Court File No.: 00-CV-192059CPA

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

- and -

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA
THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA
THE SYNOD OF THE DIOCESE OF ALGOMA
THE SYNOD OF THE DIOCESE OF ATHABASCA
THE SYNOD OF THE DIOCESE OF BRANDON
THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA
THE SYNOD OF THE DIOCESE OF CALGARY
THE SYNOD OF THE DIOCESE OF CARIBOO
THE INCORPORATED SYNOD OF THE DIOCESE OF HURON
THE SYNOD OF THE DIOCESE OF KEEWATIN
THE DIOCESE OF MOOSONEE
THE SYNOD OF THE DIOCESE OF WESTMINISTER
THE SYNOD OF THE DIOCESE OF QU'APPELLE
THE DIOCESE OF SASKATCHEWAN
THE SYNOD OF THE DIOCESE OF YUKON
THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY)
THE PRESBYTARIAN CHURCH IN CANADA
THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA
THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA
BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA
THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA
THE UNITED CHURCH OF CANADA
THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA
THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA
THE METHODIST CHURCH OF CANADA
THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA)
THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS
THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY
THE ROMAN CATHOLIC BISHOP OF KAMLOOPS

THE ROMAN CATHOLIC BISHOP OF THUNDER BAY
THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER
THE ROMAN CATHOLIC BISHOP OF VICTORIA
THE ROMAN CATHOLIC BISHOP OF NELSON
THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE
LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD-McLENNAN
THE CATHOLIC ARCHDIOCESE OF EDMONTON
LA DIOCÈSE DE SAINT-PAUL
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE
THE ARCHIEPISCOPAL CORPORATION OF REGINA
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN
THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG
LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE.MARIE
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY
LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT
THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA
THE MISSIONARY OBLATES OF MARY IMMACULATE – GRANDIN PROVINCE
LES PÈRES MONTFORTAINS (also known as THE COMPANY OF MARY)
JESUIT FATHERS OF UPPER CANADA
THE MISSIONARY OBLATES OF MARY IMMACULATE – PROVINCE OF ST. JOSEPH
LES MISSIONAIRES OBLATES DE MARIE IMMACULÉE (also known as LES REVERENDS PÈRES OBLATES DE L'IMMACULÉE CONCEPTION DE MARIE)
THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE
LES REVERENDS PÈRES OBLATS DE MARIE IMMACULÉE DES TERRITOIRES DU NORD OUEST
LES MISSIONAIRES OBLATS DE MARIE IMMACULÉE (PROVINCE DU CANADA – EST)
THE SISTERS OF SAINT ANNE
THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS)
THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA
THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA)
THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES
THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE L'HÔPITAL GÉNÉRAL DE MONTRÉAL)
THE GREY SISTERS NICOLET

THE GREY NUNS OF MANITOBA INC. (also known as LES SŒURS GRISES DU MANITOBA INC.)
THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE
LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE
LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE NICOLET AND THE SISTERS OF ASSUMPTION)
LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA
THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIÉTÉ DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY)
MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE)
LES SOEURS DE LA CHARITÉ D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA – GREY NUNS OF THE CROSS)
SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE)
THE SISTERS OF CHARITY OF ST.VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX)
LES SOEURS DE NOTRE DAME AUXILIATRICE
LES SŒURS DE ST. FRANÇOIS D'ASSISE
SISTERS OF THE PRESENTATION OF MARY (SŒURS DE LA PRÉSENTATION DE MARIE)
THE BENEDICTINE SISTERS
INSTITUT DES SŒURS DU BON CONSEIL
IMPACT NORTH MINISTRIES
THE BAPTIST CHURCH IN CANADA

Third Parties

MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA
(on motion to strike the Affidavit of Donald Outerbridge)

Department of Justice
Bank of Canada Building
234 Wellington Street
East Tower, Room 1001
Ottawa, Ontario
K1A 0H8

Per: Paul Vickery

Tel: (613) 948-1483
Fax: (613) 941-5879
LSUC No.: 17196T

paul.vickery@justice.gc.ca
Counsel for the Defendant, The Attorney General of Canada

TO: Merchant Law Group
Barristers & Solicitors
#100 - Saskatchewan Drive Plaza
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8

Attention: Mr. Anthony Merchant, Q.C.

Tel.: (306) 359-7777
Fax: (306) 522-3299

INDEX

Court File No.: 00-CV-192059CPA

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

- and -

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA
THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA
THE SYNOD OF THE DIOCESE OF ALGOMA
THE SYNOD OF THE DIOCESE OF ATHABASCA
THE SYNOD OF THE DIOCESE OF BRANDON
THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA
THE SYNOD OF THE DIOCESE OF CALGARY
THE SYNOD OF THE DIOCESE OF CARIBOO
THE INCORPORATED SYNOD OF THE DIOCESE OF HURON
THE SYNOD OF THE DIOCESE OF KEEWATIN
THE DIOCESE OF MOOSONEE
THE SYNOD OF THE DIOCESE OF WESTMINISTER
THE SYNOD OF THE DIOCESE OF QU'APPELLE
THE DIOCESE OF SASKATCHEWAN
THE SYNOD OF THE DIOCESE OF YUKON
THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY)
THE PRESBYTARIAN CHURCH IN CANADA
THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA
THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA
BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA
THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA
THE UNITED CHURCH OF CANADA
THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA
THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA
THE METHODIST CHURCH OF CANADA
THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA)
THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS
THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY
THE ROMAN CATHOLIC BISHOP OF KAMLOOPS

THE ROMAN CATHOLIC BISHOP OF THUNDER BAY
THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER
THE ROMAN CATHOLIC BISHOP OF VICTORIA
THE ROMAN CATHOLIC BISHOP OF NELSON
THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE
LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD-McLENNAN
THE CATHOLIC ARCHDIOCESE OF EDMONTON
LA DIOCÈSE DE SAINT-PAUL
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE
THE ARCHIEPISCOPAL CORPORATION OF REGINA
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN
THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG
LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE.MARIE
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY
LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT
THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA
THE MISSIONARY OBLATES OF MARY IMMACULATE – GRANDIN PROVINCE
LES PÈRES MONTFORTAINS (also known as THE COMPANY OF MARY)
JESUIT FATHERS OF UPPER CANADA
THE MISSIONARY OBLATES OF MARY IMMACULATE – PROVINCE OF ST. JOSEPH
LES MISSIONAIRES OBLATES DE MARIE IMMACULÉE (also known as LES REVERENDS PÈRES OBLATES DE L'IMMACULÉE CONCEPTION DE MARIE)
THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE
LES REVERENDS PÈRES OBLATS DE MARIE IMMACULÉE DES TERRITOIRES DU NORD OUEST
LES MISSIONAIRES OBLATS DE MARIE IMMACULÉE (PROVINCE DU CANADA – EST)
THE SISTERS OF SAINT ANNE
THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS)
THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA
THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA)
THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES
THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE L'HÔPITAL GÉNÉRAL DE MONTRÉAL)
THE GREY SISTERS NICOLET

THE GREY NUNS OF MANITOBA INC. (also known as LES SŒURS GRISES DU MANITOBA INC.)
THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE
LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE
LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE NICOLET AND THE SISTERS OF ASSUMPTION)
LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA
THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIÉTÉ DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY)
MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE)
LES SOEURS DE LA CHARITÉ D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA – GREY NUNS OF THE CROSS)
SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE)
THE SISTERS OF CHARITY OF ST.VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX)
LES SOEURS DE NOTRE DAME AUXILIATRICE
LES SŒURS DE ST. FRANÇOIS D'ASSISE
SISTERS OF THE PRESENTATION OF MARY (SŒURS DE LA PRÉSENTATION DE MARIE)
THE BENEDICTINE SISTERS
INSTITUT DES SŒURS DU BON CONSEIL
IMPACT NORTH MINISTRIES
THE BAPTIST CHURCH IN CANADA

Third Parties

NOTICE OF MOTION OF THE ATTORNEY GENERAL OF CANADA

(on motion to strike the Affidavit of Donald Outerbridge)

The Defendant, the Attorney General of Canada, will make a motion to the Honourable Mr. Justice Winkler on August 29, 2006 or as soon after that time as the motion can be heard, at 393 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: Oral hearing.

THE MOTION IS FOR:

1. An Order striking out the Affidavit of Donald I. M. Outerbridge either in its entirety or portions thereof as indicated in paragraphs 9, 10, 11, 12, 13, and 14 of the factum of the Attorney General of Canada;
2. Costs of this motion; and
3. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, ss. 4.06(2), 25.11 and 39.01(4).

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Such evidence as counsel may advise and this Honourable Court may permit.

Department of Justice
Bank of Canada Building
234 Wellington Street
East Tower, Room 1001
Ottawa, Ontario
K1A 0H8

Per: Paul Vickery

Tel: (613) 948-1483
Fax: (613) 941-5879
LSUC No.: 17196T

paul.vickery@justice.gc.ca
Counsel for the Defendant, The Attorney General of Canada

TO: Merchant Law Group
Barristers & Solicitors
#100 - Saskatchewan Drive Plaza
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8

Attention: Mr. Anthony Merchant, Q.C.

Tel.: (306) 359–7777
Fax: (306) 522-3299

Court File No.: 00-CV-192059CPA

CHARLES BAXTER, SR. AND ELIJAH BAXTER	AND	ATTORNEY GENERAL OF CANADA
Plaintiff		Defendant

(Short title of proceeding)

ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding Commenced at
Toronto

MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA
(on motion to strike the Affidavit of Donald Outerbridge)

Department of Justice
Civil Litigation Branch
Bank of Canada Building
234 Wellington Street
East Tower, Room 1001
Ottawa, Ontario
K1A 0H8

Per: **Paul Vickery**
LSUC No.: 17196T

Tel: (613) 948-1483
Fax: (613) 941-5879
Solicitor for the Defendant.

Court File No.: 00-CV-192059CPA

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

- and -

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA
THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA
THE SYNOD OF THE DIOCESE OF ALGOMA
THE SYNOD OF THE DIOCESE OF ATHABASCA
THE SYNOD OF THE DIOCESE OF BRANDON
THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA
THE SYNOD OF THE DIOCESE OF CALGARY
THE SYNOD OF THE DIOCESE OF CARIBOO
THE INCORPORATED SYNOD OF THE DIOCESE OF HURON
THE SYNOD OF THE DIOCESE OF KEEWATIN
THE DIOCESE OF MOOSONEE
THE SYNOD OF THE DIOCESE OF WESTMINISTER
THE SYNOD OF THE DIOCESE OF QU'APPELLE
THE DIOCESE OF SASKATCHEWAN
THE SYNOD OF THE DIOCESE OF YUKON
THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND
(also known as THE NEW ENGLAND COMPANY)
THE PRESBYTARIAN CHURCH IN CANADA
THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA
THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA
BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA
THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA
THE UNITED CHURCH OF CANADA
THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA
THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA
THE METHODIST CHURCH OF CANADA
THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA)

THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS
THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY
THE ROMAN CATHOLIC BISHOP OF KAMLOOPS
THE ROMAN CATHOLIC BISHOP OF THUNDER BAY
THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER
THE ROMAN CATHOLIC BISHOP OF VICTORIA
THE ROMAN CATHOLIC BISHOP OF NELSON
THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE
LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD-McLENNAN
THE CATHOLIC ARCHDIOCESE OF EDMONTON
LA DIOCÈSE DE SAINT-PAUL
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE
THE ARCHIEPISCOPAL CORPORATION OF REGINA
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN
THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG
LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE.MARIE
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY
LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT
THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA
THE MISSIONARY OBLATES OF MARY IMMACULATE – GRANDIN PROVINCE
LES PÈRES MONTFORTAINS (also known as THE COMPANY OF MARY)
JESUIT FATHERS OF UPPER CANADA
THE MISSIONARY OBLATES OF MARY IMMACULATE – PROVINCE OF ST. JOSEPH
LES MISSIONAIRES OBLATES DE MARIE IMMACULÉE (also known as LES REVERENDS PÈRES OBLATES DE L'IMMACULÉE CONCEPTION DE MARIE)
THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE
LES REVERENDS PÈRES OBLATS DE MARIE IMMACULÉE DES TERRITOIRES DU NORD OUEST
LES MISSIONAIRES OBLATS DE MARIE IMMACULÉE (PROVINCE DU CANADA – EST)
THE SISTERS OF SAINT ANNE
THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS)
THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA
THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA)

THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES
THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE L'HÔPITAL GÉNÉRAL DE MONTRÉAL), THE GREY SISTERS NICOLET
THE GREY NUNS OF MANITOBA INC. (also known as LES SŒURS GRISES DU MANITOBA INC.)
THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE
LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE
LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE NICOLET AND THE SISTERS OF ASSUMPTION)
LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA
THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIÉTÉ DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY)
MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE)
LES SOEURS DE LA CHARITÉ D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA – GREY NUNS OF THE CROSS)
SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE)
THE SISTERS OF CHARITY OF ST.VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX)
LES SOEURS DE NOTRE DAME AUXILIATRICE
LES SŒURS DE ST. FRANÇOIS D'ASSISE
SISTERS OF THE PRESENTATION OF MARY (SŒURS DE LA PRÉSENTATION DE MARIE), THE BENEDICTINE SISTERS, INSTITUT DES SŒURS DU BON CONSEIL, IMPACT NORTH MINISTRIES, THE BAPTIST CHURCH IN CANADA

Third Parties

FACTUM AND BOOK OF AUTHORITIES OF THE ATTORNEY GENERAL OF CANADA
(on motion to strike the Affidavit of Donald Outerbridge)

Department of Justice
Bank of Canada Building
234 Wellington Street
East Tower, Room 1001
Ottawa, Ontario
K1A 0H8

Per: Paul Vickery

Tel: (613) 948-1483
Fax: (613) 941-5879
LSUC No.: 17196T

paul.vickery@justice.gc.ca

Counsel for the Defendant, The Attorney General of Canada

TO: Merchant Law Group
Barristers & Solicitors
#100 - Saskatchewan Drive Plaza
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8

Attention: Mr. Anthony Merchant, Q.C.

Tel.: (306) 359–7777
Fax: (306) 522-3299

INDEX

Court File No.: 00-CV-192059CPA

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

- and -

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA
THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA
THE SYNOD OF THE DIOCESE OF ALGOMA
THE SYNOD OF THE DIOCESE OF ATHABASCA
THE SYNOD OF THE DIOCESE OF BRANDON
THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA
THE SYNOD OF THE DIOCESE OF CALGARY
THE SYNOD OF THE DIOCESE OF CARIBOO
THE INCORPORATED SYNOD OF THE DIOCESE OF HURON
THE SYNOD OF THE DIOCESE OF KEEWATIN
THE DIOCESE OF MOOSONEE
THE SYNOD OF THE DIOCESE OF WESTMINISTER
THE SYNOD OF THE DIOCESE OF QU'APPELLE
THE DIOCESE OF SASKATCHEWAN
THE SYNOD OF THE DIOCESE OF YUKON
THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY)
THE PRESBYTARIAN CHURCH IN CANADA
THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA
THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA
BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA
THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA
THE UNITED CHURCH OF CANADA
THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA
THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA
THE METHODIST CHURCH OF CANADA
THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA)

THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS
THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY
THE ROMAN CATHOLIC BISHOP OF KAMLOOPS
THE ROMAN CATHOLIC BISHOP OF THUNDER BAY
THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER
THE ROMAN CATHOLIC BISHOP OF VICTORIA
THE ROMAN CATHOLIC BISHOP OF NELSON
THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE
LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD-McLENNAN
THE CATHOLIC ARCHDIOCESE OF EDMONTON
LA DIOCÈSE DE SAINT-PAUL
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE
THE ARCHIEPISCOPAL CORPORATION OF REGINA
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN
THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG
LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE.MARIE
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY
LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT
THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT
THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA
THE MISSIONARY OBLATES OF MARY IMMACULATE – GRANDIN PROVINCE
LES PÈRES MONTFORTAINS (also known as THE COMPANY OF MARY)
JESUIT FATHERS OF UPPER CANADA
THE MISSIONARY OBLATES OF MARY IMMACULATE – PROVINCE OF ST. JOSEPH
LES MISSIONAIRES OBLATES DE MARIE IMMACULÉE (also known as LES REVERENDS PÈRES OBLATES DE L'IMMACULÉE CONCEPTION DE MARIE)
THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE
LES REVERENDS PÈRES OBLATS DE MARIE IMMACULÉE DES TERRITOIRES DU NORD OUEST
LES MISSIONAIRES OBLATS DE MARIE IMMACULÉE (PROVINCE DU CANADA – EST)
THE SISTERS OF SAINT ANNE
THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS)
THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA
THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA)

THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES
THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE L'HÔPITAL GÉNÉRAL DE MONTRÉAL)
THE GREY SISTERS NICOLET
THE GREY NUNS OF MANITOBA INC. (also known as LES SŒURS GRISES DU MANITOBA INC.)
THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE
LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE
LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE NICOLET AND THE SISTERS OF ASSUMPTION)
LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA
THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIÉTÉ DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY)
MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE)
LES SOEURS DE LA CHARITÉ D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA – GREY NUNS OF THE CROSS)
SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE)
THE SISTERS OF CHARITY OF ST.VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX)
LES SOEURS DE NOTRE DAME AUXILIATRICE
LES SŒURS DE ST. FRANÇOIS D'ASSISE
SISTERS OF THE PRESENTATION OF MARY (SŒURS DE LA PRÉSENTATION DE MARIE), THE BENEDICTINE SISTERS, INSTITUT DES SŒURS DU BON CONSEIL, IMPACT NORTH MINISTRIES, THE BAPTIST CHURCH IN CANADA

Third Parties

FACTUM OF THE ATTORNEY GENERAL OF CANADA
(on motion to strike the Affidavit of Donald Outerbridge)

PART I - FACTS AND OVERVIEW

1. The Attorney General of Canada seeks an order striking the affidavit of Donald I. M. Outerbridge, sworn on August 8, 2006 ("Outerbridge Affidavit" or "Affidavit").

> *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, ss. 4.06(2), 25.11, and 39.01(4), TAB 1

PART II – ISSUES

2. Should this Court strike the Outerbridge Affidavit; either in its entirety or portions thereof, on the ground that the Affidavit does not conform to the Rules of Civil Procedure and offends the best evidence rule, in that Mr. Outerbridge is not the proper affiant of the information in his affidavit?

PARTS III – STATEMENT OF LAW

3. Pursuant to Rule 25.11 of the *Rules of Civil Procedure*, the Court may strike out or expunge all or part of a document on the ground that the document:

(a) is scandalous, frivolous or vexatious; or

(b) is an abuse of the process of the court.

> *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 1994, s. 25.11, TAB 1

4. Rules 4.06(2) and 39.01(4) govern the contents of affidavits. Pursuant to Rule 4.06(2), an affidavit must be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where the rules provide otherwise. Pursuant to Rule 39.01(4), affidavits on a motion may contain statements of the deponent's information and belief if the source of the information and the fact of the belief are specified in the affidavit.

> *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 1994, ss. 4.06(2) and 39.01(4), TAB 1

5. In *Chopik* v. *Mitsubishi Paper Mills Ltd.*, Shaughnessy, J. has summarized the principles related to affidavits as follows:

- An affidavit should not contain improper hearsay, argument and irrelevant information. Legal argument and submissions are not proper for affidavits, are superfluous and should be struck;

- Offensive allegations made for the purposes of prejudicing another party and inflammatory rhetoric directed at a party are scandalous and should also be struck;

- Where it is clear at law that evidence is inadmissible, to leave the evidence on the record is embarrassing and prejudicial to the fair hearing of the motion or application. A party should not be put to the needless expenditure of time and

resources in responding to evidence which can have no impact on the outcome of the proceeding; and

- The fact that the action is a proposed class proceeding has no bearing on the analysis. It is not an objective of the *Class Proceedings Act, 1992* to modify or abridge the traditional rules of practice and pleading.

> *Chopik* v. *Mitsubishi Paper Mills Ltd.*, [2002] O.J. No. 2780 (S.C.J.), para. 26, TAB 2
>
> See also:
>
> *Canadian Blood Services* v. *Freeman*, [2004] O.J. No. 4519 (S.C.J.) (Master Beadouin), TAB 3
>
> *Csak* v. *Mokos*, [1995] O.J. No. 4027 (C.J. (Gen. Div.)) (Master Clark); aff'd on the issue of the affidavit [1996] O.J. No. 2338 C.J. (Gen. Div.)) (Simmons, J.), TAB 4

PART IV - ARGUMENT

6. The Outerbridge Affidavit does not comply with the Ontario Rules of Civil Procedure. Accordingly, this Court should expunge, disregard or give no weight to those portions of the Outerbridge Affidavit which are improper and contrary to the rules regarding affidavit evidence. In addition, Mr. Outerbridge is not a suitable deponent because he almost entirely lacks personal knowledge of the matters to which he deposes in his affidavit.

7. The Affidavit is subject to attack on a number of grounds. It contains statements which are irrelevant to the issue before this Court; irrelevant statements which are

inflammatory and amount to an abuse on the process of the court; statements based on hearsay; statements based on information and belief without the sources of the information indicated; and statements which amount to personal opinions of the deponent as well as conclusions and argument.

8. Many of the paragraphs and statements in the Affidavit are offensive on more than one ground, such as relevance, opinion, hearsay and lack of source of the information.

9. The following paragraphs or portions of paragraphs ought to be struck out or given no weight on the ground that they contain personal opinions of the deponent: 18, 19 (first 5 sentences), 20 (2nd sentence), 22 (1st sentence), 23 (1st and last sentence), 24 (2nd sentence), 25, 26 (1st sentence), 27, 29-32, 34, 38, 39, 40 (last 3 sentences), 41, 43, 45, 46 (4th and last sentence), 47, 48, 51, 52, 54, 55 (1st and last sentence), 56 (first 2 sentences), 57-61, 62 (1st sentence), 63 (1st and 5th sentence), 65, 67, 69, 70, 72, 77, 78 (1st, 2nd and 4th sentence), 79 (1st, 3rd, 4th and last 2 sentences), 80, 81 (1st sentence), 82 (2nd sentence), 83-88, 90, and 91.

10. The following paragraphs or portions of paragraphs ought to be struck out or given no weight on the ground that they contain argument or conclusions (legal or otherwise): 7-9, 19, 31, 32 (3rd sentence), 34, 40 (last 3 sentences), 41 (first 2 sentences), 43, 44 (last sentence), 45, 57 (last sentence), 59, 60, 65 (last sentence), 69, 77 (last sentence), 78 (2nd and last sentence), 79 (last sentence), 80, 81, 82 (2nd sentence), 87 (last sentence), and 91.

11. The following paragraphs or portions of paragraphs ought to be struck out or given no weight on the ground that they fail to provide the source of the information: 8, 11-18, 19 (last sentence), 20 (last sentence), 21-25, 26 (2nd and 3rd sentence), 27-33, 35-37, 39, 41 (last 2 sentences), 43, 44, 46-59, 61-64, 65 (2nd sentence), 66, 67 (1st sentence), 70, 72-76, 79, 81-83, and 87.

12. The following paragraphs or portions of paragraphs ought to be struck out or given no weight on the ground that they amount to hearsay: 15 (2nd, 3rd and 7th sentence), 16, 20, 27, 28, 35 (1st sentence), 36 (2nd sentence), 37, 40, 45 (3rd sentence), 48 (3rd sentence), 71, 72 (1st sentence), and 83 (2nd sentence).

13. The following paragraphs or portions of paragraphs ought to be struck out or given no weight on the ground that they contain irrelevant statements: 12-19, 20 with Exhibits, 21-26, 27 with Exhibits, 28-32, 35, 36, 38, 39, 40 with Exhibits, 41-44, 46, 47, 49, 50-53, 54, 56, 57-70, 71 with Exhibits, 72-73, 76, 78, 79, 81-84, 87-89 and 91.

14. The following paragraphs or portions of paragraphs ought to be struck out or given no weight on the ground that they contain irrelevant statements which are also inflammatory and are thus an abuse on the process of the court: 24, 33, 35 (2nd sentence), 37, 38, (1st sentence), 48, 67 (2nd sentence), 77, 80, 85, 86, 87 (1st sentence), 88 (1st sentence), and 90.

15. Below is a more detailed discussion of the some of the problems which the above-referenced paragraphs raise, by categories of grounds listed above.

(a) Affidavits must be confined to statements of fact – expressions of opinion, argument and illegal submissions ought to be struck out

16. The following paragraphs and statements should be struck out as they constitute opinion, argument or conclusions (legal and otherwise) as opposed to fact, contrary to Rule 4.06(2).

17. In **paragraph 7**, Mr. Outerbridge states why the evidence is being provided by way of "information and belief" is necessary. This is argument.

18. **Paragraph 8** provides an argument as to why Mr. Outerbridge is the proper deponent.

19. **Paragraph 9** sets out reasons why the form of the Outerbridge Affidavit does not comply with Rule 39.01 of the Rules of Civil Procedure. This amounts to argument.

20. In **paragraph 18**, the statement "...this recognition of our work regarding First Nations seems to result in additional clients coming to our firm" is clearly opinion and a conclusion which is for the Court to draw. It is also irrelevant and has no probative value.

21. **Paragraph 19** is a mix of opinion and advocacy or argument, and speculation about the mental states of others. For example, "Residential School litigation became a crusade for many lawyers..." and "MLG saw a huge injustice..." and "MLG lawyers cared...".

22. The further statement that "Prosecuting claims was expensive for MLG because MLG represented such a large number of Residential School clients..." lacks foundation because there has been no positive (or admissible) statement about how many residential school clients MLG actually had at any given time.

23. In **paragraph 22**, the statement that "...MLG offices...tend not to be in locations which would be off putting to First Nations people" is an opinion.

24. In **paragraph 23**, the statements "The determination of MLG on behalf of First Nations people is also noted by the First Nations community" and "....Being available helped earn our client's trust" are again Mr. Outerbridge's personal opinions.

25. **Paragraphs 24, 41, 69 and 91** set out Mr. Outerbridge's opinions about the impact of MLG on the negotiations, the Government's decision to negotiate a settlement, and the factors which lead to the settlement. These paragraphs contain expressions of opinion, argument and illegal submissions, and all offend Rule 4.06(2). They are inflammatory and an abuse on the process of the Court, thereby offending Rule 25.11(b) and (c).

Canadian Blood Services v. *Freeman*, *supra*, para. 18, TAB 3

Csak v. *Mokos*, *supra*, para. 26, TAB 4

26. Similarly, in **paragraph 24**, the statement "...We believe maintaining the pressure of litigation by thousands of victims was a fundamental reason why..." and in **paragraph 25**, the statement "...in the view of MLG..." are opinions and, moreover, they are not even

the deponent's opinions. They are expressions of opinion and statements of belief of some unidentified persons.

27. Statements such as the one in **paragraph 24** ("We believe...") also contravene the requirement that affidavits be drawn in the first person. Furthermore, since Mr. Outerbridge cannot depose to the number of clients MLG represented or the litigation activities which MLG has undertaken, he has not established that there was "litigation by thousands of victims".

28. In **paragraphs 29, 30, and 31**, statements such as "MLG has represented approximately half of all Residential School survivors..." lack foundation because there is no statement of fact about the total number of IRS claims (para. 29). They are a mere opinion.

29. In **paragraph 30**, the statement "...MLG has issued more than half of the claims ...in...Alberta...[and]...Saskatchewan." lacks foundation and therefore is mere opinion.

30. **Paragraph 31** is both an opinion and conclusion. Rather than setting out the actual litigation work that MLG has done, Mr. Outerbridge infers it by showing how much the salaries of Justice lawyers were in Saskatchewan. The actual litigation work which MLG has done in Saskatchewan and elsewhere ought not to be inferred in this manner.

31. In **paragraph 33**, the statements "The Government...made it very difficult to bring cases to a conclusion." and "The government would delay proceedings and make it

very difficult for our clients, as well as making it expensive and difficult for us as a law firm" are opinions as well as irrelevant statements which are also inflammatory.

32. **Paragraphs 34-37** amount to a personal opinion, are largely inflammatory and are also entirely irrelevant. **Paragraph 34** also amounts to a conclusion which is for the Court to draw.

33. **Paragraph 40** contains an opinion which Mr. Outerbridge has formed from reading newspaper articles.

34. **Paragraph 43** contains argument.

35. In **paragraph 45,** Mr. Outerbridge is purporting to give a legal opinion on the litigation risks faced by residential schools plaintiffs. He is not qualified to do so and there is no source for this opinion or belief.

36. **Paragraph 47** expresses Mr. Outerbridge's opinion about MLG's ability to pressure the government and influence the judiciary through the media. It is also argument and inflammatory, and lacks any evidentiary foundation.

37. **Paragraph 48** is largely vague and contains a multitude of expressions of opinion and argument as well as conclusions. The statement "Our sense was that they [Baxter National Consortium] also were doing..." expresses an opinion on behalf of others. No source of this information is provided.

38. **Paragraph 52** expresses an opinion regarding the nature of the settlement. In the same paragraph, the statement "It is common in resolving class disputes for a great deal of time and effort to go into discussions and negotiations..." is also an expression of a personal view.

39. **Paragraph 54** expresses a personal opinion regarding risk.

40. The statements in **paragraph 55** that "The BNC did an excellent job in the discussions with the Federal Government..." and in **paragraph 57** that "Work by the BNC was also important.", "The success by the BNC in *Cloud* was profound in its impact.", and "The good work by the BNC... was influential." as well as **paragraph 58** express Mr. Outerbridge's personal opinion as to the effectiveness of the Baxter National Consortium ("BNC"). The statement "Our lawyers... also took part meaningfully in the Alberta case management process." is also an expression of Mr. Outerbridge's personal view.

41. **Paragraphs 59 and 60** contain opinion about fairness of compensation to lawyers and is argument, not fact. In addition, the second sentence in **paragraph 59** ("MLG lawyers who attended the discussions not only think...") expresses a view of others without providing the source.

42. In **paragraph 63**, Mr. Outerbridge purports to express a legal opinion on the type of a Saskatchewan case.

43. **Paragraph 68** is an opinion and a speculation as to the type of information which will be put before the Saskatchewan court in September.

44. **Paragraph 69** expresses Mr. Outerbridge's opinion on the contributions of the BNC and MLG to the settlement negotiations.

45. In **paragraphs 78 and 82,** Mr. Outerbridge again expresses a personal view as to reasons for which many partners and lawyers left MLG. In addition, **paragraph 82** also contains hearsay.

46. **Paragraphs 83 and 84** amount to an opinion.

47. In **paragraph 85,** Mr. Outerbridge expresses an opinion on the impact of the negotiations on residential school survivors.

48. In **paragraph 87,** the statement that "Most survivors did not opted [sic] for that process because of limits on payouts and... of the ADR program..." professes to speak on behalf of the survivors and their state of mind when choosing not to proceed to the ADR.

49. The statements in **paragraph 87** which refer to the structural weaknesses of the Dispute Resolution are opinion.

50. In **paragraph 90,** Mr. Outerbridge expresses an opinion on the effectiveness of Mr. Phil Fontaine in his role as advocate for fairness and justice, the extent of his influence on the Prime Minister, and his impact on the negotiations.

(b) **No source of information provided**

51. Rule 39.01(4) requires that an affidavit in support of a motion should be based on the deponent's personal knowledge. Where the statements are not based on the deponent's personal knowledge, the source of the information and the fact of the belief should be included.

Canadian Blood Services v. *Freeman*, *supra*, para. 19, TAB 3

See also *Chopik* v. *Mitstubishi Paper Mills*, *supra*, TAB 2

52. It is also improper for the deponent to swear to the belief of other unnamed people without stating the basis for the belief.

Chopik, *supra*, para. 39, TAB 2

53. In the face of an objection being taken, the Court may not waive this irregularity.

Canadian Blood Services v. *Freeman*, *supra*, para. 19, TAB 3

54. **Paragraph 9** sets out reasons why the form of the Outerbridge Affidavit does not comply with Rule 39.01 of the Rules of Civil Procedure:

> ...Where a paragraph of this my affidavit is on information and belief, the paragraph will end with the number or numbers of the lawyers by whom I am informed with respect to **some of the information** in that paragraph... [Emphasis added]

55. This is unacceptable for a number of reasons, including:

(a) Where there are multiple statements in a paragraph, it cannot be determined which statements are based on information and belief and which are based on personal knowledge; and

(b) Where there are multiple sources listed, it is not possible to determine which statement is attributable to which source.

56. For these reasons alone, paragraphs 12-16, 23, 26, 32, 33, 36, 37, 43, 46-48, 55-59, 62, 63, 70, 79, and 81 should be struck out as offending Rule 39.01(4).

57. Additional paragraphs listed in paragraph 11 of this factum ought to be struck out or given no weight because they cite no source of information whatsoever. These paragraphs are: 8, 11, 18, 19 (last sentence), 20 (last sentence), 21, 22, 24, 25, 27-31, 35, 39, 41 (last 2 sentences), 44, 45, 49-54, 61, 64, 65 (2nd sentence), 66, 67 (1st sentence), 72-76, 82, 83, and 87.

58. These paragraphs (as listed in paragraph 57 above) do not state the source of Mr. Outerbridge's information and belief. Mr. Outerbridge can only have very limited personal knowledge as the Executive Director of MLG since 1993. He has provided no information on his duties as the Executive Director or how he has gained the personal knowledge that he professes to have. There is no basis on which to conclude that many of these statements are within his personal knowledge. For these reasons, those paragraphs should be struck.

59. In **paragraph 28**, no source is cited for the statement that "On November 20, 2006, we had 8,099 Residential School client files". Furthermore, what is missing from the affidavit is the number of clients MLG had at May 30, 2005. Besides, the year 2006 in the date is clearly incorrect.

60. The statement in **paragraph 35** that "According to press reports...." is not admissible and there is no source. It is also hearsay.

61. The statement in **paragraph 41** that "We are continuing to conduct Examinations for Discovery, moving cases to pre-trial and trial, dealing in ADR." lacks a source. The remainder of the paragraph is an opinion.

62. **Paragraph 44** must be based on information and belief but no source is stated.

63. **Paragraphs 49-54** make references to the proposed settlement but the Settlement Agreement itself is not itself referenced as the source of the information in these paragraphs.

64. The statements in **paragraph 61** require a source or otherwise they constitute an opinion.

65. There is no source provided in the assertions contained in **paragraphs 64 and 76.**

66. In **Paragraph 65**, no source is cited for the statement "We have been advised that the full materials...".

67. In **paragraph 83**, Mr. Outerbridge deposes that "...MLG has been many lawyers and even partners leave the firm, citing to me that their main reasons for leaving the firm was..." No sources of this information are provided.

(c) Hearsay

68. An affidavit must not contain hearsay except as allowed by rule 39.01(4).

Csak v. *Mokos*, *supra*, para. 8 (per Master Clark), TAB 4

69. The Outerbridge Affidavit contains many instances of hearsay combined with personal opinions and assertions lacking any foundation. The test for admission of hearsay has not been met in that Mr. Outerbridge would not be able to offer this evidence in court, leaving no principled basis for the admission into evidence of these statements and offending Rule 4.06(2) of the Ontario Rules of Civil Procedure.

70. Furthermore, the Outerbridge Affidavit is drafted in such a way that it is impossible to distinguish between what was within the deponent's personal knowledge and what information he had received from another. Mr. Outerbridge has failed to identify what events he had personally witnessed and about which ones he had been told.

Csak v. *Mokos*, *supra*, paras. 13-14 (per Master Clark), TAB 4

71. In *Csak* v. *Mokos*, Master Clark held that this particular hearsay fault ran throughout the affidavit and rendered it useless as evidence. The Court struck out the affidavit in its entirety on that ground alone.

Csak v. *Mokos*, *supra*, para. 14, TAB 4

72. The following paragraphs should be struck out or given no weight as they constitute such hearsay.

73. In **paragraph 15**, the statements referring to what was said by one of the Chiefs, two band council members, and Patrick Alberts, apart from being irrelevant, are hearsay.

74. In **paragraph 16**, the following statement contains hearsay and is irrelevant: "...A number of individuals in First Nations institutions, band offices, healing centers, were known to us to be recommending that individuals with Residential School Claims contact our firm."

75. The reference in **paragraphs 36 and 37** to what a government lawyer said in court and how the judge responded are hearsay. The statements are also inflammatory and irrelevant.

76. **Paragraph 45** contains hearsay in the statement that "... many in the legal profession and government asserted that there was no legal foundation for 'Residential School claim'." In addition, it expresses an opinion. No source of this information is provided and the statement is irrelevant.

77. The reference in **paragraph 72** to the government insisting on a "settlement involving many unusual factors and placing unusual burdens" is a mix of hearsay, opinion and an assertion lacking any source. It is also irrelevant.

78. All of the **paragraphs (20, 27, 28, 35, 40, and 71)** which rely on the information from the media are also impermissible hearsay. They are not being referred to for the proposition that the media published certain information but for the actual truth of the contents of the articles and as such are inadmissible. Both the statements in the affidavit and the exhibits ought to be struck.

(d) <u>Statements irrelevant to the issues before the Court</u>

79. The vast majority of the affidavit speaks to matters which are entirely irrelevant to and have no bearing on the issues before the Court. The following paragraphs or portions of paragraphs ought to be struck out or given no weight on the ground that they contain irrelevant statements: 12-19, 20 with Exhibits, 21-26, 27 with Exhibits, 28-32, 35, 36, 38, 39, 40 with Exhibits, 41-44, 46, 47, 49-54, 56-70, 71 with Exhibits, 72-73, 76, 78, 79, 81-84, 87-89, and 91.

80. Furthermore, the following paragraphs or portions of paragraphs ought to be struck out or given no weight on the ground that they contain irrelevant statements which are also inflammatory and are thus an abuse on the process of the court: 24, 33, 35 (2nd sentence), 37, 38 (1st sentence), 48, 67 (2nd sentence), 77, 80, 85, 86, 87 (1st sentence), 88 (1st sentence), and 90.

81. In particular, **paragraph 13** describing Mr. Merchant's family members' involvement in the Government, and various positions they have held in various provincial and federal governments are not even remotely related to the issues before this Court.

82. Excerpts from the press in the form of **articles attached as Exhibits and referenced in paragraphs 20, 27, 40, and 71** of the Affidavit are inadmissible evidence and attaching them to an affidavit does not cloak them with admissibility. The articles are entirely irrelevant to the issues before the Court. Neither the deponent nor the articles themselves indicate where or when they were published. Several of the articles do not mention MLG at all.

83. **Paragraphs 25 and 26** contain references to the media and electronic media. The references to media interviews are irrelevant and not probative.

84. **Paragraphs 77, 80, 86, and 87** contain many irrelevant, inflammatory statements, such as "This long journey has been a difficult battle for Residential School survivors (and MLG). It became an obsession for many in our firm. MLG would not be bullied by the government lawyers...." (para. 77); "The government could afford to defend impractically." (para. 80); and "When the Government of Canada decided that they would fight every case and revictimize litigant after litigant, that was the wrong decision. It entrenched within the First Nations community a sense of further betrayal..." (para. 86); and "The government... presented packages which were half-hearted and unsuccessful in ending Residential Schools litigation..." (para. 87).

85. Argumentative and rhetorical statements, such as **paragraph 88**, and should also be struck or given no weight.

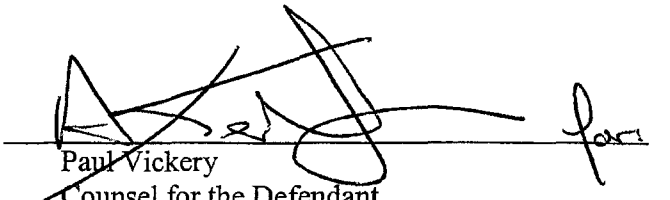
Chopik, supra, para. 55, TAB 2

PART V - ORDER SOUGHT

86. The Respondent, the Attorney General of Canada, therefore requests an order striking the Outerbridge Affidavit or portions thereof.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa this 15th day of August, 2006.



Paul Vickery
Counsel for the Defendant,
the Attorney General of Canada

PART VI – LIST OF AUTHORITIES

LEGISLATION:

1. *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, ss. 4.06(2), 25.11, and 39.01(4), TAB 1

CASE LAW:

2. *Chopik* v. *Mitsubishi Paper Mills Ltd.*, [2002] O.J. No. 2780 (S.C.J.)

3. *Canadian Blood Services* v. *Freeman*, [2004] O.J. No. 4519 (S.C.J.)

4. *Csak* v. *Mokos*, [1995] O.J. No. 4027 (C.J. (Gen. Div.)) (Master Clark); aff'd on the issue of the affidavit [1996] O.J. No. 2338 C.J. (Gen. Div.)) (Simmons, J.)

Courts of Justice Act

R.R.O. 1990, REGULATION 194

Amended to O. Reg. 77/06

RULES OF CIVIL PROCEDURE

This is the English version of a bilingual regulation.

RULE 4 COURT DOCUMENTS

AFFIDAVITS

4.06

Contents

(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 4.06 (2).

PLEADINGS

RULE 25 PLEADINGS IN AN ACTION

STRIKING OUT A PLEADING OR OTHER DOCUMENT

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court. R.R.O. 1990, Reg. 194, r. 25.11.

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

EVIDENCE BY AFFIDAVIT

39.01

Contents — Motions

(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Case Name:

Chopik v. Mitsubishi Paper Mills Ltd.

Between
Gerald Chopik and 973178 Ontario Limited, plaintiffs, and
Mitsubishi Paper Mills Ltd., Mitsubishi Corporation and
Mitsubishi Canada Limited, defendants

[2002] O.J. No. 2780
Court File No. 51345/99

Ontario Superior Court of Justice
Shaughnessy J.

Heard: May 2, 2002.
Judgment: July 9, 2002.
(65 paras.)

Practice — Pleadings — Striking out pleadings — Grounds, unnecessary, irrelevant, immaterial or redundant — Grounds, prejudice, embarrass or delay fair trial — Affidavits, striking out — Argument — Irrelevant or improper matters.

This was an application by the defendant Mitsubishi corporation for an order striking out certain paragraphs from the plaintiff's statement of claim and from two affidavits in support of the plaintiffs' class action certification motion. Mistubishi claimed that the impugned paragraphs were irrelevant to the certification proceedings, that they were embarrassing, and that they should therefore be struck out. The plaintiffs argued that the impugned paragraphs, which related to the size and resources of the defendant corporation, were necessary to support its claim of conspiracy.

HELD: Application allowed. The impugned paragraphs consisted of irrelevant facts, were in the nature of legal arguments, or were otherwise unnecessary or embarrassing. As to the affidavit, the impugned paragraphs were irrelevant to the issues which would be considered in a motion for certification of a class action, or were in the nature of arguments. Several paragraphs, which were in accordance with the Rules, were allowed to stand.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, s. 5, 5(1)(a).

Ontario Rules of Civil Procedure, Rules 4.06(2), 25.06(1), 25.11, 39.01(4).

Counsel:

Allen M. Cooper, for the plaintiffs.
Andrew J. Roman and Michelle Wong, for the defendant, Mitsubishi Paper Mills Ltd.
John B. Laskin and Linda Plumpton, for the defendant, Mitsubishi Canada Limited.

[Quicklaw note: An amended page was released by the Court July 16, 2002. The changes were not indicated. This document contains the amended text.]

¶ 1 **SHAUGHNESSY J.**:— The Defendants Mitsubishi Canada Limited and Mitsubishi Paper Mills Ltd. seek an order striking out various paragraphs of the Statement of Claim and the Affidavits of Gerald Chopik sworn April 3, 2002 and April 10, 2002 filed in support of a motion for certification.

¶ 2 In this proposed class action proceeding, the Plaintiffs claim against Mitsubishi Canada Limited and Mitsubishi Paper Mills Ltd. for alleged breaches of Canadian Competition laws in the sale of thermal fax paper for home and business use between 1991 and 1996. The Plaintiffs bring this action on their own behalf and on behalf of any purchaser of thermal fax paper in the material period with some limited exceptions.

¶ 3 The Plaintiff's counsel advises that this action will be discontinued as against the Mitsubishi Corporation.

Statement of Claim

¶ 4 The Defendants move to strike paragraphs 64, 65, 70, 71, 72 and 73 of the Amended, Amended Statement of Claim.

¶ 5 Counsel for the Plaintiffs in the factum and in his submissions to the Court, concedes that paragraphs 64, 65, 71 and 72 of the Statement of Claim ought to be struck. Accordingly, an Order will issue striking paragraphs 64, 65, 71 and 72 of the Amended, Amended Statement of Claim.

¶ 6 In paragraph 70 of the Amended, Amended Statement of Claim, the Plaintiffs state:

> Exemplary damages must be of sufficient amount to deter the defendants from committing further acts contrary to the Act. With respect to their financial means, MPM's [Mitsubishi Paper Mills Ltd.] revenues and net income for their fiscal year ending March, 1996 were U.S. $2.062 billion and U.S. $50.4 million. In the 12 months ending March, 1998, MC [Mitsubishi Corporation] reported its net income and shareholder's equity as JY 10.071 billion and JY 312.385 billion respectively. Using an exchange rate of JY 87 to C $1 MC's [Mitsubishi Corporation] net income and shareholders equity equate to C $115.758 million and C $3.59 billion.

¶ 7 In paragraph 73 of the Amended, Amended Statement of Claim, the Plaintiff states:

> The Plaintiffs plead that the defendants violations of the Act were part of an unlawful systemic MGC [Mitsubishi Group of Companies] - wide attempt to control commerce. The "harmonious way" referred to in the letter written by MPM [Mitsubishi Paper Mills Ltd.] and MC [Mitsubishi Corporation] in fact referred to secret, price fixing and price programs that are contrary to law and harmful to the purchasers of the defendants

products involving class members. The defendants are members of the Mitsubishi group of companies, an organization that has repeatedly and willfully breached anti-trust laws worldwide. Members of the MGC have been investigated, prosecuted and litigated by authorities around the world for practices similar to the allegations contained herein. Previous prosecutions, fines and penalties have not deterred the Mitsubishi Companies from continuing anti-competitive activities contrary to law.

¶ 8 The Defendants state that paragraphs 70 and 73 are pleadings of argument relating to a "need for deterrence". It is submitted that these paragraphs also contain evidence as well as allegations relating to corporate entities and proceedings which are entirely irrelevant to this action. The Defendants argue that these paragraphs are embarrassing and should be struck out.

¶ 9 The Plaintiff's position is that paragraph 70 refers to the claim for exemplary damages and further that the information pleaded is relevant to the size of the company and its ability to pay punitive damages claimed.

¶ 10 The Plaintiff's position in relation to paragraph 73 of the Statement of Claim is that the pleading effectively suggests that there is a worldwide conspiracy and the pleading provides information on the scope of the conspiracy involving a number of the Mitsubishi group of companies. While counsel for the Plaintiff acknowledges that he does not intend to continue the action as against Mitsubishi Corporation, he nevertheless submits that they are part of a conglomerate involved in a conspiracy of price fixing and/or price maintenance.

Analysis

¶ 11 The Rules of Civil Procedure that are relevant to a consideration of the pleadings in issue are; Rule 25.06(1) and 25.11 of the Rules of Civil Procedure.

¶ 12 Rule 25.06(1) provides that "every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defense, but not the evidence by which those facts are to be proved".

¶ 13 Rule 25.11 provides that: the court may strike out or expunge all or part of a pleading or other documents, with or without leave to amend, on the ground that the pleading or other document:

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

¶ 14 I find that the statements contained in paragraphs 70 and 73 of the Amended, Amended Statement of Claim are not in conformity with the provisions of Rule 25.06(1) and therefore, must be struck on the basis detailed under Rule 25.11.

¶ 15 It is my opinion that the paragraphs in issue do not plead a material fact that is necessary for either the certification motion or the prosecution of this action. In both paragraphs, there are several references to the Mitsubishi Corporation and its income, shareholders' equity and allegations of its involvement in a conspiracy. There is also in paragraph 73 similar allegations relating to the Mitsubishi Group of Companies. However, counsel for the Plaintiff advises that the Mitsubishi Corporation was

never served with the originating Statement of Claim and indeed, he advised the court that it was the intention of the Plaintiffs not to proceed against the Corporation. Further, the allegations against the Mitsubishi Group of Companies, at best, involves a number of unnamed companies manufacturing products which are not the subject matter of this proceeding.

¶ 16 Even if I were to accept the Plaintiffs' position that the pleadings related to exemplary damages and the scope of a conspiracy of price-fixing, these paragraphs would nevertheless offend Rule 25.06(1) in that it is a pleading of evidence. I would also find that the pleading in both paragraphs is frivolous and they have the potential to delay the fair trial of the action.

¶ 17 I would also observe that the statements in paragraphs 70 and 73 would also constitute an abuse of process. In the case of National Trust Co. v. Furbacher, [1994] O.J. No. 2385, Farley J. noted that there are many ways in which pleadings may be an abuse of process. Citing Chadwick J. in Carnegie v. Rasmussen Starr Rudely (1994), 19 O.R. (3d), 272 at p. 277-8:

> Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights ...

¶ 18 In the National Trust Co. v. Furbacher case, (supra), the Court succinctly delineated that the function of pleadings is to:

(i) define with clarity and precision the question in controversy between the litigants;

(ii) to give fair notice of the precise case which is required to be met and the precise remedies sought and;

(iii) assist the Court in its investigations of the truth and the allegations made.

¶ 19 I find that paragraphs 70 and 73 of the Amended, Amended, Statement of Claim do not meet the aforementioned objectives of a pleading. The evidence that the Plaintiffs plead in the paragraph is irrelevant and has no bearing on the claim. The paragraph refers to events or circumstances which are alleged to have occurred outside Canada by companies who are not parties to this proceeding and materials or goods which are not the subject matter of this proceeding.

¶ 20 I further find that paragraphs 70 and 73 are not a concise statement of relevant facts, but instead are "a rambling, diffused, mixed-up mass of facts, evidence, arguments and law", (Cadillac Contracting and Developments Ltd. v. Tanenbaum, [1954] O.W.N. 221 at p. 224-5).

¶ 21 In the result, I order that paragraphs 70 and 73 of the Amended, Amended Statement of Claim be struck. Since the pleading is adjudged irrelevant and unnecessary, there is no need for a consideration of a further amendment to the Statement of Claim.

Affidavit of Gerald Chopik, Sworn April 3, 2002 (The First Chopik Affidavit)

¶ 22 The Plaintiffs have served and filed an Affidavit of Gerald Chopik sworn April 3, 2002 in support of a motion for certification. Counsel for the Plaintiffs in his factum states that the Plaintiffs do not oppose and take no position on a motion to strike paragraphs 6, 7, 8, 9, 10, 11, 31, 35, 37 and 42 of the First Chopik Affidavit. In his submissions to the Court, counsel for the Plaintiffs concedes that

paragraphs 27, 35 and 41 should also be struck as matters of argument which are best left in the Plaintiffs' factum on certification. Counsel for the Plaintiffs also concedes that the following sentence in paragraph 26 should be struck:

> Furthermore, I am informed from Quicklaw and verily believe that other fines imposed for quasi-criminal resale price maintenance, from government prosecutions, were too low to make the Competition Bureau's surveillance a serious deterrent to potential offenders.

¶ 23 The Defendants' position is that numerous paragraphs in both Chopik Affidavits contain irrelevant information and do not relate to the test for certification in s. 5 of the Class Proceedings Act. Further, the Defendants state that the Affidavit offends the Rules of Practice.

¶ 24 The Plaintiffs submit that the paragraphs in issue in both Affidavits relate to the evidential basis for certification and therefore, are relevant to that hearing.

Law

¶ 25 The rules relevant to a review of both Affidavits are Rule 4.06(2) and Rule 39.01(4) of the Rules of Civil Procedure. Rule 4.06(2) provides that "an affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that that deponent could give if testifying as a witness in court ...". Rule 39.01(4) provides that an affidavit for use in a motion "may contain statements of the deponent's information and belief if the source of the information and the fact of belief are specified in the Affidavit."

¶ 26 The case law that is relevant to this part of the motion is as follows:

1. Affidavits on a motion that fail to state the source of the deponent's information and belief will be struck if the paragraph deals with a contentious matter; but it may be saved by Rule 1.04 if it deals with non-contentious matters and the exhibits to the affidavit or other evidence filed on the motion reveal the source of the information and belief. (Cameron v. Taylor (1992), 10 O.R. (3d) 277 Ont. Ct. (Gen. Div.).

2. Improper hearsay, argument and irrelevant information should not be contained in an affidavit. Similarly, legal argument belongs in a factum or brief, not an affidavit. Legal submissions contained in affidavits are superfluous and should be struck. (Canada Post Corp. v. Smith (1994), 20 O.R. (3d) 173 at 188 (Div. Ct.) and Czak v. Mokos (1995), 18 R.F.L. (4th) 161 at 165 (Master).

3. Offensive allegations made for the purposes of prejudicing another party and inflammatory rhetoric directed at a party are scandalous and should also be struck. (Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters (2001), 143 O.A.C. 103 at 111-112 (S.C.J.) aff'd. [2001] O.J. No. 5320 (Div. Ct.).

4. Where it is clear in law that evidence is inadmissible, to leave the evidence on the record is embarrassing and prejudicial to the fair hearing of the motion or application. A party should not be put to the needless expenditure of time and resources in responding to evidence which can have no impact on the outcome

of the proceeding. (Noble China Inc. v. Lei) (1998), 42 O.R. (3d) 69 at 94-95 (Gen. Div.).

5. The fact that this action is a proposed class proceeding has no bearing on the analysis. It is not an objective of the Class Proceeding Act, 1992 to modify or abridge the traditional rules of practice and pleading. (Edwards v. Law Society of Upper Canada) (1995), 40 C.P.C. (3d) 316 at 321 (Gen. Div.).

¶ 27 Having reviewed these principles of law and the applicable rules of practice, I will now make specific reference to the paragraphs of both Affidavits.

¶ 28 Paragraph 3 of the First Chopik Affidavit references U.S. federal proceedings relating to unrelated companies in a conspiracy with respect to price fixing of thermal fax paper.

¶ 29 The preamble to paragraph 3 is not relevant to the test for certification under s. 5 of the Class Proceedings Act. An Affidavit should not contain argument or irrelevant information. However, paragraphs 3(a), (b) and (c) in my opinion, may be relevant to the issue of whether the pleadings disclose a cause of action. (s. 5(1) of the C.P.A.) in relation to a breach of the Competition Act, R.S.C. 1985, chap. C-34. A certificate of conviction is annexed to the Affidavit in support of the allegation of a guilty plea for one of the corporate defendants to a breach of s. 45(1)(c) of the Competition Act. Therefore, paragraphs 3(a), (b) and (c) of the First Chopik Affidavit are not struck.

¶ 30 However, at paragraph 3(d) the Plaintiffs attach to the First Chopik Affidavit the decision of the Federal Court of Canada, which discusses a conspiracy in 1991-1992 involving one of the corporate defendants to prevent or lessen competition in the production, manufacture, purchase, or sale of thermal fax paper in Canada. To the extent that it relates to a consideration of s. 5.(1)(a) of the C.P.A., I find that the information in this paragraph may be relevant to the certification application. Therefore, paragraph 3(d) is not struck.

¶ 31 However, paragraph 3(e) is not remotely related to the issues or the parties to this proceeding. Therefore, paragraph 3(e) is struck.

¶ 32 Paragraphs 4 and 5 of the Affidavit relate to the history of certain Mitsubishi companies. Paragraph 4 refers to articles which are found on "Mitsubishi Internet web sites" and popular magazines that describe Mitsubishi's history.

¶ 33 If all the Plaintiffs purported to accomplish was a "brief" history of the defendant corporation, as well as indicating the information as to how the companies are related, such information would be acceptable in part, in order to put in context the issues in this proceeding. However, the first and last sentences of paragraph 4 are not relevant to this certification. They involve conclusions at law and they are statements made outside the knowledge of the deponent. Similarly, paragraph 5 relates to alleged acts relating to the formation of a "cartel" outside of Canada. In the last sentence, the deponent states "I verily believe that the defendants acted as one organization (i.e. a (keirtsu) with respect to their illegal acts complained of within this proceeding". I find that these statements do not relate to the test for certification. These statements are arguments or conclusions at law, which are outside the knowledge of the deponent. Therefore, paragraph 4 and 5 of the First Chopik Affidavit are struck with leave to amend.

¶ 34 Paragraph 12 of the First Chopik Affidavit states:

I am in receipt of an article from the Washington Times dated the 28th of March, 1991. This article indicates that a U.S. Mitsubishi company paid $8 M to settle a price-fixing charges in Maryland. Exhibit N}.

¶ 35 However, a review of Exhibit N referred to in paragraph 12 indicates that the Mitsubishi Electronics America agreed to make a refund to consumers who bought television sets in 1988 in the United States. This is a different company distributing a different product than in the present proceeding.

¶ 36 Accordingly, I find that paragraph 12 of the Affidavit is irrelevant to the motion for certification and it is struck.

¶ 37 Paragraph 13 of the Affidavit begins with "Price-fixing is not an unusual activity for Mitsubishi. Mitsubishi companies have been found guilty of anti-trust activities in Canada and the United States for anti-competitive act (sic) covering fax paper, televisions and more". The deponent goes on to enumerate a number of published articles in U.S. newspapers and trade magazines. A review of the articles annexed as exhibits indicates that they are brief accounts of the status of lawsuits relating to companies other than the named defendants and involving products which are not the subject matter of this action.

¶ 38 I find that paragraph 13 is irrelevant to a certification motion. The opening sentence of the paragraph is incorrect and misleading. There are no references to anti-trust violations involving the Mitsubishi companies in Canada. Further, the exhibit does not relate to anti-trust violations involving fax paper. Therefore, paragraph 13 of the First Chopik Affidavit is struck.

¶ 39 In paragraph 14 of the Affidavit, the deponent states: ."I, along with prospective class members, verily believe that the illegal acts of the defendants resulted in increased costs to myself ...". Counsel for the defendants suggests that it is improper for the deponent to swear to the belief of other unnamed people without stating the basis for the belief. I accept that the words "along with other prospective class member" should be excised from the Affidavit.

¶ 40 The deponent in paragraph 14 goes on to state that he is in receipt of a press release from the Competition Bureau dated July 16, 1996, "in respect to illegal activities described in this proceeding." Annexed as an exhibit is a Toronto Sun newspaper summary of a story indicating that a completely unrelated company had been ordered to pay a fine after pleading guilty to conspiracy to fix prices for thermal fax paper. The newspaper story quotes a Deputy Minister who "estimates" that this unrelated company inflated the price of fax paper by about 9%. The Plaintiff's position is that paragraph 14 and the exhibit attached, are relevant to establishing that the proposed class members sustained damages and therefore have a valid cause of action. However, I find that paragraph 14 is misleading. The exhibit annexed does not relate to the "government's investigation of illegal activities in this proceeding". At best, one can conclude that there are other companies involved in price fixing of thermal fax paper. However, the issue is whether that is relevant to a certification motion. I find that it is not relevant. Therefore paragraph 14 is struck.

¶ 41 In paragraph 15, the deponent states his belief in the extent of the damages sustained by the proposed class members. He annexes a web site report as the basis for the belief. I am inclined to leave this paragraph as it may have some relevance to the issues related to certification. Therefore, this paragraph will not be struck from the Affidavit.

¶ 42 In paragraph 16, the deponent states that a class action is the only "forum" where prospective class members can obtain monetary damages. He then goes on to state that "fines resulting from

Competition Bureau prosecutions" are not "distributed back to Canadian purchasers ... rather, these fines would go to government coffers, not the victims of the crime." This paragraph calls for a conclusion at law, it is argumentative and perhaps is best placed in a factum. However, the paragraph can be amended in such a manner that it could be made relevant to s. 5(1)(d) of the Class Proceedings Act, 1992. Therefore, in relation to this paragraph, I grant leave to amend. However, all conclusions of law and argument are to be excluded.

¶ 43 Paragraph 17 refers to a number of civil actions in the United States in which settlements were achieved. Again, these settlements involve different companies than the named defendants. I find that this portion of the Affidavit contains information which is not relevant to a certification motion. I further find that the deponent does not identify the specific persons he spoke to in forming his belief. This paragraph is therefore struck from the Affidavit.

¶ 44 Paragraphs 18, 19, 21 and 22 of the Affidavit of Gerald Chopik sworn April 3, 2002 relates to an Agreed Statement of Facts in the proceeding Her Majesty The Queen v. Mitsubishi Paper Mills Ltd. in the Federal Court of Canada. The Agreed Statement of Facts dated February 12, 1997, which is annexed to the Affidavit refers to a pricing agreement which prevented or lessened unduly the competition in thermal facsimile paper in Canada.

¶ 45 I find that paragraphs 18, 19, 21 and 22 of the Affidavit may be relevant to a certification motion. Therefore, these paragraphs will not be struck.

¶ 46 Paragraph 20 states that "retailer staff" advised the Plaintiff that the "fax paper" purchased over the "period in question were most likely those of the defendants and their guilty co-conspirators". This paragraph is deficient in that it does not name the "retailer staff" referred to and the words "guilty co-conspirators" is argumentative. The Plaintiffs may amend this paragraph by naming who are the "retailer staff" and leaving out the argumentative portion of the sentence.

¶ 47 Paragraph 23 refers to other class members who have receipts, "demonstrating that they were required to purchase thermal fax paper for the facsimile machines used to support their business communications." This paragraph does not indicate how the thermal fax paper they purchased relates to the named defendants. The Plaintiff may amend this paragraph, if so advised, to make it relevant to a motion for certification.

¶ 48 In paragraph 24 of the Affidavit, it quotes an official of the Competition Bureau who states that the conspiracy involving thermal fax paper "raised prices by 9 percent". Annexed as an exhibit is a web page of a Toronto Sun article dated July 17, 1996, which refers to an unrelated company that pleaded guilty to conspiracy to fix the price of thermal fax paper. This paragraph is struck as not being relevant to the certification motion as it does not involve the parties to this action.

¶ 49 Paragraph 25 of the Affidavit makes reference to the administration and distribution of damages to "indirect purchasers" and likewise refers to "the 'citric' and 'sorbate' class actions". The information in this paragraph may be placed in a factum and argued on the motion for certification. However, it is legal argument and I would think outside the deponent's knowledge. Counsel for the Plaintiff conceded that this matter was best left for argument. Accordingly, this paragraph is struck from the Affidavit.

¶ 50 In paragraph 26, the deponent discusses the "Koss court decision" and opines that the "$2,500 fine for quasi-criminal price maintenance violations is to low ...". The paragraph goes on to provide the views of the deponent concerning the legitimacy of the court process in relation to a number of other unrelated companies. This paragraph is improper, argumentative and irrelevant to a certification motion,

and accordingly is struck. Similarly paragraph 27 refers to the reported decision in Predovich v. Armstrong and the principles of law enunciated therein. Again, this paragraph may be relevant to a factum, but it is argument relating to a legal issue and it is therefore improper to be placed in the Affidavit. Counsel for the Plaintiff conceded in oral argument that it is improper. The paragraph, accordingly, is struck.

¶ 51 Paragraph 28 begins with the sentence; "past criminal fines and convictions have not dissuaded Mitsubishi Companies from engaging in anti-trust breaches activities (sic)". The paragraph then goes on to recite breaches by corporations that are not parties to the proceedings and/or products which are not related to this proceeding. I find that this paragraph is inflammatory, scandalous and prejudicial. It is not relevant to a certification motion and is therefore struck.

¶ 52 Paragraph 32 contains a typographical error. The word "Matsushita" should state instead "Mitsubishi". With this amendment, the paragraph is satisfactory and can stand.

¶ 53 The second sentence of paragraph 34 reads "These damages are too small to be worthwhile pursuing by class members against powerful foreign companies". This sentence may relate to the preferable procedure under s. 5(1)(d), however, the words "against powerful companies" should be excised as they are argumentative and rhetorical and otherwise not relevant to a certification motion.

¶ 54 In paragraph 36, the deponent states that he believes, with the assistance of his counsel "I have presented a workable draft plan for the proceeding that will effectively advance the claim on behalf of the class". Whether the Plaintiff has satisfied the requirements under s. 5(1) of the Class Proceedings Act, 1992 is for the Court to decide. The deponent's belief that he has produced a "workable plan" is irrelevant to a certification motion. This paragraph is to be struck.

¶ 55 Paragraphs 39, 40 and 41 of the Affidavit, relate to the Competition Bureau. Annexed to the Affidavit is a one page summary of the activity of the Competition Bureau purportedly from April 1 to September 30, 1997. The source or basis for this information is not identified. Therefore, paragraph 39 of the Affidavit is struck. Paragraph 40 however, refers to the Competition Bureau's Annual Report ending March 31, 1996 and may be relevant to submissions relating to the preferable procedure and behavior modification under the CPA. However, paragraph 41 states a conclusion that "the Competition Bureau does not have the resources to prosecute antitrust offenders. Plaintiffs and class members cannot depend on the Competition Bureau ...". I find that the deponent's opinion is irrelevant and immaterial. Accordingly, I find that paragraph 41 is argumentative and rhetorical and it should be struck. Likewise paragraph 39 should be struck, however paragraph 40 can stand.

Supplementary Affidavit of Gerald Chopik Sworn April 10, 2002

¶ 56 Counsel for the Plaintiff has acknowledged and agreed that paragraphs 10, 13, 14 and 15 of the Affidavit of Gerald Chopik sworn April 10, 2002 are improper and therefore are to be struck.

¶ 57 Counsel for the Defendant Mitsubishi Paper Mills Ltd. attacks paragraphs 4 through 7 of the Supplementary Affidavit of Mr. Chopik. These paragraphs quote extensively from the agreed Statement of Facts referred to in paragraph 18, 19, 21 and 22 of the first Affidavit. This Agreed Statement of Facts does relate to thermal fax paper and the Defendant Mitsubishi Paper Mills Ltd. I find that these paragraphs may be relevant to the Plaintiff's motion for certification. Therefore, I refuse to strike these paragraphs.

¶ 58 Paragraph 8 of the Supplementary Affidavit refers to the Reasons of Mr. Justice Rothstein in

Canada v. Kanzaki Specialty Papers Inc., [1994] F.C.J. No. 1081. This paragraph relates to argument and law and it does not, in my opinion, belong in an Affidavit. The paragraph is struck.

¶ 59 In paragraph 9, the deponent proceeds to provide an "estimate" of the overcharging relating to thermal fax paper. The information (or calculations) provided in this paragraph may be relevant to the motion for certification. The Plaintiff may be able to demonstrate that this "estimate" is relevant to s. 5 (1)(d) of the CPA. Therefore, I direct that this paragraph may stand.

¶ 60 Paragraph 11 recites that the deponent has "been in contact with several prospective class members and was advised that their direct losses are calculable in the six-figure dollar range, traceable to the defendants". This paragraph is similar to paragraph 17 of the first Affidavit sworn April 3, 2002. The deponent has failed to identify the persons he spoke to in forming his belief. This paragraph is accordingly struck with leave to amend to name the individuals that the deponent spoke to in forming his belief.

¶ 61 Paragraph 12 refers again to the Agreed Statement of Facts which is annexed as an exhibit to the first Affidavit. However, this paragraph goes on to argue that the "wrongful gain" and "ill-gotten overcharges to the class" remain to be discovered. The deponent then states that he has instructed his counsel to obtain relevant records from the Competition Bureau after certification. While this reference to the Agreed Statement of Facts is not of itself a breach of the rules, nevertheless, the balance of the paragraph is argumentative, prejudicial, rhetorical and irrelevant to a certification motion. The paragraph is accordingly, struck.

Summary

¶ 62 In the result, I hereby order and direct that paragraphs 64, 65, 70, 71, 72 and 73 of the Amended, Amended Statement of Claim be struck.

¶ 63 Counsel for the Plaintiff shall either deliver a fresh Affidavit in support of the motion for certification or amend the existing Affidavits as determined by these Reasons. An approved copy of the Order shall be submitted to me for signing.

¶ 64 In addition, thereto and with the consent of the parties, I grant an Order extending the time for the Defendants Mitsubishi Paper Mills Ltd. and Mitsubishi Canada Ltd. to deliver responses to the Plaintiff's request to admit dated March 1, 2002 and April 12, 2002 for 30 days after the disposition of the certification motion and the expiry of any appeals therefrom.

¶ 65 Counsel for the parties may contact my secretary and arrange a convenient date to attend before me to make submissions on costs.

SHAUGHNESSY J.

QL Update: 20020807 cp/s/qlhcc/qlmjb/qlkjg/qlltl

Case Name:

Canadian Blood Services v. Freeman

Between
Canadian Blood Services/Societe Canadienne Du Sang,
plaintiff, and
Kyle Freeman, defendant, and
Canadian Aids Society, moving party/proposed
intervenor
And between
Kyle Freeman, plaintiff by counterclaim, and
Canadian Blood Services/Societe Canadienne du Sang
and The Attorney General of Canada, defendants to the
counterclaim, and
Canadian Aids Society, moving party/proposed
intervenor

[2004] O.J. No. 4519
Court File No. 02-CV-20980

Ontario Superior Court of Justice
Master Beaudoin

Heard: October 5, 2004.
Judgment: November 4, 2004.
(40 paras.)

Civil evidence — Documentary evidence — Affidavits — Statements on information or belief — Striking out — Civil procedure — Actions — Intervenors — Amicus curiae — Parties — Intervenors — Charter litigation — Requirement of interest — Constitutional law — Canadian Charter of Rights and Freedoms — Reasonable limits — Oakes test — Sufficient importance — Health law — Blood services.

Application by the Canadian Aids Society (CAS) to intervene as a party in an action by the plaintiff Canadian Blood Services (CBS) against the defendant Freeman for negligent misrepresentation. CBS was responsible for collecting, processing and distributing blood products. As part of its screening process in the collection of blood products, CBS asked donors to answer standard questions prior to donating blood to identify donors whose blood might pose a risk to recipients. One question was whether the intended donor had had sex with a man, even once, since 1977. Freeman was a former blood donor. CBS launched an action for damages after Freeman allegedly falsely and negligently responded to the questionnaire that he had not had sex with a man, not even once, since 1977. According to the claim, Freeman later contacted CBS anonymously to advise that he had lied when he had answered that question. CBS sought

damages in the amount of $100,000.00 for Freeman's alleged negligent misrepresentation. In his counterclaim, Freeman contended that the question discriminated against him based on his sexual orientation. He asserted that the question was not rationally connected to the purpose it was supposed to serve, which is to screen out persons whose behaviour places them at a higher than normal level of risk of having contracted an HIV infection. The CAS sought to intervene as a party, or, failing that, as a friend of the court pursuant to Rule 13.02. The parties exchanged affidavits of documents listing over 900 records. They included documents setting out the positions of various stakeholders and interest groups, including CAS. The Executive Director of CAS, Lapierre, prepared an affidavit. CBS submitted that the court should disregard portions of the Lapierre affidavit as being improper and contrary to the rules regarding affidavit evidence. It also argued that some portions should be struck because they were scandalous, frivolous, vexatious, or an abuse of the process of the court. In addition, CBS submitted that some paragraphs contravened Rule 4.06(2) because they constituted opinion as opposed to fact. Finally, CBS argued that certain paragraphs should be struck as they consisted of statements which were irrelevant to the issue.

HELD: Application allowed. The CAS was granted permission to intervene as a friend of the court. The court concurred that some paragraphs did contain expressions of opinion, argument or illegal submissions, offending the Rule. However, Lapierre was entitled to set out CAS's position in this litigation. The court also struck paragraphs where it was clear that they were not based on Lapierre's personal knowledge. With respect to other paragraphs, the court held that while their relevance may be marginal, they were not frivolous, scandalous, or vexatious. However, the court struck one sentence as it was unsupported by any evidence. It was inflammatory and prejudicial. The CAS represented a broad spectrum of blood consumers and suppliers, same-sex oriented or otherwise, as well as people with HIV. The court held that no other party to the proceeding represented the interests of the groups that CAS represented. It was satisfied that CAS and its members would be directly affected by the outcome of this proceeding and that CAS had met the first branch of the test set out in Rule 13.01. The court then considered what useful contribution CAS could provide to the proceeding. Case law indicated that the proposed intervenor had to demonstrate that the court's ability to determine the constitutional question in issue would be enhanced by their intervention as a party. It was clear that questions raised by CAS would be limited to issues involving discrimination and policy issues, the very issues raised by Freeman in his statement of defence. Although CAS had demonstrated that it has a direct interest in the action, the court could not conclude that CAS could make a useful contribution by adding it as a party.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 4.06(2), 13.01(1), 13.02, 25.11, 39.01(4), 39.01(5).

Counsel:

Sally A. Gomery, for the Plaintiff

Philip M. Macadam, for the Defendant

Jason Tan, for the Moving Party Intervenor

John C. Spencer, for the Attorney General of Canada

DECISION

MASTER BEAUDOIN:—

Nature of the Motion

¶ 1 The Canadian Aids Society ("CAS") moves for an order granting it leave to intervene as an added party in the within action, including the counterclaim, with the full rights of a party pursuant to Rule 13.01(1) of the Rules of Civil Procedures. In the alternative, CAS seeks an order granting leave to intervene as a friend of the Court pursuant to Rule 13.02 of the Rules.

Background

¶ 2 Canadian Blood Services ("CBS") is responsible for collecting, processing and distributing blood products in Canada with the exception of Quebec. As part of its screening process in the collection of blood products, a CBS representative will ask each donor to answer standard questions prior to donating blood. The questions are designed to identify donors whose blood might pose a risk to recipients. Question 18 addresses only intended male donors. That question asks whether the intended donor has had sex with a man, even once, since 1977.

¶ 3 Kyle Freeman is a former blood donor. CBS launched this action for damages after Mr. Freeman allegedly falsely and negligently responded to the questionnaire that he had not had sex with a man, not even once, since 1977. According to the claim issued in this action, Mr. Freeman later contacted CBS anonymously to advise that he had lied when he had answered that question. CBS seeks damages in the amount of $100,000.00 for Mr. Freeman's alleged negligent misrepresentation.

¶ 4 In his counterclaim which adds the Attorney General of Canada as a Defendant, Mr. Freeman contends that question 18 as posed, discriminates against him based on his sexual orientation. He asserts that question 18 is not rationally connected to the purpose it is supposed to serve, which is to screen out persons whose behavior places them at a higher than normal level of risk having contracted an HIV infection.

¶ 5 Since the issues raised in his statement of defence are relevant to a determination of this motion, I reproduce paragraphs 10, 13, 15 and 16 here:

> 10. Question number 18 is overbroad and not rationally connected to its purpose. This question excludes gay men from donating blood because they are gay and not because the person has engaged in behaviour that puts him at a higher risk for contracting HIV. Blood screening techniques used by CBS can detect HIV in a person's blood if they were infected more than

3 months earlier. There is an approximately three-month window period in which blood-screening techniques cannot detect HIV in the blood. Accordingly, if the purpose of the donor questionnaire is to exclude persons who have engaged in behaviour that puts them at a higher risk for contracting HIV, then, the questions used by CBS should target the period where tests cannot detect HIV. Persons who have engaged in behaviour that puts them at a higher risk for contracting HIV should not be excluded from donating blood forever, rather, they should only be excluded from donating blood for the period in which blood-screening techniques cannot detect the HIV.

13. Question number 18 discriminates against him and all gay men on the basis of sexual orientation because this question excludes gay men from donating blood because they are gay and not because the person has engaged in behaviour that puts them at a higher risk for contracting HIV.

15. Accordingly, question number 18 of the CBS donor questionnaire is discriminatory because it violates section 15 of the Charter and is therefore of no force or effect.

16. In the alternative, question number 18 is discriminatory because it violates sections 3, 5, and 12 of the Canadian Human Rights Act and is therefore of no force or effect.

Steps taken to date

¶ 6 The parties have exchanged affidavits of documents listing over 900 records. These productions relate to the history and regulation of the blood system, donor screening and deferral criteria in Canada and internationally. They include documents setting out the positions of various stakeholders and interest groups, including CAS.

¶ 7 CBS examined Mr. Freeman for discovery on June 24, 2002 but his examination is not yet completed. No discovery of CBS or the Attorney General has been conducted to date.

The Intervenor

¶ 8 In his affidavit, Paul Lapierre, the Executive Director of CAS, states that CAS was formed in 1985 as the national umbrella group for local AIDS service organizations across Canada, including the AIDS Committee of Toronto ("ACT") and AIDS Vancouver ("AV"). Many of CAS's member groups have existed since the emergence of AIDS in Canada in 1982. Some of CAS's member groups emerged from local gay and lesbian organizations which turned their attention to AIDS when it first appeared. CAS currently comprises over 120 local, regional and national AIDS service organizations.

¶ 9 CAS's mandate includes public education on HIV and AIDS to prevent transmission of HIV and to advocate for those people who are HIV positive. CAS has a long history of participation in consultations, both formal and informal, with the Plaintiff, the Canadian Red Cross Society (former national blood transfusion service administrator) and representatives of Health Canada regarding the safety of the blood supply in Canada.

¶ 10 CAS has intervened in the Supreme Court of Canada in cases which involved gay and lesbian equality rights, specifically section 15(1) of the Canadian Charter of Rights and Freedoms. These cases included Vriend v. Alberta, [1998] 1 S.C.R. 493, and Little Sisters v. Canada, [2000] 2 S.C.R. 1120.

¶ 11 CAS has also intervened at the Supreme Court of Canada in Latimer v. R., [2000] 1 S.C.R. 3, because assisted suicide was an issue of some importance to people in the last stages of AIDS and one in which CAS had developed a position paper. CAS also sought and was granted intervenor status in Hodge v. Canada, [2004] S.C.J. No. 60, which raised issues of entitlement to a survivor pension for common law spouses under the Canada Pension Plan. This issue was of importance to people with HIV and AIDS who need the additional financial assistance provided by a survivor pension.

¶ 12 CAS has intervened in other courts and tribunals on behalf of the gay and lesbian community and persons with HIV/AIDS. These cases included Thwaites v. Canada, [1994] 3 F.C. 38, at the Federal Court Trial Division, Hodder/Boulais v. Minister of Human Resources Development, before the Pensions Appeal Board and Fisk v. Canada at the Federal Court of Appeal.

¶ 13 In 1993, CAS was granted standing at the Commission of Inquiry of the blood system in Canada (the "Krever Inquiry"). CAS participated in the local and national hearings and was granted standing at the judicial review proceedings of the Krever Inquiry which were heard before the Federal Court (Trial Division), [1996] 3 F.C. 259, Federal Court of Appeal, [1997] 2 F.C. 36, and the Supreme Court of Canada, [1997] 3 S.C.R. 440.

¶ 14 In 1994, CAS was an applicant before the Ontario Court (General Division), against the province of Ontario and the CRCS. In that proceeding CAS was seeking to prevent the identities of donors of frozen blood samples from being released to public health authorities and tested for HIV without the consent of donors. In the Vriend v. Alberta, Little Sisters v. Canada and Latimer v. R., CAS was allowed to file a factum and present oral submissions in all the appeals. In Hodge, CAS's intervention was limited to filing a factum. It appears that CAS was granted the right to file a factum and make oral submissions in the Hodder and Boulais cases however those cases settled before the appeals were heard. From the record, the only cases where CAS was directly involved in developing the record before the Court were the 1994 matter, wherein CAS was the applicant, and the Krever Inquiry. With respect to the latter, the Attorney General of Canada notes that the test for standing at a public inquiry is different from Rule 13 of the Rules of Civil Procedures. Although CBS submits that the Lapierre affidavit fails to define CAS's legal status, its membership or its precise mandate, I take notice that other courts have recognized CAS as an organization entitled to seek standing.

Preliminary Objection

¶ 15 CBS takes the position that the Court should disregard or give no weight to portions of the Lapierre affidavit relied upon by CAS in support of its motion. In particular, CBS submits that paragraphs 17, 18, 19, 22, 25, 26, 27 and 28 of the Lapierre affidavit should be disregarded or be given no weight as being improper and contrary to the rules regarding affidavit evidence.

¶ 16 The general rule as to the contents of affidavits are set out in Rules 4.06(2) and 39.01(5) which latter rule deals specifically with affidavits used in motions.

Rule 4.06(2) provides:

> An affidavit should be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

Rule 39.01(5) states:

> An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

¶ 17 CBS also relies on Rule 25.11, which confers on the Court a general power to strike out or expunge part or all of any document, including an affidavit if it is scandalous, frivolous or vexatious or an abuse of the process of the Court.

¶ 18 CBS submits that paragraphs 25, 26, 27 and 28 of Paul Lapierre's affidavit contravene Rule 4.06(2) because they constitute opinion as opposed to fact. In paragraph 25, Mr. Lapierre expresses the view that current CBS blood screening practices convey the message that "AIDS is a gay disease and that all heterosexuals are safe blood donors". In paragraphs 26 and 27, Mr. Lapierre further sets out his opinions about the impact of current blood donor screening practices. I concur that these paragraphs do contain expressions of opinion, argument or illegal submissions and that these offend Rule 4.06(2). They contain conclusions that must be drawn by the Court itself and is not appropriate for a witness to do that. [See Note 1 below] On the other hand, I do not find that paragraph 28 offends that Rule as Mr. Lapierre is entitled to set out CAS's position in this litigation.

Note 1: Csak v. Mokos, [1995] O.J. No. 4027 at p. 26 (Gen. Div.).

¶ 19 A number of the paragraphs of the Lapierre affidavit appear to offend Rule 39.01(4). That Rule requires that an affidavit in support of a motion should be based on the deponent's personal knowledge. Where the statements are not based on the deponent's personal knowledge, the source of the information and the fact of the belief should be included. The Rule is well known and, in the face of an objection being taken, the Court may not waive the irregularity. [See Note 2 below] Paragraphs 18 and 19 of the Lapierre affidavit do not state the source of the deponent's information and belief. The only source of information that Mr. Lapierre identifies, aside from his own personal knowledge, is the advice from his solicitor, Patricia A. LeFebour. In paragraphs 33 and 34, Mr. Lapierre specifically states that Ms. LeFebour is the source of the information deposed to in each of those paragraphs. Nowhere else in this affidavit does Mr.

Lapierre state that his statements are based on information and belief. On the other hand, Mr. Lapierre can only have very limited personal knowledge in his position as Executive Director of CAS since he has only held this position since 2002. He provides no information about any activities or involvement with the CAS prior to 2002. Since paragraphs 18 and 19 purport to set out the opinions of the medical and scientific community in the 1980s and 1990s and, since his affidavit is silent as to his involvement in this history, there is no basis on which to conclude that these statements are within his personal knowledge. For these reasons, those paragraphs should be struck.

Note 2: Chopik v. Mitsubishi Paper Mills Ltd. (2002), 26 C.P.C. (5th) 104 at 110 (S.C.J.).

¶ 20 Finally, CBS argues that paragraphs 17, 18, 19, 22, 25, 26, 27 and 28 should be struck as being contrary to Rule 25.11 as they consist of statements which are irrelevant to the issue. Paragraphs 18, 19, 25, 26, 27 and 28 have been previously dealt with and I don't propose do deal with them here. At Paragraph 17, Mr. Lapierre reproduces comments in the Krever Report that certain screening practices used by the Canadian Red Cross Society twenty years ago were unscientific and premised on stereotypes. CBS argues that these comments are irrelevant. While their relevance may be marginal, I do not view such a paragraph as being a frivolous, or scandalous or vexatious or otherwise offending Rule 25.11. At Paragraph 22 however, Mr. Lapierre boldly states that "CAS is aware that many young persons object to donating blood because they perceive the questionnaire to be homophobic". This paragraph is unsupported by any evidence beyond Mr. Lapierre's unqualified assertion, and I concur with the Plaintiff's submission that this statement is inflammatory and prejudicial and ought to be struck. For these reasons, I concur with CBS's submission that those portions of the Lapierre affidavit identified above ought to be disregarded by the Court in assessing the Intervenor's evidence in support of this motion.

Intervention

¶ 21 Rule 13 allows a non-party to intervene in a proceeding and it provides for two distinct forms of intervention; leave to intervene as an added party; and leave to intervene as a friend of the Court. In this case, CAS seeks firstly to intervene as an added party and, alternatively, to intervene as a friend of the Court. The Attorney General of Canada submits that CAS might intervene only as a friend of the Court. CBS argues that CAS does not meet the test for intervention in either case.

¶ 22 Rule 13.01 provides:

> (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the persons claims,
>
> (a) an interest in the subject matter of the proceeding;
> (b) that the person may be adversely affected by a judgment in the

proceeding; or

(c) that there exists between the person and one or more of the parties to

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

¶ 23 Rule 13.02 states:

> Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

¶ 24 In determining whether or not a moving party should be granted leave to intervene as an added party, it must be noted that the moving party need only meet any one of the criteria set out in 13.01(1)(a), (b) or (c). Once that is done, the Court must consider "whether the intervention will unduly delay or prejudice the determination of the rights of the parties". If the Court is then satisfied by the moving party that there will be no such undue delay or prejudice, the Court can exercise its discretion in determining if the moving party should be added as a party and if so, on what terms it considers just.

¶ 25 As Molloy J. in Trempe et al. v. Reybroek et al. (2002) 57 O.R. (3d) 786 (S.C.J.) stated at page 796:

> Rule 13.01 contains a built-in safeguard in the form of judicial discretion. The right to intervene is not automatic upon meeting one of the three tests set out in the sub-clauses of the rule. Rather, there is an overriding discretion set out in rule 13.01(2) based on whether the intervention would "delay or prejudice the determination of the rights of the parties to the proceeding". Further, the intervention may be granted on such terms as the court considers just. That might extend to granting full rights to participate on the same basis as any party, but might also be more restrictive. For example, the intervening party might be restricted to argument only with no right to file evidence. The broad judicial discretion afforded by this sub-rule prevents the addition of a party if this would cause an injustice to the existing parties.

¶ 26 There are two significant principles to consider in deciding this issue. The first is that greater latitude is to be given in intervenor motions in cases involving Charter challenges since such challenges generally involve a greater public interest. [See Note 3 below] The second is the distinction between intervenor status at an appellate level and intervenor status before a Court of first instance. At this level, and in this particular proceeding, the proposed intervenor is asking for input into the formation of the record. As noted by Lang J. [See Note 4 below] in Halpern, "the potential scope for intervention is far greater where the intervenor wishes to participate fully

in setting the record. Such an intervention would potentially result in dramatic increase in delay and expense for all parties". [See Note 5 below].

Note 3: Peele (Regional Municipality) v. Great Atlantic and Pacific Company of Canada (1990), 74 O.R. (2d) 164 at p. 167, 2 C.R.R. (2d) 327 (C.A.), and Halpern v. Wong, (2000), 51 O.R. (3d) 742 at para. 16 (Div. Crt.).

Note 4: (As she then was).

Note 5: P. 747 para. 10.

¶ 27 The Halpern decision is of considerable guidance since Justice Lang thoroughly canvassed the relevant case law. At paragraph 21, Justice Lang refers to the criteria in Rule 13.01 and sets out the following test:

(1) Does the proposed intervenor have sufficient, direct "interest" in this Charter challenge judicial review?
(2) What useful contribution could the proposed intervenor make to the proceeding?
(3) If such interest and useful contribution are established, would the intervenor's involvement either prejudice or delay the determination of the rights of the parties to the proceeding?
(4) Is any such prejudice or delay counterbalanced by the useful contribution of the proposed intervenor?
(5) What terms or conditions might be imposed on the intervention to ensure that the goals are met of useful contribution without undue delay or prejudice? [See Note 6 below]

Note 6: P. 749 at para 21.

¶ 28 On the facts of that case, Justice Lang found that there was a sufficient interest on the part of EGALE to be granted intervenor status as an added party on that application for judicial review. For that reason she did not have to consider sub-paragraphs (b) and (c) of Rule 13.01(1).

Does CAS have an interest?

¶ 29 In determining whether or not a proposed intervenor has a sufficient "interest" in the subject matter of the proceeding, it is helpful to review the case law and the following statements are of assistance:

* The intervenors' interest must be a public interest but also one that is over

and above that of the general public. [See Note 7 below]

* The proposed intervenor must do more than state that it is an organization that is representative of certain groups across the country that agrees with one of the parties. [See Note 8 below]
* Experience as an interest group is insufficient to meet the test. [See Note 9 below]
* Witness experience is not helpful. [See Note 10 below]
* Ability to give expert evidence on particular matters is non-determinative since that activity can be more appropriately undertaken by providing the expert testimony on behalf of one of the parties. [See Note 11 below]
* Past role as an advocate and as an intervenor may not be enough. [See Note 12 below]
* Experience as a lobbyist is insufficient to meet the test; and some cases add that lobbyists should not be given access to the courts. [See Note 13 below]

Note 7: Halpern para. 15.

Note 8: Halpern para. 23.

Note 9: Halpern para. 24 and R. v. Ward, [1997] N.J. No. 113 (Nfld. S.C.T.D.).

Note 10: Halpern para. 26.

Note 11: Halpern para. 26.

Note 12: Ethyl Canada Inc. v. Canada (Attorney General) [1997] O.J. No. 4225 (Gen. Div.).

Note 13: Halpern at para. 24, 25 and Ward v. Canada (Attorney General), supra.

¶ 30 Rule 13.01(1)(a) only requires that "an interest" be demonstrated by the proposed intervenor and the case law requires that interest to be "direct". In Halpern, Justice Lang reviewed EGALE'S experience as an interest group and concluded that its interest extended beyond its involvement as a lobbyist or as a witness. She noted that EGALE had developed institutional knowledge and "represented a broad based spectrum of gays and lesbians across Canada" and that its "members would be directly affected by the outcome of this proceeding in one manner or another. It has also shown appreciation for diverse perspectives of gays and lesbian on equality issues". [See Note 14 below] The impact on its members was sufficient to meet the test of an "interest in the subject matter".

Note 14: P. 751 para. 27.

¶ 31 Notwithstanding its other deficiencies, the affidavit of Paul Lapierre discloses that CAS is an umbrella group for approximately 120 local, regional and national AIDS service organizations. CAS represents a broad spectrum of blood consumers and suppliers, same-sex oriented or otherwise. It also represents people with HIV. Because they are immune suppressed, they are more susceptible to infections. CAS's mandate includes public education on HIV and AIDS to prevent the transmission of HIV. Because HIV and AIDS have had a disproportionate impact on the gay community, Mr. Lapierre deposes that CAS has always had an interest in sexual orientation equality issues. CAS and its member groups have been involved in messages to promote the safety of Canada's blood supply.

¶ 32 Mr. Freeman is a gay male who does not have AIDS. No other party to this proceeding represents the interests of the groups that CAS represents. The screening criteria used by CBS will impact CAS's members who are consumers of blood products and its public education mandate. I am satisfied that CAS and its members will be directly affected by the outcome of this proceeding and that CAS has met the first branch of the test set out in Rule 13.01.

Useful Contribution

¶ 33 Following Halpern, I must now consider what useful contribution that CAS can provide to the proceeding. Once again, the case law provides some direction and I note the following:

* The proposed intervenor cannot simply repeat another party's evidence or argument or give a slightly different emphasis on arguments presented by the parties. The fact that intervenors might be prepared to make a more sweeping constitutional argument does not mean that they will be added as a party to the dispute. [See Note 15 below]
* The fact that one party to the proceeding may lack resources is insufficient to advance an intervenor application. In this case, Mr. Freeman's counsel points to his client's lack of resources and expertise. In Halpern, Justice Lang determined that intervention is not granted simply to provide help to a party. As she said at paragraph 30:

> If a party has difficulty with resources, such a difficulty must be addressed in other ways. Of course, nothing in these reasons would preclude EGALE's counsel or other like-minded counsel from rendering assistance to counsel for the applicants if they so choose.

* It's insufficient for a proposed intervenor to promise not to overlap or duplicate any of the arguments from materials of the original parties. The onus is on them to persuade the Court of the significance of what they will be contributing rather than the significance of what they will not be doing. [See Note 16 below]

Note 15: Stadium Corp. of Ontario Ltd. v. Toronto (City) (1992), 10 O.R. (3d) 203, 11 M.P.L.R. (2d) 68 (Div. Ct.), reversed on other grounds (1993), 12 O.R. (3d) 646, 14 M.P.L.R. (2d) 229 (C.A.)

Note 16: M. v. H. (1994), 20 O.R. (3d) 70 (Gen. Div.) at p. 80.

¶ 34 The comments of Justice Epstein in the M. v. H. decision, supra, are helpful.

> She states at pp 79-80:
> Typically, when intervention is sought, the nature of the interest and potential contribution of the proposed intervenors is put forward to enable the court to have some idea how they would fit into the case. ... The moving parties have presented the court with no information as to what contribution they can make to the legal arguments in this proceeding, over and above that which will be made by the parties.
> Finally she concludes:
> The intervention of third parties into a private dispute, in particular such a personal one, should not be lightly entertained. An intervention adds to the costs and complexity of the litigation, regardless of agreements to restrict submissions. It always constitutes an inconvenience that ought not to be imposed on the parties except under compelling circumstances, which do not exist in this case.

¶ 35 These comments are echoed in the Halpern decision where Justice Lang noted the distinction that needs to be made when a proposed intervenor is seeking to have input into the formation of the record. In the end, the proposed intervenor has to demonstrate that the Court's ability to determine the constitutional question in issue will be enhanced by their intervention as a party.

¶ 36 I have closely examined the evidence that has been placed by CAS in support of the relief that it seeks. CAS seeks to be added as a party with all of the attendant rights and responsibilities including, but not limited to, the rights to adduce evidence and to make written and oral submissions on the legal issues in dispute. It seeks to participate as a party on discoveries although it promises not to duplicate questions. It asks for leave to file expert reports and call expert witnesses at trial.

¶ 37 At paragraph 21 of his affidavit, Mr. Lapierre states that CAS will be able to provide this the Court with "legal argument on the issues relevant to the case". He repeats this at paragraph 35 where he says that CAS's submissions will focus on the legal arguments and any policy considerations that CAS believes to be of assistance to the Court. He adds that CAS may decide not to participate in the examinations for discovery except to the extent that they deal with the overall equality of rights and policy arguments. Ms. LeFebour, in her affidavit, states she recognized many of the documents listed in the affidavits of documents filed in these proceedings and that CAS has extensive knowledge of these documents. She adds at paragraph 30 that "the extensive institutional knowledge CAS could provide regarding these documents would not otherwise be provided by the parties to these proceedings".

¶ 38 Nowhere in its affidavit material does CAS identify any experts that it proposes to call at trial. No additional documents have been identified by Ms. LeFebour. While Mr. Lapierre states that CAS may or may not participate in discovery, its questions would be limited to issues

involving discrimination and policy issues. These are the very issues raised by Mr. Freeman in his statement of defence. Mr. Freeman supports CAS's application as intervenor because he recognizes and acknowledges that CAS has resources and expertise that he and his counsel do not possess. As noted in Halpern, supra, that is insufficient to grant an intervenor full party status. In that case, Lang J. limited EGALE to filing an affidavit on 2 issues that were not being addressed by any of the parties.

Conclusion

¶ 39 Although CAS has demonstrated that it has a direct interest in this action, I cannot conclude that CAS can make a useful contribution to the development of the record in this proceeding by adding them as a party to the action. If it has additional expertise and resources, CAS can make this available to Mr. Freeman and his counsel or provide expert testimony at trial. Accordingly, I order that CAS be allowed to intervene as a friend of the Court pursuant to Rule 13.02 subject to the following terms:

1) that CAS take the record as it is and not be permitted to file further material without consent of the other parties or without leave of the trial judge;
2) that it not seek or be subject to an award of costs;
3) that its written arguments not duplicate the arguments of any other parties to the proceedings. They not exceed 20 pages in length unless otherwise ordered by the trial judge;
4) that it adhere to any case management timetables set by this Court;
5) that the time allocated for oral submissions be limited to 30 minutes or less otherwise permitted by the trial judge.

¶ 40 If I do not hear from the parties in writing on or before November 30th, 2004, I would direct that there should be no costs.

MASTER BEAUDOIN

QL UPDATE: 20041115
cp/e/qw/qlmxd/qlkjg/qlbdp

Indexed as:

▲ Csak v. Mokos

IN THE MATTER OF The Construction Lien Act R.S.O. 1990, Chapter c. C.30

Between
Charles Csak and Krystina Csak (also known as Kristine Kiewal), plaintiff, and
Mary Mokos, defendant

[1995] O.J. No. 4027
Court File No. C3045/94

Ontario Court of Justice (General Division)
Master Clark

Heard: December 7 and 11, 1995.
Judgment: December 21, 1995.
(16 pp.)

Practice — Evidence — Affidavits, striking out — Hearsay — Irrelevant or improper matters — Discovery — Production and inspection of documents — Use of documents produced, implied undertaking rule.

Motion for an order striking out an affidavit filed in opposition to an application to remove the defendants' solicitors of record in the action. The plaintiff applicant also sought an order striking from the defendant's material filed on the said application certain pre-trial briefs on the grounds that to use such documents would breach the implied undertaking rule. The affidavit in question was sworn by a barrister and solicitor in the employ of the defendant's solicitor whose removal was being sought in the main action. It contained both arguments and irrelevancies. Further, the statements in the affidavit were drafted in such a way that it was impossible to distinguish what was within the deponent's personal knowledge and what information she had received from another. With respect to the second order sought by the plaintiff, the briefs which he wanted excluded had been prepared by him and delivered in divorce and commercial actions brought by his ex-wife against him and in which the defendant's solicitor acted for the plaintiff therein. As such, the briefs were used at the pre-trials in those two actions.

HELD: Motion allowed. In failing to identify what events she personally witnessed and which ones she was told about, the deponent had run afoul of Rule 39.01(4). This particular hearsay fault ran throughout the affidavit and rendered it useless as evidence. On that ground alone, the affidavit ought to be struck out in its entirety. The plaintiff applicant was entitled to the protection of the implied undertaking rule. There were extenuating circumstances here sufficient to give the defendant's need to

use the pre-trial briefs a higher priority than the plaintiff's privacy and the general public interest in encouraging full disclosure in pre-trial briefs. No relief could, therefore, be granted to the defendant in the application of the implied undertaking rule.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 4.06(1)(d), 4.06(2), 25.11, 39.01(4).

Counsel:

R. Willis, Q.C., counsel for the plaintiff.
M.Z. Tufman, counsel for the defendants.

¶ 1 **MASTER CLARK**:— This motion questions the sufficiency of a common form of wording used in affidavits made on information and belief, and applies the rule in Goodman v. Rossi (1995) 24 O.R. (3d) 359.

¶ 2 The within motion is preliminary to the main motion, brought by the plaintiff to remove Tufman & Associates as solicitors of record in this action.

¶ 3 On the within motion, the plaintiff seeks an order striking out the affidavit of Nathalie Boutet sworn October 26, 1996, which was filed in opposition to the main motion.

¶ 4 Further, the plaintiff seeks an order striking from the defendant's material filed on the main motion the following documents:

(1) certain pretrial briefs and

(2) the affidavit of Elzbieta Kieltyka sworn August 27, 1991,

on the grounds that to use such documents would breach the implied undertaking rule and,

(3) the written reasons of Wilson, J. dated January 22, 1993,

on the grounds that the reasons are irrelevant to the main motion.

¶ 5 By way of background it should be stated that references in these reasons to the "divorce action" or the "commercial action" or like references, are references to two actions brought by Elzbieta Kieltyka the former wife of the within plaintiff. Those actions were ordered tried together and have been disposed of.

The Boutet Affidavit

¶ 6 Nathalie Boutet is a barrister and solicitor called to the Bar of Ontario and in the employ of Mr. Tufman who acknowledged during argument that he had composed her affidavit:

Mr. Willis argues 3 points.

(1) The affidavit contravenes Rule 4.06(2) in that it contains argument and irrelevancies.

(2) The affidavit does not comply with Rule 39.01(4) in that it does not name the source or swear belief in that source.

(3) The affidavit is an abuse of the process of the court in that it contains many statements that are scandalous, and which in other ways contravene Rule 25.11.

¶ 7 Rule 4.06(2) confines every affidavit to "evidence that the deponent could give if testifying as a witness in court". That means that the affidavit is not to contain argument or irrelevancies. The Boutet affidavit contains both in abundance.

¶ 8 Neither may an affidavit offer hearsay except as allowed by rule 39.01(4). This affidavit contains a lot of hearsay that does not meet the requirements of that rule.

¶ 9 Rule 39.01(4) states

(4) "An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit."

¶ 10 Paragraph 1 of the affidavit of Nathalie Boutet reads as follows:

"1. I am associated in the practice of law with Messrs. Tufman & Associates, the solicitors for the defendant herein. I assisted as a junior counsel to Mr. Marek Z. Tufman in conduct of the actions number ND182939/91Q and 93-CQ-33911, involving Mr. Csak's former spouse, Elizabeth, in this court. I attended a number of hearings and most of the pre-trials in this matter, as well as the trial itself. As such, I have knowledge of the matters hereinafter deposed to.

Wherever in this affidavit I depose to matters of which I do not have personal knowledge, and unless indicated otherwise, I have been advised thereof by Mr. Tufman, and I therefore verily believe them to be true."

¶ 11 (I note only in passing that notwithstanding Rule 4.06(1)(d), some paragraphs of the Boutet affidavit are not numbered. This is not an unimportant matter. It is extremely awkward to have to refer to a paragraph that has no number. Therefore for the purposes of these reasons, I will refer to the second paragraph of paragraph 1 as being paragraph 1A.)

¶ 12 Paragraph 1 forewarns the reader that the deponent attended only "a number" of hearings, and attended only "most" of the pre-trials all connected to two other certain actions, and the deponent swears that "as such," she has "knowledge of the matters being deposed to".

¶ 13 The error is not in that sentence. The error is made in subsequent paragraphs of the affidavit wherein the deponent fails to identify those hearings and pre-trials that she did attend. In the absence of

such identification, there is no way to distinguish her personal knowledge from information she received from another.

¶ 14 In failing to identify what events she personally witnessed and which ones she was told about, the deponent has run afoul of Rule 39.01(4). Unfortunately, this particular hearsay fault runs throughout the affidavit and renders it useless as evidence. On that ground alone, the affidavit ought to be struck out in its entirety, and I so order.

¶ 15 In an apparent effort to comply with Rule 39.01(4), the deponent added paragraph 1A to the affidavit. Unfortunately, that paragraph only compounds the problem created by paragraph 1. Paragraph 1A should have simply read:

> "I have personal knowledge of the matters deposed herein, except where the paragraph states that it is based on information and belief".

¶ 16 The deponent having so sworn, the reader then knows that the paragraphs that follow contain the personal knowledge of the deponent unless another source is declared.

¶ 17 The next criticism of this affidavit is that it contains paragraph after paragraph of material that is irrelevant to the issues in the main motion. I refer to those paragraphs containing minute details of interlocutory proceedings and allegations in the pleadings in the divorce action and the commercial action.

¶ 18 The affidavit has another major fault in that it contains many sentences which may be described as "detached comments." For instance, paragraph 2 of the Boutet affidavit reads as follows:

> "2. I have read the affidavit of Charles Csak, sworn herein on the 6th day of October, 1995. As set out herein, the affidavit is substantially untrue."

¶ 19 Since the thrust of the paragraph is not directed at any specific paragraph in Mr. Csak's opposing affidavit, it has no value as evidence. It has only an inflammatory effect on the reader, an effect that would be difficult not to foresee.

¶ 20 Another example of the "detached comment", is

> "Not only was there was no confidential information elicited during the course of such examinations, but much of the relevant information was not provided either."

¶ 21 The above paragraph appears in the Boutet affidavit at the end of a section entitled "Discoveries". It is of no use to the court in that form because it contains a conclusion without offering the facts on which the conclusion is based. The only way to present evidence of what in such a general way was not disclosed at the examinations, would be to provide the transcripts if such is relevant at all.

¶ 22 The following sentence (dealing still with irrelevant discoveries) is yet another example of words that carry no weight as evidence of the facts sought to be proved,

> "To give some flavour of the nature of most of the objections, a typical one might be

found at p. 52 of the transcript where Mr. Willis instructed Mr. Csak not to answer a question whether Mr. Csak had a lawyer give him any advice with respect to the pre-nuptial agreement (when at the same time the pleadings set up an equivalent of non es factum with respect to the agreement)."

¶ 23 Quite apart from its total irrelevance to the main motion, the sentence is entirely inadequate as evidence of anything. If the discoveries referred to are proof of something, the transcripts should be produced on the main motion and examined in argument. Ms. Boutet's opinion as to what the transcripts say, or of the "flavour" of the objections, is of no consequence.

¶ 24 The affidavit is yet still offensive because it offers the deponent's opinion as to "the position of the parties" in the other litigation which opinion was formed upon the deponent's reading of the amended pleadings in those actions. It should be noted well, that pleadings always speak for themselves, and if they are relevant to the motion, to remove Tufman, they must be included in the material as exhibits so that they may be directly examined.

¶ 25 The affidavit also contains a number of scandalous sentences, so-called because the only purpose of the sentence is to put the plaintiff in a bad light for no reason except to put the plaintiff in a bad light.

¶ 26 Lastly, Ms. Boutet regularly states as facts, those conclusions that must be drawn by the court itself. It is not appropriate for a witness to do that. It is only appropriate for the witness to swear to facts from which the court may draw conclusions. An example of this is Boutet's declaration that certain information in opposing affidavits is "an outright lie" and "totally ludicrous". While the court might eventually find that to be it is improper for the witness to preempt the court with that language. Furthermore, such language denigrates the deponent in the eyes of the court.

¶ 27 Considering all the above, I find that the Boutet affidavit is not proper evidence by any measurement and is wholly struck out.

The Reasons of Wilson, J.

¶ 28 I will make no order prohibiting the use of the written reasons of Judge Wilson. Whether or not those reasons are relevant to the main motion is best left to the argument on that motion.

The Affidavit of Elzbieta Kieltyka

¶ 29 Mr. Willis argues that this affidavit should also be struck from the material to be used on the main motion, because it is entirely irrelevant. He says that it is not fair to ask the plaintiff to simply ignore it because its presence could create mischief. If it remains in the material the plaintiff will have to take measures to deal with it whether by way of a responding affidavit or by cross-examination. That will cost money and time, and will delay the hearing of the motion and the prosecution of the plaintiff's action, he says.

¶ 30 The affidavit in question was sworn on August 27, 1991, and was used in the divorce action. The affidavit runs to 30 pages with 14 exhibits occupying a further 30 pages.

¶ 31 Some of the exhibits are letters written in a foreign language but which are recited in English in the affidavit. Mr. Tufman informed the court that he had, himself, translated those letters in preparing

the Kieltyka affidavit. Inexplicably, the deponent does not say that these letters were translated by Mr. Tufman, and she thereby implicitly invites the reader to accept them as having been translated by her. Not only is this deceptive, it amounts to hearsay.

¶ 32 Furthermore, by translating these letters, Mr. Tufman became, in effect, a witness and in Ontario, counsel may not usually conduct a motion or a trial while at the same time speaking as a witness.

¶ 33 Therefore, if the defendant is advised that these letters must be included in the material on the main motion, they will have to be translated by a qualified translator other than counsel. Until they are so translated into English, their use by Mr. Tufman is inappropriate.

¶ 34 Having read all of the Kieltyka affidavit, I cannot see how any part of it is relevant to the main motion. The affidavit deals by times with blood tests, with the romance that lead to Mr. Csak marrying Elzbieta Kieltyka (now divorced) with a pre-nuptial agreement and with other matters that may have been relevant to the divorce, but have no connection whatsoever to removing Mr. Tufman from the record.

¶ 35 Because this affidavit, does not distinguish between the deponent's personal information, and information received from others, is fragrantly irrelevant, and in certain aspects scandalous, it will be struck from the material delivered by the defendant for use in opposing the plaintiff's motion to remove Tufman & Associates from the record.

The Implied Undertaking Rule

¶ 36 Mr. Tufman courteously informed Mr. Willis by mail that he (Tufman) intended to use certain pre-trial briefs on the main motion. Mr. Willis moves to have those briefs excluded from the evidence.

¶ 37 The briefs were prepared by Mr. Csak, and were delivered to the plaintiff in the divorce and commercial actions and were used at the pre-trials in those two actions. For purposes of the within motion, I consider these pre-trial briefs to be Mr. Csak's documents delivered under compulsion of the court, in a manner akin to production of documentation. While these briefs contain some information that is public, they contain a great deal more information that is private and which would never have been divulged except for the requirement that litigating parties be open and forthcoming on their trial briefs in the pursuit of the objective of isolating issues and perhaps settling the action.

¶ 38 The Ontario law concerning the implied undertaking rule, is reviewed, organized, and clearly stated by Morden, A.C.J.O. on behalf of the court, in Goodman v. Rossi, (1995), 24 O.R. (3d) 359 and in Orfus Realty v. D.C. Jewelly of Canada Ltd. (1995) 24 O.R. (3D) 379.

¶ 39 In Goodman, Mr. Justice Morden held the law to be that

> "a party who obtains a document from the other party under the discovery process in the Rules of Civil Procedure, is subject to an implied undertaking not to use the document for a purpose other than that of the proceeding in which the document was obtained, except with consent of the other party or with leave of the court."

¶ 40 Dealing with the scope of the rule, His Lordship opined, but did not hold, that such an undertaking ended with the reading of the documents in court, a point not in issue here.

¶ 41 He then agreed with parts of the reasons of Moldaver J. (who delivered a minority decision in Goodman v. Rossi (supra) in the Divisional Court) and seemed to favour two important limitations on the implied undertaking rule;

(1) that it pertain only to information that could not have been obtained by legitimate means other than those of the litigation process, and

(2) that the obligation not to use, favours only the producing party, not third parties.

¶ 42 As to point (1), it cannot be disputed that the pre-trial briefs here were prepared under court compulsion, and therefore the information contained therein became available only through the litigation process.

¶ 43 The effect of point (2) above, is that the undertaking would only protect Mr. Csak, who produced the briefs, and would not protect others.

¶ 44 I find that Mr. Csak is entitled to the protection of the rule, and I must now consider whether or not the defendant is entitled to be relieved of the application of the rule in these circumstances.

¶ 45 In Goodman v. Rossi, (supra) the court stated clearly that the implied undertaking was not absolute, that relief could be granted in appropriate circumstances, preferably upon the application of the person who wishes to use such documentation. That is not the case here. The defendant announced her intention to use the material, but left the plaintiff to move against it.

¶ 46 While in Goodman, (supra) the court did not set out a universal test to decide when relief should be granted, my reading of the reasons convinces me that relief should not be granted to the defendant in the within action and that the pretrial briefs in question ought not to be used on the main motion

¶ 47 In the present action, not only is the privacy of the plaintiff to be considered as against the prejudice to the

defendant if the briefs are not allowed to be used herein, but the policy of the courts that requires the production of such briefs and their use in the first place, must also be considered. In my view, if, without extenuating circumstances being shown, pretrial briefs from one action are allowed to be used on an interlocutory motion in another action, the policy of disclosure in pre-trial briefs will be threatened.

¶ 48 However, I see no such extenuating circumstances here sufficient to give the defendant's need to use the briefs a higher priority than the plaintiff's privacy and the general public interest in encouraging full disclosure in pre-trial briefs. No relief can therefore be granted to the defendant in the application of the rule in Goodman v. Rossi.

¶ 49 In all the circumstances the plaintiff must succeed and the pre-trial briefs may not to be used in the main motion.

¶ 50 In the result, an order will go striking out the Boutet affidavit with leave to deliver a fresh affidavit provided such fresh affidavit is delivery within 10 days from the entry of the order. An order will also go striking from the defendant's material both the affidavit of Elzbieta Kieltyka and any reference to the pre-trial briefs.

¶ 51 The costs of this motion are fixed at $3,500.00 payable forthwith to the defendant to the plaintiff.

¶ 52 In view of the fact that costs were not addressed by counsel, the above order is without prejudice to counsel's right to speak to costs if so advised. Arrangements may be made through my office.

MASTER CLARK

QL Update: 960109
qp/s/mmr/DRS/DRS/DRS

** Unedited **

Indexed as:

✥ Csak v. Mokos

Between
Charles Csak and Krystina Csak (also known as Kristine Kiewal), plaintiffs (respondent), and
Mary Mokos, defendant (appellant)

[1996] O.J. No. 2338
Court File No. C30454/94

Ontario Court of Justice (General Division)
Brampton, Ontario
Simmons J.

June 12, 1996.
(4 pp.)

Practice — Discovery — Implied undertaking rule — Exception, consent.

This appeal related to an alleged breach of the implied undertaking rule. A Master's order prohibited the defendant from using the pre-trial briefs of the plaintiff. The plaintiff alluded to the content of the pre-trial conference briefs in his material filed in support of the main motion.

HELD: Appeal allowed. By referring to the pre-trial conference briefs in the main motion, the plaintiff had consented to the defendant using the briefs in the main motion. The Master should have allowed the defendant to use those briefs as an exemption to the implied undertaking rule.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 30.1.

Counsel:

R. Willis, for the respondent.
Marek Z. Tufman, for the appellant.

SIMMONS J. (endorsement):—

Disposition.

¶ 1

1. The appeal is allowed in part. Order to go setting aside those portions of the Master's order which prohibit the defendant from using the pre-trial briefs of the plaintiff in Action Numbers 91 ND 182939 and 93 CQ 33911 on the motion brought by the plaintiffs to remove Tufman & Associates as counsel for the defendant and which prohibit the defendant from referring to the said pre-trial briefs in her material delivered for such motion. The appeal is otherwise dismissed.

Reasons.

¶ 2 1. Neither counsel contested the applicability of the implied undertaking rule to this case (albeit plaintiff's counsel disputed defence counsel's contention that Rule 30.01 should be applied to this case). I shall accordingly assume, without deciding, that the implied undertaking rule is applicable.

¶ 3 2. Mr. Csak alluded to the content of the pre-trial conference briefs in his material filed in support of the main motion. By implication therefore he consented to the defendant using the pre-trial conference briefs which were filed on Mr. Csak's behalf in the other litigation on the main motion.

¶ 4 3. Consent is recognized as an exception to the implied undertaking rule both as a matter of common law (see Goodman v. Rossi (1995), 24 O.R. (3d) 359 at pp. 371, 378) and pursuant to the codification of the implied undertaking rule set out in Rule 30.1 (see Rule 30.1(4)). The learned Master erred by failing to take account of the implied consent of Mr. Csak. That error is an error in principle as opposed to an error in the exercise of discretion.

¶ 5 4. Consent to disclosure of the content of pre-trial conference briefs prepared for use in other litigation does not offend Rule 50.03 in these circumstances. Rule 50.03 is limited in its applicability to the proceeding in which the memorandum is filed. The privacy interest of both parties as well as of the administration of justice in the pre-trial briefs is protected by the application of the implied undertaking rule.

¶ 6 5. In light of the ruling on this appeal there should be no outstanding issues concerning other parameters within which reference to the pre-trial conference briefs might be made.

¶ 7 6. The Master's decision to refuse to grant the defendant leave to bring a motion to strike the affidavit of Mr. Csak constituted an exercise of discretion. I see no error in principle in the manner in which he exercised his discretion. The appeal against that aspect of his order must therefore be dismissed: Marleen Investments Ltd. v. McBride (1979), 13 C.P.C. 221 (H.C.J.).

Costs.

¶ 8 Counsel may speak to me by appointment to be arranged through the trial co-ordinator at Brampton if they wish on the issue of costs, failing which there will be no order as to costs.

SIMMONS J.

QL Update: 960704
qp/d/lmm/DRS/DRS

Court File No.: 00-CV-192059CPA

CHARLES BAXTER, SR. AND ELIJAH BAXTER AND ATTORNEY GENERAL OF CANADA

Plaintiff Defendant

(Short title of proceeding)

ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding Commenced at
Toronto

FACTUM AND BOOK OF AUTHORITIES OF THE ATTORNEY GENERAL OF CANADA
(on motion to strike the Affidavit of Donald Outerbridge)

Department of Justice
Civil Litigation Branch
Bank of Canada Building
234 Wellington Street
East Tower, Room 1001
Ottawa, Ontario
K1A 0H8

Per: **Paul Vickery**
LSUC No.: 17196T

Tel: (613) 948-1483
Fax: (613) 941-5879
Solicitor for the Defendant.