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DOCKET: C41379

COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., ARMSTRONG and LANG JJ.A.

B E T W E E N :

CHEICKH BANGOURA **Plaintiff (Respondent)**	**Paul B. Schabas and Ryder L. Gilliland, for the appellants**
- and -	
THE WASHINGTON POST, WILLIAM BRANIGIN, JAMES RUPERT, STEVEN BUCKLEY, UNITED NATIONS and FRED ECKHARD **Defendants (Appellants)**	**Kikélola Roach, Jackie Esmonde and Selwyn A. Pieters for the respondent** **Brian MacLeod Rogers and Melissa Kluger for the intervenor Media Coalition**

Heard: March 8, 2005

On appeal from the order of Justice Romain W. M. Pitt of the Superior Court of Justice dated January 27, 2004 and reported at (2004), 235 D.L.R. (4th) 564.

ARMSTRONG J.A.:

BACKGROUND

[1] The respondent, Cheickh Bangoura, sued the *Washington Post* and three of its reporters in respect of two newspaper articles, which he alleges are defamatory. When the articles were published in January 1997, Mr. Bangoura was employed by the United Nations in Nairobi, Kenya. The articles related to Mr. Bangoura's conduct in a prior posting with the United Nations in the Ivory Coast. At the time of publication of the articles, there were only seven subscribers to the *Washington Post* in Ontario. At that time, Mr. Bangoura was not an Ontario resident. When the action was commenced, more than six years after the

publication of the articles, Mr. Bangoura was a resident of Ontario. The issue before us is whether the Ontario courts should assume jurisdiction in this case.

[2] Counsel for the *Washington Post* and its reporters brought a motion to stay the action on the ground that there is no real and substantial connection between this action and Ontario or between the *Washington Post* and Ontario. They also submitted that Ontario is not the most convenient forum and that the service of the statement of claim *ex juris* should be set aside.

[3] In dismissing the motion, Pitt J. of the Superior Court of Justice held that it was appropriate for the Ontario courts to assume jurisdiction, that Ontario was the most convenient forum and that the service *ex juris* of the statement of claim was proper. The *Washington Post* and its reporters now appeal the order of the motion judge.

THE FACTS

[4] Mr. Bangoura was born and raised in Guinea. He was a student in Germany between 1978 and 1986. Between 1987 and 1993, he was employed by the United Nations in Austria. In September 1993, he was seconded to the United Nations Drug Control Program in the Ivory Coast as assistant regional director for West Africa, where he remained until December of 1994. He was then transferred to the United Nations Drug Control Program in Kenya under a contract that was to expire at the end of January 1997. In Kenya, Mr. Bangoura was assistant regional director of the UN Drug Control Program's regional office for Eastern and Southern Africa.

[5] On Sunday, January 5, 1997, the *Washington Post* published an article under the headline, "Cloud of Scandal Follows UN Drug Control Official: Boutros-Ghali Ties Allegedly Gave Protection". The article refers specifically to Mr. Bangoura and alleges that his UN colleagues had accused him of sexual harassment, financial improprieties and nepotism during his tenure in the Ivory Coast. The article suggests that he had eluded punishment in part by invoking close ties to Mr. Boutros-Ghali, the former UN secretary general, a close friend of Mr. Bangoura's father-in-law.

[6] Mr. Bangoura was suspended from his position as assistant regional director of the UN Drug Control Program for Eastern and Southern Africa on January 9, 1997.

[7] On Friday, January 10, 1997, the *Washington Post* published a second article under the headline, "UN Removes African from Drug Agency:

Controversial Envoy's Misconduct Cited". The second article repeated the allegations that were contained in the earlier article.

[8] In February 1997, Mr. Bangoura joined his wife and two children in Montreal, where they had moved in December 1996. Mr. Bangoura and his family lived in Montreal until June 2000, when they moved to Ontario in the Brampton area. This action was commenced in April 2003.

[9] In addition to the *Washington Post*, the statement of claim named three reporters, William Branigin, James Rupert and Steven Buckley, as defendants. In 1997, William Branigin lived in Washington. He now lives in Reston, Virginia, adjacent to Washington. James Rupert was a foreign correspondent for the *Washington Post* in Abidjan, Ivory Coast. He now lives in the state of New York. Steven Buckley was a foreign correspondent for the *Washington Post* in Nairobi, Kenya. He now lives in Florida.

[10] WP Company LLC carried on business as the *Washington Post*. It is a wholly owned subsidiary of The Washington Post Company, with its head office in the city of Washington in the District of Columbia. The circulation of the *Washington Post* on Sunday, January 5, 1997, was approximately 1,106,968. Over 95 per cent of the *Washington Post* newspapers were distributed in the District of Columbia area. Only 7 copies of the newspaper were delivered in Ontario. Approximately 781,704 copies of the *Washington Post* were distributed on Friday, January 10, 1997 – over 95 per cent in the District of Columbia area. Only 7 copies were delivered to subscribers in Ontario.

[11] The two articles in issue were also published on the *Washington Post* Web site and were available free of charge for fourteen days following publication. Thereafter, the articles could be accessed through a paid archive. Only one person, counsel for Mr. Bangoura, has accessed the articles through the paid archive.

[12] Summaries of the two articles, containing the gist of the allegations made against Mr. Bangoura, continue to be available free of charge through the Internet from the *Washington Post* archive.

[13] The *Washington Post* has a small office in Toronto for use by a reporter for news gathering purposes.

[14] The United Nations and an official of the UN Secretariat, Fred Eckhard, were also named as defendants in this action. However, Mr. Bangoura is no longer proceeding against the United Nations and Mr. Eckhard.

[15] The court had the benefit of submissions from counsel for the Media Coalition, which intervened in this appeal. The members of the Media Coalition publish newspapers, magazines and books worldwide and they broadcast radio and television programming in North America and elsewhere. They publish Internet Web sites that have been accessed by millions of viewers in more than two hundred countries. The members include national and international organizations in Canada, the United States of America, the United Kingdom and Europe. The members of the Media Coalition assist journalists and advocate for freedom of expression throughout the world.

THE ACTION

[16] In his statement of claim, Mr. Bangoura seeks the following relief against the *Washington Post*:

(i) an order directing the *Washington Post* to cease the publication of the articles that had appeared on its web page since January 1997;

(ii) an order directing the *Washington Post* to publish a retraction;

(iii) damages in the amount of $5 million for intentional interference with prospective economic advantage and inducing a breach of employment contract;

(iv) damages in the amount of $1 million for intentional infliction of mental anguish;

(v) damages in the amount of $1 million for negligence;

(vi) damages in the amount of $1 million for refusing to post retractions and for unreasonable delay in removing defamatory messages posted on the *Washington Post* Web site;

(vii) punitive and exemplary damages in the amount of $2 million;

(viii) pre-judgment and post-judgment interest and costs on a substantial indemnity scale.

[17] Although Mr. Bangoura submits in his factum that the action is not a defamation action, there are numerous references throughout his statement of claim to defamation such as: “the tort of defamation”, “publications of the defamation”, “defamatory articles”, “defamatory materials”, “defamatory

statements", "defamatory publication", "defamatory publications", "defamatory innuendos" and "the defamation". He also asserts in his statement of claim that, "The Plaintiff alleges that the said articles and website publications must be taken together as constituting a libel against the Plaintiff." It is perhaps worth noting that the motion judge approached the case as if it were a libel case. See para. 24 of his reasons.

[18] Counsel for Mr. Bangoura did not advise us why she takes the position that her client is not suing in defamation. It may be that she does so in an effort to avoid a potential problem concerning the notice and limitation provisions contained in ss. 5-6 of the *Libel and Slander Act*, R.S.O. 1990, c. L.12. However, that issue is not before us. In my view, whether this case is simply a libel case "dressed up" as something else does not change the analysis in respect of whether the Ontario courts should assume jurisdiction.

ANALYSIS OF THE MOTION JUDGE'S REASONS

[19] The motion judge began his analysis of the jurisdictional issue by considering the eight factors articulated by Sharpe J.A. in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.). In that case, the court considered the real and substantial connection test developed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. Sharpe J.A. observed at para. 75 that "it is not possible to reduce the real and substantial connection test to a fixed formula." However, he found it useful to identify the factors which appear to have been considered by the Supreme Court of Canada and other courts in addressing the question of whether a court should assume jurisdiction in a case involving an out-of-province defendant on the basis of damage sustained in Ontario, as a result of a tort committed outside the province. Sharpe J.A. was careful to note at para. 76 that "no factor is determinative". The factors considered in *Muscutt* are the following:

(i) the connection between the forum and the plaintiff's claim;

(ii) the connection between the forum and the defendant;

(iii) unfairness to the defendant in assuming jurisdiction;

(iv) unfairness to the plaintiff in not assuming jurisdiction;

(v) the involvement of other parties to the suit;

(vi) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same juris-dictional basis;

(vii) whether the case is interprovincial or international in nature; and

(viii) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[20] *Muscutt* and *Morguard* were both interprovincial cases. However, *Muscutt* was argued together with four other appeals, all of which involved defendants in foreign jurisdictions.[1] [1] The recent judgment of the Supreme Court of Canada in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, has made it clear that the real and substantial connection test applies to international cases.

The motion judge's application of the *Muscutt* factors

(i) The connection between the forum and the plaintiff's claim

[21] The motion judge acknowledged that Mr. Bangoura had resided in Ontario for a relatively short period and that when the articles were originally published, he did not reside in Ontario. However, he concluded at para. 22(1) that Mr. Bangoura was "an international public servant, who has found a home and work in Ontario where the damages to his reputation would have the greatest impact."

[22] The connection between Ontario and Mr. Bangoura's claim is minimal at best. In fact, there was no connection with Ontario until more than three years after the publication of the articles in question. In *Muscutt*, Sharpe J.A. raised this very issue at para. 79 of his reasons:

On the other hand, if the plaintiff lacks a significant connection with the forum, the case for assuming jurisdiction on the basis of damage sustained within the jurisdiction is weaker. If the connection is tenuous, courts should be wary of assuming jurisdiction. Mere residence in the jurisdiction does not constitute a sufficient basis for assuming jurisdiction. See V. Black, "Territorial Jurisdiction Based on the Plaintiff's Residence: *Dennis v. Salvation Army Grace General Hospital Board"* (1997), 14 C.P.C. (4th) 207 at p. 232, 156 N.S.R. (2d) 372 (C.A.), where the author writes:

Permitting a plaintiff to assume a new residence and sue a defendant there in respect of events that occurred elsewhere seems to be harsh to defendants, and this is particularly so when those events comprise a completed tort.

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[1] [1] See *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84 (C.A.); *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 (C.A.); *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76 (C.A.); *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.).

…

Even if the connection is significant, however, the case for assuming jurisdiction is proportional to the degree of damage sustained within the jurisdiction. It is difficult to justify assuming jurisdiction against an out-of-province defendant unless the plaintiff has suffered significant damage within the jurisdiction.

[23] In an affidavit filed by Mr. Bangoura, he deposed:

As a result of the continued action of the Washington Post, I have sustained damages in Ontario and elsewhere in that my opportunities for economic advancement in my profession have been adversely affected.

No details are provided. The distribution of the articles was minimal. Only Mr. Bangoura's lawyer accessed the two articles on the *Washington Post* Internet database. Whatever damages were suffered by Mr. Bangoura's losing his job with the UN, more than three years before he took up residence in Ontario, are not damages suffered in Ontario. In my view, there is no evidence that Mr. Bangoura has suffered significant damages within Ontario.

(ii) The connection between the forum and the defendant

[24] The motion judge concluded that the defendants had no connection to Ontario, but observed at para. 22(2) that the *Washington Post* is a major newspaper which is "often spoken of in the same breath as the *New York Times* and the *London Telegraph*." He concluded that "the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided."

[25] I agree with the submissions of counsel for the appellants that there is no significant connection between the *Washington Post* defendants and Ontario. I cannot agree with the motion judge when he concluded that the appellants "should have reasonably foreseen that the story would follow the plaintiff wherever he resided." It was not reasonably foreseeable in January 1997 that Mr. Bangoura would end up as a resident of Ontario three years later. To hold otherwise would mean that a defendant could be sued almost anywhere in the world based upon where a plaintiff may decide to establish his or her residence long after the publication of the defamation.

(iii) Any unfairness to the defendant in assuming jurisdiction

[26] In respect of this factor, the motion judge said at para. 22(3):

While the personal defendants have no connection to Ontario, the *Post* is a newspaper with an international profile, and its writers influence viewpoints throughout the English-speaking world. I would be surprised if it were not insured for damages for libel or defamation anywhere in the world, and if it is not, then it should be.

[27] There is no evidence in the record in respect of the *Washington Post*'s insurance coverage.

(iv) Any unfairness to the plaintiff in not assuming jurisdiction

[28] In his reasons, the motion judge stated at para. 22(4):

The plaintiff has no connection with any of the jurisdictions in which the defendants reside. Since Washington is the residence of only one of the defendants, the plaintiff could be faced with the same objections from the personal defendants if the action were commenced in Washington, where the [plaintiff] has no reputation to defend. What is more, there is a clear juridical advantage to the plaintiff in Ontario implicitly acknowledged by the *Post*. The delay argument advanced by the *Post* in terms of a potential statutory impediment is neutral on this issue.

[29] Although unfairness to the plaintiff in not assuming jurisdiction might often be a powerful factor within a *Muscutt* analysis, it must be remembered that the plaintiff had no connection with Ontario until more than three years after the publication of the articles in question. While in *Muscutt*, Sharpe J.A. found at para. 88 that "the principles of order and fairness should be considered in relation to the plaintiff as well as the defendant", he followed by adverting to *Morguard, supra,* at p. 1108, in which La Forest J. held that this factor comes into play only where there is otherwise a real and substantial connection with the action. If the plaintiff's evidence does not support such a connection elsewhere within the *Muscutt* analysis, it becomes increasingly difficult to accord weight to this factor.

(v) The involvement of other parties in the suit

[30] The motion judge stated at para. 22(5) that "the involvement of other defendants residing respectively in New York and Florida is a factor, in my view, in favour of the plaintiff's choice of forum."

[31] In my view, the fact that two of the personal defendants now live in New York and Florida does not favour Ontario. This factor relates more to a *forum conveniens* argument than to the assumption of jurisdiction. In any event, the

main defendant, the *Washington Post*, is located in Washington, D.C., and the remaining personal defendant, William Branigin, resides in nearby Virginia.

(vi) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis

[32] The motion judge observed at para. 22(6) that:

I can see no reason why Ontario would be unwilling to enforce a judgment of a foreign court against an Ontario newspaper with a worldwide reputation, even if the damages were limited to the foreign jurisdiction, especially where, as here, the plaintiff is an international public servant. Such a newspaper should reasonably contemplate the likelihood of such damage occurring.

[33] Sharpe J.A. in *Leufkens* cautioned that if an Ontario court assumes jurisdiction against a foreign defendant, it would require Ontario courts to enforce foreign judgments pronounced on the same jurisdictional basis against Ontario defendants. Although *Leufkens* involved a lawsuit by an Ontario plaintiff against a Swiss travel company for injuries suffered in Costa Rica, the principle raised by Sharpe J.A. at para. 33 of his judgment is apt:

When assessing the real and substantial connection test and the principles of order and fairness, it is important to consider the interests of potential Ontario defendants as well as those of Ontario plaintiffs. In light of *Morguard* and *Hunt* [*Hunt v. T & N plc*, [1993] 4 S.C.R. 289], finding that the real and substantial connection test has been met would require Ontario courts to enforce foreign judgments rendered on the same jurisdictional basis against Ontario defendants who offer tourism services to visitors of this province. In my view, we should not adopt such a rule, since it would impose an unreasonable burden on providers of tourism services in Ontario. To take the example mentioned during oral argument, it would seem harsh to require an Algonquin Park canoe rental operator to litigate the claim of an injured Japanese tourist in Tokyo. Although negligent operators should certainly be held to account for their negligence, if they confine their activities to Ontario, they are entitled to expect that claims will be litigated in the courts of this province.

[34] Admittedly, while the facts in *Leufkens* are more "confined" than they could ever be in litigation involving articles published on the Internet, it must be remembered that on the evidence presented before the motion judge, the articles did not reach significantly into Ontario. As I have mentioned, Mr. Bangoura's lawyer was the only person in Ontario to access the two articles on the *Washington Post* Internet database. While other articles published on the Internet may proliferate well beyond their original target audiences into other jurisdictions, the

fact scenario before me falls far closer to the situation described in *Leufkens*. If the cautionary warning of Sharpe J.A. is not taken into account, it could lead to Ontario publishers and broadcasters being sued anywhere in the world with the prospect that the Ontario courts would be obliged to enforce foreign judgments obtained against them.

(vii) Whether the case is interprovincial or international in nature

[35] The motion judge agreed that since the case is international in nature, rather than interprovincial, it is more difficult to justify the assumption of jurisdiction.

(viii) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[36] In considering this factor, the motion judge referred to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a judgment of the United States Supreme Court, and *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, a judgment of the Supreme Court of Canada. In *New York Times v. Sullivan*, the United States Supreme Court held that public officials could only succeed in a defamation claim where they could establish that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." See *New York Times v. Sullivan* at p. 280.

[37] In *Hill v. Scientology*, the Supreme Court of Canada refused to adopt the so-called actual malice rule in *New York Times v. Sullivan*. Counsel for the *Washington Post* had filed on the return of the motion a legal opinion from Lee Levine, a defamation lawyer in Washington, D.C., who stated:

In the circumstances you posit – i.e., a foreign libel judgment that could not be rendered in the first instance by a court bound by *New York Times Co. v. Sullivan* and its progeny – it is my opinion that a District of Columbia court would deem such a judgment to be repugnant to the public policy of the District and of the United States and would therefore decline to recognize or enforce it.

…

Courts in the District of Columbia and in other American jurisdictions have uniformly held that libel judgments rendered in foreign courts where the law does not comport with the principle set forth in *New York Times Co. v. Sullivan* and its progeny are repugnant to the public policy of those jurisdictions and must therefore be denied recognition.

[38] The motion judge concluded at para. 23:

Frankly, I see the unwillingness of an American court to enforce a Canadian libel judgment as an unfortunate expression of lack of comity. This should not be allowed to have an impact on Canadian values. The Washington Post defendants' home jurisdiction's unwillingness to enforce such an order is not determinative of whether the court should assume jurisdiction. See *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Ont. Sup. Ct.)…

[39] The motion judge's conclusion does not take into account that the rule in *New York Times v. Sullivan* is rooted in the guarantees of freedom of speech and of the press under the First Amendment of the U.S. Constitution. In any event, the reality is that American courts will not enforce foreign libel judgments that are based on the application of legal principles that are contrary to the actual malice rule. Although the Supreme Court of Canada has rejected the rule for perfectly valid reasons, it is, in my view, not correct to say that the American courts' unwillingness to enforce a Canadian libel judgment is "an unfortunate expression of lack of comity". Canada and the U.S. have simply taken different approaches to a complex area of the law, based upon different policy considerations related to freedom of speech and the protection of individual reputations.

[40] The Supreme Court of Canada has recognized that Canadian courts may refuse to enforce a judgment of a foreign court which is deemed to be contrary to the Canadian concept of justice. In *Beals v. Saldanha, supra*, Major J., writing for the majority, said at para. 71:

The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in Castel and Walker, *supra*, at p. 14-28:

…the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts.

Given the centrality of freedom of speech to the United States Constitution, it could be argued that an American court's refusal to recognize a Canadian judgment based on principles divergent from *New York Times v. Sullivan* would fall into the category of repugnant law rather than repugnant fact.

[41] The motion judge supported his decision by relying upon the judgment of the High Court of Australia in *Dow Jones & Co. Inc. v. Gutnick* (2002), 210 C.L.R. 575 (H.C.A.).

[42] *Dow Jones v. Gutnick* involved an article published in both *Barron's* magazine and *Barron's Online*. Mr. Gutnick was an Australian businessman who resided in the State of Victoria. He commenced his action in Victoria. Dow Jones was served with the originating process outside Australia. The issue in the case was *forum non conveniens.* The court held that Victoria was the appropriate forum.

[43] In respect of *Dow Jones v. Gutnick*, the motion judge quoted at para. 22(8) of his reasons from a number of paragraphs of the factum filed by counsel for Mr. Bangoura that he said put "the whole issue in a proper perspective". The motion judge was presumably of the view that counsel's analysis of the *Dow Jones v. Gutnick* case supported his view that Ontario should assume jurisdiction.

[44] Gutnick was a well-known businessman who resided in Victoria at the time of the impugned publication. There was evidence that *Barron's* had some 1,700 Internet subscribers in Australia. Gutnick undertook that he would sue only in Victoria and only in respect of damages to his reputation in that state.

[45] I do not find the Australian case to be helpful in determining the issue before this court.

CONCLUSION

[46] As a result of the above analysis, I conclude that the motion judge erred in his application of the *Muscutt* factors. This leads me to conclude further that there is simply no real and substantial connection between this action and Ontario and that it is not appropriate for the courts of Ontario to assume jurisdiction.

SUBMISSIONS ON BEHALF OF THE MEDIA COALITION

[47] Counsel for the Media Coalition adopted the submissions of counsel for the *Washington Post* in his analysis of the real and substantial connection test and the application of the *Muscutt* factors. In addition, counsel for the Media Coalition offered alternative approaches to the issue of jurisdiction, which he submitted are consistent with the real and substantial connection test and capable of incorporation into the proper application of the *Muscutt* factors.

[48] The alternative approaches relate to publication on the Internet, which is a matter of considerable concern, given the Internet's worldwide, multi-jurisdictional reach. The approaches suggested by the Media Coalition include:

(i) The Targeting Approach – under this approach, a court would take jurisdiction where the publication is targeted at the particular forum of the court.

(ii) The Active/Passive Approach – under this approach, a foreign defendant who actively sends electronic publications to a particular forum would be subject to the jurisdiction of that forum's courts. A defendant who simply posts to a passive Web site would not be subject to such jurisdiction.

(iii) The Country of Origin Approach – under this approach, jurisdiction is taken where the publication originated. The theory of this approach is that it is in the country of origin where the publisher has the last opportunity to control the content of the publication.

(iv) Foreseeability and Totality of Circumstances – this approach is similar to the approach taken by the court in *Muscutt* and its companion cases.

[49] The submissions made on behalf of the Media Coalition were helpful and interesting. However, I do not find it necessary to adopt any of the particular approaches that are proposed by the Coalition. It is not necessary to do so in order to decide this case. It may be that in some future case involving Internet publication, this court will find it useful to consider and apply one or more of the proposed approaches. However, that is for another day.

SERVICE *EX JURIS* AND *FORUM NON CONVENIENS*

[50] In view of my conclusion that it is not appropriate for the Ontario courts to assume jurisdiction in this case, I find it unnecessary to deal with the issues of service *ex juris* and *forum non conveniens*.

DISPOSITION

[51] For the reasons discussed above, I would allow the appeal, set aside the order of the motion judge and grant an order staying the action.

COSTS

[52] Counsel for the appellants shall have their costs of the appeal on a partial indemnity basis fixed in the amount of $7,500 including disbursements and Goods and Services Tax. The appellants are also entitled to their costs on a partial indemnity scale before the motion judge. If the parties cannot agree on the

quantum of the costs before the motion judge, then the appellants should make brief written submissions (not to exceed five pages double-spaced) within ten days of the release of this judgment. The respondent shall file a brief written response (not to exceed five pages double-spaced) within ten days of receiving the appellants' costs submission. If so advised, counsel for the appellants may file a reply (not to exceed three pages double-spaced) within five days of the receipt of the respondent's response.

RELEASED:

"SEP 16 2005" "Robert P. Armstrong J.A."

"RRM" "I agree Roy McMurtry C.J.O."

"I agree S. E. Lang J.A."