

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Boudreau v. Red Knight Enterprises (1987) Ltd.*, 2015 NSSC 177

**Date:** 20150618

**Docket:** Hfx No. 165510

**Registry:** Halifax

**Between:**

Bentley Boudreau

Plaintiff

v.

Red Knight Enterprises (1987) Limited

Defendant

**Decision**

**Judge:** The Honourable Justice Gerald R. P. Moir

**Heard:** June 17, 2015, representations only

**Moir J.:**

[1] In my capacity as chambers judge, Prothonotary Anselm made a motion under Rule 22.12(1) about what to do with exhibits that were entered at trial in this case ten years ago. I am determining the motion based on representations made by the prothonotary and Deputy Prothonotary Darlene Peach, as permitted by Rule 22.12(2).

[2] The practice long ago in this province was for the prothonotaries to package an exhibit, often years after the trial, and mail it, without reference or explanation, to the lawyer who tendered it on behalf of his or her then client. Somehow the practice has become elaborate, and far more so than the Rules provide, even though staff are today more burdened with greater responsibilities and relatively fewer front line positions. Court staff research our civil exhibits, contact former counsel or try to do so, and seek consents to return exhibits. Where consents are not forthcoming, staff prepare affidavits and seek an order from a judge.

[3] Practice is not uniform in the common law jurisdictions, or from time to time, or as between civil and criminal trials. Order 35, Rule 12 of the English Rules provided that parties to a Queen's Bench trial had to apply immediately after the trial for permission to take away their exhibits and had to maintain them for

appeal: *The Supreme Court Practice*, 1984, p. 626. In Ontario, the registrar is required to return exhibits from a civil trial after expiry of the time for appeal or disposition of the appeal: Ontario Rule 52.04(4). The registrar has no discretion. In criminal trials, the trial court has power to return an exhibit not tainted by illegality, but the practice is to do so on application after the proceeding is terminated: *Ewaschuk* (2015) 3:1560.

[4] In Nova Scotia, prothonotaries have a discretion to return exhibits. Rule 84.04(2) provides:

The prothonotary may, unless a judge orders otherwise, return an exhibit to a party on whose motion the exhibit was entered, or who filed an affidavit to which the exhibit was attached, no sooner than six months after the day that one of the following occurs:

- (a) expiry, without an appeal having been started, of the time for appeal to the Nova Scotia Court of Appeal from the order that finally determines all issues in the proceeding;
- (b) expiry, without an application having been made for leave to appeal, of the time for making an application to the Supreme Court of Canada after the appeal of an order in the proceeding to the Nova Scotia Court of Appeal;
- (c) dismissal by the Supreme Court of Canada of an application for leave to appeal;
- (d) final determination by the Supreme Court of Canada.

This does not mandate the elaborate practice that has grown up. We do not need the consent of a party to return their exhibit to them, or an order from a judge in the alternative.

[5] In some cases, return will be easy. In others, there may be no counsel of record, parties may have moved, or counsel may no longer be in practice. The present case is easy. The parties were represented by respected and experienced counsel who are still in practice. They will know what to do with the exhibit when they receive it, such as destroying it, keeping it, sending it to the client or former client, or returning it to the court with an explanation.

[6] In other cases, the prothonotary's discretion may not be fairly exercised without making efforts to track down a party. Otherwise, the prothonotary is within her discretion when she causes an exhibit to be delivered to the party's apparent address after the times in Rule 84.04(2).

[7] When counsel or former counsel is no longer in practice, when former counsel explains why he or she cannot accept delivery, or when a party cannot be found, the prothonotary's recourse is to Rule 84.04(3) and a judge's order for destruction or other disposition.

[8] In conclusion, I direct the prothonotary to deliver the exhibits in this case to former counsel. If a counsel cannot accept delivery and returns the exhibits with an explanation, the prothonotary must search for an address for the party and send

the exhibits there. Only when that fails can the prothonotary give up on her discretion to return exhibits.

Moir J.