

CANADA / JUDGMENT

Gourlay v. Crystal Mountain Resorts Ltd.

2020 BCCA 191

COURT

British Columbia Court of Appeal

DECIDED

6 July 2020

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2020 BCCA 191 Gourlay v. Crystal Mountain Resorts Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gourlay v. Crystal Mountain Resorts Ltd.,

2020 BCCA 191

Date: 20200706

Docket: CA46236

Between:

Kevin Gourlay

Appellant

(Plaintiff)

And

Crystal Mountain Resorts Ltd.,

Crystal Ski & Golf Resort Inc., and John Doe

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated June 26, 2019 (Gourlay v. Crystal Mountain Resorts Ltd., 2019 BCSC 1134, Vernon Registry No. S53213).

Counsel for the Appellant (via videoconference):

J.D. Cotter

C.T. Hart

Counsel for the Respondents, Crystal Mountain Resorts Ltd., and Crystal Ski & Golf Resort Inc. (via videoconference):

M. Gianacopoulos

A. Render

Place and Date of Hearing:

Vancouver, British Columbia

June 2, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 6, 2020

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

Summary:

Appeal by the plaintiff (ski patroller) in a personal injury action arising from a chairlift incident, from an order permitting the defendant (ski resort) to amend its response to civil claim to plead the action is barred by the Workers Compensation Act. As a result of that amendment the trial was adjourned to await a determination by the Workers' Compensation Appeal Tribunal as to whether the plaintiff's injuries arose out of and in the course of his employment. The plaintiff contends the amendment should not have been permitted because the parties agreed liability is not in issue and consented to a case plan order to that effect. In the alternative, the plaintiff submits the parties agreed to have damages assessed by a judge acting as an arbitrator. The plaintiff also challenges the chambers judge's decision not to award him costs of the amendment/ adjournment application and costs thrown away of the trial. Last, he submits an undertaking

should have been imposed requiring the defendant to pay him the equivalent of any lost workers' compensation should the action be statute barred: Held: Appeal dismissed. Both the amendment and adjournment were appropriate. The case plan order does not preclude the defendant from raising the statutory bar and it was proper to adjourn the trial to await the Tribunal's decision. The record does not support the contention the parties had agreed to have a judge act as an arbitrator. There is no basis to interfere with the chamber judge's discretionary costs decisions. Although the judge failed to address the plaintiff's request for an undertaking, there is no need to remit that issue. The plaintiff applied for workers' compensation within time and there is nothing to indicate he would not be entitled to compensation from the date of the incident should his action be barred.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] This appeal arises in the context of a personal injury action for damages commenced by Kevin Gourlay in the Supreme Court of British Columbia against Crystal Mountain Resorts Ltd. and Crystal Ski & Golf Resort Inc. (collectively "Crystal Mountain"). Mr. Gourlay appeals from Justice Hori's order: (a) granting Crystal Mountain's application to adjourn the trial less than a week before it was to start; (b) permitting Crystal Mountain to amend its pleadings to allege the action is barred by the Workers Compensation Act, R.S.B.C. 1996, c. 492, repealed and re-enacted as R.S.B.C. 2019, c. 1, in force April 6, 2020 [WCA]; (c) declining to award Mr. Gourlay costs of the application and costs thrown away of the trial; and (d) failing to require Crystal Mountain to undertake to pay him the equivalent of any workers' compensation he might lose should the action be statute barred. A significant factor in this appeal is that approximately one and one half years earlier the parties agreed to limit the trial to the issue of damages and consented to a case plan order to that effect.
- [2] For the reasons that follow, I would dismiss this appeal.

Workers Compensation Act Provisions

- [3] The relevant provisions of WCA in force at the time of the chambers judge's decision and their current equivalents are set out below:

R.S.B.C. 1996, c. 492

R.S.B.C. 2019, c. 1

Limitations of actions, election and subrogation

Limitation on legal proceedings against employers or workers

10 The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of

the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

127(1) Subject to subsection (2),

(a) the compensation provisions are in place of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker or a dependant or family member of the worker is or may be entitled against

(i) the employer of the worker,

(ii) an employer within the scope of the compensation provisions, or

(iii) any other worker,

in respect of any personal injury, disablement or death of the worker arising out of and in the course of employment, and

(b) no action lies in respect of such an injury, disablement or death.

(2) Subsection (1) applies only if the action or conduct of

(a) the employer or the employer's servant or agent, or

(b) the other worker,

that caused the breach of duty of care arose out of and in the course of employment within the scope of the compensation provisions.

Exclusive Jurisdiction

Exclusive jurisdiction of appeal tribunal

254 The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under this Part and to make any order permitted to be made, including the following:

(c) all matters that the appeal tribunal is requested to determine under section 257;

308 The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under this Part and to make any order permitted to be made, including the following:

(c) all matters that the appeal tribunal is requested to determine under section 311;

Appeal tribunal decision or action final

Appeal tribunal decision or action final

255(1) Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.

- (2) Proceedings by or before the chair or appeal tribunal under this Part must not
 - (a) be restrained by injunction, prohibition or other process or proceeding in any court, or
 - (b) be removed by certiorari or otherwise into any court.
- (3) The Board must comply with a final decision of the appeal tribunal made in an appeal under this Part.
- (4) A party in whose favour the appeal tribunal makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the Supreme Court.
- (5) A final decision filed under subsection (4) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

309(1) Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.

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Certification to court

Request for appeal tribunal certification to court

257(1) Where an action is commenced based on

- (a) a disability caused by occupational disease,
- (b) a personal injury, or
- (c) death,

the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.

- (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether
 - (a) a person was, at the time the cause of action arose, a worker,
 - (b) the injury, disability or death of a worker arose out of, and in the course of, the worker's employment,
 - (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
 - (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.
- (3) This Part, except section 253(4), applies to proceedings under this section as if the proceedings were an appeal under this Part.

311(1) If a court action is commenced based on

- (a) a personal injury,
- (b) death, or
- (c) a disability caused by occupational disease,

the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.

- (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether
 - (a) a person was, at the time the cause of action arose, a worker,
 - (b) a worker's injury, death or disability arose out of, and in the course of, the worker's employment,
 - (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
 - (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of the compensation provisions.
- (3) This Part, except section 306(4), applies to proceedings under this section as if the proceedings were an appeal under this Part.

Factual Background

- [4] Crystal Mountain Ski Resort is near West Kelowna, British Columbia. On March 1, 2014, Mr. Gourlay and his spouse, Meagan Harvey, were injured in a chairlift incident. Both were members of the ski patrol. The ski resort closed immediately after the incident.
- [5] Crystal Mountain is an "employer" under the WCA. Shortly after the incident, both Mr. Gourlay and Ms. Harvey submitted claims to WorkSafeBC (i.e., the Workers' Compensation Board, or "WCB") for compensation under the WCA.
- [6] On March 6, 2014, WorkSafeBC wrote to Crystal Mountain in connection with Ms. Harvey's claim, directing it to file an employer's report as required by the WCA. In that letter, Crystal Mountain is referred to as the "employer" and Ms. Harvey as its "employee" and "worker". Crystal Mountain's office manager completed that report, describing Ms. Harvey as a "ski patroller"/"volunteer" who is not paid any wages. (This information comes from Ms. Harvey's WorkSafeBC file, which is in the appeal book. The appeal book does not contain Mr. Gourlay's WorkSafeBC file, but it is not disputed that the office manager also completed a report with respect to him.)
- [7] In the course of assessing Mr. Gourlay's and Ms. Harvey's claims, WorkSafeBC spoke to a person at Crystal Mountain who supervises the ski patrol.
- [8] On March 19, 2014, an Entitlement Officer with WorkSafeBC wrote separately to Mr. Gourlay and Ms. Harvey denying their WCB claims on the basis they were not in an employment relationship with Crystal Mountain. Those letters, copies of which were sent to Crystal Mountain, contain the following:

Evidence

- You were hired by Crystal Mountain Resorts Ltd. to work on a volunteer basis as a ski patrol for 2013-2014 season
- As a volunteer you were committed to provide 11 shifts
- As a volunteer you received one adult seasonal lift pass
- As a volunteer you do not receive any money

Decision

The evidence on file supports that you were required to fulfill a minimal number of shifts and in lieu of compensation receive a season ski pass of minimal value while volunteering at Crystal Mountain Resorts Ltd. This does not create an employment relationship and therefore you are not considered a worker covered by the Workers Compensation Act.

The letters advised Mr. Gourlay and Ms. Harvey of their right to request a review by the Review Division. Neither sought a review.

- [9] In early 2016, Mr. Gourlay and Ms. Harvey retained the same counsel to commence separate civil actions against Crystal Mountain. For convenience, I will refer to that person simply as "Mr. Gourlay's counsel".
- [10] Crystal Mountain filed responses in both actions. The responses did not plead the actions are barred by the WCA.
- [11] Ms. Harvey's examination for discovery took place on May 9, 2017. She stated she and Mr. Gourlay received the following benefits from Crystal Mountain for being on the ski patrol: (a) seasonal ski passes; (b) discounts on ski waxing; (c) restaurant discounts (possibly 50%); (d) an occasional family pass; and (e) coverage under a disability insurance program. She received lost-work disability benefits covering four weeks and reimbursement for some medical expenses. Mr. Gourlay was not covered for disability insurance as he was a student (i.e., unemployed) at the time of the incident. Ms. Harvey said their respective WCB benefits claims were denied because they "weren't compensated enough to be considered a worker". She said she had some material on the denial that her counsel could produce.
- [12] On January 5, 2018, a consent order was made ordering a joint case planning conference for the Gourlay and Harvey actions and a similar action commenced by L.W. arising out of the chairlift incident.
- [13] On January 22, 2018, just prior to a case planning conference, Crystal Mountain's counsel sent a letter to Mr. Gourlay's counsel and L.W.'s counsel. The body of that letter reads:

This letter will confirm the terms agreed to on the resolution of the liability issue in the above-referenced cases.

It is agreed between the parties that each case will proceed separately to trial on the issue of damages and that liability will not be contested by the defendants.

The plaintiffs have agreed to limit their claim for damages in the following amounts: [amounts omitted]

The plaintiffs each agree that should their case proceed to trial and judgement is awarded in excess of the amount set out above, the defendants will only be liable up to and including the amount individually agreed to by each plaintiff in this letter, plus taxable costs and disbursements.

Each plaintiff has also agreed not to amend the Notice of Civil Claim to claim either exemplary or punitive damages.

There should be no reference during either the Case Planning Conference today or in the resulting Case Plan Order to the limit of liability under the policy insuring the defendants or to the agreement between the parties as to the allocation of the limit between the three claims. This letter will serve as the agreement between the parties as to the allocation of the insurance limits. I have amended the draft Case Plan Orders in each case to reflect this. The draft orders are attached.

Assuming you both agree with the terms outlined in this letter, would you kindly sign this letter where indicated and return same to me in due course.

Counsel for Mr. Gourlay, Ms. Harvey and L.W. signed the letter.

[14] The case planning conference continued later on January 22, 2018. That day, the presiding judge, with the consent of the parties, made case plan orders in the three actions, the operative terms of which read:

THIS COURT ORDERS that:

1. The trial of this matter will deal with the assessment of damages only;
2. The defendants have agreed to pay damages as assessed at trial or as negotiated;
3. The issue of liability will not be adjudicated and will not be an issue in this litigation;
4. The plaintiff will not claim punitive or exemplary damages.

As L.W.'s action is not relevant to this appeal, nothing further need be said about it.

[15] Mr. Gourlay's examination for discovery took place on March 2, 2018. He was not asked to provide any WCB-related documents.

[16] The trial of the Gourlay action was set to commence on July 2, 2019, for eight days with a jury. The trial of the Harvey action was set to commence on August 12, 2019, without a jury. The Harvey action was scheduled to be heard at the same time as another damages action brought by Ms. Harvey arising from a motor vehicle accident that occurred after the chairlift incident.

[17] On January 18, 2019, Crystal Mountain's counsel sent an email to Mr. Gourlay's counsel concerning requests that remained outstanding from Mr. Gourlay's examination for discovery, e.g., tax returns, clinical records, college records. On January 25, 2019, Mr. Gourlay's counsel provided some of the requested documents. Later that day, Crystal Mountain's counsel sent an email requesting tax returns for Mr. Gourlay and Ms. Harvey.

[18] On January 28, 2019, Crystal Mountain's counsel wrote to Mr. Gourlay's counsel requesting:

- (a) With respect to Mr. Gourlay: tax returns for two years post-incident; and
- (b) With respect to Ms. Harvey: among other things, documents relating to (i) the disability insurance benefits she received; and (ii) her WCB benefits claim.

[19] On January 30, 2019, Mr. Gourlay's counsel provided a number of documents but none concerning Ms. Harvey's WCB claim. With respect to that claim, counsel wrote:

3. Ms. Harvey's WCB claim was declined and she was deemed not adequately compensated to be considered a worker under the legislation.

[20] A mediation held on February 1, 2019, was unsuccessful.

[21] Mr. Gourlay and Ms. Harvey filed their respective trial briefs on April 18, 2019. The section entitled "Summary of Issues and Positions" states:

Issues in dispute

Filing party's position

1. Liability

Liability has been admitted by the Defendants.

2. Quantum of damages

The Plaintiff has suffered damages due to the accident including injuries, pain and suffering, cost of care, and special damages.

The trial briefs filed by Crystal Mountain in the Gourlay action (on April 29, 2019) and the Harvey action (on April 30, 2019) state:

Issues in dispute

Filing Party's position

1 LIABILITY

The parties have agreed that liability will not be contested by the defendants Crystal Mountain Resorts Ltd. and Crystal Ski & Golf Resort Inc.

2 DAMAGES

The assessment of damages has not been agreed to and remains in dispute.

[22] On May 10, 2019, Crystal Mountain's counsel--acting pursuant to Rules 7-1(10) and 7-1(11) of the Supreme Court Civil Rules--emailed a request to Mr. Gourlay's counsel for documents not listed on Mr. Gourlay's list of documents. One of the items requested was:

4. Work Safe BC file: Covering the period two years pre-accident to date. (The relevance of this is the investigation consideration and medical assessments made by the work safe people at the time of the incident. As well, it relates to Mr. Gourlay's medical history.)

[23] On May 15, 2019, Mr. Gourlay's counsel advised Crystal Mountain's counsel by email that he would request the WorkSafeBC file as it was something he "would not typically get without a specific request from opposing counsel." In a follow-up letter emailed later that day, Mr. Gourlay's counsel advised he had requested the file.

[24] On May 21, 2019, in the course of an email exchange concerning matters relating to the upcoming trials, Crystal Mountain's counsel wrote:

In the meantime, would you please send me all WCB correspondence you have regarding the question of whether the claims of Mr Gorlay [sic] and Ms Harvey are covered by WCB?

[25] That day, the legal department of the Workers' Compensation Appeal Tribunal ("WCAT") provided Crystal Mountain's counsel with a copy of WCAT Decision No. A1703068 (March 27, 2019). In that decision, the WCAT held that a ski patroller injured while training at a ski resort as a member of a volunteer ski patrol organization was in an employee/employer relationship with that organization and, therefore, a worker within the meaning of the WCA. It further held that the ski patroller was not an employee of the resort.

[26] At a case management conference later on May 21, 2019, Crystal Mountain's counsel advised Hori J. of the WCAT decision and that he was awaiting production of the WCB files. He further stated that Crystal Mountain would likely seek to amend its responses in both actions to plead s. 10 of the WCA as a defence. The WCA creates a comprehensive system of compensation for workers who sustain injuries out of and in the course of their employment. Section 10(1) [now s. 127(1)] bars a worker from bringing an action against an employer or another worker. Counsel also referred to s. 257 [now s. 311], which allows the court or a party to an action to have the question of whether a person is a worker determined by the WCAT. By virtue of ss. 254 and 255 [now ss. 308 and 309], that determination is final.

[27] The chambers judge directed that any application to amend pleadings or to adjourn the trials be brought by June 14, 2019.

[28] On the afternoon of May 21, 2019, Mr. Gourlay's counsel emailed Crystal Mountain's counsel copies of the WorkSafeBC letters denying Mr. Gourlay's and Ms. Harvey's claims.

[29] On May 27, 2019, Crystal Mountain's counsel filed applications with the WCAT for a "Section 257 Determination and Certification to Court" with respect to Mr. Gourlay's and Ms. Harvey's actions.

[30] On May 28, 2019, the person who was general manager of the ski resort in 2014 provided Crystal Mountain's counsel with information concerning the relationship between the resort and members of the ski patrol, including benefits the ski patrollers received in 2014. According to the general manager, those benefits included: (a) a seasonal ski pass valued at \$695; (b) reciprocal rights to ski at no charge or at a 50% discount at certain ski resorts in British Columbia, Alberta, Saskatchewan, and Manitoba; (c) health and disability insurance coverage; (d) free ski and snowboard equipment rental; (e) complimentary ski tickets for

family or friends; and (f) complementary meals.

- [31] On June 3, 2019, the WCAT wrote to counsel for Crystal Mountain and Mr. Gourlay acknowledging receipt of the s. 257 applications. The application relating to Mr. Gourlay was given WCAT No. A1901320, and the one relating to Ms. Harvey was given WCAT No. A1901321. The WCAT stated it requires at least 180 days to make a determination and suggested the trials be adjourned to await its decisions.
- [32] On June 5, 2019, Crystal Mountain filed an application in the Gourlay action seeking the following:
- (a) leave to amend its response to civil claim to plead that at the time of the chairlift incident Mr. Gourlay was a "worker" and that, as a result, his claim is barred by the WCA, in particular by s. 10; and
 - (b) either a six-month stay of the action to await the WCAT's determination of the s. 257 application, or an adjournment of the trial.

In addition, and any event, Crystal Mountain sought an adjournment of the trial based on: (a) incomplete document disclosure; and (b) insufficient time having been set aside for the trial.

Crystal Mountain filed a second application seeking an order that Mr. Gourlay produce certain documents.

- [33] On June 10, 2019, Crystal Mountain filed the same applications in the Harvey action.
- [34] Mr. Gourlay and Ms. Harvey filed their application responses on June 12, 2019. That day, Mr. Gourlay's counsel sent Crystal Mountain's counsel Ms. Harvey's WorkSafeBC file.
- [35] The applications came before the chambers judge on June 20, 2019; he reserved judgment. On June 26, 2019, the judge, in oral reasons for judgment, granted Crystal Mountain leave to amend its pleadings and adjourned both trials generally. He adjourned the production of documents application to await the WCAT's s. 257 determinations.
- [36] The chambers judge made no order with respect to the costs of the applications and denied Mr. Gourlay's and Ms. Harvey's requests for trial costs thrown away. He further ordered that any costs thrown away by the defendant in Ms. Harvey's motor vehicle action be paid in the cause in her action against Crystal Mountain.
- [37] The chambers judge did not address Mr. Gourlay's argument--advanced because the WCA contains time limits with respect to applications for compensation--that a stay or adjournment should be conditional on Crystal Mountain undertaking to pay him the equivalent of any workers' compensation he might lose should the WCAT determination result in his action being barred.

[38] On June 17, 2019, both Mr. Gourlay and Ms. Harvey filed appeals from the chambers judge's order in their respective action. Ms. Harvey later abandoned her appeal and, therefore, only the order in the Gourlay action is now in issue.

Chambers Judge's Reasons

(2019 BCSC 1134)

- [39] In granting Crystal Mountain leave to amend its pleadings to allege the action is barred by the WCA, the chambers judge rejected Mr. Gourlay's submissions that: (a) the January 22, 2018 case plan order estopped Crystal Mountain from amending its pleadings; and (b) the proper course was for Crystal Mountain to apply to set that order aside. The judge further held that a breach of contract action was required to address Mr. Gourlay's assertion that Crystal Mountain had a contractual obligation to pay the damages assessed at a trial.
- [40] The judge adjourned the trial to await the WCAT's determination of the s. 257 application with respect to Mr. Gourlay because that determination could have a "significant persuasive effect" on the trial: para. 22.
- [41] In declining to order costs of the application or costs thrown away in Mr. Gourlay's favour, the judge said this:
- [27] While the defendants may have avoided the need for late applications if they had made more extensive investigations earlier because the defendants had the means to know the worker status of the plaintiffs, the plaintiffs ought to have made WorkSafeBC disclosure earlier than they had. In addition, the parties had no control over the recent publication of the Workers' Compensation Appeal Tribunal decision on volunteers.

Grounds of Appeal

- [42] In his factum, Mr. Gourlay asserts that the chambers judge "erred in law, principle, and fact as follows":
- a. in failing to require [Crystal Mountain] to set aside the consent order before proceeding with the amendment application;
 - b. in determining that, rather than requiring [Crystal Mountain] to apply to set aside the consent order, [Mr. Gourlay] should be required to plead an action on the basis of breach of contract;
 - c. in granting leave to [Crystal Mountain] to amend their Response to Civil Claim to plead a defence based on section 10 of the Workers Compensation Act, RSBC 1996, c 492 (the "section 10 defence"); and
 - d. in failing to exercise his discretion to require [Crystal Mountain] to pay the costs of [Mr. Gourlay] arising from the late requested amendments and the adjournment of [Mr. Gourlay's] trial, and by failing to order the appropriate undertaking.

[43] I will address the first three grounds together, as all focus on the effect of the case plan order.

Analysis

The Effect of the Case Plan Order

[44] What lies at the core of Mr. Gourlay's arguments is the proposition that the case plan order precluded the chambers judge from allowing Crystal Mountain to amend its response to civil claim to plead s. 10 of the WCA. Mr. Gourlay says that unless and until that order is set aside, the damages-assessment phase of his action should proceed to trial. He further says he is entitled to obtain judgment in his favour even if the WCAT determines his injuries arose out of and in the course of his employment.

[45] Mr. Gourlay accepts that, but for case plan order, a determination by the WCAT that his injuries arose out of and in the course of his employment would preclude him from obtaining a judgment against Crystal Mountain. This is because of the "historic trade-off" that lies at the heart of workers' compensation schemes. As Justice Karakatsanis explained in *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] 1 S.C.R. 546:

[51] Workers' compensation schemes in Canada follow the Meredith model, a "historic trade-off" under which workers lose their cause of action against their employers for workplace injuries, but gain coverage under a no-fault insurance scheme (*Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, at para. 29, citing *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 25). Employers are forced to contribute to the scheme, but are freed from potentially crippling liability. These schemes provide guaranteed compensation for injuries arising from industrial diseases or accidents (*Marine Services*, at para. 30).

[Emphasis added.]

[46] It is well established that if there is a question as to whether an action is barred by the provisions of a workers' compensation scheme, then the action should not proceed until the plaintiff's status is determined by the compensation authority with exclusive jurisdiction to decide it. The seminal authority for this proposition is *The Dominion Cannery Ltd. v. Costanza*, [1923] S.C.R. 46, in which the Court considered the provisions of *The Workmen's Compensation Act*, S.O. 1914, c. 25.

[47] In that case, an action for damages was commenced by employees who lived in a company-owned house and contracted typhoid fever from drinking contaminated water from a company-owned well. At the start of the trial, the trial judge permitted Dominion Cannery to amend its defence to add the following:

The statement of claim discloses no cause of action and the defendants will so contend at the trial. If the plaintiffs suffered the damages alleged then the plaintiffs should apply to the Workmen's Compensation Board and are not entitled to maintain this action as same is barred by the provisions of that Act.

[48] The trial judge rejected Dominion Canners's argument that the plaintiffs had no cause of action because what occurred was an "accident"--as that term was defined in the legislation--that entitled them to workers' compensation. A jury found for the plaintiffs and awarded them damages. A majority of the Ontario Supreme Court-Appellate Division (3:2) dismissed Dominion Canners's appeal on the basis that what occurred was not an "accident": (1921), 67 D.L.R. 413 (Ont. C.A.). The dissenting judges would have allowed the appeal and dismissed the action on the basis that what occurred was an "accident" and, therefore, the claims were within the exclusive jurisdiction of the Workmen's Compensation Board.

[49] Dominion Canners appealed to the Supreme Court of Canada. After the appeal was argued and judgment reserved, the Court called for further submissions on the question of whether the courts below had jurisdiction to decide whether The Workmen's Compensation Act barred the action. The majority (4:2) held that neither of those courts had the power to decide that question because it was within the Board's exclusive jurisdiction: at 61. In speaking for the majority, Justice Anglin (as he then was), stated that in any case where the bar might apply, a trial judge should stay proceedings until that issue is decided by the Board (at 62-63):

If the defendant does not plead the statutory bar but facts stated in the pleading or adduced in evidence at the trial indicate that the case might fall within s. 3(1) of the statute and that ss. 15(1) and 60(1) might therefore apply, the court would, I think, be if not obliged certainly free proprio motu, to take cognizance of those provisions and stay further proceedings in the action until the question whether the right to maintain it had been taken away by the Act should be determined by the only competent tribunal. [citations omitted]. Again the defendant would have no interest to have such stay removed. It was probably to meet these difficulties that s.s. 2 was added to s. 15 in 1915 enabling "any party to an action" to apply for the board's adjudication upon the question whether the action is one the right to maintain which is taken away by the statute.

Under the amended statute, in my opinion, whenever this question arises as a substantial issue in the course of an action the proper course to take is to stay proceedings in the action until it has been adjudicated upon by the board. [citation omitted]. In view of the provisions of s. 20 [requiring a worker to give notice of an "accident" as soon as practicable and claim compensation within six months] the workman-plaintiff will be well advised in every case where there is any conceivable ground for contending that his claim falls within the Act to seek the determination of the board at the earliest possible date.

[Emphasis added.]

- [50] Being of the view that the trial judge should have stayed proceedings to permit the Board to determine whether the action was barred, Anglin J. stayed the appeal for that purpose: at 68. Similarly, in *Mack Trucks Manufacturing Co. v. Forget*, [1974] S.C.R. 788 at 791-792, aff'g [1971] 1 O.R. 682 (C.A.), the Supreme Court held that the Court of Appeal for Ontario was right to stay an appeal pending an application to the Workmen's Compensation Board for a decision on whether the plaintiff's action was barred.
- [51] With respect to British Columbia's workers' compensation scheme, in *Alcyon Shipping Co. v. O'Krane*, [1961] S.C.R. 299 at 304-305, and *Farrell v. Workmen's Compensation Board*, [1962] S.C.R. 48 at 51, the Supreme Court held that under the Workmen's Compensation Act, R.S.B.C. 1948, c. 370, the Board was vested with exclusive jurisdiction to determine whether a right of action had been taken away by that Act. In 2003, that jurisdiction was vested in the WCAT: Workers Compensation Amendment Act (No. 2), S.B.C. 2002, c. 66, s. 33, and B.C. Reg. 320/2002.
- [52] *Dominion Cannery* stands for another proposition, namely, that a statutory bar to an action can be raised and given effect at any point in the proceedings, even when the bar has not been pleaded. That is what occurred in *Horvath v. Thring*, 2001 BCCA 551, 93 B.C.L.R. (3d) 51, which although not a workers' compensation case, is relevant to the present appeal.
- [53] Mr. Horvath was a member of the Royal Canadian Mounted Police who was injured while on duty when the motorcycle he was riding collided with a pick-truck driven by Mr. Thring. The collision occurred on a stretch of highway the R.C.M.P. had closed to traffic in preparation for a bicycle race. Mr. Horvath commenced an action against Mr. Thring, General Motors (the owner of the truck), and Her Majesty the Queen in Right of Canada. The Crown was sued on the basis it was vicariously liable for the negligence of unidentified R.C.M.P. officers who had permitted Mr. Thring to proceed south along what was normally a northbound lane.
- [54] Liability was tried first. Crown counsel conceded that if the unidentified officers were at fault for the accident, then the Crown would be vicariously liable. The trial judge found that the accident was caused equally by the negligence of Mr. Thring and the unidentified officers: [1999] B.C.J. No. 809 (S.C.) The order entered to give effect to that finding provided:
- THIS COURT ORDERS that liability is apportioned equally between, on the one hand, the Defendant, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, and on the other hand, the Defendants, DOUGLAS WALTER THRING and GENERAL MOTORS OF CANADA LIMITED, with liability resting jointly and severally with these Defendants, and all of them;
- [55] Sometime after the order was entered, new counsel for the Crown became aware that Mr. Horvath had applied for and been granted a pension under the Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11. This alerted counsel to the potential application of two provisions that bar proceedings against the Crown when a plaintiff has received or may receive benefits or compensation from the Crown, namely, s. 111 of the Pension Act, R.S.C. 1995, c. P-6, and s. 9 of the Crown Liability and Proceedings Act, R.S.C.

1985, c. C-50.

- [56] The Crown applied to amend its statement of defence to plead the statutory bars and for summary dismissal of the claim against it. A chambers judge dismissed that application on the basis that, assuming the trial judge lacked jurisdiction to find the Crown liable, another judge lacked authority to vary the trial judge's order: 2000 BCSC 123. This Court granted the Crown leave to appeal the trial judge's order and the chambers judge's order.
- [57] On appeal, the Crown did not challenge the trial judge's finding that the unidentified officers were 50% "at fault" for the accident. Its position was that in light of the statutory bars, it could not be held liable for the actions of those officers. This Court agreed. In the result, it amended the trial judge's order to reflect his apportionment of fault and dismissed the action against the Crown. In doing so, Justice Newbury equated the statutory bars in the Pension Act and the Crown Liability and Proceedings Act to that in the WCA:
- [14] I am not persuaded that the two types of statutory bar are different in principle. Section 10(1) of the Workers' Compensation Act [sic] applies to bar any right of action to which a worker or the family of a worker is or may be entitled against an employer for injury arising out of and in the course of employment. Similarly, s. 9 of the Crown Liability and Proceedings Act applies to bar a right of action against the Crown where a pension or compensation has been paid or is payable by the Crown, and s. 111 of the Pension Act bars a right of action against Her Majesty in respect of any injury where a pension is or 'may be awarded' under that statute. In each case, it must be shown that the plaintiff 'qualifies' by virtue of his employment, to receive benefits from the statutory scheme. (Under the R.C.M.P. Superannuation Act, it appears the member is not even required to show that his disability is related in any way to his employment.) Once it is shown the plaintiff was or is a member of the R.C.M.P. and has been injured, he is entitled, or "may be entitled" in future to an award, and the statutory bar operates. As [counsel for the Crown] noted, moreover, there was evidence before [the trial judge] of the fact of Mr. Horvath's occupation and his injury, so that it was not necessary for Her Majesty to prove by additional evidence that he had in fact been granted a pension or the promise of one.
- [15] In the final analysis, I find that as in the workers' compensation cases, the making of an order of liability in the face of the statutory bars was unlawful, even though no one at the time realized it. The evidence necessary for the raising of the issue was before the Court, which could properly have raised it of its own motion. It is unfortunate the bars were not brought to the Court's attention; but the fact that they were not, and that an order was entered, does not in my view validate an otherwise unlawful order. The statutes referred to above and the interests of justice require that the appeal be allowed from [the trial judge's] order. It is unnecessary, I hope, to add that this is in no way a reflection on the trial judge.

[Emphasis added.]

Having dismissed the action as statute barred, this Court did not find it necessary to deal with the appeal from the chambers judge's order: para. 16.

- [58] The predominant view in the Supreme Court of British Columbia is to stay proceedings when the issue of whether a right of action has been taken away by workers' compensation legislation arises, so that the WCB, and now the WCAT, can make its determination: *Hazell v. Toews*, [1997] B.C.J. No. 2495 (S.C.) (defendant permitted to amend pleadings); *Zacharias v. Lo*, [1999] B.C.J. No. 881 (S.C.) (defendant permitted to amend pleadings); *Chau v. Crawford*, 2015 BCSC 1756; *Garritty v. Richmond Kinsmen Home Support Society*, 2016 BCSC 2204. In *Canadian Pacific Limited v. Jones Estate*, 1989 CarswellBC 1620 (S.C.), the stay was granted at the end of the liability phase of a trial; in *Davidson v. Kokanee Park Marine*, 2001 BCSC 940, the stay was granted after a jury had awarded the plaintiff damages.
- [59] Mr. Gourlay submits the case plan order distinguishes his case from those to which I have just referred. He says that by reason of the doctrine of estoppel, as long as that order is in place: (a) it is not open to Crystal Mountain to dispute liability; and (b) the Supreme Court is obligated to assess damages and grant an order in his favour. In support of this argument Mr. Gourlay cites *Haley v. Brown* (1990), 44 B.C.L.R. (2d) 134 (S.C.), leave to appeal ref'd 1990 CarswellBC 1215 (C.A.), and *Ingenhaag v. Burdock*, [1991] B.C.J. No. 995 (S.C.). I do not find those decisions to have any application in the present circumstances. Both involved split trials in which liability and quantum had been severed. After the respective defendants were found liable and orders to that effect had been entered, they applied to amend their respective pleadings to raise a new defence to liability. Those applications were denied. However, in neither case was there a possibility that the plaintiff's right to bring an action in the first place had been removed by statute.
- [60] Mr. Gourlay also seeks to draw a parallel between his case and cases he says stand for the proposition that a defendant who admits or accepts liability will not be permitted to rely on a limitation period. In particular, he quotes the following from the judgment of Justice Hutcheson in *Remedios v. Morey* (1965), 53 D.L.R. (2d) 38 at 46 (B.C.S.C.), appeal dismissed (1966), 57 D.L.R. (2d) 550 (B.C.C.A.):

The [*Cohen v. Snelling*, [1943] 2 All E.R. 577 (C.A.) and *Wright v. John Bagnall & Sons, Ltd.*, [1900] 2 Q.B. 240 (C.A.)] cases are authority for the proposition that where the negotiations have reached the point that liability has definitely been accepted by the defendants leaving only the quantum of damages or compensation to be agreed upon or settled the defendants will not be allowed to plead a statutory limitation which would impeach that liability.

- [61] Appellate authorities also note that a defendant can, by their conduct, be prohibited from relying on a limitation defence by the doctrines of estoppel and/or waiver: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 1 S.C.R. 50 at 58-59; *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 at 67-68; *Hrynenko v. Hrynenko* (1998), 58 B.C.L.R. (3d) 258 at para. 44 (C.A.). However, I do not find it necessary to discuss the cases Mr. Gourlay cites in any detail as the parallel he seeks to draw is inapt. A limitation period is an

affirmative defence that must be pleaded: *Chouinard v. Army & Navy Dept. Store Ltd.*, 2008 BCCA 353 at para. 5, 83 B.C.L.R. (4th) 292. A defendant who pleads a limitation defence is asserting that the plaintiff has lost their entitlement to pursue a cause of action because the plaintiff failed to commence proceedings within a statutorily prescribed period. Put otherwise, a limitation period is a time-bar that may negate a plaintiff's right to pursue an action they otherwise would have a right to pursue; the right of action otherwise exists.

- [62] On the other hand, an employer who says a cause of action is statute barred because the plaintiff is a worker whose injuries arose out of and in the course of employment is saying the action is one the plaintiff was never entitled to pursue. If a plaintiff was a worker, then, by virtue of s. 10 [now s. 127] of the WCA, their right to bring an action against an employer never arose; its existence was "taken away" ab initio (i.e., from the beginning) by statute: *Dominion Cannery* at 62. As Justice Cumming (then of the Supreme Court of British Columbia) stated in *Jones Estate*:
- [355] What must be borne in mind is that the provisions of the Act do more than simply provide a defence to an action; they go to the standing of the plaintiffs to maintain their action in the first place.
- [63] To succeed in an action a plaintiff must have a claim that is justiciable in the court in which the action is brought; that court must have jurisdiction over the subject matter and authority to grant the remedy sought. However, an essential aspect of the "historic trade-off" is the removal of curial jurisdiction over worker versus employer personal injury claims for which the worker is entitled to compensation under a workers' compensation scheme. In British Columbia, if the WCAT determines a worker is entitled to such compensation then, regardless of when that determination is made, no court has jurisdiction to grant the worker a remedy in damages against an employer.
- [64] That the parties consented to an order limiting the issue to be tried in Mr. Gourlay's action cannot give the Supreme Court of British Columbia jurisdiction to assess damages and direct Crystal Mountain to pay them if that Court does not have jurisdiction over that action. It is well established that consent cannot confer jurisdiction. In *Township of Cornwall v. Ottawa and New York Railway. Co.* (1916), 52 S.C.R. 466, aff'd [1917] A.C. 399 (J.C.P.C.), Justice Duff (as he then was) said this (at 497):

Consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived, otherwise it cannot. Where want of jurisdiction touches the subject matter of the controversy or where the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative.

Indeed, this principle is referred to in *Dominion Cannery*, wherein Anglin J. stated (at 66-67):

Where a court is deprived of jurisdiction over a subject by statute no acquiescence--not even express consent--can confer jurisdiction upon it.

See also: *First Majestic Silver Corp. v. Santos*, 2014 BCCA 115 at paras. 35-36, 372 D.L.R. (4th) 628, leave to appeal ref'd [2014] 3 S.C.R. x.

- [65] The case plan order in the present case was intended to govern the proceedings of an action moving forward. For Mr. Gourlay to obtain a judgment against Crystal Mountain he must have a justiciable cause of action against it. I do not accept Mr. Gourlay's argument that because Crystal Mountain's agreement not to contest liability is expressed in a court order, the Supreme Court has authority to grant judgment in his favour even if he does not have a justiciable cause of action. I agree with Crystal Mountain that there was no need for it to apply to set the case plan order aside. If the WCAT determines that Mr. Gourlay has a justiciable cause of action, then the trial will proceed in accordance with that order.
- [66] Mr. Gourlay advances one further argument that needs to be addressed, namely, that the parties agreed to constitute the Supreme Court of British Columbia as a "private tribunal" entitled to award him damages even if he does not have a justiciable cause of action. Mr. Gourlay did not take this point before the chambers judge, nor is it referred to in his factum. He first raised it in his reply factum and mentioned it in oral reply, relying on the following cases: *The Canadian Pacific Railway Company v. Fleming* (1893), 22 S.C.R. 33; *Wong Soon v. Gareb*, [1935] 2 D.L.R. 415 (B.C.C.A.); and *Conant Paints Ltd. v. Clark*, [1955] 2 D.L.R. 151 (Ont. C.A.). I do not find these cases applicable given how Mr. Gourlay and Crystal Mountain have conducted this litigation.
- [67] In *Fleming*, Mr. Fleming commenced an action against a railway company for damages sustained as a result of a collision with a locomotive. That action went to trial before a judge of the Supreme Court of New Brunswick sitting with a jury. At that time, in New Brunswick, only a jury had authority to decide questions of fact and assess damages. At the conclusion of the evidence counsel consented to the case being withdrawn from the jury and referred to the Supreme Court sitting in banc for decision. The agreement was entered in the Court's minutes.
- [68] The case was then decided by six judges, one of whom had been the trial judge. A majority (4:2) found for Mr. Fleming and awarded him damages: (1892), 31 N.B.R. 318. The railway appealed to Supreme Court of Canada. On that appeal, Mr. Fleming took a preliminary objection to that Court's jurisdiction, submitting that the company could no more appeal to the Supreme Court than it could if the matter had been decided by private arbitrators. A majority of the Court (3:2) agreed and quashed the appeal, describing the in banc judges as having acted as "quasi arbitrators": at 36. The dissenting judges would have allowed the appeal.
- [69] In *Wong Soon*, an action was commenced in the Supreme Court of British Columbia for damages for trespass and to recover possession of property. The parties entered into a written agreement that a County Court judge would try the matter in the County Court. With the consent of the parties, a local judge of the Supreme Court made an order purporting to give effect to that agreement under the provisions of the County Courts Act, R.S.B.C. 1924. C.

53. Later, a County Court judge found for the plaintiff and the defendant appealed. The appeal was quashed on the basis that the local judge did not have jurisdiction to order the action tried in the County Court; therefore, no appeal was available. This Court found that the parties had agreed to have a County Court judge act as an arbitrator.

- [70] In *Conant Paints*, the parties agreed a local judge of the Supreme Court of Ontario could hear a debt-related matter beyond his jurisdiction. In holding that an appeal from the judge's decision did not lie, the Court of Appeal held that the parties had consented to "the determination of their rights outside of the ordinary course of the Court": at 154-155.
- [71] There is also *Saxon v. Saxon*, [1978] 4 W.W.R. 327 (B.C.C.A.). In that case, a local judge of the Supreme Court of British Columbia tried an action that was beyond his jurisdiction. The case is unusual in that the judge, who had raised the question of his jurisdiction at the outset, held that the parties by their conduct had consented to his acting as a quasi-arbitrator: [1976] 4 W.W.R. 300 at 304. In the result, the judge issued an arbitral award in Mrs. Saxon's favour. In subsequent proceedings relating to the enforcement of that award, this Court agreed that Mr. Saxon had consented to the judge acting as a quasi-arbitrator: at 332-333.
- [72] Returning to the present case, nothing in the record could possibly support a finding that the parties consented to damages being assessed by a Supreme Court judge sitting as an arbitrator. Their conduct throughout is consistent only with an intention to have damages assessed by a judge sitting qua judge. Of note is that both the written agreement and case plan order refer to damages being assessed at a "trial".
- [73] I cannot help but note that if Mr. Gourlay were correct that the parties agreed to arbitrate damages, then it is likely he would not have a right to appeal the chambers judge's order, as it may have formed part of the arbitral proceedings.
- [74] As for the chambers judge having granted Crystal Mountain leave to plead the WCA, that was a discretionary decision subject to considerable appellate deference. This Court will not interfere absent an error in principle, a palpable and overriding error, or a demonstrated injustice: *British Columbia (Civil Forfeiture) v. Vo*, 2013 BCCA 279 at para. 10, 340 B.C.A.C. 18. Once Crystal Mountain raised the issue of whether Mr. Gourlay's action was statutorily barred, it was appropriate for that issue to be reflected in the pleadings. Nevertheless, the absence of such a pleading would not preclude a court from giving effect to a statutory bar. As mentioned above, in *Dominion Cannerys*, the Supreme Court of Canada held that an action should be stayed even when a workers' compensation bar has not been pleaded, and in *Horvath*, this Court dismissed an action based on statutory bars that had not been pleaded.

- [75] I wish to note that I have not found it necessary to address whether Mr. Gourlay would be able to maintain a breach of contract action against Crystal Mountain should his present action be statute barred. That issue is best left to be decided in a properly-pleaded breach of contract action.
- [76] In conclusion, I would not accede to Mr. Gourlay's arguments that the chambers judge erred in granting Crystal Mountain leave to amend its pleadings and in adjourning the trial to await the WCAT's decision.

The Decision Not to Award Costs

- [77] Costs awards are discretionary and entitled to appellate deference. As Justice Arbour stated in *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27, [2004] 1 S.C.R. 303, "[a] court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong".
- [78] Mr. Gourlay contends the chambers judge erred in not awarding him costs of Crystal Mountain's application or costs thrown away occasioned by the adjournment of the trial. His position is that the judge erred in placing any responsibility on him for the late revelation that his action may be statute barred. In particular, Mr. Gourlay submits the judge was "palpably wrong" in finding he ought to have made earlier disclosure of WorkSafeBC documents. In other words, he says the judge made an "obvious" error: *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38, [2016] 2 S.C.R. 352. I disagree. In my view, it was open to the judge to find Mr. Gourlay should have disclosed the WorkSafeBC documents earlier than he did.
- [79] It is clear that shortly after the chairlift incident both parties were aware, or ought to have been aware, of the possibility that the WCA might have a bearing on Mr. Gourlay's entitlement to compensation for his injuries. However, neither party availed themselves of the opportunity provided by s. 257 [now s. 311] of the WCA to have the WCAT make the determination central to Mr. Gourlay's right to maintain his action until considerable time had passed. As I read the chambers judge's reasons, he found that inaction by both parties--which can be gleaned from a fair reading of the record--led to the late application to amend and the need to adjourn the trial to await the WCAT's determination.
- [80] I would not accede to this ground of appeal.

The Decision Not to Impose an Undertaking

- [81] Before the chambers judge, Mr. Gourlay submitted any amendment or adjournment should be conditional on Crystal Mountain undertaking to pay him, in the event the WCAT's decision results in his action being statute barred, the equivalent of the workers' compensation he would have received but for the delay in making the s. 257 application. Such an undertaking was imposed in *Parmar v. Virk* (1995), 9 B.C.L.R. (3d) 394 at para. 26 (C.A. Chambers), as a condition of granting leave to appeal the order of a Supreme Court

judge dismissing an appeal from the order of a master refusing leave to amend a statement of defence to plead s. 10 of the WCA; that appeal was not prosecuted. As reflected in *Roberts v. Pearson*, 2018 BCSC 504 at paras. 19-25, these undertakings have also been imposed by Supreme Court masters and judges. They are predicated on the fact that the WCA requires an application for compensation to be filed within one year after the date of an injury, etc., except in "special circumstances": s. 55 [now s. 151].

[82] The chambers judge did not address the undertaking issue in his oral reasons. It is regrettable counsel did not draw that omission to his attention immediately after he delivered those reasons so that he could have dealt with it forthwith. Certainly, counsel could have raised the matter with him prior to the formal order being entered three months later.

[83] I see no need to remit this issue for decision. I say that because Mr. Gourlay has failed to demonstrate such an undertaking would be appropriate in his circumstances. This case is unlike those in which undertakings have been imposed as here Mr. Gourlay applied for workers' compensation within days of the chairlift incident. This Court has not been directed to anything that suggests the WCB would not treat his entitlement to compensation as running from the date of the incident, should it transpire that his action is statute barred.

[84] I would not accede to this ground of appeal.

Disposition

[85] I would dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Goepel"

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