SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Power Inc. v. AMCI Export Corporation, 2009 NSSC 62

Date: 20090303
Docket: Hfx No. 219171
Registry: Halifax

Between:

Nova Scotia Power Incorporated

Plaintiff

v.

AMCI Export Corporation

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	May 12, 2008, June 20,2008, September 12, 2008, October 23, 2008, January 22, 2009, February 6, 2009 in Halifax, Nova Scotia
Written Decision:	March 3, 2009
Oral Decision:	February 6, 2009
Counsel:	David Coles, Q.C., for the plaintiff with Rebecca Hiltz-LeBlanc Craig Garson, Q.C., for the defendant

By the Court:

[1] This proceeding arises from an application for summary judgment. In the main proceeding the plaintiff claims that the defendant failed to supply coal as required by an agreement between the parties. The plaintiff sought summary judgment on the defendant's amended defence, which I granted in February 2008: see 2008 NSSC 49.

Background

[2] In the period between the hearing of the summary judgment application and my rendering of a written decision, the defendant conducted oral examinations for discovery of two of the plaintiff's officials, Mr. Thompson and Mr. Fiolek. Mr. Thompson agreed to conduct a search of his notebooks to determine whether they contained any information related to the "shipping defence," or to the plaintiff's claim generally. Prior to his own discovery, and before the decision was issued, Mr. Fiolek produced additional excerpts from his own notebooks. The plaintiff then filed a supplementary list of documents. I note that in the oral decision I indicated that Mr. Thompson and Mr. Fiolek had discovered new notebooks; in

fact, they produced additional excerpts from notebooks that were already known. I do not believe that anything turns on this distinction.

[3] The defendant subsequently filed an application to have the court review the entirety of the notebooks in order to determine whether there were additional entries that had a semblance of relevance. This application was filed for special chambers, but the plaintiff took the position that the application should be heard by me. Counsel for the defendant claimed that the order on the summary judgment application should not be issued until I considered any additional evidence that might arise from a review of the notebooks. Counsel for the defendant claimed that if I conducted the review I would be in a conflict.

[4] I advised the parties then that, as a review of this information was important, and it was holding up the order for summary judgment, I would review the notebooks to determine whether any entries had a semblance of relevance to the proceedings, and whether any documents were covered by solicitor-client privilege.

[5] The review of the notebooks took place in October and November 2008. Mr. Garson was excused from this review. I advised him that, should there be any issue with respect any entry as to relevance or privilege, there would be an opportunity for him to advance any argument as to the procedure to be followed. The review was conducted on the record, as it was necessary for Mr. Thompson and Mr. Fiolek to assist me in understanding the entries in the notebooks, many of which could only be understood with an explanation of their context or meaning. This review was conducted in the presence of Mr. Coles and Ms. Hiltz-LeBlanc, counsel for the plaintiff. They did not make argument with respect to the semblance of relevancy of the entries. Their role was clerical, and mainly consisted of identifying entries that had been disclosed and asserting privilege over entries where they believed it to be warranted. The ultimate determination as to what should be disclosed was for the court.

[6] Following the completion of the review, I directed the plaintiff to make additional disclosure of various entries that I deemed to meet the threshold test of semblance of relevancy, and to file an affidavit stating that every entry that I had identified for disclosure in fact had been disclosed to the defendant.

Discussions in court

[7] The matter of the procedure to be followed in reviewing the "black books" was discussed on the record on September 12, 2008. I put to Mr. Garson the question of whether he should be present in the event it was necessary for me, in the course of reviewing the books, to "talk to Thomson or Fiolek or Ms. Godbout about what is written here." Mr. Garson's response was that he could not be present for questions of privilege. Mr. Coles raised his client's concern about protecting confidential trade information that was not relevant to the proceeding. His suggestion was that I review the documents, flag any about which I needed explanations, and put any questions to Mr. Thomson and Mr. Fiolek. Mr. Garson would subsequently be invited to make whatever submissions he deemed necessary arising out of this document review and disclosure procedure. Mr. Garson accepted this procedure.

[8] Upon reconvening on October 23, there was a discussion about how matters would proceed in view of additional documents that had been disclosed by NSPI. The following exchange occurred:

> THE COURT: Mr. Garson, I appreciate your concern and frustration... I'm wondering if we can do something today to advance the process, or would the documents from yesterday affect your presentation today?
>
> MR. GARSON: It's up to you. If you had time to go through what you received yesterday... I don't know how much I'm going to be in this room, that's up to you...

[9] There followed a discussion of the manner in which I would put questions to Mr. Thomson and Mr. Fiolek. I raised the question of whether Mr. Garson was "entitled to stay in the room as I go through the books asking why pages weren't included...". I ultimately gave the following instructions:

> THE COURT: Well Mr. Garson, here's what I propose to do and I'll hear you if you have any concerns. I propose to adjourn. I propose to have it recorded on a restricted basis and that is that it's not available. It's a voir dire. It's not available unless I decide to have it disclosed. Once I review it, there will be portions maybe that I will be hopefully able to, if possible there are any obviously. I will have those typed up and then sent to you and then you will tell me whether you wish to have either Mr. Fiolek or Mr. Thomson come back for cross examination on those records. I may also tell you that, without disclosing the nature, I am going to tell you that there are some that are, what I consider to be litigation privilege or solicitor-client privilege and you may say "well how did you come to that". I will certainly hear you on what the law is and what your argument would be on what a proper application ... what the principles are on those two issues and even on the issue of relevance and in the event that that may recast my mind and review the entirety of the transcript that's typed and then I will make a final decision based on your argument at that time.

[10] The following exchange ensued:

MR. GARSON: So is it your direction that I just leave? Is that what you want me to do?

THE COURT: Well I guess so.

MR. GARSON: Okay

THE COURT: I mean, I hate to tell anyone to leave.

MR. GARSON: That's fine.

THE COURT: It's not my custom to invite people to leave the court room. But in this case I must say, I think I have to.

[11] Mr. Garson then provided his contact information and left the courtroom.

Law

[12] The law respecting "reasonable apprehension of bias" was reviewed in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537. In that case, a criminal prosecution, the trial judge called the acting director of the public prosecution service and called for the removal of the Crown prosecutor, due to the manner in which the case was being conducted. If the prosecutor were not removed, the trial judge said he would take steps "to secure that end". The Crown, supported by one of the accused, brought a

motion for the trial judge's recusal. The trial judge denied the motion. The Nova Scotia Court of Appeal ordered a new trial on the basis of reasonable apprehension of bias. On appeal to the Supreme Court of Canada, La Forest and Cory, JJ., for the majority, said, at para. 3:

> In July 1994, before the trial commenced, the trial judge made a phone call to a senior member of the staff of the Attorney General. Disturbing as it was the call in itself did not create an apprehension of bias. However, on March 2, 1995, when the trial was well under way, the judge again called the senior member of staff. To make such a call during the trial was, to say the least, unfortunate if not ill advised. It was sufficient in itself to raise the issue of apprehension of bias. Further, the words of the trial judge during this conversation confirmed that there was a reasonable apprehension of bias. He expressed his displeasure with the manner in which the Crown attorney was conducting the case. The trial judge recommended that he be removed from the case and if he were not he would take steps "to secure that end". He thereby interfered with the Crown's conduct of its case, and so became inappropriately involved in the fray.

[13] As to the timing for raising the issue, La Forest and Cory, JJ. said, at para. 11:

> Our colleagues contend that allegations of bias should be made in a timely fashion and cite American cases for this proposition. We accept that in order to maintain the integrity of the court's authority such allegations must, as a general rule, be brought forward as soon as it is reasonably possible to do so. However, in this case, the Crown took the courageous position of moving to have the trial judge recuse himself within five days of his demonstration of bias or at least the reasonable apprehension of bias. Thus it moved in a timely, appropriate and reasonable manner. The Crown certainly cannot be faulted on that score.

[14] The court in *R. v. Trang*, 2002 ABQB 1130; 2002 CarswellAlta 1676 (Q.B.), provided a useful review of the law relating to reasonable apprehension of bias. Watson J. said, at paras. 17-19:

> The vantage point from which one would evaluate the question of partiality would be that of reasonable people, aware of the facts, viewing the proceedings from the outside. Lord Hewart, C.J. in [*R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256] stated a core principle:
>
> > It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.
>
> This principle was re-stated by Cory, J. in [*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484], and noted by the other members of the Court in that case. The corollary to this principle is that an inquiry into a reasonable apprehension of bias is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.... Laskin, C.J.C. for the majority in [*Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369] stated this position:
>
> This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies.[p. 391]
>
> In [*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631], Cory, J. indicated that the reasonable member of the public whose loss of confidence would be of concern would be that of the "fully informed observer". Cory, J. in *S. (R.D.)* went on to add that such person would be expected to think the matter through. The law does not set its face arbitrarily against claims of reasonable apprehension of bias by judges, but the party claiming such must make out the claim:

[111] The manner in which the test for bias should be applied was set out with great clarity by de Grandpré, J. in his dissenting reasons in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394, 68 D.L.R. (3d) 716:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude."

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case... Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"... To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community.

[112] The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré, J. in *Committee for Justice, supra*, at pp. 394- 95:

> I can see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias", or "real likelihood of bias". *The grounds for this apprehension must, however, be substantial* and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis by Cory J.]

> Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough....

[15] Watson, J. went on to discuss the significance and substance of the judge's oath of office, at paras. 20-21:

> One of the reasons for the imposition of a burden to show a reasonable apprehension of bias is that of practical necessity. The judicial oath of office and the commitment of judges to it must be taken seriously. If such were to be treated as mere formalisms of no weight on such occasions as recusal motions, the implications would be generally disturbing to the repute of justice generally. The repute of justice is an essential ingredient to the Rule of Law in a democratic society where compliance with law and its principles is largely based on an honour system relying on the law-abiding nature of free citizens, and also upon a generalized public confidence in the justice of the system....
>
> 21 Moreover, as Cory, J. pointed out in *S. (R.D.)*, experience also has spoken in favour of a presumption of judicial conduct by judges who are oath-bound to do justice:
>
> > [117] Courts have rightly recognized that there is a presumption that judges will carry out their oath of office... This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias... The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.

[16] There is authority to suggest that allegations of bias should be raised at the "earliest practicable opportunity," failing which the complaining party may be taken to have waived the right to raise the issue: see *Eikelenboom (c.o.b. Eiklyn Farms) v. Holstein Assn. of Canada*, 2004 NSCA 103; [2004] N.S.J. No. 330, at para. 33, where a claim of actual bias was pursued on judicial review, although it had been abandoned at the original hearing. In *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), Pugsley, J.A. stated, at para. 63, that "[a] lawyer who wishes to object to a presiding judge on the ground of reasonable apprehension of bias is expected to make the recusal motion with reasonable promptness after ascertaining the grounds for filing the motion; otherwise there will be a waste of judicial time and resources and a heightened risk that litigants would use recusal motions for strategic purposes...."

Discussion

Reasonable apprehension of bias

(1) Exposure to information

[17] Mr. Garson suggests that my review of the documents to determine whether they had a semblance of relevancy or were privileged prevents me from continuing as chambers judge in this matter, and prevents me from admitting further evidence or to reject further evidence and to grant the order requested by the plaintiff, due to the a reasonable apprehension of bias. The defendant took the position prior to the document review that I should not review the documents, and that this should instead be done by a justice who had no connection with the application for summary judgment. Although I invited counsel for the defendant to provide me with authority to support his argument that by continuing, and not recusing myself, a reasonable apprehension of bias arises, he has not directed me to any such authority.

[18] As to what information I was actually exposed to in conducting the document review, I reviewed some entries in the notebooks that were irrelevant, some that were privileged and some that I determined had a semblance of relevance. Does my exposure to such materials give rise to a reasonable apprehension of bias? As has been noted above, it is presumed that a judge will set aside such extraneous information in reaching a decision. The defendant has not

pointed to any convincing reason to believe that this presumption should not apply in these circumstances.

[19] Counsel for the plaintiff points out that in the criminal context, judges are frequently required to rule upon the admissibility of documents or statements. Despite being exposed to such material, judges are accustomed to ignoring inadmissible evidence when rendering a decision. I note the following comment from *R. v. Novak*, [1995] B.C.J. No. 1127 (B.C.C.A.), at para. 8:

> Judges are routinely called upon to disabuse their minds of evidence which they have heard but which, as a matter of law, is not admissible in the trial before them. It is fundamental to their role to decide the case only on the evidence properly admissible in that case....

[20] I see no basis upon which to conclude that reading documents or entries that may be privileged or that do not meet the threshold test of semblance of relevancy raises a reasonable apprehension of bias on the basis that my ability to reach an impartial or independent decision based entirely on admissible evidence would be tainted. I note as well that, had another judge reviewed the documents, it would still have been necessary to seek guidance from Mr. Thompson and Mr. Fiolek,

and, assuming the same procedure was used, if would still have been necessary for that judge to conduct the review in the presence of the plaintiff's counsel.

(2) Protecting the existing decision

[21] I am also unable to agree with Mr. Garson's contention that a reasonable observer would conclude that I would be reviewing the notebooks, and addressing issues of privilege and semblance of relevance, with a view to protecting the summary judgment decision I had rendered. I note that, while Mr. Garson maintains that there is no allegation of actual bias, this argument seems more akin to a claim of actual bias than to a reasonable apprehension. I am satisfied that the defendant has not offered any evidence to support the view that this issue raises a reasonable apprehension of bias.

(3) Exclusion of the defendant's counsel

[22] The defendant claims that by excluding him from the courtroom during the review process, and permitting Mr. Coles and Ms. Hiltz-LeBlanc to remain, gives rise to a reasonable apprehension of bias. Mr. Garson asserts that it came as a

surprise to him that he was to be excluded, while Mr. Coles or Ms. Hiltz-LeBlanc remained.

[23] The purpose of the review was for me to ask questions of Mr. Thompson and Mr. Fiolek, and for them to explain the entries in their notebooks for the purpose of determining whether the documents in question had a semblance of relevance. This is a procedure that would normally be conducted by a judge alone, with no assistance. The complication in the present matter, however, was that the notebooks, and specifically the entries therein, were of a nature that they could not be properly assessed without the assistance of their creators, Mr. Thompson and Mr. Fiolek. The entries were largely incomprehensible on their faces, sometimes consisting of nothing more than a name or telephone number. Neither relevance nor privilege was evident from the face of the entries.

[24] Mr. Coles and Ms. Hiltz-LeBlanc's role was clerical. It consisted of identifying entries that had been disclosed, as well as entries upon which the plaintiff asserted privilege. This occasionally required counsel to seek or provide clarification as to the content of certain entries. They then took direction from me as to the portions of the notebooks that should be disclosed to the defendants. I

took the view that their presence could be necessary to draw my attention to issues of privilege that might arise in the course of the review, given that the documents were not comprehensible on their face, and I was being assisted by their client's representatives. I acknowledge, however, that the fact that counsel's role was a clerical one does not, in itself, dispel an argument that a reasonable apprehension of bias could arise. Moreover, there is no question that, as a rule, communication with one counsel, in the absence of the other counsel, is inappropriate. In these unusual circumstances, there did not appear to be any other practical way to proceed; to consult with Mr. Thompson and Mr. Fiolek *in camera* in the absence of counsel would also have been objectionable.

[25] The record of the discussions between myself and counsel in September and October, prior to the document review being conducted, indicates that the fact that Mr. Garson would not be permitted to stay in the courtroom during the review was a matter that had been raised and discussed. The record also indicates that Mr. Garson raised no objection of this nature when he was asked to leave the courtroom. He provided his contact information and departed. Given these circumstances, I do not accept that Mr. Garson could have been taken by surprise that he was the only one asked to leave the court room. Given the nature of the

review, the record indicates that he recognized that he could not be in the courtroom while I reviewed the notebooks.

[26] Mr. Garson further submits that if only Mr. Fiolek and Mr. Thompson had remained in the courtroom, with all counsel excluded, there would be no difficulty with my conducting a review of the notebooks with their assistance if such review followed on certain principles. This position appears to be inconsistent with his view, discussed above, that my exposure to documents that were excluded on the basis of semblance of relevance or privilege creates a reasonable apprehension of bias.

The defendant's application for a mistrial

[27] In the event that I do not recuse myself, the defendant requests that I should dismiss NSPI's second summary judgment application and declare a mistrial as a result of NSPI's failure to make full and timely disclosure of documents. The defendant filed its Second Amended Defence on August 3, 2006. Upon filing of the new defence, Mr. Garson wrote to Mr. Coles requesting (in summary) disclosure of any documents relevant to new issues raised by para. 8 of the new

defence. The plaintiff filed its second summary judgment application on December 11, 2006, relating specifically to para. 8 of the second amended defence. The plaintiff filed a supplemental list of documents on June 8, 2007.

[28] The second summary judgment application came on for hearing in August 2007. In the course of this proceeding, Mr. Coles advised that all relevant excerpts of Mr. Thomson's notebooks had been disclosed. There is no suggestion that Mr. Coles was aware that this was incorrect. However, the defendant submits that there has been no satisfactory explanation for this failure of the plaintiff's disclosure obligations. Mr. Thomson undertook to examine his notebooks on November 22, 2007. My decision on the second summary judgment application was released on February 20, 2008. The plaintiff provided additional disclosure on March 3, 2008.

[29] Mr. Garson acknowledges that little of consequence actually arose from the documents that were produced as a result of my review; he cannot, he says, point to "smoking gun" or a "bomb" in the additional notebooks. He claims, however, that the plaintiff's failure to make timely disclosure has tainted the proceeding and submits that I should declare a mistrial. The defendant cites *R. v. Dixon*, [1998] 1 S.C.R. 244, where the issue concerned an accused person's right to disclosure from

the Crown. Cory, J. , for the court, set out a two-step analysis for determining whether the right to make full answer and defence was impaired. He said, at para. 36:

> First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence. [Emphasis in original.]

[30] The plaintiff does not dispute that disclosure was late, but maintains that the failure to disclose was an irregularity and should be treated as such under *Rule* 3. The documents produced after of the hearing on the summary judgment do not reveal any document that would change the result of the summary judgment decision. The defendant, however, does not suggest that I should change the decision based on information contained in the additional documents; the defendant's complaint relates to the exceptional delay in producing documents

required to be disclosed under *Rule* 20. All that being said, it is clear that a mistrial is a drastic remedy that should only be resorted to where no other remedy can address the error or prejudice: see *Sawridge Band v. Canada*, 2007 FC 657; [2007] F.C.J. No. 895, at para. 405.

[31] The defendant adds that it did not file any affidavit at the time of the summary judgment application, relying on the documents that had been previously disclosed, and particularly upon Mr. Thompson's affidavit. However, the defendant did not seek leave to reopen the application and to provide a reply affidavit on the basis of the additional disclosure.

[32] I am unable to accept the plaintiff's argument that the failure to abide by *Rule* 20 was merely an irregularity. Such a failure gives rise to a presumption that the party who failed to make timely disclosure did so out of either indifference or disinterest. I am unable to conclude that it was an intentional failure without additional evidence. However, there is no apparent basis to argue that the position of the defendant has been prejudiced in any way that cannot be remedied by costs. In these circumstances, such failure does not amount to sufficient reason to declare a mistrial.

Conclusion

[33] Accordingly, I am not persuaded that a reasonable observer would conclude that the circumstances gave rise to a reasonable apprehension of bias. I am also not persuaded that the deficiencies in disclosure by the plaintiff are of such gravity that a mistrial is justified.

[34] I note for the record that I directed that the notebooks be marked as exhibits for purposes of reference and identification.

[35] A separate, supplementary decision will be issued on costs.

J.