SUPREME COURT OF NOVA SCOTIA

Citation: Northern Pulp Nova Scotia Corporation v. D.R. Brenton Ltd., 2011 NSSC 510

Date: 20110922
Docket: Pic No. 340973
Registry: Pictou

Between:

Northern Pulp Nova Scotia Corporation

Plaintiff

v.

D.R. Brenton Limited, carrying on business as Don Breton's Fire and Safety Equipment and Don Brenton's Fire Protection Equipment

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Heard:	September 22, 2011, in Pictou, Nova Scotia
Oral Decision:	September 22, 2011
Written Decision:	February 29, 2012
Counsel:	Donn Fraser, for the Plaintiff Michael E. Dunphy,Q.C. for the Defendant

By the Court: (Orally)

[1] The following is my oral decision in the matter of Northern Pulp Nova Scotia Corporation and D.R. Brenton Limited. This was a motion to strike subpoenas issued by the Plaintiff to the Defendant witnesses to appear at a discovery scheduled previously for September 27, 28, 29 and 30, 2011.

[2] This being an oral decision, I do reserve the right to expand on reasons and to commit it to writing should same become necessary or should I so decide.

[3] The motion also seeks the Court's direction on the order in which the witnesses of the Plaintiff and the Defendant will be questioned over those four days.

[4] I have considered the affidavit filed in support of the motion filed by Ms. Amy McGregor and I have also considered the affidavit filed in response by the Plaintiff, (Mr. Guy Harfouche's affidavit) as well as the written and oral submissions of counsel.

[5] Notwithstanding that this motion demonstrates a lack of agreeability of the parties, they do agree on a number of points. First that if it is at all possible, there should in these types of matters be agreement among counsel, if that can be achieved. The parties should not have to resort to the Courts, at least on a regular basis to decide these types of matters, but it does happen. This is one of those cases where unfortunately it could not be worked out and I accept the submissions and representations of both counsel on behalf of the parties that it could legitimately not be worked out before coming to court. Hindsight, of course, being always clearer.

[6] Both parties also agree that I have a discretion in this matter and I myself consider that I have a discretion both under Rule 2 and under Rule 94.06 which allows me to exercise my discretion on motions. Some of the Rules limit my discretion. The Rule that was submitted in this case, Rule 18.16 has no limit on that discretion. It simply says:

> "18.16 (1) A party at a discovery must abide by both of the following rules for conduct of discovery, unless the parties agree or a judge directs otherwise..."

[7] Now I am mindful of the position of the Defendant now is that the particular Rule may not apply to this situation although I would say and confirm that in the written submissions both sides also agreed that Rule 18.16 did have applicability.

[8] Mr. Dunphy, on behalf of the Defendant, essentially cited five (5) reasons why he felt his client's motion should be granted. First he says that it is common practice for the Plaintiff to be examined first in civil litigation when liability is an issue, and during his lengthy and considerable time at the bar, he has rarely seen otherwise. There are occasions when it does occur, but that would be the norm. He also said secondly that a corporate party has a right to be represented during the discovery hearing. Thirdly, he says that the Plaintiff's position that it is entitled to have witnesses excluded in the manner sought by the Plaintiff is wrong in law. On this point, I am mindful that the Plaintiff is essentially saying that they believe the main issue is the order of the discoveries but I am also mindful of the fact that the order they are seeking has the result and effect of making exclusion redundant if indeed they get the opportunity to examine first the Defendant's witnesses. The fourth point made by Mr. Dunphy is that the Plaintiff should have applied, instead of issuing the discovery subpoenas, or made a motion to the Court for exclusion (see paras. 16 & 18 herein). And the fifth and last point is by using discovery subpoenas as they did and having them issued, that use was for something not intended by the Rule, for a purpose other than what a discovery subpoena is meant.

[9] Ms. Cameron, in reply on behalf of the Plaintiff, states that they have validly issued discovery subpoenas, that they are permitted to do so under Rule 18.16, that they have adhered to the Rules, that they attempted to reach an agreement and were unable to reach an agreement and only then did they issue the discovery subpoenas. They state there was no agreement otherwise, and so therefore they are the ones who have a right to direct the conduct of the discovery in their desire to discover the Defendant's witnesses first. They state that the subpoenas should not be overturned and that there is nothing in the conduct of the Plaintiff that would warrant a finding of abuse of process.

[10] Having considered all of the materials, I would arrive at a number of findings. First, I do not believe that the January 20, 2011 email from Mr. Fraser suggesting a target date for discoveries in mid year, this I believe was Exhibit B to Mr. Harfouche's affidavit, I do not find that to be a valid request for discovery. I think it is a mere suggestion on his part as to how he saw the litigation unfolding.

Secondly, I believe there was a tentative agreement that discoveries would be held in mid-July which stemmed from the May 6 email forwarded by Mr. Dunphy. That agreement fell through and both parties were, I suppose, responsible to some degree, perhaps for that one. Mr. Dunphy which he admits, not putting the dates in the schedule and as well Mr. Fraser, although he states, or recollects, replying to those emails, he cannot confirm same to the Court and does not take issue with Mr. Dunphy's indication that he did not reply, in spite of his own recollection.

[11] Now in their briefs, both parties, as I have already said, cited Rule 18.16(1)(a) as having applicability.

[12] My next finding is that I agree with the Defendant's submission that the case of **TransCanada Pipelines Limited v. The Armour Group Limited** 1991 Carswell NS 77, is applicable in that a corporation merely because it is a corporation is no different and has a right to be represented at discovery by a party. This would also be in accord with Rule 18.16(2) which states each party is entitled to attend a discovery.

[13] I am also persuaded, and I think this is in keeping with both the practice and the previous (1972) Civil Procedure Rules, that a defendant has the right to know the case against them. If I may once again refer to the **TransCanada Pipeline** case, in that case our Court of Appeal stated in paragraph 2 on page 2:

> "Trans Canada is entitled to make full answer in defence."

[14] Secondly, I think a party should have a right to have their counsel present to represent them throughout the discovery. Again, citing **TransCanada Pipeline** at para. 1, page 2:

> "The basic principle is that parties are entitled to be present during examinations for discovery."

[15] In the case of a corporation, it is entitled to be represented by a designate, and also represented by counsel, which the Defendant chose to do in this case.

[16] As far as excluding witnesses, I have been given no authority for this by the Plaintiff, acknowledging that the Plaintiff is saying that the issue is the order of the discovery, not the exclusion.

[17] Having reviewed the evidence before me, and at any rate, I see no basis in the evidence for special circumstances as to credibility issues in this case, compared to other cases that would warrant exclusion. And while it may be obiter for me to say, I see no legitimate concern for delay on the part of the Defendant or its counsel that warrants such special consideration or that would warrant exclusion to be achieved by the Plaintiff deciding or directing who would be discovered first by issuing the discovery subpoenas.

[18] I note that the subpoenas were issued in the midst of discussion by the parties, while attempting to make arrangements for discovery in good faith. I acknowledge the Plaintiff's frustration that they felt they were getting nowhere and they felt that this was something that they were entitled to resort to. But, the use of discoveries in this manner, although my ruling will fall short of any ruling on abuse of process, I think is something to be frowned upon. I think the better method would have been for the Plaintiff to make an application or a motion, if need be, directing the order of witnesses and in that manner and at an evidentiary hearing explain to the Court why they felt the credibility issues warranted a different order for the discovery to occur.

[19] I believe Rule 18.16 is applicable to this type of case in that it is the closest Rule we have that attempts to govern or deal with conduct at a discovery. I believe it attempts to get at or give control to the party who first requests a discovery of a witness by agreement or by discovery subpoena and in that way the conduct would include directing the order in which the parties at the discovery will question the witness, each witness either discovered by agreement or under discovery subpoena.

[20] The Defendant says it now believes the Rule does not apply and the Plaintiff says at any rate there is no agreement so it should not apply.

[21] As I said for the reasons indicated, I think it does and if it does, I find that it was the Defendant who first requested the discovery of the Plaintiff's witnesses in this case in January of 2011.

[22] If I am wrong and Rule 18.16 does not apply to this case, for example, for the reasons indicated by the Defendant's counsel or for any other reason, I believe it is within my discretion still under Rule 2 and under Rule 94 to decide upon

whether these discovery subpoenas should be struck and whether the order requested by the Defendant should be granted.

[23] Primarily, a concern and principle that I rely upon, and it is fundamental, is that a person or a party must and should know the case against them and the case it must meet. I believe this, in part, was the rationale behind the Rule contained in the 1972 Rules and the existing practice that the Plaintiff's witnesses would be discovered first in the discovery.

[24] I am inclined to exercise my discretion to grant the order requested by the Defendant in this case for the reasons I have indicated and I so order.

J.