
CANADA / JUDGMENT

Sauve v. Maxxam Insurance Services Incorporated

2016 BCSC 894

COURT

Supreme Court of British Columbia

DECIDED

20 May 2016

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2016 BCSC 894 Sauve v. Maxxam Insurance Services Incorporated

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sauve v. Maxxam Insurance Services Incorporated,

2016 BCSC 894

Date: 20160520

Docket: 12-2923

Registry: Victoria

Between:

Teresa Maureen Sauve

and Ronald Edwin Lang

Plaintiffs

And:

Maxxam Insurance Services Incorporated,

Maxxam Insurance Services (Burnaby) Ltd.

and Bill Rai

Defendants

And:

Hub International Canada West ULC dba

Hub International Barton Insurance Brokers,
Teresa Maureen Sauve and Donald Edwin Lang

Defendants by Counterclaim

Before: Master Bouck

Reasons for Judgment

Counsel for the Plaintiffs:

J.M. Aiyadurai

Counsel for the Defendants:

D. Jackson

Counsel for the Defendants by Counterclaim Hub International Canada West ULC dba Hub
International Barton Insurance Brokers

L. Tsang

Place and Date of Hearing:

Victoria, B.C.

April 28, 2016

Place and Date of Judgment:

Victoria, B.C.

May 20, 2016

Introduction

- [1] These reasons address applications brought by the plaintiffs and the defendants, respectively, seeking disclosure of certain documents. While the defendants' application is fairly straightforward, the relief sought by the plaintiffs requires a more in depth consideration of disclosure requirements under SCCR 7-1(11) and (14). The plaintiffs also seek an order compelling the defendant Rai to answer "requests" made at an examination for discovery held in January 2014. Those requests mirror the document disclosure sought on the application.

Background Facts

- [2] The background information which follows is derived from the pleadings and affidavit material filed in support of the applications. I make no specific findings of fact.

- [3] The plaintiffs have both worked extensively in the local insurance industry. Ms. Sauve is described in the pleadings as an insurance broker, while Mr. Lang is described as a road service agent and later manager.
- [4] The defendant Rai is also a long-time insurance agent and broker and the controlling mind and alter ego of the co-defendants Maxxam Insurance Services Inc. ("Maxxam Victoria") and Maxxam Insurance Services (Burnaby) Ltd. ("Maxxam Burnaby"). According to the defendants' response to civil claim, Maxxam Victoria was formerly known as Empress Insurance Services Incorporated ("Empress") which in turn operated as a Sussex Insurance franchise. The name change occurred in 2007 following the defendant Rai's purchase of all shares in Empress. Maxxam Burnaby operates as an insurance call centre under the direction of the defendant Rai.
- [5] The defendant by counterclaim Hub is the former employer of both plaintiffs and Mr. Lang's current employer. Ms. Sauve is no longer in the workforce.
- [6] This litigation arose as a result of the plaintiffs' employment and business relationship with the defendants Maxxam Victoria and Rai. The plaintiffs and defendants disagree on even the most basic elements of that relationship including when and how it began, why it ended and the particular employment terms.
- [7] The plaintiffs say that they were lured from their employment with Hub (or its otherwise named predecessor) by the defendant Rai's verbal promises of a shareholding interest in Maxxam Victoria. The defendants deny this allegation or, in the alternative, allege that any such promise was predicated on the plaintiffs' good performance in their respective positions. The defendants say that both plaintiffs failed in that regard.
- [8] Both of the plaintiffs signed employment contracts with Maxxam Victoria. Neither contract references shares being issued to the plaintiffs. The plaintiffs nonetheless believed that the revenue each brought into the business from insurance sales was enhancing the value of the promised shares. There exist two documents entitled "Underlying Trust Agreement" which are purportedly signed by Mr. Rai and acknowledge that he would divest a percentage of non-voting shares in Maxxam Victoria to each of the plaintiffs. The document states that the share valuation will be conducted "upon retirement or change in career". In fact, only one share has ever been issued by Maxxam Victoria since its incorporation and that share, in Mr. Rai's name, is now fully encumbered.
- [9] The plaintiffs also plead that monies from sales transactions that each brought into Maxxam Victoria was diverted by the defendants for improper purposes, including to pay for the ownership of a condominium used by Mr. Rai's alleged girlfriend (and Maxxam employee) Tanya Coutu and for the benefit of Maxxam Burnaby. The defendant Rai admits that monies received into Maxxam Victoria and Maxxam Burnaby have been co-mingled. Mr. Rai also admits that Maxxam Victoria revenues were used to buy his golf club membership and pay for other personal expenses. Mr. Rai makes no apologies for using Maxxam funds for these personal expenses given that he is the owner and sole officer of both companies.

- [10] According to the plaintiffs, Ms. Sauve's working relationship with Maxxam Victoria broke down in or about 2011; Mr. Lang's employment relationship ended in the following year. Mr. Lang went to work with Hub in 2012. Upon their departure, the plaintiffs each requested redemption of the shares held in Maxxam Victoria. The plaintiffs then learned that such shares had never been issued.
- [11] In their counterclaim, the defendants say that the plaintiff Lang and Hub are using confidential client lists to solicit business to the detriment of Maxxam Victoria and Maxxam Burnaby. The defendants' response makes reference to a "particularly valuable" client, Metro Lexus Toyota Victoria ("Metro"), which is said to have moved all of its business from Maxxam Victoria to Hub in 2012. That client list and related information is the subject matter of the defendants' application for additional document disclosure.
- [12] The plaintiffs claim the following relief against all defendants:
- general damages;
 - a declaration that each of them is a constructive trustee for the benefit of the plaintiffs of the share(s) issued by the defendants Maxxam;
 - a declaration that each of the defendants is a constructive trustee for and on behalf of the plaintiffs of the defendants' revenues misappropriated or otherwise improperly used for the benefits of other persons or corporations;
 - a declaration that Mr. Rai owes a fiduciary duty to the plaintiffs and breached that duty;
 - the equitable remedy of tracing monies misappropriated or otherwise improperly used for others' benefit;
 - an accounting and valuation to determine the proper value of Maxxam Victoria and the monetary value of the share or monetary entitlement;
 - rescission of the employment contracts;
 - damages on a quantum meruit basis based on the value of benefits the plaintiffs bestowed on the defendant Maxxam Victoria and the lost opportunity costs to the plaintiffs of providing services to Maxxam Victoria instead of pursuing other ways of earning income.
- [13] In terms of material facts underpinning most of this relief, the plaintiffs' amended notice of civil claim pleads:
27. The Defendant Maxxam's revenues have been misappropriated or otherwise improperly transferred to, or used for the benefit of, other persons and corporations including, inter alia, the Defendant Rai and the Defendant Maxxam Burnaby and Tanya Coutu.
 28. The Defendant Rai and the Defendant Maxxam Burnaby have improperly received monies from the Defendant Maxxam and have done so in the absence of good faith and without paying good consideration for those monies.

29. The Defendant Rai and the Defendant Maxxam used the revenues of the Defendant Maxxam for purposes that were not for the benefit of the Defendant Maxxam. These include:
- (a) the Defendant Maxxam paying the mortgage payments on a condominium not used for the benefit of the Defendant Maxxam;
 - (b) the Defendant Maxxam paying Tanva Coutu an inordinately high salary;
 - (c) the Defendant Maxxam paying expenses that were incurred by the Defendant Maxxam Burnaby and/or using the Defendant Maxxam's resources to benefit the Defendant Maxxam Burnaby; and
 - (d) the Defendant Maxxam paying for the Defendant Rai's personal expenses, including, but not limited to, his personal vehicle.
- [14] The defendants deny these allegations and say that, in fact, Maxxam Burnaby monies have been transferred to Maxxam Victoria in order to keep the latter company solvent.
- [15] The defendants' counterclaim seeks injunctive relief restraining Ms. Sauve, Mr. Lang and Hub from using confidential information allegedly acquired from Maxxam Victoria. In addition, the defendants claim an accounting of profits and commissions received directly or indirectly by Ms. Sauve, Mr. Lang and/or Hub using the confidential information. The defendants say that the plaintiff Lang deliberately omitted to record telephone contact information of clientele acquired through his employment and thus thwarted Maxxam Victoria's ability to follow up with clientele for renewal policies.
- [16] This litigation has moved along in fits and starts.
- [17] On December 9, 2015, the court dismissed the plaintiffs' summary trial application, finding that the matter was unsuitable for that process. The relief sought in the summary trial application is narrower than that pled in the notice of civil claim. The summary trial notice of application sought an award of damages representing a percentage interest in Maxxam Victoria reflecting the value of the plaintiffs' promised shareholdings, the appointment of an expert to value Maxxam Victoria and directions on what that valuation would encompass.
- [18] Based on the wide-ranging facts and claims pled by both the plaintiffs and the defendants, all parties have sought extensive document disclosure. Pursuant to a case plan order made on February 25, 2016, the parties were to bring applications for document production orders by April 30, 2016.
- [19] Hub says that it has complied with all of its document disclosure obligations. Three supplemental lists of documents have been delivered, one on the eve of this application. Hub and the defendants blame each other for the circumstance of this apparent late delivery. The defendants' counsel has been unable to review all of the recently disclosed documents with his client.

- [20] Despite this action having been commenced in 2012, no trial date has been set as all parties wish to pursue resolution of the claims at a judicial settlement conference.

The Law

- [21] In support of their application, the plaintiffs rely on SCCR 7-1(10), (11) and (12). The defendants' notice of application cites SCCR 7-1(12), (13), (15), (16) and (17). Before describing the specifics of the applications, it is appropriate to review the parameters of document disclosure under the SCCR and, in particular, the parties' obligations with respect to document disclosure under the so-called "first tier" [the plaintiffs' application] and the "second tier" [the defendants' application]. A helpful summary of the present state of the law is found in *Imperial Parking Canada Corp. v. Anderson*, 2014 BCSC 989 at paras. 13-26:

Discovery of Documents under Supreme Court Civil Rule 7-1

- [13] Much of the discussion which follows is derived from *Beihl v. Strang*, 2010 BCSC 1391, *Edwards v. Ganzer*, 2012 BCSC 138, and Kent "Discovery of Documents Under Supreme Court Civil Rule 7-1: Technical and Evidentiary Conundrums", 70 Advocate 703, (2012).
- [14] The Supreme Court Civil Rules which came into effect July 1, 2010 impose limits on the discovery process. The "new" rules changed the procedure for discovery and inspection of documents.
- [15] Rule 26 of the former Supreme Court Rules required each party upon demand to deliver a "list of documents that are or have been in the party's possession or control relating to every matter in question in the action". The old rule was broadly interpreted in accordance with the test described in the famous case, *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.) in which the Court of Appeal stated:

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to train of inquiry, which may have either of these two consequences ...

[Emphasis in original.]

- [16] As applied in B.C., the above principle obliged parties to make discovery of often a very substantial number of documents, many of which were subsequently determined to be largely irrelevant to the issues in dispute. However, according to the introduction to the new rules, "Peruvian Guano is mortally wounded if not already dead".

[17] Rule 7-1 contemplates the following:

- production within 35 days of the end of the pleading period,
- of a list of documents that are or have been in the party's possession or control,
- which could, if available, be used by any party of record at trial to prove or disprove a material fact [emphasis added], including
- all other documents to which the party intends to refer at trial,
- mandatory ongoing discovery of additional documents initially omitted through inaccuracy/incompleteness or arising through subsequent possession/control, by way of "prompt amendment" of the list of documents,
- the ability of a party to make demand for discovery of additional documents not set out on the list which "relate to any or all matters in question in the action" (the "old" test) provided justification is supplied, and
- prohibition of the use at trial of any document of which discovery has not been made.

[18] In short, Rule 7-1 contemplates a two-tier document discovery process involving:

1. initial discovery that may be relatively narrow; and
2. further discovery on demand of broader classes of documents.

The First Tier

[19] The first tier of document discovery applies the "probative of material facts" test. It is much more narrow than any Peruvian Guano "direct/indirect, relating to matters in question/train of inquiry possibility" test.

[20] The concept of "material facts" requires a careful analysis and understanding of the causes of action/defence in each case. Each cause of action, whether it is negligence, breach of contract, conspiracy or simple debt, is broken down into constituent elements i.e. the components that must be established on the evidence in order to make out the cause of action/defence. The factual underpinnings of these elements are the "material facts" and to the extent that they can be proved/disproved by way of documents, the latter are the documents that must be initially disclosed under Rule 7-1(1).

[21] Under the new rules, plaintiffs and defendants must plead the "material facts". Part 1 of the notice of civil claim requires the plaintiff to "set out a concise statement of the material facts giving rise to the plaintiffs claim". A defendant's response to civil claim must admit, deny or disclaim knowledge of those facts, must set out the defendant's own version of the facts including any additional "material facts relevant to the matters raised".

[22] Hence, reference to the facts that have been specifically pleaded in the pleadings can assist in determining what are the "material facts" in relation to which document discovery must occur. If the pleadings are poorly drafted or otherwise inadequate, careful analysis of the material elements of the cause of action sought to be pleaded will be required to "inform" the proper document discovery process.

The Second Tier

[23] Subsections 7-1(10) and (11) provide for the second tier of the new document discovery process. They allow a party to demand the listing/production of additional documents or classes of documents beyond what has already been disclosed. But there is a major difference between the two subsections, namely,

- a demand under Rule 7-1(10) is for additional documents that should have been disclosed under subrule (1) i.e. documents that are probative of a material fact or any other document to which the party intends to refer at trial, whereas
- the additional documents that may be demanded under Rule 7-1(11) are for such additional documents within the listing party's "possession, power or control" and which "relate to any or all matters in question in the action" i.e. the Peruvian Guano discovery under the former rules with the addition of the word "power".

[24] A demand for broader discovery of documents under Rule 7-1(11) must be accompanied by:

- a written demand identifying additional documents or classes of documents with reasonable specificity, and
- an indication of the reason why such additional documents or classes of documents should be disclosed in the case.

[25] This "two-tiered" process of initial narrow discovery of documents followed by broader discovery of documents upon justifiable demand requires a rigorous assessment of the adequacy of any party's discovery of documents. Casual, pro-forma approaches should be avoided. Counsel have an ethical and professional duty to be diligent and to act with scrupulous integrity with respect to the pursuit and assessment of what documents must be produced and what documents need not be produced.

[26] Competent and ethical counsel can reasonably disagree in any given case on the materiality of certain facts or the relevance of documents related to such facts. Indeed, Rule 7-1 expressly contemplates such disputes being brought for and resolved by the court. But proper and professional conduct does not permit deliberate non-disclosure of documents which are required to be disclosed, nor knowing disregard of the Rules based on cynical assumptions respecting strategy or cost. The discovery of documents under the new rule demands good judgment and utmost integrity, perhaps even more so than in the past.

Discussion

[22] Although the parties have levelled criticism at one another over the lack of specificity in document disclosure demands and, for that matter, in the rejections of those demands, I am satisfied that the obligations under Rule 7-1(12) have largely, if imperfectly, been met. I will now turn to the relief sought in each of the applications.

A. The plaintiffs' application

[23] The plaintiffs' application is properly framed in that they seek an order that the defendants amend and serve their list of documents. The additional documents sought to be listed are as follows:

- i All documents relating to Maxxam Victoria ceasing to be a franchise of the franchisor Sussex;
- ii. All payroll records and T4 slips for all employees at Maxxam Victoria from November 2008 to March 31, 2013;
- iii. All employment contracts entered into between Maxxam Victoria and its employees during the business years which end March 31, 2011, March 31, 2012 and March 31, 2013;
- iv. All credit card records of the three Mastercards held by Maxxam Victoria and/or Mr. Rai showing all transactions made using those cards between April 1, 2010 and March 31, 2013;
- v. All financial statements, including income statements, for Maxxam Victoria and Maxxam Burnaby for the years ending March 31, 2012 and March 31, 2013;
- vi. All records showing commissions earned by employees of Maxxam Victoria from January 1, 2007 to March 31, 2013;
- vii. All records of the insurance policies that each employee at Maxxam Victoria sold for the years ending March 31, 2007 until March 31, 2013 (records of the numbers of policies each employee sold is sufficient);
- viii. All records showing the number of point of sale machines in Maxxam Victoria's premises in 2012 and which bank accounts each of those point of sale machines made deposits to;
- ix. All records showing the breakdown of bank charges and interest charges for the year ending March 31, 2011 for Maxxam Victoria;
- x. For Maxxam Victoria for the 2012 and 2013 taxation years, all notices of assessments/reassessment issued by the Canada Revenue Agency ("CRA") and all tax returns and supporting financial statements;
- xi. All bank records from 2006 to March 31, 2013 for the Bank of Montreal account, RBC account and Island Savings account used by Maxxam Victoria;

xii. All records of revenue that the Motomaxx product generated for Maxxam Victoria from the date of the inception of that product until March 31, 2013;

xiii. All Mr. Rai's T4 and other tax slips, tax returns and CRA notices of assessment/reassessment for the 2011, 2012 and 2013 taxation years; and

xiv. All financial statements, tax returns, and CRA notices of assessment/reassessment for Maxxam Burnaby from October 2008 to the year ending March 31, 2013.

[24] Some of the relief was not argued as it was either abandoned or the particular documents have already been produced.

[25] The plaintiffs submit that the outstanding documents fall with the first tier of disclosure and ought to have been already listed by the defendants. In the alternative, if the documents fall with the second tier, the documents are said to be relevant and producible on the following grounds:

- some are relevant to the issue of whether revenues of Maxxam Victoria were used to pay for Mr. Rai's personal expenses and Maxxam Burnaby's expenses;
- some are relevant to the issue of whether Maxxam Victoria paid certain employees' inordinately high salaries (i.e. Tanya Coutu) and whether some employees of Maxxam Victoria were actually providing services to Maxxam Burnaby's call centre; and
- some are relevant to obtaining and executing an order for a tracing, accounting and valuation of Maxxam Victoria.

[26] In opposing the application, the defendants draw an analogy between the relief sought in this action and the remedies available in a shareholders oppression proceeding. It is submitted that the plaintiffs are not entitled to any source documents or raw data that might reveal the financial dealings or workings of the Maxxam defendants beyond what has already been produced or agreed to be produced: *Brown v. Dee Lake Resort Ltd.*, 2012 BCSC 647 at paras. 15-16.

[27] The remedies sought by the plaintiffs in their notice of civil claim are very broad and while perhaps not novel, certainly out of the ordinary. Whether any of the plaintiffs' claims or remedies have a foundation in law is to be determined by the trial judge. Meanwhile, document disclosure obligations arise from the content of pleadings.

[28] In addressing the plaintiffs' application, I must decide whether the particular document or category of documents can be used to prove the factual underpinnings of a cause of action pled and/or whether a broader disclosure obligation is warranted because the documents relate to any matter in question in the litigation: *Imperial Parking, Global Pacific Concepts Inc. v. Owners of Strata Plan NW 141*, 2011 BCSC 1752. Even if broader document disclosure might be appropriate, however, the court may still excuse the defendants' compliance with the plaintiffs' demand on the basis that such disclosure is inconsistent with proportionality objectives or for other reasons: *SCCR 7-1(14)*, 1-3, *Przybysz v. Crowe*, 2011 BCSC 731.

- [29] At the end of the day, all of the plaintiffs' claims and remedies rest on the proving that one or both of them is entitled to a financial interest in Maxxam Victoria. They must also prove the value of that interest, but I can see no way of avoiding the use of expert evidence to determine that value.
- [30] The plaintiffs have certainly put the defendants' business practices in issue in the pleadings. In terms of the material facts to be proven, the defendants have admitted that monies have flowed between Maxxam Victoria and Maxxam Burnaby during the course of the plaintiffs' employment relationship. The defendant Rai has also admitted to using Maxxam monies to pay for personal expenses. Whether that flow or use of monies was improper is a matter of legal argument, not document disclosure.
- [31] Even if the plaintiffs can prove entitlement to an interest in Maxxam Victoria, they may not be entitled to disclosure of all of the defendants' financial records and dealings. It will be up to the trial judge to decide whether a tracing, accounting or some other remedy is justified. Only then could the court entertain disclosure orders that are equivalent to a financial audit. In that regard, I agree with the defendants that the breadth of disclosure sought by the plaintiffs goes beyond what even a valid shareholder is entitled to see from a company in an oppression action or otherwise. It seems incongruous that a purported shareholder could have greater access a company's financial and business records than an actual shareholder. Furthermore, I am not persuaded that the breadth of the disclosure sought is necessary to advance the plaintiffs' case at trial or disprove the defendants' case. For example, the employment contracts and payroll records of the company are of no assistance in establishing the plaintiffs' interest in the business as shareholders. While not raised by the defendants, I am also of the view that any utility in these particular documents do not justify the invasion of the privacy of various individual employees. In addition, there is the potential for mischief, and further privacy invasions, if company banking records are ordered disclosed to the plaintiffs who at the end of the day might be deemed mere employees of Maxxam Victoria. Mr. Rai's credit card statements, the general ledger, company financial statements and other documents already disclosed can assist the plaintiffs in determining how corporate revenues were used. Finally, other than their summary trial application proposing the appointment of a chartered accountant to value Maxxam Victoria, the plaintiffs give no indication that financial source documents are needed to instruct their own expert for trial. Indeed, there is no evidence suggesting that an expert has been retained for that purpose.
- [32] I will order that the defendants amend their list to include the notices of assessments or re-assessments as requested in items x. and xiii. above. The defendants agree to list, or have already listed, the documents requested in item i., iv, v., vi. No further document disclosure will be ordered at this time.

B. The defendants' application

- [33] The defendants seek an order that Hub amend its list of documents to contain the following:

- a) all records relating to policies sold by Hub to former Maxxam clients during the two year period commencing on May 31, 2012, such policies to include ICBC and the following spreadsheets from the defendants' Amended List of Documents, dated January 6, 2014, wherein Ron Lang (REL) is noted as the producer with respect client policies is-sued by Maxxam:
- 1.64 - the Metro client list from 2011 -12;
 - 1.66 - other clients processed by REL from 2011-12;
 - 1.67 - other clients processed by REL from 2010-11; AND
- b) records showing all clients whom Ronald Lang sold auto policies to in the two year period starting on June 16, 2012.
- [34] As noted, the defendants are unable to definitively state that Hub has not complied with this demand. Based on the affidavit material, I am unable to reach any conclusion in that regard. Hub is not obliged to produce the records referred to in paragraph 1 b) in Part 1 of the notice of application. I agree with Hub's submissions that the only records related to a material fact at issue in the pleadings are those which show an overlap between the clients formerly with Maxxam and now with Hub. Therefore, that aspect of the defendants' application is dismissed.
- [35] The relief sought in paragraph 1 a) is adjourned generally with liberty to re-set upon the defendants filing further affidavit material that specifically identifies any purported omissions in the Hub lists of documents.
- [36] Given that the outcome of this remaining aspect application is uncertain, costs related to the preparation for and attendance at this application will be in the cause as between the defendants and Hub

Summary

- [37] The defendants shall amend and serve its list of documents to include the following:
- i. All documents relating to Maxxam Victoria ceasing to be a franchise of the franchisor Sussex;
 - v. All financial statements, including income statements, for Maxxam Victoria and Maxxam Burnaby for the years ending March 31, 2012 and March 31, 2013;
 - x. For Maxxam Victoria for the 2012 and 2013 taxation years, all notices of assessments/reassessment issued by the Canada Revenue Agency ("CRA") (tax returns having already been produced);
 - xiii. CRA notice of assessment/reassessment for Mr. Rai's 2011, 2012 and 2013 taxation years (tax returns having already been produced).

- [38] I understood from submission that item iv. has been disclosed. If not formerly listed by the defendants, that step should also be taken.
- [39] The balance of relief sought in the plaintiffs' application is dismissed.
- [40] The relief sought in paragraph 1 a) of the defendants' notice of application is adjourned generally with liberty to renew upon the defendants bringing evidence of omissions in the Hub lists of documents.
- [41] The relief sought in paragraph 1 b) of the defendants' application is dismissed.
- [42] Costs of the plaintiffs' application will be in the cause between the plaintiffs and the defendants. Costs of the defendants' application will be in the cause between the defendants and defendants by counterclaim.

"C.P. Bouck"

Master C.P. Bouck

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