COURT OF APPEAL FOR YUKON

Citation: *Sabo v. Canada (Attorney General)*, 2013 YKCA 2

Date: 20130206
Docket: YU676

Between:

Daniel Sabo

Appellant
(Plaintiff)

And

Attorney General of Canada, Marcel Clement, Richard Herd, Gina LeCheminant, Cpl. Dan Parlee, Charles F. Roots, Bill Schneck, and John Wood

Respondents
(Defendants)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson
The Honourable Mr. Justice Harris

On appeal from: Supreme Court of Yukon, April 13, 2011
(*Sabo v. Canada (Attorney General),* 2011 YKSC 34,
Whitehorse Registry 01-A0226)

The Appellant appeared in person

Counsel for the Respondent: Alexander Benitah

Place and Date of Hearing: Whitehorse, Yukon
November 5, 2012

Place and Date of Judgment: Vancouver, British Columbia
February 6, 2013

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] In May 1999, Mr. Sabo provided a rock that he believed to be a meteorite to the Geological Survey of Canada (the "GSC") for examination. His case at trial was centred on a claim that the employees of the GSC breached an agreement stipulating what investigations of the "meteorite" they were authorized to undertake by removing more material from it than was permitted. They then did not return the original "meteorite" to him. Rather, he contended, they fraudulently substituted the original "meteorite" with a man-made replica.

[2] Mr. Sabo believed his "meteorite" had great commercial value, in part because of formations growing on it that were, he was convinced, extraterrestrial life forms and therefore the actions of the GSC deprived him of an opportunity to discover and realize its true value.

[3] In his action, Mr. Sabo named many of the individuals with whom he dealt. He alleged a variety of causes of action including conspiracy, fraud, breach of trust, misfeasance and breach of contract.

[4] He also brought into the action an RCMP officer, Cpl. Parlee, claiming that he had not properly investigated Mr. Sabo's allegations against the GSC employees and thereby assisted them in their conspiracy. As well, a Mr. Schneck, who is a metallurgical expert, became a defendant because he allegedly destroyed or altered evidence or committed a breach of trust, and also participated in the conspiracy.

[5] The trial judge, reasons indexed at 2011 YKSC 34, dismissed Mr. Sabo's action in all respects except one. He found that the GSC had, for some years, wrongfully retained possession of a small piece of the "meteorite" (the "off-cut") which had been removed for testing to determine whether it was, in fact, a meteorite. The judge did not, however, award any damages, nominal or otherwise, arising from this legal wrong.

[6] In dismissing the balance of Mr. Sabo's action the trial judge made two critical findings of fact. First, that in August 1999, the GSC returned to Mr. Sabo what it had received from him (minus the off-cut). It did not return, as Mr. Sabo had alleged, a replica of the "meteorite". Second, that the "meteorite" had not had extraterrestrial life forms growing or living on it. He concluded that whatever accounted for the green colourations on the surface of the "meteorite" were terrestrial in origin. These findings were the critical findings of fact underlying the dismissal of the various other claims advanced by Mr. Sabo against the GSC and its employees. The trial judge also found, based on his findings of fact, no merit in the case against either Cpl. Parlee or Mr. Schneck.

[7] Mr. Sabo appeals the dismissal of his action. At the heart of his appeal is an argument that the trial judge misapprehended or did not consider critical evidence. Accordingly, the trial judge committed palpable and overriding errors in making the findings of fact that underlie the result. During the course of the hearing, Mr. Sabo focused particularly on several pieces of evidence he described as "smoking guns" which he submitted were completely ignored by the trial judge. The thrust of his appeal does not depend on alleging that the trial judge made other errors of law.

[8] For the reasons that follow I would allow the appeal, but only to the extent of awarding Mr. Sabo nominal damages arising from the GSC wrongfully maintaining possession of the off-cut. I would not accede to any of the other grounds of appeal advanced. In particular, I am satisfied that the facts found by the trial judge, and which were sufficient to lead to the dismissal of all of the other claims, were supported by the evidence.

Background

[9] In 1986, Mr. Sabo discovered what he came to believe was a small meteorite. He found it near Mayo, Yukon. In 1987, he had the "meteorite" assayed, received a report that described it as a meteorite, and there for some years the matter stood.

[10] As the trial judge observed, no special arrangements were taken to protect the "meteorite". In 1997-98, Mr. Sabo took the "meteorite" to the United States, where his parents lived, but returned to the Yukon with it. After his return, it sat on a windowsill in his cabin. Mr. Sabo noticed that green formations developed in a seam of the "meteorite". There is no dispute that the "meteorite" did develop a green colouration. The only material dispute about the green colouration is whether its origin was extraterrestrial, as Mr. Sabo contended, or terrestrial.

[11] In September 1998, Mr. Sabo allowed a business acquaintance to take the "meteorite" into the United States, to have it sold without an export permit. At some point after September 1998, the "meteorite" was in his parent's possession in New Mexico. In any event, Mr. Sabo did not see the "meteorite", or have it in his own possession, until late August 1999, after it had been returned to him by the GSC.

[12] The trial judge noted that there was no evidence about who inspected or handled the "meteorite" or what sampling tests might have been performed on it prior to it being transmitted to the GSC in 1999. In any event, Mr. Sabo made arrangements to have a friend collect the "meteorite" and deliver it to the GSC in the spring of 1999. The evidence of that friend is that the green colouration was still on the "meteorite" and there are photographs of the "meteorite" that show its condition before it was sent to the GSC.

[13] Dr. Roots, of the GSC in the Yukon, received the "meteorite" in May 1999, with instructions from Mr. Sabo to deliver it to the GSC in Ottawa, which he did. It arrived in Ottawa on May 17, 1999 and a Dr. Herd accepted it, but did not do any invasive or destructive testing of it until Mr. Sabo gave his consent. Mr. Sabo initially refused, but subsequently consented to allow Dr. Herd to remove an off-cut of the "meteorite" for additional testing in late July 1999.

[14] Dr. Herd authorized the polishing of the cut surface of the "meteorite" to allow for further analysis and to restore its aesthetic appearance.

[15] Mr. Sabo became unhappy with the GSC and demanded the “meteorite’s” return. The “meteorite” was then returned to Mr. Sabo, minus the off-cut, along with a comprehensive report, which indicated that more sophisticated testing was required to determine whether the “meteorite” was, in fact, a meteorite.

[16] When Mr. Sabo received the “meteorite” he noted two things: first, he believed it weighed significantly less than it had when sent to the GSC, even taking account of the off-cut that the GSC had kept, and second, the green colouration had disappeared. He contacted the RCMP to investigate the missing weight and the missing “extraterrestrial life form” on the “meteorite”. Cpl. Parlee contacted Dr. Roots and the GSC in Ottawa. After receiving information, Cpl. Parlee concluded that the chain of continuity to the “meteorite” had been disrupted to the point that it would be impossible to prove a reliable starting weight. He concluded the investigation.

[17] Mr. Sabo’s complaint evolved to the point that he concluded that the GSC had sent him a replica of his original “meteorite”, complete down to its geological structure, and that others were involved in this cover up. He decided to travel to Ottawa to confront the GSC himself. On Thursday, February 24, 2000, Mr. Sabo arrived, unannounced, and confronted Dr. Herd, demanding that the off-cut be returned to him along with any photographs take of it. The GSC agreed to give Mr. Sabo accurate reproductions of all photos and slides, and most of them were delivered to him the following day, Friday, with a promise that the remaining ones would be delivered on Monday. The reason that they were not all available is that Dr. Herd had felt so threatened during his meeting with Mr. Sabo that he did not attend work the next day.

[18] The following Monday, Mr. Sabo refused to enter the building as he claimed that he feared for his safety. He recorded his outdoor meeting with representatives of the GSC. The GSC, after hearing Mr. Sabo’s allegation that they had substituted the “meteorite”, refused to give him the off-cut, believing that a civil lawsuit was forthcoming and that the off-cut was their best proof that they had returned the

original “meteorite” to Mr. Sabo. The trial judge found as fact that Mr. Sabo, on that day, had cancelled any implied agreement permitting the off-cut to remain at the GSC in Ottawa. The trial judge concluded that the GSC had no legal authority to retain the off-cut from that date.

[19] After Mr. Sabo returned home with the “meteorite” he took a hacksaw to it and cut it into three smaller pieces, in an attempt to prove that the GSC had substituted his original “meteorite”. He sent portions of the “meteorite” for testing and analysis and eventually received a court order that led to the off-cut being sent on September 29, 2008 to Power Tech Labs Inc. for analysis.

The Trial Judgment

[20] Mr. Sabo represented himself at trial. The litigation started in January 2002 and was case managed for several years before the trial commenced in 2011. In that time Mr. Sabo was permitted to amend his statement of claim, prove some of his case by affidavit evidence, as well as have a non-resident judge try the case. Mr. Sabo was also permitted to present his closing arguments in writing.

[21] Mr. Sabo alleged that the GSC conspired to prevent him from realizing the full value of his discovery of a “meteorite” through the wrongful conduct of fraud, theft, breach of trust, misfeasance, breach of contract and abuse of office. Mr. Sabo further alleged that Cpl. Parlee either did not properly investigate his allegations against the GSC or that he assisted the GSC in a cover-up. Mr. Sabo also alleged that a Mr. Schneck, an expert Mr. Sabo engaged to do an independent analysis of the “meteorite”, destroyed evidence and participated in the cover-up.

[22] Mr. Sabo’s claim for relief included a demand for the return of the original “meteorite” with all of its parts as well as all photographs, slides and documents which relate to the “meteorite” and are in the possession of the GSC. Mr. Sabo also sought an order to have the “meteorite’s” true value assessed, or in the alternative, damages for economic loss in the amount of $12,150,000, based on the alleged starting weight of the “meteorite” (243 grams), valued at $50,000 US per gram. The

respondents denied any impropriety in their handling of the “meteorite”, and denied that they had substituted a replica for Mr. Sabo’s original “meteorite”.

[23] The factual underpinnings of the allegations include the assertions that the GSC had removed more material from the “meteorite” than Mr. Sabo had authorized, that the GSC replaced Mr. Sabo’s “meteorite” with a duplicate, that the GSC removed an extraterrestrial surface formation on the “meteorite”, that the GSC retained a portion of the “meteorite” without lawful reason, that Cpl. Parlee conducted an improper investigation, and finally, that Mr. Schneck made alterations to the “meteorite” while it was in his possession.

[24] The trial judge determined that Mr. Sabo’s claim was anchored in two key factual claims, namely whether the GSC had returned a replica of the original “meteorite” to Mr. Sabo and whether the “meteorite” had an extraterrestrial life form growing or living upon it.

[25] In brief, the trial judge found as a fact that the GSC returned what they had received (minus the off-cut) and not a replica, and that whatever the origin of the green formation on the “meteorite” it was of terrestrial, not extraterrestrial, origin. Further, the trial judge concluded that the GSC did not breach its agreement with Mr. Sabo about what tests they could perform on the meteorite.

[26] The trial judge heard from several expert witnesses, including a court-appointed expert and Mr. Sabo’s experts.

[27] To prove his theory that the GSC had substituted a replica, Mr. Sabo relied primarily on photographic evidence and the testimony of expert witnesses; none of whom opined that a replica had been substituted for the original “meteorite” or that the green formations were of extraterrestrial origin. The trial judge rejected Mr. Sabo’s claim that the government substituted his “meteorite” with a replica as unsupported by the evidence, and accepted the evidence of a court-appointed expert that the off-cut and Mr. Sabo’s sections of the “meteorite” were portions of the same original object. His reasons are as follows:

> [137] Therefore, the premise upon which Mr. Sabo bases his whole case, that the government substituted his meteorite (and its extraterrestrial passenger) for a replica is rejected in the strongest possible terms. It is simply not supported. Elementally, the original and its alleged duplicate have an indistinguishable elemental composition. Mr. Sabo's allegation that a sulphide containing part of the original "meteorite" has a different chemical composition than the alleged duplicate is also rejected. Dr. Kissin explained how that part of the rock can change when exposed to terrestrial conditions.
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> [138] Mr. Sabo's litigation approach has been to hire responsible labs and experts to create specific and isolated evidence. Mr. Schiefke, as an example, was to look at tool marks. ASL is another, as is Power Tech Labs. Power Tech took some photographs as did a Dr. Sidney Williams in Arizona and Microvision Northwest-Forensic Consulting Inc. All these experts have one thing in common; they were asked to create specific and isolated evidence. Not one of these credible agencies and professionals expressed the view that either that the GSC substituted Mr. Sabo's meteorite for some kind of duplicate, or that the meteorite Mr. Sabo recovered had an extraterrestrial life form growing on it. It is Mr. Sabo who attempts to provide the intuitive expertise to tie this hodgepodge of fragments together and reach two conclusions: a substitution took place, and there was an extraterrestrial life form growing on the meteorite. Bluntly, the technical data does not support this thesis. The court-appointed expert opinion is to the contrary.

[28] The tool mark expert, a Mr. Schiefke, for example, reviewed slides taken of sections of the "meteorite" at different times. He concluded that one slide showed tool marks on an area of the meteorite, but another slide, taken at a different time, did not. Mr. Schiefke could not determine the time the tool mark was made, and admitted that he had never interpreted a tool mark from an electron microscope photograph before. Mr. Sabo asked the trial judge to draw the conclusion that the tool marks supported his theory that a substitution took place. The trial judge rejected the inference he was asked to draw after a careful consideration of what inferences could be drawn from the evidence and other possible explanations for the observations made by the expert.

[29] The trial judge rejected the claim that the surface formation was any type of extraterrestrial life form. The only "evidence" to support this proposition came from Mr. Sabo himself, who, the trial judge noted, was not scientifically qualified to give such an opinion. The trial judge said:

> [146] The more probable, practical, and prudent observation is the simplest one that makes the most common sense. The green formation is a "made on earth" product of oxidation. Before a court could determine that the formation

> found on the meteorite was extraterrestrial in origin a credible professional expert would be required to give that evidence. Mr. Sabo's evidence was given sincerely; he honestly believes that it was an extraterrestrial life form which emerged from the crevasse on his meteorite.
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> [147] However, absent a certified and credible expert, and recognizing that over 10 years had gone by between the time that Mr. Sabo found the rock and noticed the growth, the more probable cause is that outlined by the Defendants. I recognize that the Defendants have self-interest in their position but their explanation is logical and accords with common-sense and science that is in the grasp of any grade 9 or 10 student in Canadian schools. Thus I conclude that it is more probable than not that the "colour bloom" was a common chemical reaction between the meteorite, composed mostly of iron and nickel but also other trace elements, and the oxygen in the air, heat and moisture. The other possible explanation is that it was lichen, a mundane organic and terrestrial organism. As neither the meteorite nor any of its parts, were introduced in evidence it is difficult to be any more precise on this point.
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> [148] These conclusions defeat the claims that involve substitution of the meteorite by some kind of duplicate, or suppression and/or removal of the alleged extraterrestrial life form.

[30] The trial judge did, however, find that the GSC had retained the off-cut without lawful excuse. The trial judge found as fact that on February 29, 2000, Mr. Sabo demanded the return of his off-cut and cancelled any implied agreement allowing the off-cut to remain in Ottawa for ongoing analysis. Further, that the GSC accepted that the off-cut was Mr. Sabo's property, and that their decision to retain the off-cut was for the sole purpose of trial evidence and out of fear of litigation. The trial judge concluded that "from February 29, 2000, to September 29, 2008, when the "off cut" was effectively returned to Mr. Sabo and transmitted with certain conditions by court order of Senior Judge Veale to Mr. Sabo's chosen testing laboratory, Power Tech Labs Inc., the GSC had no legal authority from the owner of the "off cut" to retain that object" (at para. 106).

[31] No damages were awarded, punitive, exemplary or otherwise, however, as the trial judge determined that despite the entire "meteorite" having a possible total value of perhaps $1,000 to $2,500, the off-cut was nearly valueless.

> [159] ... Irrespective of the value assigned to the meteorite, Mr. Sabo got it back (less the GSC "off cut") when he requested it, and therefore suffered no damage. He did not prove that the delay in its return (if any) cost him anything. His damage claim presupposes a meteorite substitution and a huge per gram value - neither were proven.

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> [162] Punitive and exemplary damages are not appropriate in this case because the error was made in good faith and with full and open communication to the RCMP that at the time when the RCMP still had a file although they were no longer pursuing the investigation. Shortly after the government retained the meteorite "off cut", litigation did start. From that point forward neither party saw fit to ask a court for any declaratory rulings concerning the GSC possession of the sample, until it much later became the subject of an application to the case management judge.
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> [163] "Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency." *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196, 126 D.L.R. (4th) 129. The GSC acted incorrectly, but its misconduct does not in any way approach the threshold standard. Thus, in my view this is not an appropriate case for punitive or exemplary damages.

[32] The trial judge also concluded that Cpl. Parlee conducted a reasonable investigation of Mr. Sabo's claims and that there was no evidence that he participated in any conspiracy. Likewise, he found there was no evidence capable of supporting a claim against Mr. Schneck and dismissed the action against him.

[33] The trial judge dismissed all causes of action against all of the defendants and held that Mr. Sabo had not proven on a balance of probabilities any of his claims, causes of action or heads of damage.

Issues on Appeal

[34] The appellant alleges that the trial judge made the following errors in judgment:

(a) in failing to conclude there was a breach of the oral agreement between the appellant and the GSC;

(b) in failing to conclude that Cpl. Parlee did not act reasonably in the discharge of his duties in the investigation;

(c) in failing to conclude that damages could flow from a successful claim in detinue;

(d) in failing to conclude that the "meteorite" returned to the appellant was the one originally provided to the GSC;

(e) in conducting the trial in such a way that gives rise to partiality; and

(f) in failing to provide adequate reasons for judgment concerning the critical issue of the missing formations.

[35] In my analysis, I have reorganized the issues somewhat treating the allegation about the substitution of the "meteorite" as an aspect of the breach of contract claim. If no error has been demonstrated in the findings of fact on that question, then Mr. Sabo's claims fall away, whether they sound in contract or fraud.

Analysis

[36] The basis of most of the appellant's allegations of error concern findings of fact made by the trial judge. The standard of review for findings of fact is whether they are based on a "palpable and overriding error". This standard of review requires a high degree of deference to the trier of fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 10. Fact finding includes credibility assessments, the weighing of competing evidence and drawing inferences from the facts. The majority of the Supreme Court of Canada in *Housen* reviewed the purpose behind this deferential standard, quoting at para. 12 Justice La Forest in *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at para. 32:

> It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. ... Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact [citations omitted].

A palpable and overriding error is an error that must be "plainly seen" to have led to a wrong result: *Housen* at paras. 4-6. The same standard applies to the trial judge's inferences of fact, which will not be disturbed unless "the trial judge made a palpable

and overriding error in coming to a factual conclusion based on accepted facts" (*Housen* at para. 21).

[37] As will be apparent I have not been persuaded that the trial judge made any palpable or overriding errors in finding the facts. His findings are well supported by the evidence.

Whether the trial judge erred in determining that the GSC had not breached their contract with the appellant?

[38] This aspect of Mr. Sabo's appeal turns on his claims that the trial judge misapprehended or ignored critical material evidence leading to palpable and overriding error. The evidence in question related to the before and after weight of the "meteorite", photographic evidence demonstrating that the off-cut happened before he gave consent, evidence supporting his theory of a substitution, and the loss of the green formations while in the possession of the GSC.

[39] In his factum, Mr. Sabo argued multiple reasons why the trial judge misapprehended the evidence and erred in his findings of fact. Having reviewed the record, it is, with respect, apparent that Mr. Sabo is rearguing the case and has not, in my view, identified legal errors in the trial judge's assessment of the evidence.

[40] The trial judge based his conclusions about the terms of the agreement mainly on the evidence of Ms. LeCheminant, a supervisor with the GSC. The trial judge concluded that where the evidence of Ms. LeCheminant and Mr. Sabo conflicted he found Ms. LeCheminant more credible, primarily because she kept, in the course of her duties, a written daily log which recorded the details of her conversations (para. 50).

[41] To the extent that the findings about the terms of the agreement turned on credibility, the trial judge was entitled to rely on the evidence of Ms. LeCheminant. He explained why he preferred her evidence. Mr. Sabo has not demonstrated any legal error in the trial judge's assessment of credibility.

[42] The trial judge found that the GSC acted in accordance with the oral agreement reached with Mr. Sabo about what they could and could not do in examining and testing the "meteorite". More specifically he found that the invasive test required was initially refused by Mr. Sabo, but that this position changed after a conversation with Ms. LeCheminant on July 27, 1999. As a result of that conversation, Mr. Sabo agreed to allow a small off-cut to be taken, of no pre-determined weight, provided the green formations were protected and the cut be made without oil or lubricant (paras. 49-53). At trial, Mr. Sabo alleged that he had only provided consent under duress, a position the trial judge found was not communicated to the GSC. The trial judge concluded that the GSC, with consent, took the off-cut and repolished the cut surface and further found that Mr. Sabo's consent extended to the repolishing (para. 55).

[43] In reaching his conclusion that the GSC acted in accordance with the agreement, the trial judge rejected a number of claims advanced by Mr. Sabo. These included suggestions that the GSC made the off-cut prior to his consent, that more was cut off the "meteorite" than was permitted, and that the GSC substituted the original with a duplicate.

Whether the off-cut was done without consent?

[44] The trial judge found that the testing of the "meteorite" by removing the off-cut took place after Mr. Sabo had given his permission on July 27, 1999. Mr. Sabo argues that this time line is wrong and that the procedure occurred before he gave his consent. He says the "smoking gun" ignored by the trial judge is a date stamp on a slide taken after the procedure that bears a date of July 1999, thereby proving that the sample was cut before he consented to it.

[45] The trial judge does not refer explicitly to the date stamp, but, even so, I am not persuaded that this materially advances Mr. Sabo's argument. A trial judge is not required to refer to every piece of evidence. He had evidence from the GSC that the procedure occurred after the consent was given. Dr. Herd testified that after receiving consent, the off-cut was removed on July 28, 1999. Mr. Sabo alleges that

the slide in question, which showed the "meteorite" post cut, was date stamped for the month of July 2009, proving, he argues, that the off-cut was done without his consent.

[46] The date stamp, even if it is accurate, does not prove that the procedure occurred before July 27, 1999. The stamp is consistent with the procedure being conducted in July 1999. At best, the stamp only suggests the possibility that the procedure might have been carried out earlier in July. It is by no means clear that the stamp is, in any event, accurate. So far as I have been able to determine, its accuracy was not established at trial. In the circumstances, I am not persuaded that the trial judge's failure to refer to the date stamp establishes that he made a palpable and overriding error in his finding that the GSC honoured its agreement with Mr. Sabo by taking the off-cut only with his permission. That finding is supported by other admissible evidence which he accepted.

Whether the GSC duplicated the "meteorite"?

[47] On the central question of whether the GSC returned a duplicate or the original "meteorite" it received, the trial judge's findings are amply supported by the evidence. He made findings of fact based on the evidence of the GSC and also relied on expert opinion. The trial judge accepted the evidence of Dr. Kissin, a court-appointed expert, that what was returned to Mr. Sabo was the same object as the off-cut and that it was not conceivable that the returned "meteorite" could have been a reproduction. This opinion was rooted in Dr. Kissin's analysis and comparison of the chemical composition of the returned material and the off-cut, as well as an explanation of some chemical changes that had occurred.

[48] The appellant asserts that the trial judge made overriding and palpable errors in findings of fact; specifically the trial judge misapprehended the evidence of the elemental composition of the "meteorite". Mr. Sabo identifies the "smoking gun" evidence as Dr. Herd's August 4, 1999 letter to Mr. Sabo and the February 28, 2000 letter from Ms. LeCheminant to Cpl. Parlee. Mr. Sabo claims that the Dr. Herd letter definitely identifies the object as an iron "meteorite", called the Maya "meteorite", and

as being plessitic, while the Ms. LeCheminant letter identifies the iron “meteorite” as containing troilite, an iron sulphide not uncommon in an iron “meteorite”. This, he argues, is in direct contrast to Dr. Kissin’s evidence that the distinctive feature is of a different chemical composition. The trial judge accepted Dr. Kissin’s evidence that the chemical composition of the object can commonly change from troilite to pentlandite when exposed to terrestrial conditions.

[49] In supplementary submissions, Mr. Sabo argues that Dr. Kissin did not fulfil his duty to give impartial and reliable testimony and accuses him of deliberately misleading the court on two critical points. I have reviewed the reports of Dr. Kissin that formed the basis of his opinion and reviewed Mr. Sabo’s cross-examination of him. I am satisfied that the reports provide a sound foundation for the findings of fact made by the trial judge. I am also satisfied that the criticisms now levelled at Dr. Kissin were not put to him in cross-examination, although there was every opportunity to do so. The allegations are serious. They have the potential to be gravely damaging to Dr. Kissin’s professional reputation. It is incumbent on me to say, therefore, that I see nothing in the record that would lend even the slightest support to the suggestion that Dr. Kissin failed to fulfil his duty as a court-appointed expert or that he deliberately mislead the court. Mr. Sabo’s supplementary submissions do not advance his appeal.

[50] Mr. Sabo has not demonstrated any error in the trial judge’s acceptance of Dr. Kissin’s critical and decisive evidence.

[51] Standing alone, Dr. Kissin’s evidence was sufficient to dispose of the issue, but the judge went further and considered other evidence, including photographs and the evidence of tool marks which Mr. Sabo argued had demonstrated the contrary. Acknowledging that neither sample was presented in court, the trial judge compared Mr. Sabo’s photos of the “meteorite” pre-GSC and photos contained in the Kissin report and determined that they were the same, based primarily on the distinctive butterfly-like profile of the object.

[52] Mr. Sabo also argues that the trial judge made palpable and overriding errors in his apprehension of the tool mark evidence, specifically of photographs of a certain part of the “meteorite”. One set shows tool marks, while another set does not, supporting, Mr. Sabo argues, his theory that the original “meteorite” was substituted for a replica.

[53] The trial judge reviewed the photographic and expert evidence and found that the expert could neither confirm how or when the tool marks were created, nor which part of the “meteorite” was examined. The trial judge also found that there were several plausible explanations for the tool marks. Importantly, the trial judge noted that Mr. Sabo had possession of the “meteorite” for quite some time and had himself cut the “meteorite” with a hacksaw.

[54] The trial judge assessed that evidence and considered Mr. Sabo’s arguments about the inferences to be drawn from it in making his findings. He committed no reviewable error in so doing. Indeed, his conclusion that the GSC returned what they received is unassailable.

[55] Regarding the missing weight, the trial judge did not accept Mr. Sabo’s assertions that there was a reliable starting weight, and accepted the evidence that the missing weight resulted from a combination of the off-cut and the process of etching and polishing the “meteorite”.

[56] The trial judge reviewed several expert reports, had the benefit of expert testimony and the photographic evidence, all of which supported his conclusion that Mr. Sabo received his original “meteorite” from the GSC. The trial judge’s findings of fact were based on the evidence and he committed no palpable and overriding error in reaching them.

[57] I am satisfied, moreover, that the trial judge’s conclusion that the GSC did not breach the contract by cutting off more of the “meteorite” than they were entitled to do was supported by the evidence. He considered Mr. Sabo’s evidence about the object’s weight before it came into the possession of the GSC and its weight later.

He assessed Mr. Sabo's evidence and found it lacking. He accepted Dr. Herd's evidence of the "meteorite's" weight when it arrived at the GSC, the weight of the off-cut and the total reduction of weight after the off-cut and repolishing. The trial judge also considered other possible explanations of the change in the weight of the "meteorite" over time. In the result he found that the GSC removed no more material than inevitably would have occurred as a result of the procedures to which Mr. Sabo had agreed. Accordingly, the GSC did not breach the contract in this respect.

[58] In my opinion, the trial judge's findings of fact and the conclusions drawn from them are supported by the evidence. No error has been demonstrated in them.

Whether the GSC removed the green formations?

[59] The second "smoking gun" evidence that Mr. Sabo alleges was ignored by the trial judge concerns the surface formations found on the "meteorite". Mr. Sabo claims that the GSC removed the surface formations, which greatly altered the "meteorite's" value. The specific evidence he points to in support of his allegation is a photograph, taken by a Pat Hunt, which, he claims, proves that the GSC removed the surface formations when the "meteorite" was in their care. He alleges that the trial judge ignored this important evidence, which was a palpable and overriding error leading him to wrongly conclude that the GSC had not breached the terms of their agreement with him.

[60] There are two aspects to this question, as I see it. First, whether the green formations, whatever their origin, disappeared from the "meteorite" while it was in the GSC's possession. That is, did they fail to protect the green formations as they had agreed. Second, if the GSC failed to protect the formations, did they destroy, allow to be destroyed, or keep anything of value; namely, the extraterrestrial life forms.

[61] The second question is, from a practical perspective, the more important because it underlies Mr. Sabo's claim to damages. Little of consequence would follow from the GSC failing to protect the green formations if they were valueless. This is what the trial judge found.

[62] The trial judge's findings are found at paras. 146-7 of his reasons, set out above. He found the explanations for the presence of the formations that were most plausible were those outlined by the defendants; that the formation was either a result of a common chemical reaction or was a type of lichen. He explained why he rejected Mr. Sabo's claim of extraterrestrial origin. With respect, I find no palpable or overriding error in the trial judge's conclusions based on the evidence he had before him. In my opinion the findings of fact are unassailable.

[63] The trial judge did not make an explicit finding on when the green colouration faded from the surface of the "meteorite". It is apparent that it did not "disappear" because the GSC kept the "meteorite". The trial judge found that the original had been returned to Mr. Sabo. On my reading of the trial judgment, the trial judge must be taken to have rejected the claim that the formations disappeared because the GSC breached its agreement to protect them. The judge accepted that the GSC had taken on that obligation. He expressly accepted the evidence of the employees at the GSC in which they denied any wrong doing in relation to Mr. Sabo's rock formation (para. 144). This conclusion must be taken to encompass any breach of the agreements about the handling of the "meteorite", (with the exception of retaining the off-cut, which is dealt with separately by the judge). In my view, such a conclusion was open to the judge on the evidence and supported by it. Mr. Sabo has not demonstrated any reviewable error on this aspect of his appeal.

[64] I would not accede to these grounds of appeal.

Whether the trial judge erred when he held that Cpl. Parlee had acted reasonably in discharging his duties?

[65] After the GSC returned the "meteorite" (minus the off-cut) to Mr. Sabo, Mr. Sabo contacted the RCMP alleging that the GSC had returned a "meteorite" weighing significantly less, even accounting for the off-cut, and without the valuable surface formation, which Mr. Sabo believed was of extraterrestrial origin. The trial judge found as fact that the RCMP investigated the missing weight claim, but not the missing extraterrestrial formation, by contacting Dr. Roots and Ms. LeCheminant of

the GSC. Dr. Roots attended for an interview and created a written summary of relevant information and communications and Ms. LeCheminant was interviewed by phone and sent a comprehensive letter setting out the position of the GSC.

[66] The trial judge also found as fact that after receiving this information Cpl. Parlee concluded that the chain of continuity to the "meteorite" was disrupted, mostly due to ambiguity about the initial weight, and the extent to which it was in possession of people other than Mr. Sabo. Cpl. Parlee, not being able to prove a reliable starting weight, could not then conclude that the "meteorite" was missing weight. Cpl. Parlee concluded that this was a civil matter and closed the file.

[67] The trial judge heard from a number of witnesses on this issue, where he was required to make determinations of credibility when the evidence conflicted. He concluded that Cpl. Parlee's decision to not pursue the investigation was within his discretion and was reasonable on the evidence.

[68] Mr. Sabo alleges that the trial judge made palpable and overriding errors of fact by ignoring, what he argues, are crucial pieces of evidence, namely transcripts of Mr. Sabo's taped conversations with Cpl. Parlee that show, he argues, that Cpl. Parlee changed his story and proof that his duties to investigate were not discharged. Mr. Sabo argues that this error was significant, justifying a reassessment of that evidence by this Court.

[69] A trial judge, when providing reasons for judgment, is not required to "address each detail of the evidence or set out every aspect of his analysis," see *Bjornson v. Shaw*, 2010 BCCA 510, 295 B.C.A.C. 248 at para. 26. While it is true that the trial judge does not explicitly address the audio taped conversations between Mr. Sabo and Cpl. Parlee in his reasons, it is not clear to me that they conflict in any way with the trial judge's assessment of the evidence or would have influenced his decision. The transcripts of the telephone conversations between Mr. Sabo and Cpl. Parlee clearly show that Cpl. Parlee communicated to Mr. Sabo that he believed this to be a civil matter. Mr. Sabo told Cpl. Parlee that he was pursuing a civil remedy. This is consistent with the view the trial judge took of the matter.

[70] The trial judge applied the relevant authorities, including *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 67, when determining whether Cpl. Parlee's conduct met the standard of care of a reasonable police officer. The trial judge's conclusion that the investigation was reasonable was based on his assessment of the evidence. No palpable or overriding error in assessing that evidence has been identified.

[71] I would not accede to this ground of appeal.

Whether the trial judge erred in not awarding damages for detinue?

[72] Mr. Sabo asserts that the trial judge erred in his valuation of the off-cut and in his decision not to award damages, even nominal, despite finding that the GSC had no legal authority to retain the off-cut.

[73] In his factum, Mr. Sabo does not take issue with the trial judge's conclusion that a cause of action in detinue had been made out. Indeed, he expressly acknowledges that he sought a judgment in detinue that would compel the return of the off-cut and damages for detention.

[74] We directed the parties to have a trial order entered before we would release a judgment. The Order was finally entered on January 24, 2013. The material part of the Order reads:

> THIS COURT DECLARES that it was an error for the Geological Survey of Canada to detain the "off-cut" between February 29, 2000 and September 29, 2008.
>
> THIS COURT ORDERS THAT:
>
> a. The plaintiff's claims against all defendants are dismissed; ...

[75] In supplementary submissions, Mr. Sabo submits that the court should have either granted an order for the unconditional return of the off-cut or dismissed the claim in detinue. In any event, the court should not have made the declaration in detinue that it did, claiming that the declaration simply stated a fact, did not

determine the rights of the parties as to ownership, was not made in accordance with the law, and included argument or reasons.

[76] With respect, I see no merit in these submissions. The issue whether the GSC had wrongfully retained possession of the off-cut for a period of time raises an issue about detinue. The trial judge found facts about the GSC retaining possession of the off-cut (possession it did not have at the time of trial). The declaration was obviously intended to be a vindication of Mr. Sabo's rights. The trial judge did not err in making the declaration based on the facts he had found. The reference to the "error" in detaining the off-cut is at most a redundancy. When read as whole the legal effect of the order is clear.

[77] The trial judge was not faced with a choice only of ordering its unconditional return or dismissing the claim in detinue. As the trial judge stated at para. 106 of the reasons, the off-cut was effectively returned to Mr. Sabo on February 29, 2000 when it was transmitted to his chosen testing laboratory by order of Senior Judge Veale. Any conditions affecting its continuing location and possession should be addressed by application, if that is necessary.

[78] The Supreme Court of Canada reviewed the award of damages in detinue in *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al.*, [1979] 1 S.C.R. 633 at 652-653, and noted that once detinue is made out, the measure of compensatory damages is the value of the object (in that case shares) at the end of the trial in addition to damages for the actual detention: see also *R.F. Fry & Associates (Pacific) Ltd. v. Peter Reimer & Deacon Barclays De Zoete Wedd Ltd.*, [1993] 8 W.W.R. 663 (B.C.C.A.) at para. 23, and *Kostiuk (Re)*, 2002 BCCA 410, 215 D.L.R. (4th) 78 at paras. 34-36. In *Asamera,* Justice Estey for the Court noted at 652-653 the following:

> In detinue, the measure of damages has been said to be the value of the shares at the end of the trial, and in addition, damages for the detention. The value of the shares at the end of the trial must be awarded on the basis that the action in detinue is, in fact, a quasi-proprietary action for the return of the plaintiff's goods. If that cannot be done, then the clearest approximation of the plaintiff's loss is the value of those goods when they would have been recovered, that is, at the end of the trial. In addition, an award must

> compensate the plaintiff for damages flowing from the wrongful detention of his property, which it seems must be assessed on the basis of the highest value of the goods between the date at which the plaintiff ought to have recovered possession and at the end of trial.

[79] The trial judge noted that Mr. Sabo based his assessment of the "meteorite's" value on Internet research, but led no expert evidence about damages. It should be noted that the trial judge explicitly did not find that the rock formation was a meteorite. Dr. Herd, although not qualified as an expert of the value of meteorites, estimated that if the "meteorite" was certified, it might have a value between $1,000 and $2,500. The trial judge held that Mr. Sabo had proven on a balance of probabilities that the "meteorite" had a value of $2,500 conditional on it being certified as a "meteorite". However because Mr. Sabo had the "meteorite" returned, minus the off-cut, and had not proven that the delay in the return of the "meteorite" or the loss of the off-cut cost him anything, the trial judge did not award damages.

[80] The trial judge determined that the off-cut, the part of the "meteorite" that the trial judge found the GSC had no legal authority to retain, was valueless and on that basis did not award damages. Even though there was some evidence of value of about $5 per gram and evidence that the off-cut weighed approximately 12 grams, any value the off-cut had was minimal; even that value was contingent on proof that it came from a meteorite, a fact that was not itself proven. In those circumstances, I cannot find that the trial judge committed a palpable and overriding error in reaching the conclusion that the off-cut was valueless.

[81] In his supplementary submissions, Mr. Sabo argues the trial judge should have awarded exemplary or punitive damages based on "the defendants ... deliberately [choosing] to disregard the law in order to protect themselves from an adverse court ruling ...". Mr. Sabo's argument on this point is simply an attempt to reargue the facts. The trial judge made findings that the defendants had not acted in bad faith. That finding is supported by the evidence and no error of principle underlying it has been demonstrated by Mr. Sabo.

[82] Having said that, I am satisfied the trial judge did err in not awarding nominal damages. Detinue is a cause of action that does not depend on proof of damages: it is actionable *per se*. Nominal damages are awarded where a plaintiff's legal rights have been breached. That is the case here, as the trial judge found. Nominal damages affirm the infraction of legal rights in the absence of proof of loss caused by the infraction: see *The "Mediana",* [1900] A.C. 113 (H.L). I am unable to accept the submission made by the respondents that, on the facts of this case, the declaration of detinue was sufficient to vindicate Mr. Sabo's rights.

[83] More recent cases do not establish a "going rate" for nominal damages, although the Alberta Court of Appeal has said that an award of $5,000 could not be said to be nominal: see, *Chohan v. Cadsky*, 2009 ABCA 334, 464 A.R. 57 at para. 145. The Ontario Court of Appeal has also suggested that nominal damages should be set at $1: see *Place Concorde East Limited Partnership et al. v. Shelter Corp. of Canada Ltd. et al.* (2006), 211 O.A.C. 141 at para. 78. The courts in British Columbia have taken a different approach. In *Dawydiuk v. Insurance Corporation of British Columbia,* 2010 BCCA 353, for example, $1,000 has been awarded as nominal damages. In the circumstances of this case I would award $1,000 as nominal damages.

Whether the trial judge's conduct constituted partiality and judicial misconduct?

[84] The appellant alleges that the trial judge made false, misleading and prejudicial comments about him throughout the reasons for judgment. This conduct, he argues, raises a serious question of partiality and bias. He does not allege misconduct during the trial itself, but in the written reasons for judgment.

[85] The test for determining whether a litigant has a reasonable apprehension of bias on the part of a trial judge is set out in a unanimous decision of the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at para. 60:

> In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by Grandpré J. in [*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369] at p. 394, is the reasonable apprehension of bias:
>
> > ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[86] The inquiry is fact specific and must be examined contextually.

[87] Mr. Sabo takes issue with several comments in the trial judge's written reasons, but most pointedly comments to the effect that Mr. Sabo believed he was "under surveillance by two men wearing black suits", who "may have broken into his room" to steal a statutory declaration of the "meteorite's" weight and then fax it to the GSC. In his testimony Mr. Sabo had denied faxing the statutory declaration to the GSC himself, despite it being signed by Mr. Sabo and faxed to the GSC from the Ottawa motel during the time that Mr. Sabo was staying there. In Mr. Sabo's written argument he asserted another possibility as to how the GSC received Mr. Sabo's statutory declaration, that Cpl. Parlee may have sent it, despite the fact that Cpl. Parlee was in the Yukon at the time, while Mr. Sabo was in Ottawa, at the motel the fax was sent from.

[88] In my opinion, it is clear from the comprehensive and careful reasons for judgment that the trial judge took Mr. Sabo's allegations seriously and assessed them carefully. He devoted a great deal of time and effort to address each issue in a fair and impartial manner. The use of a phrase characterizing the men Mr. Sabo alleged had him under surveillance as "two men wearing black suits" does not demonstrate any failure on the part of the judge to decide the issues fairly, impartially and on the evidence. Similarly, the handful of other comments to which Mr. Sabo objects do not lay any foundation to raise a question about the trial judge's alleged lack of partiality. Moreover, it is clear that the trial judge based his

conclusions on the evidence. Nothing in the reasons would lead an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, to conclude that the trial judge was biased. Indeed, to the contrary, the objective reader can only be impressed by the care taken by the trial judge in dealing fairly with Mr. Sabo's case.

[89] I would not accede to this ground of appeal.

Whether the reasons for judgment are sufficient for appellate review?

[90] Mr. Sabo alleges that the reasons in relation to the missing surface formations are inadequate to allow for appellate review. He argues that the trial judge presented only conclusions and ignored crucial evidence.

[91] The Court of Appeal for British Columbia discussed how the sufficiency of reasons is to be evaluated in *R. v. Nduwayo*, 2012 BCCA 281, 323 B.C.A.C. 249 at para. 66:

> The law of insufficiency of reasons is well-settled. The leading cases are *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, and *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3. A trial judge is required to give reasons that provide a basis for a verdict, provide public accountability for a decision, and permit meaningful appellate review. Reasons will be sufficient if they serve the functions reasons are meant to fulfill. The sufficiency of reasons is evaluated by reading them as a whole and in the context of the record. Perfection is not the standard, and every finding or inference of fact or credibility need not be spelled out.

[92] I am satisfied that the trial judge's reasons satisfy this test. The trial judge went into comprehensive detail reviewing the evidence, explaining his assessment of the credibility of witnesses, his factual findings and inferences from facts and his conclusions. It is not necessary for the trial judge to dissect every piece of evidence produced at trial. The trial judge adequately explained his reasons for concluding that the surface formations were terrestrial in origin. The trial judge's failure to focus expressly on when the green staining or formations disappeared is, at most, a minor deficiency in otherwise comprehensive reasons. In any event, I have dealt with the judge's handling of this issue on a substantive basis in these reasons. I am satisfied

that the reasons, when read with the record, were sufficient to permit meaningful appellate review.

[93] I would not accede to this ground of appeal.

Conclusion

[94] I would allow the appeal, but only to the extent of awarding Mr. Sabo nominal damages of $1,000 arising from the GSC wrongfully maintaining possession of the off-cut. I would not accede to any of the other grounds of appeal advanced. Although I would allow the appeal in respect of the one issue addressed, Mr. Sabo has not succeeded on any of the principal grounds of appeal. In the result, I would award the costs of this appeal to the respondents.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Hinkson"