Date:19991005
C.A. 149217

NOVA SCOTIA COURT OF APPEAL

[Cite as: Lowe v. Canadian Pacific Ltd., 1999 NSCA 115]

Freeman, Flinn and Cromwell, JJ.A.

BETWEEN:

DONALD J. LOWE and MICHAEL A. LOWE Appellants - and - CANADIAN PACIFIC LIMITED, a body corporate and DOMINION ATLANTIC RAILWAY, a body corporate Respondents	)	W. Bruce Gillis, Q.C. for the appellants Elizabeth Jollimore for the respondents Appeal heard: October 5, 1999 Judgment delivered: October 5, 1999

THE COURT: Application for leave to appeal to the Supreme Court of Canada dismissed per oral reasons for judgment of Cromwell, J.A.; Freeman and Flinn, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CROMWELL J.A.:

[1] This is an application for leave to appeal to the Supreme Court of Canada pursuant to s. 37 of the **Supreme Court of Canada Act**.

[2] The respondents sued the applicants for a declaration, an injunction and damages based on the contention that the applicants were not entitled to enter or use the respondents' lands as a landing strip. The action succeeded at trial (see (1998), 172 N.S.R. (2d) 89) and an appeal from that judgment was dismissed by unanimous judgment of this Court delivered orally at the conclusion of the argument of the appeal on June 3, 1999 ([1999] N.S.J. No. 195 (Q.L.)).

[3] The principal issue was the nature of the property interest, if any, of the respondents in certain railway lands at Clementsport. The operation of the railroad on the lands in question was abandoned and the applicants contended at trial and on appeal that the respondents' proprietary interest was lost upon abandonment. The trial judge and this Court concluded that the respondents' interests derived from the acquisition by the Western Counties Railway Company of the fee simple in the railway lands in 1876. The proposed appeal to the Supreme Court of Canada is to challenge this conclusion.

[4] It is argued in support of the application that the judgment sought to be appealed has broad implications for "... hundreds and perhaps thousands of landowners

in the Annapolis Valley and Southwestern Nova Scotia" and, for the title to "... other abandoned railroads in the province." (The quotations are from the applicants' brief). However, not a single piece of litigation aside from the present case with respect to this issue has been brought to our attention.

[5] It is also submitted that the judgment of this Court is inconsistent with the decision of the Supreme Court of Canada in **Paul v. Canadian Pacific Ltd.**, [1988] 2 S.C.R. 654. That case was brought to the attention of the panel which heard this appeal. Our review of the case does not lead us to think that it is so clearly inconsistent to require leave to be granted by this Court.

[6] The applicants submit that it is more economical for them to seek leave in this Court. We doubt this to be the case given that applications to the Supreme Court of Canada for leave to appeal are almost invariably dealt with in writing so that travel to Ottawa to argue the application is not required. In those rare cases in which an oral hearing is directed, the Court may provide teleconferencing to avoid travel.

[7] This Court has a broad discretion under s. 37 which, while phrased differently, is essentially concurrent with the jurisdiction of the Supreme Court of Canada under s. 40 to grant leave to appeal. Faced with this concurrent jurisdiction, the courts of appeal in Manitoba, Newfoundland, Prince Edward Island, Saskatchewan and British Columbia have held, albeit in varying language, that an important consideration in the exercise of the provincial appellate courts' discretion under s. 37 is the desirability of the Supreme

Court of Canada controlling its own docket: see **Campbell v. East-West Packers (1969) Ltd. (No. 2)** (1982), 143 D.L.R. (3d) 136 (Man. C.A.); **Winfield Developments Ltd. v. Winnipeg (City)**, [1989] M.J. No. 427 (C.A.) (Q.L.); **Pearlman v. Winnipeg (City)**, [1992] M.J. No. 485 (C.A.) (Q.L.); **Chartier v. Chartier**, [1997] M.J. No. 574; **Pittman v. Manufacturers Life Insurance Co.** (1991), 80 D.L.R. (4th) 634 (Nfld. C.A.); **Marlay Construction Ltd. v. Mount Pearl (City)**, [1997] N.J. No. 9 (C.A.); **Pre-Bilt Structures Ltd. v. Thompson** (1986), 57 Nfld. & P.E.I.R. 177 (P.E.I.C.A.); **Armco Canada Ltd. v. P.C.L. Construction Ltd.** (1986), 33 D.L.R. (4th) 621 (Sask. C.A.); **Cohnstaedt v. University of Regina**, [1986] S.J. No. 754 (C.A.) (Q.L.); **Ashmead v. British** Columbia, [1992] 6 W.W.R. 763 (B.C.C.A.); **R. v. Williams**, [1994] B.C.J. No. 2745 (C.A.) (Q.L.); **British Columbia (Attorney General) v. Mount Currie Indian Band**, [1992] B.C.J. No. 2090 (C.A.) (Q.L.). That Court can decide, with the benefit of the national perspective which it enjoys, which cases are most deserving of its attention. A similar approach has been adopted by the Federal Court of Canada to the exercise of its discretion to grant leave to appeal to the Supreme Court pursuant to s. 37.1 of the **Supreme Court of Canada Act**: see for example, **Redpath Industries Ltd. v. Cisco (The)**, [1994] F.C.J. No. 269 (C.A.) and cases referred to therein. We are not aware of any Canadian appellate courts having rejected this principle. We would adopt this general approach and decide that our discretion to grant leave to appeal to the Supreme Court should be exercised in only rare and exceptional circumstances. Generally, leave to appeal should be sought from the Supreme Court of Canada.

[8] In our view, there is nothing rare or exceptional in this case which would justify this Court in requiring the Supreme Court of Canada to hear it. The application for leave to appeal is dismissed without prejudice to the applicants' right to seek leave from the Supreme Court of Canada. We leave the matter of an extension of time to make that application to the discretion of the Supreme Court. We award the respondents their costs of this application fixed at $750.00 inclusive of disbursements.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.