

SUPERIOR COURT OF JUSTICE

NELSON BARBADOS GROUP LTD.

Plaintiff

- and -

RICHARD COX et al

Defendants

BEFORE THE HONOURABLE JUSTICE SHAUGHNESSY,
AT THE COURTHOUSE IN OSHAWA, ONTARIO
ON THURSDAY, AUGUST 9, 2012.

MOTION WITHOUT NOTICE

APPEARANCES:

B. GREENSPAN

Counsel for Donald Best

1 THURSDAY, AUGUST 9, 2012

2 **THE COURT:** Good morning, Mr. Greenspan.

3 **MR. GREENSPAN:** Good morning, Your Honour. Your
4 Honour, first of all, I'd like to thank you and
5 your office for arranging for what I hope will be
6 just a brief moment of your time and I apologize
7 for interrupting the flow of what's happening.

8 **THE COURT:** Oh, you don't have to apologize. I'm
9 always happy to accommodate you. By the way,
10 just while I'm thinking of it, congratulations on
11 the honorary doctorate that you just received.

12 **MR. GREENSPAN:** Thank you, sir.

13 **THE COURT:** I just read about it in the
14 *Law Society Gazette* yesterday.

15 **MR. GREENSPAN:** Thank you, Your Honour.

16 **THE COURT:** So heartiest congratulations. We're in
17 very esteemed company.

18 **MR. GREENSPAN:** Thank you. It's interesting.
19 Unfortunately, I am going to be attending a
20 funeral today later on in the day. Justice
21 Trotter's mother passed away but Justice Trotter
22 sent me a website when I got the doctorate and it
23 was "Now that you're a doctor you can perform
24 surgeries," and there is a website of self-
25 surgeries that is really quite spectacular. I
26 haven't done that yet but thank you very much,
27 sir. I appreciate it.

28
29 Anyway, it's interesting and I wasn't going to
30 mention it but because we're starting informally,

you know, it's quite unusual for me to be on a
case where Her Majesty the Queen doesn't come

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first and there have been times throughout my career where I have appeared on civil contempt matters.

The very first civil matter I ever did was, quite nostalgically, a case called City of Sault Ste. Marie versus Ann Young and Mr. Kurisko, later Mr. Justice Kurisko, from Sault Ste Marie was on the other side on behalf of the City of Sault Ste. Marie and I was in the Civil Court of Appeal in Osgoode and Justice Jessop was in the middle, so it's the early eighties at the time, and he looked at me and said, "Is this your baptism in the Civil Court of Appeal?" And I said, "It is, sir," and he said, "Picked the wrong vehicle." So there is a history of perhaps civil contempt issues.

THE COURT: Well, it would be interesting to be on a case with Stan Kurisko as well.

MR. GREENSPAN: It was. It was very. It was very, no question about it.

Sir, what brings me here today is to seek your directions because the civil case that led to the civil contempt...

THE COURT: Yes.

MR. GREENSPAN: The matter of Nelson Barbados Group Ltd. and 63 defendants were named.

THE COURT: Yes.

MR. GREENSPAN: ...in that action. That case has now been resolved and settled and it's over. And now, in an attempt to seek - and you will see we not only have the application before you today

1 but we have a draft application of the release
2 that we will seek in the main motion that we want
3 to bring before you that we are at a bit of a
4 loss as to who we ought to serve.
5

6 To just remind you, at the time of what was
7 occurring, at the relevant time, Your Honour held
8 Mr. Best in contempt on January the 15th of 2010.
9 You sentenced him at that time to three months'
10 incarceration and a fine of \$7500. At that time,
11 counsel - four sets of counsel appeared on behalf
12 of the defendants during that timeframe.

13 **THE COURT:** Yes.

14 **MR. GREENSPAN:** But they only represented 11 of
15 the defendants or at least the record reflects
16 that they represented 11 of the 63 defendants.
17 The rest of the defendants were apparently
18 unrepresented or didn't actually participate in
19 response to the action by Nelson Barbados. As a
20 result - and quite frankly, now that it is
21 settled, we are not confident, although we are
22 happy to serve them, that Mr. Silver or Mr. Roman,
23 Mr. Ranking or Mr. Clarke have much interest in
24 returning to court to respond or to make
25 representations with respect to the application
26 which we seek. But at the same time, we wanted to
27 do it right. We wanted to make sure that we
28 served any interested party who might want to
29 attend for whatever reason they want to attend.
30 Our inclination was to serve only the defendants
31 who were appearing at the time as the transcript
32 reveals.

1 **THE COURT:** Yes.

2 **MR. GREENSPAN:** That was our first inclination but
3 we wanted to make sure that we weren't remiss in
4 our obligation to serve other parties if
5 Your Honour thought, as a matter of practice, we
6 ought to. So that's the first and most important
7 part of the reason for my attendance this morning,
8 just who ought we to serve.

9
10 The other one is perhaps a little bit more
11 controversial and there is this very lengthy
12 affidavit that we have served that will be the
13 primary affidavit in the main motion once we
14 schedule that and we hope to schedule it
15 certainly no later than the end of October. We
16 would like to schedule it early in the fall,
17 subject to Your Honour's availability and your
18 schedule.

19
20 In that lengthy affidavit, there are positions
21 that are taken that may impact - and I must say
22 in terms of his recollection and what occurred,
23 it may impact upon some of the counsel who were
24 active at the time in this matter in terms of
25 their recollection, his recollection and again,
26 we thought, as a matter of fairness, all of those
27 counsel ought to be aware of it and ought to be
28 served with this affidavit in order that they
29 might, if they choose, respond to the position
30 that Mr. Best takes in his affidavit. So that was
31 that aspect of it.

32

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1 The other aspect is, as his affidavit reveals, he
2 has primarily, with his family, lived in
3 New Zealand.

4 **THE COURT:** I found out for the first time after I
5 read the material.

6 **MR. GREENSPAN:** Well, quite frankly, we didn't
7 know until this affidavit and I must say I am
8 unaware of where he currently resides.

9 **THE COURT:** I am not asking you.

10 **MR. GREENSPAN:** He contacts us either by email and
11 we arrange for telephone calls and I must say,
12 and I don't think we've been remiss, but it's
13 been a very very difficult process since we were
14 first approached about getting involved in this
15 matter. It's been a difficult process to come to
16 the level of knowledge that we now have to be
17 able to produce this affidavit, which was only
18 sworn in April of this year, and we were retained
19 in May of last year. So it's taken us all...

20 **THE COURT:** May of last year?

21 **MR. GREENSPAN:** May of 2011 is when we were - the
22 end of May, 2011 is when we were first retained
23 but it took us about 10 months really to get our
24 hands around this and to understand it and be
25 able to produce the affidavit as we see it
26 primarily because there was - the telephone
27 nature of the relationship and the desire to get
28 materials together so that we could understand it
29 and present it properly to you. But in the
30 interim, what we now see is this.

31
32 He has got to return to Canada. There is a

1 warrant that Your Honour issued, subject to your
2 order of January 15, 2010, for his arrest. What
3 we respectfully would suggest or request from
4 Your Honour is that the execution of that order
5 be lifted to October 31st, 2012 or the date of the
6 application, whichever is the earlier, so that we
7 might be permitted the opportunity for Mr. Best
8 to return to Canada, come before the court out of
9 custody and be able to make the representations
10 and be subject to potential cross-examination on
11 his affidavit out of custody and therefore, be in
12 a position that when we come before you - if
13 Your Honour, at the end of the day, chooses to
14 re-incarcerate, so be it but that at least the
15 preparations, the cross-examinations, potentially,
16 and the appearance in court and his movement
17 through Immigration, that that can be made out of
18 custody.

19
20 We don't anticipate that he would come to Canada
21 prior to early September, so we're just talking
22 about a period of perhaps four to six weeks at
23 the maximum where he would be at large in Canada
24 and not subject to the execution of the arrest
25 warrant. That is really the only secondary issue
26 and I leave that with Your Honour and at your
27 discretion, sir, and those are the two issues
28 that I wanted to raise before you on this matter.

29 **THE COURT:** Well, my first comment, Mr. Greenspan,
30 is that this contempt hearing was not on my
31 initiative. So it was not one made at the
32 instance of the court. It was brought primarily,

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1 I'm going to say, by Mr. Silver and Mr. Ranking
2 and if anything, the way the case was conducted -
3 and frankly, there was - I mean I have got three
4 transcripts here. I'm telling you there must have
5 been eight, maybe eight transcripts or more of
6 various attendances, not always directly. Well,
7 Mr. Best was the principal of Nelson Barbados.
8 Mr. McKenzie was the lawyer representing the
9 corporation up to a point. So I can't remember at
10 this point in time who actually put it before me
11 or whether it was joint or how many persons were
12 on it. I would think, though, as a starting point,
13 that there should be notice. Are they no longer
14 interested? You know the parties, who they
15 represented in these proceedings, presumably, and
16 do they have any appetite? I really don't know.

17
18 The second part is do they have standing, in any
19 event? My sense - I am not making a ruling on it.
20 I am going to let them come. I am going to ask
21 you to serve at least the individuals who
22 appeared on the contempt hearing.

23 **MR. GREENSPAN:** Yes, sir.

24 **THE COURT:** And I can't tell you which law firms
25 those are from looking at it.

26 **MR. GREENSPAN:** It would appear...

27 **THE COURT:** There is another - sorry.

28 **MR. GREENSPAN:** I'm sorry, sir. It would appear -
29 well, in the three transcripts that we do have,
30 on all of them it appears to be the same. On
31 January the 15th, which is when the contempt
32 citation took place, at that time, if you can

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1 look to page three of the transcript, you will
2 see that the usual suspects were all there, and
3 that is at Schedule A.

4 **THE COURT:** Yes. As I looked at the other
5 transcripts, Motion, December 2nd, they seem to be
6 the same but when I went over...

7 **MR. GREENSPAN:** Yes, sir.

8 **THE COURT:** ...to November 2nd, there is somebody
9 called Butler, Conklin and Kewan and they may
10 have been alternative representatives to the
11 others. There is many more counsel who
12 participated in the proceedings but not in that
13 contempt proceeding. So I think we would be safe
14 at least on the contempt motion is what I am
15 looking at, the contempt hearing, at least Silver,
16 Roman and Ranking. Those three I distinctly
17 remember. Morse, Clarke I think were - riding the
18 rails would be my term.

19 **MR. GREENSPAN:** Morse was with Ranking.

20 **THE COURT:** Maybe that's the case.

21 **MR. GREENSPAN:** Okay, so it's Mr. Ranking and
22 Ms. Morse for the defendant, Price Waterhouse,
23 who we believe actually initiated the contempt.

24 **THE COURT:** That may very well be. My memory is
25 just light on this and I must tell you I don't
26 have the file or the transcript. I didn't order
27 it up. But if you have any difficulty, I will get
28 the court file for you. I'm sure it's gone to
29 storage somewhere.

30 **MR. GREENSPAN:** If you might, sir, if you look at
31 January 15th for a moment.

32 **THE COURT:** January 15th, yes.

1 **MR. GREENSPAN:** Yes, if you look at January 15th...

2 **THE COURT:** Got it.

3 **MR. GREENSPAN:** Go to the second page, Schedule A,

4 you will see that for the defendants...

5 **THE COURT:** Yes.

6 **MR. GREENSPAN:** ...were Lorne Silver, Mr. Ranking

7 and Ms. Morse for Price Waterhouse, Mr. Roman and

8 then Ms. Clarke.

9 **THE COURT:** Now what are we going to do about

10 Nelson Barbados because Mr. McKenzie and his law

11 firm, well, they have parted ways is what I'm

12 told but something erupted, as you know, after

13 this.

14 **MR. GREENSPAN:** Yes.

15 **THE COURT:** ...where Mr. McKenzie had to leave and

16 not only that but counsel, a very leading counsel

17 and I forgot his name, had to get off the record.

18 So I don't now who represents Nelson Barbados at

19 this point in time.

20 **MR. GREENSPAN:** Well, I think no one does at this

21 point but I am more than happy - I will tell you,

22 sir, that I know Mr. McKenzie personally. I think

23 he's now retired from practice but there is no

24 problem in ensuring that Mr. McKenzie is aware of

25 the proceedings and is given notice of the

26 proceedings as well.

27 **THE COURT:** I think it would helpful for other

28 reasons and I suppose if Mr. Best is still a

29 Director of Nelson Barbados, which is the

30 representation to the court, and that status

31 hasn't changed, then Nelson Barbados Group Ltd.

32 is on notice by Mr. Best being on notice.

1 **MR. GREENSPAN:** Yes, sir.
2 **THE COURT:** So I think that would probably do it.
3 **MR. GREENSPAN:** Thank you.
4 **THE COURT:** I think you are quite right that
5 Mr. Ranking and certainly Mr. Silver and Mr.
6 Roman - but those three were the three lead
7 counsel and as the many applications proceeded,
8 other counsel just dropped off or they didn't
9 even gown. They just watched what was going on in
10 the courtroom. So I think if you've got that
11 group, I think we've got service out of the way.
12 **MR. GREENSPAN:** So the last one, just for
13 certainty...
14 **THE COURT:** Ms. Clarke?
15 **MR. GREENSPAN:** Ms. Clarke. Should I, just as a
16 matter of caution, add her?
17 **THE COURT:** I think so. We might as well.
18 **MR. GREENSPAN:** ...because she did appear at the
19 time.
20 **THE COURT:** Yes, and that is the First Caribbean
21 International Bank.
22 **MR. GREENSPAN:** Yes.
23 **THE COURT:** But boy, they had...
24 **MR. GREENSPAN:** I'm sure they will have no
25 interest, sir.
26 **THE COURT:** ...little or no interest whatsoever
27 here.
28 **MR. GREENSPAN:** No, no. I'm sure their first
29 question will be, "Who is paying the bill?"
30 **THE COURT:** And I am always cognizant of that but
31 in any event, it may be we will see who, if any,
32 shows. So that would be the first step.

1 The second is a date. We may have to get the
2 trial co-ordinator on the phone here because she
3 is the real boss. Would you mind getting Jackie
4 on the phone just for a moment? I am just going
5 to put out some dates and Mr. Greenspan can tell
6 me how it works. It looks to me the week of
7 October 1st could be available because I am duty
8 judge that week but then I start criminal the
9 weeks of October 8th, 15th. There is the week of
10 October 22nd. I am doing civil pre-trials but they
11 can rearrange or squeeze cases around that week.
12 So maybe we could get her on the phone and find
13 out which...

14 **MR. GREENSPAN:** So that was October 22nd?

15 **THE COURT:** The week of. The only day I would not
16 want it is the 25th. I am doing a very lengthy
17 sentencing that day or I'm having a sentence
18 hearing. I don't know if I will be doing the
19 sentencing that day.

20 **COURT REGISTRAR:** How long?

21 **THE COURT:** I am going to say half a day. I think
22 the 22nd might be better if we could go into that
23 week but I don't know how that works for
24 Mr. Greenspan. Of course, we don't know what
25 works for the other counsel either. That is the
26 problem.

27 **COURT REGISTRAR:** October 23rd in the a.m. She
28 also has October 12th, either a.m. or p.m.

29 **MR. GREENSPAN:** That may be better. October...

30 **COURT REGISTRAR:** 12th.

31 **MR. GREENSPAN:** That's a Friday.

32 **THE COURT:** I think she is thinking at the end of

1 a criminal sitting. I have a reputation for
2 finishing early so I think they are thinking they
3 will squeeze a day in.

4 **MR. GREENSPAN:** Sir, I'll tell you, I'm scheduled
5 that day to be the final day of a motion in
6 Newmarket and I think that is a safe - like there
7 was a couple of days that were added on as safety
8 days and I have co-counsel on that one, so I'm
9 really comfortable with Friday, October 12th.

10 **THE COURT:** So am I.

11 **MR. GREENSPAN:** All right, that's good.

12 **THE COURT:** So would you tell her the 12th and are
13 we going in the morning then, Mr. Greenspan?

14 **MR. GREENSPAN:** Yes, sir.

15 **THE COURT:** Thank you. I will mark Nelson Barbados
16 at 9:30 a.m. re: Best. Now, I come to the third
17 item. It gives me some concern in terms of the
18 history of Mr. Best but I suppose what I'd like
19 to hear is that Mr. Best would surrender himself
20 into custody when I go to hear this but that may
21 be too extreme. But it is the history that
22 bothers me, which is still alive in my mind. This
23 is not a case I could possibly ever forget
24 because I think I began it in 2008 and it ended
25 in 2010. But on the other hand, counsel may very
26 well want to cross-examine him and so, with your
27 advice that he will be in attendance, I don't see
28 where I have any difficulty. So I am prepared to
29 make an interim order. I will make it on the
30 motion or the application record here, I guess.
31 We will get you a copy of this, Mr. Greenspan,
32 but so far I have ordered:

1 1. I hereby order that the counsel listed on
2 the contempt hearing transcript of
3 January 15, 2010 shall be served with the
4 application and supporting materials.

5 2. The application is adjourned to Friday,
6 October 12, 2012, 9:30 a.m. before me.

7 3. It is further ordered that the execution of
8 the arrest warrant shall be temporarily
9 stayed until October 12, 2012 to permit
10 Mr. Donald Best to return to Canada,
11 instruct counsel and, if required, to be
12 available for cross-examination on his
13 affidavit.

14 **MR. GREENSPAN:** Thank you, sir.

15 **THE COURT:** That's it on that?

16 **MR. GREENSPAN:** Thank you, I appreciate it. I
17 take it, unlike my usual practice, I have to
18 prepare a formal order, I suspect, for the court
19 to execute it.

20 **THE COURT:** I'm afraid that's how it happens in
21 this arena. I want to raise an issue with you
22 right now.

23 **MR. GREENSPAN:** Yes, sir.

24 **THE COURT:** ...which, frankly, is of no
25 consequence or importance to me but I suspect you
26 would know because you have a client who you have
27 been dealing with for some time. Mr. Best and
28 Mr. McKenzie filed a complaint with the Canadian
29 Judicial Council.

30 **MR. GREENSPAN:** I'm aware, sir.

31 **THE COURT:** You know from representing judges and
32 other people throughout the time, I don't know

1 that they file a complaint. I am never told. It
2 was reviewed by the Chief Justice of Manitoba and
3 I received notification May, June of this year
4 that - my Chief Justice, Heather Smith, sent me a
5 copy advising that the Judicial Council did not
6 wish any comments from me and that they had
7 closed their file and I was given the decision -
8 I will call it that - of the Chief Justice of
9 Manitoba.

10
11 I just want to point that out. I'm sure you knew
12 and frankly, it is of no importance or
13 consequence because every person that comes
14 before this court has the absolute right to
15 register a complaint before the Judicial Council.
16 So I, frankly, want to just tell you that at the
17 outset but I think you know and further, as I say,
18 it is of no consequence. It doesn't influence me
19 whatsoever.

20 **MR. GREENSPAN:** Sir, I want to make it clear for
21 the record that I was fully aware of the
22 complaint having been made. I in fact received a
23 copy through Mr. Best of the decision of the
24 Judicial Council. I have also reviewed that. I am
25 fully aware of it. Had I had any concerns, you
26 would have heard the concerns expressed and I,
27 from the outset of this application, sir, made it
28 clear that our view was that this matter should
29 come back before you and we are content that this
30 matter come before you and that you make the
31 determination on the motion.

32 **THE COURT:** Great. I must tell you I don't think

1 there is any judge upstairs who is exactly
2 hankering to try to go in and understand this
3 case and its history.

4 **MR. GREENSPAN:** No.

5 **THE COURT:** So they are relieved, I can tell you.
6 I had a discussions with my colleagues about that
7 event and I said, "I don't know what
8 Mr. Greenspan is going to say and if he does say
9 it," and then all I saw was this aghast look from
10 all of them saying, "Come on, don't push this on
11 to us. It's going to take us days to understand
12 the history." I mean the history, what happened,
13 is very much alive in my head because of the very
14 unusual circumstances of the case.

15 **MR. GREENSPAN:** I appreciate that and we're fully
16 aware of it and we're, as I say, totally content
17 that the matter proceed before you.

18 **THE COURT:** And I also want to tell you,
19 Mr. Greenspan, in terms of any procedural matters
20 because you serve these counsel and you know,
21 several of them are very very busy, if they are
22 going to run into a problem about it, we can
23 simply convene a conference call if you call
24 Jackie Traviss, the Trial Co-ordinator. I would
25 convene a conference call to try to work out
26 dates. I found, in that particular case, it was
27 extraordinary the number of leaps and bounds we
28 had to go to get everybody together in the
29 courthouse at the same time. But if it will be of
30 any assistance - but I will not discuss anything
31 else other than scheduling.

32 **MR. GREENSPAN:** Yes, sir.

THE COURT: And with everyone on the phone and rather than have you come out here, just arrange it and I'll be happy to accommodate you.

MR. GREENSPAN: Thank you, sir. We would appreciate it. Thank you.

THE COURT: We will get Mr. Mills to photocopy for Mr. Greenspan a copy of my endorsement.

A D J O U R N M E N T

(9:39 AM)

FORM 2

Certificate of Transcript

Evidence Act, subsection 5(2)

I, Maxine Newell, certify that this document is a true and accurate transcript of the recordings of Nelson Barbados & Cox et al in the Superior Court of Justice held at 150 Bond St. E., Oshawa, Ontario, taken from Recording number 2812-206-20120809-082800, which has been certified in Form 1.

August 16, 2012

Maxine Newell, C.C.R.