File No. CT 2005-006

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by B-Filer Inc, B. Filer Inc. doing business as GPAY GuaranteedPayment and NPay Inc. for an order pursuant to section 103.1 granting leave to make application under sections 75 and 77 of the *Competition Act*;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and NPay Inc. for an interim order pursuant to section 104 of the **Competition Act**.

BETWEEN:

B-FILER INC., B-FILER INC. doing business as GPAY GUARANTEEDPAYMENT and NPAY INC.

Applicants

-and-

THE BANK OF NOVA SCOTIA

Respondent

THE BANK OF NOVA SCOTIA'S BRIEF OF AUTHORITIES

Motion to Amend Pleadings

April 27, 2006

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-and-

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Travellers Indemnity Company of Canada *Appellant*

v.

Andrew Clifford Maracle, Jr. *Respondent*

INDEXED AS: MARACLE *v.* TRAVELLERS INDEMNITY CO. OF CANADA

File No.: 21725.

1991: February 28; 1991: June 6.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance — Limitation periods — Promissory estoppel — Action against insurer brought after limitation period had expired — Whether doctrine of promissory estoppel effective answer to limitation period defence — Whether insurer admitted liability — Whether insurer promised not to rely on limitation period.

Limitation of actions — Promissory estoppel — Action against insurer brought after limitation period had expired — Whether doctrine of promissory estoppel effective answer to limitation period defence.

Respondent's commercial building was destroyed by fire. The insurer admitted liability for the full amount of the coverage for equipment and stock, and paid this amount into court after it learned of third party claims, but no agreement was reached on the amount for the building. The insurer later wrote respondent offering to settle the building claim as well, and to pay the amount offered into court, "without prejudice" to the insurer's liability. Respondent did not reply to this letter, but shortly after the one-year limitation period had expired, issued a statement of claim for the amount of building coverage claimed. The trial judge found that there was no expressed promise by the insurer not to rely on the limitation period and dismissed the action. The Court of Appeal reversed the judgment. In a majority decision it found that promissory estoppel can prevent the insurer from relying on a limitation period where there has been either an admission of liability or a promise not to rely on the limitation period. This appeal is to determine

Travellers Indemnity Company of Canada *Appelante*

c.

Andrew Clifford Maracle, fils *Intimé*

RÉPERTORIÉ: MARACLE *c.* TRAVELLERS INDEMNITY CO. OF CANADA

Nº du greffe: 21725.

1991: 28 février; 1991: 6 juin.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Assurance — Délais de prescription — Irrecevabilité fondée sur une promesse — Action intentée contre l'assureur après expiration du délai de prescription — La théorie de l'irrecevabilité fondée sur une promesse peut-elle être opposée avec succès au moyen de défense de prescription? — L'assureur a-t-il fait une reconnaissance de responsabilité? — L'assureur a-t-il promis de ne pas invoquer la prescription?

Prescription — Irrecevabilité fondée sur une promesse — Action intentée contre l'assureur après expiration du délai de prescription — La théorie de l'irrecevabilité fondée sur une promesse peut-elle être opposée avec succès au moyen de défense de prescription?

L'immeuble commercial de l'intimé a été détruit par le feu. L'assureur a reconnu son obligation de verser la totalité de l'indemnité stipulée pour l'équipement et le stock, somme qu'il a consignée à la cour après avoir été informé de réclamations de tierces personnes. Les parties n'ont cependant pas pu s'entendre sur le montant de l'indemnité pour le bâtiment. L'assureur a par la suite adressé à l'intimé une lettre offrant de l'indemniser également pour le bâtiment et de consigner à la cour la somme ainsi offerte, «sous toutes réserves», sans engager aucunement sa responsabilité. L'intimé n'a pas répondu à cette lettre, mais peu après l'expiration du délai de prescription d'un an, il a produit une déclaration portant sur le montant de l'indemnité réclamée à l'égard du bâtiment. Le juge de première instance a conclu qu'il n'y avait aucune promesse expresse de l'assureur de ne pas invoquer la prescription et a rejeté l'action. Cette décision a été infirmée par la Cour d'appel à la majorité, qui a dit que l'irrecevabilité fondée sur une promesse

whether the doctrine of promissory estoppel is an effective answer to the limitation period defence, and whether the insurer's admission of liability created a debtor-creditor relationship and thereby a separate contract between the insurer and the insured for which the limitation period would be six years.

peut venir empêcher l'assureur d'invoquer la prescription lorsqu'il a soit reconnu l'existence d'une obligation lui incombant, soit promis de ne pas invoquer la prescription. Le pourvoi vise à déterminer si la théorie de l'irrecevabilité fondée sur une promesse peut être opposée avec succès au moyen de défense de prescription et si la reconnaissance par l'assureur de l'existence d'une obligation lui incombant a fait naître un rapport de débiteur et de créancier, créant par le fait même un contrat distinct entre l'assureur et l'assuré prévoyant une prescription de six ans.

Held: The appeal should be allowed.

Arrêt: Le pourvoi est accueilli.

The party relying on the doctrine of promissory estoppel must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. The representee must also establish that, in reliance on the representation, he acted on it or in some way changed his position. While an admission of liability is one of the factors from which a court may infer that a promise was made not to rely on the limitation period, it is not an alternate basis of promissory estoppel. The admission of liability must go beyond an offer of settlement and extend to the limitation period. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. If this inference is drawn as a finding of fact and the admission led the plaintiff to miss the limitation period, promissory estoppel has been established. In this case the trial judge, having found that there was no promise relating to the limitation period, was correct in concluding that promissory estoppel had not been made out. Further, the admission of liability with respect to the coverage for equipment and stock could not be construed to apply to the building coverage, particularly since the letter offering to settle that aspect of the claim contained an express reservation of rights.

Il incombe à la partie qui invoque l'irrecevabilité fondée sur une promesse d'établir que l'autre partie a, par ses paroles ou sa conduite, fait une promesse ou donné une assurance destinées à modifier leurs rapports juridiques et à inciter à l'accomplissement de certains actes. De plus, le destinataire des déclarations doit prouver que, sur la foi de celles-ci, il a pris une mesure quelconque ou a de quelque manière changé sa position. Bien que la reconnaissance d'une obligation figure parmi les facteurs dont un tribunal peut déduire qu'on a promis de ne pas invoquer la prescription, il ne s'agit pas là d'un autre fondement de l'irrecevabilité découlant d'une promesse. La reconnaissance d'obligation doit constituer plus qu'une offre de règlement et doit s'appliquer au délai de prescription. Il doit y avoir des paroles ou une conduite à partir desquelles on peut conclure que la reconnaissance devait jouer, que l'affaire soit réglée ou non, et que l'unique question en litige entre les parties, dans l'éventualité de poursuites judiciaires, est celle du montant de l'indemnité. Si cette conclusion de fait est tirée et que la reconnaissance a amené le demandeur à laisser expirer le délai de prescription, l'irrecevabilité fondée sur une promesse est dès lors établie. En l'espèce, le juge de première instance, ayant conclu à l'absence d'une promesse concernant le délai de prescription, a eu raison de décider qu'on n'avait pas établi l'irrecevabilité fondée sur une promesse. En outre, la reconnaissance d'une obligation à l'égard de la couverture visant l'équipement et le stock ne peut être interprétée comme s'appliquant à la couverture prévue pour le bâtiment, d'autant plus que la lettre offrant une indemnité pour le bâtiment contient une réservation expresse de droits.

The insurer's implied promise to pay respondent an amount yet to be determined could not create any contractual rights since there was no acceptance.

La promesse implicite de l'assureur de verser à l'intimé une somme dont le montant est à déterminer ne peut faire naître aucune obligation contractuelle étant donné qu'il n'y a pas eu d'acceptation.

Cases Cited

Disapproved: *Collavino Inc. v. Employers Mutual Liability Insurance Co. of Wisconsin* (1984), 5 C.C.L.I. 94; **referred to:** *Gillis v. Bourgard* (1983), 41 O.R. (2d) 107; *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607; *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641; *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61.

Statutes and Regulations Cited

Insurance Act, R.S.O. 1980, c. 218, ss. 106, 118, 125, Item 14.

APPEAL from a judgment of the Ontario Court of Appeal (1989), 70 O.R. (2d) 360, 62 D.L.R. (4th) 570, 35 O.A.C. 297, [1990] I.L.R. ¶ 1-2539, 40 C.C.L.I. 161, reversing a decision of the High Court of Justice, [1988] I.L.R. ¶ 1-2326, 31 C.C.L.I. 42, dismissing respondent's action. Appeal allowed.

Joshua Liswood and *Linda Dolan*, for the appellant.

Ross V. Smiley, Q.C., and *Will O'Hara*, for the respondent.

The judgment of the Court was delivered by

SOPINKA J.—This appeal was heard concurrently with *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61. Both appeals raise the issue as to the circumstances in which an admission of liability made to a prospective plaintiff by a prospective defendant amounts to promissory estoppel precluding reliance on a limitation period.

Facts

On November 10, 1982, the commercial building of the respondent Maracle was destroyed by fire. The appellant was notified immediately. The policy provided coverage of three separate categories of assets: (i) fixtures, equipment and tenant improvements, (ii) stock in trade, and (iii) the building proper. This is referred to as a commercial package of insurance protection.

Jurisprudence

Arrêt critiqué: *Collavino Inc. v. Employers Mutual Liability Insurance Co. of Wisconsin* (1984), 5 C.C.L.I. 94; **arrêts mentionnés:** *Gillis v. Bourgard* (1983), 41 O.R. (2d) 107; *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] R.C.S. 607; *Engineered Homes Ltd. c. Mason*, [1983] 1 R.C.S. 641; *Marchischuk c. Dominion Industrial Supplies Ltd.*, [1991] 2 R.C.S. 61.

Lois et règlements cités

Loi sur les assurances, L.R.O. 1980, ch. 218, art. 106, 118, 125, numéro 14.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1989), 70 O.R. (2d) 360, 62 D.L.R. (4th) 570, 35 O.A.C. 297, [1990] I.L.R. ¶ 1-2539, 40 C.C.L.I. 161, qui a infirmé une décision de la Haute Cour de justice, [1988] I.L.R. ¶ 1-2326, 31 C.C.L.I. 42, rejetant l'action de l'intimé. Pourvoi accueilli.

Joshua Liswood et *Linda Dolan*, pour l'appelante.

Ross V. Smiley, c.r., et *Will O'Hara*, pour l'intimé.

Version française du jugement de la Cour rendu par

LE JUGE SOPINKA—Le présent pourvoi a été entendu en même temps que *Marchischuk c. Dominion Industrial Supplies Ltd.*, [1991] 2 R.C.S. 61. Ils soulèvent tous les deux la question des circonstances dans lesquelles une reconnaissance de responsabilité faite à un demandeur éventuel par un défendeur éventuel entraîne l'irrecevabilité, fondée sur une promesse, à invoquer la prescription.

Les faits

Le 10 novembre 1982, l'immeuble commercial de l'intimé Maracle a été détruit par le feu. L'appelante en a été informée immédiatement. La police d'assurance couvrait trois catégories distinctes de biens: (i) les accessoires fixes, l'équipement et les améliorations effectuées par le locataire, (ii) le stock, et (iii) le bâtiment proprement dit. C'est ce qu'il est convenu d'appeler une assurance commerciale globale.

The respondent was underinsured with respect to the first two categories covered by the policy, and the insurance company soon admitted liability for the full amount for them, $70,000. No agreement, however, was reached with respect to the amount for the building and this remained in dispute throughout. The maximum coverage for the building was $100,000. The adjuster put the depreciated value of the structure at $84,000. Initially, the insurer considered exercising its option to replace the building, but on December 16, 1982, the insurer made Maracle a cash offer of $75,000. Maracle rejected it.

The insurer was advised that there were third party claims against the proceeds of the policy. Accordingly, on January 13, 1983 it sought, and was granted, permission pursuant to s. 118 of the *Insurance Act*, R.S.O. 1980, c. 218, to pay the $70,000 for the settled claims into court. The affidavit accompanying this payment included an admission of liability with respect to these proceeds. On February 23, 1983 the insurer advised the respondent by letter that the insurer was prepared to settle the building claim for $84,000, and to pay that amount into court as well. A Proof of Loss form for $84,000 was included, as was a blank Proof of Loss to be completed and returned by the insured should the offer prove unacceptable. Maracle did not reply to this letter, notwithstanding its clarity:

> Should this proposal not be acceptable to you, then in accordance with the Statutory Conditions of the contract and to comply with the Insurance Act, we enclose Blank Proofs of Loss.
>
> . . .
>
> The foregoing information and submission of these Proofs is to comply with the Insurance Act, Without Prejudice, to the liability of the insurer.

En ce qui concerne les deux premières catégories de biens visés par la police, l'assurance prise par l'intimé était insuffisante et la compagnie d'assurance a eu tôt fait de reconnaître son obligation de verser à leur égard la totalité de l'indemnité stipulée, soit 70 000 $. Les parties n'ont cependant pas pu s'entendre sur le montant de l'indemnité pour le bâtiment et elles ne sont jamais parvenues à se mettre d'accord sur ce point. La couverture maximale prévue pour le bâtiment était de 100 000 $. L'expert en assurance a fixé à 84 000 $ la valeur non amortie de celui-ci. L'assureur avait initialement envisagé d'exercer son option de remplacer le bâtiment, mais, le 16 décembre 1982, il a fait à Maracle une offre de 75 000 $ comptant, que Maracle a rejetée.

Ayant été informé de réclamations de tierces personnes contre le produit de la police, l'assureur a demandé et s'est vu accorder, le 13 janvier 1983, en vertu de l'art. 118 de la *Loi sur les assurances*, L.R.O. 1980, ch. 218, l'autorisation de consigner à la cour la somme de 70 000 $ à l'égard des sinistres réglés. L'affidavit accompagnant cette consignation contenait une reconnaissance d'obligation d'indemniser relativement à cette somme. Le 23 février 1983, l'assureur a fait savoir à l'intimé, dans une lettre, qu'il était prêt à accorder 84 000 $ pour le bâtiment et à consigner cette somme à la cour également. Jointes à la lettre étaient une formule de preuve de sinistre où se trouvait inscrite la somme de 84 000 $, ainsi qu'une formule de preuve de sinistre en blanc à remplir et à renvoyer par l'assuré au cas où l'offre susmentionnée ne lui conviendrait pas. Maracle n'a pas répondu à cette lettre malgré son caractère non équivoque:

> [TRADUCTION] Pour le cas où cette offre ne vous conviendrait pas, nous joignons aux présentes, en exécution des conditions légales du contrat et conformément à la Loi sur les assurances, des formules de preuve de sinistre en blanc.
>
> . . .
>
> L'assureur vous fait parvenir ces renseignements et les formules de preuve de sinistre sous toutes réserves afin de se conformer à la Loi sur les assurances et sans engager aucunement sa responsabilité.

In August 1983, Maracle retained a solicitor, Shanbaum, to take the matter on his behalf, and provided Shanbaum with a copy of the insurer's letter of February 23, 1983. No further communication, however, took place between the parties prior to the expiry of the limitation period on November 10, 1983. On November 23, 1983, Maracle issued a statement of claim with respect to the amount claimed under item (iii), the building coverage. Trial of the limitation issue commenced in Ontario High Court on January 28, 1987.

En août 1983, Maracle a retenu les services d'un avocat du nom de Shanbaum pour le représenter dans ce dossier et lui a fourni une copie de la lettre de l'assureur du 23 février 1983. Il n'y a cependant pas eu d'autre communication entre les parties antérieurement au 10 novembre 1983, date d'expiration du délai de prescription. Le 23 novembre 1983, Maracle a produit une déclaration portant sur le montant de l'indemnité réclamée à l'égard du bâtiment (la catégorie (iii)). L'instruction de la question de la prescription a débuté devant la Haute Cour de l'Ontario le 28 janvier 1987.

Judgments Below

Ontario High Court of Justice (1987), 31 C.C.L.I. 42

Les jugements des juridictions inférieures

Haute Cour de justice de l'Ontario (1987), 31 C.C.L.I. 42

Sirois J. began with a chronological summary of the undisputed facts. He then provided a synopsis of the positions of the parties. The defence was failure to commence the action within one year after the loss as per statutory condition 14 of the policy, as set out in s. 125, Item 14 of the *Insurance Act* of Ontario. As well, the defence of failure to file a proof of loss was raised.

Le juge Sirois a commencé par résumer chronologiquement les faits, qui ne sont pas contestés, pour présenter ensuite un aperçu des positions des parties. Le moyen de défense invoqué était l'omission d'intenter l'action dans un délai d'un an après le sinistre, ainsi que l'exige la condition légale numéro 14 de la police, qui est la condition numéro 14 énoncée à l'art. 125 de la *Loi sur les assurances* de l'Ontario. A également été avancée à titre de défense l'omission de produire une preuve de sinistre.

The plaintiff relied on estoppel, arguing that the defendant expressly admitted liability under the contract to pay the plaintiff, and therefore became the debtor of the plaintiff for an amount on the building to be determined following investigation as to quantum only. Alternatively, the plaintiff alleged that the defendant waived the limitation period and entered into a constructive settlement of the plaintiff's claim, subject only to assessment of the value of the loss of the building. In answer to the defence of breach of the condition to file Proof of Loss, the plaintiff argued that it was entitled to relief from forfeiture under s. 106 of the *Insurance Act*.

Le demandeur a soulevé l'irrecevabilité, faisant valoir que la défenderesse avait expressément reconnu son obligation contractuelle d'indemniser le demandeur et qu'elle s'était ainsi rendue débitrice envers lui d'une somme afférente au bâtiment, à déterminer à la suite d'une enquête portant uniquement sur le montant. Le demandeur a fait valoir subsidiairement que la défenderesse avait renoncé à invoquer la prescription et qu'elle avait implicitement accédé à la demande de règlement du demandeur, sous réserve seulement de la détermination de la valeur du bâtiment sinistré. En réponse à la défense de non-production d'une preuve de sinistre, le demandeur a soutenu que l'art. 106 de la *Loi sur les assurances* lui reconnaissait le droit à une protection contre la déchéance de l'assurance.

Sirois J. noted that he had been referred to no case where an admission under s. 118 of the *Insurance Act* had been made by the insurer. After considering the

Le juge Sirois a fait remarquer qu'on ne lui avait signalé aucune affaire dans laquelle un assureur avait fait la reconnaissance visée à l'art. 118 de la *Loi sur*

decision of the Ontario Court of Appeal in *Gillis v. Bourgard* (1983), 41 O.R. (2d) 107, and Holland J.'s decision in *Collavino Inc. v. Employers Mutual Liability Insurance Co. of Wisconsin* (1984), 5 C.C.L.I. 94 (Ont. H.C.), Sirois J. concluded (at p. 47):

From the above decision, there are two essential elements to the doctrine of promissory estoppel. Firstly, there must be an expressed or implied admission of liability, and secondly, there must be an expressed or implied promise by the insurer not to rely on the limitation period.

. . .

In our case we have one of those ingredients, namely, the expressed admission of liability under s. 118 of the *Insurance Act*. There is no expressed promise by the insurer not to rely on the limitation period. The evidence is that after its offer of February 23, 1983, the insurer maintained silence.

From those facts I conclude that despite the fact of the formal admission of liability, of payment of part of the proceeds in court, one cannot infer that this amounted to a promise by the insurer not to rely on the limitation period defence.

As a result, the plaintiff must fail and I must dismiss the action. On the facts of this case, however, I conclude that it should be dismissed without costs.

Ontario Court of Appeal (1989), 70 O.R. (2d) 360

The majority of the court, *per* Brooke J.A. (Craig J. *ad hoc* concurring), were of the view that the case at bar was distinguishable on the facts from *Gillis v. Bourgard, supra*, on the basis that in that case there was no clear admission of liability. In the case at bar, in the court's view, the respondent not only admitted liability, but made the same admission to the court in applying for permission to pay in the proceeds of the policy.

The majority expressly adopted the view of Holland J. in *Collavino Inc. v. Employers Mutual Liability, supra*, that promissory estoppel is an effective answer to the defence of a limitation period where

les assurances. Ayant examiné l'arrêt rendu par la Cour d'appel de l'Ontario dans *Gillis v. Bourgard* (1983), 41 O.R. (2d) 107, et la décision du juge Holland dans *Collavino Inc. v. Employers Mutual Liability Insurance Co. of Wisconsin* (1984), 5 C.C.L.I. 94 (H.C. Ont.), le juge Sirois a conclu (à la p. 47):

[TRADUCTION] Il ressort de la décision citée ci-dessus que la théorie de l'irrecevabilité fondée sur une promesse comporte deux éléments essentiels. Premièrement, il doit y avoir une reconnaissance expresse ou implicite d'une obligation et, deuxièmement, il doit y avoir une promesse, expresse ou implicite, de la part de l'assureur qu'il n'invoquera pas la prescription.

. . .

Nous avons en l'espèce un de ces éléments: la reconnaissance expresse d'une obligation, prévue à l'art. 118 de la *Loi sur les assurances*. Il n'y a aucune promesse expresse de l'assureur de ne pas invoquer la prescription. D'après la preuve, il est resté silencieux à la suite de son offre du 23 février 1983.

Je déduis de ces faits qu'en dépit de la reconnaissance expresse de l'obligation et malgré la consignation à la cour d'une partie du produit, on ne saurait en conclure que l'assureur promettait par là de ne pas se prévaloir de la défense de prescription.

Par conséquent, force m'est de débouter le demandeur. Compte tenu toutefois des faits de l'espèce, j'estime qu'il n'y pas lieu d'adjuger de dépens.

La Cour d'appel de l'Ontario (1989), 70 O.R. (2d) 360

La majorité en Cour d'appel (le juge Brooke, avec l'appui du juge suppléant Craig) était d'avis que les faits de la présente instance permettent de la distinguer d'avec l'affaire *Gillis v. Bourgard*, précitée, puisque, dans cette dernière, il n'y avait pas eu de reconnaissance non équivoque d'une obligation. En l'espèce, selon la Cour d'appel, non seulement l'intimée a reconnu l'obligation lui incombant, mais elle a réitéré cette reconnaissance en adressant à la cour sa demande d'autorisation d'y consigner le produit de la police.

La majorité a donc expressément adopté le point de vue exprimé par le juge Holland dans *Collavino Inc. v. Employers Mutual Liability*, précité, à savoir que l'irrecevabilité fondée sur une promesse peut être

there is either an express or implied admission of liability or an implied promise not to rely on the limitation period, as long as the further requirement is met that there must be some evidence that one of the parties entered into a course of negotiations which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced. The majority was of the view that the further requirement was met in this case.

Galligan J.A. dissented on the basis that the course of negotiations established in this case was insufficient to estop the insurer from relying on the limitation period (at p. 364):

It is my opinion that the insurer never admitted liability to pay $84,000 or any specific amount for damages to the building. It made an offer of settlement, which offer was not accepted. It made clear that in the event that the offer was not accepted, that the provisions of the statutory conditions and of the *Insurance Act* were to apply. The insurer in this case, in my opinion, neither did nor said anything which could have led anyone to think that it was waiving its right to rely upon the limitation contained in the statutory condition.

I am unable to agree with my colleagues that the fact that the insurance company exercised the right given to it under s. 118 of the *Insurance Act* to pay into court moneys for which it admitted liability under two of the coverages disentitled it to rely on the statutory condition imposing a limitation of one year for a claim under the building coverage.

Points in Issue

1. Whether the Court of Appeal erred in finding that the doctrine of promissory estoppel was an effective answer to the defence that the respondent's action was barred as not having been brought within the one-year contractual and statutory limitation period.

2. Did the insurer's admission of liability create a debtor-creditor relationship between the insurer and the insured and thereby an implied promise to pay the

opposée avec succès à une défense de prescription lorsqu'il y a soit une reconnaissance expresse ou implicite d'une obligation, soit une promesse implicite de ne pas invoquer la prescription, à condition que soit remplie en outre la condition selon laquelle il doit exister des éléments de preuve établissant que l'une des parties a mené des négociations qui ont amené l'autre partie à supposer qu'elle ne tiendrait pas rigidement à l'exécution des obligations contractuelles dont elle était créancière. De l'avis de la majorité, cette exigence additionnelle avait été remplie en l'espèce.

Le juge Galligan a fondé sa dissidence sur le fait que les négociations qui ont eu lieu dans la présente instance ne suffisaient pas pour rendre l'assureur irrecevable à invoquer la prescription (à la p. 364):

[TRADUCTION] À mon avis, l'assureur ne s'est jamais reconnu obligé de payer 84 000$, ou quelque autre somme déterminée, à titre d'indemnité pour le bâtiment. Il a fait une offre de règlement, qui n'a pas été acceptée. De plus, il a bien précisé qu'advenant le cas où l'offre n'était pas acceptée, la condition légale pertinente et la *Loi sur les assurances* s'appliqueraient. J'estime qu'en l'espèce l'assureur n'a rien fait ni rien dit qui eût pu faire croire à qui que ce soit qu'il renonçait à son droit d'invoquer la prescription prévue par la condition légale applicable.

Je ne puis convenir avec mes collègues que la compagnie d'assurance, par suite de l'exercice du droit, dont elle jouissait aux termes de l'art. 118 de la *Loi sur les assurances*, de consigner à la cour la somme à l'égard de laquelle elle reconnaissait son obligation en ce qui concerne deux catégories de biens assurés, se trouvait inhabilitée à invoquer la condition légale prévoyant une prescription d'un an pour une action relative au bâtiment.

Les questions en litige

1. Est-ce à tort que la Cour d'appel a conclu que la théorie de l'irrecevabilité fondée sur une promesse pouvait être opposée avec succès au moyen de défense alléguant la prescription de l'action de l'intimé du fait qu'elle n'avait pas été intentée dans le délai d'un an prévu au contrat et dans la loi?

2. La reconnaissance par l'assureur de l'existence d'une obligation lui incombant a-t-elle fait naître entre lui et l'assuré un rapport de débiteur et de

insured an amount to be ascertained either by agreement or by a reference, and as such, constitute a separate contract between the insurer and the insured wherein the limitation for suit would be six years?

Issue 1: Promissory Estoppel

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

In *Collavino Inc. v. Employers Mutual Liability*, *supra*, Holland J., in applying these principles to a case in which an admission of liability had been made, stated (at p. 101):

Promissory estoppel can prevent the insurer from relying on a limitation period where there has been either (1) an admission of liability of [*sic*: "or"] (2) a promise not to rely on the limitation period relied on by the insured. . . .

créancier emportant implicitement une promesse de verser à l'assuré une somme à déterminer de gré à gré ou dans le cadre d'un renvoi et constituant comme tel un contrat distinct entre l'assureur et l'assuré prévoyant une prescription de six ans?

La première question: l'irrecevabilité fondée sur une promesse

Les principes de l'irrecevabilité fondée sur une promesse sont bien établis. Il incombe à la partie qui invoque cette exception d'établir que l'autre partie a, par ses paroles ou sa conduite, fait une promesse ou donné une assurance destinées à modifier leurs rapports juridiques et à inciter à l'accomplissement de certains actes. De plus, le destinataire des déclarations doit prouver que, sur la foi de celles-ci, il a pris une mesure quelconque ou a de quelque manière changé sa position. Dans l'arrêt *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] R.C.S. 607, le juge Ritchie dit, à la p. 615:

[TRADUCTION] Il me semble évident que ce genre de défense d'*equity* ne peut être invoquée en l'absence d'une preuve qu'une des parties a mené des négociations qui ont eu pour effet d'amener l'autre à croire que les obligations strictes prévues au contrat ne seraient pas exécutées, et je crois que cela suppose qu'il doit y avoir une preuve qui permet de conclure que la première partie a voulu que les rapports juridiques établis par le contrat soient modifiés en conséquence des négociations.

Ce passage a été cité et approuvé par le juge McIntyre dans l'arrêt *Engineered Homes Ltd. c. Mason*, [1983] 1 R.C.S. 641, à la p. 647. Le juge McIntyre y affirme que la promesse doit être non équivoque, mais qu'elle peut s'inférer des circonstances.

Dans *Collavino Inc. v. Employers Mutual Liability*, précité, le juge Holland a appliqué ces principes à un cas où l'existence d'une obligation avait été reconnue. D'après le juge Holland (à la p. 101):

[TRADUCTION] L'irrecevabilité fondée sur une promesse peut venir empêcher l'assureur d'invoquer la prescription lorsqu'il a soit (1) reconnu l'existence d'une obligation lui incombant, soit (2) promis de ne pas invoquer la prescription, promesse à laquelle s'est fié l'assuré. . .

Before the principle applies there must be some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced.

This passage would imply that an admission of liability *per se* is an alternative basis on which promissory estoppel can be based. In my view, while an admission of liability is clearly one of the factors from which a court may infer as a finding of fact that a promise was made not to rely on the limitation period, it is not an alternate basis of promissory estoppel. In *Gillis v. Bourgard*, *supra*, the Ontario Court of Appeal, *per* Brooke J.A., dealt with a case in which an admission of liability was the basis for a claim of promissory estoppel. In concluding that the necessary ingredients for promissory estoppel had not been established, Brooke J.A. stated, at p. 109:

> It seems to us that what occurred here was, at best, no more than normal dealings between parties attempting to resolve an insurance claim. To hold that it could or did give rise to any admission of liability or a promise not to rely upon a condition of the contract, the limitation period, is completely unwarranted and puts in jeopardy the benefit of such dealings to litigants.

An admission of liability is frequently made in the course of settlement negotiations. This is often a preliminary step in order to clear the way to enter into a discussion as to quantum. Indeed, when an offer to pay a stated amount is made by one party to the other, an admission of liability is usually implicit. In this type of situation, the admission of liability is simply an acknowledgment that, for the purpose of settlement discussions, the admitting party is taking no issue that he or she was negligent, liable for breach of contract, etc. There must be something more for an admission of liability to extend to a limitation period. The principles of promissory estoppel require that the promissor, by words or conduct,

Pour que le principe s'applique, il doit y avoir des éléments de preuve établissant que l'une des parties a mené des négociations qui ont amené l'autre partie à supposer qu'elle ne tiendrait pas rigidement à l'exécution des obligations contractuelles dont elle était créancière.

Il se dégage implicitement de ce passage que la reconnaissance d'une obligation constitue en elle-même un autre fondement possible de l'irrecevabilité fondée sur une promesse. À mon avis, bien que la reconnaissance d'une obligation figure évidemment parmi les facteurs dont un tribunal peut déduire qu'on a en fait promis de ne pas invoquer la prescription, il ne s'agit pas là d'un autre fondement de l'irrecevabilité découlant d'une promesse. Dans *Gillis v. Bourgard*, précité, la Cour d'appel de l'Ontario, parlant par l'intermédiaire du juge Brooke, s'est penchée sur un cas où une allégation d'irrecevabilité fondée sur une promesse reposait sur la reconnaissance d'une obligation. En concluant que les éléments nécessaires pour qu'il y ait irrecevabilité fondée sur une promesse n'avaient pas été établis, le juge Brooke a dit, à la p. 109:

> [TRADUCTION] Il nous semble qu'en mettant les choses au mieux, il n'y a eu en l'espèce rien d'autre que des négociations normales entre des parties qui tentent de régler une demande d'indemnité en matière d'assurance. Il est tout à fait injustifié de conclure que ces négociations ont pu engendrer, ou ont en fait engendré, une reconnaissance d'obligation ou une promesse de ne pas se prévaloir d'une condition du contrat, à savoir le délai de prescription; cela met en péril d'ailleurs les avantages que présentent de telles négociations pour les parties à un litige.

Une reconnaissance d'obligation intervient souvent dans le cadre de négociations en vue d'un règlement. Dans bien des cas, elle constitue une étape préliminaire à franchir avant que ne puisse être abordée la question de l'indemnité. En effet, quand une partie fait à l'autre une offre de lui verser une somme déterminée, cela emporte habituellement une reconnaissance implicite d'obligation. Dans ce genre de cas, la reconnaissance d'une obligation revient simplement à dire qu'aux fins des négociations en vue d'un règlement, la partie qui fait la reconnaissance ne conteste pas sa négligence, sa responsabilité découlant de la violation du contrat, etc. Il en faut davantage pour que la reconnaissance d'une obligation s'applique en

intend to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period must be such that the trier of fact can infer from it that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. Whether this inference can be drawn is an issue of fact. If this finding is in favour of the plaintiff and the effect of the admission in the circumstances led the plaintiff to miss the limitation period, the elements of promissory estoppel have been established.

matière de prescription. Les principes de l'irrecevabilité fondée sur une promesse exigent que l'auteur de la promesse ait manifesté, par ses paroles ou par sa conduite, l'intention de modifier des relations juridiques. Voilà pourquoi il est nécessaire que toute reconnaissance d'obligation qui doit être considérée comme une promesse de ne pas invoquer la prescription soit de telle nature que le juge des faits puisse en déduire qu'elle a été faite précisément dans cette intention. Il doit y avoir des paroles ou une conduite à partir desquelles on peut conclure que la reconnaissance devait jouer, que l'affaire soit réglée ou non, et que l'unique question en litige entre les parties, dans l'éventualité de poursuites judiciaires, est celle du montant de l'indemnité. Quant à savoir si cette conclusion peut être tirée, c'est là une question de fait. À supposer que la conclusion soit favorable au demandeur et que, dans les circonstances, la reconnaissance en question ait amené le demandeur à laisser expirer le délai de prescription, les éléments de l'irrecevabilité fondée sur une promesse sont dès lors établis.

Application to this Case

The trial judge expressly found that the words and conduct referred to herein could not be interpreted as a promise, express or implied, not to rely on the limitation period. While the majority of the Court of Appeal were of the view that the admission of liability in this case went beyond an offer of settlement, they do not explain how they were able to infer that it extended to the limitation period. Not only is there no evidence to suggest that the admission was intended to have this effect, but the letter of February 23, 1983 was made "without prejudice" to the liability of the insurer. The use of this expression is commonly understood to mean that if there is no settlement, the party making the offer is free to assert all its rights, unaffected by anything stated or done in the negotiations. In my opinion, therefore, the trial judge, having found that there was no promise relating to the limitation period, was correct in concluding that promissory estoppel had not been made out. Furthermore, I agree with Galligan J.A. that an admission of liability with respect to coverage for item (i) fixtures, equipment and tenant improvements and item (ii) stock in trade could not be construed to apply to item (iii) the building coverage. Any inference that might otherwise be drawn from this admission was blunted by

Application en l'espèce

Le juge de première instance a conclu expressément que les paroles et la conduite en cause ne sauraient s'interpréter comme une promesse, expresse ou implicite, de ne pas invoquer la prescription. Bien que les juges majoritaires en Cour d'appel aient estimé que la reconnaissance d'obligation faite en l'espèce constituait plus qu'une offre de règlement, ils n'expliquent pas comment ils ont pu inférer que cette reconnaissance s'appliquait au délai de prescription. Non seulement il n'existe aucun élément de preuve qui laisse entendre que la reconnaissance a été faite dans une telle intention, mais la lettre du 23 février 1983 porte la mention «sous toutes réserves» en ce qui concerne la responsabilité de l'assureur. Cette expression s'emploie communément pour indiquer qu'au cas où aucun règlement n'interviendrait, la partie qui a fait l'offre est libre de se prévaloir de tous ses droits indépendamment de tout ce qu'elle a pu dire ou faire au cours des négociations. J'estime en conséquence que le juge de première instance, ayant conclu à l'absence d'une promesse concernant le délai de prescription, a eu raison de décider qu'on n'avait pas établi l'irrecevabilité fondée sur une promesse. En outre, je partage l'avis du juge Galligan de la Cour d'appel que la reconnaissance d'une

the letter of February 23, 1983, containing an express reservation of rights.

Issue 2

This submission was based on the premise that a promise to pay an amount yet to be determined and to pay it into court somehow creates a debt. In the absence of acceptance, no contractual rights, including a debt, could be created. The submission therefore has no merit.

Conclusion

The appeal is therefore allowed and the judgment of the Court of Appeal is set aside, with costs to the appellant both here and in the Court of Appeal. The judgment of Sirois J. is restored.

Appeal allowed with costs.

Solicitors for the appellant: Sawers, Liswood, Scott, Hickman, Toronto.

Solicitors for the respondent: Lilly, Goldman, Blott, Fejer, Toronto.

obligation à l'égard de la couverture visant la catégorie (i) (les accessoires fixes, l'équipement et les améliorations effectuées par le locataire) et la catégorie (ii) (le stock) ne peut être interprétée comme s'appliquant à la couverture prévue pour la catégorie (iii) (le bâtiment). Toute conclusion qui aurait pu par ailleurs être tirée de cette reconnaissance se trouve affaiblie par la lettre du 23 février 1983, qui contient une réservation expresse de droits.

La seconde question

Cet argument reposait sur la prémisse selon laquelle une promesse de payer une somme dont le montant est à déterminer, et de consigner cette somme à la cour, engendre de quelque manière une dette. Or, à défaut d'acceptation, aucune obligation contractuelle, y compris une dette, ne peut prendre naissance. Cet argument est donc sans fondement.

Conclusion

Le pourvoi est en conséquence accueilli et l'arrêt de la Cour d'appel est infirmé, avec adjudication des dépens à l'appelante, tant en notre Cour qu'en Cour d'appel. La décision du juge Sirois est rétablie.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante: Sawers, Liswood, Scott, Hickman, Toronto.

Procureurs de l'intimé: Lilly, Goldman, Blott, Fejer, Toronto.

[Indexed as: **Maxwell v. MLG Ventures Ltd.**]

GWEN MAXWELL v. MLG VENTURES LIMITED
and STEVE A. STAVRO

Ontario Court of Justice (General Division)
Ground J.

Heard – August 15, 1995.
Judgment – September 19, 1995.

Parties – Representative or class actions – Procedural requirements – Pleadings – Amendment – After certification – Amendments that fundamentally changed nature of action not permitted – Amendments that were consistent with original claim permitted – Securities Act, R.S.O. 1990, c. S.5, ss. 131, 134 – Ontario, Rules of Civil Procedure, r. 26.01.

The plaintiff brought an action for damages arising out of alleged breaches of ss. 131 and 134 of the *Securities Act* (Ont.) as the result of alleged misrepresentations in an offering circular pursuant to which the corporate defendant offered to purchase for cash all outstanding shares of another corporation. The action was certified as a class action. The class was all former shareholders of the corporation who tendered their shares pursuant to the offer. After certification as a class proceeding, the plaintiff moved for leave to amend the statement of claim to add further allegations of misrepresentation, various breaches of fiduciary duties, and to claim new relief.

The defendants contended that the amendments fundamentally changed the nature of the action. The defendants submitted that the court ought either to allow the amendments and decertify the class action, or refuse the amendments for failing to disclose a cause of action. The defendants were of the view that the amendments were not based on any new information which came to the attention of the plaintiffs subsequent to the certification date and that the amendments and additional relief claimed should have been included in the statement of claim submitted to the court at the time of the certification order. It was also the position of the defendants that the amendments would change the composition of the class and render the class unidentifiable.

Held – The motion was granted in part.

The approach to be taken was to ask: (1) whether the proposed amendments disclosed a tenable cause of action and whether leave should be granted; (2) whether the proposed amendments fundamentally changed the nature of the action and whether leave should be granted in view of the fact that the action had already been certified or, alternatively, whether leave should be granted and the action decertified; and (3) whether the statement of claim, if the amendments were permitted, would contain allegations of fact justifying a claim for punitive damages.

The new allegation of misrepresentation disclosed a cause of action but did not fundamentally change the nature of the action. That amendment was permissible.

The allegations of breach of fiduciary duty disclosed a cause of action and would not render the class unidentifiable. However, these allegations did fundamen-

tally change the nature of the action as originally certified and would require reconsideration by the court of all the issues examined on the original motion for certification. It was not appropriate to certify an action as a class proceeding and then, by motion to amend the statement of claim, reconstitute the action by adding serious new allegations which fundamentally changed the nature of the action. These amendments should not be permitted.

Other proposed amendments that were refused included a request for declaratory relief and a claim for exemplary or punitive damages.

Cases considered

Dusik v. Newton (1985), 62 B.C.L.R. 1 (C.A.) – referred to.
Keneber Inc. v. Midland (Town) (1994), 16 O.R. (3d) 753 (Gen. Div.) – applied.
Percival v. Wright, [1902] 2 Ch. 421 – referred to.
Seaway Trust Co. v. Markle (1988), 25 C.P.C. (2d) 64 (Ont. Master) [affirmed (1990), 40 C.P.C. (2d) 4 (Ont. H.C.)] – applied.
Tongue v. Vencap Equities Alberta Ltd., 17 Alta. L.R. (3d) 103, 148 A.R. 321, [1994] 5 W.W.R. 674, 14 B.L.R. (2d) 50, 5 C.C.L.S. 141 (Q.B.) – considered.

Statutes considered

Business Corporations Act, R.S.O. 1990, c. B.16 –
Pt. XIV
Pt. XV
Securities Act, R.S.O. 1990, c. S.5 –
s. 131
s. 131(1)
s. 131(11)
s. 134

Rules considered

Ontario, Rules of Civil Procedure –
r. 26.01

MOTION to amend statement of claim in class proceeding.

J. Perry Borden, Q.C., and *James B. Stratton*, for moving party (plaintiff).

Jeffrey S. Leon and *Maureen Helt*, for responding parties (defendants).

(Doc. 95-CQ-60022)

September 19, 1995. GROUND J.: –

Background

1 This action was certified as a class proceeding and the plaintiff appointed as representative plaintiff by order made April 27, 1995. The balance of that motion was adjourned to today's date to settle the

form of notice, plan and agreement regarding fees to be forwarded to class members.

2 The adjourned portion of the motion was heard today, together with a motion for leave to amend the statement of claim. Drafts of the notice, plan and agreement regarding fees were submitted on the hearing of the adjourned motion and the forms thereof settled, and, accordingly, these reasons will deal only with the motion for leave to amend the statement of claim.

3 The original statement of claim claimed damages arising out of alleged breaches by the defendants of ss. 131 and 134 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "*Securities Act*"), as a result of alleged misrepresentations in an offering circular dated April 18, 1994, pursuant to which the defendant MLG Ventures Limited ("Ventures") made an offer to purchase for cash all of the outstanding shares of Maple Leaf Gardens Limited ("MLGL"). The proposed amendments to the statement of claim include a new para. 9, where it is alleged that Ventures was aware that the executors and trustees of the estate had been advised by the public trustee that court approval would be required for the sale of the estate's shares of MLGL to Ventures, that this constituted a change of material fact, and that the failure by Ventures to deliver notice of this change of material fact during the extended offer period constitutes a misrepresentation within the meaning of the *Securities Act*.

4 The amendments to the statement of claim also include a new para. 14, containing a number of allegations that the defendant Steve A. Stavro ("Stavro") breached his fiduciary duties to the members of the class in a number of respects. The proposed new para. 14 reads as follows:

> 14. The plaintiff alleges, and the fact is, that the defendant Stavro has breached his fiduciary duties to the member of the class represented by the plaintiff in that he did:
>
> i) on or about October, 1991, while a party to an agreement with Molson entered into in September 1991, whereby Molson had the right to "put" the Shares held by it to Knob Hill Farms Limited, a corporation wholly owned by Stavro, at a price to be determined by the trading price of the Shares on the Toronto Stock Exchange, accept the positions of Chairman and Chief Executive Officer of MLGL, positions of influence and control over the value of the shares of MLGL, and remained in those positions at all material times while his duty to the shareholders of MLGL to act in their best interests conflicted with his personal interest in having the value of such shares minimized; and
>
> ii) negotiate for his personal benefit through Knob Hill Farms Limited, a "call" on the shares of MLGL held by Molson, being 19.99% of the issued and outstanding common shares of MLGL, the

effect of which was to secure for himself the exclusive power to control or proceed with the privatization of MLGL thereby suppressing any prospect for purchasers to acquire shares of MLGL with any intention to take MLGL private; and

iii) in or about October, 1991, while the holder through his wholly owned corporation, Knob Hill Farms Limited, of an option pursuant to the undated term sheet referred to in the Offering Circular, and the Right of First Refusal/Option Agreement dated March 1, 1991, also referred to in the Offering Circular, fail to withdraw from management of MLGL and did accept and continue in the positions of Chairman and Chief Executive Officer of MLGL, positions of influence and control over the value of the asset optioned to him at fair market value, and contrary to the express provisions of the term sheet and Right of First Refusal/Option Agreement which required his withdrawal from management upon the appointment of a Chief Operating Officer, which said appointment took place in July, 1991.

iv) in or about the first quarter of 1993, while in the position of Chairman and Chief Executive Officer of MLGL, fail to disclose to the shareholders of MLGL, or publicly, his intention to proceed through Knob Hill Farms Limited with the purchase of the Estate Shares under the terms of the Right of First Refusal/Option Agreement made March 1, 1991 and took various steps toward that objective.

v) while in the positions of Chairman and Chief Executive Officer of MLGL, through Knob Hill Farms Limited, negotiate and enter into the Lock-Up Agreement referred to in the Offering Circular, in the effect of which was to suppress interest from any other potential purchaser and to preclude any exposure of the shares to the open market, thereby minimizing the value of the Shares and creating a benefit for himself with a corresponding detriment to the members of the class represented by the plaintiff; and

vi) fail to ascertain the true fair market value of the common shares of MLGL by exposing such shares to the open market and encouraging competitive bids for such shares, when he knew or ought to have known that such a process was the only reliable method of determining fair market value, and that having regard to the nature of the underlying assets of MLGL, appraisal reports were not reliable in making that determination.

5 The relief sought in the statement of claim is amended to include the following clauses:

1. b) a declaration that the interest held by MLG Ventures Limited in the shares formerly owned by The Molson Companies Limited, representing a 19.99 per cent interest in Maple Leaf Gardens, Limited, is an interest held pursuant to a constructive trust for the benefit of the Estate of Harold E. Ballard;

> c) an Order that the Common Shares of Maple Leaf Gardens, Limited tendered by the members of the class represented by the Plaintiff to the Offer to Purchase made by the defendant, MLG Ventures Limited, as hereinafter set out, be included in any subsequent sale of shares held by MLG Ventures Limited, either through that defendant or through the Estate of Harold Edwin Ballard;
>
> d) damages as may be determined against Steve A. Stavro for breach of his fiduciary duty as a Director of Maple Leaf Gardens, Limited to the plaintiff and to the members of the class represented by the plaintiff.
>
> e) exemplary and punitive damages in the amount of $5,000,000.00;
>
> i) such further and other relief as this Honourable Court may deem just.

6 The amended statement of claim also includes a new para. 17, which provides that the plaintiff pleads and relies on certain sections of the *Securities Act* and also on Parts XIV and XV of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "O.B.C.A.").

Submissions

7 Rule 26.01 of the *Rules of Civil Procedure* provides:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

8 Counsel for the plaintiffs submits that leave ought to be granted to amend the statement of claim to include relief for breach of the common law fiduciary duty owed by Stavro to the minority shareholders in a situation where a director of a company is purchasing directly, or indirectly, shares of the company from other major shareholders and from minority shareholders. They submit that the specific breaches of fiduciary duty are set out in the new para. 14 of the statement of claim, that the breaches of fiduciary duty were continuing breaches up to and following the date of the offer, and that the measure of damages as a result of the breaches of fiduciary duty can be determined by the court based upon the greater of the price ultimately obtained for the shares if the existing transaction as between Ventures and the estate of Harold E. Ballard is set aside and the market price of the shares, as determined by the court with reference to the provisions of the *Securities Act*, immediately after the general disclosure of the material fact or material change, less in either case the offering price of $34 per share multiplied by the number of shares held by members of the class. They further submit that the conduct of Stavro constitutes a prima facie case to claim punitive damages.

9 With respect to the relief sought by way of declaration that the interest held by Ventures in the MLGL shares formerly owned by The Molson Companies Limited ("Molson") is held pursuant to a constructive trust for the benefit of the estate, counsel for the plaintiffs submit that the court has inherent jurisdiction to make a finding or issue a declaration that a constructive trust exists even though all the parties to such trust are not before the court. With respect to the relief sought by way of an order that the shares of MLGL tendered by members of the class be included in any subsequent sale of shares held by Ventures, either directly or through the estate, counsel for the plaintiffs submit that the court has inherent jurisdiction to order disgorgement of property acquired by a party through a breach of fiduciary duty. They further submit that the proposed amendments to the statement of claim seek relief that is not available through the provisions of the *Securities Act* and submit that s. 131(11) of the *Securities Act* provides that the right of action for rescission or damages conferred by the *Securities Act* is in addition to and without derogation from any other right which the minority shareholders may have at law.

10 Counsel for the defendants submit that the amendments sought, other than the new para. 9, fundamentally change the nature of the action which is already certified and the court ought either to allow the amendments and decertify the action as a class action or not allow the amendments. It is their submission that it is not "just" to certify a class proceeding and then allow amendments to the statement of claim which fundamentally change the nature of that proceeding to one that is entirely different from the action certified. They further submit that the amendments are not based on any new information which came to the attention of the plaintiffs subsequent to the certification date and that the amendments now sought and the additional relief now claimed should have been included in the statement of claim submitted to the court at the time of the certification order. They note that the action as originally framed was based on alleged breaches by the defendants of ss. 131 and 134 of the *Securities Act* and that, particularly with respect to liability for misrepresentations in an offering circular, the *Securities Act* provides in s. 131(1) that every security holder shall be deemed to have relied on the misrepresentation and, accordingly, a class proceeding is particularly appropriate for an action based on such misrepresentations.

11 With respect to the alleged breaches of fiduciary duty, it is the position of counsel for the defendants that the proposed new para. 14 of the amended statement of claim does not set out a tenable cause of action and that, accordingly, the amendment ought not to be permitted. They submit that the paragraph alleges that Stavro breached unspecified fiduciary duties to the members of the class by entering into agreements that entitled him to acquire additional shares in

MLGL, that such conduct is not contrary to the *Securities Act*, was fully disclosed and is not actionable. In any event, they submit that directors and officers do not owe a fiduciary duty to individual groups of shareholders but to the corporation, and that Stavro's fiduciary duty was owed to MLGL. In addition, it is their position that to allow the amendments would result in the class no longer being identifiable. The class, as certified, was all former shareholders of MLGL, who tendered their shares pursuant to the offer. If the amendments are permitted, there will be a number of issues raised as to who was a shareholder of MLGL at various points in time, what knowledge or information each had respecting the activities of Stavro which are alleged to be breaches of fiduciary duty, whether Stavro owed a fiduciary duty to such shareholder, and what damages, if any, flowed from the breach of that fiduciary duty. With respect to the relief sought by way of a declaration that Ventures's interest in shares formerly owned by Molson is held pursuant to a constructive trust for the benefit of the estate, it is their position that the court does not have jurisdiction to make a declaration imposing a constructive trust in favour of a party not before the court. Regarding the order sought that the plaintiffs' shares be included in any subsequent sale of shares by Ventures, either directly or through the estate, they submit that the court has no jurisdiction to make an order affecting the estate, which is not a party before the court, and that, as there is no tenable cause of action for breach of fiduciary duty established, there is no basis for a disgorgement order. With respect to the claim for punitive damages, it is the position of counsel for the defendants that there are no facts set out in the amended statement of claim which would justify the awarding of punitive damages.

Issues

12 The issues that arise on the motion for leave to amend the statement of claim appear to me to be as follows:

1. whether the proposed amendments disclose a tenable cause of action and whether leave should be granted;

2. whether the proposed amendments fundamentally change the nature of the action and, accordingly, whether leave should be granted in view of the fact that the action has already been certified as a class proceeding, or, in the alternative, whether leave should be granted and the action decertified;

3. whether the statement of claim, if the amendments are allowed, would contain allegations of fact justifying a claim for punitive damages.

13 I am satisfied that the proposed new para. 9 simply contains a further allegation of misrepresentation in the offering circular and, accordingly, does not fundamentally change the nature of the action, and as I have already concluded in my earlier order that the original statement of claim discloses a tenable cause of action, I will allow the amendment to the statement of claim to include the new para. 9.

14 The issues regarding whether the proposed amendments disclose a tenable cause of action and whether they ought to be permitted in view of the fact that the action has already been certified as a class proceeding appear to me to break down into three subissues:

> (a) whether the allegations of breach of fiduciary duty disclose a tenable cause of action and fundamentally change the nature of the action;
>
> (b) whether the relief sought by way of a declaration that a constructive trust exists with respect to the MLGL shares formerly owned by Molson is within the jurisdiction of the court and, accordingly, whether there exists the tenable cause of action in seeking such relief;
>
> (c) whether the relief sought by way of an order that the shares of MLGL tendered by members of the class be included in any subsequent sale of shares by Ventures or through the estate.

15 With respect to the proposed amendments to the statement of claim alleging breaches of fiduciary duty on the part of Stavro, I accept the submission of counsel for the plaintiff that there may well be situations where, in the context of a particular transaction, a particular director may owe a fiduciary duty to a group of shareholders. In *Tongue v. Vencap Equities Alberta Ltd.* (1994), 14 B.L.R. (2d) 50 (Alta. Q.B.), the court, in referring to fiduciary duties arising when directors purchase shares from shareholders, stated as follows, at pp. 87-88:

> In *Dusik v. Newton* (1985), 62 B.C.L.R. 1 (C.A.), at p. 23 the Court stated:
>
> "Counsel for Newton says that the general rule is that laid down in *Percival v. Wright*, that a director does not owe a fiduciary duty to minority shareholders and only three exceptions have emerged. They are where a director acts as an agent of a minority shareholder; where a director buys shares from a minority shareholder; and where a director has been dishonest with or has misled a minority shareholder. In our view the law is no longer that restrictive."
>
> While "the law is no longer that restrictive", it is clear that where a director buys shares from a minority shareholder a fiduciary duty arises.

> Therefore, as the first group, the director-shareholders, purchased shares from the Plaintiffs it is my opinion that they each owed the Plaintiffs a fiduciary duty to disclose to them the fact of Arthur Andersen's interest and the price per share it was willing to pay. They breached this duty causing the Plaintiffs damage when they sold their shares at a price far below their value.

16 The duty recognized by the courts in these cases appears, however, to be a duty of disclosure and there is no allegation in the proposed amendments of non-disclosure by Stavro other than an allegation that in the first quarter of 1993, Stavro failed to disclose his intention to proceed with the purchase of the estate shares. I accept the submission of counsel for the defendants that such disclosure was made by Stavro at the appropriate time in accordance with the provisions of the *Securities Act* and certainly was made in the offering circular.

17 On a motion to amend pleadings, the court is not to consider the factual and evidentiary merits of the proposed new claim (see *Seaway Trust Co. v. Markle* (1988), 25 C.P.C. (2d) 64 (Ont. Master)), and in order to refuse leave to amend the pleading, it seems to me that the court must conclude, on the face of the pleading itself, that it does not disclose a tenable cause of action. In *Keneber Inc. v. Midland (Town)* (1994), 16 O.R. (3d) 753 (Gen. Div.), Howden J. stated, at pp. 758-759, as follows:

> It appears to me that as rule 26.01 is a rule regarding pleading, it is referring to amendments which meet the normal rules governing pleadings in rules 25.06 and 25.07. In addition, such an amendment should not be allowed, where to do so would merely result in another proceeding to strike it as frivolous, vexatious or an abuse of the court process (rule 25.11) or as disclosing no reasonable cause of action or defence (rule 21.11). In other words, amendments, like any other pleading, are subject to the normal rules as to form, relevance and basis in law. Therefore it is not only proper but in the interests of sound judicial process that leave to amend under rule 26.01 not be granted unless the amendment sought is tenable in law. If the unsuccessful party is not satisfied, the reasons are available and the order is subject to the usual right=ts [sic] of appeal. This in no way means any lengthy inquiry into ultimate chances of success or testimonial credibility, and thus there is no undermining of the simplifying purpose of rule 26.01.
>
> I conclude that I should consider in contemplating leave under rule 26.01 whether the amendment sought discloses a reasonable defence in law.

18 Counsel for the defendants have alleged that the allegations of breach of fiduciary duty on the part of Stavro contained in the proposed new para. 14 of the statement of claim disclose no tenable cause of action on the basis that no conflict of interest exists simply

because a director buys shares or has the right to buy shares of a corporation so long as this information is disclosed, that the purchases by Stavro did not give Stavro the "exclusive right to control or proceed with privatization of MLGL," that the plaintiffs have no cause of action based on the breach of an agreement between Stavro and Molson, that disclosure of the intent to purchase the estate shares was made in a timely fashion in accordance with the *Securities Act*, that negotiations with Molson and the estate and the agreements entered into were fully disclosed in the offering circular, and that, if the directors of MLGL did not properly evaluate the Stavro offer, that does not constitute a breach of fiduciary duty on the part of Stavro. A determination of these questions would, in my view, require consideration of factual evidence and submissions as to applicable law and that this is not the job of the court when considering a motion for leave to amend pleadings. I accordingly must conclude that the proposed amendments to the statement of claim relating to alleged breaches of fiduciary duty by Stavro, on their face, disclose a tenable cause of action and therefore ought to be permitted.

19 I am not satisfied that allowing such amendments would effect a change in the composition of the class so that it is unidentifiable. It appears to me that, if the plaintiffs are successful in establishing a breach of fiduciary duty based on the allegations contained in the statement of claim, such breaches continued through the offering period and would be applicable to all members of the class who tendered their shares pursuant to the offer, and any distinctions among members of the class as to particular knowledge could be dealt with by the filing of affidavits as already provided for.

20 The other main ground on which counsel for the defendants resisted the proposed amendments contained in the new para. 14 of the statement of claim was that the original action as certified was framed as an action for damages arising out of alleged breaches by the defendants of ss. 131 and 134 of the *Securities Act* as a result of alleged misrepresentations in the offering circular and that the proposed amendments fundamentally change the nature of such action. I concluded that the statement of claim submitted to the court at that time disclosed a cause of action, that there was an identifiable class of persons who were deemed to have relied on the alleged misrepresentations, that the statement of claim raised issues common to all persons who tendered their shares pursuant to the offering circular, that the class action was the preferable procedure for the resolution of the issues raised in the statement of claim, and that Maxwell would be an appropriate representative plaintiff for all members of the class. In my view, to permit the amendments sought in the proposed new para. 14 would fundamentally change the nature of the action and would require reconsideration of all the matters considered on the first

application. I think it not appropriate to have an action certified as a class proceeding and then, by motion to amend the statement of claim, reconstitute the action by adding serious new allegations which fundamentally change the nature of the action to one quite different from the action originally certified. I am accordingly not prepared to grant leave to permit the amendments contained in the proposed new para. 14 of the statement of claim, not because such amendments fail to set out a tenable cause of action or result in the class being unidentifiable, but because such amendments, in my view, fundamentally change the nature of the action originally certified and would require reconsideration by the court of all the issues examined on the original application to certify the action. It occurs to me that, if the members of the class have a valid action based upon the allegations in the proposed new para. 14, such action should be separately constituted and might proceed as an oppression action under O.B.C.A.

21 With respect to the relief sought by way of a declaration that the interest held by Ventures in shares formerly owned by Molson is held pursuant to a constructive trust for the benefit of the estate, I have difficulty concluding that the court has jurisdiction to make such a declaration when the beneficiary of such trust will not be before the court and its position as to the existence of any such trust not known to the court. I also have some difficulty with the status of the plaintiffs to seek a remedy by way of declaration that an interest in property held by the defendant Ventures is held pursuant to a constructive trust for the benefit of a third party. Accordingly, I am not prepared to allow the amendment seeking the declaration that the interest of Ventures in MLGL shares formerly owned by Molson is held pursuant to a constructive trust for the benefit of the estate. With respect to the relief sought by way of an order that the shares of MLGL tendered by members of the class be included in any subsequent sale of shares by Ventures directly or through the estate, it seems to me that such an order could only be justified on the basis of a disgorgement order as a result of a finding by the court that there has been a breach of fiduciary duty by the defendants. As I am not prepared to allow the amendments dealing with the breach of fiduciary duty, the amendment seeking relief by way of the order sought will also not be allowed.

22 It was acknowledged by counsel for the plaintiffs that the claim for exemplary or punitive damages related only to the breaches of fiduciary duty and, accordingly, the amendment sought to claim such damages will not be allowed.

23 I am not certain as to the purpose of the reference to Parts XIV and XV in the proposed new para. 17 of the statement of claim. These parts deal with fundamental changes and compulsory acquisitions.

24 I am accordingly prepared to grant leave to amend the statement of claim only to include the proposed new para. 9, which alleges a further misrepresentation within the meaning of the *Securities Act*, the proposed new para. 17 insofar as it refers to the *Securities Act*, and the proposed new clause (i) to para. 1 seeking "such further and other relief as this Honourable Court may deem just."

25 Counsel are invited to speak to me or write to me regarding the costs of this motion.

Order accordingly.

Indexed as:

Endean v. Canadian Red Cross Society

Between

Anita Endean, as representative plaintiff, plaintiff, and
The Canadian Red Cross Society, Her Majesty the Queen in right of the province of British Columbia, and the Attorney General of Canada, defendants, and
Prince George Regional Hospital, Dr. William Galliford, Dr. Robert Hart Dykes, Dr. Peter Houghton, Dr. John Doe, Her Majesty the Queen in right of Canada, and Her Majesty the Queen in right of the Province of British Columbia, third parties

[1998] B.C.J. No. 1542
Vancouver Registry No. C965349

British Columbia Supreme Court
Vancouver, British Columbia
K. Smith J.

Heard: June 19, 1998.
Judgment: filed June 24, 1998.
(6 pp.)

Practice — Persons who can sue and be sued — Individuals and corporations, status or standing — Class actions, members of class.

Application by the plaintiff Endean as representative plaintiff in a class action against the Canadian Red Cross Society, the province of British Columbia and the Attorney-General of Canada, for leave to amend the statement of claim and for an order amending certification of the class action. The requested amendments would, first of all, delete a claim in respect of which certification had been quashed by the Court of Appeal and second, extend the relevant time period by moving the commencement date back from August 1, 1986 to January 1, 1986. Third, Endean sought to add to the class proceeding claims by personal representatives and dependents of persons who died as a result of being infected with hepatitis C by transfusion during the material time, and claims by persons who were infected by a partner or parent who was infected by transfusion during the material time. Endean admitted that the purpose of the amendments was to facilitate settlement negotiations between representatives of all persons infected with hepatitis C by blood transfusion in Canada, the federal government, and the provincial governments. If no settlement was achieved and the action proceeded, Endean's intention was to revisit the amendments and have them varied or withdrawn.

¶ 2 Leave to make the first proposed amendment is granted.

¶ 3 The Crowns federal and provincial consent to the second and third proposed amendments but the Red Cross opposes them. Counsel for the Red Cross contended that the plaintiff is actually trying to have a settlement class certified and that the application is premature as no settlement is yet agreed upon. Further, he submitted that the amendments may not be granted unless the conditions set out in s. 4 of the Act are met, and that the plaintiff has not offered any evidence in that regard.

¶ 4 Counsel for the plaintiff advised that the purpose of the proposed amendments is to facilitate current settlement negotiations between representatives of all persons infected with hepatitis C by blood transfusion in Canada, the federal government, and the provincial governments. The idea is to harmonize this action and similar class actions in Quebec and Ontario so that a national settlement, if one should be reached, may be more easily implemented. To that end, the parties have also entered into an agreement that this action will not be advanced so long as the negotiations are ongoing.

¶ 5 However, counsel for the plaintiff and for the two levels of government candidly advised that, if no settlement is achieved and if this action must proceed, they will wish to revisit these amendments and have them varied or even withdrawn. Thus, the amendments, if granted, are not to govern this action.

¶ 6 Rule 24(1) of the Rules of Court, so far as it is relevant for present purposes, states:

> (1) A party may amend an originating process or pleading issued or filed by the party at any time with leave of the court . . . .

The general principle upon which leave will be granted is accurately stated in The Conduct of Civil Litigation in British Columbia, Fraser and Horn, (Butterworths: 1978), Vol. 2, p. 1481, as follows:

> Order 28, Rule 1, MR 305 of the Supreme Court Rules, 1961, authorized the court to allow amendment of pleadings "as may be necessary for the purpose of determining the real questions in controversy between the parties." Although this expression was not carried forward into the present Rules of Court, it is beyond question that it is the principle on which the court will still act....

¶ 7 Here, the purpose of the proposed amendments is not to enable the determination of the real questions in controversy. Rather, the purpose is a collateral one, and the amendments may well be abandoned if and when it becomes necessary to determine the real issues. Accordingly, this is not a situation where the court should exercise its discretion to permit these amendments.

¶ 8 Moreover, and more significantly, I agree with counsel for the Red Cross that the proposed amendments, if granted, would amount to the certification of new causes of action and to the expansion of the certified class of plaintiffs. Such accretions must pass scrutiny under s. 4

of the Act before they may be certified for class-proceeding status and, as the plaintiff has not led any evidence in that regard nor made any attempt to satisfy s. 4, the application must be dismissed on that ground as well.

¶ 9 During submissions, counsel for the plaintiff sought assistance from s. 12 of the Act, which says:

> 12. The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination....

However, that section contemplates only the management of proceedings certified on the basis of the cause or causes of action pled in the underlying action. It does not permit the certification of new causes of action or the creation of a new or expanded class of plaintiffs under the guise of amendment of the pleadings.

¶ 10 Accordingly, leave to make the second and third proposed amendments is refused.

K. SMITH J.

QL Update: 980630
cp/d/kjm/DRS

Scenario 3	MINUS			LOSS
	Scenario 4	$1,306,044.70	$1,140,754.30	$165,290.40
	Scenario 5	$1,306,044.70	$1,070,135.60	$235,909.10
	Scenario 6	$1,306,044.70	$978,251.73	$327,792.97

TABLE 5
CONTINGENCIES

Scenario 1	MINUS			LOSS
	Scenario 4	$1,531,426.20	$1,021,067.40	$510,358.80
	Scenario 5	$1,531,426.20	$956,772.75	$574,653.45
	Scenario 6	$1,531,426.20	$876,332.06	$655,094.14
Scenario 2	MINUS			LOSS
	Scenario 4	$1,373,879.90	$1,021,067.40	$352,812.50
	Scenario 5	$1,373,879.90	$956,772.75	$417,107.15
	Scenario 6	$1,373,879.90	$876,332.06	$497,547.84
Scenario 3	MINUS			LOSS
	Scenario 4	$1,179,273.30	$1,021,067.40	$158,205.90
	Scenario 5	$1,179,273.30	$956,772.75	$222,500.55
	Scenario 6	$1,179,273.30	$876,332.06	$302,941.24

TABLE 6

	Scenario 1	MINUS ACTUAL	LOSS
1990	$55,900.73	$17,743.49	$38,157.24
1991	$75,739.63	31,942.12	$42,797.51
1992	$35,129.42	$15,047.47	$20,081.95
		TOTAL	$101,036.70
	Scenario 2	MINUS ACTUAL	LOSS
1990	$51,152.02	$17,743.49	$33,408.53
1991	$67,720.72	$31,942.12	$35,778.60
1992	$31,520.15	$15,047.47	$16,472.68
		TOTAL	$85,659.81
	Scenario 3	MINUS ACTUAL	LOSS
1990	$44,771.06	$17,743.49	$27,027.57
1991	$58,517.50	$31,942.12	$26,575.38
1992	$27,061.85	$15,047.47	$12,014.38
		TOTAL	$65,617.33

Comité d'Environnement de la Baie Inc. v. Société d'Électrolyse et de Chimie Alcan Ltée

Court File No. 200-09-000666-914 (150-06-000002-865)

Quebec Court of Appeal Tourigny, Brossard JJ.A., Chevalier J. (ad hoc)
March 16, 1992.

Civil procedure — Class actions — Quebec law — Principal questions required to be defined by judge on motion for authorization of class action —

Claim for damages for loss caused by manner of handling, storing or shipping certain products — Plaintiff adding motion for injunction to correct condition of defendant's premises — Also claiming exemplary damages — Not accessory claims — Not within defined questions — Charter of Human Rights and Freedoms, R.S.Q., c. C-12 — Civil Code of Lower Canada, arts. 1053, 496 — Code of Civil Procedure, R.S.Q., c. C-25, art. 1005.

Damages — Exemplary damages — Quebec law — Exemplary damages not part of Quebec law until Charter of Human Rights and Freedoms and other statutes providing for them — Not accessory remedy to damage claim in approved class action — Charter of Human Rights and Freedoms, R.S.Q., c. C-12 — Civil Code of Lower Canada, arts. 1053, 406 — Code of Civil Procedure, R.S.Q., c. C-25, art. 1005.

The plaintiff has been authorized by the Court of Appeal to bring a class action against the defendant and the matter had been referred to the Superior Court to determine the questions to be dealt with as required by art. 1005 of the *Code of Civil Procedure*, R.S.Q., c. C-25. The judge hearing the matter stated the following questions: (1) Is the respondent (defendant) liable under arts. 1053 or 406 of the *Civil Code of Lower Canada* for members of the group involved in handling, shipping or storage of aggregate in [certain storage facilities]? (2) Which application applies to the members' action? (3) Does the theory of acceptance of risks apply to the members' action? (4) What categories of damages may be sought in such a claim? Under the heading "related conclusions sought" the judge asserted that a conclusion that the group was seeking damages in a class action with the amount ordered would be appropriate, or if an amount could not be determined, an order that each member be awarded individual damages.

Thereafter the plaintiff served a statement of claim containing 53 paragraphs, one of which claimed exemplary damages of $10 million "for intentional infringement of the right to peaceful enjoyment of their property" contrary to the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, or infringement of their inalienable personal rights under the Charter. Another claimed a declaration that the defendant had no right to allow pollutants to escape to neighbouring land and an order that this state of affairs be corrected. The defendant moved to have these claims struck out as not being authorized by the court's order. This motion was dismissed. The defendant appealed.

Held, the appeal should be allowed and the paragraphs and conclusions raised by them should be struck out. The declaration sought amounted to an injunction. A motion for an injunction is, if not entirely incompatible with, at least profoundly distinct from, an action for damages. It could not be included in the statement of claim without further formality. While an order for an injunction as a remedy may not be incompatible with an order for damages, the defendant should have had the opportunity to contest the point on the motion to authorize the class action.

Exemplary damages were unknown to civil law until certain statutes, including the *Charter of Human Rights and Freedoms*, provided for them. The claim was thus a claim based on the Charter and not an accessory remedy in the authorized action.

Proulx v. Pyser, [1985] R.D.J. 47; *Procureur générale de la province de Québec v. Progress Brand Clothes Inc.*, [1979] Que. C.A. 326, **apld**

Other cases referred to

Papadatos v. Sutherland, [1987] R.J.Q. 1020

Statutes referred to

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, arts. 6, 49
Civil Code of Lower Canada, arts. 406, 1053
Code of Civil Procedure, R.S.Q., c. C-25, arts. 199, 203, 1003, 1005, 1006, 1016 [arts. 999 to 1051 enacted 1978, c. 8, s. 3]

APPEAL from an order of Laflamme J. dismissing a motion to strike out two paragraphs of a statement of claim in a class action.

Gerald R. Tremblay, Q.C., for appellant.
Jacques Larochelle, for respondent.

The judgment of the court was delivered by

TOURIGNY J. (translation):—On February 6, 1990, this court allowed an appeal by the respondent, Le Comité d'Environnement de La Baie Inc. (the Comité) and granted the authorization sought by that company to bring an action against Alcan, the appellant in the case at bar. The appellant sought and was refused leave to appeal that decision to the Supreme Court.

This court authorized the bringing of the class action and also referred the matter to the Superior Court so that that court could deal with the questions mentioned in art. 1005 of the *Code of Civil Procedure*, R.S.Q., c. C-25, and so that the Comité could proceed with the case.

Following that decision, the Associate Chief Justice of the Superior Court appointed a judge to deal with questions related to the bringing of the class action.

On December 18, 1990, the Honourable Ovide Laflamme, who had been appointed by the Associate Chief Justice, handed down a decision in which he identified the principal questions to be dealt with collectively. After considering the suggestions of the parties, he held as follows (a.m., p. 89):

> It would seem that both parties have provided an acceptable statement of the questions to be dealt with; we must ultimately choose one of them keeping in mind that the terms of the statement will not limit the remedies available to the parties;
>
> The Court would state the questions as follows:
>
> 1. Is the respondent liable under art. 1053 or 406 of the Civil Code of Lower Canada for members of the group involved in handling, shipping or storage of aggregate at the Port Alfred port facilities located at Ville La Baie?
> 2. Which application applies to the members' action?
> 3. Does the theory of acceptance of risks apply to the members' action?

4. What categories of damages might be sought in such a claim?

3 — *Related Conclusions Sought*:

That does not seem to present any difficulties; clearly the group is seeking an order for damages through a class action; it would be appropriate to draft a conclusion to this effect and for the amount ordered; if the evidence would not permit a general indemnity to be awarded to the members, it would be appropriate to order that each member should be awarded individual damages;

Following this decision, the Comité served Alcan with a statement of claim containing some 53 paragraphs. Paragraphs 51 and 53 which are the subjects of this appeal are quoted below (a.m., p. 19):

(51) The plaintiff also seeks, on behalf of the members of the group, an award of exemplary damages in the amount of TEN MILLION DOLLARS (10,000,000), for intentional infringement of the right to peaceful enjoyment of their property contrary to section 6 of the Charter of Human Rights and Freedoms, or for infringement of their inviolability and personal freedom contrary to section 1 of the same Charter.

. . . . .

(53) In addition, the plaintiff asks that this honourable Court state and declare that the defendant has no right to allow raw materials, in other words mainly green coke, calcinated coke, bauxite and alumina, to escape onto neighbouring lands and that the defendant must, within a reasonable period of time, take all steps necessary to ensure that these pollutants remain on its land;

The statement of claim concluded as follows (a.m., p. 20):

ALLOW this action;

ORDER the defendant to pay to the Clerk of the Court the sum of TWENTY-ONE MILLION DOLLARS ($21,000,000) with interest at the legal rate and the additional indemnity provided for in article 1056 b) or 1065.1 of the Civil Code from the time of service of the motion to authorize the bringing of the class action plus costs;

ORDER that this amount be paid individually to the members in accordance with the provisions of articles 1037 et seq. of the Code of Civil Procedure, or, if the evidence permits, make immediate provision for the said amount to be distributed among the members;

OR, IN THE ALTERNATIVE, IF THE EVIDENCE IS NOT SUFFICIENT TO ESTABLISH THE TOTAL AMOUNT OF THE MEMBERS' CLAIMS ACCURATELY:

ORDER that the members may present individual claims in accordance with the provisions of sections 1037 et seq. of the Code of Civil Procedure;

ORDER immediately, if possible, the heads of damages under which a claim can be made and establish a scale of claims for such damages in cases where it is possible to do so;

STATE AND DECLARE that the defendant has no right to allow its pollutants, mainly green coke, calcinated coke, bauxite and alumina, to escape onto

neighbouring lands and especially onto land belonging to members of the group;

ORDER the defendant to correct this state of affairs as soon as possible and prevent its neighbours from being polluted by dust from green coke, calcinated coke, bauxite and alumina;

ALL WITH COSTS AGAINST THE DEFENDANT.

Following receipt of this document, Alcan served the Comité with a motion to strike out allegations in which it basically alleged that paras. 51 and 53 quoted above were not included in the questions authorized in the decision of December 18, 1990, and that, therefore, they should be omitted on the grounds that they constitute an illegal amendment of the class action as authorized. The Comité contested the motion and Judge Laflamme, in a decision handed down on September 18, 1991, dismissed the motion.

On appeal to this court, Alcan raised the same questions as those argued before Judge Laflamme. It criticized the Comité for introducing, in its statement of claim, elements which are completely different from those authorized by the court. It claims that the Comité transformed the initial proceedings from an action for damages based on arts. 1053 and 406 of the *Civil Code of Lower Canada* to a proceeding based in part on the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, in particular, s. 6, and to an action for a declaratory judgment and an injunction.

According to Alcan, as the exceptional legislation which makes provision for class action specifies that the action must be authorized, the principal questions, as defined, cannot be amended without going back to square one of the process authorizing the class action. Alcan disputes the Comité's claim that that is not true and that it could simply have proceeded by way of amendment.

Judge Laflamme disposed of the arguments of the parties as follows (a.m. Appendix, p. 10):

The defendant argues that this action is both distinct and unauthorized;

If it were distinct, there is no doubt that it would not have been authorized because it would have been added after authorization by the court;

But this is basically a case involving one action; the addition of exemplary damages does not have the effect of amending the nature of the indemnity; moreover the only effect of the amendments is to add to conclusions sought arising from the same facts; the questions in dispute do not vary;

Conclusions can be amended in an action to make them coincide with proven facts;

Since the Court has held that the claim in the statement, para. 51 and para. 53 quoted above, does not create an action distinct from what was authorized, it is not appropriate to elaborate on the other aspects of arguments put forth by counsel for the defendant;

Authorities cited in support of the motion support the notion of a "distinct" action;

Even in the Court of Appeal decision in *Papadatos v. Sutherland* (1987) R.J.Q. pg. 1020, which was cited by the defendant and which dealt with an action for damages to which a head of claim for exemplary damages was added, Mr. Justice Kaufman wrote:

> "Therefore, as a matter of law, the trial judge was entitled to consider the Respondent's claim for exemplary damages."

Thus, it is clear that the rationale for Judge Laflamme's decision is that it is basically the same action. He even specifies that there is no doubt that if it were a distinct claim, it would not have been authorized because it would have been an addition to what the court had initially authorized.

With respect for the trial judge, he does not explicitly dispose of the arguments regarding para. 53, in other words, Alcan's claims regarding the declaratory aspect and the order for an injunction.

Before analyzing the additions to the action and their scope, it should be mentioned that counsel for the Comité, in argument before this court, dealt with the appeal as if it were, for all practical purposes, a motion which he himself had brought to amend the motion for authorization. He claims that the class action complies with the usual amending procedure (art. 199 *et seq. C.C.P.*). He argues that, either the "new" questions raised in the statement of claim are accessory to the principal questions already authorized and, therefore, do not require amendment because all that needs to be dealt with by the order are *principal* questions or, in the alternative, in the case of principal questions, he has the right to amend his action in the circumstances provided for in art. 203 of the *Code of Civil Procedure*. Such a request was presented before this court but there is nothing to indicate that it was presented before the trial judge.

Although this line of reasoning may be clever, I do not agree with it. What we have to deal with, and we must not lose sight of this, is a motion to strike out certain paragraphs; the Comité's motion was not a motion to amend.

I do not believe that we have to give in to the temptation to regard the decision handed down as a decision which would have allowed an amendment. That is not the meaning of the decision and Judge Laflamme leaves at least some room for thinking that he might not have come to the same decision if that had been the nature of the motion. The Comité did not ask the court for authorization to amend the initial authorization. It asked the court to add to its statement of claim, without any request for amendment of any kind, the allegations and conclusions mentioned above.

In these circumstances, I see no need for further discussion about the possibility of submitting the class action to the usual amendment rules. That is not the question before us and, in the case at bar, is only theoretical.

Although the motion is described as a motion to strike out certain paragraphs, it affects both the allegations and conclusions and it must be considered in the specific and exceptional context of a statement of claim to be used as the basis for a class action previously authorized by a judicial decision as required by law.

The intention of the legislature was that a class action should obey certain very specific rules (art. 1003). Usually it is the decision allowing the motion which should identify the principal questions in dispute and the conclusions sought.

Once this procedure has been completed, a notice is given to the members indicating, *inter alia*, the questions in dispute and the conclusion sought (art. 1006 *C.C.P.*).

This court regards the conditions imposed by the legislature in art. 1003 *C.C.P.* as restrictive: see *Proulx v. Pyser*, [1985] R.D.J. 47.

A court seized with an application for authorization must decide as a prior condition that "the alleged facts appear to justify the conclusions sought" on the basis, *inter alia*, of the affidavits submitted in support of the application.

In the case at bar, the application for authorization identified the principal questions in dispute and the conclusions sought as follows (a.m., pp. 35-6):

> IDENTIFY the principal questions of fact and law which will be dealt with collectively as follows:
>
> > The responsibility of the respondent for damage which it caused and is still causing to the members by its fault, negligence and carelessness.
>
> IDENTIFY the related conclusions sought as follows:
>
> > Order for damages in the amount of twenty-one million dollars ($21,000,000.00).

These elements should, in my opinion, be taken into account in analyzing the questions in dispute.

Therefore, I would, first of all, deal with para. 53 before analyzing the parties' claims with respect to para. 51.

(1) *Paragraph 53 of the statement of claim*

It seems clear to me that para. 53 adds to the existing action conclusions which are not only declaratory in nature since they ask the court "to state and declare" but which are also in the nature of an injunction and which, although they take the form of a request to state and declare, specify that the court should state and declare

that the defendant, Alcan, should take all *necessary* measures to keep the polluting material on its land and this must be done within a reasonable amount of time.

The conclusion related to the last part of para. 53 demands nothing less than an order to correct the pollution "as soon as possible".

Without deciding whether or not these measures are enforceable, since that is not the purpose of the appeal before us, I can only regard that part of the statement of claim at issue here as being equivalent to a claim for an injunction.

In my view, it is also clear that the first part of para. 53, and the penultimate finding of the action, would lead the court to state and to declare that Alcan has no right to pollute.

With respect for the contrary opinion, it is my view that these findings are equivalent to an injunction and if Alcan failed to respect the injunction, it would be guilty of contempt of court. The motion for an injunction and the action for damages are, in my view, two actions which, if not entirely incompatible, are at least profoundly distinct. A fairly recent and consistent body of case law has held that an essential condition for obtaining an injunction is that the situation cannot be remedied by awarding damages. Although all orders issued by the court are properly considered as injunctions, nevertheless, if such orders are not obeyed, then specific penalties ensue which have absolutely nothing to do with the payment of damages. Such orders can be enforced by contempt of court, even when they do not involve an injunction as such: *Procureur général de la province de Québec v. Progress Brand Clothes Inc.*, [1979] Que. C.A. 326. We must remember that the penalty for contempt of court can even include imprisonment.

Therefore, I would not conclude that, in the context of a class action where the principal questions must be specifically authorized and be the object of a specific publication and of specific modes of contestation, it would be possible to include a conclusion of this nature in a statement of claim, without further formality, given that the initial claim was based strictly on damages mentioned in art. 1053 of the *Civil Code*.

That does not mean that the type of order which the Comité would like to add to the judgment's conclusions is incompatible with the conclusions of an action for damages. However, the nature of the remedies, the substantial difference in the conclusions which are, on the one hand, almost penal in nature and, on the other hand, the payment of money, seem to me to militate in favour of Alcan's position. In my view, Alcan should at least have been allowed to contest, in the usual way on the motion to authorize the

class action, the admissibility, the relevance and the grounds for an order to cease and desist (to avoid calling it an injunction). It has not had that opportunity.

I would also reject the Comité's argument that the other allegations in the statement of claim lead implicitly to the same conclusions. An order permitting or forbidding certain conduct cannot be implicit in our law. The sanctions involved are, once again, too serious to permit such an approach.

Therefore, with respect, I find that despite the fact that his grounds are not explicit in the judgment, the trial judge erred in refusing Alcan's application with respect to para. 53 of the statement of claim and the related conclusions.

(2) *Paragraph 51 of the statement of claim and related conclusions*

The Comité also includes, in its statement of claim, a paragraph to the effect that Alcan violated the fundamental rights of the citizens and people involved in the class action, especially with respect to s. 6 of the Quebec *Charter of Human Rights and Freedoms*, and it claims, under this head, exemplary damages for $10 million.

In its motion, Alcan claims that this is not an accessory remedy or an additional remedy which is implicitly necessary with respect to the action already instituted and authorized. Alcan claims, in fact, that exemplary damages are not known in Quebec civil law, at least not in principle, and that it is only under s. 49 of the *Charter of Human Rights and Freedoms* that it is possible to obtain exemplary damages on certain conditions provided for explicitly in the Charter. Alcan concludes therefore that there can be no question of an authorized action because the authorized action cannot, as formulated, include exemplary damages.

The Comité argues that those are simply damages resulting from the same conduct and that they are clearly related to those already alleged. While recognizing, however, that the amount of $10 million was not included in the amount initially authorized, the Comité claims that a request for special authorization on this question is not required since it clearly involves an addition to the quantum which could be permitted by art. 406 of the *Civil Code.*

The trial judge seems to base his position on a decision of this court, *Papadatos v. Sutherland*, [1987] R.J.Q. 1020. At the end of the decision, he quotes a paragraph from the judgment of Mr. Justice Kaufman and concludes that exemplary damages can be added to damages claimed under art. 1053 *et seq.* of the *Civil Code.*

With great respect for the trial judge, I am of the opinion that he has attributed to this court's decision a meaning which I feel it does not have. The decision handed down in this case seems to me, according to the judgment rendered, to be an action brought also under s. 49 of the *Charter of Human Rights and Freedoms.* Therefore, that means that the very basis of the action as argued rests both on the Charter and on art. 1053 of the *Civil Code.* In any case, the question in dispute was whether an order for exemplary damages could be added to a sentence of imprisonment of 10 years imposed on the applicants by a criminal court.

The Honourable Mr. Justice Rothman, after pointing out that in his view the only serious ground of appeal in this case was the question of exemplary damages, said as follows (p. 1021):

> The only serious ground raised by Appellant in this appeal relates to the award of 7 000 $ as exemplary damages. Let me say at once that this issue does not appear to have been argued before the trial judge, perhaps because the claim for exemplary damages was only added to Respondent's action by amendment at trial.

In my view, that means that the question of the addition of exemplary damages was not discussed before the trial judge.

We must remember that that case involved physical aggression, torture and humiliation which Mr. Sutherland was subjected to over a period of several hours one horrible night.

Mr. Justice Rothman, in his opinion, provided an historical account of the issue of exemplary damages in Quebec law and recalled that exemplary damages were unknown before certain statutes, including the *Charter of Human Rights and Freedoms*, made specific provision for such damages. He said as follows (p. 1022):

> The concept of exemplary damages or punitive damages is an English common law concept which, historically, was unknown to the law of Quebec (*Chaput v. Romain*, [1955] S.C.R. 834) Under Quebec law, damages were awarded to the victim of an offense or a quasi-offense for the purpose of compensating him for the harm done and, in principle, no exemplary damages could be awarded. In recent years, however, several statutes providing for exemplary damages have been enacted by the Quebec Legislature, including the Quebec Charter of Rights. Professor Baudouin observes (Jean-Louis Baudoin, *La responsabilité civile délictuelle* Cowansville: Y. Blais, 1985, pp. 109-110) [translation]:
>
> > "In contrast to the civil law, the common law is familiar with the notion of using exemplary damages or punitive damages to indicate disapproval of very negligent conduct or conduct which is indicative of intent to harm or of bad faith. This concept is foreign to classic civil law where civil responsibility simply has a reparatory role and which leaves the task of punishing conduct deemed reprehensible to the criminal law. However, the Quebec legislature recently introduced exemplary damages on

> various grounds in a series of specific statutes. In certain cases, in order to protect a particular category of property (trees), in others as a means of preventing the repetition of certain acts, and, finally, in others to recognize the malicious and intentional nature of the act and, when the harm actually caused is minimal, to make it clear that money cannot buy the right to cause harm. Proposed changes to the Civil Code make provision for generalization of the rule in cases of severe or intentional negligence."
>
> The object of exemplary damages is not, of course, to compensate the victim for the harm he has suffered. That must be done by ordinary compensatory damages and, under our civil law, he is entitled to full compensation for all of his damages, physicial as well as moral. In the present case, the trial judge awarded Respondent sums totalling 11 000 $ to compensate him for these damages.
>
> Exemplary damages, on the other hand, have a different purpose. They are intended to punish the wrong-doer for his acts and to deter him, and others who might be tempted to imitate his behaviour, from repeating this kind of conduct.

Other decisions have confirmed this principle. Therefore, it would seem to me in the circumstances of this case that the action for exemplary damages is essentially based on the *Charter of Human Rights and Freedoms* since that is the only Quebec statute, other than the *Civil Code*, cited by the Comité, which would justify awarding exemplary damages.

Even if it is clear that the exemplary damages are a result of the same acts, can it be said that such damages are implicit or accessory damages? With respect, I do not think so.

I do not see how a non-existent suit can be implicit without specific reference to the Charter, since the action which was authorized and the initial motion do not mention it.

I am also not convinced that we can use the word "accessory" when we speak of an action brought under the *Quebec Charter of Human Rights and Freedoms*, a document which has often been characterized as *quasi*-constitutional and which, at least so far as some of its provisions are concerned, takes precedence over any other Quebec legislation.

Again, the paragraphs in the statement of claim are not unreconcilable; however, in my view, in light of what I have just said, they do include questions which, in the context of bringing a class action, cannot be treated as accessory to the principal questions already authorized.

Would the situation be different if Judge Laflamme had had to deal with a motion for an amendment? Although, as I have said, the question was not present as such, there is no reason why we cannot consider it.

In dealing with such a motion and considering the parties' submissions in this context, the judge could have decided whether he should or should not allow the amendment in accordance with art. 1016 *C.C.P.*, or whether he should require a certain number of formalities before reconsidering, for example, the new questions in light of the conditions set forth in art. 1003 *C.C.P.*

Therefore, for these reasons, I would allow the appeal and order that paras. 51 and 53 of the statement of claim be struck out and that the conclusions related thereto also be struck out.

Appeal allowed.

Cooper v. Miller and two other actions*

[Indexed as: Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee]

Court File Nos. V01259; CA012726; CA013123

British Columbia Court of Appeal, Southin, Proudfoot and Hinds JJ.A.
December 19, 1991.†

Damages — Personal injuries — Collateral benefits — Disability insurance benefits deductible from award if paid and funded by employer — Not deductible if premium paid to independent insurer by employee or if there is right of subrogation.

Appeals in three actions for damages for personal injuries were heard together. In each case the injured plaintiff had been prevented by the injury from working for various periods, and had received disability benefits of various sorts. In the first case, the benefits were paid by an insurer and the plaintiff contributed 30% of the cost of the premium by pay deductions. In the second case, the premium cost of a "weekly indemnity plan" was paid by the employer, but a "long-term disability plan" required employee contributions of 30% of the cost of the premiums. There was a right of subrogation in the long-term disability plan but not in the weekly indemnity plan. In the third case, the plan was funded by the employer, which had no right of subrogation.

On appeal from decisions not requiring deduction of the benefits from the plaintiffs' damages, **held**, the first plaintiff fell into the category of those who had bought insurance, and consequently no deduction should be made. In the second case, the sum received pursuant to the weekly indemnity plan, but not that received under the long-term disability plan should be deducted. In the third case, where there was no insurer in the ordinary sense of the word, the amounts received by the plaintiff should all be deducted from the damages.

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* Applications for leave to appeal to the Supreme Court of Canada granted October 1, 1992 (La Forest, Sopinka and Gonthier JJ.) (Court File Nos. 22860; 22863; 22867).

† Received October 16, 1992.

[Indexed as: **Ebco Industries Ltd. v. Eppich**]

Ebco Industries Ltd., Plaintiff and Helmut Eppich and Hugo Eppich, Defendants

British Columbia Supreme Court

Pitfield J.

Heard: June 1, 2000

Judgment: July 12, 2000

Docket: Vancouver C974439, 2000 BCSC 1075

William C. Kaplan and *Bruce C. Elwood*, for Discovery Enterprises Inc.
Henning Wiebach and *Rupert Shore*, for Ebco Industries Ltd.
H. Roderick Anderson, for Defendant, Helmut Eppich.
Craig P. Dennis, for Defendant, Hugo Eppich.

Corporations — Shareholders — Shareholders' remedies — Derivative actions — Under statute — Miscellaneous issues — Derivative action was brought with leave of court on behalf of applicant company — Company applied to strike out certain parts of statement of claim on grounds that cause of action was beyond scope of order — Application granted — Issue was whether derivative action is limited in nature and extent by terms of order authorizing its commencement — Section 201(1) of Company Act cannot be construed as authorizing action undefined in nature and extent — Statement of claim identified two causes of action, being breach of defendants' fiduciary duty to refrain from using corporate resources for personal obligations and breach of defendants' duty to avoid shareholder conflict — Proceeding must be restricted to cause of action as identified in order — All paragraphs of statement of claim dealing with breach of duty to avoid conflict struck — Company Act, R.S.B.C. 1996, c. 62, s. 201(1).

Cases considered by *Pitfield J.*:

Crown Zellerbach Canada Ltd. v. R. (1979), 13 B.C.L.R. 276, 11 C.P.C. 187, 101 D.L.R. (3d) 240 (B.C. C.A.) — considered

Letang v. Cooper (1964), [1965] 1 Q.B. 232, [1964] 2 All E.R. 929, [1964] Lloyd's Rep. 339 (Eng. C.A.) — considered

Northwest Sports Enterprises Ltd. v. Griffiths (1999), 46 C.P.C. (4th) 262 (B.C. S.C. [In Chambers]) — applied

Statutes considered:

Company Act, R.S.B.C. 1979, c. 59
s. 225(1)(a) — referred to

Company Act, R.S.B.C. 1996, c. 62
s. 201 — considered
s. 201(1) — considered
ss. 201(1)-201(3) — considered
s. 201(2) — referred to
s. 201(3) — considered

s. 201(3)(a) — considered
s. 201(3)(d) — referred to
Court Order Interest Act, R.S.B.C. 1996, c. 79
Generally — referred to

Rules considered:

Rules Of Court, 1990, B.C. Reg. 221/90
R. 1(8) "action" — considered
R. 5(1) — considered

APPLICATION to strike out parts of statement of claim in derivative action.

***Pitfield J.*:**

1 In somewhat unique circumstances, Ebco Industries Ltd. applies to strike out certain portions of the statement of claim filed on behalf of the company by Discovery Enterprises Inc. in a derivative action commenced with leave of the court granted pursuant to s. 201(3) of the *Company Act*, R.S.B.C. 1996, c. 62. The application proceeds on the basis that a cause of action, not approved by the court, is raised by the pleadings.

2 The defendants Helmut and Hugo Eppich concur in and support the application. While the Eppichs might have made the same application supported in their efforts by the company, I see no reason why the company should be precluded from making the application in its own name. The course and conduct of the action will require the company and its personnel to be involved in some manner. The scope of that involvement and its impact on the company will be affected by the nature and extent of the action.

3 Discovery wrote to Ebco as follows on August 1, 1996:

> August 1, 1996
>
> Ebco Industries Ltd.
> 7851 Alderbridge Way
> Richmond, B.C. V6X 2A4
>
> Attention: Helmut Eppich
> Chairman and Chief Executive Officer
>
> Dear Sir:
>
> Re: Ebco Aerospace Division
>
> I write pursuant to s. 225(a) of the Company Act.
>
> I ask that the directors of Ebco promptly commence and diligently prosecute an action against Hugo and Helmut Eppich on the basis described below.
>
> Hugo and Helmut Eppich were at the material times the sole directors and voting shareholders of Ebco. As such they owed duties of care and loyalty to Ebco.

> The Eppich brothers had a falling out. They agreed to resolve their dispute by arbitration. Ebco was not a party to the dispute. Nor was it a party to the agreement to arbitrate. Ebco had no interest in the subject matter of the arbitration. So the costs of the arbitration were clearly costs personal to the Eppichs.
>
> Those costs (including the fees of the arbitrator and of the consultants employed by the Eppichs and by the arbitrator) were very large — well in excess of one million dollars.
>
> Hugo and Helmut Eppich agreed among themselves — an agreement that is recorded in the submission to arbitration — to use their powers as directors and sole voting shareholders to cause Ebco to pay the costs of the arbitration.
>
> That action was a serious breach of the Eppichs' duty of loyalty. To the extent the agreement has been carried into effect, the Eppichs must repay the funds they have taken. To the extent that the agreement has not yet been carried into effect, the Eppichs must be restrained from doing so.
>
> Time is short. I ask for your immediate response confirming that:
>
> a. Ebco will not pay out any further corporate funds with respect to the costs of the arbitration, whether those costs relate to the provision of professional services during the course of the arbitration or otherwise; and
>
> b. Ebco will immediately commence a proceeding against yourself and Hugo Eppich for an accounting of funds that you have both caused Ebco to wrongfully pay on account of the costs associated with the arbitration.
>
> I ask for your reply by Tuesday, August 6, 1996 at 200 p.m., failing which proceedings will be commenced.
>
> Yours truly,
>
> DISCOVERY ENTERPRISES INC.
> Timothy J. Ryan, Chairman
> c.c. Hugo Eppich
> c.c. Clark Wilson (Attn. Mr. Rick Hamilton)

4 The directors of Ebco took no action. Discovery applied to the court by petition for leave to commence an action in Ebco's name against the defendants who were or are shareholders, officers and directors of Ebco. The petition made reference to the alleged personal nature of the arbitration and set forth the grounds on which it was claimed that capital was soon to be received by Ebco from which additional arbitration expenses might be paid.

5 The order granted on July 22, 1997 by Williams C.J.S.C. provided as follows:

> THIS COURT ORDERS that the Petitioner is hereby granted leave pursuant to section 201 of the Company Act, R.S.B.C. 1996, c. 62, to commence and prosecute an action in the name of, and on behalf of, the Respondent [Ebco],

by issuing a Writ of Summons in the form attached and marked as Schedule A.

6 The endorsement approved by the court was in the same form as set forth in the petition and provided as follows:

ENDORSEMENT

The Plaintiff's action against the Defendants and each of them is for breach of their fiduciary duties and duties of care to the Plaintiff, and for breaches of their duties pursuant to sections 142, 14 and 145 of the Company Act, R.S.B.C. 1979, c. 59, in causing the Plaintiff to pay certain costs, including, but not limited to:

A. professional fees and other costs incurred in connection with an arbitration before the Honourable Nathan Nemetz to resolve personal property disputes between the Defendants; and

B. professional fees and other costs incurred in connection with a reorganization of the Defendants' ownership of shares of the Plaintiff, its subsidiaries and affiliates, and of other assets;

and includes claims for the following relief:

1. An accounting for, and a reimbursement to the Plaintiff of, all monies paid by the Plaintiff with respect to the arbitration between the Defendants commencing on or about June 26, 1992, including but not limited to all fees for professional services provided with respect to that arbitration;

2. An order that the Defendants disgorge any benefit that they have received as a result of the breaches of duty described above;

3. Equitable compensation and damages for the breaches of duty referred to above (including equitable compensation of damages for being knowing participants in, or recipients of benefits from, those breaches of duty);

4. Equitable interest or, alternatively, interest pursuant to the Court Order Interest Act, R.S.B.C. 1979, c. 76 in all amounts payable by the Defendants to the Plaintiff;

5. Costs; and

6. Such other relief that this honourable Court may consider appropriate.

7 The derivative action was commenced by writ of summons on August 14, 1997. The endorsement was in the form specified by the order.

8 The statement of claim was filed on October 26, 1999. In addition to pleading facts and particulars in relation to the personal nature of the arbitration and the amounts paid or to be paid by Ebco in relation thereto, the statement of claim

contained the following additional pleas, the italicized portions of which Ebco applies to strike out:

> 13. Between 1990 and October 1994, the Eppich Brothers allowed the Shareholder Dispute to interfere with their duties as executives and directors of Ebco, *and with the business and operations of Ebco*. The Eppich Brothers retained lawyers and accountants to represent and assist them in dealings with each other, and charged the cost of those advisors to Ebco.
>
> 14. *The Eppich Brothers were aware throughout the Shareholder Dispute that Ebco was also struggling financially under a heavy debt load and limited cash flow, and facing a major recession in the manufacturing sector, all of which was made worse by the Shareholders Dispute.*
>
> 22. The Arbitration was complex and lengthy. The hearings were held in September and November of 1992, and in January and February of 1993. The proceedings included expert and lay witnesses and submission of counsel. The Eppich Brothers were both represented by two Counsel. The Eppich Brothers both filed expert evidence and reports. The Arbitrator was represented by counsel and assisted by an assessor. *The Eppich Brothers used Ebco management and employees to prepare and present their cases at the Arbitration.*
>
> 35. The Arbitration Expenses were paid by Ebco over a period of time, from 1991 to 1997. *Ebco was forced to sell its real estate in Burnaby, British Columbia, and Cambridge, Ontario, and its control block of shares in Epic Data International in order to pay the Arbitration Expenses.*
>
> 37. At all material times, the Eppich Brothers knew, or recklessly disregarded the facts, that:
>
> (a) the Arbitration Expenses were personal in nature and ought to have been assumed by them in their capacity as shareholders; and
>
> (b) *payment of the Arbitration Expenses would have an adverse effect on Ebco and its divisions, including, but not limited to*:
>
> (i) *compromising the operations of the company and its divisions by depriving Ebco of essential working capital*;
>
> (ii) *compromising Ebco's relationship with its creditors and making it difficult or impossible for the company to obtain a line of credit*;
>
> (iii) *compromising the company's ability to discharge its contractual obligations*;
>
> (iv) *compromising the ability of the company and its divisions to expand their capacity, compete favourably and obtain new work.*
>
> 38. The Eppich Brothers breached their duties to Ebco; in particular, the Eppich Brothers:

(a) *allowed the Shareholder Dispute to escalate to the point that they could no longer function as executives or discharge their obligations as directors*;

(b) *failed to resign from their executive positions or their positions on the Board of Directors until the Shareholder Dispute was resolved*;

(c) *failed to appoint an independent board of directors or an independent management committee to operate the Ebco Group of Companies until they could resolved the Shareholder Dispute*;

(d) *failed, from January of 1990 to November 1994, to provide leadership or direction to Ebco, or to exercise executive decision-making pursuant to their duties to the company*;

(e) *entered into an arbitration and reorganization of the Ebco Group of Companies in which they put their personal interests ahead of those of Ebco*;

(f) *failed to disclose to the company's auditors, lenders and shareholders the real cost of the Shareholder Dispute and the estimated cost of the Arbitration*;

(g) *caused the company to pay for the cost of the Shareholder Dispute, the Arbitration and the subsequent reorganization of the Ebco Group of Companies, the total costs of which included, but is not limited to, the Arbitration Expenses as defined herein*;

(h) *exposed the Company to re-assessment by Revenue Canada and additional costs, including interest and penalties; and*

(i) *caused the company to resist unreasonably an application by Discovery for leave to commence this derivative action by, among other things, attempting to withhold relevant documents, thereby exposing the company to further unreasonable and unnecessary legal expenses and court-ordered costs.*

39. The Eppich Brothers' breach of duties have caused, and continue to cause, loss and damage to Ebco, particulars of which include but are not limited to:

(a) *a loss of corporate funds*;

(b) *a loss of corporate assets*;

(c) *diversion of management and employee time*;

(d) *a loss of business opportunities.*

(e) *a loss of confidence in Ebco by its past, present and potential creditors, shareholders, suppliers and customers*;

(f) *legal fees and disbursements paid by Ebco to resist Discovery's application for leave to commence this derivative action; and*

(g) *costs awarded against Ebco in connection with the application by Discovery for leave to commence this derivative action, including the costs of appeals.*

9 The relief sought in the statement of claim, the italicized portion of which Ebco applies to strike out, was the following:

> WHEREFORE Discovery claims the following relief in the name and on behalf of Ebco:
>
> (a) an accounting for all monies paid by Ebco in respect of the dispute between Helmut and Hugo Eppich;
>
> (b) an order that the Defendants disgorge to Ebco any benefit that they have received as a result of the breaches of duty described above;
>
> (c) compensation and damages for the breaches of duty described above, including equitable compensation for being knowing participants in, or recipients of benefits from, those breaches of duty;
>
> (d) aggravated and punitive damages;
>
> (e) equitable interest or, alternatively, interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 on all amounts payable by the Defendants to Ebco;
>
> (f) costs;
>
> (g) *an order restraining Helmut Eppich from causing Ebco to return to him, directly or indirectly, any of the damages or other compensation recovered by Ebco in these proceedings, by way of declaring a dividend, or otherwise; and*
>
> (h) such other relief that this Honourable Court may consider appropriate.

10 Ebco states the basis of its application in the following terms:

> The endorsement on the writ brought by Discovery in the name and on behalf of Ebco is identical to the endorsement on the writ attached to both the petition seeking leave and the order granting leave. The statement of claim filed by Discovery in the name and on behalf of Ebco however expands greatly upon the scope of the action for which leave was obtained.
>
> The statement of claim advances claims against Helmut Eppich and Hugo Eppich for loss and damage arising out of "a loss of corporate assets," "diversion of management and employee time," "a loss of business opportunities," "a loss of confidence in Ebco by its past, present and potential creditors, shareholders, suppliers and customers," "legal fees and disbursements paid by Ebco to resist Discovery's application for leave to commence this derivative action," and "costs awarded against Ebco in connection with the application by Discovery for leave to commence this derivative action including the costs of appeals."
>
> The claim advanced by Discovery in the name and on behalf of Ebco is, given its scope, essentially brought without leave of the court. This claim, by virtue of its substantially increased scope not only exposes Ebco to increased costs but requires Ebco and its personnel to participate in a much more lengthy and complex trial than would otherwise be the case. As such, it will

necessarily divert the time and energy of management and employees from profitable pursuits.

11 Discovery states its opposition to the application as follows:

(a) In any action, the plaintiff may, in the statement of claim, alter, modify or extend the claim set out in the endorsement to the writ of summons without commencing a new action or amending the writ.

(b) In a derivative action, the party with conduct of the action may amend the claim on which leave was granted, at any time, without bringing a new application for leave, so long as the amendment does not allege a new cause of action or so fundamentally change the nature of the claim as to require reconsideration of all of the matters considered in granting leave.

(c) Pleadings which amplify or particularize Discovery's view of how the cause of action stated in the endorsed Writ of Summons in this case came about are appropriate allegations for a statement of claim, do not allege a new cause of action and do not require a new application for leave.

(d) Further:

(i) the endorsement to the Writ of Summons is broad and general and does not restrict the claim to professional fees *simpliciter*;

(ii) the impugned allegations in the Statement of Claim are particulars of the broad and general cause of action alleged in the Writ;

(iii) the impugned allegations state material facts, not new causes of action, and are all relevant and important to the claim advanced and to a successful outcome;

(iv) many of the impugned material facts came to Discovery's attention through documents produced by Ebco and admissions by Ebco's deponent during the leave proceedings;

(v) the respondents and the judge granting leave had ample notice of the full scope of the claim alleged in the Statement of Claim; and

(vi) the allegations now impugned do not so fundamentally change the claim advanced as to require reconsideration of any of the matters considered in granting leave.

12 At issue are these points. Is a derivative action limited in nature and extent by the terms of the order authorizing its commencement? If limited, does the statement of claim exceed the limits in the circumstances of this case?

13 Section 201(1) through (3) of the *Act* provide as follows:

> **Derivative action**
>
> 201 (1) A member or director of a company may, with leave of the court, bring an action in the name and on behalf of the company
>
> (a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or
>
> (b) to obtain damages for any breach of a right, duty or obligations referred to in paragraph (a),
>
> whether the right, duty or obligation arises under this Act or otherwise.
>
> (2) A member or director of a company, with leave of the court, in the name and on behalf of the company, may defend an action brought against the company.
>
> (3) A member or director, on notice to the company, may apply to the court for the leave referred to in subsection (1) or (2) and, if
>
> (a) the member or director has made reasonable efforts to cause the directors of the company to commence or diligently prosecute or defend the action,
>
> (b) the member or director is acting in good faith,
>
> (c) it is prima facie in the interests of the company that the action be brought or defended, and
>
> (d) in the case of an application by a member, the member was a member of the company at the time of the transaction or other event giving rise to the cause of action,
>
> the court may require that notice of the application be served on those persons, and may grant the leave on terms it considers appropriate.

14 The word "action" in s. 201(1) is not defined in the *Act*. Section 201(1) does not use the phrase "cause of action" but the phrase does appear in s. 201(3)(d).

15 Rule 1(8) of the Rules of Court defines an action to mean a proceeding commenced by writ of summons. The rule defines a proceeding to mean an action, suit, cause, matter, appeal or originating application.

16 In my opinion, the wording of s. 201(1) cannot be construed to authorize an action undefined in nature and extent. Rather it authorizes a proceeding in respect of a cause of action, namely a factual situation that gives rise to a claim for damages because of the breach of a right, duty or obligation owed to the company.

17 With respect to the nature of a cause of action, the Court of Appeal stated the following in *Crown Zellerbach Canada Ltd. v. R.* (1979), 13 B.C.L.R. 276 (B.C. C.A.) at 282:

> Cases dealing with the meaning of the phrase "cause of action" state that the phrase includes or comprises every fact which the plaintiff must prove, if opposed, in order to obtain a judgment.

18 In *Letang v. Cooper*, [1964] 2 All E.R. 929 (Eng. C.A.) at 934 the English Court of Appeal stated the following with respect to a cause of action:

> A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

19 For there to be a cause of action in the context of a derivative action within the meaning of s. 201 of the *Act*, there must be a duty and there must be a factual situation indicative of a breach of the duty. The absence of either part of the equation means there is no cause of action and nothing in respect of which the court may grant leave as contemplated by s. 201 of the *Act*.

20 The requirement that a cause of action must be identified is further supported by s. 201(3)(a) which requires the member or director seeking authorization to commence the derivative action to first make reasonable efforts to cause the directors of the company to commence or diligently prosecute the action. The section contemplates that the duty will be identified and the manner of breach specified in order that the directors may consider the request.

21 In this case Discovery, as the complaining shareholder, described the defendants' duty in its letter to the directors of August 1, 1996 to which I have referred. Discovery described the factual situation resulting in a breach including the approval of an agreement to pay the arbitration expenses and the actual payment of such expenses.

22 The nature of the cause of action was affirmed in the petition to the court and in the draft writ of summons for which court approval was sought. The court order authorized the commencement of the action in conformity with the writ annexed to the order.

23 Neither the letter nor the petition asserts a duty on the part of either defendant not to become engaged in a shareholder dispute which might adversely affect Ebco by diverting care and attention away from corporate matters toward personal matters to the prejudice of Ebco.

24 Had such an action been proposed, Discovery would have been obliged to ask the company itself to commence the action. That was not done. Only after such a request had been considered and rejected would the court be obliged to ensure that the complaining shareholder was acting in good faith and that the proposed action was *prima facie* in the interests of the company.

25 The statement of claim identifies two separate causes of action. The first was the breach of the defendants' fiduciary duty to refrain from using corporate re-

sources to discharge personal obligations. The substance of the second was the breach of the defendants' duty to avoid shareholder conflict which would impair their ability to provide leadership or direction to Ebco or to exercise executive decision-making pursuant to their duties to Ebco.

26 The scheme of s. 201 is to require the pursuit of every derivative cause of action to be approved by the court. Rule 5(1) of the Rules of Court which permits a party to assert distinct claims against another party in a single proceeding does not apply in the case of derivative actions unless approval for each cause of action has been obtained from the court.

27 Without further application of the kind contemplated by s. 201 of the *Act*, the proceeding which has been commenced by writ must be restricted to the cause of action as it was framed from the outset, namely the breach of the fiduciary duty owed by the defendants Helmut and Hugo Eppich to refrain from authorizing and directing payment of their allegedly personal arbitration expenses.

28 In this regard, my opinion conforms to that of Henderson J. who considered a similar problem in *Northwest Sports Enterprises Ltd. v. Griffiths* (February 9, 1999), Doc. Vancouver C966948, A943168 (B.C. S.C. [In Chambers]), as follows:

> The same finding [that a fresh application for leave under s. 201 must be made] applies to the requested amendments to the statement of claim insofar as they add new causes of action. Amendments of that sort should be the subject of a fresh application under s. 201. It may be in the interests of the company to advance one cause of action against a defendant but not another. A claim of fraud, for example, may not be in the best interests of the company as it exposes I to special costs if the allegation is unproven. That may be so even though it is in a company's interest to advance other related claims against the same defendant arising from the same transaction. In my view, each proposed cause of action against each defendant must be vetted separately by the court under s. 201 before leave is granted.

29 Those parts of the statement of claim which purport to assert a claim for damages arising other than in the context of the authorization and payment of arbitration expenses will be struck.

30 The words "and with the business and operations of Ebco" in paragraph 13 of the statement of claim will be struck. Interference with the business and operations of the company is not part of the claim with respect to the personal nature of the arbitration.

31 The words "all of which was made worse by the Shareholders Dispute" will be struck from paragraph 14 of the statement of claim. The allegation is not relevant to a claim that the arbitration expenses were personal in nature. The remainder of the paragraph alleging that the defendants were aware throughout the shareholder dispute that Ebco was struggling financially under a heavy debt load and limited cash flow and facing a major recession in the manufacturing

sector will remain. The allegation may be relevant to the question whether aggravated or punitive damages are appropriate in the circumstances.

32 The sentence "The Eppich Brothers used Ebco management and employees to prepare and present their cases at the Arbitration" will not be struck from paragraph 22 of the statement of claim. The cost to the company of those services, to the extent provided, may be a factor in the determination of damages flowing from the use or application of company resources for personal purposes.

33 No part of paragraph 35 of the statement of claim will be struck. The allegation in the paragraph may be relevant to the issue of damage to the company arising from the agreement to pay the arbitration expenses if Ebco was required to sell the real estate in question to raise funds to pay the arbitration costs.

34 Paragraphs 37(b)(I), (ii), (iii) and (iv) will not be struck. They particularize consequences alleged to flow from the payment of arbitration expenses that were personal in nature. As such, they could be relevant to the question whether aggravated or punitive damages are appropriate in the circumstances.

35 Paragraphs 38(a), (b), (c), (d), and (I) will be struck. The allegations do not relate to the question whether the arbitration expenses were personal in nature. The allegations pertain to the defendants' alleged breach of their duty to function as executives and discharge their obligations as directors. Paragraph (h) will not be struck as the assessment of interest and penalties in relation to the expenses may arguably comprise part of the cost associated with the payment of the arbitration expenses.

36 Paragraphs 39(b) and (c) will not be struck. The claims in those paragraphs may be relevant to the computation of the cost of paying the arbitration expenses.

37 Paragraphs 39(d), (e), (f) and (g) of the statement of claim will be struck. None of the claims relates to the recovery of the arbitration expenses or aggravated or punitive damages in relation thereto.

38 Paragraph (g) of the prayer for relief will be struck. The prayer is in the nature of a request for an injunction in respect of future corporate conduct, the propriety of which does not arise in the context of a claim to recover expenses alleged to have been paid for the personal benefit of the Eppich Brothers.

39 Costs of this application shall be in the cause.

Application granted.

[Indexed as: **Northwest Sports Enterprises Ltd. v. Griffiths**]

Northwest Sports Enterprises Ltd., Plaintiff and Arthur Roberts Griffiths, Orca Bay Hockey Holdings Ltd., 473996 B.C. Ltd., S.A.G. Holdings Ltd., Orca Bay Basketball Management Inc., J. Lawrence Dampier, D. Alexander Farac, Frank William Griffiths, Emily Jane Griffiths-Hamilton, Coleman Hall, Douglas Martin Holtby, Edward M. Lawson, William L. McEwen, Raymond Perrault, Peter Paul Saunders, Andres E. Saxton, Peter Wynne Webster, Sydney W. Welsh and David A. Williams, Defendants

Primex Investments Ltd., Petitioner and Northwest Sports Enterprises Ltd. and 453333 B.C. Ltd., Respondents

British Columbia Supreme Court [In Chambers]

Henderson J.

Oral reasons: February 9, 1999

Docket: Vancouver C966948, A943168

S. Schachter and *S. Levine*, for Northwest Sports.
R. Goepel, for E.J. Griffiths.
G. Macintosh, Q.C., for F.W. Griffiths.
T. Woods, for A.R. Griffiths.
L. Fong, for Orca Bay.

Corporations — Practice and procedure in actions involving corporations — Parties — Adding or substituting — P Ltd. obtained order granting leave to bring derivative action in name of and on behalf of N Ltd. — Order included term that any party was at liberty to apply for directions regarding conduct of action — P Ltd. applied pursuant to term in order and pursuant to s. 201(4) of Company Act for leave to join defendants in derivative action — When P Ltd. obtained leave to bring derivative action, it was not aware of all of necessary defendants — Information disclosed at examinations for discovery led P Ltd. to conclude that additional defendants were necessary in order to successfully obtain all relief sought — N Ltd. applied in derivative action for leave pursuant to R. 15(5)(a) of British Columbia, Rules of Court, 1990 to add defendants — Applications dismissed — Rule 15(5)(a) did not provide jurisdiction to add defendants — Fresh application should be brought under s. 201(1) of Act — Adding or deleting parties is not properly subject of application for directions under s. 201(4)(a) of Act — Fundamental elements of civil action should not be altered under guise of merely giving directions — Intention of Legislature in s. 201(1) of Act is that leave must be obtained with respect to specific named defendants — For purposes of s. 201 of Act, claim against each individual defendant is separate action and court must determine with respect to each defendant whether it is in interests of company that action be brought — Both N Ltd. and putative defendants have right to determination under s. 201 of Act with respect to each proposed defendant — Company Act, R.S.B.C. 1996, c. 62, s. 201, 201(1), 201(4), 201(4)(a) — British Columbia, Rules of Court, 1990, B.C. Reg. 221/90, R. 15(5)(a).

Corporations — Practice and procedure in actions involving corporations — Pleadings — General — P Ltd. obtained order granting leave to bring derivative action in name of and on behalf of N Ltd. — Order included term that any party was at liberty to apply for directions regarding conduct of action — N Ltd. applied in derivative action for order pursuant to R. 24(1) of British Columbia, Rules of Court, 1990 for leave to amend statement of claim — Application dismissed — Relief could not be granted under R. 24(1) — Fresh application should be brought pursuant to s. 201(1) of Company Act — Adding or deleting causes of action is not properly subject of application for directions in s. 201(4)(a) of Act — Fundamental elements of civil action should not be altered under guise of merely giving directions — Each proposed cause of action against each defendant must be scrutinized separately by court under s. 201 of Act before leave granted — Possible that it was in interests of company to advance one cause of action against one defendant but not another — Amendments not alleging new causes of action need not be subject of application under s. 201 of Act but could expeditiously be dealt with by judge hearing such application — Company Act, R.S.B.C. 1996, c. 62, s. 201, 201(1), 201(4)(a) — British Columbia, Rules of Court, 1990, B.C. Reg. 221/90, R. 24(1).

Statutes considered by Henderson J.:

Company Act, R.S.B.C. 1996, c. 62
- s. 201 — considered
- s. 201(1) — considered
- s. 201(3) — considered
- s. 201(4) — considered
- s. 201(4)(a) — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
- R. 15(5)(a) — considered
- R. 24(1) — considered

APPLICATION for leave to apply in name of, and on behalf of, plaintiff in derivative action to add defendants to derivative action; APPLICATION for leave by plaintiff in derivative action to add defendants to derivative action and to amend statement of claim.

***Henderson J.* (orally):**

1 There are two applications before me in two separate actions. The petitioner Primex investments Ltd. applies in action number A943168 for an order pursuant to the order of Mr. Justice Tysoe pronounced November 1, 1995, and also pursuant to s. 201(4) of the *Company Act*, that primex be granted leave to apply in the name and on behalf of Northwest Sports Enterprises Ltd. to join five companies as additional defendants in action number C966948. That latter action is a derivative action in the name of Northwest Sports Enterprises Ltd. and is the subject of the second motion before me.

2 In the derivative action, the plaintiff Northwest applies for an order pursuant to Rule 15(5)(a) for leave to add the five new defendants and additionally for an

order pursuant to Rule 24(1) for leave to amend the statement of claim. Some, but not all, of the proposed amendments are consequent upon adding the five new defendants.

3 As I have said, Primex sought and obtained from Mr. Justice Tysoe an order permitting it to bring this derivative action in the name of and on behalf of Northwest. At the time Mr. Justice Tysoe granted the order, he included in it a term giving any party liberty to apply for directions with respect to the conduct of the action. In any event, s. 201(4) of the *Company Act* provides that, while an action brought or defended under that section is pending, this court may give directions for the conduct of the action.

4 On an application for leave under s. 201 of the *Company Act*, the evidence placed before the court must address four considerations specified in s. 201(3). The court must consider, first, whether the applicant has made reasonable efforts to cause the directors of the company to commence or diligently prosecute or defend the action; second, whether the applicant, who will be a member or director of the company, is acting in good faith; third, whether it is *prima facie* in the interests of the company that the action be brought or defended; and fourth, if the applicant is alleged to be a member, whether the applicant was indeed a member of the company at the time of the impugned transaction.

5 At the time of the application before Mr. Justice Tysoe, it would appear that the applicant Primex was not aware of all of the necessary defendants. The relief sought is broad in scope; the allegation of fact in the statement of claim covers a lot of ground. The examinations for discovery have been conducted and almost concluded. I am told that, as a result of information obtained during those discoveries, the plaintiff now understands that five additional defendants are necessary if it is to successfully obtain all of the relief sought.

6 There is a case management order in effect, which I made by memorandum on November 26, 1998. That memorandum sets out that any application to add a party or for leave to amend a pleading is to be made by January 8, 1999. In light of what I have heard on this pair of applications, and in light of the positions taken by the parties, I will relax that case management requirement so as to permit the plaintiff to pursue the addition of these parties and the amendment to its statement of claim.

7 The first question of substance is whether I can grant at this juncture, pursuant to Rule 15(5)(a), an order adding these new defendants. I am satisfied I cannot. The intent of the legislature expressed in s. 201(1) of the *Company Act* is that leave of this court be obtained under that section with respect to specific named defendants. For the purpose of s. 201, a claim against each individual defendant is in effect a separate action. With respect to each defendant, the court must determine whether it is *prima facie* in the interests of the company that the action be brought. It may well be in the interests of Northwest, for example, to sue some of the entities involved in this narrative but not others. Both Northwest

and the putative defendants have a right to a determination under s. 201 with respect to each proposed defendant.

8 The second guestion is whether, on the material before me, I can grant leave pursuant to s. 201. Mr. schachter couches this application as an application for "directions for the conduct of the action" under s. 201(4)(a). As I have indicated, the order of Mr. Justice Tysoe also grants leave to apply for directions.

9 An application for directions is concerned with the efficient management of the trial process. A myriad of procedural matters can be addressed on such an application.

10 I am satisfied, however, that the fundamental constituents of a civil action should not: be altered under the guise of merely giving directions. Thaddition or deletion of parties and causes of action are not properly the subject of an application for directions. They are far more fundamental.

11 The third issue is whether the material already placed before Mr. Justice Tysoe, supplemented by what is now before me, is sufficient to allow me to grant leave at this time under s. 201(1). I am satisfied that to consider the application in that manner would be premature. The affidavit evidence does not address in any substantive way the requirements of s. 201(3).

12 I find that Primex must bring a fresh application for leave under s. 201(1). Counsel should attempt to set the matter down for the consideration of Mr. Justice Tysoe. If, however, he is unavailable within a reasonable period of time, any other judge of this court may hear the application. Since I am the designated trial judge, it is undesirable that the necessary affidavit material be placed before me

13 The same finding applies to the requested amendments to the statement of claim insofar as they add new causes of action. Amendments of that sort should be the subject of a fresh application under s. 201(1). It may be in the interests of the company to advance one cause of action against a defendant but not another. An claim of fraud, for example, may not be in the best interests of the company as it exposes it to special costs if the allegation is unproven. That may be so even though it is in a company's interest to advance other related claims against the same defendant arising from the same transaction. In my view, each proposed cause of action against each defendant must be vetted separately by the court under s. 201 before leave is granted.

14 Some of the amendments sought are of less consequence. They do not allege new causes of action but simply particularize existing ones. That sort of amendment does not need to be the subject of an application under s. 201. However, it would be expeditious for the judge who hears the s. 201 application to deal with those proposed amendments at the same time. That is especially so in light of my understanding that the respondents here have no substantive objection to most of the sought-after amendments that do not add new causes of action.

15 As a consequence, the two applications before me are dismissed.

Applications dismissed.

Davidson et al. v. Chapman's Limited et al., [1945] O.W.N. 309 at 310, that it is necessary to ascertain the very right and justice of the case, I think the order should be made.

But every reasonable and proper precaution must be taken to protect the plaintiff against unreasonable or unnecessary embarrassment and inconvenience. The order will therefore contain a provision that the plaintiff will have the right to have his own medical practitioner present at the examination, particularly to see that there is no greater disturbance of the plaintiff than is absolutely necessary to make the blood test. The plaintiff may also have his counsel present at the examination for the same or any other proper purpose. The convenience of the plaintiff must be met, and he will be examined at Oakville if he prefers.

Costs in the cause.

Order accordingly.

HIGH COURT OF JUSTICE.

THE MASTER. 2nd NOVEMBER 1946.

HITCHIN v. HITCHIN.

Practice—Writ for Service out of Ontario—Cause of Action Set up—Proposed Amendment Setting up New Cause of Action, Not within Rule 25.

A motion by the plaintiff for leave to amend the indorsement of the writ of summons.

The motion was heard by **The Master** (G. D. Conant, K.C.) in chambers at Toronto.

E. R. Peacock, for the plaintiff, applicant.

J. W. Blain, for the defendant, *contra*.

The Master [after stating the nature of the motion]:—By an order dated 15th June 1946 the plaintiff obtained leave to issue a writ for service out of the jurisdiction upon the defendant at Vancouver, British Columbia. The affidavit in support of the application for the order alleged the breach by the defendant of an agreement to pay the plaintiff $100 per month for the support of the plaintiff and her daughter. The order was, presumably, made under Rule 25(1)(*e*), as relating to an action in respect of a breach within Ontario of a contract. The writ issued pursuant to the order claims the amount due and which may be due until the trial of the action under the agreement.

The plaintiff now deposes that the agreement referred to in her previous affidavit and in the writ was never executed by the defendant, and that there is in fact no agreement between the parties, and asks leave to amend the indorsement in the writ to claim alimony.

If the plaintiff had applied for leave to issue a writ to claim alimony, as she now proposes, it would have been necessary for her to establish that the defendant had assets in Ontario of the value of $200 at least: Rule 25(1)(*j*). No allegation to this effect was made on the plaintiff's application for leave to issue the writ, and the plaintiff does not allege this ground to support her present application. The defendant has appeared and has thus attorned to the jurisdiction of, and is before, the Court: *Superior Copper Co. Limited v. Perry* (1918), 42 O.L.R. 45; *Bavaria v. Bavaria and Baker,* [1946] O.W.N. 262, but only in respect of the plaintiff's claim as indorsed in the writ. The plaintiff should not be allowed to do indirectly what she could not do directly, *i.e.,* proceed against the defendant without establishing that he has assets in Ontario of the value of $200 at least. If such a course were permitted, the purpose of Rule 25 regarding service out of Ontario might be largely, if not entirely, defeated. A plaintiff could make a nominal claim within the Rule, and then by amendment prosecute a substantial claim beyond and quite outside Rule 25.

An order will go dismissing the application. Costs to the defendant in the cause.

Order accordingly.

of the application. It was not considered necessary to cause the co-respondent to be served. Evidence as to the breach of the conditions on which cohabitation was resumed was given before the Court. This, in my opinion, is the proper procedure. While, of course, under Rule 801 the judge hearing the motion for judgment absolute is given the discretion to grant the order on an affidavit fully stating the facts, I should think that ordinarily he would wish to have the evidence given *viva voce* before him or, if that is not convenient, to direct an issue.

The judgment nisi pronounced on 13th November 1939 is made absolute.

Judgment accordingly.

HIGH COURT OF JUSTICE.

CONANT, SENIOR MASTER. 30TH JULY 1948.

EMPIRE-UNIVERSAL FILMS LIMITED ET AL. v. RANK ET AL.

Practice—Service of Writ of Summons—Non-resident Defendant—Service within Ontario after Leave Granted to Serve without Ontario—Effect of Entry of Order for Service Out—Amendment of Statement of Claim—Rules 25, 26, 69, 109(1), 127.

An application by the plaintiffs for leave to amend the indorsement on the writ of summons, and the statement of claim.

The application was heard by **Conant, Senior Master,** at Toronto.

J. R. Cartwright, K.C., F. W. Fisher, K.C., and P. A. H. Hess, for the plaintiffs, applicants.

D. L. McCarthy, K.C., and W. G. C. Howland, for the de-defendant Rank, *contra.*

K. G. Morden, K.C., and R. G. Phelan, for other defendants.

Conant, Senior Master [after stating the nature of the application]:—The status of the defendant Rank will be first discussed and determined.

By an order of this Court dated 12th March 1947 the plaintiffs were given leave to issue a concurrent writ for service out of the jurisdiction upon the defendants Rank and General Cinema Corporation Limited in England, and to serve notice of the said writ upon the defendants J. Arthur Rank Organization Inc., Universal Pictures Company Inc., International Pictures Corporation, United World Pictures Co. Inc.

and Eagle-Lion Films Inc. at New York, in the United States of America. Pursuant to that order a concurrent writ of summons for service out of the jurisdiction was issued, and it was served upon the defendant Rank in London, England, on 27th March 1947.

The defendants Rank, J. Arthur Rank Organization Inc., General Cinema Finance Corporation Limited and Eagle-Lion Films Inc. applied to rescind the order above mentioned, or in the alternative for leave to enter a conditional appearance, and an order of this Court was made on 23rd May 1947 ([1947] O.W.N. 725), giving each of these defendants leave to enter a conditional appearance, and dismissing the application otherwise. An appeal from this order was dismissed by Genest J.: [1947] O.W.N. at 735.

Three of the defendants, J. Arthur Rank Organization Inc., General Cinema Finance Corporation Limited and Eagle-Lion Films Inc., by leave of the Chief Justice of the High Court, appealed from the last-mentioned order of Genest J., dismissing the appeal from the order of this Court, and it was held in the Court of Appeal ([1948] O.R. 235 at 253, [1948] 3 D.L.R. 74) that "the appeal should be allowed, and in so far as the appellants are affected thereby, the order of the Master granting leave to the plaintiffs to issue a concurrent writ of summons should be set aside and the concurrent writ should be amended accordingly, and the service thereof on the appellants should also be set aside".

The defendant Rank did not join in, and was not one of the appellants on, this appeal to the Court of Appeal, and the order of this Court, and the service of the concurrent writ pursuant thereto, were set aside only "in so far as the appellants are affected thereby".

The defendant Rank was served with the writ of summons in Toronto on 20th May 1947. He has not entered an appearance to the writ of summons thus served, but entered a conditional appearance pursuant to the order of this Court of 23rd May, affirmed by Genest J. as above stated.

Mr. McCarthy has argued that the plaintiffs have elected to proceed against the defendant Rank as a defendant served out of the jurisdiction and that accordingly they should not be allowed to amend unless there has been compliance with Rules 25 and 26 with respect to the claims proposed to be added.

It is well-settled law that where an order has been made for service out of the jurisdiction leave should not be granted to amend so as to set up a new cause of action for which leave to serve out of the jurisdiction would not have been granted: *Holland et al. v. Leslie,* [1894] 2 Q.B. 450; *Hitchin v. Hitchin,*

[1946] O.W.N. 913. Whether or not this principle applies in the present case as to the defendant Rank depends upon whether he is before the Court as a defendant served out of the jurisdiction.

In *Lewis v. Wiley* (1923), 53 O.L.R. 608, the defendant was served out of the jurisdiction. He applied to set aside the service, and was allowed to enter a conditional appearance, which he did. He came within the jurisdiction and the plaintiff served him personally with the writ. The Master made an order setting aside this service, and Riddell J. held as follows:

"Of course the service on a foreigner temporarily within the jurisdiction is good unless he has been enticed within: *Watkins v. North American Land and Timber Co.* (1894), 20 Times L.R. 534; *cf. Snow v. Cole* (1877), 7 P.R. 162; and it is equally certain that an order for service out of the jurisdiction does not take away the right to serve within the jurisdiction. . . .

"The plaintiff has delivered his statement of claim, thereby acting upon the order affirming service without the jurisdiction; and it would be an abuse of the process of the Court to allow him an advantage from personal service after availing himself of the advantage given by that order.

"He must elect under which service to proceed—if he elect the personal service within the jurisdiction, he should pay all the costs of the proceedings to allow and affirm the service without the jurisdiction and of the proceedings taken on the strength of such service—these costs to be payable forthwith. He should in either case pay the costs of the motion before the Master and of this appeal in any event. Five days may be allowed to exercise his option."

Mr. McCarthy has argued that the plaintiffs have elected to proceed against the defendant Rank under the service upon him out of the jurisdiction for the reason, among others, that the plaintiffs issued and entered the order of this Court dated 12th March 1947, allowing the concurrent writ for service out of the jurisdiction to issue, on 5th June, after the defendant Rank had entered a conditional appearance on 2nd June, pursuant to the order of this Court dated 23rd May, and after the defendant Rank was served with the writ of summons in Ontario on 20th May.

Mr. Cartwright, for the plaintiffs, stated during the argument that the plaintiffs elect to proceed against the defendant Rank under the service upon him in Ontario.

Although in the present case the plaintiffs issued and entered the order allowing a concurrent writ to be issued and served out of the jurisdiction after the defendant Rank was served in Ontario and had entered a conditional appearance, and in the

present case the defendant Rank was served in Ontario on 20th May 1947 and entered a conditional appearance on 2nd June, whereas in *Lewis v. Wiley* a conditional appearance was first entered and the defendant was afterwards served in Ontario, I do not think that the plaintiffs are by such conduct or proceedings deprived of their right to elect now to proceed against the defendant Rank under the service upon him in Ontario. According to the judgment of Riddell J. in *Lewis v. Wiley,* "an order for service out of the jurisdiction does not take away the right to serve within the jurisdiction", and there is nothing in the judgment, and no authority has been cited, to suggest that the right to serve within the jurisdiction is related to or affected by the entry of a conditional appearance, or the issuing and entry of the order for service out of the jurisdiction, before or after such service within the jurisdiction. Nor has any authority been cited to support the argument that the proceedings referred to by Mr. McCarthy constitute election by the plaintiffs to proceed against the defendant Rank under the service upon him out of the jurisdiction. The plaintiffs, therefore, may now proceed against the defendant Rank under the service upon him in Ontario but on terms, discussed later, as in *Lewis v. Wiley, supra.*

Subject to the plaintiffs complying with the terms later set out, the defendant Rank is before the Court as a defendant served in Ontario and is in the same position as the other defendants appearing on this application, none of whom has entered an appearance.

None of the defendants before the Court has delivered a statement of defence and Rule 127 provides as follows: "A plaintiff may, without leave, amend his statement of claim, including a claim specially indorsed on the writ, once, either before the statement of defence has been delivered, or after it has been delivered and before the expiration of the time limited for reply, and before replying."

The claims which the plaintiffs ask leave to add to the indorsement in their writ of summons are quite within the provisions of Rule 69. None of the amendments to the statement of claim which the plaintiffs ask leave to make go beyond what is permitted by Rule 109(1).

Upon the plaintiffs paying all the costs of the defendant Rank arising out of the order of this Court dated 12th March 1947, an order will go as asked. Otherwise an order will go dismissing the application. Costs in either event to the defendants appearing in any event of the cause.

Order accordingly.

Kwong Hung Chan *Appellant*

v.

The Minister of Employment and Immigration *Respondent*

and

Immigration and Refugee Board and Canadian Council for Refugees *Interveners*

INDEXED AS: CHAN *v.* CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)

File No.: 23813.

1995: January 31; 1995: October 19.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Convention refugee — Well-founded fear of persecution because of membership in particular social group or political opinion — Likelihood of forced sterilization following breach of China's one-child policy — Confession as to involvement in pro-democracy movement — Whether or not appellant had well-founded fear of persecution for reasons of membership in a particular social group (his family) or political opinion — Whether or not sterilization a form of "persecution" within the meaning of s. 2(1)(a) of the Immigration Act — Whether or not persons facing forced sterilization members of a "particular social group" — Whether or not persons refusing forced sterilization expressing a "political opinion" — Immigration Act, R.S.C., 1985, c. I-2, ss. 2(1) "Convention refugee", (a)(i), (ii), (b), 3(g), 19(1)(c).

Appellant sought Convention refugee status because of his fear of being forcibly sterilized for a violation of China's one-child birth control laws. To be classified a Convention refugee, the appellant had to establish that he had a well-founded fear of persecution for reasons of membership in a particular social group (his family) or political opinion. He had been visited at his restaurant on a number of occasions by the Public Security Bureau (PSB) because of alleged involvement in the pro-democracy movement and had signed a confession to

Kwong Hung Chan *Appelant*

c.

Le ministre de l'Emploi et de l'Immigration *Intimé*

et

La Commission de l'immigration et du statut de réfugié et le Conseil canadien pour les réfugiés *Intervenants*

RÉPERTORIÉ: CHAN *c.* CANADA (MINISTRE DE L'EMPLOI ET DE L'IMMIGRATION)

N° du greffe: 23813.

1995: 31 janvier; 1995: 19 octobre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Réfugié au sens de la Convention — Crainte fondée de persécution du fait de l'appartenance à un groupe social ou des opinions politiques — Risque probable de stérilisation forcée par suite de la violation de la politique chinoise de l'enfant unique — Confession concernant la participation au mouvement pro-démocratique — L'appelant craint-il avec raison d'être persécuté du fait de son appartenance à un groupe social (sa famille) ou de ses opinions politiques? — La stérilisation est-elle une forme de «persécution» au sens de l'art. 2(1)a) de la Loi sur l'immigration? — Les personnes qui risquent d'être stérilisées de force font-elles partie d'un «groupe social»? — Les personnes qui refusent de subir la stérilisation forcée expriment-elles une «opinion politique»? — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 2(1) «réfugié au sens de la Convention», a)(i), (ii), b), 3g), 19(1)c).

L'appelant a demandé le statut de réfugié au sens de la Convention en raison de sa crainte d'être stérilisé de force pour avoir violé la politique chinoise de l'enfant unique. Pour être considéré comme un réfugié au sens de la Convention, l'appelant devait établir qu'il craignait avec raison d'être persécuté du fait de son appartenance à un groupe social (sa famille) ou de ses opinions politiques. Les agents du bureau de la sécurité publique (BSP) avaient effectué de nombreuses visites au restaurant de l'appelant en raison de la présumée participation

this effect in July 1989. He had been visited at home on five occasions by the PSB following the discovery of the second child in April 1990 and his wife lost her job because of the breach. To end these PSB visits appellant submitted a written undertaking to undergo sterilization within three months. He then fled China. Appellant alleged a fear of persecution by being forced to undergo sterilization. He testified that since leaving, his family had suffered harassment from the PSB and that, if returned to China, he might face arrest, imprisonment, long-term unemployment or even murder. The Immigration and Refugee Board found that the appellant was not a Convention refugee. It held that forced sterilization did not constitute a form of persecution, so made no finding as to whether the appellant had a well-founded fear of forced sterilization. The Federal Court of Appeal upheld the Board's decision. The issues to be considered here included: (1) whether forced sterilization is a form of "persecution" within the meaning of s. 2(1)(*a*) of the *Immigration Act*; (2) whether persons facing forced sterilization are members of a "particular social group"; (3) whether those refusing forced sterilization are expressing a "political opinion"; and (4) whether, assuming persons who have a well-founded fear of sterilization for violating China's one-child policy are eligible to be considered Convention refugees, the appellant has a well-founded fear of forced sterilization or of other persecution.

Held (La Forest, L'Heureux-Dubé and Gonthier JJ. dissenting): The appeal should be dismissed.

Per Sopinka, Cory, Iacobucci and Major JJ.: A person facing forced sterilization was assumed (without its being decided) to be a member of a particular social group. The claimant, to establish a well-founded fear of sterilization, must demonstrate subjective fear persecution and establish that this fear is well-founded in the objective sense, both on a balance of probabilities.

A refugee claimant must establish to the Board's satisfaction that the alleged fear exists in his or her mind in order to meet the subjective aspect of the test for a well-founded fear of persecution. Normally the claimant's evidence will be sufficient to meet the subjective aspect of the test where the claimant is found to be a credible witness and his or her testimony is consistent. Here,

de ce dernier au mouvement pro-démocratique et de la confession qu'il avait signée à cet égard en juillet 1989. Le BSP s'était rendu au domicile de l'appelant à cinq reprises à la suite de la découverte de la naissance du deuxième enfant en avril 1990; son épouse a d'ailleurs perdu son emploi en raison de cette violation de la politique de l'enfant unique. Pour mettre fin aux visites du BSP, l'appelant s'est engagé par écrit à subir la stérilisation dans un délai de trois mois. Il a ensuite fui la Chine. L'appelant a dit craindre d'être persécuté en étant forcé de se faire stériliser. Il a témoigné que, depuis son départ de la Chine, sa famille a été harcelée par le BSP et que, s'il retournait en Chine, il risquait d'être arrêté, d'être emprisonné, de rester en chômage prolongé et même d'être assassiné. La Commission de l'immigration et du statut de réfugié a statué que l'appelant n'était pas un réfugié au sens de la Convention. Comme la Commission a décidé que la stérilisation forcée n'était pas une forme de persécution, elle ne s'est pas prononcée sur la question de savoir si l'appelant craignait avec raison d'être persécuté en étant forcé de se faire stériliser. La Cour d'appel fédérale a confirmé la décision de la Commission. Voici les questions qui se posent en l'espèce: (1) La stérilisation forcée est-elle une forme de «persécution» au sens de l'al. 2(1)*a*) de la *Loi sur l'immigration*? (2) Les personnes qui risquent d'être stérilisées de force font-elles partie d'un «groupe social»? (3) Les personnes qui refusent la stérilisation forcée expriment-elles une «opinion politique»? (4) À supposer que les personnes qui craignent avec raison d'être stérilisées pour avoir violé la politique chinoise de l'enfant unique soient admissibles au statut de réfugié au sens de la Convention, l'appelant est-il fondé de craindre d'être stérilisé de force ou de subir d'autres persécutions?

Arrêt (les juges La Forest, L'Heureux-Dubé et Gonthier sont dissidents): Le pourvoi est rejeté.

Les juges Sopinka, Cory, Iacobucci et Major: Il a été tenu pour acquis (sans en décider) qu'une personne qui risque d'être stérilisée de force est membre d'un groupe social. Pour établir qu'il craint avec raison d'être stérilisé, le demandeur doit établir l'existence d'une crainte subjective de persécution ainsi que le fondement objectif de cette crainte, dans les deux cas selon la prépondérance des probabilités.

Pour satisfaire à l'élément subjectif du critère servant à déterminer si la crainte de persécution est fondée, le demandeur doit convaincre la Commission que la crainte qu'il allègue existe dans son esprit. Normalement, lorsque le demandeur est jugé être un témoin crédible et qu'il dépose de façon cohérente, son témoignage sera suffisant pour satisfaire à l'élément subjectif

appellant's testimony, even with respect to his own fear of forced sterilization, was equivocal and inconsistent at times.

The appellant did not meet the burden of proof on the objective aspect of the test. Evidence with respect to the enforcement procedures used within a claimant's particular region at the relevant time was not presented to the Board. Such evidence, if not available in documentary form, can be established through testimony with respect to similarly situated individuals. Appellant provided neither. Nor did he produce any evidence that the forced sterilization is inflicted upon men in his area. In fact, the documentary evidence produced by the appellant strongly suggested that penalties for breach of the one-child policy only applied against women. Then, too, the local authorities had taken no action to enforce appellant's signed consent to sterilization even though more than a year had lapsed and the fine levied for the breach of the birth control laws had still not been paid and, indeed, had been reduced. Absent any evidence to establish that his alleged fear of forced sterilization was objectively well-founded, the Board was unable to determine that the appellant had a well-founded fear of persecution in the form of a forced sterilization. The issue of whether or not the forced sterilization was related to the appellant's alleged involvement with the pro-democracy movement was not raised by the appellant at the Board level or on appeal and was not before this Court.

Per La Forest, L'Heureux-Dubé and Gonthier JJ. (dissenting): The Court could not safely decide whether or not there was evidence on which the Board could conclude that the appellant was a member of a particular group. The matter should be remitted back to the Board to be decided in accordance with the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* (the "UNHCR Handbook"). Using these guidelines for establishing the facts of a given case, a determination could be made as to whether a Convention refugee was entitled to any benefit of the doubt regarding his story.

Here, the appellant's account of events so closely mirrors the known facts concerning the implementation of China's population policy that, given the absence of

du critère. En l'espèce, le témoignage de l'appelant, quand il porte sur sa propre crainte d'être stérilisé de force, est parfois équivoque et incohérent.

L'appelant ne s'est pas acquitté du fardeau de la preuve qui lui incombait en ce qui concerne l'élément objectif du critère. Il n'a été présenté à la Commission aucune preuve concernant les méthodes visant à faire respecter la politique qui étaient appliquées dans la région du demandeur, pendant la période en cause. Lorsqu'une telle preuve n'est pas disponible sous forme documentaire, le demandeur peut faire état, dans son témoignage, de personnes qui se trouvent dans une situation analogue à la sienne. En l'espèce, l'appelant n'a fourni ni l'une ni l'autre de ces preuves. De plus, il n'a produit aucun élément de preuve visant à établir que la stérilisation forcée est infligée aux hommes dans sa région. En fait, la preuve documentaire qu'il a déposée tendait fortement à indiquer que les peines pour violation de la politique de l'enfant unique étaient appliquées principalement aux femmes. Plus d'un an après la signature par l'appelant de la formule de consentement à la stérilisation, les autorités locales n'avaient toujours pris aucune mesure pour faire exécuter ce consentement, et l'amende qui avait été infligée pour la violation de la politique démographique n'avait pas encore été payée et, de fait, avait été réduite. L'appelant n'ayant produit aucun élément de preuve visant à établir que sa crainte d'être stérilisé de force avait un fondement objectif, la Commission n'était pas en mesure de statuer que l'appelant craignait avec raison d'être persécuté en étant forcé de se faire stériliser. La question de savoir s'il existait un lien entre la stérilisation forcée et la présumée participation de l'appelant au mouvement pro-démocratique n'a pas été soulevée par ce dernier devant la Commission ou en appel, et la Cour n'en était pas saisie.

Les juges La Forest, L'Heureux-Dubé et Gonthier (dissidents): Il serait hasardeux pour la Cour de décider s'il y avait des éléments de preuve permettant à la Commission de conclure que l'appelant appartenait à un groupe. L'affaire devrait être renvoyée à la Commission, qui en décidera conformément au *Guide des procédures et critères à appliquer pour déterminer le statut de réfugié* (le «Guide du HCNUR») du Haut Commissariat des Nations Unies pour les réfugiés. Il était possible, à partir des lignes directrices relatives à l'établissement des faits, de déterminer s'il fallait accorder au demandeur du statut de réfugié au sens de la Convention le bénéfice du doute relativement à sa version des faits.

En l'espèce, la version des faits donnée par l'appelant concorde de façon si étroite avec les faits notoires relatifs à la mise en œuvre de la politique démographique de

any negative finding as to the credibility of the appellant or of his evidence, his quite plausible account is entitled to the benefit of any doubt that may exist. Sections of his testimony should not be seized upon in isolation. Such a technique is antithetical to the guidelines of the UNHCR Handbook. In light of these explicit guidelines, Canada's refugee burden should not be thwarted by an unduly stringent application of exacting legal proof that fails to take account of the contextual obstacles customary to refugee hearings.

The implementation of China's one-child policy, through sterilization by local officials, can constitute a well-founded fear of persecution. The alleged persecution does not have to emanate from the state itself to trigger a Convention obligation. Serious human rights violations may well issue from non-state actors or from subordinate state authorities if the state is incapable or unwilling to protect its nationals from abuse. Determination of the precise degree of involvement by the Chinese government was neither necessary nor possible from the evidentiary record.

When the means employed place broadly protected and well understood basic human rights under international law such as the security of the person in jeopardy, the boundary between acceptable means of achieving a legitimate policy and persecution is crossed. Canadian judicial bodies may at that juncture pronounce on the validity of the means by which a social policy may be implemented in an individual case by either granting or denying Convention refugee status, assuming of course that the claimant's credibility is not in question and that his or her account conforms with generally known facts.

Basic human rights transcend subjective and parochial perspectives and extend beyond national boundaries. Recourse can be had to the municipal law of the admitting nation, nevertheless, because that law may well animate a consideration of whether the alleged feared conduct fundamentally violates basic human rights. Forced sterilization constitutes a gross infringement of the security of the person and readily qualifies as the type of fundamental violation of basic human rights that constitutes persecution. Notwithstanding the

la Chine que, vu l'absence de conclusions défavorables quant à la crédibilité de l'appelant ou de la preuve qu'il a présentée, il y a lieu d'accorder à sa version des faits — par ailleurs tout à fait plausible — le bénéfice de tout doute qui pourrait exister. Il ne faut pas considérer isolément des passages du témoignage de l'appelant. Une telle méthode est contraire aux lignes directrices du Guide du HCNUR. Vu ces lignes directrices explicites, il ne faut pas gêner le respect de la responsabilité du Canada envers les réfugiés par une application excessivement stricte de règles de preuve exigeantes, ne tenant pas compte des obstacles contextuels propres à l'audition des revendications du statut de réfugié.

La mise en œuvre de la politique chinoise de l'enfant unique, par les mesures de stérilisation imposées par les fonctionnaires locaux, peut amener une personne à craindre avec raison d'être persécutée. Il n'est pas nécessaire que la persécution alléguée émane de l'État pour donner ouverture à l'application d'une obligation prévue par la Convention. Il est fort possible que des violations graves des droits de la personne soient commises par des acteurs non étatiques ou des autorités gouvernementales de rang inférieur, si l'État en cause ne peut pas ou ne veut pas protéger ses citoyens contre ces abus. Il n'est ni nécessaire ni possible, à partir de la preuve disponible, de déterminer avec précision le degré de participation du gouvernement chinois.

Lorsque les moyens utilisés ont pour effet de mettre en péril des droits fondamentaux de la personne — tel le droit de chacun à la sécurité de sa personne — qui, en vertu du droit international, sont bien définis et jouissent d'une protection considérable, la ligne qui sépare la persécution et les moyens acceptables pour exécuter une politique légitime a alors été franchie. C'est à ce moment que les tribunaux canadiens peuvent, dans un cas donné, se prononcer sur la validité des moyens de mise en œuvre d'une politique sociale, et ce en accordant ou en refusant à une personne le statut de réfugié au sens de la Convention, à supposer bien entendu que la crédibilité du demandeur ne soit pas en cause et que sa version des faits concorde avec les faits notoires.

Les droits fondamentaux de la personne transcendent les perspectives subjectives et chauvines, et ils s'appliquent au-delà des frontières nationales. On peut néanmoins faire appel au droit interne du pays d'admission, car ce droit pourrait bien inciter à l'examen de la question de savoir si la conduite appréhendée viole de façon cruciale des droits fondamentaux de la personne. La stérilisation forcée constitue une grave atteinte au droit d'un individu à la sécurité de sa personne et pourrait facilement être qualifiée de violation majeure des droits

technique, forced sterilization is in essence an inhuman, degrading and irreversible treatment.

A well-founded fear must be evaluated both subjectively and objectively. The fact that the appellant did not specifically invoke the term "fear of persecution" or equivalent words to that effect was of no particular import. The testimony of his harassment, together with his flight from China, directs a finding that he had an implicit well-founded fear of persecution. The generally known facts establish the existence of objective grounds for appellant's fearing forced sterilization. This was an issue for consideration by the Board.

A refugee alleging membership in a particular social group does not have to be in voluntary association with other persons similar to him- or herself. Rather, he or she must be voluntarily associated with a particular status for reasons so fundamental to that person's human dignity that he or she should not be forced to forsake that association. The association or group exists by virtue of a common attempt made by its members to exercise a fundamental human right. The right asserted can be categorized as the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children. This fundamental right has been recognized in international law. The possibility also exists that the appellant may have a well-founded fear of persecution on the basis of a political opinion held by or imputed to him.

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By Major J.

Distinguished: *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314; **referred to:** *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680; *R. v. Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 1 All E.R. 193.

By La Forest J. (dissenting)

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689; *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314; *E. (Mrs.) v. Eve*,

fondamentaux de la personne, du type de celles qui constituent de la persécution. Quelle que soit la technique utilisée, il est incontestable que la stérilisation forcée est essentiellement un traitement inhumain, dégradant et irréversible.

Il faut se demander, à la fois sur le plan subjectif et sur le plan objectif, si le demandeur craint avec raison d'être persécuté. Le fait que l'appelant n'a pas spécifiquement employé l'expression «craint d'être persécuté» ou des mots équivalents ne revêt pas d'importance particulière. Le témoignage de l'appelant concernant le harcèlement, conjugué à son départ subséquent de la Chine, porte à conclure que l'appelant éprouvait une crainte implicite d'être persécuté. Les faits notoires établissent l'existence de raisons objectives justifiant l'appelant de craindre d'être forcé de se faire stériliser. Il s'agit d'une question qui devait être examinée par la Commission.

Le demandeur qui dit appartenir à un groupe social n'a pas besoin d'être associé volontairement avec d'autres personnes semblables à lui. Il doit plutôt être volontairement associé de par un statut particulier, pour des raisons si essentielles à sa dignité humaine, qu'il ne devrait pas être contraint de renoncer à cette association. L'association ou le groupe existe parce que ses membres ont tenté, ensemble, d'exercer un droit fondamental de la personne. Le droit revendiqué peut être qualifié de droit fondamental de tous les couples et individus de décider librement et en toute connaissance du moment où ils auront des enfants, du nombre d'enfants qu'ils auront et de l'espacement des naissances. Ce droit fondamental a été reconnu en droit international. Il est par ailleurs possible que l'appelant craigne avec raison d'être persécuté du fait des opinions politiques qu'il a ou qu'on lui impute.

Jurisprudence

Citée par le juge Major

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Canada (Procureur général) c. Ward, [1993] 2 R.C.S. 689; *Cheung c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 2 C.F. 314; *E. (Mme) c. Eve*,

[1986] 2 S.C.R. 388; *H. (W.I.) (Re)*, [1989] C.R.D.D. No. 15; *Guo Chun Di v. Carroll*, 842 F.Supp. 858 (1994); *Xin-Chang Zhang v. Slattery*, 859 F.Supp. 708 (1994); *Matter of Chang*, Int. Dec. 3107 (1989); *Minister for Immigration and Ethnic Affairs v. Respondent A* (1995), 130 A.L.R. 48, rev'g (1994), 127 A.L.R. 383; *Canada (Minister of Employment and Immigration) v. Mayers*, [1993] 1 F.C. 154; *Rajudeen v. Minister of Employment and Immigration* (1984), 55 N.R. 129; *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (1995); *Shu-Hao Zhao v. Schiltgen*, 1995 WL 165562; *A. (W.R.) (Re)*, [1989] C.R.D.D. No. 98; *K. (H.H.) (Re)*, [1991] C.R.D.D. No. 484; *X. (D.K.) (Re)*, [1989] C.R.D.D. No. 293.

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Valpy, Michael. "The suspicion of a gelded refugee process", *Globe and Mail*, Toronto, March 7, 1995, p. A2.

APPEAL from a judgment of the Federal Court of Appeal, [1993] 3 F.C. 675, 156 N.R. 279, 20 Imm. L.R. (2d) 181, dismissing an appeal from a judgment of the Immigration and Refugee Board (Refugee Division). Appeal dismissed, La Forest, L'Heureux-Dubé and Gonthier JJ. dissenting.

Rod Holloway and *Jennifer Chow*, for the appellant.

Gerald Donegan, for the respondent.

Brian A. Crane, Q.C., and *Howard Eddy*, for the intervener Immigration and Refugee Board.

Ronald Shacter, for the intervener Canadian Council of Refugees.

Moriarty, Tara A. «*Guo v. Carroll*: Political Opinion, Persecution, and Coercive Population Control in the People's Republic of China», 8 *Geo. Immigr. L.J.* 469.

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United States of America. Department of State. Report submitted to the Committee on Foreign Relations, U.S. Senate and the Committee on Foreign Affairs, House of Representatives. *Country Reports on Human Rights Practices for 1990*. Washington: U.S. Government Printing Office, 1991.

Valpy, Michael. «The suspicion of a gelded refugee process», *Globe and Mail*, Toronto, March 7, 1995, p. A2.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1993] 3 C.F. 675, 156 N.R. 279, 20 Imm. L.R. (2d) 181, qui a rejeté l'appel formé contre une décision de la Commission de l'immigration et du statut de réfugié (Section du statut de réfugié). Pourvoi rejeté, les juges La Forest, L'Heureux-Dubé et Gonthier sont dissidents.

Rod Holloway et *Jennifer Chow*, pour l'appelant.

Gerald Donegan, pour l'intimé.

Brian A. Crane, c.r., et *Howard Eddy*, pour l'intervenante la Commission de l'immigration et du statut de réfugié.

Ronald Shacter, pour l'intervenant le Conseil canadien pour les réfugiés.

reduced to reflect the loss in earnings of his wife who did lose her job.

147 Of greater concern, however, is the fact that no appeal was ever taken from the Board's finding that the appellant did not face persecution for his pro-democracy political opinion. Thus, the Board's decision on the question of persecution in relation to the appellant's pro-democracy political opinion is final. This Court should not seek to overturn the Board's determination by introducing new factors at this level into an issue which was finally determined at the Board level and not appealed. Furthermore, the appellant did not raise the possibility that he might face forced sterilization for his pro-democracy political opinion either at the Board level or at any level on appeal. It is not open to this Court to decide the appellant's case on the basis of an issue on which leave to appeal was not granted. No argument was heard by the Court on this issue and no reliance was placed on it by the appellant himself.

148 The only issue raised in this appeal which involved political opinion was whether the action of having a child in contravention of China's one-child policy was an action which was sufficiently expressive of a political opinion to independently found a refugee claim. Given my finding that the appellant did not establish a well-founded fear of persecution, I do not find it necessary to deal with this issue.

149 In light of the fact that not all persons who have breached the one-child policy in China face a reasonable chance of forced sterilization, the appellant must establish a well-founded fear of forced sterilization before he can attempt to rely on the decision in *Cheung*. The appellant failed to adduce any evidence to establish on a balance of probabilities that his alleged fear of forced sterilization was objectively well-founded. On the basis of the oral testimony and documentary evidence presented by the appellant, forced sterilization remains no more

compte de la perte de revenus subie par son épouse du fait qu'elle a effectivement perdu son emploi.

Fait plus significatif, toutefois, il n'a jamais été interjeté appel de la conclusion de la Commission que l'appelant ne risquait pas la persécution du fait de ses opinions politiques pro-démocratiques. Par conséquent, la décision de la Commission touchant la crainte de persécution de l'appelant fondée sur ses opinions politiques pro-démocratiques est finale. Notre Cour ne devrait pas envisager d'infirmer la décision de la Commission en introduisant, à ce stade-ci, de nouveaux facteurs concernant une question qui a été tranchée de façon définitive par la Commission et n'a pas l'objet d'un appel. Qui plus est, ni devant la Commission ni devant quelque juridiction d'appel, l'appelant n'a soulevé la possibilité qu'il soit forcé de se faire stériliser du fait de ses opinions politiques pro-démocratiques. Notre Cour ne peut statuer sur le pourvoi de l'appelant en se fondant sur une question à l'égard de laquelle celui-ci n'a pas été autorisé à se pourvoir. De plus, cette question n'a fait l'objet d'aucun argument devant la Cour et l'appelant lui-même ne l'a pas invoquée.

La seule question relative aux opinions politiques et soulevée dans le présent pourvoi était de savoir si le fait d'avoir un enfant en contravention de la politique de l'enfant unique constituait de la part du demandeur du statut de réfugié une manifestation suffisamment éloquente de ses opinions politiques pour justifier à elle seule la revendication de ce dernier. Compte tenu de ma conclusion que l'appelant n'a pas établi qu'il craint avec raison d'être persécuté, j'estime qu'il n'est pas nécessaire d'examiner cette question.

Étant donné que les personnes qui violent la politique chinoise de l'enfant unique ne courent pas toutes une possibilité raisonnable d'être stérilisées de force, l'appelant doit établir qu'il craint avec raison d'être stérilisé de force avant de pouvoir invoquer l'arrêt *Cheung*. L'appelant n'a produit aucun élément de preuve visant à établir que, selon la prépondérance des probabilités, sa crainte d'être stérilisé de force avait un fondement objectif. Compte tenu du témoignage oral de l'appelant et de la preuve documentaire qu'il a présentée, la

than a "mere possibility" for the appellant. In the absence of that evidence, the Board was unable to determine that the appellant has a well-founded fear of persecution in the form of a forced sterilization.

This conclusion is decisive of the appeal as the appellant has failed to establish on the evidence presented an essential component of the definition of Convention refugee. In the absence of the appellant's meeting the burden of establishing a proper fact foundation on a balance of probabilities, appellate courts are handicapped in attempting to determine legal issues not grounded on the facts and should not attempt to do so. Therefore, the question of whether *Cheung* should be followed in light of the decision of this Court in *Ward* should await a case in which the necessary facts have been established in the refugee determination hearing.

The appellant failed to present any evidence with respect to a crucial element of his claim. There was, therefore, no legal basis upon which the Board could accept him as a convention refugee. The appeal must, therefore, be dismissed.

Appeal dismissed, LA FOREST, L'HEUREUX-DUBÉ *and* GONTHIER JJ. *dissenting.*

Solicitor for the appellant: Legal Services Society, Vancouver.

Solicitor for the respondent: John C. Tait, Ottawa.

Solicitors for the intervener Immigration and Refugee Board: Gowling, Strathy & Henderson, Ottawa.

Solicitor for the intervener Canadian Council for Refugees: Parkdale Community Legal Services, Toronto.

stérilisation forcée ne demeure rien de plus qu'une «simple possibilité» en ce qui le concerne. En l'absence de la preuve de l'élément susmentionné, la Commission n'était pas en mesure de statuer que l'appelant craignait avec raison d'être persécuté en étant forcé de se faire stériliser.

La conclusion qui précède a un effet déterminant sur le présent pourvoi, car l'appelant n'a pas été en mesure, à la lumière de la preuve présentée, d'établir un des éléments essentiels de la définition de réfugié au sens de la Convention. En effet, dans les cas où l'appelant ne s'acquitte pas du fardeau d'établir, selon la prépondérance des probabilités, un fondement factuel valable, il est difficile pour les tribunaux d'appel de trancher des questions de droit qui ne reposent pas sur des faits, et ils ne devraient pas tenter de le faire. Par conséquent, la question de savoir si l'arrêt *Cheung* devrait être suivi, compte tenu de l'arrêt *Ward* de notre Cour, devra attendre une espèce où les faits nécessaires auront été établis à l'audition de la revendication du statut de réfugié. 150

Comme l'appelant n'a présenté aucun élément de preuve à l'égard d'un élément fondamental de sa revendication, la Commission ne pouvait donc s'appuyer sur aucun fondement juridique pour lui reconnaître le statut de réfugié au sens de la Convention. Par conséquent, le pourvoi doit être rejeté. 151

Pourvoi rejeté, les juges LA FOREST, L'HEUREUX-DUBÉ *et* GONTHIER *sont dissidents.*

Procureur de l'appelant: Legal Services Society, Vancouver.

Procureur de l'intimé: John C. Tait, Ottawa.

Procureurs de l'intervenante la Commission de l'immigration et du statut de réfugié: Gowling, Strathy & Henderson, Ottawa.

Procureur de l'intervenant le Conseil canadien pour les réfugiés: Parkdale Community Legal Services, Toronto.

Gerald Michael Wigman *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* WIGMAN

File No.: 17940.

*1985: November 6.
**1986: February 6; 1987: April 9.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard1, Lamer, Le Dain and La Forest JJ.
1 Chouinard J. took no part in the judgment.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law -- Kienapple principle -- Accused convicted of breaking and entering and committing robbery, and of attempted murder -- Offences arising out of the same incident -- Whether rule against multiple convictions applicable to preclude conviction of attempted murder.

Criminal law -- Charge to jury -- Mens rea -- Attempted murder --Trial judge's charge relating to the required intent for attempted murder in accordance with the interpretation given by the Supreme Court of Canada in Lajoie -- Supreme Court changing in Ancio its interpretation on the requisite mental element for a conviction for attempted murder -- Ancio decision rendered after accused was granted leave to appeal at large to the Supreme Court of Canada -- Whether accused entitled to benefit from the new interpretation of the Criminal Code given in Ancio -- Scope of leave to appeal -- Criminal Code, R.S.C. 1970, c. C-34, ss. 212(a), 618(1)(b).

Criminal law -- Appeal from conviction -- Error in trial judge's charge to jury concerning the necessary intent for a conviction for attempted murder -- Appeal against conviction for attempted murder dismissed and conviction for an included offence substituted -- Criminal Code, R.S.C. 1970, c. C-34, ss. 228(b), 613(1)(b)(i), (iii), (3).

In 1981, appellant pleaded guilty to breaking and entering and committing robbery, and he was later charged with attempted murder. The second offence took place during the breaking and entering incident. The victim was brutally beaten and suffered severe injuries. She would likely have died without treatment. The trial judge charged the jury that appellant could be convicted of attempted murder if he had an intention to kill or an intention to cause bodily harm knowing that death may result and being reckless whether death ensues or not. This charge was in accordance with *Lajoie v. The Queen*, [1974] S.C.R. 399. Appellant was convicted. On appeal from his conviction, appellant invoked the rule against multiple convictions enunciated in the *Kienapple* case, [1975] 1 S.C.R. 729, and alleged that having pleaded guilty to breaking and entering and robbery, he should not have been tried again for attempted murder arising out of the same set of circumstances. The Court of Appeal held that the *Kienapple* principle did not apply and dismissed the appeal. The appellant was then granted leave to appeal at large to this Court. At the hearing, he indicated that he intended to rely also on the *Ancio* case, [1984] 1 S.C.R. 225. The *Ancio* decision, which was rendered after appellant obtained leave to appeal to this Court, overruled *Lajoie* and held that the *mens rea* for attempted murder was the specific intent to kill. The Court adjourned the hearing to permit both parties to file factums on the new issue. At the new hearing, both the *Kienapple* issue and the *Ancio* issue were argued. The Crown conceded that the trial judge's charge was an error of law if *Ancio* were to be applied, but it contended that (1) to entertain the *Ancio* issue would be to hear an appeal on an issue in respect of which no leave has been granted; (2) if leave should be granted, the proviso in s. 613(1)(*b*)(iii) of the *Criminal Code* should in any event be applied in so far as it may be grounded in an attack on the judge's charge to the jury; and (3) should this Court not

apply the proviso in s. 613(1)(*b*)(iii) of the *Code* to this appeal, it should substitute conviction for an offence under s. 228 of the *Code*.

Held: The appeal should be dismissed but the conviction at trial for the offence of attempted murder should be substituted by a conviction for the included offence of causing bodily harm with intent to endanger life.

(1) *The Kienapple Issue*

The *Kienapple* principle has no application in this case. For the *Kienapple* rule to apply, there must be both a factual and legal nexus between the charges. Multiple convictions are only precluded under the *Kienapple* principle if they arise from the same "cause", "matter", or "delict", and if there is sufficient proximity between the offences charged. This requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle. In the case at bar, the offence of attempted murder involved the appellant's striking the victim with intent to kill or, at that time, with intent to cause bodily harm, knowing it to be likely to cause death and being reckless whether death ensued or not. The elements of the offence of breaking and entering and committing robbery involved breaking and entering the apartment, taking jewellery and money, and using violence. There is no overlapping of the essential elements of the two offences, the only common element is violence, and the required specific intents are clearly different.

(2) *The Ancio Issue*

Provided that he is still in the judicial system, an accused charged with an offence is entitled to have his culpability determined on the basis of what is held to be the proper and accurate interpretation of the *Criminal Code*. This test affords a means of striking a balance between the impractical dream of providing perfect justice to all those convicted under the overruled authority and the practical necessity of having some finality in the criminal process. Finality in criminal proceedings is of the utmost importance, but it is adequately served by the normal operation of *res judicata*. Thus a person convicted under *Lajoie* will not be able to reopen his or her case, unless the conviction is not final.

The fact that appellant's factum filed in support of his motion for leave and the oral argument at the hearing of the motion related solely to the *Kienapple* issue does not preclude him from invoking *Ancio*. Leave to appeal to this Court was not limited to the *Kienapple* issue but was granted without any restriction. The appellant became entitled to bring into question the validity of his conviction on any question of law at a time when this Court had just reversed its own interpretation of attempted murder. The appellant is thus entitled to invoke the new question of law raised by reason of *Ancio* in accordance with s. 618(1)(*b*) of the *Code*. He has established that he was "in the system" since he still had an appeal pending before this Court when *Ancio* was released.

It is common ground that the charge to the jury did not conform to *Ancio*. The curative provision of s. 613(1)(*b*)(iii) of the *Code* cannot be used to save the attempted murder conviction since it is not clear that the jury would have convicted the appellant of this offence if instructed that the necessary intent was the intent to kill. The appeal should be dismissed but a conviction for the included offence of causing bodily harm with intent to endanger life, contrary to s. 228(*b*) of the *Code*, should be substituted pursuant to s. 613(1)(*b*)(i) and s. 613(3) of the *Code*. This included offence was put to the jury but no verdict was rendered on it as the jury found the appellant guilty of attempted murder. Since the jurors convicted on the basis of one of the two mental elements put to them in the trial judge's charge, it follows that they would also have convicted the appellant of the offence under s. 228(*b*).

Finally, the analysis of the *Kienapple* issue is equally applicable in respect of the s. 228(*b*) offence. The intent required under s. 228(*b*) is an aggravated intent distinct and additional to that which would suffice for a conviction of breaking and entering and robbery.

Cases Cited

Applied: *R. v. Prince*, [1986] 2 S.C.R. 480; *R. v. Ancio*, [1984] 1 S.C.R. 225; **distinguished**:

Kienapple v. The Queen, [1975] 1 S.C.R. 729; **considered**: *R. v. Taylor*, [1950] 2 K.B. 368; *R. v. Caouette*, [1973] S.C.R. 859; **referred to**: *Lajoie v. The Queen*, [1974] S.C.R. 399; *R. v. Treanor* (1939), 27 Cr. App. Rep. 35; *R. v. Warner*, [1961] S.C.R. 144; *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662; *Canadian Dredge & Dock Co. v. The Queen* (1981), 56 C.C.C. (2d) 576 (*sub nom. R. v. McNamara*); *Lizotte v. The King*, [1951] S.C.R. 115; *R. v. Nantais*, [1966] 4 C.C.C. 108; *R. v. Fyfe*, [1968] 1 C.C.C. 295; *R. v. Ruggiero* (1972), 9 C.C.C. (2d) 546; *Sheppe v. The Queen*, [1980] 2 S.C.R. 22; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Hotte* (1984), 13 W.C.B. 224; *R. v. Braun* (1984), 12 W.C.B. 281; *R. v. Beaver* (1984), 64 N.S.R. 158; *R. v. Bains and Grewal* (1985), 7 O.A.C. 67, leave to appeal refused, [1985] 1 S.C.R. v; *R. v. Singh (Inderjit)* (1985), 8 O.A.C. 100; *Czubak c. La Reine*, R.J.P.Q., 86-180.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 21, 212(*a*), 228, 613(1)(*b*)(i), (iii), (3), 618(1)(*a*), (*b*) [am. 1974-75-76, c. 105, s. 18], 621(1)(*b*).

Supreme Court Act, R.S.C. 1970, c. S-19, s. 48.

APPEAL from a judgment of the British Columbia Court of Appeal (1983), 6 C.C.C. (3d) 289, dismissing the accused's appeal from his conviction for attempted murder. Appeal dismissed, but the conviction at trial for the offence of attempted murder should be substituted by a conviction for the included offence of causing bodily harm with intent to endanger life.

Sheldon Goldberg, for the appellant.

Allan Stewart, Q.C., for the respondent.

The following is the judgment delivered by

1.THE COURT--In 1974, in *Lajoie v. The Queen,* [1974] S.C.R. 399, this Court, speaking through Martland J., held that when s. 24(1) of the *Criminal Code* referred to "an intent to commit an offence" in relation to murder, it meant an intention to commit that offence in any of the ways provided for under s. 212 or s. 213 of the *Code*. The effect of the decision was that on an attempted murder charge the Crown could succeed, insofar as the mental element of the crime was concerned, on proving beyond reasonable doubt that the accused either (i) meant to cause death or (ii) meant to cause bodily harm that the accused knew was likely to cause death and was reckless whether death ensued or not.

2 Some ten years later in *R. v. Ancio*, [1984] I S.C.R. 225, the majority of the Court, speaking through McIntyre J., held that *Lajoie* should no longer be followed, that the *mens rea* for attempted murder was the specific intent to kill. A mental element falling short of that level might well lead to conviction for another offence, for example, one of the aggravated forms of assault, but not conviction for an attempted murder.

3 In 1981, during the period between the 1974 judgment in *Lajoie* and the 1984 judgment in *Ancio*, the appellant Gerald Michael Wigman was tried and convicted before a judge and jury of attempting to murder one Margaret Hill by beating her. The judge charged that the accused could be convicted if the jury found he had either of the two intents mentioned. That was the law according to *Lajoie*. It was an error of law however if *Ancio* is applied, as the Crown concedes. The appellant, whose conviction is now under review in this Court, says he is entitled to the benefit of *Ancio*. The Crown says he is not. That is the first and primary issue in this appeal. A second point arises as to the possible application of the so-called *Kien- apple* principle, found in *Kienapple v. The Queen*, [1975] I S.C.R. 729.

I

The Facts and the Trial

4 Mr. Wigman was charged with three counts of breaking and entering and robbery in an

indictment dated October 26, 1981. Count #2 related to an apartment in the City of Vancouver in which Mrs. Margaret Hill resided. Mr. Wigman pleaded guilty to all three charges before Toy J. of the British Columbia Supreme Court.

5 On October 30, 1981, Mr. Wigman was charged with an attempted murder that took place during the break and enter incident cited in Count #2. Mrs. Hill, a 69 year old woman, lived alone in a ground floor apartment. She went to bed at 8:30 p.m. on May 16, 1981. A neighbour found her lying on the floor of her bedroom the next day at 4:00 p.m. and it was evident that she had suffered very severe injuries. The apartment was "an awful mess". A number of items had been taken. The telephone cord had been cut. Medical evidence indicated that she had been struck on the head at least six times and had enormous bruises on other parts of her body. She would likely have died without treatment. The fingerprints of the accused were found in the apartment.

6 The charge was heard by Toy J. and a jury. At the opening of the trial the accused, by his counsel, admitted that he, the accused, gained entry to Mrs. Hill's apartment by removing a sliding door from the apartment balcony, and that he stole various items of jewellery and a sum of money. There was no reference during the trial to Mr. Wigman's prior guilty plea to the break and enter charge. Nor was reference made to the *Kienapple* argument that the accused could not be convicted of both the robbery charge and the attempted murder charge, the violence being common to both.

7 Mr. Wigman's defence to the attempted murder charge was that he had been accompanied by a person called "Dave" who had assaulted and severely beaten Mrs. Hill.

8 The judge charged the jury as to the requisite intent for attempted murder as follows:

> . . . you can go either route, an intention to kill or an intention to cause bodily harm knowing that death may result and being reckless whether death ensues or not.

Words giving the jury the choice of two intents were repeated many times in the charge of the jury. This charge was in accordance with *Lajoie*, but it now conflicts with *Ancio.*

9 Toy J. left with the jury two included offences to the attempted murder charge: (1) causing bodily harm with intent to endanger life; and (2) assault causing bodily harm. The jury retired to deliberate at 5:12 p.m. on November 6, 1981 and returned at 5:28 p.m. on November 7, 1981 with a verdict of guilty of attempted murder.

10 The judge noted upon sentencing that the testimony of the accused that a "Dave X" had administered the beatings without the knowledge or agreement of the accused was rejected by the jury in whole or in part, although it could not be said whether the jury found Mr. Wigman guilty as a principal, or as a party to a common purpose pursuant to s. 21(2) of the *Criminal Code*. We would add that it cannot be said with certainty whether the jury found that Mr. Wigman meant to cause death or that he had the lesser and now irrelevant intent, namely, that of meaning to cause bodily harm that he knew was likely to cause death or was reckless whether death ensued or not.

11 On December 4, 1981, Toy J. sentenced the appellant to ten years in prison with respect to the charge of breaking and entering and committing robbery, and to life imprisonment with respect to the conviction on the charge of attempted murder.

II

The Court of Appeal of British Columbia

12 Mr. Wigman, having obtained new counsel, appealed to the Court of Appeal of British Columbia against his conviction for attempted murder. His counsel took as his main point that the accused, having pleaded guilty to breaking and entering, and robbery, should not have been tried again for attempted murder arising out of the same set of circumstances. This is the *Kienapple* issue. The Court was of the opinion that the principle did not have any application to the facts in this case. In a decision reported at (1983), 6 C.C.C. (3d) 289, Hutcheon J.A. reviewed a number of the authorities canvassed in *Sheppe v. The Queen*, [1980] 2 S.C.R. 22, and the statement of Laskin

C.J., at p. 27:

In *Kienapple v. The Queen, supra,* this Court was concerned with a single act which gave rise to two different offences, and it held that multiple convictions could not be supported for the same delict or for the same cause or matter or where the same or substantially the same elements entered into two different offences.

Hutcheon J.A. concluded at p. 292 that the correct view of the matter was set out in the Crown's argument:

The breaking and entering and robbery involved the accused entering the victims [*sic*] apartment, taking the woman's jewellery and money and using violence. The offence of attempted murder involved the accused striking the woman with one of the two intents set out in s. 212(a) of the Criminal Code, or at the very least, involved the accused in that he was a party to such an offence, pursuant to section 21(2) and section 212(a).

Hutcheon J.A. held that on the facts in the case there were two offences involving the same violence, but he had no difficulty in reaching the conclusion that different factual and legal elements underlay the two offences.

III

The Supreme Court of Canada

13 Mr. Wigman applied to this Court for leave to appeal which was granted on December 15, 1983 by a panel consisting of Laskin C.J. and Dickson and Estey JJ., [1983] 2 S.C.R. xv. Leave was granted at large, that is to say the leave was not confined to any specified point or points. The order granting leave to appeal reads:

UPON APPLICATION by counsel on behalf of the Applicant for an Order granting leave to appeal from the judgment of the Court of Appeal for British Columbia dated the 28th day of June, 1983, and upon hearing what was alleged by counsel on behalf of the Applicant as well as the Respondent on the 5th day of December, 1983;

IT IS ORDERED that leave to appeal be granted.

14 In a factum filed on June 25, 1984, the appellant set out the issues proposed to be argued:

THAT the Appellant having pleaded guilty to Breaking and Entering and Robbery should not have been tried again for Attempted Murder, arising out of the same set of circumstances;

THAT the Trial Judge erred in not determining and/or in failing to permit the jury to determine whether the Attempted Murder went beyond the facts disclosed by the Breaking and Entering and Robbery;

THAT the Appellant having been sentenced to imprisonment for 10 years for Breaking and Entering and Robbery should not have been sentenced again for Attempted Murder;

THAT the Court of Appeal erred in finding that the two convictions arising from the same violence should stand and that *Kienapple v. The Queen* (1974), 15 C.C.C. (2nd) 524 had no application to the facts of this case.

15 The appeal was scheduled to be heard on the morning of November 6, 1985. Shortly before the Court convened that morning, counsel for the appellant told counsel for the Crown that he intended to raise the *R. v. Ancio* issue. When the Court opened, counsel made this known to the Court. Crown counsel objected on the ground that he had had no warning of opposing counsel's intention to argue *Ancio* and that the Crown was not in a position to respond to any such argument. The Court accordingly adjourned the hearing to permit counsel for the appellant to prepare a written

submission on the *Ancio* issue and to afford Crown counsel an opportunity to respond. Supplementary factums were filed.

16 On the renewed hearing of the appeal, both the *Kienapple* issue and the *Ancio* issue were argued. The Crown makes three submissions. It contends that to entertain the *Ancio* issue would be to hear an appeal on an issue in respect of which no leave has been granted. It contends further that if leave should be granted, the proviso in s. 613(1)(*b*)(iii) of the *Criminal Code* should in any event be applied in so far as it may be grounded in an attack on the judge's charge to the jury. Finally, it is contended that, should this Court not apply the proviso in s. 613(1)(*b*)(iii) of the *Code* to this appeal, it should substitute conviction for an offence under s. 228 of the *Code* as it stood on the date of the offence.

IV

The *Kienapple* Issue

17 We agree with the conclusion of the British Columbia Court of Appeal that the *Kienapple* principle has no application and that Mr. Wigman could be convicted of the two offences in question. In view of the extensive review undertaken in *R. v. Prince*, [1986] 2 S.C.R. 480, it is sufficient to simply reiterate that a two-part test must be met for the *Kienapple* rule to apply: there must be both a factual and legal nexus between the charges. Multiple convictions are only precluded under the *Kienapple* principle if they arise from the same "cause", "matter", or "delict", and if there is sufficient proximity between the offences charged. This requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.

18 In the case at bar, the offence of attempted murder involved the appellant striking Mrs. Hill with intent to kill or, at that time, with intent to cause bodily harm, knowing it to be likely to cause death and being reckless whether death ensued or not. The elements of the offence of breaking and entering and committing robbery involved breaking and entering the apartment, taking jewellery and money, and using violence. There is no overlapping of the essential elements of the two offences, the only common element is violence, and the required specific intents are clearly different. The *Kienapple* principle does not apply and the appellant must fail on this point.

V

The *Ancio* Issue

19 As already indicated, the *Ancio* decision had not yet been released at the time the appellant sought and obtained leave to appeal.

20 The appellant, however, submits that the charge of the trial judge to the jury conflicts with the new interpretation of the *Criminal Code* given in *Ancio*. The inadequacy of the charge in this respect is not in doubt, as is conceded by the Crown. The main point in issue is whether the appellant can invoke what is now considered to be the correct interpretation of the *Code*.

21 The appropriate test is whether or not the accused is still in the judicial system. As expressed in the Crown's factum, this test affords a means of striking a balance between the "wholly impractical dream of providing perfect justice to *all* those convicted under the overruled authority and the practical necessity of having some finality in the criminal process". Finality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of *res judicata*: a matter once finally judicially decided cannot be relitigated. Thus a person convicted under *Lajoie* will not be able to reopen his or her case, unless, of course, the conviction is not final. In the *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 757, the Court observed that *res judicata* would even preclude the reopening of cases decided by the courts on the basis of constitutionally invalid laws. The *res judicata* principle would apply with at least as much force to cases decided on the basis of subsequently overruled case law.

22 The Crown, however, argues that Mr. Wigman ought not to be able to benefit from *Ancio*. Counsel for the Crown contends that the appellant was granted leave exclusively on the *Kienapple*

rule since the factum filed in support of his motion for leave and the oral argument at the hearing of the motion were all related solely to this argument.

23 The flaw in the Crown's proposition is that it does not make any distinction between the leave to appeal being limited to certain issues and the same leave being granted at large. It is clear that the Court is empowered to restrict an appeal to certain specific issues: *Lizotte v. The King*, [1951] S.C.R. 115, at pp. 117-18; *R. v. Warner*, [1961] S.C.R. 144, at pp. 147-48; *Kienapple, supra*, at p. 732; and *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, at p. 669; (1981), 56 C.C.C. (2d) 576 (*sub nom. R. v. McNamara*). In such cases, the Supreme Court is without jurisdiction to hear arguments dealing with issues other than the ones enumerated on the order granting leave to appeal: *Lizotte, supra,* at p. 133; *Warner, supra*, at p. 151; *Kienapple, supra*, at p. 732; and *Canadian Dredge & Dock Co., supra*, at p. 671. However, the situation is different when the right of appeal has not been restricted to a specific question of law. The appellant is then entitled to raise additional questions of law, subject to the discretion of the Court for instance, not to decide a case on the basis of an issue tardily raised.

24 In this regard, s. 618(1)(*b*) of the *Code*, which governs the right to appeal in this case, should be quoted in the context of the whole section:

618. (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(*a*) on any question of law on which a judge of the court of appeal dissents, or

(*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow. [Emphasis added.]

25 The difference in the wording between s. 618(1)(*a*) and (*b*) is significant. The respondent's argument would require this Court to construe s. 618(1)(*b*) as if it read:

618. (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(*a*) on any question of law on which a judge of the court of appeal dissents, or

(*b*) on any question of law on which leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow. [Emphasis added.]

26 That this cannot be the correct interpretation when leave to appeal has been granted at large is well illustrated in *R. v. Caouette*, [1973] S.C.R. 859, which involved the scope of s. 621(1)(*b*), the counterpart of s. 618(1)(*b*) for the Crown:

621. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 603 or 604 or dismisses an appeal taken pursuant to paragraph 605(1)(*a*) or subsection 605(3), the Attorney General may appeal to the Supreme Court of Canada

(*a*) on any question of law on which a judge of the court of appeal dissents, or

(*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.

(As it then read.)

27 In that case, the Crown asserted an appeal as of right, based on the questions of law on which

there had been a dissent, against the acquittal of Caouette by the Court of Appeal. The Crown however also obtained leave to appeal under s. 621(1)(*b*) "on any question of law". After having stated that the jurisdiction of the Supreme Court was the threshold question in the appeal, Laskin J., as he then was, dissenting on another point, expressed the following comments at p. 881 on the Crown's right of appeal after leave has been granted at large:

> This leave ... must, in my understanding, be taken to relate to any question of law that goes to the validity of the verdict of acquittal; it cannot be construed to refer to a question of law whose correct resolution would not affect the result reached by the majority of the Quebec Court of Appeal. The unlimited character of the leave makes it necessary to determine what were the grounds upon which the Quebec Court of Appeal set aside the conviction herein and to consider the grounds urged in this Court against the acquittal; in this latter respect there is no restriction to the grounds upon which the Quebec Court of Appeal proceeded. [Emphasis added.]

(See also the comments of the majority at pp. 868-69.)

28 For reasons of fairness, the Court is reluctant to decide a case on a basis which was not argued by the parties and upon which the provincial courts have not spoken. This is a far cry, however, from suggesting that any issue not contained in the leave application which may tend to support acquittal or conviction is beyond the reach of the Court. For example, let us suppose that *Ancio* had never been heard or decided by the Court and *Wigman* had proceeded to be argued solely on the *Kienapple* issue. It would have been open to the Court to ask for additional argument on the correctness of the Court's decision in *Lajoie*. The Court can, and not infrequently does, raise issues which did not attract the interest of the parties at the time of the leave application. In short, this case arose while avenues of redress from the judgment were still open to the accused -- it was still "in the system" so to speak. The possibility for an appellant to raise a new question of law should, however, be subject to counsel for the opposing party being given notice that the point will be raised and sufficient opportunity to respond, which was assured in the present case by granting the adjournment requested.

29 Provided that he is still in the system, an accused charged with an offence is entitled to have his or her culpability determined on the basis of what is held to be the proper and accurate interpretation of the *Code*. The same reasoning was inevitably though implicitly adopted in *Ancio*. Obviously, the respondent Ancio was still in the system; once it is established in the case at bar that the appellant is still in the system, then the rationale for applying to him the ruling in *Ancio* is the same as the one which was taken for granted in *Ancio* with respect to the respondent Ancio.

30 This rationale is grounded in the principle that an accused should not be convicted on the basis of the interpretation of a statute which, at the appropriate time, is known to be wrong. An apt expression of this principle can be found in the following passage written by Lord Goddard C.J. on behalf of the full Court of Criminal Appeal in *R. v. Taylor*, [1950] 2 K.B. 368, at p. 371:

> This court ... has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted.

31. *Taylor* was a bigamy case where the Court of Criminal Appeal reconsidered its previous interpretation of the statutory defence of seven years absence available to a "Person Marrying a Second Time", given in the *R. v. Treanor* case (1939), 27 Cr. App. Rep. 35. The above-quoted passage is directed at the limits of the doctrine of *stare decisis* but it also explains why the new and presumably correct interpretation of an offence-creating statute should be applied to the accused who is still before the court when the correct interpretation is rendered.

32 This rationale was recently followed in *R. v. Hotte* (1984), 13 W.C.B. 224, in a decision almost identical to the case at bar. On October 21, 1982, Hotte was convicted at trial of attempted murder. The trial judge had charged himself that the intent required to be proven by the Crown was that specified in either s. 212(*a*)(i) or s. 212(*a*)(ii) of the *Code*. Prior to the appeal against conviction being heard before the Court of Appeal of Alberta, this Court released its judgment in *Ancio*. Laycraft J.A.,

speaking for the Court of Appeal, came to the conclusion that, as a consequence of the interpretation given in *Ancio*, the appellant had been wrongly convicted of attempted murder, and he set aside the conviction on this charge. On the evidence of the case and on the findings made by the trial judge, however, Laycraft J.A., pursuant to s. 613 of the *Code*, substituted a conviction for the included offence of causing bodily harm with intent to wound, maim or disfigure, under s. 228 of the *Code*, as it then stood. *Hotte* is only one of several decisions wherein different courts of appeal have consistently applied *Ancio* to convictions entered prior to the ruling of this Court: see *R. v. Braun* (1984), 12 W.C.B. 281 (Alta. C.A.); *R. v. Beaver* (1984), 64 N.S.R. 158 (C.A.); *R. v. Bains and Grewal* (1985), 7 O.A.C. 67, leave to appeal refused, [1985] I S.C.R. v; *R. v. Singh (Inderjit)* (1985), 8 O.A.C. 100, and *Czubak c. La Reine*, R.J.P.Q., 86-180 (C.A.)

33 We should finally add that the possibility for the appellant to raise the new interpretation given in *Ancio* is consistent with the power of this Court, in s. 48 of the *Supreme Court Act*, R.S.C. 1970, c. S-19, to resort to its general discretion to order a new trial when "the ends of justice seem to require it".

VI

Conclusion

34 The determinative factor in the case at bar is that the appellant became entitled to bring into question the validity of his conviction on any question of law at a time when this Court had just reversed its own interpretation of attempted murder. The appellant is thus entitled to invoke the new question of law raised by reason of *Ancio* in accordance with s. 618(1)(*b*) of the *Code*. He has established that he was "in the system" since he still had an appeal pending before this Court when *Ancio* was released.

35 It is common ground that the charge to the jury did not conform to *Ancio*. The curative provision of s. 613(1)(*b*)(iii) cannot be used since it is not clear that the jury would have convicted Mr. Wigman of attempted murder if instructed that the necessary intent was the intent to kill. Firstly, it cannot be determined with any degree of certainty that the jury completely rejected Mr. Wigman's story that "Dave" was the person who administered the beating. The jury may have found that Mr. Wigman was a party to the offence committed by "Dave". Secondly, in spite of the savagery of the attack, it cannot be concluded that the jury found or ought to have found that the attacker had the intent to kill rather than the intent to inflict bodily harm which he knew was likely to cause death.

36 Nonetheless, the Crown has indicated that it would be satisfied with the substitution of a conviction for the included offence of causing bodily harm with intent to endanger life, contrary to s. 228 of the *Code* as it read at the material time:

228. Every one who, with intent

(*a*) to wound, maim or disfigure any person,

(*b*) to endanger the life of any person, or

(*c*) to prevent the arrest or detention of any person,

discharges a firearm, air gun or air pistol at or causes bodily harm in any way to any person, whether or not that person is the one mentioned in paragraph (*a*), (*b*) or (*c*), is guilty of an indictable offence and is liable to imprisonment for fourteen years.

37 This included offence was put to the jury, but of course no verdict was rendered on it since the jury found Mr. Wigman guilty of attempted murder. The two mental elements put to the jury in the trial judge's charge on attempted murder were (i) the intent to kill, and (ii) the intent to cause bodily harm that he knows is likely to cause death and is reckless whether death ensues or not. Since the jurors convicted on the basis of one of these two mental elements, it follows that they would also have convicted Mr. Wigman of the offence under s. 228. The previous comments on the *Kienapple* rule are equally applicable in respect of the s. 228(*b*) offence. The intent required under s. 228(*b*) is

an aggravated intent distinct and additional to that which would suffice for a conviction of breaking and entering and robbery.

38 Accordingly, we would, pursuant to s. 613(1)(*b*)(i) and s. 613(3), dismiss the appeal but substitute a conviction for the included offence of causing bodily harm with intent to endanger life (s. 228 of the *Criminal Code*); see *R. v. Nantais,* [1966] 4 C.C.C. 108 (Ont. C.A.); *R. v. Fyfe*, [1968] 1 C.C.C. 295 (B.C.C.A.); *R. v. Ruggiero* (1972), 9 C.C.C. (2d) 546 (Ont. C.A.); *R. v. Hotte, supra*, and *R. v. Singh (Inderjit), supra.*

39 The case should be remitted to the Supreme Court of British Columbia for sentencing.

Appeal dismissed.

Solicitor for the appellant: Sheldon Goldberg, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General of British Columbia, Vancouver.

John Edward Kienapple *Appellant*;

and

Her Majesty The Queen *Respondent.*

1973: October 15; 1974: February 12.

Present: Fauteux C.J., Abbott, Martland, Judson, Ritchie, Spence, Pigeon, Laskin and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Two convictions for same act—Whether second conviction proper—Charges to be treated as alternatives—Whether unlawful sexual intercourse included offence of rape—Criminal Code, ss. 7(2), 11, 140, 143, 144, 146, 147, 535, 536, 537, 743(2).

The appellant was indicted jointly with another male person on two counts involving a thirteen year old girl, namely, rape contrary to s. 143 and unlawful carnal knowledge of a female under fourteen years of age contrary to s. 146(1) of the *Criminal Code.* Following the direction of the trial judge the jury brought in a verdict of guilty on both counts and the accused was sentenced to two concurrent terms of ten years. The Court of Appeal for Ontario dismissed the accused's appeal without written or recorded reasons and leave to appeal to this Court was given on the question whether the accused, having been convicted of rape, should in respect of the same single act have also been convicted of sexual intercourse with a female under the age of fourteen, not being his wife, an issue which had not been raised in the Courts below.

Held (Fauteux C.J., Abbott, Martland and Ritchie JJ. dissenting): The appeal should be allowed.

Per Judson, Spence, Pigeon, Laskin and Dickson JJ: Although there have been cases where multiple convictions were registered, when in substance only one "crime" has been committed, refusal to interfere on appeal was justified because only one sentence was imposed. The better practice, however, is to avoid multiple convictions *and* in relation to potentially multiple convictions, it is important to know the verdict on the first count since if that verdict is guilty

John Edward Kienapple *Appelant*;

et

Sa Majesté La Reine *Intimée.*

1973: le 15 octobre; 1974: le 12 février.

Présents: Le Juge en chef Fauteux et les Juges Abbott, Martland, Judson, Ritchie, Spence, Pigeon, Laskin, et Dickson.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel—Deux verdicts de culpabilité pour le même acte—Le second verdict de culpabilité est-il approprié?—Inculpations devant être traitées comme offrant un choix—Les rapports sexuels illicites sont-ils inclus dans l'infraction de viol?—Code criminel, art. 7(2), 11, 140, 143, 144, 146, 147, 535, 536, 537, 743(2).

L'appelant fut inculpé conjointement avec une autre personne du sexe masculin sous deux chefs d'accusation concernant une adolescente de treize ans, soit, de viol, en contravention de l'art. 143 du *Code criminel,* et de rapports sexuels avec une personne du sexe féminin âgée de moins de quatorze ans, en contravention de l'art. 146, par. (1). A la suite de la directive du juge de première instance, le jury a rendu un verdict de culpabilité et l'accusé fut condamné à deux peines de dix ans d'emprisonnement à être purgées simultanément. La Cour d'appel de l'Ontario a rejeté l'appel de l'accusé sans rédiger ni inscrire de motifs et la permission d'interjeter appel à cette Cour a été accordée sur la question de savoir si l'accusé, ayant été déclaré coupable de viol, devait à l'égard du seul et même acte être également reconnu coupable d'avoir eu des rapports sexuels avec une personne du sexe féminin âgée de moins de quatorze ans qui n'est pas son épouse, une question qui n'avait pas été soulevée dans les cours d'instance inférieure.

Arrêt (Le Juge en chef Fauteux et les Juges Abbott, Martland et Ritchie étant dissidents): Le pourvoi doit être accueilli.

Les Juges Judson, Spence, Pigeon, Laskin et Dickson: Bien qu'il y ait eu des cas où on a inscrit des déclarations de culpabilité multiples quand en substance un seul «crime» avait été commis, le refus d'intervenir était justifié du fait qu'une seule peine avait été imposée. Le mieux, cependant, est d'éviter les déclarations de culpabilité multiples, *et* lorsqu'il y a possibilité de déclarations de culpabilité multiples il est important de connaître le verdict relatif au pre-

and the same or substantially the same elements make up the second count charged the situation invites the application of the rule against multiple convictions. While in the present case there is the superadded element of age in s. 146(1) this does not operate to distinguish unlawful carnal knowledge from rape. Age under fourteen is material where consent to the sexual intercourse is present but once that is ruled out it becomes meaningless as a distinguishing feature of the offence of rape and unlawful carnal knowledge.

Per Fauteux C.J. and Abbott, Martland and Ritchie JJ. *dissenting:* The appellant was not convicted twice in respect of the same offence. The cases dealing with double punishment are not relevant to the issue of law which is before us and which is the legal power to convict an accused of two separate offences in respect of the same act.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing, without written reasons, an appeal from the appellant's convictions for (1) rape contrary to s. 143 of the *Criminal Code* and (2) unlawful carnal knowledge of a female under fourteen years of age. Appeal allowed, conviction for unlawful carnal knowledge quashed, Fauteux C.J. and Abbott, Martland and Ritchie JJ. dissenting.

[*Hudson v. Lee* (1589), 4 Co. Rep. 43a, 76 E.R. 989; *Cox and Paton v. The Queen,* [1963] S.C.R. 500; *The Queen v. Miles* (1890), 24 Q.B.D. 423; *R. v. Thomas,* [1950] 1 K.B. 26; *Wemyss v. Hopkins* (1875), L.R. 10 Q.B. 378; *R. v. Quon,* [1948] S.C.R. 508; *Connelly v. Director of Public Prosecutions,* [1964] A.C. 1254; *R. v. Morris* (1867), L.R. 1 C.C.R. 90; *R. v. Lockett,* [1914] 2 K.B. 720; *Kelly v. The King* (1916), 54 S.C.R. 220; *R. v. Siggins,* [1960] O.R. 284; *R. v. Hendrick and Smith* (1931), 23 Cr. App. R. 1; *R. v. Hodgson* (1973), 57 Cr. App. R. 502; *R. v. Marcus and Richmond,* [1931] O.R. 164 referred to.]

J. D. Morton, Q.C., for the appellant.

D. A. McKenzie, for the respondent.

mier chef puisque si le verdict est de culpabilité et que les mêmes éléments, ou fondamentalement les mêmes, constituent le second chef d'accusation, la situation invite l'application d'une règle s'opposant aux condamnations multiples. Bien que dans l'espèce présente, il existe l'élément surajouté que constitue l'âge à l'art. 146, par. (1), ceci n'a pas pour effet de distinguer du viol les rapports sexuels illicites. Un âge inférieur à quatorze ans est certainement pertinent lorsqu'il y a eu consentement aux rapports sexuels mais dès lors que cela est éliminé, l'âge perd tout son sens en tant que trait distinctif des infractions de viol et de rapports sexuels.

Le Juge en chef Fauteux et *les* Juges Abbott, Martland et Ritchie *dissidents:* L'appelant n'a pas été trouvé coupable deux fois pour la même infraction. Les arrêts traitant de dualité de peines n'ont rien à voir avec la question de droit qui nous est soumise, laquelle porte sur le pouvoir légal de prononcer la culpabilité quant à deux infractions, distinctes relativement au même acte.

POURVOI à l'encontre d'un arrêt de la Cour d'appel d'Ontario rejetant, sans motifs écrits, un appel des déclarations de culpabilité prononcées contre l'appelant pour (1) viol en contravention de l'art. 143 du *Code criminel* et (2) rapports sexuels avec une personne du sexe féminin âgée de moins de quatorze ans. Pourvoi accueilli, déclaration de culpabilité de rapports sexuels illicites infirmée, le Juge en chef Fauteux, et les Juges Abbott, Martland et Ritchie étant dissidents.

[Arrêts mentionnés: *Hudson c. Lee* (1589), 4 Co. Rep. 43a, 76 E.R. 989; *Cox et Paton c. La Reine,* [1963] R.C.S. 500; *La Reine c. Miles* (1890), 24 Q.B.D. 423; *R. c. Thomas,* [1950] 1 K.B. 26; *Wemyss c. Hopkins* (1875), L.R. 10 Q.B. 378; *R. c. Quon,* [1948] R.C.S. 508; *Connelly c. Director of Public Prosecutions,* [1964] A.C. 1254; *R. c. Morris* (1867), L.R. 1 C.C.R. 90; *R. c. Lockett,* [1914] 2 K.B. 720; *Kelly c. Le Roi* (1916), 54 R.C.S. 220; *R. c. Siggins,* [1960] O.R. 284; *R. c. Hendrick et Smith* (1931), 23 Cr. App. R. 1; *R. c. Hodgson* (1973), 57 Cr. App. R. 502; *R. c. Marcus et Richmond,* [1931] O.R. 164.]

J. D. Morton, c.r., pour l'appelant.

D. A. McKenzie, pour l'intimée.

THE CHIEF JUSTICE (*dissenting*)—For the reasons given by Mr. Justice Ritchie and the comments relevant to this case which I made in *Doré v. The Attorney General of Canada*[1] I would dismiss the appeal.

MARTLAND J. (*dissenting*)—I agree with the reasons of my brother Ritchie. I would like to add the following comment. The point which is in issue in the present appeal was never raised at trial, or before the Court of Appeal.

Presumably, when leave to appeal to this Court was granted it was felt that the outcome of the appeal, if successful, would have some practical favourable consequences for the appellant. However, in the course of his argument, counsel for the appellant conceded that if the appeal succeeded the appellant would not be entitled to obtain a new trial in respect of both the charges against him. He was still subject to the sentence on the charge of rape, which sentence was exactly the same as, and concurrent with, the sentence on the other charge.

In the result, therefore, the appeal to this Court constituted an academic exercise, the only result of which, if successful, will be to prevent the addition to the appellant's already lengthy criminal record of a conviction for the crime of sexual intercourse with a female under the age of fourteen, not being his wife, which crime it is clear that he committed.

The Chief Justice and Abbott and Martland JJ. concurred with the judgment delivered by

RITCHIE J. (*dissenting*)—I have had the advantage of reading the reasons for judgment of my brother Laskin in which he has recounted the circumstances giving rise to this appeal.

The appeal came on for hearing pursuant to an order of this Court granting leave to appeal in accordance with the provisions of s. 618(1)(*b*) of the *Criminal Code*. The jurisdiction conferred by that section is, of course, confined to ques-

[1] [1975] 1 S.C.R. 756.

LE JUGE EN CHEF (*dissident*)—Pour les motifs donnés par le Juge Ritchie et les commentaires pertinents à la présente affaire que j'ai faits dans l'affaire *Fernand Doré c. Le Procureur général du Canada*[1], je rejetterais l'appel.

LE JUGE MARTLAND (*dissident*)—J'adopte les motifs énoncés par mon collègue le Juge Ritchie. J'ajouterais l'observation suivante. Le point en litige dans l'appel n'a jamais été soulevé au procès, ni devant la Cour d'appel.

Il faut présumer qu'on a pensé, lorsque la permission d'interjeter appel en cette Cour fut accordée, que si l'appel était accueilli certaines conséquences pratiques favorables à l'appelant s'ensuivraient. Toutefois, au cours de sa plaidoirie, l'avocat de l'appelant a concédé que si l'appel était accueilli l'appelant n'aurait pas droit à un nouveau procès sous les deux inculpations portées contre lui. Il était toujours assujetti à la peine prononcée sur l'inculpation de viol, et cette peine était exactement la même que celle s'attachant à l'autre inculpation, et devait être purgée en même temps.

En fin de compte, par conséquent, l'appel en cette Cour constitue un débat académique; son seul résultat, s'il est accueilli, sera d'empêcher que soit ajoutée au casier judiciaire déjà lourdement chargé de l'appelant une condamnation pour le crime d'avoir eu des rapports sexuels avec une personne du sexe féminin de moins de quatorze ans qui n'était pas son épouse, crime qu'il a manifestement commis.

Le Juge en Chef et les Juges Abbott et Martland ont souscrit au jugement rendu par

LE JUGE RITCHIE (*dissident*)—J'ai eu l'avantage de lire les motifs de jugement de mon collègue le Juge Laskin, dans lesquels il fait le récit des circonstances dont le présent pourvoi découle.

L'appel fut entendu par suite d'une ordonnance de cette Cour accordant permission d'appeler conformément aux dispositions de l'art. 618, par. (1), al. *b*) du *Code criminel*. La compétence conférée par cet article est, il va sans dire,

[1] [1975] 1 S.C.R. 756.

tions of law in the strict sense and the order which was granted in the present case reads as follows:

IT IS ORDERED that leave to appeal be and the same is hereby granted *limited to* the question whether the accused, having been convicted of rape, should in respect of the same single act have also been convicted of sexual intercourse with a female under the age of fourteen, not being his wife.

(The italics are my own).

In my understanding it has been the general practice of this Court when hearing an appeal pursuant to an order granting leave to confine itself exclusively to the question or questions posed in such an order, and even if the order here in question had not contained express words of limitation, I think it would be contrary to this practice to entertain the appeal on any ground other than the one which is expressly specified.

It is, therefore, important in my view to determine at the outset the exact limits of the question with which this appeal is concerned.

It will at once be apparent that the issue before us is confined to the validity of the second *conviction.* No question is raised as to the propriety of the judge's action in sentencing the appellant as he did on both counts if the second conviction is valid, and indeed, while that was a matter over which the Court of Appeal had jurisdiction, this Court is not clothed with the same authority.

The appellant was charged, together with one Wayne Ronald Constable, that he raped one Jacqueline Mary Chafe contrary to the *Criminal Code*, and second, that he had sexual intercourse with the same girl, she being a female under the age of fourteen years who was not his wife, contrary to the *Criminal Code.* The two accused were arraigned separately on each of the two charges and the appellant pleaded "not guilty" to both. The two offences with which the appellant was charged are defined in the

restreinte aux questions de droit au sens strict du terme et l'ordonnance rendue en l'espèce se lit comme suit:

[TRADUCTION] IL EST ORDONNÉ que la permission d'appeler soit par les présentes accordée, *seulement en ce qui a trait à* la question de savoir si l'accusé, ayant été déclaré coupable de viol, devait à l'égard du seul et même acte être également trouvé coupable d'avoir eu des rapports sexuels avec une personne du sexe féminin âgée de moins de quatorze ans qui n'est pas son épouse.

(J'ai mis des mots en italique).

A mon sens, la pratique généralement suivie par cette Cour lorsqu'elle entend un appel interjeté à la suite d'une ordonnance accordant permission d'appeler est de s'en tenir exclusivement à la question ou aux questions posées dans l'ordonnance, et même si la question en la présente espèce ne renfermait pas des termes expressément restrictifs, je pense qu'il serait contraire à la pratique de connaître d'un appel sur un moyen autre que celui qui est explicitement spécifié.

Il est donc important selon moi de déterminer tout d'abord le cadre exact de la question en jeu dans le présent appel.

Il devient tout de suite manifeste que le litige devant nous est restreint à la validité de la seconde *déclaration de culpabilité.* Personne n'a soulevé la question de savoir si le juge a eu raison d'imposer la sentence qu'il a prononcée sur les deux chefs d'accusation, si la seconde déclaration de culpabilité est valide, et évidemment, bien que la Cour d'appel ait eu compétence en la matière cette Cour n'est pas revêtue de la même autorité.

L'appelant a été inculpé, avec un nommé Wayne Ronald Constable, d'avoir violé une dénommée Jacqueline Mary Chafe en contravention du *Code criminel*, et deuxièmement, d'avoir eu des rapports sexuels avec ladite personne, une personne du sexe féminin âgée de moins de quatorze ans qui n'était pas son épouse, en contravention du *Code criminel.* Les deux accusés furent interpelés séparément sous chacune des deux inculpations et l'appelant a plaidé «non coupable» aux deux. Les deux

Operation Dismantle Inc., Canadian Union of Public Employees, Canadian Union of Postal Workers, National Union of Provincial Government Employees, Ontario Federation of Labour, Arts for Peace, Canadian Peace Research and Education Association, World Federalists of Canada, Alberni Valley Coalition for Nuclear Disarmament, Comox Valley Nuclear Responsibility Society, Cranbrook Citizens for Nuclear Disarmament, Peace Education Network, Windsor Coalition for Disarmament, Union of Spiritual Communities of Christ Committee for World Disarmament and Peace, Against Cruise Testing Coalition, B.C. Voice of Women, National Action Committee on the Status of Women, Carman Nuclear Disarmament Committee, Project Survival, Denman Island Peace Group, Thunder Bay Coalition for Peace and Nuclear Disarmament, Muskoka Peace Group, Global Citizens' Association, Physicians for Social Responsibility (Montreal Branch)
Appellants;

and

Her Majesty The Queen, The Right Honourable Prime Minister, the Attorney General of Canada, the Secretary of State for External Affairs, the Minister of Defence
Respondents.

File No.: 18154.

1984: February 14, 15; 1985: May 9.

Present: Ritchie*, Dickson, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Canadian Charter of Rights and Freedoms — Right to life, liberty and security of person — U.S. cruise missile testing in Canada — Testing alleged to increase risk of nuclear war in violation of that right — Motion to strike out — Whether or not facts as alleged in violation of Charter — Canadian

* Ritchie J. took no part in the judgment.

Operation Dismantle Inc., Syndicat canadien de la Fonction publique, Syndicat des postiers du Canada, Syndicat national de la Fonction publique provinciale, Fédération du travail de l'Ontario, Arts for Peace, Association canadienne d'éducation et de recherche pour la paix, Mouvement canadien pour une fédération mondiale, Alberni Valley Coalition for Nuclear Disarmament, Comox Valley Nuclear Responsibility Society, Cranbrook Citizens for Nuclear Disarmament, Peace Education Network, Windsor Coalition for Disarmament, Union of Spiritual Communities of Christ Committee for World Disarmament and Peace, Against Cruise Testing Coalition, La Voix des femmes (C.-B.), Comité national d'action sur le statut de la femme, Carman Nuclear Disarmament Committee, Project Survival, Denman Island Peace Group, Thunder Bay Coalition for Peace and Nuclear Disarmament, Muskoka Peace Group, Global Citizens' Association, Association des médecins pour la responsabilité sociale (section de Montréal)
Appelants;

et

Sa Majesté La Reine, le très honorable Premier ministre, le procureur général du Canada, le secrétaire d'État aux Affaires extérieures, le ministre de la Défense
Intimés.

N° du greffe: 18154.

1984: 14, 15 février; 1985: 9 mai.

Présents: Les juges Ritchie*, Dickson, Estey, McIntyre, Chouinard, Lamer et Wilson.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte canadienne des droits et libertés — Droit à la vie, à la liberté et à la sécurité de la personne — Essais du missile de croisière américain au Canada — Allégation que les essais accroissent le danger de guerre nucléaire en violation de ce droit — Requête en radiation — Les faits allégués constituent-

* Le juge Ritchie n'a pas pris part au jugement.

Charter of Rights and Freedoms, ss. 1, 7, 24(1), 32(1)(a) — Constitution Act, 1982, s. 52(1).

Jurisdiction — Judicial review — Cabinet decision relating to national defence and external affairs — Whether or not decision reviewable by courts.

Practice — Motion to strike — U.S. cruise missile tests alleged to increase risk of nuclear war in violation of s. 7 of Charter — Whether or not statement of claim should be struck out — Whether or not statement of claim can be amended before statement of defence filed — Federal Court Rules, Rules 419(1), 421, 1104, 1723.

This appeal is from a judgment of the Federal Court of Appeal which allowed respondents' appeal from a judgment dismissing their motion to strike out the appellants' statement of claim.

Appellants alleged that a decision made by the Government of Canada to allow the United States to test cruise missiles in Canada violated s. 7 of the *Charter*. The development of the cruise missile, it was argued, heightened the risk of nuclear war and the increased American military presence and interest in Canada as a result of the testing allegedly made Canada more likely to be a target for nuclear attack. Declaratory relief, an injunction and damages were sought.

Held: The appeal should be dismissed.

Per Dickson, Estey, McIntyre, Chouinard and Lamer JJ.: The appellants' statement of claim should be struck out and their cause of action dismissed. The statement of claim does not disclose facts which, if taken as true, would prove that the Canadian government's decision to permit the testing of the cruise missile in Canada could cause a violation or a threat of violation of their rights under s. 7 of the *Charter*.

The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict and thereby violates the right to life, liberty and security of the person. This alleged violation of s. 7 turns upon an actual increase in the risk of nuclear war resulting from the federal cabinet's decision to permit the testing. This allegation is premised upon assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of uncertainty and change, will react to the Canadian government's decision to permit the testing of the cruise. Since the foreign policy decisions of independent nations are not capable of prediction on the

ils une violation de la Charte? — Charte canadienne des droits et libertés, art. 1, 7, 24(1), 32(1)a) — Loi constitutionnelle de 1982, art. 52(1).

Compétence — Contrôle judiciaire — Décision du cabinet concernant la défense nationale et les affaires extérieures — Les tribunaux peuvent-ils contrôler une telle décision?

Pratique — Requête en radiation — Allégation que les essais du missile de croisière américain accroissent le danger de guerre nucléaire en violation de l'art. 7 de la Charte — La déclaration doit-elle être radiée? — La déclaration peut-elle être modifiée avant la production de la défense? — Règles de la Cour fédérale, règles 419(1), 421, 1104, 1723.

Il s'agit en l'espèce d'un pourvoi contre un arrêt de la Cour d'appel fédérale qui a accueilli l'appel interjeté par les intimés contre un jugement rejetant leur requête en radiation de la déclaration des appelants.

Les appelants allèguent que la décision du gouvernement du Canada d'autoriser les États-Unis à procéder aux essais des missiles de croisière au Canada viole l'art. 7 de la *Charte*. La mise au point du missile de croisière, soutient-on, augmente le danger de guerre nucléaire et la présence militaire et les intérêts américains se trouvant accrus au Canada par suite des essais, cela augmentera la probabilité pour le Canada d'être la cible d'une attaque nucléaire. Un jugement déclaratoire, une injonction et des dommages-intérêts sont demandés.

Arrêt: Le pourvoi est rejeté.

Les juges Dickson, Estey, McIntyre, Chouinard et Lamer: La déclaration des appelants est radiée et leur cause d'action est rejetée. La déclaration n'articule pas des faits qui, s'ils étaient exacts, démontreraient que la décision du gouvernement canadien d'autoriser les essais du missile de croisière au Canada pourrait porter atteinte ou menacer de porter atteinte aux droits que leur confère l'art. 7 de la *Charte*.

Dans la déclaration, il est allégué principalement que les essais du missile de croisière au Canada constituent une menace pour la vie et la sécurité des Canadiens parce qu'ils accroissent le danger de conflit nucléaire et que, par conséquent, ils violent le droit à la vie, à la liberté et à la sécurité de la personne. La prétendue violation de l'art. 7 suppose un accroissement réel du danger de guerre nucléaire résultant de la décision du cabinet fédéral d'autoriser les essais. Cette allégation repose sur des suppositions et des hypothèses concernant la manière dont des pays indépendants et souverains, agissant dans un climat international d'incertitude et de changement, réagiront face à la décision du gouvernement canadien d'autoriser les essais du missile de croi-

basis of evidence to any degree of certainty approaching probability, the nature of the reaction to the federal cabinet's decision to permit the testing can only be a matter of speculation. The appellants could never prove the causal link between the decision to permit the testing and the increase in the threat of nuclear conflict.

Cabinet decisions are reviewable by the courts under s. 32(1)(*a*) of the *Charter* and the executive branch of the Canadian government bears a general duty to act in accordance with the dictates of the *Charter*. The decision to permit the testing of the cruise missile cannot be considered contrary to the duties of the executive since the possible effects of this government action are matters of mere speculation. Section 7 could only give rise to a duty on the part of the executive to refrain from permitting the testing if it could be said that a deprivation of life or security of the person could be proven to result from the impugned government act.

Per Wilson J.: The government's decision to allow the testing of the U.S. cruise missile in Canada, even although an exercise of the royal prerogative, was reviewable by the courts under s. 32(1)(*a*) of the *Charter*. It was not insulated from review because it was a "political question" since the Court had a constitutional obligation under s. 24 of the *Charter* to decide whether any particular act of the executive violated or threatened to violate any right of the citizen.

On a motion to strike out a statement of claim as disclosing no reasonable cause of action, the court must take the allegations of fact therein as proved. If such allegations raise a justiciable issue the court cannot abdicate its responsibility for review on the basis of anticipated problems of proof.

This statement of claim was struck, notwithstanding the general hesitancy of the courts to strike, because the facts disclosed no reasonable cause of action (1) under s. 24(1) of the *Charter*, (2) under s. 52(1) of the *Constitution Act, 1982* or (3) under the common law power to grant declaratory relief. To succeed in their claim for relief under s. 24 of the *Charter* the plaintiffs would have to establish a violation or threat of violation of their right under s. 7 of the *Charter*. To obtain a declaration of unconstitutionality under s. 52(1) of the *Constitution Act, 1982*, the plaintiffs would have to show that the government's decision to test the cruise missile in Canada was inconsistent with their right

sière. Comme les décisions en matière de politique étrangère de pays indépendants et souverains ne sauraient être prédites, à partir de la preuve, avec un degré de certitude qui approcherait de la probabilité, la nature des réactions face à la décision du cabinet fédéral d'autoriser les essais ne peut être que conjecturale. Les appelants ne pourraient jamais établir le lien de causalité entre la décision d'autoriser les essais et l'accroissement de la menace de conflit nucléaire.

Les décisions du cabinet sont assujetties au contrôle judiciaire en vertu de l'al. 32(1)*a*) de la *Charte* et l'exécutif du gouvernement canadien a l'obligation générale d'agir conformément aux préceptes de la *Charte*. La décision d'autoriser les essais du missile de croisière ne peut pas être considérée comme contraire aux obligations du pouvoir exécutif puisque les effets possibles de cette mesure gouvernementale sont purement conjecturaux. L'article 7 n'aurait pu imposer au pouvoir exécutif l'obligation de s'abstenir d'autoriser les essais que si l'on avait pu dire qu'il était possible de prouver qu'une atteinte à la vie ou à la sécurité de la personne pouvait résulter de l'action gouvernementale attaquée.

Le juge Wilson: La décision gouvernementale d'autoriser les essais du missile de croisière américain au Canada, même s'il s'agit d'un exercice de la prérogative royale, est assujettie au contrôle judiciaire en vertu de l'al. 32(1)*a*) de la *Charte*. Elle n'échappe pas au contrôle du fait qu'il s'agit d'une «question politique» puisque la Cour a l'obligation constitutionnelle, en vertu de l'art. 24 de la *Charte*, de décider si un acte particulier quelconque du pouvoir exécutif viole ou menace de violer quelque droit du citoyen.

Lorsqu'elle est saisie d'une requête en radiation d'une déclaration pour le motif que cette dernière ne divulgue aucune cause raisonnable d'action, la cour doit considérer comme prouvées les allégations de fait y contenues. Si ces allégations soulèvent une question qui relève de la cour, celle-ci ne peut abdiquer sa responsabilité de contrôle parce qu'elle anticipe des problèmes de preuve.

La déclaration est radiée, bien qu'en règle générale les tribunaux hésitent à le faire, pour le motif que les faits ne révèlent aucune cause raisonnable d'action fondée (1) sur le par. 24(1) de la *Charte*, (2) sur le par. 52(1) de la *Loi constitutionnelle de 1982*, ou (3) sur le pouvoir de *common law* d'accorder un jugement déclaratoire. Pour avoir droit à une réparation en vertu de l'art. 24 de la *Charte*, les demandeurs doivent établir qu'il y a violation ou menace de violation du droit que leur garantit l'art. 7 de la *Charte*. Pour obtenir une déclaration d'inconstitutionnalité en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*, les demandeurs doivent démontrer que la décision gouvernementale de procéder aux essais du

under s. 7. To obtain declaratory relief at common law, they would have to establish a violation or threatened violation of their right under s. 7.

The government's decision to test the cruise missile in Canada does not give rise to a violation or threatened violation of the plaintiffs' right under s. 7. Even an independent, substantive right to life, liberty and security of the person cannot be absolute. It must take account of the corresponding rights of others and of the right of the state to protect the collectivity as well as the individual against external threats. The central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. It does not extend to incidental effects of governmental action in the field of inter-state relations.

There is at the very least a strong presumption that governmental action concerning the relation of the state with other states, and not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may incidentally increase the risk of death or injury that individuals generally have to face.

Section 1 of the *Charter* was not called into operation here given the finding that the facts as alleged could not constitute a violation of s. 7.

Since the application to amend the statement of claim was filed after the Crown instituted its appeal, the application was made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal applied. Appellants' right under Rule 421 had therefore expired and their only recourse was to proceed under Rule 1104.

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missile de croisière au Canada est incompatible avec le droit que leur confère l'art. 7. Pour obtenir un jugement déclaratoire en *common law*, ils doivent établir qu'il y a violation ou menace de violation du droit que leur confère l'art. 7.

La décision gouvernementale de procéder aux essais du missile de croisière au Canada ne viole ni ne menace de violer le droit que garantit aux demandeurs l'art. 7. Même un droit fondamental et indépendant à la vie, à la liberté et à la sécurité de la personne ne peut être absolu. Il doit prendre en compte les droits correspondants d'autrui ainsi que le droit de l'État de protéger la collectivité aussi bien que l'individu contre des menaces extérieures. L'article vise principalement l'atteinte gouvernementale directe à la vie, à la liberté et à la sécurité personnelle des citoyens. Il ne s'étend pas aux effets incidents de l'action gouvernementale dans le domaine des relations entre États.

Il y a, à tout le moins, une forte présomption qu'on n'a jamais voulu qu'une action gouvernementale concernant les relations de l'État avec d'autres États, et qui donc n'est dirigée contre aucun membre de la collectivité politique immédiate, tombe sous le coup de l'art. 7, même si cette action peut avoir l'effet incident d'accroître le risque de mort ou de préjudice auquel les gens doivent faire face en général.

L'article 1 de la *Charte* ne joue pas en l'espèce étant donné la conclusion que les faits allégués ne peuvent constituer une violation de l'art. 7.

Comme la demande de modification de la déclaration a été produite après que la Couronne eut formé son appel, la requête a été formulée «pendant qu'un appel ... est en cours», de sorte que les règles de la Cour d'appel fédérale s'appliquaient. Le droit que la règle 421 conférait aux appelants devenait donc caduc et leur seul recours était d'agir sur le fondement de la règle 1104.

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APPEAL from a judgment of the Federal Court of Appeal, [1983] 1 F.C. 745, 49 N.R. 363, allowing an appeal from a judgment of Cattanach J., [1983] 1 F.C. 429, dismissing a motion to strike out. Appeal dismissed.

Gordon F. Henderson, Q.C., Lawrence Greenspon and *Emilio Binavince*, for the appellants.

W. I. C. Binnie, Q.C., and *Graham R. Garton*, for the respondents.

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Weston, Melville. «Political Questions,» 38 *Harv. L. Rev.* 296 (1925), 296-333.

Zamir, J. *The Declaratory Judgment*, London, Stevens & Sons Ltd., 1962.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1983] 1 C.F. 745, 49 N.R. 363, qui a accueilli l'appel d'un jugement du juge Cattanach, [1983] 1 C.F. 429, qui avait rejeté une requête en radiation. Pourvoi rejeté.

Gordon F. Henderson, c.r., Lawrence Greenspon et *Emilio Binavince*, pour les appelants.

W. I. C. Binnie, c.r., et *Graham R. Garton*, pour les intimés.

considerations. A court might find that that constituted a violation of s. 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under s. 1 of the *Charter*. Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the Court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review. It is not, however, called into operation here since the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7.

(4) Can the Statement of Claim be Amended?

The appellants were denied leave by Pratte J. to amend their statement of claim by adding the following:

> The very testing of the cruise missiles *per se* in Canada endangers the Charter of Rights and Freedoms Section 7: Rights.

Since this is a conclusion of law, not fact, it cannot in my view affect the factual allegations which the Court must accept as proved in order to decide whether the statement of claim should be struck out. We do not know the basis on which Pratte J. refused the amendment. He gave no reasons, nor was he obliged to. The matter was purely discretionary under Rule 1104. Certainly conclusions of law may be pleaded: see *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd.*, [1948] O.W.N. 221, *per* Gale J. at pp. 221-22, but they do not form part of the factual allegations which must be taken as proved for

question pourrait être différente. Un tribunal pourrait juger qu'il y a là une violation de l'art. 7 et il appartiendrait alors au gouvernement de tenter de démontrer qu'un essai du missile de croisière avec des ogives réelles est justifié en vertu de l'article premier de la *Charte*. L'article premier, à mon avis, constitue le mécanisme purement canadien par l'intermédiaire duquel les tribunaux ont à décider de la justiciabilité de questions litigieuses particulières dont ils sont saisis. Il concrétise par la mention d'une société libre et démocratique les caractéristiques essentielles de notre constitution, y compris la séparation des pouvoirs, le gouvernement responsable et la primauté du droit. Il supprime la nécessité de la doctrine des «questions politiques» et autorise le tribunal à connaître de considérations de «prudence», pourrait-on dire, comme s'il s'agissait de questions de principes, sans abdiquer la responsabilité constitutionnelle qui lui a été attribuée d'exercer un contrôle judiciaire. Il ne joue pas cependant en l'espèce puisque les faits articulés dans la déclaration, même si leur exactitude pouvait être démontrée, ne pourraient, à mon avis, constituer une violation de l'art. 7.

4) La déclaration peut-elle être modifiée?

Le juge Pratte a refusé que les appelants modifient leur déclaration en y ajoutant:

> [TRADUCTION] Les essais des missiles de croisière au Canada, en eux-mêmes, portent atteinte aux droits garantis par l'article 7 de la *Charte des droits et libertés*.

Puisque c'est là une conclusion de droit et non une conclusion de fait, elle ne peut à mon avis modifier les faits que la Cour doit considérer comme démontrés pour décider s'il faut radier la déclaration. Nous ignorons pourquoi le juge Pratte a refusé la modification. Il n'a fourni aucun motif et il n'était pas tenu d'en fournir. La question était purement discrétionnaire en vertu de la règle 1104. On peut certainement plaider des conclusions de droit: voir *Famous Players Canadian Corporation Ltd. v. J.J. Turner and Sons Ltd.*, [1948] O.W.N. 221, le juge Gale aux pp. 221 et 222, mais comme les suppositions et les opinions, elles ne font pas

purposes of a motion to strike. No appeal was taken from the order of Pratte J.

Counsel for the appellants submit that prior to the filing of a statement of defence they were entitled to amend as of right under Rule 421 and that they should not be prejudiced with respect to this right because they invoked the discretion of the Court under Rule 1104. It may, however, be of significance in this connection that their application for amendment to the statement of claim was filed after the Crown had instituted its appeal to the Federal Court of Appeal. In my view, their application was therefore one made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal would apply. This means, in my view, that the appellants' right under Rule 421 had expired and their only recourse was to proceed under Rule 1104.

The point, however, may be academic. The proposed amendment amounts to no more than an assertion of the conclusion which the appellants submit the Court ought to come to on the main issue in the case. Since the Court must address that issue in any event, the addition of the suggested amendment could, it seems to me, make no difference one way or the other to the appellants' case.

Conclusions

In summary, it seems to me that the issues raised on the appeal are to be disposed of as follows:

(1) The government's decision to permit testing of the cruise missile in Canada cannot escape judicial review on any of the grounds advanced;

(2) The statement of claim may be struck out if the facts as alleged do not disclose a reasonable cause of action which in this case could be either

(a) a cause of action under s. 24(1) of the *Charter*; or

partie des allégations de fait qu'on doit considérer comme démontrées aux fins d'une requête en radiation. L'ordre du juge Pratte n'a pas été porté en appel.

Les avocats des appelants soutiennent que tant qu'il n'y avait pas production d'une défense, ils étaient autorisés de plein droit à modifier leur déclaration conformément à la règle 421, et qu'ils ne devraient pas perdre ce droit simplement parce qu'ils ont invoqué le pouvoir discrétionnaire de la Cour aux termes de la règle 1104. Il peut cependant être significatif à cet égard que leur demande de modification de la déclaration a été produite après que la Couronne eut formé son appel en Cour d'appel fédérale. À mon avis, leur requête a donc été formulée «pendant qu'un appel ... est en cours» de sorte que les règles de la Cour d'appel fédérale s'appliquaient. Cela signifie, à mon avis, que le droit que la règle 421 conférait aux appelants devenait caduc et que leur seul recours était d'agir sur le fondement de la règle 1104.

Cependant, la question peut bien être théorique. La modification proposée n'est rien d'autre que l'assertion de la conclusion à laquelle, soutiennent les appelants, la Cour devrait arriver sur la question principale. Comme la Cour doit examiner la question de toute façon, l'ajout de la modification proposée ne ferait, me semble-t-il, aucune différence dans un sens ou dans l'autre en ce qui concerne la thèse des appelants.

Conclusions

En bref, il me semble que les questions soulevées par le pourvoi doivent être tranchées ainsi:

(1) la décision gouvernementale d'autoriser l'essai du missile de croisière au Canada ne saurait échapper au contrôle judiciaire pour aucun des motifs qu'on a fait valoir;

(2) la déclaration peut être radiée si les faits articulés ne révèlent aucune cause raisonnable d'action, laquelle en l'espèce pourrait être:

a) une cause d'action fondée sur le par. 24(1) de la Charte; ou

(b) a cause of action for declaratory relief at common law on the principle of *Dyson v. Attorney-General, supra*; or

(c) a cause of action under s. 52(1) of the *Constitution Act, 1982* for a declaration of unconstitutionality.

(3) Taking the facts alleged as proven, they could not constitute a violation of s. 7 of the *Charter* so as to give rise to a cause of action under s. 24(1);

(4) The appellants could not establish their status to sue at common law for declaratory relief for the same reason that they could not establish a cause of action under s. 24(1); and

(5) The appellants could not establish a cause of action for declaratory relief under s. 52(1) since the facts as alleged could not constitute a violation of s. 7 and therefore no inconsistency with the provisions of the Constitution could be established.

I would accordingly dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Karam, Tannis, Greenspon, Vanier.

Solicitor for the respondents: R. Tassé, Ottawa.

b) une cause d'action qui vise à obtenir un jugement déclaratoire de *common law* selon le principe de l'arrêt *Dyson v. Attorney-General*, précité; ou

c) une cause d'action fondée sur le par. 52(1) de la *Loi constitutionnelle de 1982*, visant à obtenir un jugement déclaratoire d'inconstitutionnalité.

(3) les faits articulés, même considérés comme prouvés, ne peuvent constituer une violation de l'art. 7 de la *Charte* de manière à donner naissance à une cause d'action fondée sur le par. 24(1);

(4) les appelants n'ont pu démontrer leur qualité pour demander, en *common law*, un jugement déclaratoire pour la même raison qu'ils n'ont pu établir une cause d'action fondée sur le par. 24(1);

(5) et enfin les appelants n'ont pu établir une cause d'action pour obtenir un jugement déclaratoire en vertu du par. 52(1) puisqu'il n'existe aucune «règle de droit» que l'on puisse contester.

Je suis donc d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants: Karam, Tannis, Greenspon, Vanier.

Procureur des intimés: R. Tassé, Ottawa.

Assuming the existence of a fiduciary relationship in 1978 or 1979, it would have been superceded by the subsequent events and the conduct of Mr. Pape in dealing with the project.

The appeal is allowed with costs. The judgment below is set aside and the action is dismissed with costs.

Appeal allowed.

Milliken & Co. et al. v. Interface Flooring Systems (Canada) Inc.

[Indexed as: Milliken & Co. v. Interface Flooring Systems (Canada) Inc.]

Court File No. T-3016-92

Federal Court, Trial Division, Nadon J. *December 14, 1993.**

Civil procedure — Pleadings — Amendment — Concurrent filing of amendment of statement of claim and appeal from order setting aside former order striking statement of claim — Federal Court Rules, C.R.C. 1978, c. 663, Rules 421 and 1104 — Amendment not relevant to appeal.

The plaintiffs filed a statement of claim alleging copyright infringement. The defendants succeeded in having it struck for failing to disclose a cause of action. Upon appeal, the order striking the statement of claim was set aside. The plaintiffs then filed an amended statement of claim, adding a claim for industrial design infringement. On the same day the defendant filed a notice of appeal.

The defendants subsequently brought a motion to strike the amendments. At first instance the court concluded that Rule 421 of the *Federal Court Rules*, C.R.C. 1978, c. 663, pursuant to which the amendments had been made, was inappropriate. The amendments were struck and the plaintiffs appealed.

Held, the appeal is allowed.

The amendments were filed during the pendency of an appeal. When the amendments sought pertain to matters under consideration on appeal, they must be made under Rule 1104. The amendments in this case bear no relevance to the subject-matter of the defendant's appeal. There is no reason to defer from the general principles of Rule 421. The defendant's motion to strike the amendment is denied as it is not plain and obvious that the plaintiff's case cannot possibly succeed.

United Brotherhood of Carpenters and Joiners of America, Local 2103 v. The Queen (1986), 9 F.T.R. 7; *Kibale v. Canada* (1990), 123 N.R. 153, 50 F.T.R. 320*n*, 25 A.C.W.S. (3d) 726; *Karlsson v. M.N.R.*, [1991] 2 C.T.C. 282, 91 D.T.C. 5611, 30 A.C.W.S. (3d) 20, **apld**

Operation Dismantle Inc. v. Canada (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441, 13 C.R.R. 287, 59 N.R. 1, 31 A.C.W.S. (2d) 45, **distd**

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* Judgment received February 16, 1994.

Other cases referred to

Milliken & Co. v. Interface Flooring Systems (Canada) Inc. (1993), 48 C.P.R. (3d) 320, 62 F.T.R. 318, 39 A.C.W.S. (3d) 1193; revd 52 C.P.R. (3d) 92, 69 F.T.R. 39, 44 A.C.W.S. (3d) 402

Statutes referred to

Industrial Design Act, R.S.C. 1985, c. I-9

Rules and regulations referred to

Federal Court Rules, C.R.C. 1978, c. 663, Rules 419(1)(*a*), (2), 420 to 430, 1104

APPEAL from an order of Giles A.S.P. striking out the plaintiffs' amendments to their statement of claim, allowed.

Alexander Macklin, Q.C., for plaintiffs.
Gregory A. Piasetzki, for defendant.

NADON J.:—The plaintiffs are appealing from the order of Giles Associate Senior Prothonotary (A.S.P.), dated November 8, 1993, pursuant to which the plaintiffs' amendments to their statement of claim were struck.

Facts

The relevant facts are as follows:

The plaintiffs filed a statement of claim on December 11, 1992, in which they allege that the defendant infringed their copyright in an artistic work known as "Mangrove" which was originally published as a textile design pattern for carpet tiles.

On January 6, 1993, the defendant brought a motion to strike the plaintiffs' statement of claim on the ground that it failed to disclose a reasonable cause of action. Giles A.S.P. granted the defendant's motion to strike the statement of claim and dismissed the plaintiffs' action by an order dated April 15, 1993 [*Milliken & Co. v. Interface Flooring Systems (Canada) Inc.* (1993), 48 C.P.R. (3d) 320, 62 F.T.R. 318, 39 A.C.W.S. (3d) 1193].

The plaintiffs appealed the order of Giles A.S.P. and by an order dated October 7, 1993, Strayer J. allowed the plaintiffs' appeal thus setting aside the order striking out the statement of claim and dismissing the action [52 C.P.R. (3d) 92, 69 F.T.R. 39, 44 A.C.W.S. (3d) 402].

On October 15, 1993, the plaintiffs filed an amended statement of claim pursuant to Rule 421 of the *Federal Court Rules*, C.R.C. 1978, c. 663, in the Ottawa Registry, adding to their claim for infringement of copyright, a claim for infringement of an industrial design registration. On the same day, the defendant filed a notice of appeal of Strayer J.'s order in the Toronto Registry of this court.

The amendments which the plaintiffs seek to make to their statement of claim relate to industrial design registration No.

67420 of the plaintiff, Milliken & Company, which issued on November 6, 1990. The amendments sought to be made pertain exclusively to the industrial design infringement and have nothing to do with the subject-matter of the pending appeal which is concerned only with the copyright issue.

On November 1, 1993, the defendant brought a motion to strike the industrial design amendments on the ground that the amendments could not be made by virtue of Rule 421, but rather, could only be made pursuant to Rule 1104. In the alternative, the defendant seeks to strike the amendments on the ground that they do not disclose a reasonable cause of action.

On November 8, 1993, Giles, A.S.P. held that Rule 1104 was applicable and that the plaintiffs could not amend their statement of claim pursuant to Rule 421.

The issues in this appeal, as they appear from the plaintiffs' memorandum of argument, are as follows:

> (1) Does Rule 1104 apply to this matter so that the Amended Statement of Claim could not be filed during the pendency of an appeal;
>
> (2) If the answer to the first issue is yes, then was the Amended Statement of Claim filed during the pendency of an appeal;
>
> (3) If the answer to the first or the second question is no, it is plain and obvious that the amendments in the Amended Statement of Claim do not disclose a reasonable cause of action.

Analysis

This matter is an appeal from the order of Giles A.S.P. rendered on November 8, 1993. In my view, I am fully entitled to decide this appeal *de novo*. The first and second issues raise questions of law and the third issue, even though it involves the exercise of discretion under Rule 419(1)(*a*), raises a question essential to the final issue in the case.

I will deal first of all with the second issue. The answer to this question must necessarily be in the affirmative as both the notice of appeal and the amendments were filed, in Toronto and in Ottawa, on October 15, 1993. The fact that the amendments may have been filed minutes or hours earlier is, in my view, irrelevant.

I now turn to the first issue. Rules 421 and 1104 read as follow:

> 421(1) A party may, without leave, amend any of his pleadings at any time before any other party has pleaded thereto.
>
> (2) A party may, without leave, amend any of his pleadings at any time on the filing of the written consent of the opposite party.
>
> . . . . .
>
> 1104(1) At any time during the pendency of an appeal or other proceeding in the Court of Appeal, the Court may, upon the application of any party, or without any such application, make all such amendments as are necessary

for the purpose of determining the appeal or other proceeding, or the real question in controversy between the parties as disclosed by the pleadings, evidence or proceedings.

(2) An amendment may be made under paragraph (1), whether the necessity for the same is or is not occasioned by the defect, error, act, default or neglect of the party applying to amend.

(3) Every amendment shall be made upon such terms as to payment of costs, postponing or adjourning a hearing or otherwise, as to the Court seems just.

The meaning of Rule 421(1) is clear, that is that a plaintiff may file an amended statement of claim, without leave, until such time as the defendant has filed its defence: see *United Brotherhood of Carpenters and Joiners of America, Local 2103 v. The Queen* (1986), 9 F.T.R. 7 (T.D.).

The controversy herein results from the fact that both the amendments and the defendant's notice of appeal were filed on the same day. As a result, the defendant takes the position that any amendments to the statement of claim during the pendency of the appeal can only be made in virtue of Rule 1104.

In support of its position, the defendant relies on the minority judgment of Wilson J. in the case of *Operation Dismantle Inc. v. Canada* (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441, 13 C.R.R. 287. Specifically, the defendant relies on a statement made by Wilson J. at p. 519 where she writes:

> Counsel for the appellants submit that prior to the filing of a statement of defence they were entitled to amend as of right under Rule 421 and that they should not be prejudiced with respect to this right because they invoked the discretion of the court under Rule 1104. It may, however, be of significance in this connection that their application for amendment to the statement of claim was filed after the Crown had instituted its appeal to the Federal Court of Appeal. In my view, their application was therefore one made "during the pendency of an appeal" to which the rules of the Federal Court of Appeal would apply. This means, in my view, that the appellants' right under Rule 421 had expired and their only recourse was to proceed under Rule 1104.
>
> The point, however, may be academic. The proposed amendment amounts to no more than an assertion of the conclusion which the appellants submit the court ought to come to on the main issue in the case. Since the court must address that issue in any event, the addition of the suggested amendment could, it seems to me, make no difference one way or the other to the appellants' case.

It is my view that the principle stated by Wilson J. must be interpreted so as to apply only in so far as the proposed amendment pertains to an issue under appeal. Rule 1104 does not state, expressly or implicitly, that Rule 421 cannot be resorted to by a party during the pendency of an appeal. What Rule 1104 states is that the Court of Appeal may, upon application by a party or without any such application, permit amendments which are

necessary for the determination of the appeal or of the real controversy between the parties.

Thus, when the amendments sought to be made pertain to a matter or matters that are under consideration in the appeal, they must be made in accordance with Rule 1104. In the *Operation Dismantle* case, it is clear from the judgment of Wilson J. that the proposed amendment was in respect of an issue under consideration by the Supreme Court on the appeal. In the present case, the amendments which the plaintiffs seek to make pertain to the alleged infringement of their industrial design registration, an issue that bears no relevance to the subject-matter of the defendant's appeal.

The defendant's position is one of "all or nothing". In other words, if I were to accept the defendant's reasoning, the plaintiffs could not, during the pendency of the appeal, make any amendments whatsoever. For example, the plaintiffs could not amend their statement of claim to correct the quantum of their damages even though such an amendment would have no bearing on, or relevance to, the issue under appeal.

I cannot accept the defendant's argument on this point. In my view, the purpose of Rule 1104 is to give the Court of Appeal control over those aspects of pleadings which it will likely consider. If the Court of Appeal is to effectively deal with issues on appeal, parties should not be able to amend the aspects of their pleadings dealing with these issues without leave of the Court of Appeal. Where the amendments in question will not be considered by the Court of Appeal, there is no reason to defer from the general principles of Rules 420 to 430 of which Rule 421 permits plaintiffs to amend their statement of claim without leave until the defendants have pleaded thereto.

I therefore conclude that Rule 1104 does not apply to the amendments which the plaintiffs seek to make.

I now turn to the third issue. The amendments which the plaintiffs seek to make relate to the plaintiff Milliken and Company's industrial design registration No. 67420 which was registered in Ottawa on November 6, 1990.

The plaintiffs allege that the *Industrial Design Act*, R.S.C. 1985, c. I-9, did not allow them to assert their design registration when they filed their original statement of claim on December 11, 1992. They allege, however, that the *Industrial Design Act* was amended by the Intellectual Property Improvement Bill, Bill S-17, S.C. 1993, c. 15, and as a result of this amendment, the assigned registered industrial design is opposable to the defendant.

The defendant's application to strike the amendments is based on Rule 419(1)(*a*) and Rule 419(2) which read as follows:

> 419(1) The Court may at any stage of an action order any pleading or anything in any pleading to be struck out, with or without leave to amend, on the ground that
>
> (*a*) it discloses no reasonable cause of action or defence, as the case may be,
>
> . . . . .
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(*a*).

The case law is clear that for a motion brought under Rule 419(1)(*a*) to succeed, it must be plain and obvious that the plaintiff's case cannot possibly succeed. I cannot so conclude.

The defendant argues, among other things, that as the plaintiffs' amendments relating to the industrial design registration were not brought within 12 months of the cause of action, the plaintiffs' rights of action in regard thereto are extinguished. Such an argument was addressed by the Federal Court of Appeal in *Kibale v. Canada* (1990), 123 N.R. 153, 50 F.T.R. 320*n*, 25 A.C.W.S. (3d) 726 (C.A.). At pp. 154-5, Pratte J.A. writes as follows:

> A motion under rule 419(1)(a) must be considered solely on the basis of the procedural documents, as no evidence is admissible. This is stated in rule 419(2) [see footnote 1]. On the other hand, a statute of limitations under the common law does not terminate the cause of action, but only gives the defendant a procedural means of defence that he may choose not to employ and must, should he choose to employ it, plead in his defence (see rule 409). In other words, a plaintiff is not, in writing his declaration, obligated to allege all the facts demonstrating that his action was brought in due time. A plaintiff is not obligated to foresee all the arguments the adverse party might bring against him. He can wait until the defence is filed and, should the defendant argue that the action is late, plead in reply any facts disclosing, in his opinion, that it is not late. It follows that, as Collier, J., held in *Hanna et al. v. Canada* (1986), 9 F.T.R. 124, a defendant must plead a statute of limitations in his defence; he cannot do so in a motion to strike out under rule 419 because, for the reasons I have set out, an action cannot be said to be late on the sole ground that the statement does not demonstrate it is not late.

The *Kibale* case was followed by Rouleau J. in *Karlsson v. M.N.R.*, [1991] 2 C.T.C. 282, 91 D.T.C. 5611, 30 A.C.W.S. (3d) 20 (F.C.T.D.). Thus, in my view, Rule 419(1)(*a*) is not the proper vehicle to assert a defence based on limitation.

For these reasons, the plaintiffs' appeal is allowed and the order of Giles A.S.P. dated November 8, 1993, striking out the plaintiffs' amendments is set aside.

Costs shall be in the cause.

Appeal allowed.

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by B-Filer Inc, B. Filer Inc. doing business as GPAY GuaranteedPayment and NPay Inc. for an order pursuant to section 103.1 granting leave to make application under sections 75 and 77 of the *Competition Act*;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and NPay Inc. for an interim order pursuant to section 104 of the **Competition Act**.

BETWEEN:

B-FILER INC. Applicants	- and -	THE BANK OF NOVA SCOTIA Respondent

Court File No. CT 2005-006

COMPETITION TRIBUNAL

THE BANK OF NOVA SCOTIA'S
BRIEF OF AUTHORITIES
Motion to Amend Pleadings
April 27, 2006

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