SUPREME COURT OF NOVA SCOTIA

Citation: Bell Aliant Regional Communications Inc. v. Cabletec Ltd., 2011 NSSC 136

Date: 20110406
Docket: Hfx No. 307920 and 307917
Registry: Halifax

Hfx No. 307920

Between:

Bell Aliant Regional Communications, Limited Partnership by its General Partner, Bell Aliant Regional Communications Inc.

Plaintiff

v.

Cabletec Limited

Defendant

Supreme Court of Nova Scotia

Hfx No. 307917

Bell Aliant Regional Communications, Limited Partnership by its General Partner, Bell Aliant Regional Communications Inc.

Plaintiff

v.

J. Clair Callaghan

Defendant

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	February 9, 2011, in Halifax, Nova Scotia
Counsel:	Joseph Herschorn , for the Plaintiff/Applicant Chris Robinson, for the Defendant/Respondent

By the Court:

Introduction:

[1] This is an application for Summary Judgement by the Plaintiff, Bell Aliant, on the grounds that the Defendant, Cabletec, and its principal, Clair Callaghan, have no evidence to support their allegations in defence of Bell Aliant's claim or to support their Counter Claim. The claim by Bell Aliant is for an unpaid amount arising out of a five year contract to supply telephone and other services to Cabletec. Cabletec was in the business of reselling these services. During the term of the latest contract, which contract is not in dispute, the "landscape" in the telecommunications industry was changing rapidly and significantly such that Cabletec could not continue to supply services to its customers at competitive prices if it had to pay Bell Aliant the contracted price. Cabletec alleges that Bell Aliant represented and gave its assurances that the contract prices would be adjusted in a number of ways so that Cabletec could stay in business and Bell Aliant would continue to sell its services to Cabletec.

[2] Cabletec alleges that it relied on the representations and assurances of Bell Aliant to its detriment and it now challenges the amount claimed owing to Bell Aliant. It also makes a Counter Claim against Bell Aliant. Bell Aliant contends that Cabletec has not a "shred" of evidence to support its allegations, that these are bare assertions, and it has moved that both the Defence and the Counter Claim be dismissed and Summary Judgement entered in its favour.

Background:

[3] Bell Aliant and Cabletec had been doing business for some 15 years prior to January of 2009 when the supply of services to Cabletec was terminated by Bell Aliant. The parties had a history of entering into service contracts with 5 year terms. Bell Aliant terminated its supply of services to Cabletec because it claimed that Cabletec owed it approximately $1.6 million dollars in overdue and unpaid invoices.

[4] The agreement for services which is pertinent to these legal proceedings covers the period August 20, 2004 to August 20, 2009. The previous agreement had expired August 19, 2004. It is noted that the August 20, 2004 to August 20, 2009 agreement was not executed by the parties until January of 2007. It is also

noted that, prior to the execution of the latest agreement, the market forces which caused Cabletec to not be able to compete in the market place to resell its services and at the same time pay Bell Aliant the contracted price were already evident. This had been the case since the early 2000's. As a result, Cabletec was not able to keep its debt to Bell Aliant current and up to date.

[5] In an effort to keep Bell Aliant providing services to Cabletec and to keep Cabletec in business, it was agreed that Mr. Callaghan, the principal of Cabletec, would execute a personal guarantee to a maximum of $200,000.00. This document is dated January 23, but the year is not indicated; however, it appears that the guarantee was executed in 2004, but had been agreed to in 2003. As a result of this guarantee, both Mr. Callaghan and Cabletec have been sued by Bell Aliant.

[6] While the Defence filed in the Callaghan guarantee suit alleged duress, undue influence, and threats by Bell Aliant in order to get the guarantee signed, it became clear at the hearing of this motion that Mr. Callaghan signed that document freely, willingly, and voluntarily, and he admitted the same at the hearing. Therefore any defence with regard to the guarantee would rest on the ruling with regard to the liability and the alleged amount owing by Cabletec to Bell Aliant.

[7] The crux of this matter are the allegations by Mr. Callaghan that during the period 2003/2004 to 2008 he was unwaveringly assured by representatives of Bell Aliant that the price structures by which Cabletec was receiving its services would be adjusted. He says this was in order to permit Cabletec to continue to compete by reselling in the market place the services which it purchased from Bell Aliant. Mr. Callaghan asserts in his affidavit and upon cross-examination at this hearing that this was to be accomplished in a number of possible alternative ways, or a combination thereof. Mr. Callaghan is adamant that his company would not have continued to resell Bell Aliant services in the market place at a loss for as long as it did had he not received assurances from Bell Aliant that the price structure for those services would be adjusted so Cabletec could stay in business. There are three main ways in which Mr. Callaghan alleges this was going to be accomplished and he says he was told this consistently by various representatives of Bell Aliant; and he names Mr. William (Bill) Hanson, Mr. Ernie Kemball and Mr. Gilles Volpe in particular.

[8] One of the ways in which Mr. Callaghan alleges that Bell Aliant was going to adjust its price to Cabletec was by instituting a “special tariff”. Mr. Callaghan

alleged in his sworn affidavit and during cross-examination at the hearing of this motion that he was told by Mr. Hanson in early 2004 that it would be "easy" for Bell Aliant to draft a "special tariff" to apply to Cabletec. Mr. Callaghan states he was told by Mr. Hanson on a number of occasions that a "special tariff" had been drafted but not yet submitted by Bell Aliant to the Canadian Radio-Television and Telecommunications Commission ("CRTC"). Mr. Callaghan was aware that CRTC approval would be required for such a tariff; but he states he was told by Mr. Hanson and Mr. Volpe that it would not be difficult to achieve and that Bell Aliant was motivated to get it done because Cabletec was a valuable client of Bell Aliant. In the end a "special tariff" was not achieved and it appears that none was submitted to the CRTC. Mr. Callaghan says he does not know precisely what that "special tariff" would be; only that it would be competitive in the market place.

[9] Another possible way in which Mr. Callaghan says that Bell Aliant was going to fix the price structure problem was by way of an "administrative fee". Mr. Callaghan says a 16% administrative fee payable to Cabletec was discussed with Mr. Hanson and Mr. Volpe as a possible short term fix to Cabletec's pricing problems. Again, an "administrative fee" was never achieved nor was one ever agreed upon between the parties.

[10] A third possible way in which Mr. Callaghan says Bell Aliant representatives indicated a pricing structure fix could be achieved was by way of "wholesale pricing" for the services provided to Cabletec. Mr. Callaghan says he did not know precisely what the "wholesale price" would be; but he says he was assured that it would be less than the current price Cabletec was paying and that it would be competitive. Mr. Callaghan testified that he did not know if such a pricing arrangement would require CRTC approval or some form of deregulation. Again, such a pricing arrangement was never achieved and it does not appear that any applications in that regard were ever made to the CRTC, if such was required; however, the evidence of whether any of these "fixes" were ever attempted by Bell Aliant would be in its "hands" and not Cabletec's.

[11] Another issue which looms large in these proceedings is the question of "retroactivity". Mr. Callaghan says he always understood that any price structure fix would be retroactive in some manner because that would be required to address Cabletec's unpaid debt to Bell Aliant; otherwise, Cabletec would not be able to repay its debt to Bell Aliant, nor stay in business. Again, no clear agreement was ever reached on the "retroactivity" issue as it might pertain to the three pricing

structure “fixes” which Mr. Callaghan says he was assured would be employed, or at the very least attempted by Bell Aliant. Mr. Callaghan points to the fact that Bell Aliant froze a part of its debt, approximately $600,000.00, which was “put in a box” and bearing no interest as support for Cabletec’s position that it was assured by Bell Aliant that the uncompetitive pricing structure would be adjusted and fixed, one way or another.

[12] Mr. Callaghan also points to the fact that financial statements incorporating a pricing structure fix were prepared and submitted for a financing application to the Royal Bank as further support of the assurances and representations which he alleges he had received from Bell Aliant.

[13] Mr. Paul Pothier, the Regional Director of Wholesale Services for Bell Aliant, has filed two affidavits refuting Mr. Callaghan’s allegations that Cabletec was given assurances that the pricing structure would be fixed. He states that he can find no documentary evidence that such representations or assurances were clearly given to Mr. Callaghan or that any agreements in that regard were ever reached. It is noted that Mr. Pothier was not on the scene at Bell Aliant when Mr. Callaghan alleges these discussions were going on; and there are no refuting affidavits from Messers, Hanson, Volpe, or Kemball, the named representatives of Bell Aliant.

[14] To summarize; while there is no dispute that Cabletec has not been able to pay the amount claimed by Bell Aliant, Cabletec contends that it was induced to continue buying services from Bell Aliant and re-selling these services to its customers at a loss, at least during the period 2004 to 2009. Cabletec alleges that it was the representations made and assurances given by Bell Aliant that the pricing structure would be fixed, and on which it relied, which induced it to continue its business at a loss. It claims Bell Aliant did not follow through on its promises and, more importantly, that Bell Aliant did not make reasonable efforts to follow through on its assurances and promises to fix the pricing structure.

[15] Cabletec has framed its defence and Counter Claim in its brief on this motion as being based on “breach of contract” and “detrimental reliance”. The “breach of contract” basis would require that the contract covering the period 2004 to 2009 had been varied. The evidence put forward so far does not establish that the terms of the contract were ever varied in sufficient detail so as to permit a “breach of contract” defence or Counter Claim. Moreover, I am not aware that

"detrimental reliance" of itself constitutes a cause of action. In effect, Cabletec is alleging a form of misrepresentation and a lack of good faith on the part of Bell Aliant, which Cabletec says induced it to continue its business to its detriment. I have reviewed the pleadings and they are capable of supporting a defence and Counter Claim based on a form of misrepresentation and consequential damages, if any.

[16] Bell Aliant contends that Cabletec's defence and Counter Claim cannot succeed because Cabletec cannot establish a variation of the 2004 to 2009 contract with a sufficient degree of detail or specificity to allow Cabletec to avoid its debt to Bell Aliant or to establish a Counter Claim. There can be no doubt that for any Counter Claim to succeed or be quantified there would have to be clear evidence of the situation in the market and the prices during the relevant times. There has been no such evidence presented in this proceeding; but that may be more a matter for trial than on a motion for Summary Judgement and "the question of a genuine issue for trial"; which is the issue I have to decide.

[17] Bell Aliant also contends that, on this motion "Cabletec is required to produce evidence on which promissory estoppel could be found", and that Cabletec has failed to do so. Bell Aliant argues that, for promissory estoppel to apply, Cabletec must provide evidence of the necessary details for a variation of contract; something which Bell Aliant contends has not been done because of the lack of documentary evidence on that point. Cabletec contends it is not necessary that it "prove" its case on a balance of probabilities at the Summary Judgement motion stage, only that it establish that there is a "genuine issue for trial".

Issues:

1. Has the moving party, Bell Aliant, shown, on the evidence, that there is "no genuine issue of material fact requiring trial"?

2. If the answer to question No. 1 is yes; then have the responding parties, Cabletec and Mr. Callaghan, refuted or countered, on the evidence, and established that there is "a genuine issue of material fact requiring trial" and that they have "a real chance of success"?

Authorities:

[18] The leading case on the subject of Summary Judgement in Canada appears to continue to be *Guarantee Co. of North America v Gordon Capital Corp.*, [1999] 3 S.C.R. 423. This case has been followed and cited with approval by Superior and Courts of Appeal in just about every province. This continues to be so in this province even though there is a slight variation in the Civil Procedure Rules of the various provinces and even though Nova Scotia has recently amended its Rules. The new Civil Procedure Rule which applies to the present case is CPR No. 13.04:

> Summary judgment on evidence
>
> > 13.04(1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
> >
> > (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
> >
> > (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of genuine issue for trial depends on the evidence presented.
> >
> > (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
> >
> > (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
> >
> > (6) The motion may be made after pleadings close.

[19] The Supreme Court in *Guarantee*, *supra*, at para 27, framed the test as follows:

> 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Management Ltd. V Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) At para. 15; *Dawson v Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at pp. 267-68; *Irving*

> *Ungerman Ltd. v Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) At pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success." *Hercules, supra,* at para. 15.

[20] This Court recently considered the issue of Summary Judgement in the case of *AGC Glass Centre v Roofing Connection*, 2010 NSSC 108. Bryson, J. (as he then was) stated the test as follows at paras. 13 and 14:

> 13 Keeping in mind that it is the *plaintiff* who is moving for summary judgment, and who must establish that there is no "genuine issue" for trial, I would characterize the test and applicable legal principles in this way;
>
> (1) The plaintiff must show that, on un-controverted facts, it is entitled, as a matter of law, to succeed; that is to say, that there is no fact material to the cause of action that is in issue;
>
> (2) The burden then shifts to the defendant to show evidence that the defence has a real prospect of success; that is to say that there is a genuine issue of fact material to the claim or defence, that must be decided before the case can be determined on its merits;
>
> (3) The responding party must put "its best foot forward" or risk losing. This requires more than a simple assertion, but requires evidence, *United Gulf, supra*;
>
> (4) If material facts are not in dispute, the court has an obligation to apply the law to those facts and decide the matter, *Eikelenboom, supra*; [Emphasis added]
>
> 14 To defeat a summary judgment application, a responding party cannot be coy about its true position. A vague assertion of factual disputes will not do. In *Canada* (*Attorney General*) *v. Lameman*, [2008] 1 S.C.R. 372, 2008 SCC 14, the Court said:
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> > [11] ... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried ... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts ... [Emphasis added]
> >
> > [19] ... In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be

> adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. ...

[21] The above noted quote from *Canada (Attorney General) v Lameman* by Justice Bryson does not include para. 10 and the first part of para. 11, which are as follows:

> 10 This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
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> 11 For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings...If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal... [Emphasis added]

[22] When one reads the words "must prove this" and "does prove this" in the first part of para. 11 of *Lameman* it could lead one to the conclusion that the moving party, and perhaps the responding party, must "prove" their case on the civil burden of proof. However, the words used in *Guarantee*, *supra*, are "shown" and "establish" with regard to the burden on the moving and responding parties respectively. It appears that what is meant is that the moving party must "show" a *prima facie* case which the responding party can refute, albeit with some evidence and more than "bare assertions". Obviously the parties should not be required to "prove" their cases in a Summary Judgment application by way a of bifurcated trial. Surely that is not what was intended. Neverless there is some indication that could be the view of some counsel in this jurisdiction because the number of such

motions appears to have grown significantly, both at the trial and appeal levels, since the coming into force of our New Rule 13.04. This is inspite of the fact that A. C. J. Smith in *Spring Garden Holdings Ltd. v Ryan Duffy's Restaurants Ltd.*, 2010 NSSC 71, said the following at para. 24, after citing *Guarantee, supra* with approval:

> 24 While this test was established under the 1972 Civil Procedure Rules - in my view the test remains the same under Rule 13.04.

And Farrar, J. A. said the following in *Gilbert v Giffin*, 2010 NSCA 95, at paras. 14 and 15:

> 14 The prerequisites for summary judgment to dismiss an action are - first that the applying defendant show that there is no genuine issue of material fact requiring trial; and second, that the responding plaintiff fails to show that his claim has a real chance of success. (*Guarantee Co. of North America v Gordon Capital Corp*., [1999] 3 S.C.R. 423 (S.C.C.) At para. 27).
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> 15 The Chambers judge correctly cited the test. The question is whether he erred in its application.

[23] I accept counsel for the Defendants' submission that the case of *Young (Litigation Guardian of) v Meery*, 2009 NSCA 47, continues to be applicable and that the comments of Saunders, J. A., and the quotes which he apparently accepted at paras. 21-23, are relevant to the present motion:

> 21 Regarding the judge's restricted role in the fact-finding process on a motion for summary judgment the starting point is the decision of the Supreme Court of Canada in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.). In that case, the Court confirmed that where there are disputes of fact, the disputes should be determined at trial. (See paras. 27-30). This Court has consistently taken this approach on summary judgment applications. See for example *Oceanus Marine Inc. v. Saunders*, [1996] N.S.J. No. 301 (N.S.C.A.); *Campbell v. Lienaux*, [1998] N.S.J. No. 142 (N.S.C.A.); and *United Gulf Developments Ltd. v. Iskandar*, 2004 NSCA 35. (N.S.C.A.)
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> 22 In *Oceanus, supra*, Justice Pugsley discussed the role of the Chambers judge in the face of conflicting evidence in a summary judgment application. He stated that a Chambers judge is not entitled to make findings of fact or determinations of credibility when confronted with conflicting evidence in an application for summary judgment; those are exercises left to a trial judge or a

> jury. That is, the presence of conflicting evidence will likely be enough to meet the low threshold of raising an arguable issue, and will thereby be enough to dismiss an application for summary judgment. [Emphasis added]

23 Further elaboration concerning the limited role of a Chambers judge on a summary judgment application was provided by Justice Roscoe in *Huntley, supra* where she observed at paras. 37-39:

> [37] However, there was sufficient information before the chambers judge, to indicate that there will be conflicting evidence at trial. ...
>
> [38] In addition, the plaintiffs will have the opportunity to test the credibility of ... As well ... the quality of his observation will be questioned. The trier of fact will be asked to draw inferences from all the evidence.
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> [39] A summary judgment application is not the time for evaluating credibility, weighing evidence and drawing inferences. In *Dawson v. Rexcraft Storage*, [1998] O.J. No. 3240 (C.A.) Borins, J.A. explained:
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> > 19 In *Aguonie*, [1998] O.J. No. 459 this court discussed the role of a motions judge in determining whether a genuine issue exists with respect to a material fact. It is helpful to repeat what the court said at pp. 235-36:
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> > In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact....
> >
> > 28 ... However, at the end of the day, it is clear that the courts accord significant deference to the trial process as the final arbiter of the dispute which has brought the parties to litigation. If there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear the claim, or the defence, which has been attacked by the moving party, the case must be sent to trial. It is not for the motions judge to resolve the issue.

[24] With regard to the “real chance of success” test enunciated in *Guarantee, supra*; this has been accepted by Hood, J. of this Court in *Eikelton v Holstien Assn.*

of Canada, 2003 NSSC 241, para. 10 (reversed on other grounds, see 2004 N.S.C.A. 103) and she stated it as follows:

> 10 ... A "real" chance of success is not to be expressed in percentages. It does not mean that the plaintiffs are likely to succeed at trial or have a better than 50/50 chance of success. At trial, plaintiffs have the onus of establishing their claim on the balance of probabilities. A real chance of success means the possibility of their success is not illusory or unrealistic. It is no more than saying they could succeed and the determination of whether they will or not should be left for the trial. The trial judge will have to examine all the surrounding circumstances. That is not the role of a chambers judge on a summary judgment application. [Emphasis in original]

[25] This statement of the test has been accepted on several occasions by this Court and by our Court of Appeal.

Analysis:

[26] I will deal with issue No. 1, which is the first part of the test on a summary judgement application; but I will consider all of the evidence presented on this motion, as opposed to concentrating primarily on the evidence presented by the moving party. Although, one could argue that the *Guarantee* and *Lameman* cases, *supra*, suggest a different approach. In my respectful opinion, it is difficult to see how one could proceed otherwise in the fact driven world of a trial court faced with "all" the evidence. It is difficult to separate step one and step two of the test, as suggested in the cases, when one is faced with "all" the evidence presented on such a motion; unless a two stage hearing was held, which is not usually the case. It is difficult to see how step one can be proven, as suggested in *Lameman*, *supra*; and then unproven in step two of the test. I am not a philosopher, but I have trouble with this concept.

[27] In any event, in this case we have Cabletec through its principal, Mr. Callaghan, alleging in a sworn affidavit and in unwavering testimony on rigorous cross-examination, that he was represented and assured by representatives of Bell Aliant that they would attempt a number of things to fix the unsustainable pricing structure for services supplied during the period 2004-2009. It appears that none of these measures were initiated and it is not clear that they were even attempted by Bell Aliant. Mr. Callaghan alleges in the same manner that Cabletec, and himself

personally, suffered financial damages as a result of what in effect are allegations of a form of misrepresentation. Mr. Callaghan has said that he signed the 2004-2009 contract in 2007 because the alleged representations and assurances of Bell Aliant were ongoing.

[28] Bell Aliant has denied Mr. Callaghan's allegations, primarily through an affidavit of Mr. Pothier, which simply states that there is no documentary evidence of the assurances alleged by Mr. Callaghan. As noted previously, Mr. Pothier was not on the scene for Bell Aliant at the relevant times and there are no affidavits from the Bell Aliant representatives named by Mr. Callaghan. One could question whether this is putting one's best foot forward. But even if there were such affidavits, this Court would still be required to weigh the evidence and assess credibility; a process which is not permitted on an application for Summary Judgement. (See *Meery supra*).

[29] Granted, the documentary evidence supporting Mr. Callaghan's allegations is scarce, but there is some. That, together with Mr. Callaghan's sworn evidence, is sufficient for me to find that there "is a genuine issue of material fact requiring trial". The issues for trial appear to be whether the representations and assurances alleged by Mr. Callaghan can be proven to have been made on the required burden of proof; and if so, what damages, if any, flow from that?

Conclusion:

[30] I find that Bell Aliant has failed to show that there is "no genuine issue of material fact requiring trial" and I therefore dismiss its motion for Summary Judgement.

[31] Even if I had found that Bell Aliant met its burden on the first part of the test, I would have found that Cabletec and Mr. Callaghan had "established" their claims as being ones with a real chance of success, as that test has been defined by the authorities.

[32] In any event, I would dismiss Bell Aliant's motion.

Costs:

[33] With regard to the question of costs on this motion, my preliminary view is that costs should be in and follow the cause; however, I will entertain oral submissions from the parties at a mutually convenient time, if anyone so requests.

Order:

[34] I will grant an Order accordingly, prepared by counsel for the defendants and consented as to form by all concerned.

Boudreau, J.