

CV 05577

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

LINDA COCKNEY, AS ADMINISTRATRIX OF THE ESTATE OF  
 JAMES ROBERT COCKNEY, DECEASED;  
 LARRY HENRY PONTUS, PUBLIC TRUSTEE OF THE NORTHWEST  
 TERRITORIES, AS ADMINISTRATOR OF THE ESTATE OF  
 NAOMI MARGOT CARDINAL, DECEASED;  
 LARRY HENRY PONTUS, PUBLIC TRUSTEE OF THE NORTHWEST  
 TERRITORIES, AS ADMINISTRATOR OF THE ESTATE OF  
 DEVAUGHN JORDYN KELSEY CARDINAL, DECEASED;  
 LARRY HENRY PONTUS, PUBLIC TRUSTEE OF THE NORTHWEST  
 TERRITORIES, AS ADMINISTRATOR OF THE ESTATE OF  
 JASON LOUIS JACOBSON, DECEASED;  
 LARRY HENRY PONTUS, PUBLIC TRUSTEE OF THE NORTHWEST  
 TERRITORIES, AS ADMINISTRATOR OF THE ESTATE OF  
 MARTHA ANNA ELIAS, DECEASED;  
 LARRY HENRY PONTUS, PUBLIC TRUSTEE OF THE NORTHWEST  
 TERRITORIES, AS ADMINISTRATOR OF THE ESTATE OF  
 WILLARD BROOKS, DECEASED

Plaintiffs

- and -

ARCTIC WINGS AND ROTORS LIMITED and  
 FRANK CARMICHAEL

Defendants

---

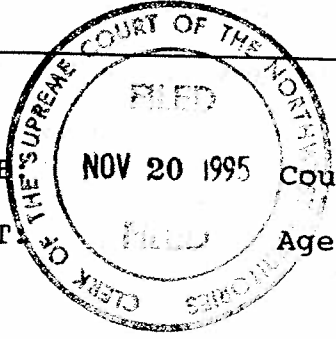
Transcript of the Chambers Application before The Honourable  
 Madam Justice V. A. Schuler, at Yellowknife in the Northwest  
 Territories, on Wednesday, November 15th A.D., 1995.

---

APPEARANCES:

MR. V. SCHWAB Counsel for the Plaintiffs

MR. A. WRIGHT Agent for Counsel for the Defendants



1 MR. SCHWAB: I beg your pardon. My friend is just  
2 showing me a letter that was apparently stalled in the  
3 mail. We haven't received it.

4 THE COURT: Certainly.

5 MR. SCHWAB: Madam, this lady is a lawyer in  
6 Alberta, Gwen Parsons. In fact, she went to high  
7 school in Yellowknife and then went to the big city to  
8 get a nursing degree and a law degree. She has been  
9 practicing with our firm for about seven or eight  
10 years. She has written the bar exam of the Northwest  
11 Territories. The fees have been paid but the exam has  
12 not yet been marked. She has worked with me on that  
13 file. Would she be permitted to sit with me? She  
14 will not speak but she has some information on the  
15 file that could assist the Court.

16 THE COURT: Do you have any objection to that, Mr.  
17 Wright?

18 MR. WRIGHT: No, I have advised him that was fine.

19 THE COURT: That's fine then.

20 MR. SCHWAB: We hope that she will be admitted very  
21 shortly once the exam papers have been marked.

22 MR. WRIGHT: My Lady, I -- my instructions this  
23 morning, I appear as local agent for Mr. Berens who is  
24 counsel in Vancouver for Arctic Wings and Rotors in  
25 this matter.

26 I just discovered, my friend tells me that he --  
27 they didn't receive a couple of letters that I sent

1 last week. But there was a facsimile letter sent to  
2 them by my instructing solicitor in which we express  
3 our -- my clients express their position regarding  
4 this application.

5 Put simply, they advised Mr. Schwab that they are  
6 admitting liability in this matter.

7 THE COURT: They are admitting liability?

8 MR. WRIGHT: They are prepared to admit liability  
9 for the purpose if this matter has to proceed to a  
10 quantum assessment.

11 They do not however -- obviously this is an  
12 insured claim. They do not however wish to have a  
13 judgment entered against Arctic Wings and Rotors for I  
14 think I submit are legitimate commercial reasons, and  
15 we have advised Mr. Schwab of that.

16 We have also been attempting to conduct settlement  
17 negotiations in this matter for some time.

18 Quite simply -- I think that my friend will agree --  
19 a substantial settlement proposal was put forward. We  
20 have not as yet received anything more than -- than  
21 what my friend tells me and Mr. Berens, he is prepared  
22 to recommend to his client that they will take a  
23 settlement; in other words, no firm settlement  
24 proposal.

25 And my clients take the position that this  
26 application is unnecessary. They should be treated  
27 the same as any other defendant that wants to discuss

1 settlement and if it is impossible to resolve the  
2 matter, they will take the position at trial that they  
3 are admitting liability and that the matter can  
4 proceed to a judgment of quantum.

5 But it's their position that settlement  
6 negotiations should be at least given a chance to  
7 proceed so the insured, Arctic Wings and Rotors, if  
8 possible, does not have a judgment against it.

9 The relief that my friend is seeking pursuant to  
10 Rule 167 is discretionary. The Court -- Rule 167 says  
11 that if the Court is satisfied that judgment may  
12 issue, the Court may grant a summary judgment. There  
13 is no requirement.

14 In the circumstances, as I say, my instructions  
15 are to request an adjournment in order that settlement  
16 negotiations can proceed and certainly if the matter  
17 proceeds to trial, what I have said is obviously on  
18 the record. My friend knows what my client's position  
19 will be, and I submit that there should be no  
20 prejudice to his claim to then proceed to have a  
21 quantum -- the matter determined based upon quantum  
22 only.

23 Now, I had sent Mr. Schwab a couple of letters  
24 since that -- since the letter of November 6th that  
25 Mr. Berens has sent him. I understand that he hasn't  
26 received them yet and I don't understand why that is  
27 but I am not disputing what he is saying.

1 THE COURT: These are letters that --

2 MR. WRIGHT: -- That I sent. I understood that Mr.  
3 Schwab was taking the position that Mr. Berens is not  
4 a member of this bar and therefore he wasn't listening  
5 to his correspondence so I repeated what Mr. Berens  
6 had sent -- said in subsequent letters.

7 If they haven't received them, that's unfortunate,  
8 I apologize for that, but essentially the same message  
9 was sent out by Mr. Berens.

10 And Mr. Berens advised Mr. Schwab in that letter  
11 that the letter was being written with prejudice to  
12 the issue of costs and what we are concerned about is  
13 the cost of Mr. Schwab's attendance here in court  
14 today for this application. We view it as totally  
15 unnecessary in view of the position that I have been  
16 instructed to take. And my clients are intent of  
17 resolving this matter as expeditiously as possible,  
18 and I think that is clear from the conduct in the  
19 settlement negotiations so far.

20 Those are my submissions.

21 THE COURT: Thank you, Mr. Wright. Mr. Schwab?

22 MR. SCHWAB: Unfortunately, Mr. Berens is not a  
23 member of the bar and he is not here. We have here a  
24 letter from Mr. Berens and the specific wording in  
25 this letter is:

26 In the interim, our principals  
27 have instructed us to inform you that  
the liability of Arctic Wings and Rotors  
Ltd. for this accident shall not be

1           contested in the event settlement  
2           efforts fail and one or more of these  
3           claims have to proceed to trial for  
          quantum assessment.

4           Well, this case has been a matter of two years of  
5           delay and delay. Of course, this action is brought by  
6           the Public Trustee and the Public Trustee is in this  
7           courtroom. And the Public Trustee has contacted the  
8           individual family members entitled to compensation.  
9           They all live in the Tuktoyaktuk area and indeed we  
10          have received consent to all parties to a settlement.

11          The settlement is, shall we say, meager,  
12          relatively speaking.

13          Reluctantly, the Public Trustee has agreed. We  
14          have advised Mr. Berens and Mr. Berens is not prepared  
15          to take the settlement on that basis. And we speak  
16          about very modest compensation.

17          The mere fact that Mr. Berens now says that you  
18          should not proceed because, as he puts it, "liability  
19          for this accident shall not be contested in the event  
20          settlement efforts fail", does not help.

21          The accident took place on the 3rd of December,  
22          1993 - basically two years ago. And six passengers  
23          were killed. In respect of one calamity, the Cockney  
24          estate, a settlement was made approximately six months  
25          ago and therefore it is my affidavit on file the  
26          Cockney action has been accordingly discontinued.

27          The Public Trustee has instructed us that there

1 are certain limits below the Public Trustee will not  
2 consent and those limits have been communicated and  
3 our position is firm that we can not and will not  
4 recommend -- in any event, the Public Trustee will not  
5 recommend -- to accept any less than the particular  
6 amounts which I can ensure you are very modest.

7 I have to say that the application has a purpose  
8 of speeding the action either to settlement or to the  
9 stage that the action only requires an assessment of  
10 damages.

11 We have been delayed, we have sometimes been  
12 waiting for weeks and months for replies and if our  
13 application is granted, we would also ask for an order  
14 of this Court to set a time limit for the  
15 interrogatories or examination of the individual  
16 claimants as to the amount of the individual damages.

17 At this moment, all the defendants have done; that  
18 is, the corporate defendant and the individual  
19 defendant, have filed a very short Statement of  
20 Defence denying liability.

21 We proceeded by way of interrogatories, which are  
22 relatively short, and I don't like the term normally,  
23 but the best answer to the result of the  
24 interrogatories was stone-walling.

25 We filed notices to admit, again many of the  
26 questions were not answered.

27 I have prepared, with the assistance of Ms.

1           Parsons, a very comprehensive brief and you may not  
2           have had an opportunity to see that brief, Madam?

3   THE COURT:           I don't believe there is a brief on  
4           the file.

5   MR. SCHWAB:           It was filed, Madam, by our agent.

6   THE COURT:           Madam Clerk, I didn't see any brief on  
7           the file?

8   THE CLERK:           Neither have I. I can go and check  
9           that.

10   THE COURT:           Well, perhaps that should be done.  
11           Your understanding is that it was filed when?

12   MR. SCHWAB:           Beginning of last week. The week  
13           before. It was served -- you have a copy of that?

14   THE COURT:           Have you been served with that, Mr.  
15           Wright?

16   MR. WRIGHT:           Yes.

17   THE COURT:           Are you going to be referring  
18           extensively to the brief now, is that your intention?

19   MR. SCHWAB:           Well, I will summarize this, maybe you  
20           can reserve your decision, but this brief is very  
21           comprehensive. It took a lot of time.

22   MR. WRIGHT:           My Lady, I fail to see the need for  
23           that. To me, the issue is, We are not contesting  
24           liability. To me, the issue is, Do we get the  
25           adjournment or not. I don't think we need to spend a  
26           lot of time going over his brief.

27   THE COURT:           Well, let's deal first of all with the



1 request for the adjournment then.

2 Mr. Schwab, your submissions on Mr. Wright's  
3 request for the adjournment.

4 MR. SCHWAB: All right. The statement of -- I do  
5 have to refer, please, to my brief to some extent.  
6 Could I hand you a copy now. We have a second copy  
7 here.

8 THE COURT: That's fine, if you have no objection,  
9 Mr. Wright?

10 MR. WRIGHT: Go ahead.

11 MR. SCHWAB: In the brief, we have first a list of  
12 authorities.

13 We then have the facts which was that six  
14 passengers boarded an airplane, 5 o'clock in the  
15 afternoon -- those facts are admitted -- and a couple  
16 of minutes later, they all were killed in an aircraft  
17 violently contacting the ground about six miles south  
18 of Tuktoyaktuk.

19 The death certificates are on file and that's  
20 submitted to the Court.

21 The Statement of Claim -- and I am really  
22 shortening this very extensive brief, Madam.

23 THE COURT: I have read the pleadings and the  
24 documents that were filed in support of this  
25 application.

26 MR. SCHWAB: Yes. The Statement of Claim was  
27 answered by a very summary defence denying negligence,

1 very short, about six lines long. Then came the  
2 notices to admit the interrogatories. Even though in  
3 the Statement of Claim very specific allegations of  
4 negligence were contained we only have general denial.  
5 The guess of the cause was not touched in the  
6 interrogatories about the notice to admit. Nothing  
7 basically took place after the closing of the  
8 pleadings and the interrogatories and the notice to  
9 admit.

10 The fact is, the very plain fact, is that there is  
11 no defence to the action except as to quantum and we  
12 have been been stalled acting on behalf of the Public  
13 Trustee and our clients for close to two years in what  
14 is a closed and shut case.

15 What we are saying is, is there should be no more  
16 delays. There should be either a settlement or there  
17 should be a proceeding to the assessment.

18 The very purpose of the rule we are relying on is  
19 to speed matters, to not burden the Court's time  
20 unnecessarily and after all, (6) of the summary  
21 judgment Rule 167 says,

22 Where the Court is satisfied the  
23 defence is only as to amount it may  
24 direct that the action proceed only to  
25 assess the amount or may direct a  
reference to accounting to determine the  
amount.

26 Now, our courts have developed *res ipsa loquitur*  
27 in aviation accidents since the past fifty years,

1 since the Malone case, and it is quite clear that if  
2 the defendant just denies, is not specific, does  
3 nothing, Courts will apply the rule of res ipsa  
4 loquitur.

5 The defendant has to prove that there is a  
6 reasonable possibility that the accident happened  
7 without negligence.

8 None of that is the case here.

9 We have a tragic accident, six people plus the  
10 pilot are wiped out, no explanation has been  
11 forthcoming. No explanation that the accident  
12 happened without negligence of the corporate defendant  
13 and two years later, we are stalled.

14 Under the circumstances, now to make a request for  
15 an adjournment is nothing else but basically taking  
16 the endurance of our clients of which two claimants  
17 are 80 years old and the mother and father of one of  
18 the claimants, a splendid young boy just turning 16,  
19 good in school, good athlete, died in a tragic fire  
20 several months later.

21 What I am saying is delay works against the  
22 defendants and particularly since two of the  
23 defendants are 80 and 81 -- sorry, two of the  
24 claimants are 80 and 81 years old. They need  
25 assistance now, not in another year or two. Two years  
26 is long enough.

27 As to the merits, I refer to my brief. If the

1 defendant has not given any evidence that the accident  
2 could have happened without negligence on the  
3 defendant, the corporate defendant, then the summary  
4 judgment should be granted and, with respect, the  
5 defendant has not given any evidence how the accident  
6 happened.

7 I do have here in front of me the report by the  
8 Transportation Safety Board as to the causes of the  
9 accident.

10 Now this report is not directly admissible in  
11 evidence before this Court. It is protected under the  
12 legislation. All I wish to say is that the report  
13 does not contain any statement showing that the  
14 accident happened without negligence.

15 What we are asking is that the application now  
16 please be granted.

17 You may want to reserve the application so that  
18 you can read our very extensive brief, ma'am, and that  
19 there not be an adjournment, that there be a ruling,  
20 so that we can either proceed to the settlement which  
21 is already approved in the amount accepted, or set  
22 this matter for assessment and have a time limit set  
23 for the defendants to do their interrogation or  
24 discoveries as required.

25 I might state that the settlement negotiations --  
26 ma'am, to get an idea of how close this matter has  
27 come, without prejudice, the Vancouver lawyer office

1 for the insurer, 195,000 for the death of six persons.  
2 Whereas the Public Trustee, that we are in total  
3 agreement with, our principal, demands a minimum --  
4 \$218,000 which includes funderal expense and interest  
5 on the pre-judgment -- interest.

6 So we are being held on, held on, and two of the  
7 claimants are 80 and 81 years old. Several others are  
8 in their 60s. We don't think it is a matter that  
9 should be further delayed.

10 We are asking would you kindly consider our  
11 detailed brief and to then make a ruling and please  
12 not to adjourn except for the purpose of your studying  
13 the issue and making a ruling because as if it were  
14 further hardship against the plaintiffs.

15 They have waited two years. And all the  
16 defendants have done is filed a Statement of Defence,  
17 filed very short, evasive answers to the  
18 interrogatories, filed very evasive answers to the  
19 notice to admit as the cause of accident stating this  
20 is opinions or -- and we are here being delayed and  
21 delayed.

22 Thank you very much.

23 THE COURT: Mr. Schwab, can I just ask you, were  
24 you given notice prior to today that an adjournment  
25 would be requested?

26 MR. SCHWAB: No, we were not. I came special up  
27 from Edmonton yesterday afternoon.

1           We were advised that the application would be  
2           opposed. But we were not advised that an adjournment  
3           would be requested.

4           We would not have come up. We did in fact write a  
5           letter asking that if there were examination on the  
6           two affidavits filed to please advise us before so  
7           that we do not waste our time coming up as it were  
8           adjourned. This letter was written about three weeks  
9           ago.

10       THE COURT:           I'm sorry?

11       MR. SCHWAB:           This letter was written three weeks  
12           ago to make certain that there would be a hearing  
13           today so that we did not unnecessarily travel.

14       MR. WRIGHT:           My Lady --

15       MR. SCHWAB:           -- It was already adjourned once at  
16           the request of my friend.

17       THE COURT:           That was from the September -- or  
18           October date?

19       MR. SCHWAB:           That's correct.

20       MR. WRIGHT:           My Lady, let me read to you the letter  
21           of Mr. Howard Berens which my friend acknowledges and  
22           I understand his dispute with it is the fact that Mr.  
23           Berens is not a member of this bar.

24                            Thank you for your correspondence  
25                            of October the 27th, 1995. If you are  
26                            not prepared to advance a firm  
27                            settlement proposal on behalf of each of  
                          the families, then in that case the only  
                          alternative left to our principals is to  
                          proceed and make payment into court for  
                          each of the plaintiffs.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

Accordingly, I would urge you to provide us with a firm settlement proposal for each family.

In the interim, our principals have instructed us to inform you that the liability of Arctic Wings and Rotorss for this action shall not be contested in the event that settlement efforts fail and one or more of these claims has to proceed to trial for a quantum assessment.

In view of the foregoing, it is obviously unnecessary for you to continue with your preparation for the summary judgement application against Arctic Wings and Rotors Ltd. that is currently scheduled for next Wednesday and we trust you shall adjourn the application sine die.

THE COURT:                   What is the date of that letter?

MR. WRIGHT:                6th of November, and it was faxed the same date, My Lady.

This letter is written with prejudice as to the issue of costs and in view of our telephone discussion this morning, hope you shall have instructions to advance firm settlement proposals shortly.

We thank you. We await hearing from you and thank you for your ongoing courtesy and cooperation.

Now, there were two subsequent letters that I was to have sent out in August but they didn't get faxed as I thought, however that position was communicated to my friend.

MR. SCHWAB:                On the 8th of November, I wrote the following letter.

1 Attached, please find a formal  
2 consent order with respect to our  
3 application under Rule 167 of the Rules  
4 of Court scheduled for special chambers  
5 on November 15, 1995.

6 This was sent by courier, originally sent by  
7 courier on the 8th of November and by fax on the same  
8 day.

9 Given Mr. Berens statement is  
10 without prejudice letter that Arctic  
11 Wings Rotorss Ltd. will not be contesting  
12 liability, we can see no logical  
13 objection to you signing a consent  
14 order.

15 We do note that the without  
16 prejudice statement as made by Mr.  
17 Berens is of course not admitted to the  
18 N.W.T. bar. The consent would have to  
19 be delivered to our agent in  
20 Yellowknife, Lloyd Stang, at his new  
21 address of 5107-53rd Street by noon on  
22 Friday, November 10, '95 as Monday,  
23 November 13th is a holiday and would not  
24 give the Court sufficient notice.  
25 Otherwise, we will proceed as planned on  
26 the 15th of November, 1995.

27 Yours very truly, Vern Schwab.

We made our position very clear that we would  
proceed unless a consent order was signed.

THE COURT: What did the consent order say  
exactly?

MR. SCHWAB: May I proceed to the bench and show it  
to you?

THE COURT: If you would give it to Madam Clerk,  
that would be fine.

THE COURT: Mr. Wright, with respect to your  
position on the main application -- you are asking for



1 an adjournment of this application but at the same  
2 time, as I understand it, you are putting on the  
3 record that liability is not an issue?

4 MR. WRIGHT: That's correct.

5 THE COURT: In this case. So that, in effect, you  
6 are admitting what Mr. Schwab is seeking in his  
7 application? You just don't want a judgment?

8 MR. WRIGHT: Against Arctic Wings and Rotors,  
9 that's correct.

10 THE COURT: When you say that you don't want a  
11 judgment, you don't want an order that says that in  
12 effect that they are liable, is that correct?

13 MR. WRIGHT: Yes, and I think -- I don't see how  
14 that judgment gets Mr. Schwab what he is wanting. He  
15 wants a settlement. He has discussed with you what  
16 the "without prejudice" negotiations are. You can see  
17 we are not very far apart. I don't see how a judgment  
18 furthers his position one iota. We still have to go  
19 to a quantum trial if we come to an agreement on this  
20 so how does it help and that he has got what he wants  
21 which is that they are -- he is not going to have to  
22 go through all of the evidence necessary to prove  
23 liability. And he was told that more than a week ago.

24 MR. SCHWAB: With respect, we are entitled to the  
25 order.

26 My friend has instructed to sort of put a straight  
27 lace on our legal position. We can not really move

1 unless we have an order cutting out the liability  
2 issue.

3 We want to be in position that if there is no  
4 settlement, we can force an assessment of damages in  
5 the near foreseeable future instead of further  
6 waiting. Our clients, as I say, are aging and they  
7 can't wait. Some of them are desperate.

8 THE COURT: Well, I would like to think about  
9 this. Would you be available at 1:30? Is the  
10 courtroom available then?

11 THE CLERK: Yes, that's fine.

12 THE COURT: 1:30 this afternoon. Mr. Wright,  
13 would you be --

14 MR. WRIGHT: -- Could we perhaps do it at 2  
15 o'clock?

16 THE COURT: That's fine with me. The courtroom is  
17 available then as well? Is that all right with you,  
18 Mr. Schwab, as well?

19 MR. SCHWAB: Could you accomodate me? I have an  
20 aircraft in the airport hanger and --

21 MR. WRIGHT: -- I'll change my other arrangements.

22 THE COURT: 1:30 is okay?

23 MR. SCHWAB: That would be very kind. There is  
24 freezing rain in Edmonton's forecast.

25 THE COURT: 1:30 then.

26 MR. SCHWAB: Thank you, ma'am.

27 (ADJOURNMENT)

1 THE COURT: Mr. Wright, Mr. Schwab, as to the  
2 application by Mr. Wright for an adjournment, I am not  
3 going to grant the application for the adjournment.

4 As I understand it, the only reason really for  
5 asking for the adjournment is so that settlement  
6 discussions can continue. I note that there was an  
7 adjournment once previously and that this date was  
8 agreed upon.

9 So in light of that, and in light of what Mr.  
10 Wright had put on the record, I am not going to grant  
11 the adjournment.

12 Mr. Wright, I am not clear, and I should make one  
13 thing or confirm one thing first of all. As I  
14 understand it, you have not filed any material on this  
15 application, is that correct?

16 MR. WRIGHT: That's correct.

17 THE COURT: In light of that fact, do you have any  
18 submissions that you want to make on the main  
19 application?

20 MR. WRIGHT: No.

21 THE COURT: Well, taking that into account, the  
22 fact that there has been no material filed and the  
23 fact that Mr. Wright has indicated for the record that  
24 liability will be admitted or is admitted, I see no  
25 reason not to grant the application for summary  
26 judgment. So I will grant that as against the  
27 corporate defendant only; that is, Arctic Wings and

1 Rotors Limited, and I will direct that this matter  
2 proceed to an assessment of the amount of damages.

3 I am not however going to impose any particular  
4 restrictions or time limits on the defendants and I  
5 will leave it to counsel to apply under the Rules of  
6 Court if there are any problems or delays in that  
7 regard.

8 Now, my inclination is to leave the issue of costs  
9 to the Judge who hears the assessment of damages  
10 assuming that that in fact does take place. And I  
11 will do that.

12 MR. SCHWAB: Thank you.

13 THE COURT: Is there anything further?

14 MR. WRIGHT: No, My Lady.

15 **(AT WHICH TIME THIS CHAMBERS APPLICATION CONCLUDED)**

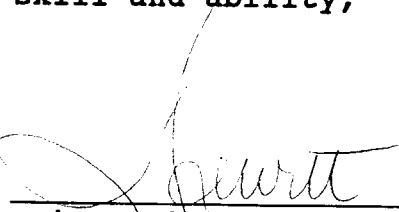
16

17 Certified correct to the best of my  
18 skill and ability,

19

20

21

  
\_\_\_\_\_  
Lois Hewitt,  
Court Reporter

22

23

24

25

26

27