Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Court File No. T-577-87

BETWEEN:

IMPERIAL OIL LIMITED
and its subdivision PARAMINS

Plaintiff

- and -

THE LUBRIZOL CORPORATION
and LUBRIZOL CANADA, LIMITED

Defendants

- and -

DR. FRED W. BILLMEYER JR.

Intervenor

REASONS FOR ORDER

CULLEN J.:

Counsel for the parties are well aware of the background to this hearing so these reasons need no comment on all the proceedings leading up to a hearing in Toronto on Tuesday, July 29, 1997. My earlier decisions that I had no jurisdiction or authority to order production of documents as requested by Imperial Oil, and my refusing Lubrizol's request for particulars were appealed to the Federal Court of Appeal.

Hugessen J.A. (as he than was) wrote:

> These two appeals were set down for hearing together. They attack two preliminary rulings by the Trial Division, the first refusing Imperial's request for documents, the second refusing Lubrizol's request for particulars. All this was in the context of an application under Rule 1733 to set aside a judgment based, *inter*

> *alia*, on serious allegations of fraud. In preparing for the hearing we all came to the view that, given the nature of the allegations, it was almost inconceivable that Rule 1733 application could be decided without a trial. Rule 327 makes provision for precisely this kind of situation:
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> | | |
> |---|---|
> | *Rule 327.* Upon any motion the Court may direct the trial of any issue arising out of the motion, and may give such directions with regard to the pre-trial procedure, the conduct of the trial and the disposition of the motion as may seem expedient. | *Règle 327.* Sur toute requête, la Cour pourra prescrire l'instruction d'un point litigieux soulevé à l'occasion de la requête, et pourra donner, au sujet de la procédure préalable à l'instruction, de la procédure d'instruction et la décision sur la requête, les directives qu'elle estime opportunes. |
>
> At the opening of the hearing we raised this matter with counsel who, after a brief adjournment, agreed that they should indeed approach the trial judge and seek appropriate directions. That being so, the hearing of these appeals will be adjourned *sine die* so that the parties may act accordingly.

Counsel for all parties met with me, and with the reasoning of Hugessen J.A. and its acceptance by the parties, I signed an Order on June 9, 1997, attached hereto and marked Document I.

In keeping with the terms of the Order, Imperial Oil filed and served a statement of claim on Lubrizol and Dr. W. Billmeyer.

No notices of motion were made by Lubrizol and Dr. Billmeyer, and again in keeping with the terms of the said Order Lubrizol filed and served a statement of defence on Imperial Oil, and Dr. W. Billmeyer, following which Dr. Billmeyer filed and served a response on Imperial Oil, and Lubrizol.

Following receipt of the statement of defence and the response, Imperial Oil - in keeping with Clause 6 of my Order, filed and served a notice of motion seeking a series of Orders.

As might be expected, Lubrizol and Dr. W. Billmeyer saw things quite differently and answered the motion by way of correspondence, and two letters.

ANALYSIS

Issue # 1

I was not surprised to find that Dr. W. Billmeyer would seek status as an intervenor. Nor it seems were Lubrizol nor Imperial Oil. It's fair to say that Dr. Billmeyer is the centre piece to the 1733 motion, and now this process recommended by the Federal Court of Appeal. Personally, I'm satisfied that had Dr. Billmeyer sought status as a defendant, he would probably have been successful.

Now as an intervenor however, he can in effect sit back, watch how the action goes or where he feels it is headed and then make his move to buttress Lubrizol or attack Imperial Oil's points or both approaches are available to him.

No reasons were given by the Court as to the turn of events leading to Dr. Billmeyer status as an intervenor because all parties agreed, and the Court was not moved to disagree with counsel on this issue - in fact I felt it would assist in getting all the facts, and Dr. Billmeyer's rational for stating in part, in his response at 2(c) "gave such evidences fairly and honestly, based on his knowledge and expertise".

Frankly, I was surprised that the response was not more forthcoming. I do not believe Dr. Billmeyer need be bound to the position outlined by Imperial Oil in paragraph 17 of its memorandum of arguments. I do not propose any wording that would be suitable or the type of response, Dr. Billmeyer should give <u>but</u> something more is called for here if the Court, Imperial Oil or Lubrizol are to be properly and fully informed. I agree with counsel for Imperial Oil that "It is a matter of fundamental fairness for Imperial Oil (and I'd add the Court and Lubrizol) to know in advance of the trial of the Rule 1733 issues what his present position is".

It seems to me that it is also in Dr. Billmeyer's best interest to take a stand, spell it out. There should be no surprise(s) that the Court, Imperial Oil or Lubrizol should have to deal with at the hearing. I will leave it to Dr. Billmeyer to draft the necessary pleading, which can later be the basis for his argument at the main hearing.

I accept that Dr. Billmeyer is not a defendant but its essential that everyone knows what Dr. Billmeyer's version of the matter is in order that "the parties may come to the issue", to paraphrase Middleton J.A. in the case of *Richard* v. *Hall* [1928] 3 D.L.R. 189 at page 191.

Issue # 2

As I've already indicated Dr. Billmeyer is not bound by ground rules set down by Imperial Oil i.e. his pleading must be limited or be required to chose between "his Ohio story and the compelling story told by Lubrizol in is statement of defence."

Issues # 3

Paragraph 42 - The case for Imperial Oil is spelled out by counsel for Imperial Oil at pages 44-45 of the transcript:

> So I therefore bring to this Court the evidence which is without question authentic, arguments going on, it would appear, all over the globe in various jurisdictions between Exxon and Lubrizol, to determine whether this allegation of Exxon's admission is something that the Court should get into or is it extraneous to the rule 1733 motion and to allow that issue to be litigated here would greatly prolong and enlarge the 1733 hearing.
>
> I come at it in this way, that the Statement of Claim of Imperial Oil fundamentally relates to the expert evidence led by Lubrizol at trial and our allegation is not that the Court should relitigate what went on before you in 1990, but focus on whether or not Dr. Billmeyer misled this Court with false testimony and whether or not that testimony was relied upon by you to give the judgment that you gave.
>
> It is not our intention nor do I think it permitted by rule 1733, to lead a whole lot of evidence as to what is the correct Mn of the PIB and led through witnesses or sources other than a consideration of the expert testimony provided at the 1990 trial. In other words, the Dr. Billmeyer story, whatever that story may be.
>
> ...

> In the factum at page eight, that point is made at paragraph 21 and 22, and the submission in paragraph 23 that the true Mn of the PIB, however designated, would certainly be an issue on a retrial of the proceeding, if a retrial is ordered, but is not an issue in my submission, certainly, that Imperial Oil addressed or thought it was in a position to address in the Statement of Claim.
>
> (emphasis mine)

With respect to Lubrizol, I feel that counsel moved on occasion into the issue to be decided at the hearing following the filing and serving of Imperial Oil's reply. For example at page 83 of the transcript, "and that you made certain findings with regard to those matters based on a number of sources (emphasis mine). However to be fair to counsel, this approach was done so that, "you can see the purpose of the pleadings which we have filed and the position we have taken with regard to my friend's motion." (transcript page 83).

Counsel for Lubrizol takes the position:

> ... it is not that we are saying this Court has to retry the molecular weight. It is that there is a witness or rather an officer of Exxon who was one of the accredited lawyers attached to the trial at the time at 1990 who has said that it is not surprising that that number was reached by Dr. Billmeyer. Just as Dr. Billmeyer has to explain what he said in Ohio, I suggest that Mr. Bialo has to explain what he said in Ohio with regard to the lack of surprise as to the findings of Dr. Billmeyer. We don't have to relitigate the Ohio action. They never suggested that we would have to relitigate the Ohio action in bringing in Dr. Billmeyer's deposition.
>
> ...
>
> The pleading is that Exxon, the supplier of PIB to Imperial Oil, has freely acknowledge that the molecular weight of Parapol 2200 at the time of the Canadian trial, was about 2400, and that Dr. Billmeyer's findings were therefore not surprising.
>
> The relevance, of course, of that goes to the whole question of the knowledge of Imperial Oil at the time of the trial and their position at the time of the trial.
>
> Now, my friend suggests that this would inevitably bring in all of the other litigation that is currently pending. They didn't suggest that the Ohio action was going to come in if we brought in Billmeyer's statement and I'm not suggesting that we have to bring it in when we bring in the other two statements. These are simply statements which are to be considered by you in determining whether, first of all, that Imperial come here with clean hands.

On balance, I am satisfied that paragraph 42 not be struck. Both side are clear that we are not to relitigate the 1990 case I have already decided, which was upheld by the Court of Appeal. Counsel for Imperial Oil, as already stated - "nor do I think it permitted by Rule 1733 to lead a whole lot of evidence as to what is the correct Mn of the PIB" (transcript pages 44-45).

Issue # 4

Paragraph 49 - Imperial Oil states Rule 1733 prescribes a process that is explicitly not an action, nor an originating process of any kind. It is an interlocutory motion. The allegation in paragraph 49 of Lubrizol's statement of defence that limitation periods address interlocutory motions within pending actions does not disclose a "reasonable defence" in law and must be struck out under Rule 419(1) of the *Federal Court Rules*.

However, Lubrizol makes the counter-point in paragraphs 16, 17, 18 of Lubrizol's factum:

> 16. The sole basis stated in support of Imperial's motion on this issue is that a Rule 1733 motion is not "an action" within the scope of s. 45(1)(g) of the *Ontario Limitations Act* incorporated by s. 39(1) of the *Federal Court Act*.
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> 17. In this regard, it is noted that s. 39 of the *Federal Court Act* refers to:
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> (a) (1) laws relating to prescription and limitation of actions being applicable to "any proceedings in the Court"; and
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> (b) (2) "a proceeding in the Court in respect of a cause of action".
>
> *Federal Court Act*, s. 39 **Tab 5**
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> 18. It is submitted that Imperial has asserted a cause of action in a proceeding in this Court and that s. 45 of the *Ontario Limitations Act* and s. 39(1) of the *Federal Court Act* are applicable thereto.

Paragraph 49 will not be struck.

Issue # 5

Imperial Oil seeks additional particulars to focus with precision the allegations in Lubrizol's defence.

This is, in the final analysis Imperial Oil's case to make, and the pleading of Imperial Oil is a comprehensive, and yet succinct coverage of the issues as it sees them.

Letters requesting particulars and motions seeking particulars are plentiful. At this stage, it is difficult to fathom that either party is still missing some information.

I accept Lubrizol's admonition at paragraphs 23-27 of its factum:

> 23. Imperial has provided no evidence that particulars are required for the purposes of pleading. Unless the pleading is bad upon it face, which is not the case here, particulars will be refused where the applicant has made no showing of the necessity for them by way of affidavit in support of the motion.
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> Windsurfing International Inc. v. Novaction Sports Inc. (1987), 19 C.P.R. (3d) 230 (F.C.T.D.) at p. 237 **Tab 11**
>
> Flexi-Coil Ltd. v. F.P. Bourgault Industries 1988, 19 C.P.R. (3d) 125 (F.C.T.D.) at p. 127 **Tab 12**
>
> Astra AG v. Inflazyme Pharmaceuticals Inc. (1995), 61 C.P.R. (3d) 178 (F.C.T.D.) at p. 181 **Tab 13**
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> 24. Where, as occurred in this motion, the applicant has filed an affidavit in support of the motion, but has not purported in that affidavit to support the need for particulars for pleading, then an adverse inference can and should be drawn that there is no evidence available to the applicant to support the need for particulars for the purpose of pleading.
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> 25. Particulars are neither discovery nor a fishing expedition. They are to enable a party to plead.
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> Smith, Kline & French v. Lek Tovarna (1985), 4 C.P.R. (3d) 257 (F.C.T.D.) at p. 258 **Tab 14**
>
> Astra AG v. Inflazyme Pharmaceuticals Inc. (1995), 61 C.P.R. (3d) 178 (F.C.T.D.) at p. 184 **Tab 13**
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> 26. While no Demand for Particulars was sent by Imperial prior to bringing its motion, Lubrizol has provided Particulars on July 22, 1997 as in response to a Demand for Particulars, in the interests of saving time. This response illustrates the refusals for further particulars at this stage as well as the reasons for them.
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> see Rule 415(5) **Tab 15**
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> 27. Any further level of detail can and should be dealt with at the discovery.

The application for further particulars is dismissed.

OTTAWA, ONTARIO

August 6, 1997.

B. Cullen

J.F.C.C.

Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

DOCUMENT I

T-577-87

OTTAWA, ONTARIO, THIS 9TH DAY OF JUNE, 1997

PRESENT: THE HONOURABLE MR. JUSTICE CULLEN

BETWEEN:

IMPERIAL OIL LIMITED
and its subdivision PARAMINS

Plaintiff

- and -

THE LUBRIZOL CORPORATION
and LUBRIZOL CANADA LIMITED

Defendants

- and -

Dr. Fred W. Billmeyer Jr.

Intervenor

ORDER

UPON MOTION by the Plaintiff for an Order under Rule 1733 for the reversal or variation of the trial judgment herein dated September 17, 1990, upon the ground of matters arising subsequent to the making thereof, or subsequently discovered, or fraud or for such other order as may be appropriate and just in the circumstances;

AND UPON the delivery by the Plaintiff of a Fresh Notice of Motion dated March 12, 1997, in respect of its motion under Rule 1733;

AND UPON Fred W. Billmeyer Jr. being added as an intervenor in this matter by Order of this Court dated May 20, 1997;

AND UPON A MOTION by both parties for directions in relation to such motion under *The Federal Court Rules of Practice*;

AND UPON reading the decision of the Federal Court of Appeal dated May 15, 1997, and particularly its direction that "it was almost inconceivable that the Rule 1713 application could be decided without a trial";

AND UPON accepting the approach recommended by the said Order that Rule 327 makes provisions for precisely the situation here;

AND UPON the approval of the Plaintiff, the Defendant and the Intervenor herein;

IT IS HEREBY ORDERED THAT:

1. The style of cause for this hearing, in the interest of clarity shall read:

IMPERIAL OIL LIMITED
and its subdivision PARAMINS

Plaintiff

- and -

THE LUBRIZOL CORPORATION
and LUBRIZOL CANADA LIMITED

Defendants

- and -

Dr. Fred W. Billmeyer Jr.

Intervenor

2. There shall be a trial of the issues raised by the Plaintiff, Imperial Oil Limited, in its Fresh Notice of Motion dated March 12, 1997 in accordance with the directions set forth herein, subject to further Order of the Court.

3. Imperial Oil Limited shall issue a Statement of Claim within 15 days of the date that this Order is entered by the Court.

4. Any motion by the Defendants or any of them with respect to the Statement of Claim shall be heard by the Court at a time, place and date to be selected by the Court upon application therefor.

5. Each Defendant named in the Statement of Claim shall deliver a Statement of Defence within 15 days of having been served with the Statement of Claim, or as provided in the disposition of the motion referred to in paragraph 4, whichever is later. The Intervenor, Dr. Fred W. Billmeyer Jr., shall file his response to the Statement of Claim within the same time frame as the Defendants.

6. Any motion by Imperial Oil Limited in respect of the Statements of Defence, or any of them, shall be heard by the Court at a time, place and date to be determined by the Court on application therefor.

7. Imperial Oil Limited shall deliver a Reply and Joinder of Issue, if any, within 10 days of delivery of the last of the Statements of Defence referred to in paragraph 6, or as provided in the disposition of the motion referred to in paragraph 6, whichever is later.

8. Within 15 days of the close of pleadings, each party shall deliver an Affidavit of Documents in accordance with Rule 448 of *The Federal Court Rules of Practice*.

9. Examinations for discovery shall be commenced as follows:

   (i) Imperial Oil Limited on Tuesday, July 29, 1997;

(ii) Lubrizol Corporation and Lubrizol Canada Limited on Tuesday, August 5, 1997;

"B. Cullen"

J.F.C.C.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	**T-577-87**
STYLE OF CAUSE:	**IMPERIAL OIL LIMITED and its subdivision PARAMIS v. THE LUBRIZOL CORPORATION and LUBRIZOL CANADA, LIMITED and DR. FRED W. BILLMEYER JR.**
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 29, 1997

REASONS FOR ORDER OF MR. JUSTICE CULLEN

DATED:AUGUST 6th, 1997

APPEARANCES:

Mr. Ian Binnie, Q.C.	FOR PLAINTIFF
Mr. John Nelligan, Q.C.	FOR DEFENDANT
Mr. Donald Plumley, Q.C	FOR DEFENDANT
Mr. Peter E. J. Wells	FOR DEFENDANT
Mr. Roger T. Hughes, Q.C.	FOR INTERVENOR

SOLICITORS OF RECORD:

McCARTHY, TÉTRAULT TORONTO, ONTARIO	FOR PLAINTIFF
NELLIGAN, POWER OTTAWA, ONTARIO	FOR DEFENDANT
LANG, MICHENER TORONTO, ONTARIO	FOR DEFENDANT
RIDOUT & MAYBEE TORONTO, ONTARIO	FOR DEFENDANT
SIM, HUGHES, ASHTON & McKAY TORONTO, ONTARIO	FOR INTERVENOR

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