IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ceperkovic v. MacDonald,*
2016 BCSC 939

Date: 20160525
Docket: M115103
Registry: Vancouver

Between:

Linda Ceperkovic

Plaintiff

And

Francis Cameron MacDonald and Janet MacDonald

Defendants

- and -

Docket: M130039
Registry: Vancouver

Between:

Randolph Michael Patriquin

Plaintiff

And

**Francis Cameron MacDonald, Janet Lynn MacDonald,
Linda Kathleen Ceperkovic, VW Credit Canada, Inc.
and Credit VW Canada, Inc.**

Defendants

Corrected Judgment: The front page of the judgment was amended on June 14, 2016 to reflect the correct counsel appearances.

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

Counsel for the Plaintiff Ceperkovic (M115103): K.L. Simon

Counsel for the MacDonald Defendants: D.G. Perry
J. Mehat-Gill

Counsel for the Plaintiff Patriquin:	J. Brun
Counsel for the Defendants Ceperkovic, VW Credit Canada, Inc. and Credit VW Canada, Inc. (M130039):	D. Fiorvento
Place and Dates of Trial:	Vancouver, B.C. February 9-11, 2016
Place and Date of Judgment:	Vancouver, B.C. May 25, 2016

Introduction

[1] These actions arise from a motor vehicle accident that occurred at about 10:00 a.m. on May 20, 2011 at the intersection of the Mary Hill Bypass and Shaughnessy Street (the "intersection") in Port Coquitlam, British Columbia (the "accident"). By case plan order of December 17, 2015, liability in both actions is to be decided in this trial and evidence admitted for purposes of one trial is also admitted for purposes of the other, subject to the direction of the trial judge. Quantum of damage in both actions is to be tried separate from this trial. A third action (Vancouver Registry No. M113685), initiated by Francis MacDonald against Linda Ceperkovic and VW Credit Canada Inc., was discontinued in November 2015.

[2] The accident involved three vehicles: a black Volkswagen operated by the plaintiff (defendant in the Patriquin action), Linda Ceperkovic ("Ceperkovic") and leased from the defendant VW Credit Canada Inc. (the "Ceperkovic vehicle"), a white Pontiac operated by the defendant, Francis MacDonald ("MacDonald"), and owned by the defendant, Janet MacDonald (the "MacDonald vehicle"), and a transit bus operated by the plaintiff, Randolph Patriquin ("Patriquin"), and owned by his employer, Coast Mountain Bus Company (the "transit bus"). There were two impacts: first, between the Ceperkovic vehicle and the MacDonald vehicle and, second, between the MacDonald vehicle and the transit bus.

[3] There was no issue in this trial that the transit bus was stopped at a red light and was in the eastbound left turn lane of the Mary Hill Bypass when it was struck by the MacDonald vehicle, which had been proceeding west on the Mary Hill Bypass. The MacDonald and Ceperkovic vehicles had collided, causing the MacDonald vehicle to swerve across the intersection and into the stationary transit bus. The primary issue in this trial is: which of Ceperkovic or MacDonald had the red light? Or, who had the green light?

Facts

[4] Ceperkovic was travelling southbound on Shaughnessy Street headed to her home about a kilometre from the Mary Hill Bypass intersection around 10:00 a.m. on

May 20, 2011. She was not in a rush. Shaughnessy Street southbound has one through lane and a left turn lane. On this bright spring day, traffic was light on Shaughnessy Street but the Mary Hill Bypass, a major route, was typically busy. The Mary Hill Bypass has two through lanes and one left turn lane in both directions. Some distance before the intersection, there are signs that read “prepare to stop” and have flashing amber lights to warn drivers on the Mary Hill Bypass that they may be required to stop at the intersection with Shaughnessy Street.

[5] As Ceperkovic approached the intersection from about 10 car lengths back, she noticed that the light was red and she slowed to a complete stop just prior to the stop line across the southbound through lane. She observed a large delivery truck in the westbound curb lane of the Mary Hill Bypass, a vehicle behind that truck, no other vehicles in the other Mary Hill Bypass westbound lanes, a transit bus in the eastbound left turn lane of the Mary Hill Bypass, a vehicle behind the bus, a vehicle in the eastbound through lane of the Mary Hill Bypass next to the transit bus, and no vehicles headed northbound on Shaughnessy Street. All of the vehicles on the Mary Hill Bypass had come to a stop. She would have observed any other vehicles that had stopped at the intersection as her acuity and memory were both good. Ceperkovic remained stopped for the full sequence of lights.

[6] Ceperkovic was familiar with the lights at the intersection. Her recollection coincides with the traffic controller’s evidence about the lights. There is no advance green for left turning vehicles on Shaughnessy Street. Traffic headed westbound on the Mary Hill Bypass is controlled by a three light fixture for through traffic and a separate light on the median for left turning vehicles. The green light for the Mary Hill Bypass lasts longer than the green light for Shaughnessy Street.

[7] Ceperkovic testified that the light turned green for her after she had waited out the sequence. She scanned the intersection. The transit bus remained stopped. She had started to proceed when a motorcycle headed eastbound on the Mary Hill Bypass whizzed through the intersection, causing her to stop within the cross-walk area. She scanned the intersection again and then proceeded cautiously, having

already been cautioned by the motorcycle going through on a red light. The eastbound bus and car and the westbound truck on the Mary Hill Bypass remained stopped. Ceperkovic said that the light remained green for her and she proceeded slowly through the intersection. It was not suggested to her in cross-examination that the light had been red when she proceeded into the intersection.

[8] Ceperkovic said that she then suddenly saw a white blur and braked but was hit by the MacDonald vehicle. The Ceperkovic vehicle was struck near the left front tire. The Ceperkovic vehicle did not travel very far before coming to a stop. Ceperkovic's impression was that the MacDonald vehicle was travelling very fast. Ceperkovic saw the MacDonald vehicle hit the left turn light standard but did not see the impact with the transit bus. No other vehicles had proceeded westbound or eastbound through the intersection prior to the collision.

[9] Patriquin had been working as a transit operator for 27 years at the time of the accident. He was very familiar with the intersection. As he approached Shaughnessy Street headed eastbound on the Mary Hill Bypass, he pulled into the left turn lane to turn onto Shaughnessy Street. He noticed the left turn lane light go red and brought his transit bus to a stop at the stop line. He heard a loud sound like a motorcycle and turned his head to the right. Then, there was a crash as a car hit his bus. The light had remained red for him throughout this time. He did not know how the collision occurred, had not seen the motorcycle, and was not aware of the first collision. He was not cross-examined about his bus being fully stopped at a red light when the MacDonald vehicle crashed into the transit bus.

[10] David Ironside ("Ironside") was the driver of the vehicle that was stopped in the eastbound through lane of the Mary Hill Bypass beside the transit bus. He had seen the amber "prepare to stop" lights flashing and passed a motorcycle before coming to a full stop at the red light. The bus was also stopped. Ironside said that the motorcycle then went straight through the red light. He thought: "Holy crap! [The motorcycle] blew through a solid red light! … He came out of nowhere and blew right through it". Then, he heard a collision. A vehicle came in his direction and hit the

bus. Ironside thought: “Good thing the bus was there because it would’ve hit my car”. Ironside testified that the light was red for eastbound traffic when he heard the collision. The transit bus had not moved except from the impact. Ironside gave his contact information to the bus driver. His testimony was not seriously contested and is accepted.

[11] On the basis of all of this evidence alone, it could be concluded that the MacDonald vehicle probably went through a red light on the assumption that the eastbound and westbound lights on the Mary Hill Bypass are synchronized. But there is then the testimony of MacDonald and Janet MacDonald to consider.

[12] MacDonald and Janet MacDonald were on their way to grandparents’ day at a school in West Vancouver from their home in Maple Ridge. MacDonald was travelling in the left westbound through lane of the Mary Hill Bypass. He noticed that a truck was stopped in the other westbound through lane to his right and that the light was red. Other cars were behind the truck and MacDonald saw a transit bus in the eastbound turn lane. He noticed no other vehicles at the intersection. MacDonald did not notice the advance warning flashing amber light before the intersection. He did not notice a motorcycle pass through the intersection. MacDonald said that he started to slow down but the light turned green when he was about two or three car lengths away from the intersection. He had been going “about 70” kilometres per hour when he started to slow down. MacDonald proceeded past the stopped vehicles to his right and into the intersection. He testified that he was being careful because he had to see “around the hood of the truck” to his right. He saw another car come across the cross-walk to his right, thought “what are they doing?”, looked to see the green light, and then the car hit him. He testified that the Ceperkovic vehicle was travelling “flat out”, “at high speed”, with the “pedal to the metal” and took no evasive action whatsoever. He said that the Ceperkovic vehicle “ploughed” into the front wheel on the passenger side of his vehicle. The airbags deployed in the MacDonald vehicle and it veered into the transit bus. MacDonald testified both in direct and cross-examination that the bus had remained stopped in the left eastbound turn lane throughout.

[13] MacDonald agreed that his recollection was not good. He also agreed that his vision was impaired by a cataract. He would not agree until his discovery was put to him in cross-examination that he could not read street signs and “could not recall” if he had problems seeing at a distance at the time of the accident. He said that he “probably” had “slowed to 50” and “probably” was six or eight car lengths from the intersection when the light was red. However, he also said that he could not recall his speed when the light turned green and that he intended to stop. In a statement to police on the day of the accident, MacDonald said that he had come to a full stop at a red light at Shaughnessy Street before the light turned green and he proceeded. In explanation for the contradiction in his evidence, MacDonald said that he “probably” was on painkillers by the time he gave his statement and that he had come to a stop “if only for a beat”. He acknowledged that he was fully in the intersection before he saw the Ceperkovic vehicle. He denied that the Ceperkovic vehicle had the green light.

[14] Janet MacDonald was doing a Sudoku puzzle in the front passenger seat of the MacDonald vehicle at the time of the accident. Her practice was to memorize the numbers that she had worked out while the car was in motion and then write down the numbers when the light was red. She was not paying attention to the traffic but did notice the truck stopped to her right. She testified that she was aware that the car slowed down as they approached the intersection and she saw the red light. She was getting ready to fill in the numbers but MacDonald “picked up”. Janet MacDonald said that she noticed the light was green and said that MacDonald never did stop. They had just cleared the truck when the first impact occurred. Janet MacDonald did not see the Ceperkovic vehicle prior to impact. She did not see the collision but felt it. The airbags deployed and the next thing she saw was the grill of the bus.

[15] Janet MacDonald admitted that she was not really looking or paying attention to traffic. She was too busy going over the Sudoku numbers. She did not notice the advance flashing yellow lights. She sensed the red light from the movement of the car. She had told police that their vehicle had come to a full stop at the red light but

acknowledged in cross-examination that the vehicle had never come to a full stop before proceeding into the intersection. She could not recall whether she was still looking over the numbers when MacDonald yelled and the first impact occurred.

[16] From all of this evidence, it is certain that Patriquin and Ironside had stopped their vehicles for a red light on the Mary Hill Bypass. It is also certain that neither saw a green light to allow them to proceed into the intersection before the accident occurred. There is no issue that the traffic lights were functioning properly on May 20, 2011.

[17] Graham Cross is the senior traffic operations engineer in charge of all traffic operations for the south coast region for the provincial Department of Transport. He detailed in evidence the operation of the traffic signals at the intersection and how the loops imbedded into the pavement detect the flow of traffic. He explained the signal sequences which were set out in his report. The default position is green for the Mary Hill Bypass unless or until there is a call or demand by vehicles on Shaughnessy Street. There is no phase where both southbound traffic on Shaughnessy Street and westbound traffic on the Mary Hill Bypass have a green light. Based upon the positions of the vehicles as determined in evidence, Mr. Cross established that MacDonald could only have had a green light if Ironside had a green light and the transit bus had a red light. If the transit bus and the Ironside vehicle both had green lights, then the MacDonald vehicle would have had a red light. If the Ceperkovic vehicle had a green light, then the westbound MacDonald vehicle would have had a red light. If the bus was stopped at the red light and if the Ceperkovic vehicle was stopped in the through lane, then both would have had priority over the westbound MacDonald vehicle for a green light. The Ceperkovic vehicle would have had priority over the transit bus. Based upon the situation of all of the vehicles and the evidence from Mr. Cross of the light sequencing, and accepting that Ironside and Patriquin had red lights, it is not possible that the MacDonald vehicle had a green light.

[18] In all of the circumstances and given the preponderance of the evidence and the frailties of the evidence of MacDonald and Janet MacDonald, the only conclusion is that MacDonald did not have the green light. He was mistaken and could not have seen the westbound light on the Mary Hill Bypass change from red to green. Ceperkovic had the green light and proceeded accordingly.

[19] Ceperkovic also took reasonable care in all of the circumstances to look out for her own and others' safety. She noticed the motorcycle and slowed down even though she had the green light. She then proceeded cautiously. It is concluded that MacDonald basically ran the light and failed to stop when the light turned red.

Analysis

[20] MacDonald entered the intersection on a red light. This caused the collision with the Ceperkovic vehicle, which had the right of way, and then caused the MacDonald vehicle to crash into the transit bus that remained stationary at the red light throughout this accident.

[21] By failing to stop at a red light, MacDonald breached sections 125, 129 and 144 of the *Motor Vehicle Act*, R.S.B.C.1996, c. 318. However, no statute is necessary for the general proposition that a vehicle entering a controlled intersection with a green light has the right of way over vehicles facing the red light (*Haczewski v. British Columbia*, 2012 BCSC 380 at para. 12). In this circumstance, the vehicle with the right of way has a limited duty of care to drivers who unlawfully proceed on a red light (*Yick v. Johnson*, 2012 BCSC 1485 at para. 20 (*Yick*)). Ceperkovic's duty in the circumstances was to take all reasonable steps to avoid a collision if, in fact, she saw the MacDonald vehicle (*Yick* at paras. 20-23). Ceperkovic and Patriquin were both entitled to assume that MacDonald would obey the rules of the road (*Yick* at para. 23; *Salaam v. Abramovic*, 2010 BCCA 212 at para. 25).

[22] Contributory negligence may apply where the plaintiff is "part author of his own injury" (*Nance v. British Columbia Electric Railway*, [1951] A.C. 601 at 611, [1951] 3 D.L.R. 705 at 711 (P.C.)). Neither Patriquin nor Ceperkovic fall within this description.

[23] It follows that Francis MacDonald and Janet MacDonald are 100% liable for the accident.

Costs

(a) Ordinary costs

[24] Ceperkovic sought costs payable on Scale B. Although the MacDonald defendants argued that costs should be in the cause so that the plaintiff would be deprived of her costs and have to await the result of the assessment of quantum of damages, this is contrary to the intent of the order for the separate trial of liability with which the defendants agreed. No discoveries have taken place and no trial dates have been set for assessment of quantum of damages. As the successful party, Ceperkovic is awarded costs on Scale B.

(b) Additional costs pursuant to Rule 7-7(4)

[25] Patriquin sought an award of double costs against the defendants, MacDonald and Janet MacDonald, for trial preparation, attendance at trial and written argument and an award of ordinary costs for time spent in preparing the plaintiff for testimony. The basis for an award of additional costs was the unreasonable refusal of these defendants to admit the truth of facts as set out in a Notice to Admit pursuant to Rule 7-7(4).

[26] The Notice to Admit dated January 7, 2016 read:

> THE FACTS, the admission of which is requested are:
>
> 1. A motor vehicle accident occurred on May 20, 2011 at or near the intersection of Mary Hill Bypass and Shaughnessy Street in Port Coquitlam, BC, involving:
>
> a. A vehicle owned by the Defendant Janet Lynn MacDonald and being driven westbound on Mary Hill Bypass by the Defendant Francis Cameron MacDonald;
>
> b. A vehicle leased from the Defendant \/W Credit Canada Inc. by the Defendant Linda Ceperkovic, and being driven by Linda Ceperkovic southbound on Shaughnessy Street; and
>
> c. A Coast Mountain Bus being operated by the Plaintiff, Randolph Patriquin, heading eastbound on Mary Hill Bypass ("the Accident").

2. At the time of the Accident, the Plaintiff's bus was stopped for a red light at the said intersection, waiting to make a left-hand turn.

3. At the moment of impact between the Defendants' vehicles, the Plaintiff's bus had not moved from its stopped position.

4. The force of impact between the Defendants' vehicles caused the vehicle being driven by the Defendant Francis Cameron MacDonald to collide with the Plaintiff's bus.

[27] The Reply to Notice to Admit for MacDonald and Janet MacDonald dated January 19, 2016 said: "Paragraph 1 is admitted; and Paragraphs 2 to 4 are not admitted." (underlining in document). The issue here is whether the failure to admit facts 2 to 4 was unreasonable within the meaning of Rule 7-7(4)?

[28] Rule 7-7 provides:

> Notice to admit
>
> (1) In an action in which a response to civil claim has been filed, a party of record may, by service of a notice to admit in Form 26, request any party of record to admit, for the purposes of the action only, the truth of a fact or the authenticity of a document specified in the notice.
>
> Effect of notice to admit
>
> (2) Unless the court otherwise orders, the truth of a fact or the authenticity of a document specified in a notice to admit is deemed to be admitted, for the purposes of the action only, unless, within 14 days after service of the notice to admit, the party receiving the notice to admit serves on the party serving the notice to admit a written statement that
>
> (a) specifically denies the truth of the fact or the authenticity of the document,
>
> (b) sets out in detail the reasons why the party cannot make the admission, or
>
> (c) states that the refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and sets out in detail the reasons for the refusal.
>
> …
>
> Unreasonable refusal to admit
>
> (4) If a responding party unreasonably denies or refuses to admit the truth of a fact or the authenticity of a document specified in a notice to admit, the court may order the party to pay the costs of proving the truth of the fact or the authenticity of the document and may award as a penalty additional costs, or deprive a party of costs, as the court considers appropriate.

[29] The rules of other provincial and territorial superior courts, and the federal court, also provide for notices or requests to admit and are broadly similar. In particular, they all contemplate that there may be cost consequences for an unreasonable failure to admit (*Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 6.37, 10.33(2); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 51; Saskatchewan, *The Queen's Bench Rules*, r. 6-51; *Queen's Bench Rules*, Man. Reg. 553/88, r. 51; Nova Scotia, *Civil Procedure Rules*, r. 20; *Rules of Court*, N.B. Reg. 82-73, r. 51; *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, r. 33; Prince Edward Island, *Rules of Civil Procedure*, r. 51; *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 294; *Rules of Court*, Y.O.I.C. 2009/65, Part 2, r. 31; *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. (Nu.) 010-96, r. 294; *Federal Courts Rules*, S.O.R./98-106, rr. 255–256, 400(3)). Authorities from those jurisdictions are informative.

[30] The purposes of the notice to admit are multiple. The primary purpose is to "save both the Court and litigants the time and expense involved in proving the authenticity of documents or in proving facts" (*Clarke v. Minister of National Revenue* (2000), 189 F.T.R. 76 at para. 43, [2000] F.C.J. No. 475). The rule is intended to eliminate issues altogether from a case or to facilitate proof of issues that cannot be eliminated (Garry D. Watson & Derek McKay, eds., *Holmested and Watson: Ontario Civil Procedure* (Toronto: Carswell, 1993) (looseleaf updated 2014, release 1) vol. 5 at 51§7 (*Holmested and Watson*)). Thus, the notice to admit can isolate important factors from a strategic and cost efficient perspective (*Foster v. Juhasz*, 2010 BCSC 143 at paras. 25-27). It enables the parties to "prepare for an efficient trial focused on what is disputed" (*Orlan Karigan & Associate Ltd. v. Hoffman* (2000), 52 O.R. (3d) 235 at para. 21 (Sup. Ct. J.)). The notice to admit obviates the necessity and expense of calling evidence at trial (*Canada Southern Petroleum v. Amoco Canada Petroleum* (1994), 168 A.R. 126 at para. 16 (Q.B.)). Ultimately, it is a means to foster the timely adjudication of a claim on its merits (*Furgiuele v. Don Casselman Global Enterprises*, 2013 ONSC 7032 at para. 44 (*Furgiuele*)).

[31] When is a failure to admit unreasonable within the meaning of Rule 7-7(4)? Criteria for unreasonableness may be gleaned from the rules and case authorities from B.C. and other Canadian jurisdictions.

[32] The first requirement, which may seem obvious, is that the truth of the fact or authenticity of the document must be subsequently proven. This is explicit in the rules of some other jurisdictions (Ontario Rule 51.04, Manitoba Rule 51.04, Prince Edward Island Rule 51.04, New Brunswick Rule 51.03(2), Nova Scotia Rule 20.06, Saskatchewan Rule 6-51(2), Northwest Territories Rule 294(4), Nunavut Rule 294(4)).

[33] Irrelevancy is a ground for refusing to admit a fact (Rule 7-7(2)(c)). If the admission sought was of no substantial importance and did nothing to save time and expense or served only to harass a party, then failure to admit cannot be said to be unreasonable (see e.g. *Milani v. Milani*, [2005] O.J. No. 693 at para. 12, 2005 CanLII 4444 (Sup. Ct. J.)).

[34] Privilege is a valid reason for refusing to admit a fact or document (Rule 7-7(2)(c)). However, it is accepted that it will be relatively rare that privilege can be asserted since ordinarily a matter of fact can be admitted or denied without raising the question of the nature of the communication that apprised the party of the fact (*Holmested and Watson* at 51§10(3)).

[35] If a notice to admit is “otherwise improper”, there are grounds for refusal to admit (Rule 7-7(2)(c)). Examples of otherwise improper notices to admit include: the notice is a veiled attempt to obtain particulars or ensure compliance with discovery obligations (*Muskoka Lakes (Township) v. 1679753 Ontario Ltd.*, 2011 ONSC 1997 at paras. 34-39; *Slate Falls Nation v. Canada (Attorney General)*, [2005] O.J. No. 5228 at para. 40, 2005 CanLII 45206 (Sup. Ct. J.)) (*Slate Falls Nation*)); the notice is to admit a question of law alone (*Gecho v. BCAA Insurance Corp.* (1996), 35 C.C.L.I. (2d) 178 at para. 12, 1996 CarswellBC 538 (S.C.), rev’d on other grounds 35 B.C.L.R. (3d) 82 (C.A.)); the notice is overly repetitious, overly broad, or in the nature of argument (*Slate Falls Nation* at paras. 33-37); and the notice is vague and

the party has not responded to requests for clarification until trial (*Sperry Inc. v. Ford* (1997), 122 Man. R. (2d) 227 at para. 7, 1997 CarswellMan 355 (Q.B.)).

[36] The notice to admit must have been reasonably capable of evaluation within the time required for response. A party is deemed to have admitted the truth of a fact or the authenticity of a document unless the party serves a response within 14 days after service of the notice to admit (Rule 7-7(2)). If the truth of the fact or the authenticity of the document at issue is not reasonably capable of being evaluated within this time, or at all, a refusal to admit is not unreasonable. Circumstances in which a notice to admit may be incapable of being evaluated in time or at all include if it is extremely long and detailed (*Bronson v. Hewitt*, 2011 BCSC 102 at para. 151, aff'd 2013 BCCA 367) or if the fact at issue cannot be reasonably evaluated, such as what is in the mind of another (*Children's Aid Society of Algoma v. M.O.*, [2001] O.J. No. 5220 at para. 44, 2001 CanLII 37715 (Ct. J.)). While lack of knowledge may be a proper ground for refusing to admit a fact or document, it is unlikely that this explanation would be accepted if the party has not taken reasonable steps to inform themselves about the fact or document (see e.g. *Pershad v. Lachan*, 2015 ONSC 5290 at para. 81). This is in keeping with the basic duty under the discovery rules that the party discovered should take reasonable steps to inform himself or herself.

[37] Finally, it may not be unreasonable to refuse to admit a fact if the refusing party had reasonable grounds for believing that it would prevail on the matter. Since the purpose of the rule is to enable an efficient trial focused on what is disputed, a court will be unlikely to impose cost consequences on a party for failing to admit a fact that the party had a reasonable basis to dispute. It might be reasonable to deny facts that were contrary to the defendant's evidence and contrary to the foundation of the defendant's case and that involved matters of conflicting evidence from which the court had to make findings of fact (*Kansa General Insurance Co. v. Harding, Boss & McLeod Surveys Ltd.*, 159 Sask. R. 241 at para. 11, 45 C.C.L.I. (2d) 143 (Q.B.)). It might be reasonable if the facts at issue were the subject of expert investigations on both sides (*Ochoa v. Canadian Mountain Holidays Inc.* (1997), 10 C.P.C. (4th) 102 at para. 12, [1997] B.C.J. No. 1219 (S.C.)). However, it might very

well be unreasonable if the refusal was unsupported by any evidence beyond a party's testimony that was found to be unconvincing (*Andreichikov v. Andreichikov*, 2011 BCSC 1374 at para. 53). It may be unreasonable if the party denied facts drawn straight from his examination for discovery (*Paciorka v. TD Waterhouse*, 2008 CarswellOnt 948 at paras. 4 and 26, 2008 CanLII 6646 (Sup. Ct. J.)). Also, it may be unreasonable if the party had already been criminally convicted based on the same facts (*Glendale v. Drozdzik* (1993), 77 B.C.L.R. (2d) 106 at para. 39 (C.A.) (*Glendale*)).

[38] In summary, the failure to admit the truth of a fact may be unreasonable within the meaning of Rule 7-7(4) if:

(a) the truth of the fact is subsequently proved;

(b) the fact was relevant to a material issue in the case;

(c) the fact was not subject to privilege;

(d) the notice to admit was not otherwise improper;

(e) the notice to admit was reasonably capable of evaluation within the time required for response; and

(f) the refusing party had no reasonable grounds for believing that it would prevail on the matter.

[39] The failure of the MacDonald defendants to admit facts 2 through 4 of the Notice to Admit was unreasonable in the circumstances here. The defendants admitted in argument that the reply was not responsive. Each of these facts was proven in evidence and was clearly relevant to the issue of liability. MacDonald testified both in direct and cross-examination that the bus had remained stopped in the left eastbound turn lane throughout. There was no basis in evidence to deny that the bus remained stopped at the red light, waiting to turn, and remained there throughout the accident. These facts could have been admitted within the time allotted, and the notice was not otherwise improper. There was no basis whatsoever

for the defendants to have believed that the facts were otherwise than as set out in the notice.

[40] What, if any, cost consequence should be imposed? Rule 7-7(4) is discretionary. If the failure to admit did not significantly lengthen the trial or otherwise increase expenses, the court often makes no order or might grant a nominal award (*AMT Finance Inc. v. Gonabady*, 2010 BCSC 278 at para. 116; *Moni-Shirazi v. Sun*, 2010 BCSC 2021 at para. 45; *Patterson v. Hryciuk*, 2005 ABQB 136 at paras. 32-33; *Waterous Investments Inc. v. Liberton Holdings Ltd.* (1996), 183 A.R. 229 at para. 33 (Q.B.) (*Waterous Investments Inc.*)).

[41] If the court does make an order under Rule 7-7(4), it can order that the refusing party pay the costs of proving the fact or document and can also order that the refusing party pay additional costs, or be deprived of costs, as a penalty. Generally, the amount of the award should reflect the amount of court time taken up unnecessarily because of the denial (*Blake v. Gill* (1997), 35 B.C.L.R. (3d) 34 at para. 20 (S.C.) (*Blake*)). Thus, if a party is put to the trouble and expense of calling evidence to prove a fact that has been unreasonably denied, the originating party should be entitled to costs and disbursements in relation to that evidence (*Blake* at para. 20; *Waterous Investments Inc.* at para. 31). Where the originating party is otherwise entitled to costs, they are usually awarded increased costs (*Waterous Investments Inc.* at para. 32).

[42] The court has awarded costs of proving a fact or document, or denied costs, at different scales as the circumstances demand. These include:

(a) double costs and disbursements: for three days of trial occupied by liability, which should have been admitted, as well as double disbursements related to liability (*Glendale* at paras. 38-40); for costs and disbursements associated with a witness whose testimony would not have been necessary had a reasonable admission been made (*Blake* at para. 24);

(b) triple costs for the days of trial and trial preparation required to prove the authenticity of documents as business records (*American Creek Resources Ltd. v. Teuton Resources Corp.*, 2014 BCSC 2214 at paras. 108-111, aff'd 2015 BCCA 170 (*American Creek Resources Ltd.*));

(c) denial of a successful defendant's costs for the six days of trial that would have been unnecessary had the defendant made a reasonable admission (*Tricontinental Investments Co. v. Guarantee Co. of North America et al.* (1988), 29 C.P.C. (2d) 99 at 104-105, 34 C.C.L.I. 293) (Ont. High Ct. J.), aff'd (1991), 48 C.C.L.I. 1, [1991] O.J. No. 3049 (C.A.)); and

(d) solicitor-and-client costs or special costs for the expenses that would have been unnecessary had reasonable admissions been made (*To v. Toronto Board of Education* (2001), 55 O.R. (3d) 641, 204 D.L.R. (4th) 704 (C.A.)); however, these are unlikely to be awarded in the absence of a failure to admit that was reprehensible (*American Creek Resources Ltd.* at para. 110).

[43] While the cost consequences of an unreasonable failure to admit are usually confined to the costs of proving the truth of facts or the authenticity of documents, the power conferred by Rule 7-7(4) to penalize a party by awarding additional costs or depriving a party of costs "as the court considers appropriate" suggests that in an appropriate case the court could go further. At the least, it is not outside of contemplation that if the entire trial could have been avoided had reasonable admissions been made (for example, if the originating party could have applied for judgment on admissions under Rule 7-7(6)), the party who unreasonably failed to admit the facts could be penalized by an award of additional costs for all steps taken following delivery of the notice to admit.

[44] Here, the plaintiff bus driver would not have had to lead any evidence and would not have had to cross-examine other parties or witnesses if the facts had not

been unreasonably denied. Other than perhaps being called as a witness in the Ceperkovic action, Patriquin would not have had to appear. An award of double costs against the defendants, MacDonald and Janet MacDonald, for trial preparation, attendance at trial and written argument and an award of ordinary costs for time spent in preparing Patriquin for testimony is very reasonable. The plaintiff, Patriquin, is awarded those costs pursuant to Rule 7-7(4).

Conclusion

[45] Francis MacDonald and Janet MacDonald are 100% liable for the accident.

[46] Ceperkovic is entitled to costs and disbursements in the action on Scale B.

[47] Patriquin is entitled to an award of double costs for trial preparation, attendance at trial and written argument and an award of ordinary costs on Scale B for time spent in preparing Patriquin for testimony and for the balance of costs and disbursements in the action.

"Dillon J."

The Honourable Madam Justice Dillon