IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Copage v. Annapolis Valley First Nation,
2004 NSSC 94

Date: 20040430
Docket: S.K. 10,860
Registry: Kentville

Between:

Murray Copage, Sr., Janette Peterson,
Lawrence Toney and Marilyn Toney

Plaintiffs

v.

The Annapolis Valley Band

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: April 22, 2004, in Kentville, Nova Scotia

Counsel: Donald Urquhart, Esq., counsel for the plaintiff,
Lawrence Toney.

Peter D. Nathanson, Esq., counsel for the defendant,
Annapolis Valley Band.

By the Court:

[1] This is the application of the plaintiff, Lawrence Toney, for an order setting aside the Notice of Trial pursuant to **Civil Procedure Rule** 25..01.

BACKGROUND

[2] In January, 1999, the defendant First Nations Band entered into a five year employment contract with Janette Peterson to act as a commissioner on the Gaming Commission of the defendant Band.

[3] In August, 2001, the defendant Band entered into separate five year employment contracts with three additional persons (the other plaintiffs - Murray Copage, Lawrence Toney and Marilyn Toney) to act as commissioners of the Band's Gaming Commission. At the time of their hiring, Copage, Lawrence Toney and Marilyn Toney were the chief and the two Band counsellors for the defendant Band.

[4] In December, 2001, a new Band council was elected and in January, 2002, the Band Council stopped paying the four commissioners.

[5] On March 1, 2002, this action was commenced in the Supreme Court of Nova Scotia, by the four commissioners against the Band, claiming as relief specific performance of the employment contracts and damages for the time they were not paid, on the basis of constructive dismissal.

[6] The Band filed a defence alleging that:

(a) The contracts were void for uncertainty;

(b) If not void for uncertainty, the plaintiffs had breached the contracts;

(c) The contracts were void for public policy reasons because the plaintiffs were the Band council at the time the contracts were entered into and were in effect in a conflict situation;

(d) The contracts were void by reason of being entered into contrary to the provisions of the **Indian Act**.

The Band also counter-claimed for an accounting of the monies received under the contracts by the plaintiffs before payment was stopped.

[7] In August 2002, Lawrence Toney and Murray Copage, Sr., two of the plaintiffs, filed a complaint with the Canada Labour Board against the Band for wrongful dismissal.

[8] The Canada Labour Board appointed Judge J.A. MacLellan as an adjudicator to hear the complaint. Judge MacLellan held a two and a half day hearing on January 14, 15 and 25, 2003. Evidence was given under oath and subject to cross-examination. The parties were represented by counsel and written submissions were provided to the judge after the hearing.

[9] On April 29, 2003, Judge MacLellan filed a lengthy written decision. The decision is a matter of public record. A reading of the decision makes it evident that all of the same issues as are contained in the statement of claim, defence and counter-claim in this action, were argued before Judge MacLellan and dealt with in his written decision.

[10] Judge MacLellan determined that the employment contracts were valid and enforceable and that Copage, and Lawrence Toney had been wrongfully dismissed.

[11] At the request of the parties, Judge MacLellan did not deal with the remedies at the time of the first hearing and decision. It was agreed that these would be dealt with at a subsequent date.

[12] Following Judge MacLellan's decision, and before the issues of remedies was heard:

(a) the defendant Band reinstated effective May 1, 2003, both Copage and Lawrence Toney; and

(b) The defendant Band reached an agreement with Copage as to the amount of compensation to pay him for the period January, 2002 to April, 2003, when he was not paid.

[13] Apparently, as both counsel acknowledged, the reinstatement of the plaintiffs Murray Copage and Lawrence Toney were voluntary (that is, were not made pursuant to an order) but was done as a result of the April 29, 2003, decision of Judge MacLellan.

[14] On June 18, 2003, Judge MacLellan conducted a hearing into the appropriate remedy for Lawrence Toney. Counsel were present and submissions were made. By written decision dated June 24, 2003, Judge MacLellan decided that Lawrence Toney was entitled to $26,800.00. In reaching his decision as to the quantum of damages, Judge MacLellan deducted from the estimated amount that Lawrence Toney would have earned as a commissioner, the amount he in fact earned as a bus driver together with the amount that he could have received in E.I. benefits if he had applied, together with an amount that had been advanced by the defendant Band to Toney in January, 2002.

[15] Judge MacLellan's decision was confirmed by an order issued June 24, 2003. The defendant Band did not honour the order. A "Writ of Seizure" was issued on December 22, 2003, and as a result the plaintiff received the damage award of $26,800.00 on February 25, 2004.

[16] In the meantime on October 20, 2003, the defendant Band filed with the Federal Court of Appeal, an application for judicial review of Judge MacLellan's decisions of April 29 and June 24, 2003. In the application for judicial review they

allege three errors of law by the adjudicator. Lawrence Toney filed a Notice of Appearance opposing the application. The application is still outstanding.

[17] On October 13, 2003, consent orders were filed with this Court dismissing the claims and counter-claims between Murray Copage and Marilyn Toney and the defendant Band.

[18] On October 15, 2003, the defendant Band filed a Notice of Trial in the within action and on November 6, 2003, at a date assignment conference, trial was set down for four days, May 25 - May 28, 2004..

[19] On February 16, 2004, a consent order was filed with the Court dismissing the claim of Janette Peterson against the defendant Band and the counter-claim of the Band against Janette Peterson.

[20] As of February 16, 2004, the only parties left in the within action are the plaintiff Lawrence Toney and the defendant The Annapolis Valley Band.

[21] The plaintiff seeks, pursuant to **Civil Procedure Rule 25.01** an order setting aside the Notice of Trial on the basis of *issue estoppel* and/or *res judicata* and/or abuse of process.

THE DEFENDANT BAND'S POSITION

[22] The defendant Band submits that:

(1) Once the Notice of Trial was filed in this action and ten days had passed without objection, the plaintiff can not bring this application without leave of the court which leave should only be granted in exceptional circumstances.

(2) A remedy under **Civil Procedure Rule** 25.01 is not an appropriate remedy in the case at bar. The Band relies upon **Haupt v. Eco-Nova Multi-Media Productions Ltd,** an unreported decision of Mr. Justice Davison made on December 18, 2000, (S.H. No. 167501).

(3) That this Court should not consider the post hearing memorandums filed with Judge MacLellan in the Canadian Labour Board Proceeding.

(4) That *res judicata* and *issue estoppel* are not applicable to the case at bar because:

(a) the burden of proof before the Canada Labour Board was on the defendant Band;

(b) the decision of the Canada Labour Board was not final;

(c) the processes before the Canada Labour Board were different than the processes before this Court; in particular, the rules of evidence were different and pre-hearing discovery was not available, and

(d) *Res judicata* was not pleaded in the plaintiff's Statement of Claim and is, therefore, not available.

ANALYSIS

Defendant Band's First Argument

[23] Until the consent order dismissing the claim and counter-claim between Janette Peterson and the Band was filed on February 16, 2004, there were two plaintiffs and one defendant in this action.

[24] Because Janette Peterson had not been a party to the Canadian Labour Board litigation, there was no basis upon which Lawrence Toney could apply, or this Court could grant a remedy based upon *res judicata* and/or *issue estoppel*. Secondly, because Janette Peterson was not a Band counsellor at the time of her appointment as a commissioner of the Gaming Commission, many of the issues affecting Lawrence Toney and the defence of the Band in relation to the contract were not applicable to her.

[25] For the above reasons it would not have been appropriate for an application to be brought or for the Court to hear an application for a stay of the basis of *res*

judicata before February, 2004, and in any event long after the Notice of Trial was filed.

[26] For that reason this Court finds that the circumstances surrounding the bringing of this application are exceptional and justify the granting of leave.

Defendant Band's Second Argument

[27] The effect of the plaintiff's application for a stay under Rule 25.01 is that the matters at issue between the two remaining parties have already been decided by the Canada Labour Board and for that reason there is nothing left for this Court to decide.

[28] The Band submits that in effect the plaintiff is seeking summary judgment and should have applied pursuant to **Civil Procedure Rule** 13 for it. The Band relies upon the **Haupt** decision referred to above.

[29] In **Haupt** Justice Davison, J., held in respect to an application commenced under **Civil Procedure Rule 9**, that the real remedy sought was a recovery order

under **Civil Procedure Rule** 48. He further held that one of the parties was in effect asking the court in a preliminary motion to interpret an agreement. He found at paragraph 15 of his decision that Rule 25.01 should not be used to answer a question of law or fact unless there is an agreed statement of facts, except in exceptional circumstances. He found that this case was not a case involving exceptional circumstances.

[30] The law in Nova Scotia regarding Rule 25.01 begins with the refusal by Cowan, C.J.T.D., to strike a statement of claim in **McCallum v. Pepsi Cola Canada Limited** (1974) 15 N.S.R.(2d) 27. He said at paragraph 15:

> [15] It is quite clear that if the parties agree to submit the question of law, on an agreed statement of facts, as to whether the plaintiff has any cause of action against MacLean's Beverages Limited, that question may be decided by the court. In this case, however, there is no such agreement of the parties. Counsel appearing on behalf of the two other defendants, and on behalf of the plaintiff in each case, take the position that the questions raised are matters which should be decided by the judge presiding at the trial of each of these proceedings, and that it may be that certain facts, which are not apparent at the present time, may appear on the hearing which might affect the decision of the court.

[31] And at paragraphs 20 and 21:

> [20] It is apparent that, in the present cases, the Statements of claim do disclose causes of action and that it is only by the introduction of

> evidence by affidavit that any question is raised as to the causes of action. it is for this reason, in my opinion, that rule 14.25(2) permits the introduction of evidence only by leave of the court. An application of the kind now before me should be made under rule 14.25 and would normally succeed only if the statement of claim disclosed on its face no cause of action.
>
> [21] I am of the opinion that the action should not be dismissed at this stage, and that the defence raised on behalf of MacLean's Beverages Limited should be dealt with by the judge who hears the proceedings in due course after hearing all the evidence. The application is dismissed with costs to the other parties to be taxed.

[32] In this case it was appropriate for the Court to refuse to strike the Statement of Claim by reason of the fact that the parties were relying upon conflicting affidavits and it was clear that there were conflicts as to the facts.

[33] This case was cited by the Nova Scotia Court of Appeal in **Curry v. Dargie** (1984), 62 N.S.R.(2d) 416. In this case, an officer of the Residential Tenancies Board was sued by a landlord for malicious prosecution. One of his defences was Crown immunity, which the defendant's counsel tried to have decided by an application made under rule 14.25 and 25.01. At paragraph 45, MacDonald, J.A., wrote:

> To my mind the only proper method of having the issue of Crown immunity determined in this case before trial was on a proper application under rule 25. This rule, however, <u>appears to be</u>

> applicable only where the parties agree to submit a question of law to the court based upon an agreed statement of fact. **McCallum v. Pepsi Cola Canada Ltd. et al.** (1974), 25 N.S.R.(2d) 27; 14 A.P.R. 27.

[34] The **Curry** decision has been frequently cited by Nova Scotia Courts (at least 20 times that I could find) as stating that no application can come forward without an agreed statement of facts. In fact, what MacDonald, J.A., said in **Curry**, was that based on the **McCallum** decision, it "appears" that an agreed statement of facts is necessary. In both of these cases, there appeared to be serious issues of fact that were not agreed to and that were in dispute.

[35] Using a principled approach, it is appropriate for a court to decline on a preliminary or interlocutory motion to determine an issue of law where the facts are in dispute or where the facts are not clear. I believe that **Curry** and **McCallum** may have been misapplied in subsequent decisions to suggest that it is not possible to have a matter determined under Rule 25.01 unless there is an agreed statement of facts. Rule 25.01 does not on the face of it require an agreed statement of facts. It is appropriate to leave for trial, matters of fact that are in dispute and upon which questions of law are dependant. However, the issue in the case at bar is whether or not the lengthy litigation before the Canada Labour Board decided as between the same parties the same issues that are outstanding to be determined in a four day

trial before this court. To wait until the trial and to hear the evidence before deciding whether or not the matter is *res judicata* or not, would not be appropriate. This is particularly so where, as in the case at bar, there is no dispute as to the facts upon which this application is brought. It would be ironic if the defendant can, by refusing to agree to a statement of facts, prevent a court from determining, before a trial begins, whether there exists *res judicata* or *issue estoppel*.

[36] In the case at bar the record consists of the following:

(a) The pleadings before this Court, including the consent orders that effective February 16, 2004, removed all of the parties except the plaintiff, Lawrence Toney and the defendant Band;

(b) The decisions of Judge MacLellan for the Canada Labour Board dated April 29, 2003 and June 24, 2003, which are part of public record, and

(c) the application for judicial review filed on October, 2003, by the defendant Band to the Federal Court of Appeal.

[37] The principles upon which *res judicata* and *issue estoppel* have been determined by courts are most recently set out in a decision of the Nova Scotia Court of Appeal: **Kaiser v. Dural, a division of Multibond Inc.**, 2003 NSCA122. It has been raised in the past in such decisions as: **Shanks v. Irving (J.D.) Ltd** (1985) 70 N.S.R.(2d) 10 and **Fraser v. Westminer Can. Ltd.** (1996), 155 N.S.R.(2d) 347 (N.S.C.A.)

[38] In the case at bar, the information necessary to determine the issue of *res judicata* or *issue estoppel* is available from the pleadings and the public record and is not factually in dispute.

[39] This case is one of the "exceptional circumstances" referred to by our Court of Appeal in **Fraser v. Westminer Canada Ltd** (supra), that is capable of being dealt with in the absence of an agreed statement of facts. As said above, it would be ironic if this Court could not decide the issue of *res judicata* before trial. It would defeat the purpose of such an application.

[40] Other decisions of our Court that have made comments about Rule 25.01 that would permit applications, without agreed statements of fact, include:

(a) Seacoast Towers Ltd. v. MacLean (1986), 75 N.S.R.(2d) 70. In paragraphs 18 - 23 the Court confirmed that the rule is that there should be an agreed statement of facts. The court found in that case that the factual issues were not "straightforward"; it implicitly left room for exceptions at paragraph 23:

> Even if there may be exceptions to the principle set out in **Curry**, in my opinion, this case does not fall within any such exception.

(b) **Fuller Construction v. Centennial Group** (1987), 80 N.S.R.(2d) 428 (CoCt). With respect to a decision as to whether to stay a counter-claim and third party action, the Court held that, under Rule 25.01, jurisdictional issues should be decided prior to trial, notwithstanding a lack of an agreed statement of fact.

(c) **American Home Assurance Co et al. v. Brett Pontiac** (1992), 116 N.S.R.(2d) 319 (N.S.C.A.). In this action the defendant sought to strike the statement of claim pursuant to Rule 14.25 and Rule 25.01. The Chambers judge dismissed the application. The Court of Appeal allowed the application. It said it would not grant the application unless on the facts as pleaded the action is "obviously unsustainable". At paragraph 35 the Court said:

> . . . Because no such action is disclosed by the pleadings, it would be unjust to permit the proceedings to continue to an inevitable unsuccessful conclusion, exposing all parties to bootless costs. The heavy burden upon the appellant Brett has been discharged.

[41] Most importantly, in this decision the Court of Appeal recognized the approach endorsed by the Supreme Court of Canada in **Rivard v. Morier and Boily** (1985), 64 N.R. 46, where at paragraph 36 the Court set out the following important principle:

> It is important to avoid litigation or to terminate it as quickly as possible when it cannot succeed in law. This is provided in the **Civil Code of Procedure**. It is also the way litigation is disposed of in many other jurisdictions, by means of a motion or application to strike out the statement of claim.

[42] Our Court of Appeal again dealt with this issue in **Future Inns Canada Inc v. Labour Relations Board** (1999), 179 N.S.R.(2d) 213, beginning at paragraph 30 and ending at paragraph 54. Pugsley, J.A. endorsed the approach set out in the **Rivard** decision of the Supreme Court of Canada. It put the **Curry** decision in context at paragraph 43:

> In view of the uncertainty respecting the issues of whether the respondent tenancy officer was carrying out a judicial function, that mixed matter of law and fact should not have been determined on a rule 14.25 application. With respect, however, I would not share Justice MacDonald's conclusion that the issue of Crown immunity should never be determined on a preliminary application under that

> rule. **Curry v. Dargie** was decided a year and a half before the decision in **Rivard;** consequently, Justice Macdonald's comments on that particular issue have to be considered in light of the subsequent opinion of the majority in **Rivard.**

He concluded that questions of law may be determined when the law is clear and no additional evidence is required to resolve the issues raised.

[43] In the case at bar there is no dispute with regards to the basic facts and the decisions of Judge MacLellan are matters of public record. For that reason I am satisfied that the application, in the case at bar, is an appropriate case for determination, by an interlocutory motion, before trial.

Defendant Band's Third Argument

[44] The defendant has expressed concern that the plaintiff included in his application as exhibits, copies of the post hearing memorandums filed before Judge MacLellan in the Canadian Labour Board Proceedings. This is based upon the "Implied Undertaking Rule". The plaintiff responded that the rule did not apply to the post hearing memorandums that were substitutes for the submission after the hearing, and further points out that the defendant Band had requested that the

memorandums filed with Judge MacLellan be forwarded by Judge MacLellan to the Federal Court of Appeal as part of the record in respect of its application for judicial review.

[45] While I am not convinced by the argument that the "Implied Undertaking Rule" applies to the post hearing memorandums, I have not, in fact, read them and they form no part of the background to the decision made in this case.

Defendant's Band's Fourth Argument

[46] The defendant says that *res judicata* and *issue estoppel* do not apply to the case at bar for four reasons. The first reason is that the burden of proof before the Canada Labour Board was on the defendant. The defendant says the burden of proof would not be upon it to prove the existence or validity of the contract before this court.

[47] I have read the decision of Judge MacLellan. He made findings of fact in respect of all the crucial issues before him, which were the same issues that are, based on the pleadings, before this Court. Nowhere in his decision is it explicitly

or implicitly stated or held that his findings of fact were based on the burden of proof.

[48] Because it is clear from the decision of Judge MacLellan that he made findings of fact upon which he, and if the matter was held before our court, we, would have been obligated to find as he did, that I find that the issue of whether or not the burden of proof was on the defendant did not affect the final decision of Judge MacLellan.

[49] Secondly, the defendant says that the Canadian Labour Board decision was not final. He referred to the application for judiciary review made to the Federal Court of Appeal raising three issues of law as evidence of this. Section 243 of the Canada Labour Code reads as follows:

> 243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.
>
> (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain any adjudicator in any proceedings of the adjudicator under section 242.

[50] The application of the defendant Band for judiciary review by the Federal Court of Appeal does not detract from section 243 of the Canada Labour Code which says the decision is final.

[51] To apply for judicial review is not the same as to “appeal”. The law that if the decision of a court or tribunal is subject to appeal, then it is not final until the time for the filing of the appeal has expired without an appeal does not apply here. In the case at bar there is no right of appeal from the decision of the Canadian Labour Board.

[52] The defendant’s third argument is that the processes before the Canada Labour Board are different from those before our court. The process carried out by the Canada Labour Board in this case was carried out in a judicial manner. Counsel were present, evidence was given at a two and a half day hearing and witnesses were subject to cross-examination. The absence of any pre-hearing discovery procedures does not detract from the fact that, upon reading the decisions of Judge MacLellan, it appears that the parties had a hearing which followed the rules of natural justice and was judicial in nature.

[53] The defendant has referred the court to **British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.** (1996) CarswellBC 2571, for the proposition that not all tribunal decisions should be considered as giving the right to *issue estoppel*. I agree with the analysis of the British Columbia Supreme Court in the above decision and in particular their analysis beginning at paragraph 26. There are some circumstances where decisions of administrative tribunals may not appropriately be the basis for *res judicata* or *issue estoppel*.

[54] None of the factors discussed in that case apply, in my view, to the case at bar. I note the reference in that decision to the decision of the Ontario Court of Appeal (Abella JA) in **Rasanen v. Rosemount Instruments Ltd.,** (1994), 112 D.L.R. (4th) 683. It describes and reinforces that *issue estoppel* is intended to preclude relitigation of issues that have been determined in a prior proceeding. Firstly, the issues must have been the same issues, and secondly, the decision of the administrative tribunal must have been a "judicial decision" and in this sense it is clear they meant that the tribunal must have been independent and impartial, and used fair procedures and have the intention that its decisions be binding.

[55] On the face of the record, the plaintiff and defendant submitted to the jurisdiction of the Canada Labour Board, the proceedings were before an adjudicator who is in fact a judge, the parties were represented by counsel and evidence was given under oath.

[56] On the face of the decision and public record the proceedings were judicial in every sense. I am not aware of jurisprudence that the procedures before a tribunal or other general or specialized court need to be identical or even similar to these before our Court in order for the principles of *res judicata* and *issue estoppel* to apply.

[57] The fourth reason that the defendant puts forth is that *res judicata* was not pleaded by the plaintiff in the statement of claim. For this the defendant relies upon decisions of the Supreme Court of Canada in 1896, the Saskatchewan Court of Appeal in 1929 and an unappealed portion of the decision of our Court of Appeal in **R. v. Marshall** in 1997.

[58] In my view this argument is without merit. At the time the statement of claim was issued in this case, no action had been taken by Mr. Copage or Mr.

Toney before the Canada Labour Board, so there was nothing to plead in respect of. *Res judicata* only came into issue once the Canada Labour Board had issued its decision and order. Not only that, *res judicata* and *issue estoppel* would not have applied before February 16, 2004, when the defendant and Janette Peterson agreed to a mutual dismissal of their claims, thereby, leaving only Lawrence Toney and the defendant Band as parties to the action.

[59] Applying the pre-conditions to the operation of *issue estoppel*, as described by Binnie, J., in **Danyluk v. Ainsworth Technologies Inc** (2001) 2 S.C.R. 460, I find that:

> (a) The issues with respect to the validity of the employment contract between Lawrence Toney and the Band and the issues with respect to the alleged breach of that contract, and the issue with respect to constructive dismissal are identical to the questions dealt with by Judge MacLellan and the proceedings under the Canada Labour Code.
>
> (b) The judicial decision made by the Canada Labour Board is final in accordance with s. 243 of the Canada Labour Code, and

(c) As of February 16, 2004, the parties to the judicial decision before the Canada Labour Board are the same parties as remain in the proceedings in the case at bar.

[60] The principle upon which *res judicata* and *issue estoppel* is founded is that it is in the public interest to promote finality in legal proceedings. It requires litigants to put their best foot forward when first required to do so and that they only are entitled to "one bite at the cherry". Once decided the losing party should not have the benefit of further harassment of the winning party.

[61] The Canada Labour Board in its decision has already awarded damages and through its execution process collected for the plaintiff the damages it ordered. I fail to see how a four day retrial of the same subject matter before the Supreme Court of Nova Scotia could result in any benefit to the defendant. This court could not over rule an execution order already effected under the authority of the Canada Labour Code through the Federal Court of Canada. Any decision the Supreme Court of Nova Scotia may make would be moot.

[62] I order that the trial of the within matter be stayed on the basis of the principle of *res judicata* and *issue estoppel.*

Gregory M. Warner, J.