SUPREME COURT OF NOVA SCOTIA
Citation: Reading v. Johnson, 2011 NSSC 87

Date: 20110228
Docket: Syd. No. 289967
Registry: Sydney

Between:

Anne Reading

Plaintiff

v.

Heather Johnson

Defendant

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	February 28, 2011, in Sydney, Nova Scotia
Oral Decision:	February 28, 2011
Written Decision:	March 2, 2011
Counsel:	Anne Reading, Plaintiff, in person Frank G. Gillis, Q.C., for the Defendant

By the Court (Orally):

[1] There are two motions before the Court today. As the outcome of both may impact significantly on the timing of further steps in the litigation, it is important that the parties know quickly the Court's determination, so they can proceed accordingly. As such, I intend to give my reasons today, albeit in a somewhat more abbreviated form, than if the decision had been reserved.

BACKGROUND

[2] Anne Reading has brought an action against Heather Johnson, alleging defamation. The action was commenced on December 21, 2007, and has been defended vigorously. The action arises in the context of the two women's employment circumstances, specifically that as her Nursing Supervisor, Ms. Johnson allegedly sent a defamatory letter about Ms. Reading to the Worker's Compensation Board and the College of Registered Nurses in late 2006.

[3] There have, since the action commenced, been a number of interlocutory proceedings addressing procedural issues, as well as a failed application for summary judgment brought by Ms. Reading. The Court understands that in

addition to the two motions before me today, that there is a decision currently on reserve arising from a motion before Justice Murray heard earlier this month, and that Ms. Reading has recently filed a motion seeking to amend her pleadings, which is scheduled for April, 2011. Clearly, the litigation to date, has been contentious.

THE PRESENT MOTIONS

[4] As noted above, there are two motions before the Court. The first is brought by Mr. Stuart Peters, spouse of Ms. Reading, seeking to be "joined to the plaintiff as an intervenor", pursuant to Civil Procedure Rule 35.10. Ms. Reading is in support of the motion. The second motion is brought by Ms. Reading under Civil Procedure Rules 18.13 and 18.17, seeking direction relating to the discovery of Ms. Johnson. Both motions are opposed by Ms. Johnson. I intend to address each separately, and in the order noted above.

MOTION TO INTERVENE - CIVIL PROCEDURE RULE 35.10

[5] Dealing first with Mr. Peters' motion, I begin by considering the applicable Rule. Rule 35.10 reads as follows:

> 35.10(1) A person who is not a party to an action or application and wishes to be joined may move for an order joining the person as an intervenor.
>
> (2) A judge who is satisfied that the intervention will not unduly delay the proceeding, or cause serious prejudice to a party, may grant the order in one of the following circumstances:
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> > (a) the person has an interest in the subject of the proceeding;
> >
> > (b) the person may be adversely affected by the outcome of the proceeding;
> >
> > (c) the person ought to be bound by a finding on the determination of a question of law or fact in the proceedings;
> >
> > (d) intervention by the person is in the public interest.
>
> (3) Unless a judge orders otherwise, an intervenor must comply with all Rules applicable to a defendant, including the Rules in Part 5 - Disclosure and Discovery.
>
> (4) Unless a judge orders otherwise, an intervenor is entitled to all of the procedural rights of a party.

> (5) The judge may make an order restricting an intervenor's procedural duties and right, and generally, regulating the intervenor's participation in an action or application.

a) Position of the Applicant

[6] Mr. Peters asserts that he has an interest in the proceeding and that, should his wife not be successful in the claim, he may be adversely affected financially by the outcome. He further asserts that his intervention is warranted given Ms. Reading's current health circumstances, namely that she is having difficulty coping with working full-time and attending to the requirements of advancing the litigation. Mr. Peters has made it clear in his submissions that pursuant to Rule 35.10(4), he will be seeking to be entitled to all procedural rights afforded to a party. Ms. Reading echos the argument put forward by her spouse.

b) Position of the Respondent

[7] Ms. Johnson through her legal counsel has outlined her rationale in objecting to the motion, and raises three primary concerns. Firstly, it is submitted that given this action was commenced in 2007, and that Mr. Peters has been aware, and active within the various appearances, that the Court should dismiss the motion on the

basis of laches. Secondly, it is submitted that permitting Mr. Peters to intervene would unduly delay the proceedings, especially in light of the fact that the Applicant has made it clear that he wishes, in addition to the rights of Ms. Reading, to be entitled to all rights afforded to an independent party. It is argued this will only serve to belabour future steps in the litigation. As a third issue, it is submitted that granting the motion will cause serious prejudice to the Defendant. It is further submitted that the primary objective of the motion is to permit Mr. Peters to take over carriage of his wife's action, given her health concerns, and that this is not an appropriate consideration under, nor use of, Rule 35.10.

c) Determination

[8] Rule 35.10, like all of the current rules, came into effect on January 1, 2009. I have not been made aware of, nor has my own brief review, disclosed any determinations made under the rule since its inception. There are, of course, numerous determinations made under former Rule 8.01, which are of interpretative assistance.

[9] In my view, Rule 35.10 creates a two staged analysis for the determination of motions to intervene. The first stage requires the Court to consider whether granting the motion would cause undue delay, or cause serious prejudice to a party. In most circumstances, it would be the applicant who would carry the burden of satisfying the Court that granting the order would not unduly delay the proceeding, whereas it is the applicant who is in the best position to be aware of how he or she intends to further advance its position, if successful. In most circumstances, one would anticipate a respondent opposing the motion to carry the burden of showing serious prejudice, as they are in the best position to speak to the impact of granting the motion on the advancement of their case. Certainly, there may be circumstances where the above burdens may reverse, given the multitude of contexts which may give rise to such motions. Regardless of the burden, I do not view it as necessary that both factors are established, one may be sufficient to stop the motion in its tracks.

[10] The second stage of the analysis is contained in the later part of Rule 35.10(2), which provides the Court with four circumstances in which a motion can be granted, should the Court have determined there is no undue delay, or serious

prejudice. The wording of the provision is clear that the presence of any one of the four factors may be sufficient to grant the relief sought.

[11] Notwithstanding the above, it should not be overlooking that the Court retains a discretion to dismiss a motion, even where an applicant successfully navigates the two stage analysis.

[12] In the present circumstances, I am far from satisfied that granting Mr. Peter's motion will not unduly delay the proceedings. I am quite fearful that it will. As is her right, Ms. Reading is self-represented. There is no indication that if permitted to intervene, Mr. Peters intends to retain legal counsel. As noted earlier, there have been a number of motions already brought before the Court, most by Ms. Reading, most with limited success. There are more to come. Although self-represented parties certainly have the right to advance their positions, including making various motions, it is not at all uncommon, that such proceedings often become more complex, and time consuming, than if legal counsel were involved. Such is a reality that cannot be overlooked particularly based upon the procedural history of this litigation to date.

[13] Mr. Peters has made clear that he is seeking to exercise all rights normally afforded to a party. As such, it is reasonable to anticipate that proceedings may be complicated due to he and Ms. Reading each putting forward their respective position on future procedural matters. By way of example, as an intervenor, Mr. Peters may initiate further procedural steps as an independent party, such as seeking discoveries, or the amendment of pleadings to reflect his new status in the proceedings, all of which may, unduly delay the proceeding which has already been before the Court for in excess of three years.

[14] Based on the two stage analysis, the Court could conclude consideration of the motion at this stage. However, in the event my analysis relating to the first stage is found to be incorrect or otherwise improper, it may be prudent to proceed further to consider whether there are any factors which favour the applicant's position, and in particular whether this matter falls within any of the "circumstances" contemplated in Rule 35.10(2)(a) through (d).

[15] Mr. Peters asserts that he has "an interest in the subject of the proceedings", as contemplated by subsection (a). Undoubtedly, as the spouse of a party to litigation, he is interested in the matter, as most supportive spouses would be. If

his wife was defamed, he would understandably want that wrong to be addressed, and as such, his interest in the Court proceedings is more than understandable. However, the more important inquiry, and the one which must be addressed is what is intended within the Rule by use of the phrase "interest in the subject of the proceedings"? Is the type of interest described above enough, or is something else more required? Fortunately, there is some guidance found in earlier decisions, rendered under the former rule, which is of assistance.

[16] Former Rule 8.01 reads in part:

> 8.01(1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto where,
>
> > (a) he claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the judgment therein, or otherwise;

[17] Clearly, the wording of the former provision relating to an interest in the proceeding is not dissimilar to the present Rule. There is clear authority for the view that an interest, as contemplated by the rule, must be more than that arising from a supportive spouse, there must be some independent, direct interest in the issues being litigated before the Court. This was addressed by the Court of Appeal

in ***L & B Electric Ltd. v. Selig***, 2006 NSCA 130. There a chambers judge had found that shareholders should be permitted to intervene in a proceeding involving the Company and another shareholder. The chambers judge had determined that as the litigation may impact on share valuation and other issues relating to the operation of the Company, that the shareholders seeking to intervene had a direct interest in the subject matter of the litigation. On appeal, the Court found the chamber's judge did not err.

[18] In her reasons, Justice Bateman endorses that the "interest" of the proposed intervenor, should be a "direct interest". She writes:

> [9] On a plain reading of the Rule, a judge may exercise her discretion to grant intervention if the applicant has an "interest" in the proceeding. This Rule has been liberally interpreted in Nova Scotia. (citations omitted)
>
> [10] Not uncommonly, the sufficiency of the applicant's "interest" in the litigation is in dispute (citation omitted) However, here the judge accepted the applicants, as employees and shareholders, have a "direct and . . .profound financial interest in the subject matter of the litigation and its eventual outcome". The appellants do not dispute this.
>
> [11] From a review of the case law I conclude that intervention has often been permitted where the applicant has a direct interest in the proceeding, subject to the judge's discretion to refuse intervention if it would "unduly delay or prejudice the adjudication of the rights of the parties to the proceedings". This is consistent with a liberal interpretation of our Rules.

> "Direct" interest is consistently used in the language of the case law but has no single meaning in its application. However, the intended intervenors here clearly fall within even the most restrictive definition. The outcome of this litigation has the potential to significantly impact the value of their shareholdings, their working conditions and possibly their future employment.

[19] Mr. Peters argues that his circumstances parallel those of the intervening shareholders in ***L & B Electric, supra***. With respect, I disagree. In that instance, the shareholders had a direct interest in the subject matter of the litigation, as it related or potentially related to the value of their shares in the Company, a party to the proceedings. Here, Mr. Peters was not involved in the alleged defamation - it was not a statement made about him, and it was made in the context of the employment setting of his wife, in which he has no personal involvement.

[20] In the circumstances before me, I do not consider that Mr. Peters has a direct interest in the proceedings before the Court, which would justify his intervention. I have also considered the evidence and submissions relating to Ms. Reading's health circumstances, and in particular whether such would give rise to an "interest" as contemplated by the Rule. I find that it does not. Other than the personal interest arising given the concern for his spouse, Mr. Peters does not have his own direct or independent interest in the subject matter of the proceedings.

Even if this Court made a finding, which I decline to do so based on the evidence before me, that Ms. Reading was incapable of advancing the litigation on her own behalf, this does not create an interest for Mr. Peters. Intervention under Rule 35.10 is not the appropriate approach to dealing with Ms. Reading's alleged limitations in my view. I am aware that in past appearances, Mr. Peters has been permitted, pursuant to Rule 34.08, to assist Ms. Reading in the presentation of her case. That may be, subject to appropriate evidence being placed before the Court, a more appropriate route to address the concerns raised by Mr. Peters and Ms. Reading.

[21] I take a similar view with respect to Mr. Peter's assertion that as Ms. Reading's spouse, he "may be adversely affected by the outcome of the proceedings". If Ms. Reading is unsuccessful in her action against Ms. Johnson, she may be subject to a cost award. The payment of that award may impact upon the financial resources of both Ms. Reading and her spouse. However, I do not view this as being sufficient to fall within the circumstance contemplated by the Rule. To adopt Mr. Peters' argument, would be to virtually open the flood gates for all non-party spouses, or others whose finances are tied in some fashion to a litigant, to become intervenors. That is not the intention of the Rule. There must

be more, such as the intervenor having some independent or direct financial consequence arising from the issues being litigated. I do not view Mr. Peters as falling within this provision.

[22] Further, I do not view Mr. Peters as falling within either Rule 35.10(2)© or (d). The subject matter of the litigation is not such that there is any reason to bind Mr. Peters in any way, nor is there any suggestion that the public interest would be served by granting the motion.

[23] For the reasons above, the motion brought by Stuart Peters to intervene in the proceedings is dismissed.

MOTION FOR DIRECTIONS REGARDING CONDUCT OF DISCOVERY

[24] Ms. Reading has brought a motion under Rules 18.13 and 18.17, following the attempted discovery of Heather Johnson on February 10, 2011. The relevant Rules read as follows:

> 18.17(3) The only person who may object to a question is the person who is being questioned, a person who claims privilege over the information to be given in answer to the question, or a party whose officer or employee is being questioned.

> (4) A person who is represented by counsel must make an objection through counsel.
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> (6) The party questioning must respond to an objection in one of the following ways:
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> > (a) withdraw the question;
> >
> > (b) continue with the discovery, if that is possible, and reserve the question, line of questions, or subject for ruling by a judge;
> >
> > (c) adjourn the discovery, if there is no reasonable alternative, and bring a motion for a ruling on the objection as soon as if practical.
>
> (7) A judge may determine an objection to a question, or a line of questions, made at discovery.
>
> (8) A judge may order resumption of the discovery, and provide any directions for its further conduct.

a) Position of the Applicant

[25] Ms. Reading terminated the discovery of Heather Johnson which commenced on February 10, 2011 due to what she viewed as the inappropriate intervention into the proceedings by counsel for the witness. In her written submissions she asserts that the "interference by counsel for the defendant was so intrusive that it was impossible to speak directly to the defendant", and as a result, this motion was brought. Ms. Reading's affidavit dated February 18, 2011 sheds

further light on the nature of her concerns regarding the conduct at discovery of Mr. Gillis, counsel for Ms. Johnson. I note in particular the following paragraphs:

> 7. Several times Mr. Gillis objected to my questions without being asked by the defendant to do so. Page 8 at 11, page 10 at 3, page 12 at 1, page 13 at 7, 10, 13 and 16, page 14 at 5.
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> 8. At page 14 at 1 it can be seen that I told Mr. Gillis that he was not allowed to object on behalf of his client without her asking him to do so and that she had not asked him once.
>
> 9. Mr. Gillis replied that he would continue to interrupt and accused me of playing games.
>
> 10. At no time did the defendant speak to Mr. Gillis.

[26] It is clear from the above, as well as her oral submissions that Ms. Reading is of the view that the interplay between Rules 18.17(3) and (4) requires a party, who is represented by counsel, to instruct their legal counsel to make an objection should concern arise during the course of their discovery examination. Further, Ms. Reading asserts that the above provisions dictate that should the party themselves not provide the required instruction to object, that their counsel is prohibited from making an objection, or any type of interjection within the proceedings. Ms. Reading, quite correctly points out, that the discovery transcript fails to disclose Ms. Johnson instructing Mr. Gillis to make objections on her behalf. She asserts his interventions, as a result, were inappropriate. She is

seeking direction from the Court, addressed at Mr. Gillis, to cease such objectionable conduct, at the resumption of Ms. Johnson's discovery.

b) Position of the Respondent

[27] Through her Counsel, Ms. Johnson opposes the motion, and in particular, Ms. Reading's interpretation of the relevant rules. It is asserted that there is no requirement that a party being questioned must identify an objectionable inquiry, and then instruct their counsel to interject accordingly. The Court was referred to the discovery transcript, and it was suggested that any interjections made by Mr. Gillis were reasonable in the circumstances, most notably due to the form in which the questions were posed. It is requested that the Court prohibit further discovery to be undertaken of Ms. Johnson, given Ms. Reading's approach to the process.

c) Determination

[28] It is not at all uncommon for a Court to be asked to determine whether a question posed at discovery was the subject of a proper objection. The vast majority of objections raised during the course of a discovery, which find themselves before the Court, relate to whether or not the question will elicit evidence which is relevant to the matter being litigated. The case law offers up many examples of parties and Courts struggling with what is "relevant". It is not always an easy determination.

[29] This motion however, does not involve such a determination. It addresses something much more fundamental, namely, the proper role of counsel at discovery, including when they are permitted to make objections, on the basis of any grounds, not just relevancy. Ms. Reading's interpretation, giving rise to a restricted role for Counsel, is not, in my view, supportable either on the basis of the clear wording of the relevant Rules themselves, nor commonsense.

[30] In my view, neither when read separately, or in combination, can the provisions contained in Rule 18.17(3) and (4) give rise to the interpretation

advanced by Ms. Reading. Subsection (3) is intended to address situations where another party may seek to object to a question being posed to a co-party during discovery. The provision makes it clear that such is not appropriate, unless the objector falls within an exception contemplated within the rule. It has nothing to do with the role of Counsel.

[31] Subsection (4) directly relates to the role of counsel. Its plain reading directly contradicts the view taken by Ms. Reading. The provision requires, where a party is represented by legal counsel, that counsel make any objection that arises during the discovery examination. There is nothing in the Rule which mandates, or even suggests, that in order to make the objection, which only counsel is entitled to make, that their client must first direct them to do so.

[32] I turn now to common sense. As noted above, objections at discovery frequently relate to the issue of relevancy. Rule 18.13 requires a witness at discovery to "answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence". Rule 18.17(5) clearly highlights that objections can be made during discovery if a question is not relevant. Determining whether or not a question is "relevant" is not, as noted earlier, always an easy task.

It often requires an analysis of the pleadings filed in the proceedings, and other sometimes complex considerations. Lawyers, who are legally trained, often take differing views on what is relevant, and seek court intervention.

[33] I raise this, because Ms. Reading's interpretation and suggested procedure would place the burden upon the party themselves to first recognize that a question being posed to them may not be relevant, and instruct their counsel to object. The vast majority of parties being discovered are not legally trained, and even if possessing of some legal knowledge, should not be expected, while in the witness chair, to identify issues relating to the appropriateness of questions. It is unrealistic for a party to be expected to understand legal concepts, and recognize when it is necessary or advisable to object. That is the role of legal Counsel. That is one of the reasons why parties hire legal counsel - to recognize legal issues that arise.

[34] Mr. Gillis, as counsel for Ms. Johnson is not obligated to sit back, and wait for instructions from his client to object to an inappropriate question. He is not only entitled, but obligated to do so, as part of his proper representation of his client. I have taken the opportunity to review the discovery transcript, and in particular, the interjections made by Mr. Gillis. I do not view any of the

interventions by Counsel to be objectionable. This motion serves as an example of the peril self-represented litigants face when advancing their own cause before the Court, as it is completely without merit, and undoubtedly would not have been necessary or undertaken if Ms. Reading was represented, or had sought legal advice, prior to launching it.

[35] Contrary to the view expressed on behalf of Ms. Johnson, I do not view it as being appropriate however, to prohibit Ms. Reading from continuing her discovery examination. I do believe that direction to Ms. Reading, as contemplated in Rule 18.17(8) may be conducive to a more orderly and productive examination. It should go without saying that the Court expects both parties to comply with the Rules relating to discovery, and in particular, this Court's determination on the motion. I offer the following additional direction:

> a) In posing questions, Ms. Reading should ask one question only, and await a response. It is not conducive to a productive examination to pose a series of questions to a witness in one breath, as it leaves the witness uncertain as to which question should be answered. Where one of a series of questions is in fact answered, it may create uncertainty should the transcript be reviewed later, as to what question the witness was intending to answer;
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> b) If Ms. Reading is posing a question relating to a particular document, such as an affidavit or answers to interrogatories, she should permit the witness to have the document in question in

front of her, including the opportunity to review any particular provisions which are specifically referenced in the question;

c) Ms. Reading should refrain from repeating questions already posed to the witness in the course of the discovery, or by way of interrogatories, unless seeking further clarification as to the answer. This direction is not intended to prohibit Ms. Reading from presenting further evidence to the witness, such as an affidavit or other document, and inquiring whether such may alter the answer previously given by the witness;

d) Prior to reconvening Ms. Johnson's discovery, Ms. Reading may benefit from reviewing materials relating to the proper conduct of discovery examinations which may be of assistance to her. The Court is aware of at least two text books on the subject. This is not to be viewed as being mandatory, but merely a suggestion;

e) Similarly, Ms. Reading as a self-represented litigant, may benefit from seeking out the assistance of legal counsel to explain the discovery process and perhaps assist her in the preparation of discovery questions. Again, this is a suggestion;

f) In the event Mr. Gillis determines it is necessary to pose an objection during the discovery examination, I would ask that in addition to the obligation contained in Rule 18.17(5), that he remain mindful that Ms. Reading is self-represented and to my knowledge, is not legally trained. As such, I would expect that he frame the nature and basis of his objection accordingly.

COSTS

[36] As being successful in relation to both motions, Ms. Johnson is seeking costs, payable forthwith. Rule 77 addresses the issue of costs. Rule 77.05 addresses costs relating to motions, and in particular, that Tariff C under the ***Costs and Fees Act*** apply, unless determined otherwise by the Court.

[37] I find that this is an appropriate circumstance to apply Tariff C, with some variation given the particular circumstances before the Court. In terms of amount, for a matter taking less than 1 hour, costs in the amount of $250 to $500 is contained within the tariff. It is also suggested that costs, when determined, are to be in the cause. It has long been recognized that a judge, having heard the matter, has discretion to award those costs which are viewed as appropriate given the circumstances.

[38] In the matter before me, both motions were relatively straightforward, and both collectively were heard in less than an hour. There is no reason to vary from the suggested quantum. I view it as being appropriate that costs in the total amount of $250.00 be awarded in relation to the two motions. I further find that costs should be payable forthwith by Ms. Reading to Ms. Johnson. The motion brought

by Mr. Peters was entirely for the purported benefit of Ms. Reading, which she fully supported, and she should, as a party, bear the cost consequences. The motion pertaining to the discovery was completely without merit, and in my view, an unnecessary delay in the litigation process, which should attract immediate cost consequences.

[39] I am directing Court staff to prepare a written version of my oral decision today as quickly as possible, so that the parties may have the benefit of reviewing the directions provided relating to Ms. Johnson's discovery.

J.