EB-2006-0322

IN THE MATTER OF the *Ontario Energy Board Act, 1988,* S.O. 1998, c.15, (Schedule B);

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of The Board's *Rules of Practice and Procedure.*

FACTUM
OF THE CORPORATION OF THE CITY OF KITCHENER

INTRODUCTION

1. This Factum is filed pursuant to the Procedural Order of the Ontario Energy Board ("the Board") dated January 27, 2005 under Rule 45.01 of the Board's Rules of Practice and Procedure ("the Board's Rules") requiring the City of Kitchener (Kitchener) to address the threshold question of whether the Board's decision in EB-2005-0051 ("NGEIR") should be reviewed before conducting the review on the merits of Kitchener's motion to review.

2. Kitchener in its motion seeks a review of those parts of the decision in NGEIR that relate to the:

a) approval given by the Board to the aggregate excess method proposed by Union Gas Limited (Union) to determine the level of cost based storage to be allocated for seasonal load balancing

needs of all of Union's in-franchise customers in Ontario including the gas utility of Kitchener;

b) the freezing of cost based storage space available for Union's in-franchise customers in Ontario at 100 PJs.

3. On the questions posed by the Procedural Order under Rule 45.01 of the Board's Rules this Factum will address:

a) the Board's jurisdiction to hear the motion;

b) the scope of the Board's discretion on motions to review its decisions;

c) the reasons supporting a decision to review the Board's decision in NGEIR as requested by Kitchener.

THE BOARD'S JURISDICTION TO REVIEW

4. Absent statutory authority, and subject to limited exceptions, the general rule is that administrative adjudicators have no inherent jurisdiction to reconsider their decisions. For the Board the statutory source of its jurisdiction to reconsider is s.21.1(1) of the *Statutory Powers Procedures Act*, R.S.O. 1990, c.s.22 ("the *SPPA*") which provides:

> A tribunal may, if it considers it advisable and if its rules made under s.25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

5. Rules 42 to 45 of the Board's Rules perfect the Board's jurisdiction under s.21.2(1) of the *SPPA* and provide the procedural mechanisms for bringing the review before the Board.

6. Rule 44.01(a) of the Board's Rules states:

Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;
(ii) change in circumstances;
(iii) new facts that have arisen;
(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

7. Rule 8 of the Board's Rules states:

8. Motions

8.01 Unless the Board directs otherwise, any party requiring a decision or order of the Board on any matter arising during a proceeding shall do so by serving and filing a notice of motion.

8.02 A notice of motion shall be in writing and shall be in the form specified in the *Practice Directions.*

8.03 The notice of motion and any supporting documents shall be filed and served within such a time period as the Board shall direct.

8.04 Unless the Board directs otherwise, a party who wishes to respond to the notice of motion, shall file and serve, at least two calendar days prior to the motion's hearing date, a written response, an indication of any oral evidence that party seeks to present, and any evidence the party relies on, in appropriate affidavit form.

8.05 The Board, in hearing a motion, may permit oral or other evidence in addition to the supporting documents accompanying the notice, response or reply.

8. The grounds in Kitchener's motion relating to errors in fact fall squarely within the scope of Rule 44.01. However, the list of grounds in Rule 44.01 cannot be taken as an exhaustive list or otherwise used to limit the complete discretion given the Board by s.21.2(1) of *SPPA.* Accordingly, it is open to the Board to consider an application to review on the basis of a ground not listed in Rule 44 including grounds which constitute an error in law. It is submitted therefore that the Board has a statutory jurisdiction to review its decision in NGEIR on all of the grounds set out in Kitchener's Notice of Motion.

THE SCOPE OF THE BOARD'S DISCRETION ON A MOTION TO REVIEW

9. The power to review granted by s.21.2(1) of the *SPPA* is discretionary. It is given without conditions or limitations as to any ground that can be relied on or as to any circumstance when a review must or must not be granted.

***Russell v. Toronto (City)* (2000), 52 O.R. (3d) 9 (C.A.)**

10. It is Kitchener's respectful submission that the Board ought to exercise its discretion to hear the motion on the merits for the reasons set out in the next section of this factum.

11. In dealing with jurisdictional or other threshold questions before proceeding to hear the merits of Kitchener's motion, it is submitted that the Board should not attempt to resolve any factual disputes. Rather, it is submitted that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

***Hunt v. Carey* (1990), 74 D.L.R. (4th) 321 at 335 (S.C.C.)**

Reasons supporting Reconsideration

A. The method for allocating Ontario storage space affects all customers in Ontario

12. The allocation of storage space is not a customer specific issue relating only to Kitchener. As described below, it limits the storage available to serve Ontario customers so as to increase the cost of Union's annual gas supply plan and the costs of furnishing late season load balancing not covered by the gas supply plan and forces Ontario customers to the otherwise unnecessary expense of winter gas purchases in order to maintain reliable service; all contrary to s.2(2) of the *Ontario Energy Board Act*, 1998, S.O. 1998 c.15 (the "Act") which requires the Board "to protect the interest of consumers with respect to prices and the reliability and quality of gas service".

13. The issue has an additional impact on the 45 semi-unbundled customers in the T1 and T3 rate classes in that 35 of them have contractual allocations which exceed aggregate excess. In this group, aggregate excess will force Kitchener to the otherwise unnecessary expense of winter gas purchases in order to provide the late season load balancing function currently provided by its existing contractual storage allocation.

14. Accordingly, it is submitted that the matters raised in this motion engage the fundamental responsibilities of the Board under the *Act* to provide reliable gas service to the consumers in Ontario without the imposition of unnecessary costs and unreasonable utility rates.

NGEIR decision, p.18
Exhibit J12.2, p. 56

***Ontario Energy Board Act,* 1998 c. 15, s.2.2**

B. The Board in NGEIR failed to take into account the fact that aggregate excess unnecessarily increases utility rates and therefore offends the requirement of just and reasonable rates under ss. 2 and 36 of the Act.

15. Gas Utilities have three basic sources of supply to meet the needs of their customers during winter periods; storage, daily contract deliveries and winter spot purchases. With respect to storage capacity, the Board has approved for Union, on an annual planned basis, the requirement that it retain sufficient storage capacity for late season load balancing sufficient to meet a reasonable standard of security of service for its customers. This standard requires Union to maintain 2 control points for storage inventory:

(a) On March 1 of each year sufficient storage inventory to meet design day demand;

(b) On March 31 of each year storage inventory of 5.6 bcf to manage daily variances and load balancing in April.

Exhibit X 3.1, Appendix F
Transcript Vol. 12, pp. 38, 39

16. The above requirements for storage inventory on March 1 and March 31 are annual planned requirements which do not vary in periods of colder or warmer than normal weather.

Exhibit X 3.1, Appendix F
Transcript Vol. 12, pp. 38, 39

17. The aggregate excess allocation is exhausted by March 31 in a year of normal weather. Accordingly, aggregate excess is not designed to meet Union's storage requirement at March 31 for load balancing in April. If the weather is normal or colder than normal, Union is required to meet its late season storage requirements by purchasing winter spot gas. On a smaller scale, aggregate excess creates the same problem for the Kitchener utility.

Transcript Vol. 12, pp. 40 and 123

18. Union acknowledges that the cost of winter spot gas exceeds the cost of gas purchased and stored before November 1.

Transcript Vol. 12, p. 117

19. There is no evidence that aggregate excess represents the least cost method of meeting late season storage requirements for Ontario customers.

Transcript Vol. 6, pp. 67-70
Transcript Vol. 12, pp. 81, 82
Exhibit J12.2, at p. 74

20. The least cost mix of winter purchases and November 1 storage allocation to meet load balancing requirements is ascertainable with the use of planning tools such as the computer program SENDOUT. Enbridge Gas Distribution Inc. ("Enbridge") testified that it uses SENDOUT to determine the optimal mix of supply sources and storage to meet its load balancing requirements. In other words, Enbridge uses SENDOUT to solve for the optimal amount of storage in its gas supply plan as opposed to fixing storage on the basis of aggregate excess or some other method. Given the evidence of Enbridge during the course of the hearing, the Board's finding at page 85 of the NGEIR decision to the affect that

Enbridge uses a methodology similar to that of Union's for storage allocation is questionable.

Transcript Vol. 6, pp. 67-70

Union on the other hand does not attempt to determine the optimal mix of November 1 storage and winter purchases for the purpose of meeting its service requirements. Rather Union's storage level for November 1 is fixed by the aggregate excess method. Union makes no attempt to produce a least cost approach to meet its load balancing requirements.

21. The evidence given in NGEIR indicates that Union's approach of fixing storage allocation on November 1 by aggregate excess unnecessarily adds an average of 1.6 million dollars annually to the cost of its gas supply plan and additional costs when it is required to purchase winter spot gas to provide a reserve of 5.6 bcf on March 31.

Exhibit J12.2, at pp. 44, 47, and 50
Vol. 12, pp. 83-84

22. The Board in NGEIR ignored the fact that under normal weather aggregate excess imposes unnecessary costs on customers and therefore causes unreasonable rates contrary to ss. 2 and 36 of the Act. Accordingly, the use of aggregate excess, and the unnecessary costs associated with its use, will continue to be contentious issues in any subsequent rate proceeding. In these circumstances, it is submitted that the Board should exercise its discretion to rescind and correct the decision in NGEIR to ensure that the allocation method for storage does not unnecessarily increase utility rates. It is submitted that reconsideration is appropriate where a tribunal, as here, has ignored its statutory mandate.

***Russell v. Toronto (City)* (2000), 52 O.R. (3d) 9 (C.A.)**

C. There is no Evidence to Support the Board's Conclusion that aggregate excess meets the reasonable load balancing requirements of the Kitchener utility

23. As noted in paragraph 15 of this Factum, the Board has approved the storage component of Union's gas supply plan. The storage component has two essential requirements:

a) sufficient gas in storage on March 1 to meet design day demand;
b) sufficient gas in storage on March 31 to provide a reserve.

24. The evidence at the hearing establishes that under aggregate excess Kitchener would have been at risk in 5 of the past 6 years because it would not have received full deliverability from storage on March 1 and therefore would not have met the standards set by the Board for customers in southwestern Ontario served by Union which requires full deliverability from storage on that date. Although Kitchener's rates are not regulated by the Board, it is still entitled to the protection of s.2.2 of the *Act*. It is submitted that this provision is violated by the decision in NGEIR which forces the Kitchener utility to the otherwise unnecessary expense of winter spot purchases to deliver the equivalent standard of service to its customers.

Transcript Vol. 12, p. 193

25. The evidence at the hearing also established that storage under the aggregate excess method is exhausted on March 31 and therefore is not available to provide the reserve that utilities in Ontario, including Kitchener, requires for late season load balancing.

Transcript Vol. 12, p. 40

26. In assessing the sufficiency of aggregate excess for Kitchener, the Board ignored the evidence referred to in paragraphs 24 and 25, above, and instead referred to the evidence argued by Union that "... there has been only one occasion in the past 5 years when Kitchener's storage allocation was insufficient". However, the actual allocation to Kitchener over the past 6 years (to which this evidence referred) has been at a contractual level which is 10.6% higher than aggregate excess. Accordingly, the evidence relied on by the Board was unrelated to the sufficiency of aggregate excess for Kitchener.

NGEIR Decision, p. 95

Transcript Vol. 12, p. 176

27. It is submitted that the Board should exercise its discretion to reconsider and correct the injustice and error in law of a decision made in the absence of any supporting evidence and contrary to the evidence.

E. Freeze on cost based storage is contrary to ss. 2 and 36 of the *Act*

28. There is currently no shortage of storage space in Ontario for the purpose of serving the Ontario consumer. The "need" asserted by the utilities to develop new storage is not a matter which engages the Ontario public interest or the Board's statutory duty of regulating utility services for the Ontario consumer.

29. On the other hand, the Board's approval in NGEIR of a freeze or a cap on the amount of cost based storage to be reserved for Union's in-franchise use will,

over time, lead to an increase in utility rates. In addition, Ontario's storage reserves provide a physical hedge against the ever increasing volatility in gas prices. It allows the Ontario consumer to plan off-peak purchases to minimize exposure to price run-ups which often result from winter demand.

Exhibit K12.9

30. In the circumstances, it is clearly not in the interest of Ontario or of the gas consumers of Ontario to limit the level of cost based storage in order to increase and secure the space available for sale at market to out of Ontario users. Accordingly, this portion of the decision is contrary to the interest of Ontario and contrary to ss. 2 and 36 of the *Act* which requires the Board to give primacy to the needs of Ontario consumers.

31. It is submitted that the Board's power to review should be used to rescind and correct this portion of the NGEIR decision.

F. Considerations respecting the right of appeal to the Divisional Court or a petition to the Lt. Governor in council

32. It is submitted that any hearing before the Divisional Court or the Lt. Governor in council, as the case may be, will be advanced by the opinion of the Board on a review of the matters raised in this Motion.

33. It is further submitted that because an appeal to the Divisional Court is limited to questions of law and jurisdiction, a review by the Board is better suited to address the issues raised in Kitchener's Notice of Motion.

***Ontario Energy Board Act*, s. 33 (1) and (2) and s. 34(1) (*supra*)**

ALL OF WHICH IS RESPECTFULLY SUBMITTED

_____

J. Alick Ryder, Counsel to the City of Kitchener

SCHEDULE "A"

Tab

1 ***Russell v. Toronto (City)*** **(2000), 52 O.R. (3d) 9 (C.A.)**

2 ***Hunt v. Carey*** **(1990), 74 D.L.R. (4^{th}) 321 at 335 (S.C.C.)**

1 of 8 DOCUMENTS

Russell v. Shanahan et al.; Ontario Municipal Board, intervenor*
[Indexed as: Russell v. Toronto (City)]

52 O.R. (3d) 9

[2000] O.J. No. 4762

Docket Nos. C33545 and C33549

Court of Appeal for Ontario

Finlayson, Labrosse and Weiler JJ.A.

December 19, 2000
* Application for leave to appeal to the Supreme Court of Canada was dismissed with costs August 9, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28428, S.C.C. Bulletin, 2001, p. 1413.

Administrative law--Boards and tribunals--Power to review --Ontario Municipal Board--Jurisdiction--Power to review and reconsider decision--Municipality passing by-law having effect of prohibiting development on ravine lots - Landowner's appeal for exemption dismissed--Landowner applying for review hearing --Review Panel granting exemption to zoning by-law--Review Panel having jurisdiction to substitute its decision for decision of First Panel--Board having wide power to review and reconsider its decisions--Divisional Court erring in setting aside decision of Review Panel--Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 43.

Planning--Zoning--Exemptions--Ontario Municipal Board --Jurisdiction--Power to review and reconsider decision --Municipality passing by-law having effect of prohibiting development on ravine lots--Landowner's appeal for exemption dismissed--Landowner applying for review hearing--Review Panel granting exemption to zoning by-law--Review Panel having jurisdiction to substitute its decision for decision of First Panel--Board having wide power to review and reconsider its decisions--Divisional Court erring in setting aside decision of Review Panel--Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 43

In 1995, R purchased a vacant ravine lot in the City of Toronto, and the day after he applied for a building permit to build a home, the City passed an interim control by-law prohibiting all uses on his lot and three others for one year. In 1997, the City enacted a new ravine control by-law that effectively prohibited construction on the four ravine lots. R and D, another ravine lot owner, appealed to the Ontario Municipal Board for exemptions to the new by-law. After a three-week hearing, their appeal was dismissed, the Board concluding that the by-law had been enacted for the valid planning purposes of protecting ravines from development. R and D sought a review of the Board's decision pursuant to s. 43 of the Ontario Municipal Board Act, which provides that "the Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it." After a one-day hearing, the Review Panel granted the application on the basis that the First Panel had ignored the long-standing policy of the Board that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public, then the zoning will not be approved unless the appropriate authority is prepared to acquire the lands within a reasonable time or the municipality can justify the drastic result of the by-law. R's neighbours and the City appealed only the R decision to the Divisional Court. The Divisional Court allowed the appeal, holding that in the absence of manifest error on the part of the First Panel, the Review Panel was not entitled to substitute its own decision. R and the Board both appealed the judgment of the Divisional Court.

Held, the appeals should be allowed.

The Review Panel had the jurisdiction to substitute its opinion for the First Panel. On the whole, courts have been mindful of the uniqueness of the power to review in administrative proceedings and have been loath to interpret the power narrowly. Section 43 confers a broad jurisdiction on the Board to review its decisions. To say that the Review Panel had the power to review an earlier decision, but without the ability to reconsider it, amounted to no power at all. The Divisional Court erred because it failed to appreciate the distinction between the Review Panel's wide plenary power under s. 43 of the Ontario Municipal Board Act to rehear or review with the Board's self-imposed directive that limited the exercise of that power to two main circumstances, that is, first, to correct typographical or clerical errors and, second, in circumstances of allegations of fraud, new evidence and failure of natural justice or material failure of fact or law. The Divisional Court did not appreciate that the requirement for the applicant for review to show a "manifest error" in the decision of the panel under review was an internal guideline of the Board, not a requirement of s. 43. It was up to the Review Panel to determine on the facts of each case when manifest error has occurred. Further, the Divisional Court erred in interpreting the reasons of the Review Panel. The reasons did not state that the municipality cannot "down-zone" property without providing compensation. The Board was not taking issue with the ability of the municipality to pass such a by-law; rather, it was asserting its own independent jurisdiction to insist upon a justification for such a drastic action. The Review Panel's decision was within its jurisdiction under s. 43. In the exercise of its jurisdiction, it was not necessary for the Review Panel to make an express finding that the by-law as amended complied with the Official Plan, as required by s. 24 of the Planning Act, R.S.O. 1990, c. P.13.

Cases referred to

Canada Mortgage & Housing Corp. (Re) (1994), 31 O.M.B.R. 471 (sub nom. Canada Mortgage and Housing Corp. v. Vaughan (City)); Commercial Union Assurance v. Ontario Human Rights Commission (1988), 63 O.R. (2d) 112, 20 C.C.E.L. 236, 47 D.L.R. (4th) 477, 26 O.A.C. 387 (C.A.); Hall v. Ontario (Ministry of Community and Social Services) (1997), 154 D.L.R. (4th) 696 (Ont. Div. Ct.); Merrens v. Metropolitan Toronto (Municipality), [1973] 2 O.R. 265, 33 D.L.R. (3d) 513 (Div. Ct.); Nepean (Township) Restricted Area By-law 73-76 (Re) (1979), 10 O.M.B.R. 76 (Lieut. Gov. in Council); varg (1978), 9 O.M.B.R. 36; St. Catharines (City) v. Faith Lutheran Social Services Inc. (1991), 4 M.P.L.R. (2d) 225 (Ont. Gen. Div.)

Statutes referred to

Ontario Municipal Board Act, R.S.O. 1990, c. O.28, ss. 43, 96
Planning Act, R.S.O. 1990, c. P.13, as am., ss. 24, 34(1), 38(4)

Authorities referred to

Reid, Administrative Law and Practice (Toronto: Butterworths, 1971)
Rogers, Law of Canadian Municipal Corporations, 2d ed. (Toronto: Carswell, 1971-), vol. 2, loose-leaf

APPEAL from a judgment of the Divisional Court (MacFarland, Ferrier and Winkler JJ.) (1999), 5 M.P.L.R. (3d) 14

that set aside a decision of a Review Panel of the Ontario Municipal Board.

Stephen Diamond, for appellant.
Leo F. Longo, for respondents Shanahan, Triggs, McFayden and Clarke.
Leslie Mendelson and William Hawryliw, for respondent City of Toronto.
Leslie McIntosh, for the Ontario Municipal Board.

The judgment of the court was delivered by

[1] **FINLAYSON J.A.**:--Derek Russell ("Russell") and the Ontario Municipal Board (the "Board") appeal separately the judgment of the Divisional Court [reported (1999), 5 M.P.L.R. (3d) 14] setting aside the decision of a panel of the Ontario Municipal Board (the "Review Panel") dated September 3, 1998, and restoring an earlier decision of another panel of the Ontario Municipal Board (the "First Panel") dated December 16, 1997. The Ontario Municipal Board was represented at the hearing before the Divisional Court pursuant to s. 96(2) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 (the "Act"), and limited its submissions to jurisdictional issues.

Facts

[2] In 1995, Russell purchased a vacant ravine lot on Glen Road in Rosedale for $50,000 with the intention of building a home. To build a home, Russell needed to obtain a building permit from the City of Toronto. He applied for a permit on July 26, 1995. His plans and drawings complied with all the applicable zoning by-laws, but he needed City Council's approval pursuant to the City's ravine control by-law. The day after Russell made his application, the City's Land Use Committee directed the Planning Commissioner to conduct the study of four Rosedale properties located on the ravine. Russell's property was one of the four lots under study. On August 14, 1995, City Council enacted Interim Control By-law 1995-0550, prohibiting all uses on the four lots for one year.

[3] On December 23, 1996, the Planning Commissioner provided a report to City Council recommending that the existing residential zoning be retained for the four properties studied, allowing single-unit homes to be built. City Council rejected the recommendation and retained outside planning consultants. On July 14, 1997, the outside consultants' report was enacted by City Council in the form of a new ravine control by-law (Ravine Impact Boundary By-law 1997-0369) that effectively prohibited any construction on Russell's lands. The purported intention of the by-law was to protect ravines from development. The three other vacant Rosedale properties were likewise affected.

[4] Another Rosedale property owner, Vera Dickinson (who had owned a vacant ravine lot on Beaumont Road for 36 years), and Russell, appealed to the Board under the provisions of the Planning Act, R.S.O. 1990, c. P.13, as amended, for exemptions from the new by-law. There was a three-week hearing during which 12 experts were called. Opposing the appeals were the City and several Rosedale ratepayers.

[5] The First Panel dismissed the appeals, finding that there was no reason to exempt the appellants from the application of the by-law, which had been enacted "for a valid planning purpose, to protect ravines from development". Russell and Dickinson sought a review of the First Panel's decision by a Review Panel of the Board pursuant to s. 43 of the [Ontario Municipal Board] Act. Section 43 provides: "The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it."

[6] After a one-day hearing, the Review Panel granted the review application on the basis that the First Panel had ignored the long-standing policy of the Board in dealing with this type of zoning by-law, which was first set out in its decision Re Nepean (Township) Restricted Area By-law 73-76 (1978), 9 O.M.B.R. 36 at *p.* 55:

> This Board has always maintained that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved. We do not wish or intend to depart from that general principle and we hope the solution suggested will allow the township to achieve its goals and at the same time be fair to the land-owner.

The Review Panel accordingly allowed the appeals and amended the by-law to exempt the two applicants' properties.

[7] Russell's neighbours and the City appealed only the Russell decision, with leave, to the Divisional Court. The Divisional Court allowed the appeal, holding that in the absence of "manifest error" on the part of the First Panel, the Review Panel was not entitled to substitute its own opinion. Specifically, MacFarland J. for the court stated [at p. 15 M.P.L.R.]:

> We are of the view that all the questions posed for the opinion of the court must be answered in the affirmative. Even if the effect of the by-law was to sterilize the lands owned by the Respondent Russell, the Board erred in overturning the Hearing [Board] decision for that reason. The Planning Act clearly gives the municipality the right to pass the by-law in question and there is clear authority that such right does not carry with it a corresponding obligation to pay compensation absent bad faith on the part of the municipality or specific statutory obligation to this effect. As was stated by Estey J. in British Columbia v. Tener [[1985] 1 S.C.R. 533 at p. 557], a decision of the Supreme Court of Canada,
>
> > Ordinarily in this country . . . compensation does not follow zoning either up or down.
>
> In its hearing decision, the Board applied the existing authority to the facts as it found them and in our view it did so correctly. It is not open to the Board in a Section 43 review to substitute its opinion for that of the Board which heard the matter on the merits over a three-week hearing save in exceptional circumstances.
>
> It is apparent that the Board on review simply preferred an approach other than the approach taken by the Hearing Board. This does not, in our view, constitute "manifest error" on the part of the Hearing Board which did as it is obliged to do in weighing the public and private interests and in result favoured the public interest over the private interest of Mr. Russell.

[8] The Divisional Court also faulted the Review Panel's decision on the basis that it failed to consider s. 24 of the Planning Act, dealing with an amendment to an official plan [at pp. 15-16 M.P.L.R.]:

> There is nothing in the Board's decision to indicate whether it considered the effect of its decision in relation to the mandatory provision of subsection 1 of Section 24 of the Planning Act. The decision in this respect is simply silent and in the face of the mandatory requirement of subsection 1, that is not sufficient. The Board is obliged to consider this aspect and it did not do so and fell into error.

Relevant Statutory Provisions

> Ontario Municipal Board Act
>
> 43. The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.
>
> Planning Act
>
> 24(1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.
>
> (2) If a council or a planning board has adopted an amendment to an official plan, the council of any municipality or the planning board of any planning area to which the plan or any part of the plan applies may, before the amendment to the official plan comes into effect, pass a by-law that does not conform with the official plan but will conform with if the amendment comes into effect, and the by-law shall be conclusively deemed to have conformed with the official plan on and after the day it was passed if the amendment come into effect.
>
> . . . . .
>
> (4) If a by-law is passed under section 34 by the council of a municipality or a planning board in a planning area in which an official plan is in effect and, within the time limited for appeal no appeal is taken or an appeal is taken and the appeal is withdrawn or dismissed or the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan, except, if the by-law is passed in the circumstances mentioned in subsection (2), the by-law shall be conclusively deemed to be in conformity with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect.

. . . . .

34(1) Zoning by-laws may be passed by the councils of local municipalities:

. . . . .

3.2 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,

i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,

ii. that is a significant corridor or shoreline of a lake, river or stream, or

iii. that is a significant natural corridor, feature or area.

Issues

(1) Did the Divisional Court err in holding that it was not open to the Review Panel of the Board to substitute its opinion for that of the First Panel of the Board under s. 43 of the Act?

(2) Was the Review Panel correct in ruling that the First Panel had made a manifest error?

(3) Was it necessary for the second panel of the Board to hold a hearing to determine that the by-law as amended was in conformity with s. 24(1) of the Planning Act?

Analysis

Issue 1: Did the Review Panel have jurisdiction under s. 43 to substitute its opinion?

[9] In my opinion, the Divisional Court failed to appreciate the distinction between the statutory authority of the Review Panel to rehear or review its own decisions under s. 43 of the Act and the self-imposed directive of the Board on the exercise of that power.

[10] The Board has developed a general policy with respect to the exercise of its wide plenary power under s. 43. In Practice Direction 12, dated October 31, 1997, the Board stated that it would exercise its power under s. 43 in two main circumstances. The first, under Part A, is to correct "typographical or clerical errors and minor omissions". The second, in Part B, [is] where the Board sets out three "reasons for review" in addition to minor errors. They are an "allegation of fraud", "new evidence" and "failure of natural justice or material failure of fact or law".

[11] In Canada Mortgage and Housing Corp. v. Vaughan (City) (1994), 31 O.M.B.R. 471, the Board set out its jurisprudence with respect to s. 43 at pp. 474-75:

> The jurisprudence of the board in this regard has been most clear. The past decisions indicate that we are reluctant to grant a s. 43 review unless there is a jurisdictional defect, or where there has been a change of circumstances or new evidence available, or where there is a manifest error of decisions or if there is an apprehension of bias or undue influence. While the list may not be exhaustive and the board's discretion should not be fettered unduly on an a priori basis, there is a common thread running through all the cases dealing with this question of review. We cannot allow any of our decisions to be reviewed or retried for some flimsy or unsubstantial reasons. As an adjudicative tribunal which renders decisions that have profound effects on public and propriety interests, our decisions should be well-considered and must have some measure of finality. If a motion is launched on grounds other than those enumerated, it should be to the Divisional Court which has either the compet ence and the authority to overturn our findings of fact and law. It never has been nor would ever be our wont to constitute ourselves as an appellate body, routinely reviewing or rehearing our own decisions.

(Emphasis added)

[12] The question whether s. 43 empowers a review panel to rescind the decision of an earlier panel based on the misapplication of a planning principle was considered by a single judge of the Divisional Court on an application for leave to appeal from a decision of the Board in St. Catharines (City) v. Faith Lutheran Social Services Inc. (1991), 4 M.P.L.R. (2d) 225 at p. 236 (Ont. Gen. Div.). There, White J. held:

> . . . s. 42 [now s. 43 of the Act] contemplates the Board reviewing its own decision in the event that it is satisfied that in any previous decision it has misinterpreted the facts, or wrongly assessed them; that is, that it has misinterpreted the planning evidence, or wrongly assessed the planning evidence, or failed to apply good planning policy in the entire matter.
>
> . . . [T]he Board had full jurisdiction to grant a rehearing of the decisions of Mr. Cole on the basis that Mr. Cole had misapprehended the planning evidence, and had given a decision that reflected bad planning policy. The wisdom of that policy is entirely a matter for the Board. It is not the type of matter that a court is equipped to deal with. . . .

[13] In the case at bar, the Review Panel considered the First Panel to have committed a "manifest error" by placing "the public interest uppermost in [its] mind" and by failing to apply the planning "principle" concerning "down-zoning" developed in the Board's past policies and jurisprudence, which require a balancing of public and private interests when considering whether to approve zoning by-laws.

[14] The Divisional Court erred in ruling that s. 43 of the Act did not permit the Review Panel to substitute its decision for that of the First Panel. To say that the Review Panel has the power to review an earlier decision without the ability to reconsider it amounts to no power at all. In Merrens v. Metropolitan Toronto (Municipality), [1973] 2 O.R. 265 at p. 278, 33 D.L.R. (3d) 513 at p. 526 (Div. Ct.), Lacourcière J. referred to the following passage in Reid, Administrative Law and Practice (Toronto: Butterworths, 1971), at p. 103:

> The power to reconsider decisions is peculiar to tribunals. It is not found in the law-courts. Its existence is the consequence of a general lack of provisions for appeal, particularly on questions of fact, from tribunals, and of the regulatory nature of most tribunals. In both respects the tribunals differ from the courts. The power to reconsider thus appears to be an appropriate means both for the correction of errors in the absence of an appeal and to permit adjustments to be made as changes in the regulated activity occur. The importance of such a power has been recognized by the courts.

[15] On the whole, courts have been mindful of the uniqueness of the power of review in administrative proceedings and have been loath to interpret the power narrowly. For example, the Divisional Court has repeatedly stressed the wide nature of such powers and has refused to read them down: Merrens, supra, St. Catharines, supra, and Hall v. Ontario (Ministry of Community and Social Services) (1997), 154 D.L.R. (4th) 696.

[16] This court, in Commercial Union Assurance v. Ontario Human Rights Commission (1988), 63 O.R. (2d) 112, 47 D.L.R. (4th) 477, held that the power of reconsideration under the Ontario Human Rights Code is to be interpreted widely in order to prevent injustice. In their endorsement, Lacourcière, Zuber and McKinlay JJ.A. wrote at p. 479 D.L.R. [p. 114 O.R.]:

> We do not agree with counsel for the appellants that the broad power of reconsideration which results in a final decision requires that new facts be established: see Re Merrens and Municipality of Metropolitan Toronto [supra]. The power is important and may be the only way to correct errors where no right of appeal is provided, or to allow for adjustments even if circumstances remain unchanged. That is the meaning to be given to the maintenance of the integrity of the administrative process.

[17] The above language with reference to analogous sections in the statute governing another administrative tribunal is helpful to our analysis of the Act in the case in appeal.

[18] My own view is that the Divisional Court in the instant case interpreted s. 43 in a manner which is supported neither by the legislation nor by the weight of judicial authority. Section 43 confers a broad jurisdiction on the Board for its review authority which is in contradistinction to the narrow right of appeal to the Divisional Court provided in s. 96 of the Act. Section 96 provides:

> 96(1) Subject to the provisions of Part IV, an appeal lies from the Board to the Divisional Court, with leave of the Divisional Court, on a question of law.

[19] This narrow right of appeal supports an interpretation of the Board's reconsideration powers which is significantly broader than that stated by the Divisional Court. That court did not appear to appreciate that the requirement that an applicant for review show a "manifest error" in the decision of the panel under review is an internal guideline of the Board, not a requirement of s. 43 of the Act. The Board has seen fit to explain in Practice Direction 12 the circumstances under which it would exercise its powers on a review under s. 43 of the Act and expanded on those guidelines in Canada Mortgage and Housing Corp., supra, to say that it will correct errors on

review where there is a manifest error. In my view it is up to the Review Panel to determine on the facts of each case when manifest error has occurred. Similarly, there is nothing in s. 43 of the Act that prevents a Review Panel from "substituting its own opinion" for that of the original panel. In holding otherwise, the Divisional Court departed from established case law.

[20] In the end, the Divisional Court committed its own manifest error by substituting its opinion for that of the Review Panel. In doing so, the Divisional Court entered into a policy-making role that is outside its jurisdiction. Moreover, the Divisional Court focused solely on the jurisdiction of the City to enact the by-law in dispute and failed to address the jurisdiction of the Board on a review of an appeal by affected property owners under the Planning Act from the City's exercise of that jurisdiction. One of the functions of the Board, acknowledged countless times by the courts, is to make and apply policies. In that regard, the Board is very different from a court. Here, the Review Panel applied a policy to a set of undisputed facts and on that basis granted the relief requested by Russell. The effect of the decision by the Divisional Court was to strip the Board of its policy-making role.

[21] In a leading text on local government law, Rogers, Law of Canadian Municipal Corporations, 2d ed., vol. 2, loose-leaf (Toronto: Carswell, 1971-), the following statement is made in connection with the power of the Board to approve by-laws at p. 1502:

> Generally speaking, the Ontario Board has absolute discretion in giving or withholding its approval, and its decisions on applications for approval are not reviewable by the Divisional Court. For the most part its decisions involve questions of policy within its discretion with which the court will not interfere. In the exercise of its discretion where no statutory direction is given as to the matters which the Board is to consider when dealing with a question, then it must be taken that the legislature has left it entirely to the Board's discretion.

Issue 2: Manifest error

[22] The Divisional Court erred in its interpretation of the reasons of the Review Panel. The Review Panel did not, as the Divisional Court suggests, refuse to approve the by-law because it thought that the City could not sterilize the lands in question without providing compensation to the owners. The First Panel's decision was reversed because it did not apply a long-standing Board policy that it will not approve a by-law that has such an effect unless the municipality in question can justify such a drastic result within the guidelines set out in earlier decisions of the Board.

[23] The Review Panel found that the entirety of the Dickinson premises and a good portion of the Russell premises would be rendered unfit for development by the by-law. It said:

> The Board finds that the effect of this by-law on the applicants of the motion is profound and inexorably devastating. The underlying residential rights of both these properties will be effectively removed and these two properties will be, for all intents and purposes, completely sterilized. [The Review Panel cites the proposition from Re Nepean (Township) at p. 55, that "if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved."]
>
> This oft-quoted dicta of Mr. A. J. L. Chapman, Q.C. [in Re Nepean (Township)] is the best enunciation of the Board's long standing tendency to ensure that privately owned lands will not be transformed to public purposes such as open-space or park by zoning instruments unless there is a concomitant commitment on behalf of the municipality to expropriate or to acquire the lands in question. This rule, like many traditional rules of the Board, must be subject to a number of exceptions. We will deal with the exceptions later.

[24] The Review Panel then reiterated its "strongly held belief" that planning decisions must not allow the concerns of the public good nor private interests to become the exclusive and singular goals, but rather the Board should be motivated by its time-honoured experience that planning is often a delicate balancing between these "two noble and sometimes competing objectives". This policy recognizes that planning decisions, no matter how benevolent or farsighted their intent, can easily become "an unwitting and unquestioning tool to extinguish or debilitate the proprietary interests of an owner".

[25] Far from stating that a municipality cannot sterilize or "down-zone" private property without providing for compensation, the Review Panel asserted that the municipality can re-designate or re-zone for the public benefit to arrest a trend that is harmful or undesirable:

> Where the health and safety of existing or future inhabitants are involved, where there are patent and imminent hazards to the well being of the community, the municipality should have the unfettered discretion to sterilize the use of lands, without the additional burden of compensation. In the present case, we have not heard from the counsel from the City or from Mr. Longo that development of the applicants' lands will attract or invite such considerations.

[26] The Board was not taking issue with the ability of the municipality to pass such a by-law. Rather, it was asserting its own independent jurisdiction to insist upon a justification for such a drastic action. This was completely within its jurisdiction under s. 43 to do so.

Issue 3: Section 24 of the Planning Act

[27] When City Council adopted Ravine Impact Boundary By-law No. 1997-0369, it imposed building restrictions on ravine lands encompassing some 170 Rosedale properties. The by-law was designed to indicate precisely where residential development will be permitted. Russell and Dickinson were denied building permits because of the effect of the building constraints in the by-law. They appealed to the Board under s. 38(4) of the Planning Act and asked for exceptions for the two residential properties. It was these appeals that were heard by the First Panel.

[28] Section 24(1) of the Planning Act provides that no public work shall be undertaken and no by-law shall be passed, and "except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith". The First Panel heard the appeals and was very much alive to the need that the Ravine Impact Boundary By-law and the exceptions sought by Russell and Dickinson comply with the Official Plan. It expressly said so. However, after considering all the evidence taken over three weeks, particularly the extensive presentation by Russell, the First Panel declined to grant the exceptions and dismissed the appeals. It is common ground that in doing so it found that the by-law was in conformity with the Official Plan.

[29] The Review Panel reviewed the same evidence as the First Panel. It granted the application for a review under s. 43 of the Act, allowed the appeals under the Planning Act and amended By-Law 1997-0369 "so that the applicants lands are exempted". The suggestion that the Review Panel was not similarly aware of the need to find that the by-law as amended was in compliance with the Official Plan is to suggest that it was not aware of the basic provisions of the Planning Act, notably s. 24(4), that "where an appeal is taken and . . . the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan. . . ." As is apparent, it is not necessary for the Board to make an express finding of compliance.

Disposition

[30] For the above reasons, I would allow the appeal, set aside the judgment of the Divisional Court and order that judgment be entered restoring the decision of the Review Panel. The appellant Russell is entitled to its costs of the appeal, including the motion for leave to appeal, and of the hearing before the Divisional Court.

Order accordingly.

Carey Canada Inc. et al. v. Hunt et al.
Flintkote Mines Ltd. et al. v. Hunt et al.

[Indexed as: Hunt v. Carey Canada Inc.]

Supreme Court of Canada, Lamer C.J.C., Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ. October 4, 1990.*

Civil procedure — Pleadings — Formal validity — Respondent allegedly suffering from exposure to asbestos during course of employment — Action against defendants alleging conspiracy to withhold information about dangers associated with asbestos — Statement of claim to be struck out only when plain and obviously disclosing no reasonable claim — Not plain and obvious that statement of claim failed to disclose reasonable claim — Statement of claim allowed to stand.

The respondent H, a retired electrician, alleged that he was exposed to asbestos fibres over the course of his employment. He brought an action against the various defendants in which he alleged that they were involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967 and that after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres. He further alleged that all of the defendants conspired to withhold information about the dangers associated with asbestos and that, as a result of that conspiracy, he contracted mesothelioma.

One of the defendants brought an application to have the action against it, which was based solely on the allegations of conspiracy, dismissed on the basis that it disclosed no reasonable claim. At first instance the motion was allowed and the action was dismissed. On appeal, the order was set aside.

On further appeal, **held**, the appeal should be dismissed.

The British Columbia Rules of Court may strike out any part of a statement of claim that discloses no reasonable claim. This rule of practice with respect to striking out is similar to that of other provinces. The test to be applied is whether it is "plain and obvious" that the statement of claim discloses no reasonable claim. The sole question is whether, assuming that all the facts the plaintiff alleges are true, the plaintiff can present a question "fit to be tried". The complexity or novelty of the question that the plaintiff wishes to bring to trial should not act as a bar to that trial taking place. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong case should prevent the plaintiff from proceeding. Only if the action is certain to fail because it contains a radical defect should the relevant portions of a statement of claim be struck out.

It was not plain and obvious that the plaintiff's claims in the tort of conspiracy disclosed no reasonable cause of action. It was not plain and obvious that allowing the action to proceed amounted to an abuse of process. It would be inappropriate to deny a litigant who was capable of fitting his allegations into the law on civil conspiracy the opportunity to persuade a court that the facts were as alleged and the tort of conspiracy should be held to apply on these facts. While courts should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts. It may well be that an agreement between corporations to withhold information that a toxic product might give rise to harm of a magnitude that could

* Chief Justice at the time of judgment.

not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort in this context. However, that is precisely the kind of question that is for the trial judge to consider in light of the evidence. It is not for the court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success. It should be left to the trial judge to ascertain whether the plaintiff can establish that the predominant purpose of the alleged conspiracy was to injure the plaintiff. It should also be left to the trial judge to consider the merits of any arguments that may be advanced to the effect that the "predominant purpose" test should be modified in the context of the case. The fact that the Quebec's *Business Concerns Records Act*, R.S.Q. 1977, c. D-12, might limit the range of information that the defendants could produce at trial is not relevant to the question whether the plaintiff's statement of claim discloses a reasonable claim.

The fact that a pleading reveals an arguable, difficult or important point of law cannot justify striking out part of the statement of claim. The fact that a plaintiff alleges that a defendant committed other torts is not a bar to pleading tort of conspiracy. It is inappropriate on a motion to strike out a statement of claim to get into the issue of whether the plaintiff's allegations concerning other nominate torts will be successful. That is a matter to be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in the light of the evidence and the submissions.

In the result the appellants have not demonstrated that those portions of the respondent's statement of claim which alleged the tort of conspiracy failed to disclose a reasonable claim.

Metropolitan Bank, Ltd. v. Pooley, [1881-85] All E.R. Rep. 949; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch.D. 489; *Dyson v. Attorney-General*, [1911] 1 K.B. 410; *Drummond-Jackson v. British Medical Assn.*, [1970] 1 All E.R. 1094; *A.-G. Duchy of Lancaster v. London & North Western R. Co.*, [1892] 3 Ch. 274; *Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd.*, [1899] 1 Q.B. 86; *Ross v. Scottish Union & National Ins. Co.* (1920), 53 D.L.R. 415, 47 O.L.R. 308; *R. ex rel. Tilfree v. Clark*, [1943] 3 D.L.R. 884, [1943] O.R. 501; *Gilbert Surgical Supply Co. v. F.W. Horner Ltd.*, [1960] O.W.N. 289, 34 C.P.R. 17, 19 Fox Pat. C. 209; *Minnes v. Minnes* (1982), 34 D.L.R. (2d) 497, 39 W.W.R. 112; *A.-G. Can. v. Inuit Tapirisat of Canada* (1980), 115 D.L.R. (3d) 1, [1980] 2 S.C.R. 735, 33 N.R. 304; *Operation Dismantle Inc. v. The Queen* (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441, 13 C.R.R. 287, 12 Admin. L.R. 16, 59 N.R. 1; *Dumont v. Canada (Attorney-General)* (1990), 67 D.L.R. (4th) 159n, [1990] 1 S.C.R. 279, 105 N.R. 228, 19 A.C.W.S. (3d) 1300; *Lonrho Ltd. v. Shell Petroleum Co. (No. 2)*, [1982] A.C. 173; *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.* (1983), 145 D.L.R. (3d) 385, [1983] 1 S.C.R. 452, 72 C.P.R. (2d) 1, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 47 N.R. 191; *Frame v. Smith* (1987), 42 D.L.R. (4th) 81, [1987] 2 S.C.R. 99, 9 R.F.L. (2d) 225, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 78 N.R. 40, **consd**

Other cases **referred to**

Evans v. Barclays Bank, [1924] W.N. 97; *Kemsley v. Foot*, [1951] T.L.R. 197; *Nagle v. Feilden*, [1966] 2 Q.B. 633; *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17, [1988] 4 W.W.R. 742, 28 C.P.C. (2d) 49; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1899), 23 Q.B.D. 598; *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563

Statutes referred to

Business Concerns Records Act, R.S.Q. 1977, c. D-12
Supreme Court of Judicature Act, 1873 (U.K.), c. 66

Rules and regulations referred to

Consolidated Rules of the Supreme Court of Ontario, 1913, Rule 124
Rules of Civil Procedure, O. Reg. 560/84, rule 21.01
Rules of Court, B.C. Reg. 221/90, Rule 19(24)
Rules of the Supreme Court, 1988 (U.K.), O. 18, r. 19, O. 25, r. 4

APPEAL from a judgment of the British Columbia Court of Appeal, 15 A.C.W.S. (3d) 355, setting aside an order of Hollinrake J. striking out allegations of the tort of conspiracy.

Jack M. Giles, Q.C., and *Robert G. McDonell*, for appellant, Carey Canada Inc.

D.M.M. Goldie, Q.C., for appellant, Lac d'Amiante du Québec Ltée.

M. Marvyn Koenigsberg, for appellant, National Gypsum Co.

David Martin and *Michael P. Maryn*, for appellants, Atlas Turner Inc., Asbestos Corporation Ltd. and Bell Asbestos Mines Ltd.

James A. MacAulay and *K.N. Affleck*, for respondent, T & N, P.L.C.

Robert G. Ward and *S.E. Fraser*, for respondent, Flintkote Mines Ltd.

J.J. Camp, Q.C., and *P.G. Foy*, for respondent, George Ernest Hunt.

The judgment of the court was delivered by

WILSON J.:—The issue raised in these appeals is whether it is open to the respondent to proceed with an action against the appellants for the tort of conspiracy. In particular, the appeals raise the question whether those portions of the respondent's statement of claim in which he alleges that the appellants conspired to withhold information concerning the effects of asbestos fibres disclose a reasonable claim within the meaning of Rule 19(24)(*a*) of the British Columbia Rules of Court.

1. THE FACTS

The respondent, George Hunt, is a retired electrician who alleges that he was exposed to asbestos fibres over the course of his employment. Mr. Hunt has brought an action against Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcox & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulation Ltd., Johns-Manville Amiante Canada

Inc., Lac D'Amiante du Québec Ltée., National Asbestos Mines Limited, The Quebec Asbestos Mining Association and T & N, P.L.C. ("the defendants").

Mr. Hunt alleges that the defendants were involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. He alleges that after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres. In addition to suing Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N in negligence, Mr. Hunt alleges that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma.

The relevant portions of Mr. Hunt's statement of claim read as follows:

> 16. At various times, the particulars of which are well known to the defendants, including the period between 1940 and 1967, the defendants mined and processed asbestos and designed, manufactured, packaged, advertised, promoted, distributed and sold a variety of products containing asbestos fibres (the "Products"), the particulars of which are also well known to the defendants.
>
> 17. After about 1934 the defendants knew or ought to have known that the asbestos fibres contained in the Products could cause diseases, including cancer and asbestosis, in those who worked with or were otherwise exposed to those fibres.
>
> 18. After about 1934, some or all of the defendants conspired with each other with the predominant purpose of injuring the plaintiff [*sic*] and others who would be exposed to the asbestos fibres in the Products, by preventing this knowledge becoming public knowledge and, in particular, by preventing it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products.
>
> 19. Alternatively, after about 1934, some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff and others who would be exposed to the asbestos fibres in the Products would result from the defendants' acts.
>
> 20. The defendants' acts in furtherance of the conspiracy referred to in paragraphs 18 and 19 include:
>
> (a) fraudulently, deceitfully or negligently suppressing, distorting and misrepresenting the results of medical and scientific research on the disease-causing effects of asbestos;
>
> (b) fraudulently, deceitfully or negligently misrepresenting the disease-causing effects of asbestos by disseminating incorrect, incomplete, outdated, misleading and distorted information about those effects;
>
> (c) fraudulently, deceitfully or negligently attempting to discredit doctors and scientists who claimed that asbestos caused disease;

(d) fraudulently, deceitfully or negligently marketing and promoting the Products without any or adequate warning of the dangers they posed to those exposed to them; and

(e) fraudulently, deceitfully or negligently attempting to influence to their benefit government regulation of the use of asbestos and the Products.

Carey Canada Inc. brought an application before the Supreme Court of British Columbia under Rule 19(24)(*a*) of the British Columbia Rules of Court seeking to have the action against it, which was based solely on the allegations of conspiracy, dismissed on the basis that it disclosed no reasonable claim. Rule 19(24) provides:

> 19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (*a*) it discloses no reasonable claim or defence as the case may be, or
>
> (*b*) it is unnecessary, scandalous, frivolous, or vexatious, or
>
> (*c*) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (*d*) it is otherwise an abuse of the process of the court,
>
> and may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client.

2. THE COURTS BELOW

(a) *Supreme Court of British Columbia*

Hollinrake J. accepted Carey Canada's submission that the only damage that could be the subject of a conspiracy action was "direct damage". Although counsel's memorandum summarizing Hollinrake J.'s oral reasons for judgment does not explain precisely what he understood the term "direct damage" to mean, it would appear that he meant damage suffered by a plaintiff that flows directly from acts aimed specifically at that plaintiff. Hollinrake J. stated:

> Dealing with the issue of direct or indirect damage, in the first kind of conspiracy Estey J. refers to the "predominant purpose" of the defendants' conduct [see: *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.* (1983), 145 D.L.R. (3d) 385 at pp. 398-9, [1983] 1 S.C.R. 452, 72 C.P.R. (2d) 1]. I think this does import direct damage. The second type of conspiracy refers to conduct "directed towards the plaintiff". I think this imports direct damage. I think these conclusions are justified by what happened in *Canada Cement LaFarge Ltd.*

Hollinrake J. therefore allowed the motion and dismissed the action against Carey Canada as disclosing no reasonable claim.

(b) *British Columbia Court of Appeal*

By order of the British Columbia Court of Appeal (dated March 30, 1989), Flintkote Mines Limited and T. & N., P.L.C. were named as respondents to the appeal in the Court of Appeal.

Anderson J.A. (Macfarlane and Esson JJ.A. concurring) allowed the appeal and set aside Hollinrake J.'s order. Anderson J.A. explained his reasons:

> (1) The cases relied upon by counsel for the respondent Carey Canada Inc. and the learned trial judge to the effect that there is no such tort as a conspiracy to injure by unlawful means where the damage is indirect, all relate to the area of competition in the marketplace and to labour-management disputes. They may not be applicable to the very different circumstances alleged in this case and to the very different social considerations.
>
> (2) The arguments as to law and fact are intricate and complex and should be dealt with at trial after all the evidence is adduced. At this stage of the proceedings it is impossible to reach the conclusion that there is no cause of action in fact or law: see *Minnes v. Minnes* (1962), 34 D.L.R. (2d) 497 at p. 505, 39 W.W.R. 112.

Esson J.A. (Anderson and MacFarlane JJ.A. agreeing) gave additional reasons stressing that the "language of predominant purpose and direct damage" in *Canada Cement LaFarge Ltd.* had arisen in cases that involved competition and pure economic loss. In Mr. Hunt's case, however, the context was very different. Mr. Hunt had suffered personal injury and claimed that by conspiring to suppress information the defendants had created a foreseeable risk of causing him the harm which he in fact suffered. It was not possible at this stage in the proceedings to determine that the damage was not sufficiently direct to be able to support an action rooted in the tort of conspiracy. Esson J.A. specifically declined to embark upon a detailed consideration of the law of conspiracy, noting:

> It has not generally been part of our tradition and, given the complexity and novelty of some of the issues raised in this case, it would I think be particularly undesirable to render a such decisions [*sic*], as it were, in a vacuum. For those reasons, as well as the reasons given by Mr. Justice Anderson, I agree in allowing the appeal.

3. THE ISSUES

The issues that arise in this appeal are:

1. In what circumstances may a statement of claim (or portions of it) be struck out?
2. Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

4. ANALYSIS

(1) *In what circumstances may a statement of claim be struck out?*

Carey Canada's motion to have the action dismissed was made pursuant to Rule 19(24)(*a*) of the British Columbia Rules of Court. This rule stipulates that a court may strike out any part of a statement of claim that "discloses no reasonable claim". The rules of practice with respect to striking out a statement of claim are similar in other provinces. In Ontario, for example, rule 21.01 of the Rules of Civil Procedure states:

> 21.01(1) A party may move before a judge,
>
> (*a*) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial savings of costs; or
>
> (*b*) *to strike out a pleading on the ground that it discloses no reasonable cause of action* or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> (2) No evidence is admissible on a motion,
>
> (*a*) under clause (1)(*a*), except with leave of a judge or on consent of the parties;
>
> (*b*) under clause (1)(*b*).

(Emphasis added.)

Rule 19(24) of the British Columbia Rules of Court and analogous provisions in other provinces are the result of a "codification" of the court's power under its inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action: see Beverly M. McLachlin and James P. Taylor, *British Columbia Practice*, 2nd ed. (Vancouver: Butterworths, 1979), vol. 1, p. 19-71. This process of codification first took place in England shortly after the *Supreme Court of Judicature Act, 1873* (U.K.), c. 66 was enacted. It is therefore of some interest to review the interpretation the courts in England have given to their rules relating to the striking out of a statement of claim.

(a) *England*

In *Metropolitan Bank, Ltd. v. Pooley*, [1881-85] All E.R. Rep. 949 (H.L.), the Lord Chancellor explained at p. 951 that before the *Supreme Court of Judicature Act, 1873*, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" even although there was no written rule stating that courts could do so. The Lord Chancellor noted that

"[t]he power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure". That is, it was open to courts to ensure that their process was not used simply to harass parties through the initiation of actions that were obviously without merit.

Before the advent of the *Supreme Court of Judicature Act, 1873* and the new *Rules of the Supreme Court* (enacted in 1883) it had been open to parties to use a "demurrer" to challenge a statement of claim. That is, it had been open to a defendant to admit all the facts that the plaintiff's pleadings alleged and to assert that these facts were not sufficient in law to sustain the plaintiff's case. When a demurrer was pleaded the question of law that was thereby raised was immediately set down for argument and decision: see Halsbury's Laws of England, 4th ed., vol. 36, para. 2, n. 7 and para. 35, n. 5; S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (Toronto: Butterworths, 1981), at p. 72; and John Hamilton Baker, *An Introduction to English Legal History*, 2nd ed. (Toronto: Butterworths, 1981), at p. 69. But a formal and technical practice eventually grew up around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were thereby raised. As the Lord Chancellor explained in *Pooley*, it was eventually thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless. It was with this objective in mind that O. 25, r. 4 of the 1883 *Rules of the Supreme Court* came into force:

> 4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment entered accordingly, as may be just.

Commenting on the relative merits of demurrers and the new rule, Chitty J. observed in *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489 at p. 496:

> Having regard to the terms of rule 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

One of the most important points advanced in the early decisions dealing with O. 25, r. 4 was the proposition that the rule was

derived from the courts' power to ensure both that they remained a forum in which genuine legal issues were addressed and that they did not become a vehicle for "vexatious" actions without legal merit designed solely to harass another party. In *Pooley, supra*, at p. 954, Lord Blackburn asserted that the new rule "considerably extends the power of the court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law". None the less, as Chitty J. subsequently observed in *Peruvian Guano Co.*, the rule was not intended to prevent a "substantial case" from coming forward. Its summary procedures were only to be used where it was apparent that allowing the case to go forward would amount to an abuse of the court's process.

In one of the better-known decisions concerning the circumstances in which resort should be had to the rule Lindley M.R. stated (*Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd.*, [1899] 1 Q.B. 86 at p. 91):

> The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. *The use of the expression "reasonable cause of action" in rule 4 shews that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases.*

(Emphasis added.) Lindley M.R.'s observations made clear that even if the rule expanded the court's power to stay actions, courts were to use the rule only in those exceptional instances where it was "plain and obvious" that, even if one accepted the version of the facts put forward in the statement of claim, the plaintiff's case did not disclose a reasonable cause of action. The question was not whether the plaintiff could succeed since this was a matter properly left for determination at trial. The question was simply whether the plaintiff was advancing a "reasonable" argument that could properly form the subject-matter of a trial.

The Master of the Rolls had made this very point some six years earlier (*A.-G. Duchy of Lancaster v. London & North Western R. Co.*, [1892] 3 Ch. 274 (C.A.) at pp. 276-77):

> Then the Vice-Chancellor says: "*The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious*; therefore, I shall let the parties plead in the usual way". It appears to me that this is perfectly right. To what extent is the Court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given under Order xxv., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched — cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take

> a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether.

(Emphasis added.) Thus, the fact that the plaintiff's case was a complicated one could not justify striking out the statement of claim. Complex matters that disclosed substantive questions of law were most appropriately addressed at trial where evidence concerning the facts could be led and where arguments about the merits of a plaintiff's case could be made.

The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: see *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.); *Evans v. Barclays Bank*, [1924] W.N. 97 (C.A.); *Kemsley v. Foot*, [1951] 1 T.L.R. 197 (C.A.); and *Nagle v. Feilden*, [1966] 2 Q.B. 633 (C.A.). Lord Justice Fletcher Moulton's observations in *Dyson*, at pp. 418-9, are particularly instructive:

> Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. *But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure.* They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. *To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.*

(Emphasis added.)

A more recent and no less instructive discussion of these principles may be found in Lord Pearson's reasons in *Drummond-Jackson v. British Medical Assn.*, [1970] 1 All E.R. 1094 (C.A.) I note that in *Drummond-Jackson* the Court of Appeal dealt with Rules of the Supreme Court, O. 18, r. 19 (the provision that replaced R.S.C. O. 25, r. 4 in 1962), a provision very similar to the rules that now govern the striking out of pleadings in Canada:

> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
>
> (*a*) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (*b*) it is scandalous, frivolous or vexatious; or
>
> (*c*) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (*d*) it is otherwise an abuse of the process of the court:
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(*a*).

Responding to Lord Denning's suggestion that the potential length and complexity of a trial should be taken into account when considering whether to strike out a statement of claim, Lord Pearson (with whom Sir Gordon Willmer concurred in separate reasons) reaffirmed the proposition that Lord Justice Lindley had advanced some eighty years earlier in *A.-G. Duchy of Lancaster:* length and complexity were *not* appropriate factors to consider when deciding whether a statement of claim should be struck out. Lord Pearson said at pp. 1101-2:

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases . . .
>
> In my opinion the traditional and hitherto accepted view — that the power should only be used in plain and obvious cases — is correct according to the evident intention of the rule for several reasons. First, there is in r 19(1)(*a*) the expression "reasonable cause of action" to which Sir Nathaniel Lindley MR called attention in *Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd.* [*supra*]. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some chance of success, when (as required by r 19(2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle v Feilden* [*supra*] Danckwerts LJ said (at p. 648):
>
> "The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one

which cannot succeed or is in some way an abuse of the process of the court".

Salmon LJ said (at p. 651):

> "It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable".

Secondly, r 19(1)(*a*) takes some colour from its context in r 19(1)(*b*) — "scandalous, frivolous and vexatious" — r 19(1)(*c*) — "prejudice, embarrass or delay the fair trial of the action" — and r. 19(1)(*d*) — "otherwise an abuse of the process of the court". *The defect referred to in r 19(1)(a) is a radical defect ranking with those referred to in the other paragraphs.* Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. *The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success.*

(Emphasis added.) Lord Pearson concluded at p. 1102:

> That is the basis of the rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. *It is not permissible to anticipate the defence or defences — possibly some very strong ones — which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to rely on at the trial.*

(Emphasis added.)

In England, then, the test that governs an application under R.S.C. O. 18, r. 19 has always been and remains a simple one: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? Is there a defect in the statement of claim that can properly be characterized as a "radical defect" ranking with the others listed in O. 18, r. 19? If it is plain and obvious that the action is certain to fail because it contains some such radical defect, then the relevant portions of the statement of claim may properly be struck out. To allow such an action to proceed, even although it was certain to fail, would be to permit the defendant to be "vexed" and would therefore amount to the very kind of abuse of the court's process that the rule was meant to prevent. But if there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues of law and fact that might have to be addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Provided that the plaintiff can present a "substantive" case, that case should be heard.

(b) *Canada*

(i) *Ontario and British Columbia Courts of Appeal*

In Canada, provincial courts of appeal have long had to grapple with the very same issues concerning the rules with respect to statements of claim that courts in England have dealt with for over a century. As noted earlier, the rules of practice in this country are to a large extent modelled on England's rules of practice. It comes as no surprise, therefore, that the test Canadian courts of appeal have adopted is in essence the same one that the courts in England favour.

Ontario: In Ontario, for example, the Court of Appeal dealt with Rule 124 (the predecessor to Rule 21.01) in *Ross v. Scottish Union & National Ins. Co.* (1920), 53 D.L.R. 415, 47 O.L.R. 308 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4, and read as follows:

> 124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

In *Ross*, Magee J.A. embraced the "plain and obvious" test developed in England, stating at pp. 421-2:

> That inherent jurisdiction is partly embodied in our Rule 124, which allows pleadings to be struck out if disclosing no reasonable cause of action or defence, and thereby, in such case, or if the action or defence is shewn to be vexatious or frivolous, the action may be stayed or dismissed or judgment be entered accordingly. *The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence.*

(Emphasis added.) Magee J.A. went on to note at p. 423:

> To justify the use of Rule 124, a statement of claim should not be merely demurrable, but it should be manifest that it is something worse, so that it will not be curable by amendment: *Dadswell v. Jacobs* (1887), 34 Ch. D. 278, 281; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: *Boaler v. Holder* (1886), 54 T.L.R. 298.

At an early date, then, the Ontario Court of Appeal had modelled its approach to Rule 124 on the approach that had been consistently favoured in England. And over time the Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything other than the clearest of cases. As Laidlaw J.A. put it in *R. ex rel. Tolfree v. Clark*, [1943] 3 D.L.R. 684 at p. 691, [1943] O.R. 501 (C.A.):

> The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: *Evans v Barclay's Bk. and Galloway*, [1924] W.N. 97 (C.A.). But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained.

More recently, in *Gilbert Surgical Supply Co. v. F.W. Horner Ltd.*, [1960] O.W.N. 289 at pp. 289-90, 34 C.P.R. 17, 19 Fox Pat. C. 209 (C.A.), Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

Thus, the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

British Columbia: In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in *Minnes v. Minnes* (1962), 34 D.L.R. (2d) 497, 39 W.W.R. 112 (B.C.C.A.), Tysoe J.A. observed at p. 505:

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, r. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. *So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a Judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out.* If the action involves investigation of serious questions of law or questions of general importance, or if the facts are to be known before rights are definitely decided, the Rule ought not to be applied.

(Emphasis added.) For his part Norris J.A. noted at p. 500 (agreeing with Tysoe J.A.):

> I might add that upon the motion, with respect, *it was not for the learned trial Judge as it is not for this Court to consider the issues between the parties as they would be considered on trial.* All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed

from that pleading with such amendments as might reasonably be made, a proper case to be tried.

(Emphasis added.) The law as stated in *Minnes v. Minnes* was recently reaffirmed in *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 at p. 23, [1988] 4 W.W.R. 742, 28 C.P.C. (2d) 49 (C.A.), *per* McLachlin J.A. Similarly, Anderson and Esson JJ.A. relied on *Minnes v. Minnes* in this appeal.

Once again then the "plain and obvious" test has been firmly embraced. The British Columbia Court of Appeal has confirmed that the summary proceedings available under the rule in question do not afford an appropriate forum in which to engage in a detailed examination of the strengths and weaknesses of the plaintiff's case. The sole question is whether, assuming that all the facts the plaintiff alleges are true, the plaintiff can present a question "fit to be tried". The complexity or novelty of the question that the plaintiff wishes to bring to trial should not act as a bar to that trial taking place.

(ii) *Supreme Court of Canada*

While this court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has none the less consistently upheld the "plain and obvious" test. Justice Estey, speaking for the court in *A.-G. Can. v. Inuit Tapirisat of Canada* (1980), 115 D.L.R. (3d) 1 at p. 5, [1980] 2 S.C.R. 735, 33 N.R. 304, stated:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Ins. Co.* . . .

I had occasion to affirm this proposition in *Operation Dismantle Inc. v. The Queen* (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441, 13 C.R.R. 287. At p. 515 I provided the following summary of the law in this area (with which the rest of the court concurred):

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is: do they disclose a reasonable cause of action, i.e., a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Ass'n*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. The Queen* (1981), 124 D.L.R. (3d) 260 at p. 268, 37 N.R. 127 (*sub nom. Dowson v. Government of Canada*) (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed"?

And at p. 508 I observed:

> It would seem then that as a general principle the courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action,

The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs.

(Emphasis added.)

Most recently, in *Dumont v. Canada (Attorney-General)*, (1990), 67 D.L.R. (4th) 159*n*, [1990] 1 S.C.R. 279, 105 N.R. 228, I made clear at p. 160 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

Thus, the test in Canada governing the application of provisions like Rule 19(24)(*a*) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(*a*).

The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

(2) *Should Mr. Hunt's allegations based on the tort of conspiracy be struck from his statement of claim?*

In the last decade the tort of conspiracy has received a considerable amount of attention. In England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt:

> If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious conspiracy actionable at the suit of C exists *unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B.* This proposition is established by five decisions at the highest level: *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* [1892] A.C. 25; *Quinn v. Leathem* [1901] A.C. 495; *Sorrell v. Smith* [1925] A.C. 700; *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch* [1942] A.C. 435 and *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173.

(See: *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563 at p. 593 (C.A.), *per* Slade L.J.) (Emphasis added.) Courts in England have, however, encountered greater difficulty in stating with precision the applicable principles governing situations in which unlawful means are employed. In particular, they have struggled to decide whether the plaintiff must establish, not just that the defendants used means that were unlawful and resulted in harm to the plaintiff, but also that the defendants actually intended to harm the plaintiff.

In *Lonrho Ltd. v. Shell Petroleum Co. (No. 2)* [1982] A.C. 173, the House of Lords dealt with a consultative case stated by arbitrators in which it was asked to consider whether the tort of conspiracy could be extended to embrace a situation where the agreement in question resulted in a contravention of penal law (unlawful means) but did not include an intention to injure the plaintiff. In the process of deciding whether the tort should be so extended Lord Diplock noted at pp. 188-9:

> My Lords, conspiracy as a criminal offence has a long history. It consists of "the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it." I cite from Viscount Simon L.C.'s now classic speech in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch* [1942] A.C. 435, 439. Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted the agreement which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement, but of concerted action taken pursuant to agreement.

Lord Diplock went on to observe that he was of the view that the rationale that had apparently fueled the development of the tort in the late-nineteenth and early-twentieth centuries, namely that "a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise" (see: *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D.

598 (C.A.) at p. 616, *per* Bowen L.J.) was somewhat anachronistic in light of modern commercial developments. Nevertheless he did not feel that this meant that the tort could now be dispensed with. He said at p. 189:

> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in *Quinn v. Leathem* [1901] A.C. 495, and accepted as good law in the *Crofter case* [1924] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

Having set out this groundwork and having thereby confirmed that the tort of conspiracy was applicable in circumstances where the defendants entered into an agreement the predominant purpose of which was to injure the plaintiff, Lord Diplock turned to the question whether the tort should be extended beyond these confines. He concluded at p. 189:

> This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already anomalous tort beyond those narrow limits that are all that common sense and the application of the legal logic of the decided cases require.
>
> My Lords, my choice is unhesitatingly the same as that of Parker J. and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

Lord Diplock's observations made clear that in order to succeed with the tort of conspiracy in England a plaintiff would have to demonstrate that the purpose for which parties acted in accordance with their agreement was to harm the plaintiff. The English Court of Appeal has recently had an opportunity to consider Lord Diplock's judgment in *Lonrho* (see: *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, *supra*) and has confirmed at p. 604 that "the House plainly intended the presence of a predominant intention to injure to be the touchstone of an actionable conspiracy". The Court of Appeal continued:

> Where the predominant intention to injure is absent but the defendants pursuant to agreement commit torts against the plaintiff, the House held, we conclude, that common sense and the legal logic of the decided cases are satisfied if the plaintiff is denied a remedy in conspiracy and left to sue on the substantive torts.

Thus, regardless of whether the alleged conspirators used lawful or unlawful means, the law in England required the plaintiff to establish that the defendants entered into the agreement with the predominant purpose of injuring the plaintiff.

Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in *Lonrho*. Indeed, this court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in *Lonrho* in *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, (1983), 145 D.L.R. (3d) 385, [1983] 1 S.C.R. 452, 72 C.P.R. (2d) 1. Justice Estey stated at p. 396:

> The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases in which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff.

This passage made clear that this court agreed with the House of Lords that where a plaintiff alleges that the defendants entered into an agreement whose predominant purpose was to injure the plaintiff and where the plaintiff alleges that he or she has in fact suffered damage as a result of the agreement, then regardless of the lawfulness of the means that the defendants are alleged to have used to implement the agreement the plaintiff will have made out a cognizable claim in the tort of conspiracy.

But what of situations in which the plaintiff alleges that there was an agreement that involved the use of unlawful means and that resulted in the plaintiff's suffering damage? Must the plaintiff also establish that the predominant purpose of the agreement was to injure him or her? It is in answering this question that Estey J. chose to follow a somewhat different path from Lord Diplock. Estey J. was of the view that it was not appropriate to go as far as the House of Lords had gone in precluding the action. He said at pp. 398-9:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

(1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,

(2) *where the conduct of the defendants is unlawful*, the conduct is directed towards the plaintiff (alone or together with others), and *the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.*

In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

(Emphasis added.)

Estey J.'s summary of the law in Canada suggests that in cases falling into the second category it may not be necessary to prove actual intent. As G. H. L. Fridman has noted in *The Law of Torts in Canada*, vol. 2 (Toronto: Carswells, 1990), at p. 265:

> The difference between the English and Canadian formulations of the tort of conspiracy lies in the way the intent of the defendants is expressed. The language of Lord Diplock seems to indicate that the necessary intent should be actual. That of Estey J. suggests that it may be possible for a court to infer an intent to injure from the circumstances even if the defendants deny they acted with any such intent.

Fridman goes on to observe at pp. 265-6

> In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.

In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

I note that in this appeal Mr. Hunt was clearly fully aware of Estey J.'s observation in *Canada Cement LaFarge Ltd.* when he prepared paras. 18 and 19 of his statement of claim. Paragraph 18 of his statement of claim follows faithfully the first proposition that

Estey J. put forward at pp. 398-9, alleging that some or all of the defendants "conspired with each other with the predominant purpose of injuring" Mr. Hunt. Paragraph 19 of the statement of claim presents an alternative argument that is faithful to the wording of Estey J.'s second proposition, alleging that "some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff" would result. If there is a defect in Mr. Hunt's statement of claim, it is certainly *not* that paras. 18 or 19 fail to follow the language of this court's most recent pronouncement on the conditions that must be met in order to ground a claim in the tort of conspiracy. In other words, given this court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim, it is not "plain and obvious" that the plaintiff's statement of claim fails to disclose a reasonable claim.

The defendants contend, however, that this court's recent pronouncements, as well as those of courts in England, make clear that the tort of conspiracy cannot be invoked outside a commercial law context and that it certainly cannot be invoked in personal injury litigation. They point out that in *Lonrho, supra*, at p. 189, Lord Diplock was not prepared to extend the tort to cover the facts of the case before him. They emphasize that Estey J. displayed a measure of sympathy for Lord Diplock's reluctance to extend the scope of the tort when he stated at p. 400 of *Canada Cement LaFarge Ltd.*:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho, supra*,, at pp. 188-9 A-C., pp. 458-4 All E.R. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law world. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

Finally, the defendants point to my observations in *Frame v. Smith* (1987), 42 D.L.R. (4th) 81, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, where I had occasion to consider whether the tort of conspiracy might be extended to cover a case in which a father was suing his former wife for denying him access to his children. Although I was in dissent in the final result, the court agreed with my observations about the tort of conspiracy (see La Forest J. at

p. 114). The defendants place a good deal of weight on my suggestion that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context" (at p. 89). I concluded that even although the tort could in theory be extended to the facts of *Frame*, it was not desirable to extend the tort to the custody and access context.

Not surprisingly, the defendants contend that it would be equally inappropriate to extend the tort of conspiracy to cover the facts of this case. The difficulty I have, however, is that in this appeal we are asked to consider whether the allegations of conspiracy should be struck from the plaintiff's statement of claim, not whether the plaintiff will be successful in convincing a court that the tort of conspiracy should extend to cover the facts of this case. In other words, the question before us is simply whether it is "plain and obvious" that the statement of claim contains a radical defect.

Is it plain and obvious that allowing this action to proceed amounts to an abuse of process? I do not think so. While there has clearly been judicial reluctance to extend the scope of the tort beyond the commercial context, I do not think this court has ever suggested that the tort could not have application in other contexts. While Estey J. expressed the view in *Canada Cement LaFarge Ltd.*, at p. 400, that the action had lost much of its usefulness, and while I noted in *Frame v. Smith*, at pp. 89-90, that some have even suggested that consideration should be given to abolishing the tort entirely (see: Peter Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C. L. Rev. 229 at p. 254), we both affirmed the ongoing existence of the tort at the date of these judgments. In my view, it would be highly inappropriate for this court to deny a litigant who is capable of fitting his allegations into Estey J.'s two-pronged summary of the law on civil conspiracy the opportunity to persuade a court that the facts are as alleged and that the tort of conspiracy should be held to apply on these facts. While courts should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

I note that in *Frame v. Smith*, at p. 91, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination". But in the appeal now before us it seems to me much less obvious

that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

The issues that will arise at the trial of the plaintiff's action in conspiracy will unquestionably be difficult. The plaintiff may have to make complex submissions about whether the evidence establishes that the defendants conspired either with a view to causing him harm or in circumstances where they should have known that their actions would cause him harm. He may well have to make novel arguments concerning whether it is enough that the defendants knew or ought to have known that a class of which the plaintiff was a member would suffer harm. The trial judge might conclude, as some of the defendants have submitted, that the plaintiff should have sued the defendants as joint tortfeasors rather than alleging the tort of conspiracy. But this Court's statements in *Inuit Tapirisat* and *Operation Dismantle Inc.*, as well as decisions such as *Dyson* and *Drummond-Jackson*, make clear that none of these considerations may be taken into account on an application brought under Rule 19(24) of the British Columbia Supreme Court Rules.

In my view, Anderson and Esson JJ.A. were entirely correct in suggesting that it should be left to the trial judge to ascertain whether the plaintiff can establish that the predominant purpose of the alleged conspiracy was to injure the plaintiff. It seems to me that they were also correct in suggesting that it should be left to the trial judge to consider the merits of any arguments that may be advanced to the effect that the "predominant purpose" test should be modified in the context of this case. Similarly, it seems to me that the argument that some of the defendants advanced, to the effect that Quebec's *Business Concerns Records Act*, R.S.Q. 1977, c. D-12, might limit the range of information that the defendants could produce at trial, is a matter that is not relevant to the

question whether the plaintiff's statement of claim discloses a reasonable claim.

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in para. 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.

In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff *alleges* that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the *facts* as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that "[u]pon proof of the commission of the tortious acts alleged" in para. 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This is a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of

conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

In the result the appellants have not demonstrated that those portions of the respondent's statement of claim which allege the tort of conspiracy fail to disclose a reasonable claim. They should not therefore be struck out under Rule 19(24)(*a*) of the British Columbia Rules of Court.

5. DISPOSITION

The appeal should be dismissed with costs.

Appeal dismissed.

Shewish et al. v. MacMillan Bloedel Ltd. et al.

[Indexed as: Shewish v. MacMillan Bloedel Ltd.]

British Columbia Court of Appeal, Taggart, Toy and Hollinrake JJ.A.
*August 15, 1990.**

Damages — Property damage — Wrongful cutting of timber on plaintiff's land — Defendant culpably negligent — Damages based on export value of timber, less costs of transport and production but with no allowance for costs of severance.

The defendant cut timber on the plaintiff's land, having omitted to follow the standard procedure of obtaining survey notes to locate the property line. In an action for damages for trespass the trial judge based damages on the best price available for export logs, less the cost of transporting the logs for export. The judge refused to make any other deduction from the export price.

On appeal by the defendant to the British Columbia Court of Appeal, **held**, allowing the appeal in part, there were two measures of damages in such cases, a milder measure (where the defendant had acted in good faith) and a severer measure; in this case the negligence of the defendant was of sufficient magnitude to attract the severer measure. On this measure, the defendant was not entitled to deduct costs of severance, but was entitled to deduct production costs, in addition to transport costs.

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* Received November 22, 1990.

SCHEDULE "B"

Tab

1 Rule 8, 42, 44 and 45 of the Rules of Practice and Procedure of the Ontario Energy Board

2. ***Statutory Powers Procedures Act*, R.S.O. 1990, c.s.22**

3. ***Ontario Energy Board Act*, 1998 c. 15, s.2.2**