IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Binder v. Royal Bank of Canada, 2003 NSSC 174

Date: 20030818
Docket: S.H. 119788
Registry: Halifax

Between:

Fabian Lowell Binder

Plaintiff

v.

Royal Bank of Canada and Bank of Montreal

Defendants

v.

H. Reuben Cohen

Third Party

Judge: The Honourable Justice Gerald R.P. Moir

Heard: 16 April and 4 June 2003

Counsel: Richard Bureau and David Walker QC for the Plaintiff

Mr. William L. Ryan QC and Colin Piercey for the Defendant, Royal Bank of Canada

Douglas Tupper QC and Michelle Higgins for the Defendant, Bank of Montreal

S. Bruce Outhouse QC for the Third Party

Moir, J.:

[1] *Introduction* This action was started in 1995. Mr. Binder sued the Royal Bank of Canada and the Bank of Montreal for his own alleged losses arising from the endorsement in 1972 of cheques payable to a New Brunswick company in which Mr. Binder owned half the stock. The banks almost immediately applied under *Rule* 25.01(1) for a determination of whether the action was barred by the *Limitation of Actions Act* and they also applied under *Rule* 14.25(1) for an order striking the statement of claim. This Court determined that the action was statute-barred but the Court of Appeal set aside that decision on the grounds that the application was not supported by an agreed statement of facts and the determination required findings of fact "in particular regarding the timing of the discoverability of the material facts by the appellant": *Binder* v. *Royal Bank of Canada*, [1996] N.S.J. 126 (CA) para. 10. Since then our *Civil Procedure Rules* have been amended so that defendants can apply for summary judgment against the claims of plaintiffs. So, the banks have revived the subject of their 1995 motion under *Rule 25.01*, but under the rubric of summary judgment rather than pre-trial determination. Also, the banks have revived their applications under *Rule 14.25* since they were never adjudicated upon by this Court or the Court of Appeal in 1995 and 1996. The subjects have also been expanded. In addition to the Nova Scotia limitations legislation, the Bank of Montreal pleaded provisions of the federal *Bank Act* that may bar proceedings against banks after a period of years. Also, the banks want to amend their pleadings to include a defence under the New Brunswick *Limitation of Actions Act* on the ground that New Brunswick's is the governing law. For reasons to be stated, I will grant leave. Consequently, I will assess the claim and the limitations defences and apply the principles for striking a statement of claim or granting summary judgment to that assessment. The defendants request that I order a separate trial on the limitations issues if the statement of claim stands and summary judgment is not granted. However, I am finding for the defendants on the main issues.

[2] *Rules 28.04 (Striking Pleadings) and 13.01 (Summary Judgment)* The banks bring their motions under both of these rules. So much has been said by this Court and the Court of Appeal about these rules that one might state the settled principles and move quickly to the task of applying them. Yet this case wants more elaboration of the principles. That is for two reasons. Firstly, since the banks seek to apply both rules based upon the same materials, it is helpful to be clear from the beginning about the differences and, particularly, the differences between

the kind of information that may be considered. More than helpful, delineation is necessary where, on an application under a related rule, it has already been found that determination of issues between the parties required findings of fact regarding the discoverability issue. Secondly, Rule 13.01 was recently amended to allow defendants to apply for summary judgment and there are questions about the extent to which the established approach to summary judgment applies where the result would be dismissal of a claim.

[3] The established approach when summary judgment could only be granted against defendants set a high threshold but it also put some burden upon the defendant. The plaintiff was required to clearly prove its claim, usually by affidavit with right of cross-examination. If the claim was established in this way the defendant had to establish a point reasonably to be argued in defence. This approach followed Justice Cooper's review of English and Canadian authorities in *Carl B. Potter Ltd. v. Antil Canada Ltd. and others* (1976), 15 N.S.R. (2d) 408 (SC,AD) and has been articulated and applied in numerous reported decisions since then. It is not possible to exactly mirror this approach in the new circumstance of an application for summary judgment against the plaintiff.

[4] Civil procedure rules of many Canadian Courts allow defendants to apply for summary judgment dismissing claims. These include the Federal Court of Canada (*Federal Court Rules, 1998*, SOR/98-106, rule 213), the Alberta Queen's Bench (*Alberta Rules of Court*, AR 390/68, rule 159), the Manitoba Queen's Bench (*Queen's Bench Rules*, M.Reg. 553/88, rule 20.01), the New Brunswick Queen's Bench (*Rules of Court*, rule 22.01) and the Superior Court of Justice in Ontario [*Rules of Civil Procedure* (Ontario), rule 20.01]. In each instance, these rules describe a standard. In the Federal Court, Alberta, Manitoba and Ontario, the court must be satisfied that there is "no genuine issue for trial" [216(1), 159(3), 20.03(1), 20.01(1)respectively]. In New Brunswick, the standard is expressed as "no defence or merit to a claim" [22.04(1)].

[5] The Supreme Court of Canada commented on the approach for summary judgment against a plaintiff in a case under the Manitoba rule and in a case under the Ontario rule. The case arising from Manitoba determined, for Canada, the question of corporate auditors' liability to shareholders. The defendants successfully applied for summary judgment. Writing for the Court, Justice LaForest described the approach followed by the Manitoba Queen's Bench and the Court of Appeal:

> ... the defendant bears the initial burden of proving that the case is one where the question whether there exists a genuine issue for trial can properly be raised, the plaintiff bears the subsequent burden of establishing that his claim has a real chance of success. [*Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, para. 5, see also para. 9]

(a) This was based upon the formulation in *Fidkalo v. Levin* (1992), 76 Man. R. (2d) 267 (CA) and, at para. 15 of *Hercules*, the Supreme Court of Canada agreed with that formulation. Thus, the plaintiffs "bore the burden of establishing that their claim had 'a real chance of success'": *Hercules*, para. 15. This came up again in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423. The main issue there was whether an insurer could rely on a limitation period under a fidelity bond if the insurer had wrongly rescinded the bond. The insurer-defendant obtained summary judgment at motions court but the Ontario Court of Appeal took an opposite view on the substantive issue. Also, Carthy, J.A. held "the question of when the loss was discovered within the meaning of the bond should be left for determination at trial" (SCC at para. 26). The Supreme Court restored the summary judgment. Writing jointly for the Court, Iacobucci and Bastarache, J.J. stated at para. 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 ... [citations omitted]. 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).

Their review of the motion judge's reasoning at para. 28 to 34 demonstrates that there is room for drawing inferences from undisputed facts on summary judgment motions. The Court concluded at para. 35:

> The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding. The motions judge found that the undisputed facts met the definition of discovery of loss under the Bond and that a reasonable

> person would have assumed that they were sufficient to establish that a loss of the type covered by the Bond had been or would be incurred.
>
> (a) Consequently, the motions judge made no error in granting summary judgment (para. 26).

[6] For many years our rules provided for summary judgment "on the ground that the defendant has no defence to a claim". This provision was carried into *Rule* 13.01 of our "new" rules of 1972. It copied the English rule and the language can be traced back to the nineteenth century in both our rules and the English rules. Clearly, the approach to summary judgment I described earlier was not developed upon the wording of the rule. There is nothing in the text suggesting that the plaintiff must clearly prove its claim or that, in that event, the defendant bears an onus to demonstrate, by evidence, an arguable point in defence. Rather, the approach was developed by the courts in response to the nature of the application allowed by the rules.

[7] Now any party may apply for summary judgment. And, the express standard picks up something of the approach adopted by the courts under the old rule. Now, the application is made on the ground that "there is no arguable issue to be tried with respect to the claim": 13.01(a) or "there is no arguable issue to be tried with respect to the defence": 13.01(b). In my opinion, no substantive distinction can be made between "no genuine issue for trial" and "no arguable issue to be tried". Thus, the approach adopted by the Supreme Court of Canada in *Hercules* and in *Guarantee Company of North America* applies to summary judgment applications before this Court. The applicant must meet a threshold. Generally, that threshold is met when the case is such that the Court should properly inquire into the presence or absence of a genuine issue (*Hercules*, para. 5 and 15), which I would equate with a reasonably arguable issue. Specifically, the threshold is met in cases where "there is no genuine issue of material fact requiring trial" (*Guarantee Company of North America*, para. 27, emphasis added). Once the threshold is met, the respondent is required to show a real chance of success in its claim or defence. This is not much different from the approach we are used to and, like it, this approach places incentive on both parties to produce evidence justifying their positions.

[8] Rule 14.25(1) codifies aspects of the Court's inherent jurisdiction to control abuses of its own processes. It provides:

> The court may at any stage of a proceeding order any pleading, affidavit, or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
>
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

(a) Under 14.25(2), unless the court permits, no evidence is admissible where the application is brought on the ground of 14.25(1)(a), "it discloses no reasonable cause of action or defence", which is the only applicable ground on the banks' applications under this rule.

[9] On a motion to strike a statement of claim, the Court will read the pleading generously, in a light most favourable to the plaintiff and it will assume that the averments, so read, are true. The Court will only strike the statement of claim if the outcome of the case is plain and obvious, even beyond reasonable doubt: *Hunt v. Carey Canada Inc.*, [1990] S.C.J. No. 93, para. 32. It was put this way at para. 10 of *Seacoast Towers Services Ltd. v. MacLean*, [1986] N.S.J. No. 312 (SC, AD):

> A statement of claim may be struck out under rule 14.25(1)(a) where it is clear on the face of the pleadings that no reasonable cause of action is disclosed or, to put it another way, that, on the face of the pleadings, the action is obviously unsustainable.

Matthews, J.A. continued by commenting pointedly "the purpose of an application under that rule is not to try issues, but determine if there are issues to be tried". Thus, novelty is no reason to strike a pleading: *Hunt*, para. 34; *TG Industries Ltd. v. Williams*, [2001] N.J.T. 241 (CA), para. 8. On the other hand, some questions of law are appropriately answered under rule 14.25(1)(a) in determining whether a claim or defence is obviously unsustainable: *Future Inns Canada Inc. v. Nova Scotia Labour Relations Board*, [1999] N.S.J. 258 (CA), para. 112.

[10] A most helpful discussion of the relationship between the jurisdiction to strike a pleading and the jurisdiction to grant summary judgment is provided by Borins, J.A. in *Dawson and others v. Rexcraft Storage and Warehouse Inc.*, [1998] O.J. 3240 (CA) at para. 6 to 16. He began by noting the "paramountcy of the due process requirements which apply to the resolution of disputes", namely "pre-trial discovery and a plenary trial on the merits" (para. 6). Striking pleadings and granting summary judgment are powers confined by the paramountcy of due process through trial. As regards the motion to strike (a statement of claim), Justice Borins writes at para. 8:

> The essence of the defendant's motion is that the "wrong" described in the statement of claim, is not recognized as a violation of the plaintiff's legal rights, with the result that the court would be unable to grant a remedy even if the plaintiff proved all the facts alleged. Thus, to permit the plaintiff to litigate the claim through discovery and trial would be a waste of both the parties' and the court's time.

(a) Consequently, "the only question posed by the motion is whether the statement of claim states a legally sufficient claim, i.e., whether it is substantively adequate." (para. 9). Noting that on a motion for summary judgment the motions judge must "consult not only the pleadings, but affidavits, cross-examination of the deponents, examinations for discovery, admissions and other evidence" (para. 13), Justice Borins said "The essential purpose of summary judgment is to isolate, and then terminate, claims and defences that are factually unsupported." (para. 13). This makes the primary distinction between striking a pleading and summary judgment. At para. 14 Justice Borins said:

> Thus, while a rule 21.01(1)(b) motion focuses on the substantive adequacy of a claim, or a defence, it offers no assistance in weeding out cases where a substantively adequate claim, or defence, has been pleaded but cannot be proved. [para. 14]

(a) He contrasted summary judgment in these terms:

> At the summary judgment stage the court wants to see what evidence the parties have to put before the trial judge, or jury, if a trial is held. Although the onus is on the moving party to establish the absence of a genuine issue for trial ... there is an evidentiary burden on the responding party who may not rest on the allegations

> or denials in the party's pleadings, but must present by way of affidavit, or other evidence, specific facts showing that there is a genuine issue for trial. [para. 17]
>
> (a) I find this explanation of the difference between a motion to strike pleadings and a motion for summary judgment helpful in analysing the arguments made in this case. I see the argument based upon *Foss* v. *Harbottle* as going to a motion to strike and I see the arguments based upon statutory limitations as going to summary judgment. The former calls into question the substantive adequacy of Mr. Binder's claims against the banks and the later asserts that there is no factual basis upon which to counter the limitation defences.

[11] This helps clarify the appropriate stance now to be taken in light of the Court of Appeal's finding in 1996 that determination of the issue of prescription under the Nova Scotia *Limitation of Actions Act* required findings of fact, particularly as regards "the timing of the discoverability of the material facts by the appellant [Mr. Binder]", para. 10. Just as the 1995 application under *Rule 25.01(1)* needed to be supported by an agreed statement of facts or something equivalent to that, the room for evidence on an application under 14.25(1)(a) is very limited. Leave must be granted under 14.25(2) and, at that, affidavit evidence may not contradict the pleading under attack although it may provide "the details or particulars of the transactions that are relevant to the action": *Silver* v. *Co-operators General Insurance Co.*, [2002] N.S.J. 309 (CA) at para. 5. No answer is pleaded in Nova Scotia but the discoverability issue was contested on the applications in 1995 just as it is now. In view of the 1996 finding of the Court of Appeal, it may be inappropriate to revisit the limitations defences under a rule so similarly restricted as 25.01(1) is in reference to presentation of evidence. However, the discussion in *Dawson* shows that summary judgment is the more appropriate process and it lends itself to an examination of the evidence that would be produced at trial.

[12] I will now state the results of my review of the pleadings, the material upon which to determine whether the claims pleaded are obviously precluded by the rule in *Foss* v. *Harbottle.* Then I will discuss the affidavit evidence, which, in conjunction with the pleadings, provides the material from which to determine whether the defendants are entitled to summary judgment. Finally, I shall determine the issues.

[13] *Pleadings* According to the statement of claim, Gorbin Enterprises Ltd. was incorporated in 1968 under the laws of New Brunswick and the shares were issued

equally to Mr. Max Gordon (hense "Gor-") and the plaintiff, Mr. Fabian Binder (hense, "-bin"). The statement of claim tells further that Gorbin was incorporated to construct a nineteen unit apartment building in Moncton and to act as landlord supplying apartments to tenants after construction. The statement of claim says that the construction was completed over five months, with Mr. Binder devoting much of his time to the project. Banking services and working capital were provided by a branch of the Bank of Nova Scotia in Moncton and the capital financing came from the Central Trust Company of Canada, which was secured by a mortgage against the apartment building for $142,000.

[14] The statement of claim alleges that four years later, in 1972, another mortgage was recorded. It was signed by Mr. Gordon on behalf of Gorbin to secure a loan granted by Standard Investments Limited in the face amount of $75,000. This mortgage was executed and delivered "without the knowledge or approval of Mr. Binder and contrary to the Shareholders Agreement, Shareholders Resolutions and Banking Resolutions of Gorbin".

[15] The claim against the Bank of Montreal focuses upon a cheque drawn by Standard Investments to advance the second mortgage loan. Standard Investments drew a cheque for $54,837.81 payable to Gorbin Enterprises, Mrs. Gordon, Mr. Gordon and solicitor Reuben Cohen. According to the statement of claim it was never endorsed by Gorbin Enterprises although a Moncton branch of the Bank of Montreal accepted the cheque and deposited it to the account of solicitor Cohen at that branch. To do so without ascertaining the existence of an endorsement on behalf of Gorbin is said to be "[c]ontrary to standard banking practices, procedures and regulations and its own internal policies". This is alleged to have been a breach of fiduciary duty owed by the Bank of Montreal to Mr. Binder.

[16] The claim against the Royal Bank focuses upon three cheques by which most of the Standard Investments loan was advanced from Mr. Cohen's account. These cheques were dated in September 1972 and were for $15,000 then $5,000 then $49,837.81. The first two were made payable to Mr. and Mrs. Gordon, not the purported mortgagor, Gorbin Enterprises. The third was made payable to all three. The first two cheques were endorsed by Mr. and Mrs. Gordon and were deposited to the account of one of Mr. Gordon's companies at a Royal Bank of Canada branch in Moncton. Mr. Gordon purported to endorse the third cheque on behalf of Gorbin Enterprises and it too was deposited to the account of Mr. Gorbin's company at the Royal Bank. According to paragraph 15 of the statement of claim, for the Royal to

have accepted the third cheque for deposit to the account of a third party corporation without ascertaining the validity of the Gorbin Enterprises endorsement is "[c]ontrary to standard banking practices, procedures and regulations and its [the Royal's] own internal policies". This is alleged to have been a breach of fiduciary duty owed by the Royal Bank to Mr. Binder.

[17] According to the statement of claim, the second mortgage was eventually assigned to the first mortgagee, Central Trust. In 1981 Central took foreclosure proceedings against the Gorbin property. The statement of claim denies that Mr. Gorbin had any notice of the foreclosure. On the contrary, it alleges that Mr. Binder only learned of the 1972 second mortgage in 1982 when he found out that the property had been foreclosed. The statement of claim also pleads that Mr. Binder first learned of the cheques in May 1988 and it says in paragraph 22(b):

> ...all material facts to base this action were not discovered by the Plaintiff until early 1990, including, but not limited to, the discovery, in 1989 of the existence of a Bank of Montreal directive to employees requiring that cheques payable to corporations must be deposited to that corporate payee's credit...

(a) Clearly, these pleadings anticipate limitation of actions defences.

[18] In addition to breach of fiduciary duty, the statement of claim alleges that the "shortcuts" taken by the Banks were "negligent, illegal, contrary to standard banking practices, contrary to bank and banking regulations, contrary to established internal policies". Paragraphs 23(b), (c) and (d) allege that the banks' actions or neglect accommodated a fraud and that such gives rise to liability on "the basis of *res ipsa locutor* or equivalent principles". Paragraphs 24 and 26 refer to damages for conversion and paragraph 25 makes reference to "the conversion of funds of Gorbin Enterprises Ltd. by the Royal Bank of Canada".

[19] The Bank of Montreal defended on the basis "that none of the cheques referred to in the statement of claim was made payable or issued to the Plaintiff", thus raising the rule in *Foss* v. *Harbottle.* It also denied breach of fiduciary duty, negligence and conversion. And, it set up defences based upon the *Limitation of Actions Act,* RSNS 1989, c. 258, s. 2 and the *Bank Act*, SC 1991, c. 46, s.159. The Bank of Montreal now applies for leave to amend the defence by including the *Limitation of Actions Act*, SNB c. L-8, ss. 6, 7 8 and 9 as primary and the Nova Scotia limit as alternative. The Royal Bank defended on the basis that "the allegations set forth in the statement of claim disclose no cause of action against the Royal Bank", and on a denial that the

bank owed any fiduciary duty to the plaintiff and by setting up the Nova Scotia *Limitation of Actions Act.* It has presented a draft statement of claim including amendments to plead s. 9 of the New Brunswick *Limitations of Actions Act* in the alternative and to please provisions of the *Bank Act.*

[20] *Affidavit Evidence* For the Bank of Montreal, affidavits were provided by a retired Senior Account Manager, Mr. William Crawford, and by counsel, Ms. Higgins. The affidavits of counsel proved excerpts from the transcript of Mr. Binder's discovery and other uncontroverted documents. For the Royal Bank of Canada, affidavits were by an in-house Paralegal, Ms. Melda Langille, and by counsel, Mr. Piercey. The affidavit of counsel proved excerpts from Mr. Binder's discovery. For the plaintiff, I was supplied with three affidavits, all of Mr. Binder himself. There was no cross-examination on any affidavit.

[21] *1968-1972: Incorporation to Second Mortgage Advances* Mr. Crawford's affidavit attaches a copy of the Letters Patent incorporating Gorbin Enterprises. The Letters Patent were issued by the Provincial Secretary of New Brunswick on 10 October 1968 under the Companies Act RSNB 1952, c. 33. The company received powers to "carry on business as contractors, builders, roofers ..." as well as to deal in real estate including leasing. The provisional directors were George Thomas Mitton, George Irving Mitton and Hilda Burnette Mitton. An annual return filed with the Provincial Secretary in 1970 shows the directors to be Max S. Gordon, G. I. Mitton and F. L. Binder. Mr. Gordon was the president and Mr. Mitton was secretary and treasurer. George I. Mitton was a well known member of the New Brunswick bar who practiced many years at Moncton. Mr. Binder regarded Mr. Mitton as "our company lawyer".

[22] Mr. Binder says that Gorbin Enterprises provided a banking resolution to the Bank of Nova Scotia when Gorbin was incorporated. He recalls that the resolution provided all cheques had to be signed by both him and Mr. Gordon. It appears from Mr. Binder's responses on discovery that he had no reason to believe that such a resolution was being acted upon by the Bank of Nova Scotia as of January 1971.

[23] Mr. Binder's affidavits show that Gorbin Enterprises acquired land at 34 Clearview Drive, Moncton, New Brunswick and, in 1969, finished constructing an apartment building there, which was named "Tammy Manor" after Mr. Binder's daughter. He was living temporarily in New Brunswick at the time and he returned

to Halifax in the summer of 1969 after the apartment building was complete. He adopted the role of passive investor, leaving operations entirely to Mr. Gordon.

[24] The 1971 and 1972 annual returns for Gorbin Enterprises show the same directors as in 1970, Mr. Gordon, Mr. Binder and Mr. Mitton, but they show Mr. Binder rather than Mr. Mitton as secretary and treasurer. This is somewhat at odds with Mr. Binder's averments to the effect that he ceased to be active in the operations of Gorbin Enterprises after the summer of 1969. The returns are also at odds with a document certified by Mr. Mitton in 1972. One of Ms. Higgins' affidavits attaches By-Law No. 4 of Gorbin Enterprises Ltd., which Mr. Mitton certified as the secretary. His certificate states that the by-law was passed by the directors and sanctioned by the shareholders on 29 September 1972. The by-law authorizes the directors to borrow $70,000 from Standard Investments and to mortgage the company's property on Clearview Street.

[25] Mr. Crawford's affidavit exhibits the second mortgage. The execution bears Mr. Gordon's signature and the company seal. It purports to mortgage three contiguous lots of land on Clearview Street, Lewisville, New Brunswick for $75,000 subject to a first mortgage to the Central Trust Company of Canada. The second mortgage was repayable on terms with 16% interest, which, in 1972, suggests higher risk. The affidavit also exhibits a Standard Investments Limited cheque drawn on the CIBC for $54,837.81 payable to Gorbin Enterprises Ltd., Yolande Gordon, Max Gordon and H. Reuben Cohen. The cheque was endorsed by Mr. And Mrs. Gordon and Mr. Gordon alone signed after "Gorbin Enterprises Ltd. Per:". The back of the cheque is also stamped "FOR DEPOSIT ONLY TO THE CREDIT OF H. R. COHEN 'CURRENT ACCOUNT'". It was deposited to the credit of Mr. Cohen's account at the Highfield and Main Branch of the Bank of Montreal in Moncton. Mr. Cohen is also a well known New Brunswick lawyer.

[26] Mr. Crawford's affidavit exhibits the $49,837.81 cheque drawn on Mr. Cohen's account at the Bank of Montreal, to the credit of which the Standard Investments Limited cheque had been deposited on 21 September 1972. On that same day, Mr. Cohen drew the $49,837.81 cheque in favour of Gorbin Enterprises, Ms. Gordon and Mrs. Gordon. The Cohen cheque was endorsed in the same way as the Standard Investments cheque and it was stamped "FOR DEPOSIT ONLY TO THE CREDIT OF GORDON'S CONCRETE PRODUCTS LTD". It was deposited to the credit Gordon's Concrete at the Mountain Road branch of the Royal Bank of Canada in Moncton, New Brunswick.

[27] As will be seen, it did not, for many years, come to the attention of the Bank of Montreal or the Royal Bank that anyone alleged that there was anything wrong with the banks having accepted the cheques for deposit to the credit of their customers, respectively Mr. Cohen and Gordon Concrete. According to Mr. Crawford's affidavit it is now impossible to identify which Bank of Montreal employees were involved in the presentation of the Standard Investments cheque and all bank records relating to the matter have been destroyed including all records relating to the 1972 account of H. Reuben Cohen. For the Royal Bank, Ms. Langille swore that it is also impossible to identify the appropriate employees of that bank and that the Royal Bank also destroyed records related to these transactions. Further, both Max Gordon and George I. Mitton died early this year. They had been living in Moncton, New Brunswick.

[28] *1981: Foreclosure* Not much is known to me about the operation of Gorbin Enterprises for the nine years after the second mortgage. In one of his affidavits Mr. Binder describes his passive role after the summer of 1989 this way:

> That at the time I left Moncton Mr. Gordon and I entered into a verbal agreement under which he was to operate the apartment building for the next 12 or 13 years, make regular mortgage payments and extra mortgage payments when possible, pay all the operating expenses and take a management fee for himself. The funds to make these payments would come from the rents. After that period of time had gone by, I was to take over the operation;
>
> (a) And further, "I had little contact with Mr. Gordon after that although I periodically visited the apartment building to see if it was being well maintained and was well tenanted".

[29] The Central Trust Company of Canada, which held the first mortgage, formed part of Central and Nova Scotia Trust, then Central and Eastern, then Central Trust Company (later Central Guarantee, etc.). In 1974 Standard Investments assigned the second Gorbin Enterprises mortgage to Central and Eastern. Gorbin defaulted and late in 1981 Central Trust exercised power of sale rights under the second mortgage, foreclosing the rest of the equity. In New Brunswick, power of sale proceedings lead to a public auction at which it is permissible for the mortgagee to bid. The mortgagee issues a deed to itself if it is the highest bidder. This particular foreclosure remedy is based on common law but is also backed by legislation. In this instance, Central was the highest bidder at $78,000 and it issued a deed to itself. Central sold the property in September 1982 to Emmerson and Audrey Binder, the plaintiff's brother and sister-

in-law. Central Trust financed the purchase, taking back a mortgage for $154,015. All of this is documented in the affidavit of Mr. Crawford.

[30] *Mr. Binder's Knowledge* Mr. Binder maintains that he was unaware of the 1972 mortgage and advances until 1982, after the foreclosure. Most of the corporate records are gone. Bank records are gone. For present purposes, we must assume wrong the certificate of Mr. Mitton by which he certified that the directors of Gorbin Enterprises passed and the shareholders confirmed By-Law 4 authorizing the 1972 mortgage. Mr. Binder says in his affidavits that in 1972 he was making arrangements to return to Moncton to implement his long term plan of taking over the operation of the apartment building from Mr. Gordon. Then Mr. Binder learned about the foreclosure from a friend. So, Mr. Binder went to Moncton to see Mr. Cohen in his capacity as "a senior officer at Standard Investments". Mr. Binder says Mr. Cohen told him that cancelled cheques for the mortgage advances had been destroyed. Mr. Binder also discovered that Mr. Gordon had left Moncton. He made efforts to find him but these failed. So, in 1982 Mr. Binder knew that ten years previous Gorbin Enterprises had granted what Binder considered to be an unauthorized mortgage and that advances had been made by way of cheques.

[31] Nothing much happened for six years. In March 1988, Mr. Binder wrote to Standard Investments in Moncton to the attention of "The Accountant". He stated particulars of the 1972 transaction and requested a copy of the mortgage and a copy of the cheque. He explained he was a one-half owner of Gorbin Enterprises and needed the documents for tax purposes. Less than two weeks later Standard Investments provided the required documents. Mr. Binder requested more information. It was provided swiftly. As of April 1988, Mr. Binder knew that Gorbin had granted what he considered to be an unauthorized mortgage. He knew the mortgage loan had been advanced by two cheques to the Gordons and one cheque for $54,837.81 to Gorbin Enterprises, the Gordons and Mr. Cohen. He knew that Gorbin Enterprises had endorsed by Max Gordon only, the very crux of his claim against the Bank of Montreal. And, he knew that the cheque had been deposited at the Highfield and Main branch of the Bank of Montreal in Moncton for the credit of Mr. Cohen. According to Mr. Binder's affidavits, he also secured in 1988 a copy of the $49,837.81 cheque drawn by Mr. Cohen. Thus, he was also aware that the cheque payable to Gorbin Enterprises had been endorsed for it by Max Gordon only and had been deposited to the account of Gordon Concrete Products Ltd., the very crux of Mr. Binder's claim against the Royal Bank.

[32] Mr. Binder took his complaint to the Bank of Montreal. On 7 June 1988, less than three months after Mr. Binder requested a copy of the 1972 cheque, the bank responded to the case put by Mr. Binder saying, "the period of prescription for such claims is 6 years". There have been many communications between Mr. Binder and various officials of the Bank of Montreal since that time. I have read them but nothing seems remarkable except Mr. Binder's discovery in 1989 of a bank policy concerning deposit of cheques endorsed by corporations. I am also cognizant of communications with the Royal Bank. As with the Bank of Montreal, this shows Mr. Binder's pursuit of his case but nothing said resolves the issues for me. If anything, the dealings show a consistency on Mr. Binder's part and that of the banks, a consistency which tends to indicate that Mr. Binder was as informed on the basics of his claims in the end as he was in 1988. The policy of the Bank of Montreal to which I have been referred is dated 23 October 1972, a month after the cheques. It superseded a policy dated 1 December 1969. At that, the part to which I am referred is dated 4 September 1979. The policy provides that cheques payable to corporations "must be deposited to the payee's credit". They should not be cashed or endorsed over to another's account. The policy refers to concerns about fraud and tax evasion.

[33] *Striking the Statement of Claim on the Basis of* Foss *v.* Harbottle *Hercules Managements*, which I have cited for principles applicable on summary judgment, decided that corporate auditors do not owe a duty of care to the shareholders. In upholding the trial and appellate decisions for summary judgment against the plaintiff shareholders, the Court also held that the claim "ought to have been brought as a derivative action" (para. 64). The Court applied *Foss* v. *Harbottle*, "shareholders have no cause of action in law for wrongs done to the corporation" (para. 59). For the Court, Justice LaForest adopted (also at para. 59) the rationale stated by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)*, [1982] 1 All E.R. 354 at p. 367:

> The rule [in *Foss* v. *Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders

> observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.
>
> (a) Justice LaForest added "... the rule is also sound from a policy perspective, in as much as it avoids the procedural hassle of a multiplicity of actions." (para. 59)

[34] As referred to at para. 62 in *Hercules*, case law has recognized that some claims may be personal to a shareholder even though the same set of facts gave rise to a distinct cause of action for the company. The issue is whether the claim advanced by the shareholder is personal or derivative. As in *Hercules*, the claim here is undoubtably derivative. The essence of the pleaded claims is the banks' acceptance for deposit to third party accounts of faultily endorsed cheques payable to Gorbin Enterprises. Assuming everything stated as fact in the statement of claim to be true, the cause would be Gorbin Enterprises' if there is one. I cannot see how a shareholder can have an complaint about the absence of a signing officer's signature on an endorsement, aside from the injury to the company and the consequential injury to share value.

[35] On behalf of the plaintiff, it is submitted that Gorbin Enterprises is long since becoming insolvent and has "ceased to exist". In my opinion, the rule in *Foss* v. *Harbottle* knows no exception of that kind. Further, there was no suggestion of the corporation having been irredeemably struck and New Brunswick followed the Dickerson model for its *Business Corporations Act*, SNB c. C-13 including the provisions for derivative actions, s. 164. Charter corporations were continued under the new statute by s. 192. It is also argued that Rule 5.05 assists the plaintiff. That rule allows that causes of action survive certain events. It does not provide for the transfer of a corporate cause to a shareholder. These kinds of arguments run counter to the rationale for *Foss* v. *Harbottle*. Mr. Binder is not responsible for any liabilities of Gorbin Enterprises and he does not acquire its causes of action by virtue simply of being a limited liability shareholder.

[36] No amendment has been requested and none comes to mind as could improve the plaintiff's position. Assuming it to be true that the banks accepted cheques payable to Gorbin Enterprises but improperly endorsed, it does not follow that the banks are liable to shareholders of the injured company. That is the premise of the statement of claim. Thus, the outcome of this action is plain and obvious. The claim

is obviously unsustainable because it undoubtably runs afoul of the principle in *Foss* v. *Harbottle*.

[37] In case I am wrong in that assessment, I shall provide my alternate assessments of the limitation issues.

[38] *Nova Scotia Statutory Limitation* To recapitulate the rationale for revisiting this subject. The remarks at para. 10 of *Binder v. Royal Bank of Canada,* [1996] N.S.J. 126 (CA) were in the context of that Court's determination that, subject to exceptional cases, a motion under Rule 25.01 must be supported by an agreed statement of facts. The situation is similar with Rule 14.25, where there is no room for any factual contest. Summary judgment, for the reasons given by Justice Borins in *Dawson*, is different. The chambers judge sees something of the evidence the parties would place before the trial judge or jury and the chambers judge is required to make some assessment based upon the affidavits and other materials. I believe I would be required to consider the subject under 13.01 notwithstanding the previous finding under 25.01.

[39] The banks pleaded s. 2(1)(e) of the *Limitation of Actions Act*, RSNS 1989, c. 258. The affidavits, and particularly tracts from Mr. Binder's discovery, make it clear that he was aware of the material facts in 1988. He knew the cheques had been drawn payable to Gorbin Enterprises and others. He knew they had been deposited to the credit of third parties. And, he knew that they had not been properly endorsed, to his understanding of the corporate signing authority. It is difficult to see how a cause of action against a bank could be founded upon a breach of internal policy by a teller. Whatever ways the evidence discovered in 1989 might advance the claim, the material facts of the alleged cause were known before then. Thus, the six year limitation under s. 2(1)(e) began to run in 1988 or before.

[40] The applicants submit that I should find the limitation period began to run in 1982, after Mr. Binder learned of the foreclosure. That asks me to assume the role of trial judge rather than chambers judge on a motion for summary judgment. Mr. Binder did not, in 1982, know about the way the cheques had been endorsed and deposited. Whether he had constructive knowledge is arguable. If it matters, it deserves a trial.

[41] Under s. 2(1)(e), the limit clearly ran out in 1994, the year before suit was commenced. However, under s. 3, this Court has a discretion to extend the limit for

up to four more years. That discretion has not been engaged on these applications. It would take much for me to conclude that the plaintiff has no argument worth making for the exercise of that discretion. I am not satisfied that the defendants have met the threshold of demonstrating that this is a proper case to inquire into the existence of a genuine or an arguable issue on the basis of the Nova Scotia *Limitation of Actions Act*.

[42] <u>*Leave to Amend to Plead the New Brunswick Statutory Limitation*</u> As I said, the banks apply for leave to amend their defences to plead the *Limitation of Actions Act*, SNB c. L-8, ss. 6, 7, 8 and 9. A request for an amendment is to be allowed:

> ... unless it was shown to the judge that the applicant was acting in bad faith or that by allowing the amendment the other party would suffer serious prejudice that could not be compensated by costs. *Stacey v. Consolidated Foods Corp. of Canada Ltd.*, [1986] N.S.J. 356 (SC, AD) para. 4.

(a) For Mr. Binder, one objection is that New Brunswick law is less favourable to him. It does not include the discretion to extend a limitation period by up to four years. This is not the kind of prejudice *Stacey* referred to. Every sensible and desired amendment advances the proponent's case to the detriment of the opponent. As I see it, the prejudice is to be found in having to face a new claim or a new defence raised after the time for pleadings. Counsel for Mr. Binder emphasize the time that has passed. The banks pleaded the Nova Scotia statute in 1995, eight years ago. They argued the Nova Scotia statute in their applications of 1995 and on Mr. Binder's appeal in 1996. I am not aware though of any evidence suggesting that the progress of this suit over the last eight years would have been different had the New Brunswick statute been pleaded, let alone prejudicially different in ways that cannot be compensated in costs. Witnesses have died and, no doubt, some memories faded over that long time, but there is no suggestion that evidence going exclusively to the New Brunswick limitation has been lost. On the contrary, the Nova Scotia statutes raised the same factual issues as would have been raised by pleading the New Brunswick statute, and the Nova Scotia statute raised additional issues because of the limited discretion to extend time.

[43] I am satisfied that there has been no bad faith going to the banks' requests for this amendment and I am satisfied that the plaintiff will suffer no prejudice on account of the New Brunswick limitation having been pleaded now rather than in the beginning. As counsel for the plaintiff point out, the justice of allowing or disallowing a request for an amendment is the overriding consideration: *Lamey v. Wentworth Valley Developments*, [1999] N.S.J. 122 (CA), para. 12. In my assessment the banks have a serious defence to put forward under the New Brunswick statute and, in all the circumstances, it would be unjust to prevent the defence from being put before the Court. Consequently, I will exercise my discretion under rule 15.02 by allowing the amendments.

[44] The Royal Bank also seeks an amendment pleading the provisions of the *Bank Act*. These provisions were raised by the Bank of Montreal in the defence it filed in 1995. So the plaintiff has been aware of that issue from inception. I will allow the amendment.

[45] *New Brunswick Statutory Limitation* Section 9 of the New Brunswick *Limitation of Actions Act* would bar an action of this kind after six years and without any discretion to extend the time. I have already stated, in reference to the Nova Scotia statute, that it is beyond argument that by 1988 Mr. Binder was aware of the material facts upon which his claim is based. To reiterate that in reference to the New Brunswick limitation. The decisions in *Kamloops v. Nielson*, [1984] 2 S.C.R. 2 and *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 extended the time from which limitations of this kind begin to run. They run from the time "when the material facts on which ... [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence ..." (*Kamloops* para. 77). This calls for knowledge, actual or imputed, of "material facts", not of all relevant evidence. The discovery of the internal Bank of Montreal policy may have been a discovery of relevant evidence but the material facts of the pleaded causes were actually known to Mr. Binder in 1988. I appreciate that the statement of claim avers to departures from internal bank policy and standard banking practices but these averments do not plead any element of any cause of action apparent from the statement of claim. In that regard, the statement of claim pleads evidence, not material fact and the presence of the averments does not elevate their content to material fact for the purpose of assessing discoverability in a limitations defence to the extent that is permitted towards summary judgment.

[46] It is beyond doubt that the law of New Brunswick applies to the pleaded causes and that the New Brunswick *Limitations of Action Act* governs. I refer to my discussion of the pleadings and the affidavit evidence. The company allegedly harmed is a New Brunswick company. The company advantaged is a New Brunswick company. The bank branches involved are in Moncton. The land at issue is in Moncton. All individual witnesses were in Moncton except the plaintiff, who was living there when the narrative begins. All relevant events occurred at Moncton: the incorporation, the land acquisition, the initial financing, the construction of the apartment building, its operation, the second mortgage, the cheques drawn to advance the mortgage loan, the endorsements, the deposits, further years of operation and the foreclosure.

[47] The decision in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 was released just a few months before this action was commenced and it does not appear to have been in the minds of counsel when the defences were prepared. It followed (para. 85 and 86) the decision of the New Brunswick Court of Appeal in *Clark v. Naqui* (1990), 99 N.B.R. (2d) 271 (CA) and overruled the common law position that limitations statutes are procedural for the purpose of determining applicable law. Thus, Canada embraced the position in the civil law countries that limitation of actions statutes like those of Nova Scotia and New Brunswick are substantive law and are to be applied according to the law of the place of an actionable wrong rather than the law of the place where proceedings are taken. That being one of the holdings in *Tolofson*, the New Brunswick *Limitation of Actions Act* clearly applies to the causes advanced in these proceedings.

[48] Counsel for Mr. Binder argue the Nova Scotia statute applies on account of tacit agreement or waiver. The only evidence offered for that is the course of this proceeding itself. Indeed, the Bank of Montreal appears to have been referring to the New Brunswick statute when it first explained to Mr. Binder that any claim he had was statute barred. Two points are made in favour of the submission that there is an arguable or genuine issue of tacit agreement, the one that the banks pleaded and argued the Nova Scotia statute, the other that the banks accepted Nova Scotia law whenever they took advantage of or complied with our *Civil Procedure Rules*. Respectfully, counsels' second point confuses the question of applicable substantive law with the question of jurisdiction. Assuming that this Court may exercise jurisdiction (see, para. 40 of *Tolofson*) and seeing as this Court has not refused to exercise that jurisdiction under *forum non conveniens* (also, para. 40), our *Civil Procedure Rules* and other laws of procedure apply to the proceeding although the

substantive law of New Brunswick governs the determination: *Tolofson*, para. 77-79. Mr. Binder sued in Nova Scotia. That the defendants adhered to Nova Scotia procedure says nothing about applicable substantive law.

[49] If the Nova Scotia limitations statute applies it is because of the banks having pleaded it and having argued it on their motions in 1995 and the appeal in 1996. Mr. Binder's counsel emphasize this sentence from the end of para. 47 of Justice LaForest's judgment in *Tolofson*: "Thus the parties may either tacitly or by agreement choose to be governed by the *lex fori* if they find it advisable to do so." This must not be taken out of context. In para. 47, Justice LaForest was discussing some of the "forces that militated in favour of the English rule". Among these were difficulties in proof of foreign law, which "has now been considerably attenuated in light of advances in transportation and communication". It is further attenuated "by application of the rule that, in the absence of proof of foreign law, the *lex fori* will apply." That is what "tacitly" referred to. That is quite clear in the passage. The parties may tacitly choose the *lex fori* by not proving the law of the *lex loci delicti*. Otherwise, there is need to show an agreement. Thus, at para. 88 of *Tolofson*, where Justice LaForest discusses ways in which local laws of procedure may affect the application of the limitations statute of another province or state, he says "Additionally, a substantive limitation defence such as the one in the case at bar may be waived either by failure to plead it, if this is required, or by agreement."

[50] In *Tolofson* the Court chose certainty in the principles governing questions of applicable law generally and applicable limitations statutes specifically. Justice LaForest specifically rejected the "flexible" American approach at para. 53:

> I leave aside for the moment the assumptions that a flexible rule better meets the demands of justice, fairness and practical results and underline what seems to be the most obvious defect of this approach -- its extreme uncertainty.
>
> (a) At para. 69, he referred to Canada as "a single country with different provinces exercising territorial legislative jurisdiction" and said that:
>
> The nature of our constitutional arrangements ... would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the lex loci delicti rule.
>
> (a) Thus, with Australia, we follow the cleaner Continental principle regarding applicable law. (More flexibility is allowed as regards

> jurisdiction: see the rest of the discussion in para. 69.) It would go against the spirit of *Tolofson* for trial courts to start taking a plastic approach to what might constitute an agreement to apply other law or a waiver of applicable law. The judgment specifically comments upon the exceptions in cases of agreement and waiver. I take these to be references to the law of contract and promissory estoppel and to cases where parties do not prove any difference in the law of the fourm and the law of the site. Imprecise references to a tacit agreement or waiver cannot be enough even to meet the threshold of summary judgment. One must demonstrate an arguable issue based upon evidence and upon the principles of contract or estoppel or, if it is district from promissory estoppel, the doctrine of waiver as discussed in *Saskatchewan River Bungalows Ltd.* v. *Maritime Life Assurance Co.*, [1994] S.C.J. 59 at para. 18 to 20.

[51] As I have already suggested, it is not surprising that the pleadings and early motions in this case concerned the Nova Scotia *Limitation of Actions Act*. The pleadings were drafted and the motions were made in the months following *Tolofson*. So, in the circumstances, this does not point to the possibility of an express contract between the parties and it does not supply the basics pointing to the possibilities for implying a contract. Further, nothing points to the possibility of detrimental reliance as would found a promissory estoppel or the possibility of an unequivocal and conscious intention to abandon rights as would found equitable waiver. Obviously, there has been no waiver in the sense to which Justice LaForest referred, failing to present evidence of the law of the site. Therefore, there is no arguable issue that the banks have agreed to waive or have tacitly waived the application of substantive New Brunswick law.

[52] Bank Act *Limitation* When the cheques were created, s. 74(2) of the *Bank Act*, RSC 1970, c. B-1 was applicable. A new *Bank Act* was enacted and came into force in 1980: SC 1980-81-82-83, c. 40, later RSC 1985, c. B-1. It replaced s. 74(2) with s. 159(2), which read:

> Except as provided in subsection (3), in any action or proceeding, the liability of a bank shall be determined by reference only to evidence of matters that have arisen or things that have occurred, including records or portions thereof, and documents, vouchers, paid instruments and papers that are dated or came into existence, or that

> contained entries or writings made, during the period of ten years immediately proceeding the commencement of the action or the proceeding.
>
> (a) The 1970 provision was similarly worded but the period was fifteen rather than ten years. The latest *Bank Act*, SC 1991, c. 46, dropped this provision and delegated to Governor-in-Council regulatory power for destruction of records. No regulations have been made. For the reasons expressed by Winkler, J. in *Persaud v. Royal Bank of Canada*, [1994] O.J. 1140 (O-GD), affirmed [1996] O.J. 3904 (CA), I hold that the new *Bank Act* did not repeal s. 159(2) retroactively or have retrospective affect in circumstances where s. 159(2) applied before 1991. Thus, s. 159(2) applied in this case effective 1982 on the tenth anniversary of the drawing, endorsement and deposit of the cheques at issue. Subsection 159(2) prevents Mr. Binder from producing any evidence of those transactions.

[53] Mr. Walker argued that the banks should have brought applications raising this issue earlier. He refers to *Curry v. Dargie*, [1984] N.S.J. 34 (SC, AD). Reasons were given by MacDonald, J.A. and Hart, J.A. with Pace, J.A. agreeing with both. A motion to strike a statement of claim on the ground it disclosed no cause of action was successful in chambers. The appeal was allowed. Justice Macdonald included among his reasons "The application to strike was, in my opinion, made far too late in the proceedings." (para. 47). It seems to me that an application under 14.25(1)(a) should be brought promptly since it is based entirely on the face of the pleadings. Different considerations may apply in the other abuse of process grounds set out in 14.25(1)(b), (c) and (d), since they involve issues about which evidence is necessary and it is not excluded under 14.25(2). Further, as I have said, the present issue is more appropriately brought forward under the rubric of summary judgment. In any case, I do not take Justice MacDonald's remark to tie the hands of the Court when the claim is clearly unsustainable and I agree with Justice Scanlan in *Canada Life Assurance* v. *Nova Scotia (Minister of Municipal Affairs)*, [1996] N.S.J. 3 (SC) at para. 12. Counsel for the plaintiff made similar arguments in reference to the present motions under *Rule* 14.25(1)(a), which I have confined to the question of *Foss* v. *Harbottle*. However, the circumstance is unusual because the *Rule* 14.25 motions did not have to be dealt with by the Chambers Judge in 1995 and were not raised alternatively by notice of contention on the appeal. In all of the circumstances, it seemed to me unjust to leave the *Foss* v. *Harbottle* issue for trial if the action was clearly unsustainable because of it.

[54] Mr. Walker also argued that the banks have, in various ways, acknowledged Mr. Binder's claim and the evidence he wants to produce at trial. I see nothing to suggest an admission by the banks that the transactions occurred only as the surviving documents suggest or that any document is admissible or that the transactions may be proven despite the *Bank Act*. Mr. Walker referred to the list of documents but these may lead to admissions of authenticity, not admissibility. He referred also to bank correspondence suggesting Mr. Binder would have been compensated if he established his case "on the merits". Hardly a communication by which rights are terminated, the letter, in any case, makes it clear that the bank did not regard a statute-barred claim to be meritorious.

[55] Mr. Walker also argued that the *Bill of Rights* serves to require a restrictive interpretation of s. 159(2). It should be read so as not to "deprive a person of the right to a fair hearing" under s. 2(e). The subsection is really a limitation of actions provision. Textually, it proscribes evidence but it does so with such breadth ("evidence of matters that have arisen or things that have occurred ... during the period of ten years") as to exclude any cause ten years old. This captures the usual objects of limitation provisions. It does not go to the hearing, but to the cause. It does not set up an unfair hearing. It blocks claims that would be unfair because of lapse of time.

[56] Mr. Walker argues that s. 159(2) offends equality rights under the *Charter*. Respectfully, I do not see how s. 15(1) is engaged. Any who had claims against banks arising before 1991 had to take action within ten years of the "matter" or "thing". The kinds of issues involved in a s. 15(1) challenge simply do not arise. Further, s. 159(2) became effective against Mr. Binder's claims in 1982, just before the *Charter* came into force and more than three years before s. 15 came into force under s. 32(2).

[57] <u>*Conclusion*</u> Assessing the pleadings and only the pleadings, the statement of claim advances causes of Gorbin Enterprises Limited. They are entirely derivative. Nothing has been made to appear such that under amended pleadings any argument could be made that the claims are personal. Consequently, I will strike the statement of claim under *Rule* 14.25(1)(a). Otherwise, I would have granted summary judgment on the ground that the defendants met the threshold and there is no reasonable chance of success because the claims are prescribed, firstly, under the New Brunswick limitations statute and, secondly, under the former s. 159 of the *Bank Act* of 1980. I will accept written submissions on costs and any other outstanding issues. If counsel prefer a hearing, any may contact my office.

J.

Halifax, Nova Scotia
18 August 2003