Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

SEP 0 9 1997

T-488-96

97 252 051

Between:

HER MAJESTY THE QUEEN,

Plaintiff,

- and -

HARVEY PALMIER,

Defendant.

REASONS FOR ORDER

JOHN A. HARGRAVE
PROTHONOTARY

The Plaintiff's written motion is to amend a default judgment pursuant to Rule 337(6) in order to substitute a substantially larger figure as damages.

BACKGROUND

By way of relevant background the Crown's 28 February 1996 Statement of Claim, to recover a debt under the *Prairie Grain Advanced Payments Act*, claimed $45,094.37. On 28 May 1997 the Canadian Wheat Board's running account of credits, interest and balance showed an opening debt of $107,422.02 in December of 1993, substantial credits during the intervening years, interest charges, a balance of $15,140.43, and per diem interest of $2.58.

On 29 May 1997 the Court issued a default judgment for $15,140.01, together with costs. The Crown correctly pointed to an error on the part of the Court: the figure should have been $15,143.01, taking into account the balance shown on the running account and one day's interest as of 29 May 1997. On 20 June 1997 the Court issued an amended judgment to correct what was a

mathematical error of $3.00. This is the sort of correction which is clearly allowed by Rule 337(6), being:

> "Clerical mistakes in judgments, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court without an appeal."

The Crown, through the Canadian Wheat Board, now applies for a further amendment, requesting judgment in the amount of $27,598.38, by reason of adjustments to the payment record. Various amounts, initially credited to Mr. Palmier's account in April of 1997, in total some $12,000.00, were withdrawn. The most recent accounting shows that those withdrawals occurred in April of 1997. Apparently the Canadian Wheat Board legal department worked from one set of records, said to be up to date as of 28 May 1997 and sworn to as correct on the default judgment application. But elsewhere in the Canadian Wheat Board system there were other figures which, from the computer printout represent amounts transferred elsewhere in April of 1997, or if one relies upon the latest affidavit evidence, were adjustments made some time after 29 May 1997.

ANALYSIS

This latest aspect first came to my attention, in mid July. Knowing, as set out in *Labrie v. Les Uniformes Town & Country Inc.* (1992), 141 N.R. 159 (F.C.A.), that once a judgment has become final it may only be reconsidered pursuant to Rule 337(5), dealing with discrepancies between judgment and reasons or matters accidentally overlooked, or Rule 337(6), dealing with clerical mistakes, or set aside under Rule 1733, upon the ground of some matter arising subsequently to the making of an order or which has subsequently been discovered, I invited counsel for the Canadian Wheat Board to make written submissions to augment the brief affidavit material. Counsel has not provided any submissions within the specified time frame.

I do not see that Rule 337(5) is applicable, for the rule does not apply where the oversight was committed by a party and not by the Court: *Boateng v. M.E I.* (1990), 112 N.R. 318 at 319 (F.C.A.) and *Zeneca Pharma Inc. v. Minister of National Health and Welfare* (1996), 66 C.P.R. (3d) 169 at 173 (F.C.T.D.). Nor can the Court correct the error under Rules 337(6) for the accidental slip or omission was not one on the part of the Court: see for example *Kramer v. The Queen*, [1976] 1 F.C. 242 at 245 (F.C.T.D.). However, the Court should take a broad view of Rule 1733 and, subject to any undue resulting prejudice, correct a judgment where the Rule is applicable (loc. cit.).

Rule 1733 deals with instances in which a matter either arises after an order or judgment has been made, or is subsequently discovered (the third branch of the rule is not applicable). This Rule is not pleaded in the present motion, nor would it be proper to resolve the motion on the basis that counsel may merely have referred to the wrong Rule, for the material in support is to some degree ambiguous and does not deal with the appropriate issues. I would again refer counsel to the *Zeneca Pharma* case (*supra*) at page 174 for the appropriate test to apply:

> "A party relying on this rule must establish not only that the new matter was discovered subsequent to the judgment, but that it could not, with reasonable diligence, have been discovered sooner, and is of such character that if it had been brought forward in the proceedings, it would have altered that judgment."

This is the minimum test, for the Federal Court of Appeal in *Re Saywack and M.E.I.* (1986), 27 D.L.R. (4th) 617 considers Rule 1733 in depth, touches on the practice in the old Court of Chancery in England and a parallel Ontario Rule and concludes that the test set out in *Dumble v. Cobourg & Peterborough Railway Co.* (1881), 29 Gr. 121 (Ont.H.C.) ought to be applied. To paraphrase the test, which is stated at pages 132 and 133 of the *Dumble* case and which is based on English precedent, the party wishing to rely on new evidence must show first, that what has been discovered came to its knowledge, or the knowledge of its agents after it could have been made use of in the suit and that it could not, with reasonable

diligence, have been discovered sooner and second, that had it been brought forward in the suit it might probably have altered the judgment. However, the passage goes on to make it clear that a court should be wary of being put on a course of repeated litigation for it must be clear to litigants that it is necessary to use reasonably active diligence in the first instance and as a result a court ought not to be easily induced to break with the general rule as to the finality of a judgment once it is pronounced.

The motion is dismissed. The Crown will have to be satisfied with the amount of the judgment, subject to having the default judgment set aside under Rule 1733.

(Sgd.) "John A. Hargrave"

Prothonotary

Vancouver, British Columbia
August 11, 1997

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE:	**HER MAJESTY THE QUEEN**
	- and -
	HARVEY PALMIER
COURT NO.:	**T-488-96**

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF COUNSEL.

REASONS FOR ORDER OF MR. JOHN A. HARGRAVE, PROTHONOTARY dated August 11, 1997

WRITTEN SUBMISSIONS BY:

Margaret Redmond	**for Plaintiff**

SOLICITORS OF RECORD:

George Thomson **Deputy Attorney General** **of Canada**	**for Plaintiff**

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