

# OMBUDSMAN OF BRITISH COLUMBIA

*Special Report No. 6*

*to*

*The Legislative Assembly  
of British Columbia*

**“A MATTER OF ADMINISTRATION”:  
B.C. APPEAL COURT JUDGMENT**

OMBUDSMAN OF BRITISH COLUMBIA

SPECIAL REPORT #6

TO

THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

"A MATTER OF ADMINISTRATION":

B.C. APPEAL COURT JUDGMENT

July 27, 1982



Legislative Assembly  
Province of British Columbia

OMBUDSMAN

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July 27, 1982

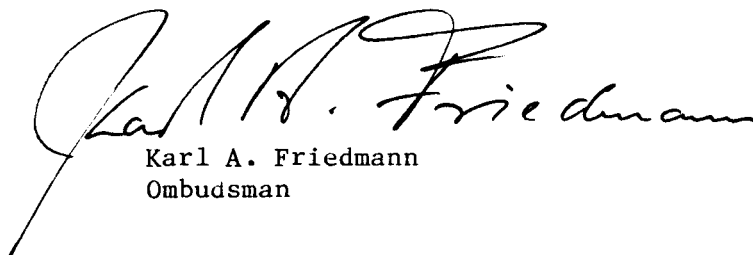
The Honourable Harvey W. Schroeder  
Speaker of the Legislative Assembly  
Province of British Columbia  
Parliament Buildings  
Victoria, B.C.

Mr. Speaker:

I have the honour to submit herewith a special report to the Legislative Assembly pursuant to section 30(2) of the Ombudsman Act, R.S.B.C. 1979, chapter 306.

The report intends to bring to the attention of the Legislative Assembly an important interpretation of the Ombudsman Act by the B.C. Court of Appeal.

Respectfully yours,

  
Karl A. Friedmann  
Ombudsman

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## I. Report

The British Columbia Court of Appeal last week delivered an important judgment rendering a judicial interpretation of parts of the Ombudsman Act of British Columbia.

The B.C. Development Corporation had successfully argued before the B.C. Supreme Court in December 1981 that the Ombudsman did not have jurisdiction to investigate certain actions of B.C. Development Corporation. The Supreme Court then found (in part): "Individual transactions requiring the exercise of business judgment are not matters of administration..."; the actions of B.C. Development Corporation and The First Capital City Development Company Limited which caused King Neptune Seafoods Ltd. to complain to me were therefore outside the Ombudsman's jurisdiction, the Supreme Court declared.

I appealed that decision to the B.C. Court of Appeal and last week's decision confirms that my original interpretation of Section 10 of the Ombudsman Act was correct.

The entire judgment is reproduced in this report for the information of the Legislative Assembly, government authorities and the public. The following excerpts highlight the conclusions of the Court of Appeal:

"In the case on appeal, the complaint was that the conduct of B.C.D.C., an agent of the Crown, in carrying out its executive functions acted unjustly and in bad faith in failing to renew the lease. The executive and public function being carried out by B.C.D.C. was the implementation of government policy in accordance with the objects prescribed by the Development Corporation Act. It follows that the Ombudsman had jurisdiction to investigate this 'matter of administration' in accordance with the objects prescribed in the Development Corporation Act."

"I come now to deal with the argument that in some way the words 'matter of administration' do not include 'acts or decisions' made in the exercise of business judgment. It is argued that the exercise of business powers is not an exercise of governmental powers and that the words 'governmental powers' should only include powers which cannot be exercised by an ordinary citizen. I am completely unable to grasp this distinction. The object of the statute is to enable every citizen to have his complaints relating to alleged unjust conduct on the part of the government or its agents investigated by the Ombudsman. It cannot matter to the citizen whether the alleged unjust conduct relates to 'business' or otherwise."

"I agree with the learned chambers judge that the words 'matter of administration' are limiting words and that there must be some limits to the power bestowed on the Ombudsman. Generally speaking, the Ombudsman cannot interfere in the purely legislative or judicial fields."

Following the December 1981 judgment of the Supreme Court in this case a number of governmental authorities disputed my right to investigate certain types of complaints based on the Court's interpretation of Section 10 of the Ombudsman Act. The Appeal Court's decision should now settle those disputes and I look forward to the continued cooperation of those authorities in investigating and settling those outstanding complaints in a reasonable and timely manner.

## Court of Appeal

BETWEEN:

BRITISH COLUMBIA DEVELOPMENT  
CORPORATION and THE FIRST  
CAPITAL CITY DEVELOPMENT  
COMPANY LIMITED

Petitioners  
(RESPONDENTS)

AND

KARL A. FRIEDMANN, OMBUDSMAN

Respondent  
(APPELLANT)

AND

THE ATTORNEY GENERAL FOR THE  
PROVINCE OF BRITISH COLUMBIA

Respondent  
(RESPONDENT)

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE CRAIG

Coram: The Honourable Mr. Justice McFarlane  
The Honourable Mr. Justice Craig  
The Honourable Mr. Justice Anderson

Counsel for the Appellant: I.G. Nathanson, Esq.  
F.S. Borowicz, Esq.

Counsel for the Respondents: J.M. Giles, Esq., Q.C.  
Miss J. Janson

Vancouver, British Columbia  
July 23, 1982

I would allow the appeal, generally for the reasons given by Anderson, J.A.





# Court of Appeal

BETWEEN:		)	
		)	
	BRITISH COLUMBIA DEVELOPMENT	)	
	CORPORATION and THE FIRST	)	
	CAPITAL CITY DEVELOPMENT	)	
	COMPANY LIMITED	)	
		)	
	PETITIONERS	)	
	(RESPONDENTS)	)	
		)	
AND		)	REASONS FOR JUDGMENT
		)	
	KARL A. FRIEDMANN, OMBUDSMAN	)	OF THE HONOURABLE
		)	
	RESPONDENT	)	MR. JUSTICE ANDERSON
	(APPELLANT)	)	
		)	
AND		)	
		)	
	THE ATTORNEY GENERAL FOR THE	)	
	PROVINCE OF BRITISH COLUMBIA	)	
		)	
	RESPONDENT	)	
	(RESPONDENT)	)	

Coram:           The Honourable Mr. Justice McFarlane  
                   The Honourable Mr. Justice Craig  
                   The Honourable Mr. Justice Anderson

Counsel for the Appellant:           I. G. Nathanson, Esq.  
   F. S. Borowicz, Esq.

Counsel for the Respondents:       J. M. Giles, Esq., Q.C.  
   Miss J. Janson

Vancouver, British Columbia  
 July 23, 1982

This is an appeal from an order of McEachern, C.J.S.C.  
 wherein he held that the Appellant Ombudsman had no jurisdiction

to investigate a complaint made by King Neptune Seafoods Ltd.  
against the British Columbia Development Corporation ("B.C.D.C.").

The case centres around a river front property  
situate in downtown New Westminster, which was acquired by  
B.C.D.C. as part of the redevelopment of a large part of the  
waterfront. King Neptune Seafoods Ltd. had operated a well  
known seafood restaurant on leased premises on the river front  
for many years. Its present lease, which was for fifteen years,  
expired at the end of 1981 and did not contain any provision  
for renewal. B.C.D.C. refused to renew the lease held by  
King Neptune Seafoods Ltd. and that company complained to the  
Ombudsman that it had been led to believe that it would be  
included in the redevelopment plan. It alleged bad faith on  
the part of B.C.D.C.

The Ombudsman commenced an investigation into the  
complaint and B.C.D.C. sought an order declaring that the  
Ombudsman had no jurisdiction to investigate the complaint.  
McEachern, C.J.S.C. so ordered.

The relevant provisions of the *Ombudsman Act*,  
R.S.B.C. 1979, Ch.306 are as follows:

10. (1) The Ombudsman, with respect to a matter  
of administration, on a complaint or on his own  
initiative, may investigate
- (a) a decision or recommendation made;
  - (b) an act done or omitted; or
  - (c) a procedure used
- by an authority that aggrieves or may aggrieve a person.

- (2) The powers and duties conferred on the Ombudsman may be exercised and performed notwithstanding a provision in an Act to the effect that
- (a) a decision, recommendation or act is final;
  - (b) no appeal lies in respect of it; or
  - (c) no proceeding or decision of the authority whose decision, recommendation or act it is shall be challenged, reviewed, quashed or called into question.

\* \* \*

22. (1) Where, after completing an investigation, the Ombudsman believes that
- (a) a decision, recommendation, act or omission that was the subject matter of the investigation was
    - (i) contrary to law;
    - (ii) unjust, oppressive or improperly discriminatory;
    - (iii) made, done or omitted pursuant to a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory;
    - (iv) based in whole or in part on a mistake of law or fact or on irrelevant grounds or consideration;
    - (v) related to the application of arbitrary, unreasonable or unfair procedures; or
    - (vi) otherwise wrong;
  - (b) in doing or omitting an act in making or acting on a decision or recommendation, an authority
    - (i) did so for an improper purpose;
    - (ii) failed to give adequate and appropriate reasons in relation to the nature of the matter; or
    - (iii) was negligent or acted improperly; or
  - (c) there was unreasonable delay in dealing with the subject matter of the investigation,
- the Ombudsman shall report his opinion and the reasons for it to the authority and may make the recommendation he considers appropriate.
- (2) Without restricting subsection (1), the Ombudsman may recommend that
- (a) a matter be referred to the appropriate authority for further consideration;
  - (b) an act be remedied;
  - (c) an omission or delay be rectified;

- (d) a decision or recommendation be cancelled or varied;
- (e) reasons be given;
- (f) a practice, procedure or course of conduct be altered;
- (g) an enactment or other rule of law be reconsidered; or
- (h) any other steps be taken.

23. (1) Where the Ombudsman makes a recommendation under section 22, he may request that the authority notify him within a specified time of the steps that have been or are proposed to be taken to give effect to his recommendation, or if no steps have been or are proposed to be taken, the reasons for not following the recommendation.

(2) Where, after considering a response made by an authority under subsection (1) the Ombudsman believes it advisable to modify or further modify his recommendation, he shall notify the authority of his recommendation as modified and may request that the authority notify him of the steps that have been or are proposed to be taken to give effect to the modified recommendation, or if no steps have been or are proposed to be taken, of the reasons for not following the modified recommendation.

24. (1) If within a reasonable time after a request by the Ombudsman has been made under section 23 no action is taken that the Ombudsman believes adequate or appropriate, he may, after considering any reasons given by the authority, submit a report of the matter to the Lieutenant Governor in Council and, after that, may make such report to the Legislative Assembly respecting the matter as he considers appropriate.

(2) The Ombudsman shall attach to a report under subsection (1) a copy of his recommendation and any response made to him under section 23, but he shall delete from his recommendation and from the response any material that would unreasonably invade any person's privacy, and may in his discretion delete material revealing the identity of a member, officer or employee of an authority.

It is conceded that B.C.D.C. is an "authority" and that the conduct of the B.C.D.C. in refusing to renew the lease is an "act or decision" of B.C.D.C.

The objects of B.C.D.C. are set out in the Development Corporation Act, R.S.B.C. 1979, Ch. 93 as follows:

4. The object of the corporation is to create, develop and increase income, employment, tax revenue and other economic benefits to the Province by encouraging and assisting in the establishment, expansion and continued operation of industrial enterprises in the Province, ....

4.1 The further objects of the corporation are to act as agent for, and provide assistance to, the government in the administration or implementation of government programs.

5. Notwithstanding any other Act, the Corporation has all the powers necessary to carry out its objects and, without limiting the generality of the foregoing, may, for the purposes of this Act,

\* \* \*

- (e) acquire, develop, maintain, manage, operate, rent or sell land, buildings, plants, machinery, equipment and utilities or any interest in them, and enter into agreements with municipal corporations or with other persons for these purposes;

The issue on this appeal is whether the Appellant Ombudsman had jurisdiction to investigate the complaint made to him by King Neptune Seafoods Ltd. in respect of the "act or decision" of B.C.D.C. in refusing to renew the lease held by King Neptune Seafoods Ltd. and is succinctly stated in the factum of the B.C.D.C. as follows:

This appeal turns on the correct characterization of the object of the Ombudsman's investigation; was it a matter of administration?

The Ombudsman stated his objective as follows:

*The Act or decision that I am investigating is the refusal to renew the lease with King Neptune Foods Ltd. or to sell the property to it.*

It is submitted this decision is not a matter of administration because it and the negotiations leading to it did not involve the exercise (or non-exercise) of governmental power.

It is submitted by counsel for the Ombudsman that the complaint related not only to "an act or decision" by B.C.D.C. but also to "a procedure of management or of administration". In my view, it is not necessary to decide whether the conduct of B.C.D.C. was "a procedure of management or of administration" because in my view the decision and the conduct leading up to it clearly involved the exercise of a governmental power relating "to a matter of administration".

The reasons for judgment of the learned trial judge in holding that the "act or decision" of B.C.D.C. did not involve "a matter of administration" may be summarized as follows:

- (1) The inclusion of the qualifying words "matter of administration" imply that there is some limitation on the power of the Ombudsman.
- (2) The decision of the B.C.D.C. was not "a matter of administration" because it was not an adjudication falling within the field of administrative law. There was no obligation to weigh competing or conflicting claims.

- (3) The exercise of business judgment is not a matter of administration or in respect of a matter of administration.

My reasons for holding that the "act or decision" of B.C.D.C. in failing to renew the lease related to a "matter of administration" may be summarized as follows:

- (a) The plain and ordinary meaning of the words "matter of administration" is a "matter relating to the carrying out of the executive or management functions of government".
- (b) The word "administration" while including factual situations where the government or its agent is required to decide between competing claims, is not limited to such factual situations.
- (c) If a matter relates to the carrying out of executive or management functions it is a "matter of administration" and does not cease to be such a matter merely because the carrying out of such functions requires the exercise of business judgment.

In S.A. de Smith "Judicial Review of Administrative Action", Third Edition, an "administrative" function is dealt with as being synonymous with an "executive" function. See de Smith, *supra*, at pp.57 and 60 as follows:

The functions of public authorities may be roughly classified as (i) legislative, (ii) administrative (or executive), (iii) judicial (or quasi-judicial) and (iv) ministerial.

\* \* \*

The term "administrative" is capable of bearing a wide range of meanings, some of which are remote from the problems raised by the classification of statutory functions. In such phrases as "administrative law," "administrative tribunal" and "judicial review of administrative action" it refers to broad areas of governmental activity in which the repositories of power may exercise every class of statutory function. We need not dwell upon these usages. Nor, at this point, shall we consider the analytical distinctions drawn between administrative and judicial functions; these can conveniently be postponed until we discuss the meanings of "judicial."

The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice. Legal consequences flow from this distinction.

See also Halsbury's Laws of England, Vol.1, Fourth Edition, (Administrative Law, para. 4):

4. *Organs and functions of government.* There are three principal organs of government: the legislature (the Queen in Parliament), the executive or administration, and the judiciary. The functions of government are classified as legislative; executive or administrative; judicial; and ministerial. Broadly, legislative acts entail the formulation, making and promulgation of new rules of law which are general in application; executive and administrative acts entail the formulation or application of general policy in relation to particular situations or cases, or the making or execution of



individual discretionary decisions; judicial acts involve the determination of questions of law and fact, or the exercise of limited discretionary power, in relation to claims and controversies susceptible of resolution by reference to pre-existing legal rules or standards, or the adoption of a procedure analogous to that of a court of law in the course of resolving a disputed issue; ministerial acts consist of the performance of a public duty in the discharge of which little or no discretion is legally permissible.

The above definitions of the word "administrative" were adopted by Morden, J.A. in *Re Ombudsman of Ontario and Health Disciplines Board of Ontario et al* (1979), 104 D.L.R. (3d) 597 at p.607 :

The foregoing seems to me to be relevant background against which to approach the interpretation of s. 1(a). An important guide to what is intended by "an administrative unit of the Government of Ontario" is that the expression includes Ministries. When this is taken into account together with the well-known fact, discussed in the preceding paragraph, that other bodies play an important part in the Government of Ontario, it is reasonable to interpret "administrative" as describing those functions of Government which are not performed by the Legislative Assembly and the Courts. Broadly speaking it describes that part of Government which administers the law and governmental policy. While "administrative" is a common synonym for "executive" it is a wider and more appropriate term, in the context we are considering, since "executive" probably would be more readily associated only with those components of Government comprising the Executive Council and the various Ministries. A large number of those bodies popularly known as administrative tribunals, are, by virtue of their names, commissions or boards, and for this reason, I can appreciate why the words "commission" and "board" would be a useful part of the definition in s.1(a). However, these words do not exhaust the field of such bodies. There are other names such as society, foundation, corporation, committee, and so on. Hence the convenience of "or other administrative unit" ....

I refer also to de Smith's *Judicial Review of Administrative Action*, 3rd ed. (1973), where it is said at p.60 that "administrative" is "capable of...a wide range of meanings" and that in such phrases as "administrative law", "administrative tribunal" and "judicial review of administrative action", it refers to broad areas of governmental activity in which the repositories of power may exercise every class of ...function". I accept this as a proper, albeit not an exactly definite, approach to the meaning of the term in the context we are considering.

In the case on appeal, the complaint was that the conduct of B.C.D.C., an agent of the Crown, in carrying out its executive functions acted unjustly and in bad faith in failing to renew the lease. The executive and public function being carried out by B.C.D.C. was the implementation of government policy in accordance with the objects prescribed by the Development Corporation Act. It follows that the Ombudsman had jurisdiction to investigate this "matter of administration" in accordance with the objects prescribed in the Development Corporation Act.

I come now to deal with the argument that in some way the words "matter of administration" do not include "acts or decisions" made in the exercise of business judgment. It is argued that the exercise of business powers is not an exercise of governmental powers and that the words "governmental powers" should only include powers which cannot be exercised by an ordinary citizen. I am completely unable to grasp this distinction. The object of the statute is to enable every citizen to have his complaints relating to alleged unjust conduct on the part of the government or its agents investigated by the Ombudsman. It cannot matter to the citizen whether the alleged unjust conduct relates to "business" or otherwise.

I point out as well that the government is not subject to the same restraints and controls as the ordinary citizen. The government exercises monopolistic and untrammelled powers. It is not restrained by the influence of the marketplace. It is not subject to scrutiny or control by anyone. A company exercising "ordinary business powers" is subject to the scrutiny and control of the shareholders as well as to the influence of the marketplace.

In the case on appeal B.C.D.C. was not engaged in a purely commercial enterprise but was acting in furtherance of government policy. In so doing it was given an absolute discretion and was not subject to the checks and balances of the open market. In other words, B.C.D.C. was not an "ordinary lessor".

The learned chambers judge placed some reliance on the case of *Ombudsman of Nova Scotia v. Sydney Steel Corporation et al* (1977) 17 N.S.R. 361. It is not necessary for the purposes of this appeal to determine whether that case was properly decided for two reasons:

- (1) The Nova Scotia statute refers to "the administration of any law" as compared to the British Columbia statute which gives jurisdiction over "matters of administration". In this connection, while the Sydney Steel Corporation may have been engaged in a "matter of administration" it cannot be said that it was, in carrying on its business, "administering a law".

See judgment of MacKeigan, C.J.N.S. at p. 366:

I find the phrase "administration by a department ...of any law of the Province" to be singularly unilluminating. If we were here concerned about investigation of the failure of a highway official to keep snow plowed on a stretch of highway or a mis-handling of a student in a vocational school, could it really be said with any meaning that the Ombudsman would then be investigating the administration respectively of the *Highway Act* (or would it be the *Motor Vehicle Act*?) or the *Education Act*? Or, in both cases, would he not be investigating the administration of a department rather than the administration of a law by a department?

(2) The Steel Corporation was carrying on a purely commercial enterprise. I again refer to the judgment of MacKeigan, C.J.N.S. at p.367:

Examination of the corporation's Act shows that the corporation's function is not governmental but entirely industrial and commercial - to make and sell steel. It is distinguishable from any private manufacturing company only in that it is owned and financed by the Province (and if it should become successful would cease to be supported financially and cease to come within the definition of "agency"). It is not a public utility which may be charged with a public interest and thus perform a public function. It cannot be said to be administering in any governmental sense its Act of incorporation, which merely defines its corporate structure and powers.

In the case on appeal, the acquisition of land was for the purposes of the river front development scheme. B.C.D.C. was performing a governmental public function in the public interest in accordance with its objects and powers, as provided for in sections 4 and 4.1 of the *Development Corporation Act*. It was not engaged in a commercial enterprise but in a programme designed to implement government policy.

I also wish to deal with the following passage  
from the reasons for judgment of the learned chambers judge:

It just cannot be the case, in my view, that the Legislature intended every business decision made by an authority should be subject to investigation. If that were so, no authority could function in any competitive market, particularly in the real estate development field and no development corporation could ever satisfy lenders that a safe investment could be made and, as I have said, there would be no reason to add any qualifying words to Section 10(1).

With respect to this passage, I think, with respect, that the learned chambers judge has misconceived the powers of the Ombudsman. The Ombudsman has power to investigate and report. He has no power to interfere with the carrying out of executive functions. See judgment of Milvain, C.J. in *Re Ombudsman Act* (1970), 72 W.W.R. 176 at p.187:

A Commissioner of the Legislature is an officer of the Legislature, appointed by that body for a prescribed term, paid by a vote of appropriation, and reporting annually to the Legislature. Like the Provincial Auditor, he responds to and is accountable only to the Legislature, and exercises analogous discretions and powers. It is not his function to overrule decisions of responsible officials or to institute proceedings of a punitive nature for wrongdoing or malfeasance in office, but rather to assist the ordinary citizen who is bewildered by the complexities of departmental Government and feels that he has been done an injustice. Such a citizen may, and sometimes does, turn to his member in the Legislative Assembly for aid. The member then performs, within the limits of the time available to him, the functions of an Ombudsman: he enquires and ascertains, he obtains and exchanges information, he seeks by review and discussion to correct injustices and to dispel misunderstandings.

and at p.190:

I am satisfied that the basic purpose of an ombudsman is provision of a "watch-dog" designed to look into the entire workings of administrative laws. I am sure this must involve scrutiny of the work done by the various tribunals which form a necessary part of such administrative laws.

Surely, no harm can come from an investigation and report as to whether the government has acted in a just and fair manner in dealing with the citizens of the Province. It is not necessary that the citizen have a right of redress or have suffered loss. As was said in de Smith, *supra*, at page 49:

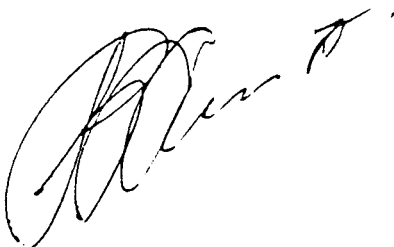
Of crucial importance is the meaning of "injustice in consequence of maladministration." "Injustice" has been widely interpreted, covering not merely injury redressible in a court of law but also "the sense of outrage aroused by unfair or incompetent administration, even where the complainant has suffered no actual loss." "Maladministration" was deliberately undefined: the Parliamentary Commissioner was left to work out his own case-law. The term includes corruption, bias and unfair discrimination, misleading a member of the public, failure to notify him of his rights, losing or mislaying documents, sitting on a decision or an answer to a request for information for an inordinate length of time, failing to explain why a decision was made or why a situation had arisen when it was unreasonable to refuse, making a decision on the basis of faulty information which should have been properly ascertained and assembled.

I agree with the learned chambers judge that the words "matter of administration" are limiting words and that there must be some limits to the power bestowed on the Ombudsman. Generally speaking, the Ombudsman cannot interfere

in the purely legislative or judicial fields. That is not to say, however, that in "matters of administration" which do not concern the legislative or judicial fields that the Ombudsman does not have jurisdiction. Subject to what may be said in future cases, where a Crown corporation is engaged in a purely commercial enterprise, the Ombudsman does have jurisdiction over all executive functions even though such functions in some aspects require the exercise of business judgment.

Lastly, it was suggested that the "act or decision" of the Ombudsman in renewing the lease was unrelated to the allegations of bad faith and the negotiations which took place. The "act or decision" cannot be examined in a vacuum but must be examined in relation to the events which led up to the "act or decision" including the conduct of the B.C.D.C.

For the above reasons, I would allow the appeal and quash the order made by the learned chambers judge.

A handwritten signature in black ink, appearing to be 'R. J. ...', is written over the bottom portion of the page. The signature is fluid and cursive, with a large initial 'R' and a smaller 'J'.