Court File No.: CV-22-00088514-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ZEXI LI, HAPPY GOAT COFFEE COMPANY INC., 7983794 CANADA INC (c.o.b. as UNION: LOCAL 613) And GEOFFREY DELANEY

Plaintiffs

and

CHRIS BARBER, BENJAMIN DICHTER, TAMARA LICH, PATRICK KING, JAMES BAUDER, BRIGITTE BELTON, DANIEL BULFORD, DALE ENNS, CHAD EROS, CHRIS GARRAH, MIRANDA GASIOR, JOE JANZEN, JASON LAFACE, TOM MARAZZO, RYAN MIHILEWICZ, SEAN TIESSEN, NICHLOAS ST. LOUIS (a.k.a. @NOBODYCARIBOU), FREEDOM 2022 HUMAN RIGHTS AND FREEDOMS, GIVESENDGO LLC, JACOB WELLS, HAROLD JONKER, JONKER TRUCKING INC. and BRAD HOWLAND

Defendants

Proceeding under *Class Proceedings Act, 1992*

MOVING PARTIES' BOOK OF AUTHORITIES NOT AVAILABLE ELECTRONICALLY

(Motion pursuant to section 137.1(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43)

November 30, 2023

CHARTER ADVOCATES CANADA

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Counsel for the Defendants, GiveSendGo LLC, Jacob Wells, Chris Garrah, Nicholas St. Louis, Benjamin Dichter and Brigitte Belton

AND TO: **CHAD EROS**

[redacted]

Defendant

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2008 CarswellOnt 3820
Ontario Superior Court of Justice (Divisional Court)

Railink Canada Ltd. v. Ontario

2008 CarswellOnt 3820, 165 A.C.W.S. (3d) 822, 95 L.C.R. 28

Railink Canada Ltd. Carrying on Business as the Southern Ontario Railway, Plaintiff and Her Majesty The Queen in Right of Ontario, Defendant

Carnwath J.

Heard: April 17, 2008
Judgment: April 24, 2008
Docket: 96/08

Proceedings: refusing leave to appeal *Railink Canada Ltd. v. Ontario* (2007), 2007 CarswellOnt 7727, 95 L.C.R. 17, Crane J. (Ont. S.C.J.) [Ontario]; additional reasons at *Railink Canada Ltd. v. Ontario* (2008), 2008 CarswellOnt 3714, Carnwath J. (Ont. Div. Ct.) [Ontario]

Counsel: Leonard Marsello, Christopher P. Thompson, for Moving Party/Defendant
Kenneth R. Peel, for Responding Party/Plaintiff

Subject: Civil Practice and Procedure; Torts; Public
Related Abridgment Classifications
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Headnote
Civil practice and procedure --- Practice on appeal — Interlocutory or final orders — Interlocutory orders — Leave to appeal
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Torts --- Nuisance — Liability — Particular nuisance — Highways and streets — Obstruction or interference

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Torts --- Miscellaneous

Railway property located adjacent to site of Aboriginal protest in Caledonia, which lasted several months — Railway filed statement of claim against Ontario for police acts and omissions causing property damage and economic loss — Crown brought motion for summary judgment under R. 21.01(b), on basis that pleading disclosed no reasonable cause of action — Motion was dismissed — Crown brought motion for leave to appeal — Motion dismissed — No good reason existed to doubt correctness of motions judge's finding that Crown failed to establish action of wrongful appropriation of property could not possibly succeed.

Law enforcement agencies --- Police — Duties, rights and liabilities of officers — Conduct of officers — Negligence

Railway property located adjacent to site of Aboriginal protest in Caledonia, which lasted several months — Railway filed statement of claim against Ontario for police acts and omissions causing property damage and economic loss — Crown brought motion for summary judgment under R. 21.01(b), on basis that pleading disclosed no reasonable cause of action — Motion was dismissed — Crown brought motion for leave to appeal — Motion dismissed — Motions judge was entitled to find, on evidence before him, that Crown failed to establish that argument of proximity could not possibly succeed — No good reason existed to doubt correctness of motions judge's finding that Crown failed to establish action of negligence could not possibly succeed.

Table of Authorities

Cases considered by *Carnwath J.*:

Canadian Pacific Railway v. Vancouver (City) (2006), 18 M.P.L.R. (4th) 1, 262 D.L.R. (4th) 454, 221 B.C.A.C. 1, 364 W.A.C. 1, 2006 SCC 5, 2006 CarswellBC 404, 2006 CarswellBC 405, 88 L.C.R. 161, 40 R.P.R. (4th) 159, 345 N.R. 140, [2006] 1 S.C.R. 227 (S.C.C.) — referred to

Grant v. St. Lawrence Seaway Authority (1960), [1960] O.R. 298, 23 D.L.R. (2d) 252, 1960 CarswellOnt 103 (Ont. C.A.) — considered

Haskett v. Trans Union of Canada Inc. (2003), 224 D.L.R. (4th) 419, 169 O.A.C. 201, 2003 CarswellOnt 692, 15 C.C.L.T. (3d) 194, 63 O.R. (3d) 577 (Ont. C.A.) — referred to

Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board (2007), 2007 SCC 41, 2007 CarswellOnt 6265, 2007 CarswellOnt 6266, 87 O.R. (3d) 397 (note), 40 M.P.L.R. (4th) 1, 64 Admin. L.R. (4th) 163, 50 C.C.L.T. (3d) 1, 368 N.R. 1, 285 D.L.R. (4th) 620, [2007] 3 S.C.R. 129, 50 C.R. (6th) 279, 230 O.A.C. 260 (S.C.C.) — followed

Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1990), *(*sub nom. *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police)* 1 C.R.R. (2d) 211, *(*sub nom. *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police)* 72 D.L.R. (4th) 580, 1990 CarswellOnt 442, *(*sub nom. *Jane Doe v. Board of Police Commissioners of Metropolitan Toronto)* 40 O.A.C. 161, 5 C.C.L.T. (2d) 77, *(*sub nom. *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police)* 74 O.R. (2d) 225, 50 C.P.C. (2d) 92 (Ont. Div. Ct.) — referred to

Royal Anne Hotel Co. v. Ashcroft (Village) (1979), 8 C.C.L.T. 179, 1979 CarswellBC 657, [1979] 2 W.W.R. 462, 9 M.P.L.R. 176, 95 D.L.R. (3d) 756 (B.C. C.A.) — considered

Schenck v. Ontario (1987), 21 C.P.C. (2d) xlvii, 1987 CarswellOnt 1051, 1987 CarswellOnt 1051F, *(*sub nom. *Schenck v. Ontario (Minister of Transportation & Communications))* [1987] 2 S.C.R. 289, 50 D.L.R. (4th) 384, 79 N.R. 317, 23 O.A.C. 82 (S.C.C.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 21.01(1)(b) — referred to

R. 62.02(4)(a) — referred to

MOTION by Crown for leave to appeal from judgment reported at *Railink Canada Ltd. v. Ontario* (2007), 2007 CarswellOnt 7727, 95 L.C.R. 17 (Ont. S.C.J.) [Ontario], dismissing motion for summary judgment.

***Carnwath J.*:**

1 The motion for leave to appeal is denied.

2 The motions judge properly identified the appropriate test on a leave to appeal motion under r. 21.01(1)(b). The defendant must accept all allegations of fact in the statement of claim. The onus lies on the defendant to establish that it is plain and obvious and beyond doubt that the plaintiff cannot succeed.

3 A court should be reluctant to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion state before there is a record on which a court can analyze the strengths and weaknesses of the policy arguments. *Haskett v. Trans Union of Canada Inc.* (2003), 63 O.R. (3d) 577 (Ont. C.A.) at para. 52.

The Claims in Negligence

4 In applying the *Anns* test Crane J. found that foreseeability was not seriously in issue. As for proximity, he noted that the plaintiff's property was adjacent to the site of the protest. The rail line was used by the police in its enforcement action. He was not satisfied that a relationship of close proximity could not possibly succeed. He was entitled to come to this conclusion on the evidence before him. I find no good reason to doubt the correctness of his decision on this point.

5 As for the novelty of the claim, he noted that negligent failure to warn falls within the general principles in *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Ont. Div. Ct.).

6 He further noticed that both *Jane Doe* and *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41 (S.C.C.) contemplated duties of care owed to private individuals in specific circumstances as might be found from time to time by the courts.

7 Of particular importance to this motion is the judgment in *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*:

> [52] Police, like other professionals, exercise professional discretion. No compelling distinction lies between police and other professionals on this score. Discretion, hunch and intuition have their proper place in police investigation. However, to characterize police work as completely unpredictable and unbound by standards of reasonableness is to deny its professional nature. Police exercise their discretion and professional judgment in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work.
>
> [53] Police are not unlike other professionals in this respect. Many professional practitioners exercise similar levels of discretion. The practices of law and medicine, for example, involve discretion, intuition and occasionally hunch. Professionals in these fields are subject to a duty of care in tort nonetheless, and the courts routinely review their actions in negligence actions without apparent difficulty.
>
> [54] Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals, An appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is exercise their discretion unreasonably. This is in the public interest. *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, (above)

8 Following paragraphs in *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board* effectively dispose of the defendants submissions in this matter with respect to "chilling effect" and "flood of litigation". Crane J. concluded that

the defendant had not satisfied the onus of establishing that the negligence claims could not possibly succeed. He was entitled to come to this conclusion on the evidence before him. I find no good reason to doubt the correctness of his decision.

The Alternative Claim of Nuisance

9 Crane J. adopted the definition of nuisance as stated in *Royal Anne Hotel Co. v. Ashcroft (Village)* (1979), 8 C.C.L.T. 179 (B.C. C.A.) at 185 :

> A person then may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use of enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

10 Crane J. then noted the assumed fact that the police directed the plaintiff not to clean the debris from its rail line nor to carry on its business of operating its trains on the line. Whether this was an unreasonable interference was a question for the trier of fact in balancing private loss against the social utility of the defendant's conduct. He found a parallel with the situation in *Schenck v. Ontario*, [1987] 2 S.C.R. 289 (S.C.C.).

11 Crane J. then cited *Grant v. St. Lawrence Seaway Authority* (1960), 23 D.L.R. (2d) 252 (Ont. C.A.) at p. 256:

> .....may bring actions in their own names in respect of a public nuisance when and only when they can show that they have suffered some particular, direct and substantial damage over and above that sustained by the public at large or when the interference with the public right involves a violation of some private right of those persons or when the statute has given those persons a special protection or benefit which is being invaded.

12 He noted that the plaintiff pleaded a particular, direct and substantial damage as distinct from inconvenience sustained by the public at large. He found the defendant had failed to established that the action of nuisance could not possible succeed. I find no good reason to doubt the correctness of his decision

The Claim for Wrongful Appropriation of Property

13 Crane J. found the law will provide a remedy to whomever sustains a *de facto* taking of a beneficial interest in property and the removal of all reasonable uses of the property. He cited as authority *Canadian Pacific Railway v. Vancouver (City)*, [2006] 1 S.C.R. 227 (S.C.C.) at para. 30. Since the plaintiff had pleaded those elements for the period of April 20 to June 13, 2006, he found the defendant had not satisfied its onus to establish that the action for wrongful appropriation of property could not possibly succeed. I find no good reason to doubt the correctness of his decision on this point.

Conflicting Decisions

14 In order to satisfy r. 62.02(4)(a) it is insufficient to show that two courts have exercised their discretion to produce different results. It is necessary to demonstrate a difference n the principles chosen as a guide to the exercise of such discretion. My review of the cases cited in support of the defendants submissions persuade me that they are fact driven but do not demonstrate a difference in the principles chosen as a guide to the exercise of discretion. I therefore find no conflicting decisions.

15 If the parties are unable to agree on costs they may submit brief written reasons not to exceed three pages within 15 days of the date of these reasons.

Motion dismissed.

1935 CarswellMan 71
Manitoba King's Bench

Chiswell v. Charleswood (Rural Municipality)

1935 CarswellMan 71, [1935] 3 W.W.R. 217

Chiswell v. Rural Municipality of Charleswood and Alcrest Golf Club Limited

MacDonald, C.J.K.B.

Judgment: September 18, 1935

Counsel: *L. St. G. Stubbs* , for plaintiff.
W. J. Lindal, K.C. , for defendant, Alcrest Golf Club Limited.
W. A. Johnston, K.C. , for defendant. Rural Municipality of Charleswood

Subject: Torts
Related Abridgment Classifications
Torts
XVI Nuisance
XVI.5 Miscellaneous
Headnote
Torts --- Nuisance — Practice and procedure — Burden of proof
Motion to Strike Out.
In an action by a landowner against a golf club wherein he sought an injunction on the ground of nuisance *held* , on appeal from the dismissal by the Referee of a motion to strike out certain portions of the statement of claim, that the plaintiff was entitled to show that the acts of the defendant in maintaining and operating the golf course constituted a public nuisance and that, because thereof, he suffered particular, direct, and substantial special damage, above that sustained by the public at large. His pleadings were held to meet that requirement, but one paragraph was ordered to be amended so as to confine its application to plaintiff's own property.

***Christie, Deputy Referee* :**

1 Application to strike out certain portions of plaintiff's statement of claim.

2 The statement of claim alleges that the plaintiff is the owner of lands fronting on Hilton Street in the defendant municipality; that the defendant golf club maintains and operates a golf course on lands adjoining Hilton Street, and uses in connection with said golf course certain portions of Hilton Street and other public highways in said municipality; that said Hilton Street and other highways are thereby obstructed and rendered unsafe, and that access to and egress from the lands of the plaintiff and others is interfered with; that in the course of play golf balls are driven onto the lands of plaintiff and others and retrieved therefrom, in the course of which damage is done and that thereby the golf club is maintaining a public nuisance; that the plaintiff suffers damage by reason of said nuisance above that suffered by the public generally.

3 It is contended by the defendant that the plaintiff must be limited in his allegations to that portion of the golf course and its operation from which the plaintiff suffers such special damage, and that he is not entitled to allege injury to other properties than his own.

4 There are two essentials which the plaintiff must set up to give him a right to sue for an injunction: (1) That the defendant is maintaining a public nuisance; and (2) That the plaintiff suffers damage by reason of said nuisance above that suffered by the public generally, and he must state such facts as will support these elements of his claim; that is to say, he must describe

what he complains of as constituting a public nuisance, and he must set forth the circumstances from which he claims to suffer such special damage.

5 Having established his right to sue, I think he is entitled to set forth fully what he contends constitutes the public nuisance complained of, and the circumstances in respect of which he claims damages. The extent of his relief will then depend upon the facts proved in evidence.

6 Read in this light, I think the statement of claim is not objectionable, and I would dismiss the motion with costs.

***Macdonald, C.J.K.B.* :**

7 This is an appeal from the order of the learned Referee dismissing a motion to strike out certain portions of the statement of claim particularly enumerated in the notice of motion and on the grounds mentioned therein.

8 The statement of claim goes beyond the limits of the redress sought by the plaintiff, but it does not obscure or make uncertain what he lawfully seeks. It is quite explicit on this point. He seeks redress which in part is of a public character, and, it is contended by the defendant, not within the proper competence of an individual affected conjointly with the public, and is such as should be brought before the Courts through the intervention of the Attorney-General.

9 In *Benjamin v. Storr* (1874) L.R. 9 C.P. 400 , 43 L.J.C.P. 162, Brett, J. says:

> This action is founded upon alleged wrongful acts by the defendants, viz., the unreasonable use of a highway, — unreasonable to such an extent as to amount to a nuisance. That alone would not give the plaintiff a right of action; but the plaintiff goes on to allege ... that the nuisance complained of is of such a kind as to cause him a particular injury other than and beyond that suffered by the rest of the public, and therefore he claims damages against the defendants. ... The cases referred to upon this subject show that there are three things which the plaintiff must substantiate,. beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must show a particular injury to himself beyond that which is suffered by the rest of the public. It is not enough for him to show that he suffered the same inconvenience in the use of the highway as other people do, if the alleged nuisance be the obstruction of a highway.

10 In the present case the plaintiff is entitled to show that the acts of the defendant constitute a public nuisance, and that by reason thereof he suffers particular, direct and substantial and special damage above that sustained by the public at large; and by par. 16 of the statement of claim he meets that requirement for the purpose of pleading. He is, therefore, entitled to maintain his action.

11 There are further and other allegations in the statement of claim which are simply a reiteration of the nuisance complained of; and, although not so expressed, can be held to apply to the plaintiff's alleged claim for an injunction and for damages. Par. 11 [1] should be confined to the property of the plaintiff, and properties of other residents and owners upon Hilton Street, and trespass thereon, and damage thereto should be and are hereby struck out. In other respects I do not see any objection to the statement of claim.

12 Costs in the cause.

Footnotes

1 Par. 11 read:
11. Players upon the said golf course frequently drive or hit their golf balls on to the said property of the plaintiff, and on to the properties of the other residents and owners upon said Hilton Street, and in retrieving their said golf balls trespass upon and do damage to the said property of the plaintiff and to the properties of the other residents and owners of the said Hilton Street.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Gay v. Regional Health Authority 7 | 2010 NBQB 128, 2010 CarswellNB 677, 931 A.P.R. 1, 361 N.B.R. (2d) 1, [2010] N.B.J. No. 130, 187 A.C.W.S. (3d) 346 | (N.B. Q.B., Apr 13, 2010)

1998 CarswellOnt 4898
Ontario Court of Justice, General Division

Robb Estate v. St. Joseph's Health Care Centre

1998 CarswellOnt 4898, [1998] O.J. No. 5394, 31 C.P.C. (4th) 99, 84 A.C.W.S. (3d) 910, 87 O.T.C. 241

Alma Robb as Executrix of the Estate of L. Wayne Robb, deceased, Alma Robb, Douglas Robb, Heather Robb, by her Litigation Guardian Alma Robb, Edna Robb and George Robb, Plaintiffs and St. Joseph's Health Care Centre, Victoria Hospital, The Canadian Red Cross Society and Her Majesty The Queen in Right of Ontario, Bayer Corp. and Bayer Inc., Defendants

C. Gray Rintoul, Trevor Rintoul and Tracey Rintoul by their Litigation Guardian, C. Gray Rintoul, Lynne Perreira and Lisa Edgington, Plaintiffs and St. Joseph's Health Centre, Sarnia Hospital, St. Joseph's Health Care Centre, The Wellesley Hospital, The Canadian Red Cross Society, Her Majesty The Queen in Right of Ontario, Bayer Corp. and Bayer Inc., Defendants

Christopher Farrow, also known as Christopher Leblanc, Stephanie Beaulieu and Steven Farrow, by their Litigation Guardian, Joanne Farrow and the said Joanne Farrow, Plaintiffs and The Canadian Red Cross Society, The Hospital for Sick Children, Her Majesty The Queen in Right of Ontario, Bayer Corp. and Bayer Inc., Defendants

E. Macdonald J.

Heard: December 2-3, 1998
Judgment: December 23, 1998
Docket: 92-CU-54356, 92-CU-59486, 98-CV-139060

Counsel: *Kenneth Arenson* and *Rebecca Nelson*, for the Applicants.
Allyson A. Webster, *Peter K. Boekle* and *Chris I.R. Morrison*, for the Red Cross.
Mario Pietrangeli and *James Maloney*, for Her Majesty The Queen in Right of Ontario.
Allyn Abbot, for Bayer Corp. and Bayer Inc.
Ian R. Dick, *Nancy Noble* and *Farhana Parsons*, for the Attorney General of Canada (Third Party Claim).

Subject: Evidence; Torts; Civil Practice and Procedure
Related Abridgment Classifications
Evidence
V Documentary evidence
V.2 Public documents
V.2.d Miscellaneous
Evidence
IX Hearsay
IX.3 Traditional exceptions to rule against admission
IX.3.d Business records and other declarations in course of duty
Headnote
Evidence --- Hearsay rule and exceptions — Exceptions — General

Plaintiffs contracted HIV from contaminated blood products — Plaintiffs brought actions against, inter alia, Minister responsible for administration of national blood supply — Commission of inquiry released public report of inquiry into administration of national blood supply — Plaintiffs moved to admit inquiry report for truth of its contents pursuant to "public documents" exception to hearsay rule — Motion dismissed — Public inquiry not resolving lis inter partes and not result of adversarial proceedings — Inquiry entitled to consider evidence notwithstanding common-law or statutory inadmissibility — Inquiry report not meeting test of inherent reliability required to constitute "public document".

Evidence --- Documentary evidence — Public documents — General

Plaintiffs contracted HIV from contaminated blood products — Plaintiffs brought actions against, inter alia, Minister responsible for administration of national blood supply — Commission of inquiry released public report of inquiry into administration of national blood supply — Plaintiffs moved to admit inquiry report as public document — Motion dismissed — Public documents traditionally admissible for their inherent reliability — Inherent reliability requires strict application of rules of evidence — Inquiry mandated to rely upon opinion, hearsay and hypothetical evidence — Plaintiff entitled to prove facts in report by calling direct evidence — Inquiry report not admissible as public document.

Table of Authorities

Cases considered by *E. Macdonald J.*:

Bird v. Keep, [1918] 2 K.B. 692 (Eng. C.A.) — considered

Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System), 37 Admin. L.R. (2d) 260, 136 D.L.R. (4th) 449, [1996] 3 F.C. 259, (sub nom. *Canada (Attorney General) v. Royal Commission of Inquiry on the Blood System in Canada)* 115 F.T.R. 81 (Fed. T.D.) — referred to

Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System), 142 D.L.R. (4th) 237, (sub nom. *Canada (Attorney General) v. Royal Commission of Inquiry on the Blood System in Canada)* 207 N.R. 1, [1997] 2 F.C. 36, 123 F.T.R. 320 (note) (Fed. C.A.) — considered

Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System), 48 Admin. L.R. (2d) 1, 151 D.L.R. (4th) 1, (sub nom. *Canada (Attorney General) v. Royal Commission of Inquiry on the Blood System in Canada)* 216 N.R. 321, (sub nom. *Canada (Attorney General) v. Royal Commission of Inquiry on the Blood System in Canada)* 132 F.T.R. 160 (note), (sub nom. *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System))* [1997] 3 S.C.R. 440 (S.C.C.) — considered

Copeland v. McDonald, [1978] 2 F.C. 815, 42 C.C.C. (2d) 334, 88 D.L.R. (3d) 724 (Fed. T.D.) — considered

Ioannou v. Demetriou, [1952] A.C. 84 (Eng. C.A.) — referred to

R. v. Kaipianinen (1953), 17 C.R. 388, [1954] O.R. 43, 107 C.C.C. 377 (Ont. C.A.) — considered

R. v. P. (A.) (1996), 109 C.C.C. (3d) 385, 92 O.A.C. 376, 1 C.R. (5th) 327 (Ont. C.A.) — considered

Statutes considered:

Access to Information Act, R.S.C. 1985, c. A-1

Generally — referred to

Inquiries Act, R.S.C. 1985, c. I-11

Pt. I — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 37.15 — referred to

MOTION by plaintiffs to admit reports of public inquiries into evidence as proof of their contents.

***E. Macdonald J.*:**

1 This is a motion brought at trial by the plaintiffs who ask that the report of the Royal Commission of Inquiry into the Blood System ("the Krever Report [1] ") and the report of the Information Commissioner John W. Grace ("the Grace Report") be admitted into evidence at this trial as prima facie proof of the subject matter contained in both reports. The admission of both reports is sought on the basis that they are public documents and as such are admissible as an exception to the hearsay rule. There are three separate actions being tried together. In the Robb and Rintoul actions, the plaintiffs are the surviving families of Gray Rintoul and Wayne Robb. Gray Rintoul and Wayne Robb were Factor IX hemophiliacs. Both were infused with HIV-

contaminated blood products and died from complications arising from AIDS. Gray Rintoul died August 18, 1995. Wayne Robb died November 3, 1993.

2 Christopher Farrow, also known as Christopher LeBlanc, is now almost 18 years old. He is also a Factor IX hemophiliac. His mother, Joanne Farrow, was informed the he was infected with HIV when he was six years old. He now lives with his sixteen year-old sister Stephanie and her boyfriend in Mattawa, Ontario. He attends high school and is in Grade 10.

3 The claims brought by the plaintiffs seek damages arising from the alleged negligence of the defendants (except for the hospitals, who have now been let out of the actions). Broadly speaking, the plaintiffs allege that the Canadian Red Cross Society (the "CRCS"), the Queen in the Right of Ontario ("Ontario") and Bayer Inc. (in the form of a corporate predecessor named Miles Laboratories Inc., acting through its division Cutter Biological ("Cutter")) owed the plaintiffs a duty of care in providing blood products used in the treatment of a type of hemophilia called "hemophilia B" or "Factor IX hemophilia."

4 The CRCS screened donors and collected blood. The CRCS and Cutter used the collected blood to manufacture a blood product used in the treatment of hemophilia B called Factor IX. The CRCS and Cutter distributed the Factor IX to doctors, hospitals and other treaters, and ultimately to hemophilia B patients. The plaintiffs allege that Ontario oversaw, supervised or regulated this collection, manufacture and distribution process. The plaintiffs allege that one or more of these defendants failed to meet the standard of care and negligently exposed Wayne Robb, Gray Rintoul and Christopher Farrow to HIV infection.

5 The plaintiffs also allege that certain minutes of a meeting of a committee called the Canadian Blood Committee, of which the plaintiffs say Ontario was a member, were destroyed.

6 On November 2, 1998, in her capacity as trial management justice under Rule 37.15, Madam Justice Benotto dealt with a motion brought by Ontario to add the Attorney General of Canada as a third party in these actions and for an order striking out the paragraphs in the Amended Statement of Claim which referred to the Krever Inquiry.

7 Madam Justice Benotto, in disposing of the motion before her, commented that "as a matter of fact and law" the Krever Inquiry made certain findings which are listed in the statement of claim. The defendants argued before Madam Justice Benotto that the Krever Report cannot bind the court in the trial of these actions. In her endorsement, Madam Justice Benotto wrote:

> The plaintiffs say they realize that, but they are entitled to put forth its findings as prima facie evidence of the facts therein contained.
>
> The defendants are correct that the commission has no authority to determine legal liability. However, to conduct three blood trials against the Red Cross without reference to the Krever Inquiry would be virtually impossible. The report is a public document. Subject to any ruling by the trial judge, the plaintiffs will be entitled to lead evidence about the findings and conclusions in the report. They are not conclusive and binding on the court.

8 Mr. Arenson, on behalf of the plaintiffs, urged me to conclude from these comments that the Krever Report is a public document. Mr. Arenson submitted that Madam Justice Benotto's comments are "a very clear statement of the opinion of that judge, a judge of coordinate authority on this very case," and that while her comments should not be seen as binding the trial justice, they are very persuasive to the outcome of the motion now before me.

9 In view of the issues which were before her at the time, the comment "the report is a public document" is *obiter*. It was not intended to foreclose the issue of whether or not the report can be admitted as evidence in this trial as an exception to the hearsay rule. Mr. Arenson argued that the report, being a public document and having emerged from a public process, should be admitted into evidence in this trial and that the plaintiffs should be able to rely on certain findings of Commissioner Krever as evidence of the truth of their findings in this trial.

The Public Documents Exception to the Hearsay Rule

10 The public documents exception to the hearsay rule permits into evidence statements contained in public documents. The statements are admissible without proof because of their "inherent reliability or trustworthiness and because of the inconvenience

of requiring public officials to be present in the court to prove them." See *R. v. P. (A.)* (1996), 109 C.C.C. (3d) 385 (Ont. C.A.). To my mind, this is the fundamental basis which gives rise to the doctrine.

11 Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2d ed. (Butterworths: 1992) at 231 sets forth the basis for public documents exception to the hearsay rule:

> Founded on the belief that public officers will perform their tasks properly, carefully, and honestly, an exception to the hearsay rule was created for written statements prepared by public officials in the exercise of their duty. When it is part of the function of a public officer to make a statement as to a fact coming within his [or her] knowledge, it is assumed that, in all likelihood, he [or she] will do his [or her] duty and make a correct statement. The circumstances of publicity also adds another element of trustworthiness. Where an official record is necessarily subject to public inspection, the facility and certainty with which errors would be exposed and corrected provides an additional guarantee of accuracy.
>
> Before this exception to the hearsay rule comes into play, the following preconditions, cumulatively providing a measure of dependability, must be established:
>
> (1) The subject matter of the statement must be of a public nature;
>
> (2) The statement must have been prepared with a view to being retained and kept as a public record;
>
> (3) It must have been made for a public purpose and available to the public for inspection at all times;
>
> (4) It must have been prepared by a public officer in pursuance of his duty.

12 I have considered the authorities which have reviewed what constitutes a public document. In *R. v. Kaipianinen* (1953), 107 C.C.C. 377 (Ont. C.A.), the Court of Appeal of Ontario cited with approval Lord Tucker's public documents test, outlined in *Ioannou v. Demetriou*, [1952] A.C. 84 (Eng. C.A.). In order for a document to be considered public, it must be shown, either intrinsically from the contents of the document itself or from other evidence, that: (a) a judicial or semi-judicial inquiry was held; (b) the inquiry was held with the purpose that the report would be made public; (c) the report was at all times open to public inspection; and (d) the statements in a document tendered in evidence should be statements with regard to matters which it was the duty of the public officer who held the inquiry to inquire into and report on (*Kaipiainen, supra*, at p. 377).

13 All these requirements must be met and until such occurs the statements in the documents remain inadmissible. The foundation for the admissibility of the statements must be made by their admission at trial for proof not only of the nature but of the purpose for which and the authority under which the documents were prepared. Mr. Arenson submitted that with respect to the Krever Report, Commissioner Krever was appointed by the government of Canada, pursuant to Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11 to "to report on the mandate, organization, management, operations, financing and regulation of all activities of the blood system in Canada...." Krever Report, pp. 1081-2. Accordingly, Mr. Arenson says that the report can be said to have been prepared by a public official acting judicially or quasi-judicially in the exercise of his or her duty. Mr. Arenson argued that this is demonstrated by the fact that Commissioner Krever was empowered to make and did make Rules of Procedure and Practice for the Commission. He referred to pages 1098-1105 of the Krever Report in this context.

14 Mr. Arenson pointed out that all of the hearings before Justice Krever were conducted in public and all persons who had an interest in the mandate of the inquiry were represented by counsel.

15 In the context of the second branch of the public documents test, Mr. Arenson pointed out that the Krever Inquiry was held with the object of making its report public. The public aspect of the Commission was enhanced by the direction to Commissioner Krever that all papers and records of the inquiry were to be filed with the Clerk of the Privy Council. Mr. Arenson submitted on these bases that it has been demonstrated that the purpose behind the inquiry was to make its findings public.

16 Thirdly, with respect to the report being at all times open to public inspection, Mr. Arenson pointed out that because the Commissioner's documentary evidence and testimony was placed in a special room maintained for the purpose of public inspection that the public inspection aspect of the test was met.

17 Regarding the fourth branch of the public documents test, Mr. Arenson pointed out that Commissioner Krever was empowered to conduct an inquiry to review and report on the blood system in Canada and that he had jurisdiction to issue notices of potential findings of misconduct. This jurisdiction was upheld by the Federal Court both at the trial and appeal levels and by the Supreme Court of Canada. *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)* (1997), 142 D.L.R. (4th) 237 (Fed. C.A.); [1997] 3 S.C.R. 440 (S.C.C.).

18 Nevertheless, I have concluded that the Krever Report cannot be admitted as evidence in this trial as proof of its contents and conclusions.

19 The Krever Report contains the opinion of Commissioner Krever based on a record that is not before this court. The report contains Commissioner Krever's conclusions and opinions based upon what he observed as having occurred, upon what he found to have been done correctly and incorrectly, and upon what he found should have been done but was not done. Commissioner Krever did not apply the standards of proof of evidence which are applicable to the conduct of a civil trial. I accept the submission of Mr. Morrison that Commissioner Krever's conclusions and opinions are based on evidence and opinions given at the hearings, much of which would not be admissible in a civil or criminal trial. This was recognized by Commissioner Krever himself. He made the following observations at the outset of the Inquiry on November 22, 1993:

> It [the Inquiry] is not and will not be a witch hunt. It is not concerned with criminal or civil liability. I shall make findings of fact. It will be for others, not for the commission, to decide what actions if any are warranted by those findings.
>
> I shall not make recommendations about prosecution or civil liability. I shall not permit the hearings to be used for ulterior purposes, such as a preliminary inquiry, or Examination for Discovery, or in aid of existing or future criminal or civil liability....

See *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)* (Fed. C.A.) at 261.

And on November 24, 1995 the Commissioner said:

> I want to repeat what I have said before on more than one occasion that this is not a trial. No one, no person, or organization is on trial. This is not an adversary proceeding in which a party makes allegations against another party. It is an inquiry, inquisitional in nature.

Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System) (Fed. C.A.) at 261.

Accordingly, the Krever Inquiry was described by Commissioner Krever himself as "...an inquiry into facts that will form the foundation of important policy recommendations" (*Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)* [(1996), 37 Admin. L.R. (2d) 260 (Fed. T.D.)], quoted at para. 89).

20 To my mind, these comments illustrate that Commissioner Krever proceeded on the basis that he did not intend for his findings to be used in subsequent civil proceedings. But this alone is not sufficient to decide the issue. The public documents exception to the hearsay rule was never intended to be applied to admit into evidence at a trial documents such as the Krever Report.

21 The hallmark of a judicial or quasi-judicial decision is that it determines a *lis inter partes*. At the Krever Inquiry, there was no *lis inter partes*. The authorities which consider the nature of judicial inquiries make this point very clearly. For example, in *Copeland v. McDonald* (1978), 88 D.L.R. (3d) 724 (Fed. T.D.), Cattanach J. found that a commission of inquiry appointed to investigate certain activities of the R.C.M.P., and which was directed to report to the Governor in Council, was a fact-finding body and did not determine any *lis inter partes*. Accordingly, it was not judicial or even quasi-judicial. In *Bird v. Keep*, [1918] 2 K.B. 692 (Eng. C.A.), Swinfen Eady M.R. found that the trial judge properly excluded the findings of a coroner's "inquisition." One reason for this was his finding at p. 698 that "[t]he coroner's inquisition is not like a judgment *in rem*. Nothing is done which is conclusive upon any person affected by it.... An inquiry before a coroner is merely in the nature of a preliminary investigation. It is not of any binding force."

22 It is no answer to say, as has occurred in this case, that the plaintiffs are unable to bring forward the evidence that would prove their claims in these three actions. The statement of their counsel cannot constitute evidence and, in any event, there is nothing at law to prevent the plaintiffs from bringing forward such evidence and proving it on the balance of probabilities. The plaintiffs cannot be said to be prejudiced by the onus, fundamental to the conduct of a civil trial, to bring forward evidence which supports the case alleged by the plaintiffs.

23 To the extent that Commissioner Krever relied on evidence which may be inadmissible in a civil trial to come to his conclusions, the defendants would be prejudiced by the introduction of such evidence. If the report were admitted, the defendants would be unable to have the opportunity to test the evidentiary findings which are contained in the report. They could not cross examine the report. They cannot know the evidence upon which the particular findings contained in the report are based. This was never a purpose for which the Krever Commission was intended.

24 There are also public policy considerations which prevent the Krever Report from being admitted into evidence. To admit the Krever Report as evidence in this trial would have the effect of converting a commission of inquiry into something that it was never intended to be. A commission of inquiry is a means by which the executive branch of the government can be informed on a particular issue. A commission of inquiry cannot have the collateral purpose of providing evidence in civil proceedings. If I were to so find, parties in future civil proceedings could attempt to make use of the findings of a commission of inquiry for that purpose.

The Grace Report

25 This reasoning also applies to prevent the Grace Report from being admitted into evidence as proof of its contents. The Grace Report is dated January 21, 1997. It is the report of the Information Commissioner of Canada John W. Grace. It contains the results of his investigation of a complaint made on September 8, 1995 against Health Canada following reports which alleged the destruction of audio tapes and verbatim transcripts in the possession of the Canadian Blood Committee Secretariat (the "Secretariat") of meetings of the Canadian Blood Committee (the "CBC") held between 1982 and 1989. Underlying the allegation of destruction of the audio tapes and verbatim transcripts is the allegation that the destruction of records occurred to thwart their release under the *Access to Information Act*, R.S.C. 1985, c. A-1. Commissioner Grace focused in his report on a decision taken at a meeting on May 16-18, 1989 of the CBC which directed the Secretariat to destroy the records of all previous meetings of the CBC in the possession of the Secretariat since its inception in 1982. The Report of Commissioner Grace is, according to the plaintiffs, relevant to the issues in this action. The investigation was not a public process. Commissioner Grace was not required to apply a standard of proof analogous to civil proceedings.

26 The reasoning which prohibits the admission of the Krever Report is applicable to the question of whether the Grace Report can be admitted.

Disposition

27 In the result, neither report can be admitted into evidence as proof of their respective contents in this trial, in whole or in part. The plaintiffs' motion to introduce the Krever Report and the Grace Report into evidence as proof of their contents is denied.

Motion dismissed.

Footnotes

1 The Commission was headed by the Honorable Justice Horace Krever of the Ontario Court of Appeal. As he was acting within the purview of his authority as Commissioner at the times relevant to this motion, I refer throughout these reasons to Krever J.A. as Commissioner Krever; and I refer to the Commission generally as the Krever Inquiry.

ZEXI LI. ET AL.
PLAINTIFFS

-and-

CHRIS BARBER ET AL.
DEFENDANTS

Court File No.: CV-22-00088514-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT OTTAWA

MOVING PARTIES' BOOK OF AUTHORITIES NOT AVAILABLE ELECTRONICALLY

CHARTER ADVOCATES CANADA
[redacted]

James Manson (LSO# 54963K)

[redacted]

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