NOVA SCOTIA COURT OF APPEAL

Citation: *Jacobsen v. 1358751 Nova Scotia Ltd.*, 2008 NSCA 45

Date: 20080513
Docket: CA 285744
Registry: Halifax

Between:

Alex L. Jacobsen

Appellant

v.

1358751 Nova Scotia Limited (formerly MacLellan Lincoln Mercury Sales Limited)

Respondent

Judges:	Cromwell, Saunders and Oland, JJ.A.
Appeal Heard:	April 16, 2008, in Halifax, Nova Scotia
Held:	Appeal allowed in part per reasons for judgment of Oland, J.A.; Cromwell and Saunders, JJ.A. concurring.
Counsel:	R. Lester Jesudason, for the appellant Colin D. Piercey and Keith MacKay, for the respondent

Reasons for judgment:

[1] In his written decision dated August 21, 2007, Justice Arthur J. LeBlanc held that the respondent, a company incorporated under the laws of Nova Scotia, did not have to hold a current certificate of registration pursuant to s. 17(1) of the *Corporations Registration Act*, R.S.N.S. 1989, c. 101 (the "*CRA*") before it could sell real property pursuant to an execution order. In so deciding, he reversed his previous oral ruling. He also dismissed the appellant's application to vary or stay an order granting leave for the issuance of the execution order and the execution order itself.

[2] The appellant appeals the decision of the Chambers judge, which is reported as *MacLellan Lincoln Mercury Ltd. v. Jacobsen*, 2007 NSSC 245, and his two orders dated September 11, 2007. For the reasons which follow, I would allow the appeal in part.

Background

[3] In March 1987, the respondent, then MacLellan Lincoln Mercury Sales Limited, commenced an action against the appellant pursuant to a lease agreement for a car. Its statement of claim alleged that the appellant had defaulted under the terms of the lease, and that the respondent had seized the vehicle. On June 16, 1987 the respondent obtained default judgment for some $10,000. That same day, it obtained an execution order (the "Original Execution Order") and had the certificate of judgment recorded at the Registry of Deeds in Halifax. No other attempt was made to collect on the judgment.

[4] The appellant and his wife have lived in Lower Sackville since 1975. They have had the same telephone number for over 20 years. In July 1996, the couple purchased a home in Lower Sackville. The judgment in favour of the respondent was not brought to their attention when they purchased and mortgaged their residence.

[5] The respondent was incorporated under the *Companies Act* of Nova Scotia in 1980. In February 2003, its registration pursuant to the *CRA* was revoked for non-payment of fees and has never been reinstated.

[6] Leave of the court is required before the Prothonotary can issue an execution order to enforce a order when six years or more have elapsed since the date of the order: *Civil Procedure Rule* 52.04. Actions upon a judgment must be commenced within 20 years after recovery of that judgment: *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s. 2(1)(c). Nineteen years and 11 months after the issuance of the 1987 judgment and the Original Execution Order, the respondent applied *ex parte* for an order granting leave to the Prothonotary to issue an execution order. On May 7, 2007, Justice Gordon A. Tidman granted the order (the "Leave Order") and the Prothonotary issued an execution order (the "Execution Order"). Although there is an error in the body of the Execution Order, the validity of that document has not been questioned.

[7] At the hearing of the appeal, the appellant spent a good deal of time in oral submissions inviting us to draw inferences about whether Keith MacKay was really the party seeking enforcement rather than simply counsel for the respondent. The propriety of Mr. MacKay's actions in seeking to collect on the 1987 judgment is not before us. This record would neither invite nor permit such inquiry.

[8] After the issuance of the Execution Order on May 7, 2007, the respondent sent the appellant a letter containing copies of the relevant documents. It also advised that, under the *Sale of Land Under Execution Act*, his interest in his home was to be sold by public auction in five weeks, on June 15, 2007. With interest under the *Interest on Judgments Act* during the intervening years and recording fees, the amount owed had increased to almost $21,000. The appellant immediately retained counsel. His lawyer advised the respondent that its letter was the first notice his client received of any judgment, and that the appellant had never been served with the originating notice and statement of claim in 1987.

[9] On May 15, 2007 the respondent changed its name to 1358751 Nova Scotia Limited. It immediately applied to amend its name in the style of cause for this proceeding. The appellant objected, based in part on the respondent's registration under the *CRA* having been revoked and not reinstated. Following submissions, on May 23, 2007 the Chambers judge rendered an oral decision. He held:

> . . . On the question of whether or not the Plaintiff should be registered, I believe that the step taken, at least before me by the Plaintiff is a step in the proceeding, and consequently the company ought to be registered. It doesn't mean that the execution order failed. It simply means that before there is a sale that the Plaintiff

> should comply with provisions of the *Corporation Registration Act*. That is my view, and as a result I know that maybe it's likely that this company hasn't carried on business for some time. I don't know. In any event - I think in any event – and again the execution order granted by Justice Tidman is not – that issue is not before me, but that would likely be my own – the same response for that. If I were – but again, I'm not hearing that. I'm hearing on this proceeding here.
>
> Consequently, I would agree with the submissions made by Mr. Mason, that there should be registration under the *Corporation Registration Act*, at least in the matter before me, and that's the result of my finding. [Emphasis added]

[10] Although registration can be reinstated simply by the payment of fees and filing of statements, the respondent did not proceed to do so. On May 31, 2007, before issuance of an order, the respondent made additional written submissions and asked the Chambers judge to reconsider. Eight days later, the parties appeared and made further submissions pertaining to s. 17 of the *CRA*. While awaiting the decision, the respondent indicated its intention to proceed with the sale of the appellant's home on June 15th. The appellant responded with an emergency application for an order *inter alia* compelling the respondent to comply with the oral decision of May 23, 2007, namely, to register prior to the sale.

[11] By an oral decision delivered on June 13, 2007, the Chambers judge reversed his previous ruling on the application of s. 17 of the *CRA*. When he gave his previous ruling on the issue of whether it was necessary for the respondent to have a current registration in force under the *CRA*, he had been referred to *C.B.M. Contracting & Developing Ltd. v. Johnstone* (1980), 39 N.S.R. (2d) 156 (S.C.A.D.). Only afterwards was he provided with *I.A.C. Limited v. Donald E. Hirtle Transport Limited and Hirtle and J.P. Trailer Leasing Inc. and Proulx (Third Parties)* (1977), 27 N.S.R. (2d) 416 (S.C.T.D.), affirmed at (1978), 29 N.S.R. (2d) 482 (S.C.A.D.) and *Kaeser Compressors Inc. v. Bent* (2006), 247 N.S.R. (2d) 359 (S.C.).

[12] The appellant then amended his emergency application to one seeking an order amending or varying the Leave Order and for an order staying the Execution Order. By an oral decision delivered on June 15, 2007, the Chambers judge dismissed that application. The sale of the appellant's home did not proceed as scheduled that day. The parties arranged to have funds paid into court pending the outcome of this appeal.

[13] The Chambers judge's written decision pertaining to his reversal of his May 23, 2007 ruling and s. 17 of the *CRA* issued on August 21, 2007. In dismissing the appellant's application to stay the Leave Order and Execution Order, the Chambers judge found that the appellant had been served in 1987 with the statement of claim. His two orders, one permitting the name change in the style of cause, and the second dismissing the application to stay the Leave Order and the Execution Order, are dated September 11, 2007. The appellant appeals his decision and both orders.

Issues

[14] In his notice of appeal, the appellant submits that:

1. the Chambers judge improperly exercised his discretion in reversing his previous ruling requiring the respondent to hold a valid certificate of registration pursuant to s. 17 of the *CRA* in order to amend its name in the style of cause in S.H. No. 60337 (280486) and in order to proceed with the sale of the appellant's property;

2. he erred in law in holding that the respondent did not need to have a valid certificate of registration in order to apply for leave for the Prothonotary to issue an execution order and to apply to amend its name in that style of cause and to proceed with the sale of the appellant's property;

3. he erred in law by failing to strike or stay the Leave Order dated May 7, 2007; and

4. he erred in law by failing to strike or stay the Execution Order issued by the Prothonotary on May 7, 2007.

[15] The appellant acknowledges that his principal grounds are those which concern the Chambers judge's interpretation of s. 17(1) of the *CRA* and his refusal to stay or strike the Leave Order and Execution Order. In my respectful view, should his decision pertaining to corporate registration be correct, it would be inappropriate for this court to maintain that the Chamber judge's ruling amounted to an error in law on the basis that he reversed his previous ruling.

Standard of Review

[16] The interpretation of a statutory provision, namely s. 17(1) of the *CRA*, is a question of law which attracts the standard of review of correctness. The Chambers judge's decision not to stay or strike the Leave Order or the Execution Order is a discretionary one. This court will intervene only if there has been an error in legal principle, a palpable and overriding error of fact or if the decision gives rise to a patent injustice: *Cluett v. Metro Computerized Bookkeeping Ltd. et al.*, 2005 NSCA 84 at ¶ 2.

Section 17 of the *CRA*

[17] In his decision pertaining to s. 17(1) of the *CRA*, the Chambers judge considered *I.A.C. Limited, Kaeser Compressors*, and *C.B.M. Contracting*. He commented in giving his oral decision on June 13, 2007 that he believed that *I.A.C.* and *C.B.M. Contracting*, both decisions of this court, to be conflicting decisions which "may very well be a matter for a definite decision of the Court of Appeal." In his written decision dated August 21, 2007 he concluded:

> 12 I respectfully believe that of (sic) the approach taken by the appeal court in *I.A.C.* is the correct approach giving the full meaning to s. 17(1) of the Act and limiting the requirement for registration to foreign corporations as defined in the Act.

[18] The appellant submits that the judge erred by declining to follow *C.B.M. Contracting* and by choosing, instead, to follow *I.A.C.* In my view, those decisions do not conflict and the Chambers judge was correct to follow *I.A.C.*

[19] The *CRA* is a short statute, containing only 17 sections. Except for corporations incorporated and registered pursuant to the laws of another province of Canada designated by the Governor in Council (s. 3(2)), it applies to corporations generally (s. 3(1)).

[20] The *CRA* provides for the issuance of certificates of registration to Dominion corporations, foreign corporations and domestic corporations (s.5). Terms are defined in s. 2, which reads in part:

> **Interpretation**

> 2 In this Act,
>
> . . .
>
> (c) "corporation" means a body corporate that is a domestic corporation or a Dominion corporation or a foreign corporation as hereinafter defined;
>
> (d) "domestic corporation" means a body corporate that is incorporated by or under the authority of an Act of the Legislature and has gain for its purpose or object;
>
> (e) "Dominion corporation" means a body corporate that is incorporated by or under the authority of an Act of the Parliament of Canada and has gain for its purpose or object;
>
> . . .
>
> (g) "foreign corporation" means a body corporate that is incorporated otherwise than by or under the authority of an Act of the Legislature or of the Parliament of Canada and has gain for its purpose or object;

[21] Every corporation registered under the *CRA* must appoint and have a recognized agent resident within Nova Scotia for the purposes of service (s. 9). It must also file an annual statement setting out certain information (s. 10) and, when requested by the Registrar of Joint Stock Companies, must file a statement regarding certain particulars.

[22] The *CRA* sets out two kinds of sanctions against companies that carry on business without a certificate of registration in force. One is a financial penalty against the company and certain persons involved in its governance and management, or employed by it:

> **Penalty for not holding certificate**
>
> 13 (1) If any corporation, whether incorporated before or on the first day of October, 1912, or at any time thereafter, does or carries on in the Province any part of its business while it does not hold a certificate of registration that is in force, such corporation shall be liable to a penalty of fifty dollars for every day on which it so does or carries on any part of its business, and every director, manager, secretary, agent, traveller or salesman of the corporation, who, with notice that the corporation does not hold a certificate of registration that is in

> force, transacts in the Province any part of the business of the corporation, shall, for every day on which he so transacts the same, be liable to a penalty of fifty dollars.
>
> (2) This Section shall not apply to a Dominion corporation until the expiration of one month after its commencing to carry on business in the Province.

[23] The second sanction is directed to a company's ability to bring or maintain legal proceedings. Section 17 and, in particular, the proviso at the conclusion of s. 17(1), is the focus of the appeal of the Chambers judge's decision that the respondent did not have to hold a current certificate of registration in order to sell the appellant's home. Section 17 reads:

> **Restriction on bringing court action**
>
> 17 (1) Unless and until a corporation holds a certificate of registration that is in force, it shall not be capable of bringing or maintaining any action, suit or other proceeding in any court in the Province in respect to any contract made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force, provided, however, that this Section shall not apply to any company incorporated by or under the authority of an Act of the Parliament of Canada or by or under the authority of an Act of the Legislature.
>
> (2) An assignment of a debt or any chose in action by a corporation not holding a certificate of registration that is in force to an individual or a corporation holding a certificate of registration that is in force shall not enable the assignee or anyone claiming through or under the assignee to bring or maintain any such action, suit or proceeding in any court in the Province based on the subject of the assignment. (Emphasis added)

[24] My conclusion in regard to s. 17(1) of the *CRA* that *I.A.C.* and *C.B.M. Contracting* do not conflict, and that *I.A.C.* should be followed in this case, is based on a close examination of those decisions of this court. In *I.A.C.*, the plaintiff finance company claimed against the corporate maker and individual endorser of a promissory note which had been assigned to it. Among other things, the defendants pleaded s. 44 of the *CRA*, which is identical to s. 17 of the current *CRA*. They argued that the note's corporate assignor did not, at any material time, hold a certificate of registration that was in force under the *CRA*, that the promissory note was an assignment of a debt or chose in action by an unregistered

corporation and consequently that, as assignee, the finance company could not bring or maintain the action against the defendants.

[25] On appeal, MacKeigan, C.J. for the court stated at ¶ 5 that he agreed with Chief Justice Cowan in the result and basically adopted his reasons. In the trial decision, Chief Justice Cowan found that as the corporate assignor was not incorporated by or under an *Act* of the Parliament of Canada or an *Act* of the Legislature of Nova Scotia, and at no material time was registered under the *CRA*, it could not have brought an action against the defendants. He then considered whether the assignee finance company, which was incorporated under the *Canada Corporations Act*, also could not maintain the action.

[26] Chief Justice Cowan determined:

> 24 . . . My interpretation of s. 44, as amended in 1972, is that the entire section is inapplicable to a company incorporated by or under the authority of an **Act** of the Parliament of Canada, or by or under the authority of an **Act** of the Legislature of Nova Scotia. The proviso in question refers to "this section", which I interpret to refer to sub-s. (2) as well as sub-s. (1) of s. 44.

He found that s. 44 of the *CRA* did not apply, and provided no defence to the defendants. On the appeal from his decision, Chief Justice MacKeigan, writing for the court expressly adopted the reasons of Chief Justice Cowan.

[27] *I.A.C.* was followed in *Kaeser Compressors*, a 2006 decision of Boudreau, J. of the Nova Scotia Supreme Court. There the plaintiff company, which was incorporated under the *Canada Business Corporations Act*, sued for goods delivered and unpaid and for breach of contract. The defendants applied to strike out the originating notice and statement of claim, arguing that the plaintiff was not registered under s. 17(1) of the *CRA* and so could not bring or maintain the action. Justice Boudreau dismissed the application, holding that s. 17(1) did not apply to “domestic or Dominion corporations,” that is, companies incorporated by or under the authority of the Legislature of Nova Scotia or an Act of the Parliament of Canada.

[28] In his decision, the judge expressly rejected the argument that the phrase "by or under the authority of an Act of the Parliament of Canada" must be interpreted to mean by a special act of Parliament creating the body corporate and not under

the general provisions of legislation providing for incorporation of companies. Justice Boudreau observed at ¶ 9 that:

> . . . the exempting provisions do not just state "incorporated by an **Act**" but also state "incorporated under the authority of an Act of either Parliament or the Legislature". If the exemption was meant to only exempt companies incorporated by a Special **Act** of those bodies, then the words under the authority would be redundant and have no meaning or purpose.

He also pointed to differences in the application of s. 13(1) of the *CRA* which provides for the financial penalty against companies without certificates of registration in force, and s. 17(1):

> 14 I find that s. 17(1) of the **Act** does not apply to "domestic or Dominion corporations", ie., companies incorporated by or under the authority of an Act of the Parliament of Canada or the Legislature of Nova Scotia. I am especially persuaded to this conclusion by the definitions of "domestic and Dominion" corporations found in the definition sections (2(c), (d), (e) and (g)) of the **Act**. It appears that s. 17(1) applies only to "foreign corporations" as defined in s. 2(g) of the **Act**, unlike the penalty section, s. 13(1), which applies to "any corporation". I must confess that the different applications of ss. 17(1) and 13(1) produces a somewhat perplexing anomaly; ie., a domestic or Dominion corporation can sue in Nova Scotia without registering under the **Act**, but it cannot carry on any part of its business without a daily monetary penalty if it is not so registered.

[29] As is evident from these reviews of *I.A.C.* and *Kaeser Compressor*, which followed *I.A.C.*, those decisions contained detailed consideration of s. 17(1) and of the wording of the proviso at its conclusion. That was not the case with *C.B.M. Contracting*.

[30] In *C.B.M. Contracting*, a builder successfully sued a homeowner for work done and material provided. After its action was commenced but before trial, the corporate builder's registration under the *CRA* was revoked. This court held that it could not enforce the judgment in its favour until the builder renewed its registration.

[31] In his decision on behalf of the court, Justice Coffin set out s. 44(1) [now s. 17(1)] of the *CRA*. He relied on *Shore v. Cantwell and Cantwell* (1975), 21 N.S.R. (2d) 288 in which MacIntosh, J. considered a provision of the *Partnerships and Business Names Registration Act* where the partnership had commenced an action

before registration but registered before a pre-trial conference. Coffin, J. was of the opinion (at ¶ 72) that the view expressed by Justice MacIntosh, namely that in order to "maintain" an action, a partnership would have to renew its registration, was correct. It followed that in *C.B.M. Contracting*, the corporate builder was estopped from maintaining its action until it renewed its registration under the *CRA*. The issuance of the order for judgment was stayed pending registration.

[32] *C.B.M. Contracting* was directed to the timing of registration rather than the requirement for registration. The analysis did not include an examination of s. 17(1) of the *CRA*, as was done in *I.A.C.* The timing issue does not arise in the present case, and I need not deal with it in this decision.

[33] In his submissions, the appellant also relied upon *MacMullin et al. v. D'Addario* (1988), 88 N.S.R. (2d) 383 (S.C.); *Digby (District) v. Leon (Ted) Lowe 1984 Ltd.* (1997), 167 N.S.R. (2d) 327 (S.C.); *South Mountain Trout Farm Ltd. v. Mid Valley Construction (1982) Ltd.*, [2001] N.S.J. No. 122 (S.C.); and *Homewood Enterprises Ltd. (c.o.b. Waterside Auto Sales) v. 147486 Canada Ltd. (c.o.b. Halifax Nissan)* (2003), 212 N.S.R. (2d) 390 (S.C.). None of these decisions include an analysis of s. 17(1) of the *CRA*, and none is an appellate decision.

[34] In summary, this court dealt with the proviso in s. 17(1) of the *CRA* only in *I.A.C.* In my view, the Chambers judge did not err in relying upon *I.A.C.*

The Leave Order and Execution Order

[35] In my respectful view, the Chambers judge erred by failing to strike or stay the Leave Order and the Execution Order which issued on the same day, May 7, 2007.

[36] The respondent's *ex parte* application for leave was supported by two affidavits. In one, its president deposed that the respondent had not received any of the monies owed under to the June 16, 1987 judgment, and that a certificate of the judgment had been recorded. In the second, Mr. MacKay set out the calculation of the amount owing on May 7, 2007. Neither affidavit addressed why the respondent had not proceeded earlier. At the hearing of the application, Justice Tidman raised the question of the long delay and sought an explanation. After hearing submissions in that regard, the judge granted the Leave Order.

[37] It is apparent from his decision dismissing the appellant's application to stay or strike the Leave Order that the Chambers judge was aware of the jurisprudence calling for an explanation of the delay before the renewal of an execution order, and that if it is established that significant prejudice accrues to the defendant if the execution order is renewed, the application to renew may be denied. He referred at ¶ 22 of his decision to *Commercial Credit Plan Ltd. v. MacLeod* (1986), 75 N.S.R. (2d) 197 (S.C.T.D.) and *N.S. Tractors & Equipment Ltd. v. Morton* (1986), 79 N.S.R. (2d) 59 (S.C.T.D.) and reviewed these decisions.

[38] However, the Chambers judge determined:

> 36 The defendant argues that I should apply *Commercial Credit* and *Nova Scotia Tractors*. However, in my view these cases have been abrogated by the decision in *Neiff Joseph*. In that case the judgment had been granted in 1977 and the matter was before the Court of Appeal in December 1996, some 19 years later. *Neiff Joseph* also disposes of the suggestion that a Notice of Intention to Proceed is required here. . . . (Emphasis added)

[39] With respect, in determining that the matter of delay and the circumstances surrounding it could not be considered on an application to renew an execution order, the judge erred in law.

[40] The decision on which the Chambers judge relied is *Windy Bay Fisheries Ltd. v. Joseph (Neiff) Land Surveyors Ltd.* (1996), 157 N.S.R. (2d) 367 (C.A.). This was an appeal from a judge's *ex parte* order, not from an unsuccessful application to set aside or vary an order made *ex parte*. There, Roscoe, J.A. for the court, said:

> [4] As stated by this court in **N.S. Tractors & Equipment Ltd. v. Morton** . . . the Chambers judge would have no grounds for refusing to grant leave in the absence of some rule of law barring recovery. Although it may have been preferable for the affidavit in support to have provided more detail respecting the attempts at, or the delay in, enforcement of the judgment, the Chambers judge committed no reviewable error.
>
> [5] The **Rules** do provide three avenues for the Supreme Court to review an execution order granted after a rule 52.04 application: Rule 37.13 which provides for a review of any order granted ex parte, and rules 52.09 and 53.13 which allow for stays of execution orders. In our view those rules provide appropriate recourse

> if an execution order is granted in circumstances where its enforcement would be unjust.

[41] Nowhere does Justice Roscoe determine that reasons for the delay are no longer a consideration. Her statement that "more detail" would have been preferable indicates that there were some particulars regarding the reasons for delay in enforcement in the reasons below. Moreover, her decision points out procedural rules which could be relied upon where an execution order is granted where its enforcement is unjust. The Chambers judge's understanding of the *Windy Bay* decision was incorrect.

Disposition

[42] I turn then to the determination of the appropriate disposition of this appeal. There is no requirement in *Civil Procedure Rule* 52.04 that notice be given of the application for leave to renew an execution order: *Windy Bay* at ¶ 2. Consequently, the application before Justice Tidman proceeded *ex parte*. As pointed out earlier, the issue of delay was not addressed in the sworn affidavits filed in support. The judge had to seek clarification at the hearing. He exercised his discretion and granted the Leave Order.

[43] Reasons for the delay that stretched to almost 20 years from the judgment and the Original Execution Order were not fully explored at the hearing before Justice Tidman. Nor was there any evidence in regards to the prejudice that may have been or would be suffered by the appellant if leave was granted, or by the respondent, if it was not. On the application to strike or stay the Leave Order, the Chambers judge erred in determining that the reasons for delay were not material on such a leave application. As a result, he did not consider the issues of delay and prejudice.

[44] In these circumstances, I would allow the appeal against the decision and order of the Chambers judge dismissing the application to stay the Leave Order and the Execution Order. I would also strike the Leave Order and the Execution Order. This disposition is without prejudice to the respondent, upon notice to the appellant, re-applying for leave for the issuance of an execution order. I would order the respondent to pay the appellant costs of $2,000. on the appeal, together with disbursements as taxed or agreed. The respondent shall also return to the appellant the costs and disbursements allowed by the Chambers judge, and shall

pay the appellant costs in the amount of $1,000. and disbursements as taxed or agreed, on the application.

Oland, J.A.

Concurred in:

Cromwell, J.A.

Saunders, J.A.