NOVA SCOTIA COURT OF APPEAL
Citation: ***Royal & Sun Alliance Insurance Company of Canada v. Raymond***, 2014 NSCA 13

Date: 20140206
Docket: CA 413454
Registry: Halifax

Between:

Royal & Sun Alliance Insurance Company of Canada

Appellant

v.

Logan Llewellyn Raymond

Respondent

Judges: Beveridge, Farrar and Bryson, JJ.A.

Appeal Heard: October 7, 2013, in Halifax, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of Bryson, J.A.; Beveridge and Farrar, JJ.A. concurring.

Counsel: Lisa Richards and Tim Roberts, for the appellant
Ansley Simpson and Robert B. Carter, for the respondent

Reasons for judgment:

[1] Logan Llewellyn Raymond was a passenger in a vehicle insured by Royal & Sun Alliance Insurance Company of Canada ("Royal") when that vehicle was involved in a single motor vehicle collision. The parties agree that Mr. Raymond suffered significant injuries as a result of the motor vehicle accident in which the driver was killed. Mr. Raymond is in his early 20's. He commenced an action against Royal, claiming Section B medical and income disability benefits. Some benefits were paid, but Royal discontinued income disability payments and has refused to cover a number of outstanding medical expenses. Accordingly, Mr. Raymond brought an action under Rule 57 (claims under $100,000) seeking income disability benefits to the date of trial – which he estimated at approximately $15,000 – and for outstanding medical expenses in the amount of $9,633.47, together with interest.

[2] Royal objects that proceeding under Rule 57 is inappropriate in the circumstances of this case. Royal says that the real amount involved far exceeds $100,000 and that Rule 57 is not intended to apply in such a situation. Royal brought a motion before The Honourable Justice Gerald P. Moir in Chambers seeking a declaration to that effect. In dismissing Royal's motion [2013 NSSC 53], Justice Moir said in part:

> [14] For two reasons, this court should not require that Mr. Raymond's claim be determined outside Rule 57. First, the plaintiff is the one who determines whether the Rule applies and the Rule provides its own mechanisms for overriding the plaintiff's choice. Second, the estimate required by Rule 57.04(1)(c) is an estimate of the total value of the causes of action sued for and, in a disability policy of this kind, any liability to make future payments is a separate cause recoverable only if the disability persists.
>
> [15] *Plaintiff's Choice*. Part 12 - Actions Under $100,000 channels all actions into the ordinary Rules for disclosure, discovery, and trial or into Rules for economized procedures. It is one way in which the Rules pursue the principle of proportionality.
>
> [16] Unlike Rule 58 - Action for Claim Valued Under $100,00, Rule 57 - Action for Damages Under $100,000 requires that the plaintiff do the channelling, not the defendant and not the court: Rule 57.03(1). The plaintiff must follow the three steps in Rule 57.04, but the third step requires the plaintiff to exercise judgment and to undertake some risk.

> [17] The first two steps in Rule 57.04(1) are easy to determine, and easy for the court to scrutinize. The plaintiff must (a) "determine whether the claim is for damages only" and (b) "if so, determine whether the claim is based only on ..." certain named causes.
>
> [18] The third step arises only if the first two lead to positive answers:
>
> > (c) if so, estimate whether the total of all claims, except costs and future interest, is less than $100,000.
>
> As I said, that step requires the exercise of judgment. The consequences of misjudgment are in Rules 57.04(3) to (5). An under-estimate comes up against the cap, and an unreasonable over-estimate leads to costs against the plaintiff.
>
> [19] It is, therefore, not surprising that Rule 57 contains no provision for the defendant to challenge, or the court to correct, the plaintiff's estimate under Rule 57.04(1)(c). The plaintiff is in control of the channelling process. The recourse for a defendant who disagrees with channelling into Rule 57 is not to attack the plaintiff's estimate. A defendant's recourse is to Rule 57.03(5), which permits review on three grounds. The primary ground is "justice cannot be done by applying this Rule".

[3] Royal has appealed and in its factum has recast its 11 grounds of appeal as follows:

> 17. RSA submits the sole issue on appeal is whether the Learned Justice erred in law in finding Raymond's claim was properly brought under Rule 57.
>
> 18. Determination of this issue requires consideration of multiple sub-issues as identified in the Appellant's Grounds of Appeal [Appeal Book, Tab 1], including:
>
> - Whether the Learned Justice properly defined Raymond's "real claim" within the context of Section B wage indemnity claims.
> - Whether the Learned Justice properly interpreted "the total of all claims" as stated in Rule 57.04(1)(c).
> - Whether the Learned Justice erred in failing to address the practical effect of a finding of disability at trial.
> - Whether the Learned Justice erred in law by applying a simplified procedure to a complex disability benefits claim.
> - Whether the Learned Justice failed to exempt this action from Rule 57 application due to the claim's non-compliance with Rule 57.04 requirements.
> - Alternatively, if the claim is determined to have complied with Rule 57.04 requirements, whether the Learned Justice failed to exempt this action

> from Rule 57 due to the inability for justice to be done, as *per* Rule 57.03(5).
>
> • Whether the Learned Justice erred in law by acknowledging Raymond improperly claimed for a declaration but only requiring the claim for a declaration be withdrawn.
>
> 19. The Appellant will address the issue throughout "Part 5 – Argument" and touch on all its grounds of appeal under the Argument's sub-headings.

[4] In addition, following the oral hearing before this Court, the Panel requested that counsel provide supplementary written submissions on "… whether Rule 57.04(3) limits a plaintiff to the amount allegedly owing at the time the action is commenced or to an amount (up to $99,999.00) allegedly owing as of the date of judgment?".

[5] The Court has received supplementary written submissions from both parties.

Standard of Review:

[6] In *Fawson v. St. Clair*, 2013 NSCA 123, this Court recapitulated the standard of review for an interlocutory decision:

> [16] It is settled law that any decision based on the judicial exercise of discretion is entitled to considerable deference on appeal. In such circumstances an appellant bears a heavy burden. It is no longer necessary to concern oneself with an inquiry as to whether or not the effect of the impugned order had a final, terminating effect on the proceedings. There is now but one standard of review in such matters. We will not intervene unless the judge erred in principle or, to the extent to which the judge was exercising a discretion, a patent injustice has occurred. See for example **Innocente v. Canada (Attorney General)**, 2012 NSCA 36, and most recently, **Burton Canada Company v. Coady**, 2013 NSCA 95.

[7] But the court went on to explain that in certain circumstances, a correctness standard may apply:

> [17] This, however, tells only half the story. To the extent the judge was exercising a discretion, his decision will be reviewable on such a standard. But one must not lose sight of the function Justice Coady was performing. Having been asked to distribute the surplus left over after the lands were sold by the Sheriff at a public auction***, the judge was bound to decide the validity and priority of competing claims to that surplus in accordance with long-established***

> ***legal principles grounded in this province's statutory and common law. To that extent the judge's disposition had to be right and is reviewable by this Court on a standard of correctness***. See for example: **Pew v. Zinck and Lobster Point Reality**, [1953] 1 S.C.R. 285; **Traders Group Ltd. v. Mason and Mason** (1974), 10 N.S.R. (2d) 115 (N.S.S.C.A.D.); **A.V.G. Management Science Ltd. v. Barwell Developments Ltd.**, [1979] 2 S.C.R. 43; **State Mutual Life Assurance Co. of America v. Clam Bay Estates Ltd.** (1980), 39 N.S.R. (2d) 131 (N.S.S.C.A.D.); **Devan Properties Ltd. v. Metropolitan Stores of Canada Ltd.** (1988), 88 N.S.R. (2d) 129 (N.S.S.C.A.D.); **Credit Union Atlantic Ltd. v. Bonang** (1995), 145 N.S.R. (2d) 175; **Bank of Nova Scotia v. 1890486 Nova Scotia Ltd.**, 2003 NSSC 119, appeal dismissed 2004 NSCA 6; **Hants Kings Business Development Centre Ltd. v. Arenburg**, 2012 NSSC 105; and **Xceed Mortgage Corp. v. Baker**, 2012 NSSC 221.
>
> [Emphasis added]

[8] Accordingly, I would apply a correctness standard to the Chambers judge's interpretation of Rule 57.

Rule 57:

[9] Rule 57 was introduced in the new *Nova Scotia Civil Procedure Rules* in 2009. It permits an action for damages under $100,000 in certain circumstances:

> **57.03 (**1) This Rule applies to an action in which the plaintiff, acting in accordance with Rule 57.04, states in a notice of action or notice of action for debt that the action is within this Rule.
>
> (2) Rule 57.04 applies to all actions.
>
> (3) A judge who continues an application as an action under Rule 6 – Choosing between Action and Application, or severs a claim in an action under Rule 37 - Consolidation and Separation, may order that this Rule 57 applies to the action, or severed claim, if the judge is satisfied the action or severed claim is within clauses (a), (b), and (c) of Rule 57.04(1).
>
> (4) Under Rule 58 - Action for Claim Valued under $100,000, a judge may order that this Rule applies to an action.
>
> (5) A judge who is satisfied on one of the following may except an action under $100,000 from the provisions of this Rule:
>
> (a) justice cannot be done by applying this Rule;
>
> (b) a party or the public has a significant intangible interest at stake in the outcome of the action;

> (c) a counterclaim, crossclaim, or third party claim is filed, it would be unjust to limit procedures applicable to the counterclaim, crossclaim, or third party claim as provided in this Rule, and the counterclaim, crossclaim, or third party claim is not to be separated under Rule 37 - Consolidation and Separation.
>
> **57.04** (1) A person who starts an action, other than an action to enforce a builder's lien, must do all of the following:
>
> (a) determine whether the claim is for damages only;
>
> (b) if so, determine whether the claim is based only on debt, injury to property, personal injury, supply of goods or services, or losses caused by breach of contract, breach of trust, or dismissal from employment;
>
> (c) if so, estimate whether the total of all claims, except costs and future interest, is less than $100,000.
>
> (2) A plaintiff who makes the determinations and estimates under Rule 57.04(1) in the affirmative must state, in the notice of action or notice of action for debt, that the action is within this Rule.
>
> (3) A plaintiff who states in the notice of action, or notice of action for debt, that this Rule applies may not have judgment for more than $99,999.99, plus interest after the day the action is started and costs.
>
> (4) A plaintiff who would otherwise be entitled to costs but who unreasonably states that an action is not within this Rule is disentitled to costs, including an indemnification for disbursements.
>
> (5) A judge who determines to order costs against a plaintiff may take an unreasonable statement that the action is not within this Rule into consideration when fixing the amount of costs.

[10] With respect to the supplementary question posed by the court, both parties agree that damages should be calculated to the date of assessment following the usual rule in civil actions.

[11] *Civil Procedure Rule 57.04(3)* limits what a plaintiff may collect:

> **57.04** (3) A plaintiff who states in the notice of action, or notice of action for debt, that this Rule applies may not have judgment for more than $99,999.99, plus interest after the day the action is started and costs.

[12] The interpretation of this subsection was not raised before the Chambers judge and it is unnecessary to decide that question for the purposes of disposing of this appeal.

Compliance with Rule 57:

[13] Royal's fundamental submission is that Mr. Raymond has not complied with Rule 57 which therefore should not "apply" to his action. Royal points out that for the first 104 weeks of any alleged disability, Mr. Raymond would be entitled to benefits arising from his inability to perform "his own occupation". After 104 weeks, the inability relates to any "occupation". Royal argues that this means "extended income replacement benefits last as long as Raymond can prove disability from any type of work to which he might be reasonably suited". From this Royal asserts that a finding at trial that Mr. Raymond was entitled to income replacement benefits up to the date of trial, does not mean his entitlement would cease the following the day. Royal emphasizes that "Such entitlement would continue, based on that very finding of fact, until he ceased to be disabled pursuant to the policy. The facts as found at trial would have to change for the entitlement to stop".

[14] Royal points out that Mr. Raymond was only 21 years old at the time of the motor vehicle accident. The combination of his youth and his injuries could easily elevate Mr. Raymond's "total of all claims" above $100,000 for income replacement benefits alone, assuming entitlement to age 65. Mr. Raymond would also be entitled to medical and rehabilitation expenses up to $50,000. In effect, Royal says that Mr. Raymond's potential claim far exceeds the $100,000 limit in Rule 57.

[15] Rule 57.04 requires the plaintiff to estimate the value of all his claims. Royal says "claims" must be read broadly to include all potential future claims:

> **57.04** (1) (c) if so, estimate whether the *total of all claims*, except costs and future interest, is less than $100,000. [Emphasis added]

[16] With respect to this argument, Justice Moir said:

> [23] The direction in Rule 57.04(1) to estimate "the total of all claims" must be read in its entire context and given its grammatical and ordinary sense harmoniously with the scheme of the Rules, their purposes, and the intention of the judges: *Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. 2. The word "claim" is given an inclusive definition in Rule 94.10: "includes a cause of action and the remedy

> sought". The text, in light of the definition, refers to the total value of all causes in the action, not additional causes that may arise in future. Accrued disability insurance payments constitute a separate cause of action from future payments that may come due if the disability persists after trial: *Canada v. Tsiaprailis*, 2005 SCC 8.
>
> [24] The ordinary meaning of "the total of all claims" refers to the causes sued for, not those that may arise in future. That meaning goes undisturbed when the phrase is put in context. The context is not at all like that of the *Small Claims Court Act*.

[17] Royal disagrees, arguing that the rule was designed to prevent a potentially substantial claim from being "… artificially broken up to fit within the threshold for simplified procedure". Royal reiterates that the "total of all claims" should be interpreted to account for "… the potential value of all claims arising from the same cause of action".

[18] While one can acknowledge Royal's practical concern about the effect of a judgment on potential causes of action in the future, nevertheless that potential concern does not take Mr. Raymond's claim outside the rule. Future claims for disability benefits are separate causes of action. In a judicial process designed to determine liability and quantum, "claims" cannot include that to which one is not entitled as of the date of assessment and which therefore cannot be awarded.

[19] David Norwood & John D. Weir in *Norwood on Life Insurance Law in Canada*, 3rd ed (Toronto: Carswell, 2002) at p. 479 supports the foregoing conclusion:

> In any event, there can be no finding of liability for *future* disability against the insurer which provides disability insurance coverage, since disability is a matter of proof which remains with the insured to demonstrate from time to time on an ongoing basis (*Anderson v. Great-West Life Assurance Co.* (1988), 30 C.C.L.I. 85 (Ont. H.C.); *Johnston v. Alberta School Employee Benefit Plan (Trustee of)*, (1995), [1996] I.L.R. I-3268 (Alta. Q.B.) This is in contrast to a tort damages award against the liability insurer, where future loss resulting from the injury is a one-time estimate of damage caused by the tortfeasor.

[20] Craig Brown & Julio Menezes in *Insurance Law in Canada*, 2d ed (Scarborough: Carswell, 1991) write at page 246, as cited in the respondent's factum at p. 14:

> Causes of action for the recovery of ongoing payments, such as income-replacement benefits under no-fault auto insurance or accident and sickness

> insurance, continually renew themselves each time an instalment becomes payable because the insurer is under a continuing liability for each succeeding benefit. Therefore so long as entitlement to the benefits continues (by continued disability), the limitation period only bars claims "originating more than [the prescribed period] before the commencement of an action." Each cause of action "originates" with each benefit as it becomes payable, allowing for any time period between entitlement and the insurer's deadline to pay.

[21] These quotations are consistent with the case law (*Antunes v. Great-West Life Assurance Co.* [2005] O.J. No. 5529 (Q.L.) (Sup. Ct. J.); *Andersen v. Great-West Life Assurance Co.* [1988] O.J. No. 987 (Q.L.) (S.C.); *Keddy v. Clarica Life Insurance Co.* [2002] O.J. No. 5109 (Q.L.) (Sup. Ct. J.) cited at pp. 16-19 in the respondent's factum, all of which stress that the risk of multiplicity of proceedings is hypothetical, that the court cannot establish the plaintiff's continuing disability for an indefinite future period, and that any future entitlement would require a new trial.

[22] In this case Mr. Raymond's Statement of Claim does not apply to causes of action arising after trial. Justice Moir was correct when he said "… the estimate required by Rule 57.04(1)(c) is an estimate of the total value of the causes of action sued for, and in a disability policy of this kind, any liability to make future payments is a separate cause recoverable only if the disability persists".

[23] Royal protests that Justice Moir's decision is not consistent with Small Claims Court decisions which have disallowed these types of claims before that Court: *Paul Revere Life Insurance Co. v. Herbin*, [1996] N.S.J. No. 88 (Q.L.) (S.C.); *Imperial Life Financial v. Langille*, [1997] N.S.J. No. 550 (Q.L.) (S.C.).

[24] The meaning of the *Small Claims Act* and Rule 57 is a matter of statutory interpretation. As Justice Moir observed, the words of the statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme the Act, the object of the Act and the intention of the Parliament", (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; also see: *Keizer v. Slauenwhite*, 2012 NSCA 20 at ¶7).

[25] Rule 94.01 requires the Court to interpret the Rules as if they were legislation and to apply the *Interpretation Act,* R.S.N.S. 1989, c. 235.

[26] Section 9(5) of the *Interpretation Act* provides:

> **9 (5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[27] Rule 1.01 speaks to the purpose of the Rules generally:

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

[28] Rule 57.02 speaks to the economy of a proceeding under the Rule:

> **57.02** (1) This Rule provides for the economical conduct of certain defended actions by limiting pretrial and trial procedures.
>
> (2) A party to an action under $100,000 must advance the claim, or conduct the defence, within the limits prescribed by this Rule.

[29] Justice Moir found – and I agree – that the Small Claims Court cases are distinguishable:

> [26] An action under Rule 57 is tried on record with full rights of appeal. The limit is twenty times the Small Claims limit when *Paul Revere* and *Imperial Life* were decided, and four times the present limit. Pretrial procedures are not extinguished: Rule 57.02(1). Rather, the Rule aims for "economical ways of making full disclosure" in Rule 57.08, economical discovery in Rule 57.09 and 57.10, and economical trial in Rule 57.11. These Rules all contain safety valves, provisions for recourse to judicial discretion. And, Rule 57.03(5) contains the overall safety valve of a judicial discretion to except an action from the Rule.

[30] Moreover, when interpreting provincial legislation it is common to consult legislation of other provinces. In Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Markham, ON: Butterworths Canada Ltd., 1994), the author says as follows at pp. 291 and 294:

> Where two statutes dealing with the same subject or enacted to achieve the same purpose use similar or identical words, the courts may readily conclude that the words have the same meaning and effect. Conversely, where statutes that otherwise are similar use different words or adopt a different approach, this suggests that a different meaning or purpose was intended. Although there is no presumption that a legislature is bound by the drafting conventions and patterns of expression found in the legislation of another jurisdiction, the cross-jurisdictional comparison can still be instructive.
>
> When statutes enacted by different jurisdictions are similar in purpose and structure, and particularly where they respond to similar pressures for social reform, the courts may presume that despite minor differences the statutes all express the same policies and implement the same solutions.

The Ontario Simplified Rule has been applied to a disability claim in *Antunes*:

> 5 Any judgment for benefits in this action, even if payable to trial, will not bind the defendant to make payment of benefits after trial. Lang J. (as she then was) in *Harrison v. Antonopoulos* (2002), 62 O.R. (3d) 463 (S.C.J.) at p. 471, in interpreting *Coombs, supra*, stated: "A finding at trial that the plaintiff continues to be entitled to disability benefits is not thereby deciding that the plaintiff will remain so disabled indefinitely. Continuation of benefits will depend on circumstances that develop post-trial." While the onus may shift to the defendant to demonstrate recovery from disability or other change in circumstance if it wishes to deny benefits after trial in the face of such findings, any determination of a right to benefits or of continuing disability under the policy would have to be determined in a subsequent proceeding.
>
> 6 ***While this could result in "multiple" proceedings as claimed by the defendant, that possibility is hypothetical and would arise only if the plaintiff establishes disability up to trial, if she remains disabled thereafter, if she advances a claim for further benefits and if the defendant refuses to pay such benefits. That possibility should not prevent this plaintiff from advancing her claim for unpaid benefits that have accrued up to this time employing the less costly and speedier processes available under Rule 76***.
>
> [Emphasis added]

[31] In *Keddy, supra* the court commented on the question of later proceedings:

> 10 I disagree with the position advanced by the defendant. It may well be that there is potentially future litigation between the same parties dealing with the issue of entitlement to disability benefits but that will be about entitlement to disability benefits after the time of trial in the present action and based upon evidence which may come into being after this trial.

> 11 Should the plaintiff succeed at trial, the likely outcome is to include a declaration as to entitlement to disability benefits.
>
> 12 I find comments by Justice MacDonald in 1988 of assistance. *Andersen v. Great-West Life Assurance Co.* [1988] O.J. No. 987:
>
> > Although the requested direction for future payments is corollary to the declarations and would avoid a hollow judgment, the direction cannot properly be made in the circumstances of this case because I cannot say, on the evidence before me, that the disability will continue, either totally or proportionately, within the meaning for the policy, for any finite period of the policy. The most I can say is that the plaintiff is disabled today. Since the onus is on the plaintiff to establish continuing disability, it would not be proper to order the defendant insurer to make payments in respect of an indefinite future period. While this is my conclusion as to the law applicable to this case, and while, speaking generally, it may be necessary for a plaintiff to bring an action from time to time in respect of benefits withheld, I should think that a court, faced with a series of such actions between a particular plaintiff and defendant and one or more declarations of disability by a court, would find remedy in costs or damages or both.
>
> 13 What Justice MacDonald observes is simply that a person found to be disabled today may not be found to be a person disabled at some future date.

[32] In arguing that the Ontario law should not apply, Royal points to two distinctions between the Ontario and Nova Scotia rules. Royal says that Nova Scotia Rule 57.04 requires the plaintiff to estimate the total amount of "all claims", which include the "cause of action and the remedy sought", (Rule 94.10). That is correct. Royal reiterates this means that "the claim" is the claim before the court at the date of the trial "as well as further claims arising from the same cause of action". But as previously noted, claims arising after judgment are not the "same cause of action". This difference in wording between the Ontario and Nova Scotia rules is not material.

[33] Royal also claims that the Ontario cases are distinguishable, asserting that "Both Ontario decisions are based on the incorrect assumption that a plaintiff's entitlement to disability benefits, if found at trial, ends immediately post-trial". That is not what either case says. Entitlement and determination of entitlement are not the same thing. *Antunes* and *Keddy* are consistent that entitlement is determined at and as of trial; but whether entitlement continues thereafter could only be determined in a subsequent proceeding.

[34] Royal objects that this is not "practical" because once disability is determined at trial, " … it defies logic to say such a finding lasts only to the date of judgment. … while a plaintiff bears the ongoing onus of proving her claim, once there has been a finding of fact at trial she is entitled to benefits, her entitlement remains until the facts change." This may be true, but it is hypothetical, which is why future entitlement cannot be determined at trial.

[35] Royal further submits that the Ontario decisions are "absurd " because, citing *Keddy*:

> 110. … The decision amounts to saying a defendant could refuse to pay the plaintiff one day post-judgment and the plaintiff would have to sue again, despite nothing changing in her condition. RSA submits the logic employed in *Keddy* could create a never-ending cycle completely undermining the intended goal of Ontario's "Simplified Procedure".

[36] With respect, this submission confuses the precedential value of a favourable decision in a particular case with the potential for future liability.

[37] It may well be that a decision favourable to Mr. Raymond in this case would have precedential value beneficial to him in the future. But that would be the same whether one proceeded under the simplified procedure of Rule 57 or pursuant to the normal process. As a matter of law, a claimant would have to prove his claim again for alleged new breaches of contract in the future. As a matter of practice, if all things were equal, it is likely that the insurer would honour payments to which a claimant was apparently entitled and the claimant would not need to sue again. But that possible practical effect does not make it legally inevitable.

Complexity/Rule 57.04(5):

[38] Royal argues that "complexity", the "public interest" and alternatively, *Civil Procedure Rule 57.04(5)* should take this case outside Rule 57. To recapitulate, Rule 57.03(5) says:

> **57.03** (5) A judge who is satisfied on one of the following may except an action under $100,000 from the provisions of this Rule:
>
> (a) justice cannot be done by applying this Rule;
>
> (b) a party or the public has a significant intangible interest at stake in the outcome of the action;

> (c) a counterclaim, crossclaim, or third party claim is filed, it would be unjust to limit procedures applicable to the counterclaim, crossclaim, or third party claim as provided in this Rule, and the counterclaim, crossclaim, or third party claim is not to be separated under Rule 37 - Consolidation and Separation.

[39] Royal argues that it suffers prejudice by being limited to the pre-trial procedures allowed under Rule 57. Certainly under Rule 57 these procedures are more modest than those applying to an ordinary action. Documentary disclosure and oral discovery are briefer, although discovery can be expanded by agreement or order of the court. And ultimately a judge may except the proceeding from the Rule 57 if satisfied with respect to any of the conditions in Rule 57.03(5).

[40] In the context of comparing Rule 57 with other jurisdictions, Royal has submitted that:

> 63. British Columbia's judiciary has also recognized factors bringing a matter outside an expedited procedure, no matter the purported value of the claim. More specifically, a matter's complexity and the degree to which non-party stakeholders might be affected by an outcome are particularly vital considerations in this context.
>
> 64. RSA submits both factors are in play in the present matter:
>
> - Raymond's claim presents too many complexities to bind RSA to the simplified procedural steps permitted under Rule 57.
> - Further, the central issue in this claim will clarify the *Civil Procedure Rules* and will be binding on future Section B claimants and insurers. The finding will also affect the litigation of long term disability claims in general. These are serious implications affecting large number of litigants, some of whom will have extremely complex cases. As such, binding the parties to simplified procedures in this case prejudices not only the Appellant RSA, but defendants in lawsuits to follow.

[41] Royal complements this alternative submission with British Columbia jurisprudence considering British Columbia's rule on expedited process.

[42] This argument and this jurisprudence was not fully before the Chambers judge. Certainly no British Columbia jurisprudence was cited to him. Brief comment was made to the Chambers judge about depriving Royal of full disclosure rights. But no evidence of potential prejudice was led and no examples of potential prejudice were argued. Nor did Royal specifically argue Rule 57.04(5). Royal's oral submissions before the Chambers judge linked its "total

claim" argument that quantum here in reality exceeds $100,000, to its plea not to be deprived of the full pre-trial process. There was no "freestanding" argument that the process was unfair.

[43] The British Columbia cases are highly fact driven and clearly involve some exercise of discretion. The recent British Columbia cases required the court to consider the length of trial when deciding whether an expedited track was proper. Anything in excess of three days would be inappropriate under British Columbia Rule 15.1 "Fast Track Litigation". That time limitation – or failure to meet estimated trial timelines – appear to be important factors in at least two of the cases which resulted in removal from the "Fast Track" and its predecessor, Rule 66, (*Shaker v. Chow*, 2012 BCSC 617; *Smith v. Van Bregt*, 2004 BCSC 1837). Nova Scotia Rule 57 does not contain a similar time limitation. In two other cases, the applicant was unsuccessful in having the case removed from the expedited process, (*Bhate v. Telecom Leasing Canada (TLC) Ltd.*, [1999] B.C.J. No. 905; *Ram v. Pointer*, [1999] B.C.J. No. 641). To return to the quote from *Driedger*, (¶30 above), differences between British Columbia Rule 15.1 and Nova Scotia Rule 57 in this instance are not minor, which weaken the persuasive effect of the British Columbia cases.

[44] The kinds of factors that the court must consider in deciding whether to remove a case from Rule 57, should begin with Rule 57.03(5). Moreover, it is that Rule under which a party challenging the expedited process should bring its motion. As Justice Moir noted, invoking Rule 57 is a matter of the plaintiff's choice. A defendant can only challenge that choice under Rule 57.03(5). Other than arguing that it should have access to full pre-trial process, Royal has not explained how "justice cannot be done by applying this Rule", (57.03(5)(a)). Royal asserts that this is a "complex disability claim", but does not say how Rule 57 cannot accommodate that alleged complexity.

[45] Royal asserts that its concerns about complexity and the "real" value of the claim exceeding $100,000 are "… policy considerations – applicable to disability claims generally and not simply to the present matter involving Raymond". But this submission ignores that the suitability of Rule 57 is an individual determination on a case by case basis. It really is a submission that in principle all disability claims should be subject to the normal court process. That submission overlooks both the general purpose of the rules to effect a "just, speedy, and inexpensive" determination and the specific purpose of Rule 57 of allowing economical conduct of certain proceedings. If there are real, tangible concerns

about the propriety of a Rule 57 proceeding, an applicant has the opportunity of convincing a court accordingly. Royal has not done so in this case by simply making a generic argument.

Declaration:

[46] Royal complains that Mr. Raymond initially sought a declaration which is unavailable under Rule 57. The Chambers judge's decision was dependent upon the plaintiff withdrawing his claim for a declaration, which has been done. *Civil Procedure Rule 9.05(4)* permits a party to withdraw a claim before trial at any time with the permission of a judge.

Conclusion:

[47] Both parties agreed that if successful, they should receive $2,500 in costs. I would dismiss the appeal with costs of $2,500 inclusive of disbursements payable to Mr. Raymond.

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.