FILE NO.: EB-2010-0184

THE ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act, 1998 and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

BOOK OF AUTHORITIES
OF THE MOVING PARTIES

(MOTION TO COMPEL THE PRODUCTION OF UNREDACTED DOCUMENTS AND COMPEL RE-ATTENDANCE FOR EXAMINATION)

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THE ONTARIO ENERGY BOARD

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I N D E X

TAB

TAB 1

Case Name:

McGee v. London Life Insurance Co.

**RE: Barbara McGee and Pauline McCallum,
Applicants/Moving Parties, and
London Life Insurance Company Limited,
Respondent/Responding Party**

[2010] O.J. No. 898

2010 ONSC 1408

86 C.C.L.I. (4th) 86

2010 CarswellOnt 1278

81 C.C.P.B. 226

2010 CarswellOnt 1278

86 C.P.C. (6th) 381

Court File No. 07-CV-327818CP

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: January 29, 2010.
Judgment: March 8, 2010.

(23 paras.)

Civil litigation -- Parties -- Class or representative actions -- Discovery -- Production and inspection of documents -- Relevancy -- Motion by plaintiff for production of unredacted copies of documents that defendant had produced in redacted form because it considered those portions irrelevant allowed -- Impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions were not relevant -- Defendant had identified no aspect of any of the documents at issue that gave rise to an interest requiring protection.

Motion by the plaintiff for production of unredacted copies of documents that were requested on the examination of the defendant and which it had produced in redacted form. The plaintiff had commenced a class action regarding the entitlement of the defendant's former employees, whose employment was terminated in 1996 as a result of a re-organization, to the surplus in a staff pension plan after a partial wind-up of the plan. Te plaintiff argued that the documents at issue related to the central issues in the proceeding and that the defendant was not entitled to redact those portions that it considered irrelevant. The documents at issue were minutes of various committees of the defendant, minutes of Board of Director meetings and various documents related to the plan.

HELD: Motion allowed. It was impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions were not relevant. The whole of a relevant document must be produced except to the extent it contained information that would cause significant harm to the producing party or would infringe public interests deserving of protection. The party seeking to redact material bore the onus of establishing that redaction was necessary to protect an important interest. The defendant had identified no aspect of any of the documents at issue that gave rise to an interest requiring protection, other than the general interest that every company would have in the confidentiality of minutes of board and committee meetings and other corporate records.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 30.04(6)

Counsel:

Howard Goldblatt and Christine Davies, for the Moving Parties.

Jeff Galway and Ashley Richards, for the Respondent.

ENDORSEMENT

1 G.R. STRATHY J.:-- This is a pension surplus dispute that was certified by Lax J. as a class action: *McGee v. London Life Insurance Co.* (2008), 63 C.P.C. (6th) 107, [2008] O.J. No. 1760. The primary issue in the action is whether class members, former employees of the respondent ("London Life"), whose employment was terminated in 1996 as a result of a reorganization, are entitled to the surplus attributable to the partial wind-up of the staff pension plan (the "Plan"). The common issues certified by Lax J. include whether the surplus assets of the Plan were impressed with a trust in favour of Plan members, the quantum of the partial wind up surplus and whether London Life committed breaches of trust. Justice Lax subsequently ordered that the action be converted into an

application. Affidavits have been filed, cross-examinations have taken place and documents have been produced.

2 The issue on the motion before me is whether London Life can be compelled to produce unredacted copies of documents that were requested on the examination of its affiant and which it has produced in redacted form, disclosing only those portions that it considers relevant. The applicants maintain that the documents at issue relate to the central issues in the application, particularly the creation, design, funding and maintenance of the Plan, the registration of the Plan with federal tax authorities and London Life's understanding of its legal obligations under the Plan. They say that London Life must produce all relevant documents and that it is not entitled to redact those portions that it considers irrelevant.

3 The documents at issue on this motion fall into the following general categories:

(a) minutes of various London Life committees involving pensions, including the Management Committee, the Pension Committee, and the Management Development and Compensation Committee;
(b) minutes of Board of Directors Meetings and Annual General Meetings of Shareholders;
(c) various documents related to the Plan; and
(d) material submitted to the Board of Directors of London Life.

4 Where copies of these documents have been delivered to the applicants, portions have been redacted on the basis that they are irrelevant to the issues before the court on the application. In some cases, entire documents have been redacted, or not produced, on the basis of relevance. In a few cases, redactions have been made for privilege. The applicants to do not take issue with redactions for privilege.

5 For the purpose of hearing the motion, counsel for London Life provided me with unredacted copies of the documents at issue. Copies were not provided to counsel for the applicants but an "aide memoire," containing one sentence summaries of the nature of the redactions, was provided to counsel for the applicants. While a procedure of this kind is contemplated for the inspection of privileged documents under Rule 30.04(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, no such provision is made for the examination of redacted documents. Counsel for the applicant was understandably concerned, as was I, that this procedure put him at a material disadvantage in the argument of the motion.

6 In most cases, London Life admits that the document at issue is relevant, in the sense that it contains information relevant to the issues, but it says that the irrelevant portions should be redacted and should not even be disclosed to counsel for the applicants.

7 In determining whether a trust was created, the court will be required to consider all the surrounding circumstances concerning the establishment, amendment, funding, structure and

operation of the Plan: *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, [1994] S.C.J. No. 48; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)* (2005), 22 E.T.R. (3d) 238, [2005] O.J. No. 5775 (S.C.J.). I agree with the observation of Panet J. in the latter case, at para. 53, that a "narrow, highly technical approach to the issue of relevance" would not be appropriate in a case of this kind. There should be a generous approach to production in this case.

8 It is impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions are not relevant. I respectfully agree with the observations of Corbett J. in *Albrecht v. Northwest Protections Services Ltd.*, [2005] O.J. No 2149, 139 A.C.W.S. (3d) 644 (S.C.J.) at para. 11 and *Guelph (City) v. Super Blue Box Recycling Corp.* (2004), 2 C.P.C. (6th) 276, [2004] O.J. No. 4468. In the former case Corbett J. observed that there may be some cases where it would be appropriate to redact for relevance, referring to his decision in the latter case, but he declined to make any general observations in the absence of argument on the point. In the latter case he observed that redaction is common in the case of privileged documents and also referred to *Bouchard Paradis Inc. v. Markel Insurance Co. of Canada*, [2000] O.J. No. 5210, 103 A.C.W.S. (3d) 32 (S.C.J.) where Case Management Master MacLeod had approved redaction of certain information on the basis of relevance where the parties were business competitors. The Master stated, at para. 4, that: "[t]he right to redact information from documents which are otherwise relevant should *only* be given in circumstances such as these where the parties are business competitors and the information which is not relevant may be sensitive in nature." [emphasis added]

9 The whole of a relevant document must be produced except to the extent it contains information that would cause significant harm to the producing party or would infringe public interests deserving of protection. I respectfully adopt as applicable in Ontario the statement of Lowry J., as he then was, in *North American Trust Co. v. Mercer International Inc.* (1999), 36 C.P.C. (4th) 395, [1999] B.C.J. No. 2107 (S.C.) at para. 13:

> Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant *is by its nature such that there is good reason why it should not be disclosed*, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. *In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.* [emphasis added]

10 Lowry J. referred to a number of authorities, some of which were referred to by London Life in the motion before me, and observed, at para. 11:

> In the cases to which I have been referred, litigants have been relieved from disclosing the whole of a document related to a matter in question where, but only where, the part withheld has been clearly not relevant to the issues and, because of its nature, there has been good reason why that part should not be disclosed. *With reference to the decisions of this court specifically, good reason is apparent in the private nature of the affairs of a company recorded in the minutes of its directors' meetings*, or the personal sensitivity of a person's medical records, diary notations, or familial communications, and much the same can be said where expurgated disclosure of a document has been upheld in the cases cited from other jurisdictions. Statements to the effect that only the relevant parts of a document need be produced, such as in Jervis Court Development [*Jervis Court Development Ltd. v. Ricci*, [1992] B.C.J. No. 2932] at para. 24 and [*K.L.V. v. D.G.R.*], [1993] B.C.J. No. 1662] at para. 10, must be read in the context of what was decided. [emphasis added]

11 In that case, the defendants sought production of an asset purchase agreement that was part of a transaction whereby the plaintiff North American Trust Company had acquired the assets of the other plaintiff, Westlaco Investment Company. One of the assets was the debenture that was the basis of the plaintiff's claim against the defendants. The defendants asked for production not only of the assignment agreement pertaining to the debenture, but also the entire asset purchase agreement. The plaintiff was only prepared to produce a redacted version of the asset purchase agreement. Lowry J. held, at para. 15, that in order to maintain that position, the plaintiffs would have to establish that the redacted portions "are both clearly irrelevant and that there is good reason why they should not be disclosed."

12 I will return shortly to the comments of Lowry J. in the quotation above, regarding corporate minutes.

13 Irrelevance alone is not a sufficient ground on which to redact portions of a document. The party seeking to do so bears the onus of establishing that redaction is necessary to protect an important interest. Some of the cases referred to by the parties include:

(a) patents or trade secrets: *Kimberly-Clark Corp v. Procter & Gamble Inc*. (1990), 31 C.P.R. (3d) 207, [1990] F.C.J. No. 451 (F.C.T.D.); *United States Surgical Corp. v. Downs Surgical Canada Ltd.*, [1982] 1 F.C. 733, [1981] F.C.J. No. 164 (F.C.T.D.);

(b) personal income tax information: *Janhevich v. Thomas* (1977), 15 O.R. (2d) 765, [1977] O.J. No. 2227 (H.C.); *Collins v. Beach* (1988), 24 C.P.C. (2d) 228, [1988] O.J. No. 43 (H.C.);

(c) commercially sensitive financial information: *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1989), 38 C.P.C. (2d) 47, [1989] O.J. No. 1456 (H.C.); *John Labatt Ltd. v. Molson Breweries* (1993), [1994] 1 F.C.

801, [1993] F.C.J. No. 1343 (F.C.T.D.); *North American Trust Co. v. Mercer International Inc.*, above, at paras. 11, 13-16 (S.C.); *Bouchard Paradis Inc. v. Markel Insurance Co. of Canada*, above;

14 The additional cases referred to by Lowry J. give rise to another possible category:

> (d) records of a purely private and personal nature and not relevant to the issues, such as notes between parties: *Jervis Court Development Ltd. v. Ricci*, [1992] B.C.J. No. 2932 (S.C.) and personal diaries: *Lazin v. Ciba-Geigy Canada Ltd.*, [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380 (Alta. C.A.); *K.V.L. v. D.G.R.*, [1993] B.C.J. No. 1662, 39 A.C.W.S. (3d) 424 (S.C.) or irrelevant and sensitive medical information.

15 Lowry J. also referred to *Goddard v. Shoal Harbour Marine Services Limited* (1958), 24 W.W.R. 166, [1958] B.C.J. No. 23 (S.C.). In that case, the plaintiff had been granted an equitable mortgage on all the shares of the corporate defendant in order to secure a loan to two of the directors. He claimed that the directors had fraudulently diluted his security by allotting further shares to others. He was able to become registered as the owner of the hypothecated shares and sought to have the share register rectified by having the allegedly fraudulent allotment struck out. Brown J. held that the plaintiff was entitled to production of the minutes of meetings of directors and shareholders of the corporation and copies of books and accounts of the company, but only insofar as the documents had to do "directly or indirectly" with the allotment of the disputed shares. He ordered that anything in the minute books that had nothing to do with the action "may be sealed in accordance with the English practice" (at para. 16). As far as I am aware, this decision has never been considered in Ontario.

16 I do not regard *Goddard v. Shoal Harbour Marine Services Limited* as authority for a general proposition that corporate minutes enjoy any special status in terms of production and discovery. Nor do I consider the observations that I have highlighted in the reasons of Lowry J. at para. 11 of *North American Trust Co. v. Mercer International Inc.* to stand for such a broad proposition. In *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Assn*, 2009 BCSC 1498, [2009] B.C.J. No. 2166, leave to appeal refused, 2009 BCCA 452, [2009] B.C.J. No. 2077, Bruce J,. held that minutes of board meetings and executive meetings, for which privilege had not been established, were required to be produced in an unredacted form. In *St. Elizabeth Society v. Hamilton-Wentworth (Regional Municipality)* (2004), 50 C.P.C. (5th) 199, [2004] O.J. No. 1428 (S.C.J.), Harris J. of this court found that directors' minutes did not attract privilege, noting, at para. 12, that "confidentiality alone, 'no matter how earnestly desired and clearly expressed,' does not confer privilege on a communication: *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1, 193 D.L.R. (4th) 680 at 698 (C.A.)."

17 The issue was also considered by Lowry J. in *Vernon & District Credit Union v. Cue Datawest Ltd.*, [1999] B.C.J. No. 364 (S.C.). In that case, the plaintiff had sued for a declaration that

a commitment letter that it had signed in favour of the defendant did not result in a binding contract. The defendant sought production of various reports generated by the plaintiff, which had been produced by the plaintiff in redacted form. These included operations reports, a report of the general manager, a report of the board of directors and minutes of a meeting of the board of directors. The plaintiff took the position, as does London Life in the case before me, that it was only required to produce those portions of the reports that were relevant to the issues and that the balance, which it considered of no relevance, could be redacted. The plaintiff in that case went farther than London Life because it took the position that the court could not be asked to inspect the documents to determine whether the claim for relevance was sound.

18 Lowry J. firmly rejected this contention, at para. 7:

> In my view, there is simply no merit in what the plaintiff says. The position it takes is not based on any claim of privilege or commercial confidentiality. Were that the case, the court might well be required to examine the documents and rule on whether the claim to privilege was sound or whether some terms of confidentiality in an order for production would be appropriate. But otherwise, a litigant is generally not entitled to refuse to produce portions of relevant documents. The whole of a document is relevant and producible if any of its contents are relevant. The documents produced in almost every commercial law suit contain much that can be said to be irrelevant to the issues. The discovery of documents would take on a whole new meaning if litigants could go through their listed documents (minutes, reports, and correspondence) and redact those portions that they did not consider bore on the pleaded issues.

19 He held that each of the documents was producible, in its entirety, subject to a claim for privilege in the case of one document.

20 It seems to me that corporate minutes, like a personal diary, may contain some information that is irrelevant but innocuous and some information that is irrelevant and very sensitive - sensitive in the sense that the party resisting production would suffer damage or real embarrassment if the irrelevant information were to be disclosed. Very often these issues are resolved between counsel. Where they are not, the court has a duty to ensure that relevant information is produced and also to ensure that the process is not being being used for oppressive or collateral purposes.

21 In this case, London Life has identified no aspect of any of the documents at issue that gives rise to an interest requiring protection, other than the general interest that every company would have in the confidentiality of minutes of board and committee meetings and other corporate records. Nothing has been identified that could be in any way harmful to the commercial interests of London Life or that would cause embarrassment or prejudice to any third party.

22 For these reasons, I order that London Life produce for inspection copies of all relevant documents in their unredacted form. Counsel should be able to agree on a procedure for inspection,

but if they are unable to do so an appointment may be scheduled through Judges' Administration. I would also expect that counsel will be able to agree on a record that does not contain irrelevant material, for filing with the court. If, following production of the documents, the parties are unable to agree on the record, and London Life wishes to bring a motion to exclude materials from the record, a motion may be brought.

23 Counsel may make brief written submissions as to costs, addressed to me care of Judges' Administration.

G.R. STRATHY J.

cp/e/qlrpv/qljxr/qlaxw/qljyw/qlana/qljyw

TAB 2

Indexed as:

Bouchard Paradis Inc. v. Markel Insurance Co. of Canada

Between
Bouchard Paradis Inc. et. al., and
Markel Insurance Company of Canada

[2000] O.J. No. 5210

103 A.C.W.S. (3d) 32

Court File No. 96-CU-107194CM

Ontario Superior Court of Justice

Case Management Master MacLeod

Judgment: December 28, 2000.

(13 paras.)

Practice -- Discovery -- Examination -- Obtaining answers to questions, procedure.

Motions by Bouchard Paradis Inc. and Markel Insurance for orders to obtain answers to questions asked during examinations for discovery. The questions pertained to a brokerage agreement between the parties.

HELD: Motions allowed in part. Answers were to be given for questions that were determined to be relevant to the issues raised in the litigation.

Counsel:

John P. Koch and Szab Gall, for the defendant (plaintiff by counterclaim).
Richard Hayes, for the plaintiffs (defendants by counterclaim).

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1 CASE MANAGEMENT MASTER MacLEOD (endorsement):-- This endorsement should be read with my endorsement of December 1, 2000 (as amended) [See [2000] O.J. No. 5024]. I have amended that endorsement in light of submissions made at the return of this motion. The revision relates to paragraph 16. A copy of the revised endorsement will be sent to counsel together with today's reasons. The facts are set out in that endorsement.

2 On December 15th, 2000 I dealt with the plaintiffs cross motion for refusals by Markel. Counsel are to be commended for narrowing the issues in the time between the two hearing dates.

Questions relating to the Brokerage Agreement & Supplement

3 Q. 449 asks for the circumstances of Mr. Fugere's dismissal. It has been answered that Fugere was fired for cause and as well a summary of his anticipated evidence will be provided. The question need not be answered further than that as detailed particulars of the firing do not have sufficient relevance to the matters in issue.

4 Q. 1736 was answered by an undertaking to search for any such documents and to produce the relevant portions. The right to redact information from documents which are otherwise relevant should only be given in circumstances such as these where the parties are business competitors and the information which is not relevant may be sensitive in nature. In the circumstances of this case I am prepared to make a general order permitting redaction of the non relevant portions of documents which I am ordering produced. The party seeking to withhold part of a document shall provide a sufficiently detailed description of the redacted portion that the opposing party may assess its relevance or the basis for privilege if privilege is claimed. The Court may be spoken to if there is further disagreement concerning relevance.

Questions relating to the plaintiff's role in building Markel's business

5 Questions 504, 509, 514, 521, 568 & 885 ask for the premium volumes of trucking insurance written by Markel in between 1990 and 1996 'and for information relevant to assessing the impact on sales of the work done by B.P. With the exception of Q. 521 these questions are to be answered. Q. 521 asks what proportion of Markel's overall business was done in Quebec in 1990. Markel sales outside Quebec do not appear relevant to this litigation. This question need not be answered.

Assignment of the Brokerage Agreement

6 The agreement between Markel and B.P. is in two parts which appear to be executed on the same day. The first part is a brokerage agreement. The second part which is expressed to be part of the first is the agreement constituting B.P. as the underwriter for non fleet truck insurance in Quebec. The proper interpretation of the second agreement is critical to the litigation because the first agreement states that the book of business is the property of B.P. Whoever owns the business, there are clearly different duties and obligations flowing between the parties under the two parts of the agreement.

7 B.P. incorporated Eastern to carry out the underwriting function. There is dispute between the parties as to the exact impact of this. Markel argues that the second agreement was assigned by B.P. to Eastern and that Eastern thus became the agent of Markel. B.P. argues that Eastern answered to B.P. and was B.P.'s agent not Markel's. I observed at the hearing that these are not mutually exclusive propositions. Eastern could be both an agent of B.P. and an agent of Markel but in any event, the impact of the new corporation on the agreement and the rights and duties of both corporations are central to the litigation.

8 Question 923 asks for underlying documents to support a legal conclusion and asks what in the documents supports the conclusion. While Markel can be asked what evidence it relies upon and to produce the documents which support its position, it can not be asked to produce documents which have no apparent relevance. This question need not be answered.

9 Question 1735 which asks for billing records under agreement 2791 and 3330 was answered but an undertaking for clarification was given in the December 12th letter. The undertaking is to be answered and may be the subject of follow up questions. Q. 1933 has been answered.

Breach of the Exclusive Agreement

10 Each party alleges the other breached the exclusivity provisions in the agreement. Markel was asked questions about renewed and replaced policies. It is relevant what insurance was replaced by Markel after 1996 as this goes both to B.P.'s damage claim and Markel's actual losses. Q. 1337 and 1335 were answered and undertakings given. These undertakings are to be answered. Q. 1879 and 1882 ask for replacement policies written. An undertaking was given to produce these post 1996 and it is so ordered.

Plaintiff's loss of profits and damages claim

11 The plaintiff claims an accounting for profits. To the extent that an accounting is ordered, the damage claim would be quantified in that manner. B.P. also asks for damages. There is a counterclaim which also seeks an accounting or damages in the alternative. It is pleaded that a multiple of 2.5 times earned premiums is an appropriate way to value a book of business. Essentially, as the litigation is framed, one or other of the parties was the owner of the book of business. Whoever loses on this issue must compensate the other for the appropriation of the portion of the business the losing party has been able to retain. As such, the quantification of the premium volume generated prior to the termination of the agreement and subsequently is relevant.

12 Question 1754 asks Markel to answer if it can generate a proposed report from its computers and if so will it do so. The first part of the question should be answered. The report requested may well be too broad and contain information which does not pass the test of relevance. Markel has undertaken to generate a narrower report. It is appropriate that it do so and it will then be possible to determine if the information provided is adequate.

IV. Balance of the Motion

13 The balance of the motion is adjourned to a date to be set by the Court. Two hours will be reserved for the purpose.

CASE MANAGEMENT MASTER MacLEOD

cp/s/qlala

TAB 3

> and had informed himself on the question of sources of supply of heroin, necessarily a subject of vital interest to one concerned with the importing of the narcotic.[88]

Although McIntyre J. agreed that the probative value of this evidence was low, it was an error for the judge to confuse relevance with weight. He noted that if the article had been on sources of heroin supply in Hong Kong it would have had greater weight and if it had been a step-by-step guide to importing heroin, its weight would have been greater still. Yet the clipping was nevertheless still relevant evidence and it should have been put before the trier of fact.[89] The trier of law determines if the evidence is relevant. The trier of fact determines what, if any, weight is to be given to it. Obviously, where the judge is the trier of both fact and law the distinction becomes blurred and the weight to be given the evidence becomes the paramount consideration. Without relevance the evidence can have no weight.

5. *Relevance Distinguished from Materiality*

§2.50 A distinction has also been drawn between relevance and materiality.[90] Evidence is material in this sense if it is offered to prove or disprove a fact in issue.[91] For example, evidence offered by a plaintiff in a conversion action to prove a loss of profit is not material since loss of profits cannot be recovered in such an action,[92] and evidence that an accused charged with forcible entry is the owner of the land is immaterial since the offence can be committed by an owner.[93] This evidence may very well be immaterial, but it is also simply irrelevant. This excluded evidence is no more required to make out the case than is evidence that the accused owns three other properties or owns a black dog for that matter. There is no probative connection between the fact to be proved and the facts in issue as determined by the substantive law. Little is added to the analysis by adding a concept of materiality, as different results do not depend on

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88 *R. v. Morris*, [1983] 2 S.C.R. 190, at 191, [1983] S.C.J. No. 72 (S.C.C.).

89 See also *Ferris v. Monahan* (1956), 4 D.L.R. (2d) 539, [1956] N.B.J. No. 11 (N.B.C.A.); *R. v. Underwood* (2002), 9 C.R. (6th) 354, [2002] A.J. No. 1558 (Alta. C.A.) (it need only be shown that one possible interpretation of the facts is relevant to an issue at trial; the strength or weight of the evidence is a matter for the trier of fact).

90 See, for example, 11 C.E.D. Ont. (3rd ed.), Title 57, para. 11.

91 As defined in this chapter, § 2.36. In support of a *Garofoli* application to cross-examine on an affidavit in support of a wiretap authorization, the applicant must establish that the proposed cross-examination is relevant to a material issue, otherwise it will not be permitted: *R. v. Pires; R. v. Lising*, [2005] 3 S.C.R. 343, [2005] S.C.J. No. 67 (S.C.C.).

92 *Tyson v. Little* (1852), 8 U.C.R. 434, [1851] O.J. No. 28 (U.C.Q.B.).

93 *R. v. Cokely* (1856), 13 U.C.R. 521, [1855] O.J. No. 68 (U.C.Q.B.). See also *Daly v. Leamy* (1856), 5 U.C.C.P 374, [1855] O.J. No. 143 (U.C. Ct. of Comm. Pleas).

TAB 4

Case Name:

Westbank First Nation v. British Columbia Hydro and Power Authority

Westbank First Nation, appellant;
v.
British Columbia Hydro and Power Authority, respondent, and The Attorney General of Quebec, the Attorney General of Manitoba and the Attorney General of British Columbia, interveners.

[1999] S.C.J. No. 38

[1999] A.C.S. no 38

[1999] 3 S.C.R. 134

[1999] 3 R.C.S. 134

176 D.L.R. (4th) 276

246 N.R. 201

[1999] 9 W.W.R. 517

J.E. 99-1801

129 B.C.A.C. 1

67 B.C.L.R. (3d) 1

[1999] 4 C.N.L.R. 277

90 A.C.W.S. (3d) 816

File No.: 26450.

Supreme Court of Canada

Hearing and judgment: June 21, 1999.

Reasons delivered: September 10, 1999.

Present: Lamer C.J. and Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (46 paras.)

Constitutional law -- Crown -- Immunity -- Taxation -- Exemption of public lands -- Indian band passing assessment and taxation by-laws pursuant to the Indian Act -- Whether by-laws impose taxes -- Whether by-laws constitutionally inapplicable to provincial utility -- Constitution Act, 1867, s. 125.

Indians -- Taxation -- Money by-laws -- Indian band passing assessment and taxation by-laws pursuant to Indian Act -- Whether by-laws constitutionally inapplicable to provincial utility -- Constitution Act, 1867, s. 125 -- Indian Act, R.S.C., 1985, c. I-5, s. 83(1)(a).

Between 1951 and 1978, the respondent hydroelectric utility was granted from Her Majesty the Queen in Right of Canada eight permits to use and occupy various lands located on two Indian reserves in order to build electric transmission and distribution lines and to provide electrical energy to the residents of the reserves. In 1990, the appellant passed the Westbank Indian Band Assessment By-law and the Westbank Indian Band Taxation By-law, pursuant to its authority under s. 83(1)(a) of the Indian Act. The appellant passed additional by-laws from 1991 to 1995, under which the respondent was assessed $124,527.25 in taxes, penalties, and interest. The respondent refused to pay the assessed taxes, and did not appeal the assessment notices. The appellant brought an action to recover the unpaid amount. Summary judgment was granted to the respondent, which was upheld on appeal to the British Columbia Court of Appeal. The issue in this appeal is whether s. 125 of the Constitution Act, 1867 prevents the appellant from applying its assessment and taxation by-laws to the respondent, an agent of the provincial Crown.

Held: The appeal should be dismissed.

Section 125 of the Constitution Act, 1867 renders the impugned by-laws constitutionally inapplicable to the respondent. The by-laws are designed for the singular purpose of generating revenue for "local purposes". They were enacted pursuant to s. 83(1)(a) of the Indian Act, which authorizes "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve". The by-laws themselves state that their purpose is "for raising a revenue for local purposes".

Section 125 of the Constitution Act, 1867 is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It advances the goals of federalism and democracy by according a degree of operational space to each level of government, free from

interference by the other. It prohibits one level of government from taxing the property of the other. However, it does not prohibit the levying of user fees or other regulatory charges properly enacted within the government's sphere of jurisdiction.

Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125, several key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

The levies are properly described as being, in pith and substance, taxation enacted under s. 91(3) of the Constitution Act, 1867. They are enforceable by law, imposed under the authority of the legislature, and levied by a public body for a public purpose. The appellant has not demonstrated that the levies are connected to a "regulatory scheme" which could preclude the application of s. 125. The charge does not form any part of a detailed code of regulation. No costs of the regulatory scheme have been identified, to which the revenues from these charges are tied. The appellant does not seek to influence the respondent's behaviour in any way with these charges. There is no relationship between the respondent and any regulation to which these charges adhere. Although the Indian Act is legislation in relation to "Indians, and Lands reserved for the Indians", this does not, in itself, create a "regulatory scheme" in the sense required by the Constitution.

As these taxes are imposed on the respondent, which it is conceded is an agent of the provincial Crown, s. 125 is engaged. The taxation and assessment by-laws are accordingly inapplicable to the respondent.

Cases Cited

Applied: Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004; Attorney-General of British Columbia v. Attorney-General of Canada (1922), 64 S.C.R. 377, aff'd [1924] A.C. 222; referred to: M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641; Eurig Estate (Re), [1998] 2 S.C.R. 565; Attorney General of Canada v. City of Toronto (1892), 23 S.C.R. 514; Attorney- General of Canada v. Registrar of Titles, [1934] 4 D.L.R. 764; Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357; Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371 ; Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929; Re Ottawa-Carleton (Regional Municipality) By-law 234-1992, [1996] O.M.B.D. No. 553 (QL); Cape Breton Beverages Ltd. v. Nova Scotia

(Attorney General) (1997), 144 D.L.R. (4th) 536, aff'd (1997), 151 D.L.R. (4th) 575, leave to appeal refused, [1997] 3 S.C.R. vii; Minister of Justice v. City of Levis, [1919] A.C. 505; Urban Outdoor Trans Ad v. Scarborough (City) (1999), 43 O.R. (3d) 673; Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 53, 91(3), (24), 92(2), (9), (13), 125.
Indian Act, R.S.C., 1985, c. I-5, ss. 28(2), 83(1)(a) [rep. & sub. c. 17 (4th Supp.), s. 10(1)].
Interpretation Act, R.S.C., 1985, c. I-21, s. 17.
Westbank Indian Band Assessment By-law (1990), s. 36(1).
Westbank Indian Band Property Taxation Bylaw (1994), ss. 2(1), 8(1), 28, 30, 35, 36.
Westbank Indian Band Taxation By-law (1990), ss. 2(1), 8(1), 41(1), 45, 46(1), 49.

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APPEAL from a judgment of the British Columbia Court of Appeal (1997), 45 B.C.L.R. (3d) 98, 154 D.L.R. (4th) 93, 100 B.C.A.C. 92, [1998] 2 C.N.L.R. 284, affirming a decision of the British Columbia Supreme Court (1996), 138 D.L.R. (4th) 362, [1997] 2 C.N.L.R. 229, granting summary judgment to the respondent. Appeal dismissed.

Jack Woodward, Robert J. M. Janes and Patricia Hutchings, for the appellant.
Peter D. Feldberg, Anne Dobson-Mack and Cydney J. Elofson, for the respondent.
Monique Rousseau, for the intervener the Attorney General of Quebec.
Heather J. Leonoff, Q.C., for the intervener the Attorney General of Manitoba.
George H. Copley, Q.C., and Jeffrey M. Loenen, for the intervener the Attorney General of British Columbia.

Solicitors for the appellant: Woodward & Company, Victoria.
Solicitors for the respondent: Lawson, Lundell, Lawson & McIntosh, Vancouver.
Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.
Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice,

Winnipeg.
Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

The judgment of the Court was delivered by

GONTHIER J.:--

I - Introduction

1 The issue in this appeal is whether s. 125 of the Constitution Act, 1867 prevents Westbank First Nation from applying its assessment and taxation by-laws to B.C. Hydro, an agent of the provincial Crown. The answer to that question depends upon whether the by-laws enact a system of taxation, which is subject to s. 125, or some other form of regulation which is not subject to the application of s. 125. If the by-laws impose taxes, then they are constitutionally inapplicable to the provincial Crown or its agents. For the reasons that follow, it is my opinion that these by-laws are properly described as taxes, and as such, cannot be imposed on B.C. Hydro.

2 The proper approach to characterizing a governmental levy has been considered on numerous occasions by this Court in various contexts. The characterization is relevant when determining the constitutionality of a provincial levy that has indirect tendencies, for if it is a regulatory charge, or otherwise is a component of a regulatory scheme, then the provinces are constitutionally competent to impose such a charge. It is equally relevant when considering s. 53 of the Constitution Act, 1867, because if the levy is a tax, then it must be imposed by the legislature. And, as I discuss below, if the levy is characterized as a tax, then it is constitutionally inapplicable to the other level of government.

3 The impugned by-laws are designed for the singular purpose of generating revenue for "local purposes". They were enacted pursuant to s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5, which authorizes "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve". The by-laws themselves state that their purpose is "for raising a revenue for local purposes". There are no restrictions to the expenditure of these revenues; they are simply revenues for the discretionary spending of the Westbank First Nation.

4 The impugned charges bear all of the traditional hallmarks of a "tax". They are enforceable by law, imposed pursuant to the authority of Parliament, levied by a public body, and are imposed for a public purpose. There is no "nexus" between the revenues raised and the cost of any services provided. As such, they do not resemble a user fee, nor any other form of a regulatory charge. I disagree with the submissions of the appellant that they are attached to a regulatory scheme, as none

of the indicia of a "regulatory scheme" recognized by this Court in constitutional law are present in this case. As such, these charges are properly characterized as being in pith and substance "taxation" levied under s. 91(3) of the Constitution Act, 1867, and as such, are rendered inapplicable to the provincial government by s. 125 of the Constitution Act, 1867. As it is my opinion that s. 125 prevents the application of the by-laws to the respondent, it is unnecessary to address the additional arguments raised concerning s. 17 of the Interpretation Act, R.S.C., 1985, c. I-21.

II - Facts

5 The relevant facts of this appeal are not in dispute. Between 1951 and 1978, the respondent acquired eight permits from Her Majesty the Queen in Right of Canada to use and occupy various lands on the Tsinstikeptum Indian Reserves No. 9 and No. 10 in British Columbia. The permits were granted pursuant to s. 28(2) of the Indian Act with the consent of the appellant. The respondent held the permits in order to build electric transmission and distribution lines and to provide electrical energy to the residents of the Reserves. In 1990, the appellant passed the Westbank Indian Band Assessment By-law ("1990 Assessment By-law") and the Westbank Indian Band Taxation By-law ("1990 Taxation By-law"), pursuant to its authority under s. 83(1)(a) of the Indian Act. These by-laws were amended in subsequent years, but the relevant provisions remained the same. The appellant passed additional by-laws from 1991 to 1995, and under these by-laws the respondent was assessed $124,527.25 in taxes, penalties, and interest. The respondent refused to pay the assessed taxes, and did not appeal the assessment notices.

6 The appellant brought an action against the respondent to recover the unpaid amount. The respondent counterclaimed for declaratory relief stating that it was not subject to taxation under the by-laws. Both parties brought applications to the Supreme Court of British Columbia for summary judgment under Rule 18A of the British Columbia Rules of Court. Summary judgment was granted to the respondent, which was upheld on appeal to the British Columbia Court of Appeal.

III - Relevant Constitutional and Statutory Provisions

7 A. Constitution Act, 1867

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to

all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, ___

...

3. The raising of Money by any Mode or System of Taxation.

...

24. Indians, and Lands reserved for the Indians.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, ___

...

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

...

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

...

13. Property and Civil Rights in the Province.

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

B. Indian Act, R.S.C., 1985, c. I-5

28. ...

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

> 83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,
>
> (a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

C. Westbank Indian Band Taxation By-law (1990)

> 2. (1) As provided in this by-law, and for raising revenue for local purposes,
>
> (a) land and interests in land are subject to taxation;
> (b) subject to any exemption contained in this by-law, every interest holder of land shall be assessed and taxed on his interest in such land...

D. Westbank Indian Band Assessment By-law (1990)

> 36. (1) Land held or occupied by a municipality or the Crown in Right of the Province of British Columbia, held or occupied by, or on behalf of, a municipality or the Crown in Right of the Province of British Columbia, is, with the improvements on it, liable to assessment under this section, subject to the Constitution Act, S.C.

IV - Judgments Below

A. Supreme Court of British Columbia (1996), 138 D.L.R. (4th) 362

8 Downs J. held that s. 125 of the Constitution Act, 1867, exempted B.C. Hydro from taxation imposed by the appellant. At trial, the parties agreed that the respondent is an agent of the provincial Crown and that s. 125 applies to agents of the Crown. The appellant argued that s. 125 only confers immunity from taxation imposed under s. 91(3) of the Constitution Act, 1867, and the tax imposed in this case was founded on s. 91(24) of the Constitution Act, 1867. This argument was also rejected by Downs J., who held that the legislation in pith and substance fell under s. 91(3) of the Constitution Act, 1867. Downs J. distinguished this type of tax from regulatory charges, which would not attract the scrutiny of s. 125.

9 Downs J. further rejected the appellant's alternative argument that the Westbank by-laws bound the Crown because of s. 17 of the Interpretation Act. After reviewing s. 17 of the Interpretation Act,

Downs J. held that s. 83(1)(a) of the Indian Act did not expressly bind the Crown, nor would the Band's taxation regime be "wholly frustrated" if the Crown were not bound. Therefore, she held that s. 83(1)(a) and the Westbank by-laws were not binding on the provincial Crown by implication.

10 Related to this issue was the argument that the respondent was bound to accept the burden of the assessment by-law because it accepted the benefit of the permits for the rights of way. Here, Downs J. held that there was no nexus between the permits and the taxes, given that the respondent held the permits long before s. 83 of the Indian Act was enacted. Further, the by-law itself expressly stated that it was subject to the Constitution Act, and as such, the "benefit/burden" principle did not apply.

11 Downs J. also rejected numerous other arguments advanced by the appellant, which either have not been appealed or have been conceded by the appellant before this Court. As such, Downs J. granted the respondent's application for summary judgment.

B. British Columbia Court of Appeal (1997), 154 D.L.R. (4th) 93

12 Writing for the Court, Goldie J.A. found that B.C. Hydro was clearly an agent of the Crown, and held that it "at no time acted in these proceedings other than as an agent of the Crown in right of the Province" (p. 101). As B.C. Hydro was an agent of the provincial Crown, Goldie J.A. then considered the application of s. 125 of the Constitution Act, 1867. Having regard to the by-laws' preambles and effects, Goldie J.A. agreed with the trial judge that the by-laws were properly characterized as by-laws to "raise revenue for local purposes". As such, the charges were imposed pursuant to s. 91(3) of the Constitution Act, 1867, not s. 91(24). Section 91(24) could not allow the federal government "to do indirectly what it could not do directly, namely, tax the Province through its agent for the purpose of raising a revenue" (p. 103). He accordingly dismissed the appeal.

V - Issues

13 On December 1, 1998, the Chief Justice stated the following constitutional questions:

1. Is the Province constitutionally competent to constitute the Respondent, British Columbia Hydro and Power Authority ("B.C. Hydro"), an agent of the Province for the purpose of acquiring and holding interests within exclusive federal jurisdiction, namely an interest in land on an Indian Reserve?
2. If the answer to question 1 is yes, is the interest of B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia, in land and improvements located on the reserves ("Reserves") of the Appellant, Westbank First Nation ("Westbank") immune, as a result of the application of s. 125 of the Constitution Act, 1867, from taxation imposed by Westbank pursuant to assessment and taxation by-laws ("By-law") promulgated pursuant to the authority of s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5? If so, are such By-laws purporting to impose such taxation ultra vires, or inapplicable to B.C. Hydro?

3. If the answer to question 2 is no, does the Indian Act, R.S.C., 1985, c. I-5, authorize the passing of by-laws imposing taxation on the interests of the Provincial Crown or its agents on Indian reserves? If not, are the By-laws ultra vires or inapplicable to the extent that they purport to impose taxation on the interests of B.C. Hydro on the Westbank Reserves?

14 At the outset of the hearing before this Court, counsel for the appellant stated that he was "abandoning" his arguments concerning the first constitutional question, and arguments relating to a "commercial activity" exception to s. 125. Although this Court is not bound by these concessions, in my view, it was quite proper for counsel to have abandoned these arguments, which were either not raised in the courts below, or are not necessary to be decided on this appeal. I therefore find it unnecessary to consider these arguments any further.

VI - Analysis

15 The only issue to be determined in this appeal is whether s. 125 of the Constitution Act, 1867, precludes the Westbank First Nation from imposing its taxation and assessment by-laws on B.C. Hydro, an agent of the provincial Crown. To answer this question, it is useful to first understand the underlying purpose of s. 125. It is these constitutional values that inform the constitutional distinction between "taxes" and "regulatory charges", and which explain why s. 125 applies to the former but not the latter. As I explain in this section, the impugned charges are best characterized as taxation by-laws, which are constitutionally inapplicable to the respondent.

A. Section 125 of the Constitution Act, 1867

16 Section 125 of the Constitution Act, 1867 was not originally considered at the Charlottetown Conference in September 1864. It was first tabled by the then Attorney General, Sir John A. Macdonald on October 26, 1864, at the Quebec Conference (G. P. Browne, Documents on the Confederation of British North America (1969), at p. 88). The motion read: "That no lands or property belonging to the General or Local Governments shall be liable to taxation". Macdonald proposed the section along with a series of other miscellaneous clauses that dealt with the Crown prerogatives, and rights of Crown representatives. The motion was approved without any notable debate, and inserted into the "Miscellaneous" section of the Quebec resolutions, labelled as clause 47. The resolution attracted no scrutiny during the Confederation debates, although it was relocated several times before receiving its final designation of s. 125. The final text of s. 125 read: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

17 The section is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It grants to each level of government sufficient operational space to govern without interference. It is founded upon the concept that imposing a tax on a level of government may significantly harm the ability of that government to exercise its constitutionally mandated governmental functions. In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), at p. 431, Marshall C.J. explained this concept as follows:

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

In Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004, the majority of this Court referred to these statements at p. 1056, explaining at p. 1065 that "s. 125 is plainly intended to prevent inroads, by way of taxation, upon the property of one level of government, by another level of government".

18 While Canadian federalism requires some separation between each level of government, this rule is not absolute. Canada's federal system is a flexible one, and the Constitution does not create "enclaves" around federal or provincial actors. As Dickson C.J. explained in OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 18, "[t]he history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers" (see also Dickson C.J.'s comments in General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, at p. 669). Flexible federalism demands protection from taxation, but not from all forms of charges, when the charges are levied in support of other regulatory objectives within the competence of the taxing authority.

19 While the primary constitutional value served by s. 125 is federalism, it also secondarily advances the constitutional value of democracy. As this Court recently explained in Eurig Estate (Re), [1998] 2 S.C.R. 565, at para. 30, the Canadian Constitution (through the operation of s. 53 of the Constitution Act, 1867) demands that there should be no taxation without representation. In other words, individuals being taxed in a democracy have the right to have their elected representatives debate whether their money should be appropriated, and determine how it should be spent. Intergovernmental taxation is prohibited, in part, because one group of elected representatives should not be allowed to decide how taxes levied under and within the authority of another group of elected representatives should be spent. At the same time, governments are not immune from paying user fees, such as water rates, in part because the government can choose whether to use the service, and the money charged is spent solely on providing that service: Attorney General of Canada v. City of Toronto (1892), 23 S.C.R. 514; Attorney-General of Canada v. Registrar of Titles, [1934] 4 D.L.R. 764 (B.C.C.A.), at pp. 771-72. In this way, imposing a user fee is more like charging a fee for a merchantable commodity than imposing any form of taxation.

20 These principles, and the guiding structure of the Constitution, are as applicable to Indian Band Councils exercising the right of taxation authorized by s. 83 of the Indian Act as they are to the federal and provincial levels of government. The exercise of governmental powers in Canada, by any level of government, must be done in accordance with the constitutional framework of the country. This constitutional framework includes the prohibition contained in s. 125 against taxing another level of government.

B. Regulatory Charges Distinguished from Taxes

21 The natural starting point for characterizing a governmental levy is this Court's decision in Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357, at pp. 362-63. In that case, Duff J., as he then was, explained that the impugned charges in that case were taxes because they were: (1) enforceable by law, (2) imposed under the authority of the legislature, (3) imposed by a public body, and (4) intended for a public purpose. Duff J. also noted that the charges there were compulsory, and affected a large number of people.

22 These indicia of "taxation" were recently adopted by this Court in Eurig Estate, supra, at para. 15. Major J., writing for the majority of this Court, added another possible factor to consider when characterizing a governmental levy, stating at para. 21 that "[a]nother factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided". This was a useful development, as it helps to distinguish between taxes and user fees, a subset of "regulatory charges".

23 A distinction is made between simple "taxation" and "regulation", or what has elsewhere been described as "regulatory charges": P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.), vol. 1, at p. 30-28; J. E. Magnet, Constitutional Law of Canada (7th ed. 1998), vol. 1, at p. 481; G. V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution (2nd ed. 1981). The distinction between taxes, on the one hand, and regulatory charges, on the other, was highlighted by the majority of this Court in Re Exported Natural Gas Tax, supra, at pp. 1055, 1070, 1072 and 1075. In that case, the majority explained at p. 1070 that a tax is to be distinguished from a "levy [imposed] primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme".

24 It goes without saying that in order for charges to be imposed for regulatory purposes, or to otherwise be "necessarily incidental to a broader regulatory scheme", one must first identify a "regulatory scheme". Certain indicia have been present when this Court has found a "regulatory scheme". The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

25 The first factor to consider is the nature of the purported regulation itself. Regulatory schemes are usually characterized by their complexity and detail. In Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371, at p. 409, the regulatory scheme there was described as a "complete and detailed code for the regulation of the gravel and soil extraction and removal trade". In Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929, at para. 28,

the charge was described as part of a "complex regulatory framework governing land development". And, in General Motors of Canada Ltd. v. City National Leasing, supra, at p. 676, the Combines Investigation Act was described as "a complex scheme of economic regulation".

26 A regulatory scheme will have a defined regulatory purpose. A purpose statement contained in the legislation may provide assistance to the court in this regard. Professor Magnet, supra, at p. 459, correctly explains that a regulatory scheme usually "delineates certain required or prohibited conduct". For example, in Re Exported Natural Gas Tax, supra, at p. 1075, the levy there was held to not be a regulatory charge because "the tax belies any purpose of modifying or directing the allocation of gas to particular markets. Nor does the tax purport to regulate who distributes gas, how the distribution may occur, or where the transactions may occur". In sum, a regulatory scheme must "regulate" in some specific way and for some specific purpose.

27 Regulatory schemes usually involve expenditures of funds on costs which are either known, or properly estimated. In the indirect tax cases, evidence was provided demonstrating how the revenues would be used and how the regulatory costs of the scheme were estimated. In Ontario Home Builders', supra, at para. 55, the charge levied was "meticulous in its detail" and "clearly operate[d] so as to limit recoupment to the actual costs". In Allard, supra, evidence was led by city officials demonstrating the actual costs of annual road repair, based on estimates from similar repairs in the municipality. In both cases, there was a fairly close "nexus" between the estimated costs and the revenues raised through the regulatory scheme.

28 Finally, the individual subject to the regulatory charge will usually either benefit from the regulation, or cause the need for the regulation: Magnet, supra, at p. 459. In Allard, supra, the gravel trucks caused the need for the repair to the roads; in Ontario Home Builders', supra, the developers and the new home-owners caused the need for the new schools. In both cases the individuals being charged also benefited from the regulation.

29 A regulatory charge may exist to defray the expenses of the regulatory scheme, as was the case in Allard or Ontario Home Builders', or the regulatory charges themselves may be the means of advancing a regulatory purpose. In Attorney-General of British Columbia v. Attorney-General of Canada (1922), 64 S.C.R. 377 ("Johnnie Walker" case) (aff'd [1924] A.C. 222), this Court explained that customs duties were the method of advancing the regulatory purpose of encouraging the importation of certain products, and discouraging the importation of others. Anglin J., at p. 387, explained that customs duties "are, it seems to me, something more" than simple taxation. As with customs duties, other types of charges may proscribe, prohibit, or lend preferences to certain conduct with the view of changing individual behaviour. A per-tonne charge on landfill waste may be levied to discourage the production of waste: Re Ottawa-Carleton (Regional Municipality) By-law 234-1992, [1996] O.M.B.D. No. 553 (QL). A deposit-refund charge on bottles may encourage recycling of glass or plastic bottles: Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General) (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) (aff'd (1997), 151 D.L.R. (4th) 575 (N.S.C.A.), leave to appeal refused, [1997] 3 S.C.R. vii).

30 In all cases, a court should identify the primary aspect of the impugned levy. This was the underlying current of the earlier cases on s. 125, which focussed on the "pith and substance" of the charge: "Johnnie Walker" case, supra; Re Exported Natural Gas Tax, supra. Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.

C. Section 125 Treatment of Taxes, User Fees, and Regulatory Charges

31 Section 125 applies only to taxes properly enacted under s. 91(3) or 92(2) of the Constitution Act, 1867. As this Court explained in Re Exported Natural Gas Tax, at p. 1068, s. 125 does not purport to affect activities of government other than taxation. Consequently, the section will not usually apply to user fees, for they cannot be considered to be "taxation" in the constitutional meaning of the word, as developed above: City of Toronto, supra; Minister of Justice v. City of Levis, [1919] A.C. 505; Registrar of Titles, supra. In particular, it is difficult to say that payment of charges for such merchantable commodities are "compulsory" or are used for a "public purpose": Registrar of Titles, supra, at pp. 771-72; Urban Outdoor Trans Ad v. Scarborough (City) (1999), 43 O.R. (3d) 673 (Sup. Ct.), at p. 683. However, some services may be so essential that although in theory it is not compulsory to pay for the services, in reality it is: City of Levis, supra, at p. 513; Eurig Estate, supra, at para. 17.

32 Nor does s. 125 apply to other types of regulatory charges, as I have described them above. Where a charge itself is the mechanism for advancing a regulatory purpose, such as a charge that encourages or discourages certain types of behaviour, or where a charge is "ancillary or adhesive to a regulatory scheme" which may be used to defray the costs of that scheme, then they will usually be applicable to the other order of government. As the majority of the Court explained in Re Exported Natural Gas Tax, supra, at p. 1070:

> If the primary purpose is the raising of revenue for general federal purposes then the legislation falls under s. 91(3) and the limitation in s. 125 is engaged. If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, such as the "adjustment levies" considered in Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, s. A-7 et al., [1978] 2 S.C.R. 1198 or the unemployment insurance premiums in Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355, then the levy is not in pith and substance "taxation" and s. 125 does not apply.

33 By protecting each level of government from taxation, but not from other types of regulatory charges, the Constitution accords a degree of operational space to the governments in a manner

which best advances the goals of Canada's flexible federalism. It is with these concepts in mind that I now turn to the governmental levy at issue in this case.

D. Characterization of the Westbank First Nation Taxation By-laws

34 There is no question that these levies apply to the "Lands or Property" of the Crown agent. However, the parties disagree as to whether the Court of Appeal was correct in describing these by-laws as "taxation", founded upon s. 91(3) of the Constitution Act, 1867. In my view, the Court of Appeal and the trial court below were both correct in describing these by-laws as imposing "taxation" within the meaning of s. 125.

35 The charges imposed by Westbank bear all of the hallmarks of "taxation". The charges here are enforceable by law. Failure to comply with the by-law can result in all services provided by the Band being cancelled (1990 Taxation By-law, s. 8(1); Westbank Indian Band Property Taxation Bylaw (1994) ("1994 Property Taxation By-law"), s. 8(1)). The taxes form a lien on the property (1990 Taxation By-law, s. 41(1); 1994 Property Taxation By-law, s. 28). The Band can recover the taxes by distress (1990 Taxation By-law, s. 46(1); 1994 Property Taxation By-law, s. 30), forfeiture (1990 Taxation By-law, s. 49; 1994 Property Taxation By-law, s. 35), or by court action (1990 Taxation By-law, s. 45; 1994 Property Taxation By-law, s. 36). The taxes are as compulsory as any municipal tax on land or interests in land.

36 The impugned charges are imposed under the authority of the legislature and levied by a public body. The by-laws are imposed pursuant to the power conferred by s. 83 of the Indian Act. The taxes are levied by the Band Council, under its conferred authority, and are approved by the Minister of Indian Affairs and Northern Development.

37 The charges are levied for a public purpose. In this case, the public purpose is for general Band governance. Section 2(1) of the 1990 Taxation By-law and the 1994 Property Taxation By-law state that the levies are "for raising a revenue for local purposes". As Lamer C.J. explained in Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, at para. 43, the purposes of these taxes are "to promote the interests of Aboriginal peoples and to further the aims of self-government". Thus, as the Chief Justice pointed out (at para. 43), the taxes here are "more ambitious" than simple taxation. However, the existence of this secondary purpose does not remove these taxes from the head of power under which s. 83 is founded __ s. 91(3). Indeed, while the intention of Parliament in enacting s. 83 may have been to advance self-government, that does not mean that this is the specific purpose of the taxes themselves. Here, the specific purpose of these taxes is to simply raise revenue, to be brought into the discretionary spending accounts of the Band. No evidence has been brought demonstrating that these charges have a secondary purpose of discouraging or encouraging any behaviour of the respondent, nor have any other regulatory purposes been demonstrated.

38 The appellant has also not demonstrated that these charges form a nexus with any regulatory costs such as to bring it into the type of charge contemplated by Allard, supra, and Ontario Home

Builders', supra. The charge forms no part of a regulatory scheme. Although the Indian Act is legislation in relation to Indian land, this is insufficient to meet the requirements for a "regulatory scheme" in the constitutional sense. There is insufficient evidence demonstrating that the charge is attached to any "complete and detailed code"; nor can it be said that this forms part of a "complex regulatory framework". There are no costs of a regulatory scheme identified. Westbank does not seek to alter B.C. Hydro's behaviour in any way. B.C. Hydro has not caused the need for any regulation, to which the charges adhere. Nor does it benefit from any regulation provided. In summary, these charges do not "regulate" in any sense of the word, and they are not attached to any scheme which does.

39 I am also not convinced that there is any significance that can be attached to the fact that the charges are levied "for local purposes", as opposed to charges which raise revenue for the federal Consolidated Revenue Fund. In Eurig Estate, supra, para. 20, the charge was directed to the "court administration in general", as opposed to the general expenses of the province, and yet this was still held to be a tax. As in Eurig Estate, supra, at paras. 18-23, here there is only a loose, if any, relationship between the charge and any costs. I agree with the Attorney General of British Columbia's submissions that the Constitution demands more precision in order to oust the operation of s. 125.

40 None of the foregoing suggests that Westbank is constitutionally incapable of levying properly authorized regulatory charges or user fees on B.C. Hydro. In this regard, I note that the authorizing by-laws and the agreements entered into between B.C. Hydro and Westbank allow for the payment of regulatory charges in a manner which complies with the Constitution. Section 36(1) of the 1990 Assessment By-law states that land held on behalf of the Crown shall be "liable to assessment under this section, subject to the Constitution Act, S.C." (emphasis added). Section 125 was thus contemplated. In addition, clause 2 of the July 22, 1960 agreement between B.C. Hydro and the Crown, for example, states that B.C. Hydro "shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the said lands". Although this clause refers to "taxes", these must be interpreted to refer to those taxes authorized under the Constitution, as explicitly provided by the by-law, such as provincial taxes, which the province can levy on one of its agents: La Forest, supra, at pp. 182-83; P. Lordon, Crown Law (1991), at pp. 487-88. The remainder of this clause provides for the payment of all charges and levies constitutionally applicable to B.C. Hydro. The impugned tax simply is not one of those types of charges. For these reasons, the appeal must fail.

41 As it is my opinion that s. 125 renders these taxation by-laws inapplicable to the respondent, it is unnecessary to answer the third question framed by the Chief Justice.

VII - Summary

42 Section 125 of the Constitution Act, 1867, advances the goals of federalism and democracy by

according a degree of operational space to each level of government, free from interference by the other. It prohibits one level of government from taxing the property of the other. However, it does not prohibit the levying of user fees or other regulatory charges properly enacted within the government's sphere of jurisdiction.

43 In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125, several key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

44 As is evident from the fifth inquiry described above, the Court must identify the presence of a regulatory scheme in order to find a "regulatory charge". To find a regulatory scheme, a court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. This list is not exhaustive. In order for a charge to be "connected" or "adhesive" to this regulatory scheme, the court must establish a relationship between the charge and the scheme itself. This will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.

45 In the case at bar, the levies are properly described as being, in pith and substance, taxation enacted under s. 91(3) of the Constitution Act, 1867. They are enforceable by law, imposed under the authority of the legislature, and are levied by a public body for a public purpose. The appellant has not demonstrated that the levies are connected to a "regulatory scheme" which could preclude the application of s. 125. The charge does not form any part of a detailed code of regulation. No costs of the regulatory scheme have been identified, to which the revenues from these charges are tied. The appellant does not seek to influence the respondent's behaviour in any way with these charges. There is no relationship between B.C. Hydro and any regulation to which these charges adhere. Although the Indian Act is legislation in relation to "Indians, and Lands reserved for the Indians", this does not, in itself, create a "regulatory scheme" in the sense required by the Constitution.

46 As these taxes are imposed on B.C. Hydro, which it is conceded is an agent of the provincial Crown, s. 125 is engaged. As such, the taxation and assessment by-laws are inapplicable to the respondent. As this appeal can be dismissed on the second constitutional question, I find it unnecessary to consider the third constitutional question. The respondent does not seek costs in this appeal. Accordingly, it is my opinion that the appeal must be dismissed, without costs. I would therefore answer the constitutional questions as follows:

1. Is the Province constitutionally competent to constitute the Respondent, British Columbia Hydro and Power Authority ("B.C. Hydro"), an agent of the Province for the purpose of acquiring and holding interests within exclusive federal jurisdiction, namely an interest in land on an Indian Reserve?

Answer: Conceded by the appellant.

2. If the answer to question 1 is yes, is the interest of B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia, in land and improvements located on the reserves ("Reserves") of the Appellant, Westbank First Nation ("Westbank") immune, as a result of the application of s. 125 of the Constitution Act, 1867, from taxation imposed by Westbank pursuant to assessment and taxation by-laws ("By-law") promulgated pursuant to the authority of s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5? If so, are such By-laws purporting to impose such taxation ultra vires, or inapplicable to B.C. Hydro?

Answer: Yes. The By-laws are constitutionally inapplicable to B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia.

3. If the answer to question 2 is no, does the Indian Act, R.S.C., 1985, c. I-5, authorize the passing of by-laws imposing taxation on the interests of the Provincial Crown or its agents on Indian reserves? If not, are the By-laws ultra vires or inapplicable to the extent that they purport to impose taxation on the interests of B.C. Hydro on the Westbank Reserves?

Answer: Given the answer to question 2, it is unnecessary to answer this question.

cp/d/qlhbb

TAB 5

Case Name:

Ratana-Rueangsri v. Shorrock

Between
Ketsara Ratana-Rueangsri and Kittima Ratana-Rueangsri, by her litigation Guardian Ketsara Ratana-Rueangsri, and Kanistha Ratana-Rueangsri, by her litigation Guardian Ketsara Ratana-Rueangsri, Plaintiffs, and Sean Shorrock, Defendant

[2009] O.J. No. 900

Thunder Bay Court File No. CV-04-0711

Ontario Superior Court of Justice

G.P. Smith J.

Heard: January 22, 2009.
Judgment: February 19, 2009.

(36 paras.)

Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Subsequent examination -- Motion by Shorrock for an order requiring Ratana-Rueangsri to attend an examination to answer questions regarding the evidence of certain lay witnesses dismissed -- Ratana-Rueangsri provided Shorrock with a witness list as well as will-say statements after discoveries were completed -- The will-say statements contained complete summaries of the key evidence of the lay witnesses -- Therefore, further examination of Ratana-Rueangsri would serve no meaningful purpose.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 31.03(1), Rule 31.06(2), Rule 31.08, Rule 31.09, Rule 31.09(1), Rule 31.09(2)(b), Rule 39.01(1), Rule 39.01(2), Rule 39.01(3)

Counsel:

Chris Hacio, for the Plaintiffs.

Alex Demeo, for the Defendant.

Decision on Motion

1 **G.P. SMITH J.**:-- The Defendant, Sean Shorrock (the "**Defendant**"), brings this motion for an order requiring the Plaintiff, Ketsara Ratana-Rueangsri, (the "**Plaintiff**"), to attend at an examination for discovery to answer questions regarding the evidence of certain lay witnesses pertaining the injuries sustained by the Plaintiff as a result of a motor vehicle accident that occurred on the 21st day of September, 2002.

2 The Plaintiff takes the position that the Defendant is prohibited from examining the Plaintiff for the following reasons:

* The matter has been set down for trial on consent.
* The Plaintiff did not refuse to answer any questions related to this motion at two earlier examination for discovery.
* The Plaintiff's answers at the first two examinations for discovery remain correct and complete.
* The Plaintiff has no personal knowledge as to what the lay witnesses will say at trial.
* The Defendant has a detailed witness statement from the witnesses in question.
* A will-say statement of a lay witness's personal observations is not the proper subject matter to allow further re-examination of the Plaintiff .
* The matter is *res judicata.*

3 The Defendant, relying principally upon Rule 39.01of the *Rules of Civil Procedure,* maintains that he is entitled to conduct a re-examination to ask questions arising from post discovery information which completes or corrects answers and undertakings given on discovery.

Factual Background

4 Examinations of the Plaintiff have been conducted on March 7 and October 20, 2006. The Plaintiff's daughters were also examined on October 30, 2006.

5 On August 21, 2008 the Plaintiff advised that lay witnesses would be called to respond to surveillance evidence that the Defendant would be presenting at trial. The purpose of calling these witnesses was to provide evidence about the Plaintiff's pre and post accident level of functioning including: her inability to spend quality time with her children; her inability to perform pre-accident household and yard work; her wish to go back into nursing before the accident happened and, her

pre-accident level of activity.

6 On August 27, 2008, counsel for the Defendant requested the list of lay witnesses.

7 On September 3, 2008 counsel spoke to the jury list and advised that they were ready to commence the trial which was scheduled to begin on September 8.

8 Shortly thereafter, counsel for the Plaintiff delivered a letter disclosing the names of lay witnesses to be called on behalf of the Plaintiff.

9 After the jury was selected, counsel for the Plaintiff brought a motion for directions as to how to introduce the evidence of the lay witnesses. The Defendant brought a motion requesting an adjournment indicating, *inter alia*, that he required time to respond to the evidence of the lay witnesses.

10 The Defendant objected to the introduction of the evidence of the lay witnesses relying upon Rule 31.09, stating that the evidence related to an undertaking given by former counsel on October 30, 2006, at a discovery of the Plaintiff, to provide information and evidence supporting claims of loss of capacity.

11 The first motion heard on the afternoon of September 8 resulted in an order adjourning the trial to the next jury sittings. Justice Shaw provided oral reasons granting the Defendant's request for an adjournment stating:

> "On September 3, 2008, the parties spoke to the jury list. After speaking to the list, Mr. Hacio delivered to Mr. Demeo that day a list of lay witnesses he intended to call. Mr. Demeo had not provided a list of defendant witnesses advising that he was waiting to see what the witnesses of the plaintiff would be to which he might have to respond. Mr. Hacio provided telephone numbers and addresses of the witnesses on Wednesday, September the 3rd. The trial was scheduled to commence Monday, September 8, 2008.
>
> Mr. Demeo submits that if leave is granted to allow the six lay witnesses to testify, he will need an adjournment. Mr. Hacio submits that if leave is not granted, he will need an adjournment.
>
> Although the excerpts from the transcript were not listed as undertakings either in the letter regarding undertakings from Mr. Demeo on November 1, 2006, or by the court reporter, in my opinion, a fair reading of the transcript is that Ms. Erickson was undertaking to provide Mr. Demeo with any information and evidence relied upon to substantiate loss of housekeeping capacity or any other

losses of capacity claims that had not been produced as of the date of discovery. That obligation was a continuing one. I agree with Mr. Hacio that if the appropriate question was not asked on discovery, there is no general obligation to disclose subsequently discovered information, but in this case the question was asked.

The obligation to provide after-acquired information arises out of those questions and answers. The timing of the production of the information in evidence is clear. The obligation is to provide the new information forthwith, that is immediately without delay, but even if the party does not provide the information without delay, he or she must do so in sufficient time to allow the opponent to respond appropriately, for example, to interview a new witness, or to prepare rebutting evidence.

In my opinion, the disclosure on Wednesday prior to a Monday jury trial with respect to six witnesses is not sufficient time to permit an adequate response.

It is obvious to me that the evidence sought to be adduced is important. Mr. Hacio regards it of sufficient importance that if leave is not granted; he requires an adjournment. It is therefore reasonable for Mr. Demeo to assume that he has significant new evidence in which he must be able to answer to."

12 On September 9, Justice Shaw released written reasons commenting:

"[3] The first motion heard on the afternoon of September 8 resulted in an order adjourning the trial to the next jury sittings. The jury was dismissed on September 9. The motion was brought for directions as to the introduction by the plaintiffs of the evidence of six lay witnesses. The proposed evidence is related to issues of loss of enjoyment of life, loss of housekeeping capacity, loss of earning capacity and Family Law Act damages. The defendant first received details of the six lay witnesses on September 3 or 4. The defendant objected to the introduction of this evidence at trial. The defendant relied on Rule 31.09, describing the evidence as information subsequently obtained, related to an undertaking given by the plaintiffs' former counsel on discovery of the plaintiff on October 30, 2006 to provide information and evidence supporting claims of loss of capacity.

[4] The defendant submitted that if the six witnesses were allowed to testify, he would require an adjournment to properly respond. The plaintiffs submitted that

> if the six witnesses were not allowed to testify, they would require an adjournment.
>
> [5] For reasons released orally, an adjournment was granted and the jury was dismissed."

13 On September 8, 2008, counsel for the Defendant asked the Plaintiff to agree to be examined regarding the evidence of the lay witnesses. Counsel for the Plaintiff refused but replied on September 11 that he would provide "will say" statements for six of the lay witnesses. These statements have been provided and Mr. Hacio submits that they contain all of the evidence known to the Plaintiff. He invited Mr. Demeo to contact the lay witnesses if further information was required.

14 During the month of October 2008 the Defendant attempted to directly contact the lay witnesses to obtain their evidence however they either refuse or failed to respond.

The Rules of Civil Procedure

15 For the purposes of this motion the following *Rules of Civil Procedure* are relevant:

> "**31.03(1)** A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (3) to (8).
>
> **31.06(2)** A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise.
>
> **31.08** Questions on an oral examination for discovery shall be answered by the person being examined but, where there is no objection, the question may be answered by his or her lawyer and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer.
>
> **31.09(1)** Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the

examination,

(a) was incorrect or incomplete when made; or
(b) is no longer correct or complete,

the party shall forthwith provide the information in writing to every other party.

(2) Where a party provides information in writing under subrule (1),

(a) the writing may be treated at a hearing as if it formed part of the original examination of the person examined; and
(b) any adverse party may require that the information be verified by affidavit of the party or be the subject of further examination for discovery.

(3) Where a party has failed to comply with subrule (1) or a requirement under clause (2)(b), and the information subsequently discovered is,

(a) favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or
(b) not favourable to the party's case, the court may make such order as is just."

The Scope of an Examination for Discovery

16 The issue at the heart of this motion concerns the scope of the examination for discovery process. For that reason, it is useful to review what a discovery is designed to achieve.

17 Discovery is intended to help the parties know the case that they have to meet[1] thereby allowing for preparation for trial and the resolution of disputes by settlement.

18 The leading case setting out the purpose of discovery is the Ontario Court of Appeal case of *Modriski v. Arnold*[2] where the following principles were set out:

1. to enable the examining party to know the case he has to meet;
2. to enable him to procure admissions which will dispense with other formal proof of his own case;
3. to procure admissions which will destroy his opponent's case.

19 In 1981, the Ontario Court of Appeal[3] added three additional principles to the list:

- to facilitate settlement, pre-trial procedure and trials;
- to eliminate or narrow issues;
- to avoid surprise at trial.

20 The scope of discovery is established through relevance as defined by the pleadings.[4]

21 Rule 31.03(1) provides that leave of the court is required to examine a party more than once.

22 Rule 31.06(2) allows for discovery of the names and addresses of witnesses.

23 There is an obligation to correct incorrect or incomplete answers subsequent to an examination for discovery. An adverse party may require that the information be verified by affidavit or be the subject of further examination. (Rule 31.09(1)(2)).

24 Where the moving party can satisfy the court that re-examination is required for the useful purpose of ensuring full and fair disclosure, the court will make an order for the re-examination under Rule 31.09(2)(b).

25 In *Senechal v. Muskoka (Municipality)*,[5] [2005] O.J. No. 1406 (Sup. Ct.), followed in *Trewin v. MacDonald*, [2007] O.J. No. 1249 (Sup. Ct.), Master MacLeod held that, in the context of Rule 31:

> "The question of examining "more than once" is in practice a question of whether the examination was actually completed. ... Generally speaking, had ... the answer to the undertaking been available, not only would the answer have been given under oath as part of the transcript but the examining party would have been entitled to ask appropriate follow up questions as part of the examination. Arguably then an answer that genuinely gives rise to follow up questions should give rise to a right to complete the oral discovery as if the question has been answered (para. 5)."

26 The right to a follow up discovery is a limited and not an absolute right. (*Senechal v. Muskoka (Municipality), supra* at para. 6). As McNeely J. noted in *Christie Corp. v. Alvarez*,[6] Rule 31.09(2)(b) does not "give the 'adverse party' [...] an absolute right" to require the party answering the undertaking to re-attend for examination stating that while "no general rules are possible and each case must be considered on its merits" with the onus being on the applicant to show that "reattendance would serve [a] useful purpose" (para. 5). In other words, the court is "not required to order reattendance and a follow up examination simply to allow the sterile exercise of a right if it serves no purpose" (*Senechal v. Muskoka (Municipality), supra* at para. 6). (See also: *Central Guaranty Trust Co. v. Beebe Estate*, [1997] O.J. No. 4882 (Gen. Div.) and *Clustercraft Jewellery Manufacturing Co. Ltd. v. Wygee Holdings, Ltd.*, [2004] O.J. No. 2877 (Sup. Ct.)).

27 In all cases, the central question is whether re-examination would serve to advance one of the core principles of discovery described above. In *Senechal v. Muskoka (Municipality), supra*, Master McLeod queried whether the purpose of re-examination was to:

> "fulfill the purposes of discovery. Examples of situations in which an order would be appropriate are situations in which the answers appear cursory or incomplete, where they give rise to apparently relevant follow up questions that have not been asked, if newly produced documents require explanation, or the discovery transcript supplemented by the answers will not be understandable or useable at trial (para. 7)."

Discussion

28 During the examinations of the Plaintiff counsel for the Defendant did not ask any questions regarding what witnesses would be called or what they would be testifying to. For that reason the provisions of Rule 31.09 do not apply. The purpose of that rule is to prevent an abuse of the discovery process where an adverse party would be prejudiced by an incorrect or incomplete answer given during a discovery.

29 Unless questioned, a Plaintiff is not obliged to voluntarily provide its list of trial witness as part of discovery. In *Williams v. David Brown Gear Industries Inc.*,[7] Holland J. held that "[n]either by express language in the rules, nor necessary implication from them can it be said that a party must disclose the names of witnesses to be called at trial" (para. 2). (See also: *Dionisopoulos v. Provias* (1990), 71 O.R. (2d) 547 (H.C.))

30 In *Tax Time Services Ltd. v. National Trust Co.*[8]Ewaschuk J. fully adopted the comments of Granger J. in *Dionisopoulos v. Provias, supra*., and commented that disclosure of the names and evidence of witnesses is different where a party is asked specific questions in which case a Plaintiff is required to disclose the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action under Rule 31.06(2), along with "a summary of the substance of the evidence of such persons". At paragraph 47 of his judgment Ewaschuk J. stated:

> "[a] party may on an examination for discovery obtain disclosure of the names and addresses" and, if requested, an oral summary of the substance of the evidence of "persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action". [...] Once the opposing party requests the above information on discovery, the party being discovered must disclose this information in the form of oral answers but that party has no additional obligation to provide a written summary or gist of the person's knowledge. The discovering party may, however, request an undertaking by the party being discovered to provide written summaries at a later date."

31 Once these summaries are provided, Ewaschuk J. held that "[c]ounsel is not entitled to extensively question the party being discovered about the identified person and then also ask for a summary of evidence at the end of the questioning. Counsel is, however, entitled to ask for the summary and then to put further questions whether they arise out of the summary or otherwise."

Disposition

32 The Plaintiff has provided the Defendant with a witness list along with will-say statements after discoveries were completed and just prior to the commencement of the trial.

33 The Plaintiff provided this information to ensure that the Defendant was not taken by surprise and to assist the Defendant to prepare for trial and meet the case against him. The will-say statements contain a complete summary of the key evidence that the lay witnesses will testify to. Examining the Plaintiff again regarding their evidence will serve no meaningful purpose.

34 I find that the Defendant is not entitled to conduct a further examination of the Plaintiff nor would a further examination fulfill a useful purpose of ensuring full and fair disclosure. I find that the core principles and purpose of the discovery process have been achieved.

35 The Defendant's motion is dismissed.

Costs

36 The Plaintiff shall have 14 days to file written submissions as to the issue of costs. The Defendant shall have 10 days to respond. Thereafter, no further material may be file except with leave of the court.

G.P. SMITH J.

cp/e/qllqs/qlmxb/qlaxw/qlced

1 Ontario, Ministry of Attorney General, *Task Force on the Discovery Process in Ontario* (Toronto: Task Force on the Discovery Process in Ontario, 2003 at p. 20.

2 *Modriski v. Arnold,* [1947] O.W.N. 483.

3 *Ontario v. W.G. Thompson,* (1981), 32 O.R. (2d) 69.

4 *Forliti v. Woolley* (2002), 21 C.P.C. (5th) 246.

5 *Senechal v. Muskoka (Municipality)*, [2005] O.J. No. 1406 (Sup. Ct.).

6 *Christie Corp. v. Alvarez*, [1994] O.J. No. 4161 (Gen. Div.).

7 *Williams v. David Brown Gear Industries Inc.*, [1986] O.J. No. 2622.

8 *Tax Time v. National Trust* (1991), 3 O.R. (3d) 44.

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

EB-2010-0184

ONTARIO ENERGY BOARD

BOOK OF AUTHORITIES OF THE MOVING PARTIES

(MOTION TO COMPEL THE PRODUCTION OF UNREDACTED DOCUMENTS AND COMPEL RE-ATTENDANCE FOR EXAMINATION)

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