SUPREME COURT OF NOVA SCOTIA
Citation: Jeffrie v. Hendriksen, 2012 NSSC 75

Date: 20120216
Docket: Hfx No. 346079
Registry: Halifax

Between:

Roderick Jeffrie

Applicant

v.

Anthony Hendriksen, Inland Marine Services Limited
and Three Ports Fisheries Limited

Respondents

Judge:	The Honourable Justice Michael J. Wood
Heard:	February 13, 2012, in Halifax, Nova Scotia
Decision:	February 16, 2012 (Orally)
Release of Written Decision:	February 20, 2012
Counsel:	Christa M. Brothers and Matthew Pierce, for the Applicant Michael S. Ryan, Q.C. and Ezra Van Gelder, for the Respondents

By the Court: (Orally)

[1] This proceeding originated as an Application in Court as a result of a notice filed on March 29, 2011. The relief sought included:

(a) a declaration of a valid and enforceable settlement agreement;

(b) a declaration that the applicant's rights or interests have been oppressed by the respondents;

(c) damages and accounting of profits.

[2] According to the allegations in the notice, this dispute arises out of a disagreement between shareholders of the respondent, Three Ports Fisheries Limited.

[3] Shortly after the notice of application was filed, the respondents made a motion to convert the proceeding to an action. This motion was dismissed by Justice Pickup with his reasons set out in a decision dated July 14, 2011 (*Jeffrie v. Hendriksen*, 2011 NSSC 351). In his decision, Justice Pickup concluded that the matter should be dealt with expeditiously and that Mr. Jeffrie's substantive rights were at risk of erosion if the dispute could not be dealt with in a timely fashion.

[4] A motion for directions was heard by Justice Rosinski on August 10, 2011, at which time various deadlines were set for disclosure, filing of affidavits, discovery examinations, etc. The matter was scheduled for a five day complex Chambers hearing on March 1, 5, 6, 7 and 8, 2012. Discovery examinations were to be completed by January 26, 2012.

[5] In September, 2011, the respondents made a motion to consolidate this proceeding with one that they had commenced against Mr. Jeffrie and others. By decision dated September 20, 2011 (*Jeffrie v. Hendriksen*, 2011 NSSC 351), Justice Rosinski dismissed the motion. In his decision he indicated that the parties were of the view that this proceeding could be completed in the five days scheduled for March of 2012. At that point, the parties were estimating that eight witnesses, as well as some unspecified number of other lay witnesses might participate.

[6] In October, 2011, the respondents requested further particulars of the oppression allegations in the notice of application, and these were provided promptly by the applicant. At the same time, the applicant proceeded to incorporate these particulars in an amended notice of application, which proceeded by way of consent. The amended notice did not change the relief sought, but did increase the number of witnesses proposed by the applicant from two to eight. By the end of October, 2011, the respondents had affidavits from all of these witnesses.

[7] In November, 2011, the respondents requested Justice Rosinski reconsider his dismissal of the consolidation motion. This request was based primarily on the argument that the nature of this proceeding had changed significantly as a result of the particulars which had been provided and the additional witnesses that had been identified. Justice Rosinski dismissed that request for reconsideration by decision dated December 12, 2011 (*Jeffrie v. Hendriksen*, 2011 SCC 460). His decision concluded that the new information did not represent a material change in the nature of this proceeding which would result in some injustice to the respondents. He also concluded that the applicant's oppression claim deserved "very timely adjudication and substantial injustice could easily occur against Jeffrie's interests if Hfx No. 346079 is delayed".

[8] In December, 2011, the parties agreed to discovery of nine of the deponents who had filed affidavits. Counsel for the applicant suggested January 23 - 26, 2012 and this was agreed to by the respondents. The discoveries proceeded as scheduled on those dates, although more time was spent than anticipated. The examination of Mr. Ripley, one of the deponents who filed an affidavit on behalf of the respondents, was not completed and his discovery will continue by consent on February 21, 2012.

[9] On February 1, 2012, counsel for the respondents wrote to counsel for the applicant advising that his instructions were to seek an adjournment since discovery transcripts would not be available until late February, which would restrict the time available to review and prepare for the hearing. He also noted a number of outstanding discovery undertakings which needed to be prepared.

[10] Counsel for the applicant proposed to retain a second court reporter and pay them to expedite completion of the transcripts. The respondents were not prepared to share in any additional costs involved in doing so. The applicant proceeded to

retain the second reporter and transcripts have been produced over the last week with respect to a number of witnesses. It is expected that all transcripts with the exception of Mr. Ripley will be available this week.

[11] Counsel for the respondents wrote to Justice Rosinski on February 3, 2012 indicating his instructions were to make a motion for adjournment. The reason given was that discovery transcripts were unlikely to be available until February 27 and that would not leave sufficient time to review them and prepare for the hearing.

[12] At the hearing of the motion on February 14, 2012, counsel for the respondents indicated that even though transcripts were now available, he did not have sufficient time to properly review them and prepare for the hearing to start on March 1, 2012.

[13] The parties have agreed that this motion should be governed by Civil Procedure Rule 4.20, which deals with adjournment of trial dates. Rule 4.20(4) provides that an adjournment at this stage carries with it a presumption of an adverse impact on the parties' rights as well as on the efficient scheduling of facilities and court time.

[14] Rule 4.20(3) directs that a court hearing a motion for adjournment consider the respective prejudice to the parties, as well as the public interest in making efficient use of court facilities.

[15] The position of the respondents is that an adjournment will not prejudice the rights of the applicant. This is contrary to the views expressed by both Justices Pickup and Rosinski in their earlier decisions. In my view, the respondents have not rebutted the presumption of prejudice to the applicant that would result from an adjournment. To allow a significant adjournment of the hearing would defeat the purpose of an Application in Court and frustrate the decision of Justice Pickup that this matter needed to be heard expeditiously.

[16] Counsel for the respondents goes on to say that his client will be prejudiced if the adjournment is not granted because he will not have a fair opportunity to prepare for the hearing. The thrust of this submission is that the discovery examinations took longer than anticipated and therefore there will be a significant volume of transcripts which will have to be reviewed with the witnesses in order to

properly prepare them. Counsel for the applicant acknowledges the increased volume of transcripts, but says that with the expedited production there is sufficient time for her to prepare and this ought to be sufficient for the respondents' counsel as well.

[17] The response by counsel for the respondents is that the nature and extent of preparation varies from lawyer to lawyer, depending upon their personal practices and volume of other work. He made the strong submission that he simply does not have time to properly prepare, and that if the Court forces him to proceed with the hearing as scheduled, his client will suffer.

[18] I am having some difficulty understanding why the increase in volume of discovery transcripts alone would justify an adjournment. It was always understood that there would be discoveries of multiple witnesses in late January and that transcripts would be available in mid-February. This is an application in court and so the respondents have the advantage of having had the direct evidence of the applicant's witnesses through their affidavits since October. This would have allowed them to conduct a very focussed discovery examination, geared to obtaining admissions which might be useful in cross-examination. Since these discoveries took place two weeks ago, counsel should have a very good idea of what was said, although it may be still necessary to locate specific comments in the transcripts. This is not a case where counsel is reviewing transcripts from discoveries which took place several years earlier in order to refresh their memory.

[19] As for the respondents' own witnesses, I think it is fair to assume that they were properly prepared for the discovery examinations and that counsel listened to their testimony and made notes of any matters of concern. They will obviously want to review their transcripts and perhaps discuss their evidence with counsel, but this is information that should be fresh in everyone's mind.

[20] The Court is not aware of what other obligations may exist in counsel's practice which might limit the time available for preparation. As a result, I am prepared to accept the representations of counsel for the respondents that he does not have sufficient time to prepare in the fashion that he would prefer, and that forcing him to participate in the hearing in March may be somewhat prejudicial to his client.

[21] What I have concluded is that each party faces the risk of potential prejudice depending upon the outcome of this motion. If an adjournment is granted, particularly for a lengthy period of time, the applicant's substantive rights may well be affected. Conversely, if the matter proceeds as scheduled, counsel for the respondents will be scrambling to try and properly prepare which could also be somewhat detrimental. In these circumstances, I am prepared to consider a potential adjournment; however, only on strict conditions, and these are as follows:

1. The respondents will pay one half of the cost incurred in expediting production of the discovery transcripts.

2. This matter be tentatively set for specific dates between April 2, 2012 and May 16, 2012, and will be heard on those dates in the event that the action between Fredrick Saturley and CIBC World Markets Inc., Hfx. No. 305635 does not proceed to trial as scheduled.

3. Alternative dates will be fixed within the next six months for a hearing of this matter in the event that it is not dealt with during the April or May, 2012 time frame.

[22] If dates cannot be fixed as outlined above, I will revisit the issue as to whether to grant the adjournment and, if so, on what terms.

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Wood, J.