IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *61839 Newfoundland and Labrador Limited v. Philpott's Realty Co. Limited*, 2025 NLCA 18
Date: May 9, 2025
Docket Number: 202401H0007

BETWEEN:

61839 NEWFOUNDLAND AND LABRADOR LIMITED
APPELLANT

AND:

PHILPOTT'S REALTY CO. LIMITED
RESPONDENT

Coram: W.H. Goodridge, D.M. Boone and G.L.C. Noel JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, Corner Brook General Division 201104G0319 (2024 NLSC 15)
Appeal Heard:	January 22, 2025
Judgment Rendered:	May 9, 2025
Reasons for Judgment by:	D.M. Boone J.A.
Concurred in by:	W.H. Goodridge and G.L.C. Noel JJ.A.
Counsel for the Appellant:	J. Michael Collins
Counsel for the Respondent:	Kevin F. Stamp K.C.

Authorities Cited:

CASES CITED: *61839 Newfoundland & Labrador Limited v. Philpott's Realty Co. Limited*, 2024 NLSC 15; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Noton Enterprises Limited v. Philpott's Realty Co. Limited*, 2022 NLCA 38; *Szeto v. Dwyer*, 2010 NLCA 36; *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358; *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447; *Metal World Inc. v. Pennecon Energy Ltd.*, 2013 NLCA 67, var'd on other grounds 2014 NLCA 10; *Langor v. Spurrell*, 1997 CanLII 14712 (NLCA); *The Dow Chemical Company v. Ring*, 2010 NLCA 20, leave to appeal to SCC refused, 33711 (21 October 2010); *Pardy et al v. Bayer Inc-Class Actions Act*, 2003 NLSCTD 130; *OLA Staffing Inc. v. D'Angelo Brands (2156775 Ontario Inc.)*, 2018 ONCA 922; *Armstrong v. McCall*, 2006 CanLII 17248 (ONCA); *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)*, 1993 NSSC 71 (CanLII), aff'd 1994 NSCA 58 (CanLII), leave to appeal to SCC refused, 24151 (23 March 1995); *Provincial Contracting Ltd. v. Spence Aggregates Contracting Ltd.*, 1999 NSCA 116; *Dixon v. Nova Scotia (Director of Public Safety)*, 2012 NSCA 2; *Savings and Investment Bank Ltd v. Gasco Investments (Netherlands) BV and others* (1983), [1984] 1 All E.R. 296 (ChD); *R. v. Hoffman*, 2021 ONCA 781; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *Fawley v. Moslenko*, 2017 MBCA 47; *Marco Ltd. v. Newfoundland Processing Ltd. et al.*, 1995 CanLII 10495 (NLSC).

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rules 48.02, 17A.02.

TEXTS CONSIDERED: Sidney N Lederman, Michelle K Fuerst & Hamish C Stewart, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022).

D.M. Boone J.A.:

[1] The Appellant ("61839") filed a statement of claim seeking judgment against the Respondent ("Philpott's") for the principal and interest due under a December 2005 promissory note in the amount of $1,300,000. Philpott's filed a statement of defence denying liability and stating that the note had been paid and discharged through transactions that involved the issuance of certain corporate dividends. The Respondent denied that those dividends had been issued. The matter proceeded for determination by summary trial, where the judge found that the dividends had been issued.

[2] 61839 appeals on the grounds that the summary trial judge erred by excluding hearsay evidence contained in one of its affidavits and erred in finding that the record was sufficient, and that it was not unjust, to decide the issue by summary trial.

[3] For the reasons set out below, I would dismiss the appeal.

BACKGROUND

[4] The dispute between the parties originated in corporate transactions related to the Humber Valley Resort. Humber Valley Resort Corporation ("HVRC") developed the resort. Canex Development Corporation Ltd. ("Canex") was the parent company of HVRC.

[5] Philpott's was a shareholder in both HVRC and Canex.

[6] HVRC built a chalet on Lot 83 of the resort and agreed to sell the lot and chalet to Philpott's in consideration for Philpott's promise to pay $1,300,000, secured by a promissory note.

[7] HVRC and Canex reorganized through a series of transactions.

[8] Philpott's says that, as part of the reorganization, HVRC paid dividends to Canex by the issuance of three demand promissory notes. Canex assigned two of those notes, in the total amount of $1,300,000, to Philpott's in return for its acquisition (for cancellation) of Philpott's shares in Canex. HVRC and Philpott's then entered into an Offset and Release Agreement. Under that agreement, HVRC returned to Philpott's the promissory note that Philpott's had issued to HVRC to pay for the purchase of Lot 83; in exchange, Philpott's returned the $1,300,000 worth of promissory notes HVRC had issued to Canex and that Canex had assigned to Philpott's.

[9] Philpott's says that through those transactions it emerged from the HVRC reorganization with unencumbered ownership of Lot 83 because its debt for the purchase of the lot was discharged.

[10] HVRC became bankrupt. 61839 purchased some of the assets of HVRC. 61839 says that those assets included the promissory note for $1,300,000 payable by Philpott's regarding its purchase of Lot 83. 61839 sued Philpott's on that debt, maintaining that the promissory note was never paid or discharged. 61839 said that the note could only have been discharged if HVRC had issued the dividends to

Canex. It said that it could show that those dividends were never authorized or issued by HVRC because the records of HVRC that 61839 acquired did not include an authorizing directors' resolution.

[11] 61839 applied for summary trial.

[12] 61839 supported its summary trial application with an affidavit from one of its directors, Kathleen Watton (the "Watton Affidavit"), attaching various exhibits purporting to be business records of HVRC.

[13] Philpott's filed an application objecting to the admissibility of some of the exhibits attached to the Watton Affidavit. The parties agreed that that application would be dealt with as part of the hearing of the summary trial application.

[14] The summary trial judge allowed Philpott's application and excluded many of the exhibits attached to the Watton Affidavit because they were inadmissible hearsay. 61839 appeals from that decision which it says was wrong in law.

[15] The parties had agreed that the question of whether HVRC had issued the dividends was appropriate for summary trial and that it could be decided on the record. The summary trial judge conducted his own analysis of those questions and came to the same conclusions.

[16] The summary trial judge found, in favour of Philpott's, that HVRC had authorized and issued the dividends, because Philpott's "put forward documentary evidence and personal knowledge of Rex Philpott about the matter in issue that is considerably stronger than the circumstantial evidence put forward by 61839" (*61839 Newfoundland & Labrador Limited v. Philpott's Realty Co. Limited*, 2024 NLSC 15 (the "Decision"), at para. 146).

[17] 61839 argued that the summary trial judge erred by excluding many of the exhibits attached to the Watton Affidavit on the basis that they were inadmissible hearsay. As a second and alternative ground of appeal, 61839 argued that the summary trial judge erred in principle in deciding to resolve the issue of whether HVRC had issued the dividends.

[18] The summary trial judge decided that a further issue, whether HVRC had the capacity to issue the dividends, could not be decided on summary trial. Consequently, the debt claim could not be entirely resolved by the summary trial. That decision is not in issue on this appeal.

ISSUES AND STANDARD OF REVIEW

[19] The issues are as follows:

1. Did the summary trial judge err in law by excluding certain exhibits attached to the Watton Affidavit as inadmissible hearsay?

2. Did the summary trial judge err in principle in deciding that the record was sufficient for him to resolve the genuine issue of whether HVRC had issued the dividends, and whether it was just for him to do so?

[20] The first issue raises a question of law, and the standard of review is correctness.

[21] The second issue requires that we review the summary trial judge's decisions that the record was sufficient and that it was just to resolve the genuine issue on summary trial. These were exercises of discretion by the summary trial judge (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 44-45, 66-68, 83; and *Noton Enterprises Limited v. Philpott's Realty Co. Limited*, 2022 NLCA 38, at paras. 40-43). Appellate courts should not disturb discretionary decisions "unless it can be said that the discretion was exercised beyond jurisdiction, contrary to principle, on the basis of palpable and overriding error in appreciation of the facts, or will otherwise result in a manifest injustice" (*Szeto v. Dwyer*, 2010 NLCA 36, at para. 25).

ANALYSIS

ISSUE 1: Did the summary trial judge err in law by excluding exhibits as inadmissible hearsay?

[22] 61839 acknowledged that the exhibits attached to the Watton Affidavit contained hearsay. The summary trial judge considered whether the exhibits were nevertheless admissible, and he excluded some of them. 61839 says that his decision to exclude them was an error of law.

[23] 61839 argued at the summary trial that the use of hearsay in affidavits filed in support of applications is expressly permitted by the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rule 48.02:

> 48.02. (1) An affidavit used on an application may contain statements as to the belief of the deponent with the sources and grounds thereof.

[24] 61839 also argued that many formalities of proof are necessarily dispensed with on summary trial, or else the process would not be summary, and this approach is expressly adopted in rule 17A.02:

> 17A.02. (1) On an application under this rule, a party may adduce evidence by any or all of
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> (a) affidavit;
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> (b) an answer, or part of an answer, to interrogatories that may have previously been administered;
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> (c) any part of the evidence taken upon an examination for discovery.
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> …
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> (4) An affidavit for use on an application under this rule may be made on information and belief as provided in rule 48.02.(1), but on the hearing of the application, an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts.
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> (5) The Court may draw an adverse inference from the failure of a party to cross-examine on, or file affidavit evidence in reply to, an affidavit used on an application under this rule.

[25] 61839 argued in the court below that there are only three limitations on the use of hearsay evidence on summary trial. First, the affiant must state the sources and grounds for belief, as required by rule 48.02(1). Second, pursuant to rule 17A.02(4), the summary trial judge may draw an adverse inference if a party fails to provide the evidence of persons having personal knowledge of contested facts. Third, the summary trial judge may reject evidence when the record shows the evidence will be inadmissible at trial (Decision, at paras. 39-42).

[26] Philpott's said in reply that the Watton Affidavit did not meet the requirements of rule 48.02 because Ms. Watton grounded her belief in the facts in the exhibits on information from Graham Watton (her spouse and the solicitor for 61839) who himself did not have personal knowledge of the facts related to whether HVRC had authorized and issued dividends to Canex. Philpott's argued that the exhibits could

only be admitted if they were otherwise within an exception to the hearsay rule, in particular the business records exception (Decision, at paras. 47-48).

[27] The summary trial judge applied the framework for admissibility of hearsay set out in *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, at paragraph 15:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
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> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
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> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
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> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[28] On appeal, 61839 argues that the *Mapara* framework ought not to have been followed at all because rules 48.02 and 17A.02(4) expressly permit the use of hearsay evidence on summary trial. This was the same argument it presented to the summary trial judge.

[29] The summary trial judge did not accept the argument made by 61839. In so doing, he referred to a decision of the Ontario Court of Appeal in *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447, from which he extracted and applied the following principles:

> [108] In my view, although Rule 17A permits the use of affidavits made on information and belief, I would respectfully agree with the unanimous panel of the Ontario Court of Appeal in *Drummond* that caution is similarly required regarding the use of hearsay evidence in respect of contested facts and to evidence that goes to fundamental issues in dispute in a summary trial under Rule 17A.
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> [109] In exercising this caution, my task, as stated in *Drummond*, is to first determine whether the evidence will be admissible under the rules governing admissibility at trial. I have done so in the previous section of this decision. I have found that several documents sought to be admitted are not admissible and therefore would not be admissible under the rules governing admissibility at trial.

[30] 61839 says that *Drummond* was wrongly decided or, alternatively, was misapplied by the summary trial judge.

[31] I would not focus on whether this Court should fully adopt the principles stated in *Drummond*. The question raised by the first ground of appeal is whether the summary trial judge erred in law by excluding exhibits as inadmissible hearsay. I would address that question by considering the principles underlying the use of evidence in summary trial.

[32] It is settled law that rule 48.02(1), and therefore 17A.02(4), allow for the use of hearsay to support applications (*Metal World Inc. v. Pennecon Energy Ltd.*, 2013 NLCA 67, at para. 24, var'd on other grounds 2014 NLCA 10; *Langor v. Spurrell*, 1997 CanLII 14712 (NLCA), at paras. 50-51; *The Dow Chemical Company v. Ring*, 2010 NLCA 20, at para. 21, leave to appeal to SCC refused, 33711 (21 October 2010)). This is an exception to the rule against hearsay (*Pardy et al v. Bayer Inc-Class Actions Act*, 2003 NLSCTD 130, at para. 58).

[33] However, the provisions within rule 48.02(1) and 17A.02(4) allowing for the use of hearsay are conditional. First, an affiant must disclose the sources of belief and a failure to do so "will therefore generally be regarded as defective" and "would not afford the proper evidentiary base for making a determination." (*Langor*, at para. 51). Second, an affiant must say that they believe the information, and if they do not, then "admissibility of this evidence falters on the fact that the deponent did not attest to his belief in the information provided" (*OLA Staffing Inc. v. D'Angelo Brands (2156775 Ontario Inc.)*, 2018 ONCA 922, at para. 7).

[34] These conditions have the effect of allaying some of the traditional concerns with the use of hearsay evidence (see *Armstrong v. McCall*, 2006 CanLII 17248 (ONCA), at para. 33). However, the effect of the conditions is lost if the information is based on double hearsay. That is the case here where Ms. Watton's knowledge of the exhibits flows from Mr. Watton's knowledge, and Mr. Watton did not have first-hand knowledge of the information in the documents.

[35] In *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)*, 1993 NSSC 71 (CanLII), aff'd 1994 NSCA 58 (CanLII), leave to appeal to SCC refused, 24151 (23 March 1995), the court found that, while the rules may allow hearsay based on information and belief, the affiant must identify the source of the belief, and the source should be the original source of the information.

[36] *Waverley* has been cited for this point numerous times by the Nova Scotia Court of Appeal (see for example, *Provincial Contracting Ltd. v. Spence Aggregates Contracting Ltd.*, 1999 NSCA 116, at para. 5, which states the rules "do not make otherwise inadmissible hearsay admissible"; or *Dixon v. Nova Scotia (Director of Public Safety)*, 2012 NSCA 2, at para. 50). *Waverley* was also cited by Mercer J., as he then was, in *Pardy*, at paragraph 58, when discussing the admissibility of affidavit opinion evidence in support of applications.

[37] *Waverley* referred for support to the English case *Savings and Investment Bank Ltd v. Gasco Investments (Netherlands) BV and others* (1983), [1984] 1 All E.R. 296 (ChD), regarding the comparable rule, at page 305:

> Further I find it impossible to accept counsel for SIB's submission that it is sufficient in order to comply with r 5(2) that the deponent should identify only the source to him of his information even though it is clear that that source was not the original source. Thus, if the deponent was informed of a fact by A, whom the deponent knows not to have firsthand knowledge of the fact but who had obtained the information from B, I cannot believe that it is sufficient for the deponent to identify A as the source of the information. That, to my mind, would largely defeat the requirement that the sources and grounds should be stated and would make it only too easy to introduce prejudicial material without revealing the original source of hearsay information by the expedient of procuring as the deponent a person who receives information second hand. By having to reveal such original source and not merely the immediate source, the deponent affords a proper opportunity to another party to challenge and counter such evidence, as well as enabling the court to assess the weight to be attributed to such evidence….

[38] The conclusion that the rules do not mandate the admission of double hearsay is consistent with case law concerning the scope of other hearsay exceptions. For example, in *R. v. Hoffman*, 2021 ONCA 781, the court was considering whether double hearsay in a prior inconsistent statement (a so-called "*K.G.B.* statement") is admissible under the principled exception to the hearsay rule and found:

> [58] …it is trite law that a witness cannot offer hearsay evidence in their testimony unless that hearsay evidence qualifies for admission pursuant to a hearsay exception. It follows that hearsay that is itself embedded in an otherwise admissible *K.G.B.* statement will not be admissible unless that embedded "double hearsay" qualifies for admission pursuant to its own hearsay exception…. Put simply, inadmissible double hearsay cannot ride into evidence on the coattails of admissible hearsay evidence.

[39] I conclude that the hearsay exception in rules 48.02(1) and 17A.02(4) only provides an exception for hearsay evidence where the affiant says that they believe the information and states the source of the hearsay, and that source is the direct or

original source of the information, such as a person with firsthand knowledge. This was effectively the argument made by Philpott's at the summary trial.

[40] The summary trial judge was correct therefore in finding that rules 48.02(1) and 17.02A(4) alone did not render the exhibits attached to the Watton Affidavit admissible. Ms. Watton swore only that Mr. Watton had told her that the documents were authentic. Mr. Watton did not have first-hand knowledge of the information in the documents.

[41] Although rules 48.02(1) and 17A.02(4) do not mandate that double or extended hearsay evidence is admissible, it may still be admissible on summary trial if it falls within a traditional exception to the rule against hearsay or on application of the principled approach.

[42] The summary trial judge analyzed the exhibits attached to the Watton Affidavit to determine whether they could be admitted under the business records exception to the hearsay rules. The judge determined that 61839 had failed to establish that the exhibits qualified as business records under that exception to the hearsay rule. He concluded:

> There is no evidence before the Court as to the circumstances under which these records were made. In the absence of such evidence, I have no basis upon which I can conclude that the proffered records meet the common law test applicable to the business records exception to hearsay.

[43] The summary trial judge's application of the business records exception to the hearsay rules was not challenged on appeal.

[44] The summary trial judge also considered whether the exhibits attached to the Watton Affidavit might be admissible under any other exceptions to the hearsay rules. He admitted some because they were on the public registry, others because they were signed by Philpott's and constituted admissions by Philpott's, and another because it was an agreement to which 61839 was a party.

[45] The summary trial judge then applied the principled approach to admissibility of hearsay for all remaining exhibits not otherwise admitted under one of the traditional exceptions. Under the principled approach, hearsay evidence not falling within one of the traditional exceptions may, on a case-by-case basis, after consideration of the principles of necessity and reliability, be admitted as proof of the truth of its contents (*R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, and affirmed by the Supreme Court of Canada in *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R.

787, *Mapara*, and *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520). Necessity is described as reasonable necessity; reliability refers to threshold (and not ultimate) reliability. These criteria are not individually fixed standards but should instead be applied in tandem: if evidence is highly reliable then reasonable necessity is easier to demonstrate.

[46] The principled approach applies in civil as well as criminal cases but courts "must be mindful that there are dynamics in a civil case that are different than in a criminal case, such as a lesser burden of proof, the importance of access to civil justice and the principle of proportionality" (*Fawley v. Moslenko*, 2017 MBCA 47, at para. 95).

[47] The principled approach should be applied in the summary trial context "favouring proportionality and fair access to the affordable, timely and just adjudication of claims" (*Hryniak*, at para. 5). The twinned considerations of the principled approach - reliability and reasonable necessity - must be adapted to the proportionate approach to summary trial. Necessity in the summary trial context will be informed by the proportionality considerations that inform summary trials. Reasonableness should be measured against the cost involved in tendering direct evidence, practicality, the significance of the issues to which the evidence is directed and the stakes for the parties.

[48] The summary trial judge considered the appropriate principles and decided that, even in the context of a summary trial, application of the principled approach did not support the admissibility of the exhibits even on summary trial:

> [95] Turning to the principled approach to the admissibility of hearsay, the criterion of necessity has not been satisfied. Individuals with direct involvement with the creation and storage of these documents, being the former officers and directors of HVRC, were not examined at discovery. Had they been, their evidence under oath could have been presented as evidence on this application under Rule 17A.02(c). I am not satisfied that 61839 used best reasonable efforts to obtain this evidence. While it may be more expedient or convenient for 61839 not to have to secure the original evidence in relation to these documents, that is not the test for necessity.
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> [96] Nor can I conclude that the contents of these out of court written statements, because of the circumstances under which they came about, are so reliable that cross-examination of their declarants will add little, if anything, to the summary trial process. The reason for this is simple: there is no evidence as to how these various documents came about.

> [110] In respect of the exhibits that I have held are not admissible under the rules governing admissibility at trial, the onus falls on 61839 to justify some expansion of the rules governing admissibility in the context of the application.
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> [111] In this case, the context is that Kathleen Watton has grounded her belief as regards the extent and contents of HVRC's documents as recovered from a database, on Graham Watton who, like Kathleen Watton, has no personal knowledge of the matters in dispute. Nor has 61839 explained why it did not seek to tender direct evidence from the person or persons who authored, received or were responsible for maintaining HVRC's records. It is not reasonable, in my view, for the Court to justify an expansion of the rules governing admissibility by placing an onus on Philpott's to challenge the hearsay evidence. Philpott's made no secret of its objection to the proffered evidence. Indeed, Philpott's filed an application on September 27, 2022 objecting to the admissibility of the exhibits attached to Kathleen Watton's Affidavit, which application by agreement of the parties was dealt with as part of the hearing of the summary trial application itself.

[49] 61839 has not demonstrated any error in the summary trial judge's application of the principled approach.

[50] I would therefore dismiss 61839's ground of appeal that that the summary trial judge erred in excluding some of the exhibits attached to the Watton Affidavit.

ISSUE 2: Did the summary trial judge err in principle in deciding that the record was sufficient for him to resolve the genuine issue, and that it was just for him to do so?

[51] Both parties had agreed that there was a genuine issue for trial as to whether HVRC had issued the dividends to Canex, and that both had submitted that the record was sufficient for the judge to hear and decide that issue (Decision, at paras. 10, 12).

[52] 61839 now says that its concessions and submissions on the sufficiency of the record and the justice of deciding the case by summary trial were premised entirely on all the exhibits attached to the Watton Affidavit being admitted. It says that it was not asked and did not make any submissions about how excluding the evidence might affect its position. It argues that the summary trial judge erred in principle by failing to consider how the exclusion of the exhibits affected the decisions as to whether the record was sufficient and whether it was just to decide the issue on the record.

Sufficiency of the record

[53] The summary trial judge said that the narrow issue for summary trial was whether HVRC authorized and issued the dividends to Canex and that the burden of proof on that issue rested with Philpott's (Decision, at para. 17).

[54] The summary trial judge concluded that the record was sufficient to decide that narrow issue (Decision, at paras. 135-139). He noted that Philpott's had provided the affidavit of Rex Philpott and documents demonstrating the arrangement through which the December 2005 promissory note for $1,300,000 had been discharged (Decision, at paras. 121-135). He also noted that 61839 relied on circumstantial evidence and that it did not and could not be expected to have direct evidence to offer because it only had HVRC's records and was not party or witness to those arrangements (Decision, at paras. 136-137, 149). Finally, the summary trial judge noted that "counsel for 61839 candidly acknowledged that for the Court to conclude that HVRC did not issue dividends to Canex, the Court would need to draw an adverse inference against Philpott's. Counsel stated that in the absence of an adverse inference, 61839 could not establish its contention that HVRC did not issue dividends to Canex" (Decision, at para. 148).

[55] The parties had agreed that Philpott's application objecting to the admissibility of exhibits would be dealt with as part of the hearing of the summary trial application.

[56] 61839 did not say at the summary trial that its submission that the record was sufficient to resolve the issue was conditional on all its documentary evidence being held admissible.

[57] The summary trial judge was aware of the nature of the evidence contained within the inadmissible exhibits and the effect that those exhibits might have had on the outcome if they were admitted on a full trial. He nevertheless decided that he could resolve the issues.

[58] I would conclude that there is no error of principle on the part of the summary trial judge in deciding that the record was sufficient to resolve the narrow issue presented on summary trial.

Whether it was unjust to decide this issue on the summary trial application?

[59] The summary trial judge found:

> [141] Each of the parties urged the Court to decide the issue, albeit in its favour. Neither took issue with the justness of the Court's doing so.
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> [142] Of course, it is for the Court to be satisfied that it is not unjust to decide the issues on the application. I am satisfied that the Court has a sufficient handle on the facts to make an informed decision on the issue.
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> [143] The course of these proceedings to date has been quite protracted. A determination on this factual issue, even if not dispositive of the litigation, will advance it by taking an issue off the table.

[60] The summary trial judge noted that 61839 submitted that the circumstantial evidence which it provided was all the evidence that it could be expected to produce because it had HVRC's records but no personal knowledge of the facts (Decision, at para. 149).

[61] The factors considered by the summary trial judge are consistent with those that the authorities direct ought to be considered. In *Marco Ltd. v. Newfoundland Processing Ltd. et al.*, 1995 CanLII 10495 (NLSC) ("*Marco No. 2*"), the court put it this way at paragraph 76(15):

> 15. The requirement that the judge must also be satisfied that it is not "unjust" to decide the issues on the application reinforces the notion that the chambers judge should be satisfied that the court has a sufficient handle on the facts to make an informed decision. Thus, if it is clear that there is other material evidence available which might materially affect the result and the chambers judge concludes that he or she would not be deciding the case against the true factual background, he or she might well conclude that it would be unjust to deal with the matter by way of summary trial. While a party has an obligation to put his or her best foot forward, there might well be a valid explanation for the absence of such other evidence, for example, if the information is in the hands of the other party. In addition, other factors that would have to be considered by the court to determine the "justice" of proceeding would be:
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> (a) the amount involved;
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> (b) the complexity of the matter;
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> (c) its urgency;
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> (d) any prejudice likely to arise by reason of delay;
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> (e) the cost of taking the case forward to a conventional trial in relation to the amount involved;

(f) the course of the proceedings to date.

[62] In *Hryniak*, at paragraph 82, the Supreme Court said that "whether it is in the 'interest of justice' for the motion judge to exercise the new fact-finding powers provided by [the summary trial rules] depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors."

[63] The summary trial judge considered during the course of his decision that 61839 had agreed to have the question of admissibility heard at the same time as the summary trial application; that 61839 had urged that it was just to decide the issue on summary trial; that 61839 would never be able to provide direct evidence regarding the transactions that led to the discharge of the Philpott's promissory note; and that the litigation was already quite protracted.

[64] I would conclude that there is no error of principle in the summary trial judge's decision that it was just to decide the issue presented for summary trial.

[65] I would dismiss this ground of appeal.

DISPOSITION AND COSTS

[66] I would dismiss the appeal and uphold the decision of the summary trial judge, with costs to Philpott's on Column III.

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D.M. Boone J.A.

I concur : _____

W.H. Goodridge J.A.

I concur : _____

G.L.C. Noel J.A.