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Action No. 0901-16220
IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

DONALD BRODER

Plaintiff

- and -

GUY LACOURCIERE, BRIAN KICKHAM,
and MARVIN BLOOS

Defendants

CLERK OF THE COURT
JUN - 7 2010
CALGARY, ALBERTA

CROSS-EXAMINATION OF GUY LACOURCIERE
BY MR. CRAIG BRODER
HELD THE 26TH DAY OF MAY, A.D. 2010

On his Affidavit sworn the 15th day of January,
A.D. 2010, taken before Carol Bourgeois, CSR(A),
Examiner, pursuant to Rules 203(3), 728, 204(1) of
the Court of Queen's Bench of Alberta, held at the
offices of Field LLP, 400, 604 - 1st Street, S.W.,
Calgary, Alberta.

APPEARANCES:

(Craig and Donald Broder Self-represented
 (57 West Edge Road, Cochrane, Alberta T4C 1M7
 (403) 932-9992)

(R. Wong, Esq. For the Defendant
 (Lacourciere)
 (Field LLP, 400, 604 - 1st Street, S.W.,
 Calgary, Alberta T2P 1M7 (403) 260-8500)

(Carol A. Bourgeois, CSR(A) Court Reporter
 Precision Reporting
 (403) 686-2707)

1 (UPON COMMENCING AT 1:55 P.M.)

2 GUY LACOURCIERE, having been duly

3 affirmed, testified as follows:

4 Q MR. BRODER: I refer you to within your
5 affidavit, Guy Lacourciere, paragraph 4.

6 A Yes.

7 Q You refer to initially being retained to appeal an
8 order of Justice Clark on November the 2nd, 2001; is
9 that correct?

10 A That's what it says, yes.

11 Q Did you, Mr. Lacourciere, file a notice to change
12 solicitor within action 970372949 at that time? Did
13 you go on the record formally at the courthouse at
14 that time?

15 A You know, I really can't remember.

16 Q Okay. Can you refer to tab A, page 1 of the appeal
17 book digest?

18 A Yes.

19 Q Now, you identified for the record that this document
20 is a copy of the appeal book digest of the Clark
21 appeal?

22 A Yes.

23 Q Can you refer to tab A, page 2 of the appeal book
24 digest?

25 A Yes.

26 Q Are all the pleadings filed with the clerk of the
27 court prior to the Clark appeal listed within this

1 of court to address that the plaintiffs have no
2 standings to commence an action against the
3 defendants?

4 MR. WONG: Well, are you asking for opinion?

5 MR. BRODER: Well, no. I'm asking Mr.

6 Lacourciere, is this the procedure.

7 A Is this the procedure to follow --

8 Q The notice of motion.

9 A Yeah, sure.

10 Q Was this application made prior to the certificate of
11 readiness being filed?

12 A Again, I'm not sure. Do you have the date that it
13 was filed?

14 Q I'll be getting to that shortly and we can come back
15 to those questions.

16 In this action, was the issue raised by way of a
17 129 application because the plaintiffs had brought on
18 an action in their personal capacity and lack
19 standing because no personal representatives had been
20 appointed?

21 MR. WONG: Well, again, that's for a court
22 of law to determine.

23 MR. BRODER: And that's the question that I'm
24 asking.

25 MR. WONG: And that's already been termed by
26 Justice Clark in the court of appeal.

27 Q MR. BRODER: Was the first time lack of

1 standing rule 129, "the action is frivolous,
2 vexatious and an abusive process of the court" raised
3 in the original statement of defence?

4 If you would like to refer back to the original
5 statement of defence, you can.

6 A I believe so. Oh, yes, it is. Yes. "The defendants
7 claim that the claim against them by the plaintiffs
8 is frivolous, vexatious and an abusive process."

9 Q Can you refer to tab A, page 17, 18, 19 and 20.

10 A 17?

11 Q Seventeen.

12 A Eighteen.

13 Q Nineteen and 20.

14 A Sure.

15 Q Again, it's the amended amended statement of claim;
16 correct?

17 A Yes.

18 Q Was the amended amended statement of claim filed on
19 November the 5th, 2001?

20 A I'm going to have to apologize. There was no --

21 Q Were you the solicitor on the record for Donald
22 Broder and Craig Broder when the amended amended
23 statement of claim was filed?

24 A I'm not 100 percent sure, but I believe I was.

25 Q If you can refer to page 1 of the amended amended
26 statement of claim.

27 Was this the first time the personal

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1 representatives were named as plaintiffs?

2 A Yes, it is.

3 Q Were the personal representatives added as plaintiffs
4 after the deadline set out by way of an order that
5 the certificate of readiness was to be filed?

6 A Yes.

7 Q Was Elizabeth MacInnis solicitor for the plaintiffs
8 at the time of filing the amended amended statement
9 of claim?

10 A Yes.

11 Q Was it necessary to file a statement of defence to
12 the amended amended statement of claim?

13 A Not necessarily.

14 Q Was there a fiat provided for the amended amended
15 statement of claim?

16 A I'm sorry?

17 Q Was there a fiat provided for the amended amended
18 statement of claim?

19 A No.

20 Q Can you refer to tab A, page 21.

21 A Yes.

22 Q Identifying for the record that this is the granting
23 of administration of Edmund Broder?

24 A Yes.

25 Q Yes. Was Edmund Broder's date of death December the
26 26th, 1968?

27 A According to this document, that's the date of his

1 Q Did you raise in your submissions -- did you raise
2 the issue that the first time lack of personal
3 representatives was raised was not early 2001, which
4 is tab A, page 13, Sawyer's motion, but was pleaded
5 within the original statement of defence?

6 A As a matter of fact, it was told to the court of
7 appeal. The comment was made by the court of appeal
8 -- well, you ambushed Ms. MacInnes and we said, no,
9 nobody was ambushed in respect to this. That matter
10 was raised at the beginning in the statement of
11 defence.

12 Q What you mean by "ambushed Ms. MacInnes?"

13 A The court had asked the question.

14 Q If we ambushed Elizabeth MacInnes?

15 A It appears to us that Ms. MacInnes may have been
16 ambushed by the motion, by Sawyer, in respect to --
17 in respect to the motion that had been filed in 2001.
18 And at that point in time what I had told the court
19 of appeal is that the matter had originally been set
20 out in the statement of defence.

21 Q I need some clarification that we ambushed Elizabeth
22 MacInnis.

23 MR. WONG: That's what the court of appeal
24 said.

25 Q MR. BRODER: We ambushed her? Is that not
26 when you raised issues, is that not considered a
27 lawyer of competence to know when and wait until the

1 issue being raised might be to your advantage -- or
2 to our advantage?

3 MR. WONG: Do you understand that?

4 A THE WITNESS: No.

5 MR. WONG: No. Can you repeat?

6 Q MR. BRODER: All I'm saying, if you're going
7 to wait to file motion 129, would it not be to our
8 advantage if our solicitor waited for a timely
9 application?

10 A Let's be clear. You filed a statement of defence.
11 In the statement of defence it raised the issue of
12 standing, okay? Later on a comment was made, first
13 of all, by Ms. MacInnes, that she had been ambushed.
14 At which point in time the court asked me about being
15 ambushed. And I said to the court, I said, no, that
16 the -- that Ms. MacInnes was not ambushed, that the
17 matter has been raised originally in the statement of
18 defence that had been filed by Mr. Sawyer.

19 Q Did you ever communicate with Robert Sawyer with
20 respect to bringing on a notice of motion pursuant to
21 the Alberta rules of court 129?

22 A No.

23 Q Did you ever tell Donald or Craig Broder that you
24 called Robert Sawyer to discuss bringing on an
25 application, that there was lack of personal
26 representatives or outstanding?

27 A No. I told you guys and you -- in fact, when you

1 representatives in the said action prior to the date
2 the second certificate of readiness was confirmed as
3 being filed April 17th, 2003?

4 A Was the --

5 Q Were the personal representatives added prior to the
6 second certificate of readiness filed during the case
7 management meeting with Justice Marceau?

8 A According to Justice Bielby, she found that the
9 personal representatives were added to the action on
10 September 18th, 2001. That's what she held.

11 Q Was Justice Marceau ever informed when he was
12 accepting the conditional certificate of readiness,
13 that there was an order -- previous order to file a
14 certificate of readiness?

15 A No.

16 Q I refer to page 17, paragraph 82. I quote, "The
17 defendant led evidence from his then counsel, Joseph
18 Keuber to the effect that Mr. Keuber wrote to the
19 plaintiff's counsel in April 1997, advising that he
20 would advance a limitation defence, that neither of
21 his letters expressly raised the issue of the
22 plaintiff's standing to sue at that time, which, in
23 any case, was before the original statement of claim
24 was filed; therefore, those letters created no
25 estoppel which would prevent the application of the
26 principle of relation back."

27 Was this action unsuccessful for Donald Broder

1 because MacInnes relied on the principle of relation
2 back?

3 MR. WONG: Well, you're asking for an
4 opinion of the court.

5 A THE WITNESS: Do you mind? I believe the
6 reasons for judgment provided by the Honorable Madam
7 Justice Bielby are very clear and are very, very
8 straightforward.

9 So if you want to know the reasons why she did
10 this, they are set out in her reasons.

11 Q MR. BRODER: I refer back to tab A, page 13.
12 Just identify for the record that this document is
13 the notice of motion raising the issue of the
14 plaintiff's stand to rule 129.

15 Is it correct in saying that the grounds upon
16 which this application is brought are as follows.
17 That the plaintiffs have no standing to commence an
18 action against the defendants and as such, the
19 statement of claim discloses no cause of action, and
20 the action is frivolous and vexatious and is an abuse
21 of the process of court; is that correct?

22 A That's what the document says.

23 Q Is that correct?

24 A That's what the document says.

25 Q I refer you to tab A, page 6, 7 and 8. I'll turn
26 you, actually, to the page which is page 12 of that
27 document, but it's page 7 at tab A. Was there

1 anything said in that motion that is similar to that
2 in paragraph 8?

3 A Just so we're on the same page, tab A --

4 Q Tab A, page 7 -- well, it's page 7 in the tab. It's
5 the one before that. It's that one. It will have a
6 "2" at the top of the page. The second page at the
7 top.

8 A Hmm hmm. I've got it.

9 Q Was there anything that was said in that motion that
10 is similar to paragraph 8?

11 A The documents are very clear.

12 Q So they're similar?

13 A Absolutely.

14 Q Can you refer to your affidavit, paragraph 12, 13 and
15 14.

16 A Twelve, 13 and 14?

17 Q Yes. Well, start with 12, Guy, and I'll go to the
18 next one, if necessary.

19 A Yes.

20 Q So you confirm within your affidavit, paragraphs 12,
21 13 and 14, that you assisted with the trial?

22 A Yeah. I assisted you with the submissions that you
23 were going to make and to give you -- go over the
24 cases.

25 Q Did you ever inform us during that assistance to
26 ensure that Alberta rule of court 239 that the trial
27 judge be provided with all of the pleadings to ensure

1 that that was being followed?

2 MR. WONG: Do you want to look at 239?

3 Okay. I'll get you rule 239.

4 (BRIEF ADJOURNMENT)

5 Q MR. BRODER: So my question to you, Mr.
6 Lacourciere, was, if you were helping us do the
7 trial, or assisting us, why would you not bring me up
8 to speed or talk to me about confirming or ensuring
9 certain rules were being followed?

10 A I have no idea what rules -- first of all, you're
11 conducting the trial; correct?

12 Q Right.

13 A And I'm going to assume that you have followed all
14 the rules and procedures and are familiar with all of
15 the rules and procedures. My concern was to find out
16 whether your submissions were proper.

17 Whether or not you filed -- whether or not Ms.
18 MacInnes filed all the pleadings, that's not for me
19 to do. In fact, you should have looked at the
20 certificate of readiness and the trial book to see
21 whether or not they had been filed. I would point
22 out that you don't file a statement of claim where an
23 amended statement of claim has been filed, because
24 the court wants to see the amended statement of claim
25 and the amended statement of defence, if there is
26 any. That's how that works.

27 Q But do they want to see the original statement of

1 defence?

2 A No, they do not.

3 Q So the one that's filed later, the amended one
4 becomes precedent?

5 A That's correct.

6 Q All right. Well, I could have produced it during the
7 --

8 A I know you've been making a lot of this, and it could
9 be for one really good reason that I don't
10 particularly understand, but first of all, again, I'm
11 going to -- you're asking me to give you some advice
12 in respect to your --

13 Q No, I'm not asking you to give advice. We asked you
14 to give advice at trial.

15 A In January of 2000- whatever it was, you asked for
16 advice with respect to submissions before the court.
17 Before that you had hired another lawyer and you had
18 ample opportunity to review everything.

19 Now you're asking me a question as to whether or
20 not I should have told you that you had the right to
21 produce the amended -- or the statement of claim, the
22 original statement of claim. No, you didn't have
23 that right.

24 Q I didn't have that right?

25 A No.

26 Q So the amended one takes precedence?

27 A That's correct.

1 Q Total precedence?

2 A Absolutely.

3 Q You cannot bring in a previously filed statement of
4 claim into the trial?

5 A That is correct. The advice that I would have given
6 you is that a statement of claim, or any pleading,
7 for that matter, is not evidence. All it is is
8 matters that have been raised.

9 Q Correct.

10 A When you proceed to trial, you proceed to trial on
11 the final pleadings. And the reason for that is that
12 those are the issues that the court looks at on the
13 filed pleadings. That's the advice that I would have
14 given you if you would have requested it. I had no
15 idea what you had. And as far as I'm concerned
16 relying on Ms. MacInnes as being a reputable counsel,
17 that she had included the current amended amended
18 statement of claim and the amended -- or the defence
19 to the amended amended statement of claim.

20 Q And you said previously that you -- there was no need
21 to file an amended -- or a statement of defence to
22 the amended amended statement of claim. There was
23 not necessarily a need to file that?

24 A Yeah, it's not necessary to file it.

25 Q Why would you file it?

26 A Why would you file it?

27 Q Yes.

1 A Well, you would file it if there were things that you
2 wanted to -- for example, my original defence might
3 already address the issues that had been raised in
4 the amended statement of claim. In that -- in which
5 case -- a good example -- that's speculation.

6 The idea is that it's not necessary if your
7 defence deals with the issues that are raised in the
8 amended statement of claim or the amended third party
9 notice or any amended pleading.

10 Q Did you file an amended statement of -- a statement
11 of defence to the amended amended statement of claim?

12 A Oh, I wish I could remember that.

13 Q Actually --

14 A Have you got a copy of one?

15 Q I do.

16 A Well, obviously I did.

17 Q Here it is.

18 MR. WONG: This is an exhibit.

19 A THE WITNESS: Is it part of the affidavit?

20 MR. BRODER: It's a part of the fax.

21 MR. WONG: You can't rely on that.

22 A THE WITNESS: No. Whether there is some stuff
23 here.

24 Q MR. BRODER: You have a copy of that, Guy.

25 MR. WONG: We might as well mark it as an
26 exhibit if you're referring to it.

27 MR. BRODER: Mr. Wong, I'm finished and we can

1 close it off. So I have no further questions.

2 MR. WONG: For the record, the statement of
3 defence to the amended amended statement of claim was
4 filed, as well as a counterclaim by Mr. Guy
5 Lacourciere on October 21st, 2002.

6 A THE WITNESS: And the document that's here
7 has some handwriting on it that -- in particular, at
8 counterclaim in -- there is some handwritten
9 documents at P11, D3, 4, 5, 6, 7, 8, 9, 10, 11, 12
10 that are not mine. And then there are some documents
11 on the page marked 10 that are not mine. And it was
12 filed -- it was -- yes, apparently I filed it, and it
13 looks to me I filed it on October 21st, 2002.

14 EXHIBIT NO. 2:
15 STATEMENT OF DEFENCE TO THE AMENDED AMENDED
16 STATEMENT OF CLAIM, AS WELL AS A
17 COUNTERCLAIM FILE BY MR. GUY LACOURCIERE ON
18 OCTOBER 21ST, 2002

19 MR. BRODER: So no further questions.

20 A Thank you.

21 MR. WONG: Thank you.

22

23 (PROCEEDINGS ADJOURNED AT 3:22 P.M.)

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1 CERTIFICATE OF TRANSCRIPT

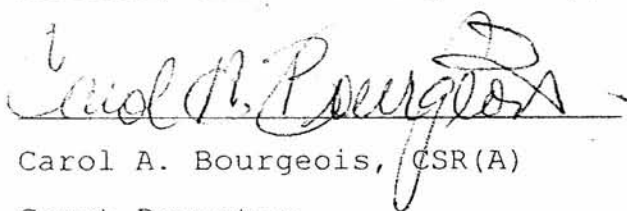
2

3 I, Carol A. Bourgeois, hereby certify that the
4 foregoing pages 1 to 45 are a true and faithful
5 transcript of the proceedings taken down by me in
6 shorthand and transcribed from my shorthand notes to
7 the best of my skill and ability.

8 Dated at the City of Calgary, Province of
9 Alberta, this 28th day of May, A.D. 2010.

10

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Carol A. Bourgeois, (CSR(A)

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Court Reporter.

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