File No. CT-2005-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE ***COMPETITION ACT***, R.S., 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) of the *Competition Act* relating to the marketing practices of The Dosco Group Inc., Fabutan Corporation, Fabutan Studios and Douglas Scott McNabb, President, carrying on business as Fabutan Sun Tan Studios;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to Section 74.01 of the *Competition Act*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

The Dosco Group Inc., Fabutan Corporation, Fabutan Studios and Douglas Scott McNabb, President carrying on business as Fabutan Sun Tan Studios;

Respondents

APPLICANT'S MEMORANDUM OF LAW

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INDEX

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APPLICANT'S MEMORANDUM OF LAW

Overview

1. The Respondent corporations move for an order granting leave to be represented by Doug McNabb, a Director of the Respondent corporations.

2. The Applicant opposes such an order on the grounds that the corporations have not shown that they cannot afford to retain counsel and that the proposed representative will be both witness and advocate.

The Standard for Granting Leave

3. The Tribunal applies the same rule respecting the representation of corporations in its proceedings as that applied by the Federal Court.

Rule 72(1), *Competition Tribunal Rules*, SOR/94-290

4. That rule states that a corporation shall be represented by a solicitor in all proceedings before the Tribunal, unless the Tribunal in special circumstances grants leave to it to be represented by an officer of that corporation.

Rule 120, *Federal Court Rules 1998*, SOR/98-106

5. The onus of "special circumstances" is a high one requiring clear and unambiguous evidence before the Court will exercise its discretion to grant an exception to the general rule.

Source Services Corp. v. Source Personnel Inc., [1995] F.C.J. No. 1658 (F.C., T.D.) at para. 4

6. "Special circumstances" are circumstances that are unusual, uncommon and exceptional and the result of external forces as distinct from the voluntary acts of the respondent.

Source Services Corp. v. Source Personnel Inc., supra, at para. 5

7. The factors relevant to whether special circumstances exist include: (1) whether the corporation can pay for a lawyer; (2) whether the proposed representative will

be required to appear as advocate and as a witness; (3) the complexity of the legal issues to be determined; and (4) whether the action can proceed in an expeditious manner.

Kobetek Systems Ltd. v. Canada, [1998] F.C.J. No. 16 (F.C., T.D.)

8. There must also be evidence proving that (5) that the proposed representative is an officer of the corporation and (6) that the proposed representative has been authorized by the corporation to represent it.

Chase Bryant Inc. v. Canada, [2002] T.C.J. No. 663 (T.C.C.) at para. 3

Source Services Corp. v. Source Personnel Inc., supra, at para. 6

9. The Applicant submits that the Respondents have not adduced clear evidence that they cannot afford to retain counsel. The Applicant further submits that Douglas McNabb, the Respondents' proposed representative, will be both a witness and an advocate in these proceedings

10. The Applicant concedes that the legal issues in this case are not complex. This case will turn on matters of fact and scientific and medical opinion.

11. The Applicant takes no position with respect to the remaining factors.

Whether the Corporation Can Pay for a Lawyer

12. Under this factor, the corporation seeking to leave to be represented by an officer must establish (1) that the corporation was impecunious and (2) that it could not raise the necessary funds from its shareholders.

Kobetek Systems Ltd. v. Canada, supra, at paras. 6, 8

Source Services Corp. v. Source Personnel Inc., supra, at paras. 8, 17

13. The Respondent corporations have not established that they are impecunious or that they are unable to secure funds from other sources to retain counsel.

14. The Respondent corporations have not established that they could not raise the necessary funds from its shareholders. It is not clear from the Affidavit of Doug McNabb that Mr. McNabb is the sole shareholder of the corporations to which he refers.

15. It is not clear how the corporations relate to one another, what relationship they have with franchisees of Fabutan and whether the corporations can secure funds through franchise arrangements or otherwise.

16. It is not clear from the Affidavit that Mr. McNabb lacks the personal resources to retain counsel or that other shareholders lack such resources.

17. Ms. McNabb states that he has pledged all of his personal assets as security of capital costs and operating expenses. He says nothing about his salary or his ability to pay counsel from savings or other possible sources of capital. Similarly, there is no evidence about the resources available to any other shareholders.

The Proposed Representative Will Appear As Advocate and Witness

18. Although the Federal Court has not applied the rule prohibiting lawyers from appearing as both counsel and witness with the same force to lay representatives, the potential conflict between these dual roles remains a concern.

Sharpe's Tropical Shell Co. v. The Queen (1996), 100 F.T.R. 59

Artemis Holdings Ltd. v. Canada (Customs and Revenue Agency), [2002] F.C.J. No. 662

19. Leave should not be given for a corporation to be represented by an officer unless denying leave would effectively deny an impecunious company its day in court.

> *Artemis Holdings Ltd. v. Canada (Customs and Revenue Agency), supra*, at para. 15

20. The Disclosure Statement filed by the Respondents indicates that Doug McNabb will testify with respect to the following matters, among others:

(a) the relationship between the corporate respondents;

(b) the nature of UV radiation and the tanning process;

(c) the nature of the tanning industry;

(d) Fabutan's equipment, standards and practices; and

(e) the risks and benefits associated with tanning.

21. This evidence goes to the very heart of the issues between the parties. The evidence cannot be characterized as "background" evidence.

22. The Tribunal will be required to assess Mr. McNabb's credibility. This is one of the concerns which underlies the prohibition on counsel appearing as a witness. That assessment may have an impact on the Tribunal's consideration of Mr. McNabb's submissions as representative.

23. It will be difficult for Mr. McNabb and for the Tribunal to distinguish between his advocacy and his evidence. For example, the witness may not distinguish between matters of fact and matters of belief, matters of genuine scientific debate, matters of law and submissions.

24. As a practical matter, Mr. McNabb will have to give his evidence in a narrative form rather than in response to questions from counsel. This has the potential to lead to confusion and may inhibit effective cross-examination.

25. For these reasons, it always preferable that a witness be examined by counsel.

Order Sought

26. The Applicant respectfully requests that this motion be denied.

Dated at Ottawa, Ontario, this 18th day of November, 2005.

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SCHEDULE A

1. *Competition Tribunal Rules*, SOR/94-290, Rule 72(1)

2. *Federal Court Rules 1998*, SOR/98-106, Rule 120

SCHEDULE B

1. *Source Services Corp. v. Source Personnel Inc.*, [1995] F.C.J. No. 1658 (F.C., T.D.)

2. *Kobetek Systems Ltd. v. Canada*, [1998] F.C.J. No. 16 (F.C., T.D.)

3. *Chase Bryant Inc. v. Canada*, [2002] T.C.J. No. 663 (T.C.C.)

4. *Sharpe's Tropical Shell Co. v. The Queen* (1996), 100 F.T.R. 59

5. *Artemis Holdings Ltd. v. Canada (Customs and Revenue Agency)*, [2002] F.C.J. No. 662

Competition Tribunal Rules

SOR/94-290

SHORT TITLE

1. These Rules may be cited as the *Competition Tribunal Rules*.

72. (1) Where, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Court Rules*, C.R.C., 1978, c. 663, shall be followed, with such modifications as the circumstances require.

)(, ch. 8, art. 58 (ann.)

PART 3

FEDERAL COURT RULES, 1998

SOR/98-106, as am. S.C. 2002, c. 8, ss. 182(3)(a), 183(2)(a); SOR/2002-417, ss. 1–20, 21 (Fr.), 22–24, 25 (Fr.), 26–30.

RÈGLES DE LA COUR FÉDÉRALE (1998)

DORS/98-106, telles que modifiées par L.C. 2002, ch. 8, art. 182(3)a), 183(2)a); DORS/2002-417, art. 1 à 17, 18 (A), 19, 20 (A), 21 à 27, 28 (A), 29 (A), 30.

PART 1 — APPLICATION AND INTERPRETATION

Application of this Part

1. (1) Application — These Rules apply to all proceedings in the Court unless otherwise provided by or under an Act of Parliament.

(2) Inconsistency with Act — In the event of any inconsistency between these Rules and an Act of Parliament or a regulation made thereunder, that Act or regulation prevails to the extent of the inconsistency.

PARTIE 1 — APPLICATION, DÉFINITIONS ET INTERPRÉTATION

Champ d'application

1. (1) Application — Sauf disposition contraire d'une loi fédérale ou de ses textes d'application, les présentes règles s'appliquent aux instances devant la Cour.

(2) Dispositions incompatibles — Les dispositions de toute loi fédérale ou de ses textes d'application l'emportent sur les dispositions incompatibles des présentes règles.

Notes

The *Federal Court Rules, 1998*, SOR/98-106, came into force on April 25, 1998. They repeal and replace the *Federal Court Rules*, C.R.C. 1978, c. 663. The new Rules apply to proceedings commenced before or after their coming into force: rule 501.

The first amendments to the *Federal Court Rules, 1998* were made by SOR/2002-417, effective November 21, 2002. The most notable change is the establishment of a modern class action regime by new rules 299.1 *et seq.*

The *Federal Court Rules, 1998* were also amended by the *Courts Administration Service Act* ("CASA"). Section 182(3) of the CASA replaces the expression "*Federal Court Act*" in the

Funding of Counsel

A.B. v. Canada (Min. of Citizenship & Immigration) (1997), 142 F.T.R. 161 (T.D.) — Section 7 of the *Charter of Rights* does not create a right to state-funded counsel in an inquiry under the *Immigration Act* to determine an individual's admissibility to Canada.

Jimenez-Beza v. Canada (1996), 123 F.T.R. 317 (T.D.) — The Court is without jurisdiction to appoint state-funded legal counsel to assist a party who cannot obtain counsel.

Henry v. Minister of Justice (1987), 15 F.T.R. 29 (T.D.) — There is nothing in the *Federal Court Act* or Rules which gives the Court jurisdiction to appoint state-funded counsel to act for a plaintiff or defendant.

120. Corporations or unincorporated associations — A corporation, partnership or unincorporated association shall be represented by a solicitor in all proceedings, unless the Court in special circumstances grants leave to it to be represented by an officer, partner or member, as the case may be.

120. Personne morale, société de personnes ou association — Une personne morale, une société de personnes ou une association sans personnalité morale se fait représenter par un avocat dans toute instance, à moins que la Cour, à cause de circonstances particulières, ne l'autorise à se faire représenter par un de ses dirigeants, associés ou membres, selon le cas.

Case Law

Gunner Industries Ltd. v. R., [2002] 4 C.T.C. 190, 2002 D.T.C. 7379, 2002 CarswellNat 2263, 2002 FCA 302 — To obtain such an order under rule 120, it is necessary to show special circumstances, such as the company cannot afford a solicitor, the issues are not complex or that the matter can be handled expeditiously by the proposed representative. Evidence must be provided to the Court in support of an order under this rule.

S.A.R. Group Relocation Inc. v. Canada (A.G.) (2002), 289 N.R. 163, 2002 CarswellNat 575, 2002 FCA 99 — A Court requires clear evidence that a company seeking to be represented by a corporate officer is truly unable to pay for a lawyer and that the person proposed to represent the corporation has been authorized to do so. A relevant consideration on such an application is whether the proposed representative would also be a witness.

Artemis Holdings Ltd. v. Canada (Customs & Revenue Agency) (2002), 19 C.P.R. (4th) 509, 220 F.T.R. 98, 2002 D.T.C. 7070, 2002 CarswellNat 1001, 2002 FCT 504 (Proth.) — Following the reasoning in *S.A.R. Group Relocation Inc.*, above, there is a differentiation between the roles of lawyer and witness, on the one hand, and the roles of a representative and witness on the other. The latter role merely militates against allowing a lay representative to act as a representative when that person might be a witness.

Synchronics Ltd. v. Synchronics Inc., 2001 CarswellNat 1171, 2001 FCA 172 — The Court granted partners in a business permission to represent their partnership on an appeal against an award of costs against the partnership given that these partners would be personally responsible for paying the costs if the appeal was unsuccessful.

WIC Premium Television Ltd. v. Levin (2001), 211 F.T.R. 201, 2001 CarswellNat 2136, 2001 FCT 1042; reconsideration refused 2001 CarswellNat 2672, 2001 FCT 1255 — The existence of special circumstances must be proved by affidavit. Such an affidavit should address impecuniousity and whether the proposed representative might be a witness in the

** Unedited **

Indexed as:

Source Services Corp. v. Source Personnel Inc.

Between
Source Services Corporation, plaintiff, and
Source Personnel Inc., defendant

[1995] F.C.J. No. 1658
Action No. T-1841-95

Federal Court of Canada - Trial Division
Toronto, Ontario
Rouleau J.

Heard: November 20, 1995
Judgment: December 11, 1995
(6 pp.)

Practice — Actions, conduct of — Party self-representation, companies.

The plaintiff appealed from an order granting K leave to represent the corporate defendant on his undertaking that he would not give evidence and that he would be responsible for any costs awarded against the defendant. The Prothonotary found that the balance sheets submitted indicated that the defendant could not readily retain a lawyer. The plaintiff argued that the evidence did not meet the test of special circumstances, that the two essential pre-conditions, namely that K was authorized by the corporation to represent it and that the corporation was impecunious were not met.

HELD: The appeal was allowed. The Prothonotary erred in granting leave. The balance sheet in question did not provide sufficient detail as to the financial status of the corporation. No evidence was adduced as to the impecuniosity of the shareholders. There was no indication of the special circumstances necessary under Rule 300(2).

Statutes, Regulations and Rules Cited:

Federal Court Rules, Rules 300(2), 336(5).

Counsel:

Arthur Renaud, for the plaintiff.
Micheal Kichuk, for the defendant.

¶ 1 **ROULEAU J.** (Reasons for Order):— On October 18, 1995, the Defendant filed a motion for an Order granting leave to Michael Kichuk, who is not a barrister and solicitor, to act on behalf of the Corporate Defendant Source Personnel Inc. as provided in Rule 300(2) of the Federal Court Rules. The grounds for the motion were that Michael Kichuk, an officer and director of the corporate defendant, is familiar with the Rules and Order of this Honourable Court and does not have sufficient cash flow to fund a solicitor to act for the corporation prior to trial.

¶ 2 On Monday the 23rd day of October, 1995, Peter A.K. Giles, Associate Senior Prothonotary, granted leave to Michael Kichuk to represent the Corporate Defendant Source Personnel Inc. in this Court on the understanding

that he should not give evidence and that he will undertake to be responsible for any costs which may be awarded against the Defendant. In his decision, Mr. Giles stated that "the abbreviated unchallenged balance sheet submitted subject to confidentiality order indicates that at September 30th, the Defendant could not readily retain lawyers".

¶ 3 The Plaintiff now appeals this Order. The Plaintiff submits that the Associate Senior Prothonotary was wrong in permitting Mr. Kichuk to act on the Defendant's behalf for the following reasons.

¶ 4 Firstly, the onus of "special circumstances" imposed by Rule 300(2) of the Federal Court Rules is a high onus which requires that clear and unambiguous evidence be before the Court before it will exercise its discretion to grant an exception to the general rule that a corporation shall be represented by a barrister and solicitor. The evidence filed by the Defendant did not meet this high threshold.

¶ 5 Secondly, the test of "special circumstances" means circumstances that are unusual, uncommon and exceptional and the result of external forces as distinct from the voluntary acts of the Defendant. There was no evidence of "special circumstances" filed by the Defendant.

¶ 6 Thirdly, the two essential pre-conditions, namely (1) that Mr. Kichuk was authorized by the corporation to represent it; and (2) that the corporation was impecunious; were not met by the evidence filed by the Defendant.

¶ 7 Fourthly, the evidence tendered by the Defendant to attempt to establish impecuniosity should have been given little or no weight since it was replete with unanswered questions relating to the financial affairs of the Defendant.

¶ 8 Lastly, to establish "impecuniosity", the Defendant was required to show not only that it did not have sufficient assets itself, but also that it could not raise the necessary funds from its shareholders. There was no evidence before the Court concerning the impecuniosity of the Defendant's shareholders.

¶ 9 An Order of a prothonotary can be appealed to this Court pursuant to Rule 336(5) of the Federal Court Rules which provides as follows:

> (5) Any person affected by an order or decision of a prothonotary, other than a judgment under Rules 432 to 437, may appeal therefrom to the Court and such appeal shall be made by an application of which a notice shall be given to all interested parties setting forth the grounds of objection and served within 14 days after the order of decision complained of, and 4 clear days before the day fixed for hearing the same, or served within such other time as may be allowed by the Court of a prothonotary on ex parte application. The appeal shall be filed no later than 2 days before the date named for hearing (In this paragraph, "Court" means "Trial Division", if the matter is in the Trial Division, and "Court of Appeal", if the matter is in the Court of Appeal.

¶ 10 The standard of review that applies on such an appeal has been well stated by Jerome A.C.J. in Astra Aktiebolag v. Astra Corp. (1995), 59 C.P.R. (3d) 340:

> While Rule 336(5) grants the right of appeal from such a decision or order of a prothonotary, it is markedly silent on the standard of review to be applied. In R. v. Aqua-Gem Investments Ltd. [1993] 2 F.C. 425 (F.C.A.) at 463-64, MacGuigan J.A. set out the applicable standard of review as follows:
>
> I also agree with the Chief Justice in part as to the standard of review to be applied to a discretionary decision of a prothonotary. Following in particular Lord Wright in Evans v. Bartlam, [1937] A.C. 473 (H.L.) at page 484, and Lacourciere J.A. in Stoicevski v. Casement

(1983), 43 O.R. (2d) 463 (Div. Ct.), discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:

> (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
>
> (b) they raise questions vital to the final issue of the case.

Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion de novo.

¶ 11 In the present case, I am of the view that Associate Senior Prothonotary erred in granting leave to Michael Kichuk to represent the Corporate Defendant Source Personnel Inc. pursuant to Rule 300(2) of the Federal Court Rules.

¶ 12 Pursuant to Rule 300(2), an Applicant must show that there are "special circumstances" which would allow the Court to grant leave. Rule 300(2) reads as follow:

Rule 300(2)

> (2) A corporation shall be represented by a solicitor in all proceedings in the Court, unless the Court, in special circumstances, grants leave to the corporation to be represented by an officer of the corporation.

¶ 13 The jurisprudence under this Rule makes it clear that it will only be in rare circumstances that a layperson will be given leave to represent a corporation. In Guccio Gucci S.p.A. v. Cebuchier (1988), 23 C.P.R. (3d), Mr. Giles summarized the law:

> Paragraph 300(2) is quite plain. A corporation must be represented by an attorney or solicitor. The Federal Court of Appeal in Father Don's Natural Products Ltd. v. Canada (1986) 65 N.R. 62 (F.C.A.) doubted whether there were any jurisdiction in the Court to allow an individual to represent a corporation. Prior to the Court of Appeal's recording of doubt, there was at least one case in which an officer was permitted to represent a British Columbia company.
>
> In Walt Disney Productions v. Just Kiddies Marketing Inc. 1 C.P.R. (3d) 250 , there was evidence that the corporation was in fact impecunious, that the individual was a member of the corporation and that the individual was authorized by the corporation to represent it... [T]hose [are the] essential preconditions.

¶ 14 The test that has to be met is whether or not the Corporation is impecunious; whether or not the Respondent is a member of the Corporation and whether or not the Corporation properly authorized the individual, in this case Mr. Kichuk, to represent its interests [See Note 1 below].

Note 1: Guccio Gucci S.p.A. v. Cebuchier (1988), 23 C.P.R. (3d) 427 (Fed. T.D.).

¶ 15 Does the Defendant meet the three part test? Mr. Kichuk is a member of the Corporation. The Corporation properly authorized him to represent its interests. In his Affidavit in support of the Motion, Michael Kichuk stated that he was the shareholder, officer and director of Source Personnel Inc.; two parts of the test have been satisfied.

¶ 16 The problem arises however,. on the issue of the impecuniosity of the corporation. Michael Kichuk stated that neither he nor the Corporation had sufficient resources to retain counsel. According to Mr. Giles, the abbreviated, and unchallenged, balance sheet, which is subject to a confidentiality order, attached to the Affidavit of Peter Giuliano, indicates that the Defendant could not readily retain lawyers. With all due respect, I disagree.

¶ 17 The Defendant has to have shown that not only was the Corporation impecunious, but so too was its principal shareholder. As to the impecuniosity of the Corporation, the abbreviated balance sheet in question does not provide sufficient detail as to the financial status of the Corporation and cannot be relied upon to reach the conclusion that counsel could not be retained. Kurzela et al. v. 526442 Ontario Ltd. et al. (1989), 66 O.R. (2d) 446 at 447, dealt with the issue of the financial status of a principal shareholder of a corporation as follows:

> . . . once it is established that the corporate claimant has insufficient assets, the onus then shifts to the claimant to show that money may not be available to it from the shareholder or shareholders of the company, to fund the action and to post security for costs, as the courts have repeatedly held.

No evidence was adduced as to the impecuniosity of the Corporation's shareholders. In addition, Mr. Giles' Order indicates that the Defendant "did have some substance" when an undertaking was given to be responsible for any costs which may be awarded against the Defendant. In short, there is no indication of the "special circumstances" necessary under Rule 300(2) to allow Michael Kichuk to represent the Defendant Corporation.

¶ 18 For the above reasons, this application is granted.

ROULEAU J.

QL Update: 951227
qp/d/hbb/DRS/DRS

** Unedited **

Indexed as:

Kobetek Systems Ltd. v. Canada

Between
Kobetek Systems Limited, applicant, and
Her Majesty the Queen, respondent

[1998] F.C.J. No. 16
Court File No. T-1969-97

Federal Court of Canada - Trial Division
Halifax, Nova Scotia
Muldoon J.

Heard: January 13, 1998
Judgment: January 14, 1998
(3 pp.)

Practice — Actions, conduct of — Party self-representation, companies.

Application by Kobetek Systems Ltd. to be represented by an officer of the corporation in an action pursuant to the Excise Tax Act. Section 300 (2) of the Federal Court Act stipulated that a corporation must be represented by a solicitor in all proceedings in the Court, unless the Court, in special circumstances, granted leave to the corporation to be represented by an officer of the corporation. The officer of the corporation appeared and limited his arguments to the belief that he was able to represent the corporation.

HELD: Motion dismissed. The fact that the officer considered himself capable of representing the corporation was not one of the "special circumstances" contemplated by rule 300(2).

Statutes, Regulations and Rules Cited:

Excise Tax Act, R.S.C. 1985, c. E-15. Federal Court Act, R.S.C. 1985, c. F-7, s.46.

Counsel:

Sieg Deleu, for the applicant.
Kathleen McManus, for the respondent.

¶ 1 **MULDOON J.** (Reasons for Order):— This application arises in the context of an action in which the applicant is plaintiff, and the sovereign is defendant. It is a tax case under the Excise Tax Act, R.S.C. 1985, Chap. E-15.

¶ 2 The plaintiff, as applicant, moves for leave to be represented in this action by an officer of the corporation, Mr. Sieg Deleu. The defendant, here the respondent, takes no position on the matter in issue. The hearing took place in Halifax on January 13, 1998.

¶ 3 This being a matter of public law - the operation of this Court's rules made pursuant to sec. 46 of the Federal Court Act, R.S.C. 1985, Chap F-7 - the respondent's neutrality is of little concern. The pertinent current

rule is 300(2), thus:

> 300(2) A corporation shall be represented by a solicitor in all proceedings in the Court, unless the Court, in special circumstances, grants leave to the corporation to be represented by an officer of the corporation.

So, the applicant must demonstrate special circumstances.

¶ 4 The jurisprudence helps to define such special circumstances. Under the previous, more inflexible rule 300(2) Mr. Justice Teitelbaum declined to grant leave in I * AM - Institute of Applied Methodology v. M.N.R. (1991) 44 F.T.R. 8. This case was cited by Mr. Justice Richard in The Bankrupt, NcS Diesel Power Incorporated et al. v. Superintendent of Bankruptcy T-724-95 (May 24, 1995), [1995] F.C.J. No. 806. Although Richard, J. acknowledged the correct rule, he relied on the decision of Teitelbaum, J. who was construing the previous rule.

¶ 5 The most recent case on rule 300(2) is Sharpe's Tropical Shell Co. v. The Queen (1996) 100 F.T.R. 59, in which Prothonotary Hargrave granted leave for the corporation to be represented by a director in lieu of a solicitor. In that case, the plaintiff was a family corporation which was unable to pay for legal representation. Denying the motion would have resulted in the corporation's inability to proceed with the action. At page 61, Prothonotary Hargrave stated:

> Where there is a director who seems reasonably capable of representing a company, an impecunious company ought not to be denied its day in court.

On the issue of a non-lawyer representing the company in an expeditious manner he added at page 61:

> There is, however, the issue of whether the action, being conducted by a lay person, will proceed in an expeditious and manageable fashion. While the material filed so far by the plaintiffs may be a little wordy, it is coherent and, on its face, presents a claim which appears reasonable. I see no reason why Richard Sharpe, by applying himself to the Rules and seeking procedural assistance from the registry staff, ought not to be able to conduct the action in a businesslike manner, having due regard to moving the action to a conclusion within a reasonable time.

¶ 6 From these cases the following factors appear to be relevant to the determination of whether special circumstances exist: whether the corporation can pay for a lawyer; whether the proposed representative will be required to appear as advocate and as witness; the complexity of the legal issues to be determined (and therefore whether it appears that the representative will be able to handle the legal issues) and whether the action can proceed in an expeditious manner.

¶ 7 In the present case Mr. Deleu appeared and stated "I should be able to do it", in essence what he stated in his affidavit herein, sworn November 7, 1997. Already the roles of witness and advocate have become difficult to distinguish! However, this is the sole ground advanced.

¶ 8 That Mr. Deleu considers himself capable of representing the plaintiff corporation, is not one of the "special circumstances" contemplated by rule 300(2).

¶ 9 The motion is dismissed without costs. The action is stayed until March 13, 1998, by which date it shall be dismissed with costs, if no plaintiff's solicitor come forward on the record. Time for the filing of a statement of defence shall run only form the date of the plaintiff's solicitor notifying the defendant's solicitor of the plaintiff's solicitor's entry onto the record herein

MULDOON J.

QL Update: 980121
qp/d/hbb/DRS

Case Name:

Chase Bryant Inc. v. Canada

Between
Chase Bryant Inc., appellant, and
Her Majesty the Queen, respondent

[2002] T.C.J. No. 663
Court File No. 2002-1463(IT)G

Tax Court of Canada
Victoria, British Columbia
Bowman A.C.J.T.C.

Heard: December 3, 2002.
Judgment: December 12, 2002.
(13 paras.)

Income tax — Returns, assessments, payment and appeals — Appeals to courts, practice — Representation by non-lawyer.

This was an application by Gunderson for an order permitting him to represent Chase Bryant in its appeal. Gunderson was a shareholder and director of Bryant, but was not a lawyer. The Tax Court of Canada Rules required that counsel represent a corporation unless leave was granted permitting the corporation to be represented by an officer. Bryant's financial statements were put into evidence and showed a very healthy financial condition. Gunderson lived in the United States and travelled extensively in connection with his work. Gunderson argued that his familiarity with the company's affairs and the complex factual matters involved meant that he could move the case along more expeditiously than if he had to instruct counsel.

HELD: Application dismissed. Bryant was able to afford counsel and it would be inefficient to be represented by a non-lawyer who was also a non-resident and travelled all over the world. No evidence of special circumstances was put forward that would justify the court exercising its discretion to permit a non-lawyer to represent Bryant.

Statutes, Regulations and Rules Cited:

Tax Court of Canada Rules, Rule 30(2).

Counsel:

Robert A. Gunderson, for the appellant.
Eric Douglas, for the respondent.

ORDER:-- Upon application by the Mr. Robert A. Gunderson to represent the appellant in its appeal before the court

And upon hearing what was alleged by the parties

It is ordered that the application be dismissed.

It is further ordered that costs be costs in the cause.

REASONS FOR ORDER

¶ 1 **BOWMAN A.C.J.T.C.**:— This matter involves a request by Mr. Robert A. Gunderson to obtain the court's permission to represent the appellant.

¶ 2 Subsection 30(2) of the Tax Court of Canada Rules (General Procedure) provides

> A corporation shall be represented by counsel in all proceedings in the Court, unless the Court, in special circumstances, grants leave to the corporation to be represented by an officer of the corporation.

¶ 3 Mr. Gunderson is a 25% shareholder of the appellant and is also a director. He is not an officer and technically this would disqualify him from representing the company. If I were otherwise inclined to grant his request that would not be an insuperable obstacle because I would simply have made the order granting him permission to represent the company conditional upon his becoming an officer. He should have no difficulty since the remaining 75% of the shares are owned by his mother and his brother.

¶ 4 In Pratts Wholesale Limited v. The Queen, 98 D.T.C. 1561, Beaubier J. of this court applied the four factors stated by Muldoon J. in Kobetek Systems Ltd. v. R., [1998] 1 C.T.C. 308 at page 310.

> From these cases the following factors appear to be relevant to the determination of whether special circumstances exist: whether the corporation can pay for a lawyer; whether the proposed representative will be required to appear as advocate and as witness; the complexity of the legal issues to be determined (and therefore whether it appears that the representative will be able to handle the legal issues) and whether the action can proceed in an expeditious manner.

¶ 5 These factors were referred to by Bowie J. in RFA Natural Gas Inc. v. R., [2000] G.S.T.C. 40.

¶ 6 The factors referred to in these cases are a useful starting point but they are neither determinative nor exhaustive. For example in RFA Natural Gas Bowie J. did not put much weight on the question whether the proposed representative might appear as a witness. I respectfully agree.

¶ 7 If there is one factor that outweighs the others it is whether the company can afford to pay a lawyer. If it can it is difficult to imagine circumstances which would justify a departure from the rule that a corporation must be represented by counsel. In Mavito Inc. c. R., [2001] 2 C.T.C. 2048, Tardif J. considered a corporate appellant's inability to pay a lawyer's fees as "a decisive factor" in such a motion as this.

¶ 8 In this case the appellant's financial statements for 1997 and 1998 were put in evidence and they show a company in very healthy financial condition. It was admitted by Mr. Gunderson that it is more or less the same situation today. It can well afford a lawyer.

¶ 9 Mr. Gunderson argued that his familiarity with the company's affairs and its voluminous records - it had offices in two cities - means that he will be able to move the case along more expeditiously than if he had to instruct a lawyer in the somewhat complex factual matters involved here. He says that the whole problem stems from a breakdown of communications between the company's accountant and the CCRA. It seems that non-legal representation has not helped the company up to now. Possibly the best way of moving the matter along is to retain the services of a competent tax counsel who can either attempt to settle the case, or, if the matter goes to trial, marshal and present the facts in an orderly way.

¶ 10 There is another factor that militates against my granting the request. Mr. Gunderson lives in the United States where he is the chief executive officer of a company that is based in London, England. It appears he travels

extensively in connection with his work. It is inefficient to have the appellant represented by a non-lawyer who is also a non-resident who might be anywhere in the world. There have already been delays in the hearing of this motion because of Mr. Gunderson's unavailability. If the matter is to proceed expeditiously it is far preferable to have a lawyer in Canada upon whom notices can be served and who can prepare a list of documents and ensure that examinations for discovery can be held in a timely fashion.

¶ 11 In short, no evidence of special circumstances has been put forward that would justify the court's exercising its discretion to permit a non-lawyer to represent the company.

¶ 12 The motion is dismissed. Costs will be in the cause.

¶ 13 In the Pratts Wholesale case Beaubier J. gave the appellant 45 days in which to appoint legal counsel who could file an appearance to act as counsel of record. I do not propose to make a similar order, but I think the appellant should move with all possible despatch to appoint counsel who may wish to consider whether any steps are necessary in addition to filing an appearance.

QL UPDATE: 20030116
cp/e/qlspg

** Unedited **

Indexed as:

Sharpe's Tropical Shell Co. v. Canada

Between
Sharpe's Tropical Shell Co. and Richard and David Sharpe,
plaintiffs, and
Her Majesty the Queen, defendant

[1995] F.C.J. No. 1084
Action No. T-1123-95

Federal Court of Canada - Trial Division
Ottawa, Ontario
Hargrave, Prothonotary

July 27, 1995
(3 pp.)

Company law — Actions, conduct of — Party self-representation, companies.

Motion for an order permitting the corporate plaintiff to be represented by one of its directors in lieu of a solicitor. In support of the motion, the director asserted that the company was in a weakened financial situation as a result of four-years of litigation with Canada Customs, that it was not currently in a position to pay for legal representation, and that he believed that he could adequately represent the company in the proceedings. The respondent took no position on the motion. Although the material filed thus far by the corporate plaintiff was a little wordy, it was coherent and, on its face, presented a claim which appeared reasonable.

HELD: Motion allowed. Where a company director seemed reasonably capable of representing a company, an impecunious company ought not to be denied its day in court. The facts of the corporate plaintiff's impecuniosity and the ability of the director to conduct the action in a business-like manner and the fact that the respondent took no position on the motion were sufficient to constitute "special circumstances" on the basis of which Rule 300(2) of the Federal Court Rules empowered the court to grant leave for representation of a corporate litigant by a person other than a solicitor.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Rules 300(2), 324.

Counsel:

Richard Sharpe, for the plaintiffs.
Wayne D. Garnons-Williams, for the defendant.

¶ 1 HARGRAVE, PROTHONOTARY (Reasons for Order):-- This is a motion by the Plaintiff, Richard Sharpe, a Director of the Plaintiff British Columbia company, Sharpe's Tropical Shell Co., for an Order granting leave that the company be represented by Richard Sharpe in lieu of a solicitor. The motion is one which the parties wish dealt with in writing pursuant to Rule 324. The Plaintiffs rely on Rule 300(2) which provides that:

A corporation shall be represented by a solicitor in all proceedings in the Court, unless the Court,

> in special circumstances, grants leave to the corporation to be represented by an officer of the corporation.

The present wording of Rule 300(2) is as a result of amendments which came into force December 7, 1990.

¶ 2 In support of the motion Richard Sharpe sets out in his affidavit that the company is in a weakened financial situation as a result of litigation with Customs over the past four years, that the company is not currently in a position to pay for legal representation, that he believes that he can adequately represent the company and that he requests that the Court grant permission for him to do so.

¶ 3 Her Majesty the Queen, the Defendant, takes no position.

¶ 4 Before the December 7, 1990, amendment to Rule 300(2), there was no practical provision which would allow a company to be represented by anyone other than an lawyer. This was made clear by the Federal Court of Appeal in Father Don's Natural Products Ltd. v. Canada (1986), 65 N.R. 62.

¶ 5 In The Bankrupt, NsC Diesel Power Incorporated et al. v. The Superintendent of Bankruptcy, an unreported decision of May 24, 1995, in action T-724-95 [Please see [1995] F.C.J. No. 806], the Court dismissed an application, on behalf of an impecunious company, that an officer act in lieu of a solicitor. The Court in NsC Diesel Power relied on Institute of Applied Methodology v. M.N.R. (1991), 44 F.T.R. 8 (F.C.T.D.) for the proposition that "It has been established in this Court that the mere fact that a corporation is impecunious and has properly authorized a director or officer to act is insufficient to override the general rule" (NsC Diesel Power at p. 2). However, while the Institute of Applied Methodology was decided in 1991, after the 1990 amendments to the Rules had come into force, the old Rule 300(2) which read "Except as expressly provided by or under any enactment, a body corporate may not begin or carry on such a proceeding otherwise than by an attorney or solicitor." was inadvertently applied. Thus, while there is apparent authority clearly against an impecunious company being represented other than by a solicitor, neither case took into account Rule 300(2) as it now stands:

> A corporation shall be represented by a solicitor in all proceedings in the Court, unless the Court, in special circumstances, grants leave to the corporation to be represented by an officer of the corporation.

¶ 6 Since the 1990 amendment an applicant must show that there are special circumstances which would allow the Court to grant leave under Rule 300(2).

¶ 7 In the present instance, the Plaintiff company appears to be a family company which, if required to hire a lawyer, would not be able to proceed with the action. Where there is a director who seems reasonably capable of representing a company, an impecunious company ought not to be denied its day in Court.

¶ 8 There is, however, the issue of whether the action, being conducted by a lay person, will proceed in an expeditious and manageable fashion. While the material filed so far by the Plaintiffs may be a little wordy, it is coherent and, on its face, presents a claim which appears reasonable. I see no reason why Richard Sharpe, by applying himself to the Rules and seeking procedural assistance from the Registry staff, ought not to be able to conduct the action in a business-like manner, having due regard to moving the action to a conclusion within a reasonable time. Indeed, counsel for the Respondent, Mr. Garnons-Williams, in a generous and proper way has, in a recent letter to Mr. Sharpe, noted the next step, preparation of affidavit of documents, and has said that should Mr. Sharpe have any questions or concerns or wish to discuss the matter further, that Mr. Sharpe should feel free to speak with him.

¶ 9 These factors, together with the advice from counsel that the Defendant takes no position, are sufficient to

constitute special circumstances. Richard Sharpe may represent the company and act for himself, however, the Court's permission to do so must not be taken as permission for Richard Sharpe to also represent David Sharpe.

HARGRAVE, PROTHONOTARY

QL Update: 950804
qp/d/hbb/DRS/DRS/DRS

Case Name:

Artemis Holdings Ltd. v. Canada (Customs and Revenue Agency)

Between
Artemis Holdings Ltd., applicant, and
Canada Customs and Revenue Agency, respondent

[2002] F.C.J. No. 662
2002 FCT 504
Docket T-433-02

Federal Court of Canada - Trial Division
Vancouver, British Columbia
Hargrave, Prothonotary

Heard: In writing.
Judgment: April 30, 2002.
(15 paras.)

Practice — Parties — Parties unrepresented by counsel — Representation by non-lawyers.

This was a motion by Artemis Holdings Ltd. for an order allowing it to be represented by Brickenden. The matter was a judicial review of a fairness request. Brickenden was the president, sole manager, director and owner of all of the shares of Artemis. The company had no employees. Brickenden testified that the company was not able to afford a lawyer. Brickenden had produced understandable and coherent materials on the application for judicial review.

HELD: Motion allowed. The company could not afford a lawyer and Brickenden was the only person with any knowledge of the facts and thus the only witness that the company could offer. The judicial review application was not complex and Brickenden seemed capable of producing understandable materials. It was not an absolute bar that a lay person could not act as both witness and advocate for an incorporated sole proprietorship. To deny Artemis the representation of its sole officer, as its advocate, would be to deny the company its day in court.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Rules 119, 120, 160.

Counsel:

No counsel mentioned.

REASONS FOR ORDER

¶ 1 HARGRAVE, PROTHONOTARY:-- These reasons arise out of the Applicant's motion to allow the sole officer and shareholder of this one-person company, Mr. Dal A.S. Brickenden, to represent his company in this litigation, which involves a review of a denial of a fairness request by the Defendant. These reasons are also reasons in a parallel motion in File T-434-02, a companion action with the same style of cause.

¶ 2 It is appropriate that Mr. Brickenden, president of the Applicant, act as the Applicant's representative in

this litigation. I will now consider this in more detail.

ANALYSIS

¶ 3 Pursuant to Rule 120 a company must be represented by a solicitor unless the Court is persuaded that there are special circumstances which allow an officer to represent the company in litigation.

¶ 4 The list of relevant factors to consider when a lay person applies to represent a company is probably open ended. Here counsel for the Respondent who relies upon WIC Premium Television Ltd. v. Levin, [2001] F.C.J. No. 1438, an 19 September 2001 decision of Madam Justice Heneghan in action T-686-99, who in turn relied upon a decision of Mr. Justice Muldoon's, Kobetek Systems Ltd. v. The Queen [1998] 1 C.T.C. 308, submits that the relevant factors are:

1. Can the corporation afford a lawyer?
2. Will the proposed representative appear both as advocate and witness?
3. Are the issues complex?
4. Can the matter proceed expeditiously? (paragraph 11 of WIC Premium Television)

This is an appropriate set of criteria in the present instance.

¶ 5 I accept that the company cannot afford a lawyer. Moreover, I also accept, from Mr. Brickenden's affidavit, that he is the sole shareholder and president of Artemis Holdings Ltd, and that, with an income averaging $17,281.00 per year, 1990 through 2000, he cannot, as sole shareholder, manager and director, afford to hire a lawyer for the company.

¶ 6 From the material I do not see that Mr. Brickenden can avoid acting both as advocate and witness, for he states that he is the sole manager, director and owner of all of the shares in the Plaintiff and that there are no employees. I will return to this dual role, for it is the critical aspect of this motion.

¶ 7 In testing whether the issues are complex I may look at both the affidavit material and at the record. The former does not address the issue of the complexity of the proceeding. However, the record does deal with complexity by inference, with the Applicant referring to extensive documentary evidence. Here I note that there is no indication whether this material is appropriately before the Court, for this is an application for judicial review, to be decided upon the documents which were before the original tribunal. With a reasonable effort to understand the applicable Federal Court Rules and some research into the nature of judicial review, I believe that Mr. Brickenden, who has produced an understandable although slightly wordy application, ought to be able to deal with the issues.

¶ 8 As to this matter proceeding expeditiously, I agree with counsel for the Respondent that the material presented on this motion is coherent. It is reasonably presented. I would not go so far as does counsel for the Respondent to say either that the thrust of the application is the correctness of the original decision or that there is an indication that the Applicant may not appreciate the nature of judicial review. However, Mr. Brickenden will have to put serious effort into fully understanding not only the time lines set out in the Rules, but also the relevant procedure and the nature of judicial review. I now return to the central issue of whether acting as a witness bars Mr. Brickenden from representing his company.

The Lay Corporate Representative as Witness

¶ 9 In Kobetek Systems Ltd. (supra) Mr. Justice Muldoon considered Rule 300(2), which allowed lay representation, by an officer of a corporation, in special circumstances. Present Rule 120 is similar. The special

circumstances test, as considered by Mr. Justice Muldoon, does leave it open, in some instances, for a corporate officer, who is not a lawyer, to represent a company. Counsel for the Respondent points out that Mr. Brickenden appears to be the only person with any knowledge of the facts and thus would be the only witness that the Applicant would be able to offer. Counsel does not press home this point with any case law to the effect that an intended lay representative who would also be a witness, being the only individual with any knowledge, would be barred from representing a company.

¶ 10 An analogy is sometimes drawn between lawyers acting as witnesses and lay representatives acting as witnesses. A good starting point is a passage from Sopinka on the Law of Evidence in Canada, 2nd edition, 1999 at page 690:

> s. 13.42 Lawyers stand on a somewhat different footing. They are competent in law to appear as witnesses in an action in which they act as counsel. Nevertheless, courts have been reluctant to allow a lawyer who has sworn an affidavit to appear as counsel in that matter. It would place the court in the untenable position of having to assess the credibility of a counsel who has given evidence. Accordingly, the practice has developed of forbidding a lawyer to appear as both counsel and witness in a motion or an action.

This bar to lawyers appearing as both counsel and witness leads to several observations. First, an individual running an unincorporated business as a sole proprietor may act as his or her own advocate, pursuant to Rule 119 and presumably give evidence. Second, were that same individual to incorporate the business, but change nothing else and were one to apply an absolute bar to a lay representative, who is an officer of the company, acting as witness, such could amount to a denial of a day in court where neither the individual, nor his company, nor any shareholder, has funds for counsel. Third, there is a question of just how absolute the bar ought to be in the case of a lay representative, who must also be a witness, because the incorporated defendant is a one-person operation.

¶ 11 One of the most absolute cases, of which I am aware, in this Court, dealing with the role of lawyer as witness, is Shipdock Amsterdam B.V. v. Cast Group Inc. (2001) 179 F.T.R. 282. There Mr. Justice O'Keefe dealt with an affidavit sworn by counsel. He referred to the danger of that practice, for it could result in cross-examination on the affidavit and thus the disclosure of privileged matters:

> [11] There is always a danger in a solicitor deposing to an affidavit and then using the affidavit on a motion which the solicitor argues or members of his firm argue. The solicitor could be cross examined, privilege issues may arise on cross-examination and the Court would have to comment and weigh the allegations made by the solicitor in the affidavit. As well the solicitor's law firm could not continue to appear for the defendant in the motion in which the affidavit was used (see International Business Machines. Corp. et al. v. Printech Ribbons Inc. et al. [1994] 1 FC 692 ; 69 F.T.R. 197 (T.D.)). (page 285)

Mr. Justice O'Keefe went on to refer to Director of Investigation & Research v. Irving Equipment (1986) 16 CPR (3d) 26, a decision in which Mr. Justice Muldoon sets out, at length, the reasons why affidavits sworn by solicitors who are counsel for a party ought to be rejected. First, it is the right of anyone to make it clear whether he or she speaks as a witness or as a professional advisor; second, the conflict of interest in which a person, as counsel or solicitor, is both an officer of the Court and a witness, leading to the difficulty for the person as witness in dealing objectively with the weight or credibility of testimony and the quandary of opposing counsel who ought not to be required to cross-examined a colleague; and third, the conflict between giving full evidence, but avoiding disclosure of what otherwise would be covered by solicitor and client privilege. Yet all of this involves lawyers not only acting as solicitors and counsel for parties, but also participating as witnesses.

¶ 12 Mr. Justice Muldoon, in Kobetek Systems Ltd. (supra), dealt with an application by an officer of a corporation to represent the corporation. He commented upon the assertion by that officer that he should be able to do what was necessary as advocate by saying "Already the roles of witness and advocate have been difficult to distinguish! However, this is the sole ground advanced." (page 310). Mr. Justice Muldoon observed that the mere fact that the officer considered himself capable of representing the plaintiff corporation was not a special circumstance within Rule 300(2), the predecessor to the present Rule 120. Of importance is that Kobetek Systems Ltd. stops short of making the roles of witness and lay advocate, when combined, an absolute bar to an officer representing his company. That this is not an absolute bar, even in the case of lawyers, was certainly recognized by Mr. Justice O'Keefe, in Shipdock Amsterdam (supra) at page 286:

> [15] I must point out that in certain cases, counsel for the party may depose to facts in an affidavit and appear and use that affidavit on a motion. For example if the solicitor is the only person who can depose to these facts then it would be acceptable for counsel to depose to the facts and then appear and use the affidavit on a motion. There are I am sure other examples.

If it is not an absolute bar, in all instances, that counsel may not rely upon his or her own affidavit, it ought not to be an absolute bar in the case of a lay person acting as both witness and advocate for an incorporated sole proprietorship.

¶ 13 The final case to which I will refer is S.A.R. Group Relocation Inc. v. Canada, [2002] F.C.J. No. 367, a 13 March 2002 decision of Mr. Justice of Appeal Strayer, dealing with a motion in writing in action A-14-02. In S.A.R. Group the president, herself a plaintiff, sought to represent her two corporations. Mr. Justice of Appeal Strayer dealt with ability to pay, authorization and the representative of the companies as a witness:

> 2 For the Court to make such an order in these circumstances it must be satisfied that the corporations are truly unable to pay for a lawyer and that the person sought to be allowed to represent them has indeed been authorized by the corporations to represent them. (Source Services Corp. v. Source Personal Inc. (1995), 105 F.T.R. 42 ; Re NsC Diesel Power Inc. (Bankrupt) (1995), 96 F.T.R. 161) . There is no clear evidence here on either point. Further, it is relevant to consider whether the proposed representative would also be a witness, as counsel cannot appear in cases where they are witnesses. (See Kobetek Systems Ltd. v. R., [1998] F.C.J. No. 16 , [1998] 1 C.T.C. 308) . In the present application for judicial review Susan A. Ryan has filed a purported affidavit (not yet sworn) which indicates she expects to be the principal witness as well as acting in role of counsel. This is another circumstance which militates against the Court making an order under Rule 120.

Relevant in this paragraph is that Mr. Justice of Appeal Strayer appears to differentiate between lawyers acting for corporations and persons representing corporations. He notes that it is relevant to consider whether the representative might be a witness, "as counsel cannot appear in cases where they are witnesses.". The authority for this statement is Kobetek Systems Ltd.: Kobetek clearly does not go so far as to bar a lay person from the two roles. I believe this is something Mr. Justice of Appeal Strayer recognizes when, referring to the role of representative and witness, he says "this is another circumstance which militates against the Court making an order under Rule 120.", for militate, used as a verb in this sense, is not an absolute. To militate against something is to contend against, certainly forcefully, but not absolutely. This is borne out by the Oxford English Dictionary definition of militate "Of evidence, facts, circumstances: To have force, 'tell' against ... some conclusion or result." This idea of having force against some conclusion is picked up by Garner in the Oxford Dictionary of Modern Legal Usage, 2nd edition, at page 569, where he discusses the legal uses of both "mitigate" and "militate", the latter meaning "to exert a strong influence.", again far less than an absolute.

CONCLUSION

¶ 14 To summarize, in S.A.R. Group Relocation Inc. first, Mr. Justice of Appeal Strayer differentiates between the roles of lawyer and witness, on the one hand, and representative and witness on the other hand, but more important he then goes on to weigh the result of the latter role as merely militating or making a strong argument or influence against allowing a lay representative, an officer of a corporation, to act as a representative when that person might be a witness. This idea of the dual role being less than an absolute bar is consistent with Rule 160 by which the Court, in special circumstances, may grant an officer of a company the privilege of representing that company as an advocate. To take a narrower view would render the Rule 120 exception meaningless in many circumstances and certainly meaningless in the case of an incorporated sole proprietorship.

¶ 15 As I pointed out in Sharpe's Tropical Shell Co. v. The Queen (1996) 100 F.T.R. 59, at page 61, "Where there is a director who seems reasonably capable of representing a company, an impecunious company ought not to be denied its day in court.". To deny Artemis Holdings Ltd. the representation of its sole officer, as its advocate, would be to deny the company its day in court. This is an instance in which the special circumstances provision in Rule 120 comes into play. To determine otherwise would be neither an equitable nor a desirable outcome. The president of Artemis Holdings Ltd., Dal A.S. Brickenden, may represent his firm in this litigation.

HARGRAVE, PROTHONOTARY

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