

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: 2703203 Manitoba Inc. v. Parks , 2006 NSSC 6

Date: 20060106
Docket: SH. No. 188275
Registry: Halifax

Between:

2703203 Manitoba Inc.

Plaintiff

v.

David Parks, Ross Parks, Lloyd Smith and Parrcom Atlantic Concepts
Incorporated

Defendants

DECISION

Revised Decision: The neutral citation on the original decision stated “2005 stated “2005 NSSC 6.” This has been corrected to “2006 NSSC 6”. The text is unchanged.

Judge: The Honourable Justice K. Peter Richard

Heard: November 21, 22, 23, 24, 25, 2005 at Halifax, Nova Scotia

Counsel: William Ryan, Counsel for the Plaintiff
Defendants - Self Represented

Richard, J.

The Action

[1] In this action the Plaintiff (Manitoba Inc) alleges that the defendants severally infringed copyrights of the Plaintiff and committed, and continue to commit the tort of passing off. The gist of the relief sought by the Plaintiff is set out in paragraph 12 (1) of the statement of claim as follows;

“Injunctive relief restraining the defendants from further publishing the Flying Cow in present or similar for(sic), restraining the defendants from further infringing on the copyright of the Plaintiff and from further passing off, restraining the defendant from further interfering with the contracts and business of the Plaintiff, restraining the Defendants from making further use of any confidential material gained from the Plaintiff, restraining the Defendants from further seeking to restrict the places where the Plaintiff’s material, namely the Coffee News can be displayed or distributed, restraining the Defendants from seeking to enforce such restrictive agreements with third parties, and an order for delivery up or forfeiture of all material gained from the Plaintiff and all offending or infringing material”.

[2] Additionally, the Plaintiff seeks general damages, special damages, an accounting of profits of the Flying Cow and aggravated or punitive damages.

[3] The Defendants represented themselves at trial and their principal spokesman was Ross Parks (Parks).

The Injunction Application

[4] This action was commenced by Originating Notice (Action) on 24 October 2002. Shortly thereafter the Plaintiff made application for an Interim Injunction. The application was heard before Goodfellow, J. in December 2002 (2703203 *Manitoba Inc v. David Parks et al*, 2002 NSSC 265, and a written decision denying the application was filed on 10 December 2002. The court found that harm will befall the Plaintiff if the injunction is not granted but further commented (page 9) that “It must be irreparable harm and the evidence does not establish at this point this essential requirement for injunctive relief”.

[5] In the course of his decision Goodfellow, J. made some interesting observations respecting the affidavit evidence which was before him. At page 3 of his decision he commented:

I read the evidence to indicate that the Coffee News accepted Ross Parks' involvement only to the extent that he was acting in essence as a banker or financier to Lloyd Smith. With the passage of time, Coffee News realized that the relationship between Lloyd Smith and Ross Parks was much closer and far different than simply Ross Parks acting as a banker. The evidence clearly indicates that although the licenses were held by Lloyd Smith, the financing, management and really ultimate control lay in the hands of Ross Parks and that essentially Lloyd Smith was a commissioned sales person who happened to hold the license.

and further at page 5 the court stated:

With respect to Coffee News, I would take a contrary position to Lloyd Smith's statement in para. 6 of his affidavit that he maintained responsibility for sales and all final decisions. My distinct impression is that, from the outset, Lloyd Smith, although the technical holder of the franchise license, was, as I previously said, really a commissioned salesman. I also have the distinct impression that, from the very outset, Ross Parks knew his involvement in Coffee News would not be acceptable to Ms. Daum, that Lloyd Smith knew this to be the situation and they conducted themselves accordingly.

The totality of the evidence before me, as opposed to the affidavit evidence before Goodfellow, J. portrays a more blatant and baleful scheme of deception and downright mendacity.

The Coffee News

[6] The principal witness for the Plaintiff was Jean Daum, President and Chief Operating Officer of Manitoba Inc. The principal business of the company is the franchising of a publication called the Coffee News, a publication which is trade marked in both Canada and the United States. Coffee News is published in 50 countries and is highly rated in various trade publications. Daum said that it took her about 10 years to get the project in operation. Most of this involved the development of a specific format which would be recognizable and consistent in all countries and in all languages. She also developed a very detailed and

comprehensive manual which she referred to as the franchise “Bible” and which is the formula for success of the Coffee News franchisee. All Coffee News publications have the exact same format, colour and style. Basically, the format shows a border of advertising with writing content in the centre portion. The writing is generally not news but rather trivia, horoscopes, puzzles and stories which are intended for light reading. This reading material for the publication is supplied by the Plaintiff and is delivered to the franchisee through coded entry into the Plaintiff’s Website. The material is then downloaded and incorporated into the body of the Coffee News. The publication is then distributed by the franchisee free of charge to various restaurants, coffee shops, convenience stores and other such stores in the area.

[7] The Coffee News is disseminated by franchisees in a geographical area set out in the franchise contract. The terms of the contract are clear and require that the franchisee sells advertising, arranges for the printing and distribution of the sheet in the designated geographical area. The geographical areas are strictly determined by population and some areas may have as many as 10 marketing areas. Halifax, for instance, has two such areas - one for downtown and the other for the Clayton Park, Bedford and Sackville area.

The Deception

[8] In reviewing the evidence in preparation for writing this section I was reminded of that ageless admonition by Shakespear - *Oh what a tangled web we weave when first we practice to deceive.*

[9] During the four and one-half days of trial there was much contradiction between the evidence of the Plaintiff and the evidence of the several defendants. At the outset I express the conclusion that where there is conflict between the evidence of the Plaintiff and the Defendant I accept that of the Plaintiff.

[10] The Plaintiff first encountered Ross Parks with respect to a Coffee News franchise in September 1998 in North Vancouver, British Columbia where a franchise arrangement was negotiated with John Schimmel. It is not clear whether Schimmel was a partner, an employee or simply a “front man” for Ross Parks. In any event, the experience was very unsatisfactory for the Plaintiff and no franchise fees were paid respecting this venture. It appears that Schimmel and Ross Parks simply pointed the finger at each other as the person largely responsible for this failure. The North Vancouver franchise was negotiated on behalf of the Plaintiff by

David Lane of Winnipeg, a senior employee of the Plaintiff who also held several Coffee News franchises in the Winnipeg area.

[11] At about the same time David Lane was diagnosed with terminal illness and expressed an interest in selling his Winnipeg franchises. Ross Parks became aware of this and entered into negotiations with Lane for these franchises. According to Daum, Ross Parks played upon Lane's health condition to get the purchase price down to unconscionable levels and then terminated the negotiations. Daum was so upset with this odious performance on the part of Ross Parks and with the North Vancouver experience that she determined that the Plaintiff and Coffee News would never again have any dealings with him.

[12] In February of 2000 the defendant Lloyd Smith entered into the picture. To the Plaintiff's knowledge, Smith concluded negotiations for the purchase of a Coffee News franchise in the Annapolis Valley. Bonnie Metzler and her sister-in-law were the holders of that franchise. An agreement was entered into between Plaintiff and Smith on 28 February 2000 (Exhibit 1 - Tab 7) to formalize the Valley transfer. Shortly after this Daum became aware that Ross Parks was somehow involved in this deal. She immediately confronted Smith who assured her

in very positive terms that Ross Parks was only involved to the extent that he had advanced a loan to Smith and that his company, Parrcom, was engaged to do some administrative work for the franchise. Daum also became aware of some involvement by Schimmel but again was assured that he was only doing limited graphics work from his Vancouver residence - because he was familiar with the Coffee News set up and could do this work easily. Upon hearing this Daum sent an e-mail to Smith stating in part “I must tell you - I WOULDN’T have allowed you to licence a Coffee News if I’d known either Ross or John Schimmel was IN ANY WAY involved in it.”

[13] It is clear that the Valley franchise was negotiated by Ross Parks , supposedly, on behalf of Smith. It is also clear that these negotiations were anything but amicable and Metzler impliedly accused Ross Parks of bad faith negotiations (see Tab 40-41). The communications by e-mail between the Plaintiff and Smith and between Smith and Ross Parks as set out at Tabs 46 through 53 disclose a strategy of lies and deceit on the part of Smith and Ross Parks to keep the Plaintiff completely in the dark as to the true extent of the involvement of Ross Parks in the Valley Coffee News franchise as well as the other Coffee News franchises which were being negotiated in Nova Scotia. Ross Parks, either directly

or through Parrcom, was the true controller and guiding force of the Valley franchise. Revenues emanating from the franchise operation were intermingled with other monies coming to Ross Parks or Parrcom and Smith had no signing or administrative authority. Smith was a mere “front man”.

[14] In August of 2000 Smith became the “named” franchisee for the Antigonish-Port Hawkesbury area and in April of 2001 he executed a similar franchise agreement for the South Shore area of Nova Scotia. As of 1 June 2002 he assumed control of the Truro franchise, having purchased the interests of Sherri Green, the previous holder. As with the Valley franchise, Ross Parks was the true owner and manager of these franchises. Any revenues were directed through Parrcom.

[15] A review of the various e-mails set out in Tabs 46 through 53 of Exhibit 2 gives one a sense of the extent to which Ross Parks et al went in order to keep the Plaintiff in the dark as to the true ownership and management of the Coffee News franchises in the Valley and elsewhere in Nova Scotia. By the same token, Smith was intimately tied to all of the Parcomm/Parks dealings and cannot be heard to say that he had no knowledge of or involvement in other portions of the business,

including the Flying Cow enterprises as discussed in the following segments of this decision.

The Flying Cow

[16] On 15 June 2002 Parrcom entered into a “Flying Cow News Template Agreement” with The Orion Group, a husband and wife team (Luke Vorstermans and Linda Ryan) out of Wolfville N. S. Simply, they were to supply the editorial material for the proposed new publication. Vostermans said that Flying Cow would be the same as Coffee News. Indeed, the first several issues of Flying Cow, published by the same printer, were identical to Coffee News in every respect, even to the quality and colour of the paper. Only the editorial content and the masthead were different.

[17] In cross-examination Ross Parks, in responding to a question respecting the publication of the Flying Cow, said “ I figured I could do it myself without franchise fees”. From all of the evidence it is clear that Ross Parks intended to replace the Coffee News in all of the franchise areas with the Flying Cow. Indeed, he appears to attempt a Newfoundland franchisee to breach a contract with Coffee

News (Tab 55 - In a memo to Vorstermans he said “ met with Newfoundland CN franchisee and he is considering ‘flipping’ to FC”.

[18] The evidence in general is somewhat confusing but I conclude that this result was not entirely unintentional on the part of the defendants, especially Ross Parks - it is merely a further manifestation of the efforts to conceal and obfuscate the realities of the situation. For this reason, the following review of the evidence may appear somewhat anecdotal and disjointed.

Antigonish/Port Hawkesbury -Cohen McInnes.

[19] Cohen McInnes is a young fellow who resides in Antigonish. In the summer of 2002 he responded to an ad in the local edition of Coffee News seeking a sales agent for the Antigonish area. The phone which he called was answered by Lloyd Smith who gave him another number which he termed the “Human Resources Department”. On calling that number he spoke to Ross Parks who said that David Parks would be in touch with him in the near future. Two weeks later McInnes met with David Parks at a local Tim Hortons. David Parks had a complete binder respecting Coffee News and also presented him with a Halifax copy of Flying Cow. He also had a business card from Flying Cow. David Parks gave the

impression that Flying Cow would not be a competitor of Coffee News but rather a “rebranding” of that paper. McInnes was engaged as an agent at a 30% commission rate. David Parks told him that Flying Cow would come later and that he had the opportunity to “grow with Flying Cow”.

[20] At some point McInnes called the Coffee News number and the answering machine had the message “Home of Coffee News and Flying Cow”. He was somewhat concerned with the obvious confusion of names so he called the head office of the Plaintiff and spoke with Ms. Daum. She sounded somewhat unnerved by the mention of Ross Parks. Apparently Jean Daum confronted Smith with this new revelation and after some discussion she “pulled the plug” on Smith and cancelled his franchise. Soon thereafter the franchise was passed to McInnes. Following his appointment McInnes said that both Ross Parks and David Parks were in the area soliciting advertising and many of his clients were of the opinion that Coffee News and Flying Cow were one and the same.

[21] During his tenure as franchisee McInnes said that the local Flying Cow was almost identical to Coffee News using the same format and paper colour. At times the Coffee News would be removed from its display stands in stores and replaced

by the Flying Cow. The copies of the Coffee News were thrown in the waste. Some of the stands for Coffee News were thrown out or otherwise disappeared from their locations. Ross Parks denied any involvement in any such activities. Directly on this point, Ryan Lockhart of Bedford knows all of the defendants and was associated in the business with Ross Parks. He said that when he was involved in the Flying Cow operations he personally saw Ross Parks remove copies of Coffee News from distribution outlets and throw them in the waste. Lockhart was told by Ross Parks to do likewise and when he refused Parks told him that his morals were too high.

The Halifax Coffee News Franchise

[22] Cameron Thompson has been the holder of the Coffee News franchise for the past 10 years. In the summer of 2000 he met Ross Parks who presented himself as a fellow Coffee News franchisee. Over their many meetings Thompson discussed the business openly with Parks as a fellow franchisee. At one such meeting Ross Parks had the Coffee News Manual with him - an allegation which Ross Parks vehemently denied. In July of 2002 the Flying Cow made its first

appearance in the Halifax area. Thompson said that it was almost identical to the Coffee News - identical colour and layout with only minor variations. He said he was shocked when he learned that Ross Parks was behind this and that he felt “violated” after having been so open with Parks as to the Halifax Coffee News franchise. In his affidavit -Exhibit 12 - Thompson said “...there was definite confusion between the distributors and advertisers about the relationship existing between Coffee News and Flying Cow. I heard repeatedly that the advertisers and distributors thought I was out of business or that I had launched a second edition of the same publication to gather more advertising space”.

Findings and Conclusions

[23] I find that the defendants, Ross Parks, Lloyd Smith and Parrcom purposely and deliberately embarked upon a program with the aim of replacing Coffee News in the franchise areas with Flying Cow. To accomplish this objective Parks used the design, format and other aspects of the Coffee News to cause confusion in the several marketing areas so that advertisers, distributors and readers may be persuaded that the two publications were “sister” editions rather than competitors. During the material times, until discovery of the deceit, Ross Parks and Smith

made a concerted and deliberate effort to keep the Plaintiff “in the dark” as to the true operation and objectives of those defendants in the franchise areas.

[24] The defendant David Parks, although involved peripherally in the operation, does not appear to have the same interest or involvement in the schemes as did the other defendants. For this reason I am of the view that David Parks, although being a willing participant in the scheme, did not have the intensity of involvement similar to the other defendants. He was merely a “hired hand” taking orders directly from his brother Ross Parks. Accordingly, I am not satisfied that he was involved to such an extent as to be held accountable to the Plaintiff. The action against David Parks is dismissed without costs.

[25] I am drawn to the comment at page 5 of the Plaintiffs brief which seems to summarize that conduct of the remaining defendants: “The Defendants are trading on the goodwill earned by the Plaintiff and furthermore are doing so using blatant misrepresentations in order to capitalize on the marketplace for their own financial gain” to which I might add - and to the further detriment of the Plaintiff. I am satisfied on a balance of probabilities that the defendants acted in concert, or implicitly as partners, to interfere with the contractual relations of the Plaintiff in

violating the franchise agreements by attempting to pass off the Flying Cow as the Coffee News.

The Law

[26] The *Trade Marks Act* states in part;

7. No person shall

(a) make a false or misleading statement tending to discredit the business, wares or services of a competitor;

(b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

(c) pass off other wares or services as and for those ordered or requested;

(d) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to

(I) the character, quality, quantity or composition,

(ii) the geographical origin, or

(iii) the mode of the manufacture, production or performance of the wares or services; or

(e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

[27] The Plaintiff quotes the following passage from Hughes and Ashton, *Hughes on Trademarks*, Second Edition, Buttersworth, 2004 p. 1002 87:

An appearance in the labels or shape of the wares or of the place where the services are performed or in the advertising thereof, whereby the public has come to identify such an appearance with the wares or services of that person, creates a proprietary right in that appearance or, as it is commonly called, “get-up”. Get-up may include the appearance of the exterior and interior of a restaurant, the manner in which indicia are applied to garments, the shape of bottles in which wares are sold, packaging a credit card or building or souvenir sculpture items, books such as almanacs, or websites. It is not material that the product of the accused party be labelled or identified by a different name if the get-up is sufficiently similar so that the public would be confused into thinking that the two are associated.

The following passage from the Supreme Court of Canada case

Ciba-Geigy Canada Limited v. Apotex Inc [1992] 3 S.C.R. 120,

appears to render a definitive explanation of law of passing off

as it may apply in the present circumstances:

More recently, in *Reckitt & Colman Products Ltd. V. Borden Inc.* [1990 1 All E.R. 873, Lord Oliver reaffirmed, at p. 880:

The law of passing off can be summarised in one short general proposition, no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the Plaintiff in such an action has to prove in order to succeed. These are three in number. First, he must establish a *goodwill* or *reputation attached to the goods or services which he supplies* in the mind of the purchasing public *by association with the identifying “get-up”* (whether it consists

simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the Plaintiff's goods or services. Second, he must demonstrate a *misrepresentation* by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the Plaintiff... Third, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer *damage* by reason of the erroneous believe engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the Plaintiff. [Emphasis added.]

[28] In my view the Plaintiff endeavoured over a long period of time to establish a particular "get-up" by which the Coffee News could be readily identified, and by so doing did establish a good will or reputation in the product. This is shown by the number of awards and other accolades received by the Coffee News over the preceding years. It is clear that the Defendants, by their actions, did misrepresent the Flying Cow as either the successor to or sister publication of the Coffee News and did thereby deceive members of the public. Such misrepresentation did actually or potentially cause damage to the Plaintiff.

[29] In the case of *Dino's Place Ltd v. Corfu Restaurant Limited*, 36 C.P.R. (3d) 146 the court found that the tort of passing off was made out on circumstances which, in my view, are less apparent than the instant case. The court said, at paragraph 17:

The combination of the same telephone number, the description of the new restaurant as “Geordino’s” and the offensive advertising is sufficient to make out the tort of **passing-off** and necessitate the injunctive relief claimed. Geordino and Mr. and Mrs. Ghinis misrepresented to prospective customers a continuing connection with the Plaintiff which, foreseeably, would tend to cause injury to the business of the Plaintiff. There will be an injunction requiring Geordino, its servants and agents to change the telephone number of its restaurant immediately (unless that has already been done). Geordino will also cease advertising in any way that it is formerly “Dino’s” and will not use or refer to the name “Dino’s” in any future advertising.

[30] Dealing specifically with the matter of copyright The British Columbia Court of Appeal in *British Columbia Jockey Club v. Standen (Winbar Publications)* [1983] B.C.J. No. 1769, Vancouver Registry No. C823501 upheld the trial judges’ application of the following passage from **Laddie, Prescott and Vitoria**, *The Modern Law of Copyright* (London: Butterworths, 1980):

2.65 A compilation is a work consisting of a collection of materials, and its merit normally resides in the painstaking labour which has been expended in assembling the facts (as in the case of a directory); or in the skill, judgment and knowledge involved in selecting those things which are to be included (as in the case of an anthology); or both. Consequently the copyright in such a work may be infringed by appropriating and undue amount of the material, although the language employed be different or the order of the material be altered. Were the law otherwise copyrights in compilations would be of little or no value. The point is succinctly stated in two dicta which has frequently been approve: “No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information”; and “The true principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour which the Plaintiff has been at for the purpose of producing his work; that is, in fact, merely to take away the result of another man’s labour or, in other words, his property”.

[31] In the present case it is clear that the defendants availed themselves “of the previous labours of another for the purpose of conveying to the public the same information” and by so doing did “take away the result of another man’s labour”. The defendant’s, in producing and distributing the Flying Cow in the form which they did, infringed the copyright of the Plaintiff.

Disposition

[32] Accordingly, an order will issue granting the relief sought by the Plaintiff as set out in paragraph 22(1) in the Statement of Claim - as follows:

22. The Plaintiff repeats the foregoing and claims against the Defendants jointly and severally:

(I) injunctive relief restraining the defendants from further publishing the Flying cow in present or similar form, restraining the defendants from further infringing on the copyright of the Plaintiff and from further passing off, restraining the defendant from further interfering with the contracts and business of the Plaintiff, restraining the Defendants from making further use of any confidential material gained from the Plaintiff, restraining the Defendants from further seeking to restrict the places where the Plaintiff’s material, namely the Coffee News can be displayed or distributed, restraining the Defendants from seeking to enforce such

restrictive agreements with third parties, and an order for delivery up or forfeiture of all material gained from the Plaintiff and all offending or infringing material;

[33] This is not to suggest that the Flying Cow is now legally defunct. It merely means that the paper cannot continue publication in a form that contravenes this restraining order. The defendants may change the size, format, the font style, the paper colour and grade in order to formulate a paper which is sufficiently different from the Coffee News so that the public will be aware that the two are separate and distinct publications. This case is not about stifling competition, but rather, about halting unfair and illegal competition and imposing certain ethical standards on the defendants' business practices.

Damages

[34] General Damages - Ms. Daum said that the Plaintiff could not collect franchise fees of about \$117,000. This amount appears to be based on an estimate of the fees lost by the Plaintiff as a result of various defaults by the defendants and the losses attributed to the "flipping" of the franchises from Coffee News to Flying Cow. Additionally, the Plaintiff paid debts of \$12,000 as a direct result of advertising fees which were wrongfully appropriated and applied to Flying Cow

publications in the Antigonish area. As a result of a direct intervention by Ross Parks into the Fredericton area the Plaintiff claims losses of about \$10,000.

[35] Ms. Daum said that she spent about 2000 hours of her time in protecting the Plaintiff's interests which were being threatened by the unlawful actions of the defendants. There is nothing in evidence to suggest a dollar amount which this cost the Plaintiff directly.

[36] In the result, I award general damages to the Plaintiff in the sum of \$139,000.00.

[37] Punitive Damages -The conduct of the several defendants in this matter was of such a cavalier and egregious nature as to demand consideration of some sort of retribution or penalty. The recent Supreme Court of Canada case *Whiten v. Pilot Insurance Co.* 2002 SCC 18, [2002] I.L.R. 1-404, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257 provides a useful analysis and eloquent commentary on the law respecting punitive damages. At paragraph 68 the court states:

....there is a substantial consensus that coincides with Lord Pratt C.J.'s view in 1763 that the general objectives of punitive damages are punishment (in the sense

of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. Put it in *Hill, supra*, at para. 196, they are “the means by which the jury or judge expresses its outrage at the egregious conduct”).

[38] The present case seems particularly appropriate for consideration of the award of punitive damages. The court in *Whiten* proceeds, at paragraph 113, to analyse some of the factors which may be considered in determining the level of blameworthiness;

1. *Whether the conduct was planned and deliberate*
2. *The intent and motive of the defendant*
3. *Whether the defendant persisted in the outrageous conduct over a lengthy period of time*
4. *Whether the defendant concealed or attempted to cover up its misconduct*
5. *The defendants awareness that what he or she was doing was wrong*
6. *Whether the defendant profited from its misconduct.*

[39] The defendants conduct in the present case was clearly planned and deliberate; their intent and motive was to deprive the Plaintiff of its business opportunity in the franchise areas; the evidence suggests that the Defendants are

persisting in their outrageous conduct; the Defendants certainly concealed or attempted to cover up their misconduct; only the wilfully blind could be unaware that such conduct was wrong; and finally, one can only conclude, since the Flying cow is still being circulated in the franchise areas, that the Defendants profited from their misconduct. Therefore, a clear case has been made out for the award of punitive damages.

[40] The conduct of the Defendants in this case was highly reprehensible. As stated at paragraph 112 of *Whiten* “The more reprehensible the conduct, the higher the *rational* limits to the potential award”. Bearing all of this in mind I fix punitive damages of \$100,000.00

[41] Pre-judgment interest is set at 2 ½% per annum on the total damage award and costs are awarded on a party and party basis at \$10,000.00.

Judgment accordingly,

Richard, J.

