C.A. No. 109424

NOVA SCOTIA COURT OF APPEAL

Cite as: Snair v. Conrad, 1995 NSCA 18

BETWEEN:

JAMES SNAIR Appellant - and - SHELLEY ANNE CONRAD, LINDA JEAN BEZANSON and MURRAY ROBERT BEZANSON, as Next Friends and as Guardian Ad Litem of the person and estate of Shelley Anne Conrad, pursuant to the provisions of the Incompetent Persons' Act, R.S.N.S. 1989, c. 218, and DONALD SNOW Respondents - and - HALIFAX INSURANCE NATIONALE-NEDERLANDEN NORTH AMERICA Applicant/ Intervenor	Ross H. Haynes and Cathy L. Dalziel for the applicant, Halifax Insurance Nationale-Nederlanden North America David J. Bright, Q.C. for the appellant, James Snair Donald A. Kerr, Q.C., and Richard F. Southcott for the respondents, Shelley Anne Conrad, Linda Jean Bezanson and Murray Robert Bezanson R. Malcolm Macleod and H. Matthew Graham for the respondent, Donald Snow Robert L. Barnes, Q.C. for Lunenburg Yacht Club Application Heard: May 4, 1995 Decision Delivered: May 5, 1995

BEFORE THE HONOURABLE JUSTICE NANCY J. BATEMAN, IN CHAMBERS

Revised Decision: The date on which the application was heard has been corrected to May 4, 1995 according to the erratum issued on March 8, 2007.

BATEMAN, J.A.: (in Chambers)

This is an application by Halifax Insurance Nationale-Nederlanden North America seeking Intervenor status in an appeal.

Shelly Conrad was injured in a boating accident. The boat was operated by James Snair. At trial it was determined that Mr. Snair is liable to Ms. Conrad for her damages. Mr. Snair has appealed that decision.

Halifax Insurance issued a policy of insurance to Mr. Snair. Mr. Snair seeks indemnification from Halifax Insurance for any amount he may pay as a result of the trial decision. Halifax Insurance has denied liability to indemnify Mr. Snair. In a separate Supreme Court action, yet to be tried, Mr. Snair seeks a declaration that Halifax Insurance provide indemnification.

Halifax Insurance relies upon Civil Procedure Rules 8 and 62.31(1) in its application for leave to intervene in the appeal by Mr. Snair.

In **R. v K.A.R.** (1992), 116 N.S.R. (2d) 418 (S.C.A.D.), Chipman J.A. held that while there is no specific provision in the Civil Procedure Rules for intervention in appeals, the Rules set out a scheme whereby trial procedures are incorporated, with necessary modifications, into the procedure of the Court of Appeal. He further held that the definition of "court" and "judge", for the purpose of Rule 62, empowers a judge of the Court of Appeal, in Chambers, to entertain an application to intervene. While Chipman J.A. was directing himself specifically to intervention on a criminal appeal, his comments apply, as well, to a civil appeal.

No issue is taken, on this application, with this court's jurisdiction to permit a party to intervene, nor with the authority of a judge, sitting alone in Chambers, to do so. I am satisfied that I do have the jurisdiction to consider this application to intervene.

Rule 8 requires that the person seeking to intervene must claim an interest in the subject matter of the proceeding. The court is to consider, as well, whether the intervention will unduly delay or prejudice the rights of the parties and make such order as it thinks just.

Halifax Insurance submits that it should be permitted to intervene as it has a clear interest in the outcome of the appeal. It could be found liable, in the Supreme Court action for a declaration, to indemnify Mr. Snair. It submits that intervention would not prejudice the adjudication of the rights of the parties, nor unduly delay the proceeding.

The application to intervene is opposed by the respondents Donald Snow and Shelley Anne Conrad and by The Lunenburg Yacht Club. The Yacht Club is not a participant in the appeal, as no challenge has been taken to the dismissal against that defendant at trial. The application is supported by the appellant James Snair.

Prior to the trial, the defendant Snair had successfully applied to a Chambers judge of the Supreme Court to add Halifax Insurance as a Third Party to the proceeding. Halifax Insurance appealed the order of the Chambers judge. The decision of the Court of Appeal is reported at (1994), 132 N.S.R. (2d) 126. In allowing

the appeal Matthews, J.A., writing for the court, quoted with approval from the factum of Halifax Insurance. At p. 132:

> 13. James Snair's third party claim is for a declaration that he is entitled to be indemnified by Halifax under the terms of an insurance policy. The only issue between James Snair and Halifax, then, is whether Halifax is required to provide indemnity or contribution to Mr. Snair. Halifax's position is that the insuring agreement in the policy expressly states that there is no indemnity in respect to the insured's liability for personal injury to persons residing in the insured's household. The indemnity issue between Halifax and James Snair will thus focus on this question. As between the plaintiff and James Snair in the main action, however, there is no issue at all concerning the plaintiff's residence or not, and no issue at all as to the existence or non-existence of Mr. Snair's insurance coverage.
>
> 14. ... The issue as to whether Mr. Snair has or has not insurance coverage has nothing at all to do with any transaction or occurrence arising in the plaintiff's action or related to it.

At p. 133 Matthews, J.A. said:

> In my opinion it is clear there are no issues in common between those actions. Thus there is good reason for those actions to be tried separately, that is, severed. That, in effect is what the chambers judge did when he ordered severance, with the main action to precede the action for indemnity.

The contract of insurance between Halifax Insurance and Mr. Snair contained a "no action" clause to the effect that the insured could not commence action against the insurer for recovery, until the obligation of the insured to pay had been determined. Matthews, J.A. found that such a clause, while a factor to be considered, was in conflict with the philosophy of the Third Party Rule and, thus, not binding upon the court. Halifax Insurance, although denying indemnification to Mr. Snair, facilitated Mr. Snair's defence.

On the Third Party application, the Chambers judge had ordered that the trial of the action between Mr. Snair and Halifax Insurance be severed and heard separately from the main proceeding. The Chambers judge did not expressly preclude Halifax Insurance from participating in the main action, but contemplated a limited role. This was of concern to the Court on the appeal. Halifax Insurance took the position that it should not be a third party, but, if not removed as such, would insist upon its right to fully participate in the trial.

Halifax Insurance says that it not only has an interest in the proceeding, but that it, alone, is in a position to raise a new issue on appeal. This issue concerns the trial judge's review of two "Mary Carter" settlement agreements entered into, prior to trial, by each of the Defendants Snow and the Lunenburg Yacht Club. By agreement of the parties to the action, the terms of the settlement agreements (without the settlement amounts) were reviewed by the trial judge. Halifax Insurance says that the learned trial judge erred at law in so doing. If permitted to intervene, Halifax Insurance proposes to raise this issue as a further ground of appeal. If this ground of appeal is advanced, the Yacht Club will join in the appeal.

On the hearing of this application counsel for Halifax Insurance attempted to expand the scope of the proposed new ground(s) of appeal. I declined to permit him to do so as the material filed in support of the application referred only to the ground of appeal based upon the "Mary Carter" settlement agreements.

Civil Procedure Rule 8.01(2) states:

> The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when

> practical, a pleading setting forth the claim or defence for which intervention is sought.

Presumably the rule is framed as it is to ensure that the issues can be fully canvassed on the application and that counsel appearing both in support and in opposition are not taken by surprise. The court must be in a position to properly consider whether permitting intervention would "unduly delay the proceeding or prejudice the adjudication of rights of the parties". That can only occur if the details of the proposed new grounds are known to the court and spoken to by counsel at the hearing of the application.

Counsel opposing the application have submitted a substantial body of law to the effect that the existence of a "Mary Carter" agreement must be brought to the attention of the trial judge prior to trial. Counsel for Halifax has provided no authority to the contrary. It is not, however, necessary to consider the potential merits of the proposed ground of appeal on this application, notwithstanding the persuasive nature of the authorities cited. All counsel at trial apparently agreed that the settlement agreements should be brought to the attention of the trial judge. None have raised this as an issue on appeal.

Halifax Insurance relies upon **Halifax Flying Club v. Maritime Builders Ltd.** (1973), 5 N.S.R. (2d) 364 (T.D.). That, however, was an application by the insurer to intervene at trial. This situation is distinct in that Halifax Insurance was apparently content not to participate at trial. Halifax Insurance could have made application to intervene, even after its successful appeal of the third party action and certainly when the issue surrounding the "Mary Carter" agreements came to its attention. It did not do

so. Halifax Insurance submits that it could not have sought to intervene at trial as it would have been improper for the insurer's role to become known to the jury. (This was to be a jury trial, although ultimately held before a judge alone.) I do not agree that with the intervention of Halifax Insurance at trial, it follows that the insurance aspects of the case would necessarily have come to the attention of the jury. Alternatively, Halifax Insurance could have sought intervention, not to participate in the trial, but for the limited purpose of raising with the trial judge, in Chambers, the propriety of his reviewing the "Mary Carter" agreements.

There are certainly instances where a litigant, not a party to the trial, has been permitted to intervene and put forward grounds of appeal that were not raised by the other appellants. The difficulty with counsel's position here, however, is that he proposes to appeal the effect of a procedure at trial to which all parties agreed. The new ground of appeal he proposes was not in issue at trial.

In **Island Nature Trust v. St. Peter's Estate Ltd. et al** (1990), 87 Nfld. & P.E.I. R. 90, (P.E.I.S.C.A.D.), the Court of Appeal considered an application by a party that had not intervened at the trial to intervene for the purposes of initiating an appeal of the trial decision. Mitchell, J.A. writing for the court said:

> The Island Nature Trust received formal notice of the commencement of the proceedings in the Court below but deliberately chose not to apply to intervene there. That being the case, it should not be added as a party now so as to raise arguments on appeal which it might have put before the trial court. A person having an interest in the subject matter of a proceeding who nevertheless decides to take the chance of sitting on the sidelines at the trial level cannot expect to be granted leave to intervene and allowed to appeal if the decision is adverse. Allowing such an intervention in those circumstances would be unfair to the parties who did participate at the trial level and contrary to the orderly conduct of proceedings.

According to the affidavit submitted by counsel for Ms. Conrad, counsel for Halifax Insurance was aware of the existence of at least one of the "Mary Carter" settlement agreements, and that the agreement would be disclosed to the trial judge prior to trial. He took no steps to seek intervenor status.

Counsel for Halifax Insurance further submits that the proper treatment of "Mary Carter" agreements is an important procedural issue that should be considered by this Court. I do not disagree. The issue should come forward, however, in a circumstance in which the parties at trial have taken opposite positions on the use of such agreements and the trial judge has had an opportunity to hear submissions on that issue and make a determination. That is not the situation here.

Counsel for Halifax Insurance further submits that he could not have anticipated how the "Mary Carter" agreements would affect the trial process until the trial had concluded. If the trial judge's review of the agreements effected the trial process improperly and in an unanticipated way, as suggested by Halifax Insurance, then this ground of appeal could have been put forward on behalf of Mr. Snair. It was not.

I am satisfied that to allow Halifax Insurance to intervene at this stage to raise a new ground of appeal is improper and would prejudice the adjudication of the rights of the parties. Additionally, it would bring a new party, The Lunenburg Yacht Club, to the appeal.

Halifax Insurance seeks leave to intervene in any event. As Halifax Insurance does have an interest in the subject matter of the proceeding, I will permit it to intervene on the appeal, but it's intervention is limited to addressing the grounds of appeal as set out in the Notice of Appeal on file, dated September 30th, 1994. Halifax Insurance shall file its factum by the date already set for the filing of the appellant's factum, June 30th, 1995.

In addition, Halifax Insurance shall not be entitled to costs on the appeal, but shall be liable to respond to an order for costs, if made against it.

While there has been divided success on this application, the main focus of the proceeding has been Halifax Insurance's request to raise a new ground of appeal, which request I have denied. The substantial part of the material submitted by opposing counsel has been in response to that issue. It is appropriate in this case that the respondents Snow and Conrad by her Guardians Ad Litem as well as The Lunenburg Yacht Club each have costs payable by Halifax Insurance, which costs I fix at $1000.00 each, inclusive of disbursements. There shall be no order for costs as regards Mr. Snair.

J.A.