No. S120840

Vancouver Registry

In the Supreme Court of British Columbia

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*
R.S.B.C. 1996, C. 241

AND

Brought under the *CLASS PROCEEDINGS ACT*
RSBC 1996 C. 50

Between

IAN ROBB FORGIE

Petitioner

And

HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA

Respondent(s)

APPLICATION RESPONSE

Application response of: *Ian Robb Forgie* (the "application respondent(s)"

THIS IS A RESPONSE TO the notice of application of *Attorney General of British Columbia* filed *2103/2012*.

Part 1: ORDERS CONSENTED TO

The application respondent(s) consent(s) to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms:

None:

Part 2: ORDERS OPPOSED

The application respondent(s) oppose(s) the granting of the all orders set out in paragraphs *1.(a.b.c.d).2.3.* of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent(s) take(s) no position on the granting of the orders set out in paragraphs *1. (a.b.c.d.)2.3.* of Part 1 of the notice of application.

The application respondent humbly prays that Law and Order *not be misconstrued by Actors; acting real or imaginary* disseminating the message being relayed without befit of the exchange real dialogue. It is Fitting, Right, Just, and Proper, to be Held to a Higher Standard; for it is written that *Man* is commanded to bear the full burden of *Truth* by his *Creator. Free* [something that is free does not cost anything] *Dom* [Latin: to God, the best, the Greatest]

Part 4: FACTUAL BASIS

Belief as to consent, *the* NOTICE OF MATERIAL TO BE RELIED ON is the presumption of a PERSON RECEIVING THIS NOTICE OF APPLICATION is unspeakable:

Criminal Code of Canada section **265.**

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief. [R.S., 1985, c. C-46, s. 267]

Part 5: LEGAL BASIS

The petitioner relies on the following authorities:

1. Supreme Court Civil Rules, B.C. Reg 168/2009. Rule 9-5 and Rule 20-5.
2. Judicial Review Procedures Act R.S. B.C. 1996 c 241, s, 1. ["*JRPA*"]
3. The inherent jurisdiction of the Superior Court of British Columbia
4. Common Law Authorities

(a). B.C. Milk Marketing Board v. Aquilini ["*B.C. Milk Marketing Board*"]
(b). Canreal Management Corporation v. Mercedes-Benz Canada Inc., 2010 BCSC 642 ["*Canreal Management Corporation*"]
(c). Contour Optik Inc. v. Viva Canada Inc., 2005 FC 724 ["*Contour Optik Inc*"]
(d). Covelli v. Sears Canada Inc., 2011 ONSC 1850 ["*Covelli*"]
(e). Dawud v. Dawud ["*Dawud*"]
(f). Dreco Energy Services Ltd. v. Wenzel, 2005 ABCA 185 ["*Dreco Energy Services Ltd.* "]
(g). Dreco Energy Services Ltd. v. Wenzel, 2006 ABQB 356 ["*Dreco Energy Services Ltd.*"]
(h). Dreco Energy Services Ltd. v. Wenzel, 2008 ABQB 489 ["*Dreco Energy Services Ltd.*"]
(i). Goldman, Sachs & Co. v. Sessions ["*Goldman, Sachs & Co.*"]
(j). GRI Simulations Inc. v. Oceaneering International Inc., 2010 NLTD 85 ["*GRI Simulations Inc.*"]
(k). National Trust Co. v. Furbacher [1994] O.J. ["*National Trust Co*"]
(l) Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441 ["*Operation Dismantle Inc.*"]
(m) Park v. Mullin, 2005 BCSC 1813 ["*Park*"]
(n)Peter Kiewit Sons Co. v. B.C. Hydro ["*Peter Kiewit Sons Co*"]
(o)R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42 ["*R.*"]
(p)Reading & Bates Construction Co. et al. v. Baker Energy Resources Corp. et al. (1988), 24 C.P.R. (3d) 66 ["*Reading & Bates Construction Co. et al*"]
(q)Sherman v. Gordon, 2009 CanLII 71722 ["*Reading & Bates Construction Co. et al*"]
(r)Shields Fuels Inc. v. More Marine Ltd., 2008 FC 947 ["*Shields Fuels Inc*"]
(s)Walter Construction v. Catalyst, 2003 BCSC 1582 ["*Walter Construction*"]
(t)Warman v. Fournier et al, 2010 ONSC 2126 ["*Warman*"]

The grounds on which the application should be stuck:

1. In the Supreme Court of British Columbia, Provincial Crown Council Speaks for Her Majesty in Right.

Rule 9-5 — Striking Pleadings

The Supreme Court of Canada recently addressed the legal framework for striking pleadings pursuant to Rule 9-5. In short, the Court repeated the longstanding test that pleadings will only be dismissed under the BC Supreme Court Rules if they have '*no reasonable prospect of success*' and that the parties cannot tender evidence in support of these applications.

In the recent case (R v. Imperial Tobacco Ltd.) the Court was faced with a lawsuit by British Columbia seeking to recover health care costs for tobacco related illnesses. In the course of defending the lawsuit the tobacco companies issued Third Party Pleadings against the Government of Canada pleading that if they are held liable to the Government of BC the Federal Government should indemnify the Tobacco Companies for damages payable. The Government of Canada brought an application to dismiss the Third Party Pleadings.

The Supreme Court of Canada granted the application and dismissed the Third Party Pleadings. In doing so the Court provided the following legal framework for Pleading strike applications:

This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action... Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial...

[19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before Hedley Byrne & Co. v. Heller & Partners Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in Donoghue v. Stevenson. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the Supreme Court Rules (now r. 9-5(2) of the Supreme Court Civil Rules). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted...

It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.

[25] Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding

(a) DILIGENT INQUIRY

diligent inquiry. A careful and good-faith probing to ascertain the truth of something. *Black's law PDF page 1377*

(i) Dawud v. Dawud

In this case, the mother brought a Motion in which she sought, among other things, the striking of the father's pleadings because of his failure to comply with court orders.

(ii) GRI Simulations Inc. v. Oceaneering International Inc., 2010 NLTD 85 (CanLII) Date: 2010-04-26 Docket: 200401T1376 Lois R. Hoegg J. In an ealier consent order, ...The defendant now asks to be relieved of its obligation because of cost and burden, or that the plaintiff fund the search. At para 32 the Court states that the Applicant (defendant) "has the burden of satisfying the court, on a balance of probabilities, that it is just to relieve them of their duty to produce any further email in accordance with the Consent Order." The Defendants' application for relief from email document production is dismissed. They were unable to show that the cost, time and effort involved in producing email which relates to matters in issue is so onerous as to relieve them of their obligation to produce it in accordance with Rule 32.02.

(iii) *Canreal Management Corporation v. Mercedes-Benz Canada Inc.*, 2010 BCSC 642 (CanLII) Date: 2010-05-05 Docket: S093481 N. Smith J. Although the defendant had disclosed a large volume of documents, the plaintiff alleges that critical documents are missing from the production based on information from a former employee of the defendant during examinations for discovery. At para 20, the court observed that the plaintiff had specified categories of documents that he considers to be relevant. The plaintiff had moved to strike the defendant's appearance or statement of defence, but the court concludes at para 35 this would be too draconian a remedy and gives leave to the plaintiff to cross-examine the defendant on his document production.

(iv) Shields Fuels Inc. v. More Marine Ltd., 2008 FC 947 (CanLII) Date: 2008-08-13 The Court held that "The rules should not be interpreted, however, so narrowly as to prevent a party from obtaining other relevant information, such as archival data that is still readily accessible and not obsolete. In exercising its discretion whether to compel production, the Court should have regard to how onerous the request for a generated record may be when balanced against its relevance and probative value." (para 13) The Court granted the order, concluding "The information requested by (the plaintiff) consists of basic archival accounting records that would be available to a company in the usual course of business."

(v) Park v. Mullin, 2005 BCSC 1813 (CanLII) Date: 2005-12-30 Docket: 04/0348. J.L. Dorgan, J. The court held that it : ".... has used its discretion to deny an application for the production of documents in the following circumstances: (1) where thousands of documents of only possible relevance are in question: *Peter Kiewit Sons Co. v. B.C. Hydro*; *B.C. Milk Marketing Board v. Aquilini*; and (2) where the documents sought do not have significant probative value and the value of production is outweighed by competing interests, such as confidentiality, and time and expense required for the party to produce the documents: *Goldman, Sachs & Co. v. Sessions*."

(vi) Walter Construction v. Catalyst, 2003 BCSC 1582 (CanLII) Date: 2003-10-17 Docket: S01585. Gray J. In a suit for breach of contract, plaintiff seeks an order for further production, including the electronic versions of documents already produced in paper. No support for the position that further production would be onerous. The court found that the the documents sought would be relevant and ordered the production. See Annex A for excerpts from the Notice of Motion. N.B. no apparent provision for privilege, although court does mention that there may be sensitive of privileged information in the electronic documents in para 38, inviting the parties to apply for a further order if they cannot agree on what will be produced.

(vii) Farley J., in *National Trust Co. v. Furbacher* [1994] O.J. No. 2385 (ON Gen Div), observed that the functions of pleadings are to:

(i) define with clarity and precision the question in controversy between the litigants;
(ii) give fair notice of the precise case which is required to be met and the precise remedies sought; and
(iii) assist the Court in its investigations of the truth and the allegations made.

(b)See Pleading and Relevance in the Rules of Civil Procedure in Canadian Jurisdictions for a table comparing the rules in all provincial superior courts and federal courts.

(i) *Covelli v. Sears Canada Inc.*, 2011 ONSC 1850 (CanLII) Date: 2011-03-23. Master Sproat. In a wrongful dismissal case, defendants moves to strike claims alleging "that Sears has adopted a corporate policy or practice of terminating employees for just cause, notwithstanding that it knows or ought to know that no just cause at law exists, as a means of unlawfully evading its statutory and common law obligation to provide employees with notice of termination, or compensation in lieu of notice". Defence expects the allegation will result in discovery of "monstrous proportions". Court sorts through conflicting authorities and concludes that the claims are not "scandalous, frivolous and vexatious or otherwise an abuse of process", agreeing that discovery plan process can be used to place parameters on the information that can be obtained, including "staged production".

(ii)Dreco Energy Services Ltd. v. Wenzel, 2008 ABQB 489 (CanLII) Date: 2008-08-11 Docket: 0203 12910 S.J. Greckol J. "Amongst the many procedural issues that have arisen en route to trial, the Plaintiffs claimed that documents stored on computers used in the Defendants' business were erased, thwarting their entitlement to full discovery.

(iii) Dreco Energy Services Ltd. v. Wenzel, 2006 ABQB 356 (CanLII) Date: 2006-05-12 Docket: 0203 12910. S.J. Greckol J. A large corporate commercial and intellectual property suit. After a fine was imposed by the judge because answers to undertakings were not delivered to counsel for the Plaintiff, the Defendant appealed the fine. The Court of Appeal (*Dreco Energy Services Ltd. v. Wenzel*, 2005 ABCA 185 (CanLII) considered new evidence that certain computer records were destroyed or erased. The CA remitted the order back to the court, saying "In terms of the sanction for contempt, we are of the view that the amount ordered is not adequate for its purpose. Requiring those in contempt to pay a part only of thrown-away costs related directly to the contempt does not bring home to the contemnors the seriousness of their actions and their responsibilities for the consequences attributable to that contempt. There is a public policy aspect to this entire issue. Generally, in principle, those who are found in civil contempt ought, at a minimum, to be required to accept responsibility for a substantial portion of the costs directly related to that contempt. It may be that a judge would also consider it appropriate to impose further monetary penalties or other sanctions, whether including striking of pleadings, drawing of adverse inferences, etc." (para 9) *The CA went on to suggest seven considerations for assessing which sanctions should be imposed, which the judge used in her analysis. (para 10).* The Court ordered the Defendant to pay the Plaintiff's "throw-away" costs, amounting to $136,146.27, plus GST, and to take all available steps to try to retrieve the information that has been lost and are to bear the costs of those efforts in any event of the cause. If the computer files cannot be retrieved, pursuant to Rule 704(1)(c), the Defendants are to pay a fine of $75,000.00, for which they will be jointly and severally liable. (paras 53,54)

(iv) Sherman v. Gordon, 2009 CanLII 71722 (ON S.C.) Date: 2009-12-16 Docket: 06-CV-310875PD1 Master Haberman. "The Court has been equally concerned where court time has been sought and then squandered. The concept of proportionality has to apply in the context of litigants' use of court time as well as to the expenditure of their funds. It is unfair to all users of the court where one party seeks far more court time than they should need because they are not prepared to do the work to streamline their motion. Court intervention should be reserved for situations where the parties are unable to resolve their differences inter se. If they expend no effort in resolution but simply present the court with their problems, we will soon find we are unable to provide our services in a timely fashion."

(v) Contour Optik Inc. v. Viva Canada Inc., 2005 FC 724 (CanLII) 2005-05-19 Docket: T-1927-02 Richard Morneau Prothonotary. The Court quotes *Reading & Bates Construction Co. et al. v. Baker Energy Resources Corp. et al.* (1988), 24 C.P.R. (3d) 66, stating "Mr. Justice McNair, in a general six-point reminder, first defines, in points 1 to 3, the tests for relevance of a question or document, and then itemizes in points 4 to 6 a series of circumstances or exceptions in which, at it happens, at the end of the day, a question need not be answered or a document need not be produced." In particular, 4 says "The court should not compel answers to questions which, although they might be considered relevant, are not at all likely to advance in any way the questioning party's legal position"; 5 says "Before compelling an answer to any question on an examination for discovery, the court must weigh the probability of the usefulness of the answer to the party seeking the information, with the time, trouble, expense and difficulty involved in obtaining it. Where on the one hand both the probative value and the usefulness of the answer to the examining party would appear to be, at the most, minimal and where, on the other hand, obtaining the answer would involve great difficulty and a considerable expenditure of time and effort to the party being examined, the court should not compel an answer. One must look at what is reasonable and fair under the circumstances" (underscored by the Court); and 6 "The ambit of questions on discovery must be restricted to unadmitted allegations of fact in the pleadings, and fishing expeditions by way of a vague, far-reaching or an irrelevant line of questioning are to be discouraged". (underscored by the Court.)

(vi) Warman v. Fournier et al, 2010 ONSC 2126 (CanLII) Date: 2010-05-03 Docket: 09-DV-1512 Wilton-Siegel J. Appeal from decision of Kershman J dated March 23, 2009. Appeal allowed and matter remitted to another motions judge for consideration, based on the principle of the need for a *prima facie* case of defamation, and Charter value of freedom of expression and the right to privacy.

Part 6: MATERIAL TO BE RELIED ON

1 **APPLICATION RESPONSE "made**

/March, 2012 by *Ian Robb Forgie"*

2 Notice to Admit "made

/March/ 2012 by *Ian Robb Forgie"*

3 **NOTICE OF INTENTION TO PROCEED "**

/March/ 2012 by *Ian Robb Forgie"*

The application respondent(s) estimate(s) that the application will take 30 minutes.

[ ] The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

[ ] The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is: .....[*Set out the application respondent's address(es) for service in compliance with Rule 4-1 (1) of the Supreme Court Civil Rules and any additional address(es) under Rule 4-1 (2) that the application respondent wishes to include.*].....

Date: *28/03/2012*] .....
.....

Signature of ~~[ ]~~ application respondent

[ ] lawyer for application respondent(s)

.....*Ian Robb Forgie*.....