C.A. No. 131435

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S., Matthews and Chipman, JJ.A.
Cite as: Frame v. Nova Scotia (Public Inquiries Act)
1996 NSCA 244

BETWEEN:

CLIFFORD FRAME and MARVEN PELLEY Appellants - and - THE HONOURABLE JUSTICE K. PETER RICHARD, in his capacity as a Commissioner under the **Public Inquiries Act** and as a Special Examiner under the **Coal Mines Regulation Act** Respondent	)	Tim Hill for the Appellants John P. Merrick, Q.C. for the Respondent Appeal Heard: December 13, 1996 Judgment Delivered: December 13, 1996

THE COURT: The appeal is dismissed without costs, per reasons given orally by Matthews, J.A., concurred in by Clarke, C.J.N.S. and Chipman, J.A.

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

MATTHEWS, J.A.:

Counsel have urged this Court to assist in moving the Westray Inquiry along by hearing this appeal quickly. We have responded by setting the hearing down at the earliest possible date and rendering this oral judgment.

We reiterate that which was set out in our judgment, C.A. No. 131435, dated November 18, 1996:

> For purposes of this judgment the background of this matter need not be set out in detail.
>
> The Commissioner of the Westray Inquiry brought an application in the Supreme Court seeking a certificate under s. 7 of the **Interprovincial Subpoena Act**, S.N.S. 1996, c. 1 and an order for a letter of request for the examination of the appellants in Toronto. In support of his application he filed an affidavit of Jocelyn C. Campbell. Paragraph 6 of that affidavit states in part:
>
> > ...staff of the Inquiry have acquired documents relevant to the terms of reference from various sources including Westray Coal ("Westray"), a division of Curragh Inc. (formerly Curragh Resources Inc.), Curragh Inc. ("Curragh"), the Provincial and Federal governments and the R.C.M.P.
>
> Counsel for the appellants forwarded to the Commissioner a notice to produce for inspection requiring production of, **inter alia**:
>
> > (c) other "acquired documents relevant to the terms of reference from various sources" referred to in paragraph 6 of the said Affidavit in the possession, power or control of the Deponent or the Commissioner.
>
> Counsel also requests that the Commissioner submit Ms. Campbell for examination for discovery upon her affidavit.
>
> The morning of the hearing before a chambers judge of the Supreme Court, on September 4, 1996, the Commissioner produced certain documents referred to in the appellants' notice

> to produce but declined to produce those documents referred to in paragraph (c) of the notice. He also declined to make Ms. Campbell available for examination for discovery.
>
> The appellants then applied to the chambers judge for **inter alia**, an order requiring production of those documents and an order requiring Ms. Campbell to attend for examination for discovery.

The chambers judge in an oral judgment decided that Ms. Campbell be available to be cross-examined on her affidavit but that the applications for the production of the requested documents and the discovery examination of Ms. Campbell be dismissed.

The appellants now appeal from the latter portion of that decision which is both discretionary and interlocutory in nature.

This court, as well as other appellate courts, has on many occasions discussed the principles of appellate review. Our function is not to retry a case. The burden on an appellant seeking to set aside an interlocutory order such as this is indeed heavy. We should only interfere if wrong principles of law have been applied, or serious substantial injustice, material injury or very great prejudice or patent injustice would result if we did not. See for example, **Exco Corp. v. Nova Scotia Savings & Loan Co. et al**. (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331 (C.A.); **Nova Scotia (Attorney General) v. Morgantaler** (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54 (C.A.); **Couglan et al v. Westminer Canada Holdings Ltd. et al.** (1989), 91 N.S.R. (2d) 214; 233 A.P.R. 214 (C.A.), **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143; 275 A.P.R. 142 (C.A.); and **Gateway Realty Limited v. Arton Holdings Limited**, (1990), 96 N.S.R. (2d) 82.

MacKeigan, J.A., in **ACA Cooperative Association Ltd. v. Associated Freezers of Canada Inc. et al.** (1989), 95 N.S.R. (2d) 35; 251 A.P.R. 35 (C.A.) at p. 37 remarked:

> Interlocutory appeals have become much too frequent and should be discouraged. They, by definition, seek interference by this Court in the middle of a proceeding. We must refrain from interfering except in the rankest case of injustice or serious error of law. Our noninterference in the middle of a trial should not, of course, be construed as approving everything the trial judge is doing.

The chambers judge confined his focus to considering whether Commission counsel has met the test pursuant to s. 7 of the **Act**. He wrote:

> ...I am satisfied that what has been delivered today by Commission counsel to Mr. Scott is reasonable and sufficient disclosure as it relates to the eventual Section 7 hearing.
>
> ...
>
> It has not been demonstrated to me that anything further is necessary or relevant to the disposition of that Section 7 hearing, and in particular to the nine questions posited by Ms. Campbell in her affidavit.

He was careful to point out that his "findings are without prejudice to any further motions to any member of" the Supreme Court. That observation is reiterated in the order:

> IT IS ORDERED THAT the application for the production of further documents by the Commission be dismissed, but without prejudice to any further motions by the Respondents;

As to the discovery examination of Ms. Campbell he commented:

> Turning then to the requested discovery examination, pre-hearing, of Ms. Campbell and of Mr. Merrick, it is a condition precedent to any such pre-trial or pre-hearing discovery that anyone with evidence to give, the evidence

> must be relevant to a subject matter in the proceeding. C.P.R. 18.01. There is not factual or evidentiary basis presented to me which would justify any pre-hearing discovery of either counsel in this case and so those requests advanced by Mr. Scott are denied, but without prejudice to any new application, provided that any new application would have no delaying effect on the timetable that I'm about to schedule.

The result of that decision and order is that the cross-examination of Ms. Campbell first take place. After that, further motions, as considered advisable, may be made.

As stated by this Court in **Minkoff v. Poole et al**, **supra**, there are instances where we will interfere with such an order including the consequences thereof, for example, where an interlocutory application results in the final disposition of the case. See as well, **Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Dev. Corp.** (1995), 141 N.S.R. (2d) 180 and Sopinka and Galowitz in their text **The Conduct of an Appeal**, Butterworths, 1993 at pp. 6 and 15.

Here the chambers judge's decision and order do not result in a foreclosure of the issues between the parties, as the chambers judge made clear.

In these circumstances, it is our unanimous opinion that the chambers judge committed no error which would cause us to intervene. The appellant has not demonstrated that the chambers judge applied wrong principles of law or that a patent injustice would result from his decision.

In consequence we dismiss the appeal but without costs.

Matthews, J.A.

Consented to:

Clarke, C.J.N.S.

Chipman, J.A.

C.A.No. 131435

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CLIFFORD FRAME and MARVEN PELLEY	)	
Appellants	)	
- and -	)	REASONS FOR JUDGMENT BY:
THE HONOURABLE JUSTICE K. PETER RICHARD,	)	
	)	MATTHEWS, J.A. (Orally)
Respondent	)	