IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***British Columbia (The Attorney General) v. Malik,***
2008 BCSC 1027

Date: 20080731
Docket: S077088
Registry: Vancouver

Between:

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia

Plaintiff

And:

Ripudaman Singh Malik, Raminder Kaur Malik, Jaspreet Singh Malik, Gurdip Singh Malik, Hardeep Singh Malik, Darshan Singh Malik, Khalsa Developments Ltd., Papillon Eastern Imports Ltd., 0772735 B.C. Ltd. and 0760887 B.C. Ltd.

Defendants

- and -

Docket: H070591
Registry: Vancouver

Between:

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia

Petitioner

And:

Ripudaman Singh Malik, Raminder Kaur Malik, 0772735 B.C. Ltd., Gurdip Singh Malik, Balbir Singh Bajwa and Khalsa Developments Ltd.

Respondents

Before: **The Honourable Mr. Justice McEwan**

Reasons for Judgment on Motions

In Action No. S077088

Counsel for the Plaintiff: F.G. Potts
B. Martyniuk

Counsel for the Defendant Ripudaman Singh Malik:	N.S. Ganapathi M.Z. Galambos
Counsel for the Defendant Raminder Kaur Malik:	T.R. Manson
Counsel for the Defendants Jaspreet Singh Malik and 0760887 B.C. Ltd.:	G.A. Nelson
Counsel for the Defendants Hardeep Singh Malik, Darshan Singh Malik and 0772735 B.C. Ltd.:	M. Pongracic-Speier
Counsel for the Defendant Khalsa Developments Ltd.:	J.C. McKechnie

In Action No. H070591

Counsel for the Petitioner:	F.G. Potts B. Martyniuk
Counsel for the Respondent Ripudaman Singh Malik:	N.S. Ganapathi M.Z. Galambos
Counsel for the Respondent Raminder Kaur Malik:	T.R. Manson
Counsel for the Respondent 0772735 B.C. Ltd.:	M. Pongracic-Speier
Counsel for the Respondent Khalsa Developments Ltd.:	J.C. McKechnie
Dates and Place of Trial/Hearing:	January 21-25; and January 31, 2008 Vancouver, B.C.

I

[1] The plaintiff (the “Province”) has brought action against the defendant Ripudaman Singh Malik (“R.S. Malik”) in debt for $5,200,131.31 plus prejudgment interest, for advances made to fund R.S. Malik’s defence in what has come to be known as the “Air India trial.” That trial concerned the explosion of a bomb on Air India flight 182 over the Atlantic, which resulted in the deaths of 329 passengers and crew. On the same day, a second bomb exploded at Narita Airport in Japan, killing two baggage handlers and injuring a number of other people. R.S. Malik was one of the persons accused of perpetrating those crimes. He was charged on October 27, 2000 and sought judicial interim release on December 22 and 29, 2000. He was acquitted on March 16, 2005 after a trial that had begun on April 28, 2003.

[2] Commencing November 20, 2001, R.S. Malik sought government funding for his defence. Although the government says there was some doubt concerning R.S. Malik’s actual financial situation, on or about March 21, 2002, it entered into certain funding arrangements which included an acknowledgement on the part of R.S. Malik that he was not entitled to such funding unless he had committed all of his resources to his defence (the “Indemnity Agreement”), and a covenant not to encumber, or to allow, his assets to be encumbered.

[3] A further agreement was made on or about August 6, 2002 (the “Defence Counsel Agreement”). It contained similar provisions, and also provided that R.S. Malik would cooperate in the transfer of all of his assets to

the Province and would assist in the identification of those assets.

[4] The Province alleges that these agreements have been breached and that R.S. Malik, his wife and three of his sons, along with the named corporate entities controlled by the Malik family, have conspired to defraud the Province and to assist R.S. Malik in avoiding his obligations under the Defence Counsel Agreement. The claims are particularized in the Writ of Summons and Statement of Claim (issued October 23, 2007), as follows:

> 33. Pursuant to the Indemnity Agreement and the DCA, for the period November 1, 2001, to and including September 19, 2003, the Plaintiff was obliged to pay legal fees and disbursements totalling FIVE MILLION TWO HUNDRED THOUSAND ONE HUNDRED and THIRTY-ONE DOLLARS AND FIFTY-ONE CENTS ($5,200,131.51), which said amount was paid by the Plaintiff on account of the Defendant Ripudaman's defence costs in respect of the Air India Trial.
>
> (the "DCA debt")
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> 34. Demand for payment of the DCA debt by the Defendant Ripudaman was made in writing by the Plaintiff on December 13, 2005, and although the Defendant Ripudaman acknowledged his said indebtedness, he has refused or neglected to pay, and the said amount remains due and owing by Ripudaman to the Plaintiff.
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> 35. Further, the Plaintiff says that the representations made by or on behalf of the Defendant Ripudaman as detailed in paragraphs 16, 19 and 24 herein, and on behalf of the Defendants Raminder, Jaspreet, Hardeep, Darshan, and Gurdip as detailed in paragraph 22 herein, were false and untrue, and were made with intent that the Plaintiff would rely upon them, and for the purpose of wrongfully obtaining payment of Ripudaman's defence costs, and the Plaintiff says that the true facts are:
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> a) at all material times, the Defendant Ripudaman had net assets of at least FIVE MILLION EIGHT HUNDRED THOUSAND DOLLARS ($5,800,000.00) and was fully capable of paying all, or a substantial portion of his defence costs;
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> b) at all material times, there were additional assets of at least FIVE MILLION EIGHT HUNDRED THOUSAND DOLLARS ($5,800,000.00) which had been largely earned by him, but which were held in the name of other family members, which assets were available to fund Ripudaman's defence costs;
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> c) each of the Defendants Raminder, Jaspreet, Hardeep, Darshan and Gurdip held assets in their names which were the rightful property of Ripudaman or alternatively, were held in trust by them for Ripudaman;
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> d) no monies, or substantially less monies than alleged, were owing by the Defendant Ripudaman to the Defendants Raminder, Jaspreet, Hardeep, Darshan and Gurdip, and;
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> e) at no time did the Defendant Ripudaman intend to transfer all or any of his assets to the Plaintiff on account of defence costs, not did he intend to co-operate with the Plaintiff in it's attempt to ascertain his true net worth.
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> 36. The Plaintiff says that had it been aware of the true facts it would not have entered into the Indemnity Agreement or the DCA and that no, or alternatively substantially less, defence costs would have been paid pursuant to those agreements and the Plaintiff says that by reason of the fraud of Ripudaman, Raminder, Jaspreet, Hardeep, Darshan and Gurdip, it has thereby suffered damages.
>
> 37. Further, or in the alternative, the Plaintiff says that the Defendants and each of them, wrongfully and maliciously conspired together and continue to conspire together to defraud and injure the Plaintiff by assisting Ripudaman to hide his assets and to disguise his net worth, by asserting non-existent and/or grossly exaggerated liabilities owed to them by Ripudaman and by secretly holdings assets in their names or through legal entities they control, which assets are the rightful property of Ripudaman, and/or by causing the Defendants, Papillon, Khalsa, or 076 Ltd. and 077 Ltd. to enter into sham transactions, to make payments not owed and acknowledge liabilities

that do not exist, and/or wrongfully withhold monies due and payable to Ripudaman, and/or by holding assets which are the rightful property of Ripudaman, all with the intent, that the Plaintiff would enter into and continue with the Indemnity Agreement and the DCA and would make payments for defence costs, and would thereafter be unable to, or would be substantially and wrongfully hindered, in collecting the DCA debt.

(the “Conspiracy”)

38. Further, the Plaintiff says that the Defendants, and each of them, fraudulently and deceitfully conspired and agreed together to cheat and defraud the Plaintiff and to hoodwink and deceive the Plaintiff and the Plaintiff’s employees and agents, so as to obtain funding for Ripudaman pursuant to the Indemnity Agreement and the DCA and so as to prevent the Plaintiff from obtaining its lawful remedies in respect of the DCA debt.

39. The Plaintiff says that the said Defendants developed and refined a scheme to defraud and injure the Plaintiff, which scheme was implemented and relied upon, in whole or in part, by the said Defendants and each of them in respect of the matters referred to herein.

[the “Scheme”)

40. The Plaintiff says that the particulars of the Scheme, as presently known to it, include the following:

a) In support of the Rowbotham Application, and in furtherance of the Conspiracy, the Defendants Ripudaman, Raminder, Hardeep, Darshan, and Jaspreet swore false Affidavits and gave false testimony about the Defendant Ripudaman’s financial position, including his net worth and interest in assets, and, without restricting the generality of the foregoing, falsely testified that:

i) The Defendants Jaspreet, Hardeep and Darshan were owed TWO HUNDRED AND SIXTY THOUSAND DOLLARS ($260,000.00) by Papillon in wages for working in the Executive Hotel, which wages were not owing;

ii) The Defendant Gurdip lent the Defendant Ripudaman THREE HUNDRED AND THIRTY THOUSAND US DOLLARS ($330,000 USD), when the true facts were those monies actually belonged to the Defendant Ripudaman; and

iii) The Defendant Raminder was owed substantial amounts when no such debt existed, or the amount of any debt was substantially exaggerated;

iv) The Defendants Ripudaman, Raminder and Gurdip falsely represented that Gurdip was lawfully entitled to a mortgage against Ripudaman’s half interest in the Yaletown Property in the amount of ONE HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS ($175,000.00) which the Defendants, Ripudaman, Raminder and Gurdip knew related to a fictitious debt;

v) The Defendants, Ripudaman, Raminder and Jaspreet falsely testified that Ripudaman held monies by way of a family trust, which monies were the property of Jaspreet, Hardeep and Darshan;

vi) The Defendants Ripudaman, Raminder and Jaspreet falsely testified that certain property owned by the Defendants Ripudaman and Raminder, in India, had no income and no value;

vii) The Defendants Ripudaman, Raminder and Jaspreet falsely testified that Ripudaman’s brother, Jasjit Malik had loaned money to Ripudaman, which loan was guaranteed by Raminder and which debt had been assigned to K.S. Nagra, and which debt with interest totalled TWO HUNDRED FIFTY-SIX THOUSAND EIGHT HUNDRED FIFTY-ONE DOLLARS and FORTY-ONE CENTS ($256,851.41), as at the time of the Rowbotham hearing;

viii) The Defendants Ripudaman, Raminder and Jaspreet colluded together so as to allow the Defendant Gurdip to obtain judgment for a fictitious, or substantially exaggerated, debt in the amount of THREE HUNDRED AND THIRTY THOUSAND US DOLLARS ($330,000.00 USD), and to that end, Jaspreet, as counsel for Ripudaman, assisted counsel for Gurdip to attempt to obtain judgment prior to the hearing of the Rowbotham application;

b) To unlawfully hinder the Plaintiff in the collection of the DCA debt, and fraudulently, and in furtherance of the Conspiracy, the Defendants Ripudaman, Raminder, Jaspreet and Gurdip allowed and/or placed fraudulent security on real property owned by Ripudaman, or on property owned by corporate entitles in which Ripudamin had an interest, and without restricting the generality of the foregoing:

i) On December 28, 2003, the Defendant Ripudaman did execute a mortgage on the Yaletown Property in the amount of TWO HUNDRED THOUSAND DOLLARS ($200,000.00), in favour of Balbir Singh Bajwa, which signature was witnessed, in his capacity as counsel, by the Defendant Jaspreet, and which mortgage was registered by the Defendant Jaspreet, in his capacity as counsel, on December 29, 2003, under Registration Number BV541795;

ii) On December 28, 2003, the Defendant Ripudaman did execute a mortgage on the Yaletown Property in the amount of ONE HUNDRED AND FIFTY THOUSAND DOLLARS ($150,000.00), in favour of the Defendant Raminder, which signature was witnessed, in his capacity as counsel by the Defendant Jaspreet, and which mortgage was registered by the Defendant Jaspreet, in his capacity as counsel, on January 2, 2004, under Registration Number BW000416;

iii) On March 14, 2005, the Defendant Ripudaman did execute a mortgage on the Yaletown Property in the amount of ONE HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS ($175,000.00) in favour of the Defendant Gurdip, which signature was witnessed, in his capacity as counsel, by the Defendant Jaspreet, and which mortgage was registered by the Defendant Jaspreet, in his capacity as counsel, on March 15, 2005 under Registration Number BX5175241;

iv) The Defendants Ripudaman and Raminder are the shareholders in 410205 B.C. Ltd., which company owned and owns, certain strata lots in Strata Plan V1S2462, Section 20, Range 4, Quamichan District. On March 30, 2005, the Defendant Jaspreet, on behalf of 410205 B.C. Ltd. did execute a mortgage on strata lots 1 to 27, 30-33, 35, 37-40, 42-44, 49, 51, 53, 55, 58-60, 62-69, 71, 73, 77, 82-85, in the amount of FOUR HUNDRED AND THIRTY-NINE THOUSAND, ONE HUNDRED AND EIGHTY-FIVE DOLLARS AND NINETY-EIGHT CENTS ($439,185.98) in favour of the Defendant Raminder, which mortgage was registered under Registration Number EX034565;

c) To unlawfully hinder the Plaintiff in the collection of the DCA debt and fraudulently and in furtherance of the Conspiracy, the Defendants Ripudaman, Raminder, Jaspreet, Hardeep and Darshan, have caused limited companies to be created and have utilized such companies to receive funds and/or other assets that are, wholly or in part, the rightful property of Ripudaman, and have caused such companies to acquire assets held corporately, and in particular, without restricting the generality of the foregoing;

i) On or about October 25, 2006, the Defendants Ripudaman, Raminder, Jaspreet, Hardeep and Darshan caused 077 Ltd. to be created and to receive funds from Ripudaman, which funds:

a) In the amount of ONE MILLION TWO HUNDRED SIXTY-SIX THOUAND,

FIVE HUNDRED AND THIRTY-NINE DOLLARS AND SEVEN CENTS ($1,266,539.07) were utilized on November 3, 2006 to purchase an Assignment of certain mortgage and other security held by Desjardins Financial Security Life Assurance Company ("Desjardins"), as against the assets of Ripudaman, Raminder and Papillon and of Desjardins' interest in certain foreclosure proceedings commenced by Desjardins in the Vancouver Registry of the Supreme Court under Petition Number S064879, and ;

b) In the amount of SIX HUNDRED FORTY-FIVE THOUSAND FIVE HUNDRED AND ONE DOLLAR AND SEVENTY CENTS ($645,501.70), were utilized on June 29, 2007 to purchase an Assignment of certain mortgage and other security held by HSBC Bank Canada ("HSBC"), as against the assets of Ripudaman, Raminder and Papillon, and of HSBC's interest in certain foreclosure proceedings commenced by HSBC in the Vancouver Registry of the Supreme Court under Petition Number H060587;

c) On January 4, 2006, the Defendant Jaspreet, in his capacity as solicitor for 077 Ltd. applied to register the Desjardins Assignment and on January 15, 2007, applied to remove the Certificate of Pending Litigation from title;

d) On July 24, 2007, Unterman, in his capacity as solicitor for 077 Ltd. applied to register the HSBC Assignment and the Defendant Jaspreet, in his capacity as solicitor for 077 Ltd. applied to remove the Certificate of Pending Litigation from title;

ii) On or about June of 2006, the Defendants Ripudaman and Jaspreet caused 076 Ltd., to be created and to receive funds from Ripudaman, which funds:

a) On June 22, 2006 were utilized by 076 Ltd. to purchase 12359 Old Yale Road, in Surrey, British Columbia, more particularly known and described as:

PID: 008-601-747

Lot 9, Plan 2559, Section 19, Range 2,

New Westminster Land District

b) On July 10, 2006 were utilized by 076 Ltd. to purchase 12369 Old Yale Road, in Surrey, British Columbia, more particularly known and described as:

PID: 012-543-756

Lot 8, Plan 2559, Section 19, Range 2,

New Westminster Land District

d) To unlawfully hinder the Plaintiff in the collection of the DCA debt, and fraudulently and in furtherance of the conspiracy the Defendant Raminder has accepted monies from the Defendant Ripudaman, which monies:

i) On July 4, 2006, were utilized by the said Defendant to purchase real property located as 12333 Old Yale Road, in Surrey, British Columbia, and more particularly described as:

PID: 010-728-520

Lot 12, Block 5N, Plan 2559, Section 19, Range 2

New Westminster Land District

and:

ii) On July 10, 2006, were utilized by the said Defendant to purchase real property located at 12348 Winram Road, in Surrey, British Columbia and more particularly

described as:

PID: 004-749-740

Lot 25, Block 5N, Plan 2559, Section 19, Range 2

New Westminster Land District

41. Further to the extent that Jaspreet provided legal services to the Defendants herein, the Plaintiff says that such legal services were provided to the other Defendants as part of the Conspiracy and pursuant to the Scheme and was obtained by the Defendants in furtherance of the fraud and conspiracy, and the Plaintiff says that no legal privilege attaches to any such legal services provided to the Defendants herein by South Fraser Law Group and/or Yaletown Law Corporation in respect of the transactions referred to herein or, in the alternative, no legal privilege applies to legal services provided to the Defendants by the Defendant Jaspreet, in respect of the transactions completed by herein.

[5] This Statement of Claim was amended on January 21, 2008 to include the following further allegations:

42. Further, or in the alternative, the Plaintiff says that Ripudaman, with the assistance of the Defendants Raminder, Jaspreet, Gurdip, Hardeep and Darshan commenced the Rowbotham proceedings against the Plaintiff without any reasonable or probable cause for commencing and prosecuting those proceedings.

43. The Plaintiff further says that the Rowbotham proceedings were terminated in the Plaintiff's favour when the proceedings were dismissed by Justice Stromberg-Stein.

44. The Plaintiff further says that when Ripudaman commenced and continued the Rowbotham proceedings with the assistance of Raminder, Jaspreet, Gurdip, Hardeep and Darshan, neither Ripudaman or Raminder, Jaspreet, Gurdip, Hardeep or Darshan had an honest belief that there were reasonable and probable grounds to commence and continue the Rowbotham proceedings.

45. The Plaintiff further says, and the fact is that Ripudaman, Raminder, Jaspreet, Gurdip, Hardeep and Darshan were actuated by malice by commencing and continuing the Rowbotham proceedings against the Plaintiff and that the said proceedings were instituted for an indirect and/or improper motive, and as such the commencement and continuation of the Rowbotham proceedings against the Plaintiff amounted to an abuse of the process of this Honourable Court.

46. The Plaintiff further says that Ripudaman, Raminder, Jaspreet, Gurdip, Hardeep and Darshan caused and/or directed the Defendants, Khalsa Developments Ltd., Papillon Eastern Imports Ltd. 0760887 B.C. Ltd. and 0772735 B.C. Ltd. to take steps necessary to assist the Defendants in the said abuse of the process of this Honourable Court.

[6] On October 23, 2007, the Province also filed a foreclosure petition (No. H070591) respecting certain commercial premises owned or controlled by R.S. Malik and his wife, the defendant Raminder K. Malik ("R.K. Malik").

[7] Immediately after these proceedings were filed, the Province appeared before this court *ex parte* seeking an Anton Piller order in relation to certain premises, and Mareva injunctions against a number of the defendants in the fraud action.

[8] Following submissions, the order was given in the terms sought.

[9] There were a series of appearances before the court for directions consequential upon the order once the parties had been served. On January 21-25, 2008, counsel appeared to make submissions setting aside the Mareva injunction and the Anton Piller orders and seeking various other forms of ancillary relief, including submissions respecting the conduct of the foreclosure action and in particular, directed to the question of whether it should be consolidated with the fraud action (No. S077088). Because these matters were heard together, I have included them in one set of reasons, which shall be filed in each action.

II

[10] The evidence before the court on the *ex parte* application included a history of the dealings between the Province and R.S. Malik, which was set out in an affidavit sworn by Gordon Houston, a lawyer employed by the Province. He deposed that on March 21, 2002, the Province entered into an "Interim Funding Agreement" which was replaced on August 6, 2002 by a "Defence Counsel Agreement".

[11] In January 2003, the Province gave R.S. Malik notice that it would be terminating this agreement if he did not execute an indemnity. R.S. Malik refused to do so unless he was ordered to do so as a condition of an order that government provide funding. On May 14-15, 2003, Tysoe J., then of this court, ordered R.S. Malik to provide financial disclosure and restrained the disposition of assets. Some disclosure followed, including some from Jaspreet Singh Malik, who described himself as R.S. Malik's "son and legal counsel in relation to financial affairs".

[12] In August 2003, R.S. Malik made an application for government funding, of a type often called a "Rowbotham order".

[13] The matter was heard by Stromberg-Stein J., commencing August 5, 2003 and completing after some 10 days of hearing on September 5, 2003. On September 19, 2003 reasons were given. Stromberg-Stein J. summarized her conclusions in the following terms:

> **Conclusion**
>
> [84] Mr. Malik bears the onus of proving that he is financially eligible for state funded counsel and that he has no ability or obligation to contribute to that funding.
>
> [85] Mr. Malik has not fulfilled the factual and evidentiary onus to establish indigency for *Rowbotham* funding. Further he has disentitled himself to *Rowbotham* funding by his actions.
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> [86] Mr. Malik has failed to demonstrate extraordinary financial circumstances; attempts to obtain funds from family or other sources to retain counsel; prudence with expenses and prioritization of payment of his legal fees; efforts to save for the cost of counsel and to raise funds by earning additional income; and that he has made all reasonable effort to use his assets to raise funds, for example by obtaining loans.
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> [87] He has demonstrated he is in a position to pay some of the costs of his defence. As well, he has demonstrated he can look to the income and assets of his spouse and family.
>
> [88] I dismiss Mr. Malik's application for *Rowbotham* funding.
>
> [89] It is in the interests of justice that this trial into the deaths 18 years ago of many innocent people continues to an orderly conclusion. Nothing in this judgment precludes an agreement between the Attorney General and Mr. Malik for interim funding with appropriate security.

[14] In the course of her reasons, Stromberg-Stein J. made a number of strong observations about the position taken by R.S. Malik to the effect that he was indigent, and about the role taken by other family members in attempting to make it appear that everything he owned was pledged in one way or another to family members. R.S. Malik claimed that these took precedence over his obligation to repay the government.

[15] Notwithstanding the dismissal of the Rowbotham application, the Province negotiated a further agreement (the "Payment Agreement") with R.S. Malik and his solicitors. On October 17, 2003, pursuant to that agreement, R.S. Malik acknowledged that he was indebted to the Province for all sums advanced under the Defence Counsel Agreement. The agreement set out terms by which future fees would be paid until the end of the trial. R.S. Malik was to provide security.

[16] The material placed before the court on October 23, 2007 outlined a series of property transactions effected by members of the South Fraser Law Group and its predecessor, Unterman and Associates, a law firm with which R.S. and R.K. Malik's son, the defendant Jaspreet, is associated. These included, as to the senior Malik's residence at 6475 Marguerite Street, Vancouver, British Columbia, the following:

a. On September 20, 1996, Deborah Rota, barrister and solicitor with Unterman & Associates,

certified the signatures of Mr. and Mrs. Malik on mortgage no. BK298817 in favour of HSBC for the sum of $1.4 million.

b. On March 12, 2003, Jaspreet Malik certified the signatures of Mr. and Mrs. Malik on mortgage no. BV107641 in favour of Desjardins Financial Security Life Assurance Company ("Desjardins") for the sum of $1,696,390.84.

c. On March 10, 2006, Jaspreet Malik filed a Cancellation of Charge no. BA358963 regarding a Judgment no. BT253341 previously registered by Imperial Life Assurance Company of Canada ("Imperial Life", which is now know as Desjardins).

d. On October 26, 2006, Jaspreet Malik certified the signatures of Mr. and Mrs. Malik on mortgage no. BA442339 in favour of the Royal Bank of Canada for the sum of $1.2 million

e. On January 4, 2007, Jaspreet Malik filed an application regarding the assignment of mortgage no. BB451372 in favour of Desjardins to 0772735 B.C. Ltd. for the sum of $1,266,539.07.

f. On January 16, 2007, Jaspreet Malik, on behalf of 0772735 B.C. Ltd., executed a release of the mortgage no. BB451372 previously assigned to 0772735 B.C. Ltd. by Desjardins.

[17] It also included the following respecting the Hamilton Street property:

a. On November 3, 1997, David Unterman of Unterman & Associates certified the signatures of Mr. and Mrs. Malik on mortgage no. BL390544 in favour of Imperial Life for the sum of $1,950,000.00.

b. On May 5, 2000, Deborah Rota certified the signatures of Mr. and Mrs. Malik on mortgage no. BP101885 in favour of HSBC for the sum of $500,000.00.

c. On March 12, 2003, Jaspreet Malik certified the signatures of Mr. and Mrs. Malik on mortgage no. BV107641 in favour of Desjardins for the sum of $1,696,390.84.

d. On November 9, 2003, Jaspreet Malik certified the signatures of Mr. and Mrs. Malik on mortgage no. BV487520 in favour of Gurdip Malik for the sum of $175,000.00.

e. On December 28, 2003, Jaspreet Malik certified the signature of Mr. Malik and made application for mortgage no. BV541795 from B. Bajwa in the sum of $200,000.00.

f. Also on December 28, 2003, Jaspreet Malik certified the signature of Mr. Malik on mortgage no. BW000416 in favour of Mrs. Malik in the sum of $150,000.00.

g. On March 14, 2005, Jaspreet Malik certified the signature of Mr. Malik and made application for registration of mortgage no. BX517524 in favour of Gurdip Malik in the sum of $175,000.00.

h. On January 15, 2007, Jaspreet Malik filed an application for Cancellation of Charge no. BB455145 regarding a Certificate of Pending Litigation previously filed by Desjardins.

i. On July 24, 2007, David Unterman filed an application regarding the assignment of mortgage no. BB101886 in favour of HSBC to 0772735 B.C. Ltd.

j. On July 24, 2007, Jaspreet Malik filed an application for Cancellation of Charge no. BB107272 regarding a Certificate of Pending Litigation filed by HSBC.

[18] There were further transactions concerning land in Esquimalt, British Columbia, which indicate the involvement of Jaspreet Malik with R.S. and R.K. Malik wherein on March 12, 2003, Jaspreet Malik certified the signatures of R.S. and R.K. Malik on mortgage no. EV029071 in favour of Desjardins for the sum of $1,696,390.84.

[19] On August 1, 2003, shortly before the Rowbotham hearing, a claim by Gurdip Malik that R.S. Malik owed him $330,000 was set down for a summary hearing. The Province intervened and the application was adjourned. The court was advised that the evidence before Stromberg-Stein J. was to the effect that R.S. Malik's son, the defendant Jaspreet Malik, had arranged for a solicitor to bring the application against his own father.

[20] The court was further advised of a series of security instruments in November 2003 collateral to the reimbursement amount under the Payment Agreement. These are set out in the affidavit of Gordon Houston, as follows:

> 40. By a Guarantee dated November 4, 2003 (the "Guarantee"), Khalsa Developments Ltd. guaranteed payment by Mr. Malik to the Province of the Reimbursement Amount under the Payment Agreement provided that the obligation of Khalsa Developments Ltd. and recourse pursuant to the terms and conditions of the Guarantee was limited to the lesser of $1,800,000.00 or the amount of the net sale proceeds from the Executive Hotel Property.
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> 41. By a Mortgage dated November 3, 2003 and registered in the New Westminster Land Title Office on November 24, 2003 under number BV487519 (the "Khalsa Mortgage") between Khalsa Developments Ltd. as Mortgagor and the Province as Mortgagee, Khalsa Developments Ltd. granted a mortgage on the Executive Hotel Property to the Province as collateral security for payment of all liabilities of Khalsa Developments Ltd. to the Province pursuant to the Guarantee.
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> 42. By a General Security Agreement dated November 3, 2003 (the "Khalsa General Security Agreement") and registered in the Personal Property Security Registry on October 14, 2003 under base registration number 325819B, Khalsa Developments Ltd. granted to the Province a security interest in all of its presently owned and after acquired property save and except consumer goods as security for payment of its liabilities pursuant to the Guarantee.

[21] On January 2, 2004, a mortgage in the amount of $150,000 was registered in favour of R.K. (Mrs.) Malik against R.S. Malik's one-half interest in the Hamilton Street property.

[22] On January 16, 2004, Jaspreet Malik was cited by the Law Society of British Columbia in relation to matters before this court, in the following terms:

> Nature of conduct to be inquired into:
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> 1. Your conduct in participating in a scheme or design to mislead the Supreme Court of British Columbia by arranging the acquisition and/or registration of security of a loan from Gurdip Malik, a family member, Ripudaman Singh Malik, a family member, and/or attempting to obtain judgment on that loan for the purpose of putting into place a reduction in the assets of Ripudaman Singh Malik prior to and for the purposes of his "Rowbotham" application.
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> 2. Your conduct in participating in a scheme or design to misrepresent the expenses or liabilities of the Papillon and/or the Khalsa Hotel businesses by:
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> a) Providing false or misleading information to the Supreme Court of British Columbia on the "Rowbotham" application of Ripudaman Singh Malik, and for the purpose of misrepresenting the value of his assets, by claiming the existence of previously undisclosed liabilities for unpaid wages now alleged to be owing to you and/or other family members;
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> b) In respect of the Khalsa Hotel business, providing false or misleading information to the Business Development Bank of Canada, and for the purpose of obtaining or attempting to obtain a benefit dishonestly for the Khalsa Hotel business, by failing to disclose liabilities for unpaid wages now alleged to be owing to you and/or other family members;
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> contrary to Chapter 1, Rule 2(3) and Chapter 4, Rule 6 of the Professional Conduct Handbook.
>
> 3. As set out in paragraphs 1 and 2 above, your engagement in dishonourable or questionable conduct that casts doubt on your professional integrity and/or competence or reflects adversely on the integrity of the legal profession or the administration of justice contrary to Chapter 2, Rule 1 of the Professional Conduct Handbook.

[23] Mr. Houston deposed that from September 19, 2003 through June 2005, legal expenses and costs of

$1,681,526.33 were incurred by R.S. Malik. Certificates were issued pursuant to the terms of the Review Agreement.

[24] On December 13, 2005 the Province demanded repayment of $5,200,131.51 paid under the Defence Counsel Agreement and $1,681,526.33, paid under the Payment Agreement. These figures were subsequently adjusted in R.S. Malik's favour on account of $72,498.81 that had been paid into court.

[25] Mr. Houston deposed that no other payments have been made.

[26] In 2006, foreclosure proceedings were commenced against the Hamilton Street property by creditors ranking in precedence to the Province. These charges were paid out by a numbered company, the defendant, 0772735 B.C. Ltd., for $1,266,539.07 and $645,501.75. The directors of the company are R.S. Malik's children, the defendants Jaspreet Malik, Hardeep Malik, Darshan Malik, and two not named in these proceedings, Japnaan Singh Malik, and Kirat Kaur Malik.

[27] Mr. Houston deposed to a belief that all of these activities were undertaken to make it impossible for the Province to recover the sums advanced under its agreements with R.S. Malik.

[28] The Province also tendered an affidavit from Richard Butler, a Ministry solicitor, setting out the history of the Province's negotiations with R.S. Malik and his representatives, and setting out the two principal agreements. A further affidavit from Mr. Houston set out the various loan, guarantee and security documents underlying these proceedings.

[29] An affidavit from David Richard Iveson, a computer forensic specialist, set out the means by which electronically stored evidence might be destroyed and what he would need to do were a search of premises authorized.

[30] On the basis of the material submitted and the representations made by counsel I was satisfied that a good arguable case of fraud of sufficient seriousness had been established such that an order ought to be made without notice, granting the relief sought upon an undertaking as to damages. The order provided that the Defendants could apply to set it aside on 24 hours notice.

[31] The order was executed in its terms (or as modified in subsequent appearances), and the independent supervising solicitors appointed under the order have reported to the court.

III

[32] The defendants' applications to set aside the Mareva and Anton Piller orders proceeded with counsel for Jaspreet Malik and 0760887 B.C. Ltd. making submissions, followed by submissions on behalf of counsel for R.S. Malik and counsel for R. K. Malik. I will set out their positions in turn.

[33] Jaspreet Singh Malik and 0760887 B.C. Ltd. ("J.S. Malik and 0760887") alleged that in six particular ways the Province failed, in the course of making the *ex parte* application, to fulfill its duty to disclose fully and frankly all material matters to the court. They relied on the articulation of this duty found in ***Evans v. Silicon Valley 1PO Network*** (2004), 24 B.C.L.R. (4th) 69 (B.C.C.A.) per Donald J.A. at paras. 32-34:

> 32 There is no disagreement between the parties on the principles of disclosure. The rule on *ex parte* applications (which was the nature of the proceeding on 18 December 2002) was described in the frequently cited decision of Wilson J., later C.J.S.C., in *Gulf Islands Navigation Ltd. v. Seafarers' International Union of North America (Canadian District)* (1959), 18 D.L.R. (2d) 216 (B.C.S.C.) at 218:
>
> > I find there is some divergence of judicial thought as to the grounds upon which an *ex parte* order ought, upon notice, to be discharged. The area of divergence does not include such generally accepted fundamental concepts as this: That the *ex parte* order is obtained *periculo petentis* so that if there has not been made to the Judge a full and frank disclosure of relevant facts, the order will be voided. Sheppard J.A. in *Kraupner v. Ruby* (1957), 7 D.L.R. (2d) 383 at p. 391 cites Scrutton L.J. in *Lazard Bros. & Co. v. Banque Industrielle de Moscou,* [1932] 1 K.B. 617 at p. 637: "Persons applying ex

> parte to the Court must use the utmost good faith, and if they do not, they cannot keep the results of their application." To emphasize the strictness with which this rule is applied, see also *Re Gedye,* (1852), 15 Beav. 254 at p. 257, 51 E.R. 535.

33 The appellant may have convinced himself that no notice to the other parties was required and that their claims were immaterial in respect of his application for an order absolute, but his counsel was obliged as an officer of the court to disclose any facts which *might* have influenced the court's decision. In *Money in a Minute Auto Loans Ltd. v. Price*, 2001 BCSC 864 (B.C.S.C. [In Chambers]), McKinnon J. makes the point in a summary of the law with which I respectfully agree, at paras. 12–14:

> [12] It is trite law to observe that an ex parte applicant must make full and frank disclosure of all material facts to the court and failure to do so allows the court to set the order aside without regard to the merits of the application: *Gulf Islands Navigation Ltd. v. Seafarers' International Union* (1959), 18 D.L.R. (2d) 625 (B.C.C.A.) ("Gulf Islands"); *R. v. Kensington Income Tax Commissioners*, [1917] 1 K.B. 504 (C.A.). Counsel must also display a high standard of candour and diligence in disclosure: *Wilder v. Davis & Co.* (1994), 92 B.C.L.R. (2) 385 (C.A.).
>
> [13] A material fact is one that may or might affect the outcome of an application: *C.P.R. v. U.L.T.U*. loc 144 (1970), 14 D.L.R. (3d) 497 (B.C.S.C.) at 500-501. It is for the court to decide what is a material fact: *Brink's – MAT Ltd. v. Elcombe*, [1988] 3 All E.R. 188 (C.A.); *Pulse Microsystems Ltd. v. SafeSoft Systems Inc.,* [1996] 6 W.W.R. 1 (Man. C.A.)
>
> [14] The court also has jurisdiction to set aside an *ex parte* order on its merits, whether or not there was material misrepresentation, if a person affected by the order applies under B.C.S.C. Rule 52 (12.3): also see *Martinuik v. Martinuik,* [2001] B.C.J. No. 588 (S.C.M.), 2001 BCSC 424. An application to set aside the order is heard *de novo* as to the law and facts of the original application: *Gulf Islands,* (above).
>
> [Emphasis added]

See also Bank of Credit & Commerce International (Overseas) Ltd. (Liquidators of) v. Akbar, 2001 BCCA 204 (B.C.C.A.) at para. 24.

34 It is not for the applicant in an *ex parte* proceeding to decide nice questions of law bearing on materiality and then to withhold information based on that decision. In *Girocredit Bank Aktiengesellschaft Der Sparkassen v. Bader,* [1998] B.C.J. No. 1516 (B.C.C.A.), Goldie J.A. in giving the decision of this Court quoted with approval from the compendium of principles enumerated by Ralph Gibson L.J. in *Brink's-Mat Ltd. v. Elcombe* (1987), [1988] 3 All E.R. 188 (Eng. C.A.), at 192:

> …(ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers …
>
> [Emphasis added]

[34] This obligation has been said to encompass an obligation to "fairly state the points to be made against [the claim]" by the defendant (see: ***Sekisui House Co. Ltd. v. Nagashima*** (1983), 42 B.C.L.R. 11 (B.C.C.A.) at p. 5).

[35] The defendants, J.S. Malik and 0760887, submit that the Province failed in this obligation because it did not advise the court that collusion and fraud were not before the court in the Rowbotham application, while relying on the reasons for judgment to obtain the relief it sought.

[36] They further submit that the submissions on the *ex parte* application relied heavily on the findings of fact made by Stromberg-Stein J. in the Rowbotham application as evidence that was "key to the application [for the injunction] because the action No. S077088 sounds in fraud and conspiracy".

[37] The question on the Rowbotham application was whether R.S. Malik had established that he was eligible for

funding within the principles applicable. Stromberg-Stein J. found that R. S. Malik had failed to carry that burden and observed that he had "disentitled himself" to such funding by his actions. J.S. Malik and 0760887 submit that while Stromberg-Stein J. may have made adverse findings of credibility in the course of that application, the exacting standards required to establish fraud were not applied. They submit that, accordingly, the findings cannot be binding on the defendants in this proceeding, either because they are *res judicata*, or under the principles of issue estoppel.

[38] In order for these principles to apply the same issue would have been decided. The test is set out in ***Danyluk v. Ainsworth Technologies Inc***., [2001] 2 S.C.R. 460 per Binnie J. at para. 24:

> 24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent,* [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]
>
> This statement was adopted by Laskin J. (later C.J.), dissenting an *Angle, supra,* at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell, supra,* at p. 558). Dickson J. (later C.J.) speaking for the majority in *Angle, supra*, at p. 255,subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
>
> 25. The preconditions to the operation of issue estoppel were set out by Dickson J., in *Angle, supra*, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[39] J.S. Malik and 0760887 submit that although Jaspreet was a witness, they were not parties, and that they and the other family defendants could not be heard on the application. As such, they say, there could be no application of *res judicata* and issue estoppel to them.

[40] Counsel for R.S. Malik adopted the submissions made on behalf of J.S. Malik and 0760887.

[41] Counsel for R.K. Malik put her arguments on the somewhat different footing that the Province acted unconscionably in obtaining the *ex parte* order because the relief sought was in breach of a promise given to R.K. Malik made after the Rowbotham application, that it would not pursue certain protected assets. I will return to this later.

[42] The position of the Province respecting the *res judicata* and issue estoppel arguments arising out of the use made by the Province of the reasons of Stromberg-Stein J. is that its argument was explicit and accurate about the nature of the Rowbotham application and the evidence given on that occasion. The Province submits that it properly explained the extent to which it relied on the findings of fact that were made by Stromberg-Stein J.

[43] The Province submits that it was under no duty to advise the court what the Rowbotham application was not, when it clearly explained what it was. The Province submits that it is not relying on the facts found by Stromberg-Stein J. as determinative of the issues relating to the legal test of fraud and conspiracy, but on the findings of fact on the particular matters which were before the court squarely on that occasion. These, they submit, included the following:

> At his bail hearing in December, 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85 [p. 3, para 5];
>
> In November, 2001, Mr. Malik approached the AG to fund his defence and asserted that he had assets but those assets were not in cash form and liquidating them would require time [p. 4 para 6];
>
> In February, 2002, negotiations between Mr. Malik's counsel and the AG led to an interim funding agreement [p.4, para 6];
>
> The funding agreement was entered into so funding could commence immediately and the AG advanced funds in good faith based on Mr. Malik's representations [p. 4, para 7];
>
> Subsequently, Mr. Malik claimed he was insolvent because his assets were insufficient to discharge his liabilities, including debt owed to unsecured creditors who were all family member [p.5, para 10];
>
> The evidence establishes a collective effort by Mr. Malik and the Malik family members to diminish the value of his estate [p.10, para 21];
>
> The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise [p. 16, para 25];
>
> Title to the Marguerite Street home is in Mrs. Malik's name alone. The land was purchased and the home constructed from joint funds. The Maliks shared all expenses [p. 19, para 35];
>
> It appears that since Mr. Malik's arrest, Papillon's annual earnings dropped from $4 million to $2.5 million per year [p. 22, para 42];
>
> Regarding property in India, the Maliks provided numerous contradictory explanations concerning both the value and the ownership of this property [p. 23, para. 45];
>
> Regarding the allegation that Gurdip Malik loaned Mr. Malik $33,000 US, the evidence shows these funds were received from Gurdip Malik's company, Papillon Eastern Importes Ltd. in Los Angeles, and used to pay business and personal expenses, and to reduce the line of credit [p. 24, para 48];
>
> Jaspreet Malik was instrumental in obtaining and arranging the registration of a security agreement against Mr. Malik's shares in the hotel [p. 25, para 49];
>
> There is evidence of collusion to secure Gurdip Malik's loan before this hearing and to reduce Mr. Malik's equity in the hotel [p. 25, para 50];
>
> There is no record of outstanding wages now claimed, dating as far back as 1994 up to 1997. No formal records were kept regarding the hours worked by the children [p.25, para. 51];
>
> Although confusing, the evidence establishes the Maliks never intended to pay their children and the children never contemplated they would be paid [p. 26, para. 53];
>
> Following Mr. Malik's arrest his family continued to transfer, give away and buy luxury vehicles. A 1999 $108,000 Mercedes, purchased by Mr. Malik with joint funds, was transferred to Mrs. Malik while he was incarcerated. Mrs. Malik elected to repay the car loan before it was due [p. 27, para. 56];
>
> Mrs. Malik gave away her 1998 Land Rover of unknown value [p. 28, para. 57];
>
> Evidence about the purchase of the Lexus is inconsistent and confusing. In March 2001 Hardeep purchased a $35,000 Lexus with joint funds. He then borrowed that amount and lent it to Khalsa Developments Ltd. The loan was paid off by Khalsa Developments Ltd. [p. 28, para. 58];

> Darshan purchased a $22,000 Chevy Blazer with joint funds in 2003 [p. 28, para. 59];
>
> The Maliks reported charitable donations for the years 1994 to 2000 of $564,729.97. Of that amount, $512,612.97 was donated to either Satman Education Society or Satnam Trust, which were headed by Mr. Malik …[p. 28, para. 60];
>
> In violation of a court order not to dispose of any assets, $72,000 from Mr. Malik's income tax refund was placed in a joint account and used to pay business debt. This money was repaid to the province during this application [p. 29, para. 63];
>
> About the end of December 2000, the Maliks voluntarily elected to pay a franchise cancellation penalty of $100,000 when the hotel changed its affiliation from the Quality Inn to the Executive Inn [p. 29, para. 64];
>
> Mr. Malik's agreement to contribute to the cost of his defence, as outlined in the Defence Counsel Agreement is a compelling consideration. Malik failed to liquidate his assets [p. 30, paras. 69-70];
>
> Mr. Malik and Mrs. Malik have manipulated facts to suit their particular needs as evidenced by the representations at the bail hearing about the value of the Malik's assets [p. 31, para. 75];
>
> The evidence shows that Mr. Malik and his family have tired to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely [p. 34, para. 82];
>
> Any perceived cash shortage is artificial and contrived [p. 34, para 83]
>
> ("Rowbotham Facts")

[44] The Province then went on to cite ***Withler v. Canada (Attorney General)***, [2002] B.C.J. No. 1395, per Garson J. at para. 25, which indicated that it is relying primarily on the third category of cases identified:

> (a) The three preconditions to the operation of the doctrine of res judicata are still part of the law of Canada and include mutuality. The three preconditions are as follows:
>
> (i) The same question has been decided in earlier proceedings.
>
> (ii) The earlier judicial decision was final.
>
> (iii) The parties or their privies are the same in both proceedings.
>
> (b) If the preconditions to the operation of res judicata are met, as either issue estoppel or action estoppel, the court must then proceed to the second stage of the analysis. In this second stage of the analysis, the court retains a discretion to consider whether justice would be served by application of the doctrine of res judicata. Res judicata will not be applied where to do so would result in a real injustice. The factors which influence the exercise of the court's discretion are open and depend on the circumstances of the particular case. The onus is on the party asserting the application of the doctrine.
>
> (c) There is a third category of cases (Saskatoon Credit Union and Nigro AngewSurpass) which I would describe as abuse of process cases, when an issue has been decided against a party. Mutuality is not a requirement. In abuse of process cases, the party asserting that there is an abuse of process, has the onus or proving that the court should exercise its discretion to apply the doctrine in the particular circumstances of the case.

[45] The Province also referred to ***Giles v. New Westminster Savings Credit Union***, [2006] B.C.J. No. 2832, per Sigurdson J. at para. 62:

> Where the strict requirements to establish issue estoppel are not met, the Court may nonetheless find that re-litigation of an issue would be an abuse of process: Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.) Local 79 at paragraph 42-43; Genesee Enterprises at paragraph 246.
>
> Chief Justice McEachern said in Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd. (1988),

22 B.C.L.R. (2d) 89 (S.C.) at 96, that he would have relied on issue estoppel or the broader doctrine of abuse of process in reaching the decision he made in that case. He said this about abuse of process:

> Abuse of process has also been used in Ontario, to prevent a retrial of issues previously decided even though the parties or issues were not precisely the same in both actions, in Bank of Montreal v. Crosson (1979), 96 D.L.R. (3d) 765 (Ont. H.C.) and Demeter v. British Pacific Life Insurance Co. (1983), 150 D.L.R. (3d) 249 (Ont. H.C.) aff'd 91984), 13 D.L.R. (4th) 318 (Ont. C.A.).
>
> Many authorities reviewed by Hardinge L.J.S.C. in Bank of B.C. v. Singh (1987), 17 B.C.L.R. (2d) 256 (B.C.S.C.) who based his decision against allowing a fresh action to proceed against parties to the former action on the ground of issue estoppel and on the ground of abuse of process against defendants who were not parties to the former proceedings.
>
> … I conclude that there is jurisdiction to dismiss an abuse of process a claim by plaintiffs who try to re-litigate common issues decided in earlier litigation.

[46] The Province submits that were the Malik family members to re-litigate the facts found in the course of the Rowbotham application, an abuse of process would occur.

IV

[47] A different, but related, submission made by J.S. Malik and 0760887 was that the Province failed to advise the court that the witnesses on the Rowbotham application were entitled to immunity from claims made in this action. They were joined in this submission by Hardeep Singh Malik and Darshan Singh Malik.

[48] Witness immunity operates to prohibit actions in respect of evidence given in court proceedings. The rule is ancient. In ***Mayer v. Mayer*** (1994), 99 B.C.L.R. (2d) 166 (BCSC), Hutchinson J. quoted some of the leading authorities providing the rationale for the rule:

> The issue of witness immunity was settled in England in R. v. Skinner (1771), Lofft. 55, in which Lord Mansfield said:
>
> > What Mr. Lucas has said is very just; neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office.
>
> The concept has been reiterated and expanded upon over the years. The strongest statement I have found was that of Lopes, L.J. in Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson, [1892] 1 Q.B. 431 at p. 451:
>
> > The authorities establish beyond all question this:
> >
> > that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognized by law, and this though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed. This "absolute privilege" has been conceded on the grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.
>
> In Cabassi v. Vila (1940) 64 C.L.R. 130, the High Court of Australia expanded the immunity to cover an allegation of conspiracy to commit perjury. Williams, J. said, at p. 151:

> Every consideration of public policy which prevents the crime of perjury followed by damage from constituting a tort is equally applicable to prevent the crime of conspiracy to commit perjury followed by its commission and consequential damage from doing so.
>
> A joint action can be brought against two or more persons for conspiracy to slander as well as against them severally (Thomas v. Moore). If the appellant is right the immunity of a witness who made a slanderous statement in the course of his evidence would be destroyed by alleging that he had conspired to do so with another person. A witness usually discusses his evidence with the solicitor for the party on whose behalf he is going to give evidence, and often with that party himself, so it would be simple to allege the conspiracy to give false evidence or to utter a slander in order to found the action. The value of the immunity of witnesses would be substantially diminished and in fact almost destroyed if such an action could be brought because, even if it failed, as pointed out by Lord Penzance in Dawkins v. Lord Rokeby, "the witness may be cleared by the jury of the imputation, and may yet have to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands."
>
> That reasoning was applied by the English Court of Appeal in Marrinan v. Vibart, [1962] 3 All. E.R. 380.
>
> The general rule of witness immunity was applied in British Columbia by Huddart J. in Carnahan v. Coutes (1990), 47 B.C.L.R. (2d) 127 and the Court of Appeal in M.(N.) (Guardian ad litem of) v. M.(I.A.S.)(1992), 69 B.C.L.R. 99; though still open in this province is the issue of whether the immunity extends to the tort of conspiracy to commit perjury.
>
> For reasons expressed by Williams, J. in Cabassi v. Vila, supra, I am of the view that the value of witness immunity would be so diminished as to have little effect if it did not also protect those who are alleged to have conspired to commit perjury. It has been recognized since Watson v. McEwan, [1905] A.C. 480 that a statement made by a witness to a party or to a party's solicitor in the course of preparation for trial is also privileged; otherwise the plaintiff could not sue for a statement made in the witness stand but could sue for the statement made in preparation for that trial. Such a result would be illogical and would defeat the policy reasons underlying the immunity. Similar considerations apply to a claim based on a conspiracy to commit perjury. (at paras. 13-17).

[49] The defendants making this submission cite this line of cases as authority for the proposition that, in their words:

> 35. These authorities confirm the immunity of a witness from a subsequent civil action, no matter how it is framed. This includes immunity from a civil action for conspiracy among witnesses to give false evidence, or for deceit.
>
> 36. Whether the Attorney General seeks to ground its claim in a scheme to give false testimony, or on issue estoppel based on the judge's findings with respect to the evidence, an action against witnesses is barred. What cannot be done directly cannot be done indirectly.
>
> 37. Immunity is a second point that may have been made against the claim by defendants, and ought to have been disclosed to the Court on an ex parte application.

[50] The Province observes that this is a *legal* construct, and that the submission is essentially that the court ought to have been advised of this possible argument. It submits that while the court must be advised of all material facts on an *ex parte* application of this kind, there is no obligation to draw the courts' attention to all conceivable arguments the other party might make.

[51] On the substantive issue, the Province submits that for the argument to be successful the case would have

to be reducible to a straightforward proposition: *but for their testimony and the affidavits filed at the Rowbotham application the plaintiff would have no cause of action.*

[52] The strong public policy rationale for the witness immunity rule operates as an exception to the more general rule that those who suffer a wrong have a right to a remedy. This places strict limits on its application. In ***Darker v. Chief Constable of the West Midlands Police***, [2001] 1 A.C. 435 (H.L.) at 468, the limitation is expressed, per Lord Hutton, as follows:

> The predominant requirement of public policy is that those who suffer a wrong should have a right to a remedy, and the case for granting an immunity which restricts that right must be clearly made out. In *Mann v. O'Neill* (1997) 71 ALJR 903 the judgment in the High Court of Australia of Brennan CJ, Dawson, Toohey and Gaudron JJ. states, at p 907: "the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated'." And in *Roy v. Prior* [1971] AC 470, where this House held that a defendant was not entitled to the absolute immunity which he claimed, Lord Wilberforce states, at p 480: "Immunities conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public interest."
>
> Moreover there is a danger in extending the immunity given to a witness in court proceedings merely by analogy. In *Mann v O'Neill* ALJR 903, 912 McHugh J warned against:
>
> A. "the temptation to recognise the availability of the defence for new factual circumstances simply because they are closely analogous to an existing category (or cases within an existing category) without examining the case for recognition in light of the underlying rationale for the defence."

[53] A helpful test for determining when the circumstances justify the application of the witness immunity rule is set out in ***Elliott v. Insurance Crime Prevention Bureau***, (2005) NSCA 115, per Cromwell J.A., at para. 120:

> To determine whether a defendant is entitled to witness immunity, four questions must be answered:
>
> 1. What is the conduct that forms the basis of the appellants' cause of action – that is, what is the "gist and essence" of the appellants' claim?
> 2. What is the scope of the claimed immunity and does the "gist and essence" of the appellants' claim fall within it?
> 3. Is the scope of the claimed immunity settled by authority?
> 4. If not, does the claimed immunity meet the test of necessity?

[54] The defendants cite a number of strong articulations of the privilege including the trial judgment in ***Workum v. Olnick****,* affirmed in the Court of Appeal (2006 BCCA 528) in the following term:

> 7. The question for the Court is whether the pleas of the plaintiff now before it are such as are within the rule – a rule of public policy – that no action will lie for the giving of false testimony in any legal proceeding, generally called the "witness immunity" rule. The rule includes conspiring to give false evidence. It does not preclude an action for planting evidence which is subsequently put before the court, or manufacturing documents, whether those documents are or are not adduced in evidence. See *Cabassi v. Vila* (1940), 64 C.L.R. 139 (H.C.A.); *Darker v. Chief Constable of the West Midlands Police,* [2001] 1 A.C. 435 (H.L.); *Surzur Overseas Ltd. v. Koros,* [1999] 2 Lloyd's L.R. 611 (C.A.) and, in this Court, *Hung v. Gardiner*, 13 B.C.L.R. (4th) 298, 2003 BCCA 257.
>
> 8 A principal rationale for the rule is in the maxim, *interest reipublicae ut sit finis litium.*
>
> …
>
> 12 The truth or falsity of all that has been said in evidence by Olnick and Brunner will be for the various tribunals to decide. It is so that sometimes tribunals are fooled into believing liars, there not only being no litmus test for truth, but also no litmus test for determining before a judge becomes a

judge whether he or she is a shrewd assessor of witnesses.

[55] Where the "gist and essence" of a claim is an action *on the evidence given in a court proceeding,* even if the allegation is that the evidence was false or fraudulent, the immunity will obtain. Where, however, the evidence given in a prior proceeding is a mere incident in, or a facet of, a larger series of transactions giving rise to a claim, it cannot be said that the "gist or essence of the claim" is the defendants' conduct and evidence given in court.

[56] The degree to which, if at all, immunity may apply to evidence given at the Rowbotham application may be a subject of argument at trial. The "gist and essence" of this fraud claim is, however, for the repayment of money advance to R.S. Malik pursuant to the Indemnity Agreement and the Defence Counsel Agreement, and for damages for fraud and deceit and conspiracy to commit fraud and deceit. The claim against R.S. Malik and the other defendant family members and legal entities controlled by family members, is that they allegedly attempted, by various means, and through various entities, to frustrate the Province's ability to recover payment under the agreements. The allegations place the Rowbotham application in the midst of this alleged scheme. Whether certain of the transactions were undertaken in contemplation of the Rowbotham application or not, the claims made by the Province are not, in substance, offensive to the maxim quoted in ***Workum*** (supra), respecting the public interest in an end to litigation. The Province has commenced an action akin to that addressed by the English Court of Appeal in ***Surzur Overseas Ltd. v. Koros***, [1999] 2 Lloyd's L.R. 611, cited with approval in ***Workum*** (supra) and ***Elliott*** (supra).

[57] There, a claim to immunity arising out of the giving of allegedly fabricated evidence in an application to vary a Mareva injunction was in issue. Koros had approached Surzur to consent to a variation (which it refused to do) on the basis of deceptive material which was subsequently tendered in court. Had Surzur gone along at the point where consent was sought, the deception would clearly have been actionable once the facts were discovered. Koros, however, then presented the evidence in court, it turns out, ineffectually. Surzur later alleged that this attempt to deceive the court was an abuse of process.

[58] Koros apparently submitted, as the defendants do here, that having presented that deceptive material the form of evidence in court, the evidence respecting that aspect of the alleged fraud ran afoul to the witness immunity rule. In summarizing the case, Wallen L.J. made a significant distinction:

> In *Roy v. Prior* [1971] A.C. 470 at p. 477 Lord Morris said:
>
> > It is well settled that no action will lie against a witness for words spoken in giving evidence in a court even if the evidence is falsely and maliciously given (see *Dawkins v. Lord Rokeby* (1873) L.R. 8 Q.B. 255, *Watson v. M'Ewan* [1905] A.C. 480). If a witness gives false evidence he may be prosecuted if the crime of perjury has been committed but a civil action for damages in respect of the words spoken will not lie (see the judgment of Lord Goddard C.J. in *Hargreaves v. Bretherton* [1959] 1 Q.B. 45). Nor is this rule to be circumvented by alleging a conspiracy between witnesses to make false statements (see *Marrinan v Vibart* [1963] 1 Q.B. 528).
> >
> > This, however, does not involve that an action which is not brought in respect of evidence given in court but is brought in respect of an alleged abuse of process of court must be defeated if one step in the course of the abuse of the process of the court involved or necessitated the giving of evidence.
>
> What the above demonstrates is that it is certainly not every cause of action which includes an averment that false evidence was given which will be struck out on the basis of witness immunity. It also seems to me that what the above demonstrates is that it is not permissible to divided allegations up as Mr. Schaff sought to do into those that involve giving evidence and those which do not. He sought to persuade us that even if allegations in relation to the warehousing agreement and the false MOAs survived, allegations which involved the deployment of the false MOAs in evidence should be struck out under the witness immunity rule. It seems to me that Lord Morris' statement shows that that is not a proper approach.
>
> In my view the statement of Lord Morris is capable of two interpretations, on either of which the plaintiffs, on the pleaded facts, will not be defeated by the witness immunity rule. On the first

> interpretation his statement should not be read simply as saying that malicious arrest or malicious prosecution alone are exceptions to the witness immunity rule. His statement, in my view, supports a broader proposition that if the action is not brought simply in respect of evidence given or supplied but is brought in relation to some broader objective during the currency of which it may well be that evidence was given witness immunity should not apply.
>
> In my view the conspiracy here had a broader objective and it was not a necessary ingredient that false evidence should be given. It so happened that in the way matters turned out it was given. It is of assistance to test the matter in this way. It seems clear that in this case the plaintiff could have recovered damages in respect of the conspiracy to hide assets, by the bringing into being of false documents, if the defendants had succeeded in doing that without bringing the matter before the Court. The suggestion has to be that because of Surzur's diligence, by virtue of which they achieved an amendment to the Mareva, did not accept the false MOAs at their face value, and forced an application to the Court, in some way their action for conspiracy is defeated. That would be absurd.

[59] The precise application or extension of the witness immunity rule to this case is not the question presently before this court. It is, at this point, an arguable legal position applicable to some of the evidence. The same is true for the submissions respecting *res judicata*. The defendants have not shown that the facts asserted by the Province in respect of these matters are seriously in issue. Rather they submit that the court ought to have had their arguments put to it on the *ex parte* application, and that the Province's failure to do so in a breach of the strict terms the law imposes on a party seeking *ex parte* relief.

[60] A failure to disclose material facts – that is, facts which would alter the premises upon which the court is asked to act – is dealt with strictly. Candour is essential to prevent the court from making orders which turn out to be ill-founded. Once the material facts are fairly and fully put to the court, however, it becomes the courts' task to assess the strength of the plaintiff's case, bearing in mind the possibility that the arguments advanced in the course of the plaintiff's submissions may be cast in quite a different light when the defendants have an opportunity to be heard. It is not the duty of the plaintiff to make those arguments, or for the court to weigh the case as if it were disposing of the issues. The facts which the Province outlined in its original submissions have not been shown to be materially misleading.

[61] From the perspective of a court assessing the evidence with a view to ensuring that the positions of the parties are protected until the facts can be determined at trial, arguments about the legal limits of *res judicata* and witness immunity will not defeat a strong fact based *prima facie* case that the defendants have acted in ways that are inconsistent with their contractual and other legal obligations. The allegation that aspects of the defendants' dealings or behaviour have been the subject of a series of adverse rulings in another proceeding, will not, in the absence of material facts demonstrating that the rulings were effectively unfounded or irrelevant, be negated by abstract arguments unattached to actual findings of fact. The legal arguments the defendants submit the Province should have made on their behalf at the *ex parte* hearing, do not (now that they have been made by the defendants' representatives), suffice to overcome the *prima facie* case that has been put on largely uncontroverted allegations of fact.

V

[62] The defendants submit that the fact that a loan allegedly owing to Gurdip S. Malik was known to the Attorney General as early as 2001 and was not drawn to the attention of the court is a failure to draw the court's attention to a material circumstance as, they submit, is its failure to advise the court that Gurdip S. Malik was not allowed to participate on the Rowbotham proceedings. It is difficult to see the specific relevance of these objections. Gurdip Malik sought to have an application for summary judgment on a loan allegedly advanced to R.S. Malik heard at the same time as the Rowbotham application. Counsel for Gurdip Malik argued that to merely make submissions as to the validity of the loan at the Rowbotham application, which he was permitted to do, was not helpful to his client, because the point was to get his security in place before the Rowbotham application was heard. The defendants submit that:

> It would be a poor system of law which might consider a person to be bound where he was not a

> party, where his interests were at stake, where he sought to participate, where he was not permitted to participate except by submissions, where his evidence was not before the court, where he had no right of appeal or review and where the party who objected to his involvement (and advised the court that it was not being asked to determine the validity of the loan *Rowbotham* Tr. P. 85.1.35) now says the loan is invalid and he is bound by the most serious allegations that can be brought in the civil law context. There was no indication of how the Attorney General would propose to stretch the law of *res judicata* and issue estoppel to such situation, either as to Gurdip S. Malik as a defendant, or to the loan itself, or to other parties to this action who are affected by any findings.
>
> [from the submission of Jaspreet Malik and 0760887B.C. Ltd.]

[63] The reasons for judgment of Stromberg-Stein J. dealt with the involvement of Gurdip Malik as follows:

> [47] Gurdip Malik allegedly loaned Mr. Malik $330,000 US. The evidence shows these funds were received from Gurdip Malik's company, Papillon Eastern Imports Inc. in Los Angeles, put into Papillon Eastern account, used to pay business and personal expenses, and to reduce the line of credit. Mrs. Malik guaranteed this loan.
>
> [48] Gurdip Malik did not testify. Mr. Malik claims the purpose of this loan was for legal fees. I agree with the Attorney that the evidence that legal fees were paid by Mr. Malik with Gurdip Malik's funds is completely unreliable.
>
> [49] Mr. Malik is being sued by his brother as per a statement of claim filed June 2003, a year before the $330,000 US loan was due. The statement of claim does not say the loan was for legal fees. Mr. Malik's son, Jaspreet, who is a lawyer, with the assistance of another lawyer, Raj Deol, attempted to obtain default judgment on behalf of Gurdip Malik before this *Rowbotham* application was heard. As well, Mr. Malik pledged his shares in Khalsa Development Ltd., which owns the hotel, to guarantee Gurdip Malik's loan. Mr. Malik admits "kind of double-pledging the assets". Jaspreet Malik was instrumental in obtaining and arranging the registration of a security agreement against Mr. Malik's shares in the hotel.
>
> [50] This security agreement was not contemporaneous with the advancement of money. I agree with the Attorney General that there is evidence of collusion to secure Gurdip Malik's loan before this hearing and to reduce Mr. Malik's equity in the hotel.

[64] The circumstances were so unusual and so apparently in accord with the other activities of R.S. Malik and other family members that Stromberg-Stein J. appears to have had little difficulty finding as she did. I accept that the validity of this loan was not specifically ruled upon because Gurdip Malik's summary judgment application was not heard. This court has not been advised whether or not he has proceeded to judgment since, or attempted to show that, respecting his loan, the inferences drawn by Stromberg-Stein J. were inappropriate. This, it seems to me, remains open to him, and would no doubt have been drawn to the court's attention had he been successful. This is not really a question of whether he had a proper hearing or was accorded status at the Rowbotham application, such that this court has been misled or led to the wrong inferences. It is, rather, a matter of Stromberg-Stein J. having drawn certain inferences in a particular context, and Gurdip Malik apparently having done nothing since to displace them. I see no materiality in an abstract argument about things Gurdip Malik could submit to the court at any time if he chose to do so.

VI

[65] The defendants submit that the Province also failed to advise the court that there was substantial evidence of "no reliance". This is an argument that, in making its decision to fund the R.S. Malik defence, the Province took upon itself the burden of establishing the facts upon which it relied. This included material showing that the Province had serious misgivings about the accuracy of R.S. Malik's assertions respecting his ability to pay. This is summarized in the defendants' argument as follows:

> There was substantial evidence that the Attorney General did not rely on assertions or representations. This too might have affected the outcome of the application for the *ex parte* orders. It is axiomatic that a person who chooses to judge for himself in the matter cannot avail himself of the facts there has been misrepresentation or say that he has acted on the faith of the representation.

[66] Even if one were to accept, for the sake of argument, that the Province made a completely independent assessment of the situation and decided that given the matters at stake, whether or not R.S. Malik's representations were reliable, the interests of justice compelled it to see the matter through, this would have no bearing on Mr. Malik's representations that he would contribute his assets to his defence, and that he would assist in the identification and transfer of those assets. The fact that he has not apparently done so to date – he provides no evidence of any good faith effort to honour his commitments – and his apparent efforts to establish that other family members are entitled to substantially all of the assets that appeared to be his, does not become the Province's problem because it was skeptical of the representations at the time they were made.

[67] Even if the Province had a duty to make this argument on behalf of the defendants – and I do not say it did – it would have made no difference. I say so because, having now had the benefit of such argument, it is insufficient to alter the balance the court was attempting to strike in granting the interlocutory orders it did.

VII

[68] The defendants further submit that the Province failed to advise the court of the law respecting privilege.

[69] This submission again proceeds from the premise that the Province had an obligation not only to refer the court to the relevant law but to instruct the court on how it ought to read that law. The court was referred to the leading decisions, particularly ***Celanese Canada Inc. v. Murray Demolition Corp.***, [2006] 2 S.C.R. 189. At the hearing of the *ex parte* motion, the whole issue of privilege was canvassed, and the fact that one of premises sought to be searched was a law firm out of which one of the defendants, a family member, practised, was at the forefront. It was recognized that, in the circumstances, there was a possibility that documents over which there might be solicitor-client privilege might be seized. The Province proposed that two independent solicitors be appointed, including one handling the "law firm" material alone. The argument is that the search that was authorized was over-broad, and that the strictness of the obligations binding the Province, characterized in various ways, were not drawn to the court's attention.

[70] In effect what is being submitted, here as elsewhere, is that the court erred in making the order it did. Where the issue is one of the correct applications of the law, it is not altogether helpful to characterize what is actually an allegation of error as the failure of a duty to draw the court's attention to the law. It is the duty of counsel, particularly on such an application, to assist the court with the applicable law, and not to mischaracterize, or to fail to tender, known relevant authority. This obligation does not extend to telling the court how to interpret or apply the relevant law. If the court has failed to properly apply the law that is ultimately the responsibility of the court, and not the failure of a duty to steer the court correctly.

[71] An order of the kind granted in this case turns on its particular facts and must recognize the intrusive nature of the remedy sought, and the importance of limiting the scope of the order to what is absolutely necessary. It is, moreover, obvious that by their nature such orders may have unintended consequences. It is therefore incumbent upon the court to be available to deal with such matters as soon as possible after the parties affected have been served. This happened. Counsel sought an early opportunity to make submissions regarding the scope of the search, and they were heard.

[72] It is possible to characterize almost any order of this kind as theoretically over-broad, given that the balance that is being attempted is to capture all that is necessary but no more than is necessary. It is of more than passing interest in assessing whether a search was, in fact (and not merely theoretically), over-broad, to consider whether there were any violations of solicitor-client privilege. John W. Horn Q.C., the independent solicitor holding the seized materials, has reported that Jaspreet Malik has had an opportunity to review the material actually seized but has not identified any actual breaches of privilege. In the circumstances, if the court erred in its application of the relevant principles, there have been no identified consequences of that error. I am not persuaded that a

theoretically over-broad order – if such were established – should be set aside on that basis alone, where there have been no consequences attributable to the error, and the error was not induced by some conduct on the part of counsel, neither of which have been established.

VIII

[73] The defendants submit that the Province failed to disclose the realistic costs of the defence. There is nothing to this argument. In allowing $25,000 for each defendant, the court was simply recognizing that there should be some allowance, fully cognizant that upon service submissions would be made by the parties themselves as to the adequacy of the amount. This is not a ground for setting the order aside.

IX

[74] Counsel for R.S. Malik adopted the submissions made on behalf of J.S. Malik and 0760887. He also submitted that there was "no evidence whatsoever" against him in the Air India trial and that he never should have been charged. This is quite irrelevant to the question of whether he is required to pay back the money advanced for his defence.

[75] R.S. Malik also represented that there is sufficient equity available should he be found liable to pay, and that this entire process and the concerns the Province has raised respecting the disposition of assets is a waste of time. The submission was most unconvincing, inasmuch as counsel was unable to point to any unencumbered asset that would be available security for any judgment that might be rendered.

X

[76] R.K. Malik also relies on the submissions of J.S. Malik and 0760887 respecting the various ways in which the Province is said to have failed in its duty to the court. She has a further submission that the Province has come to the court seeking equitable relief while it is acting unconscionably itself. She alleges that the Province made a promise not to pursue certain "protected assets" in which she had an interest, but that the effect of the Mareva injunction application is that the Province, without notice to her, came before the court seeking relief that breached that agreement. She asks that the order be set aside as against her, and that it be stayed insofar as it touches upon the "protected assets".

[77] R.K. Malik relies on the line of cases regarding full and frank disclosure of all material facts, examples of which were tendered by J.S. Malik and 0760887 in their submissions. She goes further and submits that the court ought to set the order aside on the merits, whether or not there was a material misrepresentation.

[78] The submission addresses the representations made (or more accurately, not made) by counsel for the Province at the original hearing. The fundamental complaint is that the court was not advised that:

a. In the aftermath of the Rowbotham Application, Raminder Malik asked for a specific promise from the Province not to go after her assets including the family home;

b. The Province granted that promise;

c. In reliance on that Promise, Raminder Malik acted to her detriment.

[79] R.K. Malik owns a half-interest in the Khalsa Developments Ltd. ("Khalsa"), which owns a hotel in Harrison, British Columbia. She is the sole director of the defendant Khalsa. Following the Rowbotham application, her lawyers were involved in negotiations that gave rise to the Payment Agreement dated October 17, 2003. She was not a party, but the agreement reflected discussions that resulted in the Province agreeing that "in connection with the Payment Agreement" it would not assert any claim or entitlement to R.K. Malik's interest in a series of assets enumerated in a schedule attached to the Payment Agreement. In reliance upon these representations she says she acted to her own detriment, in executing and delivering documents ancillary to the Payment Agreement which she described as follows:

a. a guarantee granted by Khalsa (the Guarantee") which is Schedule E to the said Payment Agreement;

b. a mortgage between Khalsa as Mortgagor and the Plaintiff as Mortgagee (the Khalsa Mortgage") on the Executive Hotel Property as collateral security for payment of all liabilities of Khalsa pursuant to the Guarantee, which mortgage is Schedule F to the said Payment Agreement; and

c. a general security agreement between Khalsa as Debtor and the Plaintiff as the Secured Party (the "Khalsa GSA Agreement"), which agreement is Schedule G to the said Payment Agreement.

[80] R.K. Malik submits that none of this was outlined in the original application for the *ex parte* orders.

[81] The Statement of Claim makes a number of specific allegations against R.K. Malik for false and untrue representations including the following:

…

b) The Defendant, Raminder, through her counsel, asserted that Ripudaman was substantially indebted to her and that Ripudaman had no interest, legal or beneficial, in the matrimonial home located t 6475 Marguerite Street, Vancouver, British Columbia, and that the Defendant Ripudaman's net worth amounted to minus TWO HUNDRED AND NINETY THOUSAND DOLLARS ($290,000.00);

c) The Defendants, Jaspreet, Hardeep, Darchan, and Raminder asserted that the Defendant's Papillon and Khalsa were substantially indebted to Jaspreet, Hardeep, and Darshan on account of wages and that Ripudaman was indebted to them on account of monies received in trust for their benefit;

d) The Defendants, Raminder, Jaspreet, Hardeep, Darshan and Gurdip asserted that all assets held in their respective names were their sole property and that Ripudaman had no interest in same, and that none were prepared to assist Ripudaman with payment of defence costs; …

[82] The Province makes further claims at paras. 49–51:

49. Further, the Plaintiff says that the Defendant Ripudaman has paid most, or all of the expenses in connection with the purchase and maintenance of the matrimonial home located at 6475 Marguerite Street, Vancouver, British Columbia, and more particularly, known and described as:

PID: 005-262-909

Lot 5, Except the West 66 Feet of Lot 9, Block 3, District Lot 526, Plan 4695, New Westminster Land District

and says that the Defendants Ripudaman and Raminder have represented generally, and specifically did represent to this Honourable Court at the Bail Hearing and to the Plaintiff that Ripudaman had a beneficial half interest therein, and in the circumstances the Plaintiff claims, by way of a remedial constructive trust, a Declaration that Raminder holds a half interest in the said property for the benefit of Ripudaman.

50. Further, or in the alternative, the Plaintiff says that to the extent the Defendants, Raminder, Jaspreet, Gurdip, Hardeep, Darshan, Khalsa, Papillon, 077 Ltd., and 076 Ltd. received monies and/or assets from the Defendant Ripudaman as from December 1997, such monies and/or assets are the rightful property of Ripudaman and the Plaintiff seeks an accounting of such assets received by the said Defendants or any of them and a Declaration that such monies and/or assets are the rightful property of the Defendant Ripudaman.

51. Further, or in the alternative, the Plaintiff says that to the extent the Defendants, Raminder, Jaspreet, Gurdip, Hardeep, Darshan, Khalsa, Papillon, 0772735 B.C. Ltd. and 0760887 B.C. Ltd. have monies and/or assets for which they cannot account, such monies and/or assets were obtained by reason of the fraud and Conspiracy and the said Defendants have been unjustly enriched thereby and the Plaintiff says all such monies and/or assets are impressed with a trust in favour of the

Defendant Ripudaman (hereinafter "the Trust").

[83] R.K. Malik submits that in "failing to disclose" the "protected asset" schedule incorporated in the Payment Agreement to the court, the Province failed to advise the court of a material fact that might have affected the outcome (see: ***Canadian Pacific Railway v. United Transportation Union, Local No. 144*** (1970), 14 D.L.R. (3d) 497 B.C.S.C. at pp. 500-501). The agreement not to claim against the "protected assets" was clearly consideration for the security obtained under the Payment Agreement. The Province now seeks to foreclose on that security in the separate foreclosure proceeding I have previously mentioned (No. H070591, Vancouver Registry).

[84] R.K. Malik submits that:

> It cannot be a fair and honest use of the process of this Honourable Court for the Province to sue in the Foreclosure Proceeding upon security granted by Raminder Malik, when in the AG Action the Province repudiates the very promise upon which that security was given in order to assert an interest in "Protected Assets". Such proceedings are oppressive and vexatious and, in the language of the caselaw, clearly "violate the community's sense of fair play and decency".

[85] R.K. Malik deposes that the Mareva injunction should not, in any case, have been granted because there is no irreparable harm and the balance of convenience does not favour so draconian a remedy, particularly since, she submits, the net equity in the real properties is ample to pay out the claims made by the Province. She submits that she has no interest in selling or dealing with the properties other than in the normal course of business.

[86] She also submits that the Province has not satisfactorily explained why it proceeded against her without notice, nor did it explain its delay in commencing these proceedings.

[87] The Province submits that the Payment Agreement must be understood in its terms and in the context in which it was made. By the time of the Rowbotham application the Province had advanced over $5 million in fees for R.S. Malik's defence. On the Rowbotham application Stromberg-Stein J. found that the Province was not obliged to fund R.S. Malik's defence. The Payment Agreement was executed subsequent to the Rowbotham application and the Province submits, was restricted to advances post-dating the Rowbotham application. The Province submits that it has not sought to go after any of the "protected assets" in respect of those advances except in the terms provided in the Payment Agreement. That Agreement specifically preserves the rights of the Province prior to the execution of the Payment Agreement:

> 9.18 Nothing in this agreement is intended to alter the rights of the Attorney General or Crossin that
>
> a) had accrued as at 19 September 2003 pursuant to the Defence Counsel Agreement dated for reference 1 February 2002, and terminated by the Attorney General pursuant to that terms of that agreement effective 19 September 2003,
>
> or
>
> b) that had accrued pursuant to agreement entitled Letter of Understanding on Overhead Expenses between Crossin and the Attorney General dated for reference February 1, 2002, and terminated by this Agreement.

[88] The Province submits that there has been no going back on the terms of the Payment Agreement. The foreclosure petition is the means by which it is seeking to enforce payment of its secured interest under that arrangement. It submits that the terms of the Payment Agreement do not operate retrospectively as an undertaking not to go after the "protected assets" in respect of R.K. Malik's participation in the matters alleged in the Statement of Claim, which pertain to the advances prior to the Rowbotham application.

[89] The Province submits that it fully complied with its obligations respecting disclosure in drawing the court's attention to the Payment Agreement and its relevant terms. It further submits that while counsel for R.K. Malik alluded to the negotiations leading up to the Payment Agreement, the Agreement speaks for itself and is the only relevant evidence of the terms of the arrangement.

[90] The Province submits that, properly understood, the Payment Agreement is not material to the claims made in the tort.

[91] R.K. Malik's submissions are, in essence, that the Province promised her, in an arrangement collateral to the Payment Agreement, that it would not pursue a recover against the "protected assets" identified in the schedule to the Payment Agreement under any circumstances. Apart from the implication in her affidavit that this was understood to be a broad representation that, in exchange for security following the Rowbotham application, her assets were protected throughout, there is scant evidence that this was so. Counsel for R.K. Malik submits that to suggest that she is obliged to explain herself is to reverse the onus, which he reminds the court is not upon his client in connection with the extraordinary relief the Province was granted.

[92] I do not think it is a question of onus but rather a question of "best evidence." If the arrangement negotiated on behalf of R.K. Malik bears the cast she wishes the court to place upon it, one would expect there to be better evidence – for example, from the people who negotiated on her behalf – that such was arguably the case. It is not the function of the court at this stage to be definitive – indeed, that must be avoided – but the outline of this triable issue put before the court presently is insufficient to persuade the court that the order that was given ought to be set aside. Again, the issue, while cast in terms of disclosure, is not really of that kind. The agreement was put before the court. The responding material suggests a possible construction that might be put upon the agreement. It is, however, really a suggestion that it was the duty of the Province to point out that R.K. Malik might take the position that there was a collateral oral contract that modified the terms of Payment Agreement, as between herself and the Province, such that the clause specifically protecting the rights of the Province to pursue repayment of funds already advanced, applied only as between the Province and R.S. Malik. This is legal argument and not a failure to disclose material facts and, for reasons already given was not among the obligations imposed on the Province on such a motion.

XI

[93] The motions to set aside the Mareva injunction and the Anton Piller Order brought by R.S. Malik, J.S. Malik and 070887, and R.K. Malik do not establish breaches of a duty to fully and fairly set out material facts, as alleged, such that regardless of the merits, the orders granted must be set aside. On an examination of the merits of the submissions advanced by these defendants, I say no more than that such triable issues as have been identified are insufficient to persuade me that, in adjusting the interest of the parties pending trial, in light of the nature of the allegations, the order I was persuaded to grant *ex parte* ought to be set aside or varied. I decline to do so.

[94] There is one exception, which counsel have essentially agreed upon. That is, that, in the event of a ruling that the Mareva injunction and the Anton Piller order are not set aside, the relatively nominal sum of $25,000 each allowed for legal fees may be adjusted. Counsel for R.S. Malik has suggested $100,000. I am prepared to vary the order to permit such sums a counsel may agree are reasonable, or to fix such amounts upon further submissions, if required.

XII

[95] The defendants also sought a number of orders respecting the pleadings.

[96] The defendants Hardeep Singh Malik, Darshan Singh Malik, and 0772735 B.C. Ltd. seek to have a series of allegations struck from the Statement of Claim. These include:

(a) …

(c) The Defendants, Jaspreet, Hardeep, Darchan, and Raminder asserted that the Defendants, Papillon and Khalsa were substantially indebted to Jaspreet, Hardeep and Darshan on account of wages and that Ripudaman was indebted to them on account of monies received in trust for their benefit;

(b) the part of paragraph 27 which reads:

The Plaintiff says that in support of the application, each of Ripudaman,

Raminder, Jaspreet, Hardeep, and Darshan filed sworn Affidavit material and testified under oath. In addition, the Defendant Ripudaman caused Gurjeet Singh, the in house accountant and employee of Papillon to file affidavit material.

(c) the names of Hardeep Malik and Darshan Malik, in paragraphs 35, which reads:

35. Further, the Plaintiff says that the representations made by or on behalf of the Defendant Ripudaman as detailed in paragraphs 16, 19 and 24 herein, and on behalf of the Defendants Raminder, Jaspreet, Hardeep, Darshan, and Gurdip as detailed in paragraph 22 herein, were false and untrue, and were made with intent that the Plaintiff would rely upon them, and for the purpose of wrongfully obtaining payment of Ripudaman's defence costs, and the Plaintiff says that the true facts are:

a) at all material times, the Defendant Ripudaman had net assets of at least FIVE MILLION EIGHT HUNDRED THOUSAND DOLLARS ($5,800,000.00) and was fully capable of paying all, or a substantial portion of his defence costs;

b) at all material times, there were additional assets of at least FIVE MILLION EIGHT HUNDRED THOUSAND DOLLARS ($5,800,000.00) which had been largely earned by him, but which were held in the name of other family members, which assets were available to fund Ripudaman's defence costs;

(d) Paragraphs 35(c) and (d)

c) each of the Defendants Raminder, Jaspreet, Hardeep, Darshan and Gurdip, held assets in their names which were the rightful property of Ripudaman or alternatively, were held in trust by them for Ripudaman;

d) no monies, or substantially less monies than alleged, were owing by the Defendant Ripudaman to the Defendants Raminder, Jaspreet, Hardeep, Darshan and Gurdip, and;

e) at no time did the Defendant Ripudaman intend to transfer all or any of his assets to the Plaintiff on account of defence costs, nor did he intend to co-operate with the Plaintiff in it's attempt to ascertain his true net worth.

(e) Paragraph 40a (i-vii):

40. The Plaintiff says that the particulars of the Scheme, as presently known to it, include the following:

a) In support of the Rowbotham Application, and in furtherance of the Conspiracy, the Defendants Ripudaman, Raminder, Hardeep, Darshan and Jaspreet swore false Affidavits and gave false testimony about the Defendant Ripudaman's financial position, including his net worth and interest in assets, and without restricting the generality of the foregoing, falsely testified that:

i) The Defendants Jaspreet, Hardeep, and Darshan were owed TWO HUNDRED AND SIXTY THOUSAND DOLLARS ($260,000.00) by Papillon in wages for working in the Executive Hotel, which wages were not owing;

ii) The Defendant Gurdip lent the Defendant Ripudaman THREE HUNDRED AND THIRTY THOUSAND US DOLLARS ($330,000 USD), when the true facts were those monies actually belonged to the Defendant Ripudaman; and

iii) The Defendant Raminder was owed substantial amounts when no such debt existed, or the amount of any debt was substantially exaggerated;

iv) The Defendants Ripudaman, Raminder and Gurdip falsely represented that Gurdip was lawfully entitled to a mortgage against Ripudaman's half interest in the Yaletown Property in the amount of ONE HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS

($175,000.00) which the Defendants Ripudaman, Raminder and Gurdip knew related to a fictitious debt;

v) The Defendants Ripudaman, Raminder and Jaspreet falsely testified that Ripudaman held monies by way of a family trust, which monies were the property of Jaspreet, Hardeep and Darshan;

vi) The Defendants Ripudaman, Raminder and Jaspreet falsely testified that certain property owned by the Defendants Ripudaman and Raminder, in India, had no income and no value;

vii) The Defendants, Ripudaman, Raminder and Jaspreet falsely testified that Ripudaman's brother, Jasjit Malik had loaned money to Ripudaman, which loan was guaranteed by Raminder and which debt had been assigned to K.S. Nagra, and which debt with interest totalled TWO HUNDRED FIFTY-SIX THOUSAND EIGHT HUNDRED FIFTY-ONE DOLLARS AND FORTY-ONE CENTS ($256,851.41) as at the time of the Rowbotham hearing;

(f) the following underlined part of paragraph 42:

Increased administrative and legal costs occasioned by the false testimony at the Rowbotham hearing

(g) Paragraph 50:

Further, or in the alternative, the Plaintiff says that to the extent the Defendants, Raminder, Jaspreet, Gurdip, Hardeep, Darshan, Khalsa, Papillon, 077 Ltd., and 076 Ltd. received monies and/or assets from the Defendant Ripudaman as from December 1997, such monies and/or assets are the rightful property of Ripudaman and the Plaintiff seeks an accounting of such assets received by the said Defendants or any of them and a Declaration that such monies and/or assets are the rightful property of the Defendant Ripudaman.

(h) Paragraph 51:

Further, or in the alternative, the Plaintiff says that to the extent the Defendants, Raminder, Jaspreet, Gurdip, Hardeep, Darshan, Khalsa, Papillon, 0772735 B.C. Ltd. and 0760887 B.C. Ltd. have monies and/or assets for which they cannot account, such monies and/or assets were obtained by reason of the fraud and Conspiracy and the said Defendants have been unjustly enriched thereby and the Plaintiff says all such monies and/or assets are impressed with a trust in favour of the Defendant Ripudaman (hereinafter "the Trust").

[97] The grounds upon which these defendants seek to strike out the identified portions of the Statement of Claim are primarily that the law admits of no cause of action for giving, or for a conspiracy to give, false evidence. They submit that any relief claimed in connection with evidence given at the Rowbotham application is not legally triable.

[98] Secondly, these defendants submit that no facts are pleaded in support of an accounting as claimed in paragraph 50.

[99] Lastly, these defendants plead that the unjust enrichment claim at paragraph 51 reverses the burden of proof, and ought to be struck on that basis.

[100] The applicable rule in Rule 19(24) reads:

At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or

> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[101] A pleading will not be struck unless it is plain and obvious that the pleading discloses no reasonable cause of action. A "radical defect" is necessary (see: ***Hunt v. T & N PLC***, [1990] 2 S.C.R. 959).

[102] This submission largely turns on a finding that the claim in relation to the "Rowbotham Conspiracy" is barred by the witness immunity rule. The principles have already been addressed in relation to the defendants' collective submission that failure to draw the witness immunity rule to the attention of court was fatal to the Mareva injunction and the Anton Piller order. For reasons I have already given, the Province had no obligation to make all conceivable legal arguments contrary to the facts and the law it outlined on the Mareva application. The Province identified triable issues within which what these defendants call the "Rowbotham Conspiracy" was, in its submission, an incident. These defendants' characterization of the negotiations respecting government funding going back to December 21, 2000 as part of the "Rowbotham Conspiracy" is an attempt, in turn, to enlarge the extent or ambit of the immunity claimed. This is an argument, but it is by no means so foregone or obvious that the tests applicable under Rule 19(24) have been met. It should be borne in mind, moreover, that the witness immunity rule is fact dependent. In ***Reynolds v. Kingston (City) Police Services Board***, 2007 ONCA 166, the Court held that the applicability of the witness immunity rule requires a full factual record and a trial and should not be dismissed at the pleadings stage (see also: ***Roy v. Prior***, [1971] AC 470).

[103] No persuasive case has been made out for striking the pleadings as the defendants seek. This deposes of each of the objections raised except those respecting paras. 50 and 51 of the Statement of Claim.

XIII

[104] The submission respecting section 50 is that a legal consequence is pleaded without material facts to support it.

[105] The submission respecting section 51 is that it effectively reverses the onus calling upon the defendants to explain the extent to which they obtained money or assets as if there is a presumption of fraud.

[106] Counsel for J.S. Malik and 0760887 essentially adopted the submissions made respecting the pleadings, and the "Rowbotham conspiracy" and section 51.

[107] Counsel for R.K. Malik seeks a stay of the action to the extent that it advances claims against the "protected assets". The submissions centered primarily on paras. 49, 50 and 51, respecting claims against matrimonial property, property acquired since 1997, and the claims calling, in effect, for an explanation as to the acquisition of property. For reasons already expressed, I am of the view that the argument respecting a collateral oral contract barring the Province from seeking payment of the moneys advanced before the Rowbotham application do not give rise to issues that require the court to set aside the Mareva injunction. Triable issues have been identified which the Province is entitled to advance. There can be no question of a stay in the circumstances, which could only be granted if it were clear that there was no prospect of the Province succeeding, on its view of the parties' dealings respecting the protected assets. I will not comment further on the merits. It is not at all clear at this stage of proceedings that an abuse of process has occurred.

[108] R.K. Malik also sought a stay or, in the alternative, the striking of paras. 50 and 51 of the Statement of Claim.

[109] The Province answered the applications to strike or stay paras. 50 and 51 by urging the court to consider them in the context of the other part of the Statement of Claim, particularly para. 37 which reads:

> Further, or in the alternative, the Plaintiff says that the Defendants and each of them, wrongfully and maliciously conspired together and continue to conspire together to defraud and injure the Plaintiff by assisting Ripudaman to hide his assets and to disguise his net worth, by asserting non-existent and/or grossly exaggerated liabilities owed to them by Ripudaman and by secretly holding assets in their names or through legal entities they control, which assets are the rightful property of

> Ripudaman, and/or by causing the Defendants, Papillon, Khalsa, or 076 Ltd. and 077 Ltd. to enter into sham transactions, to make payments not owed and acknowledge liabilities that do not exist, and/or wrongfully withhold monies due and payable to Ripudaman, and/or by holding assets which are the rightful property of Ripudaman, all with the intent, that the Plaintiff would enter into and continue with the Indemnity Agreement and the DCA and would make payments for defence costs, and would thereafter be unable to, or would be substantially and wrongfully hindered, in collecting the DCA debt.

[110] Having pled such a course of conduct, the Province alleges that whatever money or assets came into the alleged conspirators' hands in furtherance of that scheme is impressed with a trust and must be accounted for, as money allegedly owing to the Province as a result of the agreements entered into between it and R.S. Malik.

[111] It is possible to read paras. 50 and 51 as implying a reverse onus although the point of the paragraphs is essentially to plead a right to trace any unlawful transfers into the hands that hold them. This is not objectionable on the basis that it reverses the onus of proof – pleadings do not govern the presentation of evidence – although it may be said to be a statement of the relief sought and not a statement of material facts. It essentially functions as notice of what the Province is ultimately seeking, however, and is not so objectionable that it ought to be struck out.

[112] As I have already outlined in these reasons, I do not think the objections of R.K. Malik raise anything more than an arguable case. It was found that the strength of the case she has outlined is insufficient at this stage of the proceedings to justify setting aside the *ex parte* relief already granted. For the same reasons I cannot accede to her application for a stay.

[113] For the reasons I have given, I also regard the exceptions of the other defendants as potentially raising arguable issues, but not, in any particular, to meet the threshold required under Rule 19(24). Accordingly, the several applications to strike the pleadings are dismissed.

XIV

[114] In summary therefore the motions in Action No. S077088 before the court are disposed of as follows:

(1) The January 4, 2008 motion by R.S. Malik, seeking that the Mareva injunction be set aside, is dismissed.

(2) The January 4, 2008 motion, seeking that the Anton Piller order be set aside, is dismissed.

(3) The January 7, 2008 motion of J.S. Malik and 0760887 that the Mareva injunction and Anton Piller orders be set aside, is dismissed.

(4) The January 7, 2008 motion of R.K. Malik for an order that the Mareva injunction and Anton Piller orders be set aside, is dismissed.

(5) The January 7, 2008 applications of R.K. Malik for stay or to strike out the pleadings insofar as they touch on the "Protected Assets" identified in the "Payment Agreement" post-dating the Rowbotham proceeding, are dismissed.

(6) The January 7, 2008 applications of the defendants' Hardeep S. Malik and Darshan S. Malik, seeking that portions of the Statement of Claim be struck out, is dismissed.

(7) The January 7, 2008 application of the defendants J.S. Malik and 0760887, seeking that processes of the Statement of Claim be struck out, is dismissed.

XV

[115] I turn next to a series of motions and other relief affecting both the fraud action and the foreclosure proceeding.

[116] In order to appreciate the context, the petition, filed under No. H070591, Vancouver Registry, must be set

out. It seeks the following, against R.S. Malik, R.K. Malik, 0772735 B.C. Ltd., Gurdip Singh Malik, Balbir Singh Bajwa and Khalsa Developments Ltd.:

A. A declaration that pursuant to:

a. a Mortgage granted by the Respondent, Ripudaman Singh Malik, in favour of Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Attorney General for British Columbia (the "Petitioner") dated October 28, 2003 and registered in the Vancouver Land Title Office on November 24, 2003 under number BV487522 (the "Malik Mortgage"), the Petitioner is entitled to a Mortgage charging all of the Respondent Ripudaman Singh Malik's interest in that certain parcel or tract of land and premises situated, lying and being in the City of Vancouver in the Province of British Columbia, and being more particularly known and described as:

Parcel Identifier: 012-842-486

Lot 34 Block 76 District Lot 541 NWD Plan 3469

(the "Hamilton Street Property"); and

b. a Mortgage granted by Khalsa Developments Ltd. in favour of the Petitioner dated November 4, 2003 and registered in the New Westminster Land Title Office under number BV487519, on November 24, 2003 (the "Khalsa Mortgage"), the Petitioner is entitled to a Mortgage charging the following parcels of real property legally described as follows:

PID: 023-296-518

Parcel 1 Section 13, Township 4 Range 29 West of the Sixth Meridian NWD Plan LMP26375

PID: 000-734-217

Lot 2 of Lots 23 and 24 Block 1 Fractional Section 13 Township 4 Range 29 West of the Sixth Meridian NWD Plan 251

(collectively the "Executive Hotel Property")

in priority to the claims of the Respondents in these proceedings.

B. A declaration that pursuant to a General Security Agreement dated October 28, 2030, granted by the Respondent, Ripudaman Singh Malik, to the Petitioner (the "Malik General Security Agreement"), and registered in the Personal Property Security Registry on October 14, 2003 under base registration number 325831B, the Petitioner is entitled to a valid and enforceable security interest in all of the present and after acquired property of the Respondent, Ripudamin Singh Malik save and except consumer goods (the "Malik Collateral") in priority to the claims of the Respondents in these proceedings.

C. A declaration that pursuant to a General Security Agreement dated November 3, 2003, granted by Khalsa Developments Ltd. to the Petitioner (the "Khalsa General Security Agreement") and registered in the Personal Property Security Registry on October 14, 2003 under base registration number 325819B, the Petitioner is entitled to a valid and enforceable security interest in all of the present and after acquired property of Khalsa Developments Ltd. save and except consumer goods (the "Khalsa Collateral") in priority to the claims of the Respondents in these proceedings.

D. The Malik General Security Agreement and the Khalsa General Security Agreement are hereinafter collectively referred to as the "General Security Agreements". The Malik Collateral and Khalsa Collateral are hereinafter collectively referred to as the "Collateral".

E. A declaration that the Respondents, Ripudaman Singh Malik and Khalsa Developments Ltd., have made default under the Malik Mortgage, the Khalsa Mortgage and the General Security Agreements and that all monies thereby secured and charged upon the Hamilton Street Property, the Executive Hotel Property and the Collateral are due and owing to the Petitioner.

F. A declaration that the amount required to redeem the Hamilton Street Property, the Executive Hotel Property and the Collateral and which is due and owing to the Petitioner is $1,609,027.52 as at March 26, 2005, together with interest thereafter pursuant to the *Court Order Interest Act* to the date of payment.

G. An Order that one month be given for redemption of the Hamilton Street Property, the Executive Hotel Property and the Collateral.

H. An Order that the Petitioner recover Judgment against the Respondent, Ripudaman Singh Malik in the sum of $1,609,027.52 together with interest pursuant to the *Court Order Interest Act* from May 1, 2005 to the date of judgment.

I. An Order that the Hamilton Street Property, the Executive Hotel Property and the Collateral be sold out of Court by private sale subject to the approval of the Court and that the Petitioner have conduct of the sale and be authorized to list the Hamilton Street Property, the Executive Hotel Property and the Collateral for sale with a duly licensed real estate agent or firm and pay such agent or firm a commission not exceeding 7% on the first $100,000.00 of the purchase price and 2 ½% on the balance, such commission to be paid from the proceeds of any sale.

J. An Order appointing a receiver or receiver and manager.

K. An Order that in default of the Respondents, paying into Court to the credit of this proceeding at the Court Registry, Courthouse, 800 Smithe Street, Vancouver, British Columbia, the amount required to redeem the Malik Mortgage, the Khalsa Mortgage and the General Security Agreements the Petitioner shall be at liberty to apply for an Order that the Respondents and their respective heirs, executors, administrators, successors and assigns, and all persons claiming by, through or under them, shall stand and be absolutely and forever debarred and foreclosed of and from any and all right, title interest, claim, estate and equity in and to the Hamilton Street Property, the Executive Hotel Property and the Collateral.

L. An Order that in default of payment as aforesaid, the Petitioner recover vacant possession of the Hamilton Street Property, the Executive Hotel Property and the Collateral.

M. An Order for Occupation Rent.

N. An Order for a Certificate of Pending Litigation;

O. An Order that the Petitioner be at liberty to apply for a further accounting of what monies have become due and owing to the Petitioner since the date of the filing of the Petition.

P. Special Costs

Q. An Order for all necessary accounts, directions and enquiries together with such further or other relief as this Honourable Court deems meet.

R. Interest pursuant to the *Court Order Interest Act.*

S. A declaration that the transactions between the Respondents Ripudaman Singh Malik, Raminder Kaur Malik and 0772735 B.C. Ltd. under which 0772735 B.C. Ltd. acquired mortgages originally granted by the Respondents Ripudaman Singh Malik and Raminder Kaur Malik to HSBC Bank of Canada (formerly Hongkong Bank of Canada) and Desjardins Financial Security Life Assurance Company (formerly The Imperial Life Assurance Company of Canada) on the Hamilton Street Property are void as against the Petitioners or alternatively, that the said mortgages were made with intent to delay, hinder or defraud the Petitioner of its just and lawful remedies and are void and of no effect against the Petitioner and that no monies are owing to 0772735 B.C. Ltd. on account of those mortgages, and that the said mortgages be discharged.

[117] Before hearing a motion by R.S. Malik to consolidate the Petition with the “Fraud Action”, Action No. S077088, a motion brought by counsel for 0772735 B.C. Ltd. seeking that portions of the petition be struck out, was addressed. That motion sought that the last sentence of each of paras. 6 and 26 of the petition be struck; that

paras. 27, 28 and 29 be struck, and that the proceeding be stayed as against the respondent 0772735 B.C. Ltd.

[118] Following submissions, counsel advised that insofar as the petition alleges fraud, fraudulent conveyances and like matters, these provisions will be struck (e.g. para. 29) as already advanced in the Fraud Action No. S077088.

[119] Counsel further advised that to the extent the Petition alleges that the mortgages held by 0772735 B.C. Ltd. are void for non fraudulent reasons (e.g. para. 28), those issues will be referred to the trial list and heard at the same time as the fraud action, if necessary, which would only be in the case of a shortfall in the realization on the mortgages subject to the petition. Counsel advised that they were prepared to draft terms of a consent order to be incorporated in the order resulting from these reasons, and they are at liberty to do so.

[120] There was also discussion on the record respecting the status of R.K. Malik who was joined in the foreclosure action as the holder of a mortgage as to the undivided half interest of R.S. Malik which the Province pleads "if valid, ranks in priority behind the claim of that petitioner". Counsel advised that this mortgage had been discharged in the course of these proceedings. Accordingly, leave was granted to discontinue the foreclosure proceedings as against R.K. Malik, and that the Mareva injunction be varied to permit dealing with the property for the purposes of registering the discharge.

XVI

[121] R.S. Malik seeks to have the foreclosure petition consolidated with the tort action, in S077058 or, in the alternative to have it heard at the same time and place.

[122] He makes a similar application in foreclosure action No. H070591, seeking, in addition a stay or postponement pending the hearing of action No. S077088 and the counterclaim filed on his behalf in that proceeding.

[123] These motions are founded on a submission, to which I previously alluded, that the prosecution of the "Air India" charges against R.S. Malik was so "manifestly unjust" that the court should not obligate him to pay without first adjudicating his counterclaim for malicious prosecution. R.S. Malik submits that there is a possibility of a set-off in damages, which, while not what the law classically considers a set-off, is within the court's equitable jurisdiction to treat as such. He cites ***Brandsgard v. Petersen***, [1997] B.C.J. No. 1147, as authority for the proposition that a stay is available in the circumstances.

[124] R.S. Malik also submits that there is an efficiency argument in that the parties involved in the foreclosure matter and in the tort action are largely the same and multiplicity of causes should be avoided.

[125] The Province submits that the application cannot succeed on its face because there has been no determination that there is a triable issue necessitating the transfer of the petition to the trial list (see: ***Berg v. 426204 B.C. Ltd.***, [1995] B.C.J. No. 573). The Province also relies on ***Brandsgard v. Petersen*** (supra) for the proposition that the differences in procedure between petitions and actions militates against consolidation, or a same time and place order.

[126] The Province submits that in the circumstances of this case there remain applications to add parties (the Attorney General for Canada) in the fraud action (No. S077088) and consolidation should not be ordered if that is a possibility (see*:* ***Intra Land Corp. v. Northwood Ford Corp.***, [1999] B.C.J. No. 1352). It also submits that a consolidation would result in various parties to one proceeding sitting through long stretches of time when others would be addressing matters that did not concern them.

[127] The Province submits that there is, in any case, no triable issue in relation to the foreclosure. It cites authority to the effect that, absent issues arising from the covenants and conditions set out in the security instruments themselves, the party seeking foreclosure is entitled to an Order Nisi (see: ***Pacific Playground Holdings Ltd. v. Endeavour Developments Ltd.***, [2002] B.C.J. No. 1109).

[128] The Province submits, for similar reasons, that there is no authority that the foreclosure petition should be stayed until the R.S. Malik counterclaim or the R.K. Malik claim in the tort action is determined. It submits that where this remedy may be sought, the claims are closely related, and that they are not in the present circumstances. It further submits that there is not enough merit in the counterclaim, in any event, to warrant

consideration of R.S. Malik's application, and that even if it were ultimately successful there is no risk that he would not be able to collect his judgment.

[129] I am of the view that the application must fail for a number of reasons. No triable issue has been identified that would require the conversion of the petition, under Rule 52, to an action that could then be joined to the tort action or heard at the same time and place. The parties are not identical, although there are a number of parties in common. The submissions as to convenience are not at all persuasive.

[130] The submission that ***Brandsgard*** (supra) is authority for the proposition that a stay is appropriate fails to address the significant factual distinctions between that case and the present case, and serves to illustrate the objection raised by the Province. In ***Brandsgard***, the petitioners were seeking to foreclose on a mortgage back from a purchaser who had commenced an action in misrepresentation respecting the land subject to the mortgage, and arising out of the same purchase transaction. In the present case, the foreclosure is in respect of security given on a contract to advance legal fees, following a Rowbotham application which found that R.S. Malik had not made out a case for funding from the Province. The liability to pay legal fees falls upon R.S. Malik, although the Province agreed – in exchange for security – to pay them. The foreclosure relates to that agreement and that security. R.S. Malik was entitled to funding within the terms of the agreement, which entitled the Province to realize upon its security in default of repayment. This is, relative to R.S. Malik, unrelated to the subject matter of the fraud action – advances under an earlier, and distinct, agreement – and it is unrelated to the counterclaim.

[131] If R.S. Malik is successful on the counterclaim, he may be entitled to recover a sum of money from the Province that may, in effect, offset the amount he was responsible to pay for legal fees, but it has nothing to do with a responsibility he agreed to discharge. A stay would, in effect rewrite the Payment Agreement by the implication of a term that the funds would not necessarily be payable in the event of a successful defence. That was not the arrangement. The security given for the "Payment Agreement" must be addressed in its terms, and is not so closely related to the tort litigation or the counterclaim as to be inextricable from it. On the material before me, the claim for security remains properly addressed under the Petition. The applications in each of Action No. S077088 and Petition No. H070591 for consolidation, or for an order that they be heard not at the same time and place, or in Petition No. H070591, for a stay, are accordingly dismissed.

"McEwan J."

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The Honourable Mr. Justice McEwan