

TRANSCRIPTS

ONTARIO SUPERIOR COURT OF JUSTICE

Court File No. CV-12-468151

November 4, 2014

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SUMMARY JUDGMENT MOTION

Judge: Good Morning

Response: Good Morning Your honour.

Judge: Okay, let's see who do we have here. You are.

Bank Lawyer: Adrian Visheau, Counsel for the Bank.

LK: Louis Kakoutis, and I represent myself. And I am representing my wife as well.

Judge: Okay, you know that you cannot be representing your wife. Your wife is a separate person with rights, etcetera, etcetera. You're not a lawyer. You can't speak for her. You cannot represent her.

LK: Okay. She's in New York Teaching, I have an affidavit from her.

Judge: I mean, I don't know what the affidavit -if she wants to say anything, if she wants to make any submissions she must be here physically in person. If there's an affidavit that you'd like to present to the court you must give it to counsel and see whether he objects and then we'll see whether or not we can deal with it. But you cannot speak for her.

LK: Alright your honour.

Judge: That is, you know, it's just because you're not a lawyer.

LK: I understand.

Judge: Because she is a separate, legal person.

LK: True.

Bank Lawyer: Mr. Kakoutis did provide me with an affidavit from Effie Kakoutis. This is the second Affidavit from Effie Kakoutis. Did you get a copy for her Honour.

LK: Oh sure.

Bank Lawyer: I'm not sure it's proper to submit this evidence today.

Judge: Well, I'm, uh, I don't know what your view is on what you are proposing, but you know, she knew about the motion, she's a plaintiff, she's a party and if she wants to make submissions, she must either send a lawyer or attend in person.

LK: Or what about the affidavit. The sworn affidavit.

Judge: That's not how submissions are made to the court. I don't know what the affidavit says so, you can hand it up, I can look at it. But it's not like I'm sorry I can't.

LK: No, I understand your honour.

Judge: I'm not entitled to receive it, I'll look at it but I'm telling you that we can't do it that way.

LK: Alright, can I show it to you then your honour.

Judge: Sure, absolutely.

LK: Sure. There you go.

Judge: No, this is not proper. She's making submissions by way of affidavit, unless the Bank specifically agrees, I can't accept this.

Bank Lawyer: I don't see any reason why we would agree.

Judge: Okay, there you go so

LK: Your Honour, when we appeared before Justice Firestone, he indicated that what he needs to make a just determination is the testimony of the 2 Bank witnesses and the testimony of myself and he didn't say anything about Effie Kakoutis.

Judge: OK, let me, let me, and I have a couple of things that I need hear submissions from both of you on -firstly, I am aware of the order made by Justice Firestone. I have concerns about my jurisdiction to hear this matter, to hear this mini-trial. There is a very famous case from the Supreme Court of Canada, called Hryniak. Which I understand came down shortly after you appeared before Justice Firestone. And I'm just telling you what my concerns are and I'll let you respond. In Hryniak, the court very clearly describes a process which must be followed for Summary Judgements. The first part of the process is that the Judge hears the submissions of the parties and determines -can I make a decision in this Summary Judgment motion. And if the answer is no, I don't have enough here, the Judge then has to decide -I have the discretion to order further evidence. Can I make a decision based on the further evidence that I order. Now, the thing is that that decision about hearing further evidence is the use of discretion of the particular judge making the order. The order of Justice Firestone is mandatory It says MUST -the order for this case to be properly adjudicated, it is clear in my view that Justice Firestone has made a substantive determination at issue. Now, it is now before me. I am very concerned that I have no jurisdiction pursuant to the Hryniak case, to continue to hear this matter. Why, because I have not had the benefit of going through the two-step process. My view might be different. I notice for example in this particular case there was a video. Which was part of the materials. That has nothing to do with extraneous evidence. There is no indication, I don't know what happened at the last hearing, but there is no indication to me that Justice Firestone viewed that video. If, and it's a giant if, I need to hear submissions because if I were to hear this I would start all over again, and I would have to look at the stuff on the record, and if I were to do that I am concerned that that is an automatic right of appeal to the loser -because I have not followed the procedure, which is very clear in my view, that in Hryniak. And the view is that you take it, you look at

what's on the record, you hear submissions of the parties, you sit back and you say, okay. Can I make a decision on this. Mmmmmmm, no I'm not comfortable. I think I need one, two, three, four, five, six, seven, eight, nine ten. I'm going to order a mini-trial. I hear the mini-trial. I then decide -now can I make a decision? And maybe the answer is yes, maybe the answer is no. But there has been, arguably, I need to hear from you, an order of the court that says, in mandatory language in order to make a just determination the following must occur -one, two, three, four five. And, ah, the motions are adjourned, so it's not like you've gone outside of the Summary Judgment procedure, the motions have been adjourned, we have a new day set to hear the motions, the motions haven't changed, and present oral evidence by way of a mini-trial, as ordered by Justice Firestone -I am not seized. Okay, he is not seized but does that give me, a new court, jurisdiction, under Hryniak, to hear your case. Because, maybe as I said, in order to make that determination, I'd have to go back and hear from you, look at the video, look at everything that's in here.

LK: Your Honour

Judge: Hey wait a minute, we're going to go -I need to tell you what my position is - we'll be very measured about this -okay so I don't want to waste time. Um, I'm going to go, first of all I believe it is the Banks' Motion, and we're going to have the Bank go first, because they have the burden of proof, remember, it's not you, the Banks' Motion to dismiss your action and then your Motion to dismiss the Banks' cross-claim, so, the Bank is going to go first, cause they're the first people that said get rid of this, we should have the case dismissed. So, I'm going to ask the Bank firstly to respond to the question of my jurisdiction to proceed today. The second thing is, and then it's going to be your turn, and then the Bank has the right to reply, only because they have the burden of proof. There's also another concern of mine - and the Bank has filed, not only one motion but two motions. There's also a motion saying there's no just cause of action in the statement of claim -the statement of claim should be struck. And it seems to me that it's also a little silly to be dealing with a motion for Summary Judgement on a claim that they allegedly say to be struck. Like we're putting the cart before the horse. And then thirdly I'd like to point out to the parties that if you had only gone to trial, you would have been done way faster. But in order to hurry up you can now hurry up and wait. So, I

want to do this in a measured way, we're not going to go back and forth. So I mean I know you get it. You understand. Um, so you won't interrupt him and he doesn't get to interrupt you. You get to chill.

LK: Thank You Your Honour.

Judge: And counsel is going to respond to my concerns.

Bank Lawyer: Your honour, it's not a motion to strike, it's a motion for Summary Judgment.

Judge: Your factum spent a huge amount of time dealing with that issue.

Bank Lawyer: I go through and articulate the various heads of damages, uhm, specified by Mr. Kakoutis's statement of claim I say they don't apply to them uhm, so I don't think I booked the motion under the first part of your argument.

Judge: No, that's why I'm asking you, I need to clarify, I need to know exactly what the court is looking at.

Bank Lawyer: First of all it's a motion for Summary Judgment.

Judge: Well, you know, there is a timing here of what we're going to do and we're not going to jump into a trial or a mini-trial or a summary judgment if there is another thing that should go first. So I just want to know what are you arguing.

Bank Lawyer: Rule 21.

Judge: I know you're doing it in the alternative but you've got it backwards. You're going like this -let's use the maximum amount of time here. You tell me what are you are arguing?

Bank Lawyer: A motion under Rule 20 for summary judgment.

Judge: So what's that other, are you withdrawing that other

Bank Lawyer: If your honour believes that there's a conflict between

the two.

Judge: There's not a conflict. I want to know what you're arguing.

Bank Lawyer: I think that uhm...

Judge: You can't have your cake and eat it too. It's either there or it's not.

Bank Lawyer: Well if that's the case then we'll withdraw the motion under Rule 21.

Judge: Alright. You're sure? You don't need instructions, you don't need to do anything? There you go! Half the motion done.

LK: Thank You you're honour.

Judge: Well done. Okay. He has to ask your permission, by the way to do that.

LK: Okay, your honour, let me just clear on what is being withdrawn, I'm sorry. So the counterclaim is withdrawn?

Judge: No, no, no, no, no

LK: No, not that.

Judge: He's bringing the motion on two grounds. Number one, I win on the on the summary judgment, I should just get my -my counterclaim also says that your claim is no good, but, he's got 2 reasons why your claim is no good. The first one is that on the actual merits you lose and he wins, but the second reason was because your claim itself is deficient. It doesn't provide an actual cause of action. He is now saying I am withdrawing the second part -and his factum is dealing, two thirds of his factum is dealing with that second part. So he can no longer come back and say.

Bank Lawyer: Your honour, where I attack the various alleged causes of action, that's just in the context of Rule 20, I say there's no evidence to support them, they don't apply. That's rule 20. So the majority of the

factum, and when I proceed, near the end of the factum, where I say his claim is frivolous and vexatious, that's Rule 21.01(3)(d) and I say in the alternative it's open to the court to find and exercise its discretion and find that this claim has no merit.

Judge: Okay, so that's what you're implying then?

Bank: That's kind of just in the background.

Judge: It's you can't have it both ways. I just want to know, are you arguing that yes or no?

Bank: I will not argue that today, but I certainly

Judge: No, no, no, no, no, no, no, no, no, no. Are you proceeding with it yes or no? If you want to keep it that's fine I'm not forcing you, I just want to know what's in front of the court.

Bank: What's in front of the court is a Rule 20 motion. So I will not argue on the basis of Rule 21.01(3)(d)

Judge: So you are withdrawing it?

Bank: Yes, but I want to make clear that on my attacks on the various heads of damages are part of my Rule 20 motion.

Judge: Yes, and you will not be making any arguments under Rule 21.

Bank: That's right.

Judge: Okay, now, does he have your permission.

LK: Yes your honour, thank you very much.

Judge: Okay, we're done. So that is gone. Good.

Bank: Your honour I was very surprised that Justice Firestone did not seize himself on the matter. My understanding is that -I don't know whether your honour is bound by that order of Justice Firestone or not. Basically what's happened is that this motion has just been shunted to

you and it's now your problem to deal with. So my submission to you is that it is your discretion as to whether you want to order the trial, the mini-trial today or whether your comfortable making a determination on the basis of the paper record.

Judge: Again, maybe you have no submissions. That's why I'm asking you.

Bank Lawyer: Maybe I don't understand your honours concerns in terms of jurisdiction.

Judge: There is a court order. Maybe there is, maybe there isn't. I see something that is signed by a Judge. It says, in order to make a just determination the following MUST, M-U-S-T. Mandatory. That suggests to me that there has been a substantial decision made under the Hryniak case, under the two-step procedure. But I have now decided to use my discretionary powers to order viva voce evidence.

Bank Lawyer: Perhaps if I explained some of the context of that hearing it may be useful for your honour.

Judge: Well I don't know because it's not in the evidence. I'm really not entitled

Bank Lawyer: One of the issues. I know it's not evidence. But one of the issues I brought to the attention of the court from the start and I know that he raised is that Mr. Kakoutis has not put into evidence any statement that he actually made the alleged cash payment, which is of course the crux of this entire claim. So what I understood Justice Firestone to be doing is giving Mr. Kakoutis an opportunity to put that evidence in by way of mini-trial. That's how I interpreted his decision.

Judge: I can't interpret it that way.

Bank Lawyer: And there's also a concern, and it's part of that order, that Mr. Kakoutis did not cite Hryniak in his factum, and Mr. Firestone suggested that he file a new factum, and he did not do that, and there were also issues about possible expert evidence that was going to be delivered in respect of the Banks surveillance video, again, Mr. Kakoutis did not deliver that, and that's not either here nor there.

Frankly, I don't know how to interpret this. I think it was probably, with all due respect, incorrect for Justice Firestone to order a mini-trial and not seize himself of the matter lead to a great deal of confusion.

Judge: Yeah, and you can appreciate the concern. That is an automatic right of appeal. You know, that's like (snaps finger) easy peasy. Two sentences by the court of appeal, whoever wins, loses, and I think that's a colossal waste of time. This is why I am asking for your submissions. Let me hear what -did you understand?

LK: Yes I understood your honour. I understood very well.

Judge: What's the way out?

LK: Well your honour. There's really only one way out. I think.

Judge: Okay.

LK: And that's, you need to be confident that if you hear from the two witnesses, and if you hear from me, and if you see the evidence, I think what Justice Firestone was concerned about is credibility here. And obviously part of it, it wasn't a perfect decision, there were a lot of flaws in it, I think we all agree on that, and I just want to talk about one thing that my friend mentioned -as far as I have no sworn testimony that I gave the teller cash, well, you know, my position is, and the reason I didn't think that was a huge deal, is that our instructions to the teller was to pay our invoice and she failed to do that, and that is where we are alleging where there has been a breach of contract. Whether we agree on whether there was money given or not, the fact is this teller was negligent, she admits mistakes, she admits I told her

Judge: Okay you're getting into, I have a problem. I'm trying not to give either one of you (laughs hysterically) a free trip to the court of appeal.

LK: Yeah, I understand that. You know, so we really have to come to some consensus, I think, all three of us. You have to come to the consensus that you're confident that you can come to an agreement and we have to

Judge: Well my other concern is that even if both of you agree

LK: Even if we both agree what does the law say?

Judge: Then the loser can go to the court of appeal and go, what was that judge doing? That Hryniak case, it's truly contrary Hryniak.

LK: Your honour, you have to understand that part of the Hryniak case, and I think you raised it, is to find the most expedient solution. And now, if you don't take charge of this case, we're back to square one and contrary to the Hryniak case, which suggests that the best course of action, you know the full appreciation test has changed, so we're away from that, so I think your way out here is to say, you know, if you don't claim jurisdiction right now, it goes against the Hryniak case because you're going back to the full appreciation test. So I think we're going a step back.

Judge: No, my concern is that there is an order of the court and unless that order is varied by Justice Firestone, or appealed, I have no ability to say, I don't like that order, I'm not going to follow it.

LK: So what's the way out?

Judge: The way out is to go back in front of Justice Firestone.

Bank Lawyer: It is open to the parties, under the rules, to request leave to enter oral evidence and maybe we can do it that way. We have witnesses here that are ready to go.

Judge: Yeah but you don't understand. Under Hryniak there's a process.

Bank Lawyer: I understand.

Judge: And it appears to me that Justice Firestone is at number 2 of that process. He's already made a decision that says, I think in order to make a just determination -he's made a substantive decision. If I'm stuck with that, which I think I am, like I'm stepping into Justice Firestone's shoes and I think that is clearly contrary. Because there is no doubt that my opinion could be totally different from Justice Firestone's.

Bank Lawyer: In terms of the need to hear oral evidence?

Judge: Yup, and the thing is, I don't know that in the face of that order, even if you say, you go ahead Judge, ignore it, I don't think that that could be done without getting rid of that order. Again, you know, you can agree to whatever you like, then the loser is going to have a black and white right of appeal. So this is the conundrum. Because if I should somehow hear it the only way I can do that is to start all over again. And I would absolutely have to see the video. How can I make a decision of whether I need to see other evidence or I can see the paper record which includes the video.

Bank Lawyer: Your honour we were intending to show the video.

Judge: No I know you were but again I'm stuck.

Bank Lawyer: I understand.

Judge: With this order. And not only am I stuck with that order, Justice Firestone is in the middle of that Hryniuk, it's his discretion. So anyway, we're not going to keep going around, I'm just going to ask again, to I think, you made your submission, did you have anything further you wanted to say. I am going to have to make a decision on how I am going to proceed and I have no idea what to do.

LK: Alright, your honour, I am going to.

Judge: Do you want to talk to your wife, you probably should.

LK: Your Honour, is there any way you can accept her affidavit?

Judge: Her affidavit now doesn't do me any good.

LK: Now here's my problem, you know, I am just wondering why, because when I appeared before Justice Firestone she wasn't here, you know

Judge: Well, you know, you might have better luck before Justice Firestone.

LK: So what I am saying is, you know, because she has submitted evidence, and I have the opportunity

Judge: You just can't make submissions for her.

LK: That's fine, I won't make submissions for her, but I have the opportunity to cross-examine the Bank employees

Judge: On your own behalf, not hers.

LK: With respect to her affidavit as well however.

Judge: Yeah, yeah, yes. That's not my question right now. My question right now is can I even hear you guys. That's my first. We have to solve that question first.

LK: In my opinion, I think you have that jurisdiction, and I'm not saying that I think that Justice Firestone's decision is the best one, but I'm saying that it's workable, I'm saying that he is correct in the sense that this is a case that rests on the credibility of the parties, and that is why he ordered a mini-trial, the parties are here today, they're prepared to testify, I'm prepared to cross-examine them, my friend can do whatever he wants with me, so despite all the, we have the video, so despite any deficiency I think we're both equipped and prepared to proceed. I'd like to look at the positives in Justice Firestone's decision and that is -the reason he ordered a mini-trial is because he wants a just cause. So I think on that front we're all together, I think on that front we can really move forward and get all the evidence in because there are 2 witnesses here and that's alot of time to waste -this is the second time they've come in. Frankly, I think that if either party wants to raise an appeal in this case, well, I think we're both agreeing that we're prepared to move forward.

Judge: Are you prepared to waive your right on appeal to say that I had no jurisdiction because it was Justice Firestone who should have heard it.

LK: Oh Absolutely, I mean I'd be a, you know, if I appeal it's not going to be on that basis. Absolutely. You know, there is no way that I would

challenge that because I mean, I'm accepting the fact that I think you have jurisdiction, so I'd be a hypocrite to appeal on that basis.

Judge: I know, but the problem is, you're actually right, well, it doesn't matter whether you're right or not (laughs)

LK: Well your honour, I don't know, I kind of disagree with that but anyway

Judge: Okay, is that it, on this issue, because I'm going to have to retire and make a decision on this.

LK: Yes your honour.

Judge: Okay, now bear in mind, I'm going to try to decide what to do. If we proceed, I'm just giving you a head up right now. I'm hearing it from the start. I'm not following that order unless I think it's appropriate and I don't know that it is based on the evidence. So I'm going to do, I'm going to hear what you've already done. I don't know what you argued with Justice Firestone. Anyway so I need to decide what I am going to do. I still believe that I have no jurisdiction but I'm trying to figure out what I can do. I mean the only hole that maybe I can see is the one about figuring out the most expedient way to proceed. I still think it is totally improper. And if I do decide to proceed I'm going to write down that I think it is totally improper but that the parties insisted on proceeding. Do you need to take instructions? By the way, you're looking down at your

Bank Lawyer: No, my only thought was, since the witnesses are here, and since Mr. Kakoutis is presumably prepared to give oral evidence today, if your honour would also consider a request for leave from the parties to give oral evidence.

Judge: No, because I'm going through. I'm going to do it properly.

Bank Lawyer: Okay.

Judge: I'm going through the Hryniak test. Because that I will not compromise on. Because before I decide to hear any witnesses, I need to consider and I need to hear submissions on the stuff that's in

front of me. And one of the things that I clearly couldn't see was the video. And I need to hear reasoned argument and just to put you at a heads up, you know what's going to happen as a practical, you're going to get through that and I won't get to hearing the evidence anyway. So, we'll see how far we can go today but you have to be prepared. And you're going to have to follow my schedule. So I don't know, it could be months and months before you get in front of me again. But just so you know that. Alright, so let's take things a step at a time. I need to retire, I'll be as fast as I can, to consider whether I'm actually going to proceed today. Now, I can't remember, you must have filed Hryniak. Did you?

Bank Lawyer: I did indeed your honour.

Judge: Alright, we'll take our morning break, I'd say go away until a quarter to and have coffee or whatever.

Bank Lawyer: A quarter to twelve? Judge: Yeah, you're sure you don't need to speak to your wife right? You're okay?

LK: Yeah.

Judge: Good. Okay. I will come back as fast as I can.

ALL RISE. Court stands in recess until 11:45.

ALL RISE. Court has resumed, please be seated.

Judge: Let me tell you what my decision is - I'm just going to tell you what will happen so that you can decide what you want to do. So basically what I decided is that I can hear it because of the way I'm going to interpret the order. What you're both saying to me is that Justice Firestone didn't hear anything, he didn't hear any submissions, and in fact he says right in the order the motions didn't proceed today. So the effect of his order is nothing. It's just a friendly suggestion. If I proceed, I'm going to hear it from scratch. As I said to you, I am not, I am going to go through the proper procedure that Hryniak talks about. So we had, going back in time when you were in front of Justice Firestone...that 2 hours and 15 minutes per side and we have 2 motions. So that is an hour for each motion, for each side, and then

you need to do 30 minutes for costs. Okay. And I'll hold you to those times. That is not going to happen today. I am more than prepared to start this, but the reason that I am telling you this is because I know the dates when I can offer you to come back. Because once I start I will be seized and you will have no choice. And what I will do is to hear all your arguments to see if I could make a decision based on the paper record. And I might decide like Justice Firestone or I might decide not, I don't know. I might say, okay, I don't have enough. Or I might say, I want to hear this evidence. So the witnesses are coming back whether you like it or not. Unfortunately, because there is just not enough time. The dates, and I'm telling you all of this, so that you'll understand where I'm going if I proceed -because once I start, that's it, you're stuck with me. And the dates that I can offer you are January 20, 21, 22. One of those days. And I am thinking that your wife will also be available to come next time anyway. But I would start today so we don't waste time to make sure that we finish. So anyway, the reason I am putting forth all this in front of you, since we can't finish anyway, do you want to go back before Justice Firestone or what do you want to do? You know what the dates are. Do you want to talk about it?

Bank Lawyer: It may be worth it.

LK: Your Honour. There is something that I don't quite understand. You said we get an hour, you mean today an hour?

Judge: Yeah, okay, so let's go back. In order to argue all of this on the paper record, no evidence, forget about that evidence, we need a day. That's what it was scheduled for. And the way, a day is four and a half hours. There are 2 motions. Okay. Four and a half hours means 2 hours and 15 minutes for you, 2 hours and 15 minutes for the bank. And even then, I have to question, is that fair yes or no because there's two of you guys and there's one of them.

LK: Does it include the witnesses?

Judge: No, this is just on the paper record.

LK: Now what about

Judge: I'm not finished. There's 2 motions. We can't just wiley nilly go

all over the place. My suggestion is, we start first with the Banks motion saying that the claim itself should be dismissed. So we have an hour to deal with that on each side. Each side gets an hour total. Then we go into your motion, excuse me, yes, no, the Banks' motion for a judgement on their counterclaim. An hour, an hour. That's what I am saying. We need to make sure that we have enough time because as I said, I need to follow the process in Hryniak. The witnesses are not called until I decide that mmmmmmmmm, I can't do it on this. And even then I might say no that's stupid, I'm not going to hear the witnesses because it might be a waste of time.

LK: Well, here's the concern that I have.

Judge: Yeah.

LK: And, you know, because I'm here and obviously when you're here and you prepare for a strategy to deal with the evidence you have and Justice Firestone did make a serious blunder that I was willing to live with. And the serious blunder that he made is that he put the onus for putting forth expert witnesses on me instead of putting it on my friend. Because, according to the rules, my friend has not authenticated the video in question.

Judge: My ruling is going to say that Justice Firestone's order is no order at all. He basically said nothing. It's just a suggestion. And I'll give you my reason. I just want you to know where I'm going. Because I'm trying to fix this issue. Because I just want you to understand that we will not be finished today -no way. And I wanted to give you a date of January. Those are pretty damn good dates, so, counsel wants to talk to you. Go outside and talk about how this is going to work. Because at this point.

LK: So you're not going to make any decision today?

Judge: Oh, absolutely not.

LK: Okay.

Judge: The only decision I will make, and I'll make it orally is to say, okay, I'm going to hear you. And I'm only going to hear you because of

the submissions that both of you make by hearing you say
niaaaaaaaaaaaaaaaaaa, Justice Firestone was only trying to give him
a chance, blah, blah, blah, that's the only way I can do it.

LK: So, you know, we're going back to square one.

Judge: You are.

LK: And I'm going to pretend that you're Justice Firestone on day one.

Judge: Exactly.

LK: And that's going to be a totally different thing.

Judge: You got it.

LK: Okay, so we can talk.

Judge: Anyway, so you guys talk and let me know. Okay?

LK: Thank you Your Honour.

ALL RISE

COURT HAS RESUMED, PLEASE BE SEATED.

Judge: Thank you. Okay, now what I propose, just have a seat. I'll give you my reasons as to why I'm going to take it. And then we'll see what time we have, we'll probably break for lunch and then we'll start with our actual, physical motion. And then we'll go to the other thing, before we start I'm going to need from each side how much time they want. Because you know I'll be watching the time, right? So, on March 20, 2014, Justice Firestone adjourned both of these motions stating that these motions did not proceed before him on that day. He also stated that a new date should be set, ah, and that certain evidence should be heard by way of a mini-trial, but clearly noted that he was not seized of both of these motions as they did not proceed. The court requested the parties to make submissions to it with respect to the effect of that order. Both parties advised the court that no submissions were made before Justice Firestone. And that he only adjourned the matter, the

motion. Both parties asked this court to hear actual submissions on the substance of and the merits of the motion and urged this court to find that this court, ah, this court is not bound to follow the suggestions of Justice Firestone, which have no effect because, as is clearly indicated, the motion actually did not proceed. Both parties have waved their rights to argue on any appeal of the summary judgment motion that the court did not follow the order of Justice Firestone. Both parties rely on the advice of the Hryniak case for the court to find the most expeditious way to deal with both of these motions. As it is not possible today to have Justice Firestone hear these motions, the court will hear the actual submissions of both of these motions. Okay. That is my decision, as I said, we're getting close to lunch hour, before we start, what is the procedure that you want to follow -we have four and a half hours in total to deal with both of these motions. So I'm going to start with the motion number one, the motion of the Bank to dismiss the Plaintiff's claim. How much time, counsel, you go first because it's your motion, how much time will you need in total, and that means reply, argument in chief and reply.

Bank: An hour and a half.

Judge: For that motion, you don't have an hour and a half. There's four hours and fifteen minutes. The maximum, maximum, and I'm not even necessarily giving you that (laughs) because we have a self-represented party here. The maximum amount of time you can have for both, is two hours, because 15 minutes needs to be reserved for reply.

Bank: So you're saying I have 2 hours maximum, split between my motion to dismiss and my motion for judgment on the counterclaim.

Judge: That's correct.

Bank: The motion for the judgment on the counterclaim is really straight forward.

Judge: Okay, that's fine. So how much time then?

Bank: I can do, I can make motions, submissions, on the issue of dismissing the claim within an hour.

Judge: Okay, that includes, so dismissing the claim, so how much in chief how much reply?

Bank: I'd say 40 minutes in chief and 15 minutes reply.

Judge: Okay, so you want to tell me on your counterclaim then?

Bank: I would say 30 minutes submissions in chief and another 20 minutes in reply.

Judge: Okay, that means an extra 10 minutes goes to the party on the other side (mocking voice). Your turn. On their motion to dismiss your statement of claim, how much time do you need?

LK: Right. Your honour, what had you said before about arguing one or the other. I thought you said, you're withdrawing everything you said earlier and now we're starting all over?

Judge: That's right.

LK: Because I think you said something earlier. Didn't you?

Judge: I said we're starting all over. As if you had never been in front of Justice Firestone.

LK: Alright. Okay. So for the, how much do I, I have to divide my time between.

Judge: Both motions, so we have two motions, so we have a motion to dismiss your action.

LK: Yeah?

Judge: Okay, forget about how, you tell me what you think you need and then I'll try to increase the time or whatever.

LK: Okay

Judge: The motion, so how much time

LK: See it would depend on what he says right, so I'm having trouble

Judge: He has to start, he goes first, you get one shot.

LK: Right

Judge: And then he has to reply to you.

LK: And then you're going to make a decision?

Judge: No, and then we're going to do the other motion and then I'm going to make a decision.

LK: So you can decide the whole thing today?

Judge: No

LK: It's possible no?

Judge: I'll start over again. He's going to start. There are 2 motions. Number one, the first thing we're going to do is his motion to dismiss your claim

LK: Okay.

Judge: He is going to start with 40 minutes in chief, he's going to make his arguments for 40 minutes. Then you're going to make your arguments. And he's going to get the last word for 20 minutes. So how much time do you need?

LK: Okay, I'd say about an hour.

Judge: Okay. That's number one, that's your claim. then, the Bank again is going to make a motion, whereby they want a judgment against you, right?

LK: uhum

Judge: For the monies under the loan, and they are going to take thirty

minutes, and again, the burden of proof is always on them, 30 minutes to make their argument in chief, how much time do you need?

LK: An hour?

Judge: And then they reply for 20 minutes. Right? And then at the end of all of that stuff, we're going to do something called costs. And that is the legal fees that have been incurred through these proceedings. You're not a lawyer but you can claim expenses, you've got certain rights, and each side is going to have to claim that... so you're okay with that?

LK: Yes.

Judge: Now, in that time, if your wife were to appear, at the next time, she would be allowed submissions too but I cannot increase the time, it will go in yours.

LK: Alright.

Judge: Is that alright with you?

LK: Yes, my friend goes first right?

Judge: He always goes first, he has the burden of proof.

LK: Alright.

Judge: So, to summarize, this action to dismiss and the whole action against the Bank, 40 minutes for him, an hour for you, reply for 20 minutes again. Are you okay with that?

LK: Yes.

Judge: The same goes for the judgment against you and your wife. 30 minutes for him. An hour for you. twenty minutes for him.

LK: Okay.

Judge: Are you comfortable with that?

LK: Yes.

Judge: ...you can say one of two things, you can say to me, Judge, you don't have to hear any extra evidence, it's all in here. Or you can say, Judge, you can't decide on this, you should hear this evidence.

LK: Okay.

Judge: And bear in mind that one of the things I have to decide is can I do this fairly and justly without a trial. And just because Justice Firestone, without hearing submissions, said, I need this kind of evidence, I'm not stuck with that. I might have a different opinion, I might at the end of the day say, you're all going to trial. Okay?

Judge: Everything clear?

LK: Yes your honour.

Judge: Good. Now, so that we don't chop things up, why don't we start lunch now and we'll come back early at 2 o'clock, is that okay? So were going to start lunch now, be back for 2 o'clock, and what we're doing remember, first, we're not going to mix up these two things, because they're 2 seperate things. The bank is going to first of all convince me to dismiss your action. Okay. They're going to go fourty minutes, you're going to go an hour, you're gointg to go 20 minutes, well, until we run out of time. Before I let you go, I just want to make sure, I got no material from anybody, except the factum, nobody filed anything in the interim.

Bank Lawyer: Although I'm not going to deal with the issue today...we're actually going to hand it out when we get to that issue...

Judge: That's just an update on the numbers, on the amount that's due, that's all -allegedly due.

LK: And I'd just like to file a brief medical record, my friend has it.

Bank Lawyer: I don't see the relevance of this.

Judge: What is the -remember I'm deciding on the paper record, forget about what Justice Firestone said. We're not hearing evidence.

LK: I understand that your honour, but this is basically an exhibit, I'm claiming breach of contract and.

Judge: So those are your damages, is that what you're saying?

LK: Stress-related damages and

Judge: Well the problem is you're going to have to get counsel to look at it

LK: He has looked at it.

Judge: You object, okay. You have to get his, yeah you can't file just the day of the hearing.

LK: Alright.

Judge: So we're okay to start when I get back?

LK: Yes your honour.

Judge: Okay, did you talk to your wife?

LK: No, she's in New York. I can't reach her right now your honour.

Judge: Okay. Alright.

LK: Do you have the affidavit that I gave you your honour?

Judge: No

LK: Oh, okay.

Judge: remember I told you I couldn't take it?

LK: Alright.

Judge: Alright. We're adjourned until 2:00 o'clock.

ALL RISE

Court is resumed, please be seated.

LK: Your Honour.

Judge: Are you ready to proceed?

LK: Your Honour, before we start, I think you should know that the main point of Justice Firestone, the main point that he made is that, the consideration of a recent case, of Hryniak v. Mauldin, 2014, and I need to testify under oath and I need to walk you through the video so that you could be in the position to weigh the evidence, evaluate my credibility and draw the inference I am seeking you to make, which is, the video provided by the defendant is incomplete.

Judge: Wait, wait, wait. I just made a ruling.

LK: Your Honour

Judge: That said that on the basis of your submissions and on the basis of submissions of counsel for the Bank, Justice Fireman

LK: Firestone

Judge: Firestone's order was nothing because he didn't deal with the motions. I just made it very clear that I am proceeding, I'm starting from scratch as if Justice Firestone never even talked to you on that point.

LK: Fine Your Honour, but at the same time, the law of the land is Hryniak in this case.

Justice: I know, we're going to start arguing

LK: But we're not applying it because allowing me to testify my summary judgement motion will give me the opportunity to be heard and the Hryniak case is about access to justice.

Justice: Wait. I made a ruling. The ruling is, we start at the beginning. WAIT! He's going to make an argument, then it will be your turn, and when it's your turn to argue, you'll say I think in accordance with Hryniak, you justice should hear my evidence.

LK: Oh yeah, absolutely.

Justice: But you will do that when it's your turn. It's not your turn.

LK: But I'm not, this isn't part of my submissions, it's just, the point is your Honour, with all due respect, the reason I'm making this argument, I'm not just throwing it in because I want to aggravate you, the reason I'm making this argument is because Justice Firestone gave me the opportunity to re-write my factum.

Justice: And you didn't.

LK: I didn't because I was planning to discuss the Hryniak case orally, and part of my argument is that in order to assure access to justice in this case, which would have been in my factum if you know, I thought I was going to be denied that opportunity, and I don't want to go down that road -I want to make it clear before we start, because that's what the Hryniak case is all about, it's about access to justice and that's the law of the land.

Justice: Okay. In the beginning of the process, I told you I had a concern. Justice Firestone made an order. I said what's the effect of the order? He gave me his argument, you gave me his argument. I spent a lot of time considering how I can hear this case. I came back, I gave you a decision based on both of your submissions -water under the bridge. The decision is made. We are not following Justice Firestone's pontification because all he did was adjourn the motion. I am starting as if today, I'm going to hear everything as if you never appeared in front of him. So whatever he said is irrelevant.

LK: But here's my point Your Honour. Okay, because I'm not a lawyer.

Justice: I know but you haven't followed me

LK: I am following you. But let me be frank with you because not being

a lawyer, like I have been caught off guard, because, I understand, the things that I've got to study to effectively oppose a motion to dismiss, I have not studied. So the reason that I am making a point before we get off this situation where I am not going to be able to respond appropriately, and I am going to be denied access to justice.

Justice: And you decided to tell me this now instead of 3 hours ago.

LK: Your Honour, I am trying to think of a way to respond to a motion to dismiss and I'm thinking, you know what, I need legal advice to do that. I am prepared, I am prepared, I am prepared to proceed according to the structure that Justice Firestone defined, but in order to effectively, because you know what, I'm not perfect Your Honour, I'm not going to say my pleadings are perfect, and you know what, everybody in this case, because frankly my friend, you know we've been under the stress where my friend is threatening to kick us out of our house, and that's illegal because he's also countersuing, so this is vital, this is extremely important, and I am prepared here today to argue and to present evidence and to do what the Supreme Court of Canada has mandated in the Hryniak case. Now that's the law, I'm not saying that it has anything to do with you. That's just the law and I feel at a disadvantage unless I am provided the opportunity to testify under oath, to have the opportunity to, you know, because you have to assess credibility and if I don't testify under oath and present the evidence, I don't think you will be in a position to make a just decision.

Justice: You are going to make that argument when it is your turn. We have a process, you're not a lawyer.

LK: It's not my turn right now.

Justice: That's right. So please sit down, when it is your turn

LK: And I am telling you that I don't think I am sufficiently prepared

Justice: Okay

LK: to be able to oppose

Justice: Gotcha

LK: one motion without

Justice: WAIT

LK: without being able to present evidence.

Justice: Okay, let me explain, I'm going to explain this once, and once alone. Then you're going to sit down.

LK: Alright Your Honour. I just feel at a real disadvantage here because

Justice: I've heard you about 5 times.

LK: Alright Your Honour.

Justice: There is a process, we are going to follow the process. I told you it is his burden of proof, he's going to make his argument first, you are going to go second, you are going to make the same argument you are making now when it is your turn. Right now it is not your turn. Lawyer or no lawyer, you cannot speak when it is not your turn. or else we will never finish with this proceeding. We must, there's a rule, and the rules are there to assure that everybody is heard.

LK: That's exactly what I am trying to suggest.

Justice: Right and you will make your argument when it is your turn. It is not your turn now.

LK: And that's why I say my friend is going to stand up here and tell you that he doesn't have any evidence that I paid in cash, because that's the argument he made, and in order to oppose that argument I need to testify under oath.

Justice: You will tell me that in your argument. And maybe I'll agree with it and maybe I won't. I don't know.

LK: Alright your honour. I apologize but I just feel very uncomfortable.

Justice: Well of course you feel uncomfortable

LK: I feel very uncomfortable because you know, this is very important

Justice: I know, and you've had months and months and months of knowing that this is coming up

LK: Absolutely, but as I said, I would have filed another factum and you would have been in a better, with a new factum you would have been in a position

Justice: Oh I see.

LK: To better evaluate because, you know

Justice: Well the problem is that you're doing this now after I make my ruling

LK: Your honour, I didn't do it on purpose. It's just that I feel inadequate.

Justice: It's difficult, I understand.

LK: I feel inadequate trying to

Justice: You are the Plaintiff, you know what you have to do.

LK: I feel inadequate trying to defend when I haven't studied the rules with respect to one aspect of not being provided the opportunity to provide evidence. I just don't think that's what access to justice is about.

Justice: You are going to make. I'm the person here who decides whether or not you can present evidence.

LK: I understand that.

Justice: It is not you who says you have to hear this evidence. I am going to hear arguments on both sides. He's going to say, I don't know what he's going to say. He's going to say maybe I hear evidence

maybe I don't. Then it's going to be your turn, and I know you're not a lawyer but you have to follow the rules. Because they are there only to make sure that it's fair. And notwithstanding the fact that the Bank has a lawyer and you don't, you don't have to follow the rules

LK: Yeah but when I am opposing people who don't follow the rules

Judge: Okay, you are not being fair.

LK: I'm sorry, I apologize

Judge: You don't have to apologize.

LK: I apologize but that's the evidence.

Judge: That's enough now.

LK: Okay

Judge: You are not to interrupt again.

LK: I'm sorry

Bank Lawyer: As you honour is aware, in the Plaintiff's claim, this particular transaction occurred at the branch of the Bank of Nova Scotia located at Bathurst and Teston Rd. in Vaughn, on February 22nd, 2012. On that date, and this is not in dispute, Mr. Kakoutis attended at the branch, dealt with the teller, named Nadia Del Giudice, and instructed that teller to make a payment towards his line of credit, their Scotialine of credit in the amount of \$1188. The dispute is over where the source of that payment was to come from. Mr. Kakoutis claims that he gave cash in the amount of \$1188 to Ms. Del Giudice on that day, the Bank has no record of ever receiving cash. Ms. Del Giudice's recollection is that the instructions she received were to make the payment from Mr. Kakoutis' Powerchequing account. She attempted to process that payment. Unfortunately, due to a human error, she accidentally credited that amount of money back to the Powerchequing account. Resulting in a nullification of the transaction. In other word, no money left or went back into the account. And the balance in the Powerchequing account was the same as it was before

and after Mr. Kakoutis attempted to pay. The Bank's position that Mr. Kakoutis has absolutely no evidence whatsoever to support the allegation that the payment was made in cash, in fact there is compelling demonstrative evidence to the contrary in the form of the video surveillance footage from the branch which has been included in both the affidavits of both Daryl Weddum and Nadia Del Giudice.

Justice: Okay, so you're going to play that for me.

Bank Lawyer: I'm going to play that, so I'll take your honour through the evidence

Justice: Alright, that's fine, I just wanted to make sure

Bank Lawyer: In the Bank version of events, in respect to the transaction on February 22nd 2012, to be found in the affidavit of Nadia Del Giudice which is in the Bank's main motion record at tab 2. In that affidavit, Ms. Del Giudice attests to the fact that she was employed as a teller, at Scotiabank, during the relevant periods of time at the Branch, that she was in attendance at the Branch on February 22nd, 2012, at paragraph 4 of Ms. Del Giudice's affidavit, that she personally dealt with Mr. Kakoutis on that date. To the best of her recollection, Mr. Kakoutis approached her teller's station and presented her with the monthly account statement, for the Scotialine line of credit, and at that time the amount due was \$1188. According to Ms. Del Giudice's recollection, she was instructed to apply payment for that account, from the funds which were available in the Plaintiffs' joint chequing account. She attempted to do this using the Banks' transaction process and so on. She believed that she did in fact complete the transaction. As such she stamped the transaction receipt, the Scotialine statement. And your honour can take a look at that in Mr. Kakoutis' motion, record. That's at tab H and you can see the color copy of the Scotialine.

Judge: I have it, yeah.

Bank Lawyer: And at the bottom you see the stamp as she believed that she had processed the transaction

Judge: The one in February

Bank Lawyer: 2012, that's correct.

Judge: Okay, and what's that thing on the top.

Bank Lawyer: That's a receipt. I was about to draw Your Honour's attention to a clearer copy of that. Which is at tab G of Mr. Kakoutis's Motion record.

Judge: uh hum.

Bank Lawyer: And it shows there was a deposit of \$1188 and a corresponding withdrawal of \$1188 both occurring at the same time on the same date.

Judge: And what else on the statement in H that she refers to am I to look at? You say the scotialine personal line of credit. Where is this \$1188 due amount on that statement?

Bank Lawyer: If you take a look at the statement.

Judge: Oh here, total minimum payment.

Bank Lawyer: Total minimum payment. At that time I believe Mr. Kakoutis was already in arrears on that

Judge: Alright.

Bank Lawyer: As I said, Ms. Del Giudice believed that she had completed the transaction, as instructed, she stamped it and issued the receipt that I just showed to you.

Judge: Okay.

Bank Lawyer: Subsequently, about a month later on March 26, 2012, Mr. Kakoutis returned to the branch and approached Mr. Daryl Weddum, who is the manager of Customer Service at the branch. And now I am referring to the affidavit of Mr. Weddum which is at Tab 3 of Bank's sworn affidavit. Mr. Kakoutis voiced his concerns through Mr. Weddum that the transaction on February 12, 2012 had not gone

through. Mr. Weddum then undertook to take a look at what had happened, he went through the Banks transaction records, went through the transaction records for the account, a copy of those are available, examined them, Tab F examined them and based on his experience, by reviewing the cash that was received in the transaction records, it was his belief that a simple teller error had occurred, and that Ms. Del Giudice had likely accidentally misapplied the payment which was supposed to come from the powerchequing account and go to the Scotialine

Judge: Where's the transaction

Bank Lawyer: it's near the very bottom, 1188

Judge: Yes

Bank Lawyer: One after the other, they cancel each other out.

Judge: The D is Deposit, and WD is withdrawl.

Bank Lawyer: uhhmm

Judge: Okay.

Bank Lawyer: So it was his view that this was a simple teller error, apparently this is quite routine and he explained this to Mr. Kakoutis at the Branch, Mr. Kakoutis was not satisfied with the explanation and he left.

Judge: Just give me one second.

Bank Lawyer: In case Your Honour was wondering what I was referring to, paragraph 11 of Mr. Weddum's affidavit which recounts his first meeting with Mr. Kakoutis. Mr. Kakoutis returned once again to the branch, two days later, and on this occasion he advised Mr. Weddum as well as the Branch Manager, Chantal Ohayon, that he believed that the teller had stolen the alleged cash. Now in response to this allegation Mr. Weddum reviewed the Banks' video surveillance footage Judge: Okay, what paragraphs am I at now.

Bank Lawyer: 14 through 15 Your Honour.

Judge: Yeah, uhuh.

Bank Lawyer: He viewed the footage, and according to his understanding, the footage did not show any cash

Judge: Right, okay

Bank Lawyer: And if it's an appropriate time I can play the footage for your honour.

Judge: Yeah

Bank Lawyer: If there's any concern regarding the authentication of this footage or the accuracy of it, Mr. Weddum was the first person to view it, and if you look at the responding motion of the Bank, he confirms that the disk that is contained on the footage, he confirms that the surveillance footage captured the entire transaction occurring at the branch on February 22nd, 2012, involving their account, obtained by Mr. Weddum directly from the Bank's security department, and it had not been altered in any way shape or form from when he had first viewed it at the branch by the camera.

Judge: okay

Bank Lawyer: So I'll play that video for the court.

Judge: Is it necessary to dim the lights or will we see

Bank Lawyer: I haven't tried it yet so

Judge: We'll see what it looks like.

Bank Lawyer: We'll see what it looks like. Now this disc I will be playing is the one that was actually prepared by the Banks' security investigators. It's not a copy, all the copies were attached to the affidavits, this is the original.

Judge: Yes

LK: Can I stand up here so I can look.

Judge: Of course you can.

LK: Thank you.

Judge: Just so long as you don't intimidate anybody.

LK: I never intimidate anybody.

Judge: Just make sure you don't block anybody.

LK: Sorry.

Judge: no, no, no, you're not.

Bank Lawyer: That's Ms. Del Giudice in the frame there.

Judge: uhum

Bank: Mr. Kakoutis approaches. The item on the counter appears to be the Scotialine statement. Now you can see Mr. Kakoutis puts something on the counter and immediately picks it up. Mr. Kakoutis places his Scotiabank access card on the table, pushes it towards Ms. Del Giudice, she pushes it back to him. Then takes the card and proceeds to put his personal identification number in the machine, and this, by my understanding is that Ms. Del Giudice is obtaining instructions on the terminal there, Mr. Kakoutis takes his card back, prints the receipt, she staples it to the statement and gives it back to Mr. Kakoutis. That brings the Banks witnesses

Judge: If you want to both sit down I want you to play it again so I can get a closer look.

Bank: Absolutely.

Judge: Okay thank you

Bank Lawyer: Your honour, it is my submission that the video gives

you a complete answer, if cash had in fact exchanged hands we would have clearly have seen actions which a teller would be expected to take in such circumstances we'd see her counting the cash, probably a number of times, we're talking about a substantial amount of money, almost twelve hundred dollars. you do not see her looking for change. All you see is the exchange of what appears to be a scotialine statement, it's a large piece of paper, a card placed on the counter picked up by Mr. Kakoutis and put into the keypad machine, and the receipt issued at the end.

Judge: What's a pin-pad machine.

Bank Lawyer: The pin-pad, there is some explanation to this because Mr. Kakoutis had raised an issue as to the function of the pin-pad machine, uhm, in, I believe in the affidavit that Effie Kakoutis -in response to the supplementary affidavit of Darryl Weddum in the Banks' responding motion record, and in that supplementary affidavit, Mr. Weddum, who has experience both as a teller and a manager of customer service, who supervises the tellers, uhm, he attests to the fact that the tellers at the Branch (or at other branches of BNS) do not use the Ingenico PIN Pad devices to process payments or for any other transactional processing at all. They're only used for the purposes of identifying the customer. So each customer is assigned a pin which goes with the card, you put the card in, you punch the 4 letter pin and that satisfies the teller that they are in fact dealing with the person that they claim to be dealing with. Mr. Kakoutis is raising the argument that the Ingenico PIN card device could somehow have prevented the teller error which occurred and again, Mr. Weddum makes clear in his affidavit that this is not the case, the PIN pad device is not in any way involved with the processing of the transaction. At paragraph 6. After Mr. Weddum viewed the video at the Branch, he spoke again to Mr. Kakoutis and advised him that he had viewed the video and could not find any evidence of cash having been exchanged, uhm, Mr. Kakoutis requested to view the video, at that point it was only available on the Banks internal server, and the Bank maintains that in a secure viewing where customers are not available to access so a request for a video transfer to disc, which is what we reviewed today, Mr. Kakoutis returned again to the branch on April 27th to view the video, took various positions, he argued at one point, according to Mr. Weddum, that it did in fact show him handing the

cash to the teller, in fact he said the video had been altered and Mr. Weddum of course testified to the fact that the video had not been altered.

Judge: (inaudible) endorsement (inaudible) I don't mean to do it now but I just don't want to lose it. Can I give it to you?

Bank: Sure.

Judge: (inaudible)

Bank Lawyer: Your Honour I'd like to reiterate that there is absolutely no cogent evidence to support their allegation that they made a cash payment on February 22, 2012....the credit statement which I already showed your honour, the receipt, they claim that these constitute "material proof of payment" -I don't know what that means, and I certainly think the Bank has offered more than a reasonable explanation of what happened that day. Your Honour, absent any evidence showing that the cash payment was made, I don't see how the Plaintiff's claim can possibly succeed. I don't believe the Plaintiffs have suffered any damages as a result of the Bank's conduct. It's acknowledged that the Plaintiffs did attempt to make a payment towards the Scotia loan, but unfortunately due to human error that payment was not processed. I don't believe that error has in any way given rise to a right of action against the Bank, I don't believe any loss or damage has accrued to the Plaintiffs as a result of the Defendant's conduct. Plaintiffs have made allegations regarding damage to credit... I am giving evidence they have proffered in this regard is a letter from a Toyota financial services as exhibit C to the affidavit of Effie Kakoutis, in Mr. Kakoutis' cross motion record, denying financing. There's nothing here linking this to the Banks' actions.

Judge: They are arguing that your I guess refusal/inability to process the payment that put them into default. What's your answer to that?

Bank Lawyer: But that's not the case. That's not the case. They could have easily made the payment. There were funds in their account. In fact they refused to make a payment after the dispute arose. And again we're now crossing the line into the issue of the Banks' counterclaim but their argument seems to be that the Banks' error

somehow constitutes a breach under the loan contract and that all their obligations thereunder are extinguished is an absolutely ridiculous argument whatsoever... it would be commercially absurd if every time there was a disputed payment... it doesn't make any sense...

Judge: What do you say the cause of action is?

Bank Lawyer: I say if it's anything ... if indeed there is a cause of action it would relate to the loss of the money. It is certainly my position as your honour knows that the money was never given. But I say at best at its very highest this is a simple negligence or bailing claim for the loss of 1188 dollars. My submission of course is that there is no evidence that this cash was ever given but I say at the very highest that's what the Plaintiffs claim is all about. Everything else, their allegations of negligent misrepresentation, breach of security, all of these farfetched causes of action which have no application to the facts that were given here. And they're seeking damages of almost 1.3 million dollars. The underlying case, I submit, is frivolous and vexatious.

Judge: But again, I'm making it clear, that's not the test. We're not striking it out because it's frivolous and vexatious.

Bank Lawyer: I'm not asking your honour to strike, I'm not asking your honour to strike anything

Judge: You're asking for a dismissal

Bank Lawyer: I'm asking for a dismissal, I'm saying the claim has no chance of success, there's no evidence to support it,

Judge: Okay, Alright

Bank Lawyer: And even if there were evidence to support the alleged cash payment, at best they've got a claim for 1.3 million dollars -there's no evidence of consequential damages, there's no basis for aggravated damages as the Plaintiffs claim,

Judge: So are you saying that on that motion saying that there's no

genuine issue for trial and I can make it just on the basis of the record in front of me.

Bank Lawyer: I'm saying that there's an ample. Yes I say that the record before you provides an ample explanation as to what really occurred on the date in question, February 22nd 2012, that there's clear dispositive evidence in the form of the video surveillance tape which shows that no cash was ever exchanged,

Judge: Right

Bank Lawyer: And since that's the crux of the entire Plaintiff's claim the case should be dismissed.

(Bank lawyer sits down while Plaintiff pulls out a 12 ft. VGA cable from his briefcase which is necessary to hook up to his computer and the court supplied video monitor which provides the court with the opportunity to review evidence.)

Judge: Your turn, Oh, oh, taking out the electronics. What's that mean?

LK: Your honour, my friend, there's so many errors in what he said, I'm afraid I'm going to forget some of this but you know

Judge: Remember you have an hour, okay?

LK: Starting with my wifes affidavit your honour

Judge: Yup

LK: My friend said that

Judge: Which affidavit, the one in your motion record?

LK: Yeah, my friend, you know, if you read that affidavit,

Judge: ...you have to tell me where it is

LK: It's in, it's in, it's in

Judge: In your motion record

LK: In my motion record

Judge: And it's at tab 2 correct? ...I need to follow what you are saying.

LK: Yes your honour. You know it's really overwhelming when everything that the Bank says is essentially... (LK was thinking about the world bullshit but had to restrain himself) I don't want to say the word. But you know, he said that the pin-pad machine is only used to identify the customer. You know, I mean, that's outrageous. I mean I've spoken to dozens of tellers

Judge: I need to tell you something. You can't give evidence at this portion of the hearing.

LK: No I'm not giving you evidence

Judge: And you can't say so and so, so and so, so and so. The only evidence you can rely on is what is written down on the affidavit.

LK: Yeah, and that is what I'm looking for. Because my wife's affidavit. Where is that affidavit? I'm sorry your honour. I'm still looking for her affidavit your honour, pardon me.

Judge: It's in Tab number 2. This is what it looks like.

LK: I can't find the motion material now.

Judge: It's okay, take your time.

LK: Oh here it is, okay. Okay your honour. I mean, it's really frustrating when you get all this false information because if you look at exhibit D in my wife's affidavit,

Judge: Okay, exhibit D, uh hum.

LK: Exhibit D. And it tells you what this pad is for. And it says soft keys allow for quick.

Judge: No, no I need to follow you, where are you?

LK: It's where it says, ergonomic

Justice: Soft keys, yeah

LK: Ergonomic design, it's the third title down your honour.

Justice: Okay, you need to start, where did you get this? Where did your wife get this document?

LK: She got it from the Internet your honour and it's (about) the kind of technology that the Bank uses.

(Bank lawyer grunts and Judge says 'I know, I know'.)

Judge: Where, okay

LK: It's the Ingenico key pad.

Judge: Let me find the affidavit where, is your wife an expert on bank equipment?

LK: No, she, it says right here that softkeys allow for quick and simple access to different applications, so

Judge: Is your wife an employee of the Bank? -She doesn't say that so she went up, where does she talk about, where in her affidavit does she talk about the pin pad?

LK: She talks about it your honour, where she says, uh,

Judge: Remember. I can only

LK: Yes, she talks about it in her affidavit

Judge: What paragraph? WHAT PARAGRAPH?

LK: I'm looking for it your honour.

Judge: In paragraph 11.

LK: She says

Judge: In particular, what is the source of her information? She says, "in particular all tellers at every Bank of Nova Scotia" -how does she know that?

LK: Which paragraph are you reading?

Judge: Eleven

LK: In particular, all tellers use -oh they all use it because that's the technology that all tellers use. Whenever you go to the Bank of Nova Scotia that's what they have in front. So all tellers use this technology your honour. That's a fact.

Judge: That's not (laughs hysterically) you have to prove it. But anyway, I understand

LK: So, all the tellers use this technology, you know, I mean it's very simple, just to give you a very clear and precise narration about how this technology functions,

Judge: Exhibit D. She got that from the Internet?

LK: She got that off the Internet and it's the pad which tells you what it is. The card your honour. I mean this is simple common sense as well. The card is what identifies the person, it isn't the machine, that's an outrageous, foolish claim. The card is what identifies the customer, the pad, it's like the key and the engine, and the terminal is what provides

Bank: You can't consider (inaudible objection)

Judge: I'm not considering that

LK: I know, but I'm saying the evidence that my friend gave is incorrect.

Judge: Okay, let me repeat this. I'm only going to say it once. I'm not going to say it again. I can only consider evidence that is written down on a piece of paper saying, I am the manager, I was there. I saw this. I cannot count evidence saying, oh in my general knowledge as I walk around, this is what I see.

LK: No, your honour, every pin transaction

Judge: Well that is not evidence. You cannot give me evidence. You need to go by your wifes affidavit. And it's fine.

LK: She basically says the same thing in different words. What she says in her affidavit is every pin transaction involves a bank card, a card reader, and a computer terminal.

Judge: Okay that's fine.

LK: And that's the interaction

Judge: Alright,

LK: that produces

Judge: good enough

LK: It's a simple interaction

Judge: I'm just saying you cannot cross-examine on this, just so you know, okay? (Is judge suggesting that a Bank Manager is more credible than manufacturer specifications about the technology the Bank of Nova Scotia uses?)

Bank Lawyer: Let me respond to the submitted affidavit.

Judge: That's fine they did respond. Alright. keep going.

LK: Your honour

Judge: I get it

LK: It's a very simple

Judge: Okay, so what? So who cares? So what if they do use it?

LK: So the point is, you know, my friend said that what the teller did is an everyday error.

Judge: yeah

LK: And the fact is, it isn't. The fact is, what she did is like running a red light. You don't make that kind of error and not be aware of it.

Judge: Okay, show me how you don't make that error and not be aware of it. In affidavit evidence, not according to you.

LK: Well, my wife has provided you, in her affidavit, has provided examples with legitimate transactions. And a legitimate transaction is where you identify the method of deposit

Judge: In 14 and 13

Bank Lawyer: Your honour I don't mean to interrupt. My suggestion is that the entirety of Mrs. Kakoutis's affidavit in this motion -she's not competent to give evidence on this.

Judge: Well you will get your chance to try and make your argument.

Bank Lawyer: If we're going to belabor the affidavit that shouldn't be before the court to begin with.

Judge: Then you should have said that at the beginning, this affidavit is improperly in front of you. And you didn't. So sit down please, the Plaintiff needs to continue. You will get your chance. And in fact, I wonder if this should have been part of your argument in the first place. The Plaintiff's affidavit is inadmissible.

LK: Your honour, if you look at exhibit E

Judge: Exhibit what?

LK: E

Judge: B as in Bob?

LK: E, I'm sorry.

Judge: Yes, I have it.

LK: That's a legitimate transaction. It's difficult to make a mistake because you identify every step that you do by what you do. Cash given, American Express, cash received. The transaction that the teller did, is essentially, as I said, it's like running a red light. You can do that by accident. And I will tell you that I have spoken to many tellers and so has my wife

Judge: No, you've not spoken to tellers, I'm not hearing tellers

LK: Okay, and exhibit F is another legitimate transaction. Coin given, payment, coin received, so you don't have to think. You don't have to think to do these transactions, that's why, and it's this interaction that I am talking about, identification, insertion -the machine, terminal. All these 3 items interact to produce this receipt,

Judge: Okay

LK: So it's really foolproof.

Judge: Okay and you didn't get a receipt?

LK: I did get a receipt, and the receipt that I got is G. And this is what she did. She did a deposit without identifying what the deposit was.

Judge: mm

LK: And then she has a withdrawal. That is illegitimate. Tellers are not allowed to do that. This is not a mistake. This is illegitimate.

Judge: How do you know it's illegitimate?

LK: What?

Judge: How do you know it's illegitimate?

LK: Because they're supposed to identify what they get. They're not supposed to -this is an infraction. This is running a red light.

Judge: Okay. According to whom? Where does it say that the bank

LK: According to

Judge: Where's your evidence that says that

LK: Well she's showing you, what she's doing is showing you a legitimate transaction and she's showing you an illegitimate transaction.

Judge: You need evidence that shows that I know that this is the practice that the tellers always follow and I know it because of whatever

LK: Absolutely

Judge: Where does it say that a teller is required by Bank policy to identify whether its cash, cheque, bitcoins, coupons -where does it say that? Where's the evidence?

LK: The evidence your honour is, if you do it this way, there's nothing registered. It's essentially illegal It's like if you want to get away with

Judge: Oh, okay, alright. So the only evidence you have is your wifes evidence.

LK: No, it isn't only my wifes evidence, as I said, we gave cash, and why would anybody stamp a bill? I mean everybody knows, we've been paying bills all our lives and am I going to forget, and you know, my wife knew that I was going to pay this by cash because we relied on my mother to give us, we didn't have the money, we were struggling because we have two daughters in university. So we had to get the money from my mother. You think we'd forget that? But anyways, I can go on and on but I want to show you a few things on

the surveillance video.

Judge: Okay

LK: And just while we're doing this your honour, a point well taken that you know, whether we gave cash or not, my friend says that we instructed her to take it out of our bank account, and you know, it's entirely their fault that payment is in breach so we did not do anything, because frankly, I really get a little bit offended when people suggest that I'm trying to blame the teller for stealing my money because I really don't care. You know that's not my job. And I don't know where they get it. I've never spoken to this teller, I've never bothered her, I'm not the type to harrass, if she stole it, I really don't care. It's the Bank that's supposed to protect my money. And that's where I'm coming from. It's the Bank that's supposed to follow our instructions ...we're a client your honour and if you look at the affidavit of Daryl Weddum, and the way he tries to attack the credibility of my wife, I suggest to you that he didn't touch her credibility, and I suggest to you that nobody can touch her credibility -but his credibility? He doesn't even know what the primary purpose of a pin machine is. So if he has any credibility, my God, where is it? You find it and show me, but I'll show you the video as well.

When you saw the video your honour, according to the Supreme court, you can't really analyze it unless you watch it frame by frame. Look at the first frame. I wonder if you could tell me where I am? Keep looking. Let's go fast because you don't have too much time. You still can't see me. Am I at the front door? Am I walking in? Where am I? The reason I am saying 'where am I' is because this is going to go on for 25 per cent of the whole video. Twenty five percent of the video they're playing where am I. Where do I appear? Not yet? There are only about 370 frames, that's 25 percent of the video already. Something very interesting that you see, is there a side door at the Bank, no I don't think there is a side door.

When you walk in the front door of the Bank your honour.

Bank Lawyer: This is evidence that wasn't supposed to be before the court.

LK: No, this is just the Bank.

Judge: I cannot receive today any new evidence.

LK: I won't use this then your honour, I apologize, I didn't think that a video of me walking into the Bank was an issue.

Judge: I don't know, the other side is objecting, so

LK: Okay, so I'll go back to the video then.

Judge: Yeah

LK: Here we go. When you walk into the Bank you walk in through the front door, and you follow the arrows.

Bank Lawyer: (Inaudible objection)

LK: No it's not, I'm using your video and I'm just analyzing it.

Judge: I don't see any doors, I cannot consider this. If you wanted to put that in your affidavit you should of put it in your affidavit. I cannot consider where the door is, there's no evidence of that.

LK: Alright your honour, well anyways, the red arrow is evidence, in most Banks it's (more or less) aligned with the door and in this case as well, so the red arrow is evidence of where you're supposed to enter, and when you get to this point (red arrow facing teller) you turn and you face the teller, and according to this video, I'm still not visible. but, - there I am. According to a routine entry into the Bank, my feet at this point should be right there. (red arrow facing teller). Now, that's over 8 feet from the 'side entrance'. According to this video, there must be a side door or something, I don't know, but I just sneak in. I just sneak in like that. And these images are mirror images of when I leave. Now if you notice, this video ends, it's incomplete. Because it ends, and this is why I asked my friend, in my affidavit I said, send me a complete video. It ends when I'm in a position approximately there, abit more to the left. The frame that's missing when I am leaving is this one right here (mirror image of entry frame).

There are a lot of flaws in this video, it is incomplete and if you look at the affidavits (self-serving mirror affidavits) where they describe what happens in the video, what you see in the video, I do 2 separate transactions. Whenever I pay a bill, and I just want to show you my 3-step process,

Judge: Wait a minute, is this in your affidavit? Where is it?

LK: No, this is in the video.

Judge: Don't tell me what you're doing. I can just look at the video.

LK: Okay

Judge: You don't have to explain to me.

LK: In this part here, I put the bill on the counter, and this part here where I put my hand in my pocket, now it goes very fast, but this part where I am taking something out of my wallet, it's not the pin card, we know that because I pull the pin card later. And as I habitually take something out of my wallet here, I put it on the counter and that was a bit too fast, that motion is a little bit too jerky, I'm putting something on the counter which is probably money, but you won't find anything in the Bank affidavits about these frames right here. They miss this part completely. And I suggest to you that's not appropriate. They miss this part completely. They don't talk about this in the affidavit. And here, I'm pushing the money towards the teller as I always do, because that's what I always do, and you will know that because you will see me do the same thing when I give the teller the pin card. That part they talk about in their affidavit, but this part, nothing. I wonder why?

This video has not been authenticated. They suggest, which is a ludicrous stretch of the imagination, he is no authority, no technical knowledge and he says, oh guess what, it wasn't altered since last time I saw it. Well whoopee do!

Judge: That's what is called cross-examination. You had the right to cross-examine him and you needed to do that before appearing here today.

LK: Exactly I have the right to cross-examine.

Judge: You had the right, you had to do that before appearing here today.

LK: Well your honour, regardless, it's right before your eyes there. And if you don't want to accept it there's not much I can do. There's not much I can do if you are going to deny me the opportunity to do what the Supreme Court suggests is appropriate to get to the bottom of things and I don't think there is anything wrong with me showing you that there is a huge disparity, huge, huge disparity between what you're seeing here and what the Bank Manager and the teller testify to. The Supreme Court of Canada says you can't just press a button and look at video and come to any rational decision as to what happened, you have to examine it frame by frame and that's not what my friend has done.

The reason that it's important that I can talk about each frame, I was there. I can authenticate these frames. I can tell you, and that's the law,

Judge: You have had the opportunity to present affidavit evidence, it's right in front of me, that's what I have to go by. You are not permitted, at this stage, I won't say this again. You cannot give me new evidence until such time as I make a decision that I will hear new evidence. I'm not there yet.

LK: Your honour, the evidence is pretty clear that we did everything in our power to make sure this bill was paid. Even according to their own testimony. They indicate that we asked the teller to apply payment to our scotialine line of credit using funds from our deposit account. That wasn't done so it's one thing to make an error and another thing, you know, not to follow a clients instructions.

Judge: Okay, so they made the error so what are the repercussions of the error? As far as you're concerned. What are your damages? Because that was not your only default.

LK: Your honour, that 1188 dollar payment was for 2 payments.

Judge: Okay.

LK: And you're suggesting that's a default? No it doesn't work that way. You gotta apply the payment before you can pay the next one. You know, every contract, your honour, and I'm relying on contract law. Every contract contains what is called an implied covenant of good faith.

Judge: Okay.

LK: And fair dealing where neither party will do anything to injure the right of the other to receive the benefits of the agreement. That's the law and when one party to a contract fails to carry out his or her obligation, this party is said to be in breach of contract. This breach frees the other party from his or her obligation. There is no requirement on one party to continue the contract when the other party is clearly not going to fulfill the obligation.

The primary remedy for breach of contract is damages, the object of which is to put the victim of the breach into the position they would have been in had the contract been performed. The purpose of damages is to compensate for loss caused by the breach. What can we recover as a result of the breach?

My friend suggests 1188 dollars.

We can recover any interest charges we have incurred as a result of the breach?

We can recover expenditures which have been incurred as a result of the breach?

We can recover for loss of enjoyment and mental distress?

In this particular case, where our ability to manage our property was entirely strangled by the actions of the Bank, the amount of money that is necessary to restore us to the position before the breach occurred is a direct cause of the hardship that the Bank of Nova Scotia has imposed. We are merely suing to recover damages required to survive the breach because the Bank has created a situation where we have

no choice but to manage our finances without the cooperation of the Bank.

That is our option today because the Bank will not negotiate. They will not negotiate they want to dictate.

The tort principle involved is to assess damages by restoring, so far as is possible, the position of the injured party to the position before the damage occurred.

Where were we before this occurred?

We were in a position to manage and to use our property which is valued at one million dollars, to finance our extraordinary, financial needs. Having two daughters in university, expenses which include tuition, housing, books, food, art supplies, medical expenses, etcetera, amount to about 50 thousand dollars a year.

When the Bank breached its contractual obligation to us, it derailed the opportunity to use our property to manage our finances and it placed everything at risk. Instead of being able to rely on the low interest rates that refinancing our home would allow to meet our extraordinary financial obligations, we were forced to rely upon credit card interest rates to meet our needs and it didn't take long for high interest rates to foreclose on that type of borrowing as well because when monthly credit cards exceed available credit bankruptcy is not far away.

Clearly when I am forced to pay interest rates of 24.99 percent on my visa because of their breach, the financial crisis that the Bank created is not difficult to foresee. The opportunities denied are very clear and if you turn to Tab 3 your honour of the Bank's Motion Material, paragraph 7 of Daryl Weddum's sworn affidavit, "the charge secured the principal sum of \$680,000 and incorporated by reference Standard Charge Terms 200706. As is typical with secured revolving credit facilities, the charge was registered for an amount approximately equal to the full market value of the Property, to accommodate possible future increases in the credit limits of the Mortgage Loan and/or the Scotialine." That is the opportunity that the Bank denied us. We were planning to use, to expand our credit, to be able to our extraordinary financial needs at this time to get our girls through university.

Judge: Okay, we're going to take our afternoon break and at this point you have 15 minutes left in your argument, okay?

LK: Alright.

Judge: We'll come back in 15 minutes

ORDER, ALL RISE

COURT IS RESUMED, PLEASE BE SEATED

Judge: And now I have the Banks factum. And you referred to it. I had it in my hand and now it's magically disappeared. I cannot leave today without a copy of that factum.

Bank Lawyer: I would suggest your honour that we just remove the tabs and make a copy.

Judge: I know, I'm just trying to find it, it's just annoying. I know it was here. I don't understand what I possibly could have done with it. You're saying it's in paragraph Tab 3 and there's no Tab in there. I just don't understand. Okay, so let's permit you to finish the argument so that we can at least get through the argument today and we'll then adjourn so you now have 15 minutes to finish and then I'll

LK: Alright, your honour, with respect to the surveillance evidence, the Bank hasn't fulfilled its discovery obligation because it isn't sufficient to simply press play on the surveillance video and expect that the judge or jury to fully understand what they are seeing. In R. v. Nikolovski the Supreme Court of Canada recognized and endorsed the analysis of video evidence at the image by image level, clearly accepting that merely playing video evidence will not maximize the value of such evidence.

Judge: In order to refer to a case you need to give me a copy of it.

Bank Lawyer: I don't have a copy of that case either.

LK: I don't have a copy of the case, your honour, I just have the

reference.

Bank Lawyer: That's not good enough. I need a copy of the case.

LK: Okay, but anyways.

Judge: What you're gonna do, you're going to give me a copy for next time.

LK: Yeah, but beyond that your honour, I can give you one for sure, but beyond that

Judge: I'm not going to consider it if you don't get me a copy.

LK: Absolutely

Judge: You need to give one to the other side, so what's the name of the case?

LK: R. v. Nikolovski the Supreme Court of Canada clearly accepting that merely playing video evidence will not maximize the value of such evidence.

Judge: Is there a reference to that in your factum?

LK: I'm not sure...

Judge: Okay, so you undertake to bring one next time.

LK: oh yeah, absolutely

Judge: Otherwise I'm not going to consider it.

LK: But your honour, I must say that even under common law, and the rules of evidence are the same as far as authenticating video evidence so it's pretty consistent. And there's a famous case in the US, are those appropriate?

Judge: You have to give me

LK: I know, I can get it but will you accept it?

Judge: I'm not going to be taking a large

LK: oh, okay. Anyways, it's pretty well accepted that video evidence must be authenticated in order to gain admissibility in court... it's fairly standard because it's very easy to manipulate these things, and it's well accepted if you don't have end-to-end authentication -it's just a bunch of frames that you can put out of sequence and this is especially true if its incomplete as this one is. It's clear that it's incomplete and it's numbered from (frame) 1 to (frame) 362... I don't understand how a surveillance video starts at number one, what's the one before, negative one...

Judge: You've made your point. I'm going to hold you to your time.

LK: Just a couple more points. Your honour, in carrying out a customer's instructions, a banker acts under the mandate of the customer. And a banker who fails to exercise care in exercising a customers legitimate mandate, which is we go to get our bill paid, and I've been doing that for 50 years, well not that long, maybe 45, if the Bank does not follow the mandate it's liable for breach of contract and your honour if you look at my evidence, I mean it's stamped. Every Bank Manager accepted it except for Mr. Weddum and I'd like to ask him under oath why he doesn't. Why is he the only one? I'm not kidding you when I say I can walk into any branch in any Bank anywhere in Canada, I can't anymore because they issued a trespassing threat -the more I try to learn, the more they want to get me out of there. But before they issued a trespassing threat, I can't go anywhere now, I could walk into any branch of the Bank of Nova Scotia, talk to the manager, and he said, that's good enough. The stank is evidence of payment, what else do you want? And everybody who looks at that except the gentleman I was expecting to cross-examine today will tell you that's more than sufficient. And so I don't understand why that is not evidence, the only thing I can derive from this is that I'm dealing with a Bank that thinks that it's above the law. And I say that because they issued a foreclosure notice which is illegitimate. And my wife and I, you know, we didn't know it was illegitimate but on October 17, 2014, when the hearing was supposed to be last, I went to probono, talked to a lawyer and they said, you

know, they can't do that. It's one or the other. So we were living in fear that somebody was going to knock on our door and take our house away... the lawyer told me and I looked it up (on the Internet).

"Can. Permanent Trust Co. v. Welton Ltd., [1973] 2.O.R. 245, 33 D.L.R. (3d.) 417 (H.C.) Where an action is commenced for possession and for payments due under the mortgage, the plaintiff may not exercise the power of sale contained in the mortgage."

And if you look at their evidence. How can a Bank -it's their exhibit. They're putting, in their exhibit, evidence that they think they're above the law. And the think that makes that so, so, so disturbing is because it makes me fearful that we're not going to get the access to justice that we deserve under the Hryniak case. Because the Bank is flouting the law and nobody is doing anything about it -lawyers know, you know, he knows, did you know? -that it's illegal. I don't know if he knew. Maybe he doesn't know. But I know now. And it's disturbing to me that I have all the evidence in the world and frankly to suggest that anybody can walk into a Bank with 1188 dollars cash and be mistaken about it, I think that's rather preposterous. And my friend is making a big deal out of the fact that I didn't testify under oath -well you know what, maybe it doesn't matter. Maybe it doesn't matter because she says I told her to take it out of our account, so what does it matter if it was cash or not? She didn't follow our instructions...

Judge: You've got six minutes left.

LK: (the following passages are from Plaintiffs notes -tape is inaudible)
The core activity of Banks is very simple. They collect deposits and issue loans. Both banks and insurers are financial intermediaries, and in that respect, the services they provide, which is why we're in hot water, are potentially the lifeblood of an individual's capacity to manage every aspect of his or her life.

To us who relied on our residential mortgage to financially manage our necessities, a mortgage is clearly a 'peace of mind contract' it is not strictly a commercial agreement, and any suggestion to the contrary is quite extraordinary.

Peace of mind has nothing to do with the terms of any contract, it is

simply a function of how we use our property and our money and the burden that has been created by that inappropriate denial.

The purpose of our mortgage is defined by our needs and that is what makes our mortgage a peace of mind contract.

We need to borrow money to provide financial security and the ability to afford a home, and that is what makes the Banks' breach far more serious and consequential.

I don't know if the issue at hand has ever been addressed by the courts because Banks have rarely been brought to task to account for their negligence, but that does not mean that the Bank of Nova Scotia has the right to evict my family through their illegal demands.

Consequently, if this case produces a precedent to control the Bank's efforts to abuse the process, it's about time.

In the meantime, I have to cope with being repeatedly awakened by a wife who tosses and turns in bed, because her peace of mind has been destroyed by THE ILLEGAL AND abusive DEMANDS OF THE Bank. I have to take medication to try to avoid blowing a fuse and I have to listen to a Bank which insists that a residential mortgage is not a peace of mind contract.

I don't know which of the above is more stressful. (end of note transcription)

(back to tape)

LK: We contracted with the Bank in good faith and what do they do? You know, on October 18, 2002, I approached the Bank and I tried to negotiate a resolution with them. You know, let's solve this thing. And they continued to refuse to acknowledge our February 22nd payment. You know, I mean, I can't afford to pay it twice. And instead of cooperating with us to resolve the dispute in a contractually legitimate manner, the Bank indiscriminantly withdrew \$1700 from our account, and left us with a balance of 61 dollars. They just took it. Because they're the Bank. And as far as we are concerned this was an illegal withdrawal. Because they're the ones who breached the contract and the money that was earmarked for our monthly mortgage, didn't go

through on November 1st because it was taken away. But, on November 9, the very day that a payroll deposit of \$2687.84 was made, they took that out.

Judge: Your time is up now.

LK: Okay. So what I am sayin is that when they are indiscriminantly raiding our account and the rent cheque of my daughters bounces, and I have to borrow money and drive to Kingston to pay her landlord, and this is all illegal, this is all illegal because they are the ones who breached their contractual obligation. And once it's breached.

Judge: I've heard this argument.

LK: Okay

Judge: That's your basis for your other case. It's that they made a mistake....

LK: Well, your honour, that's true.

Judge: Alright now, I started from the very beginning, I asked you how much time you needed.

LK: Okay, sorry your honour.

Judge: Alright

Bank Lawyer: (inaudible)

Judge: ...to figure out the factum, and I also want to know we have enough time to finish your argument. You will do your reply next time. When we come back, he will have his reply to your argument, that's the first motion, okay. We will go straight into the second motion. Which is their motion for judgment against you. He again has the burden of proof. He's going to go first, you're going second, he's going last. Okay? That's what we're going to do when we come next time. If your wife is able to attend, she may make submissions but it's gotta come out of your half of your time. Okay? And in the meantime there is nothing at all to stop both of you from trying to resolve -trying to come

to some agreement, I know you've tried talking before but you will not get a decision until at least I hear it on January 22nd and it is highly unlikely you will get it that day, because I'll obviously be hearing you guys all day, so, it will come whenever it comes after that. So it's in both of your interests to try to resolve this. So I'm just saying that to both of you.

Bank Lawyer: Your honour, could I just add. You said that the burden of proof is on the Bank. I just remind your honour the Plaintiffs have brought a cross-order for judgment on their claim. So there are competing motions.

Judge: Oh, wait, just a second, I'm confused. Oh that's right, they brought a motion. I thought it was you that brought the motion.

Bank: I brought a motion to dismiss

Judge: You brought a motion for summary judgment?

Bank Lawyer: Yes he did.

LK: Cross-motion

Bank Lawyer: He brought a cross-motion for summary judgment.

Judge: You brought a cross-motion

LK: Yeah

Judge: You brought a motion for judgment on your claim, okay I get it.

Bank Lawyer: So there are competing motions for judgment.

Judge: I'm wrong, you have the burden of proof. Okay so what we have just done then, right now, is wrong.

LK: What we've done.

Judge: Because you, I thought it was your motion to begin with.

Bank Lawyer: It was my motion, initially, it was and he responded with a cross-motion for summary judgment on his claim.

LK: Yeah, that's why I was so worried.

Bank Lawyer: Competing motions.

LK: I was afraid that I would not get a chance.

Judge: It's okay, it's okay, it's okay

LK: I would agree with your honour that the burden is on the Bank but it is equally on the Plaintiffs as well.

Judge: That's right, I apologize, so there's four motions.

LK: So I was scared.

Judge: There's four motions. There's not only 2. There's 4, excuse me. Get your money's worth. Okay. You have the motion to dismiss his claim. You have a motion, that's right. To grant judgment on your claim. You're both saying, we don't have to go to trial. You can make the decision based on the paper record. That's what you're both saying.

LK: Well your honour

Judge: I'M NOT GETTING INTO THIS! No more submissions. I know you're saying you have the right to call evidence. That's fine. That's gonna be in there. And I apologize. I did realize that but I forgot about it. But this makes this case ever so much more complicated and inappropriate. But we will deal with it and it will take however long to deal with it. We may have to schedule more time. Because now we have your argument that it should be dismissed. So he now needs a chance to present. He's arguing that it shouldn't be dismissed. (laughs) So I see what you're saying now.

Bank Lawyer: I imagine that the arguments will be substantially the same. I mean he's basically argued the merits of his case.

Judge: Yeah, except that you got a chance to reply. Which isn't fair.

Bank Lawyer: But I haven't had a chance to reply.

Judge: Well, you're about to. And what I'm going to do, I'm going to give you, after he replies I'm going to give you a chance to reply as well. Okay? Because each one of you has the burden of proof on your own motion. See what's going on here is extremely unusual. Parties normally, normally will go to trial. And you've both decided to do motions for summary judgment which are basically, it's like doing 2 trials together, you're basically doing 4 trials. All at the same time. So, to repeat, what we have accomplished today, is we have heard the Banks argument in chief on their motion to dismiss your action. We have heard your answer to that motion, the Bank now has a 20 minute reply, to your argument, but because you have a motion to dismiss, to get judgment, where you want the court to order that they pay you, and the burden of proof is on you, you are going to get the last word after he's finished, you're gonna get more time, because he had an hour, you only had forty minutes, I'm giving you a twenty minute right of reply. So you follow that?

Bank Lawyer: So when we come back, when we adjourne, on January 22nd, I'll give my 20 minute reply, to what Mr. Kakoutis just said today,

Judge: Yes, and he gets a right of reply to your reply.

Bank Lawyer: And then we will proceed

Judge: And then that takes care of your action. Then we'll start the whole thing, and he's got a cross-motion on the counter-claim as well?

Bank Lawyer: He wants to dismiss the counter-claim.

Judge: That's ridiculous. Uhm. We're going to do, repeat the same procedure and in fact what we're going to have to do when we do this next time is we're probably going to have to schedule more time as well. And we don't have time to do that today because everybody will be gone. Unless. Madame registrar.

Madame Registrar. uhum

Judge: Can you see whether, what I'd like to know is whether I can extend the date of January 22nd, to include the 23rd. The answer is probably no.

Bank Lawyer: I know that one of my two, will we still require the witnesses to attend on that day.

Judge: Oh no, no, no, we're at step number 1.

Bank Lawyer: Okay. But it's just that your honour had said that these witnesses would need to attend on the 22nd.

Judge: That was before I understood what was going on.

Madame Registrar: Are you able to help Justice Pollak. Eric scheduled a one day motion to continue before herself on January the 22nd. She's now reviewing the schedules of the parties and requires the 22nd and the 23rd....

Judge: Oh Madame registrar, I'll have to deal with it next time if Eric is gone, is he gone?

Madame Registrar: He's gone for the day.

Judge: Okay, we can't do it, say thank you and we'll figure it out.

Madame Registrar: So is Bosco around?

Judge: Bosco can't do it either.

LK: Your honour what about additional evidence. Can I file the authority that I cited and stuff like that.

Judge: That's not evidence. I definitely want you to file that. Absolutely.

LK: So I can file authorities.

Judge: Yes. I need your factum. You have it? Can you go copy while I finish this stuff? I have to do an endorsement. Just make one copy for

the court and then come right back. I'm gonna endorse the record.

LK: Your honour, I don't understand how I deal with, maybe it's a silly question but illegalities

Judge: This is, I'm sorry

LK: I'm sorry.

Judge: This is very difficult because it's 4 motions.

LK: I'm abit confused,

Judge: Have been scheduled together.

LK: I'm abit confused, I though there were 2 motions.

Bank Lawyer: For judgment on dismissing the claim and for judgment on the counter-claim, I count them as one motion.

Judge: Why does Justice Firestone say there's two?

Bank Lawyer: I believe he is referring to Mr. Kakoutis's dual cross-motion.

LK: I thought it was one for you and one for me.

Bank Lawyer: That's how I understand it too. I don't understand the two seperate motions.

Judge: Alright, what I'm adjourning, we will continue on January the 22nd, it's scheduled for a full day, it starts at 10 o'clock, we finish at four thirty. At that time, I'm probably going to schedule one more time. We are not hearing any further evidence on that day. Because I have to make a decision as to whether or not I can give you a decision just based on the paper, because that's the way it works.

LK: Your honour, can I file a new motion to incorporate the Hryniak case.

Judge: You don't have to do that now. Hryniak is the law. What I'm doing is exactly what Hryniak says to do.

LK: Okay your honour.

Judge: I'm bound by Hryniak. And it's the Supreme Court of Canada and trust me I will follow it. That is why I went into this whole thing in the first place.

LK: Great, thank you your honour, that's

Judge: I am definitely bound by the Supreme Court of Canada and I will follow

LK: Well thank you that's reassuring to me now because I was kind of scared that I wouldn't get a chance to

Judge: That doesn't mean that I agree that you will

LK: No, no, no, I know you don't agree but

Judge: I didn't say I didn't agree, I just have to make a decision and I can't make a decision until I hear the case.

LK: Okay your honour, thank you.

Judge: Alright, so you will get a copy of this endorsement, oh, and you have to confirm. I'm going to put the onus on you. And if you don't confirm it you will miss the date and it will be gone. Okay? And confirm it for a day, no lesser.

Bank Lawyer: Three days before. Shall I advice Michelle Chen, you know, there's a protocol for advising to confirm a long motion your honour.

Judge: Absolutely, it's a long motion.

Judge: So I said adjourned to January 22nd, 2015, for one day to permit continuation of the hearing of these motions. I am seized as such of this motion which means that I have to hear it okay? Madame

registrar, I'm going to get the deputy to make a whole pile of copies I need to send out and a copy for Michelle and I need copies for my assistant and I'm keeping the file. Okay, so I think we're done for the day, and if you come to the back I'll give your factum. I'm sure you can get this matter resolved way faster by talking to each other. This is not going fast

LK: Well your honour, I tried but the Bank doesn't talk, they dictate. I mean I've tried

Judge: Whatever, I can't force you to talk.

LK: Like I said, we've been trying to talk for over a year now.

Judge: And do not forget, it is open for me to decide that you should be going to trial. So don't forget that either. You're spending an awful lot of time and money and if you can't make a decision you're going to have to go to trial. Take my warnings. Try to talk.

LK: I've been trying, but they don't talk, they dictate.

Judge: You know to talk you have to be receptive. So everybody's clear on what we're doing when we come back? You're replying. 20 minutes. You can have 20 minutes after he goes. He's saying, he's replying to the argument that I should dismiss your claim. You're going to be replying to his argument saying no, no, no. , don't dismiss his claim. You should grant me judgement in the amount, blah, blah, blah. Okay, burden of proof that I should give you judgement is on you. Burden of proof that I should dismiss your claim is on him. If I say you're both going to trial, the burden of proof will be on both of you when you get to trial in front of the trial judge. Okay?

LK: Yes your honour.

Judge: Thank you

ORDER ALL RISE

**GIVE A MAN
A GUN AND HE
CAN ROB A BANK,**



**GIVE A MAN A
BANK AND
HE CAN ROB
THE WORLD**

