

I, **Jessica Duncan** of the City of Barrie, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a partner at the law firm of Crawford, McLean, Anderson and Duncan LLP ("**CMAD**") located in Orillia, Ontario and as such, I have personal knowledge of the matters to which I herein depose except where such is stated to be based on information and belief in which case, I verily believe it to be true.

2. I make this affidavit for the purposes of correcting inaccuracies brought to my and my partners' attention in relation to the evidence tendered on the firm's behalf in the affidavit of K. William McKenzie ("**McKenzie**") sworn October 2, 2009 ("**McKenzie Affidavit**") as well as the testimony given on CMAD's behalf at McKenzie's cross-examination on February 3 and 8, 2010 (the "**Cross-examination**").

File History Relating to the Underlying Litigation

3. In the period between September 2005 and February 2009, McKenzie opened three separate files that related to the subject matter of the underlying litigation, specifically, Kingsland Estate ("**Kingsland**"). The Client Ledgers are as follows:

- (a) BMC 543 ("**543**") is a file titled "Allard re: Knox and Kingsland Estates Action". 543 was opened in or about September 2005 and closed in April 2009.
- (b) BMC587 ("**587**") is the file number that replaced 543 in April of 2009. There was nothing docketed to this file other than disbursements payments and trust transfers.
- (c) BMC 568 ("**568**") is a file titled "Nelson Barbados Group Ltd. v. Cox et. al". 568 was opened in or about April 2007 and closed in February, 2009.
- (d) BMC 586 ("**586**"), also titled "Nelson Barbados Group Ltd. v. Cox et. al" was opened to replace 568 in or about February 2009 and its ledger includes entries up to October 2009.

4. Herein, 543, 587, 568 and 586 are collectively referred to as the "**Files**".

5. When asked about how files were set up with respect to the underlying litigation, McKenzie's evidence was as follows (at pp.292-93, q. 1135-1138):

Mr. Ranking: "Let me just ask you to turn to tab 1. There is a file number that is referenced at that tab, and it has the moniker "bmc" in small letters, "568". Do you see that?"

McKenzie: "I do"

Q. I take it that was the file number that was assigned to this particular piece of litigation, correct?

A. I can't disagree with you.

...

1138. Q. Is this the only file to which dockets were posted with respect to the *subject matter* of the Nelson Barbados Group litigation? (emphasis added)

A. There is only one file.

6. I believe that McKenzie's evidence is not entirely accurate. 568 was opened shortly after the Ontario Nelson action was commenced. There is no file under the name "Nelson Barbados Group" relating to the period during which the Statement of Claim was drafted and issued. However, 543, which was opened in 2005 concerns the underlying issues giving rise to this litigation, and also contains docket entries and disbursements which appear to relate directly to the *subject matter* of the underlying litigation. The Client Ledger (which is a complete listing of the dockets and disbursements entered in the file) for 543 contains numerous entries that appear to relate to the Ontario action, including:

- (a) 8 Jan 2007: Lawyer 4 "...update Canadian Statement of Claim and forward for approval";
- (b) 24 Jan 2007: Lawyer 4 "...research re new claim final draft and possible avenues for service";
- (c) 28 Jan 2007: Lawyer 4 "...final read through of Canadian action for accuracy";
- (d) 29 Jan 2007: Lawyer 12 "...review, check and update claim, confer with KWM";
- (e) 29 Jan 2007: Lawyer 4 "...redraft statement of claim and consider possible new parties";
- (f) 29 Jan 2007: Lawyer 12 "...further review of Ont. action and revisions";

- (g) 30 Jan 2007: Lawyer 4 "...finalizing Canadian claim";
- (h) 31 Jan 2007: Minister of Finance "Paid to issue the Statement of Claim - "Ontario Action";
- (i) 31 Jan 2007: Lawyer12 "...review Rule 17 Re out of province service...draft clause to be added to claim...prepare claim";
- (j) 2 Feb 2007: Lawyer 4 "...review issued Canadian claim";
- (k) 9 Feb 2007: Minister of Finance "Paid to issue Claim";
- (l) 9 Feb 2007: Lawyer4 "...amend claim and add Leonard Nurse.."; and
- (m) 30 Mar 2007: Lawyer 4 "...review exhibits re Canadian action and develop conspiracy argument"

7. In addition to entries relating to the drafting and issuance of a claim in Ontario, the Client Ledger for 543 also includes entries relating to Nelson, including:

- (a) 13 Feb 2007: Cyberbahn Inc. "Paid for Corporate searches re Nelson Barbados Group Ltd."
- (b) 13 Feb 2007: Cyberbahn Inc. "Paid agent's fee for Corporate searches re Nelson Barbados Group Ltd." and
- (c) 13 Feb 2007: Cyberbahn Inc. "Paid agent's fee for data extract report re Nelson.

8. These are just examples of the numerous docket and disbursement entries in the 543 Client Ledger that appear to relate directly to the Ontario action and these are by no means an exhaustive list. Attached to my affidavit and marked as **Exhibit "A"** is a true copy of the Client Ledger for 543.

9. Based on these entries in the 543 Ledger, I believe that McKenzie's evidence about having just one file (568) relating to the subject matter of the Nelson Barbados Group litigation is inaccurate.

10. Furthermore, there were two files opened under the "Nelson Barbados Group" client name. Attached to my affidavit and marked as **Exhibit "B"** are true copies of the Client Ledger for 568 and 586 which contain all of the docket entries made to those files in relation to the Ontario Nelson action.

11. I can advise that Mr. McKenzie was in the habit of opening a series of file numbers in relation to large files due to data partition issues with PCLaw. It was not a unique occurrence.

Incorporation of Nelson Barbados Group Ltd.

12. In paragraphs 5 and 20 of his affidavit, McKenzie states that CMAD acted on the incorporation of Nelson Barbados Group Limited (“**Nelson**”). However, I have searched our firm records extensively (including files 543, 568 and 586) and can find no indication that anyone at CMAD ever opened or maintained a corporate file in relation to the incorporation of the company, nor does it appear that CMAD invoiced anyone, including Donald Best (“**Best**”), for the preparation of the documents or for the disbursement required for registering the corporation. Attached and marked as **Exhibit “C”** is a true copy of the McKenzie Affidavit.

13. After discovering that CMAD had not opened a corporate file for Nelson, I investigated whether our CyberBahn account had been used for the purpose of incorporating the company. McKenzie testified that the person in this office who “pushed the button” would have incorporated the company online. In fact, our firm has exclusively worked with Cyberbahn since the late 1990s. This is the service CMAD uses (and did use in 2005) to file Articles of Incorporation. After I was unable to locate the 2005 records in our archived files in storage, I asked our bookkeeper to obtain a Statement of Account from Cyberbahn for the period covering October 1, 2005 to December 31, 2005. The Cyberbahn Statement of Account shows that CMAD was not invoiced for filing Nelson’s Articles of Incorporation in November 2005 and I therefore believe that the incorporation was not done by anyone in this office. Attached and marked as **Exhibit “D”** is a redacted copy of the Cyberbahn Statement of Account covering October 1, 2005 to December 31, 2005. (I have redacted portions of this document to protect other clients’ privilege).

14. I then obtained a Corporation Document List (“**CDL**”) report from the Ministry of Government services by way of our Cyberbahn account. This document confirms that the articles of incorporation were filed on November 15, 2005 although there is no reference to who might have filed the document. However, there was also a “First Return” filed on November 15, 2005, and the person indicated as the “PAF” (or person authorizing filing) was Lisa Carolyn

James (“**James**”), who is a lawyer and McKenzie’s wife. Attached and marked as **Exhibit “E”** is a true copy of the CDL.

15. I do not have any knowledge as to what role, if any, James played in Nelson beyond being listed as the PAF, however, McKenzie states in his affidavit (at paragraphs 6-8) that neither he or any member of his family has ever had any direct or indirect interest or involvement with Nelson but he does not disclose that James, his wife, was the originally listed PAF. In addition, McKenzie’s evidence on his Cross-examination at (q.74) was that James was “an office manager for CMAD” at the time of the incorporation. This is not entirely accurate. James assisted at the office in the spring and summer of 2005 overseeing renovations, equipment purchases and organizational issues. She had identified herself to vendors as an office manager at various times, but she was never employed by the firm, and her invoices for hours worked were always submitted on her firm letterhead.

16. Despite being unable to locate any record of our office incorporating Nelson or any record of our office maintaining a corporate book or records for Nelson, I found two docket entries which I believe relate to the incorporation of Nelson:

- (a) One docket entry is from 543’s Client Ledger on October 24, 2005 and reads as follows:

“3.20 hours Call from PA, Review documents from JK and JG, and security documents, Call to make plans for incorporation of Canadian Company”

- (b) The second is an “admin” handwritten entry (which means no file association) made by Sunny Ware on November 15, 2005 which states:

“Assist LJ re share provisions for new Best Co.”

17. It is my belief and understanding that “PA” refers to Peter Allard, “JK” refers to John Knox, “JG” refers to Jane Goddard and “LJ” refers to James, McKenzie’s wife. Attached and marked as **Exhibit “F”** is a true copy of the handwritten entry made by Sunny Ware.

18. At his Cross-examination (p.19, q.49 and 52), McKenzie testified that he was not sure who, in the CMAD office, had incorporated Nelson and that he asked me “who pushed the button to incorporate this thing?” This is inaccurate; McKenzie never asked me any such

question. I have been unable to locate anyone in the office to whom he directed this inquiry. Further, as I noted at paragraph 9(a), the Client Ledgers for 543 disclose that the incorporation of a Canadian corporation was contemplated in October 2005 in relation to the Kingsland litigation but CMAD has no record of anyone in our office having incorporated Nelson.

Internet Blogging

19. In paragraphs 137 - 140 of his affidavit, McKenzie indicates that he did not follow the internet blogs that contained postings relating to the underlying litigation. He denies knowledge about the postings on the Blogs, including the Keltruth Blog. However in the Client Ledger for 543, there are numerous entries (see June 2007, for example) relating to "blogging". Moreover, a number of disbursements were paid out to Wanphen Panna dated April 30, 2006 to January 24, 2008 for "internet research". Wanphen Panna is the wife of Best.

20. Furthermore, in the accounting records for 543, we also located numerous paid invoices from NIS Inc., a company which appears to be owned by Best. These invoices relate to some sort of internet research, including monitoring of the KelTruth blog. Attached and marked as **Exhibit "G"** are true copies of the NIS Inc. invoices.

McKenzie's Contact E-mails

21. At his cross-examination (pp.80-81, q.313-314) Mr. McKenzie is asked about the whether "KWM External" is his personal e-mail. His answer is "I guess" followed by "I don't have an e-mail called KWM External". This is inaccurate. The name "KWM External" was the name given in our office server's global directory for Outlook to whatever address he had set up for sending and receiving e-mail when he was outside of the office and outside of the country. By 2007, this email address was lawyerbill@rogers.com. I believe that this is the e-mail that Mr. McKenzie still uses, following his departure from the firm. Mr. McKenzie and his assistant Sunny Ware always referred to it as "KWM External" when directing us to send email to him. Therefore, Mr. McKenzie's non-office e-mail address was always named "KWM External" whatever the specific address was.

Stuart Heaslet

22. At questions 370 and 375 and later on at question 403-404, Mr. McKenzie denies having prior knowledge that Mr. Heaslet would be calling Mr. Simmons on August 10, 2007 and no understanding as to why Mr. Heaslet might have made or taped the call. We have located a series of emails commencing on August 8, 2007 which seem contradictory to those statements. True copies of the series of emails relating to this issue are attached and marked as **Exhibit "H"**.

Provision of the Accounts

23. In reference to accounts provided by McKenzie to the defendants prior to his cross-examination, McKenzie was asked (p.293, q.1140) whether the accounts he provided (being Exhibit 10) were in the same form as was delivered to the client. McKenzie's answer is "I have no reason to believe otherwise....". I have been advised by Ms Stacey Ball ("**Ball**"), a law clerk at CMAD and I believe that she assisted McKenzie in preparing a brief of the accounts for the purposes of the Cross-examination. McKenzie reviewed the brief while Ball was in the process of preparing it and at that time instructed Ball to remove the Trust Statements appended to the accounts. It is my belief, based on the firm's usual practice that the accounts would always be sent to the client with the Trust Statements appended. Attached and marked as **Exhibit "I"** are true copies of the Trust Statements (with the accounts) which were removed by McKenzie before he provided the accounts to Mr. Sean Dewart.

Payment of Accounts

24. McKenzie's evidence at his cross-examination (pp.294-5, q.1143-1146) regarding how the accounts (Exhibit 10, File 568) were rendered appears inaccurate. McKenzie testified that the accounts were left at reception. However, according to the portion of the accounting records we have recovered for 543, it appears that accounts were e-mailed to Peter Allard ("**Allard**") via his assistant in Barbados, Jane Turnbull. Attached and marked as **Exhibit J** is an e-mail to Jane Turnbull from Sunny Ware, dated December 19, 2007 enclosing the accounts for both 543 and 568.

25. In addition to receiving the accounts for the Files *via* e-mail, Mr. Allard paid these accounts. Attached as **Exhibit "K"** are true copies of the true copies of the Account Statements for 543.

26. I have been unable to locate any document suggesting that accounts were ever directed to Nelson at all or that they were left in the drawers at reception to be retrieved.

27. McKenzie's evidence (p.299, q.1155) is that he was advised by Best that Nelson was paying him. However, an examination of the available accounting files for 543 reveals a series of e-mail exchanges between Allard, Dennie Flynn (another of Allard's assistants), KWM External and Sunny Ware discussing funds advanced by Allard to pay the Nelson accounts. Attached as **Exhibit "L"** are true copies of this series of e-mails.

28. Mr. McKenzie testified (pp.300-01, q. 1161-1165) that he did not keep information about the source of wire funds. McKenzie did not personally maintain these records, however, CMAD does maintain the records and they show that Peter Allard (or his company, Peterco) were the source of the wired funds. In addition to the Trust Statements referred to above, the information received from the TD Bank in response to CMAD's inquiry about two wire transfers made pursuant to the undertaking (p.300, q.1162) is attached and marked as **Exhibit "M"**.

29. We have authorized our counsel, Blaney McMurtry LLP to make further inquiries regarding wire transfers for the files. I am advised by Ms Cecilia Hoover ("Ms Hoover") that she has been in contact with representatives at CMAD's TD branch and that she has been advised of the following:

- (a) CMAD's TD representative requested the documents from Iron Mountain, the data storage company used by TD for historical documents;
- (b) Iron Mountain advised the TD representative that retrieving the documents would take some time and that Iron Mountain would provide a time and cost estimate as soon as they were able;
- (c) it would expedite matters considerably if the dates and amounts of the wire transfers were provided to Iron Mountain; and

- (d) Ms Hoover has enlisted the assistance of a law clerk to review all the client ledgers and provide a list of dates and amounts of wire transfers to Iron Mountain.

All reasonable efforts are being made to obtain the wire transfer documents as expeditiously as possible.