Court File No. 07-0141

*ONTARIO*
SUPERIOR COURT OF JUSTICE

B E T W E E N :

**NELSON BARBADOS GROUP LTD.**

Plaintiff

- and -

**RICHARD IVAN COX et al.**

Defendants

**AFFIDAVIT OF K. WILLIAM McKENZIE**
**(SWORN OCTOBER 2, 2009)**

I, **K. WILLIAM McKENZIE**, of the Town of Orillia in the Province of Ontario, solicitor, **MAKE OATH AND SAY** as follows:

1. I was called to the Bar in 1977 and practice law in Orillia, Ontario, with Crawford, McKenzie, McLean, Anderson & Duncan LLP.

2. The statement of claim in this action was issued on February 9, 2007. My firm was counsel of record for the plaintiff, Nelson Barbados Group Ltd. ("Nelson Barbados"), from that time until September 15, 2009, when an order was made removing my firm from the record. A copy of the order removing my firm from the record is marked as Exhibit "A" to this affidavit.

3. This affidavit is sworn in response to motions filed by certain defendants seeking costs against me and my firm personally. My former client, Nelson Barbados, has not waived the privilege which attaches to my communications with it.

*MY RELATIONSHIP WITH NELSON BARBADOS*

4. Nelson Barbados was incorporated on November 15, 2005. This can be seen on the company's Corporation Profile Report, which is a publicly filed document. A copy of the Corporation Profile Report for Nelson Barbados is marked as Exhibit "B" to this affidavit.

5. My firm acted on the incorporation of Nelson Barbados, and our office was used as the company's registered office address. In my experience, it is completely unexceptional for a company to have its solicitor's office used as its registered office address.

6. I do not have, and never have had:

(a) any legal or beneficial interest in Nelson Barbados, whether as a shareholder, or otherwise; or

(b) any direct or indirect interest or involvement in the company, or in any of its affairs or dealings.

7. I have never been an officer, director or employee of the corporation.

8. All of the same is true with respect to the other members of my firm, members of my family and all other persons with whom I am not at arm's-length.

9. My relationship with Nelson Barbados has at all times been strictly professional. Specifically, I acted as its counsel in this action. While the terms of my retainer were and remain privileged, I can categorically state that I have never had any direct or indirect interest in this proceeding, or its outcome, or the business transactions in issue in the proceeding. The only

form of remuneration that I have ever received, or have ever anticipated receiving from the plaintiff, is on account of professional fees earned for providing legal advice and representation.

10. As set out below, there is no evidence for the defendants' false suggestion that I am involved in this matter otherwise than as counsel. Indeed, they themselves merely assert that "there is reason to believe" this might be the case. I explain below why even this tepid assertion is a distortion of the record.

*MERITS OF PLAINTIFF'S CLAIMS*

11. I have reviewed the joint factum filed by the defendants who are seeking costs against me personally. I respond to these allegations in detail below.

12. As a preliminary matter, I observe that the defendants allege that I "forced" them "to respond to unmeritorious claims". The defendants allege further that it is a matter of "particular concern" that I "asserted a claim that was devoid of merit". The notion that I asserted any claim, or required any party to respond to it, is based on the false premise that I was party to the action in some undisclosed manner.

13. By reason of the privilege which attaches to all of my communications with the plaintiff, I am not at liberty to disclose what my opinion was about the merits of the action, what advice I provided to the plaintiff on this (or any other) point, nor am I at liberty to disclose the instructions I received from the plaintiff in respect of the advice I provided.

*THE PLAINTIFF*

14. In paragraph 22 of the factum filed on this motion, and in numerous earlier factums, the defendants allege that the plaintiff, Nelson Barbados, was incorporated "shortly before this action was commenced". This is not correct. As noted above, the plaintiff was incorporated in November 2005. The action was commenced in February 2007.[1]

15. In paragraph 24 and 33 of the defendants' factum, they assert that the plaintiff is a "shell corporation without assets, incorporated solely for the purposes of this action". The allegation that the plaintiff corporation cannot satisfy a costs order is repeated throughout the defendants' factum.

16. In fact, there is no evidence whatsoever to support the defendants' allegation that the plaintiff was incorporated "solely for the purposes of [pursuing] this action". In fact, I can categorically state that the corporation was not formed for the purpose of pursuing this or any other action. I am constrained by solicitor and client privileged from saying more.

17. Similarly, any information I have about the plaintiff's ability to satisfy a costs order was obtained in the course of the solicitor-client relationship, and is privileged. Counsel for the defendants have indicated (e.g. on a conference call with Justice Shaughnessy on August 14, 2009) that they will abandon the claim against me personally if they can be satisfied that the plaintiff is good for costs. I am unaware of any authority for the proposition that the presumed inability of a party to satisfy a costs order justifies making an order against that party's counsel.

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[1] According to their own material, the defendants have a copy of the corporation profile report which shows the date of incorporation. See defendants' factum at paragraph 23.

18. In paragraph 10 of their factum, the defendants argue that lawyers should "not be permitted to hide behind a supposed 'client' that they create", and in paragraphs 24 to 27 of their factum, the defendants describe the president of the corporation, Donald Best, as a "nominal director". Finally, as noted above, the defendants assert that "there is good reason to believe" that I am "connected" to the plaintiff and that I "may well have an interest in the action".

19. I do not understand what a 'nominal' director is. If the defendants are insinuating that Mr. Best is my nominee, and that I am the *de facto* directing mind of the corporation, they are mistaken. As set out above, neither my firm nor I have any interest in the plaintiff or in this litigation, and the suggestion that Mr. Best acted as my nominee is false.

20. Similarly, the defendants' description of the plaintiff as "a supposed 'client' that [I] created", (with the sarcastic use of inverted commas to insinuate that it was not really a client but rather my *alter ego*), is again mere innuendo which I can only answer by referring to my explicit evidence: I have no interest in the plaintiff or its affairs, and am merely its counsel. I did not "create" the client, except in the sense that, as a professional service, someone in my office incorporated the plaintiff long before any litigation was contemplated.

21. As also set out below, a witness at one point incorrectly suggested that my firm had an interest in the plaintiff's affairs.

22. When this suggestion emerged, I sent a letter to all counsel to make it clear that this was not the case. A copy of my letter dated November 7, 2007 to counsel is marked as Exhibit "C" to this affidavit.

23. The witness in question immediately wrote an email correcting his error. He said that his error had been based solely on an "assumption" based on rumours he had heard. This email, a copy of which is marked as Exhibit "D", was included in a motion record which was served and filed in November 2007. This witness also swore an affidavit which was filed in the proceeding. None of the defence counsel elected to cross-examine the witness.

24. It is on the basis of the witnesses error that the defendants contend that there is "good reason" to believe that I have an interest in the plaintiff. In paragraph 26 of their factum, the defendants note that my letter (indicating that I had no interest in the litigation) was not under oath. The defendants complain, in essence, that I did not refute the incorrect information which emerged from the witness sufficiently vehemently or specifically.

25. I do not know how correspondence from one lawyer to another could be "under oath". After the witnesses' correcting email had been filed and was in evidence before the court, my view was that the matter had been dealt with. At no time did any counsel exercise their right to cross-examine the witness, nor did any counsel subsequently pursue the issue in any manner whatsoever. None of the defendants ever filed a motion to have my firm removed from the record on the basis of a conflict of interest.

26. In short, and contrary to the defendant's allegations, the plaintiff is a not a "supposed 'client' that [I] have created", I am not "hiding behind it" and I have no interest in it. All of this is categorically affirmed by the evidence before the court. There is no evidence to the contrary, and any confusion which arose from the witnesses' error was corrected early on. The defendants'

suggestion that there is any doubt on the point is based on a selective and misleading use of the record.

*ABANDONED PROCEEDING*

27. As noted, this action was commenced on February 9, 2007. In paragraphs 28 to 33 of their factum, the defendants correctly set out that on February 1, 2007, an action was commenced naming Nelson Barbados Investments Inc. as plaintiff. The February 1 statement of claim is (materially) identical to the statement of claim issued in this action on February 9.

28. According to the defendants, the fact that two actions were commenced is said to demonstrate "the tenuous nature of the plaintiff" (whatever that means), and is said to constitute evidence of misconduct on my part.

29. In fact, there is a very simple and innocuous explanation. I prepared the statement of claim in the first action and, due to an error, did not name the plaintiff properly. As the defendants themselves point out, there is no Ontario entity called Nelson Barbados Investments Inc.

30. When I discovered my error, rather than amend the statement of claim to name the plaintiff by its correct legal name, I determined that it was simpler to issue a second statement of claim in which the plaintiff was correctly named, rather than amend the first claim. I did so and immediately discontinued the first action.

31. At the time, my information was that the first statement of claim had not been served on any of the defendants. As noted, the first claim was immediately discontinued and I am not

aware that any defendant incurred a penny in costs in dealing with it. Even if costs were incurred, they arose from a simple misnomer, which I corrected quickly and efficiently. I do not understand how the error can be characterized as misconduct.

*RULE 15 DECLARATION*

32. Under Rule 15.02, a defendant may request that a plaintiff's lawyer declare whether he or she commenced a proceeding, or whether the lawyer's client authorized the commencement of a proceeding.

33. In my experience, such demands are made at the outset of litigation, where there is reason to doubt that the lawyer who is named in an originating process in fact commenced the proceeding, or where there is reason to doubt that the plaintiff authorized it.

34. In paragraph 34 of their factum, the defendants complain that I did not respond to a request that was made pursuant to Rule 15.02. What the defendants fail to mention in their factum is that this demand was made in June 2009, after Justice Shaughnessy's judgment on the jurisdiction motion (released May 4, 2009) had disposed of the proceeding in its entirety.

35. As it so happens, I did prepare a response to this belated Rule 15.02 request. A copy of my letter of July 6, 2009 to the lawyer who made the request is marked as Exhibit "E" to this affidavit. My office is unable to locate a fax confirmation sheet to verify that the letter was sent, and it is possible that due to inadvertence it did not go out. A copy of the word processing history for this document, which shows that the letter was created in July 2009 is marked as Exhibit "F" to this affidavit. (The defendants' remedy if plaintiff's counsel fails to respond to a

Rule 15.02 request is to move to stay the action. For obvious reasons, no such motion was filed in this case.)

*INDULGENCES TO DELIVER STATEMENTS OF DEFENCE*

36. The defendants complain at paragraph 43 of their factum that I did not grant them indulgences to file statements of defence. It is true that I initially insisted that counsel respond to the originating process within the time limits prescribed by the *Rules of Civil Procedure*, (which in this case afforded them two months to respond after their clients had been served). I wanted to ensure that the litigation proceeded in an organized and timely fashion. As soon as the various defendants had been served and counsel had appeared in the action and were on the record, I extended indulgences and did my best to cooperate with respect to scheduling matters.

*MOTION CONTESTING JURISDICTION*

37. Shortly after the statement of claim was served, the defendant David Simmons served a motion to stay the action. The recitation of the facts in paragraph 45 of the defendants' factum concerning this motion, in which it is alleged that I "unilaterally made arrangements" to examine a witness and served a notice of examination for a date when I knew counsel was unavailable, is incomplete to the point of being misleading.

38. On May 17, 2007, Ryder Gilliland, one of the counsel acting for David Simmons, served material for a motion to stay this action on the basis that the Ontario Superior Court of Justice lacked jurisdiction. The supporting affidavit was sworn by Mr. Simmons, and his counsel indicated in his cover letter that his client could be produced for cross-examination in Barbados on June 5, 6 and 7. A copy of this letter is marked as Exhibit "G" to this affidavit.

39. On May 23, 2007, I wrote back to Mr. Gilliland and served a notice of examination returnable on June 6 and 7, in Barbados. A copy of this letter is marked as Exhibit "H" to this affidavit.

40. Subsequently, one of Mr. Gilliland's colleagues, Paul Schabas, wrote to indicate that he had made a mistake and the June 6 and 7 dates were not in fact convenient.

41. I became concerned that it would not be possible to conduct the examination in time for the August return date, and served a motion to strike Mr. Simmons' affidavit, however immediately upon doing so, I proposed that the motion should be resolved on the basis that Mr. Simmons be examined on "on any two consecutive days between June 1 and 22".

42. With a view to keeping costs down, I also offered to have my client subsidize Mr. Simmons' travel costs, so that he could attend in Toronto for cross-examination, instead of several counsel travelling to Barbados. A copy of my letter dated May 25, 2009, setting out my proposal, is marked as Exhibit "I" to this affidavit.

43. That is, I tried to work cooperatively with counsel to schedule matters, and at the same time, in serving the motion, sought to ensure that there was court imposed case management to keep the matter moving.

44. In addition to writing to counsel to settle the dates for Mr. Simmons' cross-examination, I also tried to telephone counsel in advance of the motion to resolve the matter. Unfortunately, I could not reach them. I followed up with a second letter on May 28, 2007 ensuring counsel of

my "full cooperation in [expediting] matters". A copy of this letter is marked as "I-1" to my affidavit.

45. Rather than returning my phone calls or answering either of my letters, Mr. Schabas chose to file a cross-motion and appeared on the motion to strike the affidavit. Justice Weekes concluded that my motion had been precipitous and awarded costs against my client. The costs order was paid.

*COPYING LETTERS TO ALL COUNSEL*

46. In paragraph 44 of their factum, the defendants complain that I refused to copy all defence counsel with all my correspondence.

47. Counsel expressed concern about this issue at the outset of the litigation, and when the parties were before Justice Weekes on May 29, 2007, Mr. Schabas sought an order compelling me to copy all counsel with all of my correspondence. Justice Weekes indicated that he did not think such an order was appropriate, noting that there could be entirely legitimate reasons for communicating with counsel individually.

48. I nevertheless canvassed with counsel the issue of copying all of them with correspondence on several occasions but never heard back from them.

49. In particular, on June 25, I wrote to all counsel and asked them about the "viability" of the proposal, and asked for their views about a "workable protocol" in this regard. I followed up with another letter on July 9. As far as I can recall, there was no response to these letters, copies of which are collectively marked as Exhibit "J" to this affidavit.

50. In any event, I endeavoured to ensure that all of my subsequent letters were in fact copied to all counsel, unless there was a specific reason to write to one counsel individually (for example to discuss settlement).

51. As noted above, this issue arose at the very outset of the litigation. If the defendants had any concerns going forward, they did not bother to share them with me, or I would have remedied the problem.

52. Thus, the defendants' submission that I refused to copy all counsel on correspondence "for tactical reasons" is false. Defence counsel complained at the very outset but ignored me when I raised the question with them less than a month later, and never raised the issue again.

*AFFIDAVIT EVIDENCE FILED BY PLAINTIFF*

53. Ultimately, most of the foreign defendants filed motions to stay the action on the basis that the courts of Ontario lacked jurisdiction, or that Ontario was not a convenient forum. I prepared responding material on behalf of the plaintiff.

54. In responding to the motions challenging jurisdiction, I filed affidavits deposed to by John Knox, who in my view had the best and most direct evidence about the matters I sought to prove in responding to the motion. Mr. Knox was cross-examined on his affidavits.

55. At paragraphs 23 and 101 to 104 of their factum, the defendants complain that Donald Best, the president of the plaintiff corporation, did not swear an affidavit and was not produced to be examined on the defendants' motions contesting the jurisdiction of this court to hear this action. The defendants suggest that this is evidence of improper conduct on my part.

56. I am not aware of any requirement that a party must file an affidavit from any particular deponent in response to a motion of this nature, far less that the failure to do so constitutes misconduct on the part of counsel. I note that none of the defendants' counsel exercised their right to examine Mr. Best as a witness on a pending motion pursuant to Rule 39.03 with respect to the motions contesting jurisdiction.

57. One of the defendants did exercise the right to examine Mr. Best, as a witness on a collateral motion dealt with below. Defence counsel correctly pointed out to the court that such an examination can be conducted as of right, and said "we don't need leave of the court to examine Mr. Best". A copy of the transcript, where defence counsel acknowledged that he was aware of his rights under Rule 39.03, is marked as Exhibit "K" to this affidavit.

58. I conclude that the defendants' decision not to examine Mr. Best and to have his evidence before the court, as they had every right to do, was an informed and deliberate decision by highly experienced counsel.

*THREATS AND SECURITY ISSUES*

59. Stewart Heaslett is an individual I have known for approximately five years, who has been involved in establishing a nature sanctuary in Barbados. I am interested in the sanctuary project and support it, and used to speak with Mr. Heaslett frequently.

60. In August 2007, Mr. Heaslett telephoned me and we spoke about the nature sanctuary, and about this litigation. He had no connection with the litigation or the underlying business transaction, however he was aware of the lawsuit. Mr. Heaslett told me that he had spoken with the defendant Peter Simmons, and that Mr. Simmons had asked him to pass a message to me.

Specifically, Mr. Simmons told Mr. Heaslett that I should "watch my back" and that "we" (the defendants?) were going to "get" John Knox. Mr. Knox was (as noted) the deponent of an affidavit I had recently filed. According to Mr. Heaslett, Mr. Simmons had urged him to relay these threats on to me.

61. As matters eventually emerged, there were three conversations along the same lines between Messrs. Simmons and Heaslett. The first was initiated by Mr. Simmons, and was not recorded. The second and third were initiated by Mr. Heaslett, and he recorded them. I did not ask him to do this, although he later provided the recordings to me.

62. The transcripts of the second and third conversations verify that Mr. Simmons made, and in fact repeated, statements of the nature alleged.

63. On hearing that I was being told to "watch my back" and that "we" were going to "get" Mr. Knox, I was concerned for myself, my family and the witness. I reported the matter to the Ontario Provincial Police and engaged security experts to assess the nature and extent of the risk.

64. I wrote to counsel on August 14, to advise them that I had received information about possible security concerns, and that it might be necessary to conduct cross-examinations in Toronto, rather than Barbados. A copy of this letter is marked as Exhibit "L" to this affidavit.

65. At paragraph 51 of their factum, the defendants suggest that I did not raise the issue of moving the examinations to Toronto until November 5, 2007. As noted above, I in fact suggested that this might be necessary shortly after I learned of the threats in August.

66. At paragraph 50 of their factum, the defendants complain that I did not provide particulars of the alleged threats when I first wrote to them on August 14, and then did not immediately respond to their requests for further details.

67. I did not do so for a variety of reasons. First, I felt it was incumbent on me to investigate the matter before alleging any wrong-doing on the part of others. I did not have the transcripts which verified that the threats had in fact been made until sometime later. Second, I felt that if there was anything to the threats, I should investigate and determine the nature and extent of the risk to the witness and myself before sharing information which might find its way back to the very people who may have been responsible for the threats in the first place.

68. The defendants took the position that I "used" the threats to "obtain a strategic advantage" in the litigation, and in fact went so far as to say that they were "likely fabricated by [me] for purely tactical reasons".[2]

69. The suggestion that I fabricated the threats is nonsensical. There is an audio recording of Mr. Simmons making the threats, which he does not dispute.

*MOTIONS RE: CROSS-EXAMINATIONS*

70. As to the supposed "strategic advantage" I supposedly sought, the main relief my client pursued by reason of the threats was for an order that cross-examinations take place in Ontario instead of Barbados, and that the defendants be required to pay for security services for my witness and me.

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[2] Moving parties' factum ¶56 and Reasons of Shaugnessy J. dated April 16, 2008, at ¶7

71. More specifically, in the Fall of 2007, the parties were exchanging material with respect to the defendants' motions to stay the action. A motion by way of conference call with Justice Shaughnessy was scheduled for early December 2007, to deal with the logistics of cross-examinations. On this motion, I sought the relief referred to in the previous paragraph.

72. I served my material on November 19, 2007. The defendants indicated that this did not afford them sufficient time to respond, and the motion was put off, on consent, to January 2008.

73. My motion material was extensive and included detailed reports from two security experts. Four of the five affidavits in the record were sworn on various dates in November. Further, some of the material in the record was responding to affidavit evidence served by the defendants, as late as November 6, 2007. It was simply not possible to marshal all of the evidence and serve the material any earlier than I did.

74. In any event, I am not aware of any prejudice, delay or wasted costs which resulted from serving my material two weeks in advance of the motion, apart from the brief *consent* adjournment of the motion from December 2007 to January 2008.

75. I simply do not understand the defendants' allegation, at paragraph 52 of their factum, that serving material in mid-November instead of early November, demonstrates a "lack of candour". As noted above, I wished to proceed deliberately in dealing with the issue of the threats made against me and the witness, and was not inclined to deliver my material piecemeal or to debate the matter in correspondence. I pulled all of the evidence together and served it at

80. I was anxious to secure his evidence, but at the same time was anxious that the action should not be delayed while I obtained an order to examine a witness outside Ontario. I therefore made arrangements to examine him in Bay City Michigan on January 10, 2008 and invited other counsel to participate in the examination if so advised. I was hopeful that counsel would co-operate and waive any formalities so that I could obtain the evidence without undue delay.

81. Counsel did not do so, but rather, objected to the examination taking place in the absence of an order. I went to Michigan by myself and obtained a transcript of Mr. Amersey's evidence which I tendered when the matter came before the court in January 2008.

82. At that time, the transcript was filed *on consent of counsel*, on the basis that they reserved their rights to argue later that the evidence was not relevant or admissible. An excerpt from the transcript of counsels' submissions on this point is marked as Exhibit "M" to this affidavit.

83. Ultimately, the defendants prevailed and Mr. Amersey's evidence was excluded on the basis that it was irrelevant, but not on the basis of any irregularities in the fashion in which it was obtained. No costs were incurred by any of the defendants by reason of the examination.

*CABLE AND WIRELESS (BARBADOS) LTD.*

84. At the motions argued in January 2008, I sought production of documents from a non-party, namely Cable and Wireless (Barbados) Ltd. The defendants opposed the motion, although the order sought would not have prejudiced their clients in any discernible way if it had been

granted. Justice Shaughnessy concluded that he had no jurisdiction to grant the relief. I am not aware that the defendants incurred any costs on this motion, as they had no reason to oppose it.

*COSTS ORDER RE: JANUARY MOTIONS*

85. The motions which were heard in January 2008 were dismissed with costs. The defendants complain about the plaintiff's delay in satisfying the costs order. When a costs order is made against a client, counsel do not control when, and if, the order is satisfied.

86. In this case, my former client failed to satisfy the costs order when it fell due, and the defendants brought a motion to dismiss the action for non-payment. This motion was adjourned when the defendants admitted in court that their calculations of the amounts due under the order were incorrect. Subsequently, the parties agreed on the correct calculation and the costs order was satisfied in full before the motion came back on. This was approximately one month after it had fallen due.

87. The amounts involved were substantial and the order was satisfied in full shortly after it fell due. In any event, as noted, counsel are not responsible for satisfying costs orders made against their clients, and I do not understand how the small delay which occurred can be characterized as misconduct on my part.

*CASE CONFERENCE IN ADVANCE OF CROSS-EXAMINATIONS*

88. Cross-examinations of the defence witnesses were scheduled to take place in Barbados in October 2008. At this point, the jurisdiction motions were scheduled to be heard on December 8, 2008.

89. There is no doubt that there were differences between counsel as to the logistics for the cross-examinations, however I disagree with the characterization in the defendants' factum that I was the sole cause of any problems. Given the number of counsel and witnesses involved, it was difficult to achieve a consensus on matters such as scheduling, and the court's assistance was required for case management purposes.

90. For example, another lawyer in my office and an articling student were assisting me with the file. They could not attend in Barbados because of family obligations. I wanted them to remain in Ontario and listen to the cross-examinations remotely in "real-time", so they could assist me. The defendants refused to agree to this, and it was one of a number of issues to be dealt with by Justice Shaughnessy in a conference call which was held on the eve of the examinations.

91. Similarly, the defendants wished to video-tape the examinations. This issue was also to be dealt with by the case management judge on the same conference call.

92. The different manner in which counsel dealt with these two issues presents a stark contrast. I had no difficulty with the defendants' request, and agreed that the cross-examinations could be video recorded. Justice Shaughnessy ordered accordingly, on consent. The defence

counsel would not, however, consent to my request that my colleagues attend by conference, on the basis that someone other than my colleagues might listen in on the call. Ultimately, Justice Shaughnessy made an order which allowed remote transmission of the examinations, provided that I arranged for an encrypted line, which I did.

*CROSS-EXAMINATIONS*

93. When the examinations began, counsel refused to accept my word that I had arranged for the transmission to be encrypted, and attempted to cross-examine me as to the specific details. In their factum, the defendants characterize the prolonged exchange which took place at the outset of the examination as misconduct on my part. Another reader might consider that counsel was posturing for his client and condescending towards me. The issue could have been dealt with before the examination began in a civil discussion between lawyers, as opposed to an attempted cross-examination of me on the record, when we were pressed for time.

94. In any event, after a few minutes were wasted, the cross-examinations proceeded. My understanding is that security is maximized by not revealing the source code or encryption technology that one is using. I provided details of the encryption to counsel when we had returned to Toronto, and never heard anything more on the issue and have never heard any suggestion that I did not comply with my obligations, as ordered.

95. As the cross-examinations began I was concerned about finishing them on time and was surprised to find that defence counsel suddenly, and without prior notice, raised questions and issues about the litigation which could have easily been resolved before the examinations started. To minimize interruptions during the limited time that I had to cross-examine the Barbadian

deponents, I requested that all questions be put to me in writing. Mr. Ranking asked me two questions in a handwritten note, and I provided short answers to both which were responsive in my view. In any event, Mr. Ranking never wrote to me to follow-up on his questions, never sent the caselaw I requested from him, and did not raise these issues again.

96. It is true that I did not provide counsel with the documents on which I wished to cross-examine their witnesses in advance of the examinations. It is equally true that defence counsel did the same with me, when they later examined the deponent of the affidavit I filed on the motion. There is no obligation to do so, and it can reduce the effectiveness of a cross-examination.

97. Finally, at paragraphs 86 and 87 of their factum, the defendants submit that the video recordings of the cross-examinations reveal that I was "inappropriate and unprofessional". The video recordings are sealed, and as far as I am aware, none of the defence counsel have viewed them. In fact, I was courteous and calm throughout the examinations, and respectful of the witnesses. The video recordings (which I have reviewed in part) demonstrate this.

98. As it so happens, the single-most memorable outburst came from one of the defence counsel, Mr. Ranking. Following his outburst, other defence counsel then piled on in their criticisms, which was typical of the difficulties which presented themselves at various stages of this litigation. An excerpt from the cross-examination of Marcus Hatch is marked as Exhibit "N" to this affidavit, and my counsel will seek to have this portion of the video-recording played at the return of this motion.

99. On another occasion, in the official examiner's office in Toronto, Mr. Ranking became angry with me during a break in the proceeding, and raised his voice and called me a "fucking idiot", or words to that exact effect. Most of the counsel who were present for the examination that day were in the room when this happened.

*SECURITY CONCERNS*

100. In support of their argument that my concerns about personal security were not *bona fide*, the defendants have filed an affidavit sworn by one of the defence counsel, Lawrence Hansen. Mr. Hansen records his observations of my activities while we were in Barbados to conduct the examinations.

101. As it so happens, an articling student who assisted me with this matter has considerable expertise as a bodyguard. Mark Lemieux was a member of the Canadian Armed Forces before attending law school, and had also been a member of various security and protection details, including providing security for the royal family in Saudi Arabia.

102. While we were in Barbados, Mr. Lemieux took various steps that Mr. Hansen is presumably not aware of. He stayed with me throughout the trip to Barbados, except at night, when he stayed in a hotel room directly across from mine. He took various other measures to reduce any security risk.

103. I infer that Barbadian officials had learned of the security threats. Early in the week, a police officer appeared at the Hilton Hotel and conducted a security check of the area and attendees, before the examinations got underway. From time to time thereafter while at the

Hilton, and on the way back to the Savannah Hotel where I was staying, I observed police officers close by.

104. If Mr. Hansen was thoroughly tracking my movements during the time we were in Barbados, as he suggests in his affidavit, he would know that I never left the Savannah Hotel except to travel the short distance to the Barbados Hilton where the examinations took place. On two or three occasions, I stretched and went for a slow jog very close to the hotel to alleviate back pain from which I was suffering. All the while, I was under Mr. Lemieux's watchful eye.

105. Mr. Hansen deposes to the fact that he saw me walk from the Hilton Hotel to the Savannah Hotel one afternoon, after cross-examinations were finished for the day. Contrary to what he says, Mr. Lemieux did not go separately in a taxi; he went in a private car we had engaged. He needed to go in a car because he was transporting all of the briefcases and boxes with our files in them. I was within sight of the car at all times during the very brief walk from one hotel to the other.

106. Finally, it must be noted that although I respectfully disagree with the view Justice Shaughnessy took of my security concerns, there is no doubt that the risk was ameliorated merely by reason of the motion having been filed. Specifically, when it became a matter of record that the brother of the Chief Justice had been recorded saying that I had "to watch my back", there was an interest on the part of Barbadian authorities in ensuring that no harm befell me. It was for this reason that I did suggest at one point that the cross-examinations take place at a more commodious location (that my security expert had assessed as being less secure than the Hilton Hotel).

107. On two evenings at the Savannah Hotel, Mr. Hansen and I spoke in the bar. We had lengthy and agreeable conversations about matters of personal interest. As one very small part of our discussions, we briefly talked about the possible settlement of this litigation. I am surprised to see settlement discussions recorded in affidavit evidence filed by experienced counsel. In any event, Mr. Hansen's affidavit is inaccurate and incomplete.

108. I do not recall saying that the cost of the litigation was "nothing" to my client. What I did say was that I understood that the defendants were well-resourced, and although they were mounting a stiff defence, my client would not be worn down and would see the matter through. I did not make the gesture referred to at paragraph 35 of Mr. Hansen's affidavit, of peeling imaginary bank notes from a bundle of cash.

109. Similarly, I did not say that "if the matter did not proceed in Ontario", the plaintiff "would just start another action" in another jurisdiction. What I did say was that there had to be a court or forum somewhere where the dispute would be litigated on the merits without jurisdictional challenges, and that it would be appropriate to discuss the merits sooner rather than later.

110. I was hoping to persuade Mr. Hansen that the defendants should accept Ontario as the proper jurisdiction, and address the merits of the case. The characterization of our discussion in paragraphs 129 and 130 of the defendants' factum ("blatant forum shopping etc.") is an embellishment of Mr. Hansen's actual evidence, and in any event is completely irreconcilable with our actual discussion.

111. Mr. Hansen and I had a further conversation about the possibility of a settlement between our clients alone. In my view, this discussion is privileged, and in any event, I would not betray Mr. Hansen's confidence without his consent.

*CROSS-EXAMINATION OF IAIN DEANE*

112. The defendant Iain Deane filed an affidavit on the stay motions. He lives in the United Kingdom and was cross-examined in Ontario on November 3, 2008.

113. At paragraphs 98 to 100 of their factum, the defendants complain that I did not ultimately rely on the transcript of this cross-examination. They allege further (without evidence) that the transcript was filed in proceedings underway in Barbados, and that I conducted the cross-examination for an improper purpose.

114. I have no information about how a copy of the transcript was filed with the Barbadian court, assuming it was. The transcripts in this proceeding were circulated widely among counsel and (presumably) their respective clients. It could have come from any one of a number of sources.

115. I exercised my right to cross-examine Mr. Deane in the hopes of obtaining evidence which would further my client's case, and for no other purpose.

*CROSS-EXAMINATION JOHN KNOX*

116. The defendants complain at paragraph 103 of the factum that I did not permit a question on Mr. Knox's cross-examination, as to whether or not his answers bound the plaintiff corporation. My view was, and remains, that this is not a proper question of a *witness* on a cross-

examination, but rather a question that is ordinarily put to the representative of a *party* who has been produced for an examination for discovery. Witnesses who are being cross-examined do not "bind" parties.

117. Similarly, the defendants complain that Mr. Knox did not have "standing" to swear an affidavit, and may have lacked "the authority of the plaintiff to prosecute the action". At the risk of belabouring the point, the defendants' argument demonstrates that they do not understand (or have chosen to ignore) the distinction between a *witness* and a *party* to a proceeding. Witnesses, as I understand it, do not need "standing" to give evidence, and do not prosecute or defend proceedings for the party who happens to adduce their evidence.

118. In short, Mr. Knox was a witness, not a party. If the defendants wished to obtain the evidence of a party (i.e. the plaintiff's president, Mr. Best) on the motion, they merely had to serve a summons to examine him as a witness on a pending motion.

119. As noted above, none of the parties provided any documents to opposing counsel in advance. That is, although I served notices of examination which required that the defence witnesses attend for cross-examination with relevant documents, I was not provided with copies in advance. This may explain why defendants' counsel did not ask me for copies of Mr. Knox's documents in advance of his cross-examination.

120. Initially, I believed that all of Mr. Knox's relevant documents were appended to his affidavits, however out of an abundance of caution at the beginning of his cross-examination, I provided counsel with a external memory drive which contained approximately 4,000 documents

which had been provided to me by Nitin Amersey, and I had previously asked Mr. Knox to review.

121. The defendants allege that I refused to explain the relevance of the documents. This is not so. In fact, I was interrupted when I tried to tell counsel what the documents were. I explained that there were a number of documents on a 'memory stick', and continued as follows:

> Mr. McKENZIE: I will explain what they are because it is pretty generic, which is ...
>
> Mr. SILVER: You don't have to explain. Just give it to me. I will mark it as an exhibit.
>
> Mr. McKENZIE: Okay.

122. Mr. Knox later began to explain that the documents emanated from Nitin Amersey, however counsel did not ask any follow up questions or pursue the matter any further with the witness. In any event, the defendants' implication that I tried to swamp them with 'over-production' of documents is unfounded:

> MR. SILVER: Before you go on, at the time that you respond, in the event that you are going to rely upon any, you should give us copies of the documents that you are relying upon.
>
> MR. McKENZIE: Well, that was what...yes.
>
> MR. SILVER: Thank you.
>
> MR. McKENZIE: In other words, we will print out any paper, rather than give you 3,800 documents and say, "Go fish." That is all I was trying to do. That is what you do in the Sedona conference.
>
> MR. SILVER: Well, we are here in Ontario, not Sedona.[4]

[4] I should clarify that I am prepared to accept that Mr. Silver was not trying to be rude, but is genuinely not aware of the Sedona Conference rules on electronic discovery which are regularly adopted in litigation in Ontario.

123. In addition to complaining about over-production, the defendants also complain about under-production. At paragraphs 112 of their factum, they allege that Mr. Knox "admitted" to having 6 to 8 boxes of documents in Barbados which were not produced. What the defendants fail to mention is that Mr. Knox said that the documents related to on-going litigation in Barbados. They were thus available to the defendants. None of the defendants' witnesses produced any such documents when I cross-examined them, which leads me to believe that the documents are not relevant.

124. Finally, on this topic, the defendants complain that I left the examination before counsel had finished examining Mr. Knox. The examination, including time for a brief re-examination by me, was scheduled to be completed by 4:30. Counsel were aware early in the day that I had another obligation which made it impossible for me to stay later. I offered to shorten the lunch break to assist counsel in finishing the examination, however even at 4:50 p.m. counsel were still cross-examining, and had no choice but to leave for my other obligation, after inviting counsel to put their remaining questions in writing, which they never did.

125. Justice Shaughnessy had set a timetable for all of the examinations, including imposing time limits. On two occasions while witnesses were being examined in Barbados, we went past 4:30, however this was at the request of defence counsel, because their witnesses had other obligations which meant they were not available at the beginning of the day.

*VIDEOS OF EXAMINATIONS*

126. In late November, as part of my preparation to argue the jurisdiction motions, I sought the defendants' consent to view copies of the video recordings that had been sealed by the Court.

I expected that defence counsel, who had requested that the cross-examinations be video recorded, would cooperate and release copies of the recordings to me.

127. Instead, defence counsel refused to cooperate. Accordingly I brought a motion returnable on December 2, 2008, to have copies of the video recordings released to counsel (not to the public at large), subject to any limitations imposed by the court.

128. The motion to have a copy of the recordings released to me was dismissed, however the court invited me to attend at the Whitby Courthouse on December 8 at 8:30 a.m. to view the videos on the morning I was scheduled to argue the jurisdiction motion. The court's order further provided that defence counsel were to arrange to have a "technician" available to assist me.

*FURTHER ADJOURNMENT OF MOTION*

129. On December 5, 2008, my office wrote to the trial coordinator to advise that I had received instructions to seek leave to appeal Justice Shaughnessy's order of December 2, 2008. We advised the court that the motion scheduled for December 8 would hopefully be adjourned in light of my instructions. A copy of my December 5 letter is marked as Exhibit "O" to this affidavit. Copies were sent to all defence counsel on that same date as indicated by the attached fax cover sheet and fax confirmation form.

130. In paragraph 119 of the defendants' factum, they allege that I attended before Justice Shaughnessy on December 8, and without prior notice, informed the court that the plaintiff would be seeking leave to appeal his order of December 2, 2008. This allegation is obviously false, as evidenced by my December 5 letter.

131. Justice Ferguson heard the motion for leave to appeal on Thursday December 11 and dismissed it. Although I expected to argue the jurisdiction motion on the following day, it was adjourned by the Court to be spoken to on January 5, 2009.[5]

132. On January 5, His Honour set the hearing of the motions for April 6, and ordered that arrangements should be made to view the videotapes at a special examiner's office, or an office of another independent party. A copy of Justice Shaughnessy's order is marked as Exhibit "Q" to this affidavit.

133. On March 2, I contacted defence counsel to make arrangement to view the video recordings. Although Justice Shaughnessy's order had not been varied, defence counsel indicated that "on further reflection" they had decided that I would only be allowed to view the recordings at the court house, on terms that defence counsel purported to unilaterally impose, which had not been ordered by Justice Shaughnessy. A copy of Bryn Gray's letter to me of March 3, 2009 is marked as Exhibit "R" to this affidavit. Although counsel were purporting to unilaterally vary a court order, I acquiesced to the demands under protest.

134. I first sent my articling student, Mark Lemieux, to review the recordings to make sure they were intact and complete. He reported that despite the fact that Mr. Schabas was supposed

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[5] Costs submissions in respect of Justice Ferguson's order were filed by defence counsel on March 11, 2009. My responding submissions were filed on March 23, 2009. Subsequently, without regard to Rule 1.09, Mr. Ranking wrote to Ferguson J. on March 30, 2009, enclosing a copy of the notice of discontinuance. In his letter, Mr. Ranking urged Her Honour to grant costs against the plaintiff on a substantial indemnity scale on the basis of the discontinuance. A copy of Mr Ranking's letter of March 30, 2009 is marked as Exhibit "P" to this affidavit.

In the result, by her order dated May 5, 2009, Her Honour granted substantial indemnity costs against the plaintiff. In paragraph 17 of their factum, the defendants urge the court to revisit Ferguson J.'s costs order on the basis of facts arising after the order was made. The defendants do not specify what new facts they are referring to, nor am I aware of any such facts.

to supply a technician to operate the equipment for viewing the recordings, he in fact sent a student-at-law who had not brought the necessary equipment to view the taped video recordings. Instead, Mr. Lemieux was only able to view DVD's, which as it turned out, were incomplete.

135. There was a prolonged exchange of correspondence in the ensuing weeks when I perceived that defence counsel were attempting to frustrate my right to view the videos. Ultimately, counsel relented and I was able to attend to view the recordings on Friday, April 3. The articling student who attended from Mr. Schabas' office forgot a piece of equipment and I could only begin reviewing the video tapes after considerable delay. As a result, I was required to obtain the court's approval to attend the following day.

136. The entire exchange of correspondence on this topic is collectively marked as Exhibit "S" to this affidavit. (The defendants' material includes only some of the letters.)

*KELTRUTH BLOG*

137. This litigation has attracted attention on at least two Internet blogs. I have no interest in, and do not follow, these (or any other) blogs.

138. The defendants have expressed concern throughout this litigation that information from the lawsuit was being publicly disseminated and finding its way into these blogs. The insinuation was that I was responsible for this.

139. Miller Thomson LLP acts for the defendant Iain Deane. Certain information was posted on the Keltruth blog which was critical of a lawyer at Miller Thomson called Maanit Zemel.

140. I am not the author of the material which criticized Ms. Zemel, and I did not provide the author with any of the information or any of the documents which formed the basis of the critical comments. I have never posted any confidential information or documents about this litigation on any blog or website, nor (to my knowledge) have I provided any confidential information or documents to any other person with the intention that they would be publicly posted. In fact, I have no knowledge about how any documents or information ended up being publicly posted. I have not participated in any blog or public postings with respect to this litigation, and have no responsibility for, or control over, others who have.

141. Miller Thomson apparently does not accept this. Andrew Roman of that firm wrote a lengthy letter to Justice Shaughnessy on January 27, 2009, complaining that the postings were "outrageous, slanderous (*sic* libellous?) and defamatory". Mr. Roman asked Justice Shaughnessy to "take steps to ensure that [I do] whatever is necessary to bring [the] conduct to an end". A copy of this letter (omitting enclosures) is marked as Exhibit "T" to this affidavit.

142. Rule 1.09 of the *Rules of Civil Procedure* prohibits out of court communications with judges. More importantly, Mr. Roman's letter falsely suggested that I was responsible for the posting in question. As set out above, I was not responsible. Mr. Roman did not ask me in advance if I was involved in this posting before sending this letter to the judge.

143. On February 2, 2009, I wrote to Miller Thomson and set out in unambiguous terms that neither my firm nor I had "defamed or participated in any defamation". A copy of this letter is marked as Exhibit "U" to this affidavit. (I did not send a copy of my letter to Justice Shaughnessy.)

144. Rather than seeking clarification, Miller Thomson filed a motion seeking various forms of remarkable relief against me and my firm (including, for example, an order that my firm deliver its computer hard-drives and all personal computers to the court for inspection by a third party technician). A copy of Miller Thomson's motion record (omitting exhibits) is marked as Exhibit "V" to this affidavit.

145. On reviewing the motion material, I wrote to Mr. Roman on February 16, 2009, and again assured him that neither I nor anyone in my firm had "published, written or otherwise been responsible for the creation of blog content" and that we had not "placed any of [the letters exchanged between counsel] on-line". I indicated that I would consent to abandonment of the motion without costs. A copy of this letter is marked is Exhibit "W" to this affidavit. There was no response to my offer.

146. The motion was ultimately heard by Regional Senior Justice Brown on April 1, 2009. In an endorsement released April 3, His Honour concluded that he was "not satisfied on the evidence" that it was established on a balance of probabilities that any party or their counsel was responsible for posting the material. His Honour held further that the *allegations against me* had not "risen to a level beyond that of speculation". A copy of His Honour's endorsement is marked as Exhibit "X" to this affidavit.

147. Miller Thomson's evidence on this issue is unchanged from that which was before R.S.J. Brown. That is, as already determined by R.S.J. Brown, the evidence has not risen beyond speculation.

148. Donald Best, the sole director of the plaintiff corporation, was examined as a witness on a the Miller Thomson motion pursuant to Rule 39.03. Miller Thomson objects to the fact that I took a number of questions under advisement at this examination, because they were irrelevant or an obvious fishing expedition.

149. Miller Thomson concedes that it never brought a motion to compel Mr. Best to answer the questions, because there was insufficient time. Miller Thomson explains that it was anxious to have the motion about the blog heard before the defence motions to stay the entire action, because (at least according to Miller Thomson) if the action was stayed, "there would be no further jurisdiction in the court to resolve the issue of the defamatory blogs, as these would have become moot".

150. This reasoning demonstrates the fundamental problem with the motion in the first place. Miller Thomson was *not* seeking to vindicate the rights of its client, Iain Deane, but rather, was pursuing a matter that was of interest to itself alone. The motion was ill-conceived and, in my respectful view, ought to have been pursued as an ordinary defamation action against the person or persons who published the blog.

151. Indeed, when the motions to stay the lawsuit were later being argued before Justice Shaughnessy, Mr. Roman explicitly stated that the motion concerning the blog had been pursued by and on behalf of his firm, and that the firm's client, Iain Deane, was not a party to the blog motion.

*ACTION DISCONTINUED AGAINST 37 DEFENDANTS*

152. On March 23, 2009, the plaintiff discontinued the action against 37 defendants. While the plaintiff's reasons for this are subject to a solicitor-client privilege that has not been waived, I can generally state that our opinions regarding the chances of success and our strategy evolved over time, particularly following the cross-examinations.

153. Insofar as the timing of the discontinuance is concerned, I received final instructions to discontinue in March, around the time that the factum was filed. The factum had not been filed in December of the previous year, because, once I obtained instructions to seek leave to appeal Justice Shaughnessy's December 2, 2008 order, I believed that it was highly likely the jurisdiction motions would not proceed on December 8, and, as such, I did not finalize and file the plaintiff's factum at that time.

*HEARING OF MOTION*

154. At paragraph 24 of the defendants' factum, they allege that I refused to answer questions posed by Justice Shaughnessy. In support of this allegation, the defendants rely on an incomplete transcript of the proceedings before Justice Shaughnessy when the jurisdiction motions were argued in April 2009.

155. I do not have a transcript of the proceeding on the first day, but my recollection is that one of the defence counsel (Mr. Silver) took the position that the court could draw an adverse inference because certain questions had been refused when John Knox was cross examined, including questions seeking the productions of certain documents. Mr. Silver invited Justice Shaughnessy to review the transcript of the cross-examination overnight.

156. When court began the following day, Justice Shaughnessy indicated that he had read portions of the transcript and (without hearing submissions) he directed me to produce "to counsel" numerous documents and extensive information which they had sought when Mr. Knox was cross-examined. No motion had been filed in respect of the refused questions.

157. Justice Shaughnessy subsequently modified his direction somewhat, and indicated that he wanted me to bring the material to court, but would hear submissions before determining whether or not it would be turned over to the defendants. He directed further that if the material was not produced, he would like an affidavit from Donald Best explaining why this was not being done.

158. His Honour indicated further that after he had heard Mr. Silver's submissions the previous day, and been invited to read the transcript, he did not think that he should be "making decisions based on ... inferences to be drawn, but [rather on] material and documents that can be provided". His Honour indicated as well that he wanted to know who the shareholders and directors of the plaintiff were, "unless you can persuade me otherwise". His Honour indicated that he would hear my submissions.

159. I considered the matter very carefully overnight, and attempted to reach my client for instructions but was unable to do so. My respectful view was (and is) that it is within the province of the parties to determine what evidence to adduce in an adversarial proceeding, and in the absence of an order obtained on a refusals motion which compelled the delivery of evidence, my client was within its rights in determining what evidence should and should not be placed

before the court. I certainly did not feel that I could tender more evidence at this late stage without instructions.

160. I attempted to contact my client to take instructions overnight, but could not reach him. I also conducted legal research and consulted with a colleague about my professional obligations in the circumstances.

161. When court resumed for the second day of argument, I indicated to Justice Shaughnessy that my client would not be tendering any further evidence on the motion, and that I did not have an affidavit from Mr. Best explaining why the requested material was not being provided. There is no doubt that this initially displeased His Honour, however I can assure the court that I most certainly did not approach the matter lightly. As it appeared that the case would not finish that day, His Honour provided a further opportunity and asked that the material be provided when court resumed the next day.

162. As matters transpired, the case did not go over for a third day. When it became apparent that the matter would conclude, His Honour "renewed his invitation" that I provide the requested material. In response, defence counsel indicated on the record that they were abandoning the issue. In particular, Mr. Silver advised the court that "the moving parties accept that the refusals were given". He indicated further that the defendants had made submissions about the effect of the refusals and that "we're happy with the record the way it is". His Honour then indicated that he "respected" what I had said earlier in the day, and the matter was concluded.

*EVENTS LEADING TO PRESENT MOTION*

163. Defence counsel accuse me of *inter alia* failing to respond to correspondence in a timely manner and serving motion materials with insufficient notice. In the case of the motion with respect to security issues, they accuse me of a "lack of candour" for failing to serve material piecemeal or responding to requests for particulars in a timely fashion. The conduct of the defendants' own counsel, as set out below, suggests that the criticisms of me are unwarranted.

164. On May 21, 2009, after the action had been disposed of, Mr. Ranking wrote to me to say that his client would be seeking costs against me personally.

165. On May 21, 2009, my associate Jessica Duncan responded, and copied all defence counsel, to ask for particulars of the basis for this relief. Her letter is marked as Exhibit "Y" to this affidavit.

166. Rather than provide particulars, Mr. Ranking responded that particulars would be provided by way of a factum which would be delivered "in due course". He "invited" her "in the interim" to read the decisions of Shaughnessy J. and Ferguson J. in the action. A copy of Mr. Ranking's letter is marked as Exhibit "Z" to this affidavit. I invite the court to review and consider the tone of the letter.

167. On May 25-29, 2009, Messrs. Schabas, Roman, Silver, Conklin and Ms. Lang wrote to say that their clients would also be seeking costs against me personally. They indicated that their client's material "would be provided shortly". A copy of their letters are marked as Exhibit "AA" to this affidavit.

168. On June 8, 2009, Mr. Ranking wrote to me on behalf of defence counsel to advise that they had unilaterally scheduled a motion for the costs hearing before Justice Shaughnessy on August 20 and 21, 2009. A copy of this letter is marked as Exhibit "BB" to this affidavit. I was not consulted with respect to this date, had still not been served with any motion material and had not had any response to the request for particulars of the basis for seeking costs against me personally.

169. On June 30, I wrote to all defence counsel again requesting particulars for the request for costs against me personally, or a copy of the material that would be filed in support of their motion for costs. I explained that without knowing the case I was required to meet, I could not determine how to respond. I also noted that I had not been consulted in advance and was not in any event available on the August dates which had been selected by defence counsel. A copy of my letter to defence counsel is marked as Exhibit "CC" to this affidavit.

170. No one responded to this letter, so I followed up with another letter to defence counsel on July 10, 2009, to remind them that I was not available on August 20 and 21, and that I could not begin to respond to their motions in the absence of any material or particulars. A copy of this letter is marked as Exhibit "DD" to this affidavit.

171. On July 29, 2009, defence counsel served a voluminous record for the motion, which, despite my repeated advice that I was not available, was still made returnable on August 20 and 21, 2009. Mr. Ranking directed the trial coordinator to place the matter on Justice Shaughnessy's list without advising her that I had not been consulted about the return date and

had explicitly said I was not available. A copy of Mr. Ranking's cover letter serving the materials is marked as Exhibit "EE" to this affidavit.

172. Subsequently, Sean Dewart was retained to respond to the motion on my behalf and on behalf of my firm. On August 12, 2009, he wrote to counsel to say that he had another hearing on August 20 and in any event did not have time to become briefed in this matter and to respond. He asked counsel to consent to an adjournment. A copy of this letter is marked as Exhibit "FF" to this affidavit.

173. Mr. Ranking responded the same day to say that his client would not consent, indicating that the motion "had been scheduled for months". A copy of this letter is marked as Exhibit "GG" to this affidavit.

174. Counsel attended on a conference call with Justice Shaughnessy on August 14, 2009 and the motion was adjourned.

175. Since that time, there has been an extensive exchange of correspondence between counsel. A selection of this correspondence is collectively marked as Exhibit "HH" to this affidavit. The tone and content of this correspondence exemplifies in a very minor way the correspondence which has been sent by defence counsel throughout this proceeding. I am advised by Mr. Dewart and verily believe that Mr. Roman has never responded to the letter sent to him on September 16, 2009.

SWORN BEFORE ME )
at the City of Toronto )
in the Province of Ontario )
this 2nd day of October, 2009 )

William K. McKenzie

A Commissioner for Taking Affidavits

**NELSON BARBADOS GROUP LTD.**
Plaintiff

and

**RICHARD IVAN COX et al.**
Defendants

Court File No: 07-0141

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at

**AFFIDAVIT OF K. WILLIAM MCKENZIE**
**(SWORN OCTOBER 2, 2009)**

Sack Goldblatt Mitchell LLP
Barristers & Solicitors
20 Dundas St. West, Suite 1100
Toronto, ON M5G 2G8

Sean Dewart LSUC#: 26708B
Heidi Rubin LSUC#: 46082P
Tel: (416) 979-6970/6438
Fax: (416) 591-7333

Lawyers for the William K. McKenzie and Crawford, McKenzie, McLean, Anderson & Duncan LLP

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