NOVA SCOTIA COURT OF APPEAL
Citation: ***L&B Electric Ltd. v. Selig***, 2006 NSCA 130

Date: 20061207
Docket: 266352
Registry: Halifax

Between:

L & B Electric Limited, a body corporate,
and Larry B. Oickle

Appellants

v.

Carolyn Marie Selig, James Carroll Selig, David Dawson Corkum, George Maurice Fancy, Michael Lindsay Hull, Norman Francis Myra, Gerald Ivan Seamone and Randolph Willis Tanner

Respondents

- and -

L&B Electric Limited, a body corporate and
Ross M. Bunnell and Rosemary Fraser

Respondents

Judges: Bateman, Oland and Hamilton, JJ.A.

Appeal Heard: November 17, 2006, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Oland and Hamilton, JJ.A. concurring.

Counsel: Victor J. Goldberg and Martha Mann, for the appellants L&B Electric Limited and Larry Oickle
Michael S. Ryan, Q.C., for the respondents Carolyn Marie Selig, James Carroll Selig, David Dawson Corkum, George Maurice Fancy, Michael Lindsay Hull, Norman Francis Myra, Gerald Ivan Seamone and Randolph Willis Tanner
Martin Dumke and Rubin Dexter for the respondents Ross M. Bunnell and Rosemary Fraser

Reasons for judgment:

[1] In a complex multi-party action involving L & B Electric Limited (the "Company"), Justice Margaret Stewart of the Supreme Court of Nova Scotia granted several shareholders of the Company leave to intervene as parties. The Company and Larry Oickle, who is a former principal in the Company, appeal.

[2] In a prior interlocutory appeal within the same action (decision reported as **L & B Electric Ltd. v. Oickle** (2006), 242 N.S.R. (2d) 356; N.S.J. No. 119 (Q.L.)), Hamilton, J.A. described the main dispute as follows:

> **[1]** This appeal involves a falling out among shareholders of a closely held company, L & B Electric Limited (the "Company"), one of the appellants. Ross M. Bunnell, the other appellant, and Larry B. Oickle, the respondent, each own or claim to own about 40% of the outstanding shares. Mr. Bunnell and Rosemary Fraser, another shareholder, continue to work for the Company. Mr. Oickle no longer works for the Company. The Company sued Mr. Oickle. He filed a defence and counterclaim admitting certain allegations in the statement of claim.
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> **[2]** On application by Mr. Oickle, Justice Gerald R.P. Moir permitted amendment of his defence to withdraw the admissions and to add a claim for an "oppression remedy" to Mr. Oickle's counterclaim for alleged misdeeds of Mr. Bunnell. The judge also granted leave to Mr. Oickle to commence a derivative action in the name of the Company for alleged misdeeds of Mr. Bunnell and Ms. Fraser. . . . .

[3] Summarizing, Bunnell (and Fraser) currently run L & B Electric Limited. Mr. Oickle was a principal and significant shareholder who says he was wrongly ousted and that Bunnell and Fraser are misusing Company assets. He is said to be now competing in his own business against the Company. On that account the Company has sued Oickle. In response, Oickle has launched an action against the Company and Bunnell on his own behalf, alleging oppression and, with leave of the court, a derivative action in the name of the Company against Bunnell and Fraser.

[4] The remaining shareholders, who also happen to be employees of the Company, applied to intervene in the proceedings and to become parties. Stewart, J. granted the application. The Company, under the direction of Mr. Oickle, and Mr. Oickle in his personal capacity, appeal.

[5] The error necessary to ground appellate intervention in a discretionary interlocutory order requires the application of wrong principles of law or a result which is patently unjust (**Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331 (C.A.)).

[6] The appellants say both branches of the test are satisfied. They submit the application should not have been granted because the intervenors are mere surrogates for Bunnell (and Fraser), advocating the same position and thus bring nothing new to the litigation.

[7] The provincial rules of court providing for intervention or its equivalent vary markedly. Some jurisdictions apply the rules liberally, others are more restrictive. (See **French v. Fish** (1997), 143 D.L.R. (4th) 626; A.J. No.148 (Q.L.) (C.A.); **Save the Eaton's Building Coalition v. Winnipeg (city)** (2001), 206 D.L.R. (4th) 541; M.J. No. 511 (Q.L.) (C.A.); **Canada (Attorney General) v. Saskatchewan Water Corp.**, [1991] 2 W.W.R. 614; S.J. No. 46 (Q.L.) (C.A., in Chambers); **Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.** (1990), 45 C.P.C. (2d) 1; O.J. No. 1378 (Q.L.) (Ont. C.A., in Chambers); **Re Starr and Township of Puslinch et al.** (1976), 12 O.R. (2d) 40 (Ont. Div. Ct); **Dha v. Ozdoba** (1991), 47 C.P.C. (2d) 23; B.C.J. No.303 (Q.L.) (B.C.C.A., in Chambers); **Kalchefsky v. Brown**, [1988] 1 W.W.R. 755; M.J. No. 565 (Q.L.) (Man. C.A., in Chambers); **Ontario (Securities Commission) v. Electra Investments (Can.) Ltc.** (1983), 44 O.R. (2d) 61 (C.A.); **Nova Scotia (Attorney General) v. Arrow Construction Products Ltd.** (1996), 148 N.S.R. (2d) 392 (C.A.)). Applications for intervention arise in varied circumstances. For example, the litigation may be between private parties; between a private party and a public body; or between two public bodies. The intended intervenor may be an individual with an interest in the actual dispute between the parties; a stranger to the litigation but whose financial or other interests will be affected by the outcome; or a public interest group in a situation where the judgment will have a great impact on others who are not immediate parties to the litigation. Consequently, there is no simple or uniform test.

[8] An important starting point is the rule which governs intervention in this jurisdiction. **Civil Procedure Rule 8.01** provides:

> (1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto where,
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> > (a) he claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the judgment therein, or otherwise;
> >
> > (b) his claim or defence and the proceeding have a question of law or fact in common;
> >
> > (c) he has a right to intervene under an enactment or rule.
>
> (2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.
>
> (3) On the application, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

(Emphasis added)

[9] On a plain reading of the **Rule**, a judge may exercise her discretion to grant intervention if the applicant has an "interest" in the proceeding. This **Rule** has been liberally interpreted in Nova Scotia. (See **Anderson and Anderson v. Co-operative Fire & Casualty Company** (1983), 58 N.S.R.(2d) 163; N.S.J. No. 428 (Q.L.) (S.C.) at para. 11; **Halifax Flying Club v. Maritime Builders Ltd.** (1973), 5 N.S.R.(2d) 364; N.S.J. No. 72 (Q.L.)(S.C.) at paras. 11 to 14; **Bluenose II Preservation Trust Society v. Tall Ships Art Production Ltd.** (2003), 37 C.P.C. (5th) 300; N.S.J. No. 320 (Q.L.) (S.C.); see also **Nicholson v. Maritime Electric Co. Ltd., Dewar and Dewar's Mobile Home Ltd.** (1979), 24 Nfld. & P.E.I.R. 1283; P.E.I.J. No.65 (Q.L.)(S.C.)).

[10] Not uncommonly, the sufficiency of the applicant's "interest" in the litigation is in dispute (see, for example, **Schofield v. Ontario (Minister of**

Consumer & Commercial Relations) (1980), 19 C.P.C. 245; O.J. No. 3613 (Q.L.) (Ont. C.A.)). However, here the judge accepted the applicants, as employees and shareholders, have a "direct and ... profound financial interest in the subject matter of the litigation and its eventual outcome." The appellants do not dispute this.

[11] From a review of the case law I conclude that intervention has often been permitted where the applicant has a direct interest in the proceeding, subject to the judge's discretion to refuse intervention if it would "unduly delay or prejudice the adjudication of the rights of the parties to the proceeding" (**Rule** 8.01(1)(c)). This is consistent with a liberal interpretation of our **Rules**. "Direct" interest is consistently used in the language of the case law but has no single meaning in its application. However, the intended intervenors here clearly fall within even the most restrictive definition. The outcome of this litigation has the potential to significantly impact the value of their shareholdings, their working conditions and possibly their future employment.

[12] Absent a direct interest, intervenor status may be granted if the applicant has some genuine interest in the issues between the parties. In such circumstances the court will consider whether the intervenor will bring a new or different perspective to the consideration of the issues (**U.T.U., Locals 1778 v. B.C. Rail Ltd.** (1990), 45 C.P.C. (2d) 33; B.C.J. No. 2503 (Q.L.), (C.A., in Chambers)). I find the remarks of Esson, J.A., as he then was, in **MacMillan Bloedel Ltd. v. Mullin** (1985), 66 B.C.L.R. 207; B.C.J. No. 2076 (Q.L.)(C.A.) at pp. 209-210, provide a helpful overview:

> Both the *Hirt* and *West Kootenay* cases allowed intervention by a person having a direct interest in the question to be decided on the appeal. I have been referred to no case in this province in which intervention has been allowed by a person not having such a direct interest. On the other hand, other courts, notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but an interest in the "public law issues". That aspect of the matter was touched upon by Madame Justice Wilson (then J.A.) in *Re Schofield and Min. of Consumer & Commercial Relations* (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.) when she gave as one of the reasons for refusing an application to intervene that [p. 771]: "This is not an application on behalf of a private or public interest group which might bring a different perspective to the issue before the Court."

> That case gave rise to an interesting diversity of views. Thorson J.A., who agreed that the application should be refused, expressed his reservations as to the validity of considering whether the interest sought to be represented was already capably represented by other parties. But I think it is implicit in his reasons, and in those of Zuber J.A. who would have allowed intervention in that case, that they agreed that the fact of the application being by a private or public interest group which could bring a different perspective to the issue before the court would be one favouring the applicant. On principle that seems to me right. The coming of the Charter has increased the desirability of permitting some such interventions.
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> I do not mean to say that every application by a private or public interest group which can bring a different perspective to the issue should be allowed. I say only that, in some cases, that is a factor which will overcome the absence of a direct interest in the outcome. In each case, it will be necessary to consider the nature of the issue and the degree of likelihood that interveners will be able to make a useful contribution to the resolution of the issue, without injustice to the immediate parties.

[13] Even where the applicant has a direct interest, the question of whether a proposed intervenor's position would be adequately represented by the existing parties is not completely irrelevant to the judge's exercise of discretion under **Rule** 8.01(1)(c). Where the judge finds that the intervention may delay the proceeding or otherwise prejudice the rights of the parties, the fact that the intervenor's position is adequately represented by an existing party may militate against allowing the intervention.

[14] Where there is no direct interest in the subject matter of the proceeding, the cases reveal that a variety of additional factors may be considered: the nature of the applicant's "interest"; whether the applicant is a public interest group which might bring a different perspective to the issue before the Court (**Schofield v. Ontario (Minister of Consumer & Commercial Relations)**, **supra**; **MacMillan Bloedel Limited v. Mullin et al.**, **supra**); whether the litigation is between private or public parties (**Kalchefsky v. Brown**, **supra**); whether a **Charter** issue is engaged (**Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada**, **supra**); whether the resolution of the dispute will have an impact beyond the parties (**Hansen v. Royal Insurance Co. et al.**, (1985), 52 O.R. (2d) 755 (Ont. H. C.)); whether the parties are unwilling or unable to raise an issue of substance which could affect the development of the law in future cases; the provisions of the court rule, if any, under which the application is made (**Save the Eaton's Building**

Coalition v. Winnipeg (city), supra). This list is not exhaustive. Each application is considered in its own context.

[15] The intended intervenors here having a direct interest and Stewart, J. not being persuaded that the intervention would unduly delay the action or otherwise prejudice the parties granted the application. She did not err. I would agree that it was unnecessary for her to require that the intervenors bring a different perspective.

[16] The appellants' submit that the intervenors' interests are adequately represented in the action by Bunnell. In view of their direct interest and the finding of no undue delay or prejudice, it was not necessary for the judge to address this point. I would note, however, that it cannot be assumed the intervenors will continue to support Bunnell (and Fraser) throughout the litigation. That will depend upon the evidence marshalled at trial. If the allegations of Bunnell's misuse of corporate assets are substantiated, the intervenors may take a different view. Indeed, under cross-examination at the hearing of the application for leave to intervene, one of the shareholders indicated that while she did not think Bunnell and Fraser had done anything wrong, if they had, the Company should be reimbursed and appropriate action taken. It is important that the intervenors' position be before the court and that all matters in dispute be determined among all those directly affected by the outcome of the proceedings.

[17] Hoping to demonstrate that the proposed intervenors were not independent of Bunnell the appellants sought to establish through cross-examination that their legal fees were paid by the Company or Bunnell. Counsel for the intervenors objected to the question asserting that the information was privileged. The judge agreed and disallowed the inquiry. This, submit the appellants, is legal error.

[18] The appellants say that if Bunnell or the Company is financing the intervenors' litigation this establishes that they are simply proxies bringing nothing new to the dispute. I disagree. The fact that a third party may be paying the intervenors' legal fees does not prove that the intervenors are not independently instructing their counsel. The initial position of the intervenors in this action is acknowledged to be supportive of Bunnell and Fraser. However, as noted above, their position may change as the evidence is presented.

[19] Consequently, I am not persuaded that the judge erred in disallowing this inquiry. The question of whether that information is privileged need not be resolved here. The result reached by the judge was not in error. As she noted in her reasons for judgment, the payment source for the intervenors' legal fees in these circumstances was irrelevant. This is so because the judge was satisfied that their personal interests were affected by these proceedings.

[20] Finally, the appellants say the judge erred in awarding costs of the application against Mr. Oickle personally rather than against the Company. Pursuant to the **Companies Act**, R.S.N.S. 1989, c. 81 (Third Schedule, s. 4) the court has a broad discretion regarding costs. Mr. Oickle is both the complainant having carriage of the derivative action on behalf of the Company and personally a party to the consolidated action. In either capacity he is exposed to an order for costs. Nothing in the record would indicate that in exercising her discretion to award costs against Mr. Oickle personally the judge applied wrong principles of law or that a patent injustice results.

[21] There being no error or patent injustice, the appeal is dismissed with costs payable by the appellant Oickle, in his personal capacity, to the respondents collectively in the amount of $1500 inclusive of disbursements.

Bateman, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.