

NOVA SCOTIA COURT OF APPEAL
Citation: *Nova Scotia v. Roué*, 2013 NSCA 94

Date: 20130827
Docket: CA 412639
Registry: Halifax

Between:

Her Majesty the Queen in right of the Province of Nova Scotia
And Lengkeek Vessel Engineering Inc., Lunenburg County
Shipwrights Incorporated, carrying on business as Covey Island
Boatworks, Lunenburg Foundary & Engineering Incorporated,
Lunenburg Shipyard Alliance Limited, MHPM Project Managers
Incorporated, and Snyder's Shipyard Limited

Appellants

v.

Joan Elizabeth Roué and Lawrence James Roué

Respondents

Judges: MacDonald, C.J.N.S.; Saunders and Fichaud, JJ.A.
Appeal Heard: June 11, 2013, in Halifax, Nova Scotia
Held: Leave to appeal granted in part. Appeal dismissed with all-inclusive costs on appeal of \$1,500 payable to the respondents, per reasons for judgment of MacDonald, C.J.N.S., Saunders and Fichaud, JJ.A. concurring.
Counsel: Steven B. Garland and Kevin K. Graham, for the appellants
Edward A. Gores, Q.C., for the appellant, Her Majesty the Queen in Right of the Province of Nova Scotia
Robert G. Belliveau, Q.C. and Michael Blades, for the respondents

Reasons for judgment:

Overview

[1] The Supreme Court of Nova Scotia has recently revamped its rules with a view to making the civil litigation process more affordable and less time consuming. In doing so, it recognized that not every factual dispute required the existing action model, premised on a comprehensive pre-trial disclosure regime and the conventional trial process where all witnesses are examined and cross-examined in court. Instead, in appropriate circumstances, these traditional safeguards could be relaxed in the interest of efficiency and cost effectiveness, while maintaining fairness in the fact-finding process. A new rule – Rule 5.07– was created to accommodate this new approach. It is known as an “application in court” and in this appeal we are asked to consider when it should be used.

Background

[2] This litigation involves the schooner *Bluenose*, Nova Scotia’s pride and joy. She was launched in 1921 in Lunenburg and her undefeated record made her a world renowned racing vessel. So great was her fame that she continues to adorn the Canadian dime.

[3] The respondents are descendants of the vessel’s original designer, William J. Roué. As such, they claim copyright interests and moral rights to his design drawings.

[4] Sadly, in 1946, the *Bluenose* came to a tragic end. She struck a reef off Haiti and sank. However, in 1963, a *Bluenose II* was constructed, with access to Mr. Roué’s original drawings, for which he was compensated. Then, in 1971, ownership of the *Bluenose II* was transferred to the Province. Unfortunately, it eventually fell into disrepair.

[5] Then, in 2010, the Province began a project that forms the subject matter of these proceedings. In fact, the actual nature of the project is central to this dispute. For its part, the Province asserts that it is merely restoring its *Bluenose II*. The respondents, however, assert that the Province, with the services of the other appellants, is creating an entirely new vessel based upon the lines of the original *Bluenose*. This, say the respondents, represents an infringement of their copyright and moral rights.

[6] Consequently, the respondents have sued the Province (and other appellants involved in this project) for a variety of remedies including damages. They have used the new Rule 5.07 to advance their claim. In response, the appellants filed a preliminary motion to change this application into a traditional action. In the process, they rely on a new supplementary Rule 6.02 – which allows a motions judge to convert a Rule 5.07 application into an action and vice versa. The appellants also sought to strike (or alternatively to obtain better particulars on) certain portions of the claim. Justice Peter P. Rosinski of the Supreme Court of Nova Scotia dismissed these motions (2013 NSSC 45).

[7] The appellants, in a joint submission, now ask this Court, firstly, to grant leave to appeal and then to overturn this ruling. In so doing, they raise the following comprehensive grounds of appeal:

...

- (4) In rendering his decision on the motion for conversion pursuant to Civil Procedure Rule 6.02, Mr. Justice Rosinski erred in fact and in law by:
- (a) failing to consider and properly apply the relevant jurisprudence in respect of motions for conversion pursuant to Rule 6.02;
 - (b) incorrectly concluding that the presumption in favour of an action under Rule 6.02(4)(b) was not present in the circumstances of this proceeding including by:
 - (i) adopting too narrow an interpretation of Rule 6.02(4)(b);
 - (ii) concluding that the “core factual issues” in the proceeding are likely to be determined by expert witnesses; and
 - (iii) concluding that the expert witnesses in the proceeding would be identified “early on” contrary to the only evidence before the Court that none of the parties had to date identified their experts; and
 - (c) incorrectly concluding that the application procedure was the most appropriate manner of proceeding having regard to the factors in Rules 6.02(5) and (6), by:

Rule 6.02(5)(a)

 - (i) concluding that the parties can quickly ascertain who their important witnesses will be, which was:
 - contrary to the evidence before the Court and Mr. Justice Rosinski’s own conclusion that the Respondents had underestimated the number of

witnesses required and thus had not identified all of their fact witnesses;

- contrary to the uncontradicted evidence that the Appellants were not yet in a position to identify all of their fact witnesses;
- contrary to the evidence that all of the parties had not yet identified their expert witnesses; and
- based upon the irrelevant consideration that the controversy between the parties was identified as early as 2009;

Rule 6.02(5)(b)

(ii) concluding that the parties can be ready to be heard in months rather than years, including by:

- relying upon his incorrect conclusion that the parties can quickly ascertain who their important witnesses will be;
- failing to properly take into account the number of procedural steps that the parties agreed were necessary in the proceeding including the production of documents and conducting oral discoveries of nine separate parties; and
- failing to consider the number and complexity of the issues raised by the pleadings, including the separate allegations of infringement of copyright and moral rights against the seven separate Appellants; the allegations of conspiracy; the unspecified general damages claim; the allegations of high-handed conduct and bad faith in support of a claim for punitive damages; the issues of validity and ownership of the asserted copyright and moral rights and quantification of damages and profits;

Rule 6.02(5)(c)

(iii) concluding that the hearing is of predictable length and content, including by:

- finding that the proceeding could be heard in 8 days or less after first concluding that the length of the hearing could not be predicted;
- ignoring the fact that none of the parties were able to provide an estimate of the duration of the hearing or its contents; and

- incorrectly concluding that the content of the hearing is predictable since the controversies were well defined in the pleadings and information filed to date;

Rule 6.02(5)(d)

- (iv) concluding that credibility of witnesses can be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony and cross-examination, including by:
- restricting his analysis to expert evidence;
 - failing to consider the credibility issues arising from the particular copyright and moral rights infringement allegations made as against the seven separate Appellants; the allegations of conspiracy; the unspecified general damages claim; the allegations of high-handed conduct and bad faith in support of a claim for punitive damages; the issues of validity and ownership of the asserted copyright and moral rights and quantification of damages and profits; and
 - failing to consider that there is no order presently permitting direct testimony to be presented *vive voce* on the application;

Rule 6.02(6)

- (v) concluding that the relatively greater costs and delay of an action/trial is significantly more likely than not in this proceeding, including by:
- failing to take into account the all of the procedural steps that the parties agreed were necessary in an application proceeding; and
 - failing to consider the Appellants' agreement to case management if the proceeding was converted to an action; and

Other Factors

- (vi) considering the Respondent Mr. Roué's failing health/age when there was no evidence filed by the Respondents on the motion demonstrating the importance of his testimony to the proceeding and failing to take into account that there are other procedures available to preserve his testimony for use at trial.

- (5) In rendering his decision on the motion to strike certain portions of the Second Amended Notice of Application pursuant to Civil Procedure Rules 13.03 and/or 88.02, Mr. Justice Rosinski erred in fact and in law by incorrectly refusing to strike:
- (a) paragraph (b)(v) notwithstanding that the Second Appeal Notice of Application is devoid of any allegations of fact upon which a Court could conclude that either of the Respondents have any rights in the name “Bluenose”;
 - (b) paragraph 35 that alleges that each of the Appellants have “co-ordinated and conspired” together in view of his conclusion that the tort of conspiracy had not been alleged by the Respondents; and
 - (c) paragraph 10 and the entire claim against the Appellant MHPM Project Managers Inc. (“MHPM”) by incorrectly concluding that the Second Amended Notice of Application disclosed a reasonable cause of action against MHPM, including by incorrectly concluding that MHPM is claimed by the Respondents to be a member of the “consortium” alleged to have infringed copyright by reconstructing the BLUENOSE II schooner when there is no such allegation in the pleading.
- (6) In rendering his decision on the motion for particulars of certain portions of the Second Amended Notice of Application pursuant to Civil Procedure Rule 38.10, Mr. Justice Rosinski erred in fact and in law by concluding that particulars of the allegations in paragraph 35 and the allegations against MHPM should not be ordered.
- (7) The Appellants rely upon section 40 of the *Judicature Act*, R.S.N.S., c. 240, sections 2, 3, 6, 13, 14.1, 14.2, 27, 28.1, 28.2, 34, 35, 38.1, 39.1, 41 (as it read on October 9, 2012), 60 and 64.1 of the *Copyright Act*, R.S.C., 1985, c. C-42, section 23(3) of the *Copyright Act*, R.S.C., 1985, c. 10 (4th Supp.), section 17 of the *Interpretation Act*, R.S.C., 1985, c. I-21 and Rules 6.02, 13.03, 88.02, 38.10, 90.04, 90.09 and 90.13 of the *Nova Scotia Civil Procedure Rules*.

Analysis

Leave to Appeal

[8] Because this is an interlocutory appeal, the appellants must first obtain leave to appeal (*Judicature Act*, R.S.N.S., 1989, c. 240, s. 40). To do so, they must establish that their grounds at least raise an “arguable issue” (**Hartling v. Nova Scotia (Attorney General)**, 2009 NSCA 130, at ¶ 135-137).

[9] Paragraphs 1 to 4 of the appellants' grounds deal with the judge's refusal to convert this application to an action. This is the first time our Court has been asked to consider this new process, which involves a comprehensive set of criteria for the motions judge to consider. For this reason alone, I would grant leave to appeal.

[10] However, I see no arguable issue for the appellants' grounds dealing with the judge's refusal to strike certain aspects of the pleadings or, in the alternative, to order further disclosure. In reaching this conclusion, I need look no further than the judge's comprehensive reasons (exceeding 12 pages) for refusing this relief. Specifically, he correctly set out the applicable law. He then accurately identified the parties' respective positions for each issue. Then, in painstaking detail, he explained why he was exercising his discretion to reject each of these requests. In short, we are essentially invited to consider this aspect of the motion as though we were hearing it in the first instance without any deference to the motions judge. That, of course, is not our role.

[11] I would therefore deny leave on this aspect of the appeal and turn to the appellants' main focus – the judge's refusal to convert this motion to the traditional action.

The Refusal to Convert

Standard of Review

[12] First, I will consider the appropriate standard of review.

[13] In denying the appellants' conversion application, the judge was exercising discretion on an interlocutory matter. As such, he is entitled to deference and we would interfere only in the face of an error in principle or a patent injustice. See: **Innocente v. Canada (Attorney General)**, 2012 NSCA 36 at ¶ 26 to 29.

The Applicable Rules

[14] At this stage it would be helpful to consider the applicable provisions, which in turn are premised on one overarching goal – “the just, speedy, and inexpensive determination of every proceeding” [Rule 1.01].

[15] I begin with Rule 5.01 which identifies various procedural options short of the traditional action. Note that the subject “application in court” is billed as “a flexible and speedy alternative to an action”:

5.01(1) As provided in these Rules, an application is an original proceeding and a motion is an interlocutory step in a proceeding.

(2) This Rule provides for an *ex parte* application, an application in chambers, and an application in court.

(3) The application in chambers is heard in a short time, and it is scheduled at a time when chambers is regularly held or at an appointed time.

(4) The application in court is for longer hearings, and it *is available, in appropriate circumstances, as a flexible and speedy alternative to an action.*

(5) A person may make an application or respond to an application, in accordance with this Rule, except an application in a family proceeding is made and responded to as provided in Part 13 - Family Proceedings.

[Emphasis added.]

[16] Here then are the comprehensive provisions for an “application in court”:

Application in court

5.07(1) A person may make an application in court by filing a notice of application in court.

(2) A person who files a notice of application in court must, in the notice, provide for a motion for directions to be given by a judge, including the appointment of a time and date for the application to be heard.

(3) The date for hearing the motion for directions must be no more than twenty-five days after the day the notice of application is filed.

(4) The motion for directions must be supported by an affidavit, which may be an affidavit of counsel, addressing all of the following:

- (a) whether there are any persons who are not parties but who may have an interest in the matters raised by the application;
- (b) whether the list of possible witnesses in the notice of application is complete;
- (c) the extent to which the applicant has disclosed documents and electronic information to the respondents and, if disclosure is not complete, the applicant’s plan for completing disclosure;
- (d) whether the applicant anticipates discovering any witness;
- (e) if the application will involve a series of hearings, an estimate of the number of hearings and when each could occur;

- (f) if the application concerns events that are unfolding, a description of the events and the expected course of the events;
- (g) if the application concerns alleged rights that could be eroded over time, an explanation of the rights, how they may be eroded, and the consequences for the applicant;
- (h) all information known to the applicant that could significantly affect the estimate of time needed to prepare for the hearing and the length of the hearing itself.

(5) A notice of application in court must be entitled “Notice of Application in Court” and otherwise include everything required in a notice of application in chambers, with each of the following modifications:

- (a) instead of a reference to each affidavit relied on, it must identify the witnesses whose affidavit the applicant intends to file and describe the subjects about which each witness could give evidence;
- (b) it must include a notice of a motion for directions and to appoint the time, date, and place for the application to be heard, and a reference to the affidavit filed in support of the motion;
- (c) it must notify the respondent of the deadline for the respondent to file a notice of contest and that the judge may proceed with the motion if the respondent, or counsel for the respondent, does not attend the hearing;
- (d) the statement about proceeding in the absence of the respondent must refer to attendance at the hearing of the motion for directions.
- (6) The notice of application in court may be in Form 5.07.

Notice of contest of application in court

5.08(1) A respondent who wishes to contest an application in court must file a notice of contest no more than fifteen days after the day the respondent is notified of the application in accordance with Rule 31 - Notice.

(2) A notice of contest for an application in court must be entitled “Notice of Contest (Application in Court)” and otherwise include everything required in a notice of application in chambers, except instead of a reference to an affidavit, it must identify the witnesses whose affidavit the respondent intends to file, identify all other possible witnesses known to the respondent not already identified by the applicant, and describe the subjects about which each identified witness could give evidence.

- (3) The notice of contest of an application in court may be in Form 5.08.

Motion for directions and to appoint time, date, and place

5.09(1) A motion for directions may be heard in chambers, by appointment, or by conference, as the prothonotary or a judge directs.

- (2) The judge who hears a motion for directions may do any of the following:
 - (a) permit an amendment to the notice of application or notice of contest;
 - (b) ascertain whether there are interested persons who are not parties and, if necessary, adjourn the motion until an interested person is made a party;
 - (c) ascertain the extent to which parties have searched for and made disclosure of documents, electronic information, or other evidence and, if necessary, order disclosure;
 - (d) order discovery, limit the time for discovery, and direct who may discover whom;
 - (e) ascertain witnesses from whom each party is likely to produce an affidavit, inquire into any requirement for cross-examination of a likely witness;
 - (f) order a party to produce an intended affiant as a witness to be cross-examined at the hearing, or out of court with a transcript;
 - (g) limit the duration or subjects for cross-examination;
 - (h) determine whether an expert opinion may be admitted and order disclosure;
 - (i) permit a witness to testify instead of swearing or affirming an affidavit and order disclosure of the witness' anticipated evidence, such as by ordering delivery of a will say statement, or order discovery of the witness;
 - (j) ascertain whether it is likely that there will be evidentiary issues the court must determine;
 - (k) set dates for filing the applicant's affidavits, the respondent's affidavits, any applicant's rebuttal affidavits, the applicant's brief, the respondent's brief, and a reply brief;
 - (l) set the time, date, and place for the hearing of the application;
 - (m) if the application requires a series of hearings, determine whether the same judge should preside in court over each hearing and either set dates for

each hearing or set the date for the first hearing and leave further scheduling to the court;

- (n) give any other directions or make any order needed to organize the application.
- (3) A judge may amend or supplement directions.

[17] In reviewing these provisions, I note several key features that serve to make this process more efficient than the traditional action. They include:

- early case management by way of the mandatory motion for directions [Rule 5.07(3)].
- dates for the hearing proper being set from the outset [Rule 5.09(2)(l)].
- flexibility regarding the extent of pre-hearing disclosure [Rule 5.09(2)(c)].
- flexibility regarding the extent of discovery hearings [Rule 5.09(2)(d)].
- flexibility regarding the extent of cross-examination [Rule 5.09(2)(f) and (g)].
- evidence-in-chief proceeding by way of affidavit [Rule 5.09(2)(e)].
- deadlines for the filing of affidavits [Rule 5.09(2)(k)].

[18] In short, this process commands aggressive case management where all pre-hearing procedures are tailored to meet predetermined pre-hearing dates. In **Guest v. MacDonald**, 2012 NSSC 452, Moir J. made similar observations:

¶23 The application provides judicial management, and assignment of dates for the hearing, at the beginning. The action, with some exceptions such as case management, leaves the litigation in the hands of the parties until one of them calls for trial dates. Judges who give directions at the beginning of applications, and judges who set trial dates, need as much information as can be given to measure the amount of time required for the hearing or trial and when the parties will be ready. But, the judge who gives directions also needs to be able to set a path over a short distance for disclosure, production of affidavit evidence, discovery, out-of-court cross-examination, and so on. The presumption in this Rule recognizes that an application has a problem with a party who legitimately holds cards close to the chest.

[19] This new process, therefore, can serve as a very efficient tool, in appropriate circumstances. However, when considering its virtues, we must also be mindful that enhancements have been made to the action process. Murphy J. makes this point in **Monk v. Wallace**, 2009 NSSC 425:

¶15 Although the expanded application route under the Rules is intended to offer prompt and more economical relief to parties who qualify for an application procedure, the Rules now also provide a more streamlined action procedure. Ms. Monk will not necessarily be subjected to inordinate delays and procedural hurdles because this matter will be determined through an action rather than by application. The action procedure now allows parties to identify trial dates much earlier in the process, involves less discovery examination, and facilitates the parties' cooperation to exchange information and have matters determined promptly. This case raises many disputed issues, and if the parties are unable to resolve their dispute by out-of-court settlement, I am convinced that the Respondents are entitled to the safeguards and benefits provided by trial procedures, which the Court also needs to fully assess all the issues.

[20] In any event, disagreements as to the appropriate process are to be resolved by way of a motion to convert under Rule 6.02. Note its general presumption favouring applications [6.02(2)]:

6.02(1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.

(2) *A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.*

(3) An application is presumed to be preferable to an action if either of the following is established:

- (a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application;
- (b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.

(4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:

- (a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;
 - (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.
- (5) On a motion to convert a proceeding, factors in favour of an application include each of the following:
- (a) the parties can quickly ascertain who their important witnesses will be;
 - (b) the parties can be ready to be heard in months, rather than years;
 - (c) the hearing is of predictable length and content;
 - (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.
- (6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

[Emphasis added.]

[21] With this backdrop, I now turn to the decision under review.

The Decision Under Review

[22] At the outset, I note that the judge displayed a clear understanding of the issues that would be at play in the hearing proper:

¶11 What is evident from those pleadings and the oral arguments made at the hearing herein is that from the Roués' perspective, the Bluenose II restoration is in relation to the same vessel that William J. Roué created/designed in 1921 and their copyright and moral rights in the copyright work remain viable and are being infringed/violated by the actions of the Respondents.

¶12 On the other hand, the Respondents question whether William J. Roué's creation/design of the Bluenose was original, was capable of copyright by anyone, and by him specifically. Even if it was, they argue that he was compensated for any use made of his drawings in the construction of Bluenose II, which was not a replica (using a "substantial portion" standard) of the Bluenose. Moreover, the Respondents say that neither of the Roués have any copyright or moral rights in the copyright work for a number of other reasons.

...

¶14 Copyright entitlements are sourced in the *Copyright Act*, R.S.C. 1985, c. C-42, as amended.

¶15 The Roués argue that the Respondents have **either** violated the copyright by recently causing a substantial reproduction (called Bluenose II) of the Bluenose to be created in violation of s. 27 of the *Copyright Act*, **or** violated the moral rights in the “work” by naming the vessel Bluenose II, should it not be a substantial reproduction of the Bluenose, contrary to ss. 14.1 and 28.2 of the *Copyright Act*.

¶16 To have a copyright infringement, the claimant must establish that a substantial copy was created of a copyright protected work, and that the disputed new work is not the product of independent design and creation.

¶17 The Respondents argue that the copyright claimed in the two pages of drawings of the design of the Bluenose attached to the Notice of Application are not violated by the new vessel/Bluenose restoration in part because:

- (i) William Roué’s design was not original or new;
- (ii) it was not legally possible in 1921 to copyright those designs;
- (iii) the name “Bluenose” is not included in the copyright because the title of the work is not “original and distinctive” nor, if it is inferred to be part of the “work,” has this specific claim been pleaded as it must be;
- (iv) the copyright has not been properly/legally transferred to Joan Roué;
- (v) the restoration of the Bluenose II is not a substantial reproduction of the Bluenose; it is an independent design by Marius Lengkeek, a designer and namesake of Lengkeek Vessel Engineering Inc., and not derived from the Bluenose drawings attached to the pleadings of the Applicants; and if the Bluenose design was used it was only “dictated by a utilitarian function of the article - s. 64.1, *Copyright Act*.”

...

¶20 In so far as the claimed infringement of the moral rights to the work are concerned the Respondents argue that:

- (i) the moral rights have not been properly/legally transferred to Lawrence Roué;
- (ii) the moral rights have not been violated due to the defence in s. 28.2(3)(b) of the *Copyright Act* - i.e. “steps taken in good faith to restore or preserve the work shall not by that act alone, constitute a distortion, mutilation or other modification of the work”;

- (iii) the test of infringement of moral rights in a work, as set out in the case *Prise de Parole Inc. v. Guérin, Éditeur Ltée* (1995), 66 C.P.R. (3d) 257 (FCTD), at paras. 25 - 28, cannot be met by the Applicants in the case at Bar.

¶21 Also relevant is the “counterclaim” that the Respondent Province would file if the Application in Court is converted to an action - see paras. 16 and 75 of its Brief. It is suggested in the evidence and pleadings that the Applicants, by proceeding with their Application, have “breached agreements with the Province,” and that such breaches cause this proceeding to constitute an abuse of process as referred to in CPR 88.02.

¶22 The Respondents finally argue in their Notice of Contest that an otherwise successful claim by the Applicants is precluded due to a combination of a s. 41(1) *Copyright Act* limitation period, the doctrine of estoppel, and laches/acquiescence.

[23] The judge then carefully reviewed all available case law and academic commentary regarding these relatively new provisions.

[24] Then, the judge turned to the Rule’s enumerated factors that favour either an application or an action. First, he found no factors favouring an application [Rule 6.02(3)]:

¶63 Regarding stage 1 - [when an application is presumptively favoured] I find that an application is not presumptively favoured:

- a - though the Applicants have made a claim for injunctive relief, given that there is an insufficient basis for them to argue that substantive rights will erode significantly more under the action process; and whereas
- b - only one hearing is anticipated.

[25] At the same time, he found no factors favouring an action [6.02(4)]:

¶64 Regarding stage 2 - [when an action is presumptively favoured] I find that an action is not presumptively favoured:

- a - no party seeks a jury trial; and
- b - it is not unreasonable “to require a party to disclose information about witnesses early in the proceeding” because the core factual issues herein are likely to be determined by expert witnesses who normally are identified early on and will be called to testify about the significance to the claimed intellectual property [copyright and moral] rights arising from the Asserted Drawings by William J. Roué and their similarity with the Bluenose II and the restored

Bluenose II. The remaining core issues, even according to the “Summary of Issues” in Kevin Graham’s affidavit, are focused on legal questions such as: when, if at all, copyright was effected; were those rights validly transferred to the Applicants; and are they still exercisable in light of any alleged agreements the Applicants have made with the Province, or are they barred by a limitation period, or a form of estoppel, to cite some examples. While expert witnesses may need to be retained, and reports/affidavits will be produced, in my opinion, such advance work will greatly focus the inquiries at the hearing, saving time and expense. Furthermore, much expense could be saved if the parties instruct their counsel to make at least some of the many numerous factual agreements possible which could significantly reduce the need for affidavit evidence to be presented. Such reasonableness, which can only be hoped for as it cannot be guaranteed, is more likely if the parties are well aware of the witnesses and evidence that each anticipates presenting. After all, each of the parties have an interest in the “success” of the restoration, using that term in its broadest sense.

[26] The judge then considered the Rule’s four additional criteria that would favour an application [Rule 6.02(5)], beginning with the ability to identify important witnesses:

¶67 Regarding CPR 6.02(5):

- (a) - given that the parties have been aware of the legal controversy herein and have had communications since late in 2009 [see paras. 10 and 11 of William E. Greenlaw’s affidavit sworn January 2, 2013], they would likely have already turned their minds to ascertaining who their **important** witnesses would be should the matter proceed to litigation - the Application and Notice of Contest already contain some witness names [see para. 7 of William E. Greenlaw’s affidavit sworn January 2, 2013 for the Respondents], and while experts are expected to testify and some are as yet unnamed (the sorts of expected expertises required are identified by the Respondents in their expert witness summary in their Notice of Contest and the “Summary of Issues” appended to Kevin K. Graham’s November 30, 2012 sworn affidavit at paras. 4 and 10 thereof), their opinions will be based primarily on documented evidence such as the drawings/parameters, etc., of each of the Bluenose, Bluenose II and the restored Bluenose II. Therefore, the evidence of at least some of these witnesses is well suited to affidavits, and such witnesses should be relatively simple to identify in quick order. I note that when I asked Mr. Garland at the hearing about expert evidence he

suggested the core issue herein is: “are the Marius Lengkeek drawings an infringement of the copyright” asserted by the Roués? He suggested further that Lengkeek and maybe one other designer would be the key witnesses for the Respondents on this issue, though surprisingly the other designer is not identified as a witness in the Notice of Contest. The Applicants have identified themselves and “experts” as witnesses. I infer that they similarly have identified who are their important (lay and expert) witnesses;

[27] This assessment informed his analysis of the second factor, prompting him to conclude that the parties could be ready in months as opposed to years:

6.02(5)(b) - Given my above-noted conclusion, I find that the parties can be ready to be heard in months rather than years if they are reasonable in their assessment of, and approach to, this litigation - further directions from the Court will go a long way to fashion reasonable expectations and timelines which should greatly increase the likelihood that the proceeding can be heard relatively quickly (even if the Province wishes to file a separate Notice of Application in Court to argue its “counterclaim”). I appreciate that Mr. Belliveau suggested that if disclosure could be completed within one month, discoveries could be completed in three months as all the witnesses were local; Mr. Garland later suggested eight months would be required to finish discoveries after disclosure was completed;

[28] Turning to the third factor, the judge conceded difficulty with accurately estimating the length of the hearing but, based on the clear issues at play, he remained confident that this could be reasonably achieved down the road.

6.02(5)(c) - The length of the hearing cannot be predicted with great certainty at this juncture, but its content is predictable since the controversies (i.e. the nature of the legal issues and expected evidence) are well defined in the pleadings/information filed to date and, at the Motion for Directions yet to be heard, the parties will not doubt assist the Court in more precisely estimating the expected length of the hearing;

[29] Then turning to the fourth factor, the judge concluded that an application would allow credibility to be satisfactorily assessed (while still leaving open the possibility of oral direct evidence):

6.02(5)(d) - credibility can be assessed satisfactorily by considering the whole of the evidence to be presented at the hearing (which by leave of

the court could exceptionally include viva voce direct evidence, e.g. for experts whose evidence would best be understood explaining their opinions using demonstrative evidence). The weight to be given to the expert opinion evidence will likely be fundamental to the determination of most, if not all, of the identified issues in the proceeding, and cross-examination is a potent tool to test the strength of their opinions.

[30] Then, as the Rule prescribes, the judge compared the potential cost and delay of an application as opposed to an action. In his view, this assessment favoured an application:

¶68 Regarding CPR 6.02(6) - I note that the Respondents have the burden ultimately pursuant to CPR 6.02(2) to satisfy the Court of its position. I also accept that I must compare “the new application with the newly streamlined action” per Moir, J., at para. 13 in *Guest*. Nevertheless, the relatively greater cost and delay of an action/trial is a significantly more likely risk than not in this case. The Application in Court process is designed to be a more customized and court driven process, which generally, and specifically in this case, will provide the necessary structure that will tend to ensure that the application will proceed in a quicker and less expensive manner than an action [in spite of the option for structure that case management gives in the case of actions CPR 26.02].

[31] Finally, all these factors were placed in the deliberation hopper, with the result favouring an application:

¶82 In summary, I conclude that the Applicants have underestimated the number of witnesses they will require, and that the Respondents have suggested by their representations (written and oral) a greater number of witnesses will be required than in my view are likely necessary. Moreover, in spite of the existence of this controversy since 2009, and the suggested complexity of the dispute, the Respondents have identified among their specific witness names in their Notice of Contest, Mr. Greenlaw and Ms. Walker. Their evidence is collateral to the core dispute here, as is that of Messrs. Kinley, Hutchinson, Croft and Daniels, who are all to give factual evidence of “the activities ... [of their Respondent employers] in the restoration project of Bluenose II.” Only Marius Lengkeek is listed as a witness to speak to the core dispute here. In spite of filing affidavits in support of this Motion, they have provided no further witness names therein. I find such lack of detail suggests that I should have less confidence in their generalized estimates: of the number of witnesses required; the complexity of the evidence likely to be presented; and the length of time required to complete a hearing to resolve the core issues in dispute.

¶83 The burden of persuading me that an action is a preferable means of proceeding is on the Respondents.

¶84 In my view, given the limitations that I face in assessing this Motion for Conversion at this time, I conclude that this Application in Court can be heard in eight days or less.

¶85 While eight days seems a long time, I have kept in mind that, the Application in Court is akin to a summary trial which can be heard relatively quickly - and such a process will better achieve the object in Rule 1.01 of a “just speedy, and inexpensive determination” of this dispute. I keep in mind that the evidence of Lawrence Roué’s failing health/age, given his status as a party and a key witness, militates toward choosing the speedier means of proceedings to resolution.

¶86 In summary, therefore, I conclude that neither proceeding is presumptively favoured in the circumstances as I have them before me, however, the factors in CPR 6.02(5) and (6) are collectively compelling to satisfy me that an Application in Court is the most appropriate manner of proceeding in this case.

Conclusion

[32] From the above passages, it is obvious to me that the judge engaged in a careful and comprehensive analysis. He considered each of the many criteria set out in Rule 6.02. He nourished his analysis with academic commentary and the relevant jurisprudence offered by his Supreme Court colleagues. He then weighed the pros and cons before making the call. I can find nothing wrong in either his analysis or with his result.

[33] I say all this, despite the appellants’ valiant efforts to convince us that the judge erred in the process. For example, they take issue with his finding [under Rule 6.02(4)(b)] that it would not be unreasonable to have early disclosure of witness information (thus negating one of the criteria favouring an action). Here they essentially assert that the judge misapprehended the serious nature of a copyright/moral rights action. I refer to their factum:

61. Moreover, Mr. Justice Rosinski, in considering Rule 6.02(4)(b), concluded that “the core factual issues herein are likely to be determined by expert witnesses who normally are identified early on” and that the remaining core issues “are focused on legal questions”. In so concluding, Mr. Justice Rosinski misapprehended both the issues in suit and the factual breadth of the copyright and moral right infringement allegations.

Rosinski Decision, para. 64b, AppealBook, Vol. I, Tab 3, pages 35 - 36.

62. As referenced above, fundamental factual evidence in respect of the allegations of infringement will include whether the allegedly infringing works were independently created by the Appellants and whether the activities of the Appellants have distorted, mutilated or otherwise modified the Asserted Drawings to the prejudice of the honour or reputation of the author.

63. Overall, Mr. Justice Rosinski's conclusion with respect to Rule 6.02(4)(b) was as a result of a clear misapprehension of the issues in dispute and the evidence upon which those issues will be resolved.

[34] I disagree. In my view, this judgment reveals a full understanding of both the legal issues at play and the type of evidence required to address these issues. In fact, the judge accepted the very list of issues proposed by the appellants, incorporating it into his decision as Appendix "C".

[35] Later in their factum, the appellants continue this theme, highlighting how the respondents' serious allegations may significantly attack their credibility and reputations:

86. However, his Lordship concluded that credibility can be assessed "satisfactorily" by way of an application (which does not permit, without leave, *viva voce* testimony of the witness in chief ²) by considering the whole of the evidence to be presented at the hearing.

²Mr. Justice Rosinski recognized that *viva voce* direct evidence on an application was "exceptional", see: Rosinski Decision, para. 67d, AppealBook, Vol. I, Tab 3, page 37.

87. In reaching this conclusion, Mr. Justice Rosinski restricted his analysis to the parties' potential experts. Thus, he failed to consider the importance of the credibility of the parties' fact witnesses.

Rosinski Decision, para. 67d, AppealBook, Vol. I, Tab 3, page 37.

88. In particular, as referenced above, an allegation of copyright infringement is akin to an allegation of theft. As such, these are serious allegations that potentially bear on professional reputations and livelihoods. The evidence of the Appellants' witnesses, including that of the Lengkeek designers, to explain and defend their activities, will be a fundamental part of the defence to the copyright infringement allegations. The Appellants should have the opportunity, as of right, to appear in court and to tell their story *viva voce* as part of their evidence in chief in order to fully defend themselves.

89. Additionally, the Respondents have called into question the conduct and activities of the Appellants by way of allegations of conspiracy, bad faith and high-handed conduct. Again, the Appellants should have the right to defend such allegations in person in front of the trier of fact as part of their evidence in chief.

90. Accordingly, Mr. Justice Rosinski erred in concluding that the credibility issues in this proceeding can be satisfactorily assessed during an application hearing rather than a trial as he misapprehended the facts and failed to take into account relevant considerations.

[36] Again, I see no basis for this assertion. The judge was keenly aware that credibility would be a key issue in this matter. Yet, to address this, he identified cross-examination as a “potent tool” and left open the option of oral direct evidence.

[37] Furthermore, many of these submissions on appeal are essentially the same as those made to the judge in the first instance. For example, in their pre-motion brief, the appellants asserted:

68. As set out in detail above, credibility of the parties’ fact and expert witnesses is fundamental to the determination of the outcome of this proceeding.

69. In addition, the Applicants’ Second Amended Notice of Application calls into question the conduct of the Respondents, including allegations of conspiracy, bad faith and high-handed conduct. As such, the Respondents ought to be provided the opportunity to present evidence to refute these allegations *viva voce* in front of the judge hearing the matter.

70. Overall, the credibility issues in this proceeding cannot be satisfactorily assessed during an application hearing rather than a trial. As such this factor also mitigates in favour of an action.

Leigh v. Belfast Mini-Mills Ltd., 2011 NSSC 300 at para. 109, BOA Tab C11.

[38] In other words, we are being invited on appeal to consider many of these issues anew, as though we were hearing the matter in the first instance. That is simply not our role.

[39] The appellants also challenge the judge’s reliance on the fact that this dispute had a history going back to 2009, thereby prompting him to conclude [under Rule 6.02(5)(a)] that it would be easier to identify potential witnesses. They argue in their factum:

70. It also appears that Mr. Justice Rosinski’s conclusion was improperly influenced to a considerable extent by his finding that the parties have been aware of the legal controversy in this proceeding since late in 2009.

Rosinski Decision, paras. 67a, Appeal Book, Vol. I, Tab 3, pages 36 - 37.

71. First, the fact that the parties may be discussing matters in advance of the commencement of a proceeding is irrelevant to a consideration of whether a

matter is best to proceed by way of an action. This proceeding was only commenced in October 2012. It does not follow that a party would, or should, engage in the time, effort and expense of hiring counsel, making all the necessary factual investigations, identifying all potential fact witnesses and retaining all necessary experts prior to the commencement of a proceeding, especially when there has been significant delay on the part of the complainant in commencing a proceeding.

72. Second, to the extent any discussions since 2009 involved a possible resolution of the dispute, those communications would have been on a “without prejudice” basis. Thus, it is improper for the Court to rely upon those discussions to the prejudice of the Appellants in dismissing their motion.

73. Third, the only evidence before the Court was that the Province and the Respondents had been discussing the legal controversy since late 2009. There was no evidence before his Lordship that the other six Appellants had been aware of the controversy prior to the commencement of the proceeding in October 2012.

Rosinski Decision, para. 67a, Appeal Book, Vol. I, Tab 3, pages 36 - 37.

74. As such, Mr. Justice Rosinski’s conclusion on the factor set out in Rule 6.02(5)(a) was contrary to the evidence before him, inconsistent with other conclusions made by him as well as being based upon irrelevant and/or improper considerations such as the prior discussions between the parties.

[40] Respectfully, this submission invites us to hold the judge to an unrealistic standard of perfection. For example, consider the criticism that the controversy was discussed only by representatives of the appellant Province and not by all the appellants. This ignores the fact that, in making this observation, the judge was relying on the affidavit of Mr. William E. Greenlaw, an executive director within the Provincial Department of Communities, Culture and Heritage. He was the appellants’ own witness who swore his affidavit not just on behalf of the Province but (at ¶ 13) “in support of [all the appellants’] motion to convert...”. In this context, I see nothing wrong with the judge adding this factor into the mix.

[41] As well, the appellants take issue with the judge’s estimate of an eight-day hearing when earlier he had highlighted the difficulties in predicting how much time would be needed. They argue in their factum:

82. However, later in his decision his Lordship finds that the matter can be heard in 8 days or less “given the limitations that I face in assessing this Motion for Conversion at this time”. This is clearly inconsistent with his earlier finding and the submissions of the parties. In addition, this conclusion appears to be based, at least in part, on a finding of a “lack of detail” provided by the Appellants on the identification of all of their potential witnesses.

However, the Appellants had identified seven specific witnesses and provided a summary of the evidence of other witnesses that had not yet been identified because it was early in the proceeding.

Rosinski Decision, paras. 67c and 84, Appeal Book, Vol. I, Tab 3, pages 37 & 43.

83. In addition, Justice Rosinski concluded that the content of the hearing is predictable since the controversies are well defined in the pleadings and information filed to date. However, the pleadings and materials define the issues; they provide little in terms of guidance regarding the content in the hearing. In particular, while the pleadings define the material facts to be determined at trial, they do not set out the documentary, affidavit or oral evidence by which those material facts will be proved. It is the evidence that will be presented that will dictate the content of the hearing.

Rosinski Decision, para. 67c, Appeal Book, Vol. I, Tab 3, page 37.

84. Overall, the evidence and submissions from both parties was that the hearing was not of predictable length or content as of the date of the motion for conversion. As such, it is submitted that Mr. Justice Rosinski erred in reaching a contrary conclusion.

[42] Here again, the appellants appear to be splitting hairs. The judge candidly acknowledged that the time required would be difficult to predict. But he was aware of the issues at play and the type of evidence required. So, he later gave it his best shot, “given the limitations I face”. I see nothing wrong with that approach.

[43] The appellants also criticize the judge for considering the respondent Lawrence James Roué’s health issues in denying their motion. Again, I refer to their factum:

94. In his decision, Mr. Justice Rosinski concluded that the Respondent Mr. Roué’s failing health/age was a relevant consideration that favoured the matter being determined by application. In so doing, Mr. Justice Rosinski concluded that Mr. Roué was a “key witness”. However, there was no evidence filed by the Respondents to that effect. In particular, there was no evidence as to what, if any, testimony Mr. Roué may provide.

Rosinski Decision, paras. 26 & 85, Appeal Book, Vol. I, Tab 3, pages 21 & 43.

Second Amended Notice of Application, paras. 26 - 28, Appeal Book, Vol. I, Tab 5, page 111.

95. Mr. Justice Rosinski also failed to take into account that there are other procedures available to preserve Mr. Roué’s testimony for use at trial should this be of a concern to the Respondents.

96. Accordingly, it is submitted that Mr. Justice Rosinski's finding that the status of the Respondent Mr. Roué as a "key witness" was not supported by the evidence and should not have been considered.

[44] Yet, again, the appellants seem to be demanding perfection. Mr. Roué's situation was simply something that the judge "kept in mind". In my view, he was perfectly entitled to do so.

[45] In short, there is no reason for the court to interfere with the discretionary decision.

[46] Before concluding, I would like to acknowledge some practical challenges to be faced by the appellants as a result of this ruling. They raised primarily three in oral argument. Firstly, they will have to present their evidence by way of affidavit without first having had the benefit of the discovery process. In other words, if this matter were to proceed by way of an action, they would have the benefit of examining the respondents under oath before committing to their version of events. Secondly, they fear being denied the benefit of calling oral, direct evidence (although the judge has not ruled this out). In other words, given the fact that their reputations will be at stake, they fear that important nuances will be lost with written affidavits as opposed to being able to explain their position orally. Thirdly, they feel rushed in preparing their case because of the tight timelines prescribed by the judge.

[47] I acknowledge that, if time and cost were only incidental factors, then what the appellants characterize as these procedural safeguards for trial fairness might occupy their fullest scope. But time and cost clearly do pertain to the overall objective of access to justice. The motions judge's job under Rule 6.02 is to achieve a balance that shortens time and lessens cost, while ensuring that the proceeding at hand maintains the essential attributes of a fair fact-finding process.

[48] There are some proceedings where the classic trial procedures will be essential. For instance, it may be important that the judge hear the witnesses tell their stories in person, as direct evidence, instead of just reading the ink on the lawyer-assisted affidavits. Or it may be that important evidence rests with unfriendly witnesses, who will not sign affidavits, and must be required to testify by subpoena. These are just examples, not an all-inclusive list. It is for the motions judge, in weighing the criteria under Rule 6.02, to assess whether fairness steps to the fore on such matters, whether the application in court under Rule 5.07 can accommodate the concern with an adjustment to the procedure, or whether it is

preferable, in the interests of fairness, that the matter be tried in the traditional manner.

[49] It would also be of assistance, in motions for conversion under Rule 6.02, for the court to have, in an affidavit, the projected time line to a hearing date, and projected length of hearing and costs of hearing, under both of the alternative scenarios.

[50] In this case, as I have indicated, the judge appropriately considered these factors.

[51] In short, Rule 5.07, in appropriate circumstances, can go a long way to enhance access to justice. It embraces both flexibility and proportionality by allowing the Court to custom design a process that fairly reflects the dynamics of each particular dispute, with the added ability to recalibrate as circumstances demand [Rule 5.09(3)].

[52] Therefore, when, as here, the motions judge assesses all the criteria prescribed in Rule 6.02 and carefully balances the pros and cons according to each individual claim, this Court will be loath to interfere.

Disposition

[53] For all these reasons, I would dismiss the appeal with \$1,500 all-inclusive costs on appeal payable to the respondents.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Fichaud, J.A.