NOVA SCOTIA COURT OF APPEAL

Citation: *T & T Inspections and Engineering Ltd. v. Green*, 2013 NSCA 107

Date: 20130924
Docket: CA 414426
Registry: Halifax

Between:

T & T Inspections and Engineering Ltd., a body corporate and Alco Industrial Inc., a body corporate

Appellants

v.

Donald Campbell Green

Respondent

Judges: Saunders, Hamilton and Bryson, JJ.A.

Appeal Heard: September 17, 2013, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Saunders, J.A.; Hamilton and Bryson, JJ.A. concurring.

Counsel: Jean McKenna, for the appellant T&T Inspections and Engineering Ltd.
Ann E. Smith, Q.C., for the appellant Alco Industrial Inc.
Jamie MacGillvray, for the respondent

Reasons for judgment:

[1] After hearing both appellants' submissions we recessed briefly and then returned to Court to announce our unanimous decision that the appeal was dismissed with reasons to follow. These are our reasons.

[2] Despite the able submissions of counsel for the appellants this appeal came perilously close to being denied leave. The reasons are obvious. Properly characterized, this is an appeal from an advance ruling on the treatment and admissibility of evidence. Had the dispute arisen during trial we would not have entertained an appeal until the trial was over. We favour a similar approach in disputes over so-called advance rulings. Otherwise this Court's limited time and resources will be usurped by premature appeals on preliminary or interlocutory rulings, effectively stopping the trial in its tracks until such collateral skirmishes can be sorted out. That is not the way things should work. Such interruptions only prolong trials; add to the expense of litigation; cause considerable disruption to dockets and the careful scheduling of witnesses; and invariably cause prejudice to one side or the other. Clearly such needless interventions defeat the object of the Rules which is to achieve "the just, speedy and inexpensive determination of every proceeding."

[3] The law in this area is well settled. Rulings made during the course of a trial respecting the admissibility or sufficiency of evidence are not regarded as appealable decisions. Instead, they constitute grounds of appeal once judgment has been rendered. Trial judges are faced with having to make any number of rulings during the course of a proceeding; not only rulings concerning the admissibility of evidence but decisions as to scheduling witnesses; granting adjournments; permitting an expert to give opinion evidence; deciding important matters during a *voir dire*; or settling the order of calling evidence and arguments, to name just a few. Permitting appeals on such rulings during the course of the trial has long been seen as completely impractical and sure to create havoc in the workings of both trial and appellate courts. See for example **H.(L.) v. Children's Aid Society of Halifax**, [1989] N.S.J. No. 107 (C.A.)(Q.L.); **New Brunswick (Milk Marketing Board) v. Mary and David Goodine Dairy Farm**, 2002 NBCA 38; **Smith v. Heron**, 2003 NSCA 82; **Sewell v. Sewell et al.**, 2010 NBCA 32; and **Tylone Steepe Homes Ltd. v. Landon**, 2011 BCCA 161.

[4] Besides the practical impediments I have just mentioned, there is a further substantive reason why such appeals ought not to be entertained. That is because one does not know if an allegedly wrong evidentiary ruling is material to the case until there is a decision on the merits, something which the appeal itself prevents. It is only when a judgment has been rendered that the impact of the impugned earlier ruling can truly be gauged.

[5] In the circumstances here I think it is a pointless and artificial exercise to seek to find support for the claim for leave on the basis that the impugned rulings were "interlocutory" or were made before the trial actually got underway. Whatever the case, it is clear that these evidentiary rulings were made by Justice Murray sitting as the trial judge. The motion which led to his consideration of the dispute has derailed the trial which had been scheduled to be heard by him this year. Two months had been set aside for the trial which was to have commenced May 6, 2013. Unfortunately, the appeal from his order has resulted in the case being adjourned without day. As a consequence counsel will now have to approach the scheduling coordinator or date assignment judge to set new dates in 2014 or beyond.

[6] Having explained why leave to appeal would ordinarily be denied as a matter of course, we are prepared in the unusual circumstances of this case to assume without deciding that an arguable issue has been raised by the appellants, so that we might provide these brief reasons dealing with the merits. I will begin by reproducing the impugned order which is the focus of this appeal:

> **ORDER**
>
> **BEFORE THE HONOURABLE JUSTICE PATRICK J. MURRAY:**
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> **UPON HEARING** the motion on behalf of the plaintiff pursuant to *Civil Procedure Rules* 27.01(1)(g) and 55.10(2) for a ruling on objections made by the defendants with respect to the admissibility of two experts' reports filed by the plaintiff;
>
> **AND UPON HEARING** the response to the motion on behalf of the defendants T&T Inspections & Engineering Ltd. and Alco Industrial Inc.;
>
> **AND UPON** the Honourable Justice Murray issuing a written evidentiary ruling on the motion by correspondence to the parties dated March 28, 2013;

AND UPON the Honourable Justice Murray issuing supplemental reasons dated April 30, 2013 as a result of the written request of the plaintiff dated April 15, 2013;

NOW UPON MOTION:

IT IS ORDERED THAT:

1. The report of Dr. Dennis Turriff of MEA Forensic dated February 25, 2013 will be admissible at the trial of this matter;

2. The report of Mr. Taras Semeniuk of Arc Mettallurgical dated January 14, 2013 does not constitute a rebuttal report pursuant to *Civil Procedure Rule* 55.05 and will not be admitted at trial as a rebuttal report.

3. The report of Mr. Taras Semeniuk is admissible at the trial of this matter to the extent that it is incorporated in the report of Dr. Dennis Turriff;

4. The plaintiff will make Dr. Dennis Turriff and Mr. Taras Semeniuk available for cross examination at trial; and

5. The defendants will be permitted to repond by way of reply by providing a further rebuttal with a final date for filing such rebuttal to be set by the Court.

AND IT IS FURTHER ORDERED that the costs in this motion shall be in the cause.

DATED at Halifax, Nova Scotia, this 23rd day of August, 2013.

[7] Without necessarily endorsing all of Justice Murray's analysis, we see no cause to interfere with his order. Here the litigation has been under case management for years by Associate Chief Justice Deborah Smith who had already given specific directions to the parties on the filing and sequence of a variety of experts' reports. Later, Justice Murray as the trial judge was called upon to implement and, to some extent, interpret the earlier directions given by the case managing judge. He then gave further directions to the parties as to the sequence, manner and extent to which the reports prepared by the plaintiff's experts and the two defendants' experts could be used at trial.

[8] It seems to us that Justice Murray's role in sorting out the impasse and ensuring that the matter moved forward efficiently and fairly to all concerned was largely fact-driven and required a sensible and effective exercise of judicial discretion.

[9] We are satisifed that Justice Murray took into account the interests of all concerned in fashioning the order as he did so as to ensure that the evidence and expert opinions assembled by the parties will be presented at trial in a fair, logical and efficient manner. The unusual circumstances in this case called for a creative solution to ensure that the positions of all sides would be fairly presented, and neither the court nor any party would be misled by only "half the story" being told.

[10] Evidently the respondent (plaintiff) Donald Campbell Green suffered very serious, long-term injuries at a well drilling site in Saskatchewan more than 13 years ago. While working as an employee of Sandy Ross Well Servicing Ltd., he was struck in the head by parts of a rod hook assembly that blew apart. Before the mishap, Alco Industrial Inc. (Alco) had been hired by Online Rig & Equipment Ltd. to repair the rod hook owned by Sandy Ross. Alco had contracted with T&T Inspections & Engineering Ltd. (T&T) to perform a professional engineering inspection on the rod hook in 1999. The respondent claims that the rod hook was negligently inspected by T&T in 1999 and negligently repaired by Alco, which caused it to break during the 2000 mishap. Not surprisingly Mr. Green's allegations of negligence on the part of either and both defendants, and which concern the condition, weight-bearing capacity and state of repair of the hook, have led to the production of a variety of complex, scientific opinions which undoubtedly will be the subject of strategic reliance or vigorous challenge at trial.

[11] It appears to us that Justice Murray recognized the competing interests and challenges facing the trier of fact in this case and did his best to craft an order which would fairly and efficiently respect those concerns. At this early stage we will not second guess his characterization and treatment of the impugned reports. This is not a case where we need to delve into the machinations of, for example, *Civil Procedure* Rule 55 entitled Expert Opinion. Neither is it the time for us to sort out the parameters of what may or may not qualify as rebuttal evidence. Obviously (and as Murray, J. recognized) the weight, if any, to be given to the various experts' reports is a question properly left to the trial judge who will be in

the best position to decide such matters after seeing and hearing the witnesses and counsels' final arguments.

[12] Accordingly, we are unanimously of the view that Murray, J. did not err in principle and his decision and confirmatory order have not produced a patent injustice.

[13] Before concluding these reasons, we do wish to express our concern over the apparent delay in bringing this case to judgment. This tragic incident occurred in June 2000, more than 13 years ago. The lawsuit was commenced in 2002. Now, more than 11 years later, the trial dates have been lost, the case has been adjourned without day, and even assuming all counsel were available the matter could not be heard – so we were advised at the appeal – until some time in 2014 at the earliest. We make no comment on the reasons or excuses for such delay as that is not before us. However, on its face, any trial that takes this long to be heard is hardly the standard by which we would expect justice to be rendered. Thus we would urge that the matter proceed without delay and, if possible, on an expedited basis.

[14] The appeal is dismissed. Justice Murray's order stands. Costs of $1,000 inclusive of disbursements are awarded to the respondent, such sum to be divided equally between the two appellants, and payable forthwith.

Saunders, J.A.

Concurred in:

Hamilton, J.A.

Bryson, J.A.