NOVA SCOTIA COURT OF APPEAL

Citation: *Grover v. MacQuarrie's Drugs Ltd.*, 2024 NSCA 8

Date: 20240112
Docket: CA 527283
Registry: Halifax

Between:

Teresa Grover

Applicant

v.

MacQuarrie's Drugs Limited operating under the business name MacKinnon Pharmacy

Respondent

Judge:	Derrick, J.A.
Motion Heard:	January 11, 2024, in Halifax, Nova Scotia in Chambers
Written Decision:	January 12, 2024
Held:	Motions granted, without costs
Counsel:	Peter C. McVey, K.C., and Lyndsay C. Jardine, for the applicant Adam McQuarrie, for the respondent

Decision:

Introduction

[1] On January 11, 2024 the Atlantic Provinces Trial Lawyers' Association (APTLA) brought two motions in aid of a proposed intervention in an appeal by a personal injury plaintiff of an interlocutory order.[1] The appeal concerns production of CCTV footage in a personal injury case. The parties to the matter are Teresa Grover and the respondent. APTLA is an association of personal injury plaintiff lawyers with a mandate for advocacy, law reform, mentoring and legal education. APTLA wants leave to intervene in Ms. Grover's appeal but is out of time. The Association brought a motion for an extension of time and a motion for leave to intervene.

[2] APTLA submits it has a reasonable excuse for missing the filing deadline. It says it can contribute to the Court's understanding of the broader systemic problems that will be created for personal injury cases if the lower court's ruling is upheld. It offers to provide a regional perspective on the implications of the ruling for courts in the other Atlantic Provinces.

[3] The appellant has advised she takes no position on APTLA's motions. Her counsel did not attend the Chambers hearing.

[4] The respondent opposes both motions and seeks costs.

[5] For the reasons that follow, I find APTLA's motions should be granted.

Justice Norton's Ruling

[6] Ms. Grover is seeking to appeal a ruling of Justice Scott Norton of the Supreme Court of Nova Scotia. On September 5, 2023, pursuant to Nova Scotia *Civil Procedure Rule* (*CPR*) 94.09, Justice Scott Norton dismissed her application for production of CCTV footage in the possession of the respondent.[2] The CCTV footage in issue was recorded by the drugstore and is said to capture the incident in which the appellant alleges she was injured. The respondent refused to produce the footage. With reference to *Rule* 94.09, Justice Norton explained the dispute:

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[1] Leave is required to appeal an interlocutory order. I will simply refer to the appellant's application for leave to appeal and appeal as "the appeal".
[2] *Grover v. MacQuarrie's Drugs Ltd*., 2023 NSSC 289.

> [4] On the date of the alleged injury, the Plaintiff was made aware by pharmacy staff that there was closed caption television ("CCTV") recording the events in the store at the time. When it was not listed or produced with the Defendant's Affidavit Disclosing Documents, the Plaintiff specifically requested that it be produced. The Defendant took the position that it was withheld from production pursuant to *Rule* 94.09 "solely for the purpose of impeaching a witness". The Plaintiff filed this motion for production of the CCTV video recording.
>
> [5] At the motion hearing, the Defendant conceded that the video recording is a "document" as defined by *Rule* 14.02; that it is relevant evidence; and that it is not subject to a claim for litigation privilege. The Plaintiff says that in such circumstances, *Rule* 14 requires the CCTV recorded video to be produced. The Defendant says that it has the right to withhold production pursuant to *Rule* 94.09 and that there is nothing in the wording of the *Rule*, the cases that have interpreted the *Rule* or its predecessor rule, that prevents the withholding of the CCTV video in this proceeding.

[7] The judge concluded the respondent was entitled to withhold the footage for the purposes of impeachment of the appellant. He said:

> [31] In conclusion, I find that the Defendant had the right to withhold the CCTV video evidence from production and not list it in the Affidavit Disclosing Documents pursuant to *Rule* 94.09 for the sole purpose of impeachment and subject to the restrictions and potential consequences described above.

[8] The appellant is seeking leave to appeal this ruling.

Issues

[9] There are three issues I have had to decide:

(1) Should I grant APTLA an extension of time for filing its motion for leave to intervene?

(2) Should I grant APTLA leave to intervene?

(3) Should costs be awarded?

[10] In support of its motions, APTLA has filed the affidavit of its Chief Executive Officer, Elizabeth (Libby) Kinghorne. The respondent did not require cross-examination of Ms. Kinghorne.

[11] The respondent says APTLA’s deadline for filing its motion seeking leave to intervene was October 26, 2023—15 clear business days after the appellant filed

her Notice of Application for Leave to Appeal on October 4, 2023. APTLA did not file its motion documents until January 4, 2024.

[12] In addition to the out-of-time issue, the respondent says APTLA has nothing additional to offer this Court in the appeal beyond that which will be argued by the appellant. As for the regional perspective, the respondent says it is irrelevant.

Legal Principles – Motion for Extension of Time

[13] The legal principles governing the motion for an extension of time are not in dispute.

[14] As Chambers judge, pursuant to *Civil Procedure Rule* 90.37(12)(h) I have the discretion to extend the time for the filing of a late motion seeking leave to intervene. In exercising my discretion I must consider the length of the delay, the reason for the delay, the applicant's *bona fide* intention to file within the time limit, the presence or absence of prejudice, and the apparent strength or merit in the proposed intervention.[3] These factors are usually in play in motions for an extension of time to file a late Notice of Appeal. They are equally applicable in the context of APTLA's motion for an extension of time in order to file a motion to intervene.

[15] There is flexibility in how the extension of time factors are weighed and balanced. The fundamental question is whether the interests of justice require the extension of time to be granted.[4]

[16] This Court has made it clear that in the case of motions to extend time to file a late Notice of Appeal, the merits of the appeal are to be taken into account:

> [45]…the ultimate question is whether or not the interests of justice require the extension of time to be granted. It cannot be in the interests of justice to extend time in order for a prospective appellant to pursue an appeal that has no merit…[5]

[17] I am satisfied this consideration applies to a motion to extend time to file a late Notice of Motion for Leave to Intervene. It does not serve the interests of justice to extend time for an applicant to advance an application for leave to intervene where the proposed intervention does not satisfy the requirements for

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[3] *Farrell v. Casavant*, 2010 NSCA 71 at para. 17.
[4] *R. v. R.E.M.*, 2011 NSCA 8 at para. 39 (*R.E.M.*)
[5] *Ibid.*

being granted standing as an intervenor. In my view, the merits of the proposed intervention is the central question to be addressed.

Legal Principles – Motion for Leave to Intervene

[18] There is no dispute about the principles to be applied on a motion for leave to intervene.

[19] In *A.B. v. Bragg Communications Inc*., Justice Farrar set out the content of *Civil Procedure Rule* 90.19 that governs a prospective intervenor:

> [5] Nova Scotia Civil Procedure Rule 90.19 (formerly Rule 62.35) prescribes a procedure to be followed by persons seeking to intervene in appeals. It reads:
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> > 90.19(1) A person may intervene in an appeal with leave of a judge of the Court of Appeal.
> >
> > (2) A judge of the Court of Appeal may make an order granting leave to intervene on terms and conditions the judge sets.
> >
> > (3) A person who wishes to intervene in an appeal may make a motion to a judge of the Court of Appeal for leave to intervene by filing a notice of motion for leave.
> >
> > (4) The notice of motion for leave to intervene must be filed no more than fifteen days after the day the notice of appeal is filed.
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> > (5) A motion for leave must concisely describe all of the following:
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> > (a) the intervenor;
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> > (b) the intervenor's interest in the appeal;
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> > (c) the intervenor's position to be taken on the appeal;
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> > (d) the submissions to be advanced by the intervenor, their relevancy to the appeal, and the reasons for believing that the submissions will be useful to the Court of Appeal will be different from those of the parties;
> >
> > (6) An intervenor's factum must not exceed twenty-five pages, unless ordered otherwise by the Court of Appeal or a judge of the Court of Appeal.
> >
> > (7) An intervenor is bound by the content of the appeal books and may not add to them, unless a judge of the Court of Appeal directs otherwise.

> (8) An intervenor may present oral argument only if permitted by the Court of Appeal or a judge of the Court of Appeal.[6]

[20] The *Rule* establishes as a key requirement that APTLA be able to show its submissions will assist the Court hearing the appeal and will be different from the arguments made by the appellant and the respondent.[7] The fundamental issue to be assessed on a motion seeking leave to intervene is whether the proposed intervenor "brings something additional to the Appeal that the parties may not be able to supply".[8]

[21] As stated by Justice Scanlan in *Nova Scotia Barristers' Society v. Trinity Western University*:

> [18]…A party seeking to gain a seat at the table must be able to convince the court that it brings with it a relevant perspective the existing parties or other intervenors will not supply.[9]

[22] The respondent says an intervention by APTLA would not provide the Court with any assistance in deciding the appeal. It is the respondent's submission the parties will be able to address the issues the Court must decide.

APTLA's Purposes as an Organization

[23] Ms. Kinghorne's affidavit describes APTLA's broader purposes of advocacy for injured plaintiffs, law reform, networking for plaintiff counsel in the four Atlantic Provinces, legal education, and mentoring and support for newly-minted lawyers. APTLA has made numerous submissions to government and regulatory bodies on legislation (insurance, class action proceedings, limitation of actions) and on civil procedure rules and contingency fee agreements.

APTLA's Late Filing

[24] The affidavit of Ms. Kinghorne sets out the steps taken to bring APTLA's motion to intervene to Chambers:

- APTLA was not a party to the litigation in the court below. It did not learn of the ruling, released on September 21, 2023, until December 14, 2023

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[6] 2010 NSCA 70.
[7] *Civil Procedure Rule* 90.19(5)(d).
[8] *Global Maxfin Investments Inc. v. Cromwell*, 2015 NSCA 9 at para. 26.
[9] 2015 NSCA 113.

when a member of APTLA's volunteer Executive brought it to Ms. Kinghorne's attention. Ms. Kinghorne then read the decision for the first time. The Executive member was not involved in the litigation.

- On December 15, 2023, Ms. Kinghorne requested consultation with legal counsel to obtain legal advice regarding a possible intervention by APTLA.

- On that same date, Ms. Kinghorne sought direction from APTLA's Executive, whose members practice in each of the Atlantic Provinces, regarding APTLA's intervention in the appeal.

- APTLA made the decision to seek leave to intervene on December 20, 2023 once legal counsel had reviewed the appellant's Notice of Application for Leave to Appeal and Notice of Appeal and the Court's date-setting letter.

- Acting on instructions from Ms. Kinghorne, on December 21, 2023 counsel for APTLA advised counsel for the parties of APTLA's intended motion to intervene. The letter from counsel (attached as an exhibit to Ms. Kinghorne's affidavit) indicated the motion would be brought in Court of Appeal Chambers on January 11, 2024.

[25] Ms. Kinghorne's affidavit explains the reasons for APTLA's delay in seeking to intervene:

- She is the part-time Chief Executive Officer of APTLA, operating and managing all aspects of the association. She has a part-time administrative assistant with no legal training.

- She was consumed by other, significant responsibilities between the release of Justice Norton's ruling on September 21, 2023 and when she learned of it, including: organizing APTLA's full-day conference on November 17 with all the related responsibilities associated with planning, promotion, logistics and administration; "closing off" the conference; preparing APTLA's 2023 fiscal year end on December 31, 2023; and annual submission of APTLA's documents and fees to the Registry of Joint Stock Companies of Nova Scotia.

- During the period of September 21 to December 14, 2023, Ms. Kinghorne also discharged contracted responsibilities as Moderator of the Real Estate Lawyers Association of Nova Scotia (RELANS) and carried out similar

organizational and management duties for RELANS' full-day conference on November 27, 2023.

[26] Ms. Kinghorne's affidavit describes APTLA's interest in the issue raised by the appeal. This interest arises from APTLA's mission and its concern about the implications for personal injury litigation should the ruling be upheld. The following encapsulates in summary form APTLA's interest:

- APTLA is a non-profit, volunteer organization of legal professionals that seeks to support access to justice and advocate for the rights of all personal injury and accident plaintiffs in all four Atlantic provinces.

- APTLA believes full and timely disclosure of all relevant but not privileged documents benefits the civil litigation process by allowing for the unrestricted assessment of evidence by plaintiffs' counsel and clients, better prediction of probable trial outcomes and the appropriate resolution of claims.

- APTLA believes that the ruling under appeal may be applied to any form of relevant but undisclosed document for which privilege has not been claimed. APTLA distinguishes the CCTV footage in issue from a true "surveillance" video obtained by a defendant after an action has been commenced and used at trial to contradict a plaintiff's testimony.

- APTLA believes the ruling may discourage or impede early resolution of claims, delaying outcomes and driving up expenses.

- APTLA further believes this Court's decision on the ruling and the application of *CPR* 94.09 may have "regional precedential significance" for personal injury plaintiffs in the other Atlantic provinces given similarities in their rules for disclosure in civil cases.

The Notice of Appeal

[27] The appellant has raised five grounds of appeal alleging the motion judge erred in law by:

(1) Determining that documents that are substantive can be withheld under *CPR* 94.09.

(2) Determining that documents not covered by litigation privilege can be withheld under *CPR* 94.09.

(3) Interpreting *CPR* 94.09 contrary to *Civil Procedure Rule* 1[10].

(4) Relying on a strictly textual (or plain meaning) interpretation of *CPR* 94.09 without considering the purpose of the Rule.

(5) Interpreting *CPR* 94.09 in such a way that it contravenes long accepted common law requiring full disclosure and preventing trial by ambush.

The Assistance Offered by APTLA to this Court

[28] APTLA says it can offer the Court the following assistance by way of submissions that would address:

- The perspective of an organization that advocates on behalf of personal injury claimants in all four Atlantic provinces.

- The systemic implications that the ruling may have, if upheld, particularly with respect to settlement. APTLA is specifically concerned to address the potential for the ruling to: limit fair tort recovery for all injured persons; to discourage or impede early resolution of claims thereby delaying timely outcomes and driving up legal expenses; impair plaintiff counsels' ability to effectively assess with their clients the available evidence; impact the advice personal injury lawyers are able to provide their plaintiff clients and to predict probable trial outcomes and undertake resolution discussions.

- The impact this Court's ruling may have on trial practice in all four Atlantic provinces.

[29] APTLA says there is no indication the appellant's submissions on the appeal will address these broader implications for personal injury plaintiffs. It notes that most personal injury cases never go to trial, a fact that amplifies the significance of resolution and the importance of unrestricted production[11] to aid in settlement.

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[10] *Civil Procedure Rule* 1 states: "These Rules are for the just, speedy, and inexpensive determination of every proceeding".

[11] Subject to privilege, of course.

[30] As I understood Mr. McVey's oral submissions, APTLA concedes it expressed in its motion materials an interest in issues the appellant can be expected to address:

- The potential for the ruling under appeal to be applied to any form of relevant but undisclosed document for which privilege has not been claimed.

- The difference between the CCTV footage in issue and "surveillance" footage obtained by a defendant after the plaintiff's action has been commenced for use at trial solely to contradict the plaintiff's testimony.

The Limits on APTLA's Proposed Intervention

[31] APTLA seeks to intervene only to the extent of filing a twenty-five page factum offering legal argument. Its factum would be filed no later than the same date the appellant's factum is due – January 19, 2024. APTLA is not seeking to file any additional materials or fresh evidence and, as *Civil Procedure Rule* 90.19(8) provides, would only make oral submissions at the appeal with leave of the hearing panel. Mr. McVey explained that APTLA is not seeking to make oral argument at the appeal but counsel would be available to answer any questions the panel might have.

The Position of the Respondent

[32] The respondent says by virtue of its very mandate and membership, APTLA should have been aware of the ruling as it was available on release to all members of the Nova Scotia Bar. In its brief in response to the motions, the respondent observes:

> However, APTLA is not just any organization. APTLA is comprised of trial lawyers across the Atlantic Provinces who have access to these decisions when they are released, and have the training and experience to follow the public record and make themselves aware of developments in matters in which they have interest, including Notices of Appeal.

[33] In the respondent's view, APTLA's "lack of vigilance" is a complete explanation for the late motion to intervene, depriving the Association of a reasonable excuse for having failed to file in time. The respondent says APTLA had no genuine intention to seek leave to intervene during the time in which it would have been entitled to file.

[34] This last point is, of course, correct as APTLA was unaware of the ruling during the 15 clear business days following its release.

[35] As for the motion to intervene, the respondent views APTLA's proposed contribution as duplicative of what will be argued by the appellant. The respondent says APTLA's concerns will be addressed by the appellant. The respondent says APTLA is in no better position to address the ruling's implications for personal injury litigation than the appellant's counsel.

[36] As for the potential for impact on personal injury cases in the other Atlantic Provinces, the respondent says this falls outside the ambit of the appeal. The respondent makes this point in its brief:

> While interpreting the *Rule* within the purpose and scope of the Rules will assist the Court in determining the appeal issues, submissions on the implication of the decision in other Atlantic Canadian jurisdictions does not aid the Court in determining the issues before it.

Analysis

[37] I do not share the respondent's critique of APTLA's failure to notice the ruling before December 14. APTLA is not a party to the litigation that spawned the ruling. APTLA's focus is not solely Nova Scotia. APTLA is an association of volunteers with a part-time Chief Executive. As anyone who has been involved in a voluntary organization knows, there is a myriad of responsibilities and differing levels of member participation and engagement. APTLA's membership is comprised of lawyers in practice with many and varied demands on their time and attention. In my view it is reasonable for an interlocutory decision in an apparently routine personal injury case to have gone unnoticed by the Association.

[38] What is of much greater significance is that when APTLA did become aware of the ruling, it acted with diligence and speed. It did not sit on its hands. Its Chief Executive Officer set into motion the processes required for the Association to make the decision about whether to intervene. Its late arrival on the scene would have no effect on the timing and orderly processes for the appeal, were it to be granted standing as an intervenor. I have identified no prejudice to the respondent and none was raised.

[39] APTLA's challenge has been to show that it can bring "something additional to the Appeal that the parties may not be able to supply". I find it has satisfied this

requirement. While I accept the issues I noted above in paragraph 30 would be duplicative of what the appellant is expected to address, I do not see the broader systemic concerns APTLA has raised will come before the Court through the focus being taken by the appellant.

[40] The grounds of appeal train their attention on the motion judge's interpretation of *CPR* 94.09 and the trial process. APTLA says it is not so concerned with the interpretation of the *Rule*. It proposes making a contribution that will seek to unpack policy and systemic considerations.

[41] To bolster its argument APTLA would bring nothing new to the table, the respondent filed the record from the hearing in the court below. This provided me with a window into the arguments the appellant can be expected to make at the appeal. Justice Norton actively engaged Ms. Langille representing the appellant and they had a vigorous exchange. Ms. Langille said the following could result from a ruling that permitted the respondent to withhold the CCTV footage:

- Dashcam footage could possibly be excluded under *CPR* 94.09.
- Experts retained at considerable expense to plaintiffs would be unable to take into account the evidence of what actually happened.
- Retention by plaintiffs of accident reconstruction reports or expert evidence that could be avoided if, for example, dashcam footage was produced in the normal course of document production.
- The increased need for adjournments by plaintiffs, possibly once the trial is already underway—creating delay—to deal with withheld evidence that defendants, having decided not to use it for impeachment, then disclose.
- Conflict with all the *Civil Procedure Rules* that emphasize full disclosure.
- Conflict with *CPR* 1, the just, speedy and inexpensive determination of every proceeding.
- The opening of floodgates with defendants withholding "basically everything" increasing litigation over production of non-privileged items.

[42] Ms. Langille also acknowledged a broader perspective was in play, beyond the interests of her client:

> …I'm not concerned about Ms. Grover's case, My Lord. I'll be a hundred percent honest with you. Her knowledge of what happened is relatively limited anyway. I honestly am confused about how they can even use this to impeach her, but I don't believe that there's anything in it, is my personal opinion, but we shall see.
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> …
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> But quite frankly, my client's knowledge here is relatively limited. I'm more concerned about, broadly speaking, this being applied going forward, case after case, when we've got things like dashcam footage that are becoming more and more common, that this is the approach that's being taken in every case. And that's problematic and cannot be the intent of this rule whatsoever.
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> …
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> We can't equate this to surveillance. It's nothing like after-the-fact surveillance. So do we really want this to be the way civil courts go now, where they can withhold…if it is permitted to withhold non-litigation privileged items…just totally changes the rules, how things are going to work in terms of experts' reports, expense, adding to the expense of multiple expert reports because it's not obtained until the last minute. Now we're at trial, "Oh, here we go, here's the evidence we ended up not using, here you go." Now I need to ask for an adjournment, I need to spend all this money on a new report, now I need new court dates, now there's delay, we're bogging down the courts.

[43] Ms. Langille addressed how the respondent's entitlement to withhold the CCTV footage could impact personal injury trial processes. However, as noted by Mr. McVey, the systemic issues APTLA says should also be understood as concerns, are not reflected in Ms. Langille's submissions.

[44] I queried Mr. McVey on whether it can be inferred from Ms. Langille's responses to the motion judge that the appellant would intend to address the broader implications of the ruling, notably the concerns being raised by APTLA. Mr. McVey said Ms. Langille, as experienced counsel, could have raised the role of disclosure in settlement, in lawyer/client relations, and in supporting counsels' ability to offer advice in relation to the case. But her focus was narrower, on the impact on the trial process of the CCTV footage being withheld for impeachment.

[45] I reflected on whether it can be inferred from Ms. Langille's comments in the court below that the appellant will raise the broader systemic issues identified by APTLA. I have concluded, in the circumstances of this case, this cannot and should not be assumed. It is too speculative to find the appellant's focus will encompass APTLA's policy analysis that could assist the Court in deciding the appeal. I find APTLA has shown it can bring something to the table that may be useful to the Court and not otherwise available.

[46] I am less persuaded by APTLA's arguments about its contribution as a regionally-based association with a perspective on the potential implications for personal injury cases in the other Atlantic provinces. I appreciate APTLA's members will have knowledge and expertise about the specific rules and disclosure practices in those other provinces but it strikes me the systemic issues must be comparable. I would expect the appellant is likely to draw the Court's attention to how the other Atlantic Provinces may have interpreted and applied similar rules.

[47] APTLA is plainly concerned about and committed to the interests and rights of personal injury plaintiffs. It is an organization engaged in improving access to justice and the administration of justice in civil litigation. It is not a busybody. It brought its motions in good faith. It has persuaded me it brings to the table submissions this Court may not otherwise hear. I am satisfied the involvement of APTLA as an intervenor under the terms mentioned in paragraph 31 could provide assistance to the Court in deciding the appeal.

Disposition

[48] I am granting APTLA the extension of time to file its Notice for Leave to Intervene. Leave to intervene is granted, without costs. APTLA will file its factum on or before January 19, 2024.

Derrick, J.A.