NOVA SCOTIA COURT OF APPEAL
Citation: ***Holstein Assocation of Canada v. Eikelenboom***, 2004 NSCA 103

Date: 20040901
Docket: CA 216762
Registry: Halifax

Between:

Holstein Association of Canada

Appellant

v.

John Eikelenboom and Colleen Eikelenboom

Respondents

Judge(s):	Glube, C.J.N.S.; Cromwell and Saunders, JJ.A.
Appeal Heard:	June 17, 2004 in Halifax, Nova Scotia
Held:	Appeal allowed, by striking out paragraphs 8, 9, 11, 12, 13(b), 13(g) and 13(h) of the statement of claim, thereby entitling the appellant to summary judgment with respect to those parts of the respondents' claim, as there is no arguable issue to be tried concerning them. Costs awarded to the appellant in the amount of $2,000.00 inclusive of disbursements
Counsel:	Alan V. Parish, Q.C. and Brian Awad, for the appellant Alain J. Bégin, for the respondents

Reasons for judgment:

[1] The appellant, Holstein Association of Canada ("Holstein Canada"), asks us to set aside the decision of Justice Suzanne Hood, sitting in Chambers, on the basis that she erred in law in dismissing the appellant's application for summary judgment under **Civil Procedure Rule** 13. Holstein Canada argues that having found that none of the material facts in the case were in dispute and that the law with respect to waiver was clear, the Chambers judge erred when she declined to apply the law and decide the matter before her.

Background

[2] I will begin with a brief review of the essential facts surrounding this litigation. The integrity of pure-bred stock in Canada is regulated under the **Animal Pedigree Act**, R.S.C. 1985, C-8 (4th supp.), ("the **APA**"). The **APA** prohibits any representation or claim that an animal is of pure-bred status unless the animal has been registered by the applicable animal pedigree association. Violators are subject to prosecution. The **APA** empowers its associations to establish the requirements for membership. The **APA** further empowers such associations to enact by-laws concerning the issuance of registration certificates, as well as their amendment, transfer and cancellation. Holstein Canada is one of several associations incorporated pursuant to the **APA**. At all material times, the plaintiffs, John Eikelenboom and Colleen Eikelenboom, were members in good standing of Holstein Canada.

[3] Following the birth of the holstein cow known as Eiklyn CC Chance CAN F 10592265 ("Chance"), the plaintiffs (respondents) applied for and obtained registration of the animal with Holstein Canada. Subsequent to the registration, the secretary-manager of Holstein Canada came to doubt the propriety of the cow's registration and sought a hearing before the executive committee pursuant to the association's by-laws. A hearing was convened in Brantford, Ontario on April 9, 2001. The plaintiffs were represented by Michael Kestenberg and Alain Bégin. The executive committee was represented by Ross Wells. The secretary-manager of the appellant was represented by Ben Jetten. The hearing was to be presided over by five members of the executive committee, including a

Ms. Labbé and a Mr. Ell. Before the hearing started Mr. Kestenberg approached Mr. Wells with issues he wished to discuss, which then led to private meetings between counsel.

[4] The first issue concerned Mr. Gordon Ell. Mr. Wells was made aware of concerns the plaintiffs had with respect to comments allegedly made by Mr. Ell in September 2000, which caused the plaintiffs to doubt Mr. Ell's ability to carry on as a member of the panel because of an apprehension of bias. It was agreed between counsel that Mr. Ell would step down from the hearing panel and the panel would proceed with four members.

[5] The second issue concerned panel member Ms. Liette Labbé. The plaintiffs were convinced she was having an affair with one of their competitors in the pure-bred stock business. Further detail surrounding their complaint is found in ¶ 8 of the statement of claim which states:

> Prior to the commencement of the hearing on April 9, 2001, counsel for the Plaintiffs advised counsel for Holstein Canada, and counsel for the Executive Committee, of a conflict of interest by a member of the Executive Committee. In particular, it was disclosed that Liette Labbé was engaged in a personal, and intimate, relationship with Martin Roberge, who at all material times was a direct competitor to the Plaintiffs and consequently stood to gain directly from a decision by the Executive Committee.

[6] In his answers to interrogatories filed in this proceeding, the plaintiffs' counsel Mr. Kestenberg claims that he did the following:

> I advised [counsel] of my clients' belief that Liette Labbé was having an affair with Martin Roberge. That in further discussion between counsel, it was indicated that there was no direct proof as to this affair, but that it was a firmly held belief by my clients based on information and observation over a number of events attended by my clients.

[7] In those same answers to interrogatories, Mr. Kestenberg describes the alleged reaction of Mr. Jetten and Mr. Wells as follows:

> In response to that statement, counsel for Holstein Canada and the Executive Committee stated that they were not even going to address this matter further given that there was no direct proof and dismissed the matter at that time. ...

> [C]ounsel for the Executive Committee and Holstein Canada felt it was beneath the dignity of Holstein Canada to address the matter further as there was no direct proof and only the firm belief of my clients.

[8] After Mr. Ell had recused himself and the hearing convened before the remaining four members of the executive committee, the Chair of the panel asked counsel the following question:

> . . . Jurisdiction and composition are a question here. Are there any issues with respect to the composition of the hearing panel, the jurisdiction of the panel to hold the hearing called for today or with respect to the notice of the hearing? Is there any questions (sic)?

[9] To this Mr. Kestenberg, replied that there was "structural" bias arising from the executive committee's relationship with Holstein Canada. He wished to record his concern that the executive committee of the association would sit and decide an issue referred to it by the secretary of that same association. Mr. Kestenberg said, "I use the term 'bias' carefully. I don't expect or believe any one of you is intentionally biased . . . ." There were other exchanges between Mr. Kestenberg and the panel, following which the Chair proposed to proceed, at which point Mr. Wells, counsel to the executive committee said:

> I might just clarify, Mr. Chairman, whether there are any other issues. Mr. Kestenberg has raised an issue. Are there any other issues in response to your question of the composition of the hearing panel, the jurisdiction of the panel to proceed, or with respect to the serving of the notice of hearing? Any other issues that any parties wish to raise? Hearing none, Mr. Chairman, it's back to you. [Underlining mine]

[10] Mr. Kestenberg did not raise with the panel any issue of bias on the part of Ms. Labbé arising from the ongoing intimate relationship she was suspected of carrying on with Mr. Roberge. Neither did Mr. Kestenberg raise any issue of the panel being influenced by the impugned conduct of Mr. Ell.

[11] The hearing did not finish on April 9. It was adjourned and reconvened on May 14, 2001. During the course of the second day of hearing, Mr. Kestenberg asked the plaintiff Colleen Eikelenboom a series of questions concerning a conversation she had had with Mr. Ell in September 2000. Those questions

prompted Mr. Wells to ask Mr. Kestenberg "whether you take any issue, or have any issue with the ability of this panel to proceed and continue its hearing." In response, Mr. Kestenberg repeated his "structural" bias argument, first made on April 9. However, Mr. Kestenberg did not raise any issue of bias on the part of Ms. Labbé arising from her alleged relationship with Mr. Roberge. Nor did he suggest that the panel may have been influenced by the actions of Mr. Ell. Mr. Kestenberg stated:

> I just want to make it perfectly clear. I'm not for a second saying that any of these people [Panel members] are acting improperly, dishonestly or are ill-motivated.

[12] In July 2001, the executive committee released its written decision, wherein it found that Chance was "definitely older than the birth date on the registration papers." The executive committee invited the parties to make further submissions as to the appropriate order it ought to consider.

[13] After reviewing the parties' submissions, the executive committee issued a supplementary written decision dated September 11, 2001, wherein Chance's registration was expunged.

[14] On January 16, 2002, the respondents commenced the within action against Holstein Canada framed in contract, claiming breach in failing to provide procedural fairness to the Eikelenbooms. They alleged actual bias against Holstein Canada stemming from the actions of Ms. Labbé and Mr. Ell. In its defence, Holstein Canada said the plaintiffs' allegations of bias had been waived at the hearing.

[15] Holstein Canada applied for summary judgment with respect to those parts of the plaintiffs' statement of claim which sought damages for breach of contract for actual bias said to have occurred in the panel's handling of the case.

[16] The appellants' application for summary judgment came on for hearing before Justice Hood in Chambers on July 23, 2003. After considering the record and submissions of counsel, Hood, J. refused to grant summary judgment, concluding that the issue of whether waiver had in fact occurred could only be decided after a full trial.

Standard of Review

[17] The standard of review in matters such as this is well known. We will not interfere with a discretionary order on an interlocutory appeal unless the Chambers judge has applied a wrong principle of law, or a patent injustice would result. See, for example: **Exco Corporation Limited v. Nova Scotia Savings and Loan et al** (1983), 59 N.S.R. (2d) 331 (C.A.); **Global Petroleum Corp. v. CBI Industries Inc.** (1997), 158 N.S.R. (2d) 201 (CA); **Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)** (1999), 178 D.L.R. (4th) 202 (N.S.C.A.).

Analysis

[18] In my respectful opinion, the learned Chambers judge erred in law in refusing Holstein Canada's request for summary judgment. For reasons that I will now explain, I would set aside her decision and grant the appellant summary judgment by striking out those parts of the plaintiffs' statement of claim that allege actual bias or seek damages as a consequence thereof.

[19] In Nova Scotia applications for summary judgment are governed by C.P.R. 13.01 which provides:

> **Application for a summary judgment**
>
> **13.01.** After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
>
> (c) the only arguable issue to be tried is as to the amount of any damages claimed.
>
> [Amend. 05/02]

Rule 13.01 allows a party to bring an application in regard to all or part of a claim or defence. Rule 13.02(b) enables the court to grant judgment with respect to all

or part of a claim. Here Holstein Canada, named as a defendant, sought to obtain summary judgment in regard to a portion of the plaintiffs' claim.

[20] The approach that ought to be taken on an application for summary judgment was explained by the Supreme Court of Canada in two recent judgments, **Hercules Management Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165, and **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423.

[21] In **Hercules** the plaintiffs were shareholders who held shares in an investment company. The defendants were auditors who performed annual audits on the company and provided audit reports to the shareholders. In 1984 the company went into receivership. The shareholders sued the auditors alleging that the audit reports for 1980, 1981 and 1982 had been negligently prepared and that the shareholders had suffered financial losses because of their reliance on those reports. The auditors brought a motion for summary judgment to dismiss the shareholders' claims. The auditors argued that there was no contract between the parties, that the auditors did not owe the individual shareholders a duty of care, and that the claims asserted could only be brought by the company and not the shareholders. The auditors' application for summary judgment was granted. The shareholders' appeal to the Manitoba Court of Appeal was dismissed. Their further appeal to the Supreme Court of Canada was also dismissed. As a first preliminary matter the Court described the approach that ought to be taken in disposing of motions for summary judgment under the prevailing rules of procedure in Manitoba. LaForest, J., writing for a unanimous seven member court, said at ¶ 15:

> . . . The first concerns the procedure to be followed in a motion for summary judgment brought under Rule 20.03(1) of the Manitoba *Court of Queen's Bench Rules*. That rule provides as follows:
>
> > 20.03(1) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.
>
> I would agree with both the Court of Appeal and the motions judge in their endorsement of the procedure set out in Fidkalo [v. Levin, (1992), 76 Man. R. (2d) 267], at p. 267, namely:

> The question to be decided on a rule 20 motion is whether there is a genuine issue for trial. Although a defendant who seeks dismissal of an action has an initial burden of showing that the case is one in which the existence of a genuine issue is a proper question for consideration, it is the plaintiff who must then, according to the rule, establish his claim as being one with a real chance of success.
>
> In the instant case, then, the appellants (who were the plaintiffs-respondents on the motion) bore the burden of establishing that their claim had "a real chance of success". They bear the same burden in this Court.

[22] **Hercules** arose in Manitoba and dealt with that province's summary judgment rule. This court has recently held that there is no appreciable difference between the standard of "no arguable issue" (used in this province) and "no genuine issue" (found in the Ontario and Manitoba rules), **United Gulf Developments Ltd. v. Iskandar**, [2004] N.S.J. No. 66.

[23] In **Gordon**, supra, an investment dealer entered into a fidelity insurance contract with its insurer, which covered dishonest and fraudulent acts committed by the dealer's employees. The dishonest borrowings of an employee led to a loss to the dealer of approximately $90,000.00. The dealer submitted a proof of loss to the insurer. The insurer repudiated the insurance contract, stating that the dealer had made a material misrepresentation in its application. The dealer denied the validity of the rescission, and sued the insurer. The insurer brought a successful motion for summary judgment dismissing the action. The motions judge held that the action was not brought within 24 months of the discovery of the loss as required by the contract. The judge held that even if the rescission was wrongful, it did not prevent the insurer from relying upon the limitation provisions in the contract. The investment dealer's appeal to the Ontario Court of Appeal was successful, the court finding that where an insurer repudiates a contract, the insured is excused from affirmative future obligations within the contract, including limitation periods. The insurer then appealed to the Supreme Court of Canada.

[24] At ¶ 28, the Court expressed its concurrence with the motions court judge's finding that "the only disputes were on the application of the law." Notwithstanding the complexity of factual and legal issues surrounding the claim, and that the application of the law to the circumstances of the case was strongly

contested, the Court held that it was an appropriate case for summary judgment. Iacobucci and Bastarache, J.J., writing for a unanimous five member Court, described the test and shifting burdens of persuasion that arise in an application for summary judgment at ¶ 27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Management Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165 (S.C.C.) at para. 15; *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success." *Hercules*, supra, at para. 15.

In allowing the appeal, setting aside the judgment of the Ontario Court of Appeal and restoring the decision of the motions court judge granting summary judgment in favour of the fidelity insurer, the Court stated:

> [28] The limitation period defence raises mixed questions of fact and law. O'Brien J. found that the only disputes were on the application of the law. We find no reason to disturb this finding.
>
> . . .
>
> [35] We agree that there is no legal issue to be resolved at trial. The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.
>
> . . .
>
> [36] We would therefore conclude that the motions judge committed no error in determining that this was a proper case for summary judgment. **Gordon** has not met the evidentiary burden to show there is a genuine issue for trial.
>
> [Underlining mine]

[25] Applying these authorities to the circumstances of this case, it is apparent that in order to show that summary judgment was available to it, Holstein Canada

had to demonstrate that there was no arguable issue of material fact requiring trial, whereupon the respondents were then required to establish their claim as being one with a real chance of success.

[26] In her analysis, Hood, J. accurately referred to the test but, in my respectful opinion, erred in its application. In her decision, the learned Chambers judge found that the facts in the matter were not in dispute. She set these out concisely at ¶ 4 of her decision and I will repeat them here:

> 1. An animal was registered with Holstein Canada but subsequently there was doubt about the propriety of the animal's registration and a hearing was convened. Before the hearing convened, counsel for the plaintiffs approached counsel for the Committee convened to conduct the hearing. As a result, one of the panel members stepped down and the hearing proceeded with four members.
>
> 2. At the same time, an issue of conflict of interest with respect to another panel member was raised by counsel for the plaintiffs but counsel for the Committee took no further action on it.
>
> 3. The hearing commenced and the chair of the panel asked if there were issues with respect to the composition of the panel or its jurisdiction to hold the hearing and related matters. A subject other than the conflict of interest allegation was raised and rejected by the panel.
>
> 4. Counsel for the panel asked again before the hearing commenced whether there were other issues about the composition of the hearing panel, etc., and again the issue of bias or conflict of interest was not raised. The hearing did not conclude on the first day and was adjourned and reconvened over one month later. At that time, the issue of the panel continuing with the hearing was again raised and plaintiffs' counsel did not raise issues of bias or conflict of interest.

[27] Immediately after providing this accurate summary of the facts, Hood, J. continued:

> [5] I am satisfied that the defendant/applicant has met the threshold test of establishing that there are no material facts in dispute between the parties. The onus then shifts to the plaintiffs to establish that they have a real chance of success on this portion of their claim.
>
> [6] The defence argues that the plaintiffs' waiver of their right to raise the issues of bias or conflict of interest is so clear that the plaintiffs have no chance of

> success. I must therefore consider whether the plaintiffs' argument that the actions at the hearing do not constitute a waiver has a real chance of success.
>
> [7] Although the law with respect to waiver is clear, that law must be applied in each case having regard to the facts of each case. As I have said, the material facts are not in dispute. What was said at the hearing is contained in the transcript of the hearing. What occurred prior to the hearing, although not part of the transcript, does not appear to be in dispute. [Underlining mine]

[28] As is obvious from these portions of the judge's decision, she had determined that the material facts were not in dispute and that the law of waiver was "clear." Having reached those conclusions, she ought to have then applied the law to those facts and decided the matter before her. She appears to have gone astray by speculating that there were, or might be, other as yet undisclosed "circumstances" to explore.

[29] After repeatedly stating in paragraphs 5-7 of her reasons that the material facts were undisputed and then distinguishing what she characterized as an application of a limitation period that arose in **Binder v. Royal Bank, Bank of Montreal and Cohen**, [2003] N.S.S.C. 174 as being:

> . . . a different exercise than the determination of whether waiver occurred based upon the facts of this case. All the circumstances both before and during the hearing before the Committee must be considered to determine if waiver in fact occurred.

Hood, J. went on to state:

> [9] One of the factors to be considered in determining if waiver in fact occurred is whether the issue was raised at the earliest opportunity. The parties' views on this differ. The plaintiffs say that having raised it with counsel before the hearing satisfied this requirement and failing to raise it again during the hearing cannot overcome that. The defendant says that, having taken no issue with the composition of the panel during the hearing, the plaintiffs waived their right to do so.
>
> [10] I conclude that this is an issue for trial. A "real" chance of success is not to be expressed in percentages. It does not mean that the plaintiffs are likely to succeed at trial or have a better than 50/50 chance of success. At trial, plaintiffs

> have the onus of establishing their claim on the balance of probabilities. A real chance of success means the possibility of their success is not illusory or unrealistic. It is no more than saying they could succeed and the determination of whether they will or not should be left for the trial. The trial judge will have to examine all the surrounding circumstances. That is not the role of a chambers judge on a summary judgment application. (emphasis in original)

[30] For reasons that are not clear to me, the learned Chambers judge concluded that only after a full trial where the judge might "examine all the surrounding circumstances" or where "[a]ll, the circumstances both before and during the hearing before the Committee" could be considered would it be possible to decide if waiver had occurred. With respect, all of the surrounding circumstances were already well known. The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in **Gordon Capital**, supra, where the only dispute concerned the application of the law, a point with which the Court quickly dispensed in rather terse prose:

> The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.

[31] For the reasons stated, this motion is one that required an application of the law to the undisputed facts. The Chambers judge erred in declining to resolve the matter before her by way of summary judgment. As cases like **Hercules** and **Gordon** have shown, while such an analysis may well be difficult and contentious, neither complexity nor controversy will exclude a proper case from the rigours of summary judgment.

[32] This is not an instance where we might refer the matter back to the Chambers judge for a proper determination after applying the law to the facts. I am satisfied that the completeness of the record and the material factual findings which are not in dispute enable this court to complete such an analysis.

[33] The crux of Holstein Canada's defence of waiver is that the plaintiffs were obliged to pursue at the hearing the two issues of alleged actual bias now asserted as the basis for their claim in damages: first, bias on the part of Ms. Labbé for the intimate relationship she is said to have had with the plaintiffs' competitor, Mr. Roberge; and second, the bias of the panel as a whole due to the actions of Mr. Ell. Having failed to formally complain at the hearing, the appellant says the plaintiffs are now barred from doing so. In choosing not to raise the allegations at the hearing before the executive committee, the plaintiffs failed to do so at the "earliest practicable opportunity" and ought to be now prevented from doing so. I agree.

[34] It is to be remembered that this action brought by the plaintiffs against Holstein Canada is framed in contract and claims damages for its breach on account of the *actual bias* of the appellant. For example, clause 11 of the statement of claim pleads:

> 11. The Plaintiffs state that the hearing held by Holstein Canada <u>was biased</u> ...
>
> 12. The Plaintiffs state that as a result of the improper, <u>and biased</u>, decision by Holstein Canada that they have suffered damages ...
>
> 13. The Plaintiffs state that ... the Defendants failed to provide procedural fairness ... in particular it: ...
>
> b. predetermined the outcome of the hearing; ....
>
> g. some, if not all, of the Tribunal members <u>were biased</u> against the Plaintiffs ...
>
> (Underlining mine)

Nothing in the plaintiffs' statement of claim alleges any reasonable apprehension of bias from the conduct of the appellant or its members. The action is restricted to breach of contract for conduct characterized as actual bias. This distinction is important. When one examines the transcript of hearings before the executive committee, it might arguably be suggested that Mr. Kestenberg, counsel for the plaintiffs, formally noted and reserved for future argument his concern of a *reasonable apprehension of bias*. However, that is not how the action is pleaded in the statement of claim filed by the respondents.

[35] It is clear from the statement of claim, and confirmed in both Ms. Colleen Eikelenboom's and in Mr. Kestenberg's answers to interrogatories that prior to the hearing, the plaintiffs, based at least in part on their own observations had a firmly held belief of bias against them on the part of Ms. Labbé owing to her affair with Mr. Martin Roberge. Further, the plaintiffs had pursued the recusal of Mr. Ell and must be taken to have had concerns as to his influence on the other members of the panel.

[36] The plaintiffs were represented by counsel who were expressly invited by the panel or opposing counsel on more than one occasion, and on both hearing days, to make submissions as to the constitution or jurisdiction of the panel. Yet plaintiffs' counsel never mentioned the issue of alleged actual bias stemming from the actions of Ms. Labbé or Mr. Ell.

[37] In addition to these clear and repeated invitations to raise any issues concerning the constitution or jurisdiction of the panel, the plaintiffs through their counsel had every opportunity to raise the issue on their own initiative at the opening of the hearing, or during the course of the hearing, or in the intervening weeks between hearing dates. The plaintiffs could have requested a recusal of Ms. Labbé, an adjournment to permit their investigation, or an inquiry by the Chair.

[38] The separate representations by Mr. Kestenberg on the record :

> "I don't expect or believe any one of you is intentionally biased" and "I just want to make it perfectly clear. I'm not for a second saying that any of these people are acting improperly, dishonestly or are ill-motivated."

constitute in my view an express waiver and an abandonment of the claims of actual bias upon which the plaintiffs' sought-after damages are, in part, based. See generally Donald Brown & John Evans *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998) Vol. 3 at ¶ 11:5500, quoting with approval de Smith's *Judicial Review of Administration Action*, 5th ed. (London: Sweet & Maxwell, 1995) at 542.

[39] It is no answer to say that counsel might be naturally hesitant to formally place their concerns on the record in light of opposing counsel's refusal to pursue the matter without proper "proof" upon first hearing about it during their private meetings before the hearing. Plaintiffs' counsel were hardly reluctant to press for Mr. Ell's recusal, which objection proved successful. The respondents wasted no

time in hiring private investigators to conduct covert surveillance of Ms. Labbé and Mr. Roberge in order to document their affair. It defies explanation why in the face of all of this counsel would expressly state that no complaint was being advanced that any member of the panel was "intentionally biased" or "acting improperly, dishonestly or are ill-motivated."

[40] These clear words, apparently chosen carefully and uttered on separate hearing days weeks apart, amounting to such an explicit concession, distinguish the circumstances of this case from others where, for example, silence or acquiescence or a deliberate course of conduct may invite inquiry as to whether waiver ought to be implied.

Disposition

[41] For these reasons I would find that the statements by plaintiffs' counsel to the panel constitute an express waiver, such that there is no arguable issue to be tried with respect to the allegations that Ms. Labbé was biased due to any intimate relationship with Mr. Roberge, or that the panel was biased due to any influence upon it from Mr. Ell.

[42] I would allow the appeal, strike out paragraphs 8, 9, 11, 12, 13(b), 13(g) and 13(h) of the statement of claim, thereby entitling the appellant to summary judgment with respect to those parts of the respondents' claim, as there is no arguable issue to be tried concerning them. I would award the appellant costs in the amount of $2,000 inclusive of disbursements.

Saunders, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.