Date: 19991109
C.A. 156447

# NOVA SCOTIA COURT OF APPEAL

**[Cite as: Ross v. Canada (Attorney General), 1999 NSCA 133]**

**Pugsley, Hallett and Flinn, JJ.A.**

**BETWEEN:**

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| BRUCE COLIN ROSS, Guardian Ad Litem of the Person and Estate of COLIN ALEXANDER ROSS<br><br>Appellant<br><br>- and -<br><br>THE ATTORNEY GENERAL OF CANADA, representing Her Majesty the Queen in the right of the Dominion of Canada through the DEPARTMENT OF VETERANS' AFFAIRS CANADA<br><br>Respondent<br><br>- and -<br><br>THE TOWN OF SPRINGHILL<br><br>Respondent<br><br>- and -<br><br>RAYMOND BOSS<br><br>Respondent | ) | Michael F. LeBlanc and Sean F. Layden<br>for the appellant<br><br>Peter R. Lederman<br>for the respondent<br>Attorney General of Canada<br><br>Roderick H. Rogers<br>for the respondent<br>Town of Springhill<br><br>Respondent Raymond Boss<br>not appearing<br><br>Appeal heard:<br>October 7, 1999<br><br>Judgment delivered:<br>November 9, 1999 |

**THE COURT:** Appeal allowed per reasons for judgment of Flinn, J.A.; Hallett and Pugsley, JJ.A. concurring.

**FLINN J.A.:**

[1] This is an appeal from the decision and order of Justice Davison of the Supreme Court, in Chambers, in which he dismissed the appellant's action against the respondent The Town of Springhill, for want of prosecution under **Civil Procedure Rule** 28.13.

[2] **Civil Procedure Rule** 28.13 provides as follows:

> Where a plaintiff does not set a proceeding down for trial, the defendant may set it down for trial, or apply to the court to dismiss the proceeding for want of prosecution and the court may order the proceeding to be dismissed or make such order as is just.

[3] The application was brought solely by the respondent The Town of Springhill. Counsel for the respondent, The Attorney General of Canada, appeared on the hearing in support of the application. The Order of the Chambers judge dismissed the appellant's action against the respondent The Town of Springhill. The Order is silent as to the status of the appellant's action against the other respondents.

[4] I will briefly outline the history of these proceedings.

[5] On June 9th, 1993, Bruce Ross, as *guardian ad litem* of the person and estate of his father, Colin Ross brought this proceeding against the Attorney General of Canada representing Her Majesty the Queen in the right of the Dominion of Canada through the Department of Veterans Affairs, The Town of Springhill and Raymond Boss. It is alleged in the statement of claim that Colin Ross has been completely incapacitated since 1974 due to organic brain syndrome resulting from a head injury which he

suffered in 1972 while employed by the Department of National Defence. He was discharged from his employment with the Department of National Defence as a result, and he received a pension with entitlement effective July 2, 1974. It is further alleged that the respondent Raymond Boss administered the pension fund in trust for Colin Ross from May 1976 to February 1986 in his capacity as an employee of the Social Services Department of The Town of Springhill. Mr. Boss continued to administer the pension plan, personally, after February 27th, 1986, until early 1992. In the statement of claim, the appellant alleges that Mr. Boss kept improper, incomplete and inaccurate accounting records. The appellant bases his claim on negligence, breach of fiduciary duty, and misappropriation and wrongful disposal of trust property. This action is brought against the respondents jointly and severally.

[6] On the 16th of July, 1993, the respondent Raymond Boss filed a defence to the action. On the 12th day of August, 1993, the respondent Town of Springhill gave a demand for particulars to the appellant to which a reply was filed on the 20th day of August, 1993, amended on the 7th day of September, 1993. Among other things, the response to the Demand for Particulars lists a number of disbursements allegedly made on behalf of Colin Ross, and the fact that no information is available respecting the stated purpose of such disbursements.

[7] On September 23rd, 1993, the respondent The Town of Springhill filed a defence to the action. On December 8th, 1993, the respondent The Attorney General of Canada filed a defence to the action, as well as a cross-claim, claiming indemnity from

the other two respondents. On the 7th of January, 1994, the respondent The Town of Springhill filed a defence to the cross-claim. On the 21st of February, 1994, the respondent Raymond Boss filed a defence to the cross-claim. The pleadings in this action were, therefore, closed as of February 21st, 1994.

[8] In 1994 there were discussions, initiated by counsel for the appellant, about arranging for discovery examinations. Discovery examinations were “put off”, for the time being, by agreement of all counsel. Also in 1994 counsel for the respondent Town of Springhill advised counsel for the appellant that there was substantial documentation involved in his file and that counsel for the appellant could attend at his office to examine the documentation. Counsel for the appellant never took up that offer. The respondent Raymond Boss died in August, 1994.

[9] In 1995 counsel for the appellant again requested a schedule for discovery examinations without success. Counsel for the appellant was requested to file a list of documents which was not done until 1997. Also in 1995, there were some discussions, and correspondence, dealing with settlement initiatives between counsel for the appellant and counsel for the Town of Springhill.

[10] In 1996, the appellant was required to obtain and instruct new counsel because counsel who initiated the proceedings advised that he could no longer act on behalf of the appellant.

[11] In 1997 counsel for the appellant filed a list of documents as did counsel for the respondent Attorney General of Canada. Also in 1997, the appellant Colin Ross, on whose behalf the action was commenced, died, and there were delays involved in getting letters probate with respect to his estate.

[12] As of 1998 no discovery examinations had yet been held with respect to this matter. Counsel for the respondent Town of Springhill gave notice that he intended to make application to Court to dismiss the action for want of prosecution.

[13] The application was heard on April 29th, 1999. Following the hearing of the application the Chambers judge filed written reasons for granting the motion and dismissing the appellant's action against the respondent Town of Springhill for want of prosecution. The basis of the Chambers judge's decision was that there was inordinate and inexcusable delay on the part of the appellant or his lawyer which gave rise to a substantial risk that it was not possible to have a fair trial of the issues.

[14] The appellant appeals the decision of the Chambers judge.

**Standard of Review**

[15] While the proceeding before the Chambers judge was an interlocutory proceeding, involving a discretionary order, the Order of the Chambers judge disposed of the appellant's proceeding against the respondent The Town of Springhill. In

**Saulnier v. Dartmouth Fuels Ltd.** (1991), 106 N.S.R. (2d) 425 (N.S.C.A.), this Court allowed an appeal from an order dismissing an action for want of prosecution. Justice Chipman said the following concerning the standard of review by this Court of such an order at p. 427:

> The principles which govern us on an appeal from a discretionary order are well-settled. We will not interfere with such an order unless wrong principles of law have been applied or a patent injustice would result. The burden of proof upon the appellant is heavy. **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, at 333, and **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54, at 57.
>
> On two occasions recently, this court has allowed appeals from discretionary orders: in **Canada (Attorney General) v. Foundation Company of Canada Ltd. et al.** (1990), 99 N.S.R. (2d) 327; 270 A.P.R. 327, from an order dismissing an action for want of prosecution and in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143, 275 A.P.R. 143, from an order dismissing an application to renew an originating notice. In both cases, the court attached considerable significance to the consequences of the discretionary orders which had the effect of finally disposing of each of the proceedings without adjudication on the merits. [emphasis added]

[16] Similarly, and more recently, in **Hurley v. Co-operators General Ins. Co.** (1998), 169 N.S.R. (2d) 22 (N.S.C.A.) this Court stated at pp. 27-28:

> The proceeding which is the subject of this appeal is an interlocutory proceeding involving a discretionary order. However, since the order of the trial judge is a final order, which dismisses the appellant's action, the decision of the Chambers judge is not given the same deference usually afforded by this court when dealing with interlocutory matters involving the exercise of discretion.

## Principles of Law

[17] The onus upon a defendant, who applies to dismiss a plaintiff's action for want of prosecution under Rule 28.13, has been reiterated by this Court in the recent cases of **Savoie v. Fagan et al** (1998), 165 N.S.R. (2d) 276 (N.S.C.A.) and **Hurley (supra)**. That onus is, as was stated by Justice Cooper in **Martell v. McAlpine**

**(Robert) Ltd.** (1978), 25 N.S.R. (2d) 540 (N.S.S.C.A.D.), as follows:

> 1. There must, first, have been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and
>
> 2. That such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to cause, or to have caused, serious prejudice to the defendants.

[18] Generally speaking, on such an application the defendant must adduce evidence to satisfy these requirements. However, there are cases where the court presumes that there is serious prejudice to the defendant, caused by the delay of the plaintiff or his lawyer. Such a presumption of serious prejudice is restricted, however, to extreme cases of inordinate and inexcusable delay. As Justice Hallett said in **Moir v. Landry** (1991), 104 N.S.R. (2d) 281 (N.S.C.A.), at p. 284:

> A plaintiff has a right to a day in court and should not lightly be deprived of that right. Therefore, it is only in extreme cases of inordinate and inexcusable delay that a court should presume serious prejudice to the defendant in the absence of evidence to support such a finding.

See also **Sauliner, (supra); Savoie (supra)** and **Hurley (supra)**.

## The Decision of the Chambers Judge

[19] The essence of the decision of the Chambers judge - to dismiss the appellant's action against the respondent The Town of Springhill - is found in two conclusions which he reached:

1. That there was inordinate and inexcusable delay on the part of the appellant or his lawyer in bringing this matter on for trial; and

2. That because the appellant, on whose behalf this action was commenced, namely, Colin Ross, has died since the commencement of this action; and because the respondent Raymond Boss has died since the commencement of this action, that the delay in this case gave rise to a substantial risk that it is not possible to have a fair trial of the issues because the delay gave rise to the situation where the trial "would not include testimony of the two main actors".

**Analysis**

[20] I will deal, firstly, with the second conclusion of the Chambers judge. With respect to this second conclusion, in order for the action to be dismissed for want of prosecution on this basis (a substantial risk that it is not possible to have a fair trial of the issues), in addition to there being inordinate and inexcusable delay on the part of the appellant or his lawyer, the defendant - in the circumstances of this case - must demonstrate:

1. that the evidence (of Raymond Boss and Colin Ross) which is not available at the trial, is both important, and would, but for the delay, have been available; and
2. that there is a connection between the inability to have that evidence at the trial, and the inordinate and inexcusable delay on the part of the appellant or his lawyer.

[21] An analysis of these two factors demonstrates reversible error, by the

Chambers judge, in his conclusion that because the evidence of these two witnesses (Boss and Ross) is not available at the trial, and because there has been inordinate and inexcusable delay on the part of the appellant or his lawyer, that there is a substantial risk that it is not possible to have a fair trial of the issues.

[22] Raymond Boss, one of the respondents, died in August, 1994. He was not examined on discovery prior to his death. The only way in which the evidence of Raymond Boss would be available at trial is if he had been examined on discovery before his death. His death was approximately one and one-half years following the commencement of this action; and only six months from the filing, by his counsel, of a defence to the cross-claim of the respondent Attorney General of Canada (February 14, 1994 - the close of pleadings). There is no evidence concerning the circumstances of Mr. Boss's death; i.e., whether it was a sudden death, or whether Mr. Boss had been ill for some time. Therefore, it is not known whether Mr. Boss could have given discovery evidence in this six month period.

[23] Under all of these circumstances, it cannot be said that the inability to have the testimony of Raymond Boss at the trial of this action results from inordinate or inexcusable delay on the part of the appellant or his lawyer. It is hardly the responsibility of the appellant's lawyer, in the circumstances of this case, to ensure that discovery examination of Raymond Boss was conducted - if it could have been conducted - within that six month period from the close of pleadings in February, 1994, to the death of Raymond Boss in August, 1994.

[24] Colin Ross, on whose behalf this action was commenced, died in May, 1997. Under normal circumstances one would certainly have expected discovery evidence to have been given by him between the time the pleadings closed (February 14th, 1994) and the date of his death (May, 1997). However, the circumstances with respect to Colin Ross are not normal. Approximately one year before this action was commenced, Judge Hall (as he then was) acting as a local judge of the Supreme Court, granted an order appointing Bruce Ross guardian of the estate and person of his father Colin Ross under the provisions of the **Incompetent Persons Act**, R.S.N.S. 1989, c. 218. The application in support of that Order is accompanied by the petition of Bruce Ross and the affidavits of two medical doctors.

[25] Dr. Carl C. Giffen, in his affidavit deposes, inter alia, as follows:

> 3. THAT Colin Ross is suffering from brain damage resulting from a head injury in 1972.
>
> 4. THAT in my opinion for the reasons as hereinbefore set forth, Colin Ross is incapable by reason of mental infirmity of properly managing his person, property and affairs.

[26] Dr. Colleen Edmonds, in her affidavit deposes, inter alia, as follows:

> 3. THAT Colin Ross is suffering from a degenerative disease of the brain.
>
> 4. THAT in my opinion for the reasons hereinbefore set forth, Colin Ross is incapable by reason of mental infirmity of properly managing his person, property and affairs.

[27] Colin Ross, as alleged in the statement of claim, has been completely incapacitated since 1974, due to organic brain syndrome resulting from a head injury.

[28] Since Mr. Ross's pension benefits had to be administered by some other person on his behalf (because of his incapacity) it is unlikely that Mr. Ross' evidence - even if he had been capable of giving testimony, would be necessary to ensure a fair trial of issues related to the administration of those pension benefits.

[29] In summary, the respondent has not demonstrated that the evidence of Colin Ross would have been available, but for inordinate and inexcusable delay on the part of the appellant or his lawyer, and would have been important for the trial of the issues. Further, at no time since the action was commenced, did counsel for the respondents Town of Springhill, or counsel for the other respondents, request discovery examination of Colin Ross.

[30] I note here that the circumstances of the Guardianship Order of Judge Hall, under the **Incompetent Persons Act**, does not appear to have been brought to the attention of the Chambers judge.

[31] In conclusion, even if there was inordinate and inexcusable delay on the part of the appellant or his lawyer in bringing this action on for trial, the Chambers judge erred in concluding that because of that delay, there was a substantial risk that there could not be a fair trial of the issues in this action because the evidence of Colin Ross and Raymond Boss would not be available at the trial. Further, it would be an injustice to summarily dismiss the appellant's action before it is tried on its merits, whatever those merits might be.

[32] Having reached this result, it is not necessary for me to deal with the first conclusion of the Chambers judge; i.e., whether there was inordinate and inexcusable delay on the part of the appellant or his lawyer.

[33] There is one further matter to which I should refer in these reasons. Assuming that there was inordinate and inexcusable delay on the part of the appellant or his lawyer, the action could be dismissed for want of prosecution if the defendant demonstrated that the delay is such as is likely to cause, or to have caused, serious prejudice to the defendant (see **Martell**), or if such serious prejudice is presumed. ( see **Moir**)

[34] In the affidavit in support of the application, counsel for the respondent Town of Springhill made no reference to prejudice, let alone serious prejudice. He did make reference to the fact that neither Colin Ross nor Raymond Boss had been examined on discovery prior to their death. As I have already indicated in these reasons, there is no connection between the lack of evidence of Raymond Boss, and any inordinate and inexcusable delay on the part of the appellant or his lawyer. Therefore, the respondent cannot claim serious prejudice arising from any such delay. Further, the respondent cannot claim serious prejudice arising from such delay, with respect to the lack of the evidence of Colin Ross, because, as I have indicated, the respondent has not demonstrated the importance of Colin Ross' evidence - even if he was capable of giving evidence - and, further, the respondent at no time requested that Colin Ross be made

available for discovery examination.

[35] In the course of his judgment, the Chambers judge said the following:

> The delay in this case was of a length to give rise to a presumption of prejudice to the defendant.

[36] It certainly does not appear from the context in which the Chambers judge used those words, that he had concluded that this case was an extreme case of inordinate and inexcusable delay, from which the Court could presume serious prejudice to the defendant (See **Moir, supra**), and counsel for the respondent Town of Springhill does not suggest otherwise. In any event, even if there is inordinate and inexcusable delay on the part of the appellant or his lawyer in bringing this matter on for trial, this is not one of those extreme cases of inordinate and inexcusable delay where serious prejudice to the defendant is presumed. While very little was done, after the close of pleadings, to advance this matter to trial, the matter did not lie dormant for lengthy periods of time.

[37] I would allow this appeal and I would set aside the order of the Chambers judge dismissing the appellant's action.

[38] During the course of submissions, counsel for the respondent, Attorney General of Canada, agreed that if this appeal was allowed his client would share, with the respondent Town of Springhill, any costs that were ordered to be paid to the appellant. I would fix the appellant's costs, both here and below, in the amount of

$2,500.00, inclusive of disbursements, and I would order them payable forthwith. Further, I would order that each of the respondents, the Town of Springhill and the Attorney General of Canada pay one-half of those costs.

Flinn, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.