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CANADA / JUDGMENT

## Credential Securities Inc., vs. QTrade Canada Inc.

2014 BCSC 345

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COURT

Supreme Court of British Columbia

DECIDED

3 March 2014

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2014 BCSC 345 Credential Securities Inc., vs. QTrade Canada Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Credential Securities Inc., vs. QTrade Canada Inc.,

2014 BCSC 345

Date: 20140303

Docket: S075914

Registry: Vancouver

Between:

Credential Securities Inc., Credential Asset Management Inc.,

Credential Financial Inc., Credential Insurance Services Inc., and

Credential Financial Strategies Inc.

Plaintiffs

And

Qtrade Canada Inc., Qtrade Securities Inc., Qtrade Asset

Management Inc., Qtrade Fund Management Inc.,

Qtrade Insurance Solutions Inc., Krystian Kolodziej, Pooja Wallia

and An Le

Defendants

Before: Master Muir

Reasons for Judgment

Counsel for the Plaintiffs:

J. Sullivan

B. Hicks

Counsel for the Defendants:

J. Goulden

M. Brechtel

Place and Date of the Hearing:

Vancouver, B.C.

January 30, 2014

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2014

- [1] These are cross applications that come before me as case management Master in this proceeding.
- [2] The defendants, who I shall refer to as Qtrade apply for:
  - a) an order that the plaintiffs (Credential) list and produce all documents that are within Credential's power, possession or control, that relate to the matters in question in the action, and in particular those classes of documents set out in paragraphs 4, 5, 6, and 8 of the Order made by me on December 14, 2012, and
  - b) an order, pursuant to Rule 7-1(8) that an authorized representative of Credential swear an affidavit that Credential has complied with that Order.
- [3] Credential, in its application, seeks leave to amend its Statement of Claim.
- [4] The background facts are set out in my reasons in Credential Securities Inc. v. Qtrade Canada Inc., 2012 BCSC 1902, and I will not repeat them here.
- [5] The plaintiffs and defendants are competitors in the wealth management and brokerage business, both with allegedly confidential websites allowing clients access to various online materials. The individual defendants were employees of the plaintiffs but left to join the employ of the defendants. After doing so, it is alleged that they continued to use their log-in information to access the plaintiffs' website and access and misappropriate confidential information. That information is alleged to have been used to benefit the business of the

defendants.

### Application of the Defendants

- [6] After the order referred to above was granted, there was an application to settle the order and the order was not entered until June 6, 2013.
- [7] Qtrade made several requests for production of the documents ordered, and on or about August 9, 2013, Credential produced an amended list of documents listing and later producing a further 103 documents.

### Privileged Documents

- [8] The first issue is that in its amended list of documents Credential does not provide an itemized list of privileged documents as required by the rules and in accordance with my order on the earlier application.
- [9] Credential admits that this listing is required and thus Credential is ordered to produce a further amended list of documents detailing the documents for which it claims privilege in accordance with BCSC Civil Rule 7-1(6).

### Deficient Document Production

- [10] The next issue raised by Qtrade is that there has been insufficient production of documents ordered produced. It submits that the document production of Credential was late, "casual", "untenably limited" and that electronic searches conducted were either not properly tailored or were not sufficiently diligent.
- [11] Qtrade thus seeks an order for compliance with my earlier order and for an affidavit of documents to be produced.
- [12] Credential takes the position that all documents have been produced in accordance with my order.
- [13] Mr. Davenport, Vice President, Information Technology at Credential Financial Inc., one of the plaintiffs in this proceeding, has deposed that:
  - 13. I have performed and overseen several document searches to locate documents that are relevant to this lawsuit. Several searches have been performed to locate all documents that are responsive to the Order. All such documents that were located have been provided to our lawyers.
  - 14. System wide searches were performed on all of Credential's active employee email accounts to locate all documents that are responsive to the Order or that could otherwise be relevant to this lawsuit.

- [14] He details a specific search done to locate emails that would indicate that the email or memorandum of Don Rolfe was forwarded to any third party. He says no such documents were located.
- [15] Mr. Davenport also deposed that:
16. When conducting searches for documents that are responsive to the Order Credential was not able to search the former email accounts of Don Rolfe, Helen Blackburn, Rob McLean and Jane Mitchell since all four of these former employees left Credential several years ago and their email accounts have been purged and permanently deleted as a result of upgrades to Credential's email server.
- [16] Qtrade also takes exception to this, saying that steps should have been taken by Credential to preserve all such documents. Although that would obviously have been prudent, it does not, to my mind, reflect on the production sought herein.
- [17] Qtrade submits that, as Credential has failed to produce any documents in response to some paragraphs of my order, "scant" production regarding other paragraphs, and has produced documents that raise questions as to the existence of other documents, I should conclude, on the authority of *Gardner v Viridis Energy Inc.*, 2012 BCSC 1816 at para. 52, that production was not sufficiently diligent and an affidavit of documents should be ordered.
- [18] In the *Gardner* case, however, it was noted at para. 49 that:
- The plaintiff has identified in its Notice of Application particular documents that the defendant has omitted to list and has attached copies of some of those documents to the affidavit filed in support of his application.
- [19] Here there is no evidence of the existence of specific documents that have not been produced. There is nothing more than suspicion on the part of Qtrade and arguments that such documents must exist.
- [20] Credential relies, amongst other things, on the decision in *Murphy Battista v. McGivern*, 2007 BCSC 1172. After considering cases in which affidavits of documents had been ordered, Mr. Justice Halfyard noted that in those cases there was actual evidence of documents that had not been disclosed and held:
- [22] On an application of this kind, I think the applicant must present evidence which supports the inference that there are more relevant documents that are or have been in the possession or control of the defendant, but which have not yet been disclosed. In his alternative argument, Mr. Carpick asks the court to draw this inference on the basis of the piecemeal and late disclosure made thus far by the defendants, together with the improbability that no records or notes of discussions would have been made.
- [23] There is direct evidence from several persons which negatives the alleged improbability. To my mind, the piecemeal and untimely disclosure does establish a possibility that the inference sought by the plaintiff is true. But in my opinion, these facts cannot and do not

establish a probability that as yet undisclosed relevant documents now exist, or have existed. It may not be necessary for the applicant to prove this required fact on the balance of probabilities, although it is unnecessary for me to decide this issue. But I think there must be at least some probability that the necessary fact is true. A mere possibility will not support a court order.

- [24] As to the second aspect of the plaintiff's application, I was unable to ascertain any separate or independent ground upon which the defendants could be ordered to deliver a further supplementary list of documents. As I see it, to make such an order would be to assume that there are relevant documents in existence which have not yet been disclosed by the defendants. As I have stated, the evidence does not support such a conclusion.
- [21] Similarly here, the mere suspicion that documents exist is not sufficient to found either an order for further production of documents or an order for an affidavit of documents. In my view, these suspicions are more properly dealt with on an examination for discovery. This aspect of the defendants' application is therefore denied.

### Disclosure of Bundled Material

- [22] Qtrade complains that certain electronic documents produced by Credential are aggregates of all computer logs covering sign-in attempts. They seek an order that Credential filter out the irrelevant sign-in attempts and produce only material relevant to these proceedings.
- [23] Mr. Davenport deposes:
5. I noticed that in the Notice of Application the Defendants have referred specifically to documents CR003436, CRD003437, and CRD003439 - CRD003448. It is important to note these are electronic documents that were obtained from Credential's computer servers. They are not physical documents in that they are not designed to be printed and reviewed in hard copy. These documents are technical in nature and they are designed to be viewed and analyzed on a computer.
- [24] He then describes the nature of each file and concludes:
10. Requests made to the Server are listed chronologically. Each entry in the Log Files contains data regarding the user's activity on the Server including the date and time of the request, the web page being requested, and the user's Internet Protocol address ("IP Address"). This data can be used to identify instances in which KnowledgeXchange and other applications requiring user authentication were accessed from a specific IP Address. For example, the Log Files may be used to help establish instances where KnowledgeXchange was accessed from an IP Address registered to Qtrade.

12. Credential does not have the ability to filter the Log Files in a way that would exclude certain entries such as requests that do not relate to KnowledgeXchange or that originated from an IP Address believed to be unrelated to this lawsuit. These kinds of modifications to the Log Files would require specialized software and may require the assistance of a third party with specific expertise in the field of analyzing Internet traffic.
- [25] Qtrade says that the evidence of Mr. Davenport, quoted above, is inconsistent. If Credential can use the files to show when KnowledgeXchange was accessed, they should be able to winnow out the irrelevant data.
- [26] Qtrade's Chief Technology Officer, Colin Wrinch, says Credential could remove from these log files those sign-in's that access an application other than KnowledgeXchange or that come from an IP address that is not relevant to the claim.
- [27] Without that, Mr. Wrinch says Qtrade is unable to tell from the information presented whether any particular sign-in accessed the KnowledgeXchange system and says that Qtrade would be required to review those files manually, which would be prohibitively time consuming and expensive.
- [28] In the circumstances, I order that Credential advise Qtrade forthwith specifically how to determine which sign-ins are relevant to these proceedings. If Credential cannot accomplish that, then in the alternative Credential will make inquiries of appropriate computer experts and ascertain and advise Qtrade of what would be required and how much it is estimated to cost to separate the relevant from the irrelevant data in these files.
- [29] There will be liberty to apply if the parties are unable to come to a reasonable resolution of this matter.

### Examinations for Discovery

- [30] Although it is not sought in either party's Notice of Application, there were submissions made that suggested I should order examinations for discovery to proceed in this matter before the end of March.
- [31] The evidence of Qtrade is that its representatives cannot be available in the first three months of 2014 as that is their busiest time of the year and they cannot afford to spare a representative for a discovery in this time period.
- [32] Qtrade also notes that although the trial of this matter is scheduled for later this year, delays in the proceeding have been delays of Credential, not of Qtrade's making. They point out that the action was commenced in 2007 but not actively pursued until 2012 and that despite my order being made for production of documents in December 2012, those documents were not forthcoming until August 2013.

[33] As there is no proper application before me, and as the orders made herein may impact the timing of future steps in this action, I direct that the parties either enter a Case Planning Order by consent or schedule a Case Planning Conference before me upon receipt of these reasons to deal with the scheduling of future steps in this matter.

#### Application of the Plaintiffs

[34] Credential seeks to amend its Notice of Civil Claim in two basic respects:

- a) to clarify that the wrongful access to KnowledgeXchange may have been accomplished by the individual defendants sharing their passwords and login information with others at Qtrade rather than or in addition to directly accessing the site themselves, and
- b) to plead that KnowledgeXchange is a "web application" rather than a database and that the "digital infrastructure relating to the design, digital framework, navigation and functionality" is confidential and proprietary information that was also improperly accessed and misappropriated by Qtrade.

[35] The second issue was raised at the application before me in November 2012. In my reasons of December 14, 2012, I noted:

[38] Although it is not pleaded, Credential submits that in addition to misappropriating the documents on the KnowledgeXchange website, "Qtrade and its employees accessed, and were privy to, the digital infrastructure of KnowledgeXchange. Credential's claim is that Qtrade misappropriated information about the design and functionality of KnowledgeXchange and has used this information to market its services to Credential's client base." It therefore seeks documents relating to the development and revision of the defendants' system.

[39] As there is no pleading that the digital infrastructure was misappropriated and wrongly used, the documents sought cannot go to prove or disprove a material fact. Their production, therefore, must be ordered in accordance with R. 7-1(11).

[36] Credential submits that it was of the view that its pleading was broad enough to incorporate this claim, and that it was not until my decision that it became aware there was an issue in this regard.

[37] Credential submits that these amendments are necessary to ensure that the issues between the parties are decided on the merits. It further submits that the amendments sought would not change the nature of this action or materially change the scope of the claims being advanced.

- [38] Qtrade, on the other hand, submits that the amendments raise new causes of action that would substantially expand the pleadings and change the course of the action. Qtrade submits that the new causes of action are statute barred by the provisions of the Copyright Act, R.S.C. 1985, c. C-42, and the Limitation Act, R.S.B.C. 1996 c. 266 and therefore the amendments should only be granted if just and convenient to do so.
- [39] Qtrade submits that the passage of time, loss of relevant and material evidence, such as the loss of the email accounts of Don Rolfe, Helen Blackburn, Rob McLean and Jane Mitchell when they ceased to be employed by Credential, the lack of explanation for the delay and the length and course of the litigation to date all militate against allowing this amendment.

### Cause of Action

- [40] Critical to the argument of Qtrade is its assertion that the amendments raise new causes of action. Because of what I am told is the sparseness of the law relating to what constitutes a cause of action for the purposes of amendments, the defendants turn to judicial considerations of what constitutes a cause of action from the law relating to cause of action estoppel.
- [41] In particular, there is a detailed consideration of what constitutes a cause of action in *Grant McLeod Contracting Ltd. v. Forestech Industries Ltd.*, 2008 BCSC 756. In part, Mr. Justice Josephson noted:
- [19] In order to determine whether the claims advanced in this action constitute a separate and distinct cause of action, it is first necessary to address what constitutes a cause of action.
- [20] In the context of cause of action estoppel, one definition often quoted is the following statement from Diplock L.J. in *Letang v. Cooper*, [1965] 1 Q.B. 232 at 242-43 (C.A.):

A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

The B.C. Court of Appeal accepted this definition in *Mohl* at ¶23.

- [21] In *Comeau v. Breau* 1994 CanLII 4469 (NB CA), (1994), 145 N.B.R. (2d) 329 (C.A.), the New Brunswick Court of Appeal defined "cause of action" in the context of cause of action estoppel as the combination of facts which give rise to the right of action by a party against another in the first action. At ¶18 the court held:

The appellants argue that an action founded in tort cannot be res judicata with one founded in contract. They miss the point. What is the same in this case is the "cause of action", that is, the combination of facts which gave rise to the right of action pursued by Comeau against the others in the first action. Because the appellants framed their action in contract in one case and in tort in the second action does not change the determinative issues which the first court heard and decided and the second court was asked to redetermine but with a different result as the objective.

[22] In the issue estoppel case of *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 S.C.R. 460, Binnie J. for the Court provided the following definition of "cause of action" at ¶54:

A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common.

[23] Black's Law Dictionary, 8th ed., s.v. "cause of action" defines a cause of action as:

1. A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person

Under the same heading, Black's Law Dictionary also defines "new cause of action":

A claim not arising out of or relating to the conduct, occurrence, or transaction contained in the original pleading

[42] Credential submits this statement of the law is not applicable in this context. In my view, however, these descriptions obviously apply whether the cause of action is being looked at in the context of cause of action estoppel or in the context of amendments to pleadings. What constitutes a cause of action must logically be consistent.

### **Amendments Regarding the Individual Defendants**

[43] Qtrade submits that who accessed and misappropriated confidential information is central to the claim made by Credential. It submits that the Statement of Claim clearly sets out as its factual foundation that it was the individual defendants who were involved in the alleged access and misappropriation and not others.

[44] While the tenor of the Statement of Claim is certainly that the individual defendants were the persons who accessed and took confidential information, there are other pleadings that broaden the ambit of that pleading, including a claim in the alternative that the defendants "conspired and combined together" to misappropriate the confidential and proprietary information.

[45] It seems to me that this pleading is broad enough to encompass a misappropriation that was achieved other than by the individual defendants accessing the database personally or directly.

[46] As a result, in my view the proposed amendments relating to who accessed the database do not raise a new cause of action and no limitation issue arises.

- [47] It is not disputed that in those circumstances amendments should be granted liberally in order to enable the real issues between the parties to be decided. As a result, the application with respect to those amendments is allowed.

#### Amendments Regarding the Digital Infrastructure

- [48] It is necessary to analyze the original Statement of Claim in order to consider the impact of these proposed amendments.
- [49] The original pleadings regarding KnowledgeXchange are as follows:
17. CAM [a plaintiff company] is a national retail mutual fund dealer that provides mutual fund products, services and related and ancillary services to its customers. CAM developed, owns and operates KnowledgeXchange® ("KnowledgeXchange"), an electronic database that contains all necessary brokerage documentation, compliance manuals, operating procedures, and sales practices to operate the investment businesses of [the plaintiffs.]
  27. KnowledgeXchange is a computer database containing, inter alia, all compliance information regarding investment dealing, all forms and documentation required to provide brokerage services, all manuals regarding the provision of services, investment documentation and information, and information, and guidebooks, and electronic advisory tools for effective sales relating to the business of [the plaintiffs.]
  28. The information contained in KnowledgeXchange is confidential and proprietary to [the plaintiffs.]
  31. While employed at Qtrade, Le, Kolodziej and Wallia, between September 14, 2005 and April 11, 2007, individually or together, repeatedly and systematically accessed the KnowledgeXchange database without authorization to gain improper and unauthorized access to and misappropriate the Plaintiffs' confidential and proprietary information. In particular, between on or about September 14, 2005 and on or about April 11, 2007, the Defendants accessed and misappropriated the following confidential and proprietary information belonging to the Plaintiffs from [Credential's] computer system:
- [50] There is then a list, covering 2 ½ single spaced pages, of over 100 specific forms, manuals, publications and tools alleged to have been accessed and misappropriated.
- [51] The proposed amendments are as follows:
17. CAM [a plaintiff company] is a national retail mutual fund dealer that provides mutual fund products, services and related and ancillary services to its customers. CAM developed, owns and operates KnowledgeXchange® ("KnowledgeXchange"), an electronic database that contains all necessary a web application by which access can be obtained to information that is confidential and proprietary such as brokerage documentation, compliance manuals, operating procedures, and sales practices to operate the investment businesses of [the plaintiffs.]

27. KnowledgeXchange is a computer database containing, inter alia, web application by which access can be obtained to information that is confidential and proprietary to [the plaintiffs] including, inter alia:
- (a) all compliance information regarding investment dealing, all forms and documentation required to provide brokerage services, all manuals regarding the provision of services, investment documentation and information, and information, and guidebooks, and electronic advisory tools for effective sales relating to the business of [the plaintiffs]; and
  - (b) The information contained in digital infrastructure relating to the design, digital framework, navigation and functionality of KnowledgeXchange is confidential and proprietary to [the plaintiffs.]

(collectively, the "Confidential and Proprietary Information").

28. The Confidential and Proprietary Information contains trade secrets of the Plaintiffs.
31. While employed at Qtrade, Le, Kolodziej and Wallia, between September 14, 2005 and April 11, 2007, individually or together, repeatedly and systematically accessed the KnowledgeXchange database without authorization to gain improper and unauthorized access to and misappropriate the Plaintiffs' confidential and proprietary information. In particular, between on or about September 14, 2005 and on or about April 11, 2007, the Defendants accessed and misappropriated the following confidential and proprietary information belonging to the Plaintiffs from [Credential's] computer system: Confidential and Proprietary Information.

...

34. In particular, between on or about September 14, 2005 and on or about April 11, 2007, the Defendants and/or employees of Qtrade used the Login Information and the computer system of Qtrade to access and misappropriate the following confidential information and proprietary information belonging to the Plaintiffs:

[the same list of forms, manuals, publications and tools is then set out]

35. In addition, the Defendants and/or employees or agents of Qtrade used the Login Information and computer system of Qtrade to unlawfully and without authorization access and misappropriate the digital infrastructure relating to the design, digital framework, navigation and functionality of KnowledgeXchange.
- [52] The proposed amendments clearly change the "operative facts" from pleading that the defendants accessed an electronic filing cabinet and misappropriated documents from it, to them having also accessed and misappropriated a proprietary web system. One claim relates to taking material stored on a KnowledgeXchange database and the other adds the taking of the proprietary basis for KnowledgeXchange itself - which has changed from a database into a complex web application.

- [53] Although the claims arise from the same circumstances and some of the material facts in support of the two claims are the same, the claims diverge to the point that they cannot be said to be the same cause of action.
- [54] Qtrade submits that the limitation period has run with respect to this new cause of action. It says that the plaintiff knew of the alleged wrongs no later than June 11, 2007, when Credential sent letters to Qtrade and the named employees with respect to the allegations.
- [55] The Copyright Act, s. 43.1(1) provides for a three year limitation period from the time the plaintiff knew of the alleged breach.
- [56] Based on the transition provisions in s. 30 of the new Limitation Act, SBC 2013, c. 13, the Limitation Act applicable to the claims other than copyright is the former act.
- [57] Qtrade argues that the claims in tort are subject to a two year limitation period pursuant to the old Limitation Act, s. 3(2)(a), which provides:
- (2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
- (a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;
- [58] In my view that position is not correct. That provision of the old Limitation Act was considered by the Court of Appeal in *W.C.B. (B.C.) v. Genstar Corp.*, 1986 CanLII 722 (BC CA), where the court held:
- [14] This case illustrates the unfortunate ambiguities which remain in the Limitation Act, notwithstanding recent attempts to clarify its provisions. Genstar contends that its joinder is governed by s. 3(1)(a) of the Act, which provides for a two-year limitation period. Section 3(1) (a) reads as follows:
3. (1) After the expiration of 2 years after the date on which the right to do so arose a person shall not bring an action
- (a) for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty.
- [15] It is evident that s. 3(1)(a) applies only if the action is for damages in respect of "injury to property". Genstar contends that the claim against it falls within this phrase. The Workers' Compensation Board, on the other hand, contends that it does not, with the result that the six-year limitation period provided by s. 3(4) governs:
- (4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

- [16] I cannot accept Genstar's contention that the action against it is for damages for "injury to property". I am persuaded by the authorities that "injury to property" refers to the situation where property is damaged by an extrinsic act, and not to the situation where a claim is made for damage occasioned by defects in the property itself. In *Alberni Dist. Credit Union v. Cambridge Properties Ltd.* 1985 CanLII 567 (BC CA), (1985), 65 B.C.L.R. 297 (C.A.), the issue, as in the case at bar, was whether the limitation period applicable to a claim for defects in the building was the two-year limitation provided by s. 3(1)(a) of the Limitation Act, or the six-year limitation period provided by s. 3(4). Esson J.A., speaking for the court, held that the action was not one in respect of "injury to property", as the "building simply has not, in plain language, been injured". Accordingly, the six-year limitation period was held to apply. Counsel for Genstar seeks to distinguish the Alberni case on the grounds that the claim there was for breach of contract rather than in tort. In my opinion, that distinction cannot be sustained. Whether the action is brought in contract or tort, damage is an essential element of it. The question in each case is whether that damage comes within the phrase "injury to property".
- [59] What is alleged here is wrongful access and misappropriation, there is no suggestion of injury to property and the appropriate limitation period would be six years pursuant to ss. 3(5) and 3(6)(c).
- [60] Credential argues that the limitation period has not expired as the cause of action was confirmed by Qtrade or was postponed in accordance with s. 6 of the old Limitation Act. It submits that these issues should not be determined on a summary application, but should be left for trial.
- [61] I am not persuaded by the arguments of the plaintiff with respect to confirmation of the cause of action as the alleged confirmation does not meet the requirements of ss. 5(2) of the old Limitation Act. The alleged confirmation consists solely of an admission that two of the individual defendants accessed KnowledgeXchange during the time of their employment with Qtrade.
- [62] Nor am I persuaded that the postponement provisions of the old Limitation Act might apply to hold off the running of time for this claim. No evidence was provided that Credential lacked knowledge of the material facts or the identity of a defendant. Counsel submitted that this would have to be canvassed on examination for discovery but, as there is no suggestion that the plaintiff was in the dark regarding these allegations, discovery of Qtrade cannot possibly assist them.
- [63] Six years from June 11, 2007 is June 11, 2013. I thus conclude that the limitation period has run and the proposed digital infrastructure claim would be barred by the effluxion of time but for s. 4(4) of the old Limitation Act, which provides:

- (4) In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, even if between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

[64] The parties referred me to the decision of the Court of Appeal in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 BCLR (3d) 282 in which the factors to be considered on an application to amend pleadings after the expiry of a limitation period are discussed at para. 67 as follows:

67 In the exercise of a judge's discretion, the length of delay, the reasons for delay and the expiry of the limitation period are all factors to be considered, but none of those factors should be considered in isolation. Regard must also be had for the presence or absence of prejudice, and the extent of the connection, if any, between the existing claims and the proposed new cause of action. Nor do I think that a plaintiff's explanation for delay must necessarily exculpate him from all "fault" or "culpability" before the court may exercise its discretion in his favour. This case is a good example. The plaintiff sought legal advice and accepted a lawyer's opinion to the effect that it did not have a claim against insurers under the policy. The lawyer was subsequently persuaded that his initial opinion was unduly pessimistic and that there was at least some prospect of success in advancing such a claim. Unfortunately, the limitation period had passed.

[65] In addition, the decision of the Court of Appeal in *Chouinard v. O'Connor*, 2011 BCCA 161 was referred to, in particular at para. 21 for the finding of the court that these factors are not an exhaustive list and that the overriding concern must always be whether the proposed amendment will be "just and convenient".

[66] The delay here of more than six years since discovery of the alleged wrongs is extensive.

[67] The only rationale advanced for the delay in pleading this claim was that counsel was of the view that the existing pleading was broad enough to encompass the claim regarding the digital infrastructure. There is no evidence from Credential in support of this submission.

[68] That excuse obviously fell away at the time counsel received my reasons of December 14, 2012.

[69] There is no explanation of why an application to advance the digital infrastructure claim was not made before the expiry of the 6 year limitation period on June 11, 2013, or indeed as to why it took over a year from discovering a problem with the pleadings until the application was brought.

[70] Counsel for Credential submitted that Qtrade had notice, on that application and since, of Credential's intention to raise the claim regarding the digital infrastructure, that they cannot be surprised by the proposed amendments and that the timing of this application cannot have undermined Qtrade's ability to respond.

- [71] Credential says there is no prejudice to Qtrade that cannot be compensated by costs and that the proposed claim regarding the digital infrastructure is obviously closely connected with the original claim, arising, as it does, from the same alleged actions of the individual defendants and Qtrade in accessing KnowledgeXchange.
- [72] Thus Credential submits that it is just and convenient for the proposed claim to be allowed.
- [73] Qtrade, however, says that where an application is brought for leave to plead a statute barred cause of action, prejudice is presumed and that not only has Credential not rebutted that presumption, but Qtrade has brought evidence of actual prejudice as well. Qtrade points particularly to the deletion by Credential of email accounts of several key former employees of Credential. It is submitted that these accounts would undoubtedly have had documents relevant to the new claim. That these former employees are no longer employed with Credential obviously raises the potential that they will not be available to testify at the trial of this matter.
- [74] I agree that some prejudice must be presumed given the expiry of the limitation period. There is nothing before me, however, that would allow me to determine whether there is any real prejudice that will arise from the deleted documents. It may well be that most are available from other sources. Further, the digital infrastructure claim would seem to me to be more likely illuminated by documents in the possession of Qtrade and by an expert comparison of the two systems and any changes made to the Qtrade system after the defendants accessed KnowledgeXchange.
- [75] There is no question that the proposed amendments would delay these already protracted proceedings. The claim would be much expanded. Given the technical nature of the document disclosure that would be required and the undoubted need for an expert or experts to opine on the nature of the two web systems involved, the trial dates presently booked for May 2014 would be lost.
- [76] The Court of Appeal in Chouinard at para. 23 confirmed that prejudice for the purposes of an application to amend consists of "only those matters that affect a defendant's ability to defend the case", such as loss of documents or unavailability of witnesses. Matters such as delay, increase in complexity and losing trial dates are matters more properly labelled hardship and inconvenience. They are, however, "factors that the judge can take into account in determining whether it is "just and convenient" to allow a cause of action to be added after the expiry of the limitation period." Chouinard, para. 26.
- [77] As I have already noted, I consider the delay in this matter to be extensive. It is certainly longer than the delay in Chouinard, which was also considered extensive. While the delay prior to my reasons of December 14, 2012 has some explanation, there is none for the delay of more than a year after that. That delay is consistent with the general failure by Credential to press this matter diligently, seen in the period of limited activity from 2007 to 2012 and the length of time taken to comply with my order of December 14, 2013 regarding document production.

- [78] Combined with the lack of connection of the proposed digital infrastructure claim to the existing claim, which would result in a significant expansion of the ambit of the claim, and considering the potential prejudice and hardship, I conclude that it would not be just and convenient to allow these amendments.
- [79] Credential submits that if I conclude that it would not be just and convenient to allow the amendments, that I should permit the amendments without prejudice to Qtrade's right to raise a limitations defence at trial.
- [80] I have concluded that to do so would be unjust. It would result in an expansion of this claim with all the attendant hardship and potential for prejudice discussed above.
- [81] Therefore, the application to amend the claim to include the digital infrastructure claim is denied.
- [82] Given the divided success, each party will bear its own costs.

"Master Muir"

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