IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Coughlan v. Westminer Canada Ltd. , 2005NSSC52

Date: 20050309
Docket: S.H. Nos. 65580, 65581,65676 and 66230
Registry: Halifax

Between:

S.H. No. 65580

Terence D. Coughlan and John A. Garnett

Plaintiffs

v.

Westminer Canada Limited, Westminer Canada Holdings Limited, James H. Lalor, Peter Maloney, Donald Snell, William B. Braithwaite, Robert Couzin and Western Mining Corporation Holdings Limited

Defendants

AND BETWEEN:

S.H. No. 65581

Terence D. Coughlan and John A. Garnett

Plaintiffs

- and -

Westminer Canada Limited and Westminer Canada Holdings Limited

Defendants

AND BETWEEN:

S.H. No. 65676

John A. Amirault, H. Robert Hemming, Colihn J. MacDonald, William S. McCartney and Fred Hansen

Plaintiffs

\- and -

Westminer Canada Limited, Westminer Canada Holdings Limited and Western Mining Corporation Holdings Limited

Defendants

AND BETWEEN:

S.H. No. 66230

John A. Amirault, H. Robert Hemming, Colihn J. MacDonald, William S. McCartney and Fred Hansen

Plaintiffs

\- and -

Westminer Canada Limited, Westminer Canada Holdings Limited, James J. Lalor, Peter Maloney, Donald Snell, William B. Braithwaite, Robert Couzin and Western Mining Corporation Holdings Limited

Defendants

Judge:	The Honourable Justice D. Merlin Nunn
Heard:	February 7 and 8, 2005, in Halifax, Nova Scotia
Counsel:	George MacDonald, Q.C., Michelle Award, and Jane O'Neill for the Applicants (Plaintiffs), Terence D. Coughlan, and the Estate of William S. McCartney and Fred Hansen Peter Roy, Thomas Donovan, Michael Messenger and Richard Niedermayer , for the Respondents (Defendants)

By the Court:[1] This is an application on behalf of Terence D. Coughlan, Fred Hanson and the Estate of William S. McCartney, three of the parties involved in the actions herein against Westminer Canada Limited. The Application is made to myself pursuant to *Civil Procedure Rules 15.08(a)* and *(e)* and the relief sought is as follows:

(i) an Order allowing the Applicants, and each of them, to maintain proceedings for the reversal or variation of Your Lordship's May 14, 1993 and August 4, 1993 Orders with respect to the Applicants', and each of their, entitlement to recover damages for the losses of their investments in Cavalier Capital Corporation (the "Seabright Orders") which Seabright Orders were issued following the trial of actions S.H. No. 65580, S.H. No. 65581, S.H. No. 65676 and S.H. No. 66230; and

(ii) a Declaration that the proceedings for the reversal or variation of the Seabright Orders in question shall be the continuation of actions S.H. No. 65580, S.H. No. 65581, S.H. No. 65676 and S.H. No. 66230 and all past proceedings, evidence, rulings and Orders, other than those affected by the Applicants' right to

> maintain proceedings for reversal or variation of the Seabright Orders, shall be a part of the record and shall be binding upon the parties thereto.

[2] The application was made to me as I was the trial judge in these actions. The actions all related to the purchase of a gold mine in Nova Scotia from Seabright Resources Inc. by Westminer Canada Limited. Hence the actions were referred to as the Seabright actions. The trial, involving all the actions, took place in the last half of 1992 over a period of almost six months with my decision filed on March 23, 1993. The decision is reported at [1993] N.S.J. No. 129 (S.C.). In that decision I found that the plaintiffs had proven the tort of civil conspiracy against the defendant and I awarded substantial damages to each of the plaintiffs, a larger group that included the three applicants here.

[3] In July, 1988 prior to the commencement of the Nova Scotia actions two Westminer Canadian companies commenced an action in Ontario against Coughlan and each of the directors of Seabright Resources Inc., the junior gold mining company. The action was reported to the Ontario Securities Commission and there was a number of contacts between representatives of Westminer and the Commission. This is all contained and elaborated upon

in my decision and need not be expanded further at this point, other than to say that I held that the defendant (a plaintiff in the Ontario action) had conspired to injure the plaintiffs in the Nova Scotia actions (the defendants, in the Ontario action) by bringing the Ontario action.

[4] The present application relates to one of the claims in the Seabright action, the Cavalier claim, for which I held the applicants could not recover because the damages claimed were too remote and could not be attributed solely to the defendants actions.

[5] The Seabright trial decision was appealed and the Nova Scotia Court of Appeal, in its decision reported at [1994] N.S.J. No. 12 (C.A.) upheld the trial decision and, more particularly, upheld that part of the decision relating to Cavalier in paragraphs 154 to 160 of its decision which I include here:

> [154 It is the position of the cross-appellants that they should recover their economic losses because the Ontario action was the wrong committed by Westminer, that Westminer should have foreseen the cross-appellants as victims of its negligence and that the wrongful act of Westminer was the proximate cause of the losses they suffered. There can be little doubt but that the Ontario action played a role in

the difficulties encountered by Cavalier. The extent of that role is the vexing issue that confronted Justice Nunn at trial and us on appeal.

[155 Justice Nunn observed that "even if the offerings were approved" ... "there were other factors of uncertainty". A review of the evidence reveals, among others, the following:

1. At the time Wood Gundy indicated its likely withdrawal from the underwriting it had a contractual right to do so for other unspecified reasons even though it professed the Ontario action had a bearing upon the integrity of Coughlan in the marketplace and presumably this would adversely affect the marketability of the share offering.
2. The share price for the Cavalier offering had not been established. Without that, it was unknown whether it would fetch a favourable response.
3. At various stages during the course of the attempts over two to three years to go to the market three underwriters were involved, namely, Wood Gundy Inc., Levesque Beaubien and J.D. Mack Limited. Apart from the evidence of Frazer and references made by the cross-appellants in their evidence and

the introduction of letters and documents, no evidence was called from persons among the underwriters, principally Wood Gundy, who were directly involved in the decisions made by the underwriters. It would have been helpful to the trial judge to have heard from such persons so that he could weigh and consider their evidence on what chances there were for the underwriting to proceed in any event. Did they, for example, consider the offering was doomed solely or principally as a result of the Ontario action? What part, in their opinions, did the other factors, about to be described, play in creating an unfavourable climate for the proposed offering? The answers to these important questions are not clear from the record.

4. The market crash on October 19, 1987 had a significant and adverse bearing on the ability of new corporate ventures to raise new capital throughout Canada and particularly in Nova Scotia. This condition continued through 1988 which was the period vital to the corporate offering proposed by Cavalier. The evidence at trial indicates there were no successful new venture

offering prospectuses out of Nova Scotia for some considerable time after the October 1987 bump.

5. Frazer testified that Cavalier developed problems related to water in its oil wells and difficulties with some of its management team, more particularly its president. It was not clear to the trial judge to what extent, if any, these were "factors of uncertainty".

6. The evidence supports the statement made in the preliminary prospectus of July 22, 1988 that it was the responsibility of Cavalier to repay the loan to National Bank upon the expiry of the letters of credit on October 12, 1988. Because Cavalier was unable to do so, the cross-appellants (and presumably others who had given letters of credit and are not parties to these proceedings) became involved in a restructuring of their interests in Cavalier. They purchased debentures at the face value of $1,000 each and common shares of Cavalier at $6.90 each, in varying amounts, the proceeds from which were used by Cavalier to pay down the loans from National and correspondingly reduce the face value of the letters of credit .

To the extent that they participated, the respondents thus reduced the principal sums of their letters of credit to investments in Cavalier. It appears that from October 12, 1988 and into 1990 Cavalier continued to sell 9% debentures at $1,000 par. It confirmed to the Ontario Securities Commission on April 26, 1990 that the face value of the debentures was their fair market value. During these same times the net asset value of common shares were reported to be in the range of $6.90 or more.

7. The trial judge was told the respondents were required to respond to their letters of credit. The exact dates on which they were required to respond and the exact amounts they were eventually required to pay are difficult to discern from the evidence.

8. Coughlan had one share in Cavalier. The investment, and the alleged loss, of Coughlan is reflected through the interests of TDCO Holdings Limited. TDCO was a family holding company in turn owned by three numbered companies of Nova Scotia incorporation. In these circumstances was the trial judge

> required to pierce several corporate veils to ascertain the true nature of Coughlan's personal loss or simply accept that the alleged loss was attributable to Coughlan in his personal capacity? Put another way, who suffered the loss Coughlan asserts -Coughlan personally or a corporate entity not a party to these proceedings?

[156 The litany recited above reflects some of the salient concerns revealed by the evidence. At the risk of repetition we return to the words of the trial judge at p. 218:

> However, there were other factors of uncertainty, even if the offerings were approved. An underwritten deal with Wood Gundy was not a certainty and may not have occurred. The market was not favourable and though there was some recovery by 1990, it still was fluctuating and not too favourable for initial offerings. There could be no assurance the issues would be sold. Problems, unassociated with financing, occurred to the companies properties which could be significant.

[157 It is the duty of this Court to review but not retry. Time and again in a variety of phrases this Court has repeated the oft quoted

words of Ritchie J. in the decision of the Supreme Court of Canada in Stein Estate et al. v. The Ship "Kathy K" et al., [1976] 62 D.L.R. (3d) 1 at p. 5:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which effected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

[158 As indicated at the outset, the submissions advanced by the respondents are matters of serious concern in pondering whether, in the words of Justice McLachlin, "there is sufficient proximity between the negligent act and the loss". In Rhodenizer v. Rhodenizer (1953), 31 M.P.R. 127, MacDonald J. stated at p. 159:

> In whatever form the rule is put it requires the appellant to prove that the trial judge was wrong. (Feindel v. Gunn (1915), 49 N.S.R. 383). In the result, if the appellant merely raises a doubt or the Court merely feels it would have come to a contrary conclusion, the appeal will fail, but if the appellant shows a total absence of factual foundation of the judge's conclusion (e.g. Daniels v. Baker (1937), 12 M.P.R. 120); or a preponderance of probabilities in his favour, he will succeed. (Simpson v. London, Midland & Scottish Ry. Co., supra; Spencer v. Irving Oil, [1952] 2 D.L.R. 437).

[159 This brings us back to the reasons delivered by Justice Nunn to ask whether the respondents have proved that he was wrong - that he made palpable and overriding errors that affected his assessment of the facts - that he misconstrued the evidence and made findings for which there is little or no evidence in support. That we might have come to a contrary result is not enough.

[160 We have reached the conclusion that the trial judge did not err in his finding that the uncertain factors disclosed by the evidence supported his result. Accordingly these two grounds of cross-appeal,

relating to claims for losses suffered through the financing of Cavalier, are dismissed.

[6] Sometime in 1994 approximately 20 investors in Cavalier commenced an action against Westminer. None of the applicants were included in the list of plaintiffs. The claim was for damages relating to their investment in Cavalier. The trial was held before Justice Moir over four and one-half months and his decision reported as *Fraser v. Westminer Canada Ltd. [2001] N.S.J. No. 495 (S.C.)* was filed in November 2001.

[7] Justice Moir, who faced substantial arguments from both sides on the Seabright decision, determined he could hear all evidence on the issues between the parties even though some issues were decided upon in the Seabright decision and the findings fundamental to that decision are evidence to be weighed in making his findings. In summary, Justice Moir reached the same factual conclusions in respect of Seabright, but reached somewhat different factual findings respecting Cavalier though he did conclude that the losses were not recoverable.

[8] The Fraser decision was appealed and the decision of the Court of Appeal, reported as *Fraser v. Westminer Canada Ltd.* [2003] N.S.J. No. 266 upheld the trial decision.

[9] In the Fraser trial there were different witnesses, additional witnesses regarding the proposed public offering, and more significantly for this application, different documents that were supplied in the exchange of document process as it is some of those upon which this application is based. The applicant refers to it as "the new evidence".

[10] The foregoing is basically background to this application to provide some understanding of the events leading up to it. Additionally, Mr. MacDonald, counsel for the Applicants, did not represent any of them during the Seabright trial though he did represent the other directors involved. Coughlan and Garnett's solicitors were Ronald Pugsley, Q.C., later Justice of the Court of Appeal of Nova Scotia, Jonathan Stobie and Geoffrey Machum. Both Pugsley and Stobie are deceased as is John Barker, Q.C. who represented the defendants. From the affidavits tendered here, each of them were significantly involved in the exchanges of documents and the pursuit of same both in the Seabright trial and for some periods thereafter as a result of the Cavalier trial.

[11] This application is made pursuant to *Civil Procedure Rule 15.08* which provides:

> 15.08 Where a party is entitled to:

> (a) maintain a proceeding for the reversal or variation of an order upon the ground of a matter arising or discovered subsequent to the making of the order:
>
> (b) impeach an order on the ground of fraud;
>
> (c) suspend the operation of an order;
>
> (d) carry an order into operation;
>
> (e) any further or other relief than that originally granted, he may apply in the proceeding for the relief claimed.

[12] Subsection (e) explains why the application is made in the original proceeding.

[13] The test for a Court to apply with regard to this application and this Rule has been laid down by the Court of Appeal in *Federal Business Development Bank v. Silver Spoon Desserts Enterprises Ltd.* [2000] N.S.J. No. 390 (C.A.) where the Court stated in Paragraphs 8 to 10:

> ... the test on an application pursuant to *Rule* 15.08 to reopen an action that has been completed, on the basis of newly discovered evidence, should be as stated in *Evans v. Smith*, [1995] 2 D.L.R. 156 (N.S.C.A.). In that case, an appeal from a dismissal of an action in trespass had been dismissed two years earlier, but no order had been

filed by the appellants. Upon discovering evidence of an error in the records at the Registry of Deeds, the appellants brought an application to reopen the appeal. Currie, J., writing for the court, indicated that in those circumstances the appellants would have to prove that despite the exercise of reasonable diligence, the error was not discovered before the trial, and that the new evidence would have to be "practically conclusive of the issue" in their favour.

...

The fact that the Nova Scotia *Civil Procedure Rules* specifically refer to an application of this type in *Rule* 15.08 should not, in my view, diminish the materiality of the new evidence. The import of the *Rule* is that it allows the application to be made in the original proceeding. Otherwise, a new action would be required. In order to succeed on an application of this nature pursuant to *Rule* 15.08(a), where all appeals and other statutory variation proceedings have been exhausted, in my view, the applicant must prove that:

(1) the matter or evidence arising or discovered subsequent to the original order, is such that it was not previously capable of

being obtained or discovered by the exercise or reasonable diligence;

(2) the new evidence is apparently credible; and

(3) when examined with the complete record of the previous proceeding, the new evidence is such that it would be practically conclusive of the issue in favour of the applicant, provided that, in a case of obvious and substantial injustice, if the second and third requirements are met, the necessity to prove due diligence should not be applied as strictly.

[14] This application has as its basis the alleged "new evidence" and that is found as Exhibit 19 to the affidavit of Terence D. Coughlan, a large volume containing 25 different groups of documents and related trial testimony.

[15] The respondent has filed two affidavits, one of Richard S. Neidermayer providing additional derivative trial testimony, and another of Katherine Knight, regarding access to Ontario Securities Commission materials.

[16] The Coughlan affidavit attaches other evidence which does not form the basis of the application. My consideration is concerning the documents only and I need not refer to a large part of the evidence and documentation provided.

[17] I agree with the submission of the respondent that the documents I am to consider can be grouped into five categories:

> **Group One**: Three documents relating to solicitor-client communications regarding legal advice pertaining to an asset check prior to the commencement of litigation by the Respondents in the Ontario Action. These comprise Tabs 1-3:
>
> > William Braithwaite's letter of June 10, 1988, to J. Lalor and attachments, consisting of a Directors' Circular relating to the purchase of Cavalier Energy and a bundle of Ontario Securities Commission ("OSC") material relating to Cavalier Energy (Tab 1);
> >
> > A follow-up memo from Mr. Braithwaite's associate, Simon Romano (not "Romans"), dated June 23, 1988 to Mr. Wise (Tab 2); and
> >
> > Extracts from Mr. Wise's June 29, 1988 confidential Board Report, other portions of which were ordered disclosed in the Seabright Actions before Your Lordship (Tab 3, identified in the index of Exhibit 19 as "unknown author" but, in fact, prepared by Mr. Wise).

Group Two: Correspondence between Peter Roy, counsel to the Respondents, and various addressees at the OSC on the corporate Respondents' behalf. These comprise documents at Tabs 7, 9-12, 14, 19-22 and 26.

Group Three: Documents prepared by Messrs. Wise, Roy or Braithwaite, in their capacities as lawyers for the Respondents, consisting of:

> memos to file and reports to their client relating to counsel discussions with staff at the OSC (Tabs 6, 8,15-17, 23-25); and
>
> a brief excerpt from the Minutes of the Board of Directors of WMC which mentions a report of Mr. Wise to them in his capacity as counsel (Tab 28).

Group Four: Documents in the possession of the OSC and its staff, and not the Respondents, consisting of:

> Joseph Groia's notes of a meeting with counsel for the Respondents (Tab 4);
>
> Mr. Groia's note to his assistant (Tab 5);
>
> an internal memo from J. Drury discussing disclosure obligations from a geological perspective (Tab 13); and

an internal OSC investigation report from N. Campbell (Tab 18).

Group Five: Answers to Interrogatories by Mr. Braithwaite served by the Plaintiffs in the Cavalier Action. All of the documents in Group Two were originally disclosed in the Cavalier Action as attachments to these Answers. Mr. Braithwaite, was a defendant in the Seabright Actions and gave evidence at trial.

[18] None of these documents were produced for the Seabright trial and privilege was claimed on those in Groups 1 to 3 at that time. They were never revealed to the plaintiff's counsel involved in Seabright. However, they were produced for the Cavalier trial. It must be acknowledged that the Cavalier trial involved different plaintiffs, different issues, and different witnesses. Group 4 documents were produced by an Ontario Securities Commission witness and were never in the respondents' possession and Group 5 were answers to interrogatories in the Cavalier action and it was those answers that contained all the documents in Group 2.

[19] Just to put everything into the actual perspective, Seabright litigation began in 1988. The trial was in 1992 with my decision in early 1993 and the appeal decision was in 1994 with leave to appeal to the Supreme Court of

Canada refused in 1994, [1994] S.C.C.A. No. 117. Cavalier litigation began in 1994 with the trial in 2000 and appeal in 2003.

[20] It is now 12 years from the time of my decision and 11 years from the decision on appeal and the refusal of leave to appeal by the Supreme Court of Canada. This fact alone imposes a heavy burden on the applicant.

[21] It is in the interest of justice and fairness that there be finality to the courts processes.

[22] The Ontario Court of Appeal in *Tsaoussis (Litigation Guardian) v. Baetz* (1998) 41 O.R. (3d) 257a case the plaintiff applied to reopen four and one-half years after settlement, after indicating that attempts to re-open after a final judgment must be carefully scrutinized, stated at paragraph 16:

> The parties in the community require that there be a definite and discernable end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernable end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their

> respective rights and obligations are revisited and reviewed as circumstances change.

[23] This principle of finality to the resolution of legal disputes is, therefore, well recognized by the courts and, though it is not necessarily decisive of an application it imposes a certain degree of strictness on the considering court and an onus upon an applicant which grows heavier as the time grows longer between final judgment and the application.

[24] To reopen a trial after this long period the evidence which leads to the reopening must be such that it will,

> taken with the other evidence adduced at trial, be expected to have affected the result (see *Palmer v. The Queen* (1980), 1 R.C. S. 759, per McIntyre, J. at page 775).

[25] Though the *Palmer* case involved criminal matters the principle that the new evidence <u>alone</u> together with the other evidence adduced at trial would affect the result is important to the considerations here. In effect, would I, as the trial judge, have decided an issue differently if, along with the evidence I heard at trial, I had these additional documents.

[26] This is essential to maintain the interest of justice in finality. *Rule 15.08* cannot be interpreted to permit a reopening of a trial based upon new found

documents then giving the opportunity to call witnesses to expand, explain or provide additional evidence to that heard at trial.

[27] I say this particularly because the appeal decision of Seabright set forth a list of items not proven and witnesses not called. From reading the Cavalier decision, I know that evidence was given and witnesses called to deal with these points. This application does not open a door for the applicant to call additional witnesses to plug any holes in the Seabright trial nor am I, at this stage, to be influenced by the Cavalier decision and, indeed, even if I had these documents in the Seabright trial, I still may have reached different conclusions than Moir, J. reached in Cavalier as the evidence I had was different, and not as complete in key respects as was the evidence before him.

[28] This is a most significant concern here for this application will fail if I am not satisfied that I would have decided differently if I had these documents at <u>my trial taking into account only the other evidence I heard.</u>

[29] The applicants place great weight upon the Cavalier decision and refer to express findings by Moir, J. with regard particularly to the underwriting agreement, the OSC approvals, the price of the shares and amounts Coughlan would raise and the amount the brokers would buy. None of this

evidence was before me and I am unable to accept that I should consider it to be applicable to the Seabright trial. See again the 8 points of concern set forth by the Appeal Court in its Seabright decision referred to earlier.

[30] As well, they maintain they meet all the requirements of the *Silver Spoon* case.

[31] The respondents, on the other hand, first raise the issue of undue delay as fatal to the application and then contend that there is an issue of privilege as well as a failure to meet the requirements set down in the *Silver Spoon* case.

[32] As must be obvious, this is a complicated matter involving a number of very difficult issues.

[33] I will deal first with privilege. I need not, at this point, take each document and determine if it was privileged. Initially, since they were privileged at the Seabright trial, I have to decide whether they lost any privilege because they were produced by the same defendant at the Cavalier trial. The principle of privilege relating to litigation has a long history and essentially it is "once privileged always privileged."

[34] In *Mann v. American Automobile Insurance Co.,* [1938] 2 D.L.R. 261 (B.C.C.A.), the British Columbia Court of Appeal stated at p. 264:

> The privilege which attaches by the invariable practice of our Courts to communications between solicitor and client ought to be carefully preserved. In my opinion the rule is, once privileged always privileged. This will apply a *fortiori* where the succeeding action is substantially the same as that in which the documents were used.

[35] The Court in *Pinder v. Sproule,* [2003] 7 W.W.R. 128 (Alta. Q.B.), at paragraph 43, stated:

> subsequent collateral use of the document may amount to a waiver, but it does not take away from the original privileged nature of the document.

[36] See also *Hamilton v. General Manufacturing Co.* [2000] O.J. No. 1636 where the Ontario Court of Appeal held that a party could re-assert litigation privilege.

[37] I conclude therefore that the documents in Groups 1, 2 and 3 which were privileged in the Seabright action remain privileged and the fact that privilege was

waived for these documents in the Cavalier trial does not waive the privilege for this application nor affect the privilege claimed earlier in Seabright.

[38] As I indicated it is not for me to look at each document now to determine if it would, in fact, be subject to privilege. That was for the parties in the Seabright trial and, in my view, it would be very wrong and decidedly

contrary to the interests of justice to begin that exercise in an application of this type.

[39] As a result I cannot see how the documents in those three groups can now become admissible in the Seabright trial.

[40] The documents in Group 4 were not documents in the possession of the respondent but rather were Ontario Securities Commission documents, produced at the Cavalier trial though one Joseph Groia, an OSC employee. They were not available for production in the 1992 trial.

[41] Group 5 documents arose by virtue of answers to interrogatories in the Cavalier trial and which included the documents in Group 2.

[42] Nothing in these latter groups affects or changes the privileged nature of the other documents in the first three groups.

[43] Next the respondent pleads delay and with considerable merit. These documents first appeared in the preparation period prior to the Cavalier trial, i.e. sometime between 1994 and 2000. It is clear that the applicant has had the OSC related evidence in Groups 2, 3, 4 and 5 for four years and the Braithwaite letter for 6 years. In fact, the applicants were aware of the existence of the Group 2 documents before the Seabright trial.

[44] Though the applicants and their solicitors were not directly involved in the Cavalier trial, Coughlan was a witness for the plaintiffs, and was given a "watching brief", the latter giving him access to all the trial exhibits.

[45] The evidence is clear that as early as April, 2000 Coughlan instructed his then counsel the late Jonathan Stobie, Q.C., to consider the adequacy of disclosures in Seabright "for the purpose of advancing any proceeding [he] might bring as a consequence thereof" (Coughlan affidavit, para. 17). There is a letter from Jonathan Stobie to Tom Donovan dated January 22, 2001 asserting that he has reviewed the Cavalier documentation and such should have been disclosed during the Seabright litigation. While indicating an intent to institute proceedings he first suggested negotiations re Coughlan's claim. Two weeks later a similar letter is sent to Donovan by George MacDonald. The intent of both related to an application to reopen the Seabright trial.

[46] Donovan replied to MacDonald by letter dated March 5, 2001 indicating that their (the respondents) position on the documents hadn't changed and then states:

> We note that you have taken no steps in the intervening two years to assert any claim arising out of the June 10, 1988 letter (the

> Briathwaite letter) and attachments on behalf of Coughlan or any of your clients. Rather than advancing your clients' allegations in a timely fashion you have chosen to await Justice Moir's decision in Fraser before taking any further steps.

[47] In his May ll reply Mr. MacDonald indicates he did not agree that there was any obligation on his clients to make an application until the Cavalier decision was filed and that he was placing the matter in abeyance until that time.

[48] Jonathan Stobie again wrote on November 21, 2001 indicating an intent to bring an action to reopen Seabright.

[49] Nothing further was done until this application was served upon the respondents on January 7, 2005. I should add that during the whole period nothing was done by the respondents to prevent or impede the progress of an application.

[50] Both the reference to enforcing the rules in *Griffin v. Corcoran* (2001), 193 N.S.R. (2d) 279, and abuse of the courts processes include a consideration of the principles relating to delay and finality.

[51] Was this delay and was it to the extent to defeat this application? The answer can only be in the affirmative. There are numerous cases in

Canadian jurisprudence relating to the importance of timeliness in asserting a right to reopen a trial and that importance grows both as the time from the trial lengthens (here 13 years) to the date of application, and as the length of time between awareness and even possession of the documents forming the basis of the application occurs and the time of application.

[52] In reviewing some cases regarding reopening or impeaching judgments the Court in *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1989) 54 D.L.R. (4th) 647 the Court at page 659 stated:

> Delay will defeat a motion to set aside a trial judgment under [Ontario] Rule 59.06. I refer in this regard to cases where the evidentiary burden has been met and the due diligence test passed, but where there is unreasonable delay in bringing or pursuing the motion to set aside.

[53] I am satisfied that this principle underlies our *Civil Procedure Rule 15.08.* Unreasonable or inordinate delay cannot be condoned and must operate as a bar to an application under this Rule.

[54] Cromwell, J. in *Griffin v. Corcoran,* supra, after stating that reopening of a trial "is an extraordinary and rare step that must be undertaken with great caution" (para 64) stated in para 66-67:

An application by one party to reopen a trial presents obvious risks of procedural injustice to the other party and, more generally, of undermining the orderly conduct of litigation. Civil litigation is not a judicial inquiry; a trial judge has no roving commission to examine every aspect of the relationship between the parties. The parties themselves must advance the issues they wish determined by the Court and put forward the evidence they consider necessary to advance their positions. They must disclose the relevant documentation to each other and be subject to extensive discovery. A trial proceeds by each side having the opportunity, in turn, to present its case. A party must bring froward the whole of the evidence on which it intends to rely. This is particularly true of the plaintiff who is not permitted to seek tactical advantage by "splitting" the case: that is, by holding back evidence known to be relevant from the outset until after the defendant has started calling its evidence.

Reopening a trial for further evidence may be offensive to all of these important principles and therefore may be procedurally unfair to the opposite party. And this may not only affect the case at hand. If allowed routinely or too readily, the possibility of reopening will

> provide an incentive to ignore these principles to gain tactical advantage. If the rules are not enforced, they will tend to be ignored.

[55] The Supreme Court of Canada has made a similar statement of principle in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 (at para. 61):

> [T]he case law dictates that the trial judge must exercise his discretion to reopen the trial "sparingly and with the greatest care" so that "fraud and abuse of the Court's processes" do not result.

[56] In my view, the applicants in this type of matter under this Rule did not have the luxury to wait out the decision in Cavalier at trial and on appeal and sometime thereafter before making an application. The applicants had the documents, or they were obtainable. They certainly were aware of them. They indicated an intention to make an application, but never did. Some short time of delay might be explainable but not a period of years from at least four to six or more from knowledge of the documents, four years from the Cavalier trial decision to four years after intention to make an application was indicated to the respondent.

[57] This is an unreasonable delay in the circumstances and must be held to deny the present application. It has not been satisfactorily explained by the applicant and there is no reason to forgive the delay.

[58] On this point, and before I deal with the tests on re-opening referred to earlier, I must indicate that this undue delay must be given considerable weight when applying the 4th part of the test relating to "interests of justice" as that has at least two aspects, that of the judicial system as well as that of the individual claimant. Here it seems that because of the length of time since the trial and the undue delay the emphasis must be on the interests of the judicial system, i.e. the notion of finality and the requirement to act without delay.

[59] The first arm of the *Silver Spoon* test is that an applicant to be successful must prove:

> the matter or evidence arising or discovered subsequent to the original order is such that it was not previously capable of being obtained or discovered by the exercise of reasonable diligence;

[60] In this regard, documents that were, and are still, privileged cannot be referred to as new evidence. As well, in the trial where over 1600 exhibits, containing a small mountain of printed material, were entered and many

witnesses who related in some way to these documents, or at least some of them, including Coughlan himself, it is difficult to accept that most, if not all were not previously capable of being obtained. At least the applicants were aware of the existence of documents of this nature and should have taken more steps to seek them out. I need not refer to the discussions regarding the Ontario Securities Commission documents as that is all contained in the affidavits on file but they do indicate knowledge of those documents and that they were not pursued. I have to conclude that the applicants did not exercise reasonable diligence during the Seabright litigation with regard to these documents. Therefore, they fail to meet the first arm of the test and that, also, results in the application being denied.

[61] The parties agree that the evidence is credible so there is no problem with the second arm of the test.

[62] The third arm, probably the most difficult, states:

> when examined with the complete record of the previous proceeding, the new evidence is such that it would be practically conclusive of the issue in favour of the applicant;

[63] Roscoe, J. in *Silver Spoon*, supra, dealing with the "practically conclusive " test at paragraph 9 states:

> [9] The "practically conclusive" test is similar to that applied by the British Columbia Court of Appeal in **D.K. Investments Ltd. v. S.W.S. Investments Ltd.**, [1990] B.C.J. No. 269; 44 B.C.L.R. (2d) 1 (C.A.), where Southin, J.A. examined the old English jurisprudence and as to the issue of materiality of the evidence on applications to reopen finalized cases, adopted the following statement of law from **Huntgate v. Gascoyne** (1984), 2 Ph. 25; 41 E.R. 850:
>
> > ... the question on applications of this kind was not merely whether the evidence was material, but whether, looking at the case made on the other side and the whole mass of evidence adduced on the former hearing, what was now brought forward would have been likely to have altered the judgment which the Court then came to; and being clearly of the opinion that that was not the case in the present instance, he must discharge the Vice Chancellor's order.

[64] If it is not clear already from my earlier comments, I do wish to make very clear that it is my interpretation of this case and others earlier referred to that I am limited to looking only at the new documents and the mass of evidence from the original hearing in considering the application. I have been

presented a great deal of evidence concerning these documents in the applicant's affidavit and I am concerned that the applicant in using the term "new evidence" is or may be including more then the documents themselves. If so, I am not. "New evidence" as far as I am concerned is limited to the documents only.

[65] Since I have already decided that none of the privileged documents are admissible because of privilege, and that privileged was never waived for Seabright, there is no "new evidence" to consider so this arm of the test is of no consequence here.

[66] Even if I am wrong on this point, I cannot accept that this "new evidence", the documents alone, would be practically conclusive of the issue of damages for the applicant if I had them to consider along with the totality of evidence in the Seabright trial. I would still have been left with the uncertainties set forth in my decision and elaborated upon by the appeal decision, supra. I did not have the witnesses or the evidence provided to Moir, J. in Cavalier, and do not see how that evidence can be incorporated into the Seabright decision.

[67] In this regard I am clearly proceeding on the basis that the "new evidence" must be practically conclusive, which it is not, and not that it opens a door

to, in effect, grant a new trial on the Cavalier claim in Seabright to hear further evidence which was not entered in the first trial. To conclude as the applicants wish, it would be necessary not only to accept the new evidence, but to hear other witnesses on matters well outside the new evidence itself such as evidence of the brokers, evaluators of the effect of water in the well, the effects of the market crash of October 17,1987, further evidence on the letters of credit, Coughlan's loss and perhaps other related evidence, all of which was available in 1992.

[68] All this would point to a further trial of some length and would create an injustice to the respondent who is entitled, by the principle of finality and the requirement of a "definite and discernable end to the legal disputes", to be able to rely that all the issues in the Seabright matter have been litigated fully in accordance with the courts rules and processes and have gone through trial, appeal and an application for leave to the Supreme Court, and are completely over, however they were resolved, and the parties go their way.

[69] The applicant fails to meet this arm of the test.

[70] Finally the fourth arm states:

> provided that, in a case of obvious and substantial injustice, if the second and third requirements are met, the necessity to prove due diligence should not be applied as strictly.

[71] This only operates in a case of obvious and substantial injustice and still requires the second and third requirements to be met. Having indicated that the applicants have not met the third requirement, it is obvious that this arm of the test is of no help to the application.

[72] However, I cannot see this as a case of “obvious and substantial” injustice. True, the applicants would be very interested in getting another chance to try to recover a substantial amount of money, but it is not an “obvious and substantial injustice” when they had the opportunity to make the claim during the trial, which they did, and produce all the necessary witnesses to prove it, which they didn’t.

[73] For reasons already given the obvious injustice here would be to the respondent if the matter was reopened as claimed here. Further there would be an obvious injustice to the court processes if the delay herein was to be condoned. There are existing principles, applied consistently by courts throughout the country, relating to undue delay and to strict observance of the rules and principles with rare and unusual exceptions. These are to be

followed to lend not only finality and certainty to the litigation processes, but also to give them credence.

[74] Concluding, the application is denied with costs.

J.