Date: 19970127
Docket: 11847
Registry: Vernon

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROBERT VICTOR McPHERSON KENNEDY, CHRISTEY DIANE KENNEDY, DENI-LYNN MARY ELIZABETH KENNEDY, SHANNA MICHELLE KENNEDY, ROBERT CLINTON JAMES KENNEDY, and WILLIAM ROBERT PARKER KENNEDY, by Guardian ad Litem, CLINTON ALEXANDER BAPTIST

PLAINTIFF

AND:

UNITED LOCK-BLOCK LTD., OK BUILDERS SUPPLIES LTD., JOHANNES ERIC FALKENBERG, J.E. FALKENBERG LTD. and EDWARD ROBERT ANDERSON

DEFENDANT

REASONS FOR JUDGMENT

OF

MASTER BISHOP

Counsel for the Plaintiffs:	
The Infant Plaintiff:	R.M. Moffat, Esq.
Robert Victor McPherson Kennedy	C.A. Wells, Esq.
Counsel for the Defendants:	
Johannes Eric Falkenberg and	
J.E. Falkenberg Ltd. and the	
Proposed defendant Ian Gordon Chapman	D.B. Wende, Esq.
Proposed defendant City of Penticton	J.R. Singleton, Esq.
Place and Date of Hearing:	December 10, 1996

[1] This action arises out of the untimely death of the infant plaintiff's mother Lynda Diane Kennedy. Mrs. Kennedy died on or about the 19th day of March 1993, when a lock-block retaining wall being constructed by the plaintiff Robert Victor McPherson Kennedy collapsed on her.

[2] There are presently three applications before the court.

[3] By way of motion filed the 11th day of October 1996, the infants by their guardian ad Litem Clinton Alexander Baptist, seek an order pursuant to Supreme Court Rule 15(5) of the ***Limitation Act*** that:

> "The City of Penticton be added as a defendant to the within action and that the Writ of Summons and Statement of Claim be amended accordingly."

[4] In the second motion filed October 18, 1996, the infants by their Guardian ad Litem Clinton Alexander Baptiste, seek an order pursuant to Supreme Court Rule 15(5) and s. 4(1) of the ***Limitation Act*** that:

> "Ian Chapman, P.Eng. be added as a defendant to the within action and the writ of summons and statement of claim be amended accordingly."

[5] In the third notice of motion the plaintiff Robert Victor McPherson Kennedy seeks the following orders:

> "1. the Corporation of the City of Penticton be added as a defendant to this proceeding; and that;

2. the writ of summons and statement of claim be amended accordingly."

[6] This application is also made pursuant to the Rules, the ***Limitation Act***, and the inherent jurisdiction of the court.

[7] The applications as framed are somewhat unusual in that the usual practice when applying to amend a writ of summons and statement of claim, or any other pleading for that matter, is to attach the proposed amendments to the notice of motion or to the affidavit in support thereof. That course of action has not been followed in these applications and the court and counsel are left to speculate on the proposed amendments and proposed causes of action.

[8] The speculation centred around a breach of duty, negligence, or failure to warn the plaintiff Kennedy of dangers in connection with the construction of the lock-block retaining wall. On the one hand, the speculation centres on an employee or employees of the City and, therefore, the City would be ultimately responsible for any negligence of their employee. On the other hand, the claim against Chapman arises from his employment with the defendant Falkenberg and his defendant company.

1. The Infant Plaintiff's Application to Add Chapman

[9] Turning first to the infant plaintiff's application to add Chapman, this application is brought pursuant to Rule 15(5) which is as follows:

> "(a) At any stage of a proceeding, the court on application by any person may
> (i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,
> (ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and
> (iii) order that a person be added as a party where there may exist between the person and any party to the proceeding, a question or issue relating to or connected
> (A) with any relief claimed in the proceeding, or
> (B) with the subject matter of the proceeding,
> which in the opinion of the court it would be just and convenient to determine as between the person and that party.
> (b) No person shall be added or substituted as a plaintiff or petitioner without the person's consent."

[10] Mr. Wende, solicitor for Mr. Chapman, resists the application on three grounds. Those grounds are:

(a) The materials filed in support of this application are woefully inadequate;

(b) No cause of action exists against Mr. Chapman; and

(c) There is no real issue or question between the plaintiffs and Mr. Chapman.

(a) The Inadequacy of the Materials

[11] The court's power to add a defendant under Rule 15(5) is a discretionary one that must be exercised judicially based on evidence placed before the court. In ***Armstrong v. Poole*** (1977) 5 B.C.L.R. 32, the plaintiff was one of two passengers injured in a motor vehicle accident. The defendant was killed in the accident and some time later the plaintiff also died. The plaintiff's administrator applied after the expiration of time under the ***Administration Act*** to have the second passenger joined as a plaintiff in the action. That application was allowed on the ground that it was necessary in order to finally adjudicate and settle the action. The defendant appealed and the appeal was allowed. At p. 35, Hinkson J.A. states:

> "Counsel for the respondent was unable to point to any evidence before the learned judge from which an inference might be drawn that it was in the interest of the plaintiff to have Hubley joined as a co-plaintiff in order that all matters connected with the claim of the plaintiff could be settled in the present proceedings.
>
> It is well established that a judge must exercise a discretion judicially: ***Evans v. Bartlam***, A.C 473, [1937] 2 All E.R. 646 (H.L.); ***Charles Osenton & Co. v. Johnston***, [1942] A.C. 130, [1941] All E.R. 245 (H.L.). In the present matter there was no evidence before the learned chambers judge upon which he could properly exercise his discretion and arrive at the conclusion which he reached."

[12] Here, the evidence filed in support of the application to join Chapman is contained in the affidavit of the infant's solicitor, Robert M. Moffat, filed October 18, 1996. He deposes that Mrs. Kennedy was killed on March 19, 1993 and that the action was commenced on behalf of Mr. Kennedy on April 13,

1994. He further deposes that the plaintiff's infants have brought their action pursuant to the ***Family Compensation Act*** as a result of the death of their mother and that his estimate of the children's claims to be in excess of $2,000,000.00.

[13] With respect to the application to join Chapman, the affidavit reads as follows:

> "8. At the time of our initial retainer and investigation it appeared that the infant Plaintiffs' claim arose out of the potential negligence of the following parties:
>
> a) Johannes Eric Falkenberg and J.E. Falkenberg Ltd. the engineer responsible for this project;
> b) United Lock-Block Ltd. the supplier of the lock-blocks;
> c) O.K. Builders Supplies Ltd. the seller and distributor of lock-blocks;
> d) Edward Robert Anderson the excavator responsible for the project;
> e) Robert Kennedy, the infants' father.
>
> 9. Eric Falkenberg and his company J.E. Falkenberg Ltd. were responsible for the engineering on this project.
>
> 10. In addition, Mr. Falkenberg had assistance from his associate Mr. Ian Chapman with this project.
>
> 11. Mr. Falkenberg has disclosed Mr. Chapman's notes relating to the events surrounding the failure of the retaining wall, a copy of which is marked Exhibit "A" and attached hereto to this Affidavit.
>
> 12. Mr. Falkenberg has also disclosed Mr. Champan's summary of the events leading up to the failure of the retaining wall on Friday, March 19, 1993, a copy of which is marked Exhibit "B" and attached hereto to this Affidavit.
>
> 13. That one issue in this litigation is the knowledge of Mr. Falkenberg as to height of the lock-block retaining wall.

> 14. On Examination for Discovery it was Mr. Falkenberg's evidence that Mr. Kennedy was specifically advised to build the wall no more than 3 blocks high.
>
> 15. From Mr. Chapman's summary of the events leading up to the collapse of the retaining wall, it is apparent that on Friday, March 19, 1993, Mr. Kennedy told Mr. Chapman that he had built the wall higher than planned. In addition, he had used the excavator to bring the wall into alignment.
>
> 16. Despite being told that the wall had been built higher, Mr. Chapman took no steps to warn Mr. Kennedy, Mr. Falkenberg or the City of Penticton.
>
> 17. The retaining wall failed on the evening of Friday, March 19, 1993. To the extent that Mr. Chapman was involved in the design and supervision of the construction of this wall Mr. Chapman's liability may be independent of or in addition to that of Mr. Falkenberg."

[14] In ***Mereigh v. Demco et al***, (1981), C.P.C. 101, the plaintiff, in error, commenced his action against Vancouver General Hospital rather than Shaughnessy Hospital. The writ was amended improperly by substituting Shaughnessy Hospital for Vancouver General and counsel for Shaughnessy applied to have the amendment declared invalid. That order was made by consent.

[15] The plaintiff then applied to delete Vancouver General and to add Shaughnessy as a party pursuant to Rule 15(5)(a)(ii).

[16] That application was dismissed, Spencer, L.J.S.C., as he then was, ruling that the participation of the hospital was not necessary to insure that all matters in the proceedings as

presently framed be effectively adjudicated upon. At p. 103 of the decision he states:

> "The first branch of subr. (ii) refers to 'a person who ought to have been joined as a party'. The problem here is to decide what is the meaning of the word 'ought' in that rule and whether the hospital here fits within the description of the phrase 'ought to have been joined' once that meaning is discovered. The description is couched in the past tense. It does not refer to a person who ought now to be joined. The applicant says Shaughnessy Hospital was an intended defendant but by mistake the wrong hospital was named in the writ. In that sense it ought to have been joined but was omitted by error. Unfortunately, I do not think the rule is intended to have the effect of a slip rule for correcting inadvertent errors in a writ. It would require something clearer than this rule to persuade me that where a limitation period has gone by, if indeed it has here, the protection of time can be snatched from a party simply by showing that the plaintiff by mistake omitted its name from the writ."

[17] Commenting on the adequacies of the materials before him, he continues on p. 104:

> "...there is insufficient material to show why in fact Shaughnessy Hospital ought to have been sued in the first place. The plaintiff had treatment for his vision there from members of the hospital staff and he has since gone blind, but no facts are deposed to as a basis for thinking any cause of action lies against the hosital(sic). The material is deficient. The plaintiff may commence an action on speculation but where he seeks the order of the Court to add a party he must depose to facts sufficient to persuade the Court to take action. It is ironic that in this case the plaintiff fails under the first branch of R. 15(5)(a)(ii) both because he knew from the outset that he intended to sue Shaughnessy Hospital and because he now produces insufficient material in any event to show why they ought to have been joined."

[18] Mr. Wende submits that the above quoted paragraph is applicable to the facts before this court. He says there are no facts before the court to persuade the court to grant the order sought.

[19] In ***Martel et al v. David Investments Limited***, unreported, June 30, 1982, Vancouver Registry, No. C822514, the plaintiffs applied pursuant to R.15(5) to join the Canadian Imperial Bank of Commerce as a defendant in the action. In that case, the plaintiffs had advanced monies to a company to be invested as share capital once certain conditions had been met and approvals had been obtained.

[20] The defendant company used the funds to guarantee loans from the Canadian Imperial Bank of Commerce. The bank later called the loans and transferred funds from the defendant to satisfy the indebtedness. The plaintiffs allege that the funds were trust funds and requested that the bank be joined as a party and the funds repaid.

[21] The material relied on by the plaintiffs stated: "The bank had all relevant documents in its possession". The bank's material showed that the bank knew that the monies were advanced for the eventual purchase of shares but were unaware of the "conditions" or "trust conditions" attached to the advances.

[22] At p. 4, The Honourable Madam Justice Proudfoot, as she then was sitting as a justice of this court, states:

> "There is no evidence before me to convince me that the Canadian Imperial Bank of Commerce had any knowledge of any arrangement between the plaintiffs and the defendant. Neither is there any evidence to support the argument that the Bank had notice of any trust arrangement, nor that the monies deposited by the defendant were subject to any trust arrangement. The plaintiffs argue that the Bank knew or ought to have known the deposition of the deposits made by the defendant as they related to the plaintiff. There is no evidence before me from which I could infer that the Bank ought to have known.
>
> I agree with Mr. Henderson that while Rule 15(5) creates a low standard of proof, however, in the case before me there is no evidence whatsoever. The plaintiffs have not presented to me sufficient evidence to support an allegation that a cause of action exists between the plaintiffs and the Canadian Imperial Bank of Commerce. The application is dismissed."

[23] In the case at hand, the facts on which the plaintiff relies may be fairly summarized as follows.

[24] The defendant Falkenberg and the Falkenberg Company were responsible for the engineering design of the wall that eventually collapsed. Chapman, an employee of the Company, had a conversation with the plaintiff Kennedy on March 19, 1993 in which Kennedy told him that he had "built the wall higher than planned". As to the possible causes of action against Chapman, the allegations are that Chapman "took no steps to warn Mr. Kennedy, Mr. Falkenberg, or the City of Penticton;" and, that "to the extent that Chapman was involved in the design and

supervision of the construction of the wall, his liability may be independent of or in addition to that of Mr. Falkenberg."

[25] I agree with Mr. Wende's submission that the infant plaintiffs' materials are woefully inadequate both in allegations of fact and in proposed cause(s) of action to support an order joining Chapman pursuant to Rule 15(5).

[26] Having made that finding, the issue arises as to whether or not the plaintiff can gain assistance from the material filed on behalf of the intended defendant Chapman to "shore up" their application. In his affidavit filed on November 28, 1996, Mr. Chapman deposes:

> 4. On or about January 1, 1992, I commenced work the Company. It was expressly agreed between myself and J.E. Falkenberg, P.Eng., the principal of the Company that as part of my employment with the Company:
>
> (a) I could not take professional responsibility for any work and that all of my work was to be under the direct supervision and responsibility of Mr. Falkenberg;
>
> 5. I verily believe that throughout 1992 and 1993 while employed by the Company, I was primarily assigned to sub-division projects or other civil work projects involving road and sewer design, and was secondarily assigned to a limited degree to structural engineering work under the supervision of Mr. Falkenberg, examples of which included timber beam sizing and detailing of steel reinforcement in concrete foundation design.
>
> 6. At no time prior to the death of Linda Kennedy on March 19, 1993 had I ever done any design or related construction work with respect to mass retaining walls, such as the Lock-Block wall which is the subject of these proceedings.

13. That in all of my dealings with Mr. Kennedy prior to the accident which killed his wife Lynda on March 19, 1993, I verily believe that:

(a) at not time did I represent myself to Mr. Kennedy as a professional engineer;

(b) I made it clear to Mr. Kennedy that because I was not a professional engineer, that I was working under the direction and supervision of Mr. Falkenberg who would have to review any and all of my design work and provide the necessary seals, assurances and approval required by the City of Penticton.

15. That contrary to the allegations in paragraph 17 of Mr. Moffat's Affidavit, as detailed in Exhibit "A" and "B" to his Affidavit, at no time was I involved in the design of the subject Lock-Block wall.

16. In further answer to the allegations in paragraph 17, at no time did I see the wall during its construction or in anyway participate in the "supervision" of its construction.

17. As disclosed in Exhibit "B" to Mr. Moffat's Affidavit, Mr. Kennedy came into the Company's office on several occasions following our Monday, March 15, 1993 meeting on site and gave me a brief progress update on the construction of his Lock-Block wall. At no time during those conversations did he ask me for design advice or any approval regarding his Lock-Block wall and at no time was I under the impression that he was ever seeking from me any design advice or approval.

18. As set out above, I have had no experience with the design and construction of mass retaining wall systems, and in March, 1993 I had only limited knowledge of the Lock-Block system. At no time in March, 1993 did I believe that I was in a position to make any scientific or engineering judgment as to the suitability of the Lock-Block wall design or its construction. At all times it was my understanding that in fact the Company was not involved in the Lock-Block wall beyond that disclosed in Exhibit "A" and "B" of Mr. Moffat's Affidavit."

[27] Attached to the affidavit of Christopher E. Hirst filed the 10th day of December, 1996, as Exhibits "A" and "B" are

portions of a transcript of the Examination for Discovery of Mr. Kennedy which was conducted initially on July 11, 1996 and continued on October 28, and 29, 1996. The Examination for Discovery transcript attached as Exhibit "B" is the Examination for Discovery held on October 29, 1996. In that discovery, the plaintiff was asked the following questions and gave the following answers:

"P. 343
1617 Q Right, and so you had no knowledge as to what professional accreditation Mr. Chapman had, he could be a draftsman so as far as you knew?
A As far as I knew he worked for Eric. I thought he was like -- I guess if you are going to be a lawyer you article, I don't know what you call it to be a engineer, studying below a guy. I didn't know what he was, and, you know, he just, you know an English man that is kind of quiet and nervous and --
P. 344
1622 Q You understand his work produced had to be reviewed and approved by Eric?
A I understood that from day one Eric had to review everything he did and he made that clear to me that he couldn't just -- I asked him who -- "Can we stamp it, I will take it?". He said, "No, Eric has to review it and stamp it."
P. 364
1684 Q Why didn't you draw to his attention what Mr. Chapman had told you and said, "Well, I am just doing what Chapman said"?
A Well, he is the engineer and Chapman is the helper.

1685 Q Just that simple, that is how you viewed them at the time?
A That simple.

1686 Q Falkenberg is the engineer, Chapman is just the helper?
A His aid, helping him, that's how I looked at it.

[28] I find these materials to be of little assistance to the plaintiffs and I dismiss the application to join Mr. Chapman on the basis of the inadequate materials. While it is true that the burden on the plaintiffs on such an application is very low and sympathy lies with them in this tragic loss, the court ought not to speculate that facts exist, although not disclosed, to support some cause of action or speculate that a cause of action may exist, although yet undisclosed.

[29] That being said, in the event that I am in error on this finding, I now turn to Mr. Wende's second and third submissions.

II. No Cause of Action Exists Against Mr. Chapman

[30] I have already opined that the court ought not to be put in the position of speculating on the cause(s) of action. In ***MacMillan Bloedel Ltd. and MacMillan Bloedel Industries Ltd. v. Binstead et al*** (1981) 58 B.C.L.R. 173, the plaintiff appealed from an order of a chambers judge who dismissed the appellant's application made under Supreme Court Rule 15(5) for an order asking that two persons who are respondents to the appeal be added as defendants in an action pending against a number of other defendants.

[31] At p. 175, McFarlane, J.A. speaking for the majority states:

> "It is my opinion, with respect, that it is apparent the chambers judge examined that evidence and used it for a purpose beyond that which is contemplated by the rule. It seems to me clear that one of the functions of the chambers judge hearing an application under this rule must be to decide whether there may exist between the appropriate parties a question which can be answered or an issue which can be decided by a court of law or by a judge exercising jurisdiction in a judicial capacity and to see, through whatever means, and not necessarily affidavits, that the question or issue is a real one in the sense that it is not entirely frivolous and would result in courts wasting judicial time. It is not the function, in my opinion, to decide whether on any kind of a balance it is likely that the plaintiff would be able to prove its allegations on a balance of probabilities or to any other degree beyond showing that there may exist such a question or such an issue."

[32] In ***Robson Bulldozing Ltd. v. Royal Bank of Canada*** (1985) 62 B.C.L.R. 267, McLachlin J., as she then was, expanded on this principle. She sets out the facts on which the application was founded at p. 269 of the decision. Those facts are:

> "This is an application by the defendants by counterclaim to be added as plaintiffs to this action pursuant to R. 15(5) of the Rules of Court.
>
> The action arises out of the financing of a construction project in 1982. The plaintiff was an excavating contractor. It borrowed money from the defendant bank for work on the project. Its loan was guaranteed by the defendants by counterclaim, Messrs. Robson and Smith. The bank was also the banker for the project owner, to whom the plaintiff looked for payment for the work it had done. The plaintiff had in hand cheques from the project owner totalling $184,000. The plaintiff alleges that the bank told it that the project owner had sufficient funds to cover those cheques. Accordingly, the plaintiff issued cheques to its subtrades. However, contrary

> to the bank's alleged representation, the project owner did not have sufficient funds to cover its cheques to the plaintiff, as a result of which they failed to clear. This left the plaintiff with insufficient funds to cover the cheques it had written to its subtrades. It required extension of its overdraft protection, which the bank granted. The plaintiff contends that, as a consequence, it has been unable to obtain performance bonds or to undertake significant work, and sues the bank for damages on account of its alleged misrepresentation. The bank, for its part, claims $347,037.85 from the defendants by counterclaim on their guarantees of the plaintiff's indebtedness.
>
> The defendants by counterclaim now seek to be joined as plaintiffs, alleging that they personally have suffered loss as a result of the bank's alleged misrepresentation as to the financial position of the project owner. They contend that the consequent expansion of their overdraft converted a corporate liability to a personal liability under their guarantees, resulting in loss to them."

[33] In dismissing the application, she restates the principles at p. 270:

> "The power conferred upon the court to join a party is discretionary to be exercised upon the proper evidence being produced: ***Ent. Realty Ltd. v. Barnes Lake Cattle Co.*** (1979), 13 B.C.L.R. 293, 10 C.P.C. 211, 101 D.L.R. (3d) 92 (C.A.); ***Armstrong v. Poole*** (1977), 2 B.C.L.R. 274, reversed 5 B.C.L.R. 32 (C.A.). The discretion should be generously exercised so as to enable effective adjudication upon all matters in dispute without delay, inconvenience and expense of separate actions and trials: ***Nor. Const. Co. v. B.C. Hydro & Power Authority*** (1970), 72 W.W.R. 455, 12 D.L.R. (3d) 730 (B.C.S.C.). However, the applicant must depose to facts sufficient to persuade the court of the applicability of the portion of R. 15(5) relied upon: ***Mereigh v. Demco*** (1981), 21 C.P.C. 101 (B.C.S.C.). In particular there must be some evidence indicating a cause of action: ***Martel v. David Invt. Ltd.***, Vancouver No. C822514, 30th June 1982 (unreported).
>
> In the case at bar, the first question is whether there is a possible cause of action between the

> proposed plaintiffs and the defendants. Unless a cause of action is suggested, it cannot be said that they ought to have been joined as parties, that their participation is necessary to ensure effectual adjudication, or that there is an issue between them which it is just and convenient be tried with the others: R. 15(5). Only if a cause of action is made out, do the conditions set out under R. 15(5) become relevant."

[34] As I earlier stated in these reasons, there is no cause(s) of action made out in any of the materials and the court and counsel were required to speculate on a possible cause(s) of action against Mr. Chapman and that, in my view, is not the function of the court on such an application. Again, as I stated earlier, the very low onus on the applicant is to establish the facts and a cause of action against the party proposed to be added in their materials. That, the plaintiff has failed to do.

[35] Following the principles set out in the ***MacMillan Bloedel*** case and the ***Robson Bulldozing*** case, the application must be dismissed as there is no cause of action suggested (in the words of the learned Madam Justice) or any question to be answered or issue which may be decided by this court (in the words of McFarlane, J.A.).

[36] Again, in the event that I am in error and in the event that the court should be required to speculate on causes of action against Mr. Chapman, I can only speculate that the

action would be framed in negligence and/or breach of duty of care (or to warn) visa vie the plaintiffs.

[37] Dealing first with the possible negligence claim, in ***McPhail's Equipment Co. Ltd. v. Roxanne III (The)*** [1994], B.C.J. No. 801, the plaintiff applied under Supreme Court Rule 15(5)(a)(ii) and (iii) to add Mr. Grant Langdon, barrister and solicitor, as a defendant.

[38] The facts on which the application was based are set out in the Reasons for Judgment at paragraphs 2 through 5 which are as follows:

> "[para2] The essential facts are as follows. In or around 12 May 1993, Grande Prairie Warehouse Leasing Corp. ("Grande Prairie") agreed to seel the vessel "Roxanne III" to the plaintiff. The closing date was set at 30 days thereafter.
>
> [para3] McPhail's Equipment Co. Ltd. ("McPhail's") appointed Mr. Robin Macfarlane to complete the transaction on its behalf. Grande prairie appointed Mr. Langdon. On 2 June 1993, Mr. Macfarlane prepared a number of documents for completion by Grande Prairie and sent them to Mr. Langdon with the request that the papers be signed and returned to him.
>
> Mr. Langdon did not respond.
>
> [para] On 11 June 1993, Mr. Langdon phoned Mr. Macfarlane and advised him the closing would take place that day or not at all. None of the documents sent to Mr. Langdon by Mr. Macfarlane had been completed and returned. There was insufficient time for McPhail's to complete the sale within the time set by Mr. Langdon and so it did not go through. However, at 5:00 PM that same day, Grande Prairie sold the vessel to Toigo Charters Ltd.
>
> [para5] McPhail's now alleges that Mr. Landgon owned it a duty of care not to deliberately set about

> on a course of conduct that would frustrate the agreement. It alleges he is liable to the plaintiff in negligence. On the basis of these facts, McPhail's contends that Mr. Langdon ought to be added as a defendant."

[39] The Honourable Mr. Justice Bouck viewed the issue as whether or not the plaintiff raised enough facts to show a prima facie or possible case that Mr. Langdon was negligent.

[40] At paragraphs 10 and 11 he states:

> "[para10] The proposed claim against Mr. Langdon is based in negligence. A cause of action in negligence requires a positive answer to 3 essential questions before it will succeed. Duty of care is only one of them. Failure to obtain a positive answer with respect to any one question means the negligence action must fail. The questions are:
>
> a) Did the defendant owe the plaintiff a duty of care?
>
> b) Did the defendant fail to meet the standard of care the law imposes with respect to that duty?
>
> c) Did the breach of the standard of care by the defendant cause the damages suffered by the plaintiff?
>
> [para11] Hence, at this stage of the proceedings, even if Mr. Langdon owed McPhail's a duty of care, the facts must show that prima facie he failed to meet the standard of that duty. What is the standard of care a solicitor for an opposite party must meet? How is it proved? There does not appear to be any evidence before me to show that prima facie Mr. Langdon failed to meet the standard of care the law imposes upon a solicitor who is acting on one side of a commercial transaction in circumstances such as the present."

[41] The learned justice dismissed the application finding that the allegations of the plaintiff do not raise a prima facie or possible case against Mr. Langdon.

[42] Similarly, in the case before me, there are no facts in any of the materials that would support the proposition that the intended defendant Chapman owed a duty of care to the plaintiffs or that he was negligent. At the risk of repeating myself yet again, the evidence of the plaintiff is that he did not rely on Chapman, knew he was not a qualified engineer, (like an articled student) and knew that everything Chapman did was supervised by or had to be checked and approved by the defendant Falkenberg.

[43] Turning now to the question of a possible duty to warn, such a duty could arise based on the principle set out in ***Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.***, (1963) 2 All E.R. at p. 575. That principle is that a duty of care (or duty to warn) may arise where, in the ordinary course of business, one person seeks advice or information from another in circumstances in which a reasonable man would know that the person inquiring is relying on the other's skill and judgment. In those circumstances, an action in negligence will lie when the person asked does not exercise a reasonable standard of care.

[44] In this case, the evidence clearly shows that Kennedy was relying on Falkenberg and not Chapman. His own evidence given on his Examination for Discovery, those questions and answers are set out earlier in these reasons, clearly sets out the Kennedy, Falkenberg, Chapman, relationship and his reliance on Falkenberg. (Questions and Answers 1684, 1685, 1686).

[45] Clearly, Chapman was under no ***Hedley Byrne*** duty here.

III Lack of an Issue or Question Between the Parties

[46] Again, as set out earlier in these reasons, the proposed (here speculative) issue or question between the parties must be a real one, one that is not entirely frivolous such that it would result in the court wasting judicial time.

[47] To speculate yet again, a possible issue or question is whether or not an employer, here Falkenberg Company is liable for the negligence of its employee, Chapman. In ***London Drugs Ltd. v. Kuehne & Nagel International Ltd.*** (1993) 1 W.W.R. 1, the plaintiff sued the defendant for negligence. At p. 10, Iacobucci, J. with whom L'Heureux-Dube, Sopinka, and Cory, JJ. concurred, set out the facts.

> "The facts are not complicated. On August 31, 1981, London Drugs Limited (hereinafter "appellant"), delivered a transformer weighing some 7,500 pounds to Kuehne and Nagel International Ltd. (hereinafter "Kuehne & Nagel") for storage pursuant to the terms and conditions of a standard form contract of storage. The transformer had been purchased from its manufacturer, Federal Pioneer Limited, and was to be

> installed in the new warehouse facility being built by the appellant. The contract of storage included the following limitation liability clause:
>
> > LIABILITY — Sec. 11(a) The responsibility of a warehouseman in the absence of written provisions is the reasonable care and diligence required by the law.
> >
> > (b) The warehouseman's liability on any one package is limited to $40 unless the holder has declared in writing a valuation in excess of $40 and paid the additional charge specified to cover warehouse liability.
>
> With full knowledge and understanding of this clause, the appellant chose not to obtain additional insurance from Kuehne & Nagel and instead arranged for its own all-risk coverage. At the time of entering into the contract the appellant knew, or can be assumed to have known, that Kuehne & Nagel's employees would be responsible for moving and upkeeping the transformer.
>
> On September 22, 1981, Dennis Gerrard Brassart and Hank Vanwinkel (hereinafter "respondents"), both employees of Kuehne & Nagel, received orders to load the transformer onto a truck which would deliver it to the appellant's new warehouse. The respondents attempted to move the transformer by lifting it with two forklift vehicles when safe practice required it to be lifted from above using brackets which were attached to the transformer and which were clearly marked for that purpose. While being lifted, the transformer toppled over and fell causing damages in the amount of $33,955.41."

[48] In finding a duty of care on the employees, the learned justice states at p. 19:

> "In my opinion, the respondents unquestionably owed a duty of care to the appellant when handling the transformer. I arrive at this conclusion with as little difficulty as the judges in the courts below. I do not base my conclusion on the terms of the contract of storage or on s.2(4) of the ***Warehouse Receipt Act*** but on well established principles of

> tort law. In all the circumstances of this case, it was reasonably foreseeable to the respondent employees that negligence on their part in the handling of the transformer would result in damage to the appellant's property. In sum, there was such a close relationship between the parties as to give rise to a duty on the respondents to exercise reasonable care."

[49] At p. 21 he continued:

> "Having said this, I wish simply to add what has already become evident by my conclusion. There is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the "very essence" of his or her employer's contractual obligations with a customer, does not owe a duty of care, whether one labels it "independent' or otherwise, to the employer's customer. Our law of negligence has long since moved away from a category approach when dealing with duties of care. It is now well established that the question of whether a duty of care arises will depend on the circumstances of each particular case, not on predetermined categories and blanket rules as to who is, and who is not, under a duty to exercise reasonable care. There may well be cases where, having regards to the particular circumstances involved, an employee will not owe a duty of care to his or her employer's customer. Indeed, the respondents have provided this court with a series of decisions where this conclusion appears to have been reached: see ***Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd.***, [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 702 (B.C.C.A.); ***Moss v. Richardson Greenshields of Canada Ltd.***, [1989] 3 W.W.R. 50, 56 Man. R. (2d) 230 (C.A.); ***Summitville Consolidated Mining Co. v. Klohn Leonoff Ltd.*** (July 6, 1989), Doc. Vancouver C880756 (B.C.S.C.); and ***R.M. & R. Log Ltd. v. Texada Towing Co.*** (1967), 62 D.L.R. (2d) 744, [1968] 1 Ex. C.R. 84.
>
> However, this does not mean that this is the necessary result in all factual situations. Abstaining from commenting on the conclusions reached in the cases cited, I find nothing in any of them, nor have I found anything else, which supports the type of blanket rule advocated by the respondents. At best, these decisions simply confirm that the

> question of whether a duty of care arises between an employee and his or her employer's customer depends on the circumstances of each particular case. The mere fact that the employee is performing the "very essence" of a contract between the plaintiff and his or her employer does not, in itself, necessarily preclude a conclusion that a duty of care was present.
>
> As conceded by the respondents, there are many decisions in which a duty of care was found to exist: see, for example, ***Northwestern Mutual Insurance Co. v. J.T. O'Bryan & Co.***, [1974] 5 W.W.R. 322, [1974] I.L.R. -639, 51 D.L.R. (3d) 693 (B.C.C.A.); ***Toronto-Dominion Bank v. Guest*** (1979), 10 C.C.L.T. 256, 16 B.C.L.R. 174, 105 D.L.R. (3d) 347 (S.C.); ***East Kootenay Community College v. Nixon & Browning*** (1988), 28 C.L.R. 189 (B.C.S.C.); and ***Ataya v. Mutual of Omaha Insurance Co.***, [1988] 1 L.R. 1-2316, 34 C.C.L.I. 307 (B.C.S.C.). In concluding discussion of this issue, I would add that the acceptance of the general rule advocated by the respondents would be at odds with the common law notion of vicarious liability. This principle, which has been well developed through years of jurisprudence, has as part of its very core the recognition that in many cases employees do owe duties of care to third parties, such as their employer's customers.
>
> As the respondents owed a duty of care to the appellant in their handling of the transformer, I would accordingly dismiss the cross-appeal."

Shortly after delivering that decision, the Supreme Court of Canada again had to reconsider the liability of employees for negligence in the performance of their duties. In the decision of ***Edgeworth Construction Ltd. v. N.D. Lea and Associates Ltd.; Pacific Coast Energy Corp et al., Intervenors***, (1993) 107 D.L.R. (4th) 169, the appellant Edgeworth Construction Ltd., a company engaged in the business of building roads, bid in 1977 successfully to build a section of highway in the Revelstoke area. It entered into a contract with the Province for the

work and allege that they lost money on the project due to errors in the specifications and construction drawings. It commenced proceedings for negligent misrepresentation against the engineering firm which prepared those drawings, N.D. Lea, as well as the individual engineers who affixed their seals.

[50] On a pretrial motion, a chambers judge ruled that Edgeworth was not entitled to pursue its action against the engineers. The Court of Appeal upheld that decision and Edgeworth appealed to the Supreme Court of Canada.

[51] Insofar as matters relating to this case are important, McLachlin, J., with whom Iacobucci and Major JJ concurred, states at p. 178:

> "For these reasons, I conclude that the courts below erred in holding that the facts pleaded by Edgeworth do not disclose a cause of action against the engineering firm, N.D. Lea.
>
> The position of the individual engineers is different. The only basis upon which they are sued is the fact that each of them affixed his seal to the design documents. In my view, this is insufficient to establish a duty of care between the individual engineers and Edgeworth. The seal attests that a qualified engineer prepared the drawing. It is not a guarantee of accuracy. The affixation of a seal, without more, is insufficient to found liability for negligent misrepresentation. I agree with the courts below that the action against the individual defendants should be struck."

[52] Forrest, J., concurring with the rest, added at p. 170:

"This case comes hot on the heels of ***London Drugs Ltd. v. Kuehne & Nagel International Ltd.*** (1992), 97 D.L.R. (4th) 261, [1992] 3 S.C.R. 299, 43 C.C.E.L. 1, where the majority was unwilling to absolve ordinary workers from liability flowing from their negligence in the course of their employment except to the extent that a contractual exemption from liability had been entered into by their employer, whereas in this case the professional employees who, one would have thought, were in a better position to take steps to protect themselves, are absolved from liability resulting from their negligence in the absence of any exonerating contract. It will be evident from my dissent in ***London Drugs*** that such a distinction, in so far as it favours professional employees, is, at the level of principle, lost on me. And it does not matter that in one case one is dealing with economic loss and in the other with physical damage; as my colleague notes, no issue of indeterminacy arises here.

There are, however, technical distinctions between the ordinary tort of negligence and negligent misrepresentation, in particular, that under the latter the representee must have relied, in a reasonable manner, on the negligent representation. I am quite happy to rely on this technical distinction to absolve the individual engineers from liability because, on balance, it seems to me, there are sound reasons of policy why they should not be subjected to a duty to the appellant. The appellant here was quite reasonably relying on the skills of the engineering firm and the firm in turn must be taken to have recognized that persons in the position of the respondents would rely on their work and act accordingly. I have cast the relationship in terms of reliance but it may also be seen as a matter of voluntary assumption of risk. As Professor Flemming put it in ***The Law of Torts***, 8th ed. (Sydney: Law Book Co., 1992), at p.641: '...the recipient must have had reasonable grounds for believing the speaker expected to be trusted'.

The situation of the individual engineers is quite different. While they may, in one sense, have expected that persons in the position of the appellant would rely on their work, they would expect that the appellant would place reliance on their firm's pocket-book and not theirs for indemnification: see ***London Drugs,*** supra, at pp. 315-16. Looked at the other way, the appellant could not reasonably rely for indemnification on the individual engineers. It would have to show that it was relying on the particular expertise of an

> individual engineer without regard to the corporate character of the engineering firm."

[53] On the evidence before me, it is abundantly clear that as the plaintiffs did not rely on the individual Chapman personally in any capacity, let alone in the capacity of a professional engineer, that no cause of action lies against him and therefore there is no issue or question to be decided visa vie the plaintiffs and he.

[54] For all of the aforementioned reasons, I dismiss the application to join Chapman as a party.

[55] The remaining two applications are by the guardian ad litem on behalf of the infants to join the City of Penticton as a party and the same application by the plaintiff Kennedy. I propose to deal first with the guardian ad litem's application on behalf of the infant plaintiffs.

2. The Application to add the Corporation of the City of Penticton Brought by the Guardian ad Litem on Behalf of the Infant Plaintiffs

[56] The incident giving rise to the proceedings occurred on the 19th day of March 1993, and an action was commenced by the father of the infants, on his own behalf only, on the 13th day of April 1994. The infants then retained counsel through a

guardian ad litem of June of 1985 and on November 21, 1995, two years and eight months after the incident, the father's writ of summons and statement of claim were amended to include claims on behalf of the infants.

[57] Mr. Singleton acknowledged that the infants were entitled to the amendment obtained to the writ of summons and statement of claim in November of 1995 as against the defendants named at that time, pursuant to the combined effect of ss. 7 and 3(1)(g) of the **Limitation Act**.

[58] This application to add the City of Penticton as a defendant to the action was initiated by the infant plaintiffs three years and seven months after the cause of action arose and 16 months after Mr. Moffat was retained to act on behalf of the plaintiffs. This is somewhat surprising as, by letter dated June 28, 1995, one of Mr. Moffat's associates, Elizabeth Harris, wrote to the City of Penticton in the following terms:

> "**VIA FAX (604) 490-2402** June 28, 1995
>
> City of Penticton
> 171 Main Street
> Penticton, BC
> V2A 5A9
>
> **Attn: Municipal Clerk**
>
> Dear Sir/Madame:
>
> **Re: Lynda Kennedy - Deceased**
> **Accident Date - March 19, 1993**
> **Claim Under Family Compensation Act**

> We are the solicitors for the children of Lynda Kennedy and represent them with respect to their claim under the Family Compensation Act resulting from the death of their mother.
>
> On March 15, 1993, a complaint was received by the City of Penticton that the excavation was unsafe. It is our position that your engineering and inspection department may have breached duties owed to our client to ensure that the construction proceeded in conformance with the City of Penticton by-law requirements, applicable building code requirements, and good and proper construction practice.
>
> On March 19, 1993, Lynda kennedy was killed when a retaining wall collapsed and crushed her. The retaining wall is located at 2715 Cedar Road in Penticton, BC. The wall was built under the authority of permits issued by the City of Penticton.
>
> We therefore put you on notice pursuant to section 755 of the Municipal Act.
>
> In the event that you or your solicitors require further particulars, please do not hesitate to contact the writer.
>
> Yours very truly,
>
> **MOFFAT WARD**
> PER:
> "Elizabeth A. Harris"
> **ELIZABETH A. HARRIS** per:cs
> EAH/cs"

[59] Mr. Singleton, on behalf of the proposed defendant Penticton, opposes the application by the infants on the following basis:

(i) The claim against Penticton is statute barred by s.754 of the **Municipal Act**, and

(ii) There is no reasonable explanation for the plaintiffs' delay in commencing the action against Penticton and

accordingly there is no basis, on an application under s. 4(1)(d) of the **Limitation Act,** to overlook the existence of the limitation defence.

i. Is the Infants' Claim Against Penticton Governed by s. 754 of the Municipal Act?

[60] Section 754 and 755 of the **Municipal Act**, R.S.B.C. 1979, c. 290 and amendments thereto are as follows:

> "754. All actions against a municipality for the unlawful doing of anything purporting to have been done by the municipality under the powers conferred by an act or the Legislature, and which might have been lawfully done by the municipality if acting in the manner prescribed by law, shall be commenced within 6 months after the cause of action shall have first arisen, or within a further period designated by the council in a particular case, but not afterwards.
>
> 755. The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. In case of the death of a person injured the failure to give notice required by this section is not a bar to the maintenance of the action. Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence."

[61] In accordance with those provisions, notice should have been given to the municipality on or before the 19th day of May 1993 and the action should have been commenced no later than the 19th day of September 1993.

[62] In the Act itself, there is a dispensation with respect to notice where there is a death, a reasonable excuse is given for not giving notice and the defendant has not been prejudiced, but there appears to be no corresponding dispensation with respect to the commencement of the proceedings in s. 754.

[63] In **Grewal v. Saanich (Dist.)** (1989) 38 B.C.L.R. (2d) at 250, the plaintiffs built a home after receiving a building permit from the defendant District. Due to unsuitable soil conditions, cracking occurred and the house settled. The plaintiffs sued the defendant vendor and also the Municipal Corporation. The trial judge dismissed the action against the District on the grounds that the plaintiff failed to comply with the six month limitation under s. 754 of the **Municipal Act**.

[64] In allowing the appeal, the Court of Appeal ruled that the section did not apply to the circumstances of that case. Page 254 of the decision is as follows:

> "The trial judge found Saanich liable in negligence in failing, among other things, to warn the Grewals of serious soil problems. In our opinion, that failure does not come within the words of s. 754.

> ...
>
> Section 754 is intended to apply to actions of the municipality that purport to be done pursuant to an enactment but that fail to comply with the requirements of the enactment. The section does not apply to acts, such as the negligent driving of a motor vehicle causing injury, for which no existing legislative authority is available to make the act lawful.
>
> ...
>
> In this case, the failure to warn was not something that existing legislative authority was available to make the act lawful."

[65] In that case, the City clearly knew of the problems with the underlying soil conditions prior to issuing the building permits and failed to warn the plaintiffs.

[66] Again here, as in the case of the application to join Mr. Chapman, counsel and the court are left to speculate as to the possible cause(s) of action against the City.

[67] Nevertheless, some hint is obtained in the letter from Ms. Harris to the Municipal clerk quoted earlier. In that letter she states:

> "It is our position that your engineering and inspection department may have beached duties owed to our client to insure that the construction proceeded in compliance with the City of Penticton By-law requirements, applicable building code requirements, and good and proper construction practice."

[68] It would seem therefore that the claim here is based on some breach of duty in relation to the permit issuing process or the duties of inspection.

[69] Both of those duties arise under s.734 of the **Municipal Act.** That section reads in part as follows:

> "Building regulations
> 734. (1) The council may, for the health, safety and protection of persons and property, and subject to the *Health Act* and the *Fire Services Act* and their regulations, by bylaw, do one or more of the following:
> (a) regulate the construction, alteration repair or demolition of buildings and structures;
> (f) prescribe conditions generally governing the issue and validity of permits, inspection of works, buildings and structures, and provide for levying and collecting of permit fees and inspection charges;"

[70] If I am correct and the proposed cause(s) of action arises out of a breach of some duty in connection with these subsections, s. 754 of the **Municipal Act** barres any actions against the City in relation to its conduct in the circumstances of this case.

[71] The next issue that arises is as to whether or not the limitation period in s. 754 is applicable to these infant plaintiffs as they are persons under a legal disability.

[72] The only decisions on this point appear to be on the old s. 739 (now s. 755) of the **Municipal Act** dealing with the

giving of notice. In **Sandhu v. City of Prince George and Zimmer**, (1981) 31 B.C.L.R. 1, and **Styger v. Slew and I.C.B.C.**, March 18, 1987, unreported, Vancouver Registry No. B840031, it was held that the failure to give notice within the 60 day limit precluded infant plaintiffs from proceeding with damage claims against the City of Prince George and the City of New Westminster.

[73] Common sense would dictate that if the infants are bound by the notice of provisions in s. 755, so too are they bound by the limitations in s. 754 of the Act.

[74] If I am correct in this ruling, the issue then arises as to whether or not the infant plaintiffs can gain any assistance from a combination of rule 15(5) and s. 4(1) of the **Limitation Act**. Rule 15(5) has been set out earlier in these reasons and s. 4(1) of the **Limitation Act** is as follows:

> "4. (1) Where an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to
> (a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim;
> (b) third party proceedings;
> (c) claim by way of set off; or
> (d) adding or substituting of a new party as plaintiff or defendant, under any applicable law with respect to any claims relating to or connected with the subject matter of the original action."

[75] The words "under any applicable law" include Rule 15(5). This puts us on a course of inquiry to determine whether or not in the circumstances of this case, it would be just and convenient to join the City as a defendant at this time.

[76] There are numerous decisions in British Columbia on this point but the law with respect to adding or substituting parties has most recently been enunciated by the Court of Appeal in the ***Teal Cedar Products (1977) v. Dale Intermediaries Ltd. et al***, 1995, B.C.C.A., Vancouver Registry No. CA09669, February 8, 1966 (unreported) case. That was an appeal by the plaintiff of the dismissal in Supreme Court Chambers of its application to add a new cause of action to its claims against the defendant insurers after the expiration of a contractual one year limitation period. At p. 6 of the decision, Finch, J.A. states, starting in paragraph 36:

> "This application was brought, as noted above, under Rule 24(1) which permits a party to amend pleadings at any time, with leave of the court. The rule is discretionary and contains no criteria for the exercise of that discretion.
>
> The rule most often involved in questions arising under the Limitation Act is Rule 15(5)(a)(iii). It is invoked on applications to add parties. Rule 15(5)(a)(iii) says that there exists a question which, in the opinion of the court, would be "just and convenient" to determine as between a party and the person sought to be added....
>
> Discretionary powers, are of course, always to be exercised judicially. It would clearly be unjudicial to permit an amendment to pleadings under Rule 24(1) if it appeared to

> be either unjust or inconvenient to do so. So, even though the words "just and convenient" are not found in Rule 24, justice and convenience would, in my view, be relevant criteria for the exercise of the discretion found in that rule."

He continues at paragraph 45 on p.8:

> "On principle, therefore, it appears to me that the discretion to permit amendments afforded by both Rule 24(1) and s. 4(4) of the Act was intended to completely unfettered and subject only to the general rule that all such discretion is to be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities. Delay, and their reasons for delay, are among the relevant considerations, and the judge should consider any explanation put forward t account for the delay. But no one factor should be accorded overriding importance, in the absence of a clear evidentiary basis for doing so."

Finally, at p. 16, paragraph 67 he states:

> "In the exercise of a judge's discretion, the length of delay, the reasons for delay and the expiry of the limitation period are all factors to be considered, but none of those factors should be considered in isolation. Regard must also be had for the presence or absence of prejudice, and the extent of the connection, if any, between the existing claims and the proposed new cause of action. Nor do I think that plaintiff's explanation for delay must necessarily exculpate him from all "fault" or "culpability" before the court may exercise its discretion in his favour."

[77] Ryan, J.A. and McEachern, C.J.B.C. concurred with Finch J.A., the learned Chief Justice adding at p.18, paragraph 74:

> "Applying the same principles regardless of whether the application is to add new defendants, as in Ricketts or new causes of action, as in Med Finance, I believe the most important considerations, not necessarily in the following order, are the length of the delay, prejudice to the respondents, and the overriding question of what is just and convenient."

[78] I now turn to consider the relevant factors.

1. Length of Delay

[79] There are several delays in this case.

[80] The first delay encompasses the limitations set out in ss. 754 and 755 of the **Municipal Act** which were discussed earlier in these reasons. There is a requirement under s. 755 to give notice within two months from the date on which the damage was sustained or else the City is not liable for damages. There is a proviso in that rule that in the case of a death, as here, the section does not act as a bar if there is a "reasonable excuse and that the defendant has not been prejudiced in its defence" by the failure to give notice.

[81] In this case, the delay is from the 19th of March 1993 until the 28th of June 1995.

[82] The second delay, and this delay is tied in with the first, is the failure to commence the proceedings against the Municipality, notwithstanding the notice requirements, within

six months after the cause of action arose. As stated earlier, the cause of action arose on the 19th of March 1993 and the application to add the City of Penticton was not made until October 11, 1996.

[83] The third delay is the delay between the time Mr. Kennedy first consulted counsel and the action was commenced on his behalf, that is to say April 13, 1994, and counsel was retained on behalf of the infants in June of 1995. Obviously, this delay overlaps to a certain extent the second delay.

2. The Reason for the Delay

[84] With respect to the reason for delay, the following paragraphs in the affidavit of Robert M. Moffat, barrister and solicitor, filed October 11, 1996 must be considered:

> "4. Our firm was retained by the grandfather of the infant Plaintiffs, Clinton Baptist, in June of 1995.
>
> 11. At the time of our initial retainer and investigation it appeared that the infant Plaintiffs' claim arose out of the potential negligence of the following parties:
>
> (a) Johannes Eric Falkenberg and J.E. Falkenberg Ltd. the engineer responsible for this project;
>
> (b) United Lock-Block Ltd. the supplier of the lock-blocks;
>
> (c) O.K. Builders Suppliers Ltd. the seller and distributor of lock-blocks;
>
> (d) Edward Robert Anderson the excavator responsible for the project;
>
> (e) Robert Kennedy, the infants father.

12. That initially, given that a retaining wall had failed, the City of Penticton was considered a potential Defendant. However, given that there was an engineer responsible for this project, I felt the City of Penticton had a defence to this action.

13. After reviewing the circumstances of case and the documentary evidence, it was determined that out of an abundance of caution, the City of Penticton should be put on notice pursuant to s.755 of the Municipal Act .

14. On June 28, 1995 the City of Penticton was put on notice of the infant Plaintiffs' claim and a copy of that letter is attached hereto and marked Exhibit "B" to this my Affidavit.

15. That the Municipal Insurance Association denied responsibility for the infant plaintiffs' claim. A copy of that letter is attached hereto and marked as Exhibit "C" to this my Affidavit.

16. On July 16, 17, and 18, 1996 Examinations for Discovery were conducted on Mr. Falkenberg, P. Eng, Mr. Tarasewich on behalf of O.K. Builders, Mr. Drew on behalf of United Lock-block and Mr. Robert Kennedy.

17 At the discovery of Mr. Falkenberg:

(a) it was determined that Falkenberg's office was notified by the City of Penticton that there was dangerous slope on site at the Kennedy property;

(b) On Monday, March 13, 1993 Falkenberg contacted the City of Penticton and advised that Mr. Kennedy was building an "emergency concrete block wall". It was his view that this was an emergency to be done right away without a building permit;

(c) Falkenberg believed that the City would go and inspect the wall and deal with Mr. Kennedy;

(d) Falkenberg was of the view that he was not responsible for this project.

18. To advance the claim of the infant Plaintiff we retained Mr. R.C. Molina, P. Eng., to investigate this matter and provide us with his expert opinion. A copy of his report is attached hereto and marked as Exhibit "D" to this my Affidavit.

> 19. As a result of his report, I concluded that the City of Penticton was a proper party to add to this Action."

[85] There is nothing in the affidavit materials setting out a "reasonable excuse" for the failure to give notice between March 19, 1993 and June of 1995 as required by the **Municipal Act**.

[86] There is also no explanation for the failure to give notice after the action was commenced on behalf of the father in April of 1994 through the period to June of 1995.

[87] There is no explanation anywhere, or reasonable excuse given, as to why the action was not commenced within the six month limitation period in s. 754 of the **Municipal Act**.

[88] The explanation proffered by Mr. Moffat in the delay from June of 1995 until October of 1996 is as follows. In paragraph 12 Mr. Moffat deposes that he considered the City as a potential defendant but rejected that course of action as there was an engineer responsible for the project.

[89] The next step in the proceedings according to his affidavit seemed to be the Examinations for Discovery conducted on July 16, 17, and 18 of 1996 and there is no explanation as to what steps, if any, were taken to investigate during the 13

month period from the time he was retained until discoveries were conducted.

[90] The only possible explanation proffered for any of the delays is contained in paragraph 18. Reading that paragraph in conjunction with paragraphs 16 and 17, one can only conclude that as a result of the Examination for Discovery Mr. Moffat retained Mr. Molina to provide an expert report. As a result of receiving the report, on or about September 3, 1996, a decision was then made to add the City, according to his affidavit.

[91] There is nothing in the report of Mr. Molina to indicate any liability attaching to the City whatsoever.

[92] I find there is no reasonable explanation and in fact no credible explanation given whatsoever of the delays.

3. Prejudice to the Defendant

[93] Where limitation periods have passed, prejudice is to be presumed.

[94] In this case, the City was entitled to rely on the limitation periods imposed in the **Municipal Act**.

[95] Notwithstanding that reliance, the City was put on official notice by Ms. Harris on June 28, 1995. Response to

that letter, that letter being set out earlier in these reasons, is found at Exhibit "C" to the affidavit of Mr. Moffat. That response is as follows:

> "Wednesday, June 28, 1995
>
> **WITHOUT PREJUDICE**
>
> Moffat Ward
> Barristers & Solicitors
> 3103 - 28th St.
> Vernon, B.C.
> V15 4Z7
>
> Attention: Ms. Elizabeth Harris
>
> Dear Madam:
>
> Re: Claimants--Children of Lynda Kennedy
> Date of Loss--March 19, 1993
> Your File--K-10107
> Our Insured--City of Penticton
>
> This acknowledges our receipt of a copy of your letter dated June 28, 1995, and addressed to our insured, the City of Penticton, on the above-captioned matter.
>
> In response, it appears that sections 754 and 755 of the Municipal Act have not been met. Also, the subject retaining wall was built by Robert Kennedy, the husband of the deceased Lynda Kennedy, and Edward Anderson, with engineering input from J.E. Falkenberg Ltd. No permit was issued by the City of Penticton for the said retaining wall.
>
> In reviewing the facts of this case, the City of Penticton is not responsible for any alleged faulty construction of the retaining wall that collapsed on March 19, 1993.
>
> Yours truly,
>
> "Kiegoon K"
> Kiegoon Kim, LL.B.
> Claims Examiner"

[96] That apparently was the last correspondence between the parties and as I stated earlier, there is no explanation at all as to why steps were not taken by the solicitor for the infant plaintiffs upon receipt of that letter. As no further steps were taken after the exchange of letters, the City was entitled to assume that no action would be taken against it.

4. Prejudice to the Plaintiffs

[97] The plaintiffs still have their cause of action against the manufacturers, the engineers, and their father and therefore their prejudice is minimal.

[98] I say that, particularly, as there is no evidence that any application was made to the City with respect to a building permit in connection with the construction of this retaining wall, merely that Mr. Falkenberg informed the City that one was being built on an emergency basis.

5. What is Just and Convenient in the Circumstances

[99] In light of the foregoing, I find it to be unjust and inconvenient to add the City as a defendant in these proceedings.

[100] This is not a case in which the identity of the City was undisclosed. The plaintiff Kennedy, his solicitor Mr. Danyliu, and Mr. Moffat, all knew of the City's identity and

both of them considered the City as a possible defendant but decided not to join them.

[101] In my view there are no circumstances that would allow the court to abrogate the limitation period set out in s. 754 of the **Municipal Act**. The application of the infants to add the City is dismissed.

3. The Application of the Plaintiff Kennedy to add the City of Penticton as a Defendant.

[102] The findings that I have made in respect of the infants on the application of ss. 754 and 755 of the **Municipal Act** apply equally, only with more strength to Mr. Kennedy.

[103] To begin with, in Mr. Danyliu's affidavit he indicates he gave the City notice on November 15, 1993. That letter reads:

> "File Number: 93,199
>
> November 25, 1993.
>
> The Corporation of the
> City of Penticton, **VIA FAX - 493-5589**
> 171 Main Street
> PENTICTON, B.C.
> V2A 5A9
>
> Dear Sirs:
>
> **Re: Wrongful Death of Linda Diane Kennedy - March 19, 1993**
>
> We represent Mr. Robert Kennedy in relation to the wrongful death of his wife, Linda Diane Kennedy, on March 19, 1993.

> We hereby provide notice to you pursuant to the Municipal Act that we will be seeking compensation for Mr. Kennedy as a result of this unfortunate occurrence. Therefore, please notify your insurers accordingly.
>
> Yours truly,
>
> **DANYLIU & COMPANY**
>
> Per:
> Paul G. Danyliu
> "P.G. Danyliu"
>
> PGD/emm"

[104] I have serious doubts that this letter meets the requirements of s. 755 of the **Municipal Act**, but even if I am incorrect in that conclusion, it is still not within the period set out in the **Municipal Act** nor has the action been commenced within the six month period and, therefore, as I found in the case of the infants, the action is statute barred.

[105] Again, there has been no reasonable explanation of the delay since November 25, 1993.

[106] Section 31(g) of the **Limitation Act** sets the limitation period for a cause of action under the **Family Compensation Act** of two years after the date on which the right to commence the proceedings arose. That date would be March 19, 1995.

[107] Assuming that the plaintiff could use that section to extend the limitation period under the ***Municipal Act***, he cannot claim, as could the infants, that the time has been suspended by s. 7(1) of the **Limitation Act** as he is under no legal disability as they are.

[108] Therefore, the plaintiff is not only barred by the limitation period in the **Municipal Act**, he is also barred by the limitation period in the **Limitation Act**.

[109] Without wishing to repeat myself yet again, the discussion with respect to the infants' application under Rule 15(5) and s.4(1) of the **Limitation Act** applies to Mr. Kennedy only with more force. Mr. Kennedy, as set out above, not only missed the limitation period under the **Municipal Act**, but also under the **Limitation Act**. One must recall that this is not an instance in which Mr. Kennedy hired a contractor to do the work. He in fact was the actual contractor performing the physical job of constructing the retaining wall and as such, at the time of death, knew of the involvement of the City if there was any at all.

[110] He ought not now to look to the court to relieve him for his lack of reasonable diligence in pursuing the claim.

[111] The application of Kennedy is also dismissed.

[112] I would be remiss in these reasons if I did not deal with one final matter and that is the possibility of an error by the solicitors for the infant plaintiffs and the plaintiff Kennedy in not bringing these applications sooner.

[113] In the case of the infants' solicitors, it is clear that Mr. Moffat was not retained within the time limit set out in the **Municipal Act**. Nevertheless, assuming the court is prepared to commence the limitation period from the time Mr. Moffat was retained, there was no action commenced within six months of his retainer.

[114] Again, the same may be true for Mr. Danyliu. It is unclear as to when he was retained to act but, again, no action was commenced within the limitation period. But, assuming the court is prepared to abridge that time, again no action was commenced within six months of his giving notice to the City.

[115] It is clear from the authority of ***Estepanian v. Brown and District of West Vancouver*** (1996) 17 B.C.L.R. (3) 383 that the failure of a solicitor to give the required notice was not a reasonable excuse within the meaning of s. 755 of the **Municipal Act**.

[116] Much can be said and indeed the court sympathises with the plight of the plaintiff and the infant plaintiffs. Nevertheless, sympathy in their predicament alone is not a

sufficient ground for granting the applications. All applications are dismissed with costs to the intended defendants.

"Michael R. Bishop"

M.R. Bishop