RE-OPENING A PROCEEDING TO INTRODUCE NEW OR FURTHER EVIDENCE

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Introduction

There is an expectation imposed upon litigating parties to place the whole of their case before the decision-maker at the time of the initial hearing. Re-opening a proceeding to introduce new or further evidence, whether done before or after a decision has been issued in the matter, is thus an extraordinary step; one that the importance of finality and quickly resolving disputes militates against taking unless exceptional circumstances are present.[i]

As stated by Andre J in ***Oakley v. Royal Bank of Canada***, 2013 ONSC 145, [2013] OJ No. 109 (SC):

> "**10** The Court requires the parties to litigation to bring forward their whole case. … In both civil and criminal matters, the Crown or plaintiff must produce and enter in its own case all clearly relevant evidence it has. …
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> **11** On the other hand, **a trial judge has the discretion to permit a plaintiff to re-open its case. This discretion however, must be exercised judicially. It must involve a scrupulous balancing of the accountability of counsel for decisions regarding the prosecution of its case and the interests of justice.** …" (QL at para. 10-11)(Emphasis added)

The ***Canadian Encyclopedic Digest* – Evidence**, IV.12.(a), summarizes the typical judicial approaches employed in applications to re-open proceedings in the following passage:

> "**§266** Where a party wishes to adduce evidence at a late stage that does not fall within the definition of rebuttal testimony, it must seek to re-open its case. The jurisprudence has not always been consistent in establishing what is required for the granting of leave to adduce new evidence and the matter is complicated by the fact that attempts to re-open can occur after the parties have closed their case, but before judgment has been delivered; after judgment has been delivered but before that judgment has been entered; and after judgment has been entered. While some judges have advocated an unfettered approach to the trial judge's discretion, whereby re-opening is permissible any time it is in the interests of justice to do so, the more common method of proceeding is to focus on two criteria: (1) whether the evidence - if it had been properly tendered - would probably have altered the judgment; and (2) whether the evidence could have been discovered sooner had the party applied reasonable

diligence. Re-opening the case is an extreme measure, and should only be allowed sparingly and with the greatest of care.

§267 While the two criteria must both be considered, the need to have exercised reasonable diligence in discovering the evidence is not absolute. The more important the evidence would be to the outcome of the case, the stronger the argument in favour of its reception. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice. Nonetheless, re-opening is unlikely to be permitted where the evidence was discovered and not adduced originally because of a tactical decision by counsel.

§268 In deciding whether to re-open, the court should also consider the complexity of the evidence and the possibility that the opposing party will need to call evidence in reply. Judges will be hesitant to re-open where it would essentially amount to a second trial. In contrast, where the evidence to be submitted is uncomplicated or undisputed, admission is more likely." (Carswell, at para. 266-268)

Leading Cases

One of the leading cases on motions to re-open is ***671122 Ontario Ltd. v. Sagaz Industries Canada Inc.***, 2001 SCC 59, 2 SCR 983 (SCC). There, the high court approved of the two-stage test first articulated in ***Scott v. Cook***, [1970] OJ No. 1487, 2 OR 769 (HCJ). That test, which is intended to assist the trial judge in exercising his or her discretion to re-open the trial, requires the moving party to:

(i) show that the evidence he or she seeks to adduce is such that, if it had been presented at trial, it would probably have changed the result, and

(ii) prove that such evidence could not have been obtained by reasonable diligence before the trial.

With respect to situations in which a motion to re-open the case is brought *before the court has rendered its judgment*, the authorities suggest that the test set out in ***Scott v. Cook***, and approved by the Supreme Court of Canada in ***Sagaz***, still applies, albeit with a slight modification to the first requirement.

This proposition, and the rationale behind it, were set forth by Mr. Justice Phelan in ***Varco Canada Ltd. v. Pason Systems Corp.***, 2011 FC 467, 92 CPR (4th) 399 (FC):

> "**17** ... On the first [prong of the *Sagaz*] test the situation is quite different where the Court has not yet reached its final conclusion. In the current situation [in which a decision has yet to be rendered] it is more appropriate to ask - could the evidence, if it had been presented, have had any influence on the result? This engages an inquiry as to materiality/relevance.
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> **18** The second branch of the *Sagaz* test can be more easily imported into the situation of new evidence before decision where it is a factor for consideration but not necessarily determinative of the issue.
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> **19** The judicial policy captured by the two-prong test is well described in *Risorto v. State Farm Mutual Automobile Insurance Co.* (2009), 70 C.P.C. (6th) 390 (Ont. Div. Ct.), in paragraphs 34-36:
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> > 34 The principles applied by the Supreme Court of Canada in *Sagaz, supra*, are not new. They have been applied by Canadian courts for decades: … In all such cases, the test for reopening the matter and permitting the calling of new evidence is the same. The moving party must satisfy the Court that the proposed evidence would probably change the result, and that it could not have been discovered by the exercise of due diligence.
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> > 35 The policy reasons for the adoption of the two-pronged test are well-known, and have been discussed in a number of the cases to which I have referred. An orderly system of litigation requires that each party put his or her best foot forward. It contemplates that judgment will be rendered after each party has done so. Litigation by instalments is not to be encouraged. There is a strong interest in finality, which should only be departed from in exceptional circumstances. Parties make strategic decisions in the course of litigation, and except in narrow circumstances they must be held to those decisions. At para. 14 of her judgment in *DeGroote*, *supra*, Lax J. quoted with approval the following statement by Wilkins J. in *Strategic Resources International Inc. v. Cimetrix Solutions Inc.* (1997), 34 O.R. (3d) 416, at p. 421:
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> > > After the trial is complete and judgment is rendered, it is always a simple matter, utilizing hindsight, to go about reconstructing a better method of presenting the case when one finds oneself in the sorry position of being a loser.
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> > 36 In the same paragraph, Lax J. noted the observation of the Court of Appeal in *Becker Milk, supra*, at p. 556, that "An unsuccessful litigant, save in very special circumstances, should not be allowed to come forward with new evidence available prior to judgment when he was content to have the trial judge bring forward his judgment based on the record produced at a trial in which that litigant actively participated."

> **20** Added to the two-part test is a consideration of whether these are exceptional circumstances that would justify setting aside the "due diligence" test or at least reducing its overall importance in the exercise of discretion. The danger that a court would be misled is an aspect of the "exceptional" circumstances consideration.
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> **22** In my view, when all of the various factors, tests and considerations are taken together, the importance of the integrity of the trial process - the search for the truth through evidence - is an overarching consideration. To some extent that consideration is addressed in the issue of whether a court would be misled." (QL at para. 17-22)

Therefore, where judgment has yet to be pronounced and a party seeks to re-open proceedings to adduce new or further evidence, the factors the court must consider include: relevance, necessity, reliability, due diligence and prejudice.

The difference between the test to be employed when a court considers re-opening after a judgment has been rendered, as opposed to before judgment, was also clarified by Butler J in ***Peier v. Cressey Whistler Townhomes Limited Partnership***, 2011 BCSC 773, [2011] BCJ No. 1085 (SC) (reviewed on other grounds):

> "**73** A trial judge has an unfettered discretion to reopen a trial after judgment has been pronounced but before an order is entered. The discretion is to be used sparingly to avoid fraud and abuse of the court process. The fundamental consideration in each case is to prevent a miscarriage of justice: … The test is, first, whether the evidence, if presented at trial, would probably have changed the result and second, whether the evidence could have been obtained before the trial by the exercise of reasonable diligence." (QL at para. 73)

As Butler J's comments suggest therefore, where the judgment has not yet been rendered, due diligence will be less of a concern to the court as it considers a motion to re-open, in that there will be less of an opportunity for the re-opening to constitute an abuse of process.[ii]

During final arguments in the British Columbia family law decision of ***Vander Ende v. Vander Ende***, 2010 BCSC 597, [2010] BCJ No. 804 (SC), the wife's counsel suggested that her client be given an opportunity to re-open her case for the limited purpose of admitting into evidence a certain waiver. The husband's counsel objected to reopening the trial and to the introduction of the waiver into evidence.

In discussing the prevailing judicial approach to applications to re-open proceedings, Madam Justice Ballance confirmed the applicable framework of analysis in the following passage:

> "**84** The decision to permit or disallow reopening is a matter of judicial discretion. **The discretion of the trial judge presiding over a civil trial to reopen the trial before judgment has been rendered is wide**. The scope of the discretion is generally narrower where judgment has been issued, and the test becomes even more rigorous depending on whether the order has or has not been entered: … **While the ambit of the judicial discretion is acknowledged as being unfettered, it must be exercised cautiously so as to prevent an abuse of process**: …. **In considering whether to reopen, the court should turn its mind to the relevance of the proposed evidence, the effect, if any, of reopening on the orderly and expeditious conduct of the trial at large, and most fundamentally, whether the other party will be prejudiced if the reopening is permitted**: *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 (Ont. C.A.)." (QL at para. 84)(Emphasis added)

Alberta Cases

In the Alberta case of ***A. Fossheim Industries Ltd. v. Remai Construction Group Inc.***, 2008 ABPC 351, [2008] AJ No. 1421 (Prov Ct) the plaintiff was a finishing contractor and the defendants were the general contractor and owner, respectively, of a 24 unit residential condominium building. The plaintiff claimed for approximately $17,000 under its sub-contract, or alternatively, on a *quantum meruit* basis. The defendant Remai both alleged that the plaintiff failed to perform and thereby repudiated the sub-contract, and counterclaimed for approximately $12,000 representing cost overruns in completing the work to be done under the sub-contract.

The trial of the action took place and judgment was reserved. However, the plaintiff Fossheim then brought an application to introduce further evidence.

The application to adduce additional evidence was in respect of three documents the plaintiff indicated it discovered after the trial from a realtor involved in the sale of the condominiums in issue. In particular, the plaintiff asserted that the new evidence contradicted the assertion of the defendant Remai that the project's completion date was not changed and that the lack of progress on the part of Fossheim was not caused by other sub-trades on the project. This, the plaintiff alleged, gave rise to credibility concerns.

In assessing the new evidence and discussing the propriety of re-opening the trial, Judge Ingram stated:

> "**9** This application was made at the same stage in the proceedings as was the case in *Schunamon* v. *Diegel* [2008] A.J. No. 806, where Rooke, J., held:
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> > "114 It is to be remembered that, at the time of the request to introduce new evidence, ... all the evidence had been received, arguments had been made, my decision had been reserved, and, subject to possible further argument, all that remained was my decision on the summary trial.
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> > …
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> > 123 I find, as a matter of law, that, when considering the admission of new evidence after trial but before judgment, the test is less stringent than that to admit new evidence before the Court of Appeal. However, the test still requires that the evidence could have the effect of altering the prospective judgment and that it could not have been obtained by reasonable diligence during trial. Even when the elements of the test are not met, there is a discretion. In exercising the discretion, the court should consider the need to prevent abuse and miscarriage of justice, but must exercise that discretion "sparingly and with the greatest of care"."

In the result the proposed new evidence was not admitted.

In the judgment of Mr. Justice Langston in ***Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd.***, 2007 ABQB 269, [2007] AJ No. 488 (QB) on an appeal from decisions by the Surface Rights Board, the issue was the rate of compensation payable by the respondent to the appellant under various surface leases. The appellant thus adduced evidence of the pattern of compensation for use of other lands.

After the conclusion of the hearing, the respondent sought to introduce further evidence related to the compensation for those lands. Langston J however, declined to permit the hearing to be re-opened, ruling that the evidence was already in existence, was discoverable through due diligence prior to the hearing, and would likely not alter the judgment:

He reasoned:

"**11** The ability of the Court to re-open a trial and permit additional evidence varies depending upon the stage of the proceeding. In *Sunny Isle Farms Ltd. v. Mayhew*, (1972), 27 D.L.R. (3d) 323 ("*Sunny Isle*"), the court was asked to consider an application to introduce new evidence in the same circumstances as exist here, namely, after the trial had been concluded but prior to the rendering of judgment.

12 In *Sunny Isle*, it was the plaintiff who sought to introduce additional evidence. On considering the application, the trial judge reviewed the pleadings and the evidence already given by the defendant at trial, noting that this evidence could be a complete answer to the plaintiff's claim. However, the defence disclosed by the defendant's evidence at trial was not the defence pled in the Statement of Defence.

13 The trial judge stated that in the circumstances of the case and given the nature of the pleadings, he would have allowed rebuttal evidence at trial, or granted an adjournment so that the plaintiff could call rebuttal evidence. The problem he now faced was that the application did not arise at the trial, but after the evidence and argument was concluded.

14 After reviewing several authorities, the trial judge stated:

> An examination of the foregoing authorities clearly establishes that a trial judge has discretion to admit further evidence after the close of the trial either for his own satisfaction or where the interest of justice requires it. This discretion has been exercised by different trial judges in many different situations and for different reasons, and I am inclined to agree with the remarks of Romer J., in the case of *Barker v. Furlong*, [1891] 2 Ch. 172 at p. 184, that where counsel had not been misled by anything falling from the other side that 'in granting the plaintiff's application after the defendant's case had been argued and closed and reply begun, I should be making a precedent, which would, if established, lead to an improper amount of laxity in conduct of plaintiff's case.' However, in the case at bar the plaintiff has, in my opinion, been misled by the defendant's defence in that the evidence led by the defence sets up a defence different from that set out in the pleadings.

15 The trial judge permitted the new evidence to be introduced, but the defendant was awarded costs of all further proceedings in any event.

16 In reaching this conclusion, the trial judge also quoted from *Woodworth v. Gagne and Gagne*, [1935] 3 W.W.R. 49, wherein the court also considered a similar application, brought before judgment. There, the court stated:

> It is in my view a serious matter to open up a trial after all the evidence has been taken, and it should never be done unless it seems imperative in the interests of justice that the case should be reopened for further evidence.

> **17** Since *Sunny Isle*, the principle has not changed; a trial judge has discretion to admit further evidence after the close of the trial either for his or her own satisfaction or where the interest of justice requires it. However, this discretion is one that is to be used sparingly.
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> **18** Following the principles set out in *Sunny Isle* and subsequent cases, three important factors bear on whether the interests of justice require this new material to be admitted:
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> 1. the availability of the evidence prior to trial;
> 2. the purpose for which the evidence is sought to be adduced; and
> 3. whether the evidence would probably alter the judgment.
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> **19** All of the surface leases attached to the Statutory Declaration of Ms. Zalik were negotiated and finalized over one year prior to the commencement of proceedings in this Court, and most were also negotiated and finalized before the hearing before the Surface Rights Board. **Courts have a general inclination not to look favourably upon the introduction of new evidence that was already in existence and arguably could have been known to the applicant, through the exercise of due diligence, prior to trial. Part of the reason for this is to avoid the laxity with which counsel may then prepare for cases if new evidence was permitted to be adduced, after trial, on a regular basis**: *Sunny Ilse*. **Another reason, however, is that there has to be a finality to the litigation process. Attempts by litigants to re-open their cases ought to be discouraged**: *Patent v. National Bank of Canada*, (1992), 124 N.B.R. (2d) 91." (QL at para. 13-19) (Emphasis added)

Langston J ultimately refused to admit the new evidence and dismissed the application to re-open.

While the framework of analysis to be judicially employed in motions to re-open hearings to adduce new or further evidence does not appear to have been frequently canvassed by the Alberta courts, one key decision in which this issue was discussed at length is ***Nelson v. 1153696 Alberta Ltd.***, 2010 ABQB 130, 478 AR 267 (QB).

That case dealt with an application to submit new evidence in relation to the trial of an action in which judgment had been pronounced but not yet entered. Madam Justice Moen observed in relation to the applicable test to be applied in a motion to re-open a proceeding and adduce new evidence:

> "**12** In preparing this judgment I identified a very recent case of Côté J.A. of the Alberta Court of Appeal that specifically addresses and reviews the legal principles that govern a judge hearing an application for fresh evidence: *Alberta v. B.M.* [2009 ABCA 258.] Justice Côté at para. 12 indicates that the rules that govern applications for fresh evidence at trial "... are very similar to the well-known rules for receiving new evidence on appeal to the

Court of Appeal". That said, Justice Côté was not addressing an application for new evidence on appeal, but rather an application to admit fresh evidence following his finding that a party had been guilty of contempt of court.

13 At para. 12 Justice Côté identifies four requirements for a court either at trial or on appeal to admit fresh evidence:

1. Could the evidence have been obtained earlier if due diligence had been observed? That the evidence was available to the applicant but not looked for because it was hard to access and because other matters pressed, is fatal.
2. Is the evidence credible?
3. Would the evidence have been practically conclusive in producing the opposite result to that earlier pronounced? A debatable matter of opinion is not sufficient. Nor is controvertible evidence which would open up an extremely complex and convoluted exercise.
4. Is the evidence in its present form admissible under the ordinary rules of evidence?

14 Some parts of this four-fold test interact. For example, the second requirement, that evidence be credible, has an obvious implication for whether evidence is conclusive or not (test requirement three).

15 Justice Côté also identified at para. 13 a non-exclusive list of other relevant criteria that have been identified in the case-law, some of which are relevant to the case before me and are:

1. Would there be a miscarriage of justice without the reopening? This is similar to the requirement that new evidence be practically conclusive in changing the result.
2. The power to reopen is to be used sparingly, and the pronounced decision is not to be taken away without very solid grounds.
3. Is the applicant trying to raise a new issue which he could have raised earlier?

16 Justice Côté notes that these considerations in certain senses interrelate with the four-fold test. For example, "a miscarriage of justice" would be a consequence where fresh evidence would be "practically conclusive in producing the opposite result". In other circumstances these considerations may effectively be 'aggravating factors' that favour rejection of an application to introduce new evidence (paras. 32-33).

17 I conclude that *Alberta v. B.M.* provides the current test in Alberta for the admission of new evidence in a matter before the judgment roll is entered and that it binds me." (QL at para. 12-17)

Madam Justice Moen, whose decision had earlier referenced the Supreme Court of Canada judgment in ***Sagaz***, then discussed the Alberta case of ***Shunamon v. Diegel***, 2008 ABQB 291, 453 AR 199 (QB), which suggested a two-part test that correlates with the first and third requirements

identified in ***Alberta v. B.M.***, and which stressed that when exercising its discretion to admit evidence, the court should consider the need to prevent abuse and miscarriage of justice, and should exercise that discretion sparingly and with the greatest of care.

She then stated:

> "**23** The Supreme Court in *Sagaz* discusses the duty of the trial judge in considering an application for fresh evidence - that is, there is an over-arching discretion in the trial judge, the trial judge should discourage unwarranted attempts to disturb the basis of the judgment, and that the trial judge must exercise his discretion sparingly and with great care: at paras. 60 and 61.
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> **24** *Alberta v. B.M.* details a more explicit rejection of a trial judge having a general residual authority to admit fresh evidence despite that evidence not meeting the four part test requirements. A failure to meet due diligence standards is fatal (para. 12). In civil matters such as this one, the new evidence must effectively determine and change the outcome (paras. 12, 13). A party can never take one position at trial, and then advance a different scenario based on new facts following the decision, unless that party can demonstrate the necessary due diligence standard was met and that the inconsistent positions were an unavoidable consequence of the manner in which evidence became available (para. 90).
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> **25** Justice Côté thus makes clear that the discretion of a judge hearing a new evidence application is tightly constrained. There are certain criteria which must be met. I therefore do not agree with Justice Graesser that the test in Alberta on application to admit fresh evidence is unfettered under the principle that the court should avoid an abuse of its processes but in any event should avoid a miscarriage of justice. What *Alberta v. B.M.* makes clear is that the four-part test itself operates to avoid a miscarriage of justice.
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> **26** Finally, I would suggest that a further factor may be added to the list of relevant criteria indicated in *Alberta v. B.M.*, para. 13, and that relates to the time at which a new evidence application occurs. How soon after the trial is closed has the application been made? Has argument been finished? Has a decision been rendered by the trial judge? I conclude that delay is a consideration, and that the later an application is made in the trial process the more likely it should be rejected.
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> **27** This principle can be viewed as a contextual facet of the due diligence requirement, that post-decision an applicant faces a higher standard when required to provide a reasonable explanation as to why the evidence was not found. In *McGinn v. Bain Insulation & Supply Ltd.* (1990), 126 A.R. 81, 2 Alta. L.R. (3d) 127 (Alta. Q.B.) at p 130 Girgulis J. observed the exercise of the discretion by a trial judge may be influenced by the timing of the application.

28 Court proceedings are based on an adversarial process, one party advances a position that is then rebutted by the defendant. Disruption of this process, 'case splitting', is an abuse of court process, *Davidson v. Patten*, 2003 ABQB 996 (Alta. Q.B.) at para. 7:

> [7] It's an old trial maxim that Plaintiffs must exhaust their evidence at the outset. They cannot split the case. In other words, they cannot rely on one set of facts, and when these have been shaken by the opponent, try to adduce more or other facts. The Plaintiff must present the case in its entirety before the Defendant is called upon to choose whether to elicit its own evidence. This rule allows the Defendant to know the case to be met and plan the defence. (*Allcock Laight & Westwood Ltd. v. Patten*, Bernard and Dynamic Displays Ltd., [1976] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22)

29 This prohibition applies equally after a case has closed. There should be a point where the litigation is completed. The manner in which due diligence is evaluated by a trial judge may be influenced by the timing of the application. In this regard, I am cognizant that after a decision has been rendered, the losing party has an opportunity to reflect on what it ought to have done at the trial to strengthen its case and may therefore after the fact seek evidence to shore up that case. Courts must scrutinize any application to admit fresh evidence for this abusive 'tactical' approach to litigation: *Alberta v. B.M.*, at para. 33.

30 Further, decisions may lead to reliance, and there is the possibility of real potential prejudice to a successful party where it unexpectedly finds a matter re-opened. As was made explicit in *Alberta v. B.M.*, the necessary threshold for due diligence is that evidence *could not have been obtained* at an earlier point. If an applicant cannot explain its delay to the point in time at which a fresh evidence application is made, then that failure will likely mean the due diligence requirement was not satisfied." (QL at para. 24-30)

Conclusion

A trial judge has a wide discretion to re-open proceedings before a judgment is rendered. That discretion is, however, one which should be exercised sparingly and with restraint, as motions to re-open necessarily involve a balancing of the accountability of counsel for decisions regarding the prosecution of its case and the interests of justice.

Accordingly, in weighing the propriety of re-opening proceedings to permit new or additional evidence to be tendered, the court will typically consider the following broad questions:

(i) Would the evidence, if it had been presented during trial, have had any influence on the result?

(ii) Could the evidence have been obtained before or during trial by the exercise of reasonable diligence?

The court will also assess: (i) the relevance, necessity, and materiality of the proposed evidence; (ii) the effect, if any, the re-opening may have on the expeditious conduct of the trial at large and the importance of the integrity of the trial process; and, (iii) whether the other party will be prejudiced if the re-opening is allowed or a miscarriage of justice perpetrated if it is not.

END

[i] ***Varco Canada Ltd. v. Pason Systems Corp.***, 2011 FC 467, 92 CPR (4th) 399 (FC), QL at para. 17

[ii] Also reference: ***Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Company***, 2011 BCSC 1536, [2011] BCJ No. 2143 (SC), QL at para. 31, where a similar point is made.