

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Holstein Association 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

Respondent

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**Judge:** The Honourable Justice Jamie W. S. Saunders

**Appeal Heard:** June 17, 2004

**Subject:** Cows. Pedigree. Intimate affair. Covert surveillance. Actual bias. Application for Summary Judgment by a defendant.  
**CPR 13.01**

**Summary:** After a series of hearings and upon being satisfied that the respondents' cow's true pedigree was not in accordance with its official registration, Holstein Canada expunged its registration from their records. The respondents then commenced an action against Holstein Canada framed in contract claiming breach in failing to provide procedural fairness. They alleged actual bias, first on the basis of comments allegedly made by a panel member which caused the respondents to doubt his ability to carry on, and second, that another member of the panel was having a secret, romantic affair with one of their competitors in the purebred stock business.

Holstein Canada applied in Chambers pursuant to **CPR 13** to strike out parts of the respondents' Statement of Claim on the basis that they had expressly waived such claims through representations made by their counsel.

The Chambers judge dismissed the appellant's application for summary judgment concluding that the issue of whether waiver had in fact occurred could only be decided after a full trial.

**Held:**

Appeal allowed . Summary judgment granted by striking out those parts of the respondents' Statement of Claim that alleged actual bias or sought damages as a consequence thereof. The approach that ought to be taken on an application for summary judgment is explained in **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.

Here, as the Chambers judge acknowledged, the material facts were not in dispute and the law of waiver was clear. Having reached those conclusions, the judge ought to have then applied the law to those facts and decided the matter. While such an analysis may well be difficult and contentious, neither complexity nor controversy will exclude a proper case from the rigors of summary judgment. The Chambers judge erred in declining to resolve the matter by way of summary judgment.

Rather than remit the matter back to the Chambers judge for a proper determination, the court was satisfied that the completeness of the record and the undisputed material facts enabled it to complete such an analysis. The Answers to Interrogatories filed by the respondents and their counsel confirmed their firmly held belief of bias against them on the part of one panel member owing to her alleged romantic affair with a competitor. The transcript of the hearings confirmed separate and clear representations by their counsel which constitute an express waiver and an abandonment of the claims of actual bias upon which the claimants' sought - after damages are, in part, based.

Costs of \$2,000.00 inclusive of disbursements awarded to the appellant.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 14 pages.**