Wolkowicz v. Avignon Inc.

RE: Reina Wolkowicz and Irving Wolkowicz, Plaintiffs, and Avignon Inc., York Region Standard Condominium Corporation Plan No. 1020 o/a Avignon on Bayview, Del Property Management Inc. and Garda Canada Security Corporation, Defendants

[2011] O.J. No. 4804

2011 ONSC 5899

Court File No. 11-CV-425485

Ontario Superior Court of Justice

Master D.E. Short

Heard: October 4, 2011.
Judgment: October 14, 2011.

(61 paras.)

Counsel:
Daniel Michaelson, for the Plaintiffs (moving parties).
Todd Robinson, for the proposed defendant.

ENDORSEMENT
Due Diligence (#1)

MASTER D.E. SHORT:--

Diligence

> careful and persistent work or effort "
>
> - Concise Oxford English Dictionary, 11th edition

Due Diligence

> "The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation."

- Black's Law Dictionary, 9th edition

I. Motion

1 The residential condominium unit owned by the plaintiffs was broken into and robbed on or about May 10th of 2009.

2 Four days after the robbery, one of the unit owners, Mr. Wolkowicz, who is a lawyer by profession, wrote a letter to the condominium corporation and property manager, outlining apparent deficiencies in the security system in place and indicating that he intended to hold them liable for the break in.

3 In that letter he refers to a discussion with "Larry of Garda Security". The letter does not appear to have been copied to any security company. The record before me contains no response from either of those two companies who are now defendants in this action addressing what was, in fact, the proper name of the security company referenced by the plaintiff.

4 The next correspondence sent with regard to these matters on the plaintiffs' behalf, as set out as exhibits to the affidavit sworn by counsel for the plaintiffs appears to be a letter dated July 5, 2010 addressed to "Avignon on Bayview" to the attention of the "Property Management"

5 The operative portion of the letter reads:

> "We hereby notify you that our client intends to commence an action against you for damages pursuant to the *Insurance Act*, and the paid policy of insurance."

6 That letter contains no request for any information with respect to the security company involved.

7 It is not until March 30, 2011 that a similar letter is addressed to Del Property Management containing the same paragraph noted above. Again, no request is made for particulars with respect to the identity of the security guard company in that letter.

8 On the same date, a letter again containing the same paragraph was sent to Garda Canada Security Corporation. That latter contained a specific reference to the premises involved, describing them as where "your company was responsible for providing the security to the complex building."

9 Also on March 30th 2011, counsel for the plaintiff made an inquiry to a private investigator regarding the May 2009 break in:

> "In your investigations did you learn who the security company was who worked the night of the break in? Mr. Wolkowicz believes it was Garda. Can you confirm this?"

10 The April 15th report received as a result, constitutes in my view, the tipping point in this case:

> "I have discretely contacted various security and property management personnel at Avignon on Bayview, and it appears that Garda was the security provider when the incident occurred based on comments made by personnel I spoke with, but I don't have anything in writing yet.

> I attempted to contacted Garda directly to confirm, but no one I spoke with would release any information.
>
> I am not sure there is much more I can do at this point, but I'm relatively certain Garda is it
>
> Call me if you need any further information."

11 A letter dated April 15 , was sent from counsel in the province of Québec, who indicated that they were the attorneys representing Garda Canada Security Corporation. In particular, they stated that they intended "to discuss that letter with our client before returning a response."

12 In reliance on this information, counsel for the plaintiff included Garda Security as a named defendants in the action in the Statement of Claim which was issued on May 2, 2011.

13 Garda then appointed Toronto counsel who wrote to plaintiffs' counsel on May 31, 2011, to advise;

> It transpired that our client is not in fact, the guard service which provided services to this building. At the material times, the guard services were provided by G4S.

14 As a consequence, the plaintiffs now seek to add G4S Security Service (Canada) Ltd. as a defendant or in the alternative to insert that name "in place of the misnamed Garda Canada security Corporation".

II. *Limitations Act* Issues

15 The plaintiffs commenced their action shortly before the expiry of the two-year limitation period, which was brought into force in Ontario, after January 1, 2004 by the *Limitations Act, 2002*.

16 In this case, shortly after the two years had expired, counsel for the plaintiffs learned that the proper name of the security firm that was responsible for the building was in fact G4S Security Service (Canada) Ltd. (" G4S Security").

17 As a consequence, the plaintiff now moves to join as a defendant, G4S Security.

18 This is the first of three cases currently under reserve by me, which in part, flow from the decision of the Court of Appeal to effectively determine that the equitable doctrine of Special Circumstances, no longer is available to parties who for whatever reason, have failed to commence an action within a normal, statutory limitation period.

19 While this rule of equity has been held to no longer be of application, the courts are still in a position to determine when a right to commence an action against a party ought to have been available applying the statutory concept of "Discoverability".

20 In particular, in this case, it is necessary to address what is the appropriate degree of due diligence required to permit an amendment to the statement of claim to now add a new party to the action after the basis two year period has expired.

21

I have previously considered this area of the law in my decision in *Parent v. Janandee Management Inc.*; 82 C.P.C. (6th) 321 ; 2009 CarswellOnt 5432; 180 A.C.W.S. (3d) 407

. I am relying upon my previous analysis in that decision where I discussed the requirements of Section 5 of the *Limitations Act, 2002.*

III. Analysis

22 The language of section 5 deals with the four requirements that must be considered when determining when a claim "is *discovered*" with respect to any possible defendant:

> "(a) The loss or damage had occurred;
> (b) The loss or damage was caused by or contributed to by an act or omission;
> (c) The act or omission was allegedly that of the defendant against which the claim is *now* being asserted; and
> (d) Having regard to the nature of the loss or damage, a proceeding would have been an appropriate means to seek to remedy it." [my emphasis throughout]

23 Section 5(b) of the *Act* deals with delayed discovery and provides that in, the commencement of the two year limitation can be deferred if the plaintiff can prove that the cause of action was not discovered nor discoverable until a later date.

24 However, I held in *Parent* that in my view, that reasonable efforts to discover the identity of parties responsible must be made and disclosed in a supporting affidavit, by the party seeking to add a new defendant after the initial two-year period.

25 In Central Trust Co. v. Rafuse [1986] 2 S.C.R. 147 at para. 77, the Supreme Court of Canada clearly laid out the point in time when a cause of action has been "discovered" for the purposes of commencement of a limitation period:

> "... when the material facts on which it is based have been discovered, or ought to have been discovered by the plaintiff **by the exercise of reasonable diligence**."

26 Further in *Peixeiro v. Haberman*, [1977] 3 S.C.R. 549 at para. 18, that Court confirmed the proposition that discovery of the cause of action occurs when the plaintiff knows some damage has occurred and the plaintiff has identified the tortfeasor.

27 The problem in this case is that counsel for the plaintiffs assert that they only identified the tortfeasor after the expiration of the two year period. However, in my view that does not end the inquiry. The *Act* provides in section 5(2) that a person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

28 This section puts the onus upon the plaintiff to satisfy me that it would be highly unlikely, if not impossible, with *due diligence* to have obtained the necessary information within two years of the theft occurring.

29 Counsel for the plaintiff filed no evidence of refusals by anyone to respond to a written request to confirm the identity of the relevant security firm.

30 On a claim several hundred thousand dollars it would seem reasonable to expect an early confirmation of the parties involved. While an investigator was retained at a late stage and he may, in my view, have been regrettably mislead since there had been a change in security providers after the theft. However, there was no evidence before me of difficulties encountered by simply asking the other defendants or making an earlier

demand on Garda for their position on this theft.

31 It is my view that the evidence before me is inadequate for me to conclude that sufficient "evidence to the contrary", has been presented to refute the presumption of section 5(2).

32 The onus was on the plaintiff to lead cogent evidence of either stonewalling by the defendants or an affidavit asserting that it would be inappropriate and abnormal to investigate the identity of the security company within two years of the date of the theft.

33 Section 5 (2) of the *Limitations Act, 2002* requires that the "contrary" be *proven* if the plaintiff is to avoid the presumption of knowledge contained in that subsection.

34 The Supreme Court of Canada cases referred to above provide guidance with respect to the need for "reasonable diligence". If the plaintiff exercised such diligence and was unable to find the information, then perhaps an extension of the time for bringing an action could be granted.

IV. Misnomer

35 In somewhat different circumstances in *Brand Name Marketing Inc. v. Rogers Communications Inc.* 2010 ONSC 2892, I considered the relevance of the extent of knowledge of the potential claim prior to the end of the two year period. There I made these observations:

> 83. Litigation ought not to be practiced on a "gotcha" basis. Here, the defendants clearly are alleged to have received and used "Pink Phone" ideas, as well information was provided directly or indirectly by predecessors of the entity that started this action. I do not believe that it will enhance the public's appreciation of our judicial system in circumstances such as this case if the court bars a plaintiff from proceeding with a "Pink Phone" related claim being advanced, at least beyond the present stage.
>
> 84. I believe that equity dictates that if a defendant knows that the "finger of litigation" is pointing in its direction, and an action is commenced on a timely basis based on specific actions, this court ought to take appropriate steps to ensure that the true *lis* between the parties is addressed, rather than permitting one party to perhaps escape its possible liability by relying upon a technical *Limitations Act* defence.

36 Both counsel referred me to the Court of Appeal's decision in *Ormerod v. Strathroy Middlesex General Hospital*, 2009 ONCA 697, 76 C.P.C.(6th) 238,97 O.R. (3d) 321, 255 0.A.C. 174. There the court discussed the parallels with an earlier case involving previously unidentified treating physicians:

> **22.** The motion judge found the facts before him to be indistinguishable from those in *Spirito v. The Trillium Health Centre,* 2008 ONCA 762, (O.C.A). In *Spirito* this court upheld the decision of the motion judge allowing the replacement of pseudonyms with the names of the initially unknown doctors who were the intended defendants. The motion judge had found that the unknown doctors identified by the pseudonyms Doctors

> AB and CD would have known that the litigating finger pointed at them. Therefore, she concluded the defendant doctors had been simply misnamed.

37 In his reasons Justice Juriansz, writing for the court looked at specific instances which would have brought the claim to the attention of the misnamed defendant within the limitation period:

> **24** This is a factual argument and must be rejected according to the findings of the motion judge. The motion judge found that Dr. Graham **would have known the litigating finger pointed at her**. He reached this conclusion after pointing out that in applying the *Davies* test the court is not limited to considering what the litigant would know, **but may, in addition, consider the knowledge of the intended litigant's representatives** when they received the statement of claim. Here the motion judge relied on the fact that Dr. Graham had the same insurer as Dr. Ferner. Upon receiving the claim, the **insurer would have had no doubt that the plaintiffs intended to claim against the emergency physician who treated** Mr. Omerod on June 25, 2001. The **insurer would have known or could easily have ascertained that the intended defendant** was Dr. Graham. In the motion judge's analysis, Dr. Graham's representative, upon receiving and reading the claim as a whole would have said **"of course it must mean Dr. Graham, but they have got her name wrong".** Consequently, he found that Dr. Graham's representatives and Dr. Graham herself **would have known that the "litigating finger" pointed to her.** As the court in *Spirito* observed, the finding of what the intended defendant would have known is primarily a finding of fact. This finding of fact led to the motion judge's conclusion that the inclusion of Dr. Ferner's name in the claim as the emergency physician instead of Dr. Graham was a misnomer. [my emphasis]

38 Here no such factors are present. There is no suggestion that any notice of a possible claim was provided to the intended defendant until after the two years had elapsed. In such circumstances it would seem that the case law would not support a replacement of one security company with another on the basis of Misnomer. The litigation finger was pointing elsewhere, at all material times.

[Editor's note: The court assigned two numbers to this paragraph. Lexis Nexis has removed the second number but retained the Court's subsequent paragraph numbering.]

V. Special Circumstances?

40 For cases dealing with events occurring after January 1, 2004, the Ontario Court of Appeal has held in *Joseph v. Paramount Canada's Wonderland,* (2008), 90 O.R. (3d) 401 (at paragraphs 27 and 28) that the equitable concept of special circumstances permitting an extension of time for suit, no longer applies in Ontario.

41 In *Pepper v. Zellers Inc.* (2006), 83 O.R.(3d) 648, Justice Lang addressed (at paragraphs 18 to 21 of her reasons) the judgment of Master Dash in *Wong v. Adler*

dealing with the proper approach to discoverability on a motion to add a party. She agreed that the judicial officer hearing the motion was entitled to assess the record to determine, as a question of fact, whether there was "any reasonable explanation" on the evidence demonstrating why the proposed defendants identity could not have been determined through the exercise of reasonable diligence.

42 Noting the importance of the fact that there was no affidavit which provided particulars of any steps taken to obtain information or which explained why no steps were taken, Justice Lang confirms (referring to the Court of Appeal's decision in *Zapfe v. Barnes*,(2003),66 O.R.(3d) 397) that "In most cases one would expect to find, as part of a solicitors affidavit, a list of the attempts made by the solicitor to obtain information to substantiate the assertion that the party was reasonably diligent."

43 Here there was such an affidavit, and the extent of the efforts undertaken are described at the outset of these reasons. Were those efforts sufficient to constitute, reasonable, and due, diligence?

VI. Applicable Test

44 In contrast to the generality of Rule 26 which relates to any amendment to a pleading, Rule 5.05 is more specific and grants the court more discretion over amendments which add parties to existing litigation.

45 My colleague Master Dash considered these distinctions, prior to the amendments to the *Rules* in 2010 and at a point in time when the doctrine of special circumstances was understood to be available in such cases.

46 In *Wakelin v. Gourley*, 76 O.R. (3d) 272; [2005] O.J. No. 2746 the plaintiff was moving to add third parties as defendants after passage of limitation period and claiming he did not know and could not with reasonable diligence have known names of proposed defendants until after expiry of limitation period. Master Dash held in his decision (which was upheld on appeal: [2006] O.J. No. 1442) that the court should examine evidentiary record to determine if there is issue of fact or credibility before automatically adding party where discoverability is relied upon.

47 In particular he discusses the "Evidentiary Threshold":

> [9] On this motion the proposed defendants accept that the plaintiff did not have actual knowledge of the identity of the tortfeasors he now wishes to add but claim that the plaintiff has not established on the evidence before me that he has acted with such due diligence as to justify adding them on the basis of discoverability. Wong v. Adler was a clear case of the plaintiff having actual knowledge of the third parties' identities and it was not necessary to consider due diligence. As indicated in the quoted passage from Wong v. Adler: "If the issue is due diligence rather than actual knowledge, this is much more likely to involve issues of credibility requiring a trial or summary judgment motion, provided of course that the plaintiff gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence." I left open a window however to challenge the addition of a defendant based on due diligence "if the evidence is clear and uncontradicted that

> the plaintiff could have obtained the requisite information with due diligence such that there is no issue of fact or credibility". It will be rare that the applicability of the discoverability principle based on due diligence will be determined on a motion to add a party. The third parties claim however this is exactly such a "clear and uncontradicted" case.
>
> [10] I must therefore consider how far the plaintiff must go on an amendment motion to adduce evidence so that the court can determine whether it is clear and uncontradicted that there has been no due diligence or whether there is a triable issue of fact or credibility best left to the trial judge or a summary judgment motion.

48 Master Dash considers the guidance of the Court of Appeal decision in *Zapfe v. Barnes* (2003), 66 O.R. (3d) 397, [2003] O.J. No. 2856 (C.A.) and outlines his view of the correct approach to such cases:

> [15] Therefore, as long as the plaintiff puts in evidence as to steps taken to ascertain the identity of the tortfeasors and gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence then that will be the end of the enquiry and the defendants will normally be added with leave to plead a limitations defence. This is not a high threshold. If the plaintiff fails to provide any reasonable explanation that could on a generous reading amount to due diligence the motion will be denied. If the plaintiff puts in evidence of steps taken but the proposed defendant also provides evidence of further reasonable steps that the plaintiff could have taken to ascertain the information within the limitation period then the court will have to consider whether the plaintiff's explanation clearly does not amount to due diligence. If there is any doubt whether the steps taken by the plaintiff could not amount to due diligence then this is an issue that must be resolved on a full evidentiary record at trial or on summary judgment. The strength of the plaintiff's case on due diligence and the opinion of the master or judge hearing the motion whether the plaintiff will succeed at trial on the limitations issue is of little or no concern on the motion to add the defendants. **The only concern is whether a reasonable explanation as to due diligence has been provided such as to raise a triable issue.**

49 Master Dash then applied these criteria to the fact situation before him and concluded that in the case of two of the proposed defendants, the hurdle had not been met. He observes:

> [24] As stated in *Zapfe*, in a motion of this nature one

expects the plaintiff or his solicitor to provide "a list of the attempts made by the solicitor to obtain information to substantiate the assertion that the party was reasonably diligent" and provide "an explanation for why she was unable to determine the facts". The solicitor has an obligation to give evidence of all steps taken to ascertain the identities of the proposed defendants. I must therefore assume that the above facts constitute the entirety of such steps. It would have been better if Wakelin had provided his own affidavit of what he knew and steps he or his paralegal took, and if the solicitors had given a full explanation of what they knew from Wakelin, what was in their file and **why they could not with due diligence have taken other steps to identify the drivers in question.**

[25] As I indicated, the burden is not high at the amendment stage to establish that there is at least a triable issue on due diligence. As long as the plaintiff puts in evidence as to steps taken to ascertain the identity of the tortfeasors and gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence then that will be the end of the enquiry and the defendants will normally be added with leave to plead a limitations defence. In my view, however, the plaintiff and his solicitors have failed even to meet that very low threshold. .....

[26] Clearly if a plaintiff does nothing in the two years after an accident to identify the tortfeasors, except possibly request a police report, that could not possibly amount to due diligence. The steps taken by the plaintiff outlined above were not much more than that.

[27] The solicitor for the third party Lisi is correct when she argues that this is the rare case where the addition of a defendant should be denied based on clear and uncontradicted evidence that the plaintiff could have obtained the requisite information prior to the expiry of the limitation period with due diligence. There has been no issue of fact or credibility raised to leave for a trial or summary judgment motion. Although the plaintiff's solicitor avers that the actual identities of the proposed defendants were unknown she does not state that their identities could not have been ascertained with due diligence. Although she outlined what steps were taken, she does not say why other steps could not have been taken to obtain the identities of the proposed defendants with due diligence. The reason she did not do so is obvious. She could not swear that all reasonable steps were taken, because such steps had not been taken. The

> minimum requirement as outlined in *Zapfe* of providing a reasonable explanation why the identities could not have been ascertained with due diligence has not been met. If I were to grant the motion on this dearth of evidence, the court would be acting as little more than rubber stamp rectifying solicitors' negligence or inadvertence under the guise of discoverability. The limitation period has expired and as such there is no tenable cause of action. [my emphasis]

50 In the year after Master Dash's decision the Court of Appeal considered the proper approach to a rule 5.04 motion in *Pepper v. Zellers Inc. (c.o.b. Zellers Pharmacy)* 83 O.R. (3d) 648;278 D.L.R. (4th) 175;39 C.P.C. (6th) 81. There Justice S.E. Lang, writing for the court observed:

> **"1. The fact-based inquiry**
>
> **14** Contrary to the appellants' argument, the motion was not akin to a rule 26.01 motion to amend a pleading, which "shall" be granted absent compensable prejudice. Rather, a rule 5.04(2) motion to add parties and, in this case, to add parties after the apparent expiration of a limitation period, is discretionary. While the threshold on such a motion is low, the motion judge is entitled to consider the evidentiary record to determine whether there is a live issue of fact or credibility about the commencement date of the limitation period."

51 In considering the issue of discoverability the court observes:

> **16** The first question in this case related to discoverability, a principle that provides that a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence. This principle ensures that a person is not unjustly precluded from litigation before he or she has the information to commence an action provided that the person can demonstrate he or she exercised reasonable or due diligence to discover the information. See *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. The obligation on a plaintiff to exercise reasonable diligence is a positive one: see *Soper v. Southcott*, [1998] O.J. No. 2799 (C.A.).

52 In particular, Justice Lang then notes:

> **18** The motion judge referred to the proper approach to discoverability on a motion to add a party, which was concisely and clearly set out by Master Dash in *Wong v. Adler*, (2004), 70 O.R. (3d) 460 (S.C.J.) at para. 45, aff'd [2005] O.J. No. 1400 (Div. Ct.):

> What is the approach a judge or master should take on a motion to add a defendant where the plaintiff wishes to plead that the limitation period has not yet expired because she did not know of and could not with due diligence have discovered the existence of that defendant? In my view, as is clearly implied in Zapfe, the motions court must examine the evidentiary record before it to determine if there is an issue of fact or of credibility on the discoverability allegation, which is a constituent element of the claim. If the court determines that there is such issue, the defendant should be added with leave to plead a limitations defence. If there is no such issue, as for example where the evidence before the motions court clearly indicates that the name of the tortfeasor and the essential facts that make up the cause of action against such tortfeasor, were actually known to the plaintiff or her solicitor more than two years before the motion to amend, the motion should be refused. If the issue is due diligence rather than actual knowledge, this is much more likely to involve issues of credibility requiring a trial or summary judgment motion, provided of course that the plaintiff gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence. That is not to say that such motion could never be denied if the evidence is clear and uncontradicted that the plaintiff could have obtained the requisite information with due diligence such that there is no issue of fact or credibility.
>
> **19** I agree with Master Dash that the motion judge was entitled to assess the record to determine, as a question of fact, whether there was "a reasonable explanation" on the evidence demonstrating why Ms. Aube's identity could not have been determined through the exercise of reasonable diligence. See also *Zapfe, supra* at para. 31.
>
> **20** An examination of the evidentiary record in this case shows that the appellants' material failed entirely to address whether they ought to have known Ms. Aube's identity and what, if any, steps they took to determine that identity. Indeed, the appellants offer no explanation other than to say that no one gave them the information.

53 In the case before me, notwithstanding the described attempts by the investigator hired shortly before the two year period expired, I am not satisfied that the evidence filed does much more than say, no one gave them the information.

54 As noted at the outset of these reasons The Oxford Dictionary defines "diligence" as "careful and persistent work or effort". I am not satisfied that the effort described in this case accords with that definition.

55 Black's Law Dictionary includes a reasonableness factor in its definition of "due diligence":

> The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation.

56 The effort to satisfy the legal requirement of the timely commencement this action against the proposed defendant, in my view, falls short of that required by the previously decided caselaw.

57 In coming to my conclusion, I was mindful of the Judgment of Justice Farley in *National Trust Co. v. Furbacher,* 50 A.C.W.S. (3rd) 1996. While the facts in that case were significantly different, Justice Farley does consider my responsibility in case such as this at paragraph 6 of his reasons:

> "Notwithstanding the use of "shall" in Rule 26.01, the Court may consider whether the proposed amendments (a) constitute an abuse of process; (b) conform with the rules of pleading or are otherwise unintelligible; and (c) are, on their face, tenable at law. See *Seaway* (Master), supra at pp. 88-9; *Germschied v. Valois* et al. (1989), 34 C.P.C. (2d) 267 at p. 292; *Vaiman et al v. Yates* (1987), 60 O.R. (2d) 696 (H.C.J.).
>
> As Rosenberg J. said at p. 698 of *Vaiman*:
>
> In my view the approach taken by Master Peppiatt is the preferable one. Why should the defendant be faced with an amendment and then have to move to strike it out on the grounds that it discloses no cause of action. If the master is of the opinion that it discloses no cause of action, he should not allow the amendment and state his reasons. The plaintiff then has the right to appeal.
>
> It seems to me that the principle Rosenberg J. was following was that if there were any fatal flaw (for whatever reason) in proposed amended pleadings it was not necessary to engage in a two-step process but rather it was desirable to cut down the pleading then and there."

58 As I am of the view that the plaintiffs raised no credibility issue or issue of fact that would merit consideration at a summary judgment motion or a trial, I am satisfied that this is a case where I am justified in "cutting down" the addition of the proposed defendant and any related amendments to the pleading, here and now.

VII. Disposition

59 As a consequence of the foregoing analysis, the motion of the plaintiffs seeking to

add G4S Security Service (Canada) Ltd. as a defendant in this action is dismissed.

60 While the issues raised were not without doubt, it seems to me appropriate that the costs of this day be awarded to the proposed defendant, on a partial indemnity basis.

61 I expect that counsel will be able to work out an appropriate amount. If not I may be spoken to. In any event those costs are payable by the moving party within 60 days of the date of these reasons.

MASTER D.E. SHORT