

Date of Release: September 25, 1996

No. C922041
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)	
	)	
KRISTINE LOUISE ODDO OCHOA	)	
	)	REASONS FOR JUDGMENT
Plaintiff	)	
AND:	)	OF THE HONOURABLE
	)	
CANADIAN MOUNTAIN HOLIDAYS INC.,	)	MADAM JUSTICE KOENIGSBERG
JOCELYN LANG and DEAN WALTON	)	
	)	
Defendants	)	

Counsel for the Plaintiff D.R. Clark and S.F. Smith

Counsel for the Defendants D. Chernichen, Q.C., D. Strand
and M.Lutz

Dates and Place of Trial September 5-8, 11-15, 18-22, 25-29,
October 2-6, 16-20, 23-27, 30-31,
November 1-3, 6-11, 20-23, 27-30,
December 4-8 and 11-14, 1995
January 15-19, 22-26, 29-30,
February 5-9, 12-16, 19,
March 4-8, 1996
Vancouver, British Columbia

INTRODUCTION

1 The Plaintiff is the widow of Alfonso Ochoa who was killed along with 8 other people by a large avalanche while heli-skiing in the Bugaboos. The accident occurred on March 12, 1991 on a run known as Bay Street. Twelve skiers and their guide, the defendant Jocelyn Lang, were beginning the last run of the March 12

afternoon. A description of the day's skiing and the events leading up to the avalanche and its aftermath were provided by one of the skiers who survived. Jeffrey Blomberg provided a statement to the RCMP shortly after the accident and testified at trial as well. Most of the description which follows is taken from Mr. Blomberg's testimony at trial. He was articulate and completely reliable in giving his evidence. I accept and find as fact all of the factual matters to which he testified.

2

It was the third day of the week's skiing and the skiing conditions were spectacular. Approximately one-half of the 44 skiers of that week in March elected to return to the lodge in the afternoon at the end of the run before Bay Street. Dean Walton and Jocelyn Lang, defendants, put together two groups of eleven and twelve respectively from the skiers who wished to continue skiing a little longer. They assembled at the base of the last run named Holy Shit. Dean Walton's group was ready first and so was flown to the top of Bay Street. Mr. Walton testified that it was his first time skiing Bay Street, which is a spectacular 2500 foot avalanche path run. He had received advice from Leo Grillmaier, the most senior and very experienced guide also guiding that day. When all five guides skiing that day met for the noon meeting and information exchange, a decision was made to ski Bay Street if logistically appropriate. Mr. Grillmaier explained the detailed

layout of the terrain to Mr. Walton and advised him to ski close to the trees on the extreme right of the skiers right run.

3 Mr. Walton and his group descended from the helicopter landing to the entry to the run which is through a rocky shoulder.

4 Bay Street is made up of three bowl shaped features, converging about midway down the slope into one large pathway to the bottom. Evidence at trial was that all three bowls can and have been skied in the past. The group planned to ski the right bowl. After Mr. Walton had located the best route down around the first group of trees, he found the way described by Mr. Grillmaier and led his group of guests down the run. He found the run to be excellent skiing.

5 Before Mr. Walton reached the bottom with his group, Ms. Lang arrived at the helicopter landing and radioed Mr. Walton for an update of information. He reported where he was and that the skiing conditions were very good on the right side of the right bowl run. Ms. Lang then instructed her group of twelve to follow her to the entry on the shoulder. She instructed them, once they regrouped at the entry, to ski down to the next re-group spot about ten turns down, to stay in to the right and not to go out further than the Walton group's tracks. She stated that on the upper part of the run there exists a feature causing a blind spot where the slope below cannot be seen, and that there is a large island of

trees toward the middle of the right bowl chute which could cause the skiers and the guide to lose sight of one another, a situation to be avoided if possible. Further, the way through the trees was narrow and skiers should follow one after the other, spaced out a bit and only one at a time. Ms Lang also instructed the group to re-group in the 30 to 40 yards that would be between her and the trees. Ms. Lang went first. She stopped about 50 meters from the entry, near the trees and watched her group come down.

6 After four or five skiers had reached Ms. Lang, a German skier came next but swung wide of the existing tracks. Ms. Lang realized that she had not adequately conveyed the instructions to him because he did not speak English and she had not spoken to him in German. She yelled at him to come over to her. One other person following after the German skier also swung wide. These skiers had made their way back to the regroup spot when the tenth skier was just moving toward the chute from the entry. This skier was Jeffrey Blomberg, who was one of three skiers still to ski down. Mr. Blomberg moved ahead of another skier who had hesitated for about twenty seconds or so. He testified that as he moved forward and down into the trees preparatory to going onto the slope, Mr. Leach, who was his partner and bringing up the rear above him, yelled "avalanche". Mr. Blomberg froze in his tracks and observed that below him eight people had formed a jagged line with Ms. Lang and that his friend, Mr. Karetsky, had already skied onto the slope and was about five feet above Ms. Lang, moving toward the

others. Mr. Blomberg heard nothing but watched as an enormous tidal wave of snow rushed past him sweeping all before it. Mr. Blomberg was about fifteen to twenty yards from the edge of the avalanche as it rushed past him.

7 Ms. Lang testified that as she was watching and waiting for the last three skiers to join the re-group she suddenly felt the snow move under her skis. There was no warning sound. As she felt it move, she yelled for her group to head for the trees which were only about ten meters away. There was no time to even move and ski out. The snow enveloped Ms. Lang. She, along with the nine other skiers in the re-group, were swept down the slope. Ms. Lang was the sole survivor. In the circumstances, her survival with only very minor injuries was a miracle.

8 A textbook rescue was undertaken within moments. All of the nine skiers' bodies were located within 45 minutes. It was clear from the way in which they were found that the impact of the snow and obstacles had killed them. It was unlikely that any had suffocated.

9 The plaintiff did not allege that there was any negligence or problem with the rescue procedures. The plaintiff says however, that the defendants were negligent in taking guests on to Bay Street on March 12, 1991. The plaintiff says it would have been obvious to a competent heli-ski guide that there was a

potential deep slab instability in the snowpack on upper Bay Street in the skiers' right bowl, and given the terrain features of the Bay Street run, no guests should have ever been taken there, unless snow stability tests were done to adequately test deep layers for instability.

10 This action is for damages arising from the alleged negligence of the defendants, which the plaintiff says resulted in the loss of Alfonso Ochoa. The death of Mr. Ochoa left his wife without a husband, six children without a father and the family without its only provider.

11 After 90 days of trial the issues in this case come down to these. First was Ms. Lang, the lead and senior guide on the Bay Street run, criminally negligent in taking her guests on the Bay Street run? Second, if Ms. Lang was not criminally negligent, was there negligence of any or all of the defendants in relation to taking guests onto Bay Street March 12, 1991? Third, Mr. Ochoa signed a waiver of liability for negligence applicable to this week of heli-skiing. Is the waiver binding on Mr. Ochoa (and subsequently his estate) and if so, does it cover the negligence alleged?

12 The length of the trial bears some comment. The Court took a view of the Bugaboo Lodge, the heli-ski feature and Bay Street in April of 1995. This view involved approximately four

stops in the helicopter at places where skiers would be dropped off or picked up. Photographs and sketches were provided in advance, as well as excerpts from various expert reports dealing with terrain and snow conditions at issue. At one point during the view, I was looking up at a particular terrain feature at or near the Bay Street run and my attention was directed to a photograph of the same area. I noted that the two views were quite markedly different. This experience, while not intellectually unexpected nor something which could not have been pointed out at trial as the evidence went in, was a cogent reminder of the limits of trying to assess decisions made by professionals in their particular environment from the perspective of evidence pictorially presented in a courtroom. The view was invaluable in assisting the Court in trying to put perspective on the evidence as it was heard. It also demonstrated the necessity for expert evidence from as many perspectives as possible.

13 The plaintiff alleges negligence in the exercise of professional judgment in an area in which professional judgment is made up of a great deal of experience, technical expertise and snow science. The defence was vigorous. It was apparent to the Court that CMH treated the matter as if heli-skiing as a commercially viable sport was at issue. As the matter developed that defence was appropriate. Whenever the defence attempted to prove that some CMH practice under attack in avalanche forecasting and guiding followed the standards in the avalanche forecasting industry, the

plaintiff asked the Court to find, if it found in favor of that defence position, that the industry standards were negligent. At times the trial took on tones of a Royal Commission into the viability of the sport of heli-skiing. The industry of avalanche forecasting was heard from and standards in that industry in general and forecasting and guiding in heli-skiing in particular, were canvassed at length. Every attempt was made on both sides to allow the Court to make considered decisions. This took time. Fortunately, this is not a case where the Court is left at the end of the day wishing that certain information had been made available, but was not.

14 The second area that necessitated a great deal of time was the claim for damages. Mr. Ochoa was a very successful businessman in Mexico. The Court heard evidence that he was in some sense, either by volume or by market share, number three in the steel industry. In addition, Mr. Ochoa was a risk-taking entrepreneur, who not only was not an employee with take home cheques to use as a benchmark of his financial contribution to his family, but he was an unorthodox businessman, who apparently by sheer force of ingenuity and personality shaped what was on its way to becoming a formidable business empire. Along with numerous properties and businesses owned by Mr. Ochoa at the time of his death, either with his brother, Francisco, or other business partners or his wife, several projects of considerable potential value were in the beginning stages of either planning or execution.

He was partway through building a new home on about eleven hectares of land in Guadalajara. He had commenced executing his plan to build a mini-steel mill. Mr. Ochoa operated successfully in the Mexican business environment. The evidence was uncontroverted that his income tax returns bore little relationship to his income stream. He owned or had the use of five homes, several automobiles, a large sailboat, horses, and small airplanes. There was a staff of persons working in his home environment. Many of his assets and domestic staff were maintained through one or another of his businesses. He co-owned most of his businesses with his brother, Francisco and both of their private and family expenses were paid through the businesses. Thus, to demonstrate Mr. Ochoa's net worth and reasonable future expectations at the time of his death is an exercise in unorthodox assessment. As a basis for the damages claim, a "consumption chart" was prepared. Essentially, Mrs. Ochoa with considerable legal and accounting help, attempted to itemize the material aspects of an opulent lifestyle and provide the Court with a reasonable estimate item by item of the cost to provide and maintain it. To provide evidence which was persuasive and reasonable, a great deal of time was given to Mrs. Ochoa and many other witnesses to provide some hard evidence and much descriptive evidence to convince the Court that a considerable amount of money in American dollars was expended regularly over at least the last four or five years of Mr. Ochoa's life to provide a particular lifestyle for the family. The average amount was approximately \$500,000 (U.S.) per year. At the same

time, clearly Mr. Ochoa was expanding his business, and his income generating ability was increasing. It is this increase in income generating ability which is the main component of the damages claim. Mrs. Ochoa was forced to sell all of Mr. Ochoa's income-generating assets and his property to his brother in an unfortunate transaction. Thus, she has realized the value of the income-generating assets and no claim on the defendants for loss from those can or is being made. The claim is essentially for the component of the income-generating business which was lost with the loss of Mr. Ochoa. His personal energy and abilities were, on the evidence, considerable. There is a loss which cannot be captured by sale of the businesses themselves without him at the helm. Also, there is the claim for the expectation, if any, that he would have continued to generate more wealth by continuing to build his businesses. Again that is only compensable to the extent that such future gain is attributable to his unique gifts.

15 The defence posed difficult and cogent points in relation to such a claim. What of Mr. Ochoa's debt at the time of his death? What of the lack of stability in the Mexican economy with the devastating devaluation of the peso and the 1994 near collapse of the economy? Was the unfortunate sale of nearly all the properties and businesses to Mr. Ochoa's brother, Francisco, for less than two million dollars (U.S.) a situation of a good deal for Mrs. Ochoa in view of the large debt load apparent at the time and her potential large liability, or, was it a forced transaction by

a greedy brother-in-law, who took advantage of a widow with six children who was not a Mexican national and who was not a business woman?

16 I heard a great deal of evidence from Mrs. Ochoa about her life with Alfonso Ochoa, its material and non-material riches. I found her entirely credible. In fact, she impressed me as an intelligent, observant, insightful and honest person. She acknowledged what she did not know. She attempted to provide some help to the Court in assessing the value of much of which had been part of her life materially with her husband when, as she acknowledged, there could not really be an accurate value assessed. She showed no inclination to exaggeration. She withstood a fair but thorough cross examination of both her credibility and her factual information, with grace. To the extent any of the information or evidence in this action, in relation to the effect of the waiver signed by her husband or the damages claim, depends on accepting her factual information as she observed or experienced something, I have no hesitation in accepting it.

17 She experienced a devastating loss as of March 12, 1991. Her marriage appeared to be an unusually good one. She shared most aspects of her husband's life, both business and pleasure. They had six children. Mr. Ochoa was clearly closely involved with his children. He was a loving, giving parent who took pride in his children's accomplishments. He included his children and his wife

as often as possible in his many activities. He cycled, sailed, skied, swam and socialized with an enthusiasm which was matched by his enthusiasm for business. He had plans for his children which included attending top universities and business careers. Mr. Ochoa himself did not attend university. He was that *rara avis*, a self-made man, who appreciated the advantages of an education. His older children, though still young at his death, did not appear to have natural gifts for academic success. They were in awe of their father, inspired by him and proud of him. When he died, the older children were left a bit rudderless, no less so because they quickly moved from Mexico to their mother's family's home in San Diego, California. There was no business left for them to grow into as had been planned by their father. Mrs. Ochoa has had to cope, not only with the loss of a beloved husband with whom she shared most of her activities in their life, but the rock on which her children's future was dependent. She was still young and vibrant at the time of his death. She is still a young woman, but coping with six children, the three oldest boys who were adolescents at the time of their father's death, has been difficult. The family, especially the older children, are still traumatized by the loss of their father.

I. CRIMINAL NEGLIGENCE

18 The plaintiff in its final amended pleadings alleged criminal negligence or conduct of a criminal nature against Dean Walton, Jocelyn Lang and Canadian Mountain Holidays (CMH),

apparently vicariously. At the end of the trial, plaintiff's counsel seemed to concede that the only evidence upon which such an allegation could rest was against Ms. Lang. No submissions were made in support of such a finding against either Mr. Walton or CMH, and I find that there is no basis for such a finding against them. I will deal with this allegation against Ms. Lang.

19 The plaintiff relies, in large part, on a decision of the Supreme Court of Canada in **R. v. Creighton** (1993), 105 D.L.R. (4th) 632 (S.C.C.) to state the test for determining if conduct is criminally negligent. The plaintiff summarizes the law as follows:

On a charge of criminal negligence, the test is one of reasonableness, and whether the conduct in question reveals a marked and significant departure from the standard which could be expected of a reasonably prudent person in the circumstances.

I cannot agree that this fairly captures the test for criminal negligence developed in **Creighton**.

20 First, to establish criminal negligence one must determine negligence. The acts or omissions complained of must depart from a reasonable standard. Second, the acts or omissions must be more than a departure from a reasonable standard. There must be a marked departure in all the circumstances of the case. Third, having found a marked departure from the standards of reasonableness, one must be able to infer on an objective foresight test that the defendant failed to direct his or her mind to the

risk and the need to take care. However, the essential element which illuminates the concept of marked departure is that of recklessness. At page 679 of the **Creighton** decision the *actus reus* is described as follows:

This may consist in carrying out the activity in a dangerous fashion, or in embarking on the activity when in all the circumstances it is dangerous to do so.

21 It is agreed that the only acts or omissions committed by Ms. Lang on March 12 which could be the basis of a finding of criminal negligence, are those occurring when she arrived at the top of the Bay Street run with her guests. All decisions which led up to their arrival at Bay Street were decisions agreed to by all the CMH guides skiing that day.

22 The standard of care required of Ms. Lang was that of a fully qualified, experienced, professional heli-ski guide. Further, it is agreed that Ms. Lang embraced the standard that it is the job of heli-ski guides to always be observant for the unexpected, and to continually test conditions. The decisions by heli-ski guides have a very low shelf life. It is agreed that having decided to ski the right side of lower Bay Street and embarking on that run after landing the helicopter, if at any time Ms. Lang thought or felt something was not as expected, she would and could abort the run.

23 The plaintiff submitted that as Ms. Lang approached the shoulder entry onto lower Bay Street she "checked out." In other words, she stopped thinking and functioning as a professional heli-ski guide.

24 The only evidence that Ms. Lang stopped "looking" was that she did not do any tests, formal or otherwise, for deep layer instability in the snow pack in the entry to the slope. In the circumstances did this render her acts dangerous or reckless of the risk that there was a deep layer instability? In my view the evidence is absolutely overwhelming that her failure to do any test, formal or otherwise, for deep layer instability as she led her guests onto the slope, was not reckless, dangerous or even a marked departure from the standard that one should be observant at all times. It was the assessment of all the guides before deciding to ski lower Bay Street, that there were no concerns about deep layer instability in general, or on that run in particular. It was not the practice of any of those persons with heli-ski experience who gave evidence at trial that tests designed for deep layer instability be done before taking guests on a run such as Bay Street in conditions such as those thought to exist on March 12. However, the plaintiff argued that Ms. Lang did no tests at all. That is, she did not even test for surface instability. She demonstrated no acts of being observant of conditions expected or unexpected. In large part this argument rests on an interpretation of the evidence of both Ms. Lang and Mr. Newman, who is a heli-ski

guide and who was the manager at the Bugaboo Lodge in 1990-1991. Ms. Lang said in evidence, she did no testing, including no ski

pole testing. She did not say she did not observe the snow conditions while skiing as she testified she normally would, that is, through the "feel" of both her skis and her ski pole planting. Ms. Lang did say she noted as she went through the entry to lower Bay Street, that she could feel the snow quickly get deeper. She also testified she did at least one pole plant to get a sense of the layering in the gully. The plaintiff interpreted Ms. Lang's evidence to be she did no testing, not even of the type she testified she normally did.

25 Mr. Newman testified he "tested" snow as he entered the Bay Street run on previous occasions and would routinely test on his entry to all runs. He tested by "jamming my ski poles in as I went across, feeling the layering of the snow".

26 From my observation and evaluation of Ms. Lang as she gave evidence over many days there is no reason to doubt that she did remain observant and that she did the kind of testing on March 12 she usually does as she skis and the same type of testing as described by Mr. Newman. No evidence given could support a finding of criminal negligence against Ms. Lang and I find she was not guilty of such conduct.

II. NEGLIGENCE

The second allegation upon which the claim against all defendants is based, is negligence. That allegation is not so simply dismissed.

1. Law

This is an action arising from an accident which occurred while highly trained professionals were exercising their skill and judgment. The accident occurred, it is admitted, because a mistake was made in the assessment of the stability of a slope in relation to avalanche risk. The issue is was that mistake the result of an error in judgment or skill or both which fell below a reasonable standard in the avalanche forecasting profession, or, if not, are the industry standards unreasonable? As the plaintiff argued:

Liability in tort will only arise where a defendant has transgressed the standards to be expected of a reasonable man, not where he has acted with due care but nevertheless made what turned out to be a wrong decision. Fridman, *The Law of Torts*, (1986), Vol. 1, at p. 289.

The characterization of the mistake or mistakes made as errors in judgment as opposed to want of skill does not remove the issue from potential liability. The issue is what is the standard of care

below which a professional heli-ski guide cannot fall in exercising judgment or skill or both.

29 Fortunately there are a few cases emanating from this jurisdiction which have set out the standard in circumstances similar to these.

30 In **Lowry v. Canadian Mountain Holidays Ltd.** (1987), 40 C.C.L.T. 1 (B.C.C.A.) the Court of Appeal in setting a standard for conduct in the heli-ski industry said this at page 11:

Did the defendant exercise reasonable care in the circumstances.

31 In **Scurfield v. Cariboo Helicopter Skiing Ltd.** (1993), 74 B.C.L.R. (2d) 224, another B.C.C.A. case dealing with an avalanche accident in a heli-ski operation, the Court said at page 225:

It is not contended that the defendants had a duty to ensure that their guests were kept away from all places where avalanches could occur in the context of helicopter skiing that would be impossible. I think it correct to say the duty of care which lay on the defendants was not to expose their guests to risks regarded in the business as unreasonably high, whether from avalanche or any other hazard to which participants in the sport are normally exposed. To enjoy the excitement of skiing in mountain wilderness areas participants are necessarily exposed both to risks which the careful skier is able to avoid and certain risks also which such skiers may be unable to avoid, including some risk of being caught in an inescapable avalanche.

32 There can be no doubt that the determination of what constitutes an unreasonably high risk must be in the eyes of a reasonably competent heli-ski guide. And perhaps most importantly, the approach as to what constitutes a reasonable or unreasonable risk in any given circumstance from the point of view of a reasonably competent heli-ski guide must not be ascertained in hindsight. As to the importance of this approach, L'Heureux-Dubé, J. in **LaPointe v. Hospital Le Gardeur**, [1992] 1 S.C.R. 351 (S.C.C.) at p. 90 said:

As a general rule, the obligation of a physician and a hospital toward a patient is not one of result but of means, that is an obligation of prudence and diligence whose violation is not to be assessed subjectively by inquiring whether the author of an act or omission has done his best, but rather according to an objective and abstract criterion under which the court asks what another doctor, another specialist ... of ordinary and reasonable knowledge, competence and skill would have done in circumstances similar to those in which the person whose conduct is to be judged found himself or herself ...

. . . courts should be careful not to rely upon the perfect vision afforded by hindsight. In order to evaluate a particular exercise of judgment fairly, the doctor's limited ability to foresee future events when determining a course of conduct must be borne in mind. Otherwise the doctor will not be assessed according to the norms of the average doctor of reasonable ability in the same circumstances but rather will be held accountable for mistakes that are apparent only after the fact ...

33 Ultimately, the plaintiff's case depends on the Court making one or more of the following findings: 1) that the decision

to ski Bay Street on March 12, made by all five guides, was a decision based on negligent application of the skill and knowledge of reasonably competent heli-ski guides; 2) that Jocelyn Lang, the guide in charge when the avalanche released killing nine people, including Alfonso Ochoa, failed, in deciding to ski Bay Street when she did, to exercise the skill and care of a reasonably competent heli-ski guide; 3) that the CMH system for avalanche forecasting is below the standard in the avalanche forecasting profession; 4) that the industry standards for avalanche forecasting are negligent.

34 The plaintiff says Lower Bay Street on March 12 constituted an unreasonably high risk to which guests should not have been exposed and all five guides should have known that. In particular, Ms. Lang, at the time she took her guests onto the run, could have avoided the accident through the exercise of reasonable judgment and by proper testing.

2) Experts

A. Plaintiff's experts

The primary evidence upon which the plaintiff relies to urge the Court to make the findings outlined above is that of two experts, Mr. Dick Penniman and Mr. Rene Boiselle.

Mr. Penniman:

35 Mr. Penniman was qualified as an expert in avalanches, particularly control, forecasting, hazard mitigation and hazard zoning, as well as education and instruction. In addition, he was qualified to provide opinions in ski safety for commercial skiing operations in organized ski areas, heli-skiing and backcountry skiing.

36 Mr. Penniman has considerable experience in ski safety and in teaching ski safety and avalanche control to backcountry skiers. The limitations of Mr. Penniman's background are: he has no experience with heli-skiing in western Canada; his experience with alpine conditions is limited; he has two to three years' experience as a forecaster - none as a dedicated forecaster at a ski operation; he has done no research on avalanches and his one experience with a heli-ski operation was so limited he did not know how run selection was done or the size of the area.

Mr. Boisselle

37 Mr. Boisselle was qualified as an expert to give evidence in snow stability assessment and guiding practices for winter recreation in the backcountry. He was not qualified to give evidence of guiding practices in heli-skiing.

38 Mr. Boisselle may be, as he said, the busiest "avalanche guy" in Quebec. However, there are no ongoing avalanche safety operations in Quebec. Mr. Boisselle has no practical working

experience in avalanche safety operations. He has no working experience as a forecaster, as a snow technician or as a ski tour guide or heli-ski guide. Further, Mr. Boisselle is not an avalanche scientist or researcher. Mr. Boisselle has a mechanical engineering background and has a research interest in avalanche control. He also has knowledge of avalanche theory acquired as an educator. Mr. Boisselle has considerable experience as a ski tour guide and backcountry skier. He has participated as an assistant guide and climbing instructor with the Alpine Club of Canada.

B) Defendants' experts

Dr. McClung

39 Dr. McClung was qualified to provide opinions on avalanche science, avalanche forecasting and snow stability. I place a great deal of weight on the evidence of David McClung. Dr. McClung brought to the task at hand a formidable array of qualifications. He is a professor of Geophysics at UBC and his academic teaching and research has focussed on the science of avalanches. Not only is he a prolific researcher and teacher in this area, covering avalanche forecasting and avalanche mechanics, but from a practical point of view, he also has extensive experience in the mountain ranges of the world, including the Himalayas, in which he has participated in a number of expeditions as an informal avalanche consultant. He has chaired the Technical Committee of the Canadian Avalanche Association in which role he has had significant input in the development of the standards in

Canada and elsewhere for avalanche forecasting. His research has extended to developing means to evaluate the way experts forecast avalanches. Also, he has developed with others, means of quantifying avalanche risk.

40 He has contributed chapters to classical works on avalanche forecasting, such as The Avalanche Handbook. Dr. McClung was particularly helpful because he has reflected upon and exposed his reflections to expert peer review on avalanche forecasting, training and avalanche mechanics. His perspective is not that of a commercial heli-ski operator. His perspective is broad by experience, training and intellectual habit.

Chris Stethem

41 Mr. Stethem was a defence expert qualified to provide opinions in snow stability assessment, avalanche forecasting, avalanche accident investigation and snow safety for operations subject to avalanche risk. Mr. Stethem has been heavily involved in snow safety for operations subject to avalanche risk. He has been involved with the Canadian Avalanche Association, particularly its education program. He has taught and assisted in the development of the Level I and Level II Avalanche courses which have become a requirement for someone to receive full certification as a mountain guide. Mr. Stethem has done extensive research into avalanche accident investigations. He, through his own consulting firm, employing expert assistance from others on a project basis,

has provided consultation on various snow safety programs throughout Canada and the U.S.A.. These include projects in avalanche forecasting, control and evaluation of such programs for the federal and provincial governments, industry and recreational ski facilities including numerous heli-ski operations, one of which is CMH.

42 Mr. Stethem has written numerous papers relevant to avalanche matters and participated in what are considered to be the premier conferences for avalanche or snow science matters.

Clair Israelson

43 Mr. Israelson investigated the accident immediately following the evening of the avalanche at the request of CMH. He has been with Parks Canada for over 25 years and is one of the pioneers of avalanche forecasting programs for recreational skiing areas and highways under federal jurisdiction. He is a teacher and contributor to course material for the Level I and Level II Avalanche courses. He was the Avalanche forecaster for the Lake Louise area in the mid 1970s.

Jack Benneto

44 Mr. Benneto investigated the Bay Street accident for the coroner's office. He is currently manager of the Avalanche program with the Ministry of Transportation and Highways. Mr. Benneto was

a heli-ski guide with CMH for four years and then an avalanche forecaster for B.C. Highways.

45 Other persons heard from with extensive expertise in avalanche forecasting, heli-ski guiding and avalanche safety standards were numerous and all were either employed professionally by CMH now or at the time of the accident. I was impressed with their expertise, honesty and integrity.

46 There is no question in this case that the resolution of the issues involving findings of negligent conduct depend on the assistance of expert evidence. A determination of the appropriateness of the decisions in question made by the guides involves an understanding of highly technical matters. In addition, the interpretation of the evidence, decisions made and the elements which make up the matters to be considered in making the decisions in question are all a matter of professional skill and judgment requiring specific expertise.

47 The Court heard a great deal of expert evidence. The expertise of the persons who were qualified to give opinion evidence was never questioned. There were questions raised about various experts' abilities to opine in specific areas, and appropriate limitations were imposed on the evidence to be given. However, each of the experts brought some level of expertise to the questions with which assistance to the Court was proffered. All of

the experts, whether for the plaintiff or the defence, were sufficiently disinterested in the outcome of the trial that there was no basis for discounting the weight of the evidence given for bias or undue advocacy for one side or the other.

48 Mr. Penniman, an expert for the plaintiff, caused me some concern by both the content and style of his evidence. He appeared to me to be an advocate for a particular point of view — that is, he was dogmatically, but unconvincingly critical of elements of the CMH system for avalanche forecasting and of the judgments made by the guides based on that system. He was rarely inhibited by his own lack of experience in heli-ski guiding or any kind of guiding in terrain like that in the Bugaboos. He occasionally used intemperate and emotive language which served to further undermine my confidence in the soundness of many of his opinions.

49 In this case, unlike that before Mr. Justice Gould in 1985 (**Lowry v. CMH** (1985), 33 C.C.L.T. 261 (B.C.S.C.) involving an avalanche accident and issues of negligence alleged on the part of CMH and its guides, none of the defence witnesses, even after thorough cross-examination, adopted the plaintiff's position on any of the disputed facts said to be contributory to the avalanche. In this case, the plaintiff's experts maintained that the conduct of the guides on March 12, the conclusions they drew from the data they had, their actions in deciding to ski Bay Street the afternoon of March 12, and their actions or non-actions in skiing it, were

incompetent and fell below any reasonable standard for a mountain guide leading guests. The defence witnesses, no matter from which perspective they came — heli-ski guide; investigator for the Coroner; academic and mountaineering background or highways avalanche control director — all negated the standards demanded or required by plaintiff's experts as applicable to the avalanche forecasting industry or heli-ski guiding. No defence expert quarreled in any significant way with any of the steps taken, conclusions drawn or actions taken by the guides in relation to the data collected, reviewed and interpreted by the guides in deciding to ski Bay Street or in the actions taken while skiing it.

50 In order to come to any conclusion on the viability of the plaintiff's position, it is necessary to choose among experts' opinions. The three most notable areas of difference between the plaintiff's experts Mr. Penniman and Mr. Boisselle and the defence's experts Mr. Stethem and Dr. McClung were: 1) what interpretation should be placed on the February 26 snow profile of Bay Street? 2) what reasonable conclusion could be drawn from avalanche occurrences observed prior to skiing Bay Street relevant to Bay Street i.e. Holy Shit, Dome Face, Evelyn's Crevasse and others? and 3) whether Bay Street should ever be skied with guests without doing tests for deep layer stability or a snow pit prior to going onto the slope, and if so, whether it should have been done March 12?

51 I have no difficulty in preferring the evidence of either Dr. McClung or Mr. Stethem over that of Mr. Penniman or Mr. Boisselle. The range of experience in both mountaineering and avalanche forecasting generally, and specifically, in relation to a mountain range like the Bugaboos and heli-ski industry standards, was far greater for the defence experts.

52 However, the case presented by the plaintiff cannot be disposed of simply by choosing among experts. An analysis of the evidence given is necessary.

3) Evidence

A) Backdrop

53 The backdrop to any analysis of the decisions made by the guides in 1991 is the CMH snow stability assessment system. There was no serious, or at least general, attack on the system itself as negligent. However, certain practices which form part of the system were attacked as negligent and I will deal with those later. There was no suggestion that the system was not in place and operating in the Bugaboos in 1991. The Court heard numerous descriptions of the system and some of its component parts were marked as exhibits at trial, such as the Season's Profile Chart (Exhibit 12) kept at the lodge and updated every day. A partial summary description of the system was given by Dr. McClung during his testimony:

-avalanche forecasting is about data collection and analysis; the principle problem is with respect to the temporal and spatial variability of the snow cover.

-information comes from a variety of sources and one of those is observations while skiing.

-it is a cumulative process starting from the beginning of the winter, monitoring the snowpack and the weather, keeping track of skiing and all the different tests that are done and all the observations and in particular discussion with fellow guides at the guides meetings; [it] includes the stability tests and snow profiles taken at the study plots.

-this constitutes an immense data base collection through the entire winter.

-so one's perceptions and one's actions are based not just on what one is observing today but there is a history involved and that is very important.

54 CMH has evolved the system over many years. Consultants are brought in at least annually for week-long workshops to discuss upgrading the system in light of the latest information and experimentation available. Every CMH guide attends that one week retraining workshop every year no matter how many years he or she has been guiding with CMH or anyone else.

55 The evidence regarding the forecasting system was lengthy, detailed, and overwhelming in its thrust and convincing that heli-ski operations in general and CMH in particular, have developed sophisticated data analysis and the largest data gathering system in the avalanche profession. Duncan Brown worked as a heli-ski guide with CMH. Before joining CMH in 1990, Mr. Brown worked at Rogers Pass for Parks Canada for three winter

seasons. His position at Rogers Pass was as an Assistant Avalanche Observer in the Snow Research and Avalanche Warning System. Comparing the system of data collection and analysis in the form of records used for avalanche forecasting between that used in Rogers Pass and that used in the Bugaboos, Mr. Brown testified as follows:

Well, I think there is no other operation that's comparable to heliski guiding in the amount of information that we have at our disposal. When you have five experienced people spending all day in the snowpack, there's --- or in the environment observing, and you have the unbelievable mobility of a helicopter, the difference between the information you gain there and the information you gain from a few remote wind stations and study plots and -- and observations you make driving along a highway, it's -- there is no comparison.

56 The process involves heavy reliance on communication and exchange of information among guides on an ongoing basis. There are two formal guides meetings each day in which data from every source is evaluated and discussed. In the morning meeting the runs and schedule for the day are discussed, planned and decided upon. Because any decision to ski a run can be changed with new information obtained as guides ski and observe, alternatives are also discussed. At lunch, guides come together to discuss observations made in the morning and firm up the schedule for the afternoon. The rule that no run is skied unless all guides agree requires that all meet and consider information relevant to a run before committing to ski it. However, since if only one guide has an objection to skiing a run it is not skied, all information is constantly exchanged and discussed throughout the day. The evening meeting provides a forum for evaluation of the day's information,

a stability evaluation is produced and information gathered is forwarded to the regional information exchange, a service used and contributed to by many in the avalanche profession province-wide, including relevant parts of Alberta.

57 Formal records are kept and information is charted and graphed on a seasonal chart called the Seasons Profile. Guides work three weeks on and one week off. When they come back after their week off, they speak to the other guides going out and guests leaving, about the preceding week's skiing. They routinely review the run lists for the previous week so they know where information gathered has come from. Also the stability evaluation, avalanche logs and any snow profiles done are reviewed.

58 In the information gathering process, the skiing itself is likely the single most valuable source of information. The guides observe conditions while skiing and ski to make observations. Skiing itself is a test and then numerous tests of the snow stability are made while skiing. Five guides skiing up to fifteen runs a day adds up to a very large number of observations of snow conditions.

59 The plaintiff's expert witnesses, Mr. Penniman and Mr. Boiselle, suggested that heli-ski avalanche forecasting principles and systems are not appreciably different from back country or ski touring principles. Both plaintiff's experts have experience

avalanche forecasting or doing snow stability assessment in back country skiing and sought to rely on that experience in critiquing the system, the principles used, and the decisions made by the heli-ski guides at CMH in 1991. Dr. McClung from both extensive field experience and his academic research perspective compared the two systems and gave the following testimony:

-there is a temptation to lump together different kinds of avalanche forecasting; in my view it is unwise and improper to do that because you have to look at the data base in which the analysis is done.

-the amount of data available for helicopter skiing as opposed to general backcountry skiing is the difference between night and day.

-a weekend backcountry skier does not have study plots, hasn't been there to monitor the layers all season; that person does not have local skiing experience with those terrain features.

-someone in a helicopter skiing operation who has been there the whole winter knows far more about the deep layers than somebody that is a backcountry forecaster that goes out and samples the terrain from time to time and that influences the data collection.

-you cannot compare it to a helicopter skiing operation system, based on cumulative process, to say, general backcountry skiing or even forecasting for a highways operation.

B) Alleged Breaches of Duty by the Defendants

60 The plaintiff particularized the breaches of duty upon which she relies to ground the allegation of negligence against the defendants. I will deal with each of the alleged breaches raised by the plaintiff.

1) Failure to Recognize a Potential for Deep Layer Instability in the week of March 10.

61 The defendants were confident that there was no deep layer instability in the snow pack as of March 12, 1991 in the Bugaboos. The plaintiff's position was that there should have been no confidence in an assessment of no potential for deep layer instability on a run like Bay Street in the week of March 10, 1991. Four grounds or bases were advanced in support of this proposition; (a) a failure to adequately review or interpret the February 26 snow profile; (b) an inadequate basis for extrapolating positive information from avalanche occurrences; (c) a failure to adequately comply with CMH's own operating procedures; and (d) an inadequate level of knowledge and skill of some of the senior guides.

(a) February 26, 1991 Profile

62 A snow profile is one piece of information which is in the category of important pieces of information gathered regularly to monitor the snow pack and its development over a season in various locations. A snow profile is a formal gathering and noting of information obtained from digging a hole in the snow, taking certain measurements, and making certain observations as to the layering and the quality of the snow crystals at various depths and the bonding between layers. Numerous snow pits were dug over the 1990-1991 season at the Bugaboos. Most of them were recorded on a snow profile. On February 26, 1991, approximately two weeks before

the accident, Eric Sommer, one of the heli-ski guides, dug a pit on lower Bay Street as part of the snowpack monitoring system.

i) The February 26 profile was inadequately interpreted

63 The plaintiff argued that Mr. Sommer who did the profile and all other guides failed to recognize that it showed potential weak layers. This failure it was argued, resulted from Mr. Sommer's failure to record properly what he observed and then the other guides' failure to give proper consideration to what was recorded. The plaintiff further argued that a slab configuration was apparent in the profile indicating that the relative strength of the layers was questionable and could change for the worse with time. Thus, says the plaintiff, the February profile bore careful and continuing scrutiny. The plaintiff says Mr. Sommer incorrectly concluded, after doing the snow pit, that it was a strong snowpack and that he had no concerns about the snow layering. The plaintiff says he may not have been correct when he said he observed rounded crystals in a cluster or when he called it "melt frozen" and said it was not facets which are a snow crystal form associated with weak bonding and instability.

64 The plaintiff further argued that Mr. Sommer either made errors in his pit digging and investigations which were subsequently put in the form of the profile and/or he made errors in recording on the profile. Some of these errors alleged to have been made by Mr. Sommer are the result of a failure of the CMH

avalanche forecasting system to set standard means of communication used by all in recording what is seen. An example of the foregoing is Mr. Sommer's recording the layer [at 126-137 cm.] as "melt freezen". The words melt freezen are a variant of the description melt freeze. Mr. Sommer is German and speaks with limited English. Melt freeze has a specific meaning in snow stratigraphy - it is a crystal form which is made up of individual crystals in clusters as the result of free water. It usually forms as a result of solar radiation or light rain producing free water transfer in the snow. When testifying, Mr. Sommer described what he observed and then labelled it as "melt freezen".

Q. What about clusters of melt freeze crystals, what do they mean to you?"

A. That means that the rounds sticking together and then I can see the clusters.

65 Further, says the plaintiff, Mr. Sommer either failed to do a shovel shear test or failed to note it, if he did one. This led to a possible false assumption about bonding strength of the layer he designated as "melt freezen".

66 The plaintiff says a careful analysis of the snow profile reveals that the layer labelled melt-freezen is anomalous.

67 The plaintiff also argued that the National Research Council guidelines expect a shovel shear test to be done when

digging a snow pit. I do not accept this as an "expectation" or a requirement, the guidelines indicate it is a matter of judgment of the observer. I note that Mr. Sommer said he did not perform the test because "it was not weak for me" which was an expression of his judgment.

The plaintiff's case on the February 26 profile depends on discounting the role of trust in the observer guides' observations and conclusions.

(ii) The role of trust in the observer guides

The CMH system as earlier described is based on all of the guides evaluation of data they observe and collect hourly. To become a professional heli-ski guide, a significant amount of experience, training and testing takes place before certification is given. The certification process is rigorous: The study of snow stratigraphy, all elements of avalanche forecasting including how to evaluate snow crystals, layers and bonding are all part of the training. No one at trial disputed that certification as a full mountain guide was a designation most, if not all, the heli-ski guides at CMH had. Only a few junior guides are at any one time still in the process of receiving full certification.

I find without question that the data gathering and evaluation system employed by CMH is consistent with the standards in the industry. It has been developed, tested and improved by

persons who play a key role in developing the standards in the industry.

71 Essentially there are few rules and many guidelines. The process of assessing the stability of the snow is a constant. A fair description of the role of the guides in the process is captured in excerpts from the cross-examination of C.J. Stethem:

A. ... I would say the industry standard is that a guide must always be looking, that a guide must employ the cumulative process of stability and terrain evaluation and that a guide must learn to recognize the unexpected.

. . . .

A. Well, I think, to talk about the reassessment first, this is the cumulative process of evaluation I'm speaking of. You're constantly adding new observations and reconsidering what you already know. That's the process of ongoing stability evaluation. And I would say that you constantly have to be observant what tests you're taking at any given moment in time, or what types of observations you're taking at any given moment in time will vary, but there's a cumulative process over time of gathering this type of information.

Q. And you continue making observations and you continue looking, do you not, sir?

A. This, yes, sure. The observation process begins at the beginning of the winter and it goes to the end of the winter.

Q. And it goes all day, every day you're out there, doesn't it?

A. Yes. I would say you're constantly observant, but what you are observing at what moment in time, remains to be seen.

72 In the process of gathering information and evaluating it, how it is gathered, and how the information gathered is communicated to other guides is a matter of judgment on the part of the guide informed by guidelines, agendas and the general ability to communicate among a given group of guides.

73 Certain kinds of information - including critical information for a proper understanding of what a test of snow stability such as a hasty pit reveals - are primarily dependent on a very subjective sense of what is being seen or felt by a guide.

74 For instance, Dr. McClung among other witnesses, testified that in relation to determining the meaning of certain layering in a snowpack - how hard or soft it is, its crystal form and size and what all observations of those sort say about snow stability — is "best left to the observer." He said it this way:

The complexity of snow is such, that you are much better off to rely on the observer; the looseness of grains can be ascertained by somebody there at the time; you can do it with your hand.

75 In relation to whether any particular test should be done, again the system is dependent on the skill and judgment of the observer. Chris Stethem testified, the choice of whether to do a shear test (a test which is one of the best tests for bonding) should be based on observation while digging. Dr. McClung testified "it would be highly unlikely you would get a really

negative indication with respect to stability using the shovel test in a thick layer where crystals are clustered."

76 The plaintiff argued that reliance on Mr. Sommer's observations of the snow crystal form as clustered rounds (a form consistent with stabilizing or stability in a layer) is not warranted by the totality of the evidence and thus, trust in this observer guide was not prudent. The preponderance of credible evidence however, supports that Mr. Sommer saw clustered rounds, not facets (a form not consistent with stability in a layer) and that the rounding process was complete.

77 The plaintiff submitted that the failure of the guides to properly scrutinize the profile was because either the profile was never reviewed at all (because it was likely not completed in time for the February 26 evening guides' meeting) or, it was likely not reviewed formally; that is, in a focussed way with all guides evaluating it either at the time it was created, February 26, or March 12, before deciding to ski the run. The profile - if properly reviewed at either time - should have raised questions about the stability of the snowpack on Bay St. and prompted further investigation, because properly viewed, the profile demonstrates anomalous findings.

78 On an analysis of all of the evidence on this subject, none of the "defects" identified by the plaintiff were demonstrated as more likely than not. First, essentially, no one could say they remembered specifically reviewing the formal profile. This is not surprising since, on the evidence of every guide and the experts called by the defense, that profile did not raise a question of instability in the minds of the viewer. It did not show an anomaly or something inexplicable or disturbing. The system is that profiles are reviewed when completed. There is no reason to believe this one was not.

79 Second, Mr. Sommer says he reported verbally to the guides his assessment of the snow stability he found and subsequently profiled. He recalls doing so. There is no reason to doubt the likelihood of that reporting.

80 Third, the whole issue of what this profile shows or does not show, and what its meaning is or was demonstrates a danger which should not be ignored. It is not unusual, when an enormous tragedy such as this accident occurs, to review in microscopic detail, in hindsight, what occurred leading up to the accident. Such an analysis is necessary and productive for a number of reasons such as learning from the experience and improving systems and procedures. But the analysis of the February 26 profile, urged by the plaintiff is as much or more speculation and conjecture than obvious fact. In its actual place in the context of the avalanche

forecasting system in place in the Bugaboos in the 1990-1991 winter season, it was one piece of data, collected by Mr. Sommer, a professional heli-ski guide, with absolutely no motive to misrepresent what he observed to his colleagues. Each guide holds in his or her hands not only the safety of the guests, but those of the other guides as well. Within the system as I have understood it, the role of trust in the observer to observe relevant information and to communicate it accurately is not misplaced. It is central to the system. It is the strength of the system. However, it can also be a weakness. On a balance of probabilities, I find there was no mis-communication of relevant information from the hasty pit dug by Mr. Sommer on February 26. I find he made the important and relevant observations from that pit about the state of snow stability in the place he dug it on lower Bay Street. I also find he communicated the information adequately; that is, he communicated that he observed a stable snowpack with specific identifiable layers. He mis-communicated to the extent that he used the term "melt-freezen" to communicate the type of crystal. It was likely not a melt freeze layer but rather a facettted layer which had undergone rounding and cluster formation. In terms of the stability of the snowpack, I accept Dr. McClung's analysis that it makes no difference what process resulted in the rounded clusters.

81 It became obvious during this trial that the lack of clear and rigid rules for communicating the important details of

observations in snow stratigraphy is a phenomenon throughout the CMH system and any other system to which the Court was exposed. The language of avalanche forecasting is still in its infancy. Each professional may have received training in a slightly different scientific language. That is, the codes for designating snow stratigraphy differ slightly from jurisdiction to jurisdiction. The use of terminology in textbooks, articles and other materials before the Court was so imprecise as to not only bewilder the Court at times, but also counsel and all witnesses. As soon as the problem was identified in the courtroom, steps were taken to try to ensure that the same process or observation was being discussed by the questioner and the witness. I point this out because just as this lack of precision or standardization was a problem in the courtroom, it also, to a lesser degree, exists in the field — lesser because the communication in the field, at least generally within CMH, is among persons of similar background training and often considerable shared experience, and so arriving at what is meant by the use of a word or symbol is easier to accomplish.

82 I find in evaluating the plaintiff's submissions on this point, that again the evidence of Dr. McClung is most helpful. After a thorough and searching cross-examination Dr. McClung testified that from his evaluation the "profile was not a problem, the crystals were rounded and clustered and weakness was not an issue from all the information."

83 It follows from the foregoing discussion that there can be no finding of a breach of duty on the part of CMH or Eric Sommer as a result of the imprecise communication of Mr. Sommer's February 26 findings on Bay Street or in any other alleged failure to properly make or interpret findings from the snow pit dug on Bay Street February 26, 1991.

(b) Extrapolation from avalanche occurrences

84 The plaintiff also took issue with the use and interpretation given to relevant avalanche occurrences. Part of the guides' assessment that there was no further concern for deep layer instability in the snowpack in the Bugaboos was based on the evaluation of avalanches which occurred within a few days or hours of the March 12 Bay Street avalanche and judged to be relevant to such an assessment.

85 The plaintiff argues essentially two points with regard to a failure to meet a reasonable standard in evaluating avalanche occurrences: First, that the system followed by CMH in evaluating avalanche occurrences as part of the avalanche forecasting system is negligent. Included within this argument is the further argument that if CMH meets the industry standard in evaluating avalanche occurrences the standard is negligent. And second, in relation to the evaluation of avalanche occurrences immediately preceding the March 12 avalanche in issue, the guides were negligent in the conclusion they drew from what they observed.

Specifically, the plaintiff says there was insufficient information about these avalanches to allow the guides to conclude they were confirming no deep layer instability.

86 A great deal of evidence was given in direct and cross-examination of almost all the witnesses relevant to avalanche forecasting on the subject of evaluating avalanche occurrences and the use the avalanche forecasting industry makes of such occurrences. Overwhelmingly, the evidence supported the following propositions:

- 1) Recent avalanche occurrences are one of the most important pieces of information in the mix of information which forms the factual matrix for avalanche forecasting.
- 2) Avalanche logs are kept to document avalanche cycles throughout the season. The logs kept by CMH conform to expectations of what such logs should contain.
- 3) Avalanche cycles are closely correlated to storm cycles and, in fact, avalanches run predictably in relation to storm cycles. A frequent designation for an avalanche in a surface layer or layers is a "storm snow avalanche".

- 4) Most avalanches which are observed are after they have run and it is the debris which is observed.
- 5) Most avalanche debris is observed from a significant distance: in heli-ski operations, often from the helicopter; in highway operations, often from a truck on a road.
- 6) It is rare in either heli-ski operations or highway operations that a "fracture line profile" or any other up-close observation of the fracture line of an avalanche is made. There are several reasons for this:
 - a) the storm and wind have blown over the fracture line;
 - b) the fracture line is in inaccessible terrain;
 - c) there is little time to do a fracture line; and
 - d) most observed avalanche debris fits prediction or expectation — that is, an analysis of the terrain and weather conditions result in an expectation of an avalanche in storm snow and thus, there is no perceived reason to take the time to do a profile.

- 7) Although it is rare to actually observe a fracture line up-close, the avalanche forecasting industry without exception relies on the "from afar" observation of debris to evaluate when it ran, what size it is, and what the probable sliding layer is of an avalanche. No studies are done or data collected to test the reliability of this evaluation.

- 8) In avalanche forecasting, for both the heli-ski industry and the Ministry of Transportation and Highways which conducts an avalanche program for opening or closing potentially affected highways, it is accepted that extrapolation from observed debris to a potential avalanche is relied upon. On the basis of a cumulative snow stability process very similar to that of CMH (a key feature of which is extrapolation from debris evaluation from afar) highway avalanche forecasters open and close highways with an approximately 80% likelihood of being right.

87 I find on all the evidence that in assessing the reasonableness of this procedure there are differences, but no distinctions to be made between the forecasting system used by B.C. Highways and the system used by CMH.

88 On all the evidence I find that the CMH system is in no respect less than the industry standard. The system in place at the Bugaboos and its general application in terms of snow stability analysis (the cumulative process) and avalanche occurrence evaluation in particular, meets the industry standard at its highest.

89 The next question is — is there a basis for finding the industry standard negligent? In order to determine this, the Court requires some other standard. One might be — does the standard affront the Court's general experience, sense of logic and common sense? Or, is there some broader standard against which this industry standard can be found wanting?

90 The question of how one can put confidence in avalanche occurrence evaluation as part of a snow stability evaluation was an issue about which the Court heard a great deal of evidence. The only evidence that the evaluation methods employed by CMH and the avalanche forecasting industry generally were inadequate, was from Mr. Penniman and Mr. Boisselle.

91 Mr. Penniman was not firm that avalanche occurrence assessments could not be adequately done in the way CMH was described as doing it. In fact, at one point he conceded that with experience of how a slope looks after a storm, an observer can interpret what has happened on a particular occasion by

categorizing it according to that past experience. Mr. Boisselle was of the opinion that no accurate determination of sliding layers could be determined without doing a fracture line profile.

92 I do not accept Mr. Boisselle's opinion as representative of a generally accepted body of opinion among experts in the avalanche forecasting industry. While I had some considerable difficulty appreciating the reason for the high level of confidence, nearly every avalanche forecasting expert or experienced heli-ski guide who testified before the Court had in the practice of evaluating avalanche occurrence debris to extrapolate the potential for avalanche risk or no avalanche risk, it was obvious that most had many years of experience in actually employing these methods. The range of experience of these experts was broad. B.C. Highways and Parks Canada employ these methods as do such persons as Dr. McClung, who in addition to an impressive academic background in snow science and specifically avalanche dynamics, has wide experience with avalanches in numerous mountain ranges and ski or hiking endeavours. This area is no field for a court to rely on general experience or common sense as a standard. In addition, the wider industry standard was in fact represented through B.C. Highways and Parks Canada. It is most important, in my view, however, that this method of evaluating avalanche occurrences or risk and extrapolating from what is observed from afar is not done in isolation. It is an integral part of the "cumulative" process. It is, as I understand it, the vast data

collection and analysis in the heli-ski industry which provides the justification for the confidence shown in determining the meaning of avalanche occurrences overall or specific snow stability. It is this ongoing process which informs the confidence with which the heli-ski guides at the Bugaboos can and do say they are comfortable with determining the how, why and when of an avalanche from observing the debris from a distance. There is no basis in the evidence for finding this practice negligent.

(c) Operating Procedures

93 In all of the alleged defects in operating procedure, the plaintiff seeks to demonstrate that the defendants did not follow several of the defendant's own rules. No one of these defects could be said to be causative of the accident which happened. The plaintiff says, however, that cumulatively they created a situation in which there was a negligent lapse in judgment and skill which took place on Bay Street, March 12, 1991.

94 I cannot accept this analysis. First, none of the alleged defects is a rule as opposed to a guideline. I will deal with these allegations each in turn.

(i) Failing to give written reasons on the run list at the morning guides' meeting for the decision not to "green" Bay Street.

There is no question that the guideline that a reason should be written down for a decision is a good one. Being forced to articulate reasons often clarifies reasoning. In this instance the reasoning for not greening Bay Street was not written. However, no one failed to understand that the reasoning on Bay Street was that the guides wanted to see what were the effects of wind, if any, in such places as Bay Street before committing to ski it — nor did anyone fail to consider the information sought and obtained about the effect of wind in specific areas before making the decision.

- (ii) Failing to specifically consider the February 26 profile when considering "local" snow stability in relation to the Bay Street run, at the morning meeting.

There was not one piece of evidence from anyone that it was the practice or would be a better practice, to review specific snow profiles relevant to a run on the morning before deciding to ski it. A large amount of evidence was given that snow profiles are reviewed and added to the cumulative knowledge bank each guide is required to keep in his or her head. Which piece of data should be specifically reviewed at a morning guides' meeting

is clearly a matter of judgment dependent on the mix of circumstances faced each day. Further, if the February 26 profile bore the interpretation given it by Mr. Boisselle, that it was a "bomb" — which I found was not one shared by anyone else giving evidence at trial, nor one I accepted — then one might have expected it to have figured more prominently in the guides' memories and to have been reviewed March 12, 1991. Its overwhelming interpretation as of no concern in the ongoing snow stability assessment explains why it would not be remembered or reviewed again.

- (iii) The fifth guide should do tests on the slope before skiing the area with guests.

This argument confuses two issues: 1) whether you take guests onto slopes which require further testing before you do that testing and 2) the fifth guide collects data for the ongoing cumulative data bank. At any point in time when a guide does a hasty pit, there is a specific reason why he or she is looking for information of a predictive nature. The information being sought is usually more general than the stability of that slope in that place and it is never to determine if it is safe to

take guests on that slope. So whenever guides dig pits in these circumstances, whether it is before guests ski the area or after is immaterial.

d) Knowledge of senior guides

95 It is alleged that all senior guides did not have the same degree of knowledge and skill with regard to important matters such as the effect of terrain features on snow stratigraphy in certain weather patterns.

96 There was no compelling evidence that any differences in knowledge were related to a lack of competence on any guides part. No doubt there are significant differences in knowledge and skill among the guides, some have 25 years experience as heli-ski guides, some five years, some, one or two years. Further, some know the specific area very well, others at any one time are new to it. However, on any point it would be impossible to say with certainty that any difference in description of facetting - its extent, its meaning etc. in the courtroom was not due to differences in how questions were asked, the language used to ask them and the language terms used to answer them. There was no demonstrated lack of competence related to heli-ski guiding among any of the guides.

2.) Test Pits

97 Another area of alleged negligence is in regard to the
amount of testing and what type should be done on each slope before
it is skied.

98 The plaintiff contended that some test of the stability
of the snowpack, preferably a snow pit, should be done on any high
risk slope before taking guests onto it.

99 It is acknowledged by the defence that there is a greater
residual risk or hazard in heli-ski operations than resort skiing
because of the following factors: limited compaction of snow by
skiing, vast amounts of terrain, exposure to avalanche paths and a
more limited use of explosives to control avalanching.

100 Dr. McClung discussed residual risk with reference to
heli-skiing this way:

Q. By 'residual risk', Dr. McClung, what is it that
you mean?

A. Well, in relation to the example I discussed
previously, having collected information over the
whole season and thought about it, discussed it
with colleagues and analyzed it, there's still
going to be -- there's still going to be risk there
due to the spacial and temporal variability of snow
cover. In other words, you've done the complete
analysis. You've done what, what's a reasonable
job.

. . . .

- A. ... There are weak spots that you can't find with say a snow profile or even two -- and the modern thinking with respect to slab mechanics is that the initial failure can be very localized. It can be very localized. It can be certainly less than, maybe less than half the top of this desk. In other words, I am not worried if one bond falls or if two bonds fail and so on, but when there's a failure over a region then it becomes possible to generate a propagating shear instability. And so the modern ideas in slab mechanics, starting from me in 1979 my paper, my following paper in 1981 and the paper by Bader and Salm in 1990, underlie the importance of imperfections in the snow cover. It's not possible to find such imperfections in a snow profile. And so when I talk about the residual risk in the sport of helicopter skiing it's rooted to this, it's the link to this question, the temporal and spatial variety of the snow cover.

101 The plaintiff argues that Bay Street is a high risk slope and as such should be tested before skiing it even if testing is not usually done to confirm expectations. It was argued that Bay Street is unusually steep and long, 2500 vertical feet, with an average 32 degree slope angle. Most importantly, as a result of its terrain features, Bay Street is particularly high risk for severe injury or death if there is an avalanche, since there are few places of refuge on the slope and many obstacles such as rocks, cliffs and trees which form serious hazards to anyone caught in an avalanche. Thus, says the plaintiff, such a run requires a higher standard of care in that, if testing is not necessary on every potential avalanche path run in the Bugaboos, it is necessary on a run such as Bay Street.

102 The defence disagreed. Mr. Stethem testified and I accept, that no one in the industry does a test profile on every run that will be skied in a week, whether prior to skiing or not. Certainly, he testified, it is not the practice to do one prior to skiing a run.

Q. Now, did you, when you reviewed the CMH procedures, identify any formal procedure for verifying the forecast that's made at the morning guide's meeting?

...

Q. Let me put it to you this way, sir. In the course of doing this forecast in early March, I think you certainly concluded, and we've heard evidence in these proceedings, that the deep layer, the December/January facet layer in deeper snowpacks, was no longer a problem. Did any -- is there any procedure whereby the snow stratigraphy in those deep layers out in the field are actually inspected to confirm what the forecast was?

A. Well, firstly, the analysis I came -- I came to the conclusion that the deep snowpack was generally stable in the Bugaboos.

Q. Yes.

A. You said only in the deeper snowpacks. But I said my analysis did not indicate problems with it anywhere.

Q. All right.

A. In the Bugaboo area. You know, the skiing -- whatever they call it. Bugaboo ski area. I don't think there's a process of confirmation. No. And I don't know anybody who does that in Canada where they make a forecast in the morning and then go out and dig a hole to confirm it. I mean, I could use the Rogers Pass example again as the best established programme. They take regular observations over time, but they make forecasts every day, but they don't go and dig a hole the day

after the forecast to make sure they were right, if that's what you're saying.

Q. Just -- that's essentially what I'm saying. Is there a formal procedure?

A. No. I don't think there's a daily formalized procedure where you go and dig profiles and confirm a forecasted snowpack.

Not one defence witness, whether a heli-ski guide at CMH, an avalanche forecaster for Parks Canada or B.C. Highways or Dr. McClung from an academic avalanche researcher's perspective, agreed that there exists a practice or requirement that a test pit should be done at either the entry to a run such as Bay Street, or at or near the start zone. The reasons were consistent as to why not. The ability to articulate those reasons ranged from barely intelligible to very helpful. However, only the two plaintiff's experts suggested such a requirement and neither had the qualifications or credentials to outweigh those of the experts against such a practice. I digress to point out that by saying what I have, the task of evaluating the evidence on those points and others, was not so simple (I might say simple minded) as counting up the number of experts for and against a proposition. Nor did I discount all evidence given by Mr. Penniman or Mr. Boisselle on the basis that they had little or no experience in the heli-ski industry. Sometimes a fresh prospective from related fields illuminates a problem not appreciated by those deeply involved.

103 What was apparent was that on most disputed points, the
defence evidence came from a broad range of perspectives in the
avalanche forecasting industry. While all the defence experts had
some connection with CMH — through having worked for CMH in the
past, having consulted with CMH at its annual workshops or having
participated with or taught CMH guides and personnel at various
avalanche forecasting conferences, courses and workshops — all of
the witnesses impressed me as thoroughly professional and reliable.

104 The defence resists the description of Bay Street as an
unusually high risk run. It was pointed out that many of the runs
open for skiing on a regular basis in the Bugaboos present
significantly comparable hazards. I accept that Bay Street is a
run of significant avalanche risk but that it is neither unique nor
uncommon in that characterization in the Bugaboo operation.

105 The issue remains whether high risk or big terrain runs
should receive different and more intense evaluation than other
runs. The defence mounted a considerable amount of testimony that
the answer should be an emphatic no. The reasons are complex and
founded in an understanding of the whole process of snow stability
evaluation.

106 The reasons why not, in summary, were that a test pit or
two or three is not a reliable test of the stability of a slope.
It depends for its predictive value on how representative it is of

the slope to be skied. Further, it is a matter of very subjective judgment where to dig a pit. Start zones, like those at lower Bay Street, are known to be highly variable and thus any assessment of what one or two pits may show depends on the confidence with which the digger can say it is representative.

107 Any evaluation of the role of a test pit must be done, I find, on the overwhelming preponderance of evidence, by reference to the cumulative process previously described. Test pits were acknowledged by all witnesses to be important pieces of evidence in the ongoing assessment of snow stability. However, their importance is as a small piece of information in the ongoing data collection.

108 Plaintiff's counsel tenaciously urged witness after witness to embrace the notion that doing a test pit before taking guests onto a run like Bay Street, was the most prudent course of action in ensuring safety first. Witnesses varied in the way they responded to this proposition. However, it was clear to the Court that such a proposition was not considered prudent by any of the defence witnesses.

109 First, if the proposition was predicated on there being some small suspicion that deep layer instability was a potential on a slope like Bay Street, unanimously all witnesses said guests should not be taken there.

110 Second, when digging test pits to gain information about a slope's snow stratigraphy as part of the cumulative process, if that slope had been agreed to be safe to ski, then whether the pit was dug before or after guests skied it was immaterial. It is frequently done by the "fifth guide" of the day who skies either before or after a group on a run and does testing for the specific information being sought by agreement of the guides to fill in the cumulative process.

111 Third, if there is no suspicion that a slope harbours potential deep layer instability then digging a test pit is unnecessary and undesirable, (because of its unreliable predictive nature). But such a requirement might become a substitute for confidence in group decision making using the whole cumulative process. This last point was raised by several witnesses and has much to recommend it.

112 The preponderance of credible evidence on the advisability of requiring a test pit to be dug before taking guests onto a slope like Bay Street, was overwhelmingly against it. I find there can be no basis for a finding of negligence on the basis that a test pit was not done on Bay Street on March 12 or any other time.

113 In summary, the plaintiff's position is that on the evidence known to the guides prior to the afternoon of March 12,

1991 when the decision to ski Bay Street was made sufficient information was known to the guides that they should have suspected that the snowpack on the lower Bay Street had a potential for instability. With that suspicion, the plaintiff says, testing of the start zone should have been done before taking guests onto the slope. Almost any kind of testing says the plaintiff, would have revealed the weakness that was present and the accident would have been avoided. The key piece of evidence which should have aroused that suspicion, says the plaintiff, was the snow profile done on February 26, 1991 on lower Bay Street. At the least, it revealed anomalous information requiring further investigation. Both the plaintiff's experts testified in support of the proposition. Mr. Penniman put it this way:

having only the February 26 profile, I would not ski the slope before digging a snow pit.

114 Mr. Boisselle, who referred to the February 26 profile as a "bomb" said:

having the February 26 profile, I want to consider snow stratifying data and see if any faceting-going on up there. [Bay Street]

115 In contrast, none of the defence witnesses, no matter what the level of expertise in avalanche forecasting — and most had a great deal of varied experience — considered the February 26

profile revealed a potential deep layer instability problem. Some defence witnesses testified that the February 26 profile contained some clues or factors, which if coupled with other factors could lead to potential instability in the snowpack. However, upon a review of the other assessment indica present by March 12, including weather, terrain, avalanche occurrences and skiing experience in similar areas, none testified a formal test of deep layer snow stability should have been done before taking guests to Bay Street.

116 Dr. McClung, an expert witness of not only impressive credentials in the area of snow science and avalanche forecasting, but also independent of CMH for his livelihood, said this:

If I could go back and put myself in the place of the guides I can say I would not have done a snow profile that day given the data and information prior to the accident.

117 The defence evidence was consistent and overwhelming that only in hindsight would the potential for a deep layer avalanche or any avalanche on Bay Street have been recognized.

118 The plaintiff sought to neutralize the defence expert witnesses' evidence to this effect by suggesting that the expert witnesses only addressed whether the avalanche itself was anomalous or difficult to predict. The real question, says the plaintiff, is whether there should have been suspicion that there was the

potential for deep slab instability. The defence witnesses however, in my view, did not differentiate these two propositions in the context of what should be expected of heli-ski guides in relation to avalanche forecasting. Both Dr. McClung, and Chris Stethem, and every other expert and heli-ski guide, concluded that in relation to the data collected and analyzed up to the afternoon of March 12, 1991, there was no reason to suspect deep layer instability in the snowpack on Bay Street or elsewhere. Once shown the extent of the underlying terrain, including rock distribution and the instability evident in a variety of places across the entry into and across the right side of Bay Street, then experts could say yes, I understand how this avalanche happened. But, no one but the two plaintiff's experts said, even under close cross-examination, "I would have suspected this avalanche was lying in wait on March 12, 1991."

119 Thus, I find there is no basis for any finding of negligence by any of the defendants in taking guests to Bay Street on March 12, 1991. The plaintiff's action must be dismissed.

120 In any event, I will consider the issue of whether there was a valid waiver of liability for negligence.

III. WAIVER OF LIABILITY

121 Central to the issue of whether the waiver of liability is binding on the plaintiff is whether the circumstances

surrounding the signing of the waiver are such that the doctrine of *non est factum* applies. There is no dispute that Mr. Ochoa signed and had witnessed on December 10, 1990, a waiver of liability for his heli-ski trip in March of 1991. That waiver was received by CMH on December 27, 1990.

122 The plaintiff takes the position that the waiver is not binding. Numerous grounds were advanced to support this position and a great deal of evidence was led on this subject. However, after a full review of all the evidence in this case, only the three broad bases outlined below seem to me to require analysis and consideration. The issues with which I intend to deal are: (A) the expanded doctrine of *non est factum*; (B) does the waiver cover the negligence as alleged; and (C) whether an exclusion clause such as this one is unconscionable in a contract for the services to be provided.

1) Findings of Fact

123 Mr. Ochoa heli-skied with CMH in the Bugaboos three times, in 1989, 1990 and 1991. Each time he went he was requested to sign and have witnessed a waiver of liability in essentially the same terms. He complied each year. The only waiver which relates to liability for the tragic and fatal accident occurring on March 12, 1991, is the waiver which was signed on December 10, 1990 and received by CMH on December 27, 1990. However, the signing of the earlier waivers and the circumstances surrounding such signing form

part of the relevant background to determining whether Mr. Ochoa knew what he was signing and thus, in the circumstances, whether he and his estate are bound by the waiver. Mr. Ochoa's first trip with the group came about because someone else in the group cancelled. Mr. Ochoa sent payment for his trip on December 23, 1988. Evidence was given that CMH sent the application form and waiver of liability to Mr. Ochoa personally on January 3, 1989. The waiver was not returned before the trip began February 10, 1989. It was CMH's practice to provide a list of all guests who had not returned a properly executed waiver to greeters at the hotel in Calgary where guests arrived prior to making their way to the Bugaboos. The guests were approached at the hotel and required to sign the waiver and have it witnessed. It was clear that such a signing was a condition of going skiing.

124 Mr. Ochoa was contacted at the hotel in Calgary on February 10, 1989 through Mr. de la Pena, who had unofficially organized and led the Mexican group to Calgary. Mr. de la Pena had executed such waivers on the previous three or four occasions he went skiing with CMH. He is fluent in both English and Spanish. He asked Mr. Ochoa to sign the waiver and he witnessed it. Mr. de la Pena did not recall witnessing Mr. Ochoa's waiver on February 10 nor could he assist with whether he explained what it was about to Mr. Ochoa. Mr. de la Pena had read the document or one similar to it in earlier years and he understood that when he signed it, he was waiving legal rights in relation to risks associated with heli-

skiing. His understanding did not seem to extend beyond this. He asked no questions and not only signed such documents himself regularly, but assisted in having others of his Mexican ski group sign them.

125 At the end of the first ski week, that is February 18, 1989, having thoroughly enjoyed his first experience heli-skiing, Mr. Ochoa signed up for the next year. This occurred on the last day at the lodge where CMH provides the time and facilities for people to sign up for the following year if they wish. By this time, Mr. Ochoa, along with the other members of the Mexican ski group, had undergone the safety training provided by CMH on the bus trip to the lodge at the beginning of the week, and after their arrival at the lodge, videos illustrating safe use of helicopters and actual heli-skiing were shown. Included with special emphasis prior to the first actual skiing, was training on how to deal with the possibility of avalanches directly impacting the skiers on a ski run.

126 On February 18, 1989, Mr. Ochoa executed another waiver form which was witnessed by a fellow skier from Mexico who was fluent in English, Jamie Gomez. Mr. Gomez had no recollection of witnessing this document. He testified at trial that he could read English and probably had read the big print in the waiver. I find, in summary of his evidence on the point of the meaning of the waiver to him and why he signed it, that he had to sign the

document in order to participate in the activity. As with all vacation documents he does not bother to read them, he just signs them so he can enjoy his vacations. It is important in my view to underscore that this attitude on the part of Mr. Gomez was not unusual among the Mexican group who testified at trial. At the same time, there was no suggestion that there was any time pressure or salesmanship applied to any of the Mexican group in order to obtain their signatures. Each of these individuals is a successful business person with considerable contact with the United States and the English language in relation to either his education, his business, his recreation (particularly skiing), or all three. Mr. Ochoa was no exception but for one unusual feature. Mr. Ochoa was the only one of the persons from the Mexican group who was not fluent in English.

127 The third waiver was signed by Mr. Ochoa at his place of business in Mexico. It was sent by CMH on November 13, 1990 because Mr. Ochoa had not confirmed by payment or in writing that he still wished to ski during the week beginning March 10, 1991. In the November 13, 1990 package CMH included a request for final payment, a completed waiver form and a trip cancellation insurance form for completion. This package was in English as was all correspondence sent to Mr. Ochoa by CMH. All the correspondence received back from Mr. Ochoa was likewise in English, prepared and sent by Ms. Gonzales, Mr. Ochoa's bilingual secretary. CMH

received on December 27, 1990, the final payment, the completed insurance form and a completed and witnessed waiver.

128 There is no serious dispute that Mr. Ochoa had very limited English language skills. He certainly was not fluent and clearly could not read English. He had a limited formal education in Spanish. While an argument could be made, and was made, that the plaintiff failed to discharge the onus of proof that Mr. Ochoa did not read, or have the waiver read to him, I am proceeding on the assumption that he did not have it read to him.

129 Mr. Ochoa, on all the evidence, was a highly resourceful, successful, self-made business man. He conducted business as an entrepreneur in the steel industry. He was among the top three in that industry in Mexico. His business expanded, primarily by his efforts, ranging from selling scrap steel from a bicycle at the age of 17, to owning a partnership with his brother and occasionally others, in a steel re-manufacturing business, a steel distribution business and other related businesses such as trucking. He was working on getting a mini-mill constructed for the manufacture of steel in Guadalajara at the time of his death. Mr. Ochoa's business interests took him all over the US and to Europe. He attended trade shows, conferences and conventions relating to his business. He purchased large machinery and developed business relationships with U.S. companies.

130

Mr. Ochoa also vacationed frequently in the United States. In addition to visiting regularly in San Diego with his in-laws and his wife's brothers, he skied regularly at Vail, Aspen and other popular ski resorts either with his family or with friends. In relation to all of Mr. Ochoa's activities, business or recreation, he developed an ability to participate fully and effectively because he had a bilingual secretary at his office and his wife, Christine, is bilingual. Mr. Ochoa relied heavily on his wife, who travelled extensively with him and translated documents or conversations as needed. There is no evidence that Mr. Ochoa did not participate in any activity (business or recreation) because of his language limitations. In addition, occasionally Mr. Ochoa participated in activities which were in the United States when he did not have translation services of his own providing. Big game hunting in Montana is one such activity which comes to mind. He participated and apparently had a successful vacation on more than one occasion in Montana. He was described by his Mexican friends with whom he regularly visited the U.S., as self-confident, resourceful, and without inhibition in asking for and getting what he wanted on these occasions. By one means or another he understood others and made himself understood in order to participate fully. He shopped, skied, dined out and never seemed to find his language limitations a barrier. I find, and the evidence is uncontroverted, that at all times and all places where Mr. Ochoa received or was asked to execute the waiver document he had fluent translation service available. If he did not know or

understand any of the material he received from CMH he needed only to ask. One further fact is relevant. In this case, by way of a Notice to Admit dated June 29, 1995, the plaintiff admitted the following: "Mr. Ochoa was aware ... of the fact that the waiver referred to the natural risks of heli-skiing and not to the risk of CMH being careless or negligent."

2) The Law

A) *Non est Factum*

131 There are many cases dealing with the enforceability of exclusion clauses similar to this one. Most of those were provided to me for consideration in this case. One which I find of particular relevance to the facts of this case is **Karroll v. Silver Star Mountain Resorts Ltd.** (1988), 33 B.C.L.R. (2d) 160, (S.C.) a decision of Madam Justice McLaughlin sitting then as Chief Justice of this Court.

132 In that decision, which involved a waiver of liability for participating in a downhill ski race, McLaughlin, C.J. considered what the obligations of a party relying on an exclusion clause are when the signor has not read the document. At pages 164-166, in relation to that issue, there is a general discussion of the applicable principles of law.

 Stated thus, the legal propositions for which the plaintiff and the defendants respectively contend appear to be incompatible. How is the general contractual

principle that a party signing a legal document is bound by its terms despite not having read them to be reconciled with a requirement that a party presenting a document for signature must take reasonable steps to bring them to the signing party's attention?

The key, in my opinion, is recognition of the limited applicability of the rule that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. It is not a general principle of contract law establishing requirements which must be met in each case. Rather, it is a limited principle, applicable only in special circumstances.

One must begin from the proposition set out in ***L'Estrange v. F. Graucob***, supra, at pp. 406-407, that "where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents". Maugham, L.J. went on to state two exceptions to this rule. The first is where the document is signed by the plaintiff "in circumstances which made it not her act" (non est factum). The second is where the agreement has been induced by fraud or misrepresentation.

To these exceptions a third has been added. Where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms, those terms should not be enforced: [Waddams, *The Law of Contract*], quoted with approval in ***Tilden Rent-A-Car v. Clendenning***, supra, per Dubin J.A. at p 605. This new exception is entirely in the spirit of the two recognized in 1934 in ***L'Estrange v. F. Graucob Ltd.*** Where a party has reason to believe that the signing party is mistaken as to a term, then the signing party cannot reasonably have been taken to have consented to that term, with the result that the signature which purportedly binds him to it is not his consensual act. Similarly, to allow someone to sign a document where one has reason to believe he is mistaken as to its contents is not far distant from active misrepresentation.

In the usual commercial situation, there is no need for the party presenting the document to bring exclusions of liability or onerous terms to the attention of the signing party, nor need he advise him to read the document. In such situations, it is safe to assume that the party signing the contract intends to be bound by its terms.

But situations may arise which suggest that the party does not intend to be bound by a term. In **Tilden** the hasty, informal way in which the contract was signed, the fact that the clause excluding liability was inconsistent with the overall purpose of the contract, and the absence of any real opportunity to read and understand the document given its length and the amount of small print on its reverse side led the court to conclude that the defendant should have known that the plaintiff had no intention of consenting to the onerous exclusion in question. In these special circumstances, there was a duty on **Tilden** to take reasonable measures to bring the exclusion clause to the attention of Mr. Clendenning.

The British Columbia Court of Appeal in **Delaney v. Cascade River Holidays**, supra, did not dissent from the view expressed in **Tilden** that circumstances may arise where it is incumbent on the party presenting the document to take reasonable steps to bring an exclusion clause to the attention of the signator. The majority held, however, that no such duty arose on the facts of that case, McFarlane J.A., Taggart J.A. concurring, after stating that the release must be interpreted and understood having regard to the whole purpose of the relationship between the deceased signator and the corporate respondent, observed that there was no doubt of the intent of the language of the release (p. 44). He concluded:

I think . . . the trial judge was correct in applying the principles stated in **L'Estrange v. F. Graucob Ltd.** . . . Having regard to the nature of the venture involved I think that there is no sufficient ground for making an exception to the general principles enunciated in that case.

Nemetz, C.J.B.C. arrived at a different conclusion on the facts, taking the view that the language of the release was misleading and contained [p. 39]:

. . . provisions so onerous and unusual that it was the duty of Cascade to see that the provisions were . . . "called to the attention of the other party" . . . A reasonably intelligent person was entitled to assume that a form titled "standard" did not contain the unusual provisions contained in this one. This was indeed what Professor Waddams has termed "misrepresentation by omission" . . .

It emerges from these authorities that there is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstance are such that a reasonable person should have known that the party signing was not consenting to the terms in question that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.

Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by them. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.

133 Considering the facts in this case and applying the principles of law which are outlined above, there can be no finding that Mr. Ochoa is not bound by the waiver he signed on December 10, 1990 on the basis that he did not know what he was signing. He knew or had every reason to know that the document affected his legal rights. He was aware of the risks involved in participating in the sport of heli-skiing, and he had every opportunity to read (by translation) the waiver, but he declined to do so. In the circumstances the only reasonable conclusion to be drawn from Mr. Ochoa's witnessed signature is that the actual contents of the waiver were immaterial to him. He was prepared to be bound by the contract.

B) Application of Waiver

134 Does this waiver cover negligence of the kind alleged in this action? That is, a failure to meet the standard of care in the heli-ski industry of taking due care in the assessment of snow stability in avalanche terrain before taking guests onto an avalanche path run. Clearly, it does not cover criminal negligence. The relevant parts of the waiver read as follows:

I waive any and all claims I may now and in the future have against, and release from all liability and agree not to sue, CMH and its officers, employees, helicopter skiing guides, agents and representatives (collectively "its staff") or the Province for any personal injury, death, property damage or loss sustained by me as a result of my participation in any helicopter skiing trip with CMH due to any cause whatsoever, including, without limitation, negligence on the part of CMH, its staff or the Province.

I am aware helicopter skiing has, in addition to the usual dangers and risks inherent in skiing, certain additional dangers and risks, some of which include:

1. AVALANCHES - which can frequently occur in the mountain terrain used for helicopter skiing and may be caused by natural forces including steepness of slopes, snow depth, instability of the snowpack or changing weather conditions, or by skiers, the helicopter or the failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur;

. . . .

5. CMH, ITS STAFF AND OTHER SKIERS - the conduct, including negligence, of CMH, of its staff including its helicopter skiing guides and of all other skiers.

135 Central, in my view, to an analysis or interpretation of this waiver of liability is what the general or reasonable person in these circumstances would understand the word negligence to mean. I am concerned that a reasonable individual reading a waiver does not understand what is meant by the word negligence. That lack of understanding might very well be so significant as to rob an agreement to a contract waiving liability for negligence of legal effect. It is not unusual for a lay person to think that negligence means making mistakes. If told it means failing to take careful measures available and understood to be necessary for safety in the circumstances, such an individual would be surprised and significantly less inclined to think it should be part of any contract of service. Indeed, on the evidence before me in this case only one of eight persons who signed this waiver of liability knew what it meant. These persons were of considerable education and experience. Significantly, Mr. Hans Gmoser, who was the founder and operating mind of the defendant CMH at the time of the accident, did not know what negligence in the waiver was intended specifically to cover. He expressed the view that it should not cover conduct such as reckless decisions made by guides under the influence of alcohol or some such thing. I took him to mean that he would expect it to cover the kind of failure of judgment alleged to have occurred in this case but not criminal or gross negligence.

Any waiver seeking to cover negligent conduct must surely contain something more than the word negligence. That something more would include, at the least, a context for the word negligence describing the kind of conduct amounting to negligence which is intended to be covered. In order for a court to find the term sufficient to cover any negligent behaviour, it must be satisfied that the individual signing it, if he read it, could reasonably be expected to understand its meaning. I hasten to add that the authorities on this subject do not require that that understanding be objectively found on the waiver alone. It may be gleaned from the circumstances of the individual's knowledge of the activity at issue coupled with the document under consideration. On that basis, I find that the waiver in this case, signed by Mr. Ochoa, meets that test. First, the waiver format and substance, if read carefully, can reasonably be understood to include a waiver of liability for negligence or a want of due care of CMH and its staff in its conduct, particularly in relation to assessing avalanche hazard. Such a risk is dealt with specifically and generally as a risk contemplated by the waiver. Second, the format of the waiver is not at all deceptive or difficult to read. While some of the print is small, it puts in bold letters several attention-getting words of warning that legal rights are at issue. Finally, CMH takes several steps to ensure that each of its guests is aware, well in advance of the trip, of the requirement to sign a waiver as a condition of heli-skiing with CMH and that CMH considers the document important. These steps include requiring that the

signature for the waiver be witnessed separately from the application form which accompanied it. These steps add to the conclusion that the meaning of the waiver is neither obscure nor unreasonable. The very type of conduct alleged to be negligent in this action is specifically contemplated by the words of the waiver. I have no hesitation in finding that the negligence alleged in this action is covered by the waiver.

C) Unconscionability

137 The next question then is, is there any reason why the contract should not be enforced: Is the contract for any reason unconscionable? I find that there is a well established and often and recently considered line of authority in Canada, that generally speaking, such exclusions for liability are not unconscionable. They are not an example of fundamental breach nor are they void as against public policy. I have seriously considered this issue in this case because despite that long line of authority, the facts in this case highlight perhaps some problems with that well established principle. In **Harry v. Kreutzinger** (1978), 9 B.C.L.R. 166 (C.A.) at 177 Mr. Justice Lambert stated the most succinct test for determining whether a contract ought to be enforced. He stated that the "single question" is "whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded." In **Knowles v. Whistler Ski Corp.** (January 14, 1991), Vancouver Registry No. C900215. (S.C.) Huddart, J., as she then was, discussed this point

in a situation apposite of the issues before me. At page 9 of the judgment she sets out the arguments to be met in that case. The plaintiff in this case makes all of the same arguments.

The plaintiffs argue that the release agreement constitutes an unconscionable bargain for several reasons. It is a standard form contract, one sided in favour of the party who drafted it. There was no opportunity for negotiations. The parties were in unequal bargaining positions. The clause is unusual because it seeks to exclude all liability. The procedures involved in executing the contract suggest to the ski renter that the shop was taking care to adjust the bindings properly, thereby leading the ordinary renter to believe that the exclusion clause would not apply to negligence relating to the bindings adjustment. Their counsel emphasized the last reason in the circumstances of Mrs. Knowles, because the technician had difficulty with one of the bindings when he was adjusting it. He says that if renters were aware they were releasing claims founded on incompetence and that those procedures were a sham, no one would ski.

138 Madam Justice Huddart in that case said she could see nothing in the nature of the Release Agreement or in the circumstances in which it was signed divergent from community standards of commercial morality.

139 In that case the Court was dealing with a release or waiver agreement in relation to the renting of ski equipment. It is clear to me that neither the agreement in that case nor the procedures employed by the company were as specific or careful in design to bring the meaning of the release to the attention of the customer as in this case. However, in that case as in several

others dealing with a release in relation to skiing itself and ski related activities, the Court found no unfairness on the grounds that there was an inequality in bargaining positions. There, as here, there was no evidence of duress, coercion or unfair advantage resulting from economic or psychological need. Here as well there is nothing in the evidence to support the conclusion that Mr. Ochoa would not have expected there to be a waiver of negligence in the waiver, given the promotional materials including the risks of heli-skiing, and his observations of the way in which the activity of guided heli-skiing was carried out by CMH. It is true that the promotional materials emphasized that the guiding would be careful, meet a high standard of professionalism and minimize risks inherent in the sport of heli-skiing. However, it did not purport to be a guarantee of no mistakes or lapses in judgment in the exercise of skill and judgment. Reading all the literature and seeing how the operation was carried out, in fact, Mr. Ochoa as a reasonable person would likely have understood the waiver to address the possibility that human error, even in the form of the exercise of judgment falling below the standard of care in the industry, might occur. If such a thing occurred as an isolated incident, in my view, it would arguably be negligence but would not remove from the contract the very thing being contracted for.

140 All of the witnesses, who were guests and participated in heli-ski vacations with CMH in the Bugaboos, including during the week of March 10, 1991 were unanimous in their appreciation for the

professionalism displayed by the CMH heli-ski operation and all of the guides. There was no evidence that there was no system for minimizing the risk of avalanches impacting skiers or that generally speaking, guides, including the defendants, were not properly trained or did not adhere to high standards of safety in guiding. Thus, there was no evidence from which one could conclude this waiver sought to remove from the contract the very thing being contracted for, that is, there was no fundamental breach.

141 In the result, I find the waiver valid and sufficient to exonerate the defendants from liability for the negligence alleged, and in the circumstances, the waiver as executed is binding on the plaintiff.

IV. DAMAGES

142 Because of my finding that there is no ground upon which the plaintiff could succeed in damages against the defendants, it is not necessary to assess damages.

DISPOSITION

143 1) The action against Jocelyn Lang for criminal negligence is dismissed.

 2) The action against any and all of the defendants in negligence is dismissed.

3) The waiver is valid and if there was a finding of negligence it would exonerate the defendants of liability.

4) Damages are not assessed as a result of the finding of no liability on all grounds.

144 Costs may be spoken to, if necessary.

"M.M. Koenigsberg J."

Koenigsberg, J.