SUPREME COURT OF NOVA SCOTIA

Citation: *778938 Ontario Limited v. Annapolis Management Inc.*, 2019 NSSC 36

Date: 20190201
Docket: Hfx. No. 480460
Registry: Halifax, Nova Scotia

Between:

778938 Ontario Limited

Applicant

v.

Annapolis Management Inc. and Ruby LLP

Respondents

DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	January 14 & 15, 2019, Halifax, Nova Scotia
Written Decision:	February 1, 2019

Counsel:	Dillon Trider, for the Applicant Peter Planetta, for the Respondents

By the Court:

Background

[1] This case involves a construction dispute between two adjacent property owners. The Applicant is the owner of a four-storey building located at 1566 Barrington Street, Halifax, commonly referred to as the "Attica" building. The Respondents are the owners of Attica's neighboring building on the northern side, a location commonly referred to as the "NFB" building. When the Respondents purchased the NFB location, that structure was a husk of a building, having been destroyed by fire in 1991 and left exposed to the elements. A crumbling brick wall abutted Attica's concrete wall.

[2] The Attica building was purchased by the Applicant in 2002. Since that time, this heritage building was fully restored as a four-storey commercial enterprise. Germane to this proceeding is the fact that the Attica building has a membrane roof.

[3] In 2013 the Respondents received municipal approval to construct a five-storey, mixed-use building at the NFB site. In December, 2017 approval was granted to build an additional two floors to its development. In 2018 the Respondents began construction of its two additional storeys. This marked the genesis of this dispute.

[4] These buildings are not connected and there is a small space between the walls. This space was susceptible to rain which had the potential of causing damage to the Attica wall. In order to avoid such damage, the Applicant built a parapet over the two abutting walls. It crossed the property line and attached to the top of the NFB wall.

[5] These two buildings co-existed as good neighbors for many years. There is no evidence that the owners of either building historically trespassed or caused nuisance to the other. The comparable height of both buildings allowed wind-driven snow to blow across the two buildings and the parapet unimpeded. As such, there were no "snow load" concerns for the Attica roof.

[6] The plan to heighten the NFB building required the erection of a steel and concrete wall some 18 feet high and above the Attica roof level. The Applicant

submits that the construction of that wall impacted the Attica building in the following three ways:

1. The NFB workers walked on and worked from the Attica roof and intentionally left materials on the Attica roof to facilitate that work. The Applicant considers these actions trespassing.
2. The NFB construction caused materials and debris, including nails and screws, to migrate from the NFB worksite onto the Attica roof. The Applicant considers this to be a nuisance.
3. The NFB's construction of the wall will cause additional snow to drift and pile on the Attica roof causing a danger to the structural integrity of that roof. The Applicant considers this to be a nuisance.

Throughout 2017 and 2018 the parties struggled to resolve these issues. The details of those discussions appear in the many emails between the parties which are in evidence. Unfortunately, those discussions did not result in a resolution.

[7] On December 7, 2018, the Applicant Attica filed an Amended Notice of Application in court in which it sought the following order:

(a) Restraining the Respondents from trespassing upon and damaging the Applicant's property;

(b) Restraining the Respondents from interfering with the Applicant's prescriptive easement relating to its roof parapet;

(c) Requiring the Respondents to pay the costs to return the Applicant's property to its original condition or as close as possible thereto;

(d) Requiring the Respondents to pay costs associated with any required reinforcement of or improvements to the Applicant's property required as a result of increased snow and/or rain load caused by the construction of the Respondents' building.

(e) Compensating the Applicant for damages caused by and relating to incidences of trespass and nuisance;

(f) For an injunction restraining the Respondents from any further construction of the block wall or any further additions to the NFB which would cause increased snow or rain load on the Attica roof until such time as the required reinforcements or repairs are performed on the Attica building;

(g) Granting punitive and aggravated damages; and

(h) Such further and other relief as this Honourable Court deems just.

The Respondents filed a Notice of Contest in which it generally argued "the modifications, renovations, and construction on the NFB building will not cause a significant or material change to the snow or rain loads to the Attica roof."

[8] In the Notice of Contest, the Respondents indicated a willingness to discuss contributions to accommodate the renovations, modifications and construction. It also agreed to mitigate the migration of debris. It also argued that the injunctive relief sought would cause undue hardship given the stage of construction and the approach of winter.

[9] In its brief and in *viva voce* evidence the Respondents argued that there was limited trespass on the Attica roof by its workers. When there was any such access, apologies were made and changes implemented. It further argues that any trespass attracted the *de minimus* principle and was done to protect the Attica roof. The evidence indicated that on August 3, 2018, counsel for the Applicant gave consent for NFB workers to go on the Attica roof for limited purposes. The Respondents argue that the evidence of debris on the Attica roof shows very small amounts of materials and does not disclose damage to that roof. The evidence, as a whole, establishes that the Respondents have always indicated that they would compensate the Applicant for strengthening its roof to accommodate the increased snow load.

[10] A Motion for Directions was held on December 7, 2018 and the following order was issued:

> The Application shall proceed on the issue of liability of the Respondents for trespass, nuisance and a determination shall be made on the question of any resulting injunction on the hearing dates of January 14, 15 and 16, 2019.
>
> After the hearing on the issue of liability, the Court will provide a further hearing date and associated filing deadlines to the parties on the question of damages.

The Applicant made a claim in its Notice for a prescriptive easement relating to the parapet that extended into the NFB airspace. Such claim was not advanced in this hearing.

[11] The reliance on email communications in commercial litigation has, in recent years, become the rule rather than the exception. This case is no different in

that the parties' principals attempted to resolve their differences through correspondence. Given that the parties' principals did not testify, my factual findings will be rooted in these exchanges. It is therefore necessary to review these exchanges. For the most part, Mr. David Garrett communicated on behalf of the Respondents. Mr. Louis Reznick is the Applicant's principal.

- On September 15, 2017 Mr. Garrett wrote Mr. Reznick seeking design plans for the existing Attica roof so that the Respondents could design a new "snow load" support plan. Mr. Reznick replied in the affirmative.

- On May 18, 2018 Mr. Garrett wrote to Mr. Reznick's Vice President respecting the "snow load" issue. He stated that since the roof addition to the NFB building has been approved, he could move ahead with the design work. He also said that work needs to continue on the NFB masonry wall and that no one from the NFB crew will go on the Attica roof and will not place materials there.

- On May 18, 2018 Mr. Reznick responded to Mr. Garrett urging his NFB team to respect his property. He chastised Mr. Garrett stating his "assumptions to what is what and what belongs to whom seems to be at issue." He further stated, "the trespassing must cease immediately and all materials must be saved and protected."

- On May 18, 2018 Mr. Garrett replied to Mr. Reznick seeking a meeting at which time they could all "review the conditions and discuss the best manner forward." Clearly, Mr. Garrett was concerned about the status of the relationship.

- On June 5, 2018 Mr. Garrett wrote to Mr. Reznick seeking a meeting as soon as possible "to discuss the interface of the NFB wall and the Attica roof."

- On June 8, 2018 Mr. Garrett wrote to Mr. Reznick indicating no response to his June 5th correspondence and stating they were anxious to move forward and maintain the construction schedule.

- On June 11, 2018 Mr. Reznick wrote to Mr. Garrett stating, "We are not willing to meet with you or your client, our neighbor, until such time as you agree to the following:"

    1. Provide an analysis of the effects to our roof caused by the construction of your addition. This has been requested from you long ago.

2. Agree to pay for repairs caused by your trades.
3. Agree to pay all costs to install protection to "our roof due to your persistent and unlawful trespass on our roof. You agree to reimburse all our costs, including legal."

- On June 11, 2018 Mr. Garrett replied to Mr. Reznick as follows:

1. Snow reinforcing will be done by the Respondents and "will be professionally designed and constructed in a timely manner."
2. The owner "cannot agree to pay for damages about which he has no idea."
3. There has been "no persistent trespass."

- On June 15, 2018 Mr. Garrett wrote to Mr. Reznick attaching plans "of the connection of the Attica roof to the new wall of the NFB". He stated that the following week they "will remove the existing parapet, construct the new parapet shown in the detail, and begin laying the concrete block to extend the wall up".

- On June 17, 2018 Mr. Reznick wrote to Mr. Garrett in response to the June 15, 2018 correspondence. He queried, "where is the report and the detail that we have asked for long ago with respect to the snow loads? We will not consider any further cooperation with you or your client without that." Mr. Reznick suggests legal action if the NFB owners do not agree to cover any damages. He finished by stating, "we require that by Monday. Failing that, we will take immediate steps on Tuesday to prevent any further consequences to our structure/property due to your trespass, and negligent and careless actions so far."

- On June 19, 2018 Mr. Garrett replied to Mr. Reznick indicating that the snow load designs are "in the works". Mr. Garrett discussed some of the obstacles to implementation which he stated, "will take time". He then stated, "In the meantime, work on the addition is held up until the NFB south masonry wall is raised. We cannot hold up the work on the addition until the reinforcement design work is done."

- On June 20, 2018 the Respondents' principal (S. Caryi) wrote to Mr. Garrett with a copy to Mr. Reznick. He addressed the following issues:

1. He will construct a new wall with a watertight barrier between the two buildings and will cover the cost.
2. He will pay for damage to the Attica roof.

3. In relation to the snow load issue, "We have budgeted for the reinforcement of your roof in our construction estimate. If you will allow our engineers and Mr. Garrett access to the property, they will devise a plan to reinforce the roof structure as required. We will then set about doing the work under their supervision, at a date that is acceptable to you."

- On July 7, 2018 Mr. Trider, counsel for the Applicant, wrote to Mr. Garrett. He addressed the snow load issue, trespass and damage to the Attica roof, and the parapet. He advised as follows: "Despite very clear requests, your client has plowed ahead without consent or approval and trampled my client's property rights. This is unacceptable. My client is not prepared to permit any further activities on or above its roof or in respect of its parapet until and unless a comprehensive plan is put in place that addresses all of the concerns noted above."

- On July 10, 2018 Mr. Garrett replied to Mr. Trider with the following opening paragraph: "We are prepared to begin immediately on the BMR Engineering structural design to upgrade the existing 1566 Barrington St. roof for additional snowload caused by the NFB addition to be paid entirely by Mr. Caryi. Mr. Caryi also stated in his email of June 20 that he will pay for any damage to the roof of 1566 caused by his workmen. We have also presented a detail by BMR for the proposed new 1566 parapet and connection to the NFB. These commitments should address items of the 'comprehensive agreement' requested by your client, as mentioned in your letter."

- On July 13, 2018 Mr. Trider wrote to Mr. Garrett in response to his July 10, 2018 correspondence. He stated, "my instructions are not to attempt to bring a halt to any construction but to ensure adequate protections are made to protect my client's property during construction." He identified the following issues: 1) snow load; 2) proposed roof tie-in detail; 3) engineering costs; and 4) protection of the Attica roof during construction. Mr. Trider's last paragraph is as follows: "If we can get agreement on the above items, once the requisite analyses have been performed, my client would be happy to have a meeting to finalize the details of a comprehensive agreement dealing with any damage to the roof of 1566, reinforcement for snow load, any required details regarding rainwater, the tie-in details and all out-of-pocket costs incurred to date by my client."

- On July 20, 2018 Mr. Garrett responded to Mr. Trider: "We have no issues with any of the basic requirements listed in the letter including an analysis of snow loading, a review of the proposed roof detail, appropriate engineering costs, and the protection of the roof of 1566 (Attica roof)."

- On July 31, 2018 Mr. Garrett wrote to the Applicant's Vice-President, S. Wilbee, outlining the steps they will take to prevent items from landing on the Attica roof.

- On August 3, 2018 Mr. Trider replied to Mr. Garrett's July 20 and July 31, 2018 correspondence. He stated, "we agree that your contractors are permitted to take the steps you note below to increase protection against falling debris from your worksite." Mr. Trider advised that he was in the process of preparing a draft access agreement to address construction issues. Mr. Trider continued as follows: "Absent an agreement, there is no consent on my client's side to have your workers accessing, walking on, working over or making modifications to the Attica building . . . We are unable to consent to any access beyond what you note below."

- On August 7, 2018 Mr. Trider wrote to Mr. Garrett, enclosing a draft Access and Indemnity Agreement.

- On September 17, 2018 Mr. Trider wrote to Mr. Garrett stating: "It has now been more than a month since the draft agreement was provided to you. Winter is fast approaching." He suggests legal action.

- On September 17, 2018 Mr. Garrett wrote to Mr. Trider indicating they have "essentially completed design work for work to the Attica roof for additional snow loads from the NFB addition."

- On September 17, 2018 Mr. Trider wrote to Mr. Garrett as follows: "Thank you for this update. I believe there is a disconnect; however, because your email has not addressed the question of the draft agreement provided to your client."

- On September 18, 2018 Mr. Garrett wrote to Mr. Trider attaching the draft Agreement. It was but a shell of the agreement drafted by Mr. Trider. Many of the clauses were either crossed out or altered. It was not signed. Legal action began on September 20, 2018.

- On September 26, 2018 Mr. Garrett wrote to Mr. Trider enclosing two structural plans for the reinforcement of the Attica roof.

- On September 28, 2018 Mr. Trider responded to Mr. Garrett, indicating which design option appealed to his client. He inquired about implementation time. In relation to the court proceeding, he stated: "This will be continuing apace; however, provided the structural work is done consistently, without delay or disruption, then this will in all likelihood significantly narrow the matters in dispute."

- On October 2, 2018 Mr. Garrett wrote to Mr. Trider concerning the two designs for roof support. He identified issues associated with both. He stated: "Following approval, 1-2 weeks will be required to source and prepare materials, scaffolding, etc." We should be able to undertake work by the end of this month and have it completed within two to three weeks.

The Facts

[12] The evidence satisfies me that initially these neighbors co-existed peacefully. Their relationship deteriorated once the Respondents decided to commence construction of the wall. It was never the Applicant's position that it was opposed to the construction of the wall or the redevelopment of the NFB project. The municipal approval for the construction of the wall anticipated a snow load issue for the Attica building. The plan contains the following proviso: "Attica - Civic 1656 Barrington - Roof Reinforcement Required for Snow Loading." This approval was dated December 1, 2017.

[13] The Respondents never questioned their responsibility to construct and pay for the reinforcement of the Attica roof. They also expressed a willingness to address issues of trespass and debris. Once municipal approvals were in place, the Respondents advised the Applicant they were anxious to immediately proceed with the development of the wall. The message was that the Respondents did not want to delay construction while waiting for the Attica reinforcement to be implemented. This was in May 2018 when snow load concerns would not be pressing.

[14] Mr. Reznick's response was harsh and he essentially forbid the Respondents from going onto the Attica roof for any reason. Mr. Garrett immediately sought a meeting to discuss the best manner to move forward but got no response from Mr. Reznick until several weeks later. Mr. Reznick's reply on June 11, 2018 gave the

Respondents an ultimatum. The message set out that there would be no meeting until the Respondents complied with the Applicant's demands. The demands made were for all associated costs to be paid, including legal.

[15] Mr. Garrett immediately replied, indicating the Respondents were willing to reinforce the Attica roof in a timely manner. He resisted agreeing to pay for damages about which he knew nothing and insisted there has been no persistent trespass. A few days later he advised Mr. Reznick that construction was soon to begin.

[16] On June 17, 2018, Mr. Reznick advised Mr. Garrett he would not cooperate with the Respondents until they received the snow load plans. Mr. Reznick threatened legal action if the plan was not immediately provided and if the Respondents did not agree to cover the damages earlier requested. Mr. Garrett replied, indicating the snow load designs were in the works and that they would take time. He stated that the Respondents could not hold up construction until the reinforcement design work was completed.

[17] Days later the Respondents agreed to pay for any damage to the Attica roof and reaffirmed their willingness to design, construct and pay for Attica reinforcements. Mr. Trider, on behalf of the Applicant, wrote to Mr. Garrett chastising the Respondents for plowing ahead with construction. He stated that any further activities must cease until a comprehensive Access and Indemnity Agreement was put in place. Drafting such an agreement was the responsibility of Mr. Trider, on behalf of the Applicant. The draft was provided to the Respondents on August 7, 2018.

[18] On September 18, 2018 Mr. Garrett wrote to Mr. Trider, enclosing an altered version of the draft agreement. Obviously, this version caused Mr. Reznick to commence legal action.

[19] Given that the Respondents were always willing to accept responsibility for the reinforcement of the Attica roof, I conclude that Mr. Reznick must accept responsibility for the current state of affairs. I find that Mr. Reznick created barriers to an effective working relationship. The main issue has always been the snow load, yet Mr. Reznick sought to achieve other benefits in his draft access and indemnity agreement. He could easily anticipate that those terms would be problematic given that the Respondents had already rejected the financial clauses in its June 17, 2018 correspondence.

[20] Since that time, an 18-foot wall has been fully erected and the Respondents are presently putting a roof over the NFB building. There is no evidence of a resolution or an implementation surrounding the snow load issue. Further, the parties never agreed on an Access and Indemnity Agreement. The Applicant argues that, without an access agreement, the Respondents' workers proceeded to access the Attica roof as they pleased to construct the concrete block wall.

[21] In light of the above, the Applicant seeks the following ongoing relief:

> Starfish states that in the circumstances, it would be appropriate to find the Respondents liable for these torts and issue an injunction restraining further trespasses and nuisances, including a provision requiring Annapolis to cease any further construction of its block wall or building that could increase the snow load on the roof of 1566 Barrington until such time as the required reinforcement work is completed.

[22] The Respondents take the position that they were always willing to design, construct and pay for the reinforcement of the Attica roof. They state that they were always willing to address the trespass and debris issues. It is the Respondents' further position that it met with intransigence and a refusal to agree with these concessions. They argue that talks broke down due to the Applicant's conduct; the threats to halt construction; demands for money and, finally, this injunction application.

[23] The correspondence between the parties indicates that, as time went on, their relationship deteriorated. Notwithstanding this deterioration, the parties usually found a way to resolve ongoing issues. I find that this level of cooperation came to an end when, on September 18, 2018, Mr. Garrett forwarded a marked up, altered copy of the Access and Indemnity Agreement to Mr. Trider. The following changes were advanced by the Respondents:

- The reference to increased storm water on the Attica roof was removed.
- While the Respondents agreed to prepare, at their own expense, a snow load analysis and design for the Attica roof, it excised the words: "Annapolis agrees to pay for all reasonable expenses incurred by Starfish to have the design reviewed by a professional engineer."
- While the Respondents agreed to pay costs of construction of the Attica roof supports, they limited that obligation by removing "all losses,

costs, out-of-pocket expenses" from the obligations associated with that construction.

- The Respondents agree that the Applicant can inspect the Respondents' construction but refuses to provide the Applicant with copies of drawings for the NFB building.
- Under the heading "Indemnity" the Respondents limited any such obligations by removing "expenses of litigation and/or arbitration, court costs, and lawyers' fees".
- While the original draft called for the Respondents to pay "any and all reasonable out-of-pocket expenses", that clause was struck.

The revised draft prepared by the Respondents turned out to be the "straw that broke the camel's back". The next step was litigation.

Trespass and Nuisance

[24] Trespass, for the purpose of this case, is a direct entry upon the property of another. There is no requirement to prove damage or substantial interference in order to prove trespass. Such actions can amount to nuisance if they cause damage to property or substantial interference with a party's enjoyment of their property. The severity of any harm or interference is relevant since, if the harm is trivial, it will not be considered as a nuisance.

[25] I am satisfied that the Respondents regularly used the Attica roof as a work platform to do work on the NFB property. I have found a couple of factors that relate to these activities. Harry McClocklin is the Site Manager for the NFB construction. He testified that, on occasion, his workers went on the Attica roof for purposes that benefitted the Attica building. Further, he testified he was of the view the Applicants were not bothered by that level of intrusion. Mr. McClocklin provided the following evidence:

> I was not aware of any agreement to access the Attica building but I was never told to not go on the roof at all. We needed to go on the roof to do certain things.

I was impressed with Mr. McClocklin's testimony. I found him to be forthright. I found that his testimony best described the reality of the situation. That reality is that when the parties were working together such access went unnoticed. When the parties were in conflict such access got noticed and acted upon by the Applicant. This observation is supported by the fact that on August 3, 2018, the

Applicant consented to the Respondents going on the roof to erect structures that would limit debris falling onto the Attica roof.

[26] I find that the Respondents' access to the Attica roof was either trivial or with the owner's license, either implied or stated. I do not conclude these items of trespass caused harm to the Attica roof or substantially interfered with the owner's enjoyment of that space. Consequently, I do not consider these actions to be a nuisance. They are in line with the severity principle found in the text *The Law of Nuisance in Canada* which states:

> **3. Severity of the Harm**
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> 3.33 Certainly when the harm is interference, and even where the harm is physical damage, the severity of the harm is a relevant factor, since, if the harm is trivial, the courts will not view it as a nuisance (or may treat damage as merely interference). The tolerance expected of the plaintiff decreases as the severity (or "intensity" or "degree") of the nuisance increases:
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> > […] the law of nuisance is meant to distinguish between the usual irritations caused by an incompatible neighbor, which must be borne as part of the cost of living in a community with others and an actual, meaningful interference with property rights being caused by disruptive activity.

On the access issue, I find that the requirements of nuisance have not been established.

Debris and Nuisance

[27] The evidence clearly establishes that NFB debris found its way onto Attica's membrane roof throughout 2018. The Applicant's concern was that much of the debris was metal and could potentially melt into the roof. I have carefully reviewed the photographic and oral evidence. I was left with the impression that the quantity of debris has been overstated. I further find that damage to the membrane roof has not been established.

[28] David Garrett's affidavit states that on July 30, 2018 he attended on the Attica roof with representatives of both parties and made the following observations:

> During this visit to the Attica we proceed to the roof, I observed no significant damage or wear to the roof that was caused by the NFB work and none was pointed out to me by the others present.

Mr. Garrett testified to spending considerable time at the NFB site. He stated that on one occasion the NFB workers laid a 200-pound steel beam on the Attica roof without permission. Once discovered, it was quickly removed with apologies and without damage to the roof. He also testified that no heavy work was done from the Attica side of the emerging wall.

[29] Harry McClocklin was the Site Supervisor for the NFB construction since 2013. He spent about 98 percent of his employment time on site. He testified that he checked the whole site every morning and would pick up occasional items that fell on the Attica roof. In his affidavit he states, "I have observed small amounts of debris on the Attica roof" and "the workers were picking up any debris daily until they were told to stay off the Attica roof." He also states, "to my knowledge there were no complaints of debris." I found Mr. McClocklin credible and I accept his evidence on this and other points.

[30] Simon Wilbee is the Applicant's Vice-President. In his affidavit he states as follows:

> 29. I personally observed metal objects which are believed to have originated from the NFB construction site melted into the roofing material of 1566 Barrington, due to extreme summer heat.
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> 30. Starfish properties had employees regularly inspect the roof of 1566 Barrington, at which time they collected the debris from the roof, some of which is pictured in Exhibit "L".

When shown various photos from 2018, he had to acknowledge there was no debris on the Attica roof. In his oral evidence he stated that on one occasion he saw the Attica roof damaged by one nail. That is the only evidence of damage caused by debris, and does not amount to nuisance.

Snow Load and Nuisance

[31] It is important to note that before the NFB project began the Respondents have acknowledged the need for reinforcement of the Attica roof and a willingness

to pay for it. I find that such a position did not change throughout construction. The Respondents state this commitment did not materialize "due to the unreasonable demands and petty complaints of the Applicant." The Respondent acknowledges that the snow load issue amounts to a nuisance. Consequently, the Applicant has established its legal rights on this issue.

Application for an Injunction

[32] The Applicant describes their position on this issue at para. 53 of its brief:

> Starfish is not seeking a drastic or unreasonable remedy such as an order requiring Annapolis to remove its block wall. It simply wants appropriate protection against migrating construction debris to be implemented, trespassing workers to be kept off its roof and to be afforded an opportunity to reinforce its roofing system prior to any further additions being made to the NFB building that would result in increased snow load.

It must be noted that, at the time of the hearing, the concrete and steel wall was completed. There is no evidence that this wall will require future alterations to achieve its purpose. The evidence is that it is this wall - and only this wall - that contributes to increased snow load. When the two buildings were of equal height, snow would not accumulate on the Attica roof, as it would blow over both roofs. The effect of the wall is to block the blow-over which means the snow has nowhere to go except onto the Attica roof.

[33] The Applicant retained Mr. Michel Comeau, P.Eng. as an expert witness entitled to give opinion evidence on the following subject area:

> The Applicant, 778938 Ontario Limited will ask that Michel Comeau be qualified as an expert in the field of the structural engineering, capable of giving opinion evidence in all areas of structural design and technical requirements of commercial buildings.

Mr. Comeau filed a report on December 18, 2018 in which he offered the following opinion:

> It is my opinion that the 2015 NBCC requires that the roof of 1566 Barrington Street needs to be designed to support an increase in snow load due to the increase in height of the 1572 Barrington Street building to the north. The roof of 1566 Barrington Street requires structural reinforcing to meet this requirement. Failure

> to reinforce the roof will leave the roof structure of 1566 Barrington Street at risk of damage under heavy snow loading. A risk to users of the building will exist.

Mr. Comeau's report and testimony limit the cause of the snow load concern to the erection of the wall. There is no other evidence of anything else contributing to the snow load concerns.

[34] Given this is an application for a permanent injunction, rather than an interlocutory injunction, the principles recited in *Northumberland Fishermen's Association v. Patriquen*, 2015 NSSC 30 apply. Leblanc, J. offered the following analysis:

> 29 The applicant submits that the caselaw in Nova Scotia confirms that permanent injunctive relief is available, but that no specific test has been delineated. Accordingly, it relies on *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2012 NLTD(G) 175, [2012] N.J. No. 398, where the Newfoundland and Labrador Supreme Court adopted the reasoning of the British Columbia Court of Appeal in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396.
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> 30 *Nalcor* involved an application for an injunction restraining certain projects at a work site. Stack J. held (following *Cambie Surgeries*) that the well-known test for an interim *injunction* set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, did not govern an application for a permanent *injunction*. Rather, "[f]or a permanent injunction, there is a two-prong test: first, has the applicant established its legal rights; and second, if so, is an *injunction* the appropriate remedy? (paras. 66-67). Stack J. described the first prong in the following terms:
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> > 68 As to the first prong of the test, at the permanent injunction stage we are no longer dealing with whether a serious issue to be tried has been established. That low threshold is sufficient to continue the inquiry where an interim injunction is sought. To make the injunction permanent, however, the applicant must prove its legal rights, usually following a trial, based upon a balance of probabilities -- the standard for establishing any civil entitlement in the courts. The permanence of the remedy sought requires a corresponding increased threshold of proof.
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> 31 As to the second prong of the analysis -- whether a permanent injunction was an appropriate remedy -- Stack. J. noted that "the grant of permanent injunction is an extraordinary discretionary remedy. It is, therefore, not a remedy that will be available to every party who has established a breach of legal rights" (para. 80). He discussed the relevant considerations:
>
> > 83 . . . the first test of whether a permanent *injunction* is an appropriate remedy is whether there is an effective alternate remedy. Only where there is no effective alternate remedy will the evaluation of a permanent

> *injunction* as an appropriate remedy continue. Irreparable harm and the balance of convenience may then be evaluated because it is important that the extraordinary remedy of a permanent *injunction* not be disproportionate to the enjoined activity; in colloquial terms, the cure must not be worse than the disease. Both the degree of harm suffered by the applicant and the effects of the prohibition on each of the parties will assist in determining the issue of proportionality. There may be other factors that a court will want to consider in this regard in any given set of circumstances. But even in the absence of an effective alternate remedy, I would not think that the court would grant a permanent *injunction* without considering irreparable harm and the balance of convenience.
>
> 84 Following the applicant's establishment of legal rights there are, therefore, two steps to the exercise of the discretion to grant a permanent *injunction*. First: is an effective alternate remedy available? If one is, then the matter is at an end and the permanent *injunction* will not be granted. If, however, there is no effective alternative remedy, then the court must be satisfied that the remedy of a permanent *injunction* is proportionate to the behaviour being enjoined.

In ***Maxwell Properties Ltd. v. Mosaic Property Management Ltd.,*** 2017 NSCA 76, Bryson, J.A. commented that "the general rule favoring a permanent injunction does not relieve the Court of the need to apply the balancing test in interlocutory cases."

Conclusion

[35] The real issue is whether a permanent injunction is the appropriate remedy. I conclude it is not. If the injunction is granted, the Respondents will be stuck with a partially-constructed NFB building. Financial losses would be immediate and substantial. Further, the Applicant's bargaining position would be greatly enhanced on issues common to both parties. The Respondents would be in a situation where they would need to accept whatever the Applicant dictated. The consequences to the Applicant would be negligible in that the Attica building is fully constructed. The snow load could be a problem for the Applicant but the wall is built and nothing can change that reality. The Applicants do have options to either remove the snow or do the reinforcement themselves and then bill the Respondents. Granting a permanent injunction would be disproportionate to the enjoined activity. In other words, the cure would be worse than the disease.

This is not an appropriate case for a permanent injunction and therefore I dismiss this application in all respects.

Coady, J.