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October 9, 2009

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Reference: 9483/3640

Ontario Energy Board
P.O. Box 2319, 26th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Re: EB-2008-0411: Union Gas Limited
Procedural Order No. 4

Dear Ms. Walli:

I am writing in response to the Board's Procedural Order No. 4 which requires "Union Gas and / or Dawn Gateway Pipeline Limited Partnership" to file copies of the five shippers contracts.

Union Gas requests that it be exempted from this order on the basis that the contracts requested are not the property of Union Gas, and Union Gas does not have the legal right to deal with the contracts. I enclose copies of the following 2 cases which have dealt with similar issues: *Continental Can Co. v. Bank of Montreal* (1974), 3 O.R. (2d) 167, 1974 CarswellOnt 952 and *Bowlen v. R.* (1977) 5 C.P.C. 215, 1977 CarswellNat 276.

In both cases, the courts held that a production order ought not to be made against a party that does not have the legal right to deal with the documents.

Since these contracts belong to Dawn Gateway Pipeline Limited Partnership, Union Gas requests that it be exempted from Procedural Order No. 4.

Yours truly,

Sharon Wong

Sharon Wong

c: All Intervenors - EB-2008-0411

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3 O.R. (2d) 167

C1974 CarswellOnt 952

Continental Can Co. v. Bank of Montreal

Continental Can Co. of Canada Ltd. v. Bank of Montreal

Ontario Supreme Court (High Court of Justice)

Hughes, J., in Chambers

Judgment: March 5, 1974
Docket: None given.

Counsel: R.J. Fraser, for defendant - appellant, Bank of Montreal

D.I. Bristow, Q.C., for plaintiff - respondent and appellant by cross-appeal

Subject: Civil Practice and Procedure

Practice --- Discovery -- Discovery of documents -- Affidavit of documents

Parties required to include in affidavit on production all documents possessed whether or not having legal control over them -- Parties not compelled to produce documents which they have no legal right to deal with.

Hughes, J.:

1 The litigation here arises out of the bankruptcy of Anglin-Norcross Corporation Limited, formerly one of the dominant enterprises in the field of construction and engineering in Canada. This company (hereinafter referred to as "Anglin Corporation"), its wholly-owned subsidiary company Anglin-Norcross (Ontario) Limited (hereinafter called "Anglin Ontario"), and other subsidiary companies, made an assignment in bankruptcy on September 22, 1967. Anglin Ontario had entered into two contracts with the plaintiff Continental Can Company of Canada Limited to provide engineering and supervision for two building projects, the first in respect of construction on Keele St. in Toronto as of July 15, 1966, and the second for work in New Toronto on November 3, 1966. By the terms of these contracts Anglin Ontario was constituted agent for Continental Can for the purpose of obtaining contractors and suppliers, negotiating the necessary agreements and making payments of moneys as required to subcontractors with funds provided by Continental Can and deposited in the agent's bank account maintained with the Bank of Montreal. A peculiarity of this bank account, and of the accounts of other subsidiary companies in other Provinces of Canada, was that upon deposit the funds were automatically transferred to an account or accounts of Anglin Corporation with the same bank in Montreal.

2 I hasten to say that this brief summary of the facts is explanatory only and in no way intended to decide any of the matters requiring proof at trial, being based solely upon what I was advised by counsel for both sides in the

course of their exceptionally lucid and cogent arguments.

3 By writ issued on June 9, 1969, Continental Can commenced an action against the trustees of the bankrupt estates of both companies and the Bank of Montreal to recover some $279,000 which, it is alleged, was at the time the assignments in bankruptcy were made owing to unpaid contractors and material suppliers in respect of both building projects and was misappropriated by the defendants by reason of the transfers referred to, the funds in question having been impressed with a trust in favour of the unpaid contractors and material suppliers pursuant to the provisions of the *Mechanics' Lien Act*, R.S.O. 1960, c. 233 [rep. 1968-69, c. 65, s. 50; see now R.S.O. 1970, c. 267], applicable at the material time. It should be said that the transfer of funds to Montreal was, according to the defendants, automatic, and designed to centralize and facilitate the payment of accounts across the country by the parent corporation, the subsidiary companies like Anglin Ontario being merely "shells", as the saying is.

4 The gist of the defendant bank's defence to the action is that although it had taken assignments of the benefit of the agreements between Anglin Ontario and Continental Can, it did not know until after the date of bankruptcy of any arrears of payments due to contractors and material suppliers, or that the moneys in question were impressed with any trust under the *Mechanics' Lien Act*. As to the assignments of sums due and growing due under the said contracts and the transfer of funds from the Toronto account of Anglin Ontario to the Montreal account of Anglin Corporation it says that this was done in the normal course of its business. It relies also upon s. 96 of the *Bank Act*, 1966-67 (Can.), c. 87 [now R.S.C. 1970, c. B-1], with regard to its responsibility to see to the execution of any trust and in relation to s. 3 of the *Mechanics' Lien Act* it says that this enactment does not apply to it in its business of banking and if it did it was either repugnant to s. 96 of the *Bank Act* or *ultra vires* so far as it purports to apply to such banking business.

5 The matters now before me come by way of appeal and cross-appeal from Master S. M. McBride who on December 11, 1973, ordered that James Russell Ellis, an officer of the bank examined for discovery at great length on behalf of the plaintiff, should reattend upon his examination to answer certain questions which he had refused to answer upon the advice of counsel and any further proper questions arising out of such answers, and further that the bank produce additional documents and file a further and better affidavit on production to include them. In connection with this order the learned Master gave full and considered reasons in writing of date even with the order. In these reasons he analyzed at length the nature of the pleadings, of the groups of questions in respect of which the plaintiff sought reattendance and answers and of the documents in respect of which production is sought and a further and better affidavit filed. In the interests of brevity and dispatch, I do not intend to reproduce what he said in whole or in part, or to repeat the process of analysis, and hope to dispose of the appeal by the defendant bank and the cross-appeal by the plaintiff by stating the argument and principles of law involved and to dispose of the appeals by reference to the Master's order.

6 Mr. Fraser for the bank said that there were two issues involved; first the knowledge of the bank as to the financial status of the contracts between Continental Can and Anglin Ontario, and second the disposition of the moneys supplied by Continental Can under those contracts subject to certain reservations as to materiality and relevance. With respect to these reservations, he sought to confine the admissibility of both questions and documents to the period between July 15, 1966, and September 22, 1967, the former being the date of the first contract and the latter the date of bankruptcy. Then he says that two groups of documents received into the custody of the bank after the date of bankruptcy, one being the property of the trustee of the estate of Anglin Corporation, a party to the action, and the other that of the Royal Trust Company, trustee for holders of bonds or debentures of Anglin Corporation, are not the bank's to produce and that generally the bank should not have to produce any documents, relevant or not, as I understand him, which came into its possession after September 22, 1967. He objected to discovery in relation to the bank's transactions with any of Anglin Corporation's subsidiaries other than Anglin Ontario. He admitted that the bank was actually paying the fees of the trustees in bankruptcy and that the bank was the prime beneficiary -- Mr. Bristow said "the sole beneficiary" -- under the trust deed given to Royal Trust.

7 Mr. Bristow contends that the joint effect of the averments on the one hand that the bank knowingly participated

in the alleged breach of trust and on the other that whatever the bank did in the handling of the accounts of Anglin Ontario and Anglin Corporation was done in the ordinary course of business, taken together with evidence given by Ellis on his examination that the bank was concerned about the financial stability of Anglin Corporation and had instituted discussions with representatives of Holland Hannen and Cubitts Limited, Anglin Corporation's largest single shareholder which had effective control of the company, entitled him to inquire as to the bank's knowledge of the financial difficulties of Anglin Corporation and all its subsidiary companies, and to require the production of documents having a bearing thereon at least from January 1, 1966, to the date of bankruptcy, and of any dealing with relevant transactions during this period regardless of when they came into the possession of the bank. He contended also that the state of knowledge of, and the extent of internal discussion by and between the officers of the bank and its managers as to the provisions and effect of s. 3 of the *Mechanics' Lien Act* were also relevant and within the ambit of inquiry. He did not accept the proposition that the bank could shelter behind any legal possession as opposed to actual or corporeal possession of the trustees in respect of the documents in the bank's custody.

8 I agree with Mr. Bristow that the scope of discovery, both as to the questions which must be answered and the documents which should be produced, cannot be narrowed in the circumstances of this case as Mr. Fraser proposes. The extent to which the bank was disposed to vary the ordinary course of its business with its customers Anglin Corporation and Anglin Ontario, if not of the other subsidiaries, because of concern about their financial stability is relevant and a proper subject of inquiry. Limitation of the material time beginning at January, 1966, and ending September 22, 1967, is reasonable and questions relating to transactions during that time affecting these companies and documents relating to them, even if coming into the possession of the bank subsequent to the latter date are also relevant. But documents in the legal possession of the trustees in bankruptcy for these companies should not be produced by the bank. I am less certain as to those which are the property of and in the possession of the Royal Trust which Mr. Fraser admitted, expressively enough, were "also in the pocket" of the bank, but in the absence of any evidence as to the provisions of the debenture or deed of trust concerned I hold that there should be no exception to the general rule. This was stated in words which I shall have occasion to refer to again by the Senior Master in *Ivey v. Canada Trust Co.*, [1962] O.W.N. 62 [at pp. 63-4]:

> As to the law and practice relating to the second objection, it is of course well settled that a party is obliged to include all documents in his affadivit on production of which he has or has had corporeal possession even if he had or has had no property in them: 12 Hals., 3rd ed., p. 27. This rule has been complied with by the defendant. However, when it comes to production and inspection of a document, the circumstances justifying the Court ordering production and inspection are limited to the case where the party has sole legal possession or sole property in the document: *op. cit.* p. 57, *Kearsley v. Philips* (1882), 10 Q.B.D. 36, 465.
>
> Counsel for the plaintiff placed some emphasis on the fact that the defendant has possession of the correspondence in question. However, as indicated above in order to qualify for an order for production, the documents must be in the legal possession of the party. In *Reid v. Langlois* (1849), 1 Mac. & G. 627, Lord Cottenham said, at p. 636
>
> > In one sense it [the document] is in his possession; but when possession for the purpose of production is spoken of, that is to say a right and power to deal with it, actual corporeal possession is not meant, but legal possession in respect of which the party is authorised to deal with the property in question.

Although I had a number of cases cited to me, and subsequently reproduced in a carefully prepared brief by Mr. Bristow, I am satisfied that the learned Senior Master (Marriott) accurately stated the law as it was at the time he rendered his decision in *Ivey's* case, and as it still appears to be.

9 Questions about the knowledge of the bank's employees of the provisions of the *Mechanics' Lien Act* in force at the material time need not be answered, since knowledge of the statute law of a Province of Canada in which the bank was doing business must be imputed to them. Similarly, documents in the form of bulletins and directives to branches dealing generally with the trust provisions of the *Mechanics' Lien Act* need not be produced for the same

reason, but an exception must be made in the case of answering such questions and producing such documents relating to the specific difficulties of Anglin Corporation and Anglin Ontario in relation to unpaid contractors and suppliers engaged on the two projects of Continental Can as may show the knowledge of the bank's employees of the trust imposed by s. 3 on moneys received from the latter company and paid into Anglin Ontario's bank account at the bank's Bay and Bloor Sts. branch in Toronto.

10 A more contentious issue is raised in the first sentence of the passage quoted above from the decision of the learned Senior Master with respect to the order for a further and better affidavit on production. The reference in 12 Hals., 3rd ed., p. 27, is to R.S.C. Ord. 31, r. 13, which prescribes a form of affidavit in the same terms as the one in use in Ontario. As is well known, the prescribed statement to be made on oath by the party making the affidavit on production reads as to paras. 1 and 4, "I have in my possession or power the documents" and "I have had, but have not now, in my possession or power the documents" and finally, in para. 7:

> 7. According to the best of my knowledge, information and belief, I have not now, and never had in my possession, custody or power, or in the possession, custody or power of my solicitors or agents, or in the possession, custody or power of any other persons or person on my behalf any deed...

This is Form 22 under our Rules, but the English form of affidavit in force from 1867 to 1964 has now given way to a "list of documents" which is Form 26 under Ord. 24, r. 5 where the phrase "power, custody or possession" is maintained throughout, the list being simply verified by a short affidavit in which the words do not appear. If as all the authorities appear to assert, the words "power or possession", at least in so far as liability to produce is concerned, refer to legal possession and power lawfully exercised, it is odd, to say the least, that a party should be expected to examine documents over which he has no legal possession or power for the purpose of making an affidavit disclosing what is or has been in his custody except in the most general terms. Yet the effect of all the authorities, and they are numerous, seems to be that the existence of documents in the custody of the party against whom discovery is sought must be disclosed in the affidavit, even though their legal possession may be either not in the party who makes it or in the joint possession of him and someone who is not a party, in which case production cannot be compelled: *Kearsley v. Philips et al.* (1882), 10 Q.B.D. 36; affirmed 10 Q.B.D. 465. The amendment of the Ontario Rules to provide for the inclusion in the affidavit of the word "custody" as well as "possession and power" might well be considered by the Rules Committee.

11 Accordingly, both the appeal and the cross-appeal will be allowed in part and the learned Senior Master's order varied in the light of the foregoing and as a result of certain concessions made on the argument by both sides, but mostly by Mr. Fraser for the bank, to compel answers by James Russell Ellis to the following questions:

> 286, 287, 386 to 393 incl., 415, 416, 417, 425, 426, 575, 578, 579, 604, 605, 758, 759, 760, 761, 844, 847, 848, 881 to 893 incl., 897 and 1295.

Paragraph 1 of his order must be amended accordingly.

12 The defendant bank must also produce documents in accordance with the Master's order amended as follows:

> (a) In para. 2 by inserting the words "in its possession or power" after the words "produce all written reports and memoranda", the words "Anglin-Norcross (Quebec) Limited, Anglin-Norcross (Maritimes) Limited, Anglin-Norcross (Western) Limited, Universal Sheet Metals Limited, Universal Plumbing & Heating Company (1969) Limited" after "Anglin-Norcross (Ontario) Limited" and the words "from January 1, 1966 to September 22, 1967 inclusive" added to the concluding words of the said paragraph.
>
> (b) In para. 3 by inserting the words "in its possession or power" after the words "produce all documents", by adding the names of the companies other than Anglin-Norcross Corporation Limited and Anglin-

Norcross (Ontario) Limited contained in (a) above, and by deleting the word "up" and substituting therefor the words "from January 1, 1966".

(c) By deleting para. 4 and substituting therefor a new para. 4 reading:

> And it is further ordered that the defendant Bank of Montreal produce minutes of the meetings of the Board of Directors of the said defendant held between January 1, 1966 and September 22, 1967, the subject of which was the financial position of Anglin-Norcross Corporation Limited, Anglin-Norcross (Ontario) Limited, Anglin-Norcross (Quebec) Limited, Anglin-Norcross (Maritimes) Limited, Anglin-Norcross (Western) Limited, Universal Sheet Metals Limited, and Universal Plumbing & Heating Company (1969) Limited, together with any written memoranda or reports tabled in respect to the aforesaid Directors' meeting or referred to therein.

(d) In para. 5 by adding the words "in its possession or power" to follow the words "memoranda and reports" and by altering the figures "1965" to "1966".

(e) In para. 7 by adding the names of the companies other than Anglin-Norcross Corporation Limited and Anglin-Norcross (Ontario) Limited contained in (c) above.

(f) In para. 8 by adding the words, "and all documents of which it has custody relating to this action".

The costs of these appeals will be in the cause.

13 *Appeal and cross-appeal allowed in part.*

END OF DOCUMENT

[1977] C.T.C. 531, [1978] 1 F.C. 798, 5 C.P.C. 215, 77 D.T.C. 5433, [1978] 1 F.C. 798

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1977 CarswellNat 276

Bowlen v. R.

Paul D Bowlen, Plaintiff, and Her Majesty the Queen, Defendant

Federal Court -- Trial Division

Thurlow, ACJ

Judgment: October 13, 1977
Docket: Court No T-5189-73

Proceedings: on application for orders to produce documents

Counsel: *H S Prowse*, QC for the plaintiff.

M R V Storrow for the defendant.

Colin L Campbell for National Westminster Bank Ltd.

Julian C C Chipman, QC for Royal Bank of Canada.

Peter J Royal for Arvella Regis Bowlen, Patrick Dennis Bowlen, Mary Elizabeth Jager (née Bowlen), William Alexander Bowlen and John Michael Bowlen.

Subject: Civil Practice and Procedure; Income Tax (Federal)

Income tax --- Administration and enforcement -- Practice and procedure on appeals -- Discovery.

Income tax --- Administration and enforcement of Act -- Books and records.

Practice --- Discovery -- Discovery of documents -- Scope of documentary discovery -- Documents in possession of non-party.

Income tax -- Federal -- Federal Court Rules -- 464(1) -- Orders for production and inspection of documents in the possession of person not parties to the action -- Meaning of "possession".

The Crown made three separate applications to the Court for orders requiring persons, who were not parties in the case, to produce and permit the inspection and the copying of documents: (1) to a Canadian bank in respect of documents in the possession of a wholly-owned subsidiary US bank; (2) to the Canadian bank and another bank in respect of documents in the possession of a Bahamian trust company which was indirectly controlled by the banks;

and (3) to five individuals in respect of documents in their possession or in the possession of the Bahamian trust company. The individuals were beneficiaries of trusts of which the Bahamian trust company was trustee.

HELD:

In Rule 464 of the Court "possession" means "legal possession". It includes a situation where the owner of the document has physical possession of it and cases where a document is not physically in the possession or custody of its owner but is in the possession or custody of an agent or bailee from whom the owner is entitled to obtain it. It does not include bare custody or possession by a person who does not own the document.

The first two applications were dismissed on the grounds that the documents were in the possession of separate foreign corporations and it was not shown that the documents were the property of the Canadian bank nor that they were held in trust or as agent of the bank. The third application in respect of the individuals was also dismissed except in regard to reports and other documents which the individuals had received from the Bahamian trust company.

Cases referred to:

Reid v. Langlois (1849), 1 Mac & G 627, 41 E.R. 1408;

Bowlen v *The Queen*, [1977] 1 F.C. 589, [1976] C.T.C. 577, 76 D.T.C. 6335;

Dallas v *Dallas*, 24 D.L.R. (2d) 746;

Rhoades v *Occidental Life Insurance Co of California*, [1973] 3 W.W.R. 625.

Annotation

As an essential element of its defence of reassessments made by the Minister of National Revenue, the Crown has attempted to invoke Rule 464 in order to compel production of documents from persons who were not parties to the action. (See *P D Bowlen* v *The Queen*, [1976] C.T.C. 577 (Federal Court -- Trial Division) and Editorial Note at page 578.) The principal significance of the decision lies in the Court's finding that the desired documents must be in the possession of the party against whom the order is sought, thus adding a further requirement to the test laid down by Smith, DJ and limiting the scope of the rule's operation. Although possession may be established where the documents are held by a bailee of the party against whom the order is sought, it cannot be said that such a party is in possession of documents for the purposes of Rule 464 merely because it is either a principal shareholder of a foreign corporation where *de facto* possession lies, or even because that corporation is its wholly-owned subsidiary. Under this rule, individuals may not be required to produce documents which are not in their possession, and thus, when the desired documents are in the custody of a bank or trust company, their production may only be compelled if they are the property of the named individuals.

This decision affirms the principle that Rule 464 is not intended to serve as a "fishing licence". Consequently, a party invoking the rule must be able to show not only that the documents are in existence, and in the possession of the party against whom the order is sought, but also that they are identified clearly enough to show relevancy to the proceedings. In this respect the judgment exhibits a partial withdrawal from the expanded scope given to the rule by Smith, DJ (*P D Bowlen* v *The Queen*, [1976] C.T.C. 577) and returns the application of the rule to the limits set by McFarlane, J (under the corresponding British Columbia rule) in *Rhoades* v *Occidental Life Insurance Company of California*, [1973] 3 W.W.R. 625, consistent with several earlier decisions on point (see, for example, *McCurdy* v *Oak Tire and Rubber Co*, 44 O.L.R. 235; *Kokan* v *Dales*, [1970] 1 O.R. 465; *Coderque* v *Mutual of Omaha Insurance Company*, [1970] 1 O.R. 473).

[1977] C.T.C. 531, [1978] 1 F.C. 798, 5 C.P.C. 215, 77 D.T.C. 5433, [1978] 1 F.C. 798

***The Associate Chief Justice*:**

1 In this action, three separate applications have been made on behalf of the Crown for orders under Rule 464(1) requiring persons who are not parties to the action to produce and permit the inspection and copying of documents. In the first two applications, what is sought is the production of documents which are referred to in the notice of motion as being in the possession not of the persons against whom the orders are sought but of others. In the third, the applicant seeks an order requiring the production of documents referred to as being in the possession of the persons against whom the order is sought and documents in the possession of another person.

2 The proceeding is an appeal from income tax assessments for the years 1963 to 1970. The central issue is whether three transactions carried out on May 9, 1963, in one of which the plaintiff transferred a portfolio of investments to Hambeldon Estates Limited, a Bahamian corporation, for $6,891,647.59, were shams and whether the income from the investments continued to be, in the years in question, in substance and in fact income of the defendant.

3 Rule 464 consists of three paragraphs following the title "Discovery and Inspection from Person not a Party". It is found among a number of rules dealing with discovery and inspection but despite the title its provision is not one for ordering discovery. It is limited to production and inspection. Paragraph (1) reads as follows:

> *Rule 464*. (1) When a document is in the possession of a person not a party to the action and the production of such document at a trial might be compelled, the Court may at the instance of any party, on notice to such person and to the other parties to the action, direct the production and inspection thereof, and may give directions respecting the preparation of a certified copy which may be used for all purposes in lieu of the original.

4 The other two paragraphs are concerned with documents in the possession of the Crown and are not involved in the present applications.

5 It will be observed that the rule applies only "When a document is in the possession of a person not a party to the action and the production of such document at a trial might be compelled". It was submitted that the use of the single word "possession" indicates that the application of the rule is narrower than that of Rules 448, 451 and 453 to 456, under which a party may be required to discover documents that are or have been in his "custody, possession or power" and to produce such of them as are in his "custody, possession or power." On the face of it, this appears to be so but, on reflection, I doubt that there is much difference, at least in so far as the right to production is concerned. However, it is not necessary to decide the point. What is involved is simply the meaning of "possession" in Rule 464. No case was cited in which the meaning is discussed and, in the absence of any expression of opinion on it, I think it means what is referred to as "legal possession" by Lord Cottenham in *Reid v. Langlois* (1849), 1 Mac & G 627 at 636; 41 ER 1408 at 1411, when he said:

> In one sense it [the document] is in his possession; but when possession for the purpose of production is spoken of, that is to say a right and power to deal with it, actual corporeal possession is not meant, but legal possession in respect of which the party is authorized to deal with the property in question.

The word plainly includes the situation where the owner of a document has physical possession of it. It includes as well, in my view, the situation where the document is not physically in the possession of its owner but is in the possession or custody of an agent or bailee from whom the owner is entitled to obtain it. I do not think, however, that it includes bare custody or possession held by one who does not own the document for, as I see it, the purpose of the notice of the application required by the rule to be given to the person in possession is to give the person entitled to it an opportunity to object to its production and that purpose would not be served if a mere custodian without title

[1977] C.T.C. 531, [1978] 1 F.C. 798, 5 C.P.C. 215, 77 D.T.C. 5433, [1978] 1 F.C. 798

were the only person entitled to be heard.

6 The purpose of Rule 464 and the jurisprudence on comparable rules in Ontario and British Columbia were recently reviewed by Smith, DJ in an earlier application in this case.[FN1] Smith, DJ points out that in those provinces there has been some relaxation in recent cases of the strict limitations placed on the rule by earlier cases which in general restricted it to production of specific documents for the purpose of simplifying the procuring of evidence for use at the trial and prevented its use as a means of obtaining discovery from persons not parties to the proceedings.

7 Smith, DJ, applying the more recent authorities, ordered the Royal Bank of Canada

> ... through its proper officers, to arrange for the production to and to permit the inspection by officers of the defendant of all ledgers, records, memoranda, correspondence, documents and other records in the possession of the Royal Bank of Canada with respect to Paul D Bowlen, the plaintiff herein, Regent Tower Estates Limited, Hambeldon Estates Limited and Bowlen Investments Ltd. wheresoever found, including, without restricting the generality of the foregoing, the documents, 319 in number, set out in Schedule A to the Notice of Motion herein, which documents were sent, received, prepared or originated by the Royal Bank of Canada, its agents or servants in the course of carrying on its business.

8 Many of the documents referred to were in New York and were produced there under arrangements between the Crown and the bank. But production was not given of documents said to be in the possession of The Royal Bank of Canada Trust Corporation (now The Royal Bank and Trust Company), a New York bank, the shares of which are owned by the Royal Bank of Canada and which is incorporated and organized under the law of New York and carries on its business there.

9 The first of the applications is directed to obtaining production of these documents. It seeks an order

> A. Directing the Royal Bank of Canada to comply with the Order of the Honourable Mr Justice C Rhodes Smith dated August 19, 1976, by producing, and allowing officers of the Defendant to inspect, all ledgers, records, reports, memoranda, correspondence or documents with respect to Regent Tower Estates Limited, Hambeldon Estates Limited, Paul Dennis Bowlen and Bowlen Investments Limited, in the possession of the Royal Bank of Canada Trust Corporation; or
>
> B. In the alternative, an Order pursuant to Rule 464 of the Rules of this Honourable Court, directing the Royal Bank of Canada to produce and allow officers of the Defendant to inspect all ledgers, records, reports, memoranda, correspondence or documents with respect to Regent Tower Estates Limited, Hambeldon Estates Limited, Paul Dennis Bowlen and Bowlen Investments Limited in the possession of the Royal Bank of Canada Trust Corporation

10 The defendant's first submission was that the production of the documents referred to was included in what the order required the Royal Bank to produce. It was conceded, however, that they were not included in the 319 listed documents referred to in the order and it does not appear to me that they can be regarded as embraced by the expression "in the possession of the Royal Bank of Canada" in the order. I should add that, if I were of the opinion that the documents were in the possession of the Royal Bank within the meaning of the order, I would regard procedure by an application for a second order to the same person for their production as open to question.

11 The defendant's principal submission was that because The Royal Bank and Trust Company is a wholly-owned subsidiary of the Royal Bank and, as a direction by it to the company would probably be respected, documents in the possession of the company should be considered to be in the possession of the Royal Bank within the mean ing of the rule and, accordingly, the Royal Bank should be ordered to produce them. Counsel conceded that this went further than any of the jurisprudence on the scope of the rule. In his submission, the order of Smith, DJ went further

than most jurisprudence in requiring production of documents not physically situated in Canada and in not requiring specific identification of the documents of which production was ordered and he sought to further expand the scope of the rule by interpreting it as applying to documents in the possession of a corporation controlled by the person against whom the order is sought.

12 In my opinion, the submission is not sustainable. The notice of motion describes the documents sought as being in the possession of The Royal Bank and Trust Company. Though that bank is a wholly-owned subsidiary of the Royal Bank, it is not the Royal Bank but a separate corporation established under the law of another country and carrying on its operation there. The documents sought are not shown to be the property of the Royal Bank. Nor has it been established that The Royal Bank and Trust Company holds them in trust for or as agent of the Royal Bank. Indeed, such evidence as there is of what the documents are suggests that they belong to The Royal Bank and Trust Company or its customers rather than to the Royal Bank. I do not think, therefore, that they can be considered to be in the possession of the Royal Bank within the meaning of the rule.

13 Counsel referred to *Dallas* v *Dallas*, 24 D.L.R. (2d) 746, but that was a case on discovery by a party to the proceedings and the document was in his possession. The case, in my view, is not of assistance in the present situation.

14 The application, therefore, fails and it will be dismissed with costs.

15 In the second of the three applications, what is sought is an order directing the Royal Bank of Canada and the National Westminster Bank Ltd

> ... to produce and allow officers of the Defendant to inspect all ledgers, records, correspondence, memoranda, reports or documents with respect to
>
> 1. Certain trusts, namely the Arvella Regis Bowlen Trust, the Patrick Dennis Bowlen Trust, the Mary Elizabeth Bowlen Trust, the John Michael Bowlen Trust and the William Alexander Bowlen Trust;
>
> 2. Regent Tower Estates Limited;
>
> 3. Hambeldon Estates Limited; and
>
> 4. Bowlen Investments Ltd
>
> in the possession of the Trust Corporation of the Bahamas Limited or its agents or servants. ...

16 When filed, the application was also directed against the Montreal Trust Company and the Imperial Life Assurance Company of Canada but the application was not pursued against them as in the meantime they had disposed of certain shareholdings which they had held in a Bahamian bank known as Roywest Banking Corporation Limited. The principal shareholders of that bank are Royal Bank International Limited, a Bahamian company owned, as to 100% of its shares, by the Royal Bank of Canada, and the National Westminster Bank Limited, the two owning between them some five-sixths of the issued shares. Roywest Banking Corporation Limited owns 99.99% of the issued shares of Trust Corporation of the Bahamas, a Bahamian company carrying on in the Bahamas the business of a trust company. It was said that this company controls the portfolio of investments sold by the plaintiff Bowlen to Hambeldon Estates Limited in one of the impugned transactions and has documents relevant to the issue in this action and that, since the Royal Bank and the National Westminster Bank combined have the effective ownership between them of the Trust Corporation of the Bahamas, they have effectively in their possession all the documents in the *de facto* possession of the trust company and should be ordered to produce them.

17 Counsel freely conceded that no such order has heretofore been granted but submitted that, as a matter of reasonableness, the Royal and National Westminster banks should be ordered to produce the documents held by a company they control. The implications of making such an order against a majority shareholder or a combination of shareholders holding together a majority of the shares of a company are far-reaching enough to make counsel's suggestion of the reasonableness of it questionable. In my opinion, the application is more tenuous than the first and fails for the like reasons. It is accordingly unnecessary for me to consider or express any opinion on the objection raised by counsel for the National Westminster Bank Limited that his client is not present in Canada.

18 The application will be dismissed with costs.

19 The remaining application seeks an order

> A. Directing Arvella Regis Bowlen, Patrick Dennis Bowlen, Mary Elizabeth Jager née Bowlen, William Alexander Bowlen and John Michael Bowlen to produce and allow the officers of the Defendant to inspect all ledgers, records, reports, memoranda, correspondence or documents with respect to Regent Tower Estates Limited, Hambeldon Estates Limited and the Trust Corporation of the Bahamas in their possession, or in the possession of the Trust Corporation of the Bahamas Limited, its agents or servants; and
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> B. Directing the preparation of certified copies thereof.

20 The affidavit filed in support of this application discloses that the named individuals are the beneficiaries of trusts of which Trust Corporation of the Bahamas Limited is the trustee, that the property of the trust in each case consists of shares of Regent Tower Estates Limited, a Bahamian corporation, which is the beneficiary of a trust, of which Trust Corporation of the Bahamas is trustee, of the shares of Hambeldon Estates Limited which owns the portfolio of investments sold to it by the plaintiff in the transactions of May 9, 1963. The final paragraph of the affidavit reads as follows:

> THAT I am of the opinion that there are in the possession, custody and power of Arvella Regis Bowlen, Patrick Dennis Bowlen, Mary Elizabeth Jager née Bowlen, William Alexander Bowlen, John Michael Bowlen, the Trust Corporation of the Bahamas, Regent Tower Estates Limited, Hambeldon Estates Limited, and/or their agents or servants, documents which may be relevant to the action herein.

21 It will be observed that in the notice of motion the named individuals and Trust Corporation of the Bahamas are lumped together and production of "ledgers, records, reports, memoranda, correspondence or documents" in the possession of any of them is sought. Which sorts of documents are claimed to be in the possession of the individuals and which in the possession of the corporation are not specified.

22 In so far as the application seeks an order requiring the named individuals to produce "ledgers, records, reports, memoranda, correspondence or documents" in the possession of Trust Corporation of the Bahamas, the application, in my opinion, fails, except with respect to documents, if any, which may be in the physical custody or possession of the company but which are the property of the named individuals, on the simple ground that the individuals may not be required under Rule 464 to produce documents which are not in their possession.

23 With respect to documents in the possession of the named individuals, within the meaning of Rule 464, it was stated by their counsel that they have received reports from the trustee, ie Trust Corporation of the Bahamas, and that they had no objection to an order being made that such reports and all other documents received by them from Trust Corporation of the Bahamas relating to their relationship to Regent Tower Estates Limited and Hambeldon Estates Limited be produced. Apart from such reports and documents, however, it is not, in my opinion, apparent from the material before me that they have in their possession relevant "ledgers, records, reports, memoranda, corre-

spondence or documents" respecting the three corporations named in the notice of motion.

24 In *Rhoades v Occidental Life Insurance Company of California*, [1973] 3 W.W.R. 625, McFarlane, JA described the limits of what may be ordered under the corresponding British Columbia rule as follows:

> I agree that when considering an application under the Rule the court or judge should not permit it to be used for the mere purpose of obtaining discovery from a person not a party. This would be a "fishing expedition", ie, an attempt to discover whether or not that person is in possession of a document, the production of which might be compellable at trial and if so, the nature of the document. The reason why a fishing expedition is not permissible is that the Rule envisages an application being made with respect to a particular document and an order for the production and inspection of that document. It must therefore be shown to the court or judge that such a document is in the possession of a person who is not a party to the action before an order can be made for the production of the document by him. I do not, however, think that the description of the document sought must be so specific that it could be picked out from among any number of other documents.

25 In my opinion, what is sought in the present application is the discovery of documents of persons who are not parties. What is asked for is not limited to specific documents and it is not limited to documents shown to be in the possession of the persons against whom the order is sought. It is not even limited to documents shown to be in existence.

26 In the result, an order will be made for production by the named individuals of the reports and documents above mentioned which they have received from Trust Corporation of the Bahamas. In other respects, the application will be dismissed. The named individuals will be entitled to their costs of the application. As between the parties to the action, the costs of the application will be costs in the cause.

FN1. [1977] 1 F.C. 589, [1976] C.T.C. 577, 76 D.T.C. 6335.

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