

NOVA SCOTIA COURT OF APPEAL

Citation: McBeth v. Nova Scotia Power Inc., 2005 NSCA 96

Date: 20050617

Docket: CA 240901

Registry: Halifax

Between:

Andrea M. McBeth

Appellant

v.

Nova Scotia Power Incorporated

Respondent

Judges:

Roscoe, Oland, Fichaud, JJ.A.

Appeal Heard:

June 8, 2005, in Halifax, Nova Scotia

Held:

Appeal dismissed per reasons for judgment of Roscoe, J.A.; Oland, and Fichaud, JJ.A., concurring.

Counsel:

Andrea M. McBeth on her own behalf
Daniel M. Campbell, Q.C., for the respondent

Reasons for judgment:

- [1] This is an appeal from a chambers decision of Justice Allan P. Boudreau ordering that the appellant's proceeding, which was commenced by way of an Originating Notice (Application Inter Partes), be converted to an Action, pursuant to **Civil Procedure Rule** 37.10(e). The decision under appeal is reported as 2005 NSSC 31; [2005] N.S.J. No. 52 (Q.L.).
- [2] The appellant, Ms. McBeth, and the respondent, Nova Scotia Power, have had a lengthy dispute regarding the timely payment of her electric bills, which culminated in the disconnection of electrical power to her residence on June 22, 2004.
- [3] By way of originating notice (application inter partes), as amended on November 22, 2004, the appellant sought adjudication of and remedies for numerous issues, including:
- declaratory relief respecting the interpretation of several provisions of the **Utility and Review Board Act**, and the **Public Utilities Act**;
 - direction by way of *certiorari* respecting regulations made pursuant to the **Public Utilities Act**;
 - "clarification of the applicability of the law of trespass to the actions" of the defendant;
 - clarification of the applicability of the duty to act in good faith and the defendant's degree of compliance with the Regulations;
 - a declaration of the applicability of several sections of the **Public Utilities Act** and the **Charter of Rights and Freedoms**, "to the actions of the Defendant as set out in the Plaintiff's affidavit";
 - injunctive relief requiring the defendant to assess and repair the plaintiff's electrical wiring;
 - special and general damages for pain and suffering caused by the defendant's breach of statutory duties; and
 - damages for trespass, extortion and violation of the plaintiff's **Charter** rights, and costs.
- [4] In support of the originating notice application, the appellant filed a lengthy affidavit setting out the factual background and the details of the dispute with the respondent as well as her position and submissions respecting the contractual obligations of the parties and the interpretation of the various statutory provisions. The respondent filed an affidavit by its Supervisor of Credit and Collections, which attached several exhibits including the

summary of billings to the appellant from 1996, two decisions of the Dispute Resolution Officer and two decisions of the Utility and Review Board.

[5] On the application by the respondent that the matter be converted into an action, the chambers judge was satisfied that there was “a very major factual dispute which is the basis for the entire litigation” and that it was therefore appropriate to have the proceeding continue as an action, rather than as an application.

[6] The relevant **Civil Procedure Rules** are 9.02 and 37:10(e):

9.02. A proceeding, other than a proceeding under Rule 57 and Rules 59 to 61,

(a) in which the sole or principal question at issue is, or is likely to be, a question of law, or one of construction of an enactment, will, contract, or other document;

(b) in which there is unlikely to be any substantial dispute of fact;

(c) which may be commenced by an originating application, originating motion, originating summons, petition, or otherwise under an enactment;

shall be commenced by filing an originating notice (application inter partes) in Form 9.02A in a proceeding between parties, and by an originating notice (ex parte application) in Form 9.02B in an ex parte proceeding.

...

37.10. On a hearing of an application, the court may on such terms as it thinks just,

(e) notwithstanding rule 9.02, order the application to be continued in court as if the proceeding had begun by an originating notice (action) and order the notice and affidavits to stand as pleadings, with liberty to any party to amend or add thereto or apply for particulars thereof, and to give any other direction as is applicable;

[7] The issue on appeal is whether there was reversible error by the chambers judge in determining that there was likely to be a substantial dispute of fact on the hearing of the application. The standard of review applicable in this case, which involves an interlocutory order of a discretionary nature, is that as set out in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143,

that is, that we will interfere only if a wrong principle of law has been applied or a patent injustice would result.

- [8] The appellant raises numerous grounds of appeal, which can be consolidated as a submission that the chambers judge erred in finding that there was a significant dispute of fact in the absence of any evidence submitted by the respondent which contradicted the facts as alleged in her affidavit, and by basing the decision on unsworn submissions by counsel for the respondent that there was a dispute of fact.
- [9] At the heart of the appellant's argument is the submission that the respondent breached its regulations respecting payment agreements with customers in arrears of payment for service. Regulation 6.5(2)(a) states:

In those cases where a domestic customer does not dispute liability for the amount in arrears and the domestic customer is unable to pay the amount in arrears, the Company shall offer the customer the opportunity to enter into a Payment Agreement that provides for reasonable terms and conditions of repayment over time of the amount in arrears, consistent with the customer's ability to pay.

- [10] If, as the appellant appears to submit, the proceeding was solely a request for an interpretation of the regulations, an application as opposed to an action would be appropriate. However, in my view, although the regulations figure prominently in the dispute, the issues raised in the originating notice extend beyond the regulations. There are obvious factual disputes which require resolution at a trial, and the chambers judge did not err in the exercise of his discretion in ordering the conversion to an action. It is not necessary to rely on submissions of counsel for the respondent to find that there is a substantial factual dispute. The affidavits of the appellant and that filed by the respondent furnish the record for numerous factual questions.
- [11] For example, in her affidavit the appellant includes as an exhibit a letter to her from the Utility and Review Board indicating that she has refused to sign a payment agreement. As well, the decisions of the Dispute Resolution Officer note the refusal of the appellant to sign a formal payment arrangement. From these documents the following factual issues arise: What period of time is relevant? Does a past refusal to sign an agreement impact upon the respondent's duty pursuant to the regulations? What other policies may be relevant to the persistent state of arrears? As well, the regulation refers to a "customer who is unable to pay the amount in arrears". Is the appellant unable to pay? What is her salary? What are her expenses? What period of time is relevant? Surely these are factual issues.

- [12] As well, the appellant alleges in her materials that as a result of her pattern of payment, she has established a contract with the respondent that allows for the accumulation of arrears and gradual repayment during the summer months when the bills for on-going usage are lower. The disconnection notice itself would appear to contest the fact of such an arrangement. As well, the appellant states in her affidavit that each Spring the respondent would mount a “terrifying collection campaign” which would seem to indicate that there is a dispute about the terms of the contract.
- [13] Other facts manifestly in dispute include whether there was a trespass, whether the appellant’s wiring is damaged, whether the respondent acted in good faith, or committed extortion, and whether the appellant suffered pain and suffering as a result of the respondent’s actions. It cannot be expected that the respondent would be found to have conceded that all the facts pleaded by the appellant are true on the basis that it did not file an affidavit dealing with these issues.
- [14] Although the appellant has set out in her affidavit some of the evidence that may be helpful to a trier of fact in resolving these issues, which the respondent has not, to date, rebutted by way of affidavit, the lack of evidence from the respondent at this point on these issues is not determinative of the application to convert the proceeding into an action. It was not an error in principle for the chambers judge in these circumstances to accept the statement by counsel for the defendant that it does not concede all the facts plead by the plaintiff, and therefore there are factual matters in dispute. According to **Rule 9.02**, if the chambers judge is satisfied based on a review of the plaintiff’s originating documents that there are likely to be substantial disputes of fact, the matter should not continue as an application (**Union of Nova Scotia Indians v. Nova Scotia (Attorney General)** 2001 NSCA 110; [2001] N.S.J. No. 264(Q.L.) at ¶ 22).
- [15] Justice Boudreau correctly determined that the central issue between the parties is whether the Power Corporation breached the disconnection regulations, and the determination of that issue is a question of fact which will depend on the resolution of numerous other factual issues.
- [16] Having considered the arguments and reviewed the pleadings, I am not persuaded that the chambers judge erred in principle or in the application of the law to the circumstances of this case or that the result reached is manifestly unjust.

[17] Accordingly, I would dismiss the appeal, but in consideration of the appellant's limited means, without costs.

Roscoe, J.A.

Concurring:

Oland, J.A.

Fichaud, J.A.