NOVA SCOTIA COURT OF APPEAL
Citation: ***Moore v. Darlington***, 2012 NSCA 68

Date: 20120621
Docket: CA 350840
Registry: Halifax

Between:

David Moore

Appellant

v.

Michelle Darlington

Respondent

Judges:	Oland, Fichaud and Farrar, JJ.A.
Appeal Heard:	March 29, 2012, in Halifax, Nova Scotia
Held:	Leave to appeal granted; appeal allowed and a new hearing ordered per reasons for judgment of Farrar, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Richard Bureau, for the appellant Peter D. Crowther and Bryen Hebert, for the respondent

Reasons for judgment:

[1] This is an appeal by David Moore from the Orders of Justice Mona M. Lynch dated June 8th, 2011 and November 17th, 2011 arising from an application for maintenance, custody and other relief and a subsequent award for costs (reported as 2011 NSSC 152 and 2011 NSSC 425). Mr. Moore alleges that the application judge erred in:

- failing to grant his request for an adjournment to obtain legal counsel to assist in the presentation of his case;
- not allowing the appellant to present documentary evidence to the court in support of his case;
- failing to take into account the nature of the disabilities from which the appellant suffers and was receiving disability income, namely, a hearing impairment and post traumatic stress disorder which further impacted the appellant's ability to participate in the trial;
- calculating Mr. Moore's income which was used to calculate both child and spousal support;
- failing to discount for business assets and liabilities when calculating the equalization payment required for the purposes of division of joint property;
- failing to discount the value of assets for pre-cohabitation contributions; and
- failing to assess the respondent's contribution, if any, when ordering a division of Mr. Moore's pension.

The appellant asks that the Order be set aside and a new hearing ordered.

[2] I am satisfied that the application judge erred in her consideration of Mr. Moore's request for an adjournment. As I am satisfied this error was sufficient to order a new hearing, it is not necessary to address the other grounds of appeal.

Overview of Facts and Proceedings

[3] Throughout the judge's decision, the notice of appeal and the submissions of counsel, both in writing and orally, the proceeding was referred to as a trial. However, this was an application for maintenance, custody and other relief under the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160 (**MCA**). As a result, I will refer to the proceedings as an application.

[4] For a more complete background of the parties' relationship, I refer to the judge's decision. For the purposes of these reasons, I will start with the history of the proceedings which led to the orders under appeal.

[5] Ms. Darlington filed an application and intake form on January 7, 2010, seeking custody, access, child maintenance and spousal maintenance; a division of Mr. Moore's RCMP pension; and a division and sale of the matrimonial home.

[6] At the time of filing her application she also filed a Parenting Statement, a Statement of Income, a Statement of Expenses and a Statement of Property. A Notice to Disclose was also prepared that same day requiring Mr. Moore to file the same documents from his perspective within 20 days of service of the document on him. The documents were served on Mr. Moore on January 14, 2010.

[7] On February 3rd, 2010, Mr. Moore filed his documents.

[8] On March 2nd, 2010, Ms. Darlington filed an Interim Application and affidavit seeking interim custody, interim child maintenance and interim spousal maintenance. That Application was amended on March 5th, 2010. The amendment is not material to the matters in issue under this appeal.

[9] Ms. Darlington was unable to serve Mr. Moore with the Interim Application. On March 31st, 2010, the date that had been originally set for the interim hearing, an *ex parte* application for substituted service was made. The judge granted an order for substituted service.

[10] Mr. Moore filed a response to the Interim Application and an affidavit on April 21st, 2010, along with an updated Parenting Statement, updated Statement of

Expenses and a Supplemental Statement of Income. At that time, Mr. Moore was represented by counsel.

[11] An interim hearing was scheduled for April 22nd, 2010. On that date, most of the issues were resolved by consent and submissions were made on the issues in dispute. As a result of that hearing, an interim order was issued which provided that the primary residence of the children would be with Ms. Darlington; reasonable access to Mr. Moore as arranged between himself and the children; child maintenance of $1,441 per month commencing April 1st, 2010 and spousal maintenance in the amount of $900 per month payable commencing April 1st, 2010 for the period of the interim order.

[12] On May 4th, 2010, Ms. Darlington's counsel wrote a letter to Mr. Moore's lawyer requesting further disclosure.

[13] On June 15th, 2010, Mr. Moore filed a Notice of Intention to Proceed in Person.

[14] Mr. Moore did not respond to the requests made in the letter of May 4th, 2010. A pre-hearing conference was held on June 18, 2010. The pre-hearing conference judge ordered Mr. Moore to provide the disclosure requested. The Order also provided for appraisal of the property in which the family had resided and ordered Mr. Moore to cooperate and make the property accessible for the appraisal. The judge also ordered the administrator of Mr. Moore's RCMP pension to provide information on his pension (the Order incorporating the judge's ruling was issued on July 15, 2010).

[15] On August 26th, 2010, another pre-hearing conference was held. At that time, an organizational pre-hearing was set for January 17th, 2011. Dates for the application were set for March 28, 29 and 30, 2011. The judge required that all the documentation outlined in the Order of July 15th, 2010, be filed no later than October 29th, 2010. On October 29th, 2010, Mr. Moore filed some, but not all of the information and documents required. Missing were corporate tax returns for 1995-97, 1999 and 2003; information about the assets and liabilities of the company; bank account documents were missing pages and were not provided for the time period ordered; and information was missing about investment accounts and litigation with the province.

[16] On November 23rd, 2010, Ms. Darlington's counsel wrote to Mr. Moore requesting compliance with the July 15, 2010 order and requesting further disclosure. No response was received from Mr. Moore. Another letter was sent to him by counsel on January 4th, 2011.

[17] The pre-hearing conference went ahead as scheduled January 17, 2011 and the date of January 27, 2011, was set for a motion to deal with the outstanding disclosure. The parties were ordered to file and exchange all material on the motion one week prior to January 27th. Filing deadlines were also given for the application with Ms. Darlington's affidavits to be filed on or before February 8th, 2011, affidavits from Mr. Moore to be filed before March 1st, 2011 and any affidavit in response from Ms. Darlington to be filed by March 15th, 2011. Pre-hearing Memorandums were to be filed and exchanged on or before March 18th, 2011 and counsel for Ms. Darlington was to file an exhibit book on that same date.

[18] Ms. Darlington filed a Notice of Motion for Directions on January 20, 2011, for the disclosure motion scheduled for January 27, 2011. On January 26th, 2011, Mr. Moore filed a letter requesting disclosure from Ms. Darlington.

[19] On January 27th, 2011, Justice Moira C. Legere Sers ordered disclosure from both parties by February 11, 2011. She also inquired of Mr. Moore whether he was going to be represented by counsel at the hearing. His response was it depended on how complicated the issues became. She urged him to seek advice from an experienced family law practitioner.

[20] Ms. Darlington filed her response to the Notice for Disclosure on February 9th, 2011, along with an updated Statement of Expenses.

[21] Between the motion on January 27th and February 11, 2011, Mr. Moore retained counsel. On February 11th, 2011, his counsel wrote to the court requesting an extension of time to file material and seeking an adjournment of the hearing dates. The reason given by Mr. Moore's counsel in the correspondence was that she was not familiar with the matter and would be unavailable on the dates scheduled. She later acknowledged, on the adjournment motion, that writing to the court to request the adjournment was not the proper process.

[22] In any event, a Notice of Motion for Directions was not filed by Mr. Moore's counsel requesting the adjournment until March 17, 2011. By then all of the filing deadlines (except for the pre-hearing memorandum deadline) had passed. The Notice of Motion was accompanied by counsel's affidavit which set out that she had been retained by Mr. Moore very recently and that she had previously committed to other matters for the hearing dates of March 28, 29 and 30th, 2011. She also said in the affidavit that Mr. Moore was not at fault for the late request for the adjournment.

[23] The motion was heard on March 21st, 2011. Mr. Moore's counsel was questioned about the delay in requesting an adjournment. She explained that she had initially written the court requesting the adjournment on February 11th, 2011. After writing the letter, she explained she was out of town for a period of time doing another trial and the delay in filing the formal application (some six weeks) was due to her schedule. She also explained that she was unaware that the motion for an adjournment was being contested until she received a letter from Ms. Darlington's solicitor on March 8th, 2011. Finally, as set out in her letter of February 11th, 2011, the primary reason for the adjournment was her unavailability.

[24] Ms. Darlington's solicitor disputed the assertion that Mr. Moore's solicitor did not know the adjournment request was going to be contested. He said that he wrote to her on February 18th saying that Ms. Darlington did not consent to the adjournment. The affidavit and submissions by counsel on behalf of Mr. Moore established the following:

1. shortly after the motion on January 27th, 2011, Mr. Moore sought and retained counsel as suggested by the motions judge;

2. that upon being retained, his solicitor wrote to the court, with a copy to Ms. Darlington's solicitor, requesting an extension of the filing deadlines and an adjournment due to her unavailability for the hearing dates;

3. that the delay in filing a formal motion seeking an adjournment was due to:

i. counsel's misunderstanding about whether the motion would be contested; and

ii. her schedule;

4. the delay in filing the motion was the solicitor's delay and was not contributed to by Mr. Moore.

[25] On March 21st, 2011, the motion for an adjournment was heard. At the commencement of the motion, the presiding judge indicated to Mr. Moore's counsel that she had five minutes to make the motion. The motion actually took only 12 minutes and did not involve any submissions by counsel on the correct legal principles to be applied when considering whether to grant an adjournment or extend the filing deadlines. It took on more of an air of a negotiation with Ms. Darlington's counsel saying his client was prepared to agree to the adjournment on payment of costs of $5,000.00. After hearing Ms. Darlington's counsel's proposal, the motions judge said she was prepared to grant the adjournment on two conditions:

1. if Mr. Moore paid $5,000 in costs, forthwith, for failing to comply with the Orders for Disclosure and for making a late request for an adjournment; and

2. even if an adjournment were granted, Mr. Moore would not get to put any more evidence before the court because of missing the filing deadlines.

[26] The restriction on Mr. Moore being able to put additional material before the court is difficult to reconcile with the purpose of the request for an adjournment. The request was made presumably for the purpose of ensuring that counsel would facilitate disclosure and to represent Mr. Moore's interests at the application. The proposed restriction imposed would certainly impede counsel's ability to adequately represent Mr. Moore at the adjourned hearing. No reason is given by the motions judge as to why, if she were prepared to grant the adjournment, that the interests of justice required her to impose this restriction. No such restriction was requested by counsel for Ms. Darlington on the hearing of the motion. It was

imposed by the judge without any consideration as to why it was necessary or appropriate. I will come back to this point later in these reasons.

[27] Later that same day, Mr. Moore's counsel advised that Mr. Moore would be proceeding with the hearing on the dates scheduled but that she would not be representing him.

[28] The hearing proceeded on March 28th, 2011. On that date, Mr. Moore filed a letter indicating that he would not be in court that day because he was required to be in Provincial Court. The matter proceeded, in Mr. Moore's absence, with the court hearing evidence from Ms. Darlington and her witnesses.

[29] On March 29th, 2011, Mr. Moore attended court indicating that he did not wish to participate in the proceedings without counsel. Ms. Darlington concluded her case and Mr. Moore was asked if he wanted anything which he filed to be considered in evidence. Once again he said he wanted counsel.

[30] Ms. Darlington's counsel indicated he wanted to ask Mr. Moore questions on cross-examination and Mr. Moore took the stand and was sworn in. He refused to answer any questions without counsel.

[31] On Wednesday, March 30th, Mr. Moore again took the stand but refused to answer any questions from the court or counsel for Ms. Darlington. Counsel for Ms. Darlington made closing submissions and Mr. Moore made some limited submissions but did not return to court after an afternoon break. The matter was adjourned for decision.

[32] On April 18, 2011, the application judge rendered her written decision. The order implementing the decision was issued on June 8th, 2011.

[33] The court set October 31st, 2011, for a hearing on costs in this matter. By decision dated November 17, 2011, the application judge released her order on costs awarding Ms. Darlington $60,000 in costs plus disbursements of $6,290.87.

[34] I have set out the proceedings in some detail for the following reasons:

1. when Mr. Moore was self-represented, he was unresponsive, in the sense that he either did not respond or did not respond completely to requests and orders from the court. Whether this was because he was being difficult or because he did not understand the process is not clear from the record. However, it was patently obvious to Justice Legere Sers on January 27, 2011, that Mr. Moore would benefit from the advice of an experienced family law practitioner;

2. once the decision was made to retain counsel, Mr. Moore did so. Any delay in formally seeking the adjournment was explained by his counsel and it was not as a result of any failing of Mr. Moore; and

3. the correspondence to the court on February 11, 2011, although not the proper manner of requesting an adjournment, alerted Ms. Darlington's counsel to the issues with respect to counsel availability, the filing deadlines and the hearing dates. It is not a stretch to conclude the filing deadlines were not met because of Mr. Moore's counsel's unavailability and lack of familiarity with the file.

[35] It is from the adjournment ruling, the Order of June 8, 2011 and the Order for Costs dated November 17, 2011that Mr. Moore appeals.

Issues

[36] Mr. Moore has raised a number of issues in his notice of appeal. As indicated earlier in these reasons, the only issue that needs to be addressed is the motions judge's ruling on the motion for adjournment.

Standard of Review

[37] The standard of review with respect to adjournments was recently addressed by Justice Fichaud in **Caterpillar Inc. v. Secunda Marine Services Ltd.**, 2010 NSCA 105:

> [5] This court applies a deferential standard to a trial judge's decision whether to grant or deny an adjournment. In *Abbott v. Sharpe*, 2007 NSCA 6, ¶ 74, Justice Saunders for the court said:

> A trial judge's right to supervise and control the trial includes a wide discretion to grant or refuse adjournments. The exercise of that discretion is owed considerable deference on appeal unless it can be shown that the judge erred in principle or that the judge did not exercise his or her discretion judicially. *Webber v. Canada Permanent Trust Co.* (1976), 18 N.S.R. (2d) 631 (N.S.C.A.), and *Moore v. Economical Mutual Insurance Co.* [1999] N.S.J. No. 250 (N.S.C.A.).

In *Moore*, cited in the passage from *Abbott*, Justice Cromwell said:

> 33 The decision to grant or refuse an adjournment is within the discretion of the presiding judge. It is a discretion which the judge is particularly well placed to exercise. An appellate court should not substitute its judgment for that of the presiding judge but should limit its review to determining whether the judge applied a wrong principle or the decision gave rise to an injustice.

[38] Therefore, in reviewing the application judge's decision in this matter we must give deference to the exercise of her discretion. In **Caterpillar**, this Court was considering the application of **Rule** 4.20(3) in considering a motion for an adjournment of a trial heard after the finish date. **Rule** 4.20(3) (as it was then) provided:

> 4.20 . . .
>
> (3) A judge hearing a motion for an adjournment after the finish date must consider each of the following:
>
> (a) the prejudice to the party seeking the adjournment, if the party is required to proceed to trial;
>
> (b) the prejudice to other parties, if they lose the trial dates;
>
> (c) the prejudice to the public, if trials are frequently adjourned when it is too late to make the best use of the time of counsel, the judge, or court staff.

[39] Both counsel on this appeal, argued the adjournment ground of appeal based on the principles as set out **Caterpillar** in its interpretation of **Rule** 4.20(3). However, **Rule** 4.20 is a rule governing procedure for adjournments of a trial

whereas this was a hearing of an application under the **MCA** for maintenance, custody and other relief. **Rule** 4.20 does not apply to this proceeding. Let me explain further.

[40] Both parties live in the Halifax Regional Municipality and the proceedings were commenced here. As a result, the proceeding falls within the exclusive jurisdiction of the Supreme Court (Family Division) (See s. 25(1)(c) and 32A(1)(x) of the **Judicature Act**, R.S.N.S. 1989, c. 240). The Civil Procedure Rules that apply to this proceeding are found in **Rule** 59 of the **Civil Procedure Rules**. **Rule** 59 distinguishes between two proceedings (hearings and trials). For example, **Rule** 59.40 concerns the hearing of an application whereas **Rule** 59.42 governs the conduct of a divorce trial.

[41] There is no rule similar to **Rule** 4.20 governing the test for an adjournment of the hearing of an application, family or otherwise.

[42] **Rule** 5.11 touches, tangentially, on adjournments in addressing the prejudice to the parties in seeking to late file an affidavit. **Rule** 5.11 provides:

> 5.11 (1) A party to an application may only file an affidavit within the deadlines under this Rule or set by a judge giving directions, unless a judge hearing the application permits an affidavit to be filed later.
>
> (2) On a motion to allow a later affidavit, the judge must consider all of the following:
>
> > (a) the prejudice that would be caused to the party who offers the affidavit, if the application proceeds without that affidavit;
> >
> > (b) the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice of an adjournment if that would be a result;
> >
> > (c) if an adjournment would result, the public interest in making the best use of court facilities, judges' time, and the time of court staff.
>
> (3) A judge who allows a late affidavit may order the party filing the affidavit to indemnify each other party for expenses resulting from the filing, including expenses resulting from any adjournment.

[43] Regardless of whether **Rule** 4.20 applied to these proceedings, the motions judge did not refer to that **Rule** or any of the principles that must be considered when faced with a request for an adjournment. Her analysis on the request for an adjournment is limited to the following:

> I think the message back to your client is he can have an adjournment if he pays $5,000 in costs for the ... for the, ... for, 1) failing to comply with the orders so far for disclosure, and 2) for making a late request for an adjournment. ...

[44] In her written decision, her reasons for not granting the adjournment are:

> [40] The adjournment was not granted by the court because the matter had been scheduled since August 26, 2010; the father had not complied with the disclosure requirements directed by Justice Legere-Sers on January 27, 2011 or the filing directions in the pre-trial conference memorandum of Justice MacDonald; the mother's material had been filed; it was one week prior to the trial and counsel had not yet met with the father. Counsel for the mother indicated that they would agree to an adjournment if the father agreed to pay costs of $5,000.00. The court indicated that no further material could be filed by the father as all of the filing deadlines had passed.

[45] Nowhere in the judge's oral or written decision does she balance the respective interests of the parties as they relate to the interests of justice (**Moore**, **infra**, para. 37).

[46] The prejudice to Mr. Moore in the failure to properly consider the request for an adjournment is obvious. On January 27, 2011, the pre-hearing conference judge strongly suggested to Mr. Moore that he should retain experienced counsel. Mr. Moore did exactly that. However, the counsel he retained was not available, for good reason, on the dates of the hearing. Admittedly, the request for an adjournment was made late in the day, however, as indicated by the affidavit of Mr. Moore's counsel, that was not the fault of Mr. Moore.

[47] The required balancing of interests was explained in **Moore v. Economical Mutual Ins.** (1999), 177 N.S.R. (2d) 269. Cromwell, J.A. (as he then was) put it thusly:

33 The decision to grant or refuse an adjournment is within the discretion of the presiding judge. It is a discretion which the judge is particularly well placed to exercise. An appellate court should not substitute its judgment for that of the presiding judge but should limit its review to determining whether the judge applied a wrong principle or the decision gave rise to an injustice.

34 The appellants were left without counsel on the eve of trial. They decided to change counsel roughly 3 weeks earlier. They thought that they had obtained the services of new counsel to take the matter to trial. Their former counsel thought so too, even after he had a two hour meeting with new counsel. The trial judge was advised of the change of counsel at a pre-trial conference. New counsel subsequently advised that he would not act and stated in an affidavit that he had only ever agreed to review the matter. After this surprising turn of events, former counsel did some trial preparation, then advised that he would not act further. All of this to say that this was not a situation in which the plaintiffs were manipulating the process for the purposes of delay. While their decision to change counsel so close to trial was risky and unwise, it is clear that they and their former counsel thought there was a firm arrangement in place with new counsel before they discharged former counsel. The trial judge appears to have accepted as a fact that the plaintiffs thought they had new counsel before they discharged their former counsel and this finding is supported by the submissions made to the trial judge by their former counsel. ...

36 Where the effect of refusing an adjournment is to force the party seeking the adjournment to proceed without counsel, the required balancing must have due regard to the importance of legal representation. While the principles set out by Hallett, J.A. for the Court in **R. v. Beals** (1993), 126 N.S.R. (2d) 131 were developed in the different context of a criminal case, I think several of them are highly relevant in civil matters. There is certainly no absolute right to counsel in civil cases and efforts to retain and instruct counsel must be exercised honestly and diligently and not for the purposes of delay. The impact of the refusal of an adjournment on the fairness of the trial must also be considered having regard, for example, to the complexity of the issues raised.

37 In this case, I think the trial judge applied wrong principles in refusing the adjournment. He did not balance the respective interests of the parties as they related to the interests of justice in securing a fair trial on the merits of the case. He did not give sufficient weight to the impact of forcing the plaintiffs to trial without counsel, particularly where he apparently did not think that the plaintiffs had attempted to use their retention of counsel for the purposes of delay. He accepted that the plaintiffs thought that they had arranged new counsel but that new counsel then declined to act, therefore leaving them without counsel. With respect, the learned trial judge appears to have given more weight to

> inconvenience to the Court and counsel for the respondent than to the serious disadvantage of forcing the appellants to trial without counsel in circumstances in which the absence of counsel was not entirely their fault and was not an apparent attempt to delay the proceedings. As plaintiffs in an action on an insurance policy, they had little, if anything, to gain from delay in any case.
>
> 38 I also think that the learned trial judge ought to have considered whether any prejudice to the respondent caused by granting the adjournment could have been compensated by the imposition of costs or other terms in granting it. The learned trial judge's reasons for denying the adjournment do not indicate that he considered this aspect. There was no evidence before the judge of any prejudice to the respondent which could match the obvious disadvantage of forcing the appellants on for trial without counsel in what was expected to be a two week trial involving allegations of arson and fraud. There was certainly no evidence that the inconvenience and costs thrown away that would have resulted from the granting of an adjournment could not have been compensated for in costs.
> (Emphasis added)

[48] The judge's comments during the adjournment motion and reasons for judgment give no indication that she considered the prejudice to Mr. Moore should he be forced to proceed with the application on the terms suggested. I appreciate that Mr. Moore, when he was representing himself, was difficult and, at times, unresponsive. However, that does not excuse the application judge from performing the proper analysis.

[49] Nor did the application judge weigh the prejudice, if any, there would be to Ms. Darlington against the prejudice to Mr. Moore. It appears from the comments of Ms. Darlington's counsel that any prejudice to her could have been compensated for in costs. As Justice Cromwell said in **Moore, supra** at para. 38:

> [38] I also think that the learned trial judge ought to have considered whether any prejudice to the respondent caused by granting the adjournment could have been compensated by the imposition of costs or other terms in granting it. ...

[50] Although **Rule** 4.20 does not apply to these proceedings, one of the factors outlined in that **Rule**, prejudice to the public, is a factor the judge could take into account when considering whether to grant an adjournment. The judge mentions this factor in her written reasons where she says as follows:

> The adjournment was not granted by the court because the matter had been scheduled since August 26, 2010. (para. 40)

[51] With respect, this is simply a statement of fact. At some point, if scheduled proceedings are frequently adjourned, there may be prejudice to the public which must figure into the balancing act. However, as she did not weigh the relevant factors, it is difficult to determine what weight was given to the matter having to be rescheduled.

[52] In my respectful view, the judge erred in principle in her decision to deny the adjournment. Her errors were:

1. to treat the adjournment issue as an issue to be mediated instead of adjudicated; and

2. if an adjournment were to be granted, then to deny Mr. Moore the opportunity to file evidence for the adjourned hearing.

[53] On the first point, the judge was prepared to allow the adjournment if Mr. Moore agreed to Ms. Darlington's request for $5,000 in costs. As Mr. Moore would not agree to the amount, the judge denied the adjournment. The judge treated the matter as a choice between a mediated adjournment, with the conditions agreed to by both parties, or no adjournment. This was an error of principle. The judge had the discretion to award Ms. Darlington $5,000 costs as a condition of the adjournment, whether or not Mr. Moore agreed with the quantum of costs. The judge did not exercise that discretion.

[54] On the second point, if an adjournment is granted, then what is gained by a prohibition on Mr. Moore adducing the evidence that would be accommodated by the adjourned interval? **Rule** 1.01 describes the "Objects of these Rules" as:

> **1.01** These Rules are for the just, speedy, and inexpensive determination of every proceeding."

The balance of these three factors assists to guide the exercise of discretion under the **Rules**: **Innocente v. Canada (Attorney General)**, 2012 NSCA 36, paras. 48-53. The denial of Mr. Moore' s opportunity to adduce relevant evidence may well impair the fairness of the result. As to speed and expense – assume that, after a

costs award of $5,000, there were to be an adjournment, and the introduction of Mr. Moore's evidence would be accommodated during the interval of the adjournment. On those assumptions, the ban on his evidence would have little marginal impact on the speed or expense of the proceeding. At the least, the judge should have addressed this issue, and her failure to do so was an error in principle.

[55] If the application judge were prepared to grant the adjournment on the condition that Mr. Moore would not be permitted to file any further material, it was incumbent on her to explain why such a restriction was necessary to balance the interests of the parties. If such a condition were going to be imposed the test as set out in **Rule** 5.11 (**supra**) had to be addressed. It was not. **Rule** 5.11 provides a **Rule** 4.20-like test for the receipt of late affidavits and would involve considering:

1. the prejudice caused to the party who offers the affidavit, if the application proceeds without the affidavit;

2. the prejudice that would be caused to the other parties by allowing the affidavit to be filed including any prejudice that an adjournment would cause; and

3. if an adjournment would result, the public interest in making the best use of the court facilities, the judge's time and out-of-court staff.

[56] The judge took none of those factors into consideration in imposing the condition on Mr. Moore. Again, in failing to do so she erred in principle.

[57] The imposition of the condition precluding the filing of any further material runs contrary to the principle that interests of the parties should be balanced as they relate to ensuring that justice is served by allowing a fair trial on the merits of the case (**Moore, supra**, para. 37).

[58] There was no evidentiary basis upon which the judge could have exercised her discretion in attaching such a condition to the granting of an adjournment or, alternatively, if there were merit to imposing the condition, it is not apparent from the record or her reasons.

[59] I am satisfied the application judge erred in principle in failing to balance the respective interest of the parties in her consideration of the adjournment request. For this reason, I would grant leave to appeal, allow the appeal and order a new hearing. As a result, the Order for Costs dated November 17, 2011 is also set aside.

[60] What then should be the costs of the proceedings below and this appeal? In **Caterpillar**, **supra**, this Court, as a condition of the adjournment (relying on **Rule** 4.21(e) and (f)) required Caterpillar, the party seeking the adjournment, in any event of the cause, to indemnify Secunda for Secunda's reasonable costs, assessed on a solicitor-client basis relating to:

1. the adjournment litigation in the Supreme Court and in the Court of Appeal; and

2. any wasted and duplicated effort of preparing twice for the trial, including the securing and attendance of witnesses.

[61] In **Caterpillar**, the judge's refusal to grant the adjournment was overturned before the trial took place. In this case, the hearing took place, as a result of the application judge's error and not as a result of the fault of either party.

[62] The legal fees incurred, including all of the proceedings below, was approximately $60,000. Of that amount, approximately $24,000 was incurred between March 21st, 2011 and the Order dated June 8, 2011. Approximately $3,000 in disbursements was incurred during the same period of time. Both of these amounts are without HST.

[63] On the motion for the adjournment, Ms. Darlington's counsel was prepared to accept the sum of $5,000 as costs to agree to the adjournment. As a result, I would award costs to Ms. Darlington as follows:

– $5,000 representing the time up to the request for the adjournment;

– 25% of counsel fees from the date of the adjournment until the Order of June 8, 2011, approximately $6,000;

– 25% of the disbursements incurred during the same period of time, approximately $750;

[64] Therefore, the total cost award to Ms. Darlington for the proceedings below resulting from this ruling granting the adjournment will be $11,750 plus HST.

[65] This amount represents a penalty to Mr. Moore for his failure to comply with the disclosure requirements which created the log jam and caused the need for an adjournment.

[66] I would not award costs to either party on the appeal.

[67] I urge both parties, on the rehearing of this matter, to make whatever use they can of the materials, evidence and transcripts arising from the original hearing so that they can, as much as possible, minimize the costs of litigation arising from these unfortunate circumstances.

Farrar, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.