Court File No. CV-16-553800

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Responding Party

and

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., WEST FACE CAPITAL INC. and MID-BOWLINE GROUP CORP.

Defendants/
Moving Party

BOOK OF AUTHORITIES OF THE MOVING PARTY, THE DEFENDANT WEST FACE CAPITAL INC.

October 21, 2016

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LIST OF AUTHORITIES

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TAB 1

Indexed as:
771225 Ontario Inc. v. Bramco Holdings Co.

Between
771225 Ontario Inc. and 648002 Ontario Limited, Applicants,
and
Bramco Holdings Co. Ltd. and Her Majesty The Queen in Right of Ontario, Respondents

[1992] O.J. No. 1772

Action No. B-12/92

Ontario Court of Justice - General Division
Windsor, Ontario

Farley J.

Heard: April 10, 1992
Judgment: April 15, 1992

(14 pp.)

Colin Campbell, Q.C., for the Applicants.
No one appearing for the Respondent Bramco.
D. Thomas H. Bell, for Her Majesty The Queen.

FARLEY J.:-- The Crown moved to have this application removed from the Commercial List. So far as I know this is the first such request made. I therefore thought it helpful to write on the point and its quasi- corollary - the transfer of a matter onto the list. I am grateful to the Crown, and Mr. Bell specifically, for the research involved and the vigour with which this motion was pursued as it allowed many aspects to be canvassed. The Crown's materials were intimidatingly exhaustive - they included, for example, excerpts in great detail of the legislation mentioned in the two practice Directions applicable to the List. The operative Practice Direction is now that found in (1992), 6 O.R. (3rd) 383 and in Quicklaw.

In general the application relates to "correcting" a 1988 transfer of real estate by 771225 Ontario Inc. ("7 company") on a nunc pro tunc basis so that title will not be taken by 648002 Ontario Limited ("6 Company"), a non-resident for Ontario land transfer tax purposes, but rather by an Ontario resident corporation. The shareholding of the 6 Company is a combination spaghetti-junction and tangled web. It was said that beneficial ownership of the 6 Company rested in Audrey No, who first came to Canada as a student in 1968, was granted immigrant status in 1973, and became a Canadian citizen in 1979. She claims to have been an Ontario resident since 1968 and to have been taxed as such for over 20 years. The Crown has assessed the Land transfer as a foreign involved transaction with the resultant tax owing of over a million dollars. The request for correction is essentially based on a claim that the transaction was completed without realizing the tax impact of using the 6 Company. The use of a Ho controlled company which did not involve foreign excursions (as the 6 Company did with intervening Liberian and Hong Kong companies and trusts) was said not to attract the higher foreign involved transaction tax rate.

On consent of all parties, including the Crown which was being joined as a party respondent, the applicants requested that this application be placed on the Commercial List. After reviewing the application record, I concluded that it was suitable for the basket clause (see now paragraph 6(j) of the 1992 Practice Direction) as being "such other commercial matter as judge presiding over the Commercial List may direct to be listed on the Commercial Lists. This decision by the presiding judge is one of discretion - but certainly not one of "indiscretion" based on what side of the bed the judge gets up on in the morning. I recall being persuaded by the factors of the intricate element of the corporate ownership tree, the knife-edge of foreign involvement affecting the land transfer tax assessability, the aspect of legal counsel's firm having in its possession corporate minute books and other records of the 6 Company and 7 Company, the contractual element of whether the relief requested could be wanted and the resultant interplay of the various "commercial" legislation and facts vis-a-vis the question of equitable juridical discretion related to the alleged mistake. As well there would be the possibility of the paper trail including a review of various and multiple commercial documents. The hearing date was canvassed and all counsel including the Crown agreed to February 19, 1992. Not quite on the eve of the hearing the Crown requested an adjournment. I reluctantly granted this, especially since the reason related to the taking of preliminary motions on items which appeared to have been contemplated by the Crown prior to the establishment of the February 19th agreed data. My reluctance related to the policy of the List that there should be adherence to agreed fixed dates. Otherwise there will be an unwarranted blockage of those parties in other litigation who wish to use the List. However I accepted the explanation after advising counsel (not Mr. Bell) of the policy and recognizing that there is a necessary transition time to ensure that all counsel who use the List are (or should be) familiar with the List's policies. I would trust that the publication of the 1992 Practice Direction in the Ontario Reports and in Quicklaw will have the benefit of alerting counsel to the practice and procedures of the List as there set out. This should minimize this type of problem for the future.

The Crown's motion to remove this application from the List was brought in conjunction with various other items. These other matters were not pursued by the Crown upon receiving some additional information and upon reflections except for a request that No reattend to answer some refused questions on her March 10, 1992 cross-examination.

CONSIDERATION OF POINTS RAISED ON REMOVAL FROM LIST

I would commence by saying that these views are my own and that they should not be regarded as forming any binding policy of the Court. However I did have the benefit of being part of the Bench and Bar group involved in assisting the formulation of the subject Practice Direction. It is true that the practice in the List is an evolving one and that the Court welcomes constructive (and, if warranted, negative) criticism concerning the operation of the List.

The setting forth of various matters under various legislation that can automatically qualify for the List should not be read as the enumeration of a roster that should be read strictly ejusdem generis.

> "6. Matters which may be listed on the Commercial List are applications, motions and actions in respect of the following:
>
> (a) Business Corporations Act (Ontario) and Canada Business Corporations Act, including:
>
> - oppression remedies applications - winding-up applications - appointment of inspectors - takeover bids - shareholder remedies - arrangements - liquidations
> - fair value determinations;
>
> (b) Securities Act, relating to take-over bids and issue bids;
> (c) receivership applications
>
> - all interlocutory motions to appoint, or give directions to, receivers and receiver/managers;
>
> (d) Companies' Creditors Arrangement Act;
> (e) Personal Property Security Act;
> (f) Bank Act, relating to realizations and priority disputes;
> (g) Winding-up Act;
> (h) Bankruptcy Act;
> (i) Pension Benefits Act;
> (j) such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List."

Otherwise the basket clause (j) would have been simply stated in terms of "other matters as a judge presiding over the Commercial List the terms are of a similar nature to those set out above". However if one is able to analogize to the situations set out in the first nine areas I would think that this would be of assistance in convincing a judge to allow a matter to be listed as a basket clause matter.

I think it desirable as well to reflect that those judges available to sit in the List are some of those who have experience, expertise and an interest by aptitude and inclination in "corporate/commercial matters", of a complex or intricate nature. To put it another way, one would trust that an objective observer on determining the nature of the case and the identity of the judge would say something to the effect that the two are well-suited. The List is not a separate Court. Membership of the Judicial team will change from time to time. A Commercial List Judge will sit in the List but as well in the General Division generally (civil, criminal, family, etc.). I think it appropriate to

note that the Court generally has evolved into some degree of specialization in other areas as well. That is not to say that most, if not all, Judges will have extended periods of time being generalists (possibly the most difficult task for a judge). Each judge is dedicated to ensuring that Ontario is well-served in all aspects of the General Division's jurisdiction.

At the present time going on the List is a voluntary matter - subject of course to judicial approval if the basket clause is involved. Coming off the List is not a free choice. In my view once there has been a determination of suitability by a judge, one would have to show that there had been such a material change in the perceived facts that a judge would on those "new" facts conclude that the matter was not suitable for the List. This was not the case here. As to those areas automatically on (if desired), since there was no judicial involvement, one would expect a much lower standard for removal - probably nothing more than a demonstration that the transfer out was not part of a stall tactic. I pause to note that item (h) Bankruptcy Act matters should of course always be heard on the List. This aspect is a natural emanation of the fact that the hearings on the Commercial List incorporate bankruptcy hearings and are in fact a graft thereon.

Mr. Bell as a good soldier went over various aspects with me and responded with candour to my enquiries. I found the exchange to be quite helpful.

The Crown compared the List with the Commercial Court in the U.K.

> "The purpose of the Commercial Court is to provide for the mercantile community a simplified procedure with briefer pleadings and more expeditious hearings and trials before experienced judges in commercial actions. For this purpose, "commercial action" includes any cause arising out of the ordinary transactions of merchants and traders and, without prejudice to the generality of the foregoing words, any cause relating to the construction of mercantile documents, the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage." Halsbury's Laws Of England, Volume 371 Practice and Procedures, para. 591.

However it should be noted that the practice in the Commercial Court is dictated by those matters which are of commercial import to the commerce of the U.K. Generally, it could be said without too much exaggeration that the matters dealt with in that Court are those that matter to those in the "city". Canadian/Ontarian/Torontonian "commercial" matters would be significantly different although there will be areas of overlap. This is obvious from the fact that corporate reorganizations are dealt with by the Companies Court in the U.K. and ship scuttling by the Commercial Court. Those interested in the U.S. Commercial Court are referred to Anthony D. Colman, The Practice and Procedure of the Commercial Court (3rd Edition, 1990) Lloyd's of London Press Ltd.

It was suggested that the interpretation of a taxing statuti was not suitable for the List. It was noted that taxing statutes are the grist of specialized tribunals. However to the extent that the Federal Courts do not have exclusive jurisdiction, the General Division would deal with tax matters in Ontario. I noted that I had just heard a lengthy business tax assessment case at the request of the parties including the Ontario Ministry.

Mr. Bell raised the aspect of the List being able to deal with matters in an expeditious fashion. He expressed concern for this in two ways: (a) that the floodgates to the List not be opened wide

with the result that "more deserving" cases are blocked out or delayed, and (b) that the Ministry may well prefer a slower (although, I presume, ever forward) pace for this litigation. As for (a) I see no immediate concern as to this. Each case is reviewed for inclusion via the basket clause on a case by case basis. While one would expect cases on all fours to be accorded the same listing treatment I would think that if the List were overwhelmed the Court would be able to communicate at Assignment Court or otherwise that the sluice was being choked down a bit in certain areas. Concerning (b) I would note that the Court is not interested in a fast pace for the mere sake of a fast pace - I make this point as to the General Division in all its aspects, not just the Commercial List. The Practice Direction now incorporates a Case Timetable by which the parties can mutually establish their own pace. In the event that the parties cannot agree then the 9:30 a.m. chambers judge in the List could fix the Case Timetable after submissions from the parties. The only concern of the court here is that there be a reasonable cause for any "delay" and that it not be simply a question of stalling or stonewalling. There is a recognition - a foundation recognition - that the parties must allow a reasonable time in all the circumstances to carry out all incourt and out-of-court matters before the case is heard on the "final merits". If the parties get off the Case Timetable schedule, they are expected to get the case back on schedule unless it has completely come off the rails. If there has been an unforeseeable derailment then a new Case Timetable will have to be established.

Mr. Bell recognized the limited resources (judge-power and physical) available to the commercial List. However this is a condition which affects the whole of the General Division. Again, I pause to note that a case in the General Division is heard by a General Division Judge whether wearing a Commercial List hat (as I was on this matter on Friday) or a General hat (as I am the next Monday). It is nothing more than a variation of robbing Peter to pay Paul. As well in that respect I do not find persuasive the submission that the case will, in Mr. Bell's view, have to be turned into a trial of an Issue(s) from an application since there are questions of credibility involved. A judge sitting in the List does not don ear plugs in this regard - a judge sitting in the List is able to deal with a trial of an Issue involving credibility aspects.

I therefore conclude that it is not appropriate to remove this matter from the commercial List. I suggested to counsel that they attempt to resolve - mutually agreeable timetable. I also note that such a motion (and the obvious great amount of research that went into same) might have been obviated if the Ministry had come in or arranged a conference call with other counsel to discuss the point.

REFUSALS

The only remaining refusals were Ho's refusal to provide: (i) her tax returns since 1968; and (ii) the identity of her family tax advisors and legal counsel in Hong Kong. Mr. Bell relied on Seaway Trustco et al. vs. Markle et al. (1988), 35 C.P.C. (2d) 64 (Master) for the proposition that questions were to be answered if relevant to the application and if fair. However Master Sandler also indicated that the question must be tested to see if it were in a bona fide way being directed to an issue on the matter or to the credibility of the witness. It did not appear to me that the groundwork for relevance was established on this motion. As well there appeared to be a lack of foundation in the examination itself - that is on the basis of the relevance of the questions refused did not leap out from the terms of the application or the material filed in its support. without that basis of relevance, in my view, the questions are a piscatorial excursion. Mr. Campbell indicated that No would not object to a co-operative discussion in these two areas as it was not his intention to deprive the Min-

istry of any truly relevant material. Mr. Bell readily acknowledged that he would not need the whole history of the tax returns. The motion is dismissed as to the refusals.

GENERAL

The Court depends on counsel cooperatively resolving as many matters as are reasonably possible while recognizing that there will be frequent incidents of problems that only can be solved by a judicial decision. Counsel of course may take advantage of the informality of a 9:30 a.m. chambers judge attendance (or a special appointment with the "seized" judge if appropriate) to resolve or narrow issues. In this regard I referred counsel to paragraph 38 of the Practice Direction. while they were correct in pointing out that the Practice Direction ended at paragraph 57, I reminded them that paragraph 58 was the unwritten rule of using common sense.

COSTS

I did not ask for submission on costs. The removal element motion was novel although perhaps not necessary to be dealt with in the way that it was. While the Crown was unsuccessful on the remaining two refusals, I note that the other questions were answered a day or so before the hearing. My preliminary view would be that there should be no costs. If counsel have a contrary view I would request a short letter submission within 10 days of the release of these reasons. Such submissions should also address the amount.

FARLEY J.

TAB 2

1997 CarswellOnt 4420
Ontario Court of Justice, General Division (In Bankruptcy)

Bank of Montreal v. Citak

1997 CarswellOnt 4420, [1997] O.J. No. 4518, 16 C.P.C. (4th) 193, 50 C.B.R. (3d) 270, 53 O.T.C. 119, 75 A.C.W.S. (3d) 254

Bank of Montreal, Plaintiff and Hirant Citak, Arpi Citak, 830921 Ontario Limited, Defendants

Marco-Polo Import Export Limited, Plaintiff and Bank of Montreal, Coopers & Lybrand Limited, Winiker Auctioneers Ltd. and Thomas A. Winiker, Senior, Defendants

Farley J.

Heard: October 17, 1997
Judgment: October 20, 1997
Docket: 95-CU-88114, 97-CU-117373

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Alan J. Davis, for the plaintiff Marco-Polo Import Export Limited.
Brian Morgan and *Mahmud Jamal*, for the defendants, Bank of Montreal and Coopers & Lybrand Limited.

Subject: Insolvency; Civil Practice and Procedure

Table of Authorities

Cases considered by *Farley J.*:

ATL Industries Inc. v. Han Eol Ind. Co. (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]) — referred to

Bank of Montreal v. Mitchell (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div. [Commercial List]) — referred to

Bank of Montreal v. Mitchell (1997), 151 D.L.R. (4th) 574 (Ont. C.A.) — referred to

Chaba v. Greschuk (1992), 5 C.P.C. (3d) 1, 127 A.R. 133, 20 W.A.C. 133 (Alta. C.A.) — referred to

Downsview Nominees Ltd. v. First City Corp. (1992), [1993] 2 W.L.R. 86, 148 N.R. 47, [1993] 3 All E.R. 626, [1993] A.C. 295 (England P.C.) — referred to

King v. Colonial Homes Ltd., [1956] S.C.R. 528, 4 D.L.R. (2d) 561 (S.C.C.) — referred to

Levy-Russell Ltd. v. Tecmotiv Inc. (1994), 13 B.L.R. (2d) 1, 54 C.P.R. (3d) 161 (Ont. Gen. Div.) — referred to

Lintaman v. Goodman (1983), 38 C.P.C. 68, 61 N.S.R. (2d) 444, 133 A.P.R. 444 (N.S. T.D.) — referred to

M. (K.) v. M. (H.), 142 N.R. 321, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 57 O.A.C. 321, 14 C.C.L.T. (2d) 1 (S.C.C.) — referred to

Mining Corp. of Canada Ltd. v. Irwin (1918), 15 O.W.N. 64 (note) (Ont. H.C. [In Chambers]) — referred to

Moase Produce Ltd. v. Royal Bank (1985), 56 Nfld. & P.E.I.R. 130, 168 A.P.R. 130 (P.E.I. S.C.) — referred to

Oliver v. Gothard (1992), 10 O.R. (3d) 309, 11 C.P.C. (3d) 342 (Ont. Gen. Div.) — referred to

Reichmann v. Toronto Life Publishing Co. (1989), 69 O.R. (2d) 242 (Ont. H.C.) — applied

Reichmann v. Toronto Life Publishing Co. (August 28, 1989), Doc. Toronto 25372/88 (Ont. H.C.) — referred to

Such v. Dominion Stores Ltd., [1961] O.R. 190, 26 D.L.R. (2d) 696 (Ont. C.A.) — referred to

Woodslee Credit Union Ltd. v. Taylor (1988), 66 O.R. (2d) 248, 33 C.P.C. (2d) 299 (Ont. H.C.) — not followed

389118 Ont. Ltd. v. Alpine Electronics (Can.) Ltd. (July 14, 1989), Doc. Toronto 7460/85 (Ont. H.C.) — referred to

447927 Ontario Inc. v. Pizza Pizza Ltd. (1987), 16 C.P.C. (2d) 277 (Ont. H.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 247 [en. 1992, c. 27, s. 89(1)] — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 108 — considered

s. 108(2) — referred to

s. 108(2)¶11 — considered

s. 108(3) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — considered

R. 47.02(2) — referred to

MOTION by defendants for order striking out jury notice pursuant to s. 108(3) of *Courts of Justice Act*.

***Farley J.*:**

Summary of Background Facts

1 Subsequent to my endorsement below, counsel agreed that the following was a summary of the background facts which would be helpful for any non-involved person to understand the context of my endorsement.

2 There are two related actions in these proceedings. This matter concerns motions brought by Bank of Montreal (the "Bank") and Coopers & Lybrand Limited ("Coopers") for orders striking the jury notice filed by the plaintiff in the latter one of the actions and transferring the two actions to the Commercial List, with the two actions to be heard together.

3 The following are the two actions in question. First, there is an action commenced in July 1995 (the "1995 Action"). In the 1995 Action, the Bank, as plaintiff, seeks to enforce written guarantees and other security given by Hirant Citak and Arpi Citak ("the Citaks") and 830921 Ontario Limited ("830921") to the Bank for the indebtedness of Marco-Polo Import-Export Limited ("Marco-Polo"). Marco-Polo is an Ontario corporation which was involved in the sale of oriental rugs, to whom the Bank provided various credit facilities. Hirant Citak is President and a director of Marco-Polo. Arpi Citak is Secretary and a director of Marco-Polo. 830921 is an Ontario corporation whose sole officer and director is Hirant Citak.

4 The Citaks and 830921, in their Statement of Defence in the 1995 Action, allege that the guarantees are invalid. They also allege that a receivership conducted by Coopers, and authorized under a General Security Agreement between Marco-Polo and the Bank, was conducted improvidently, and, to the extent that the realization was improvident, they allege that this ought to reduce amounts otherwise owing to the Bank under the guarantees. No party has delivered a jury notice in the 1995 Action.

5 Second, there is an action commenced in January 1997, brought by Marco-Polo against the Bank and Coopers for improvident realization in respect of that same receivership (the "1997 Action"). Marco-Polo has filed a jury notice in the 1997 Action.

6 Marco-Polo alleges that Coopers was "grossly negligent and/or in breach of its statutory and/or common law obligations owed to the plaintiff, in managing, selling, and/or otherwise disposing of the Marco-Polo property". The Marco-Polo property consisted principally of an inventory of oriental rugs, together with various accounts receivables and other assets of the business.

7 Marco-Polo also alleges that the Bank was "grossly negligent and/or in breach of its obligations to Marco-Polo in accordance with the terms of its security agreement, or agreements, in failing to ensure that the Marco-Polo property was sold, or otherwise disposed, in good faith, and/or in a commercially reasonable manner".

8 In their joint statement of defence, the Bank and Coopers have denied Marco-Polo's allegations.

9 The Bank has also counterclaimed against Marco-Polo for the amounts owing, after the application of the proceeds from the Marco-Polo property, under the various credit facilities which the Bank provided to Marco-Polo.

10 Counsel of record for the respective parties in the 1995 Action and in the 1997 Action are the same.

Endorsement

11 Allow me to clear up one element of mispreception or uncertainty right off the bat. There is no technical reason why a jury trial could not be held for a Commercial List matter. I would, however, note that in its seven years of operation, I do not understand that the Commercial List has ever had a jury trial. [I note in passing that while this endorsement was being typed up from the handwritten one. I was advised by Blair J. that there was a civil fraud trial scheduled for February 1998.]

12 I was given to understand by the submissions of both counsel that the only issue in question was whether the jury notice should be struck. In other words, there was concurrence that the matter be transferred to the Commercial List and that the trials be held together. The latter matter would certainly seem to me to be a sensible way of approaching

this since the law suits are intertwined. As for transference to the Commercial List, I would observe that the foundation elements of these law suits (as to the defence in the 1995 Action and as to the claim in the 1997 Action) is that there was an improvident sale by the receiver (Coopers) appointed by the lending bank (Bank). This is a subject matter appropriate for the Commercial List. The transfer is approved.

13 That leaves us with the aspect of whether the jury notice in the 1997 Action should be struck. I note that no jury notice was served by the respondents in the 1995 Action and the time has now passed for such to be done now. Mr. Morgan for the moving parties (Bank and Coopers) indicates that a jury is not permitted for such a case given the *Courts of Justice Act*, R.S.O. 1990. c. C.43, as amended, s. 108(2), and that even if it were it would be inappropriate to have a jury (see s. 108(3) of the *Courts of Justice Act* and R. 47.02(2) of the *Rules of Civil Procedure*).

Section s. 108(2).11 of the *Courts of Justice Act* provides:

> The issues of fact and the assessment of damages in an action *shall* be tried *without a jury* in respect of a claim for any of the following kinds of relief...
>
> 11. *other equitable* relief [emphasis added].

14 It seems to me that the pith and substance of the respondent's (Marco Polo's) claim in the 1997 Action is a claim for equitable damages for the breach of equitable duties. *The Law of Receivers of Companies*, by Lightman and Moss (1994; London: Sweet and Maxwell) clearly points out at page 111:

> **1. Duties: Equity and Common Law as Sources**
>
> Arising out of the particular relationship between them, *equity has recognized duties* of good faith and (on occasion) duties of care on the part of a mortgagee and a receiver appointed by a mortgagee to the mortgagor and others interested in the equity of redemption (including any guarantor of the secured indebtedness). The duty has on occasion been equated with and expressed in terms of the tort of negligence, but this is unnecessary and confusing and, indeed, wrong. [emphasis added]

15 As to the question of it being a wrong characterization to talk in terms of negligence, see *Downsview Nominees Ltd. v. First City Corp.* (1992), [1993] A.C. 295 (England P.C.) at p. 315. See also *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1 (Ont. Gen. Div.) at pp. 194-196. Spry, *The Principles of Equitable Remedies* (4th ed. 1990; Carswell: Canada) at p. 624, discusses the aspect that equitable damages and legal damages arise separately - i.e. from the breach of an equitable duty in the former case and the breach of a legal duty in the latter case. While noting that the functional significance has been muted (with the fusion of the courts of law and the courts of equity where a legal duty breach can be remedied by the award of legal damages), Spry notes that equitable damages may be awarded despite the absence of right to legal damages "where what is in question is the breach of an equitable, rather then a legal right".

16 In my view, the respondent Marco Polo is looking for equitable damages ("other equitable relief") to remedy the alleged breach of an equitable duty. The principles indicated in Lightman and Moss and in Spry are applicable here in these circumstances. Marco Polo, however, relies on *Woodslee Credit Union Ltd. v. Taylor* (1988), 66 O.R. (2d) 248 (Ont. H.C.), where Gautreau D.C.J. at p. 251 appropriately indicated:

> The defendants' real claim is damages for breach of duty. It is my view that the use of s. 121(2) to strike out a jury notice is to be decided by looking at the true nature of the claim and relief requested rather then a technical consideration of the pleading and remedy sought.

However, thereafter the decision becomes progressively confused. I would concur with Anderson J.'s views in *Reichmann v. Toronto Life Publishing Co.* (1989), 69 O.R. (2d) 242 (Ont. H.C.), leave to appeal refused (August 28, 1989), Doc. Toronto 25372/88 (Ont. H.C.), where in concluding he observed at p. 253: "In my view *Woodslee* was wrongly decided". At p. 252 of *Woodslee*, for example, the judge there seems to confuse duty with relief and ignore the fusion of the courts of

equity and common law. To my mind his quarrel with Craig J.'s views regarding fiduciary duty/equitable duty in *447927 Ontario Inc. v. Pizza Pizza Ltd.* (1987), 16 C.P.C. (2d) 277 (Ont. H.C.) would appear groundless. See also *M. (K.) v. M. (H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.) at p. 322.

17 Even if one were to view Marco Polo's 1997 Action as sounding in an accounting, it appears that this is an equitable duty question. See *Downsview, supra* at p. 315; *Snell's Equity* (29th ed. 1990; London: Sweet & Maxwell) at p. 417; and *Mining Corp. of Canada Ltd. v. Irwin* (1918), 15 O.W.N. 64 (note) (Ont. H.C. [In Chambers]).

18 Thus it would appear to me that s. 108 (2).11 of the *Court of Justice Act* precludes Marco Polo from having the 1997 Action tried before a jury.

19 In the alternative, let me canvass the question of whether in my discretion I would strike the jury notice if Marco Polo were otherwise entitled to request a jury. I certainly recognize "that the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived *expect for cogent reasons*" (emphasis added): see *Such v. Dominion Stores Ltd.*, [1961] O.R. 190 (Ont. C.A.) at p. 193, quoting Cartwright J. for the Supreme Court of Canada in *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528 (S.C.C.) at p. 533.

20 Thus, there must be cogent reasons determined in a judicial manner before a litigant is to be deprived of his otherwise entitlement to a jury trial. Mr. Davis for Marco Polo indicated that it may be premature to make any determination on this question at this stage since pleadings have only been exchanged. He advised that productions and examinations for discovery may resolve certain aspects: he indicated that the claim for an accounting may not be pursued and characterized it as only ancillary to the claim for damages. I do not see the motion as being premature: there is no particular threshold timing restriction in s. 108 of the *Courts of Justice Act* or in the *Rules of Civil Procedure*, and secondly the pleadings clearly show the pith and substance of the claims.

21 In my view, the 1997 Action raises issues of considerable complexity which make the action ill-suited for a jury. These issues include the equitable duties of a privately appointed receiver (Coopers) and a secured creditor (the Bank) to the debtor (Marco-Polo) and particularly whether Coopers was in breach of its equitable and/or statutory obligations owed to Marco-Polo in the disposition strategy and implementation and whether the inventory was disposed of in good faith and in a commercially reasonable manner. See *Levy-Russell, supra*, at pp. 192-197, where Lane J. found that these duties involved the consideration and application of complex legal principles as to the powers and duties of a private receiver under a security agreement. In addition, the contractual duties of Coopers under clause 10 of the General Security Agreement and its statutory duties under s. 247 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985. c. B-3, as amended, must be considered and reconciled (or otherwise if appropriate). The foregoing mixed questions of fact and law involving the existence and scope of the equitable, statutory and contractual duties of Coopers and the Bank to Marco-Polo and whether such had been breached, are, in my view, inappropriate for consideration by a jury: see *Oliver v. Gothard* (1992), 11 C.P.C. (3d) 342 (Ont. Gen. Div.) at pp. 347-8. Here what we have is a receivership situation involving allegations of negligence, *bona fides*, contractual rights, realization on security and conversion, which are ill-suited for a jury to consider. The jury should not be expected to perform extremely difficult (verging on the nearly impossible) tasks. See *Moase Produce Ltd. v. Royal Bank* (1985), 56 Nfld. & P.E.I.R. 130 (P.E.I. S.C.) at pp. 131-2; and *389118 Ont. Ltd. v. Alpine Electronics (Can.) Ltd.* (July 14, 1989), Doc. Toronto 7460/85 (Ont. H.C.).

22 As well, the scope and existence of the equitable duties to the guarantors will come into play in the 1995 Action; it would be difficult to maintain these two actions in tandem, one with a jury and one without (as well, there is the question of the legal validity of the guarantees given the defence of the alterations or modifications voiding the guarantees). Further, there are apparently 20 boxes of productions encompassing some 4,506 documents: see *Lintaman v. Goodman* (1983), 38 C.P.C. 68 (N.S. T.D.) at p. 70 and *Chaba v. Greschuk* (1992), 5 C.P.C. (3d) 1 (Alta. C.A.) at p. 3.

23 In conclusion, if I were otherwise required to do so, I would exercise my discretion and strike the jury notice in the 1997 Action.

24 In passing I would note that while Mr. Davis indicates that the two actions involve different parties, I do not see this as fundamentally destroying the inter-relationship of the actions. The Citaks are the owners, officers and directors of Marco-Polo as well as being guarantors of it. Please see my views in *Bank of Montreal v. Mitchell* (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div. [Commercial List]) of earlier this year, affirmed by the Ontario Court of Appeal (1997), 151 D.L.R. (4th) 574 (Ont. C.A.) and *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]).

25 Counsel were agreed that with success should go $4,500 in costs.

Result:

26

1. Transfer to the Commercial List;

2. The two actions should be heard at the same time and in a manner determined by the trial judge;

3. The jury notice is struck;

4. The respondent to pay to the moving parties $4,500 in costs forthwith.

Motion granted.

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TAB 3

2004 CarswellOnt 3952
Ont. S.C.J. [Commercial List]

Bell ExpressVu Ltd. Partnership v. Cohen

2004 CarswellOnt 3952, [2004] O.J. No. 4014, 134 A.C.W.S. (3d) 228

Bell Expressvu Limited Partnership (Plaintiff) and Jonathan Cohen, Jonathan Cohen c.o.b. as Canada Tech, et al (Defendants)

Directv, Inc. (Plaintiff) and Jonathan Cohen, Jonathan Cohen c.o.b. as Canada Tech, et al (Defendants)

Echostar Satellite LLC., et al (Plaintiffs) and Jonathan Cohen, Jonathan Cohen c.o.b. et al (Defendants)

Cumming J.

Heard: September 30, 2004
Judgment: October 1, 2004
Docket: 04-CL-5473, 04-CL-5474, 04-CL-5475

Counsel: Christopher D. Bredt, Amy Westland for Plaintiffs, Bell ExpressVu Ltd. Partnership. Directv Inc., Echostar Satellite LLC
Milton A. Davis, Maureen McGuire for Defendants, Jonathan Cohen, Jonathan Cohen c.o.b. Canada Tech

Subject: Civil Practice and Procedure

Table of Authorities

Cases considered by *Cumming J.*:

Bell ExpressVu Ltd. Partnership v. Cohen (2004), 2004 CarswellOnt 3891 (Ont. S.C.J.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.04 — referred to

R. 25.06 — referred to

R. 25.10 — referred to

R. 25.11 — referred to

R. 30.02(2) — referred to

R. 30.04(2) — referred to

R. 30.04(3) — referred to

R. 30.08(2) — referred to

R. 37 — referred to

***Cumming J.*:**

The Motions

1 The defendants bring a motion to strike out each of the three statements of claim, or alternatively provide particulars, to remove the actions from the Commercial List and to place the actions on the ordinary civil list. The defendants rely upon Rules 1.04, 25.06, 25.10, 25.11, 30.02(2), 30.04(2) and (3), 30.08(2) and 37 of the Rules of Civil Procedure.

The Claim

2 The actions relate to alleged satellite piracy by the defendants. Each of the plaintiffs provides satellite television services. *Anton Pillar* orders and interim injunctions were granted after the plaintiffs satisfied the Court of a strong *prima facie* case in each instance with lengthy and detailed affidavit evidence.

3 The defendants allegedly have refused to review the sealed boxes of seized evidence in the presence of the Independent Supervising Solicitor ("ISS") preparatory to the assertion of any claims of privilege or irrelevance.

4 The plaintiffs brought motions for access to the evidence seized. On September 21, 2004 [*Bell ExpressVu Ltd. Partnership v. Cohen*, 2004 CarswellOnt 3891 (Ont. S.C.J.)] Peppall J. ordered the defendants to assert any claims of privilege or irrelevance within seven days and granted access to the plaintiffs to the evidence thereafter over which no such claims were asserted.

5 The plaintiffs have pending motions for contempt against the defendants, which are not the subject of today's proceedings.

Disposition of the Motions at hand

6 The only evidence in support of the defendants' motions is the bald statement by a law clerk that the particulars are necessary to defend the actions. I disagree. In my view there is no basis to strike the claims nor to order particulars. I accept the submissions made in the plaintiffs' facta.

7 In my view, the statement of claims disclose reasonable causes of action each of which is tenable at law. The particulars sought by the defendants are not necessary for them to plead. The pleadings are sufficiently clear to enable the defendants to respond. The statements of claim each contain a concise statement of the material facts upon which the plaintiffs rely. A reasonable person on an objective test would easily understand what the claims are about.

8 The particulars sought constitute evidence and are within the knowledge of the defendants. The particulars sought relate to the nature of the defendants' business, the operations of such business, and relate to matters which are entirely within the knowledge of the defendants. There are no affidavits from any of the named defendants in the Defendants' Motion Records asserting the contrary. The defendants' motions amount to an attempted comprehensive discovery designed to elicit evidence in advance of examinations for discovery. The defendants also seek a quantification of damages beyond what a plaintiff is required to plead.

9 In my view, there is no basis to remove the actions from the Commercial List. The endorsement of the Commercial List Team Leader, Farley J., dated April 3, 2003 expressly provides that all "piracy"/counterfeit goods Anton Piller order requests and their related actions are approved for the Commercial List and need not be initiated in the general civil list and then transferred. Many Commercial List judges have dealt with satellite piracy cases.

10 The Practice Direction Concerning the Commercial List dated August 8, 1995 provides, *inter alia*, that "Matters Eligible for the Commercial List" include [para. 1. (k)] "such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List." The claims are also appropriate for the Commercial List given the nature and complexities of the issues involved, the probable motions that are anticipated, and the principles

relating to actions which may be appropriately transferred to the Commercial List under para. 1(1) of the Practice Direction dated February 18, 2002.

11 The defendants claim the defences they raise include constitutional issues and they also say they intend to seek a trial before a jury. These assertions do not in any way preclude the actions from remaining on the Commercial List.

12 It is not disputed that it is more probable that the three actions can proceed more expeditiously on the Commercial List than in the general Civil List.

13 For the reasons given the motions of the defendants is dismissed.

14 Submissions have been made as to costs. I have been requested to fix costs on a partial indemnity basis. Counsel have sensibly waived the requirement of providing draft bills of cost.

15 I have taken into account the commonality of issues and materials in respect of each motion and the fact that the same counsel are involved in each case.

16 Cost of the plaintiffs on each motion are fixed at $1500.00, inclusive of GST and all disbursements (i.e. the total costs are $4500.00 inclusive of GST and all disbursements). Costs are payable by the defendants on a joint and several basis forthwith, that is, within 30 days.

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TAB 4

P. 13, paras. 54-55

2011 ONSC 4837
Ontario Superior Court of Justice

Canadian National Railway v. Holmes

2011 CarswellOnt 7935, 2011 ONSC 4837, [2011] O.J. No. 3672, 205 A.C.W.S. (3d) 910

Canadian National Railway Company, Plaintiff and Scott Paul Homes, Jennifer Lynn Parisien, also known as Jennifer Lynn Flynn in her personal capacity and as the sole proprietor and operating as Efficient Construction, Janice Shirley Maureen Holmes, Murray Fussie, Scott Albert Pole, Rick Sousa, also known as Ricky Sousa, in his personal capacity and operating as Trax Unlimited, Michael Sousa, also known as Mike Sousa, in his personal capacity and operating as Trax Unlimited, Julie Sousa, 2035113 Ontario Ltd., Complete Excavating Ltd., Monterey Consulting & Construction Ltd., 2071438 Ontario Ltd., operating as Complete Trax, 2071442 Ontario Ltd., The Scott Holmes Living Trust, The Jennifer Lynn Flynn Living Trust, Greystone Ltd. and Belview Management Ltd., Defendants

D.M. Brown J.

Heard: June 14, 2011
Judgment: August 15, 2011
Docket: CV-08-7670-00CL

Counsel: M. Jilesen, for Plaintiff in the Toronto Action, Defendants, E. Hunter Harrison, Claude Mongeau, Olivier Chouc, Keith Creel, Michael Cory, Nizam-U-Din Hasham, Michael Farkouh, Dave Roy, Nick Nielsen in the Hamilton Action
M. Munro, M. Lacy, for Defendants, Scott Paul Homes, 2035113 Ontario Ltd., Complete Excavating Ltd., Monterey Consulting & Construction Ltd., The Scott Holmes Living Trust
M. Moloci, for Defendant, Jennifer Lynn Flynn
M-A. Vermette, for Defendant, Murray Fussie
D. Porter, E. Block, B. Shaw, for John Dalzell, Serge Meloche, Ben Fuscu, Bruce Power, Robert Zawerbny, Scott McCallum, Marc Pontenier, some of the Defendants in the Hamilton Action

Subject: Civil Practice and Procedure; Corporate and Commercial; Public; Torts

Table of Authorities

Cases considered by *D.M. Brown J.*:

Abrams v. Abrams (2010), 102 O.R. (3d) 645, 2010 ONSC 2703, 2010 CarswellOnt 2915, 91 C.P.C. (6th) 337 (Ont. S.C.J.) — considered

British Columbia v. Zastowny (2008), 2008 CarswellBC 214, 2008 CarswellBC 215, *(*sub nom. *Zastowny v. MacDougall)* 290 D.L.R. (4th) 219, [2008] 1 S.C.R. 27, 53 C.C.L.T. (3d) 161, *(*sub nom. *X v. R.D.M.)* 250 B.C.A.C. 3, 2008 SCC 4, [2008] 4 W.W.R. 381, 76 B.C.L.R. (4th) 1, *(*sub nom. *X. v. R.D.M.)* 370 N.R. 365, *(*sub nom. *X v. R.D.M.)* 416 W.A.C. 3 (S.C.C.) — referred to

Canadian National Railway v. Holmes (2010), 2010 CarswellOnt 4374, 2010 ONSC 2982 (Ont. Div. Ct.) — referred to

Clark v. McLauchlan (2002), 2002 CarswellOnt 1610 (Ont. S.C.J.) — referred to

Hallman v. Pure Spousal Trust (Trustee of) (2009), 2009 CarswellOnt 5795, 52 E.T.R. (3d) 29, 80 C.P.C. (6th) 139 (Ont. S.C.J.) — considered

R. v. Storrey (1990), 1990 CarswellOnt 78, 1990 CarswellOnt 989, 105 N.R. 81, [1990] 1 S.C.R. 241, 37 O.A.C. 161, 53 C.C.C. (3d) 316, 75 C.R. (3d) 1, 47 C.R.R. 210 (S.C.C.) — referred to

Russell v. York Police Services Board (2011), 2011 ONSC 4619, 2011 CarswellOnt 7316, 85 C.C.L.T. (3d) 130 (Ont. S.C.J.) — considered

Wood v. Farr Ford Ltd. (2008), 2008 CarswellOnt 6116, 67 C.P.C. (6th) 23 (Ont. S.C.J.) — considered

1014864 Ontario Ltd. v. 1721789 Ontario Inc. (2010), 2010 CarswellOnt 4183, 2010 ONSC 3306 (Ont. Master) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

s. 138 — considered

Railway Safety Act, R.S.C. 1985, c. 32 (4th Supp.)
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.04(1) — referred to

R. 6.01 — considered

R. 6.01(1)(a) — considered

R. 6.01(1)(b) — considered

R. 6.02 — considered

R. 13.1.02(2) [en. O. Reg. 14/04] — considered

R. 29.1 — considered

MOTION by employer for consolidation of actions.

***D.M. Brown J.*:**

I. To consolidate or not to consolidate?

1 "As far as possible, multiplicity of legal proceedings shall be avoided", so says section 138 of the *Courts of Justice Act*. [1] Yet, in some circumstances multiple proceedings might be required to secure the just, most expeditious and least expensive determination of disputes. [2] Whether there should be one proceeding or two turns on the particular facts of any case and the various litigation-related considerations attaching to any case.

2 Two separate actions frame the motions brought before me. In August, 2008 the Canadian National Railway Company ("CN") commenced this Toronto action - Court File No. CV-08-7670-00CL - against Scott Holmes, his wife, Jennifer Parisien (also known as Jennifer Flynn), and others, alleging deceit, conversion and conspiracy in respect of a fraudulent invoice scheme (the "Toronto Action"). In November, 2009 Scott Holmes and Jennifer Flynn were charged with several fraud-related offences in respect of the same transactions which are the subject matter of the Toronto Action. During the preliminary inquiry in November, 2010, the Crown stayed the charges. In February, 2011, Scott Holmes, Jennifer Flynn and others commenced an action in Hamilton - Court File No. 11-25681 - against CN, its officers and employees, seeking $35 million in damages for false arrest, malicious prosecution and abuse of process in respect of the failed criminal prosecution (the "Hamilton Action"). The plaintiffs have served a jury notice in the Hamilton Action.

3 Argued before me were three motions:

(i) CN moved for (i) the transfer of the Hamilton Action to the Toronto Region Commercial List, (ii) the consolidation of the Toronto and Hamilton Actions or, alternatively, an order directing their trial one after the other; (iii) a timetable for the consolidated proceeding; (iv) an order striking the jury notice in the Hamilton Action; and, (v) an order setting aside a protocol order made on December 4, 2008 in the Toronto Action. The CN Police defendants in the Hamilton Action brought a motion seeking much of the same relief;

(ii) Scott Holmes and the other plaintiffs in the Hamilton Action opposed the transfer of the Hamilton Action and moved for orders (i) establishing a timetable in the Toronto Action and (ii) removing the Toronto Action from the Commercial List and transferring it to the general Civil List in the Toronto Region.

Greyslone Ltd. and Belview Management Ltd., defendants in the Toronto Action, opposed the consolidation of the proceedings, as did Murray Fussie and Jennifer Flynn.

4 The Holmes parties had also brought a motion requiring the case management judge in the Toronto Action, C. Campbell J., to recuse himself from hearing these motions. In the result that motion did not proceed because C. Campbell J. requested that I hear the motions. At the commencement of the hearing I advised the parties that when I practiced law I had acted for CN on some tax litigation and served as a witness for CN in some U.S. regulatory proceedings. I told counsel that I would retire for a short time to enable them to consult with their clients and, on my return, one counsel was to inform me whether any (unnamed) party objected to my hearing the motions. No party raised any objection.

5 I shall first review the issues raised by the pleadings in the Toronto Action, then describe the procedural history of the Toronto Action, after which I will state the issues raised by the pleadings in the Hamilton Action. I will then examine the relief requested in light of the applicable principles of law and the specific circumstances of these two proceedings.

II. Issues raised by the Toronto Action

6 CN issued its Statement of Claim in the Toronto Action on August 6, 2008, and then amended it on December 4, 2008. No Statements of Defence for the Toronto Action were contained in the motion materials filed before me,

although one affidavit stated that in 2009 Scott Holmes served a Statement of Defence, and later an Amended Statement of Defence, and Jennifer Flynn delivered her defence in March, 2009. Evidently there are no cross-claims. Neither the Sousa/Trax Unlimited/Complete Trax nor the Greyslone/Belview defendants have delivered their pleadings; they have not been noted in default. In any event, the only pleading before me is the Amended Statement of Claim and it is from that document that I have gained an understanding of the issues in the Toronto Action.

7 The Amended Statement of Claim identifies three groups of defendants:

(i) Scott Holmes, his wife, Jennifer Lynn Flynn, their respective living trusts and the Holmes Companies which they are alleged to control - 2035113 Ontario Ltd., 2071442 Ontario Ltd., Complete Excavating Ltd., Monterey Consulting & Construction Ltd. and Efficient Construction (collectively the "Holmes Defendants");

(ii) Janice Holmes, Scott's former wife, Murray Fussie, Scott Albert Pole, Rick Sousa, Michael Sousa, Julie Sousa, Trax Unlimited and Complete Trax, persons whom CN alleges assisted Holmes to carry out his scheme and who benefited from the scheme to CN's detriment; and,

(iii) Greyslone Ltd. and Belview Management Ltd., corporations through which CN alleges that Holmes channeled funds which he obtained wrongfully from CN and whose securities interests against the Holmes Companies are invalid.

8 CN alleges that Holmes, a full-time track supervisor with the company, was responsible for dealing with the maintenance and construction of certain CN trackage, for procuring construction services and equipment for CN, and possessed limited authority to approve invoices for such services and equipment up to $10,000.00. CN alleges that Holmes breached his duties to his employer by engaging in the following wrongful conduct:

(i) He arranged for the Holmes Companies to provide services and equipment to CN without disclosing to his employer his personal interest in those companies (ASC, paras. 34 to 36);

(ii) He obtained the computer passwords of a more senior CN employee and used them to approve invoices submitted to CN by the Holmes Companies when he had no authority to make such approvals (ASC, paras. 53 to 61);

(iii) He wrongfully approved invoices submitted by the Holmes Companies for which services and equipment were never provided to CN (ASC, para. 82); and,

(iv) He utilized materials owned by CN without any colour of right to do so and without compensating CN for those materials (ASC, para. 68).

CN pleaded that when it discovered this scheme, it confronted Holmes, who denied any wrongdoing and then promptly resigned (ASC, paras. 74 to 79).

9 CN alleges that Jennifer Flynn, Janice Holmes, Fussie, Pole and the Holmes Companies all conspired with Holmes "together to perpetuate the scheme by which Holmes paid millions of dollars from CN to the Holmes Companies" (ASC, para. 64).

10 Complete Trax and Trax Unlimited provided maintenance and construction services to CN. The company alleges that the Sousas, Complete Trax and Trax Unlimited provided a car to Holmes for which they charged CN and supplied invoices to Holmes, which he approved, as a result of which they received monies to which they were not entitled (ASC, paras. 70 to 73).

11 It is alleged that Greyslone and Belview hold security interests over assets of Complete and Holmes which are invalid and that the transactions with those two defendants were "sham transactions designed to move the assets of Holmes and Holmes Defendants beyond the reach of CN" (ASC, paras. 94 to 102 and 107).

12 In its pleading CN seeks a wide range of relief including damages of up to $2 million against various defendants, except Greyslone and Belview, various forms of tracing and constructive remedies, the issuance of *Mareva*, Anton Pillar and receivership orders against Holmes, his wife, their trusts and the Holmes Companies and, to an extent, against other defendants, and the rescission of any transactions between Greyslone, Belview and the defendants and the return of any related monies.

III. Procedural history of the Toronto Action

13 The motion materials placed before me did not describe all of the steps which have occurred in the Toronto Action, but identified the following main occurrences. Immediately after serving the Statement of Claim CN sought a *Mareva* injunction and an *Anton Pillar* order. On August 8, 2008 Lederman J. granted a *Mareva* injunction against the Holmes Defendants. On consent, Newbould J. continued the *Mareva* injunction by order made August 18, 2008.

14 Then, on August 26, 2008, Spence J., on the consent of the Holmes Defendants, appointed Schonfeld Inc. as Monitor over the assets of Holmes, Flynn, the Holmes Companies and their Trusts, as well as over the business and undertaking of the Holmes Companies. By order made December 4, 2008, C. Campbell J. transformed the monitorship of Schonfeld Inc. into a receivership over the property of the Holmes Defendants. The receiver remains in place and has not been discharged, although it has no on-going role; attendances before C. Campbell J. this past February included discussions about the future role of the Receiver.

15 In 2009 Holmes moved to set aside the *Mareva* injunction and the receivership order. His motions were dismissed and he was denied leave to appeal by the Divisional Court on May 21, 2010 [*Canadian National Railway v. Holmes*, 2010 CarswellOnt 4374 (Ont. Div. Ct.)]. In 2009 Holmes changed his solicitors of record; in early 2010 so did Ms. Flynn.

16 The Receiver has brought several contempt motions against the Holmes Defendants. An August, 2009 motion alleged that the Holmes Defendants had breached court orders by selling high-end cars, retaining the proceeds, and placing a mortgage on property in Florida. Evidently that motion was resolved on the basis that Holmes and Flynn would remit the sales proceeds from the cars to the Receiver and discharge the mortgage. The vehicle proceeds were remitted to the Receiver. The mortgage was not discharged, prompting a further contempt motion by the Receiver returnable in early 2010. According to the affidavit filed by CN, Holmes ultimately complied with the court order and the contempt motion did not proceed.

17 No substantive steps apparently took place in the Toronto Action between August and November, 2010 when Mr. Holmes was subject to the preliminary inquiry in respect of the criminal charges.

18 Following the stay of the criminal proceedings, Mr. Holmes brought a motion in December, 2010 to strike CN's Amended Statement of Claim as an abuse of process. CN moved to seek disclosure of the Crown Brief in the criminal proceeding through a *Wagg* motion. Various scheduling attendances ensued in respect of those motions.

19 CN learned of the Hamilton Action in late February, 2011. On March 1, 2011 CN's counsel wrote to counsel for Mr. Holmes seeking a case conference before C. Campbell J. to schedule a motion to transfer the Hamilton Action to Toronto; CN viewed the issues in the Toronto and Hamilton actions as inextricably linked. A case conference was held on March 11, at which time C. Campbell J. set March 24 as the date for hearing the *Wagg* motion and the transfer motion.

20 Notwithstanding that scheduled motion, counsel for Mr. Holmes advised CN that his client intended to note CN in default in the Hamilton Action unless it filed a defence. C. Campbell J. ultimately dealt with that issue.

21 In late March, 2011, Mr. Holmes' counsel advised that his client was not pursuing his motion to strike out the claim. In his May 16, 2011 affidavit Mr. Holmes confirmed that he had decided not to proceed with that motion, primarily for the "pragmatic" reason that the Receiver intends to move for its discharge. The *Wagg* motion was resolved by a consent order of C. Campbell J. made March 24, 2011.

22 On March 21 Mr. Sheppard, counsel to Mr. Holmes, wrote CN's counsel to advise that his client objected to C. Campbell J. hearing the transfer motion. The only reason given was that C. Campbell J. had "been acting in the role of case-management judge for many months". Later, Mr. Holmes, in his affidavit, deposed that he had concerns about C. Campbell J. hearing the consolidation motion in light of the discussion which had taken place during a case management conference for that motion. The parties appeared on March 24 before C. Campbell J. As described in the affidavit of Ms. Lefebvre, an articled student with CN's counsel, the following transpired at the March 24 attendance before C. Campbell J.:

> 32. Mr. Munro [Holmes' counsel] made a request during the hearing for another judge to allow for "fresh eyes" for the litigation. Mr. Munro did not advise the court that the defendant was taking the position that Justice Campbell had pre-judged the consolidation motion or that there was any apprehension of bias. There was no basis to do so.
>
> 33. Justice Campbell said that he would consider what counsel had raised. His Honour directed Mr. Munro to the Commercial List Practice Direction policy of a single judge hearing all motions in case-managed proceedings.

23 In the result I heard the motions on June 14, 2011.

IV. Issues raised by the Hamilton Action

A. The claim

24 The plaintiffs in the Hamilton Action are the Holmes Defendants in the Toronto Action. The Amended Statement of Claim names three groups of defendants:

> (i) CN, certain of its officers — E. Hunter Harrison, Claude Mongeau, Keith Creel, John Dalzell, Michael Cory — some of its in-house counsel - Olivier Chouc and Nizam-U-Din Hasham — and some employees — Michael Farkouh, Nick Nielsen and Dave Roy;
>
> (ii) Members of the CN Police who were involved in the investigation into the conduct of Scott Holmes and Jennifer Flynn — Serge Meloche, Ben Fusco, Bruce Power, Robert Zawebny, Marc Pontenier and Scott McCallum; and,
>
> (iii) Janice Holmes, the ex-wife of Scott Holmes.

25 In the Hamilton Action the plaintiffs allege that Janice Holmes provided false information to CN and the CN Police which led to the criminal charges against Scott Holmes and Jennifer Flynn. Central to the plaintiffs' claim is the allegation that the CN Police conducted an investigation not only for the purpose of a criminal prosecution, "but also to assist in the prosecution of a civil action against the plaintiff Holmes for the recovery of alleged losses". The plaintiffs allege that:

> [i]n causing the investigation of criminal proceedings against the plaintiffs Holmes and Flynn and the laying of such charges amounted to an unlawful conspiracy which constituted an abuse of process. (ASC, para. 31)

26 The plaintiffs contend that the informations sworn against them lacked reasonable and probable grounds and were done for the purpose of assisting in the prosecution of the proposed civil action and therefore constituted an abuse of public office and an abuse of process. Given the eventual stay of the criminal proceedings, the Amended Statement of Claim advances a claim of malicious prosecution against the defendants.

27 The Holmes Plaintiffs plead that CN made false statements before the court in order to obtain the *Mareva* injunction and the appointment of a receiver in the Toronto Action (ASC, paras. 38 to 40). Those false statements, according to the plaintiffs, amounted to an injurious falsehood for which they seek damages.

28 The Amended Statement of Claim identifies 24 instances of conduct by the CN Police and/or CN's in-house counsel during the investigation which the plaintiffs plead amounted to abuses of process and abuses of public office.

One particular of misconduct alleged that a CN employee had failed to make full and frank disclosure on the motions for *Mareva* and *Anton Pillar* orders in the Toronto Action (ASC, para. 42(p)). The claim also asserts wrongdoing by the CN Police during the arrest and detention of Holmes and Flynn.

29 Finally, claims in defamation are made against two of the defendants, Zawerbny and Power. Although a claim for damages is asserted for the breach of *Charter* rights, the Amended Statement of Claim offers no particulars of that claim.

B. Defence of CN and its officers, employees and in-house counsel

30 The CN defendants pleaded that upon receipt of an anonymous letter alleging that Scott Holmes was committing fraud, awarding contracts to his own companies, and selling scrap metal from the CN yards, separate investigations were commenced by CN management and the CN Police. The Amended Statement of Defence made the following pleading about the results of the CN Management Investigation:

> 8. The information yielded in the investigation demonstrated that there was a scheme by which:
>
> (i) Holmes caused companies or entities related to him to provide some services to CN without disclosing his conflict of interest;
>
> (ii) Holmes caused the companies to deliver invoices which were for amounts of less than $10,000.00 each, such that they were within Homes' approval limit;
>
> (iii) Holmes, posing as another employee, inputted the invoices into the CN accounting and SAP system;
>
> (iv) Holmes then approved the invoices for payment that had been addressed to his supervisor and without the supervisor's consent caused them to be sent to Montreal to Head Office accounting for such purpose; and,
>
> (v) The companies received the payments as a result.
>
> 9. CN's internal audit team determined that under this scheme, Holmes approved payments based on invoices from companies or entities related to him, resulting in millions of dollars being paid to these companies.
>
> 10. The CN Management Investigation demonstrated that invoices were approved for which equipment and services were not provided.
>
> 11. The CN Civil Defendants acted appropriately and in accordance with the law prior to and over the course of the CN Management Investigation. Any information shared with ... the CN Police Defendants was for a lawful, proper and appropriate purpose.

31 The CN Defendants pleaded that they made full and frank disclosure on the motion for a *Mareva* injunction, and that by reason of the dismissal of Holmes' motion to set aside the *Mareva* injunction he was estopped from re-litigating that issue. CN also pleaded:

> 30. CN was the victim of a fraud perpetrated on it by Holmes through his unlawful conduct. That CN, by virtue of the provision of the *Railway Safety Act*, has an investigative and enforcement arm does not prevent it from taking the steps which it did to pursue both an investigation and the Civil Action. There is no abuse of process inherent in the CN statutory and corporate structure giving rise to any duty to the plaintiffs or cause of action known at law.
>
> . . .
>
> 38. The plaintiffs have suffered no special damages. Their conduct would have led, in any event, to investigation, charges and arrest.

39. The conduct of the plaintiffs bars any recovery of damages pursuant to the doctrine of *ex turpi causa non oritur actio* due to their illegal and wrongful conduct as pleaded above.

C. Defence of CN Police

32 In their Amended Statement of Defence the CN Police pleaded that all production orders obtained during their investigation were done so lawfully, honestly, in good faith, with reasonable and probable grounds, and:

20. The results of the investigation revealed that Mr. Holmes had participated in a scheme to procure the unauthorized approval of fraudulent invoices to companies that he owned or controlled...

33 The CN Police stated that all charges against Mr. Holmes and Ms. Flynn were laid with reasonable and probable grounds and that they conducted themselves "reasonably, lawfully, in good faith and for proper purposes". They denied making any defamatory statements.

34 The CN Police also pleaded that the "plaintiffs are barred from recovering damages pursuant to the doctrine of *ex turpi cause non oritur actio* by reason of their illegal or wrongful conduct".

D. Defence of Janice Holmes

35 Ms. Holmes denies that she conspired with any members of the CN Police to institute criminal proceedings against Holmes or Flynn. Ms. Holmes pleaded that she was not involved with any of the contracts between Complete Excavating and CN.

V. Analysis

A. Removing the Toronto action from the Commercial List (delay)

36 Let me first deal with the motion by the Holmes Defendants in the Toronto Action to remove it from the Commercial List and place it on the Civil List. They argue that CN has delayed in prosecuting the Toronto Action by not insisting that the other defendants file their defences or by failing to note them in default, and that the plaintiff has not set the action down for trial within two years.

37 I see no merit to these arguments. The record of the proceedings reveals that most of the delay in 2009 was caused by Mr. Holmes' decision to move to set aside the *Mareva* and Receivership orders, an effort which did not succeed, and by Mr. Holmes' failure to comply promptly with orders of this Court, resulting in contempt proceedings by the Receiver against him. Most of the delay in 2010 resulted from the on-going criminal preliminary hearing. Upon the stay of the criminal charges CN moved to obtain disclosure of the Crown Brief and, shortly thereafter, Mr. Holmes commenced the Hamilton Action, the effects of which have pre-occupied the parties since this past February. In sum, the record discloses no delay on the part of CN which would justify removing the Toronto Action from the Commercial List.

38 On the contrary, the litigation history of the Toronto Action points strongly to the need to keep the proceeding under the direction of the case management process which C. Campbell J. has been applying in accordance with paragraph 33 of the Commercial List Practice Direction. I therefore dismiss this part of the motion brought by the Holmes Defendants.

B. Request to transfer the Hamilton Action and to consolidate with the Toronto Action

39 CN seeks to transfer the Hamilton Action to Toronto and consolidate it with the Toronto Action; the Holmes Defendants, the Greyslone/Belview defendants and Mr. Fussie oppose that request. The issues of transfer and consolidation are inextricably linked together, so I will consider them at the same time.

B.1 The applicable Rules and their jurisprudence

40 Rule 13.1.02(2) of the *Rules of Civil Procedure* sets out the considerations which a court must take into account when determining a request to transfer a proceeding from one county to the other:

> 13.1.02(2) If subrule (1) does not apply, the court may, on any party's motion, make an order to transfer the proceeding to a county other than the one where it was commenced, if the court is satisfied,
>
> (a) that it is likely that a fair hearing cannot be held in the county where the proceeding was commenced; or
>
> (b) that a transfer is desirable in the interest of justice, having regard to,
>
> (i) where a substantial part of the events or omissions that gave rise to the claim occurred,
>
> (ii) where a substantial part of the damages were sustained,
>
> (iii) where the subject-matter of the proceeding is or was located,
>
> (iv) any local community's interest in the subject-matter of the proceeding,
>
> (v) the convenience of the parties, the witnesses and the court,
>
> (vi) whether there are counterclaims, crossclaims, or third or subsequent party claims,
>
> (vii) any advantages or disadvantages of a particular place with respect to securing the just, most expeditious and least expensive determination of the proceeding on its merits,
>
> (viii) whether judges and court facilities are available at the other county, and
>
> (ix) any other relevant matter.

41 I expressed my understanding of the jurisprudence under this rule in *Hallman v. Pure Spousal Trust (Trustee of)* where I wrote:

> The rule does not state that the initiating party must justify the choice as a reasonable one. If one of the parties opposite thinks the choice an unreasonable one for whatever reason, it may bring a motion to change the venue. On that motion the court should engage in the "holistic" exercise described in *Eveready* of considering the enumerated factors, including "any other relevant matter", in order to determine whether the moving party has demonstrated that "a transfer is desirable in the interest of justice".
>
> Certainly when one looks back at the history of earlier change of venue rules one sees courts imposing a requirement on the initiating party to select only a venue that had a rational connection with the cause of action or the parties - the history of that requirement is set out in detail in *Eveready*: paras. 12 to 15. However, as noted in *Eveready*, the requirement did not find favour with all judges: see *Eveready*, para. 16. While the connection of the venue to the parties and the subject-matter of the dispute are factors to be taken into account in the overall analysis under Rule 13.1.02(2), I agree with the analysis in *Eveready* that a court should approach the venue issue by weighing and considering each of the enumerated factors in order to determine whether a transfer of venue is desirable in the interest of justice. As echoed by M. F. Brown J. in *Patry v. Sudbury Regional Hospital* [2009] O.J. No. 1060 (S.C.J.):
>
> > The law is well established that change of venue motions are fact specific. The current rule makes it clear that none of the enumerated factors are more important than the other and all of those factors and any other factors relevant to the location of the action must be balanced to ensure that a proceeding is transferred from the county where it was commenced only if such transfer is "desirable in the interest of justice". (para. 13)
>
> Such a holistic approach best reflects the policy choices underpinning the language of the rule. [3]

42 Rule 6 of the *Rules of Civil Procedure* describes the circumstances under which a court may order the consolidation of two proceedings:

> 6.01(1) Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) they have a question of law or fact in common;
>
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
>
> (c) for any other reason an order ought to be made under this rule,
>
> the court may order that,
>
> (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
>
> (e) any of the proceedings be,
>
> (i) stayed until after the determination of any other of them, or
>
> (ii) asserted by way of counterclaim in any other of them.
>
> (2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.
>
> 6.02 Where the court has made an order that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise.

43 Perell and Morden, in *The Law of Civil Procedure in Ontario, First Edition*, explained the key considerations underlying the consolidation rule:

> Before making a consolidation order or an order for a trial together, the court will consider whether the criteria defined by the rule have been satisfied and then consider whether the balance of convenience favours such an order. It is not appropriate to consolidate actions arising from separate and distinct occurrences. In assessing whether there is a question of fact or law common to both proceedings, the focus is on whether the proposed common issue has sufficient importance in relation to the other facts or issues such that it would be desirable that the matters be consolidated, heard at the same time, or after each other.
>
> The underlying policy of the consolidation rule is to avoid a multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes, and to avoid inconsistent judicial findings. In exercising its discretion whether to order the consolidation of proceedings or that they be heard simultaneously or consecutively, the court will consider the general rule, mandated by the *Courts of Justice Act*, that, as far as possible, multiplicity of proceedings shall be avoided, and a variety of factors including: (1) the extent of the difference of commonality of the factual or issues in the proceedings; (2) the status of the progress of the several proceedings; and (3) the convenience or inconvenience, in terms of time, money, due process and administration, of bringing the proceedings together. [4]

To this I would add the comments made by Quinn J. in *Wood v. Farr Ford Ltd.*:

> The customarily expressed purpose of rule 6 is to avoid multiplicity of proceedings, thereby preventing inconsistent dispositions, protecting the scarce resources of the court and saving expense to the parties. However, it also

safeguards against a tactical decision to subject a party or parties to more than one action and, therefore, it promotes fairness. [5]

44 One can find in the case law several expressions of the variety of factors which a court should take into account when considering a request to consolidate proceedings. A very comprehensive one was offered by Master Dash in *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*:

A non-exhaustive list of some of the considerations on ordering trial together may, depending on the circumstances, include:

(a) the extent to which the issues in each action are interwoven;

(b) whether the same damages are sought in both actions, in whole or in part;

(c) whether damages overlap and whether a global assessment of damages is required;

(d) whether there is expected to be a significant overlap of evidence or of witnesses among the various actions;

(e) whether the parties the same;

(f) whether the lawyers are the same;

(g) whether there is a risk of inconsistent findings or judgment if the actions are not joined;

(h) whether the issues in one action are relatively straight forward compared to the complexity of the other actions;

(i) whether a decision in one action, if kept separate and tried first would likely put an end to the other actions or significantly narrow the issues for the other actions or significantly increase the likelihood of settlement;

(j) the litigation status of each action;

(k) whether there is a jury notice in one or more but not all of the actions;

(l) whether, if the actions are combined, certain interlocutory steps not yet taken in some of the actions, such as examinations for discovery, may be avoided by relying on transcripts from the more advanced action;

(m) the timing of the motion and the possibility of delay;

(n) whether any of the parties will save costs or alternatively have their costs increased if the actions are tried together;

(o) any advantage or prejudice the parties are likely to experience if the actions are kept separate or if they are to be tried together;

(p) whether trial together of all of the actions would result in undue procedural complexities that cannot easily be dealt with by the trial judge;

(q) whether the motion is brought on consent or over the objection of one or more parties.

[6]

B.2 Considering the factors presented by these proceedings

45 I start by considering the issue of whether the Toronto and Hamilton Actions should be consolidated because a determination of that issue will play a large role in deciding whether the Hamilton Action should be transferred to Toronto.

46 Based on my review of the pleadings in the Toronto and Hamilton Actions, it is clear that both actions have substantial facts in common and that the relief claimed in them arises, in large part, out of the same transaction or occurrence, or series of transactions or occurrences. The main issue in the Toronto Action is whether Mr. Holmes, and the other defendants, engaged in the wrongful conduct alleged by CN. That factual inquiry, and the evidence related to it, will play a large role in the Hamilton Action. Although Mr. Holmes and Ms. Flynn plead several causes of action in the Hamilton Action, a significant part of the factual inquiry in that proceeding will focus on two questions: (i) did the CN Police have reasonable cause to lay the charges against Mr. Holmes and Ms. Flynn, and (ii) did the CN Police act for an improper purpose in so doing? [7] A consideration of the question of reasonable cause, in turn, will require the review of (a) evidence concerning the officers' subjective beliefs that they had reasonable and probable grounds to charge the Hamilton plaintiffs and (b) evidence that a reasonable person, placed in the position of the officer, would have believed that reasonable and probable grounds existed to lay those charges. [8] Although the issue of the officers' subjective beliefs does not arise in the Toronto Action, certainly the evidence with respect to the existence of objective grounds for reasonable cause will track that in the Toronto Action.

47 Further, notwithstanding the limitations surrounding the defence of *ex turpi causa*, [9] the pleadings disclose that the evidence CN and the CN Police will rely upon in the Hamilton Action in support of that defence will draw largely upon the same evidence they adduce in support of their defence of the existence of reasonable cause which, in turn, will overlap significantly with the evidence the plaintiffs will adduce in the Toronto Action. Finally, in the Hamilton Action the plaintiffs have put in issue the conduct of CN in obtaining certain orders in the Toronto Action, adding to the evidentiary overlap.

48 Now, it is true that the issue of the appropriateness of the purpose of the criminal proceedings does not arise in the Toronto Action, but the issue of purpose will draw, in part, on evidence regarding the conduct of the Holmes Defendants. As well, although the Hamilton plaintiffs have also pleaded a claim in defamation, from an evidentiary perspective, that claim will play a minor role in the trial of the Hamilton Action.

49 In sum, while the issues pleaded in both actions are not identical, certainly the evidence which will be led in respect of the issues in the Toronto Action will play a very large role in the adjudication of the issues pleaded in the Hamilton Action. In other words, there will be a *very significant* overlap of evidence in the two proceedings. That factor points very strongly to some form of joinder of the two proceedings.

50 So, too, the substantial commonality of the factual matrix for the Toronto and Hamilton Actions necessitates some joinder of the actions in order to keep pre-trial discovery costs within some manageable range. Simply put, there is no need for the parties to have to tell the same story twice before trial in two different proceedings.

51 I do not regard the commencement of the two proceedings in different judicial regions as a major factor. CN commenced its action in Toronto, but Mr. Holmes did not move to change its venue. Moreover, the trip between Toronto and Hamilton is a mere daily commute for many people; it is not a road trip to some faraway land.

52 As a factor militating against joinder Ms. Flynn submitted that in the Hamilton Action she retained joint counsel with her husband, Scott Holmes, whereas in the Toronto Action she has separate counsel. I do not regard that as a reason against ordering some joinder of the two actions. The choice of retaining two different counsel was Ms. Flynn's to make, and it is open to her to instruct her different counsel to conduct themselves in a manner which will minimize the overall costs to her.

53 There is not an identity of parties in the two actions — the Sousa and Greyslone/Belview defendants are not named in the Hamilton Action and the CN Management defendants and CN Police are not named in the Toronto Action. I do not see this factor as militating against some form of joinder of the two actions. Certainly efforts should be made in the proceedings' Rule 29.1 discovery plan to schedule examinations for discovery in such a way as to ensure that only those parties who need to attend a particular examination do so, and a similar efficiency should be brought to dealing with any interlocutory motions. I have no doubt that continued case management of the proceedings and the preparation of a joint Rule 29.1 discovery plan can achieve those goals, both with respect to any pre-trial steps, as well as with developing a fair and cost-effective trial management plan.

54 One significant difference between the two actions does exist - the form of the trial. The plaintiffs served a jury notice in the Hamilton Action, whereas none has been served in the Toronto Action. The right to a jury in a civil action is a substantive right which should only be displaced in whole or in part upon it being established clearly that the issues to be tried are not appropriate for resolution by a jury. [10] CN requests that I strike out the jury notice. I am not prepared to do so at this early stage of the proceeding. Productions and discoveries have not yet occurred, nor is it clear whether expert evidence will be adduced at trial. The factual complexity of the trials has not yet come into focus, so it would be premature, in my view, to consider whether the jury notice should be struck. I fully recognize the difficulties associated with the prospect of a trial of the Toronto Action by judge alone and that of the Hamilton Action by judge and jury, including the risk of inconsistent findings of fact, but that important issue can be re-visited at a later date when more will be known about how the parties intend to present their cases at trial. Moreover, the existence of the jury notice does not prevent some of form of joinder of these two actions in order to bring cost benefits to the pre-trial preparation of the cases.

55 CN has demonstrated the existence of factors specified in Rule 6.01(1)(a) and (b) and, as well, that the balance of convenience justifies some joinder of these actions. I am not prepared to consolidate them, but I do grant the alternative relief sought by CN that the two actions be heard one immediately after the other. I transfer the Hamilton Action to the Toronto Region Commercial List. The parties have litigated for some time on the Commercial List, without protest about the venue, so I tend to regard the commencement of the Hamilton Action in that venue as more in the nature of a tactical step. In order that efficiencies from joinder are achieved in the pre-trial steps of the proceedings, I order the parties in both actions to continue with the case management of the proceedings before C. Campbell J. and I also order the parties to both actions to develop a joint Rule 29.1 discovery plan.

C. Establishing a timetable for the actions

56 Both CN and the Holmes Defendants seek orders establishing a timetable for the Toronto Action. I completely agree that a joint timetable should be imposed for the Toronto and Hamilton Actions. No party filed a proposed timetable, so I can hardly impose one in the absence of any proposals. I direct the parties to secure a 9:30 a.m. appointment before C. Campbell J. within the next three weeks in order to establish a joint timetable for both proceedings. The parties must exchange and file proposed timetables at least three days before that appointment. Of course, I would encourage the parties to discuss and agree upon a joint timetable.

D. Setting aside the Protocol Order

57 CN seeks an order varying the Protocol Order of December 4, 2008. That order was not placed in the record before me. Without an opportunity to review that order, I cannot consider varying it. The parties are to place this matter on the agenda of the 9:30 a.m. appointment which I have directed them to book with C. Campbell J.

VI. Conclusion and directions

58 For the reasons set forth above, I make the following orders:

(i) I grant the motions of CN and the CN Police to transfer the Hamilton Action to the Toronto Region Commercial List;

(ii) I dismiss the Holmes Defendants' motion to remove the Toronto Action from the Commercial List;

(iii) I order that the Toronto Action and the Hamilton Action be heard one immediately after the other;

(iv) I order the parties in both actions to continue with the case management of the proceedings before C. Campbell J.;

(v) I direct the parties to secure a 9:30 a.m. appointment before C. Campbell J. within the next three weeks in order to establish a joint timetable for both proceedings. The parties must exchange and file proposed timetables at least three days before that appointment. The issue of the variation of the Protocol Order shall be placed on the agenda of that 9:30 a.m. appointment; and,

(vi) I also order the parties to both actions to develop a joint Rule 29.1 discovery plan.

59 I wish to make one final comment concerning the reasonable and proper expectations of parties about the case management of these proceedings in light of section 33 of the Commercial List Practice Direction which enunciates the policy that one judge should hear the whole of a matter on the Commercial List. In *Abrams v. Abrams* I offered the following observations about how case management inevitably operates under such a system:

> It is apparent that Mr. Abrams has challenged my jurisdiction to make such directions because they do not accord with the way he wishes to litigate this proceeding. Judicial management of high-conflict cases, such as this one, involves, at times, a certain amount of "judicial squeezing" in order to advance the case to a hearing in a timely and proportionate manner. Not all parties take kindly to such squeezing. But, it is worth recalling the comments made by Master Haberman in her decision in *Mother of God Church v. Balolis* where one party sought the recusal of a case management master with whose directions it did not agree:
>
> > It is understood that, in a case managed environment, there will be times when the master forms an impression about how one party or the other has been conducting itself as a result of this repeated exposure. If the view is unfavourable, that, in and of itself, does not give rise to a basis for recusal. One must still meet the test that has been articulated by the Supreme Court of Canada. Similarly, if the master's repeated dealings with the parties and the issues gives rise to a sense that there is more merit to one side than the other, that, too, will not suffice to prevent further handling of the case. *That is precisely what case management was intended to do - create an expeditious and cost effective way to resolve all aspects of the disputes that come before the courts, by allowing judges/masters to become familiar with the case through repeated exposure*. [11]
>
> In other words, some amount of judicial squeezing accompanies litigation management. If some pinching occurs, that does not signal a lack of jurisdiction or bias, but simply a necessary degree of judicial hammering to bang a case back into proper procedural shape. The recent adoption of the principle of proportionality signals that the sound of the judicial hammer will only get louder. [12]

VII. Costs

60 I would encourage the parties to try to settle the costs of this motion. If they cannot, any party seeking costs may serve and file with my office written cost submissions, together with a Bill of Costs, by Monday, August 29, 2011. Any party opposing a request for costs may serve and file with my office responding written cost submissions by Friday, September 9, 2011. The costs submissions shall not exceed four pages in length, excluding the Bill of Costs.

Motion granted in part.

Footnotes

1 R.S.O. 1990, c. C.43.

2 Rule 1.04(1) of the *Rules of Civil Procedure*.

3 (2009), 80 C.P.C. (6th) 139 (Ont. S.C.J.), paras. 28 and 29.

4 Paul Perell and John Morden, *The Law of Civil Procedure in Ontario, First Edition* (LexisNexis: Toronto, 2010), p. 316.

5 (2008), 67 C.P.C. (6th) 23 (Ont. S.C.J.), para. 23.

6 2010 ONSC 3306 (Ont. Master), para. 18.

7 I recently canvassed the case law concerning the elements of false arrest, trespass, malicious prosecution, negligent investigation and breach of *Charter* rights in *Russell v. York Police Services Board*, 2011 ONSC 4619 (Ont. S.C.J.), (CanLII) at paras. 146 to 183.

8 *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), para. 17.

9 *British Columbia v. Zastowny*, [2008] 1 S.C.R. 27 (S.C.C.), para. 20.

10 *Clark v. McLauchlan*, [2002] O.J. No. 1968 (Ont. S.C.J.), para. 26.

11 *Mother of God Church v. Balolis* [2005] O.J. No. 1638, at para. 30 (Master, S.C.J.). (Emphasis added.)

12 (2010), 102 O.R. (3d) 645 (Ont. S.C.J.), para. 65.

End of Document

TAB 5

Case Name:

Gyles v. Mytravel Canada Holidays Inc. (c.o.b. Sunquest Meetings and Incentives)

Between
Cynthia Gyles, Plaintiff, and
Mytravel Canada Holidays Inc., c.o.b. as Sunquest Meetings and Incentives, Defendant

[2006] O.J. No. 2497

149 A.C.W.S. (3d) 394

[2006] O.T.C. 545

Court File No. 06-CV-311292PD1

Ontario Superior Court of Justice

P.A. Cumming J.

Heard: June 15, 2006.
Judgment: June 21, 2006.

(22 paras.)

Civil procedure -- Courts -- Application by the plaintiff to transfer a matter to the commercial list -- Application allowed -- The matter concerned a restrictive covenant in her employment contract -- The courts were flexible regarding what was placed on the commercial list.

Application by the plaintiff, Gyles, for an order transferring this action to the commercial list -- Gyles claimed against her former employer regarding restrictive covenants in her employment agreement -- She argued that after she left her employer and obtained another job, her former employer informed her new boss that she could not work there because of a restrictive covenant -- She claimed the clause was void for being against public policy -- HELD: Application allowed -- The action was transferred to the commercial list -- The courts were flexible regarding what was placed on the commercial list -- The commercial list dealt with matters expeditiously and Gyles wanted her employment situation resolved.

Counsel:

George S. Glezos, for the plaintiff

Andrew Balaura, for the Defendant

ENDORSEMENT

P.A. CUMMING J. (endorsement):--

The Motion

1 The plaintiff, Cynthia Gyles, moves to have this civil action transferred to the Commercial List. She claims against the defendant, Mytravel Canada Holidays Inc., c.o.b. as Sunquest Meetings & Incentives ("Sunquest"), her former employer, in respect of restrictive covenants in her employment agreement. Ms. Gyles' employment as an apparently successful "Business Development Manager & Account Executive" with Sunquest ended March 31, 2006.

2 Ms. Gyles delivered her Statement of Claim May 12, 2006. Both parties are resident in Toronto. Ms. Gyles seeks a declaration that the restrictive covenant provisions of her employment agreement are unenforceable, being void as against public policy. She also sues for damages for alleged intentional interference with commercial relations. It is alleged Sunquest contacted Ms. Gyles' new employer April 20 and 26, 2006, with the intent and result of having her new employment terminated on the basis the restrictive covenant in favour of Sunquest was operative. Her employment with her new employer was reportedly terminated April 27, 2006.

The Issue

3 On May 15, 2006, Ms. Gyles served the defendant with a notice of motion to transfer this action to the Commercial List. Counsel for Sunquest advised May 16 he would "vigorously" oppose the motion.

4 The issue is whether this action is to be transferred to the Commercial List under subparagraph 1(l) of the April 1, 2002, *Practice Direction* Concerning *the Commercial List ("Practice Direction")*, being the so-called basket clause'.

5 At the conclusion of submissions, I ordered that the transfer to the Commercial List take place and I set forth a timetable by which the action would proceed expeditiously. I advised my written reasons for decision would follow. These are my reasons.

6 The *Practice Direction* lists the matters eligible for the Commercial List:

> 1) Matters which may be listed on the Commercial List are applications, motions and actions which in essence involve the following:
>
> a) Bankruptcy and Insolvency Act;
> b) Bank Act relating to realizations and priority disputes;
> c) Business Corporations Act (Ontario) and Canada Business Corporations Act;
> d) Companies' Creditors Arrangement Act;
> e) Limited Partnerships Act;
> f) Pension Benefits Act;
> g) Personal Property Security Act;

h) Receivership applications and all interlocutory motions to appoint, or give directions to, receivers and receiver/managers;
i) Securities Act;
j) Winding-Up and Restructuring Act;
k) Credit Unions and Caisses Populaires Act, relating to credit unions and caisses populaires under administration or that are being wound up or liquidated; and
l) Such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List ....

In considering whether to make a direction under sub-paragraph 1(1), the judge may take into account the current and expected caseload of matters listed on the Commercial List.

7 The wording of the *Practice Direction* is permissive, not mandatory, saying that matters *may* be listed. The basket clause of subparagraph 1(l) allows a judge, in his/her discretion, to direct "other commercial matters" beyond the specific matters lists in clauses (a) to (k), to be placed on the List.

8 The normative approach in considering the application of the basket clause is to analyze whether matters are "analogous" to the enumerated specific items listed in clauses (a) to (k). See generally the comments of Farley J. in *771225 Ontario Inc. v. Bramco Holdings Co. Ltd.*, [1992] O.J. No. 1772 (Gen. Div.); O'Driscoll J. in *Fenix Developments G.P. Inc. v. Willemse* [1993] O.J. No. 285 (Gen. Div.); Farley J. in *National Trust Co. V. Furbacher* [1994] O.J. No. 1367 (Gen. Div.); and Greer J. in *Ontario Inc. v. Metropolitan Toronto Condominium Corp. No. 963* [2005] O.J. No. 2383 (S.C.J.). Courts consider whether the matter is commercial in nature, then consider such factors as the complexity of the subject matter and whether a number of parties are involved.

9 In *Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce* [1992] O.J. No. 2610 (Gen. Div.), Blair J., as he then was, also stated that "the current and expected caseload of matters listed on the Commercial List" is a factor for consideration and indeed, this consideration has been made express in the latest, current version of the *Practice Direction*.

10 In *Bankten Communication Services Ltd. v. General Motors of Canada Ltd.* [1996] O.J. No. 1803 (Gen. Div.) Jarvis J. denied a motion for transfer to the Commercial List. The essential issue in the litigation before him was simply whether the plaintiff charged the defendant in accordance with the parties' agreement. He viewed the case before him as not commercially complex, opined that the apparent accounting evidence would be straightforward and common, the quantity of production of documents was not extraordinary, and no specialized familiarity by the trial judge with commercial matters was seen to be an advantage.

11 Overall, the basket clause has been applied broadly and with flexibility. Although the Commercial List is oftentimes quite busy, the Court is accommodating where appropriate.

Disposition

12 Sunquest submits that the issues involved in the dispute at hand are not factually or legally complicated such that there is no compelling need to transfer the action to the Commercial List. Sunquest also says the alleged need for the plaintiff to advance her claim urgently is an irrelevant

factor. Sunquest expresses the concern that if the transfer is granted "it will open the floodgates for all breach of contract claims to be transferred ...."

13 The essential issue in the case at hand is the interpretation and enforceability of contractual terms of an employment contract that seek to restrain a departing, terminated employee in offering her services to a competing business. The dispute involves a commercial matter.

14 Moreover, there are underlying important public policy issues relating to restraint of trade and the conduct of commercially sophisticated business employers in the marketplace in placing fetters upon departing employees. Such clauses have a particular contemporary significance given the accelerating forces of globalization, freer trade and information technology.

15 The Commercial List strives to provide the benefits of so-called real time' litigation, where parties can quickly gain access to justice and receive timely dispositions of their disputes involving commercial matters.

16 The plaintiff, Ms. Gyles, is reportedly prevented in pursuing employment and commercial activity within her sphere of expertise because of the zeal of Sunquest in enforcing its restrictive covenant. The position of Sunquest is that its rights are clear and straightforward and that the restrictive covenant is enforceable.

17 Understandably, Ms. Gyles is anxious to obtain an early determination of the dispute given that she cannot easily work in her area of experience and expertise during the 12 month duration of the restrictive covenant, being enforced at present on a continuing basis by Sunquest.

18 The current and expected case load of the Commercial List, while extensive and demanding, is such that this action can be dealt with expeditiously on the Commercial List and quite probably, more quickly than it would be dealt with otherwise if it remained on the general Civil List. As well, the Commercial List more easily facilitates active case management, including through the 9:30 a.m. appointment process on short notice. Sunquest does not raise any possible prejudice to it through the action being transferred to the Commercial List. Moreover, while professing to wanting an expeditious determination of the dispute, Sunquest insists upon the action remaining on the Civil List where it is more likely that a determination of the dispute will take longer than if the case is dealt with on the Commercial List.

19 I make the inference in all the circumstances, and after hearing the submissions of Sunquest, that its objections to the transfer are based solely upon the belief that it may gain an advantage over the plaintiff through delaying the otherwise expeditious progress of the litigation that would be seen by the action being placed on the Commercial List.

20 In my view, and I so find, the circumstances of the commercial matter at hand mandate that there is a particular importance to the plaintiff in being able to gain as early as possible an interpretation of the legal effect of the restrictive covenant and that this is a proper factor in considering the exercise of my discretion as to whether the request for a transfer is to be granted.

21 Accordingly, for the reasons given, the motion to transfer the action to the Commercial List is granted. The Order also provides a detailed schedule for the progress of the litigation, culminating in a two to three day trial for a determination of the declaratory relief October 4-6, 2006, unless the matter is disposed of by the defendant's announced intent for a summary judgment motion, or otherwise, in the interim.

22 Given all the circumstances, and my view that there was no arguable merit to the defendant's opposition to the motion, costs on a substantial indemnity scale of $2500.00, inclusive of GST and all disbursements, are awarded to the plaintiff, payable forthwith by the defendant.

P.A. CUMMING J.

cp/e/qw/qlyxh/qlcem/qljxl/qlcal

TAB 6

P. 2, Para. 1, pp. 3-4, para. 9,
Pp. 4-5, para. 14,
P. 5, paras 15, 17
Pp. 6-7, paras 20-22,
P. 7, paras. 23, 25

Indexed as:
Lehner v. Gottfried

Between
Erika Lehner, plaintiff, and
Allan Stewart Gottfried, defendants

[1999] O.J. No. 4083

107 O.T.C. 126

18 C.B.R. (4th) 76

42 C.P.C. (4th) 206

92 A.C.W.S. (3d) 386

Court File No. 99-CV-68046CM

Ontario Superior Court of Justice
Commercial List

Molloy J.

Heard: October, 18, 1999.
Judgment: October 29, 1999.

(26 paras.)

Practice -- Motions -- Place of hearing.

This was a motion by the defendant Gottfried for an order transferring Lehner's action against him to the Commercial List. Lehner and Gottfried were each 50 per cent shareholders in a corporation. Lehner brought an action against Lehner for damages for breach of contract and breach of fiduciary duty, an accounting by Gottfried, an audit of the corporation and a winding up order. Gottfried argued that he was entitled to the judicial expertise and expeditious procedures of the Commercial List. Lehner argued that deference should be accorded to her choice of forum. She further argued that the matter was straightforward and easily within the expertise of any Superior Court Judge.

HELD: Motion allowed. The pith and substance of the action was precisely within the ambit of the Commercial List. Gottfried had put forward good reasons for transferring the action to the Commercial List. The smooth administration of the courts supported transferring the action to the Commercial List. Lehner had failed to advance any viable reason for preferring the regular list or any disadvantage to her if the action was placed on the Commercial List.

Statutes, Regulations and Rules Cited:

Ontario Business Corporations Act, R.S.O. 1990, c. B16.

Ontario Rules of Civil Procedure, Rule 77.02(c), 77.12(1).

Counsel:

C. Anthony Carroll, for the responding party (plaintiff).
Robert W. Wilson, for the moving party (defendant).

---

1 **MOLLOY J.**:-- The defendant moves for an order transferring this action to the Commercial List. The plaintiff takes the position that she deliberately commenced her action on the regular civil list in Toronto and objects to it being transferred to the Commercial List.

2 The plaintiff and the defendant are each 50% shareholders in Bistro 1206 Corp. ("the corporation") and are the corporation's sole officers and directors. The corporation operates a restaurant and catering business in Toronto. There is a written shareholders agreement between the parties executed on September 29, 1998.

3 The shareholders agreement contains a shotgun buy/sell provision. On February 9, 1999 the plaintiff offered her shares in the corporation to the defendant for $47,500.00. On February 25, 1999 the defendant declined that offer and required the plaintiff to purchase his shares at the same price. She refused to do so, alleging that at the time of her offer she was unaware of the corporation's true state of affairs.

4 This action was commenced on April 20, 1999. The plaintiff seeks a declaration that both her offer and the defendant's response render the buy-sell provisions of the shareholders agreement to be of no force and effect. She alleges various instances of misconduct by the defendant in his handling of the affairs of the corporation. In addition, the plaintiff claims:

(i) damages for breach of contract and breach of fiduciary duty;
(ii) an accounting by the defendant;
(iii) an audit of the corporation;
(iv) appointment of a receiver and manager of the corporation;
(v) an order requiring the defendant to produce financial records of the corporation;
(vi) orders with respect to tax liabilities of the corporation;
(vii) a winding up of the corporation under the Ontario Business Corporations Act, R.S.O. 1990, c. B16 ("OBCA"); and
(viii) oppression remedies under the OBCA.

(para5) The defendant has counter-claimed seeking specific performance of the purchase agreement under the buy-sell provisions of the shareholders agreement, or in the alternative, damages against the plaintiff for breach of that contract.

(para6) As preliminary matter, counsel drew to my attention the apparent conflict between Rule 77.12(1) (which provides that motions in a case managed action can only be brought before a case management judge or master) and paragraph 8 of the Commercial List Practice Direction (which provides that only a judge on the Commercial List can transfer an action onto the Commercial List. I do not see Rule 77.12(1) as being an impediment to my dealing with this motion. A case management judge cannot grant transfer of a matter to the Commercial List. It therefore makes no sense that this motion be made to a case management judge. Rule 77.02(c) contemplates that the case management rules do not apply to matters "placed on the Commercial List". It is a logical extension that Rule 77 does not apply to motions to accomplish that result. While this is an area which could certainly benefit from clarification when the Rules are next reviewed for amendment, in the meantime I am satisfied that I have jurisdiction to grant the relief sought. Indeed, in my view, only a Commercial List judge is able to grant the relief sought.

7 Paragraph 1 of the Practice Direction Concerning the Commercial List sets out the matters eligible for the Commercial List. It provides:

> Matters which may be listed on the Commercial List are applications, motions and actions which in essence involve the following:
>
> (a) Bankruptcy and Insolvency Act;
> (b) Bank Act, relating to realizations and priority disputes;
> (c) Business Corporations Act (Ontario) and Canada Business Corporations Act;
> (d) Companies' Creditors Arrangement Act;
> (e) Limited Partnerships Act;
> (f) Pensions Benefits Act;
> (g) Personal Property Security Act;
> (h) Receivership applications and all interlocutory motions to appoint, or give directions to receivers and receiver/managers;
> (i) Securities Act;
> (j) Winding up Act; and
> (k) Such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List. (Emphasis added)

8 Much of the relief claimed in the statement of claim falls squarely within categories enumerated under the Practice Direction as being automatically eligible for the Commercial List: e.g. a winding up order under the OBCA; oppression remedies under the OBCA; and the appointment of a receiver and manager. Other claims are directly related to such relief: e.g. an accounting, an audit, production of financial records; and orders with respect to tax liability. All of the claims in the action flow directly from a shareholder dispute and require an interpretation of the shareholders agreement and in particular the shotgun buy/sell provision. The pith and substance of the action are matters which are precisely within the ambit of the Commercial List, and indeed the very subject matter which the Commercial List was set up to accommodate.

9 The defendant seeks to have this action transferred to the Commercial List. Mr. Carroll, counsel for the plaintiff, argues that the plaintiff has chosen a forum which was open to her under the Rules, and that deference should be accorded to her choice. He further argues that this is a relatively straightforward matter depending on a finding of credibility and that it is easily within the

expertise of any judge of this court, including those who are not sitting on the Commercial List. He submits that placement on the Commercial List is a voluntary matter and that the plaintiff's choice of forum should only be interfered with if there are compelling reasons, such as commercial complexity.

10 The plaintiff relies upon the decision of Farley J. in 7712225 Ontario Inc. v. Bramco Holdings Co., [1992] O.J. No. 1772 (O.C.G.D.) and of Blair J. in Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce, [1992] O.J. No. 2610 (O.C.G.D.) as support for the propositions advanced. However, neither of these cases dealt with the situation before me. In Bramco, supra, Farley J. dealt with a motion to remove a case already on the Commercial List and declined to do so. In Maple Valley Acres, supra, the issue was whether an action properly commenced in Brampton could be transferred to Toronto on the grounds that it would be eligible for the Commercial List in Toronto. Blair J. held that this could not be the basis for a change of venue. Although in both these cases, reference was made to the "voluntary" nature of the Commercial List, these statements must be seen in the context of the case in which they were made.

11 In Bramco, Farley J. held at p. 3:

> At the present time going on the List is a voluntary matter - subject of course to judicial approval if the basket clause is involved. Coming off the List is not a free choice. In my view once there has been a determination of suitability by a judge, one would have to show that there had been such a material change in the perceived facts that a judge would on those "new" facts conclude that the matter was not suitable for the List. This was not the case here. As to those areas automatically on (if desired), since there was no judicial involvement, one would expect a much lower standard for removal - probably nothing more than a demonstration that the transfer out was not part of a stall tactic. (emphasis added)

12 Blair J. held in Maple Valley Acres, at p. 3:

> There is no question that access to the Commercial List is initially voluntary. The introduction to the Practice Direction makes this clear, and Farley J. confirmed as much in Bramco, supra. In my view, however, the "voluntariness" of the Commercial List is at the instance of the party bringing the proceeding, not those opposing. (emphasis added)

13 It is clear that a plaintiff is not obliged to place an action on the Commercial List even if the action would automatically qualify. It is in that sense that initial placement on the Commercial List can be described as "voluntary". I do not see the decisions of Farley J. and Blair J. referred to above as going any further than that, in so far as voluntariness is concerned. Neither case dealt with the issue of the extent to which the court will interfere with that initial voluntary choice by a plaintiff.

14 In the case before me, the plaintiff was entitled to place the action on the Commercial List because of the nature of much of the relief claimed. If the defendant had acquiesced in the plaintiff's choice of the general civil list, that would have been the end of the matter. However, the Practice Direction makes provision for a defendant to apply to have the action transferred to the Commercial List. Such a motion does not require the consent of the plaintiff. The Practice Direction therefore clearly contemplates situations in which a plaintiff who initially did not choose the Commercial List may nevertheless have his or her action transferred to it. The issue before me is the appropriate cir-

cumstances in which to make such an order. As far as I have been able to determine, there is no case law on this point.

15 The plaintiff argues that commercial complexity is a pre-requisite to an order transferring an action to the Commercial List and relies in that regard on Bankten Communications Services Ltd. v. General Motors of Canada Ltd., [1996] O.J. No. 1803 (O.C.G.D.) in which Jarvis J. held, at para 8:

> The essential liability issues in this case are not commercially complex and no unusual procedure will be required to litigate them. The assessment of damages will no doubt involve difficult concepts and sophisticated and complex evidence but I do not consider these factors to be determinative of the question. It appears to me that the primary characteristic of a case which qualifies for the Commercial List is that the liability issues involve questions of commercial complexity. I do not consider the issues that arise in this case are sufficiently commercially complex to qualify. For these reasons, this motion is therefore dismissed.

However, that case involved the application of the so-called "basket clause" at paragraph 6(k) of the Practice Direction which applies to "such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List". The considerations which apply to whether a case should be placed on the Commercial List under the "basket clause" are not necessarily the same as those which apply to cases falling within the categories enumerated in paragraphs 6(a) to (j). That is not to say that commercial complexity is not a factor to be taken into account in a motion such as the one before me. On the contrary, commercial complexity would be a compelling factor likely to result in an action being transferred to the Commercial List. However, it does not follow that a defendant cannot be successful in having an action transferred to the Commercial List unless the action is commercially complex. Complexity is a factor; it is not a prerequisite.

16 On the other hand, it cannot be the case that any action which falls within one of the enumerated heads is automatically transferred to the Commercial List at the behest of a defendant. The Practice Direction contemplates that this can only be done by order of a judge. It follows that there will be situations in which cases clearly eligible for the Commercial List will nevertheless remain elsewhere. It seems to me, however, that it will be more difficult for a plaintiff to avoid the Commercial List in a case which falls within the enumerated categories in the Practice Direction than would be the case if access to the List was only through the basket clause.

17 Mr. Carroll argues that there should be deference to the plaintiff's choice of forum. I do not see the Commercial List as a separate "forum". It is simply an administrative division of this Court designed to deal with cases of a particular type. The plaintiff's choice of "forum" was the Ontario Superior Court of Justice. Therefore, traditional rules and case law dealing with deference to the plaintiff's choice of forum have no application to a consideration of whether the plaintiff's case should proceed under the administrative rules of the Commercial List or under one of the other administrative teams for civil actions. Again, that is not to say that the plaintiff's choice of list is an irrelevant consideration. The plaintiff has carriage of the action and the plaintiff's preferences as to which administrative list should deal with the case will not be ignored. But neither will they be deferred to.

18 Mr. Wilson, on behalf of the defendant, argues that the defendant should be entitled to take advantage of the judicial expertise and expeditious procedures of the Commercial List. It is generally acknowledged that the Commercial List is able to deal with commercial matters in a more ex-

peditious manner because the judges on that List tend to have particular expertise in the subject area. The introduction to the Commercial List Practice Direction refers to the establishment of the Commercial List in 1991 and notes:

> The special procedures adopted for the hearing of matters on the Commercial List which expedite the hearing and determination of these matters have met with considerable approval and they have expedited the hearing and determination of these matters.

As stated by Farley J. in Bramco, supra, at p.3:

> I think it desirable as well to reflect that those judges available to sit in the List are some of those who have experience, expertise and an interest by aptitude and inclination in "corporate/commercial matters" of a complex and intricate nature. To put it another way, one would trust that an objective observer on determining the nature of the case and the identity of the judge would say something to the effect that the two are well-suited. The List is not a separate Court. Membership of the judicial team will change from time to time. A Commercial List Judge will sit in the List but as well in the General Division generally (civil, criminal, family, etc.). I think it appropriate to note that the Court has evolved into some degree of specialization in other areas as well. That is not to say that most, if not all, Judges will have extended periods of time being generalists (possibly the most difficult task for a judge). Each judge is dedicated to ensuring that Ontario is well-served in all aspects of the General Division's jurisdiction.

19 Obviously, there is nothing about this case which places it beyond the expertise of any judge of this Court, whether on the Commercial List or not. However, it cannot be denied that commercial matters can be more effectively dealt with on the List specially designed and administered for that purpose. This is one of the factors to be taken into account in deciding whether to accede to a defendant's request that the action be transferred to the Commercial List. This is particularly the case where, as here, a defendant has asserted a counter-claim that is also of a commercial nature.

20 I turn now to a consideration of the particular circumstances of this case. In my view, the appropriate analysis is a balancing process in which the advantages and disadvantages of the Commercial List, as opposed to the regular list, are considered from the perspectives of all parties.

21 When the plaintiff filed her statement of claim, her action was randomly selected for Case Management. I see this as a neutral factor as both parties acknowledge that the administration of the Commercial List produces the same advantages as the case management system. The situation might be different if the action was on a regular civil list. The defendant's argument that the Commercial List would result in a more expeditious determination of his case would have even more weight if the action was not being case managed.

22 However, the particular expertise of the Commercial List in cases of this nature remains a factor that is clearly to the defendant's benefit on this motion. As I have stated above, this factor has additional importance when the defendant has a counter-claim that is commercial in nature. Further, the very essence of the plaintiff's action is a commercial dispute between two shareholders in a business and all of the relief claimed flows directly from that commercial dispute. Buy-sell clauses, the interpretation of shareholders agreements, oppression remedies, interim receivers and the wind-

ing-up of corporations are all routine matters on the Commercial List and are squarely within the special expertise of the List.

23 The plaintiff was unable to point to any disadvantage to her if the action is transferred to the Commercial List. She relies solely on the fact that she chose not to go on the List and therefore should not be forced onto it. I do not consider this to be a compelling reason to deny the defendant's motion.

24 In my opinion, the case is much more easily dealt with on the Commercial List. The court has an inherent jurisdiction to control its own process. In terms of court resources and time, it is more convenient and cost effective to deal with cases of this nature on the Commercial List. This is also an appropriate, although of course not determinative, factor to be considered.

25 Thus, the defendant has brought forward good reasons for transferring the action to the Commercial List, the smooth administration of our courts supports transferring the action to the Commercial List, and the plaintiff has failed to advance any reason for preferring the regular list or any disadvantage to her if the action is placed on the Commercial List. In these circumstances, I have no hesitation in concluding that the action should be transferred to the Commercial List.

26 An order shall issue transferring this action to the Commercial List. I understand that the parties have scheduled a mediation session for December 13, 1999. Techniques of alternate dispute resolution are specifically recognized and encouraged in the Commercial List Practice Direction. Accordingly, it is appropriate to wait until the resolution of mediation before imposing further time schedules on the parties. Counsel shall attend before a Judge of the Commercial List in Chambers to speak to scheduling matters at 9:30 am on January 6, 2000. If counsel cannot agree on costs, written submissions may be sent to me, including submissions as to quantum, the defendant's submissions by November 8 and the plaintiff's submissions by November 15, 1999.

MOLLOY J.

cp/d/qlrme

TAB 7

Indexed as:

Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce (CIBC)

Between
Maple Valley Acres Limited, Applicant, and
Canadian Imperial Bank of Commerce, Respondent

[1992] O.J. No. 2610

13 C.P.C. (3d) 358

37 A.C.W.S. (3d) 331

Action No. All92/92

Ontario Court of Justice - General Division
Toronto, Ontario

Blair J.

December 4, 1992

(8 pp.)

Ellen Bessner, for Moving Party (Respondent).
Brian Jenkins, for Responding Party (Applicant).

BLAIR J.:--

Overview

This Motion is for the transfer of a matter to the Commercial List. It raises some issues of general interest relating to the practice on the Commercial List, and counsel have requested that I give Reasons for my decision.

The proceeding is a Brampton Application. It involves a dispute over priorities under a construction mortgage. The Applicant's business operations are located in Peel Region. The lands in

question are in Peel. The branch of the Defendant Bank involved in the transaction is in Metropolitan Toronto, and the Bank's solicitors are in downtown Toronto.

The reasons advanced for the transfer are these:

1) The Application involves a matter which should be transferred to the Commercial List;
2) The Brampton Court does not have a Commercial List, and the Defendant's solicitors practise law in Toronto.

The "Basket Clause"

The subject matter of the proceeding is not one which falls within one of the enumerated heads of paragraph 6 of the March 24, 1992 Practice Direction. Such matters automatically qualify for placement on the Commercial List. Accordingly, if the Application is to be transferred to the Commercial List the transfer must be by virtue of clause 6(j) or "the basket clause" as it has come to be known.

Clause 6 of the Practice Direction, in its entirety, reads as follows:

"6. Matters which may be listed on the Commercial List are applications, motions and actions in respect of the following:

(a) Business Corporations Act (Ontario) and Canada Business Corporations Act, including:

- oppression remedies applications
- winding-up applications
- appointment of inspectors
- take-over bids
- shareholder remedies
- arrangements
- liquidations
- fair value determinations;

(b) Securities Act, relating to takeover bids and issuer bids;
(c) receivership applications

- all interlocutory motions to appoint, or give directions to, receivers and receiver/managers;

(d) Companies' Creditors Arrangement Act;
(e) Personal Property Security Act;
(f) Bank Act, relating to realizations and priority disputes;
(g) Winding-up Act;
(h) Bankruptcy Act;
(i) Pension Benefits Act; and,

(i) such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List." (Underlining added)

As Farley J. pointed out, in 771225 Ontario Inc. v. Bramco Holdings Co., [1992] O.J. No. 1772, there is a flexibility in the application of the basket clause. What fruit is selected for the basket may depend somewhat on how heavily loaded the Commercial Lift wagon is with work at a given time. It is not necessary, however, that the selection be based on the ejusdem generis principle of similarity in nature to the enumerated items in subclauses (a) to (i). The practice on the List is an evolving one, and an ability to analogize between the circumstances of the case sought to be transferred and the enumerated heads may be of assistance to the Commercial List judge hearing the motion for transfer. If the matter is a commercial one, and if it is of sufficient complexity in terms of subject matter or of procedure or in terms of the numbers of parties involved -- or a combination of these varying factors -- it will be considered. As the Practice Direction notes:

> "A continuous re-evaluation process determines whether other matters should be added to those matters which may be listed on the Commercial List or whether the Commercial List procedures should be further modified or continued."

Here, the proceeding concerns a priority dispute under a land mortgage. This is not a subject matter which automatically qualifies for the Commercial List. Whether it could qualify for the List, via the "basket clause", is not something I have to determine for the purposes of this Motion because I have concluded that the proceedings should not be transferred, for other reasons set out below.

The Responding Party's Arguments

Mr. Jenkins, on behalf of the out-of-Toronto Applicant which has commenced its proceeding in Brampton as it is entitled to do, makes two primary submissions in opposing the transfer. They are:

1) that access to the Commercial List is voluntary, and that out-of-Toronto parties ought not to be compelled to litigate on the Commercial List, in Toronto, against their wishes; and,
2) that out-of-Toronto proceedings cannot be transferred to the Commercial List, by virtue of the Practice Direction, save "for special reasons" (and upon the consent of all parties), and this Application does not fall into the "special reasons" category.

The Voluntary Nature of the Commercial List

There is no question that access to the Commercial List is initially voluntary. The introduction to the Practice Direction makes this clear, and Farley J. confirmed as much in Bramco, supra. In my view, however, the "voluntariness" of the Commercial List is at the instance of the party bringing the proceeding, not those opposing. The Practice Direction states:

> "These procedures also continue to be, in the first instance, voluntary. Applicants and plaintiffs may continue to set matters that qualify for the

> Commercial List down for hearing either on the Commercial List or elsewhere. There is, however, provision for any party to have the matter transferred to, or removed from, the Commercial List." (Underlining added)

Thus, if a matter is a Toronto Region "commercial matter", as defined by clause 6, the applicant or plaintiff is entitled to have access to the Commercial List and the respondent or defendant is not entitled to deny that access by declining to consent. Were it otherwise an opposing party could place an unwarranted roadblock in the path of the party commencing the proceeding and perhaps frustrate the very kind of efficiency and economy of procedure which the Commercial List is designed to promote.

Place of Hearing

> Clause 9 of the Practice Direction provides as follows:
>
> 9. For the time being, only Toronto Region matters can be listed on the Commercial List (unless, for special reasons, authorization is given by the supervising judge) and matters listed on the Commercial List will only be heard in Toronto. (Underlining added)

Mr. Jenkins argues that there are no compelling reasons for transferring this Application from Brampton to Toronto Region in the guise of placing it on the Commercial List. The subject matter of the proceeding might qualify it for the Commercial List, he submits, but that is not, in itself, sufficient reason for the transfer. It is not enough to say that there is a Commercial List in Toronto and none in Brampton. Nor is it of much significance that the Defendant's counsel are in downtown Toronto. Meaning must be given to the phrase "for special reasons", in clause 9 of the Practice Direction, and more is necessary than simply that the matter would qualify for the List if commenced in Toronto.

I agree.

To hold otherwise would be to deprive clause 9 of the Practice Direction of its meaning. It would also expose out-of-Toronto parties and counsel to the cost and inconvenience of litigating in Toronto in an era when the Rules of Civil Procedure have recently been amended to counteract that very prospect.

I do not think that "balance of convenience" considerations such as apply to a change of venue under Rule 46.03 are useful in this context, as submitted by Ms. Bessner. If a case can be made for changing the place of hearing on such principles, those arguments stand on their own feet. The existence of a Commercial List of judges in Toronto is not a factor that creates its own "balance" for a transfer. As Farley J. noted, in Bramco, supra, "each [General Division] judge [in the Province] is dedicated to ensuring that Ontario is well-served in all aspects of the General Division's jurisdiction". Judges in the other Regions of Ontario can deal aptly with these matters too.

Disposition

Accordingly, for the foregoing reasons, the Motion is dismissed. As it raised a matter of practice not previously canvassed in respect of the Commercial List, there will be no costs.

BLAIR J.

TAB 8

P. 3, paras. 10 & 18,
P. 4, para. 21

Case Name:

Piedra v. Tsx Inc.

Between
Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero, Plaintiffs/Moving Parties, and Tsx Inc., Tsx Group Inc., William Stearns Vaughan and John Gammon, Defendants/Respondents
And between
Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero, Plaintiffs/Moving Parties, and Copper Mesa Mining Corporation, William Stearns Vaughan and John Gammon, Defendants/Respondents
And between
Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero, Plaintiffs/Moving Parties, and Copper Mesa Mining Corporation, Tsx Inc., Tsx Group Inc., William Stearns Vaughan and John Gammon, Defendants/Respondents

[2009] O.J. No. 5351

257 O.A.C. 112

Court File No. 464/09

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

S.N. Lederman J.

Heard: November 27, 2009.
Oral judgment: November 27, 2009.

(26 paras.)

Civil litigation -- Civil procedure -- Appeals -- Leave to appeal -- Interlocutory or final orders -- Standard of review -- Correctness -- Motion by plaintiffs for leave to appeal order transferring actions to commercial list dismissed -- Plaintiff brought claims against defendants based on negligence but pleaded and relied on commercial statutory provisions and raised issue of principle of corporate social responsibility governance -- No good reason to doubt correctness of order or way motion judge exercised discretion in considering wording of practice direction or pleading -- Importance of motion judge's decision did not transcend private interests of parties, raised no ques-

tions of public importance for administration of justice generally and did not require further judicial elucidation of general principles underlying practice direction.

Statutes, Regulations and Rules Cited:

British Columbia Business Corporations Act,

Rules of Civil Procedure, Rule 62.02(4)(b)

Securities Act, R.S.O. 1990, c. S.5,

Toronto Stock Exchange Act, R.S.O. 1990, c. T.15,

Counsel:

Murray Klippenstein and *W. Cory Wanless*, for the Plaintiffs.

Peter H. Griffin and *Andrew Parley*, for the Defendants.

John A. Keefe and *Peter Kolla*, for the Defendants.

ORAL REASONS FOR JUDGMENT

1 **S.N. LEDERMAN J.** (orally):-- The plaintiffs seek leave to appeal the interlocutory order of the Motions Judge, Newbould J., transferring three related actions from the civil list to the Commercial List of the Court.

2 The plaintiffs base their leave motion on Rule 62.02(4)(b), the test being that there is good reason to doubt the correctness of the order and the proposed appeal involves matters of such importance that leave to appeal should be granted. In order to succeed, the plaintiffs must satisfy both branches of this subrule.

3 In the actions, which are to be consolidated, the plaintiffs allege that the defendant, Copper Mesa Mining Corp. ("Copper Mesa"), a Canadian public company, in engaging in mining exploration in Ecuador has participated in a campaign of intimidation, harassment and violence against individuals who are opposed to its open pit mining operation.

4 The plaintiffs allege that the TSX defendants were negligent in breaching their duty of care by listing Copper Mesa on the Toronto Stock Exchange, thereby allowing Copper Mesa to raise substantial amounts of capital which has been used to finance unlawful actions against the plaintiffs, causing them harm.

5 The plaintiffs also allege that the defendants Vaughan and Gammon, who were Directors of Copper Mesa, were negligent and breached their duty of care by operating the company in a manner that created a high risk of violence to and did result in harm to the plaintiffs.

6 The plaintiffs allege that Copper Mesa is vicariously libel for the alleged harms caused to the plaintiffs by the two Directors.

7 The plaintiffs submit that the claims against the TSX defendants and the two Directors of Copper Mesa are based on the common law of negligence and are not founded on any statutes.

8 The plaintiffs oppose the transfer of the actions to the Commercial List on the grounds that they do not raise commercial issues and that no commercial relationship between the parties is in question. They say it is at heart a negligence action at common law.

9 As to the first branch of the test for granting leave under Rule 62.02(4)(b) i.e., there is good reason to doubt the correctness of the order, the plaintiffs make the following argument.

10 The Practice Direction that governs what matters may be on the Commercial List mandates an "in essence" test, namely, the matter must, in essence, involve a commercial statute or a commercial matter.

11 The plaintiffs submit that it is not enough that the law suit merely involves defendants who are commercial entities or could impact commercial interests. They argue that what must be shown is that the core legal issues in question are commercial in nature. They submit the actions must be in pith and substance commercial.

12 The Motions Judge concluded that the actions "clearly involve commercial issues". The plaintiffs submit that the Motions Judge failed to apply the specific wording of the Practice Direction and in error applied an "involving" test rather than the more rigorous "in essence involving" or a pith and substance test.

13 The plaintiffs argue that amounts to an error in law and in the exercise of discretion. Because of this failure to apply the correct test, the plaintiffs say there is good reason to doubt the correctness of the order.

14 The Motions Judge found that the actions clearly involve commercial issues because the plaintiffs, in their Statement of Claim against the Directors, plead and rely on the statutory duties and obligations of Directors under the *British Columbia Business Corporations Act*, and in their claim against the TSX defendants there is reference to the duties and obligations that the Motions Judge stated are defined in part by the *Securities Act*, the TSE Company Manual and the TSX Recognition Orders of the OSC.

15 Having regard to paragraphs 77, 92 and 109 of the proposed consolidated Statement of Claim, the plaintiffs in fact do rely on such commercial statutes as the *Toronto Stock Exchange Act* and the *British Columbia Business Corporations Act*, (similar to provisions in the OBCA) as being germane to the actions because they impose statutory legal duties of care on the defendants.

16 By pleading these provisions, the plaintiffs themselves acknowledge that the actions have a commercial law component. Even if the plaintiffs' intention is to plead and raise the statutory provisions merely to inform the common law duties of care that otherwise independently exist, an understanding and appreciation of these commercial statutes in the context of these proceedings would be helpful and these statutory provisions are part of the regular diet of the Commercial List.

17 Moreover, the pleading raises the issue of the principle of corporate social responsibility governance frameworks when the company is engaged in mining operations in developing countries.

18 Whether the degree of commercial issues amounts to being substantial or, "in essence" so as to be eligible for listing, is within the discretion of the Motions Judge. No hard and fast rules govern the assessment of sufficiency of the commercial nature of the action in question.

19 As pointed by Cumming J. in *Gyles v. My Travel Canada Holidays Inc.* [2006] O.J. No. 2497 at para. 11, "Overall, the basket clause has been applied broadly and with flexibility".

20 Even consideration of a non-commercial factor may enter into the exercise of discretion in deciding what is to be listed under the basket clause. The Practice Direction states that the Motions Judge may take into account the current and expected case load of the commercial list.

21 There is no disadvantage to a party in having the case listed on the Commercial List. In fact, procedures on the Commercial List allow for greater expediency. Moreover, the judges on the Commercial List not only have specialized knowledge about commercial issues but are part of the Superior Court of Justice and are generalists as well, quite capable of deciding issues of negligence and causation at common law.

22 The Motions Judge was engaged in a discretionary case management exercise, that is, on which list of the Court should the actions proceed. He had regard to the wording of the Practice Direction and the pleading of the plaintiffs in deciding to exercise his discretion. In doing so, he did nothing contrary to any established judicial principles. I see no good reason to doubt the correctness of the way he exercised that discretion or the order itself.

23 As to the second branch of Rule 62.02(4)(b), the Motions Judge used his discretion in applying the Practice Direction to the particular circumstances of the case before him. It was a fact specific exercise.

24 The importance of the Motions Judge's decision does not transcend the private interests of the parties. It raises no question of public importance for the administration of justice generally. It does not require any further judicial elucidation by the Divisional Court of the general principles underlying the Practice Direction. In this regard, it is instructive that counsel could point to no appellate decision reviewing a Practice Direction of any kind.

25 As neither part of the test under Rule 62.02(4)(b) has been met, the motion is dismissed.

26 I have endorsed the Record to read: "For oral reasons delivered, the motion is dismissed. Each group of the TSX defendants and the defendant directors will have their costs fixed at $1,500.00 all inclusive."

S.N. LEDERMAN J.

cp/e/qlrds/qljxr/qlaxw/qlhcs

TAB 9

2002 CarswellOnt 3852
Ontario Superior Court of Justice

Royal Bank v. Société Générale (Canada)

2002 CarswellOnt 3852, [2002] O.J. No. 4327, 118 A.C.W.S. (3d) 212

Royal Bank of Canada, Plaintiff and Société Générale (Canada) et al, Defendants

Ground J.

Heard: November 5, 2002
Judgment: November 5, 2002
Docket: 02-CV-235945CM2

Counsel: None given

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XIX Pre-trial procedures
XIX.2 Setting down or listing for trial

Headnote
Practice --- Pre-trial procedures — Setting down or listing for trial

MOTION by bank to transfer proceeding to Commercial List.

***Ground J.* (Orally):**

1 It appears to me that the issues in this action, vis-à-vis the financial institutions, are clearly issues of a commercial nature. The claims in negligence and conversion are to be determined based on banking practice and bank to bank and bank/customer relationships. It also seems to me that the claims against the insurers will involve the same factual and legal findings pertaining to the alleged forgeries as the claims against the financial institutions and that such claims are substantially intertwined.

2 I do not think that to approve the transfer of proceeding to the Commercial List in accordance with the reasons of Blair J. in Maple Valley requires a finding that all of the issues in the proceeding are exclusively commercial. Obviously, many proceedings on the Commercial List involve issues of real estate, insurance, labour and even family law. For example, proceedings are regularly brought in an insolvency situation against insurers under a Directors and Officers Liability Policy.

3 It is also my view that the disadvantages cited by Mr. Greene in transferring the proceeding to the Commercial List are not persuasive. I am not convinced that case management by case management masters on the Civil List is necessarily more efficient or more stringent than case management by a Commercial List Judge. In fact, the Commercial List Judge may take a more hands-on approach to case managing a proceeding and appointments with the Commercial List Judge are more readily obtainable. The access to mediation, either with a Commercial List Judge or by referral

to private mediation, is not only available, but is actively encouraged by the Commercial List. It is also my view that forcing this proceeding on to mandatory mediation when certain of the parties may not be ready or may be reluctant to participate would be, at a minimum, counter productive.

4 Accordingly, an order will issue:

1. approving the transfer of this action to the Commercial List

2. appointing myself as Case Management Judge and directing counsel to arrange an early case conference to deal with procedural matters generally and

3. directing that Statements of Defense be delivered or motions with respect to the Statement of Claim be brought by December 16, 2002.

5 Costs payable by the insurers to the Plaintiff in the amount of $3,000 in the cause.

Motion granted; proceeding transferred.

End of Document

TAB 10

Pp. 2-4, para. 4

Case Name:

Toronto Dominion Bank v. Bank of Nova Scotia

RE: The Toronto Dominion Bank, Applicant, and Bank of Nova Scotia, Respondent

[2013] O.J. No. 4355

2013 ONSC 6029

Court File No. CV-13-483985

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: September 20, 2013.
Judgment: September 25, 2013.

(8 paras.)

Counsel:

B. van Niejenhuis, for the Applicant.

B. Harrison, for the Respondent.

REASONS FOR DECISION

D.M. BROWN J.:--

I.

Motion to transfer a derivatives contract proceeding to the Toronto Region under the "basket clause"

1 The request by The Toronto Dominion Bank to transfer this proceeding to the Toronto Region Commercial List initially came before me at a 9:30 appointment. Counsel for the Bank of Nova Scotia opposed the request and asked for an opportunity to file materials in that regard. As a result, I heard a formal motion to transfer at a further 9:30 appointment on September 20. Notwithstanding the vigorous submissions of BNS, I granted the motion to transfer, with written reasons to follow. These are those reasons.

II.

General principles governing transfer requests to the Commercial List

2 The Commercial List is not a separate court, but a group of Toronto Region judges assigned to hear insolvency and commercial matters. The List possesses several key attributes: (i) the judges who sit on the list possess or develop expertise in insolvency and commercial disputes; (ii) the List affords quick access to judges by litigants to meet the needs of the "real-time" nature of many of the cases on it; (iii) to that end the 9:30 system of appointments enables parties to get before a judge within 24 hours, when required; and, (iv) a significant number of the proceedings on the List are case managed by judges through case conferences to ensure the fair, timely and cost-effective adjudication or resolution of the disputes on their merits.

3 However, the flexibility and accessibility offered by the Commercial List, when combined with the modest number of judges assigned to the List, necessitates that some limits be placed on the types of cases which may be heard on it. To that end the Commercial List Practice Direction identifies the matters eligible to be heard on the List. In addition to the proceedings commenced under or relating to specified statutes, paragraph 1(m) of the Practice Direction contains a "basket clause" which reads as follows:

> 1(m). Such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List, including: suitably complex cases under the *Arthur Wishart Act* (Franchise Disclosure), suitable commercial matters under the *International Commercial Arbitration Act* (Ontario), *Arbitration Act*, 1991 (Ontario) and *Commercial Arbitration Act* (Canada). (See *771225 Ontario Inc. v. Bramco Holdings Co. Ltd.*, [1992] O.J. No. 1772 and *Maple Valley Acres Limited v. CIBC*, [1992] O.J. No. 2610), *Piedra v. TSX Inc.*, [2009] O.J. No. 5351 (Div. Ct.)).
>
> In considering whether to make a direction under sub-paragraph 1(m), the judge may take into account the current and expected caseload of matters listed on the Commercial List.

4 As can be seen from the language of the basket clause, a broad discretion exists in determining which matters may be transferred on to the List. How that discretion should be exercised has been

addressed over the years in the case law:

(i) As stated by Lederman, J., sitting as a Divisional Court judge, in *Piedra v. TSX Inc.*:

> "The Practice Direction that governs what matters may be on the Commercial List mandates an 'in essence' test, namely, the matter must, in essence, involve a commercial statute or a commercial matter";[1]

(ii) Whether the degree of commercial issues amounts to being substantial or, "in essence", so as to be eligible for listing, is within the discretion of the motions judge. No hard and fast rules govern the assessment of sufficiency of the commercial nature of the action in question;[2]

(iii) Judges usually first consider whether the matter is commercial in nature, and then may go on to consider such factors as the complexity of the subject matter and whether a number of parties are involved;[3]

(iv) As Cumming J. once pointed out.: "Overall, the basket clause has been applied broadly and with flexibility";[4]

(v) Factors other than the strict subject-matter of a proceeding, such as the level of the workload on the Commercial List at any point of time, may enter into the decision whether to transfer a matter on to the List. As stated by Blair J., as he then was, in *Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce*, in turn quoting Farley J.:

> As Farley J. pointed out, in *771225 Ontario Inc. v. Bramco Holdings Co.*, [1992] O.J. No. 1772, there is a flexibility in the application of the basket clause. What fruit is selected for the basket may depend somewhat on how heavily loaded the Commercial Lift wagon is with work at a given time. It is not necessary, however, that the selection be based on the ejusdem generis principle of similarity in nature to the enumerated items in subclauses (a) to (i). The practice on the List is an evolving one, and an ability to analogize between the circumstances of the case sought to be transferred and the enumerated heads may be of assistance to the Commercial List judge

> hearing the motion for transfer. If the matter is a commercial one, and if it is of sufficient complexity in terms of subject matter or of procedure or in terms of the numbers of parties involved -- or a combination of these varying factors -- it will be considered.[5]

(vi) As well, the ability of an urgent matter to be heard elsewhere in the Court or the need for a proceeding to be subject to the style of case management practised on the Commercial List may enter into the consideration of a transfer request;

(vii) Further, as Lederman J. observed in the *Piedra* case:

> There is no disadvantage to a party in having the case listed on the Commercial List. In fact, procedures on the Commercial List allow for greater expediency. Moreover, the judges on the Commercial List not only have specialized knowledge about commercial issues but are part of the Superior Court of Justice and are generalists as well, quite capable of deciding issues of negligence and causation at common law.[6]

(viii) Finally, the location of the parties can play an important role in any decision to transfer a matter to the Commercial List. Paragraph 8 of the Practice Direction states:

> Only Toronto Region matters can be listed on the Commercial List (unless, for special reasons, authorization is given by the supervising judge). Aside from urgent insolvency matters, there should be a material connection to the Toronto Region over and above the location of counsel. Matters listed on the Commercial List shall only be heard in Toronto.

III.

Application of these principles to the facts of the present case

5 As pleaded in the Notice of Application, the dispute between TD and BNS involves two series of equity derivative transactions - specifically, cash settled equity basket options - entered into by the parties in 2009. One of the equities in the basket covered by two standard ISDA confirmations was EnCana Corporation. EnCana's equity was restructured after the parties had entered into the derivative transactions. TD pleads that the parties had agreed upon a method to adjust the settlement

mechanisms of both derivative transactions in light of EnCana's re-organization, but TD discovered in 2012, when some transactions were settled, that BNS had changed the adjustment mechanism. At least that is the pleading made by TD; no doubt BNS will give its side of the story in its responding materials.

6 Disputes involving the interpretation or performance of derivative transactions generally are heard on the Commercial List involving, as they do, commercial contracts at the more complex end of the spectrum. Given that subject-matter of the present application, I concluded that it was appropriate to transfer TD's application to the Commercial List.

7 I ordered that the parties appear before me on October 2, 2013, at a 9:30 appointment, to finalize a schedule and to set a hearing date.

8 Since this motion only consumed 10 minutes on a 9:30 appointment, I made no order as to costs.

D.M. BROWN J.

cp/e/qllqs/qlrdp/qlced

1 2009 CarswellOnt 7823 (Div. Ct.), para. 10.

2 *Ibid*., para. 18.

3 *Gyles v. Mytravel Canada Holidays Inc.*, [2006] O.J. No. 2497 (S.C.J.), para. 8.

4 *Ibid.*, para. 11.

5 (1992), 13 C.P.C. (3d) 358 (Ont. Gen. Div.), p. 361.

6 *Piedra*, *supra.*, para. 21.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

VIMPELCOM LTD. et al.
Defendants

Court File No. CV-16-553800

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE MOVING PARTY, THE DEFENDANT WEST FACE CAPITAL INC.

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