24 of the formal judgment.

That paragraph of the judgment under appeal provides:

> AND THIS COURT FURTHER ORDERS that costs of the entire action on a solicitor/client basis as set out in the Reasons for Judgment shall be awarded against the Respondent, James Kam Chen Young, the solicitor for the Respondent, W. Glen How, Q.C., and the "Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses".

Each of the parties so mulcted in costs appeals seeking an order setting aside the order for costs against him or it. Pursuant to leave granted by Mr. Justice Lambert the Law Society of British Columbia intervened to support the position taken on behalf of Mr. How that the order for costs against him should be set aside.

The findings of the trial judge which led her to make the special order as to costs may be summarized as follows:

(a)The custody claim by the appellant Young had little merit;

(b)There had been an excessive number of interlocutory applications and motions;

(c)Irrelevant and repetitious material was produced;

(d)The trial judge and chambers judge were subjected to unwarranted abuse, criticism and insult; and

(e)Someone other than Mr. Young was promoting and paying for these proceedings.

(f)Mr. Young attempted to mislead the court;

Each of these findings was, to a greater or lesser degree, challenged on these appeals. I shall deal with them in turn as they bear upon the separate appeals before us.

THE APPEAL OF MR. YOUNG

1. The General Principle

In McEvoy v. Ford Motor Company (1990), 45 B.C.L.R. (2d) 363 (B.C.S.C.), Hinds J.A. said, at 364-366:

The principles to be applied with respect to an award of solicitor-and-client costs have been considered in British Columbia in a number of decisions. In Stiles v. B.C. (W.C.B.) (1989), 38 B.C.L.R. (2d) 307, Lambert J.A. reviewed the historical basis for awarding costs and some of the more recent cases which dealt with solicitor-and-client costs. What he said commencing at p.310 bears repeating:

> The power of a Supreme Court judge to award costs stems from s.3 of the Supreme Court Act which confirms that the judges of the Supreme Court have the inherent powers of a judge of a superior court of record. The power to award costs is governed by the laws in force in England before 1858 and by the enactments, including the Rules of Court, affecting costs made in British Columbia since 1858. Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See Oasis Hotel Ltd. v. Zurich Ins. Co., 28 B.C.L.R. 230, [1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e., not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.
>
> The principle which guides the decision to award solicitor-and-client costs in a contested matter where there is no fund in issue and there the parties have not agreed on solicitor-and-client costs in advance, is that solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and

> "outrageous" have also been used. See Cominco v. Westinghouse Can. Ltd. (1980), 16 C.P.C. 19 at 22 (B.C.S.C.); Jackh v. Jackh (1981), 31 B.C.L.R. 309 at 312 (S.C.); Sussex Invt. Ltd. v. Leskovar (1981), 30 B.C.L.R. 373 at 378 (C.A.); and Doyle Const. Co. v. Carling-O'Keefe Breweries of Can. Ltd. (1988), 27 B.C.L.R. (2d) 81 C.A.).

After reading the authorities referred to by Lambert J.A. in the Stiles case, and the British Columbia authorities referred to by counsel on this application, I conclude that solicitor-and-client costs should be awarded only in exceptional cases where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties deserving of chastisement.

Counsel for the plaintiffs referred to a number of matters which occurred before the trial, and during the trial which, in his submission, constituted reprehensible, scandalous or outrageous conduct and therefore warranted the imposition of solicitor-and-client costs. He emphasized the difficulties encountered in obtaining from the defendants proper disclosure of documents. Indeed, he asserted that the defendants, particularly Ford, had concealed documents. After reviewing the relevant evidence I am unable to make that finding.

In Columbia Trust Co. v. Drew (1988), 21 B.C.L.R. (2d) 384, Macdonald J., when referring to disputes concerning the production of documents, had this to say at p.390:

> The Rules of Court provide for the resolution of such disputes. Counsel's refusal to provide such documents in these circumstances is perhaps a questionable tactic, but not an abuse of process. A refusal cannot be equated with a concealment.

In this case it was open to the plaintiffs to insist upon full discovery of documents in accordance with the Rules of Court. That was not done in a timely manner or in a sufficiently determined manner. I do not consider the difficulties caused by the defendants with regard to the production of documents to have constituted reprehensible, scandalous or outrageous conduct.

I have considered the other matters upon which counsel for the plaintiffs placed reliance to support his assertion of reprehensible, scandalous or outrageous conduct. I am satisfied that the defendants defended the action with uncompromising zeal. But the uncompromising and zealous

> defence mounted by the defendants in this case did not constitute reprehensible, scandalous or outrageous conduct warranting the imposition of solicitor-and-client costs.

In Stiles (supra), Southin J.A., at 317, commented:

> An order for solicitor-client costs under subr.1 is not to be made simply because the judge is exasperated with a litigant and especially is that so where the litigant is asserting a public right and the Chambers judge is not in a position to decide the right.

The law reports are replete with examples of what does, or does not, constitute reprehensible, scandalous or outrageous conduct warranting the imposition of solicitor-and-client costs. I shall touch upon some of them in the course of these reasons. Each case must, necessarily, turn upon its own special circumstance.

I turn now to consider the bases upon which the special order for costs was made against Mr. Young.

(a)The custody claim by the appellant Young had little merit.

In mid-August, 1987, shortly after the birth of their third daughter, the parties separated and the children remained residing with Mrs. Young. From then on into the spring of 1988 Mr. Young visited the children on a frequent and regular basis. In April and May of 1988, however, difficulties arose over the question of access, related in the main to the conflict between Mr. and Mrs.

Young with respect to religious matters.

On July 12, 1988 Mrs. Young filed her petition for divorce in which she claimed, among other relief, interim and permanent custody of the three infant children of the marriage pursuant to s.16 of the Divorce Act 1985, S.C. 1986, c.4 or, in the alternative, pursuant to Part 2 of the Family Relations Act.

On the same date, Mrs. Young filed a motion for interim and permanent custody and sought an order including the following terms:

> C. An order that the Respondent have specified access as he has requested in the past 15 months since separation, being one visit per month, and that during access the Respondent not attempt to inculcate the three infant children with the teachings of Jehovah's Witness faith; nor shall take them to any functions of the church or have in the presence of the children any one of the Jehovah's Witness faith;

Mr. Young responded with motions attacking the propriety of the proposed terms of access on Charter and other grounds and on August 3, filed his answer and counter-petition in which, as part of the relief he claimed, he sought:

> (h) Joint custody of the three children of the marriage, namely; ADRIENNE MUN-LAI YOUNG, NATALIE MUN-KAI YOUNG, and ERIKA MUN-YEE YOUNG, care and control to the Petitioner (Respondent by Counter-Petition), liberal, reasonable and unrestricted access to the Respondent (Petitioner by Counter-Petition);

On September 13, 1988 Mr. Young issued a further motion claiming for himself interim and permanent custody of the three children, with liberal and reasonable access to Mrs. Young.

Interim orders were made by Mr. Justice Spencer and by Judge Scarth, dated respectively July 27, August 16 and October 7, granting interim custody to Mrs. Young and imposing religious restrictions on Mr. Young's access. Mr. Young's motions pursuant to the Charter and the Rules of Court to strike out Mrs. Young's claim for religious restrictions and for custody of the children to him were dismissed. Mr. Young appealed against these interim orders. On May 30, 1989 his appeals were dismissed, the court directing that counsel address all matters raised before the trial judge.

By the time the action came on for trial Mr. Young's amended counter-petition contained the following claim:

> (h) Sole Custody and guardianship of the three children of the marriage, namely; ADRIENNE MUN-LAI YOUNG, NATALIE MUN-KAI YOUNG, and ERIKA MUN-YEE YOUNG, with liberal and reasonable access to the Petitioner (respondent by Counter-Petition)

In her reasons for judgment the learned trial judge said:

> In the face of the evidence of the experts tendered at trial the content of their reports being well known to the parties, including the evidence of the respondent's expert, the claim for custody had little merit indeed. I agree with the petitioner's argument on that point. Access was really no

> problem either, except for the religious conflict between the parties, the petitioner not wanting to have the children involved in the respondent's religious activities. The children did not want the involvement either. That evidence was clear. I might add there was a total disregard, in my opinion, of the childrens' wishes in this matter.

At trial Mr. Young did not seriously question the opinion of the court appointed experts that custody of the children should remain with Mrs. Young. The limited purpose of his advancing in his pleading a claim for custody and guardianship was made clear by Mr. How in his opening statement at the commencement of the trial. He said:

> . . . from the standpoint of custody let me put it in this way: Obviously with young girls a mother in the ordinary way should have custody. And we agree with that. We are not even arguing about it except this, if the mother is determined to separate the children from having a meaningful relationship with their father then there are British Columbia cases that show clearly that the court will change the custody.
>
> THE COURT: Mr. How, I've done it. I've done it. I've done it. I've changed custody if there's a problem with the custodial parent in access operating smoothly. There's plenty of law in this province to support that argument. No doubt about it. If that's where you're coming from I know where you're coming from.

The trial judge expressed the view that Mr. Young's claim for custody "had little merit indeed" but she did not say that Mrs. Young's claim was "irresistible" or that Mr. Young's claim was "doomed to failure" or "impossible to prove" or "hopeless". There was evidence both during the interlocutory proceedings and at trial to support Mr. Young's allegation that Mrs. Young had

expressed her intolerance of his religious beliefs to the children, that her views had the effect of alienating the children from him, and that she had interfered with his access.

Although he did not carry the day Mr. Young was, in my opinion, entitled to present his case in a way which might serve to maintain what he perceived to be his rights as an access parent, even if that entailed advancing what turned out to be an unsuccessful claim for custody. His having adopted this course was not, in principle, a sufficient ground for awarding costs against him on a solicitor-and-client basis. It could not properly be described as reprehensible, scandalous or outrageous.

(b)There had been an excessive number of interlocutory applications and motions.

In this regard, the trial judge said, in part:

> On the ground of excessive proceedings, I do not propose to itemize the unnecessary court proceedings again, but there were an excessive number of applications, motions, et cetera. It is easy to conclude that this case was litigated to death. Counsel for the respondent had a forum and a cause to pursue. Unfortunately, what was in the best interests of the children, their welfare, was totally lost by the respondent and his counsel in these protracted proceedings. The respondent's counsel insisted throughout the trial that the respondent's religious beliefs were on trial, that the respondent's "right to freedom of religion" was being infringed.

I attach as a schedule to these reasons for judgment, but not as

a part thereof, appendices A & B to the factum filed on behalf of Mr. How setting forth the applications made by both Mrs. and Mr. Young during the course of these proceedings. The schedule shows that of 17 interlocutory applications made in this proceeding, 6 were filed by Mrs. Young, and the remaining 11 by Mr. Young, and that these applications related to several matters including maintenance, the matrimonial home, custody, and access. Two or three of the applications related to the religious limitations imposed on Mr. Young's rights of access.

Although the trial judge stated that the number of applications and motions was excessive she did not specify which ones were in her view unnecessary. I do not propose to review them all in detail, for Mr. MacLean, in the course of his argument before this Court, confined his complaint under this head to but a few of them. He focused only on the applications referred to as items 4, 5, 7 and 9 of Appendix B. For convenience I set out here the description of them, taken from the schedule, Appendix B.

4.	Sept.2, 1988, A.B, Vol.II, p.332	Specified interim access to the children, liberty to take the children to the Jehovah's Witness Sunday service	Specified access ordered by consent; application for liberty to attend Sunday service dismissed by Order of Scarth, L.J.S.C., October 7, 1988 A.B., Vol.III, p.552
5.	Sept.14, 1988 A.B. Vol.III, p.442	Interim and permanent custody of the children, with Petitioner to have liberal and reasonable access	Dismissed by Order of Scarth L.J.S.C., Oct. 7, 1988 A.B., Vol.III, p.552

7.	Feb.20, 1989, A.B. Vol.IV, p.652	Order that Petitioner in contempt of Scarth L.J.S.C.'s Order re access, cancellation of arrears, decrease in maintenance payable to Petitioner and children	Applications for cancellation of arrears and decrease in maintenance dismissed by order of Davies J., Feb. 27, 1989 A.B., Vol. IV, p.739 Contempt application adjourned generally by Scarth J., June 15, 1989 with further specific access to the children granted to the Respondent A.B., Vol. V., p.824
9.	July 14, 1989, A.B., Vol.V, p.937	Order that matrimonial home be listed for sale and Respondent have conduct of sale, Order that arrears be cancelled.	Dismissed by Order of Dohm J., July 14, 1989 A.B., Vol. V., p.940

It will be remembered that on August 16, Judge Scarth made an interim order for sole custody and guardianship of the infant children in favour of Mrs. Young, with specified access to Mr. Young over one weekend per month starting Saturday at 9:00 a.m. until Sunday at 5:00 p.m., one evening each week, and summer and Christmas holidays as agreed upon by the parties. It was left to the parties to agree on which weekend in the month and which evening in the week Mr. Young should have this access. His access was made subject to the restrictions regarding religion which formed the main focus of Mr. Young's complaint and were the reason underlying many of the applications he made and indeed, were the principal target of his appeal to this court.

Difficulties were encountered from mid-August on in reaching any agreement as to the dates on which Mr. Young could

exercise his rights of access, hence the application referred to in item 4. The removal or modification of the religious restrictions was the object of the proceedings referred to item 5.

An appreciation of the confrontational atmosphere which prevailed between these warring spouses can be gleaned from the following extract from the proceedings before Judge Scarth on September 9, 1988.

MS. DASSONVILLE: Your honour, it's the respondent's position it's quite urgent. In the four weeks that have elapsed since your previous order the petitioner has denied evening access to the respondent two out of four weeks. The respondent has not seen his children for an evening this week, and one week when I was on vacation August 22nd he did not see his children for his evening access that week either. It's the respondent's position that the petitioner is circumventing the order of access, and she's denying access to the respondent.

THE COURT: Well, do I have to specify days of access? Are the parties not able to work out --

MS. DASSONVILLE: Unfortunately, your honour, unless I am on the phone every day to my friend and my client is on the phone every day to his wife, no agreement can be reached. In spite of the fact that I have made numerous phone calls to my friend and my client has made numerous phone calls to his wife, he has still missed two access dates. The petitioner will not agree to any dates.

THE COURT: Well, the order is perfectly clear on the parameters of the access, and as I told you yesterday, I can simply dictate the terms of when that will be. I can specify which week-end in each month and which evening in each week, but it seems to me that that's to do so in the absence of the mother saying, well, that's the Girl Guide night or that's the night I'm required to be elsewhere. Can the parties not

specify one evening each week?

MS. DASSONVILLE: Your honour, the respondent has been attempting to have an evening per week. He originally asked for Wednesday or Thursday. The petitioner has affidavits, which are filed, which go into lengthy activities which the petitioner is enrolling the children in. The only evening apparently available on that list is Wednesday evening, which is exactly the same evening the respondent has asked for, yet she's failed to agree that he can see them. It's now Friday morning. She simply will not agree to which date he can see them. She has numerous excuses as to, well, maybe I'll see the children to this activity, I don't know what day it will be, I have to register them in school. The excuses go on and on. The respondent simply has not seen his children. He cannot simply be called at 10:30 in the morning, which is what happened last week, saying you can have the children at 2:30 today because he has appointments to show houses. He needs to know when he can see them.

THE COURT: Well, if there is this difficulty, I'm going to set an evening at which access will be given. Of course, I'm going to hear from your friend before I do any such thing, and I will expect to be told if there is a particular evening that is simply out of the question. I'm not going to frustrate access on the part of the respondent by putting it on an evening where he simply is unavailable. On the other hand, I'm not going to deliberately interfere with some aspect in the mother's upbringing of the children by putting it on another night that's not good for her.

MR. MacLEAN: Your honour, I'm wondering if we could save some time. What I had suggested to my friend was that perhaps to save these repeated court appearances we perhaps set a date; if there are activities on those days that the children are involved in, the father be responsible to go with them. They're in ballet lessons and things like that that might occupy an hour of say his four-access. Most parents would enjoy going to those activities. I think my client then would feel comfortable in saying this day, and then if there are activities planned, the children still get to go to them and Dad gets to enjoy them. That is a proposal I have made to my friend. Now, I don't know if that's acceptable or not. I think that both counsel here are going to have to knock the

> parents here [sic] together and get some cooperation. It's ridiculous.

THE COURT: Either that or I will.

MR. MacLEAN: Maybe then we can do it a little cheaper for them.

THE COURT: Yes.

MR. MacLEAN: And I'm going to advise my client that you had some strong words to say about this.

THE COURT: Well, what I am prepared to do, Miss Dassonville, is to give both of you an opportunity to discuss this with your clients on the basis that if there is not agreement, days will be specified and hours will be specified, there will be particulars set out in the court order.

Eventually, on October 7, 1988, Judge Scarth made a further order settling, pursuant to an agreement reached between counsel virtually on the courthouse steps, a specific schedule for weekly evening and weekend access for Mr. Young.

The provisions of this order were apparently adhered to until some time in December when again Mrs. Young denied Mr. Young the overnight access that had been ordered, as a result of which he launched the contempt proceedings referred to item 7. They resulted in some further clarification of the terms of his access, the specifics of which were the source of continuing contention.

Mr. MacLean also contended that the proceedings were attenuated by the appeals launched by Mr. Young from the order of Mr. Justice Spencer on July 27, 1988 and from the orders of Judge Scarth made August 16 and October 7. However, during the

course of argument, he conceded that it was not unreasonable for Mr. Young to have endeavoured to have the orders of Judge Scarth reversed or modified. It appears, as well, that on September 23, 1988, the appeal from the order of Mr. Justice Spencer of July 27, which had expired by effluxion of time, was disposed of, along with other matters, by Mr. Justice Hinkson who dismissed it by consent for want of prosecution.

While the lack of cooperation and, indeed, acrimony which has characterized much of this litigation is to be deplored, Mr. Young is not in my view to be criticized or to be mulcted in costs for taking such steps as appeared necessary to assert his rights to access when Mrs. Young had not strictly complied with the orders of the court made in his favour in this regard.

I leave for consideration under heading (f) the financial matters which are referred to in items 7 and 9 of Appendix B.

(c)The trial judge and chambers judge were subjected to unwarranted abuse, criticism and insult; and

(d)Irrelevant and repetitious material was produced; and

It seems fair to say that if a party's legal advisers have so conducted the proceedings on his behalf as to have transgressed the bounds set in the Stiles case it would not be inappropriate that he be visited with the consequences of their

conduct. But as I have concluded, for reasons I set out below in Mr. How's appeal, that Mr. How did not so transgress the bounds, there is nothing under this head to visit upon Mr. Young.

(e)Someone other than Mr. Young was promoting and paying for these proceedings.

It appears to me to be axiomatic that if the non-party who has assisted a litigant in the pursuit of his lawsuit has not, in doing so, acted improperly, then the litigant himself has not, by accepting such assistance, been guilty of any impropriety either. As I have concluded, for reasons I set out below in the appeal of The Burnaby Unit, there was nothing improper in the provision of financial assistance to Mr. Young by his friends, their having done so affords no basis for the special order for costs against him.

(f)Mr. Young attempted to mislead the court.

Of greater concern, in connection with the award of solicitor-and-client costs against Mr. Young, not only as it arises in this case but in matrimonial litigation generally, is the fact, as found by the trial judge, that Mr. Young "attempted to mislead the court on various applications involving maintenance payments by failing to disclose several very important financial matters". She listed a number of examples and concluded "this type of non-disclosure was ever present".

These findings, critical of Mr. Young, are amply supported on the evidence.

On the motions respecting interim maintenance which were dealt with in July and August of 1988, Mr. Young failed to advise the court of the fact that he had received the sum of $40,000.00 from his mother in June, 1988. Worse still, he swore that his mother had not helped him since April, 1987. In addition, he failed to disclose real estate commissions of over $38,000.00 that he was to receive within days of swearing his affidavit.

In February, 1989 Mr. Young was substantially in arrears of the payment of interim maintenance which had been ordered by Mr. Justice Finch on August 4, 1988. He applied for an order cancelling the arrears and reducing the maintenance, swearing an affidavit that he was unable to comply with the interim order to pay $3,500.00 per month to Mrs. Young. However, in his affidavit Mr. Young failed to disclose a gift of over $3,200.00 which he had received just prior to swearing it, and failed to disclose an existing bank balance of $12,000.00 standing to his credit. Prior to the hearing of this application Mr. Young received two real estate commissions totalling approximately $11,000.00 and this was not disclosed. He also failed to disclose the fact that, although he was in arrears and was asserting his inability to comply with the order for interim

maintenance, he had invested $7,500.00 in an R.R.S.P. At trial Mr. Young stated that he did not consider it necessary to advise the court of the receipt of such funds and he admitted under cross-examination that he elected to pay expenses and certain debts and to purchase an R.R.S.P. ahead of making maintenance payments.

Again, in July, 1989 Mr. Young applied for orders cancelling the arrears of maintenance and reducing his monthly maintenance payments and, in support of his application, he swore an affidavit stating that he would make no real estate sales for the months of July, August or September and would receive no further income from the date of his affidavit, sworn July 13, 1989, until the trial date set for September 25. On these motions Mr. Young again failed to advise the court that he had received gifts from friends of over $3,200.00 in February of 1989, a further $9,700.00 in May of 1989, and a further $2,150.00 from his family in May and June of that year. In addition, he failed to disclose the fact that he expected an income tax refund of almost $10,000.00, his tax return having been prepared and signed on April 30, 1989.

Counsel for Mr. Young made the point that notwithstanding these significant non-disclosures, the order for maintenance was sustained and the application for the sale of the matrimonial home and the cancellation of his arrears was dismissed. Such a consideration cannot provide any excuse for

the lack of candour Mr. Young displayed.

Mr. Young had sold property pursuant to an interim agreement dated June 12 which would provide him a commission income, payable in the month of October, in excess of $16,000.00 but he did not disclose this to the court in July. It was not until his commission earnings were garnisheed in October that this source of income came to light.

The seriousness of such a lack of candour can hardly be overstated. The conduct of litigation, and particularly matrimonial litigation, is difficult enough at the best of times; when it is rendered more so by such deliberate non-disclosure as has been exhibited in this case such misconduct ought not to be ignored. It seems clear that Mr. Young's attempts to mislead the court in this case were such as to prolong the trial, to complicate the issues and to make it necessary for Mrs. Young and her solicitors to take steps in the course of the proceedings which would have been unnecessary had it not been for those attempts and the false and misleading statements made by him. The court should properly mark its disapproval of the appellant's conduct, which crosses the bounds set in Stiles, by making an appropriate award respecting costs.

Having said this, I do not overlook the fact that the trial of this action was undoubtedly rendered longer than it might otherwise have been because of a number of issues, non-

financial in nature, raised by Mrs. Young. In these circumstances I think it inappropriate and wrong in principle to saddle Mr. Young with solicitor-and-client costs for the entire action.

Counsel for the appellants presented an analysis of the time at trial devoted to the various issues which were litigated from which it appears that the evidence and argument devoted to financial issues occupied about 30% of the time at trial which took 12 days. Accordingly, it is my view that the appropriate order to make is to direct that Mr. Young pay costs on a solicitor-and-client basis for 4 days of the trial itself and for the interlocutory proceedings referred to as items 1, 3, 4 and 5 of Appendix A, the proceedings before Mr. Justice Davies referred to in item 7 of Appendix B and the proceedings before Mr. Justice Dohm referred to in item 9 of that Appendix.

With respect to the balance of the costs in the court below each party will bear his or her own.

THE APPEAL OF MR. HOW

1. General Principles

Historically, English solicitors were subject to discipline by the courts whereas barristers constituted a self-governing profession. While, in 1888, the Council of the Law Society in England was empowered to investigate complaints against solicitors, the disciplinary jurisdiction of the courts was, and continues to be, maintained (see: Solicitors Act, 1974 (Eng.) c.47, s.50(2)). The nature of this jurisdiction and the basis upon which it may be invoked was explained by Lord Wright in Myers v. Elman, [1940] A.C. 282 (H.L.), a case in which a solicitor whose managing clerk was guilty of misconduct, unbeknownst to the solicitor, in the preparation and filing of inadequate and false affidavits of documents was ordered to pay the costs of the proceedings. Lord Wright said, at 317-319:

> A solicitor (or in former days a solicitor or an attorney) was long ago held to be an officer of the Court on the Roll of which he was entered and as such to be subject to the discipline of that Court. The Court might strike him off the Roll or suspend him; for instance, the Court of Chancery might strike a solicitor off the Roll of the Court, and order a communication of that order to be made to the Courts in Westminster Hall. There are many such instances in the books. By the Solicitors Act, 1888, there was established the Disciplinary Committee appointed by the Master of the Rolls from members or past members of the Council of the Law Society. This Committee was charged with the duty of investigating complaints against solicitors and reporting their decision to the Court, which could then, if so minded, strike the solicitor off the Roll or suspend him. It was not until l9l9 that by the Solicitors Act of that year, the Disciplinary Committee was itself given power to strike off the Roll or to suspend or to order payment of costs by the solicitor subject to an appeal to the Court. But the jurisdiction of the Master of the Rolls and any judge of the High Court over solicitors was expressly preserved, as it now is by s.5, sub-s. I, of the

> Solicitors Act, 1932. Whether the Court would now entertain an application to strike a solicitor off the Roll or to suspend him instead of leaving the matter to the Disciplinary Committee may be doubted. But alongside the jurisdiction to strike off the Roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both. The ground of such an order was that the solicitor had been guilty of professional misconduct (as it is generally called) not, however, of so serious a character as to justify striking him off the Roll or suspending him. This was a summary jurisdiction exercised by the Court which had tried the case in the course of which the misconduct was committed. It was clearly preserved to the Court by s.5, sub-s. I, quoted above. It was a summary jurisdiction, in which the intervention of the judge was invoked at the conclusion of the case either by motion in the Chancery court or by a motion or application for a rule in the Courts of Common Law. Though the proceedings were penal, no stereotyped forms were followed. Hence now the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil action. All that is necessary is that the judge should see that the solicitor has full and sufficient notice of what is the complaint made against him and full and sufficient opportunity of answering it. Thus, formal amendments of the complaint are not necessary, so long as the variations of the charge are sufficiently defined and the solicitor is given sufficient liberty to make his answer. The summary jurisdiction thus involves a discretion both as to procedure and as to substantive relief, though there was and is an appeal.

The cases of the exercise of this jurisdiction to be found in the reports are numerous and show how the courts were guided by their opinion as to the character of the conduct complained of. The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by Abinger C.B. in Stephens v. Hill. (I) The matter complained of need not be criminal. It

> need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realize his duty to aid in promoting in his own sphere the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action.

The Myers case was referred to with approval by the Supreme Court of Canada in Pacific Mobile Corporation v. Hunter Douglas Canada Limited et al., [1979] 1 S.C.R. 842 at 845.

Orders requiring solicitors to pay costs personally are sparingly made. The jurisdiction to make such orders must be exercised with care and discretion and only in clear cases. That this is so is made clear in the judgment of Sachs J. in Edwards v. Edwards, [1958] P. 235 at 248 where, after referring to the speeches of Viscount Maugham, Lord Atkin and Lord Wright

in Myers v. Elman (supra), he said:

> The jurisdiction is exercised not to punish the solicitor but to protect and compensate the opposite party.
>
> It is of course, axiomatic, but none the less something which in the present case should be mentioned, that the mere fact that the litigation fails is no reason for invoking the jurisdiction: nor is an error judgment: nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of Lord Maugham, to "a serious dereliction of duty," something which justifies, according to other speeches in that case, the use of the word "gross." It is not, however, normally necessary to establish mala fides or other obliquity on the part of the solicitors; though it may be that if mala fides is established that might turn the scale in a particular case: and it is right at this stage to make it clear that no imputation whatever is made against the solicitor's honesty.
>
> No definition or list of the classes of improper acts which attract the jurisdiction can, of course, be made; but they certainly include anything which can be termed an abuse of the process of the court and oppressive conduct generally. It is also from the authorities clear, and no submission to the contrary has been here made, that unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction.
>
> Mr. Latey submitted in the course of his most helpful address that once a sufficient degree of dereliction of duty is established, the exercise of the above jurisdiction was a matter of discretion, and I accept that view. I also agree with his submission that the jurisdiction is one to be exercised sparingly and that the court can to some extent bear in mind the repercussions of making an order. On the other hand, that cannot affect the duty of the court to protect litigants from being improperly damnified. Suffice it to say that any application made to the court in relation to this jurisdiction is naturally one which causes anxious scrutiny of all the circumstances.

A solicitor may be required to pay costs personally where it is established that he has failed to advise his client that the opponent's claim is "irresistible", that the client's case is "doomed to failure", "impossible to prove" or "hopeless", and where counsel has caused a proceeding to be launched without a bona fide expectation of a favourable result. The following are some examples:

Cook v. The Earl of Rosslyn (1861), 66 E.R. 371; 3 Giff. 175, at E.R. 374, per Sir John Stuart, V.C. (opponent's claim "irresistible")

Cockel v. Whiting (1829), 39 E.R. 17; 1 Russ. + M. 42, at E.R. 18, per Sir John Leach, M.R. ("no bona fide expectation")

Edwards v. Edwards (supra), at 248, and 254 per Sachs J. ("no or substantially no chance of success"; "doomed to failure")

Wilkinson v. Wilkinson, [1963] P. 1 (C.A.), at 10 per Ormerod L.J. ("impossible to prove")

Holmes v. National Benzole Co. Ltd. (1965), 109 So. Jo. 971 (Q.B.), at 971, per Lyell J. ("hopeless")

Davy-Chiesman v. Davy-Chiesman, [1984] 1 All E.R. 321 (C.A.), at 334, per Dillon L.J. ("no or substantially no chance of success")

Worldwide Treasure Adventures Inc. v. Trivia Games Inc. (1987), 16 B.C.L.R. (2d) 135 (S.C.), at 138, per Gibbs J. (case "so hopelessly deficient that the defendants should not have been brought into court to answer for it")

Special care must be exercised in a case where it is sought to hold a solicitor personally liable to pay costs on the ground that the proceedings which had been initiated or continued had no or substantially no chance of success as the

solicitor, because of the duty of confidentially he owes his client, may be hampered in defending the allegations made against him. These considerations were outlined in Orchard v. South Eastern Electricity Board, [1987] 1 All E.R. 95 (C.A.) at 100 by Sir John Donaldson, M.R., who said:

> The jurisdiction could only be invoked in the case of serious misconduct, and the initiation or continuance of an action when it had no or substantially no chance of success might constitute such misconduct (see [1984] 1 All E.R. 321 at 334. [1984] Fam 48 at 67 per Dillon L.J.).
>
> That said, this is a jurisdiction which falls to be exercised with care and discretion and only in clear cases. In the context of a complaint that litigation was initiated or continued in circumstances in which to do so constituted serious misconduct, it must never be forgotten that it is not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the court. On the other hand, no solicitor or counsel should lend his assistance to a litigant if he is satisfied that the initiation or further prosecution of a claim is mala fide or for an ulterior purpose or, to put it more broadly, if the proceedings would be, or have become, an abuse of the process of the court or unjustifiably oppressive.
>
> There is one other aspect of which sight must not be lost. Justice requires that the solicitor shall have full opportunity of rebutting the complaint, but circumstances can arise in which he is hampered by his duty of confidentiality to his client, from which he can only be released by his client or by overriding authority, such as that contained in reg 74 of the Legal Aid (General) Regulations 1980, S1 1980/1894. In such circumstances justice requires that the solicitor be given the benefit of any doubt.

A solicitor has a duty to take any point which he

honestly believes to be fairly arguable on behalf of his client, and it is the duty of the court to hear the point. As to the first branch of this proposition Lord Denning M.R. in Abraham v. Jutson, [1963] 2 All E.R. 402 (C.A.) said, at 404.

> Appearing, as the appellant was, on behalf of an accused person, it was, as I understand it, his duty to take any point which he believed to be fairly arguable on behalf of his client. An advocate is not to usurp the province of the judge. He is not to determine what shall be the effect of legal argument. He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court. Nothing of that kind appears here.

and, as to the second branch, Taggart J.A. in Geller v. Brisseau, [1979] 6 W.W.R. 416 (B.C.C.A.) said at 424-425:

> In my opinion, it is the duty of a trial judge to listen fairly to the submissions and evidence made on behalf of a litigant. As I have already intimated, in the circumstances of this case there was at least an arguable case to be presented to the court on behalf of the plaintiff. I do not say that the action would have in any event succeeded. Far from it, because there is no basis upon which to reach that conclusion, the trial never having proceeded to a conclusion. But there was at least an arguable case which, in my opinion, it was the duty of the court to hear.
>
> Further, I think the trial judge's comments concerning the competence of Mr. Geller were, in the circumstances, also improper and unwarranted. Certainly Mr. Geller did not have the experience of other counsel who appear before trial judges and this court, but he had a case to present on behalf of his client, he had formulated that case in the statement of claim, and the statement of defence appeared to give some support to the approach that he had taken, as do

> some at least of the exhibits and some of the evidence which the plaintiff was able to present.

That being the case, I think it was wrong for the trial judge to impose on Mr. Geller the strictures which he did.

I note here that we are advised that the reasons for judgment have been reported, and can only redound to the detriment of Mr. Geller. I think those strictures ought not to stand, and I reject them.

I think, as well, that the order of the judge directing that Mr. Geller pay the costs of the two days of trial was also wrong, and ought to be set aside.

Solicitors who think that they may be mulcted in costs for advancing points which they honestly believe to be fairly arguable may not act fearlessly and in the best traditions of an independent profession. If solicitors are limited in what they think they can say or do on behalf of their clients, then the rights of those clients are also necessarily limited. The potential for a chilling effect, especially if solicitors may be exposed to orders that they pay costs as between solicitor and client, the repercussions on solicitors' positions and consequently upon that of their clients, if adverse costs awards are made, underscore the need for judges to exercise caution in the making of such orders.

The object of an order requiring a solicitor to pay costs personally is to reimburse a litigant for costs which he has incurred as a result of the solicitor's default. The object is to compensate the litigant, not to punish the solicitor,

although the effect of such an order will necessarily be punitive insofar as the solicitor is concerned.

In Holden & Co. (a firm) v. Crown Prosecution Service, [1990] 1 All E.R. 368 (C.A.), Lord Lane C.J. said, at 372:

> Despite the dictum of Lord Atkin in Myers v. Elman cited earlier, it seems clear that the object of the order is primarily to reimburse a litigant for costs which he has incurred because of the solicitor's default (see Weston v. Courts Administrator of the Central Criminal Court, [1976] 2 All ER 875 at 883, [1977] QB 32 at 45, per Stephenson LJ). The costs which the solicitor will have to pay from his own pocket will be those, and only those, which his default has caused. There is nothing to be added to that figure to mark the disapproval of the court or by way of deterrence. To that extent the object of the jurisdiction is to compensate.
>
> However, there is a punitive element as May J pointed out in Currie & Co. v. Law Society, [1976] 3 All ER 832 and 839, [1977] QB 990 at 997, in that the solicitor is having to pay a bill which would otherwise have to be met by one of the parties to the litigation. There is also necessarily an element of deterrence in that solicitors will wish to avoid the expense and adverse publicity that the exercise of the court's jurisdiction entails.

In Stiles v. Workers' Compensation Board of British Columbia (1989), 38 B.C.L.R. (2d) 307 (B.C.C.A.) this court set aside an order imposing solicitor and client costs against the unsuccessful party to a contested chambers application. I repeat what Lambert J.A. said at 311:

> The principle which guides the decision to award solicitor-and-client costs in a contested matter where there is no fund in issue and where the

> parties have not agreed on solicitor-and-client costs in advance, is that solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used. See Cominco v. Westinghouse Can. Ltd. (1980), 16 C.P.C. 19 at 22 (B.C.S.C.); Jackh v. Jackh (1981), 31 B.C.L.R. 309 at 312 (S.C.); Sussex Invt' Ltd. v. Leskovar (1981), 30 B.C.L.R. 372 at 378 (C.A.); and Doyle Const. Co. v. Carling-O'Keefe Breweries of Can. Ltd. (1988), 27 B.C.L.R. (2d) 81 (C.A.).

It would seem to follow that an award of solicitor and client costs against a solicitor personally must necessarily be an award which does more than merely compensate. It carries, as well, some punitive or deterrent element.

This leads to a consideration of the position of barristers as distinguished from solicitors, in light of the applicable legislation and Rules of Court in this Province.

In Myers v. Elman (supra) the House of Lords awarded costs against a solicitor personally in the exercise of the inherent disciplinary jurisdiction of the court over solicitors as officers of the High Court. However, as pointed out in the factum filed on behalf of the Law Society, Myers v. Elman and subsequent English decisions, ought to be applied with some caution in the context of British Columbia's Legal Profession Act and of the role of the Law Society of this Province in the disciplining of lawyers.

In British Columbia all members of the legal profession admitted as solicitors of the Supreme Court are, as are solicitors in England, officers of the courts in which they are licensed to practise (see Legal Profession Act, S.B.C. 1987, c.25, s.2(3)). English barristers, on the other hand, are not considered to be officers of the courts.

In the Legal Professions Act of 1955 the analogous section to the present s.2(3) reads:

> 2. (1) The Law Society of British Columbia (hereinafter called the "Society") shall continue to be incorporated under that name and style as a body politic and corporate, with continued succession and a common seal.
>
> (2) The members of the society shall be all persons called to the Bar of the Province, and all persons admitted as solicitors of the Supreme Court, so long as their names remain on the barristers' roll or the solicitors' roll. They shall be officers of all Courts of the Province.

That section was amended in 1969:

> 1. Section 2 of the Legal Professions Act, being chapter 214 of the Revised Statutes of British Columbia, 1960, is amended
>
> (a) in subsection (2) by striking out all the words after the word "Court" in the third line, and substituting the words "who have not ceased to be members of the Society."; and
>
> (b) by adding the following as subsection (3):
>
> (3) Every member of the Society admitted as a solicitor of the Supreme Court is an officer of all the Courts of the Province.

(The legislative history is traced in the article An Independent Bar, Sham or Reality by Mary Southin (now Southin J.A., in (1967) 25 Advocate 227-230).

In speaking of the position of the barrister in England Lord Upjohn, in Rondel v. Worsley, [1969] 1 A.C. 191 (H.L.) said, at 282-284:

> . . . the barrister is engaged in the conduct of litigation whether civil or criminal before the courts. He is not an officer of the court in the same strict sense that a solicitor is; if a solicitor fails in his duty to the court he is subject to the jurisdiction of the court, which can, and in proper cases does, make summary orders against him. The barrister is not subject to any such jurisdiction on the part of the judge. To take a simple example: if a solicitor is not present in court personally or by an authorised representative, he is open to be penalised by being ordered to pay personally costs thrown away, at the discretion of the judge. If counsel is not present, it may be that the judge will express his views upon the matter but I do not believe he has any power over counsel save to report him to the Benchers of his Inn. But while the barrister is not an officer of the court in that sense he plays a vital part in the proper administration of justice. I doubt whether anyone who has not had judicial experience appreciates the great extent to which the courts rely on the integrity and fairness of counsel in the presentation of the case. I do not propose to expand this at very great length, for it has been developed in the speeches of those of your Lordships who have already spoken upon this matter; but while counsel owes a primary duty to his client to protect him and advance his cause in every way, yet he has a duty to the court which in certain cases transcends that primary duty. I think that the Scots case of Batchelor v. Pattison and Mackersy [3 R. (Ct. of Sess.) 914, 918] sets out in a lengthy passage, which I will not quote, a very useful description of the independent conduct required of counsel in the conduct of a case. But I may mention some duties cast upon the barrister; if in a civil case the client

produces a document which may be nearly fatal to his case it is the duty of counsel to insist on its production before the court; the client may want counsel to drag his opponent through the mire by asking a number of questions in cross-examination in the hope that the opposition may be frightened into submission. Counsel here has equally a duty to the court not to cross-examine the opposition save in accordance with the usual principles and practice of the Bar. In a criminal case it is the duty of counsel not to note an irregularity and keep it as a ground of appeal to the Court of Appeal (Criminal Division) but to take the point then and there. This may be seriously prejudicial to his client's case (see Rex v. Neal) [[1949] 2 K.B. 590; 65 T.L.R.]

Counsel is equally under a duty with a view to the proper and speedy administration of justice to refuse to call witnesses, though his client may desire him to do so, if counsel believes that they will do nothing to advance his client's case or retard that of his opponent. So it is clear that counsel is in a very special position and owes a duty not merely to his client but to the true administration of justice. It is because his duty is to the court in the public interest that he must take this attitude. It is this consideration which has led to the immunity from defamation of counsel, as of the judge and the witnesses, for all that he says in court, for all the questions that he asks and for the suggestions he may make to the witnesses on the other side. This immunity is just as necessary in his general conduct of the case as in the case of defamation, not to protect counsel who abuses his position but to protect those who do not, for the reason that, in the words of Fry L.L. in Munster v. Lamb [11 Q.B.D. 588, 607] ". . . it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty." Counsel may deliberately decide beforehand not to call a witness but anyone who has practised at the Bar knows the stresses and strains that counsel undergoes during the course of a case. It is all in public; immediate decision may have to be made as to whether to call or not to call a witness and even more quickly whether to ask or not to ask a question. The judge may, for even judges are human, be perhaps unreceptive to counsel's case. All these circumstances may place counsel in a bad light with his client. If counsel is to be subject to

> actions for negligence it would make it quite impossible for him to carry out his duties properly. I am not, of course, suggesting for one moment that the fact that counsel does or does not call a witness, or does or does not ask a question or does or does not ask to amend his pleadings could possibly by itself be a cause of action for negligence, even if "jobbing backwards" on mature reflection it had been better if counsel had pursued an opposite course. The most that can be said is that he committed an error of judgment. But if the law is that counsel can be sued for negligence it is so difficult to draw the line between an alleged breach of duty where none in fact had been committed; a mere error of judgment; and negligentia or indeed crassa negligentia and counsel might be sued in actions which may well turn out to be quite misconceived: this case may, indeed be a very good example of it. But if the threat of an action is there counsel would be quite unable to give his whole impartial, unfettered and above all, uninhibited consideration to the case from moment to moment, and without that the administration of justice would be gravely hampered. So that in litigation it seems to me quite plain that immunity from action is essential in the interests of the administration of justice as a whole upon the ground of public policy. Regrettable though it may be, if in any case counsel does commit an actionable wrong (but for the immunity) the client who suffers must do so without requite in the public interest.

> I am quite unable to agree with the argument of counsel for the appellant that this immunity is any new ground of public policy. It is all part and parcel of the long-established general policy that judges, witnesses and counsel must be immune from actions arising out of their conduct during the course of litigation in the public interest. That is sufficient to dispose of this appeal.

I leave for another day the question as to whether a lawyer in British Columbia may be held liable for negligence in his capacity as a barrister as distinguished from what he may have done, or failed to do, in his capacity as a solicitor, and

focus on the question of jurisdiction over disciplinary matters.

In this Province, the legal profession is self-governed. Jurisdiction to discipline members of the profession is vested in the Benchers and the Discipline Committee of the Law Society under the provisions of the Legal Profession Act. The Act does not, as does the English legislation, expressly maintain the disciplinary jurisdiction of the court.

This court has recognized that the Benchers are responsible for determining what is, and what is not, professional misconduct, and has held that the courts ought to be reluctant to interfere in that determination. In Wilson v. Law Society of British Columbia (1986), 9 B.C.L.R. (2d) 260 (B.C.C.A.), Macfarlane J.A. said, at 264:

> What is and what is not professional misconduct is a matter for the benchers to determine, and the court must be very careful not to interfere with the decision of the benchers for their decision is, in theory, based on a professional standard which only they, being members of the profession, can properly apply: see Prescott v. Law Soc. of B.C.; Re Imrie and Inst. of Chartered Accountants of Ont., [1972] 3 O.R. 275 at 279, 28 D.L.R. (3d) 53.

The rationale is to be found in the judgment of Branca J.A. in Prescott v. Law Society of B.C., [1971] 4 W.W.R. 433 (B.C.C.A.), at 440-441 where he said:

> The Benchers are the guardians of the proper standards of professional and ethical conduct. The

> definition, in my judgment, shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession". The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men who enjoy the full confidence and trust of the members of the legal profession of this province. One of the most important statutory duties confided to that body is that of disciplining their fellow members who fail to observe the proper standards of conduct and/or ethics which are necessary to keep the profession on that very high plane of honesty, integrity and efficiency which is essential to warrant the continued confidence of the public in the profession.

I can conceive of the possibility, however remote, that the Benchers might arbitrarily and unreasonably deem that certain conduct is contrary to the best interest of the public or of the legal profession, or tends to harm the standing of the legal profession. I prefer to leave for consideration, if such a situation should arise, what the duty of this Court would be under the broad powers of review reposed in this Court by s.62 of The Legal Professions Act.

Boyd C. in Hands v. Law Society of Upper Canada (1889), 16 O.R. 625 at 635-6, affirmed 17 O.A.R. 41, stated as follows:

"It is for the Benchers, representing what is best in the profession, to determine and adjudge what is and what is not becoming conduct in a member of the Society. The body itself is practically constituted the custodian and judge and vindicator of its own integrity and honour.

Any act of any member that will seriously compromise the body of the profession in public estimation, is surely within the province of this law. It is not for the well-being of the Society itself that any limited construction should be placed upon the extent of the powers delegated to Convocation. Speaking generally, any misconduct which would prevent a person from being admitted to the Society, justifies his removal, because it indicates that he is unsafe and unfit to be entrusted with the powers and privileges of an

> honourable profession and a confidential office. The conduct which unfits a man to be a solicitor should a fortiori preclude his being a barrister, a degree of greater rank and honour in the law; and where practitioners, as in this Province, usually combine the functions of both branches of the profession, it is impracticable to discipline the solicitor and let the barrister go free. In the case in hand the broad question presented itself: was the solicitor's conduct unbecoming and unprofessional? Convocation, consisting of twenty-two Benchers, has unanimously voted 'yea' and in such a matter no better judges can be found. Having for this reason rejected Mr. Hands the solicitor, they cannot retain Mr. Hands the barrister."

The jurisdiction of the court to make an order as to costs which fulfills the compensatory objective described in Myers v. Elman is found in Rule 57(30) (now Rule 57(37)) of the Rules of Court. It provides:

Disallowance of solicitor client costs

> (30) If it appears to the court that costs have been incurred improperly or without reasonable cause, or that by reason of undue delay in proceeding under an order or of any misconduct or default of the solicitor, any costs properly incurred have proved fruitless to the person incurring them, the court may order the costs disallowed as between the solicitor and his client, and also that the solicitor repay to his client any costs which the client may have been ordered to pay to any other person, or may make such order as the justice of the case may require. The court may refer the matter to the registrar for inquiry and reports and such notice of the proceedings or order shall be given to the solicitor and the client as the court may direct.

Examples of how the court's discretion is to be exercised when considering whether costs should be awarded

against a solicitor personally under this Rule may be found in the following:

World Wide Treasure Adventures Inc. v. Trivia Games Inc. (1987), 16 B.C.L.R. (2d) 135 (S.C.)

Kern v. Kern & Weylie (1986), 50 R.F.L. (2d) 77 (Ont. H.C.)

Real Securities of Canada Ltd. v. Beland et al. (1987), 16 C.P.C. (2d) 230 (Ont. Dist. Ct.)

Weldo Plastics Ltd. v. Communication Press Ltd. (1987) 19 C.P.C. (2d) 36 (Ont. Dist. Ct.)

Holden & Co. (a firm) v. Crown Prosecution Service, [1990] 1 All E.R. 368 (C.A.)

Because of the compensatory nature of an award of costs pursuant to Rule 57(30) the Rule should be interpreted in a manner consistent with the traditional immunity of a barrister from suit, as laid down in Rondel v. Worsley (supra), and as applying only to matters other than what may be described as counsel work.

In New Zealand, where, as in this Province, there is a fused bar, Rondel v. Worsley was applied in the case of Rees v. Sinclair, [1974] 1 N.Z.L.R. 180 (C.A.). In that case McCarthy P. said at 186-187:

> In Rondel v. Worsley the House held that the immunity covered not merely the conduct and management of a cause in Court, but also preliminary work in connection therewith, such as the drawing of pleadings. More than one member of the House commented on the difficulty of drawing the line of demarcation in certain classes of barristerial work. Mr. Hassall has contended that the difficulty is even greater in New

> Zealand, where the delineations between the work of a barrister on the one hand and a solicitor on the other are less clearly marked than they are in England. Therefore, he says, we should restrict the coverage to the actual Court appearance. I agree that the boundaries are less certain in New Zealand, and that it is most difficult to draw in advance any statement of them which will satisfactorily dispose of all debatable areas, but that should not deter us from declaring the principle. I agree, too, that, having regard to the capacity of practitioners in New Zealand to be both barristers and solicitors, we should not be controlled by the divisional lines adopted in England. But I cannot narrow the protection to what is done in Court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.

It follows that an award of costs pursuant to Rule 57(30) should not be made against a solicitor personally in respect to his role in the management and conduct of a case in court or in the preliminary work which is related to the conduct of the case in court which are his functions as a barrister.

2. Application of the General Principles

For convenient reference I shall repeat here the summary of the findings of the trial judge which led her to make the

special order she did as to costs. They are that:

(a)the custody claim by the appellant Young (Mr. Young) had little merit;

(b)There had been excessive number of interlocutory applications and motions;

(c)The trial judge and chambers judge were subjected to unwarranted abuse, criticism and insult;

(d)Irrelevant and repetitious material was produced; and

(e)Someone other than Mr. Young was promoting and paying for these proceedings.

(f)Mr. Young attempted to mislead the court;

In making these findings, the trial judge did not distinguish between the three special orders as to costs which were sought, and obtained, by Mrs. Young, i.e. solicitor-and-client costs against Mr. Young, solicitor-and-client costs as against the appellant Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses (The Burnaby Unit) and solicitor-and-client costs as against Mr. How.

The trial judge made no finding that Mr. How was personally responsible for bringing a custody claim which was

meritless. Nor did she find that Mr. How was personally responsible for bringing an excessive number of motions, unless her observation that Mr. How "had a forum and a cause to pursue", in the context of her discussion of excessive proceedings, constitutes such a finding against Mr. How personally. I do not see how it can be so construed.

An award of costs should not be made against a solicitor personally on the ground that proceedings brought on behalf of a client lack merit unless it is beyond doubt, not only that the proceedings are devoid of merit and that the solicitor knew or ought to have known them to be so, but also that the responsibility for continuing with the proceedings despite their lack of merit lies with the solicitor, rather than the client. Firstly, a solicitor should not usurp the function of the court by prejudging a client's case. Secondly, it will generally be impossible for a solicitor to defend a charge that he or she is responsible for proceeding with a meritless claim, by showing that the client has been advised of the improbability of success and has nevertheless insisted on proceeding, without a violation or waiver of solicitor client privilege. (See: McGowan, Annotation to Naeyaert v. Elias (1985), 4 C.P.C (2d) 298 (Ont. H.C.).

What I have already said in connection with the appeal of Mr. Young under heading (a) has application here. Mr. How argued the custody issue through these proceedings with

reference to appropriate authorities. That his submissions did not find favour with the trial judge is no warrant for fixing him personally with solicitor-and-client costs for the entire action.

The trial judge made no finding that Mr. How was a party to Mr. Young's attempt to mislead the court.

The finding that the proceedings were promoted by and paid for by someone other than Mr. Young was clearly relevant only to the award of solicitor-and-client costs against The Burnaby Unit.

Thus, the only findings of the trial judge which might form the basis of her award of solicitor-and-client costs against Mr. How, were there nothing else in the way, are:

(a) her finding that Mr. How produced a great quantity of repetitious and irrelevant material;

(b) her finding that Mr. How subjected the court to unwarranted abuse, criticism and insult; and

(c) her finding that there had been excessive numbers of interlocutory applications and motions.

(a) Repetitious and Irrelevant Material

Counsel bears the responsibility for determining what evidence should be adduced to advance his client's cause. In doing so counsel must be allowed some latitude.

Insofar as Mr. How acted in good faith in producing the material which he did, in the belief that it was necessary to prove his client's case, the production of material not strictly necessary for the court's decision is not grounds for an award of solicitor-and-client costs against him. There is no finding that Mr. How was not bona fide.

It must also be remembered, as I have already noted, that Mrs. Young had put into issue very early on in the proceeding the question of whether the tenets of the Jehovah's Witness religion were capable of harming the children and she never abandoned her case on that point. In fact, she pursued it vigorously by delivering the Notice of Evidence of Mr. Magnani just before trial and by testifying at trial as to her concerns about the tenets of that faith. In the circumstances, it could not be said that Mr. How breached any duty to the court by adducing or seeking to adduce evidence which might prove that the tenets were not capable of being harmful or that any harm to the children resulted from Mrs. Young's intolerant attitude and not from anything Mr. Young might be teaching them or to which he might be exposing them.

A solicitor ought not to be ordered to pay solicitor-and- client costs where his conduct is merely the product of excessive zeal. That, in my view, is the most that could be said here of Mr. How's conduct, faced as he was with a

determined attack upon the religious beliefs and practices of the client for whom he was acting.

(b) Abuse and Criticism of Judges

The Law Society submits that Mr. How's remarks regarding the trial and chambers judges are not an appropriate basis for an award of solicitor-and-client costs against Mr. How, as they did themselves not cause costs to be incurred, or to be wasted, as required by Rule 57(30).

There can be no doubt that where the conduct of counsel amounts to contempt the court has ample power to visit it with appropriate consequences. In Re Duncan (1957), 11 D.L.R. (2d) 616, [1958] S.C.R. 41 the Supreme Court of Canada held, at 617 (D.L.R.) and 43 (S.C.R.), that:

> The objection taken by Mr. Duncan to our jurisdiction to cite him for contempt has no foundation. By the provisions of the Supreme Court Act, R.S.C. 1952, c.259, this Court is a common law and equity court of record and its power to cite and, in proper circumstances, find a barrister guilty of contempt of Court for words uttered in its presence is beyond question. That power has been exercised for many years and it is not necessary that steps be taken immediately.

In Weston v. Central Criminal Courts Administrator, [1976] Q.B. 32 (C.A.), a trial judge had ordered a solicitor who failed to appear on the date fixed for his client's trial and who had written an offensive letter protesting the fixing of

that date to pay the costs thrown away. His appeal was allowed, the Court of Appeal holding that the jurisdiction which the trial judge purported to exercise was not the supervisory jurisdiction of the court over solicitors as its officers, but the inherent jurisdiction to punish for contempt, and that the conduct complained of had not crossed the line dividing mere discourtesy from contempt. Lord Denning M.R. said, at 42-43:

> Seeing that the judge was punishing for contempt, there is an appeal to this court given by section 13(2)(b) of the Administration of Justice Act 1960.
>
> In Balogh v. St. Albans Crown Court, [1975] Q.B. 73, we considered this jurisdiction, and perhaps I may repeat what I said at p.85:
>
> "This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the court and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately--so as to maintain the authority of the court--to prevent disorder--to enable witnesses to be free from fear--and jurors from being improperly influenced--and the like . . . The reason is so that [the judge] should not appear to be both prosecutor and judge; for that is a role which does not become him well".
>
> The jurisdiction has rarely been exercised against counsel or solicitors in England. The most relevant authority comes from Nigeria. It was in the Privy Council: Izuora v. The Queen [1953] A.C. 327. The judge in Nigeria was to give a reserved judgment. He directed both counsel to attend. One of them did not do so. The judge held that his absence from the court without leave amounted to a contempt, and fined him £10. The Privy Council held that it was not a contempt of court. Lord Tucker said, at p.336:

"It is not possible to particularize the acts which can or cannot constitute contempt ... It is not every act of discourtesy to the court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. In the present case the appellant's conduct was clearly discourteous, it may have been in breach of rule 11 of Ord.16, and it may, perhaps, have been in dereliction of duty to his client, but in their Lordships' opinion it cannot properly be placed over the line that divides mere discourtesy from contempt."

I would apply those principles here. First, the letter of November 20, 1975. The judge described it as "scurrilous". It was most discourteous. I realise that it was written by the solicitor in the heat of the moment after a long day, when he found the case suddenly put into the list. Even so, however, it did go beyond all bounds of courtesy. But it was not a contempt of court. It did not interfere with the course of justice in the least. The proper remedy for it was to report it to the Law Society. We have been referred to the Guide to the Professional Conduct of Solicitors (1974) issued with the authority of the Law Society. It says, at p.81:

"It has been held unbefitting conduct for a solicitor to write offensive letters to clients of other solicitors, to government departments and to the public. The use of insulting language and indulging in acrimonious correspondence are neither in the interests of the client nor conducive to the maintenance of the good name of the profession."

I do not dispute the power of the courts in civil cases to visit costs on counsel for his conduct of a trial. That is a power which, because it may inhibit or prevent counsel representing his client fearlessly on the trial of the merits, is to be most sparingly exercised. It is not necessary in my

view to decide whether it can only be properly applied in a case of contempt although that is my tentative present view.

It is apparent in this case that the trial judge, in making this order against Mr. How, was not relying upon the court's power to punish for contempt. Mr. MacLean agreed that this was so and said that Mr. How's conduct could not be regarded as contumacious. I must not be taken to condone everything that was said by Mr. How in the course of this bitterly contested lawsuit, but his conduct was not such as to engage the contempt powers of the court. It is, if anything, a matter for the disciplinary process of the Law Society as to which, in deference to its jurisdiction, I say no more save that it is not a proper basis for the award of costs made against him.

(c) Interlocutory Applications and Motions

Again, what I have already said in connection with the appeal of Mr. Young, under heading (b), has application here.

The motions made by Mr. Young and the applications he defended respecting access cannot be said to indicate conduct by Mr. How which should merit an order requiring Mr. How to pay costs personally. From his side, Mr. Young was applying to get access which he alleged was being denied to him. In the circumstances, it could not be said that in assisting with these

interlocutory steps Mr. How was guilty of conduct which tended to defeat justice or constituted a failure on his part in his duty to the court.

There is nothing to suggest that Mr. How was in any way complicit in what I have referred to under heading (f) in Mr. Young's appeal as his lack of candour.

In conclusion, I am of the view that the conduct of Mr. How which was criticized by the trial judge related to his role as a barrister in the conduct and management of these proceedings on behalf of his client; that, while in some instances it could be described as less than impeccable, it fell far short of contempt; and that no order for costs should have been made pursuant to Rule 57(30) against him.

THE APPEAL OF THE BURNABY UNIT OF THE NEW WESTMINSTER CONGREGATION OF JEHOVAH'S WITNESSES

Review Application

At the trial of this action counsel for Mrs. Young gave notice of his client's intention to claim costs against the "organization" thought to be funding Mr. Young in the proceeding. The following exchange between counsel and the court is recorded:

MR. MacLEAN: One final point, my lady, just on another

topic. I am going to be asking for costs against the organization itself and I'm wondering if my friends can just advise me what the organization, the proper party for you to make a judgment against, if you do, here in British Columbia is. Is it the Watchtower, is it the Kingdom Hall, which is it, for my written submissions?

THE COURT: Maybe Mr. How will discuss that with you.

MR. MacLEAN: As long as there is a direction that I get that name for the written submissions.

THE COURT: I think that's appropriate. Mr. How I'm sure will co-operate and give you --

MR. HOW: There's no settled arrangements. It's voluntarily [sic] for those people who want to contribute, that's all. There is no -- I can't point to anybody.

MR. MacLEAN: Is there a society here in British Columbia that owns the churches? That's what I'd like to know. There must be something.

THE COURT: I'm leaving it to Mr. How to indicate to you the appropriate name of the organization here in British Columbia. I will say no more.

In response to this direction, The Burnaby Unit was named.

The Burnaby Unit is a society incorporated under the laws of British Columbia. It is a legal entity distinct from the Watch Tower Bible and Tract Society, which is itself a legal entity and which functions as an "umbrella organization" of local congregations of Jehovah's Witnesses throughout Canada.

On April 12, 1990 Mr. Justice Hinkson dismissed the application of The Burnaby Unit for leave to appeal against the

order for costs on the grounds that:

(a)The Burnaby Unit would "not be personally liable" to pay the costs so that its appeal, if leave were granted, would be academic;

(b)this Court has determined that costs can be awarded against a non-party, even absent proof of fraud; and

(c)in the light of the financial circumstances of Mrs. Young and her obligations to the children of the marriage, it was not in the interests of justice that she be involved in a further appeal, namely, The Burnaby Unit appeal.

Mr. Justice Hinkson stated that The Burnaby Unit "would not be personally liable to pay the costs" because he had, in response to his inquiry, been informed by counsel for The Burnaby Unit that the umbrella organization had agreed to indemnify The Burnaby Unit against payment of the costs.

The costs of $50,000.00, with interest, have been paid to Mrs. Young pursuant to an agreement under which she provided security for their repayment should the costs appeals of Mr. Young, Mr. How and The Burnaby Unit succeed.

This appellant asks that this court review the order of Mr. Justice Hinkson and seeks an order granting leave to appeal

against the order for costs pronounced on December 12, 1989 and, if leave to appeal is granted, an order quashing the order for costs.

As already noted, at trial counsel for Mrs. Young submitted that an organization of Jehovah's Witnesses with assets in British Columbia should be named as the entity against which an order for costs could be made, and the trial judge made a direction accordingly. Having asked for a direction concerning an entity with assets in British Columbia, and not for the name or names of those who actually funded Mr. Young's case, Mr. Turriff contended that it should not now be open to Mrs. Young to argue that The Burnaby Unit appeal is academic because The Burnaby Unit will not itself ultimately have to pay the costs. Those costs will be paid by adherents to the Jehovah's Witness faith, probably by individual contribution through the umbrella organization.

It is not necessary to resolve this subtle question because, during the course of his submissions, Mr. Turriff applied for an order that the "umbrella organization", the Watch Tower Bible and Tract Society, be substituted in place of The Burnaby Unit as the party appellant in this appeal, and, with Mr. MacLean consenting, that order was made. As a result, so far as the umbrella organization is concerned, this appeal is not now academic.

Mr. Turriff submitted that the proposed appeal involves the broad question of principle considered by the Supreme Court of the United States in N.A.A.C.P. v. Button (1963), 371 U.S. 415. In that case the court held unconstitutional legislation passed by the State of Virginia aimed at restricting the activities of the National Association for the Advancement of Coloured People in supporting litigation involving civil rights issues. Mr. Justice Brennan, who wrote the majority opinion, said, at 410:

> The basic aims and purposes of NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. To this end the Association engages in extensive educational and lobbying activities. It also devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes. For more than 10 years, the Virginia Conference has concentrated upon financing litigation aimed at ending racial segregation in the public schools of the Commonwealth.

at 416:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.

at 417:

> The NAACP is not a conventional political party; but the litigation it assists, while serving to

> vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

at 419:

> We conclude that under Chapter 33, as authoritatively construed by the Supreme Court of Appeals, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys (for example, to the Virginia Conference's legal staff) for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances. There thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. Lawyers on the legal staff or even mere NAACP members or sympathizers would understandably hesitate, at an NAACP meeting or on any other occasion, to do what the decree purports to allow, namely, acquaint "persons with what they believe to be their legal rights and . . . [advise] them to assert their rights by commencing or further prosecuting a suit . . . ." For if the lawyers, members or sympathizers also appeared in or had any connection with any litigation supported with NAACP funds contributed under the provision of the decree by which the NAACP is not prohibited "from contributing money to persons to assist them in commencing or further prosecuting such suits," they plainly would risk (if lawyers) disbarment proceedings and, lawyers and nonlawyers alike, criminal prosecution for the offense of "solicitation," to which the Virginia court gave so broad and uncertain a meaning. It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes.

at 422:

> However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious.

and, more specifically, at 424:

> Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain.

Mr. Turriff argued that what was done by this appellant in assisting Mr. Young in his litigation falls under the protection of the broad principles articulated in the N.A.A.C.P. case and particularly in the passage last quoted.

Mr. Turriff submitted further that a question of principle is involved in this appeal because this court has not finally decided the question of whether a non-party should be made liable for the payment of costs where, as here, no finding has been made by the trial judge of any intention to perpetrate a fraud on the court. This court has held that a non-party must pay the costs of a suit where that non-party has set the court process in motion as the instrument of his fraud or has so intervened as to make himself the substantial, i.e. the real litigant, although not the ostensible party, but has not decided

what the rule should be absent such a finding. (See: Oasis Hotel Ltd. et al. v. Zurich Insurance Company et al. (1981), 28 B.C.L.R. 230 (B.C.C.A.) at 232; and Marchiori v. Fewster et al., [1921] 3 W.W.R. 388 (B.C.C.A.), aff'd for other reasons, sub nom St. Lawrence Underwriters' Agency of the Western Assurance Co. v. Fewster (1922), 63 S.C.R. 342).

No case in this court or in the Supreme Court of Canada has resolved the question of whether it is a proper exercise of judicial discretion to award costs against those who, having no immediate and direct personal interest in the outcome, support a litigant who is asserting a right under the Charter.

To raise that question is to raise the even broader question of the extent to which it is lawful for persons with no direct interest in litigation to support it financially.

To award costs against a non-party is to condemn him financially for assisting a litigant. Because of the very important nature of that question, leave ought to be granted.

The Merits

In awarding costs against The Burnaby Unit, the trial judge said that during the trial it ". . . became abundantly clear . . . that someone other than [Mr. Young] was promoting and financing this lawsuit".

In Ontario it has been held that a non-party must pay costs where that non-party, considered to be the real litigant, has put forward another person, in whose name proceedings are taken, in order to escape liability for costs. (See: Re Sturmer and Town of Beavertown, [1912] 2 D.L.R. 501 (Ont. Div. Ct.), at 503).

Re Sturmer was decided with reference to nineteenth century English authorities which stated an exception, limited to ejectment cases, to the general rule that an award of costs should not be made against a non-party, the exception having been stated as a means of regulating the use by real litigants of nominal but impecunious parties for the fraudulent purpose of avoiding the payment of costs. (See: Burke v. Lidwell (1844), 1 J. La T. 703 (Ir.Ch.), at 707-08). The legal theory offered by Mr. Justice Middleton in support of the judgment in Re Sturmer was that the "real litigant" was "guilty of something in the nature of barratry and maintenance." (See: Re Sturmer, supra, at 508).

To my mind, there is no essential difference between condemning a non-party in costs and awarding damages for the tort of maintenance. Thus, unless the necessary ingredients of that tort are found, it would be an improper exercise of the discretion to make such an award.

What then constitutes maintenance? In Goodman v. The King, [1939] S.C.R. 446 the appellant was convicted on charges of maintenance and champerty. In allowing his appeal Kerwin J., referring to the decision of the House of Lords in Neville v. London Express Newspaper, [1919] A.C. 368, said, at 453:

> It is clear, however, from a perusal of all the speeches in that case that no doubt was cast upon the general proposition that to make a person liable as a maintainer, either civilly or criminally, he must have intervened officiously or improperly. Lord Finlay really puts the matter in that way by quoting the definition of maintenance in Hawkins' Pleas of the Crown. Viscount Haldane, at p.390, remarks:--
>
> > For the broad rule remains unrepealed by any statute that it is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest for its prosecution or defence.
>
> Before quoting Lord Abinger's statement, Lord Atkinson had, at p.395, stated:--
>
> > If, however, the essence of the action of maintenance be the officious intermeddling in or supporting litigation in which the meddler has no legitimate interest * * * as I think it is.
>
> Later (p.397) he quotes the extract from Prosser v. Edmonds and also (p.405) the extract from the Scott case. There is really nothing inconsistent with this view in the speech of Lord Phillimore.
>
> These references to the speeches in the House of Lords in the Neville case indicates that the views previously expressed by various writers of standing and by a number of very able judges have not been departed from and that there must exist that officious interference, that introduction of parties to enforce rights which others are not disposed to enforce, that stirring up of strife, to constitute the crime

of maintenance.

(See also: Monteith v. Calladine (1964) 49 W.W.R. 641 (B.C.C.A.), at 652 and Huechert v. Rae, B.C.S.C., Vancouver Registry No. A873177, June 15, 1989, per Mr. Justice McKenzie).

But not every instance where financial assistance is provided to a litigant by a person not a party to the lawsuit is to be characterized as a case of maintenance. In Newswander v. Giegerich (1907), 39 S.C.R. 354, the respondent Giegerich had assisted one Briggs, a poor man, in his action against Newswander for the recovery of an interest in a mining claim. Briggs' action was successful and Giegerich's subsequent claim against Briggs, seeking to enforce an agreement to share in the fruits of the litigation, was dismissed. Newswander then brought an action of maintenance against Giegerich seeking to recover as damages the costs he had incurred in unsuccessfully defending the Briggs action. In upholding the dismissal of that action, Davies J. said, at 362-363:

> It would indeed at the present day be a startling proposition to put forward that every one was guilty of the crime of maintenance who assisted another in bringing or maintaining an action, irrespective of the results or merits of such action and whether the courts sustained it or not. Many grasping, rich men and soulless corporations would greedily welcome such a determination of the law, because it would enable them successfully to ignore and refuse the claims of every poor man who had not sufficient means himself to prosecute his case in the courts, conscious that if any third person except from charity gave the necessary financial assistance to have justice enforced, as soon as it was enforced the denier of justice could turn round and compel the good Samaritan to pay him all the costs he had incurred in

attempting to defeat justice.

> Such a condition of things is repugnant to our common sense and the courts have from time to time found it necessary to engraft exceptions upon the law of maintenance making such things and relations as kindred affection or charity, with or without reasonable ground, a lawful excuse for maintaining an action and confining the law to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they had no right to bring or make.

No evidence was adduced during the interlocutory proceedings or at trial that:

(a)Mr. Young had been induced by members of the Jehovah's Witness church to allow his name to be used in the divorce proceeding as respondent in order to enable those church members to advance their own interests while avoiding liability for costs; or that

(b)Mr. Young was not disposed to enforce his rights but for the financial assistance he received from fellow members of the Jehovah's Witness church; or that

(c)those Jehovah's Witnesses who funded Mr. Young in connection with the divorce proceeding did so otherwise than from charitable motives, honestly and in good faith, believing that Mr. Young should be able to try to demonstrate that he should not be barred from teaching his children about his religious beliefs or from taking

them to his church.

Neither was there any evidence that they controlled or directed the proceedings taken on behalf of Mr. Young.

Between July 1988, when the divorce proceeding was begun, and December of that year, Mr. Young himself paid legal fees and disbursements totalling $23,747.35 in connection with the proceeding. He was not funded during that period by members of the Jehovah's Witness Church.

There was no evidence from which the trial judge could have concluded that Mr. Young was not disposed to enforce his rights but for contributions he received from fellow Jehovah's Witnesses. In fact, it seems clear, from the evidence of what Mr. Young had spent on the proceeding in its first few months, that he was determined to make out his case.

It is apparent from a review of the pleadings and proceedings, interlocutory and at trial, that it was Mrs. Young, not Mr. Young, who instigated the religious war that so coloured this litigation. She fired the first salvo with her motion for custody, issued the same day her divorce petition was filed, in which she sought an order imposing religious restrictions on Mr. Young's exercise of access. Disputes over this question were central to many of the interlocutory applications concerning custody and access. Then, on August 24, 1989, about one month

before the action was to come to trial, Mrs. Young gave notice of her intention to call, as an expert witness, one Duane Magnani, who would testify adversely about the Jehovah's Witnesses' faith and practices and the detrimental affect they might have upon children where custody of, or access to them, is awarded to an adherent of that faith.

Although, in pre-trial proceedings, the evidence of this witness was ruled out, at the trial itself counsel for Mrs. Young attempted repeatedly, though unsuccessfully, to introduce official publications of the Jehovah's Witnesses in an effort, presumably, to make the same point.

In these circumstances it was not, in my view, unlawful for members of the Jehovah's Witness church to assist Mr. Young to answer Mrs. Young's divorce petition and the terms she claimed respecting conditions of custody and access or to prosecute his counter-petition. The support they gave him was given out of charity and religious sympathy, and they were not maintainers for giving it.

In Holden et al v. Thompson et al., [1907] 2 K.B. 489 (C.A.), relatives of two children kept at a home did not approve of the religious instruction the children were given there. For that reason they removed the children from the home and later resisted proceedings taken by the authorities of the home to recover custody. The relatives were not persons of means. The

Kensit Crusade Committee, which was in sympathy with their religious views, agreed to instruct the relatives' solicitors. The charges of the solicitors exceeded what the Committee expected to have to pay and the Committee defended the solicitors' claim to recover what was due for the legal work on the ground that the agreement to support the relatives financially was bad for maintenance. Mr. Justice Phillimore rejected the defence, concluding that the Committee was not guilty of maintenance because its support of the relatives was based on a community of interest with them in the subject matter of the custody proceeding. His Lordship said, at 491-492:

> . . . I think it may very be properly contended that this case comes within the kind of exception mentioned in the judgment of Buller, J. in Master v. Miller, where he instances the kind of interest which would justify the maintaining by one person of another in a lawsuit. Lord Coleridge C.J., in delivering judgment in Bradlaugh v. Newdegate, gave the following examples of such an interest: 'A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of commons; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose;'

And at p.493, His Lordship said:

> . . . we may properly say that this case is within the exception of giving money to a poor man out of charity to maintain a right which he would not otherwise secure. On behalf of the [Committee], it was contended that this aid was not given out of charity but religious sympathy only. The answer is that it was given out of charity and religious sympathy. In this world of poverty the richest and most benevolent man cannot support

> every poor and deserving person, and there are inducements based on nationality, kinship, locality, or common religious belief which lead a rich man to assist one poor man rather than another. It is none the less charity, and none the less does it escape being criminal. If it appears that the poor man is being persecuted for religious opinions common to himself and a rich man, there is no reason why the latter should not support the former.
>
> (emphasis added)

Charity is charity whether it is discreet or not. A person who gives assistance is under no duty to make enquiry before giving it, or to give it only on reasonable and probable grounds. In Harris v. Brisco (1886), 17 Q.B.D. 504 (C.A.), in which it was held that it is a good defence to an action for maintenance that the defendant had assisted the third person from charitable motives, Fry, L.J. said, at 513-514:

> But, if the law be correctly laid down in the passages we have cited, it appears to us to follow that the limitation put on the meaning of the word "charity" by Wills, J., cannot be maintained. He requires that charity shall be thoughtful of its consequences, shall be regardful of the interest of the supposed oppressor, as well as of the supposed victim, and shall act only after due inquiry and upon reasonable and probable cause. If we were making new law and not declaring old law it would, in our opinion, be well worthy of consideration whether such a limitation of the doctrine that charity is an excuse for maintenance would not be wise and good. But is it not an anachronism to suppose any such view of charity to have been present to the minds of the judges of the reign of Henry VI.?--a view which even now is present to the minds only of a select few, and does not commend itself to a large proportion of the kind-hearted and charitable amongst mankind? To say that charity is not charity unless it be discreet, appears to us without foundation in law. Of this limitation on the word "charity" no trace can be found in any of the authorities which have been cited,

> and, furthermore, in the other exceptions to the law of maintenance, such as those arising from the relations between lord and tenant, master and servant, neighbour and neighbour, there appears, so far as we can learn, to be no case of dictum in the books in which the duty of making inquiry, or of acting only on reasonable and probable grounds, has been recognised as a limitation of the right of giving assistance.

Mr. MacLean contended that it is sufficient to found the award for costs against the non-party who assisted Mr. Young that, even though such assistance falls short of "maintenance" in the strict sense, there be a "commonality of interest". He cited in support the following authorities.

Garvin v. Barnett et al., (15 March, 1976) Vancouver Registry No. 39156, B.C.S.C.

Curry V. Davison (1922), 23 O.W.N. 3 (H.C.);

Assaf v. Koury (1980), 16 C.P.C. 202 (Ont. H.C.);

Basran v. Basran et al. (1981), 123 D.L.R. (3d) 508 (B.C.S.C.);

Yared Realty Ltd. v. Topalovic (1981), 45 C.P.C. 189 (Ont. H.C.);

D.K. Investments Ltd. v. S.W.S. Investments Ltd. (1984), 59 B.C.L.R. 333 (S.C.);

Forder v. Forder (1984), 40 R.F.L. (2d) 159 (Ont. Co. Ct.);

Baker Acceptance Corporation Limited v. Gordon et al. (1986) 70 B.C.L.R. 140 (S.C.);

269335 Alberta Ltd. v. Starlite Investments Ltd. et al. (1987), 53 Alta. L.R. (2d) 142 (Q.B.)

Garvin v. Barnett (supra) was reversed by the decision of this court on November 4, 1976 (unreported, Vancouver Registry CA760317).

I do not propose to review in detail the remainder of these cases. It is sufficient to say that a reading of them reveals that in each case where a non-party was ordered to pay costs that party was either the "real litigant", as that term is used in Re Sturmer, or had promoted the litigation improperly in such a way as to make him guilty of maintenance. None of them support the proposition that mere commonality of interest is a sufficient basis for the award of costs against a non-party who has provided assistance to a litigant. Such an award can only be made if the non-party has been guilty of maintenance and that is not the case here.

Those who supported Mr. Young had a very real interest in the constitutional issue he raised which had not yet been addressed in this court. That ultimately the constitutional point failed below did not, it seems to me, justify the award of costs. In my view, there cannot be said to have been, in the court below, wanton and officious intermeddling or any lack of justification or excuse.

I hasten to add that it does not follow that the resources of the Watch Tower Bible & Tract Society can be brought to bear in every dispute between a Jehovah's Witness' parent and a non-Jehovah's Witness' parent. Once an issue of constitutional law of the kind raised here is settled then, if further litigation on the point between other litigants is

supported, another question might arise. It may be that the right to assist without facing an award of costs cannot itself be used by the rich and powerful, no matter how great their interest in the issue, as an instrument of the oppression of those who must fight their battles alone.

Summary

I would allow the appeals of Mr. How and The Burnaby Unit (now the Watch Tower Bible & Tract Society) and set aside the orders for costs against them. They are each entitled to their costs in this Court in the event they choose to pursue them.

I would allow the appeal of Mr. Young to the extent indicated in these reasons.

In view of the fact that success has been divided on the appeal and having regard to the circumstances of the parties I would, without making any very precise calculation as to the extent of the success of either party, order that neither party pay costs to the other and that each bear his or her own costs.

The Law Society does not seek any order as to costs and, accordingly, none need be made.

"

Judgment Released: October 25, 1990

CA011876
CA011864
CA011867
CA011865
Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

IRENE HELEN YOUNG

PETITIONER (RESPONDENT)

AND:

JAMES KAM CHEN YOUNG

RESPONDENT (APPELLANT)

AND:

W. GLEN HOW

APPELLANT

AND:

BURNABY UNIT OF THE NEW WESTMINSTER CONGREGATION OF JEHOVAH'S WITNESSES

APPELLANT

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WOOD

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Wood

Counsel for the Appellant,
James Kam Chen Young: W. Glen How, Esq.
Miss Joyce L. Dassonville
Miss Sarah E. Mott-Trille

Counsel for the Appellants, W. Glen How and Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses:	Gordon Turriff, Esq. M. Ian Giroday, Esq.
Counsel for the Respondent, Irene Helen Young:	Lorne N. MacLean, Esq. David G.M. Nicol, Esq. Miss Linda A. Wong
Counsel for the Law Society of British Columbia, Intervenor in appeal CA011865:	Robert H. Guile, Q.C. Miss Joanne R. Lysyk
Place and Dates of Hearing:	Vancouver, British Columbia August 13th-17th, 1990
Place and Date of Judgment:	Vancouver, British Columbia October 25, 1990

I

I have had the privilege of reading a draft of the reasons for judgment of each of my colleagues. I agree with the disposition of all the financial issues raised on this appeal, as proposed by Southin, J.A. I also agree with the way in which Cumming, J.A. would dispose of all the appeals relating to costs.

I regret, however, that I am unable to agree with the manner in which Southin, J.A. would conclude the appeal brought by Mr. Young against the restrictions which the learned trial judge imposed on the exercise of his right of access, and it is with respect to that issue that I wish to state my own opinions.

II

In order to understand the full context in which the issues surrounding the access restrictions arose in this case, as well as the prodigious and difficult task with which the learned trial judge was faced, some reference to both the facts and the pleadings is necessary.

Some two years before the parties first separated, Mr. Young converted to the Jehovah's Witness religion. The evidence suggests that Mrs. Young would have nothing whatever to do with his beliefs and, indeed, that their disagreement on this question may well have been a factor which contributed to the break-up of their marriage. While the evidence is less clear on the question of Mr. Young's attitude towards his wife's religious beliefs, if any, I shall assume, for the purposes of this appeal, that he was equally intolerant in his views.

The parties separated in August of 1987. On 12th July, 1988, Mrs. Young filed a petition for divorce. In it she advanced a claim for custody of the three infant children of the marriage who were then aged 9 years, 7 years and 11 months respectively. Paragraph 24 of the petition set out her position on access:

24. The Petitioner is willing for the

> Respondent spouse to have access as has occurred in the last year, namely one visit per month, provided that he not attempt to convert the children to the Jehovah's Witness religion which he has recently adopted.

Concurrently with the petition Mrs. Young filed a notice of motion seeking orders, **inter alia**, for interim and permanent custody of the children, interim and permanent maintenance for herself and the children, and specified access to Mr. Young in the following terms:

> C. An Order that the Respondent have specified access as he has requested in the past 15 months since separation, being one visit per month, and that during access the Respondent not attempt to inculcate the three infant children with the teachings of Jehovah's Witness faith; nor shall take them to any functions of the church or have in the presence of the children any one of the Jehovah's Witness faith;

Mr. Young responded with an application to dismiss that paragraph of the petitioner's motion on the ground that "... it represents blatant religious discrimination". As well he sought a declaration that:

> ... the Petitioner's demand for an order restricting the Respondent's familial access because of the Petitioner's intolerance toward Respondent's faith as one of Jehovah's Witnesses is a violation of both their three infant children and the Respondent's rights

> guaranteed under **The Charter**, pursuant to Sections 2(a) (b) (d), 7 and 15(1);

At various times during the hearing of this appeal, counsel referred to the legal proceedings which followed, which included some 16 interlocutory applications and two trips to the Court of Appeal before the 12 day trial, as a "war". If war is an apt characterization of this epic struggle, it is clear that Mrs. Young both issued the declaration and fired the first shot.

Her motivation for doing so was clearly revealed in various passages of her affidavits filed in connection with the many interlocutory applications, and in portions of her examination for discovery, all of which were adopted by her at trial. In them she acknowledged her intolerance for the beliefs and practices of Jehovah's Witnesses. When giving reasons on one of the interlocutory applications, Scarth, L.J.S.C. (as he then was) described Mrs. Young's attitude towards her husband's religion as one of "undisguised loathing". At trial, she acknowledged that statement as accurately representing her view of the teachings of the Jehovah's Witnesses.

I will not detail the various orders made as a result of the many interlocutory applications. Those dealing with the question of access gave effect, with only slight modifications, to the wishes of Mrs. Young as expressed in her petition for divorce.

In August of 1989 a Notice of Evidence was served on Mr. Young's solicitors pursuant to s. 11 of the **Evidence Act**. From that notice it was clear that Mrs. Young intended to challenge the doctrines of the Jehovah's Witness religion when the matters at issue between the parties came on for trial the following month. During the hearing of the appeal we were told that at a pre-trial conference, held on the eve of trial, Huddart, J. ruled that such evidence was irrelevant.

In his opening remarks at trial, counsel for Mrs. Young indicated his intention to lead evidence designed to demonstrate Mrs. Young's view that the substance of the Jehovah's Witness religious doctrines would be harmful to the well-being of the three infant children of the marriage. After considering the nature of the intended evidence, the learned trial judge indicated that she would not allow any of it to be received, because she was "...not going to entertain a dispute between two religions."

Notwithstanding that very clear indication of the Court's position, counsel persisted throughout the trial in repeated, albeit mostly unsuccessful, attempts to lead evidence of the substance of Jehovah's Witness doctrines. Before us Mr. How for the appellant characterized these attempts as an effort to turn the dispute between the parties into a heresy trial. Such language seems uncomfortably strong for late 20th century Canadian

society, but the point was there to be made.

As to the genuine custody and access issue defined in s. 16(8) of the **Divorce Act**, namely the best interests of the children, the evidence called by both parties was surprisingly consistent. The trial judge concluded, for all of the right reasons, that an order for joint custody was clearly impractical and that Mrs. Young should have custody. When giving judgment she suggested that the matter had never been in doubt, and I think that was a fair assessment of the evidence, much of which was thus more obviously relevant to the dispute between the parties as to what, if any, restrictions should be imposed on Mr. Young's right of access. That evidence can be quickly summarized.

In preparation for the trial the children were examined by three expert witnesses; Ms. Donna MacLean, a Family Court counsellor, Dr. Karl Williams, a child psychologist, and Dr. Lawrence Onoda, a clinical psychologist. The first two were viewed by the learned trial judge as witnesses of the court. Dr. Onoda was clearly Mr. Young's witness.

Ms. MacLean had prepared two Custody and Access Reports for the assistance of the court before the trial began, and she was called as a witness at trial. She reported that initially the two eldest children enjoyed spending time with their father, but did not like the fact that he is a Jehovah's Witness. However, as

time passed they both began to express "discontentment" with access visits. There were two reasons offered for this apparent deterioration in the children's relationship with their father. They did not like having the access visits rigidly scheduled, and they did not like being made to feel guilty and uncomfortable as a consequence of being questioned by their father. From all of her interviews Ms. MacLean concluded that the children were distressed over the custody and access issue and she guessed that "religion does have something to do with it".

Dr. Williams prepared two reports which were before the court when he testified. He also had noticed a deteriorating relationship between the two older children and their father. He ascribed much of this to a sense of mistrust arising from the manner in which they were subjected to a psychological assessment by Dr. Onoda. That assessment was organized by Mr. Young and took place, without any prior notice to the children, during the first overnight access visit they had with their father. In his view the two older children display a high level of awareness with respect to the dispute between their parents over Mr. Young's religious beliefs.

Dr. Williams concluded that the two eldest children were continuing to handle the separation of their parents in an adequate manner, but that they were nevertheless showing signs of being under increased pressure "regarding family issues". Those

issues are not detailed, but would clearly include the religious dispute between parents.

The learned trial judge did not, for good reasons, give much weight to the evidence of Dr. Onoda. He was clearly a "hired gun". He did acknowledge, however, that along with other matters associated with the breakdown of the marriage, the religious dispute between the parents was causing the children some stress.

Both parents testified. Given the nature of the dispute between them, they both said pretty much what one would expect them to say. Significantly, however, Mr. Young did testify that he was prepared to respect the wishes expressed by each of the older children, in letters they wrote to the trial judge, not to have to accompany their father either when he attends his church for religious services, or during his door-to-door proselytization activities.

III

The learned trial judge concluded that in British Columbia the custodial parent has an unfettered right to determine the religious upbringing of his or her child. Relying on the decision of the Saskatchewan Court of Appeal in **Brown** v. **Brown** (1983), 39 R.F.L. (2d) 396, she reached the further conclusion that such right was not inconsistent with the access parent's

right to freedom of religion under s. 2(a) of the **Charter**.

Notwithstanding these conclusions of law, the learned trial judge went on to find, on the evidence as she saw it, that the well-being of the children required that the restrictions which are now challenged be placed on Mr. Young's exercise of the access rights which she was prepared to award. I set out her reasons:

> There will be certain restrictions because that is necessary to protect the best interests of these children. That can only be done by putting an end to this religious conflict. The respondent has become so involved in enforcing his rights he has completely overlooked the welfare of the children. The respondent can have a meaningful relationship with his children without promoting his religious beliefs.

IV

For somewhat different reasons than those expressed by the learned trial judge, Southin, J.A. has also concluded that a custodial parent has full power to determine the religious upbringing of his or her child, and that such right is unfettered by any freedom of religion which the access parent has under s. 2(a) of the **Charter**. The only restriction which Southin, J.A. would place on the "full plenitude of parental rights" enjoyed by

the custodial parent, would be to deny him or her the right to control what conversations take place between the child and the other parent during periods of access. This restriction stems not from anything found in either the **Divorce Act**, the **Family Relations Act**, or the **Charter**. Rather, it stems from the right which all children have to know any person to whom the court sees fit to grant access.

With respect, I am unable to agree with this view of either the present day scope of parental rights enjoyed by a custodial parent, or the effect of the **Charter** on the exercise of those rights. As will be seen, these issues overlap. However, I propose initially to consider each separately.

(a) The rights of custodial parents

After a comprehensive review of ancient authority, Southin, J.A. has concluded that the custodial parent today enjoys the full plenitude of parental powers historically enjoyed by a guardian under 19th century English law, even during the time the child is with the access parent, and that nothing in either the **Divorce Act** of 1985, or the **Family Relations Act** of 1978, was intended to limit either the substance or the application of that long-standing rule. Thus, in her view, the custodial parent has the absolute right to "lay down the law" to the access parent in respect of any matters relating to the child.

This strict doctrinal analysis confirms the existence of a rule of compelling simplicity, which thus has the virtue of being easy to apply. With great respect, however, I believe that it overlooks the significance of the historical development of the concept of access. That development began with the passage of **An Act to amend the Law relating to the Custody of Infants**, 2 & 3 Vict. (1839), c.54 (U.K.), commonly referred to as "Talfourd"s Act", section 1 of which specifically provided the Court of Chancery with the power:

> ...upon hearing the Petition of the Mother of any Infant or Infants being in the sole Custody or Control of the Father thereof, or of any Person by his Authority, or of any Guardian after the Death of the Father, if he shall see fit, to make Order for the Access of the Petitioner to such Infant or Infants, at such Times and subject to such Regulations as he shall deem convenient and just...

Unfortunately the Act did not define what was meant by "Access". Thus it was left to the courts to develop that meaning through the common law. Whatever may have been the history of that development in England, by the second half of this century, Canadian courts had come to recognize a "right" of access which amounted, at least in practical terms, to a right of temporary custody and control of the child, with the access parent implicitly entitled to exercise all of the powers of parenthood

associated with the minutiae of daily living during those periods of time when the child was in his or her company.

This reality was the natural outgrowth of the fact that courts frequently granted access orders which involved the child being removed from the physical custody of the custodial parent for extended periods of time.[1]

In spite of this evolution in the common law, it was not until the **Divorce Act** of 1985 that the concept of access received statutory recognition in our federal law. With the new Act, however, came not only explicit recognition of the concept, but also specific statements of principle and words of content which gave definition to its substance. I find the terms of s. 16 of the Act, when taken as a whole, to be indicative of an intention by Parliament to foster substantial changes in the law of both custody and access.

Whatever equity may have decreed, with respect to the powers of a guardian in 19th century England, the provisions of s. 16 of the **Divorce Act** of 1985 must be applied in a manner which is both consistent with the intentions of Parliament and relevant to the evolving role of parents in the modern structure of today's

[1] Walder G.W. White, **A Comparison of Some Parental and Guardian Rights** (1980), 3 Can. J. Fam. L. pp.219-28.

society. Because we are dealing here with issues of custody and access following the granting of a decree of divorce, I find it unnecessary to consider what, if any, parallel construction would be appropriate to the pertinent sections of the **Family Relations Act** of 1978.

I agree that access to a child by the non-custodial parent is a right given by statute. If, as suggested by Southin, J.A., there has been no change in the content of that right in modern times, then there was no reason for Parliament to have taken the trouble to deal with it when the new **Divorce Act** was passed in 1985. As already noted, the fact is that substantial references to custody and access and to their inter-relationship are to be found in s. 16 of the new legislation. I will not attempt an exhaustive review of all of those provisions. For the purposes of this opinion it is necessary to consider only the terms of s. 16(10):

> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

If Parliament's intention in enacting that sub-section was solely to foster a continuing relationship between children of

the marriage and both of their divorced parents, that could just as easily have been accomplished with a simple provision that access could not be denied to a natural parent, except in those cases where the best interests of the child required that such an order be made. It seems to me that at the very least, by enacting this sub-section, Parliament intended to facilitate a meaningful, as well as a continuing, post-divorce relationship between the children of the marriage and the access parent.

Without limiting the generality of the adjective "meaningful", such a relationship would surely include the opportunity on the part of the child to know that parent well and to enjoy the benefit of those attributes of parenthood which such person has to share. In most cases that would clearly be in the best interests of the child, and the best interests of the child, not parental rights, are the focus of the whole of s. 16 of the Act.

When the purpose of s. 16(10) is viewed in that light, it can be seen that the word "contact" must be given a broad meaning. It cannot be limited simply to physical contact, because in many cases any effort to maximize physical contact between a child and the access parent will only result in the child spending most of its life travelling back and forth between parents. Furthermore, it is possible to maintain a meaningful relationship even in those cases where, for reasons of logistics or economy,

the actual time spent together is severely restricted. In the context I have suggested, "contact" seems to me to define the quality of the time spent together. It bespeaks of real communication, of the opportunity to know each other well and to appreciate each other as individuals, and of the chance to preserve and to share with each other that special relationship which ought to endure between child and parent.

Viewed in that way, real contact would necessarily include the opportunity for an access parent to whom a religious belief is important to share that belief, at least in a consensual way, with his or her children.

I believe that such an approach to the construction of s. 16(10) is consistent with the obvious intention of Parliament, when passing the new Act in 1985, to enlarge the concept of access into something beyond that of a mere right of visitation. It is also consistent with the recognition and approbation of joint custody found in s. 16(4), the right of the access parent to share information relating to the health, education and welfare of the child found in s. 16(5), and the specific jurisdiction given to the court, in s. 16(6), to impose such terms, conditions or restrictions, as in its discretion it thinks fit and just, when making an order for either custody or access.

The re-assertion of the principle of maximum contact in

s. 17(9), which is concerned with the variation, rescission or suspension of support and custody orders, indicates the importance which Parliament attached to its role in the proper post-divorce relationship between children of the marriage and their parents.

I do not see that such a construction of s. 16(10) is inconsistent with either the general scheme of the Act in its entirety, or with any specific provision to be found therein. Nor do I see that it "set[s] at naught" the long-standing rule of the common law which Southin, J.A. has described so fully in her reasons. While it clearly modifies the absolute nature of that rule, much of the traditional 19th century concept of guardianship must, and does, remain undisturbed.

For example, in any case where an order of joint custody is inappropriate, the parent who does have legal custody must clearly retain the power to decide between mutually exclusive alternative choices that must be made in connection with the health, education and welfare of the child. For a child who is sick, someone must have the final responsibility to offer treatment or to instruct those who are consulted for that purpose and, if necessary, to give consent on behalf of the child for any treatment which they propose. A child cannot attend two schools at the same time or be baptised in and faithfully observe two religious doctrines simultaneously. For that reason it is reasonable that the legal prerogative to make decisions relating

to such matters remains with the custodial parent, and so it is correct, as a matter of law, to continue to say that the custodial parent has the power to "determine" such matters.

But the rule which Southin, J.A. has traced from the 19th century English Court of Chancery through to the 1978 **Family Relations Act** goes much further than that. It vests in the custodial parent the absolute right to decide all matters relating to a child of the marriage, to the exclusion of the access parent. Such a rule, in the hands of a wilful custodial parent, would soon render any right of access illusory. In the hands of the ordinary custodial parent, who has not yet overcome the capacity to be unreasonable in respect of anything to do with his or her ex-spouse, such a rule would most certainly frustrate the purpose which I believe underlies s. 16(10) of the **Divorce Act**. Indeed, on reflection, it can be seen that the full vigour of such a rule would only ever be called upon or exerted by the unreasonable.

In the context of the issue that arises in this case, I see no reason in principle why the custodial parent's right to make the choice between mutually exclusive religious options facing a child of the marriage need interfere with the right of the access parent, under s. 16(10) of the **Divorce Act**, to share his or her religious beliefs with the child.

There is another respect in which I find myself unable

to accept the continued application of the long-standing rule that would see the custodial parent exercise absolute control over the child of a marriage, even when that child is with the access parent. The emphasis in that rule is on the "rights" of the custodial parent **qua** guardian of the child. But as Blackstone recognized, parental "powers" as he preferred to call them, exist primarily to facilitate the performance of parental duties; see: **Commentaries on the Laws of England**, Hargaves edition, Sweet and Maxwell, London, 1844 , Vol. I at 452. In the two and a quarter centuries that have passed since that wisdom was noted, there has been a gradual evolution of the notion that in matters of custody and access the primary focus of the court's attention must be the best interests of the children concerned, and not the vanity of parental "rights". This evolution was noted by Wilson, J. in her dissenting judgment in **Frame v. Smith**, [1987] 2 S.C.R. 99, at p. 132 of the report:

> At first the courts were much more comfortable assessing the competing claims of parents than they were in trying to decide what was in the best interests of children. But over time the best interests of children increasingly became an important concern of the court and today it is the paramount concern...In light of these developments it can be said with some assurance that the concept of "parental rights" has fallen into disfavour. Parental responsibilities yes, but rights no.

One has only to compare the custody provisions of the

Divorce Act of 1967-68, with the terms of s. 16 of the present Act, to understand the weight of that assertion. Indeed, s. 16(8) states the point in no uncertain terms:

> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> [emphasis added]

I believe the whole of s. 16 of the **Divorce Act** of 1985, when properly construed, reflects the modern view that the best interests of a child are more aptly served by a law which recognizes the right of that child to a meaningful post-divorce relationship with both parents. That construction in turn requires that the distribution of "rights", between the custodial and the access parent, be such as to encourage such a relationship. And such a construction is inconsistent with the full-blooded traditional notion of guardianship which would give the custodial parent the absolute right to exercise full control over the child even when the other parent is exercising his or her right of access.

Finally, I note two expressions of opinion, one judicial and the other academic, both of which pre-date the **Divorce Act** of 1985, and each of which supports the view that the long standing

rule relating to the rights of the custodial parent should no longer be given unrestrained application. The judicial opinion comes from the English Court of Appeal in **Dipper v. Dipper**, [1980] 2 All E.R. 722, in which two of three judgments given expressed precisely that view. That was a case where a chambers judge had made an order giving "care and control" of the children of the marriage to the mother, and sole custody to the father. His stated purpose was to leave the children with the parent best suited to maintaining their day-to-day care, but to reserve for the father "the final say" about their future upbringing. On appeal an order of joint custody was substituted. In concurring with that result, Ormrod, L.J. said at p. 731 of the report:

> It used to be considered that the parent having custody had the right to control the children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court. In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong. So the basis of the judge's order giving custody to the father and care and control to the mother was, in my view, unsound.

These thoughts were echoed by Cumming-Bruce, L.J., who at p. 733 of the report said this about the reasons given by the

chambers judge for making the split order:

> As Ormrod LJ has explained, the judge was there falling into error, it being a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. That is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to court in order that the difference may be determined by the court.

Whatever may have been the effect of these expressions of opinion on the practice of the courts in England, it seems to me that they closely approximate the philosophy underlying s. 16 of the present **Divorce Act**.

The second reference to which I wish to allude is the Law Reform Commission of Canada, **Report on Family Law**, Ottawa, Information Canada, 1976, in which these matters were canvassed with a view to bringing the law into conformity with modern views on custody and access. At p. 48 of that report the following appears:

> The law should be made more flexible making custody less an all or nothing proposition; a judicial determination that one parent will assume primary responsibility for raising and

> caring for a child should not necessarily exclude the other from the legal right to participate as a parent in many other significant areas of the child's life.

This recommendation seems to be in keeping with the spirit of the judicial opinions just referred to, and while it cannot offer any presumptive assistance, when construing s. 16 of the **Divorce Act** of 1985, in my view it is consistent with what I see as the legislative intent underlying that section.

I conclude that the **Divorce Act** of 1985 must be taken to have modified the scope of the ancient concept of guardianship which would give the custodial parent the full plenitude of parental powers to the absolute exclusion of the access parent. Properly construed, s. 16 of the Act requires that parental powers be distributed between custodial and access parents in such a way as to encourage the children of the marriage to develop a meaningful relationship with both.

An order for custody under s. 16(1) of the Act will necessarily give the custodial parent the power to determine the religious upbringing of the child, in the sense that he or she can determine the religious faith, if any, in which the child will be baptised, and which the child will be required to observe until the age of discretion. But such an order does not give the custodial parent the right to prevent the other parent from

sharing his or her religious views with the child, whether that sharing takes the form of discussions, observance, or other activities related in some way to those views.

The right of the access parent to share his or her religious beliefs with the child flows from the provisions of s. 16(10) of the **Divorce Act** of 1985. In my view it is subject to only two limitations:

> (a)The unwillingness of the child to participate in such sharing, and
>
> (b)The power of the court to restrict that right on the grounds that exposure to the religious beliefs or practices of the access parent is, or is likely to be, harmful to the well being of the child.

Each of these limitations requires some comment. The first seems obvious. While I am prepared to assume, for the purposes of this appeal, that a custodial parent has the right to enforce religious observance against the will of the child, no such right need be vested in the access parent in order to give effect to the purpose which underlies s. 16(10) of the present **Divorce Act**. In any event, from a purely practical point of view, any access parent who seeks to force a child into religious observance or activity to which the child is opposed will soon jeopardize the tenuous ties that bind the two together. In such a case it would not be long before the child would express an

unwillingness to continue with the access ordered, and the court would then be forced to re-evaluate that order in accordance with the best interests test set out in s. 16(8).

The second also seems straightforward, but it contains a complexity that requires discussion. Obviously if it can be established, on a civil standard of proof, that exposure to conflicting religious doctrines is causing the child psychological harm, or that by engaging in the observance of, or activities associated with, the religious beliefs of the access parent, the child is suffering real psychological or physical harm, the well-being of that child would clearly require the court to intervene by way of an order which would eliminate the potential for such harm to continue. In those cases where such harm could be anticipated on a balance of probabilities, there would be grounds for an order that would avoid the problem before it begins.

But, in the exercise of the court's duty to protect the well-being of the child, care must be taken to ensure that real harm of the sort, and arising in the manner, just described is distinguished from the general emotional distress which every child experiences when confronted with both the reality of divorce and the turmoil which characterizes the post-divorce relationship of many ex-spouses. The former can properly be addressed by judicial intervention. The latter is inevitable, and in most cases lies beyond the influence of any order of the court.

It follows from what I have said so far, that the learned trial judge fell into error when she concluded that an order for custody necessarily vested in Mrs. Young the exclusive power to control all matters relating to the exposure of the children to the religious beliefs of Mr. Young. I shall leave for consideration the question whether the religious restrictions which she attached to Mr. Young's exercise of access can be justified, on the grounds that they are in the best interests of the children, until after I have dealt with the **Charter** argument raised by this appeal.

(b) Freedom of religion under s. 2(a) of the Charter

The trial judge concluded that the custodial parent's sole right to determine the religious upbringing of a child of the marriage is not inconsistent with the access parent's fundamental freedom of religion under s. 2(a) of the **Charter**. In reaching that decision she referred to a number of cases. However, the only one in which an access parent's freedom under s. 2(a) was considered was the **Brown** case. As I read the decision in that case, the Saskatchewan Court of Appeal simply confirmed the trial judge's conclusion that the father's religious beliefs and practices were likely to have an adverse effect on the well-being of his children, and concluded that the decision of the trial

judge to conduct the inquiry which led to that determination did not, by itself, violate the father's freedom of religion under s. 2(a) of the **Charter**.

As pointed out by Southin, J.A., one of the authorities relied upon by Brownridge, J.A., who gave the reasons for the court in that case, was the judgment of Hoare, J. in **Kiorgaard v. Kiorgaard and Lange**, [1967] Q.L.R. 162, a decision of the Full Court of the Queensland Supreme Court. I do not find anything said by Hoare, J. in connection with s. 116 of the **Commonwealth Constitution**, to be of much assistance in deciding the constitutional issue raised on this appeal.

That issue, as I see it, is whether or not the access parent's fundamental freedom of religion under s. 2(a) of the **Charter** is infringed by the long-standing common law rule which would give the custodial parent, as guardian of the child of the marriage, the absolute right to control the extent to which the access parent can expose that child to his or her religious beliefs.

In her reasons Southin, J.A. has concluded that the parental rights, from which that long-standing rule derives, date back at least to Roman times, and thus they pre-existed the "notions" of freedom of religion and thought found in s. 2 of the **Charter**. In her view the rights found in s. 2 of the **Charter** must

not be construed in such a way as to deny the existence of these fundamental parental rights which are preserved, undiminished in either form or substance, by s. 26 of the **Charter**. Thus, albeit for different reasons, she concurs with the conclusion reached by the learned trial judge that:

> The order that [Mrs. Young] requests placing restrictions on the religious activities the respondent can engage in with the children, does not infringe the father's religious freedoms as guaranteed by the Canadian Charter of Rights.

I have already noted how Blackstone characterized as "powers" what today are generally referred to as parental "rights". While powers are quite meaningless, in the sense that they are incapable of being lawfully exercised, without co-existing rights, I believe that in the context of a discussion of constitutional rights there is a distinction to be drawn between the two terms. I also believe that Blackstone's choice of language was deliberate, in the sense that it was intended to emphasise his point, at p. 452 of Vol. I, that:

> The **power** of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it.

Furthermore, as I read Chap. XVI of Vol. I of the **Commentaries**, Blackstone did not attribute the source of those powers enjoyed by a parent under English law to anything found in Roman law. Indeed, he offers Rome as an example of one of those "nations" the "municipal laws" of which gave larger authority to parents than others. As he explains, again at p. 452:

> The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away.

Under Roman law, in fact, children were quite legally killed, abandoned, sold into slavery and otherwise treated in a fashion which, even by Blackstone's time, had become quite unacceptable to any form of civilized thought.[2] Roman law does not sit comfortably with me as the source of a "fundamental parental right" which is said to be protected, if not in fact given constitutional status, by s. 26 of the **Charter**.

Nor am I persuaded that s. 26 of the **Charter** was intended to incorporate into our constitution any and all "rights" or "freedoms" that may arguably be said to have existed in Canada

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[2] D. Kelly Weisberg, **Evolution of the Concept of the Rights of the Child in the Western World** (1978), 21 Review of the International Commission of Jurists 43, at 44-5.

at the stroke of midnight, 17 April, 1982, any more than it was intended to render such rights or freedoms immune from constitutional scrutiny. In my view that section was intended to do no more than to turn away any argument, based on the **expressio unius** principle of statutory construction, that any right or freedom not expressly mentioned in the **Charter** does not exist.

While I am content, in a proper context, to accept the characterization of parental powers as "rights", and while I do not in any way regard such powers as unimportant to the whole scheme of Canadian family and social organization, I do not accept them as having constitutional status, in terms of either their origin or their substance.

Freedom of religion, on the other hand, is described in our Constitution as a "fundamental" freedom. Just what the full significance of the term "fundamental" will prove to be, as the lexicography of our Constitution develops, is not yet clear. If the American approach to the analysis of that concept proves apt to our experience, it will be profound. But for the purposes of this appeal I need look no further than the words of Rand, J. in **Saumur v. City of Quebec**, [1952] 2 S.C.R. 299 at 329, to find the sense of what is meant by the "fundamental" freedom of religion which every person in Canada enjoys:

> Strictly speaking, civil rights arise

> from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.

When Rand, J. wrote in **Saumur**, he spoke only for himself. I believe that s. 2 of the **Charter** gives that eloquent statement the force of a **per curiam** judgment.

The courts have an obligation to apply and to develop the common law in a manner which is consistent with constitutional values; see: **Retail, Wholesale and Department Store Union, Local 580, et al. v. Dolphin Delivery Ltd.**, [1986] 2 S.C.R. 573, at 603. I believe that a similar obligation extends to the construction and application of statutory provisions, such as s. 16(10) of the **Divorce Act**, which by their very nature look to the common law to develop the full vigour of their meaning.

The first question that necessarily arises in the context of this appeal is whose religious freedom is placed at risk by the restrictions imposed by the learned trial judge on Mr. Young's right of access to his children. In her reasons Southin, J.A. suggests that the intrusion of parental powers into the fundamental freedoms of a child below the age of discretion would at least be justifiable in a free and democratic society under s. 1 of the **Charter**. To the extent that any general statement can be

made about the application of s. 1, I find that view, and the reasons which Southin, J.A. gives for it, persuasive. However, I would prefer to leave that whole question open until it is necessary to decide it. As indicated by the way in which I have characterized the issue to be resolved, I am able to decide this case on a consideration of the access parent's freedom of religion.

What then is the scope of the access parent's freedom of religion? Again, I do not find it necessary to attempt an all encompassing definition. For the purposes of this appeal I am content to stay within those parameters of the freedom discussed by Dickson, J. in **The Queen v. Big M Drug Mart Ltd.**, [1985] 1 S.C.R. 295, at pp. 336-7:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the **Charter** is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or

> refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

From this it follows that each parent is entitled to hold his or her own views on matters of religion. Each is entitled "without fear of hindrance or reprisal" to manifest their respective beliefs openly, "... by worship and practice or by teaching and dissemination". For each an important element of the right to teach and to disseminate their respective beliefs must surely be the right to share those beliefs with their children.

Where the religious views of each, within a marriage, are **ad idem**, or at least parallel to one another in separate but orthodox doctrines which tolerate the tenets of the other, no question of dispute is likely to arise, and any state sanctioned action to support one parent's belief to the exclusion of the other would clearly be seen as a breach of the other's fundamental freedom of religion.

In those cases, still within a marriage, where the religious beliefs of each parent are widely divergent, and perhaps

even incompatible, the fundamental freedom of both, including the right of each to teach and to disseminate their respective views to their children, remains undiminished. Obviously, if the exercise by each of their individual freedom of religion, caused or threatened the probability of real psychological or physical harm to their children, state sanctioned intervention to preserve those interests would be justified under s. 1 of the **Charter**, but such action would only be justified to the extent that its purpose was accomplished in the manner least intrusive to the fundamental freedoms of each parent.

While I do not share the doubt which Southin, J.A. has expressed concerning the existence of the **parens patriae** jurisdiction of the Supreme Court of this Province, I do agree that any interference with the exercise of parental judgment, on what constitutes the best interests of their children, could only be justified on the basis of evidence establishing the probability of real harm, either physical or psychological. The jurisdiction to interfere, of course, exists in connection with any matter which creates, or threatens such real harm, and does not depend upon that harm originating in any disagreement between the parents. Thus any such harm occasioned by a religious doctrine or practice in which both parents joined would equally justify state sanctioned interference with their freedom of religion.

To this point I have considered the fundamental freedom

of religion of each parent, and any justifiable interference with that freedom, within the context of a continuing marriage. How then is the situation any different if the parents separate or divorce? Can it be any different?

It is instantly apparent that any difference could only be rationalized on the basis that something about the fact of separation or divorce necessarily or logically serves to limit the fundamental freedom of religion of either parent. One has only to state the proposition to realize its absurdity, not to mention its incompatibility with the constitutional values reflected in the **Charter**. Clearly the only justifiable limitation on the freedom of religion of either parent, in the case of separation or divorce, remains the welfare of the children in the terms described above.

This does not mean, of course, that the power or the influence of both parents over the children, relating to matters of religion, remains the same following a separation or a divorce. As has already been discussed, in the absence of an agreement between them, the custodial parent necessarily retains those parental powers that cannot practically be exercised by both in the reality of a failed marriage. Thus the power to determine the faith, if any, in which a child of the marriage shall be baptised, what religious education the child will be required to undertake, and what religious observance the child will be required to follow, lies with the custodial parent.

There is nothing about the exercise of this power which is inconsistent with the access parent's freedom of religion, because the freedom of religion guaranteed by s. 2(a) of the **Charter** does not include the right to force religious indoctrination, education or observance upon anyone. Indeed, such a notion is completely antithetical to the concept of freedom described by Dickson, J. in the **Big M Drug Mart** case. The power of parents, or in the case of a failed marriage the power of the custodial parent, to make those choices on behalf of a child of the marriage stems from the incapacity to make such decisions which the law presumes upon the child until the age of discretion is reached. It has nothing whatever do with that parent's freedom of religion, nor does it derive from any doctrine which would give legal preference to the fundamental freedom of religion of the custodial parent over that of the access parent.

Similarly, the enhanced ability of the custodial parent to influence the religious thinking of a child of the marriage stems not from any difference in the fundamental freedoms of either parent. It is the simple result of the reality that the child is likely to spend more time with the parent who has custody.

But the power of the custodial parent to make those decisions, which the law denies a child the capacity to make until

the age of discretion is reached, cannot in any way impair the freedom of the access parent to teach or disseminate his or her religious beliefs to a child of the marriage. Of necessity, however, there are limitations to the exercise of that freedom. From what has been said so far, the obvious limitations are:

> (a)The consent of the child to participate in the process of teaching or dissemination, and
>
> (b)The power of the court to restrict the right of the access parent to teach and disseminate his or her religious beliefs to the child on the grounds that exposure to the religious beliefs or practices of the access parent is, or is likely to be, harmful to the well-being of the child.

The consent of the child is required because, as has been pointed out, the freedom of religion guaranteed to all of us does not include the right to force our religious views upon anyone. The consent required is the consent of the child, because the power of consent, if exercised by the other parent, would most likely be exercised in a manner inconsistent with the access parent's freedom of religion. If the power of consent were left in the hands of the custodial parent, the access parent's right to teach or to disseminate his or her religious beliefs to a child of the marriage, and thus that parent's freedom of religion, would be vulnerable to the sort of intolerance displayed by the parties to this case.

As to the second limitation there is an important caveat which must be discussed. In her reasons Southin, J.A. has commented on the long-standing tradition of English courts to avoid embarking upon or making qualitative evaluations or comparisons of competing religious doctrines. In her view the courts ought not to be placed in such an invidious position. While I wholeheartedly agree with that sentiment, I do not believe that it can be invoked as a rule which would oblige the court to shrink from its duty to determine whether or not the exposure to conflicting religious beliefs, or the content of a religious doctrine, is threatening real harm to the welfare of a child of the marriage.

But it will be a rare case where such an issue could legitimately arise. As has been noted, it could arise in those few cases where it could credibly be asserted that exposure either to conflicting religious doctrines, or to the doctrines of the religious belief of one of the parents, is causing or is likely to cause the child real harm of a physical or psychological nature.

In such cases the evidence which will establish such harm will not come from a critical evaluation of the religious beliefs of either parent. That sort of evidence takes its force exclusively from the personal value judgments of either the person whose evaluation is offered or the judge who hears it. Rather the

threshold evidence, which will justify the court embarking on an inquiry into real physical or psychological harm caused by a religious doctrine, will be that of an independent expert whose opinion is based upon generally accepted, objective, scientific criteria for the diagnosis and evaluation of the harm alleged.

A legitimate inquiry into the substance of a religious doctrine can also arise in those rare cases where it could credibly be asserted that the religious belief of a parent advocates or counsels a breach of the secular law. A credible assertion in such a case would be one which satisfied the court that a **prima facie** case of illegality had been made out.

It would be an exceptional case where a legitimate inquiry into the religious beliefs of a parent could fall outside either of the situations just described. That is so because no court in Canada has, or can ever have, a view that favours one religious belief against another or, as Southin, J.A. has pointed out, any religious belief against none. That rule has long been recognized. In **Delvenne v. Nabbie**, [1978] 2 W.W.R. 439, (Man. C.A.), at p. 443, O'Sullivan, J.A. said:

> The courts must proceed on the basis that the law knows no distinctions as to the worth of civilized religions.

Similar expressions of opinion are to be found in **Re Bennett Infants**, [1952] O.W.N. 621, (Ont. C.A.), per Roach, J.A. at p.624. and in **Irmert v. Irmert** (1984), 64 A.R. 342, (Alta. C.A.), per Kerans, J.A. at p.342.

The reason is obvious. The fundamental freedom of religion enjoyed under the **Charter**, by those who espouse minority or unorthodox religious beliefs, or indeed by those who have no religious belief at all, can only prevail if the courts of this country maintain a role which permits no qualitative evaluation of any religious belief, and which restricts any examination of a religious doctrine to the specific objects described above.

The point was made by Dickson, J. In the **Big M Drug Mart** case, when at p. 337 of the report he noted:

> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The **Charter** safeguards religious minorities from the threat of "the tyranny of the majority".

It follows from all that has been said that the learned trial judge erred when she held that restrictions of the sort which were ultimately imposed on Mr. Young's right of access did not infringe his fundamental freedom of religion under s. 2(a)

of the **Charter**.

(c) Access and Religious Freedom

It can be seen that when s. 16(10) of the **Divorce Act**, as I have suggested it ought to be construed, is applied to the common law relating to the powers of the custodial parent, the result is in harmony with the access parent's fundamental freedom of religion under s. 2(a) of the **Charter**. That result is also in harmony with the judgment of the Ontario Supreme Court [Divisional Court] in **Hockey v. Hockey** (1989), 21 R.F.L. (3d) 105, in which the following appears at p. 106 of the report:

> In the absence of compelling evidence that the sharing of religious beliefs and practices by the access parent with the child or that the exposure to two religions is contrary to the best interest of the child, the **Divorce Act** must be interpreted in a way compatible with the fulfilment of constitutional rights, including the freedom of religion of the access parent.

The learned trial judge concluded that this passage did not represent the law in British Columbia. With respect, I think it does. The decision in the **Hockey** case also demonstrates the practical overlap between the two issues which I have considered separately, namely the parental powers and the constitutional

rights of each parent, as those powers and rights govern the manner in which their children may be exposed to their respective religious beliefs. It reinforces my view that the following principles of law are applicable to the issue of access restrictions which this case presents:

> (a) Mrs. Young has the fundamental freedom, under s. 2(a) of the **Charter**, to adopt and to follow whatever religious belief she chooses, and to teach and disseminate her beliefs to the three children of the marriage.
>
> (b) As the custodial parent, Mrs. Young also has the power to determine the religious upbringing of the three children, which means that she has the power, until each has reached the age of discretion, to require them to observe the religion of her choice, and to undertake such religious instruction as she directs.
>
> (c) As custodial parent Mrs. Young does not have the power to prevent Mr. Young from sharing his religious beliefs with the children.
>
> (d) Mr. Young also has the fundamental freedom, under s. 2(a) of the **Charter**, to adopt and to follow whatever religious belief he chooses, and to teach and disseminate his beliefs to the three children of the marriage.
>
> (e) Mr. Young's fundamental freedom of religion under s. 2(a) of the **Charter** is not limited by the powers which Mrs. Young has in her capacity as custodial parent.
>
> (f) Mr. Young's fundamental freedom of religion under s. 2(a) of the **Charter**, does not give him the right to force his religious beliefs upon his children.
>
> (g) Mr. Young's fundamental freedom of religion under s. 2(a) of the **Charter**, to

> teach and disseminate his religious beliefs to his children, is limited only to the extent that the exercise of that freedom causes, or threatens the probability of, real physical or psychological harm to the children.

There remains to be considered whether the potential for any limitation on the exercise by Mr. Young of his fundamental freedom of religion, as described in (g), was borne out by the evidence in this case.

V

As has been noted both Huddart, J., at the pre-trial conference, and the learned trial judge throughout the course of the trial, refused to permit Mrs. Young to lead evidence on the substance of the tenets of the Jehovah's Witness religion. In my view both correctly perceived that no issue of real harm, either physical or psychological, arose in this case. If any such issue had presented itself, it would have been manifest from the evidence of the expert witnesses who examined the children on a number of occasions, and who undoubtedly would have identified the existence of, or the potential for, real harm to the children arising from their father's religious beliefs, if such existed. In the absence of any such evidence, there was no basis upon which the court could legitimately entertain any inquiry into the substance of his religious beliefs.

At no time did the learned trial judge refuse to admit any evidence relevant to the issue of the children's best interests. Her decision not to admit any evidence related to the tenets of the Jehovah's Witness faith was the natural and irresistible result of the fact that the dispute between these two parents had its genesis in the intolerance of each for the religious beliefs of the other. Theirs was a dispute between beliefs, not a dispute over whether real harm would befall their children as a result of the religious beliefs of one or the other.

Thus there was no basis upon which the court could embark upon an evaluation of the religious beliefs of either, and the evidence which Mrs. Young persistently sought to bring before the court was clearly irrelevant.

The learned trial judge nonetheless imposed religious restrictions on Mr. Young's right of access. I have reviewed the evidence which was offered in support of those restrictions. In my view it fell far short of establishing that any real harm would befall the children from Mr. Young's exercise of his fundamental freedom to teach and disseminate his religious beliefs to them. No such harm was diagnosed or anticipated by either of the expert witnesses which the learned trial judge found to be credible. Nor did the evidence establish that the conflict in the religious beliefs of the parents was causing, or was likely to cause, such harm.

The evidence went no further than to establish that the children were under some stress, the cause of which was "multi-factorial", but which obviously included some component related to the religious dispute between the parents. As I have attempted to show such evidence would not even justify the court embarking on any inquiry into the religious beliefs of a parent. It is therefore axiomatic that it would not support any interference with Mr. Young's fundamental freedom of religion under s. 2(a) of the **Charter**, in the form of the restrictions imposed.

The evidence, however, did establish that neither of the two older girls wished either to go to his place of worship with him or to accompany him on his proselytization efforts. Under the analysis which I have presented Mr. Young is bound to respect their wishes. While under oath, as a witness at trial, he testified that he was willing to do so. The learned trial judge seems not to have taken that evidence into account. She certainly did not reject it. In those circumstances I am of the view that this court is entitled to accept it at face value.

I am of the view that no proper basis for the imposition of any religious restrictions on Mr. Young's right of access existed in the evidence which was before the learned trial judge.

VI

I agree with Southin, J.A. that paragraph [3] of the judgment is unnecessary in light of paragraph [2], and should therefore be struck out.

For the reasons which I have set out the restrictions imposed upon Mr. Young's exercise of his right of access to the three children of the marriage, as set out in paragraph [5] of the judgment appealed from must be struck out.

I agree with Southin, J.A. that the restriction described in paragraph [6] is unenforceable, and that for that reason alone it too should be struck out.

For the reasons given by Southin, J.A., I also agree that the restriction found in paragraph [7] of the judgment should be struck out.

As to paragraphs [22] and [23] of the judgment, I am of the view that they should simply be struck out as well. I realize that counsel for Mr. Young launched a separate motion, returnable on the date the trial was due to commence, seeking the opposite of the declarations which those two paragraphs of the judgment reflect. This was simply another example of the prolix and convoluted approach to pleadings which seems to have characterized this litigation.

As Southin, J.A. attempted to make clear to the parties, when they appeared before her in chambers in this Court in May of 1989, the issues of custody and access were both at large once the trial opened. Thus it was open to counsel to argue that any restrictions on Mr. Young's right of access, such as those which were imposed by the interlocutory orders and which Mrs. Young sought to have incorporated in the final order at trial, were inconsistent with his fundamental freedom of religion under s.

2(a) of the **Charter**, and ought not, for that reason, to be repeated. It was unnecessary to file a separate motion seeking declarations to that effect. I would simply eliminate those paragraphs from the judgment at trial.

I would allow the appeal of Mr. Young to the extent described in these reasons, and in those portions of the reasons of Southin, J.A. and Cumming, J.A. which I have adopted. I would allow the appeals of both Mr. How and the Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses. I would order costs on all of these appeals as proposed by Cumming, J.A.

"The Honourable Mr. Justice Wood"

FOOTNOTES FROM JUDGMENT

[1] Walder G.W. White, **A Comparison of Some Parental and Guardian Rights** (1980), 3 Can. J. Fam. L. pp.219-28.

[2] D. Kelly Weisberg, **Evolution of the Concept of the Rights of the Child in the Western World** (1978), 21 Review of the International Commission of Jurists 43, at 44-5.