

10

15

20

25

30

1

1

Appendix
(A)

Nelson Barbados Group Limited Plaintiff

Heidi Rubin and S. Dewart for K. William McKenzie and
Crawford, McKenzie, McLean, Anderson & Duncan L.L.P.

-and-

5 Richard Ivan Cox
Gerard Cox
Alan Cox
Philip Vernon Nicholls
Eric Ashby Bentham Deane
Owen Basil Keith Deane
Marjorie Ilma Knox
10 David Simmons
Elneth Kentish
Glyne Bannister
Glyne B. Bannister
Philip Greaves a.k.a. Philip Greaves
Gittens Clyde Turney
R.G. Mandeville & Co.
Cottle, Catford & Co.
15 Keble Worrell Ltd.
Eric Iain Stewart Deane
Estate of Colin Deane
Lee Deane
Errie Deane
Keith Deane
Malcolm Deane
20 Lionel Nurse
Leonard Nurse
Edward Bayley
Francis Deher
David Shorey
Owen Seymour Arthur
Mark Cummins
25 Graham Brown
Brian Edward Turner
G.S. Brown Associates Limited
Golf Barbados Inc.
Kingsland Estates Limited
Classic Investments Limited
Thornbrook International Consultants Inc.
Thornbrook International Inc.
30 S.B.G. Development Corporation
The Barbados Agricultural Credit Trust
Phoenix Artists Management Limited

Appendix
(A)

David C. Shorey and Company
C. Shorey and Company Ltd.
First Caribbean International Bank (Barbados) Ltd.
Price Waterhouse Coopers (Barbados)
Attorney General of Barbados
The Country of Barbados
John Does 1-25
5 Philip Greaves
Estate of Vivian Gordon Lee Deane
David Thompson
Edmund Bayley
Peter Simmons
G.S. Brown and Associates Ltd.
GBI Golf (Barbados) Inc.
10 Owen Gordon Finlay Deane
Classic Investments Limited and Life of Barbados
Limited c.o.b. as Life of Barbados Holdings
Life of Barbados Limited
David Carmichael Shorey
Price Waterhouse Coopers East Caribbean Firm
Veco Corporation
15 Commonwealth Construction Canada Ltd. and
Commonwealth Construction Inc.

Defendants

Lorne S. Silver; for the Defendants, Richard Ivan Cox, Gerard
Cox, Alan Cox, Gittens Clyde Turney, R.G. Mandeville & Co.,
20 Kingsland Estates Limited, Classic Investments Limited et al.

Gerald L.R. Ranking; for the Defendant, PricewaterhouseCoopers
East Caribbean Firm

Andrew Roman; for the Defendants Eric Ian Stewart Deane,
Estate of Colin Ian Estwick Deane

25 **Sarah Clarke;** for the Defendant First Caribbean International
Bank

30

MONDAY, NOVEMBER 2, 2009

...OTHER MATTERS SPOKEN TO.

5 THE COURT: Nelson Barbados. Would it be
helpful if I just briefly recess so we get the
right number of chairs available? You might
just go through with the registrar materials I
think are relevant on the desk - on my desk, but
they may not be, and if there's more then I'm
10 just going to invite you to go into the side
boardroom and there's - the two boxes on the
table relate to the cost issue. If there's
other materials that are going to be referred
to, though, I leave it to you to look through
the other 18 boxes and decide what's relevant.

15 MR. RANKING: Thank you, Your Honour.

THE COURT: And just while I have you - have a
captive audience here; I spoke to the registrar
this morning and I just throw this out to you
now for your consideration, the dates for the
cost hearing that she says - she can make
20 available to you are the 17th and 18th of December
and I have a non-sit the week of December 21st,
so I'll offer Monday, December the 21st as well
on the presumption that it's a three day
25 hearing.

MR. DEWART: Excuse me, Your Honour, if this is
a convenient time, I wonder if you've canvassed
other dates...

30 THE COURT: No.

MR. DEWART: ...or - because I'm not available
in December.

Nelson Barbados v. Richard Ivan Cox, et al.

THE COURT: Well then I guess we'll bring her up and I'll let her - she is the boss and you can speak to her about other dates.

MR. DEWART: Thank you.

R E C E S S

U P O N R E S U M I N G:

THE COURT: As I went back into my chambers I also received an earlier version of the bill of costs from Mr. Silver's office, which I guess was sent Friday - no, earlier than Friday. I don't know why it's so late getting up here, I'm sorry. All right. I guess if I could just get everyone's names so I know - I know most of you, but some of you are not familiar faces.

MR. RANKING: Your Honour, I'm happy to introduce counsel...

THE COURT: Thank you.

MR. RANKING: ...if you wish. This is Jessica Duncan on the far right hand side, to her left is Ms. Heidi Rubin.

MS. RUBIN: Morning.

THE COURT: How do you spell that last name, sorry.

MS. RUBIN: R-U-B-I-N.

MR. RANKING: R-U-B-I-N. To her left, Mr. Shawn Dewart.

THE COURT: Right.

MR. RANKING: To my left is my colleague Mr. Rich Butler, and Sarah Clarke is standing in for Ms. Adrian Lang for First Caribbean. Mr. Larry

- Larry Keown standing in for Lawrence Hanson,
and Mr. David Conklin, and Mr. Silver.

MR. SILVER: Morning, Your Honour.

MR. RANKING: And Mr. Ranking, Your Honour.

THE COURT: All right, first matters at hands is
I've got the captured audience of the trial
coordinator here, things don't really look good
if we go beyond December. I think Madam Trial
Coordinator you're offering February...

MS. TRAVISS: The week of February 22nd, but the
days are not vacated.

THE COURT: And I want to tell you right after
that week, as the wheel turns and some of you
have got to know my personal life, I'm going
back to Florida and I won't be back until April.
I just want to forewarn you and I won't be
bringing any boxes to Florida. So, there we
have it. Now - well, stand up if you have a
preference. I know what Mr. Dewart's position
was, but I didn't canvass all other counsel
about December or February.

MR. RANKING: Certainly I'm available, and Mr.
Butler, in December and February.

THE COURT: Mr. Silver?

MR. SILVER: I'm available the first two days in
- that you gave us in December, but the 21st I
actually have a - start a planned holiday on the
20th.

THE COURT: I wasn't keen to giving you the 21st,
because it's sort of my downtime as well, but I
thought I can come in for day. All right. So,
that's - Mr. Conklin?

MR. CONKLIN: I'll be available or - and if I'm not then I will get somebody else to be available.

THE COURT: For any of the dates?

MR. CONKLIN: For any of the dates, my clients want this heard as quickly as possible.

THE COURT: All right. Mr. Keown? Sorry.

MR. SILVER: Your Honour, I could do that for the 23rd, be available the first two days or figure out - I don't want to be the fly in the ointment, to go ahead as early as possible as well.

MR. KEOWN: In fact, Your Honour, my position is the same as Mr. Conklin's, we'll make ourselves available on either days. I am available in December, not in February, but someone can sit in for me.

THE COURT: All right. Ms. Clarke?

MS. CLARKE: Your Honour, my understanding is that Ms. Lang is not available in February, but there are some days in December that she is available.

THE COURT: Some days, I don't have any other days.

MS. CLARKE: I certainly understand. She said that she's not available on the 17th, but I'm sure that we could work something out if I attend on one day and she attends on the second day.

THE COURT: That's helpful. Mr. Dewart, what's your - sorry, Mr. Silver you're going back up.

MR. SILVER: Well, I have a memo - an email from

Paul Schabas.

THE COURT: Oh, I forgot out him.

MR. SILVER: He's not here today, and - but he has provided me with his schedule and it doesn't look like he's available on any of the dates, but we'd have to circle back to him and see if somebody else is available.

THE COURT: I'm sorry, I didn't - Mr. Dewart, what's the difficulty? You have a planned holiday?

MR. DEWART: Yes, leaving on the 15th of December.

THE COURT: Ms. Duncan?

MS. DUNCAN: Your Honour, I'm scheduled to be out of Province as well.

THE COURT: Holiday, I hope.

MS. DUNCAN: Yes.

THE COURT: Holidays I don't break, if this is a business matter I'll make you rearrange it.

Well, where does that leave us? Yes, no, maybe so. I think you're going to have to - I hate to do this, but I'm going delegate again, Mr.

Ranking, you always get hit, but I'm going to let you put out an email and say here's what's available. If you want to go beyond that, which I don't want, because you know, four years this month I go supernumerary and I really don't want this case around at this point. It's gone way beyond my imagination in terms of involvement and complexity, but if - if you want then maybe I'll leave it to you to canvass dates into April and May, and then have the registrar - I'm

5
sorry, the trial coordinator deal with that.
Now, I know in May we have a three week sitting,
so they don't want you to even come near that -
those dates, I forget when it begins - May?

MS. TRAVISS: May 17th.

MR. DEWART: Your Honour, could I interrupt,
please? I had - I'm not sure if the 22nd, 23rd
and 24th of February are workable. I had
inferred they were workable for many counsel.

MS. TRAVISS: Yes, they're workable.

MR. DEWART: Certainly....

MS. TRAVISS: For three days or two days.

MR. DEWART: I think two days, but Your Honour's
a better...

THE COURT: I like....

MR. DEWART: ...judge of how verbose....

THE COURT: I like extra time.

MR. DEWART: All right. So, certainly I can -
either I am or can make myself available on
those three days and I presume that the sandwich
shared by everyone in the room is that it's time
for this matter to come to its conclusion, and
so, I certainly know my principles would prefer
to see it dealt with in February rather than
April or May, but if it has to be April or May,
so be it, but the first choice in this camp
would be February 22 for three days.

THE COURT: All right. Well, here's a
significant aspect, Mr. Schabas has to be spoken
to and obviously none of those dates are working
for him, but let's - let's call those tentative
dates, unless I hear any further serious

objection and then we'll speak to Mr. Schabas and see if that works for him, if it doesn't then I guess we'll have a conference call, or something, to try to get this on the rails. It's not my preference, I got to tell you, I would have much preferred to deal with this in December, the reason was I could write in January and February in spotted areas, I don't even know if I got a non-sit week, but if I did I could do a lot of work in that time. I guess I've lived with it this long I don't think there's going to be much new in the universe about this case that I won't be able to recall or remember. So, mark those as tentative dates and then can I leave it to you, Mr. Silver, to speak to Mr. Schabas and then confirm to all counsel and to me....

MR. SILVER: I'll try to do it by email today during the course of the day...

THE COURT: Perfect.

MR. SILVER: ...and get back.

THE COURT: Thank you.

MS. TRAVISS: May I be excused, Your Honour?

THE COURT: Thank you, Madam Trial Coordinator. Thank you. All right.

MR. RANKING: Thank you, Your Honour. I've spoken to the court reporter and to facilitate matters I think everyone's going to make their submissions for the lectern over here.

THE COURT: Thank you.

MR. RANKING: I also have provided to Your Honour - there's no objection on the part of Mr.

5
10
15
20
25
30

Dewart, three additional volumes that you have not seen. They are before you. They are a factum for the purposes of today's attendance. There is also the affidavit of Mr. Butler, and I can tell you that that affidavit deals with the production for non-parties and basically states that the UPS Store is not opposing the relief, that's what Mr. Butler's affidavit states and then there is a book of authorities. I can also inform Your Honour that for the purposes of my submissions I will be asking you to have before you principally two motion records. The first, larger motion record, being the amended notice of motion.

THE COURT: Just one second. The further amended notice of motion record of the defendants?

MR. RANKING: I will need that one as well, that - but really I'm referring to two, Your Honour.

THE COURT: The amended notice of motion...

MR. RANKING: Yes.

THE COURT: ...and reply record...

MR. RANKING: Yes.

THE COURT: ...of the defendants.

MR. RANKING: Those are really the two motion records that I will be referring to and then I'll, obviously, make some reference to Mr. McKenzie's affidavit in due course, but for the purposes of my submissions in the short term those are the two motion records.

THE COURT: All right. Just one second then. And the joint factum of the defendants is for

the motion of the cross-examination, K. William McKenzie?

MR. RANKING: Yes, Your Honour.

THE COURT: Okay Mr. Ranking, ready to go.

MR. RANKING: Thank you, Your Honour.

MR. DEWART: Sorry, Your Honour. I apologize for interrupting my friend apparently there's been a misunderstanding between us. I had thought we were going to address a preliminary issue before my friend launched into his submissions. Relief is sought which affects the interests of my client's former client, Nelson Barbados, and it is not on proper notice of the relief being sought today, and I have more elaborate submissions to make about the significance of that, but I had understood, and perhaps my friend and I were cross purposes, we're going to deal with that first.

MR. RANKING: Well, indeed, Your Honour, where I - had I started my submissions, I would have been dealing with it, but...

MR. DEWART: Oh.

MR. RANKING: ...unfortunately Mr. Dewart has objected.

MR. DEWART: I thought he was going to - well, all right. So Your Honour, I have an adjournment request, which I'd like to speak to.

THE COURT: I guess we'll hear it first.

MR. DEWART: And just to review the bidding, Your Honour, tell you things you probably already know, we were to be arguing the main motion this morning, but we're not, and last

week there were two records which were served which my friend just referred to. One is dated October 27th, and I believe I received it that same day.

THE COURT: Yeah, what is it you're referring to?

MR. DEWART: That's the thicker of the two records.

THE COURT: Yes.

MR. DEWART: And the other is dated October 29th, if memory serves, which is Thursday and I received that Friday morning, and I presume - I've not seen the affidavits of service, but I presume - it'll be a pleasant surprise for all concerned if they'd been served personally on Mr. Best, I assume that didn't happen and that instead what happened was that it went to the - this post office box in Kingston. And Your Honour will recall from the submissions that were made before you last week that there is an existing order removing my client from the record, and - this is the order of Justice Eberhard, which provides for service of documents on the corporation and presumably Mr. Best, it's a presumption I certainly have no difficulty with.

THE COURT: You know what I have difficulty with, is that I was assigned to this matter, I don't remember now, more than two years ago?

MR. DEWART: Oh yes.

THE COURT: And under the rules by the Regional Senior Judge, so I want to ask you a question

5
right off the top, Mr. Dewart, why did anyone
bring a motion before Justice Eberhard, even to
remove counsel from record, and why was the
matter not brought before me? Because I'm
obviously aware of all the complexities,
problems and difficulties in this case, and what
ramifications can flow, even from the most
innocuous orders. So, maybe you had nothing to
do with that, but I am concerned about why this
matter would even be put before another judge.

10
MR. DEWART: Well, it's a good question, Your
Honour, and I don't endure any responsibility
for it, I certainly encouraged my client to
bring a motion to remove himself and in fairness
to my client, did not turn my mind to the point
Your Honour has just made. So, to the extent
that that was irregular or as contributed to any
problems, I must take some of the responsibility
and I apologize. It was a matter that I viewed
as urgent and I was more focused on getting it
done rather than turning my mind to the very
valid point Your Honour's just made.

15
THE COURT: In any event, I interrupted you; you
were saying that Justice Eberhard's order
provides for service on the corporation, I've
seen her order and some of the materials.

20
MR. DEWART: And also provides for it to be
effective ten days later, but in any event, what
we know and I apologize I'm going out of order a
bit, there was a curious document that was faxed
to the court, and Your Honour instructed that it
be provided to all counsel.
25
30

THE COURT: Friday afternoon.

MR. DEWART: That suggests that the - certainly the plaintiff corporation, but once again in my submission a reasonable presumption is that Mr. Best has notice of the fact that the main motion was filed before the court. So, obviously the material that went out in support of the main motion has come to the attention of, at least, the corporation and whatever natural person authored that curious letter that Your Honour received. But that's not what we're dealing with today. What we are dealing with today, instead, is an order about the scope of an examination of Mr. Best himself, which is to be conducted and the scope of a cross-examination of my client, which is to be conducted, and that - well, then obviously on the adjournment request, Your Honour, I don't want to launch into a full scale set of submissions about the importance of solicitor/client privilege. I do offer the following observations based on settled law. It's a substantive right, not a rule of evidence, and obviously not a procedural right, it's a substantive right of law that enjoys constitutional protection. It is an ancient precept of the common law, the communications of legal advisors will be confidential, and it is settled and trite law that the privilege belongs to the client, not the lawyer. I also point out to Your Honour that there is a position, an irreconcilable conflict, between my client, Mr. McKenzie, and

his former client. As a practical, if not a legal matter, probably is a legal matter as well.

THE COURT: Explain that - just explain that to me. Why do you say there's irreconcilable conflict?

MR. DEWART: By virtue of the fact - in shorthand, by virtue of the fact that my client is now a party to the proceeding.

THE COURT: All right.

MR. DEWART: But - but more importantly for every penny in costs that is, and can be, recoverable for the plaintiff itself, or for that matter, for Mr. Best itself, it reduces - I don't say eliminates, my client's exposure, but it reduces my client's exposure, and so, in my position I could make submissions about the privilege attaching to the communications between Mr. McKenzie and his former client, but my principles, including Mr. McKenzie, his firm and the insurer, would in their heart-of-hearts dearly love to see me lose that, or fail to persuade you in those submissions. It could suit their purposes if you made an order against - against my client's former client. I'm certainly not in a position where I can make submissions to you on the topic of the privilege and whether or not the client did anything to waive it and the scope of litigation privilege. I'm not in a position where, I, myself can make those adequately and provide Your Honour with the assistance you need, both representing the

5
10
15
interests of Mr. McKenzie and the interest alive with that, and his former client. So, you will be proceeding, if you proceed to hear anything today which touches on either - and to be clear, it's solicitor/client privilege, it's litigation privilege in litigation which continues, as we've all just observed, and a broader duty of confidentiality which is owed as a matter of professional obligations - as a professional obligation under the rules of professional conduct. And I appreciate, Your Honour, that I'm not arguing the motion, but if I could I would like to refer to one authority about the - which I submit demonstrates beyond any doubt the impropriety of proceeding today, and it's in a green book dated November 2nd, summary of submissions and authorities.

THE COURT: Okay, just one second.

MR. DEWART: Sorry.

20
THE COURT: This is the summary of submission and authorities of K. William McKenzie on duty of confidentiality and privilege issues?

MR. DEWART: Yes. Thank you, Your Honour.

THE COURT: Yes.

25
30
MR. DEWART: I didn't have time to prepare a factum, but did put together, literally I believe, bullet points or very short points at the front of the book and if you turn to page - excuse me, Tab 5 you'll see the decision of the Supreme Court in Lavallee and to put this case into its context Parliament enacted a section of the Criminal Code which purported to deal with

searches of lawyers offices, and the question is whether or not, I believe the - Section 381 or 481, as enacted by Parliament was constitutional, and the Supreme Court, in what I believe was one dissenting opinion, and a strongly worded judgment determined that the procedure there did not pass constitutional muster for a host of reasons, all of which parallel closely the motion which is before you today, and if I could ask Your Honour to turn to page 8 of 27 in the Lavallee reasons? This is an extract from the impugned section of the Criminal Code, and you'll see towards the top of the page there's subsection (3) of s. 488, and what it essentially - what the scene provided was that the police would execute the warrant, seal the material, and hand it to the sheriff and then it said, and this is the scheme that is - did not pass muster, where a document has been seized and placed in custody, the Attorney General or the client or the lawyer on behalf of the client may, within 14 days, bring the matter back before the court and assert that the material in question is privileged. And then if you skip right to the bottom of this page it says that where a document has been seized and placed in custody, and there has not been an application of the sort that I just described where the AG, the client or the lawyer have not taken positive steps to bring the matter back before the court, they go back before a judge who shall, quote/unquote, "shall", the Supreme

5 Court was very troubled by the use of the word
shall there, and the removal of any discretion
whatsoever, shall hand it over to the Crown.
So, that's the statutory scheme, and as I say,
it troubled the Supreme Court, and the courts
below I might add, on any one of a number of
levels, but if I could take you - and they're
enumerated beginning at page 14 of 27, and
you'll see Number 1, Absence or Inaction of
10 Solicitor, the court below found - the courts
below found that privilege could be lost to the
absence or the inaction of a solicitor for the
reasons I've just described, the scheme I've
just described, and that - and I'll come back to
that, that the court found troubling. The
15 court, if you skip down to Number 3, No Notice
Given to Client, that they found troubling, and
the strict time limits for bringing the matter
back before the court. That, as I will explain
in a moment, the court found troubling and then
20 if you go ahead to page 17, paragraph 39, this
is Justice Arbour writing for, I believe, eight
of the nine judges, "While I think it
unnecessary to revisit the numerous statements
of this court on the nature of privacy of
25 solicitor/client privilege it bears repeating
that the privilege belongs to the client and can
only be asserted or waived by the client, or
through his or her informed consent." In my
30 view the failings of the section in question,
identified in numerous judicial decisions and
described above, all share one principle fatal

feature, namely the potential breach of the privilege without the client's knowledge, let alone consent. You'll see that she refers - towards the end of this paragraph, she refers to the fact that it's a constitutionally protected right, the point I've already made, and then it goes on....

THE COURT: I'm sorry, where are you now?

MR. DEWART: Sorry, just still at the end of that paragraph 39, Your Honour.

THE COURT: Yes.

MR. DEWART: By the operation of 481 is constitutionally protected right can be violated by the mere failure of counsel to act without instruction from, or indeed, communication with the client. Thus the act allows the privilege to be - excuse me, the solicitor/client confidentiality destroyed without the client's express and informed authorization and even without the client's having an opportunity to be heard. And the - there is another authority, I won't ask Your Honour to turn it up, but I do want to refer to it before I conclude my submissions. There is a positive obligation on my client to raise this issue, which is to say that if this motion had been served my client is under positive obligation to send me to court at his own expense to draw the court's attention to the fact that privileged information is sought. There is also, and I referred to this in the conference call on Friday, Your Honour, there's an obligation on the court to raise it if the

lawyer doesn't because of the importance of the issue. So, where we find ourselves, and I will resist the temptation to say anything more than this about the timing, to the extent that this issue comes on us quickly, Your Honour, it is entirely of the moving parties making. Entirely. I have been writing and there is correspondence in the file before you, I have been writing to my friend since my first involvement in this setting out that I can't - my client cannot give up information about the plaintiff or Mr. Best. I filed an affidavit a month ago today in which I said, which Mr. McKenzie deposed, that privilege has not been waived and I fully understand that counsel are busy, and that things sometimes happen at the last minute, but where we find ourselves is on Monday, November 2nd, before Your Honour, my friend's want to proceed with a motion that will affect the interests of my client's former client. I cannot represent my client's former client. There is no one else here to do it, and that material is served, on me at least, on Wednesday and Friday of last week, and Your Honour has no basis upon which you can be satisfied that the plaintiff corporation, or Mr. Best, have any idea that you might be entertaining a motion today which will affect their interests, including interest of the most important nature and I can tell Your Honour that my - my strong advice to my client has been not to contact McKenzie. So, there's - there can be

no presumption - excuse me, Best, that my client can act as a conduit. The last thing I want is another claim against my client this time by Best or Nelson Barbados. So, we're going to hear, I'm sure, about the urgency of the matter. The urgency is - or the timing problems are self-inflicted. In my submission given the interests involved Your Honour should exercise your discretion to put this matter over to a date when you can be satisfied that if Nelson Barbados and Best are here, it's because they've made a deliberate decision to that affect, and in that - on a minor housekeeping point in that respect, as I also mentioned on the phone the other day, Your Honour, I have been imploring my friends to bring a motion to validate service. They've finally done so. So, insofar as we're talking about material - not material served last week, but insofar as we're talking about material before that. It's obvious that Nelson Barbados has notice and I've already told my friend's that I take no position on validating service up to, but not including last week, and going forward Your Honour can be satisfied that material should be reaching Mr. Best if it goes to the post office box that he was responsible for putting before the court. And I have no difficulty in facilitating service on the corporation, Mr. Best, going forward but the problem, the fatal problem, I see - submission, is proceeding on extraordinarily short notice today. I mean, it would be - in respect - for

5
10
15
example, I only received my friend's - and I'm not complaining, things unfolded quickly in the last week for whatever reason, but I only received my friend's authorities - factum and book of authorities this morning on the question of privilege. You already heard me say I didn't have enough time to put a factum together. Even if I could, theoretically, address the matter for Nelson Barbados, I couldn't do so adequately on this notice, Your Honour. This is an unfortunate and needless stampede. And I won't say whose making - because I told you I'd only say it once. Subject to any questions Your Honour has those are my submissions on the issue of the adjournment request.

THE COURT: Thank you. Mr. Ranking?

MR. RANKING: Thank you, Your Honour. Well Your Honour, it won't come as any surprise that we have something of a different view of the facts of this case. Let me start my submissions by stating that Mr. Dewart's response in saying that he could not tell us where Mr. Best was were targeted - to our letters it was saying, "Can you please assist?" And indeed, and I can take you to the record, we've been asking for Mr. Best's address for weeks.

THE COURT: I'm very familiar with it.

MR. RANKING: All right.

THE COURT: I read the - I've read all of that - those correspondence.

MR. RANKING: So, that's the first issue, Your Honour. The second is I will say that I'm

5
10
finding it somewhat difficult to listen to Mr. Dewart make submissions on behalf of Mr. Best for whom he says he has an irreconcilable conflict. I don't understand how he has standing to make submissions to this court with respect to service upon Mr. Best. But the most significant issue, Your Honour, is that Mr. Dewart's entire submissions do not bear substance in that we are not seeking to examine Mr. Best upon matters of solicitor/client privilege. There are two very discrete issues that are before this court.

THE COURT: Just one second, Mr. Ranking. Yes.

15
20
25
30
MR. RANKING: The first issue has nothing to do with privilege, in our respectful submission. I will take you to my factum momentarily, but the facts that we are seeking to obtain from Mr. Best are the same facts we are seeking to obtain from Mr. McKenzie, and if I could ask Your Honour, because I think it is important to be very precise with respect to what it is we are seeking to turn up the further amended notice of motion record, which is the small brief, and I can ask Your Honour to turn to Tab 1, paragraph 6, it's the bottom of page 4, Your Honour. And you will see that in paragraph 6 we seek an order compelling Mr. Best to appear at an examination on a date to be fixed by this court, it's the bottom of the page, Your Honour.

THE COURT: Yes.

MR. RANKING: And then importantly we turn the page under subheading A, and you will recall

5 this by reason - we have attempted to get this
information on three separate occasions, two by
counsel and one by this Honourable Court.
Subparagraph A, where the questions that were
put by Mr. Silver and myself, the cross-
examination of John Knox on November 4th, then
Mr. Roman similarly, and I will take you to some
of this, asked questions on a Rule 39.03
10 examination on the March 20th and then Your
Honour, in fact, directed that Mr. McKenzie
bring documents, or failing that, provide an
affidavit. Those are the documents that we are
seeking, and then at subparagraph B we talk
about questions relating to Mr. Best's
15 appointment and subsequent duties,
responsibilities as an officer of Nelson, his
relationship with the matters pleaded and the
related actions of Barbados and his association
and/or relationship with McKenzie. Now, that
20 association and relationship I will take you to
dates back some 13 years. I will take you to
that, it's in the affidavit material, but Mr.
Best has had an association with Mr. McKenzie,
he's a private investigator, he has sworn
25 affidavits and there are reported decisions
where Mr. Best has sworn at least three
affidavits for Mr. McKenzie, and one of the very
pivotal issues here has nothing to do with any
privilege, it has to do with when did you begin
30 your relationship, because it clearly is not an
arm's length relationship, which indeed by Mr.
McKenzie's silence one might reasonably have

5
10
inferred that that's what subparagraph B relates to. In subparagraph E, Your Honour, questions concerning the very issue, which I respectfully submit this court would be interested in, concerning the shares of Kingsland Estates including without limiting the generality of the foregoing, and this is actual language from the statement of claim, the security over and ownership rights held Nelson Barbados and the common shares.

15
20
25
30
Now, that is by way of response to what my friend says is privileged information. There is a second branch dealing with privileged information, and indeed, that deals with Mr. McKenzie - Mr. McKenzie's affidavit and whether he has waived privilege, and if he has - and this is then second issue that I will be urging upon this court, is if there was a waiver of privilege and in order to be fair to Mr. Best and recognizing that if it was unintentional the question then becomes ought Mr. Best be put on notice, and we can get into that debate, but what I say is an easier solution for this Honourable Court is not to accept my submission with respect to the waiver of privilege and simple to state - and I'll take you to my factum, I will not ask for the communication, because it's the communication which is the privilege to which the privilege attaches, but rather simply ask Your Honour to direct that the material facts underlying that communication be

5
disclosed. So, by way of summary therefore we are not seeking from Mr. Best privileged material at this stage. What we are seeking is, what I respectfully submit, are non-contentious production of documents and the opportunity to examine him on matters that are germane and relevant to the cost hearing.

10
Now, I did prepare a factum and I will take you to the operative paragraphs in support of the submissions which I've just made.

THE COURT: So, I want to get that again. So, you're not seeking matters relevant to solicitor/client privilege, rather you're seeking documents...

15
MR. RANKING: That's correct, Your Honour.

THE COURT: ...that underlie...

MR. RANKING: The business....

20
THE COURT: ...the cost - the disposition relating to the cost.

25
MR. RANKING: Well yeah, it's a little, in fact, broader than that. It also relates to the underlying business and affairs of Nelson Barbados. And the reason, Your Honour, is this; if in fact Nelson Barbados is a shell corporation by way of example, and if in fact we see that it didn't carry on business other than as a shelf corporation for Mr. McKenzie's office that goes directly to the bone fide's of the corporation, it goes directly to its interests in this lawsuit and it goes directly to whether or not it had standing to commence the action.

30

5
By way of further example there is pleaded in the statement of claim that Nelson Barbados took security and an ownership interest in the shares. We've never seen any corporate documents, any correspondence, any financial statements, we've never seen anything that which would indicate whether or not Nelson Barbados has a legitimate interest into this action.

10
So, when I urge upon this Honourable Court the fact that the examination of Mr. Best and the fact that the production of documents is, indeed, relevant to the issue of costs, I'm doing so in the backdrop of what can only
15
characterized as a very strange set of circumstances. Strange from the perspective that I don't - I can say without question, seen a cross-examination where rather than having Mr. Best put forward, the only officer of the
20
corporation, we have Mr. Knox put forward and we then have every single question refused, including whether his answers bind the corporation. So, it goes to the legitimacy of the entire underlying transaction, that's why we
25
want the documents and that's why we want to examine Mr. Best, because if I finally can examine Mr. Best my first question is going to be, "What interest do you have in Nelson Barbados? When were you appointed an officer?"
30
We know that it was in 2005, and "After having been appointed, what steps if any did you take with respect to the shares of Kingsland

5 Estates?" Mr. Best we'll say, "Mr. Ranking, I had nothing to do with that", or he might well say, "I was involved as the officer and I was able to deal with matters concerning Kingsland, and here's the ownership and security interests." But that's the reason for the entire line of inquiry, Your Honour, and that same submissions applies equally, although with more force I submit, to the affidavit of Mr. McKenzie, because Mr. McKenzie has, indeed, spoken to issues of the corporate documents in his affidavit. Now, with respect to the factum, Your Honour, I deal with the claim for privilege at page 11.

15 THE COURT: I'm sorry, where are you again, Mister....

MR. RANKING: I'm sorry, Your Honour, I'm now turning to my factum, and....

THE COURT: Page 11, did you say?

20 MR. RANKING: Yes, Your Honour. And I - I start about halfway down the page under the heading, "Unfounded Claims of Privilege Confidentiality over Corporate Documents."

25 THE COURT: I'm sorry, just a second. Page 11, yes, what paragraph?

30 MR. RANKING: Paragraph 34, Your Honour. Really the paragraphs that I'd like you to make a note in your bench brief are paragraphs 34 through 39, and I can take you back, as well, to paragraph 22. In paragraph 22 we really summarized the various documents that I was just making reference to. The two expectations to

5 that, Your Honour, is that in paragraph E and F that does deal with potentially - E and F on paragraph 22, I don't think there's any issue that subparagraphs A, B, C and D are not privileged, but I want to be careful in my submissions that....

THE COURT: I'm sorry, I'm a little slow today; paragraphs 22 A?

MR. RANKING: Yes, A, B, C and D.

10 THE COURT: A, C and D, yes. What are you saying about those?

MR. RANKING: They cannot be privileged, Your Honour, in my respectful submission.

15 Subparagraphs E and F could be privileged, and that is where even if a privilege attaches we would be seeking the material facts. And by way of example, a material fact which I respectfully submit, particularly on the facts of this case, the court can order to be produced is the address of Mr. Best. I won't go further because I - we're just dealing with this contested adjournment request, but there are material facts, which I respectfully submit, can be ordered to be produced which do not trench upon solicitor/client privilege. But if I take you 20 back to paragraph 34, Your Honour, I deal in paragraph 34 with those documents, I wanted to make that one clarification with respect to paragraph 22. Paragraph 35 deals with the onus, but then importantly paragraph 36, at the top of page 12, speaks to the privilege - I accept what Mr. Dewart says, I would not suggest otherwise, 25 30

5 that solicitor and client privilege is the
privilege of the client where it attaches to
communications whether oral or documentary
prepared by the lawyer or the client, and
flowing between them in connection with
providing legal advice.

10 I have then referred to the Court of Appeal
decision in that decision - I don't intend to
take you to, Your Honour, nor the Dublin (ph)
decision, and I've accepted what Mr. Dewart
says, that Mr. McKenzie may not waive solicitor
and client privilege, it does not belong to him.
15 I accept that, Your Honour. But what we seek to
obtain is the disclosure of all information
regarding the business and affairs of Nelson
Barbados. And what I have done, Your Honour,
and I will only refer to the excerpt from the -
of the decision that I've quoted in paragraph
20 39. That is a decision of the Ontario Court of
Appeal in Shocott and Clarkson (ph) and that
dealt with whether or not certain underlying
facts were, indeed, privileged and Mister
Justice Lacrucier (ph) at the top of page 13
25 stated, "The appellant can be compelled to
disclose all information regarding the
bankrupt's affairs, transactions, and the
whereabouts of his property." I respectfully
submit that that is akin to the backdrop of the
30 affairs of Nelson Barbados which do not require
the disclosure of communications made to the
appellant for the purpose of giving legal

advice. These communications with respect to property are not privileged. And Your Honour that - the decision of the court in Shocott and Clarkson (ph) is in our book of authorities. And again, I make the same point dealing with the disclosure of facts in paragraphs 41 and 42. So, that is why - and again, with respect to the whole issue of validating service with respect to serving Mr. Best, until we were here today I have no way of serving Mr. Best, that's why we're seeking an order for substituted service. So, it seems to me that the correct protocol for us to follow is if you were inclined to accept my submission an order might well go requiring Mr. Best to produce the documents, which are not privileged, requiring him to attend, and the whole issue with respect to my attempting to get into what arguably are privileged communications, we can defer that and wait until Mr. Best, in fact, attends. I have further submissions on that point, but I think that what I'm urging upon the court is that while it's easy for Mr. Dewart to say that we didn't act with dispatch, we did everything we could. We had no way of knowing how to serve him. And so, what I say makes sense, in my respectful submission of course, is to permit this court to order the questions to be answered, that we've been trying to have answered for many, many months. Mr. Best can attend or not attend as he sees fit, and we can then deal at a later date, if at all, with the issue of privilege. Subject

to any questions, Your Honour, those are my submissions with respect to Mr. Dewart's request for an adjournment.

THE COURT: All right. Thank you. Anyone else? Mr. Dewart?

MR. DEWART: It's not wrapped in there, Your Honour. Just - starting at the end, if the examination of Mr. Best - my friend's don't need an order to examine Mr. Best, and if they think they do - I have no difficulty with that whatsoever. They've had that right under the rules, they've waived it much earlier in the litigation once on a different motion. They've had it with respect to this motion. They don't need an order, but if they want an order, that's fine. The difficulty arises when in advance of serving a notice of examination, far less actually examining Mr. Best, they ask you in his absence to rule on the parameters of an examination which is going to take place at some point in the future, and in doing so bump up against, at a bare minimum, protected communications. And it's not, by-the-way, just solicitor/client privilege, a point my friend did not address in his submissions, it's not just solicitor/client privilege, it's also litigation privilege and the ethical duty of confidentiality that constrains both - in my client's case, anything he says and in Mr. Best's case, who's a party to ongoing litigation, what he can properly be compelled to say. And I point out that the only issue before

5
10
15
20
25
30

you right now is should you be deciding all of this in Mr. Best's absence and in the absence of Nelson Barbados, that's the only issue on the table is should this rarified debate be taking place in the absence of the people who are going to be affected by the rarified debate, and every word that spilled from Mr. Ranking's mouth could be completely sound and Your Honour would trammel Mr. Best's procedural rights, and their elementary rules of natural justice, if you exceeded to those submissions in his absence. My friend mentioned standing, where do I get - where do I have the standing to make submissions on behalf of Mr. Best? I'm not making submissions on behalf of Mr. Best. I intended to be as clear as I possibly could be, but in case I wasn't, I am making submissions on behalf of Mr. McKenzie and his firm, and they are officers of this court and I apologize Your Honour, I know I read it this morning, I looked for it while my friend was on his feet, I can find it give it to you. My friends are - excuse me, my clients are obliged as a matter of law to protect their former client's interests, and that was the problem with the search warrants in Lavallee, if the lawyer didn't do it the interest would be just trammeled, which is what my friend is proposing, without the client, the possessor of the privilege, having any chance to make submissions to the court, and Your Honour once again, I will take as long as it takes to find it, if I didn't - if I failed in that duty

5
10
as Mr. McKenzie's counsel it's incumbent upon Your Honour to protect the privilege. And so, all of that takes me back to before you proceed to find out where this line should be drawn and what's privileged and what's not, and what document is privileged or isn't, Your Honour should be satisfied that if Best and the corporation aren't here it's because they've made a deliberate decision, and I say that in my capacity as counsel for their former lawyer, not as their counsel. I can't make submissions on their behalf.

15
20
25
30
THE COURT: Just help me on that - on a point, though. We've all got this - I got this unusual letter that was sent to me and to the trial coordinator, and it came late on Friday afternoon and I directed that it be sent out to Mr. Ranking with the request that he disperse it, because his ability to deal with all the fax numbers was probably better than ours at that time of the afternoon. In that letter, which - that's all it is, is a letter, from Mr. Best; he indicates that - he first of all says that the circumstances - the present circumstances are such that the counsel of choice has been taken away from him and the corporation. He then indicates in that letter, if I'm correct, that he's not going to participate in the cost proceedings at all, and he sends a message to me to be fair. I think that's a fair summary. I don't think I'm misrepresenting everything else that was in that letter. So, what am I to infer

from that?

MR. DEWART: Well....

THE COURT: I'm - is it - can I not infer that he doesn't want any part of the proceedings.

He's not going to participate in the proceedings, as we've taken away the counsel that he would want to represent his interest - or to represent the corporations' interests.

MR. DEWART: No, Your Honour. Not - not in my submission properly, you can't do that. What you can infer from that is that he's aware that the 57.07 motion was to have been up this week. That's what you can infer from that. And you can infer from that that when he knew that was happening, or when he believed that was happening, he either says or intimates, I'm not arguing with Your Honour, he either says or intimates that he's not participating in the process, but Your Honour has no reason to infer that he's on notice of the relief which is now being sought. Which is of a completely different, and I add - I don't want to add, but I repeat, substantive nature. As the proceedings was cast, when the material was served in September, when it was served on that post office box, or whenever it was served, as the proceeding was cast he has intimated in a letter - an unrepresented litigant has intimated in a letter that he is not participating in the proceeding, but that is a far cry from saying that he has nothing to say about the waiver of privilege.

5 THE COURT: Well, I just wonder about his knowledge, because again referring to that letter, Mr. Dewart, page 2 he says - third paragraph, "It's unfair and unjust that the defendants deprived Nelson Barbados Group Limited of its lawyer"....

MR. DEWART: Sorry Your Honour, we're just sharing a copy here. Where were you reading?

10 THE COURT: Sorry, page 2, third paragraph; "It is unfair and unjust the defendants deprived Nelson Barbados Group Limited of the lawyer for the last, but critical, one percent of the case. It is unfair and unjust that the defendants continually attack Mr. McKenzie personally with false allegations. In the companies opinion this was done so that they could unfairly sue him for cost, and separate Mr. McKenzie from his client. The defendant's lawyers wrongfully attacked Mr. McKenzie's personal integrity including by saying that he created evidence of post-court documents on the internet. Defence lawyers also cross-examined Donald Best, supposedly over this online document issue, when it seemed quite obvious that the defendant, Ian Deane, either posted documents himself or contributed to the documents being posted online." But what appears to me is that Mr. Best has more knowledge than just the issue of costs that Mr. McKenzie and his law firm is now drawn in and being pursued.

25 MR. DEWART: Absolutely.

30 THE COURT: Just a minute, I see the trial

coordinator at the back.

MS. TRAVISS: It's all right, Your Honour...

THE COURT: Sorry.

MS. TRAVISS: ...I'm just taking a your...

THE COURT: Okay.

MS. TRAVISS: ...family files.

THE COURT: Thank you.

MR. DEWART: There's no doubt. As in the words of our former - one of former Prime Minister's, if he's examined I'll be there with bells on. I mean, there's no doubt in my mind whatsoever that Mr. Best has - it would not occur to me to suggest that he doesn't have relevant evidence to give and that's where I started a minute ago. They don't need an - excuse me, they don't need an order from Your Honour to examine him. Get on with it, I say.

THE COURT: Well then, what - and I heard that, and so, it's good because I had a big "X" running on that one, and what I want to know is why do I have to hear anymore then? Let's - isn't what this is all about today? We want to examine Best. We want to examine the documentation which are matters relating to the shareholding interest when the corporation was commenced, who are the officers, directors, controlling mind is, that type of thing, but without encroaching upon communications that directly relate between Mr. McKenzie and Mr. Best on behalf of the corporation. Isn't it? So, what are we here for?

MR. DEWART: I - well, my point. Or Mr. Best

could show up and start singing like a bird and waive privilege and he won't be my problem anymore, but that....

5 THE COURT: All right. Just draw a halt here. Gentlemen, where are we? I mean, you've been reasonable, all of you, throughout this case and I include Mr. Dewart. Now, he's really hit on a touchstone, so you want to examine Best, you can, there's no objection.

10 MR. RANKING: Well, the difficulty, Your Honour, is I have had my own firm try to find him, I've had private investigator try to find him.

THE COURT: Oh, I can make an order.

15 MR. RANKING: Right, and that's - and that's what we're seeking.

20 THE COURT: I'll just make an order, because what he says in here, in this letter, and I've got to believe it came from Mr. Best, that - first page, paragraph 4, "Nelson Barbados Group Limited wishes Your Honour to know that the company has not been served with any legal documents since we moved to our Kingston, Ontario mailing address as provided in the courts' order made early in September. The company has not heard anything from the defendant's lawyers." He tells me that's his mailing address. I know it's a UPS.

25 MR. RANKING: The difficulty, Your Honour, is that absent an order from this court.

30 THE COURT: Well, I give - no, you won't have to worry about absent an order. I'm going to give an order.

5
MR. RANKING: Great. Then we're off to the races, because the problem that we had, just so Your Honour knows so that we're not wasting the court's time, is Justice Eberhard's order said, "It's only effective service upon the plaintiff corporation", and we have no means of serving Mr. Best and despite our efforts to get the information from Mr. Dewart, who would not disclose it. I'm not being critical of him.

10
THE COURT: Well, he may not be able to....

MR. RANKING: No. I understand, but - so that's why - that's precisely why the paragraph 6 is the - is the order that we're seeking.

15
THE COURT: All right, but I've hit where I - I think I've got where I want to go is I'm prepared based on those submissions of Mr. Dewart, which I think is reasonable and fair, to direct notice of examination on Donald Best and Nelson Barbados, and the notice will be served by substitutional service at this address in Kingston, which I know is UPS address, that's what all of the material tells me is.

20
MR. RANKING: Yes.

25
THE COURT: And if that is put in play and I also direct that the examinations will have to take place before - well before February 22nd, 23rd, whatever those dates are so that the transcripts are available, on notice to Mr. Dewart as well, as all parties - as well as all parties, including Ms. Duncan, then have we not got beyond the problematic issue here? And you will have to follow that ginger line. I don't

30

5 know, Mr. Best says he's been trying to get
counsel, but you'll have to follow that careful
line of what is going to infringe upon
solicitor/client privilege. I mean, I don't
want to - have to get into that issue and make
decisions in advance. It may be that there are
objections taken on the basis of
solicitor/client privilege and I'm going to have
to hear them. I going to have to hear them
10 before I hear any substantive motion and in that
regard, although she's not here - as they say,
I've got to get on with this. It's - we've got
to get rid of those boxes in the room. We're
moving in February. I would like the boxes to
go back to Barrie rather than sit in the new
courthouse, which is going to be problematic.
But my thinking is if there's a problem I think
I have December 4th, if that's a Monday. I think
I have a non-sit that week. I'm prepared to
entertain any other interim motions that are
20 necessary, or that relate to the examination of
Donald Best, and I can hear him on that date and
make a ruling. I don't think that would take
more than a day, and I don't like Christmas
shopping in any event, so it suits me fine.
25 Does that make sense?

MR. RANKING: Absolutely, Your Honour.

THE COURT: Is that reasonable, Mr. Dewart?

MR. DEWART: Absolutely, Your Honour.

THE COURT: All right. Well, then....

MR. SILVER: Umm, I didn't....

THE COURT: Mr. Silver?

MALE VOICE: Just checking December.

MR. SILVER: It makes perfect sense, but - and I think I heard you say that you would direct - and it would be my submission that it would appropriate to direct what documents Mr. Best should bring with him, either bring with him or deliver in advance of the examination, to streamline it and it would be in the nature of the minute books, the shareholder register, the director's....

THE COURT: Can I just ask you, in the normal course you would put that in the notice of examination, and I could put in the order of Mister - well, I'd like to see the notice of - I'd better detail what was in there, because I don't have control over the notice of examination.

MR. SILVER: I would think - that's what I'm requesting and in addition to those items that you've described and that are familiar to all of them, the additional element would be any and all documentation that evidence is - evidence is the transfer of interest that form the basis of Nelson Barbados bringing the claim. Namely, the transfer of interest of shareholding, or whatever it was that Nelson Barbados acquired.

THE COURT: John Knox answered this and said that - didn't he say that the documents were reposed with a lawyer in Florida? Wasn't that his answer?

MR. SILVER: I can't remember, but....

MR. DEWART: I think he said the share

5 certificates were lodged somewhere, but Your Honour, if I may; counsel draft notices of examination. They're served on parties, and parties either comply or properly refuse to comply and then the parties seek relief. We're back into the same problem. If I acted for Best and I got a notice of examination that said bring the minute book, well, how could anyone object to that, but what if in their zeal they said, bring me an opinion you got from Bill McKenzie about this lawsuit.

THE COURT: Clearly wrong.

10 MR. DEWART: Best could - right, and so, it's not, at this point, once again in Best's absence - Mr. Best's absence, it's not for the court to ask Your Honour to draft their notice of examination and for you to rule effectively in advance on whether or not they've done it properly, or what they're proposing is acceptable. They should draft their notice of examination, as they did with my client, they should serve it and Best will either comply or he won't and remedies will follow.

15 THE COURT: Yeah, but how fast are you going to examine Donald Best?

MR. SILVER: Well, that...

THE COURT: It's not going to happen.

20 MR. SILVER: ...was the third thing that I would ask is that we fix a date, and that that be part of your order.

25 MR. RANKING: Your Honour, we want to examine him right away, but my only point of response to

Mr. Dewart is I did serve a notice of examination, and I think that it would be helpful because recall that Mr. Best is not represented by counsel and to deal with the issue that is before this court, the very same notice of examination could be referred to in your reasons or endorsement and you would have to cross off the last couple of sentences which deal with, arguably, privileged materials. But I do think that it is important having regard to the number of times that this case has been up dealing with this very information that Mr. Best, who is not represented by counsel, be given clear direction as to what it is - that we expect him to come, because otherwise we're going to back before Your Honour very quickly, and in terms of the timing I can make myself available on short notice, and I would say that if we're going to try to get this on, the order of Justice Eberhard says 10 days notice. I think that one of my submissions was going to be that that is likely too long, that we can - and I'm happy to give my friend notice, I'm happy to give Mr. McKenzie notice, because clearly Mr. Best is finding out about what's going on, however he's doing it, we can serve this according to your order, 4-27, I'm happy to serve the notice of examination upon everybody and we can get on with it, because it think that what's going to move this matter forward. So, the short answer to your question is I'm happy to do it on short notice, or whatever notice is

appropriate to this court, I'm also happy to have the court look at my notice of examination, which under Tab B, and have it....

THE COURT: E?

MR. RANKING: B, as in Bob, and have it revised to make - delete reference to what could otherwise be privileged materials and to take into consideration Mr. Silver's point and we can move on.

THE COURT: Sorry.

MR. RANKING: It's in the thinner book, Your Honour.

THE COURT: It's called...

MR. RANKING: The clerk....

THE COURT: ...joint - no, not the factum.

MR. RANKING: Further amended.

THE COURT: Further amended.

MR. RANKING: This was the notice of examination, Your Honour, that was served upon Mr. McKenzie, but they're the same - very same documents that we wanted to have Mr. Best produce. So, if you look at what I would be recommending is that after the word - if - four lines up from the bottom, the words, "The retainer agreement", from thereafter be struck from that notice of examination, is what I would be recommending.

THE COURT: Just let me look at it for a second.

MR. RANKING: Yes.

THE COURT: All right. Mr. Dewart?

MR. DEWART: My friend's submission misses the point I was making entirely, Your Honour. It's

not for the court to draft a notice of examination, or to make an order, but what if there's - and I can't envisage it, but what if there's a proper, legitimate, objection to producing the shareholder register? I can't imagine what it is. It's a point on which you've heard no submissions.

THE COURT: No, but - but, just hold that thought for a second. What I want is if there is that objection then obviously I'm telling you, you've got to have this examination before that non-sit week in mind. So, that objection taken whether by Mr. Best alone or counsel is then raised and brought back, and I'll deal with it. That's what I'm saying. I'll deal with it, I'll deal with all the issues as they arise. I just don't like advanced rulings, but I do think if Mr. Best - and he more or less intimates to me in the letter that he sent here, and which you all have copies, that he isn't going to get counsel. So, if he's not going to get counsel, I think it's helpful to him, probably, that there's some indication of just exactly what is going to be requested of him and to put it in the court order so that he hears - he says he has respect for me, it'll come from me as to what is the generalities of what - of what he should be looking for and producing, but that doesn't take away - and I think there has to be a provision from his right, to raise an objection under confidentiality, solicitor/client privilege, litigation

privilege.

MR. DEWART: Oh, that makes perfect sense to me, Your Honour. So, as long as - certainly if it comes with your imprimatur that can only assist, as long as he knows you'll hear from him.

You'll will hear from him, yes. As long as the order provides on its face that you will hear from him. I just don't want - let's say he doesn't show up with the minute book and the dog ate it, I don't think it would be fair - excuse me, in my submission it would be unfair if he was all of a sudden staring down the barrel of a contempt motion. So, as long as Your Honour will hear him...

THE COURT: Oh, I....

MR. DEWART: ...how could he object?

THE COURT: No, it's....

MR. DEWART: And indeed....

THE COURT: My order would reflect that the - for his assistance and direction the following materials, documents, letters, statements, should be produced and follow somewhat what is under Tab B excluding, of course, the retainer agreement, which I'm not sure you could ever get into that, and all professional accounts for services rendered by Mr. McKenzie with respect to this action. I don't know if he'll ever get into that, but that's just an initial observation and very good counsel could persuade me otherwise and I can change my mind, but I think - it behooves me to give him some direction because of the content of the letter I

5
10
15
received from him which is we're standing by the
sidelines, because we've been deprived of our
counsel, we're not going to participate, is what
he's told me. And he may take that same
position or his position may change, but I think
it would be of assistance to the deponent and
certainly not for the purposes of a contempt
motion, but it would be of assistance to the
deponent if it outlined the parameters of what I
- what the expectations are in terms of the
production, and then if he raises objections it
will also be incorporated into the order, the
matter will return before me the week of, and
I'm sorry I just don't - I didn't bring my diary
back in, but I know I have a non-sit that they
owe me.

20
MR. RANKING: Your Honour, if it is of
assistance to this court I did prepare a draft
order, and I can hand that up and it may be
that....

THE COURT: Can we do this? Can we circulate
it?

MR. RANKING: Sure.

25
30
THE COURT: And particularly Mr. Dewart, I'm
sorry I'm not trying to sidetrack you, but I
want to give the staff a bit of a break, they've
been running hard, and take a look at it
everyone, and you've heard my comments, which I
would like to see incorporated. The registrar
can phone down to Jackie Traviss and just check
that date in December that I'm sure I'm
available, because it's a non-sit, and I'll hear

any motions that week. Now Ms. Duncan, you're on your feet.

MS. DUNCAN: Yup, just very briefly, Your Honour. Could I ask for a copy of this letter? We've....

THE COURT: Oh, you didn't get it?

MS. DUNCAN: We haven't received most of the material.

THE COURT: Sure you can.

MR. RANKING: It's actually in the materials that we served. We actually attached it Mr. Butler's affidavit it's the last - as the last exhibit.

MS. DUNCAN: I don't have.

THE COURT: All right. We'll get it for you.

MS. DUNCAN: Thank you, Your Honour.

MR. RANKING: We'll get it.

MR. SILVER: Your Honour, through modern technology I've been able to confirm for Mr. Schabas that - somebody will be available the 22nd, 23rd and 24th of February. So, we can go firm on that.

THE COURT: If you don't mind penning that in to the order, because again, it's informational but it does say when the substantive motion is going to be heard and it must be heard at that time. So, I'd like you to pen that in to the draft order as well. It will be of assistance to Mr. Best. We all know what we're doing, but I want to put him on notice of just exactly what's coming down the pipe.

MR. SILVER: Thank you.

THE COURT: All right? I'll take a recess right now. Have we got anything else to discuss after we get beyond this? What about Mr. McKenzie?

MR. RANKING: We have to deal with the examination of Mr. McKenzie.

THE COURT: Yeah. Well, let's do one thing at a time.

R E C E S S

U P O N R E S U M I N G:

MR. RANKING: Thank you, Your Honour.

THE COURT: Mr. Ranking.

MR. RANKING: I can let you know that I think that we are on our way, we've used the time, I apologize we were getting copies made.

THE COURT: No. That's fine.

MR. RANKING: I'm going to hand up a marked up copy of a draft order, and I can take you through it and we have one - one matter we have to argue.

THE COURT: All right.

MR. RANKING: Which I don't think will take a great deal of time, because you've heard from both Mr. Dewart and I on point, but if I could take you through the order and what I can do is I can have this trued up at my office and a clean copy provided. This - paragraph number 1 has been agreed to, and that's to validate service with respect to documents mailed to Mr. Best at 427 Princess Street, Suite 200. Paragraph 2, Your Honour, is the paragraph

dealing with substituted service upon Mr. Best and the handwriting there provides that the order shall supersede the paragraph 2 of the order of Justice Eberhard, dated September 15th.

THE COURT: Right.

MR. RANKING: The reason for that is that there are two different timeframes we want to make sure that the service is effective.

THE COURT: Right.

MR. RANKING: We've agreed to proceed with - certainly Mr. Dewart is available on the 17th of November with the examination of Mr. Best in Toronto, and we've identified in paragraph 3, top of the next page, the various issues that should be the subject matter of that examination. And then at the bottom of the page, just so it's clear that Mr. Best is not required to disclose anything that might be privilege or confidential, and subject to my friend correcting me, it says "The Court further orders that the foregoing two paragraphs shall not prevent Donald Best from refusing to answer questions on the basis including privilege of - or confidentiality" - sorry, I'm not sure I've read that correctly.

MR. DEWART: Sorry. Just to be clear, Your Honour, it's actually - paragraph 5 comes after 3 and 4...

THE COURT: Yes. Yes, it does.

MR. DEWART: ...as restructured. So, there's a requirement for the production of documents in addition to attending and then, "This court

further orders that the foregoing two paragraphs", that is 3 and 4.

THE COURT: Right.

MR. DEWART: "Shall not prevent Donald Best from refusing to answer questions on any basis, including...

MR. RANKING: Right.

MR. DEWART: ...privileged"...

MR. RANKING: Thank you. "Including privilege or confidentiality, and the court is making no determination in this regard at this time. In the event that questions are refused and this courts' further determinations are required, the motion in this regard shall be heard by Justice Shaughnessy on", and then we did not have a date for that.

THE COURT: No, and I doubled checked. It's now - I understand it's - Monday is November 30th, so I thought it was the first week of December, but it's November 30th...

MR. RANKING: Right.

THE COURT: ...1st, 2nd, 3rd, 4th. So, I'm going to suggest we use the 30th.

MR. RANKING: You - which date? 30th?

THE COURT: November 30th, or it can be December 1st, 2nd, 3rd, or 4th.

MR. DEWART: Begging you indulgence, Your Honour.

THE COURT: That's fine.

MR. RANKING: The 2nd, Your Honour.

THE COURT: Before Justice Shaughnessy on December 2nd, 2009, at 9:30 a.m. at Whitby.

MR. RANKING: Thank you, Your Honour.

THE COURT: So, that's 5, we can go back to 4?

MR. RANKING: Yes. These are the documents that Mr. Best is to deliver and we've provided one week prior to the examination and we've identified the types of documents that we would like him to produce, and as I read this, Your Honour, what I will do as well because Mr. Best may not have been provided with a copy of the cross-examination, I will provide a copy of the cross-examination of John Knox...

THE COURT: Yes.

MR. RANKING: ...to Mr. Best.

THE COURT: And in fairness to him, as well, I think it would be fair to him if he had the affidavits of John Knox.

MR. RANKING: Fine.

THE COURT: Just to be - just to be as inclusive as we can.

MR. RANKING: I'm just making a note, Your Honour. All right. And then there was a dispute between my friend and I that I'll speak to momentarily with respect to the next two paragraphs dealing with the examination of - or cross-examination of Mr. McKenzie and the documents he's to produce. I'll speak to that momentarily.

THE COURT: Yup.

MR. RANKING: And then turning to the next page there's no position taken by my friend with respect to production of the information from the UPS Store Canada, and those paragraphs are

being agreed upon subject to any questions Your Honour may have.

THE COURT: No, I understand.

MR. RANKING: All right, and then finally just dealing with costs; rather than dealing with them today we just put those over, reserve to a later date, paragraph 11.

THE COURT: Sorry, 10 - oh, I see. All right. Yup. All right. Paragraph 11, yes.

MR. RANKING: I can tell Your Honour we already have - we have the - the way UPS works there's a franchise organization and the various franchisee's. The representative of the franchise organization said they've - they do not oppose the order, and they said, "You have to go and talk to the individual franchisee's." We have spoken to both franchisee's and both have said they do not oppose the order. We've then written to them and said, "We would like written confirmation for the court", and when Mr. Butler put his affidavit together today we were able to get a written response from one, but not the other. So, we don't actually have written confirmation, but we have been told they don't oppose the order.

THE COURT: I accept that.

MR. RANKING: Thank you, Your Honour.

MR. DEWART: Sorry to interrupt, just on an extremely minor point, Your Honour. The production of documents from the third parties we shared with me, I assume, when my friends receive it.

MR. RANKING: That's fine.

MR. DEWART: It says, "produce to the defendants", but....

MR. RANKING: That's fine.

MR. DEWART: Thank you.

MR. RANKING: I have no problem with that.

THE COURT: 11, then the costs are reserved to a later date, right?

MR. RANKING: And then we ask that - I'm not sure that we need this at this juncture, Your Honour, but we just ask that you remain seized of the action.

THE COURT: Well, that goes without saying. All right. So - all right, we're okay with that.

MR. RANKING: So, the only - the only issue that really remains outstanding and if you turn to the draft order that I've been going through, Your Honour, I have agreed not to insist upon or to delete from this draft order subparagraphs E, F, and G, at the middle of the page before paragraph 8, dealing with anything concerning Mr. McKenzie's retainer or his professional accounts, and likewise, I have agreed to take out paragraphs E and F of the following paragraph dealing with retainer or professional accounts. But the real question becomes this, and this comes back to the issue, and I don't need to spend more than two minutes really going over this, this comes back to the issue we talked about this morning and that is not an issue of privilege where there's a communication, but rather the requirement of Mr.

McKenzie to come to the examination with documents that should be in his firms possession, given the fact that - here one of his partner's incorporated this company, and that would include minute books, shareholder registers and things of that nature without being restrictive. What we don't know - and the reason that I think it's important for the court to make the order is I would like to know before I examine Mr. Best, or indeed Mr. McKenzie, what documents Mr. McKenzie has, and Mr. McKenzie may say I don't have any documents, in which case that's fine then I'm going to ask the follow up questions, "Did they ever exist?" Which will go to the legitimacy or the veracity of this corporation, and if they did exist what became of them, when did you turn them over, to whom did you turn them over, and why did you turn them over? So, all of those questions deal with the corporate documents and minute books, and things of that nature. I've told my friend that if by way of example there is a minute book and the minute book contains a minute of a board meeting in which Mr. McKenzie was present such that there is a claim for privilege relative to that minute, then I accept without issue that he ought to redact what he says is a privileged communication, and we may well be back before you to argue that, or we may not. I may be totally satisfied with my friend's explanation that it's a privileged communication for which privilege has not been waived, and we'll deal

with that in that manner. But what I'm urging is so as to move this case forward, is I don't know what documents Mr. McKenzie or his office has, I don't know what documents Mr. Best has, and just as we've asked Mr. Best to produce the documents, so too I'm asking that Mr. McKenzie or his firm produce the documents subject to whatever redactions may be appropriate having regard to claims for privilege, and we can then deal with it in an orderly fashion. When Mr. McKenzie attends, I'll have the documents, they'll be identified in the notice of examination and in this court order, or I won't have the documents, but at least I'll know one way or the other whether they exist and I can conduct the cross-examination and refine the issues that actually need to be determined, if any, upon a re-attendance on the 3rd of December. Subject to any other comments that my other co-counsel may have, those are my submissions with respect to the attendance of Mr. McKenzie. I suppose one other small thing, which I hadn't mentioned is I did ask that Mr. McKenzie attend in Toronto to be cross-examined and the reason for that is simply a matter of practicality. Mr. McKenzie is one individual as opposed to all of the defence, or however many are going to be attending, I just thought it just made practical sense to have him attend in Toronto, and I understand that he is - he may be available. We're trying to coordinate November the 20th. Mr. Dewart hasn't been able to confirm with Mr.

McKenzie whether, in fact, he is available on the 20th and clearly that's obviously something which is not yet been determined in terms of his availability on that date.

THE COURT: Mr. Silver?

MR. SILVER: I just have a small point to add, I'm not sure if Mr. Ranking said this, but the request in respect of documentation of Mr.

McKenzie in my submission is required because just generally it would help for the direction to be out there as to what you thought, or what you agreed might be relevant, but more importantly because we don't want to get caught in a situation between the examinations of Mr. Best and Mr. McKenzie and we don't get anything. And I think that's what Mr. Ranking was saying, but the point that I want to make is that in my submission the direction that he produce documentation be made and that he produce that at least a couple of days, or maybe at the same timeframe that Mr. Best is required to produce, so that we have what he has, or we know the position before we cross-examine Mr. Best. And if we just leave it to a notice of examination in the normal course, as Mr. Dewart, I think, is going to be arguing, we may be in this unfortunate situation where we cross-examine Mr. Best not knowing anything about what Mr. McKenzie has and might, or might not, produce. So, it's because the two examinations are going on over the same subject matter that we're asking that the direction be provided in the

order and that the order provides that he deliver up the material that he has and is willing to produce a week before Mr. Best's examination.

THE COURT: Yes, sir.

MR. DEWART: Your Honour, perhaps we could - if I could take everything I said this morning and take it as read, because the problem isn't with the submissions that are being made to you; litigation should be handled in an efficient manner, documents are going to be produced, why wouldn't you tend to them in advance and so forth, that's not the problem. The problem is much more fundamental than that. Again, in trying to set out the scope of an examination of a lawyer my friends are here without providing notice to the lawyer's client, and it's that simple. And that is, in my submission, a complete answer to what has been put to you. If I could ask you to turn up again, please, and won't take you back to the Lavallee case, because I've got nothing more to say about it, but if I could take you back to this summary of submissions and authorities that I referred to this morning.

THE COURT: Yes.

MR. DEWART: I'm going to take you to two things here, Your Honour. The first is the rules of professional conduct at Tab 1. I've said now several times that we're not just talking about solicitor/client privilege, there's an ongoing lawsuit here, at the risk of stating the

obvious, there's litigation privilege and there's also my client ethical obligations under the rules. The Rules of Professional Conduct, I mean, and you will see at this tab, page 15, the numbers are at the very bottom of the page, page 15, Rule 2.03, "A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client", and the commentary says it and Mr. McKenzie's book says it, this is much broader than the concept of privilege. Much, much broader than the concept of privilege. So, let's just say as the evidence is before you, that Mr. McKenzie's firm was retained to incorporate the plaintiff, and let's just say that they gave advice about the capital structure of the corporation, how many shareholders, who the shareholder would be, who the directors would be, all of that is probably privileged, any information that came into my client's possession as a result of the firms retainer to organize the corporation is probably privileged, but if it's not privileged, it most certainly is captured by this obligation. And what my friend's want - and the only argument - the only reason that they want an order from you today, Your Honour, is on the grounds of expedience and they're candid in phrasing it that way. So, on the grounds of expediency you are being asked to rule on where this line gets drawn in respect of documents in my client's possession in the absence of the affected client, and my respectful submission is that if

5
10
you trench into that territory in the absence of the client you will have fallen into error. And I referred a moment ago to Mr. McKenzie's book, if I could take you, and there's an extract, a badly photocopied extract, from Mr. McKenzie's book at Tab 2. If I could take you - Mr. McKenzie refers to the confidentiality rule, you'll see at page 3, dash, 3, the page numbers at the very bottom, and you will see just above the middle of the page the ethical duty of confidentiality?

THE COURT: Yes.

15
20
25
30
MR. DEWART: Is broader than the evidentiary rules of solicitor/client privilege in three ways, requires the lawyer to maintain information in confidence, whereas the other prevents it being induced in evidence. It applies not only to confidential communications for the exchange - for the purpose of legal advice, but to all information. My client's information about who the directors are, why the directors were appointed or what the shareholder registry says, that is all confidential information. Third implies even though other may share the lawyer's knowledge. So that the simple fact that the accountant for the corporation, for example, may know it, it doesn't lessen my client's obligations. And if you go over - I did finally find the passage if you - so, at the bottom of the page Mr. McKenzie refers to the Supreme Court of Canada decision; if you go over to the top of 3, dash, 4, "In the

5
10
15
20
25
30

absence of such a waiver", the court added, "the lawyer witness has a duty to refuse to divulge the confidential information. If the lawyer neglects to claim privilege the court should refuse to receive the confidential information and evidence whether or not objection is taken", citing Bell and Smith, 1968 decision of the Supreme Court of Canada. So, even if I weren't here making these submissions, Your Honour, in my respectful submission arguing by analogy, it would be incumbent upon Your Honour to say, no, no one's going to fish through Mr. McKenzie's file, no one's going to dictate what he will and will not bring, unless and until Best and the corporation are on notice that that's what you're asking me to do. And I - the - and carrying down the page is a paragraph beginning, "In a series of decisions", I won't read it to Your Honour, that Mr. McKenzie merely makes the point there, which I've already shown you in the other case, that this - these confidential relationships that I'm referring to and the privilege that I'm referring to, is of constitutional importance. So, on the one hand in exercising your discretion, Your Honour, on the one hand you have a fundamental principle of law of constitutional import and on the other side of the balance you have expediency, sheer expediency, which arises by virtue of the fact that my friend served their notice of examination for the first time last week. And on that basis, Your Honour, my submission is

that the only appropriate order concerning my client's cross-examination is that he shall attend, he's confirmed for me by email as we are speaking that he is available on November 20th, that my friend's shall serve a notice of examination, and if they wish to stipulate documents I will carefully consider the privilege. I will see what Mr. Best has done on his examination. He may have solved all the problems for us. And my client will produce, or not produce, an answer, or not answer, on the advice of counsel, and if we can't agree we'll come back before you and to rule anything beyond that at this juncture is, in my submission, a most serious breach of the rules of natural justice. And then in the interest of finishing with a whimper and not a bang, my client is well within his rights to insist on being examined in Barrie, which is the county town for Orillia. He has agreed he will come to Toronto to be examined. He says however, quite reasonably, that, "If I'm going to do that, and I'm going to meet with counsel to prepare, I'm going to come down the night before and my travel cost should be paid." So, the difference between counsel is over a nights hotel, and in my respectful submission if Mr. McKenzie is prepared to accommodate counsel, which he is, they should put out for a hotel so that I can meet him early in the morning, particularly that time of year, especially that time of year. There is no reason for him to get up at three or four

5 o'clock in the morning with potential weather difficulties at that time of year. So, that's what separates us, as they say, on the inconsequential points. On the more fundamental point we should obtain refusals after you've had a chance to hear from Best. Thank you, Your Honour.

THE COURT: Why don't we start with the last first, Barrie's an hour and a half from Toronto.

10 MR. DEWART: Beg your pardon?

THE COURT: I'm speaking to the defence counsel. Why don't we deal with the last issue first, Barrie's an hour and half from Toronto. If you don't want to pay for the hotel you can all get up there, but it may be that you want to split that cost. I'm guessing this is probably a \$300 bill for hotels in Toronto these days, plus meals, but that's for you to decide. The rules, of course, properly provide that he should be - he can and should be examined in the - in Barrie, which is the - as we formerly call it, The County Town for Orillia, but....

15 MR. SILVER: I would propose that we leave it in the order as Barrie and if we come to a different agreement, we can do that...

20 THE COURT: Very good idea.

MR. SILVER: ...for the hotel, so....

THE COURT: Very good idea. Let's do it that way. So, that takes care of that. All right.

30 MR. RANKING: Your Honour, I do have a very short reply. Mr. Conklin was just urging upon me if I just might consult with him for one

moment?

THE COURT: Sure. Ms. Duncan, make sure I speak to you before you go. You probably want to speak to me, but I have an issue I want to talk to you about.

MR. RANKING: Your Honour, Mr. Conklin and I are likely to say the same thing, but I'm happy to have my friend - in reply.

THE COURT: Sir.

MR. CONKLIN: I have been extremely quiet and I like it....

THE COURT: Uncharacteristically, are you?

MR. CONKLIN: You've seen that I've tended to follow the others through most of this so far, but there are just a few points I wanted to mention in reply to Mr. Dewart. The first and most important, I think, has to do with the notion of the duty of confidentiality and the distinction between the duty of confidentiality and privilege. A lawyer who receives information about a company should not be sharing that with the world, and must respect the fact that whatever information the client gives is confidential. We're not talking about that kind of problem here though, we're in a court proceeding, and we're dealing with whether or not a lawyer who has facts that in and of themselves are not privileged should be required to produce those facts to these counsel, and also ultimately to this court. And Mr. Dewart, who has not had the pleasure or misfortune of carrying on through the experience that we've

5 all had together, missed the - missed the
occasion when the court actually looked at Mr.
McKenzie and directed that he produce these very
documents or bring Mr. Best to court the next
morning. And in my submission as an officer of
the court, a tremendous amount of disrespect was
shown when the answer was given that was given
and Mr. Best failed to attend, and....

10 THE COURT: Well, let's get it accurate. What I
asked - and the transcript shows is that I asked
of Mr. McKenzie, perhaps twice and maybe even
three times that - we didn't get to the third
opportunity because it was shortened by a day,
but I said, "In failing which if you can't
15 produce it, then I wanted an affidavit from Mr.
Best as to" - for an explanation as to why
not...

MR. CONKLIN: So....

20 THE COURT: ...and then he proceeded to read to
me a statement, and frankly, I wasn't offended.

MR. CONKLIN: My point is that this information
is relevant and it has been sought for a
considered period of time, and I do think that
it is not unreasonable to look to counsel to be
able to say, now a party to a cost motion, that
25 if you have the material information and in it
of itself is not privileged, it's not about the
advice the lawyer provided, it's not about
questions that the client asked the counsel,
30 they're actual facts, objective facts, and these
facts underlie a corporate registry document
filed with the Ontario Corporate Registry to

5
10
15
20
25
30

create the company and give notice that the company exists. So, I don't think that these kinds of facts are the facts that Mr. Dewart wants to be able to say are privileged, and that we shouldn't be able to ask Mr. McKenzie to produce. The other point is that Mr. Dewart makes a major issue to the effect that Mr. Best has not had proper notice of today's hearing. Mr. Best has known and certainly we can take it, he at least believed that as of today there was going to be a cost hearing in which a serious cost order could be made, and he also would have known that any other order that the court might have deemed just might also have been paid, and there was no restriction on what the nature of that order might have been. So, I actually suggest that in the face of knowing that Mr. Best's decision to not have counsel here, and to not participate in this proceeding is not the kind of lack of notice that we should be concerned with in terms of making a very limited order that would apply to Mr. McKenzie. That's the extent of what I would have to say, and I'd ask you to take that into account in considering Mr. Dewart's position.

THE COURT: This never ends, it just keeps going back and forth...

MALE VOICE: Indeed.

THE COURT: ...like a tennis match.

MALE VOICE: Indeed.

THE COURT: But the balls in your court, Mr. Dewart.

MR. DEWART: There is - and I do not have it at my fingertips, there is extensive law about what that provision and a prayer for relief means, such further and other relief.

THE COURT: You know, I don't want to get into that.

MR. DEWART: Right.

THE COURT: That's not going to help.

MR. DEWART: Okay. So....

THE COURT: Here's - here's what I want to ask you, knowing you as I do you're going to prepare Mr. McKenzie and you're going to prepare for this examination, which is, what, 20 days away?

MR. DEWART: Yes.

THE COURT: 18 days away? At some point aren't you going to cross the continental divide in deciding what is producible and what is not producible?

MR. DEWART: Yes.

THE COURT: You're going to make that determination. You're not going to make that as a shotgun response to a question that's asked on the examination.

MR. DEWART: Correct.

THE COURT: So, what's the difficulty then of advising counsel what it is that is going to be objected to in advance? Is that - would that not solve the difficulty here?

MR. DEWART: I'm happy to do that, Your Honour, and I'm happy to elaborate on the reasons, on the grounds.

THE COURT: Sure. Well, that seems a reasonable

approach. What's wrong with that? You know, I want you to be careful in this, gentleman, I'm not afraid of the Court of Appeal, but I am concerned about process. You know that.

MR. RANKING: Right.

THE COURT: And I'm concerned to the extent, goodness knows, that expediency cannot be the order of the day, it cannot be the first and foremost consideration in the history of this proceeding and in terms of process. I want there to be fair and due process at every inch of the way, because - although I thought the jurisdiction motion was going up to the Court of Appeal, the very issue now before this court may very well be reviewed and I - it serves no one's interests - it serves no one's interest to take short cuts.

MR. SILVER: Yeah. If I could - I think that's fine implied in that is if Mr. Dewart decides, having prepared and understand the issues that production will be made, then he'll make it a week before Mr. Best's examination, is that implied in what we're talking about?

THE COURT: I think that's fair.

MR. DEWART: Yes, Your Honour.

THE COURT: That's fair.

MR. SILVER: Because - that is fair and then at least we know, and we can all govern ourselves accordingly.

MR. RANKING: I share that view, Your Honour, the only - the only added caveat I would have is this; we don't know what documents exist or

5 don't exist, so to the extent that Mr. Dewart is agreeing to inform us, it would be not only what he's prepared to produce or not produce, but whether or not the documents ever existed. We just don't - have no idea. So, if we have that sense that will speed things up tremendously, I think, and then we'll know what to expect from Mr. McKenzie and Mr. Best.

10 MR. DEWART: Well, I'm not trying to dodge, Your Honour, but I can do the following - I propose the following; I will advise my friends in advance of their examination of Mr. Best what my client's position is in respect of the documents sought in the notice of examination, which I've already been served with - which I have already
15 served, and I will set out - I hope not in labourious detail, the grounds for the position I take. And just in terms of the timing I realize - a week before I'll be at the Advocate Society Conference, so I propose the Friday before the Tuesday when Mr. Best is examined, I'll have it to my friend's then, so - so, a little less than a week, but in any event, I'll have it to them by whatever that Friday is and -
20 and it could be a problem advising whether or not - particular documents is, I don't know. I will consider my position carefully. I understand Mr. Silver to be saying he's assuming that I'll, obviously, act in good faith in this exercise and my friend's will be as prepared as they can be to examine Mr. Best.

25
30 MR. SILVER: Your Honour, that's fine but what I

5
10
15
20
25
30

didn't hear Mr. Dewart say was that in the event that they're going make production, that production will also be made along with the position the Friday before.

MR. DEWART: Yes. Sorry. I had intended - I had intended that, Your Honour.

THE COURT: That what - willing to produce - you will produce the Friday....

MR. SILVER: And then we'll deal with the rest - I think it's....

THE COURT: I not going to say anything more. I'm learning it's better just to keep my mouth shut at this point, if there's a problem we'll deal with it each inch of the way, fair?

MR. RANKING: Thank you, Your Honour.

THE COURT: All right. So, why don't I break and give you a chance now to draft that provision, because I think it should be down in writing, and so, there's no mistakes although there's a record here if you can get the reporter to give you a transcript, I suppose, what's your preference?

MR. RANKING: I think we can handle it in terms of - if we can break briefly then we'll have it settled and we'll provide it to Your Honour.

THE COURT: Let's do that.

R E C E S S

30 U P O N R E S U M I N G:

THE COURT: Mr. Ranking?

MR. RANKING: Your Honour, I'm pleased to say

that we were able resolve...

THE COURT: Terrific.

MR. RANKING: ...everything, and I will undertake to re-do the order. I'll have it circulated to Mr. Dewart, we'll have it approved as to form and content, and then send it out, presumably, to - to the court for signature.

THE COURT: Make sure it goes to Jackie Traviss, because then I'm sure to get it. All right.

So, that takes care of everything for today and hopefully I don't have to see you too often before February, if not at all. I just want to ask you a question; I think counsel may have given an answer on your behalf when I was on the conference call and - were you on the conference call on Friday?

MS. DUNCAN: No Your Honour, I was not advised of the conference call.

THE COURT: All right.

MS. DUNCAN: I'm not sure if my letter of Friday afternoon reached Your Honour?

THE COURT: It did, but much too late. I wasn't going to get on another conference call, and I regret that you weren't on the original, because I want all counsel on, but to now - I won't have private conference calls, I want them with everybody if I'm going to have more, or we don't have them at all. But I raise this issue; there's a cost issue that relates to Ms. Lang.

MS. DUNCAN: But....

THE COURT: You're - does it relate to Ms. Lang? I'm sorry.

MS. DUNCAN: Mr. Roman and Miller Thompson.

THE COURT: All right, and Justice Brown's order...

MS. DUNCAN: That's right.

THE COURT: ...Regional Senior Justice Brown's order, which he kindly passed over to me. I just wanted to make sure I've got it in my mind clear that you can still represent your law firm within the aura of this entire proceeding. It concerns me. If you say it's correct, I'm going to accept it unless somebody else tells me otherwise, but I just had a concern, it hit me like a thunderbolt, why are you appearing?

MS. DUNCAN: Well, just - to put it in a nutshell, Your Honour, the motion with Justice Brown was a motion brought by Miller Thompson against Crawford McKenzie and a number of other parties, including the plaintiff.

THE COURT: It related to the...

MS. DUNCAN: Seeking....

THE COURT: ...blog entry, right?

MS. DUNCAN: Seeking information about blog entries...

THE COURT: Right.

MS. DUNCAN: ...and making allegations and seeking production of everybody's computers, among other things.

THE COURT: Okay.

MS. DUNCAN: It was dismissed as having no basis.

THE COURT: Well, I read...

MS. DUNCAN: I appear....

THE COURT: ...his reasons.

MS. DUNCAN: I appear on behalf of my firm in relation to the fact I had to appear on that motion because it involved Mr. McKenzie personally, and my firm - my firm and I spent a great of time dealing with that motion on our own behalf...

THE COURT: Uh huh.

MS. DUNCAN: ...unrelated to the client, and unrelated to the other issues. This is a discrete issue of our firm and Miller Thompson in relation to this motion. It certainly doesn't relate to the balance of the issues before Your Honour.

THE COURT: Mr. Dewart, you must have something to say on this.

MR. DEWART: Yes Your Honour, just review the bidding. There are two motions before the court in respect of the matter dealt with by Justice Brown. The first is a motion by Miller Thompson and/or its client, it's not clear to me which, against Mr. McKenzie and his firm and I have been appointed to defend that motion and have addressed it in the material which has been filed, and will make submissions responding to that motion. Separate and apart from that, because Justice Brown, or R. S. J. Brown, reserved cost in their entirety, separate and apart from that the firm seeks to recover costs against Miller Thompson or its client, and that is the very narrow motion on which Mr. Duncan is appearing, which was filed, as I recall, last

5
10
15
20
25
30

week or the week before, and insofar as that motion by Ms. Duncan's firm is concerned, there's certainly no conflict that I can see between the firm and its former client and there's no suggestion that I've ever heard that Ms. Duncan is a witness in that matter. So, there'd be nothing that - certainly subject to anything Your Honour had to say, or ask us about, there'd be nothing to preclude Ms. Duncan from appearing as counsel on the motion by her firm to recover costs.

THE COURT: Whose costs are they? Whose - in this narrow motion, whose costs are they? Are they the client's costs?

MR. DEWART: Well, that's a question properly put to counsel.

MS. DUNCAN: No, Your Honour.

THE COURT: How do you say no?

MS. DUNCAN: These are costs of our firm related to the allegations and the relief sought in the motion against our firm. This is independent of relief sought against our client. There were allegations made that our firm had been making postings to websites in Barbados somehow. There were allegations that our firm had been indulging in libelous or slanderous behaviour, and I was required to deal with those allegations. And it's in respect of the fact that our firm; myself, Mr. McKenzie and a number of our staff, spent a great deal of time. I had to appear on, I believe, three separate occasions, February 20th, February 27th and April

1st to argue in relation to this matter in Newmarket, and that has no bearing on the balance of this proceeding. I would not have been dragged in but for the fact that our firm was made a party.

THE COURT: Whose here for Miller Thompson then?

MALE VOICE: No one, sir.

THE COURT: No one? Huh. Well, I guess they're not here, because they know I'm not going to deal with costs today. I think I've heard what you had to say, I wish I had Miller Thompson here just to respond so I understand that I'm on sure footing, but I guess the only thing we can do is you'll be dragged along in this process until I get to the point where I assess costs, which appears - or at least hear submissions on costs, which now appears to be out to February, the end of February. I take it you're not participating in any of these examinations, or otherwise, there's no reason to.

MS. DUNCAN: Not that I know of, no.

THE COURT: No.

MS. DUNCAN: Your Honour, perhaps I can request, maybe, that the court consider signing this discrete issue off...

THE COURT: Sorry...

MS. DUNCAN: ...because it's simply between....

THE COURT: ...I knew you were going to say that, that's why said it in anticipation.

MS. DUNCAN: Well....

THE COURT: But I just don't have - I don't have the additional time, frankly, to afford to this

5
10
15
20
25
30

matter. I'm giving as much as I have. I hope you understand that - I mean, I'm trying to use my non-sit weeks, which we're running into sittings that are coming up and the reason I have a non-sit right after those sittings is I end up with reserves, as much as I try to handpick jury cases, civil jury cases, I still have reserves and I've got to write. I just don't have any more time. They've got me - I'm tied up right through to Christmas other than the week of November 30th. In the month of January and February we're working hard, and one other reminder, we may very well have to have this hearing of this in the new courthouse, I'm just not sure of the timing issues. We're moving in - this court, I think, is slated, if I'm not wrong, that particular week. So, I'll leave it to the good graces of Jackie Traviss to - all those boxes that I have are still sitting there, I guess they're going to get shipped to my chambers at the new courthouse in the event that the - the movement of documents and materials, et cetera, moving boxes, takes place. I hope nothing goes wrong, but I just forewarn you that there may very well be a change and you want to check on that, where we're going to be on February 23rd. My preference is to stay here, just because I know everything is here, but - but my preferences don't matter. All right. Anything else?

MR. RANKING: Your Honour, the comment you just made reminding me of one other housekeeping

matter upon which, if I might, seek your direction; many, many weeks and months ago I prepared our materials, we served it, and I prepared a joint compendium...

THE COURT: Yes.

MR. RANKING: ...which basically contained all of the - a whole series of things, and I'm not asking for an order, I think if you could assist counsel with your direction that would be all I'm asking for this afternoon, but my friend has taken the position that the joint compendium does not comply with the rules, and he's technically correct. And he's technically correct, because when I prepared the joint compendium, I've written to Mr. McKenzie on two separate occasions and sent him the table of contents. I said, "Do you want anything else?" And I heard nothing from Mr. McKenzie. We then spent some hundred, if not thousands of dollars preparing the compendiums and circulated them, and Mr. Dewart was then retained and has taken the technical position saying that he's objecting to the documents all being in the compendium, some of which - and there are probably 20 - at least 20 letters passing between counsel.

THE COURT: I saw them.

MR. RANKING: And so, the issue, Your Honour, and it's a practical one, because Mr. Dewart and Mister - not Mister - Dewart hadn't been retained, and I've written to Mr. McKenzie, nobody had taken any objection on how these

compendiums were prepared. If I'm required, and I will say my client, PricewaterhouseCoopers, is assuming all the disbursements at this point in time as we've moved forward, but if I'm required because of your direction to go back and attach everything to an affidavit, I will. What I have done to try to address my friend's concern and I'm raising it now so that when we do get back in February that there's no issue with respect to your - the record that's before you. I have a student, actually, go through - we've prepared a table in concordance which does tie back those documents where we can find them in the actual record, and to the extent to these other correspondence, he's reviewed the files and his affidavit states that those letters were sent or received on, or about, the dates that are sent forth thereon, and based on his discussions with me has every reason to believe that the truth of the contents is true and authentic. So, that's what I've done. Now, I've written to my friend, and I've said, "Look, can you identify any particular document, any particular letter, with which you've got concern, if you can, I'll try to address it", and my friend has not identified any particular issue, but has said that's he's going to be sitting on his rights and objecting. So, if I could ask my friend to, perhaps, respond and get the benefit of your direction, that would be helpful, and I can then go away with your direction and do whatever might be necessary to fix the joint compendium which I've

prepared for all of the defence.

THE COURT: Mr. Dewart?

MR. DEWART: Your Honour, this is not a technical point. I've told my friend it's not a technical point. I'm not sure if Your Honour had a chance to look at the factum I finally delivered last week, but I deal with it at length in my factum...

THE COURT: I did.

MR. DEWART: ...there is no issue....

THE COURT: I saw that.

MR. DEWART: There is no issue about authenticity. The issue is not whether or not the documents were sent or received. I'm prepared to make that - I believe the concession is in my factum, I'm prepared to make the concession in any way that assists my friend. Quite apart from that - quite apart from that they have built a record in which, and I just elude, because that's all one has to do, to the reams of correspondence that go back and forth. The self-serving letters that fly around on all sides, as far as I can determine, and they base their submissions on the truth of the contents of the letters. So, it doesn't assist my friend - and I'm going to make submissions about that when we get to the motion. That they've not proven their case, and you can't put a letter with highly controversial facts in it and stapled it to the back of secretary's affidavit and get a million bucks. That's going to be my argument. You have to prove your case with

5 affidavit evidence and you have to put in an affidavit, a point by-the-way that has been lost on my friend since they make it so often, you prove it with an affidavit from a witness you can cross-examine. I have no interest in cross-examining Mr. Ranking's secretary about whether or not she faxed a certain letter on a certain date. I'm sure she did. But when people rely on the contents of the letter, that's an entirely different matter, and I'm going to argue that it's not been properly proven, and it's not been - and this is not a technical point, it's been put before you in a way that deprives me of the opportunity of cross-examining. You'll notice that Mr. McKenzie's put in an affidavit and we're going to cross-examine him on it. I will not have had the same opportunity with respect to the allegations that are being made against him. I do not ask Your Honour to rule on this point at this time, but to suggest this is a housekeeping matter, and I have explained this again and again and again, it's clearly set out in correspondence and the record, and I get back - I'm going to - just for present purposes say ill-mannered correspondence accusing me of playing games and taking technical position.

20 THE COURT: Well, I - I always feel saddened when I see that.

25 MR. DEWART: So....

30 THE COURT: Particularly about counsel of this caliber, but it's heating up. Let's reduce this

a little bit.

MR. DEWART: Fair enough, Your Honour.

THE COURT: None of you are Mr. McKenzie, none of you are Nelson Barbados, and frankly, none of you are the Chief Justice, or the former Chief Justice, or the Prime Minister of Barbados. So, let's just calm down here. I've got to approach this from a very rational - on a rational basis and frankly even with my heritage I - I bite my tongue from time-to-time and try and try and try to listen and value carefully what's being said, but let me bring you, Mr. Dewart, back to the final comment made by Mr. Ranking. What about the affidavit of the - I apologize, Madam Registrar, way at the back of the dais, what about the proposal about the law clerk? I mean, I - really what I see going on here is the - the opportunities for cross-examination are more limited when material is presented in a certain fashion. Whether that cross-examination is appropriate, is an entirely different matter, but I understand what's going on in the background. So, what about the suggestion that Mr. Ranking made about a law student providing an affidavit which files the correspondence?

MR. DEWART: It's not for me to dictate how Mr. Ranking proves his case. If he - certainly I will cooperate to make it as - I mean, my concern is the waste of paper and ending up with an even more cumbersome record.

THE COURT: Yeah.

MR. DEWART: But if Mr. Ranking and his

colleagues determine that that's how they want to prove their case, I will certainly - I will have things to say about the adequacy of the proof, but....

5 THE COURT: I also have the authority, don't I, in Rule 2, or - I never know which rule it is, but to expand or bridge the rules as required to meet the situation?

10 MR. DEWART: Certainly Your Honour has broad discretion to vary the rules and apply them by analogy.

THE COURT: Right.

15 MR. DEWART: I'm very - if this helps as well, if this speeds things up, I'm happy to treat the full contents of the compendium as if each letter, or document, in there had been introduced by a secretary's affidavit, or law student's affidavit, and no new record should be filed, nothing should happen that makes the record even more unmanageable than it already is and when we argue the motion I will have submissions to Your Honour about the adequacy of that evidence.

20 THE COURT: Well, I think you serve notice to the other side. I'm not going to wade in on this. I think collectively the lead counsel here can decide how they want to approach this issue and argue this issue when it comes before me. I don't think it's a housekeeping measure, I think it's a ruling in advance and I don't want to do that at this time.

25 30 MR. RANKING: Thank you, Your Honour.

Nelson Barbados v. Richard Ivan Cox, et al.

MR. DEWART: Your Honour.

THE COURT: Anything else? All right. Thank you. Good seeing you all.

M A T T E R A D J O U R N E D

5

10

15

20

25

30

Certification

FORM 2

Certificate of Transcript
Evidence Act, subsection 5 (2)

I, Brenda Wakelin, certify that this document is a true and accurate transcript of the record Nelson Barbados v. Richard Ivan Cox, et al., in the Superior Court of Justice, held at 601 Rossland Road, Whitby, Ontario taken from Recording No. 2812-3-0191/2009 and No. 2812-3-0192/2009, which has been certified in the Form 1 by R. Lenehan.

(Date)

May 21, 2012

(Signature of authorized person(s))

Brenda Wakelin, B.Sc., B.Ed., OCT, CCR, ICDR
Certified Court Reporter, CRAO
Internationally Certified Digital Reporter, IAPRT

PLEASE NOTE:

Any copies of this transcript are unauthorized and are in direct violation of Ontario Regulation 587/91, Courts of Justice Act, January 1, 1990. If additional copies are required, please contact the Records Management Clerk at 905 743 2672.

This transcript is a true certified copy bearing the original signature in blue ink.

