SUPREME COURT OF NOVA SCOTIA
Citation: Roué v. Nova Scotia, 2013 NSSC 254

Date: (20130809)
Docket: Hfx. No. 407754
Registry: Halifax

Between:

Joan Elizabeth Roué and Lawrence James Roué

Applicants

v.

Her Majesty the Queen in Right of the Province of Nova Scotia, Lengkeek Vessel Engineering Inc., Lunenburg County Shipwrights Incorporated, carrying on business as Covey Island Boatworks, Lunenburg Foundry & Engineering Incorporated, Lunenburg Shipyard Alliance Limited, MHPM Project Managers Incorporated, and Snyder's Shipyard Limited

Respondents

Revised Decision:	The text of the original decision has been corrected according to the appended erratum dated August 14, 2013. This decision replaces the previously released decision.
Judge:	The Honourable Justice Peter P. Rosinski
Heard:	July 30, 2013 in Halifax, Nova Scotia
Counsel:	Robert Belliveau, Q.C. and Michael Blades, counsel for the Applicants Edward Gores, Q.C., (Steven B. Garland), Kevin K. Graham, co-counsel for the Respondent Her Majesty the Queen in Right of the Province of Nova Scotia (Steven B. Garland) and Kevin K. Graham, counsel for all remaining Respondents

INTRODUCTION:

[1] This decision involves three Motions. The context is set out in my earlier decision 2013 NSCC 68; 2013 NSSC 135 [under appeal/heard June 11, 2013].

July 15, 2013 filed Motion

- Pursuant to CPR 14 and 15.06(3) the Roués seek an order "directing each of the Respondents to provide the Applicants with an index listing and describing the documents over which each of the Respondents claim privilege, including the type of privilege claimed in each case, excluding documents which are communications between each Respondent and outside legal counsel [the "privilege motion"]; and

- Pursuant to CPR 14 and 18.10, as well as pursuant to Section 41(g) *Judicature Act* RSNS 1989 c. 240 (on both motions) the Roués seek an order approving the issuance of a discovery subpoena (application) [the "subpoena motion"].

[2] The evidence in support of and against the motions include:

- Sworn July 15, 17 and 24, 2013 affidavits of Robert Belliveau, Q.C.;

- Sworn affidavits on file referred to in the Notice of Motion by M. Lengkeek; P. Kinley; S. Daniels; and Alan Hutchinson; and

- Sworn July 19 and 24, 2013 affidavits of Jayson Dinelle.

July 17, 2013 filed motion

- Pursuant to CPR 14, 15 and 23 the Roués seek an order "for production forthwith of the following contracts by the parties thereto, all of which are Respondents" [the “contracts motion”]:

    a) Province and Lengkeek
    b) Province and MHPM
    c) Province and Lunenburg Shipyard
    d) Lunenburg Shipyard and Lunenburg Foundry
    e) Lunenburg Shipyard and Covey Island
    f) Lunenburg Shipyard and Snyders Shipyard; and

- Pursuant to CPR 2.03(1)(c) the Roués seek an abridgement of time for the notice of hearing the motion.

- Costs payable forthwith.

[3] The evidence in support of and against the motions include:

- Sworn July 15, 17 and 24, 2013 affidavits of Robert Belliveau, Q.C.;

- Sworn affidavits on file referred to in the Notice of Motion by M. Lengkeek; P. Kinley; S. Daniels; and Alan Hutchinson; and

- Sworn July 19 and 24, 2013 affidavits of Jayson Dinelle.

FACTS

[4] The affidavits herein filed and expressly referred to in the notices of motion are the evidence. No cross examination took place.

[5] Generally, the evidence is largely undisputed and the arguments made by counsel reflect this as well. While the inferences to be drawn or the legal consequences of the facts were in dispute, the large body of affidavit evidence was contextual and not controversial in any material sense.

[6] Reference to the arguments made will better illustrate this and touch on exceptions to that generalization.

Position of the Parties

Applicants/Roués Position

[7] The Applicants/Roués in their July 15 Motion seek:

> - CPR 15.06(3) - an index listing and describing the documents over which each of the Respondents claim privilege, including the type of privilege claimed in each case, excluding documents which are communications between a Respondent and outside legal counsel.
>
> AND
>
> - CPR 18.10 - issuance of a discovery subpoena (application) for Rory MacDonald.

A - *Index of documents/privilege claims*

[8] Their position is summarized at para. 35 of Roués July 15, 2013 brief:

> To summarize, it is expressly stated in the Civil Procedure Rules and clear in the jurisprudence that the Respondents must make a positive claim of privilege over all documents which they seek to withhold from disclosure, and they must provide information about those claims of privilege to the Applicants. It appears to be for Your Lordship to determine how that information is to be provided in the context of this proceeding. This Applicants submit that the most logical approach is that taken in the *Creaser* case. The Applicants submit that the contents of the description should be provided for each document; the date, the type of privilege being claimed, the sender and recipient and the status of each, the general subject matter of the communication(without breaching privilege) and the basis upon which the specific claim for privilege is grounded.

[9] The Roués rely on CPR 15.02 and 15.06 and s. 41(g) of the Judicature Act RSNS 1989 c. 240.

[10] They acknowledge [paras. 28 and 31 of July 15, 2013 brief] that the Civil Procedure Rules do not expressly specify how this information must be provided in an Application, however they argue that the same approach as is taken in Actions in appropriate (which are governed by CPR 15.03). There have been no reported cases on this issue since the new Rules came into effect on January 1, 2009.

[11] CPR 15.02; 15.03 and 15.06 read:

> **Duty to make disclosure of documents**
> 15.02 (1) A party to a defended action or a contested application must do each of the following:
>
> > (a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;
> >
> > (b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;
> >
> > (c) acquire and disclose relevant documents the party controls but does not actually possess.
>
> (2) The party must also disclose information about all of the following:
>
> > (a) a relevant document the party once controlled but no longer controls, such as a lost document or a document given away;

(b) a claim that a document in the control of the party is subject to a privilege in favour of the party or another person, to the extent it is possible to inform another party without infringing the privilege;

(c) a relevant document newly created, discovered, or acquired;

(d) a relevant document that has ceased to be privileged.

Disclosure in an action

15.03 (1) A party to a defended action must deliver to each other party an affidavit that fulfills the party's duty to make disclosure of documents no more than forty-five days after the day pleadings close.

(2) The affidavit must contain the standard heading, be entitled "Affidavit Disclosing Documents (Individual)" or "Affidavit Disclosing Documents (Corporate)", and be sworn or affirmed by an individual party, the litigation guardian of an individual party, or an officer or employee of a corporate party.

(3) The person making the affidavit must swear to or affirm all of the following:

(a) an attached certificate of advice or understanding about disclosure duties under this Rule 15, and Rule 16 - Disclosure of Electronic Information, is true;

(b) the person has thoroughly searched for, or supervised a thorough search for, relevant documents that are actually possessed by the party;

(c) the person has become informed about relevant documents in control of, but not actually possessed by, the party and has acquired the documents, or disclosed otherwise in the affidavit;

(d) an attached Schedule A lists all relevant, non-privileged documents that are actually possessed by the party;

(e) the person has arranged for delivery of copies of the listed documents in a printed booklet, or in a readily exchangeable electronic format, that is organized in a way that corresponds to Schedule A;

(f) an attached Schedule B provides the date of retention of counsel, claims privilege over communications with counsel unless the party waives the privilege, and provides information on all claims that a document, other than a communication with counsel, is privileged in favour of the party or another person;

(g) an attached Schedule C describes each relevant document in the party's control that has not yet been acquired by the party and provides the party's undertaking to acquire the document or the reasons for not doing so;

(h) an attached Schedule D accurately describes any document once, but no longer, in the control of the party;

(i) to the best of the person's knowledge, the party has never had control of a relevant document except as disclosed in the affidavit;

(j) disclosure of electronic information is the subject of another affidavit, an agreement, or directions of a judge.

(4) The certificate attached to the affidavit must be of one of the following kinds:

(a) if the person is represented by counsel, a certificate signed by counsel stating that counsel has advised the person providing the affidavit of the duties under Rule 14 - Disclosure and Discovery in General, this Rule 15, and Rule 16 - Disclosure of Electronic Information to search for, make diligent efforts to become informed about, acquire, sort, and disclose relevant documents and electronic information, and of the kinds of documents and electronic information that may be relevant in the proceeding;

(b) if the party is acting on their own, a certificate of the party that they have taken any assistance they require to understand the duties under Rule 14 - Disclosure and Discovery in General, this Rule 15, and Rule 16 - Disclosure of Electronic Information to search for, make diligent efforts to become informed about, acquire, sort, and disclose relevant documents and electronic information, and the party understands the duties.

(5) Each schedule attached to the affidavit must describe a document so it is easily identifiable from the description, and if copies of documents are to be delivered in an electronic format rather than a printed booklet, Schedule A must conform with Rule 16.09(3)(d).

(6) The affidavit disclosing documents may be in Form 15.03A for an individual party, or Form 15.03B for a corporate party.

Disclosure in an application

15.06 (1) A party to a contested application must deliver to each other party copies of all documents required to be disclosed under this Rule 15 and a list by which the documents can be identified and put in order.

(2) The copies must be delivered in a booklet, or in a readily exchangeable electronic format.

(3) A judge may give directions for delivery of a list identifying, or an affidavit disclosing, documents in an application.

[12] In oral argument, Mr. Belliveau elaborated:

i - CPR 15.01 and 15.02 apply expressly to Applications in Court;

ii - while CPR 15.02(2)(b) is mandatory, a practice exists in Nova Scotia that a generalized claim of solicitor/client privilege without an express listing of such documents will often be permitted by opposing counsel, and unless they insist on a listing, none is provided in Actions. In this Application, Mr. Belliveau seeks the listing of all such documents from before the Notice of Intended Action was served on the Attorney General of Nova Scotia, and he specifically requests a listing of those of any counsel including those who could be characterized as "in-house counsel" for those times before that Notice was served, recognizing that some of the listed documents my nevertheless be subject to some form of privilege. He relies on two cases in particular as examples of the necessity for in-house counsel's documents to be listed and thereby notice thereof given to opposing counsel should they wish to challenge the privilege claims: *Saturley v. CIBC World Markets* 2010 NSSC 361 (Moir J.) and *Sable Offshore Energy Inc. v. Ameron International Corp* 2013 NSSC 131 (Hood J.). He similarly requests the other Respondents provide the same listing for dates before the retention of legal counsel.

[13] In essence, the Roués argue that all disclosure of documents made in actions must similarly be made in contested Applications in Court. They suggest that the same rationale and approach to effecting notice by the Respondents to the Roués should apply in Applications. That is, that a "listing" thereof is required by CPR 15.02(2) (b); which refers to "a document", suggesting individual listings are required.

[14] The Roués go on to rely on the Court of Appeal decision under the old (1972) Rules 20.02(1) and (3) as interpreted in *Creaser v. Warren* (1987) 77 NSR(2d) 429.

[15] In that and related cases from Ontario and New Brunswick, the Courts make the point that in disclosing documents, parties must provide a meaningful and sufficiently complete description of documents, and of any claims of privilege in relation to them. That description must be sufficient to allow a Court to make a *prima facie* decision whether a likely claim for privilege exists.

[16] Mr. Belliveau points out that the concession by the Respondents at para. 20 of their July 22nd brief rings hollow since the concession excludes solicitor/client

communication and solicitor work product documents which are those items that would be of interest to the Roués for the period before the Notice of Intended Action was served pursuant to s.18 of the *Proceedings Against the Crown Act* RSNS 1989 c.360 as amended.

[17] Specifically, para. 20 of the Respondents' brief reads as follows:

> The Respondents are prepared to disclose in writing information about any claim of privilege pursuant to Rule 15.02(2)(b) in respect of any relevant privileged documents other than documents that are the subject of solicitor-client privilege (including communication between the Department of Justice and the Province) or solicitor work product privilege. Otherwise, the relief sought on the Applicants' motion is overly broad and, as such, the motion ought to be dismissed.

B - *Discovery Subpoena for Rory MacDonald*

[18] CPR 18.10 (1) and (2)(d) read:

> 18.10 (1) A party may make a motion for an order approving the issuance of a discovery subpoena (application) after the notice of application is filed.
>
> (2) An order approving the issuance of a discovery subpoena (application) may provide for any of the following:
>
> • • •
>
> (d) the obligation of a corporate party to produce a witness who is an officer or employee of a corporate party;

[19] The Roués and the Respondents both have found no cases which address the test to be applied by the Court in exercising its discretion under CPR 18.10 in such circumstances.

[20] The parties have agreed under CPR 18.09 that oral discovery of the designated discovery manager, Marius Lengkeek, will take place (but has not yet) as the representative of Lengkeek. Rory MacDonald, was a prominent employee/representative of Lengkeek regarding the matters at issue.

[21] The Roués argue that this discretion should be exercised after considering whether the sought discovery subpoena would promote the "just, speedy and inexpensive resolution of the proceeding", of which an example is cited at CPR 18.24(1)(a).

[22] They note that this test is similar to the test used for revoking a discovery subpoena (action) if issued initially by the prothonotary - CPR 18.08.

[23] They emphasize that "Rory MacDonald does have relevant information which is properly obtained on discovery ...[he] took a leading role in

communications on behalf of Lengkeek with the project manager, and ...was a regular attendee of meetings with project manager including a key meeting wherein instructions were given to Lengkeek regarding the use of existing Bluenose plans - a meeting which Marius Lengkeek was absent from" [para. 42 July 15 brief/also referred to in Robert Belliveau's July 24th affidavit para. 3; affidavit July 15th para. 16 and para.18 and particularly Exhibit "O" - see the Nov. 20, 2009 meeting minutes].

[24] At the hearing, Mr. Belliveau pointed out that not only was Rory MacDonald at the November 20, 2009 meeting of the interested parties [Exh. "O" to Mr. Belliveau's July 15 affidavit] in the absence Mr. Lengkeek, but of that meeting the Minutes state that:

> "Owner prefers to us the original [Bluenose 1] lines plan. MHPM offered to help find the original BN1 lines plan."

[25] Moreover, he suggested that those minutes paint a different picture than that of the affidavit of William Greenlaw, Chair of the Steering Committee for the restoration (and primary witness for the Province as Executive Director for Heritage since January 2003 - para. 2 July 15 affidavit Greenlaw) - see Greenlaw's evidence at paras. 43-47, Tab L affidavit of Jayson Dinelle sworn July 19, 2013.

[26] Paragraph 47 thereof reads:

> Overall the Steering Committee came to the consensus that the lines identified as "Bluenose: unknown source and date, show revised sheer forward (as built)" in Exhibit 16 (red lines) were the most reflective of the Bluenose II as built and, as such, these lines were selected and the Steering Committee requested that the shape of the replacement hull be designed in accordance with these [hull] lines.

[27] Mr. Belliveau argues that it would appear that the focus had been on the original Bluenose lines plan, whereas at another point the parties were trying to reproduce Bluenose II hull lines.

[28] He iterates that what the parties were attempting to create in their design discussions is of great importance to the Roués claim, and therefore the ebb and flow of those discussions is "significant" to the success of their claim, and they are all therefore relevant at the hearing stage of this Application in Court.

[29] Mr. Belliveau also intimated that Rory MacDonald's own evidence, as opposed to that of other attendees, is the best evidence of what he said, heard and relayed to Lengkeek the designer, and if he kept his own notes thereof that could be relevant given his position as spokesperson for Lengkeek - see his publicly attributed comments at Exhibit "A" of Mr. Belliveau's July 24 affidavit:

> [in 2011] Rory MacDonald of Lengkeek Vessel Engineering....said the company used the design plans for the original Bluenose, the plans for the Bluenose as it was actually built, the plans for Bluenose II, as well as the plans of unknown origin to come up with the design lines for this ship.

[30] Although Mr. Belliveau agrees that what is important is what the parties actually did insofar as the hull lines they finally followed in construction of the new vessel, rather than what they talked about, he also urged that the Court take note of the discussions regarding incorporation of the hull lines of the original Bluenose in the new vessel, and to that extent if the new vessel's hull lines are found to have incorporated sufficiently remarkable aspects of the original Bluenose's hull lines, those discussions would be relevant. Such relevancy is necessarily difficult to assess at this stage of the proceeding, but he urged the Court to be generous in considering the relevancy test on this aspect.

[31] Mr. Belliveau also wished to discover Rory MacDonald on some "peripheral" matters which he estimated would not require much time.

[32] In summary, the Roués say the Civil Procedure Rules allow for discovery of an officer or employee of a corporate party in addition to discovery of the designated project manager ("who is the "party" for purposes of the discovery) and

since Rory MacDonald has relevant knowledge independent from Mr. Lengkeek he should be discovered.

[33] For both these motions, the Roués seek solicitor-clients costs - paras. 44-51 and 53 of their July 15th brief.

C - *Regarding the 2nd motion seeking disclosure of "all contracts between the various Respondents relating to the "Project" as that term is defined in the pleadings (the "Contract")" - para. 2 July 17th brief.*

[34] There is a preliminary point to address first. I note that the Respondents have objected to the July 26th letter of Mr. Belliveau as "improper reply". They say the Roués have "split their case by withholding these submissions until Reply."

[35] I note that the July 24th brief filed by Roués was in reply to the Respondents July 22nd brief which dealt only with the privileged documents list and Rory MacDonald discovery subpoena. On July 25th the Respondents filed their brief on the contracts issue in response to the July 17th associated Roué brief. A comparison of the Roué briefs reveals that they are each exclusively addressed to reply to these Respondents briefs on the issues raised.

[36] While the Respondents' arguments were somewhat foreseeable. I do not consider the Roué's brief of July 26th in reply to the July 25th Respondents brief on "contracts" to be abusive or motivated by bad faith to gain an unfair advantage. I will therefore consider their July 26th brief to be a proper reply.

[37] The Roués briefs (July 17 and 26th) set out their arguments that:

i) there is a positive duty of the Respondents under CPRs 15.02, 15.06 and 14.08 to effect full disclosure of all "relevant" documents to the Roués;

ii) the "contracts" are relevant, as that term is used in CPR 14.01(1);

iii) the contracts are "relevant" because:

> a) they prove the legal basis upon which the roles of each of the Respondents' liability should be assessed;
>
> b) they "are expected to form the basis for questioning at discovery regarding the Project work and, in that regard, will likely lead to the discovery of further evidence which will be relevant at trial [sic - "the hearing"]." - para 15, July 17th brief
>
> c) the Applicants' pleadings in relation to the moral rights infringement make the actual specific work carried out by the [Lunenburg Shipyard Alliance - aka Covey Island, Lunenburg Foundry, Snyders Shipyard] directly relevant to this proceeding [Second Amended Notice of Application in Court paras. 36 and 37].
>
> d) the copyright infringement claim is based on the design work of Lengkeek and the authorizations given to the other Respondents to carry out the reconstruction; the contracts provide the context to these inter-relationships including indicia thereof such as limitation of liability provisions [paras. 7-9, July 26th brief];

> e) the values of the various contracts are relevant to damages claimed by Roués because: the compensation awarded to Lengkeek for use of its plans is relevant to the potential compensation claim of Roués "for the use (i.e. reproduction or substantial production) of the copyright work"; and the aggregate value of the contracts is relevant since a successful claim for damages may be based on "a percentage of the total value of the shipbuilding contract" [paras. 10-12, July 26th brief].
>
> f) The Respondents argument, that the failure to disclose the detailed contracts is of no import because the Respondents have "admitted" any such matters of importance in their affidavits and pleadings, should be rejected for the following reasons:
>
> - the contracts are at least somewhat relevant since the Respondents have admitted the effect of their provisions in their pleadings [CPR 38.02 and 38.06 material facts only to be pleaded] and in their affidavits [only relevant facts to be included - *Waverley v. Nova Scotia* (1993) 123 NSR(2d) 46 (NSSC) per Davison J.].
>
> - such information is not "admitted" by virtue of it being addressed in evidence; and such partial and selective disclosure denies the Roués the preemptive right, as a matter of fairness, captured in the spirit of CPR 14.08 [preemption for full disclosure], to probe the extent of the evidence before committing themselves to putting forward their own evidence by way of affidavits or being hobbled in their right to effectively cross examine the Respondents affiants.

[38] In oral argument, Mr. Belliveau reiterated that although the Respondents claim that the contracts are wholly irrelevant, they do produce some aspects thereof that they claim are relevant and withhold others.

[39] To address the Respondents' confidentiality concerns regarding their contracts, Mr. Belliveau observed that as between the parties, the implied undertaking rule protects any misuse of the sensitive aspects of the contracts.

[40] Insofar as activities of the Respondents beyond Lengkeek and the Province are concerned, Mr. Blades noted that the "authorizations" made by the parties are a component of the pleaded *Copyright Act* infringements [para. 35 Notice of Application] and therefore all the contracts are relevant in that respect.

RESPONDENTS' POSITION

[41] The Respondents' evidence is contained in affidavits of Jayson B. Dinelle sworn July 19 and 24, 2013 respectively. His affidavits contain excerpts from the filed affidavits of Mr. Lengkeek, Ben Millson, William Greenlaw, Simon Daniels, Peter Kinley, Alan Hutchinson and Wade Croft.

<u>July 15 Motion</u>

A - *An indexed listing of privilege claimed documents.*

[42] The Respondents question the "manner" of disclosure intended by CPR 15.06 since the Rule does not outline a fixed manner of disclosure nor are there any cases to date which might provide guidance; nor does CPR 15.06 require a party to an application to produce a list of privileged documents. - paras. 15 and 16, July 22nd brief.

[43] Mr. Graham, in oral argument, urged the Court to except out from the mandatory listing of documents required by CPR 15.02(2)(b) those that fall within the privilege claims of solicitor-client communications (including in-house counsel for the Province) and solicitor work product documents. He suggested as a block they could be revealed by a lesser level of specificity than other discloseable documents; in fact, as I understand it, such a lesser level of specificity that the Respondents would not even be required to itemize those documents of claimed solicitor-client communications or solicitor work product - see *Rozee v. Johnson* [2001] NSJ No. 547 (NSSC) at paras. 9 and 10 per Wright J. affirmed 2002 NSCA 68 and *Debaie v. Wilson Fuel Co.* 2004 NSSC 244 (Hall J.) At paras. 17-22; and *R. v. Shirose* [1999] 1 SCR 565 at para. 50.

[44] They also point out that the Roués, if they were basing their claim for such disclosure on *Creaser v. Warren* under CPR (1972) 20.01, would not receive the requested disclosure under the older Rule 20.01 since documents subject to solicitor-client privilege or solicitor work product privilege did not have to be listed thereunder - *Rozee v. Johnson* 2002 NSCA 68, affirming [2001] NSJ No. 547 at paras 9 and 10; *Debaie v. Wilson Fuel Co.* 2004 NSSC 244, paras. 17-22.

[45] However, they "are prepared to disclose in writing information about any claim of privilege pursuant to CPR 15.02(2)(b) in respect of any relevant privileged documents other than documents that are the subject of solicitor-client privilege (including communications between the Department of Justice and the Province) or solicitor work product privilege. Otherwise, the relief sought on the Applicants motion is overly broad, and as such, the motion ought to be dismissed." - para. 20, July 22nd brief.

[46] In oral argument, Mr. Gores made submissions to the effect that legal counsel for the Province i.e. the Attorney General of Nova Scotia [s.29 *Public Service Act* RSNS 1989 c. 376 as amended] as "in-house counsel" is no less counsel vis-à-vis their ability to effect, in their multifaceted role, claims of

privilege for their client, the Province - see *R. v. Shirose* [1999] 1 SCR 565 at paras. 49-50. He was responding to Mr. Belliveau's suggestion that "in-house counsel" with their non-legal roles may be involved with documents that are not necessarily always covered by solicitor-client forms of privilege. Mr. Gores urged a case by case assessment therefore is necessary.

B - *The discovery subpoena sought for Rory MacDonald*.

[47] The Respondents note that the parties agreed under CPR 18.09 to oral discovery only of the designated discovery manager of Lengkeek and the other corporate Respondents. That discovery of Lengkeek has not yet taken place, hence the motion is premature at best, since the Roués have not otherwise established that the facts relevant to the issues in the proceeding cannot be obtained from the designated discovery manager. While CPR 18.10 governs, there is no case law yet as to, upon what factors and using what "test" a judge should exercise the discretion thereunder.

[48] The Respondents suggest that the Rules regarding Actions are not reliably helpful because the Application in the Court process is inherently more tailor

made according to the circumstances in each case, and that is why the wording of CPR 18.10 is not express as it is in Actions [CPR 18.04].

[49] This flexibility should in part be based on a consideration of what would best achieve the object of the Rules as per CPR 1.01 ["the just, speedy, and inexpensive determination of every proceeding"]. They relate that criteria specifically to CPR 18.10 by reference to CPR 18.08 which permit a judge to revoke a discovery subpoena issued by the prothonotary if it would not "promote the just, speedy and in expensive resolution [the proceeding]" in the case of an Action.

[50] In essence, they say that since arguably in an Application the exercise of discretion by a judge is even more fact driven than in Actions, therefore the frailty of the Roué's evidentiary basis for issuance of a discovery subpoena to Rory MacDonald is more pronounced.

[51] They emphasize that the attendance of MacDonald, at a purportedly key meeting on November 20, 2009 while Marius Lengkeek was absent, is considerably less significant since that meeting was before the creation of the

Lengkeek Documents in issue in the Application, and there is no evidence that MacDonald acted as a decision maker regarding the "use of the existing Bluenose plans"; moreover any "instructions" to Lengkeek in that regard would have come from the Province, and specifically the Roués will have the opportunity to discover William E. Greenlaw who was the chair of the Steering Committee which was "a committee set up by the Province to oversee the current restoration project for the Bluenose II...discussed in greater detail in Section D below" - para. 3 affidavit of William E. Greenlaw, sworn July 15, 2013.

[52] In oral argument Mr. Graham emphasized that Mr. MacDonald should not be discovered because:

- it is premature since Mr. Lengkeek had not been discovered, and it has not been shown to "promote the just, speedy and inexpensive determination" of the proceeding - see CPR 18.24;

- the proceeding boils down to a question of whether the "2 drawings" attached to the Second Amended Application in Court assert themselves in the design and construction of the hull lines of the new vessel Bluenose II? Mr. MacDonald had no role in the creation of the design documents for the new vessel, nor did he have the authority to, or did he, give any instructions regarding the new vessel's design;

- there were others present at the November 20, 2009 meeting who could recount as ably as Mr. MacDonald what transpired there, and otherwise Mr. Lengkeek can speak to any relevant topics.

[53] In response, to Mr. Belliveau's assertion that an apparent inconsistency exists between Mr. Greenlaw's affidavit [para. 42-47] and the Minutes of the November 20, 2009 meeting, he suggests that an examination of the Lengkeek, Millson and Greenlaw affidavits will reveal no inconsistency - ultimately the claimed William J. Roué drawings were not used.

[54] As to the Roués claim for solicitor-client costs, the Respondents suggest they are certainly not warranted on the facts in these motions.

C - *The Contracts between the Respondents.*

[55] The Respondents opened their July 25th brief as follows:

> The contracts that are the subject of this motion are not relevant to any of the contentious issues in this proceeding having regard to the pleadings and evidence served and filed to date... in addition the contractual relationship between the Respondents and the work that each of the Respondents carried out on the restoration project for the Bluenose II is admitted in the pleadings and/or the evidence served and filed.

[56] They argue that the contracts are not relevant to the allegations of copyright and moral rights infringement and that the contracts are "admitted in the pleadings

and the evidence: as such there are no contentious issues of fact in this proceeding that the contracts are relevant to." - para. 16, July 25th brief.

[57] In oral argument, Mr. Graham emphasized that there is no evidence or case law precedent to suggest that the overall contract price is used customarily for assessing damages in cases of copyright infringements, therefore no such relevance has been shown either.

[58] Similarly, MHPM as project manager had no hand in creation of the Lengkeek documents/design of the new vessel, nor were they involved in the actual construction therefore the MHPM contract is not relevant to the Roué's claims.

ANALYSIS

ISSUE I *The "privilege" Motion*

[59] The Roués request an index listing of documents over which each Respondent claims privilege (but not any documents after the Notice of Intended

Action was served on the Attorney General of Nova Scotia and after the other Respondents retained outside counsel).

[60] Both the Applicants and the Respondents agree that the Civil Procedure Rules provide no express direction on how the mandatory presumed full disclosure of documents required by CPR 15 is to be effected in the case of an Application in Court. I note the Crown is specifically treated no differently in these circumstances - Section 11 of the *Proceedings Against the Crown Act* RSNS 1989 c. 360

[61] While CPR 15.03 deals with disclosure in the case of Actions, and is more detailed than CPR 15.06 which deals with disclosure in the case of Applications in Court, I do not believe the drafters of the Rules intended any significant distinction to be drawn therefrom between the fundamental objectives of CPR 15.06 and CPR 15.03.

[62] For Actions and Application in Court, the provisions applicable to both [i.e. 15.01 and 15.02] set the tone – that is the parties "must disclose documents in the control of the party" and also "must disclose information about [...a claim that a

document in the control of the party is subject to a privilege....to the extent that it is possible to inform another party without infringing the privilege"] ..." per CPR 15.02(2)(b).

[63] The Respondents say no detailed listing is required for Applications in Court to comply with CPR 15.02(2)(b), as is the case for Actions per CPR 15.03 (2)(f) – Affidavit Disclosing Documents. I disagree.

[64] I have kept in mind that in interpreting the Rules, CPR 94.01 requires that I interpret them as if they were legislation, and in Nova Scotia that involves the *Interpretation Act* RSNS 1989 c. 235, particularly Sections 9 and 11, as well as the principles of statutory construction recently referred to in *Slauenwhite v. Keizer* 2012 NSCA 20 per Hamilton J. at paras. 7 and 18; per Oland J. at paras. 38 and 39.

[65] Notably, CPR 15.06(1) reads:

> A party....must deliver to each other party copies of all documents required to be disclosed under this Rule 15 and a list by which the documents can be identified and put in order. [emphasis added]

[66] Privileged claimed documents obviously need not be copied and given to the other parties before a claim for privilege can be assessed by the Court; yet, how do parties in Applications in Court communicate to the other parties which documents they have control of and for which they claim privilege?

[67] Consistent with the flexible nature of Applications in Court and the mechanisms of Motions for Direction [CPR 5.09] the manner of communicating to other parties which documents they have control of and for which they claim privilege must presumptively comply with CPR 15.01 and 15.02 and, particularly, 15.02(2)(b).

[68] Therefore, the onus to disclose is on the party with the obligation to disclose under CPR 15.02(2)(b). That onus is presumptively to provide "a list by which the documents can be identified" and put in order - CPR 15.06(1). If that party wishes to restrict the information provided to the other party(ies) below a level that would, on a document by document basis, be required by CPR 15.02(2)(b) [i.e. each document's listing must provide a meaningful description of the document, and the claim of privilege in relation thereto without destroying the privilege asserted, yet still be sufficient to allow a Court to make a prima facie decision

whether it is likely that a claim for privilege exists], then it should make a motion for directions under CPR 15.06(3) or 15.07.

[69] Disclosure cannot be limited even by the judge unless the CPR 14.08 presumption for full disclosure has been rebutted by the party opposing disclosure.

[70] In the case at bar, I conclude that:

1. The Respondents have a presumptive mandatory obligation to disclose "a list by which [all] the [relevant] documents [required to be disclosed under CPR 15] can be identified and put in order";

2. Such listing, includes a listing of any "document in the control of the party [which] is [claimed to be] subject to a privilege .... to the extent it is possible to inform another party without infringing the privilege" per CPR 15.02(2)(b); and

3. In relation to the Respondent Attorney General of Nova Scotia, that obligation presumptively affects only documents created before the Applicants/Roués served their Notice of Intended Action upon the Attorney General; and before the date of retention of counsel in relation to this litigation by each of the other Respondents.

[71] Basic procedural fairness dictates this conclusion in my opinion.

[72] I am satisfied that an Order should issue requiring the Respondents to disclose forthwith a listing by which documents can be identified and put in order

for each document over which any party Respondent asserts privilege with "information" that includes:

- the date of the document;
- the sender and recipient (and status of each);

- the general subject matter of the communication (without breaching privilege;

- the type of privilege claimed; and

- the basis upon which the specific claim for privilege is grounded

for the periods before the Notice of Intended Action was served on the Attorney General of Nova Scotia and the retention of counsel in contemplation of litigation for each of the other Respondents.

ISSUE II - *Whether to order a discovery subpoena (application) issue in relation to Rory McDonald?*

[73] It is clear that the authority to direct a discovery subpoena (application) exists - CPR 18.09 and 18.10.

[74] The relevant factors to consider, and the “test” for a judge to consider in exercising their discretion is not expressed in the new Civil Procedure Rules, and no jurisprudence has been presented as a guideline for me in this case.

[75] Therefore, I start with fundamental principles and consider the objectives of the Rules in general and in relation to discovery in Applications specifically.

[76] CPR 1.01 states:

> These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[77] CPR 5.01(4) states:

> The Application in Court is for longer hearings, and it is available, in appropriate circumstances, as a flexible and speedy alternative to an action.

[78] In the case of Actions, more inflexible and express Rules exist and set out standard operating procedure for discoveries – see CPR 18.02 to 18.08. Notably therein obligations exist that require that one consider whether a particular procedure "would promote the just, speedy and inexpensive resolution of the proceeding" in the CPRs: For example:

18.01 (a) - Duties of party in an action;

18.02(2) - Duties of party in an action;

18.04(2)(b) - Discovery subpoena in an action (party);

18.05(2)(a)(ii) - Discovery subpoena in an action (non-party);

18.08(2)(b) - Revoking a discovery subpoena in an action; and

18.08(3) - Revoking a discovery subpoena in an action

[79] CPR 18.24 provides “Examples of just, speedy, and inexpensive discovery”; see particularly 18.24(2).

[80] As a general statement, absent statutory factors, all discretionary decisions should be exercised with the “interests of justice” in mind. This requires a consideration of the relevant factual and legal factors in each case, and the application of judges’ instinct, experience, and intellect to those factors, with a view to achieving a reasonably fair and efficient outcome.

[81] In the case at Bar, the burden to establish an evidentiary foundation for the legal argument that a discovery subpoena should be issued to Rory MacDonald is on the Roués. They suggest that Rory MacDonald has significant evidence to give which could not be obtained by other reasonable means except by his discovery - CPR 18.24(1)(a).

[82] The Respondents concede that he had a prominent role in the Lengkeek organization regarding the circumstances of the Bluenose restoration, but suggest that any significant evidence he could give, can be and will be obtained by other reasonable means including the discoveries of Marius Lengkeek, William E. Greenlaw and Simon Daniels (who was also present, albeit as a representative of MHPM at the November 20, 2009 meeting which is particularly in issue here).

[83] Since Marius Lengkeek's discovery has not yet been completed, they argue that it is premature to issue a discovery subpoena (application) for Rory MacDonald in relation to the circumstances surrounding the November 20, 2009 meeting, and if he has other "peripheral" information that the Roués seek, the Roués themselves seem to characterize it as insignificant by referring to it as "peripheral", thereby making that basis for the subpoena's issuance also insufficient.

[84] I have examined the William Greenlaw, Marius Lengkeek, and the Ben Millson affidavits in comparison to that of the Minutes of the November 20, 2009 meeting notation regarding proposed use of the original Bluenose hull lines in the restored Bluenose II. The relevant portions are:

- Lengkeek, July 15, 2013 - paras. 14-15 and Exh. 4;

- Millson, July 11, 2013 - paras. 7-14 and 34 as well as Tab "A" and Exh. 2; and

- Greenlaw, July 15, 2013 - paras. 30 - 31 and 43-47; and Exh. 16.

[85] While the November 2009 Minutes can be construed as inconsistent with Mr. Greenlaw's [and Lengkeek's/Millson's] affidavit, such suggested inconsistency may also be explainable by the evolution of the project parameters from 2009 to 2012 [i.e. the hull lines the Steering Committe settled on finally].

[86] A bit disconcerting is the attribution in The Chronicle Herald article in 2011 to Rory MacDonald [July 24, 2013 affidavit of Mr. Belliveau] and his December 7, 2009 email [Exh. "O"] to Mr. Belliveau's July 15, 2013 affidavit] in which he said in effect that the original Bluenose lines were used or to be used.

[87] Nevertheless, on careful reflection, not wanting to unreasonably deprive the Roués of possibly a significant witness' discovery, yet finding the evidentiary basis therefor weak at present, and there having been no discovery of Marius Lengkeek yet, I conclude that no discovery subpoena should be issued **at this time** for Rory MacDonald.

ISSUE III *Whether to order disclosure of "all contracts between the various Respondents relating to the 'Project' as that term is defined in the pleadings (the "Contract")"*

[88] In essence, the Respondents are arguing that because of "admissions" in their pleadings and the affidavits filed to date, in the context of the Roués pleaded claims, there are no material facts that could be extracted from the contracts that would be relevant evidence at the hearing of this Application in Court.

[89] The presumption to make full disclosure is limited to "relevant" documents - CPR 14.08; and a judge can only order production of "relevant" documents - CPR 14.12.

[90] Such relevancy is assessed by asking "whether a judge presiding at the trial or hearing of the proceeding would find the document.....relevant or irrelevant" - CPR 14.01(a).

[91] Have the Respondents "admitted" all material facts that could be extracted from the Respondents' contracts with each other?

[92] Rule 20 deals with “admissions” - it does not affect the rules of evidence concerning admissions - 20.01(2).

[93] CPR 20.02 permits a party “to admit any material fact” and provides that “the admission may be made in pleadings, by other writing, orally, at a discovery, or by formal admission under this Rule.”

[94] How shall I assess whether there are any material facts that remain extractable from the contracts in question without seeing the contracts?

[95] The fact that some “admissions” have been made in the pleadings and/or filed affidavits provides me no guidance in assessing whether the contracts likely contain other relevant material facts.

[96] The Applicants have the evidentiary onus to establish the facts to support their pleadings. As a matter of principle and logic it seems sound that they must be provided with copies of the contracts between the Respondents (subject to concerns of commercially sensitive information thereby being disclosed to the public to the detriment of the Respondents).

[97] The Respondents have pleaded and given evidence that contracts exist between them in relation to the restoration of the Bluenose II. They thereby confirm that the existence of the contracts are material relevant facts.

[98] Can they then refuse to produce the actual documents claiming they are no longer relevant in light of their admissions? I think not.

[99] Admissions tend to relate to individual and discrete material facts in dispute. They must be specific enough to allow the parties to dispense with formal proof of such facts, if requested - CPR 20.

[100] Here, the Respondents gave no specifics in their pleadings initially.

[101] In their Notice of Contest filed December 20, 2012, they actually denied at paragraph 6 the Applicants' claim at paragraph 9 of the Second Amended Application in Court that "Lunenburg Shipyard Alliance Limited is a joint venture company and a consortium of the Respondents [Lunenburg Foundry; Snyder's and Covey Island Boatworks]."

[102] They denied at paragraph 7 in their Notice of Contest, the Applicants' claims at paragraph 10 of the Second Amended Notice of Application that "MHPM Project Managers Inc. provided and continue to provide project management services to the construction of the vessel."

[103] Similarly, they denied at paragraph 19 of their Notice of Contest the Applicants' claim at paragraph 32 of their Notice of Application that "the award of tender granted to the consortium Respondent....resulted in destruction and reconstruction work being carried out by each of the Respondent members ... each consortium member undertook work which accorded with the member's core competencies ... further exact details of the work undertaken by each member of the consortium is known only by the Respondents and each of them."

[104] As becomes apparent, the Respondents' Notice of Contest contains little, if anything, of significant admissions regarding the contractual framework that exists between the Respondents.

[105] In the affidavits filed, without going into detail, the Respondents tend to admit they were awarded contracts or subcontracts in relation to the restoration of the Bluenose II, and provide "scope of work" technical attachments; see affidavits for:

- Snyder's, Wade Croft - July 12, 2013 at para. 13;

- MHPM, Simon Daniels - July 15, 2013 at paras. 5-8;

- Lunenburg Shipyard Alliance and Lunenburg Foundry, Peter Kinley - July 12, 2013 at paras. 15-17;

- Covey Island Boatworks, Alan Hutchinson - July 12, 2013 at para. 13;

- Province of Nova Scotia, William Greenlaw - July 15, 2013 at paras. 34-42; and

- Lengkeek, Marius Lengkeek - July 15, 2013 at paras. 7-9

[106] To establish liability of any of the Respondents, the Roués must demonstrate on evidence that their copyright and/or moral rights subsisting in the Asserted Drawings have been violated or infringed, as the case may be, by reference to one of the following sections: 3(a), 14.1, 14.2, 27(1), 28.1, 34, 35, 38.1, 39 or 39.1 of the *Copyright Act*. These are distinct claims and the contracts may be relevant to some and not others.

[107] For the Roués to have a chance to establish liability for the various Respondents, may require that they use different legal approaches depending on the contractual and factual circumstances between the distinct Respondents herein.

[108] The nature and extent of the precise inter-relationships between the Respondents has eluded the Roués to date. In my opinion, that information is relevant to the Roué's claims, and may well be relevant to the issues of damages overall, and the apportionment of damages.

[109] I do no accept that the contracts between the Respondents herein are not "relevant", in the sense as that notion is used in CPR 14.01 and 15.06.

[110] I order that the Respondents forthwith comply with the Rules in issue here and effect disclosure/production of "all contracts between the various Respondents relating to the 'Project' as that term is defined in the pleadings (the "Contract")."

[111] I recognize that the Respondents have requested that "the order be subject to the Respondents obtaining appropriate measures to protect commercially sensitive information contained in the contracts, either through the agreement of the parties

and/or the issuance of an appropriate protective order from this Honourable Court" - para. 18 of the July 25th brief).

[112] I hope that the parties can agree to such appropriate measures beyond the protection that the implied undertaking rule would provide as between the parties - CPR 14.03.

SUMMARY

[113] I have herein given reasons why the Applicants' motions for a listing of privileged - claimed documents and production of the Respondents contracts should be granted; and why the Applicants' motion for a discovery subpoena to be issued to Rory MacDonald should not be granted at this time.

[114] I note that the moving party need not expressly claim costs - CPR 38.07 and 77.03(3); per CPR 77.05 presumptively Tariff C applies; per CPR 77.10 disbursements are included. If the parties cannot agree on a proper costs award, I will expect their written submissions (not exceeding 10 pages) by September 6, 2013.

Rosinski, J.

SUPREME COURT OF NOVA SCOTIA
Citation: Roué v. Nova Scotia, 2013 NSSC 254

Date: (20130809)
Docket: Hfx. No. 407754
Registry: Halifax

Between:

Joan Elizabeth Roué and Lawrence James Roué

Applicants

v.

Her Majesty the Queen in Right of the Province of Nova Scotia, Lengkeek Vessel Engineering Inc., Lunenburg County Shipwrights Incorporated, carrying on business as Covey Island Boatworks, Lunenburg Foundry & Engineering Incorporated, Lunenburg Shipyard Alliance Limited, MHPM Project Managers Incorporated, and Snyder's Shipyard Limited

Respondents

ERRATUM

Judge:	The Honourable Peter P. Rosinski
Heard:	July 31, 2013 in Halifax, Nova Scotia
Written Decision:	August 9, 2013
Counsel:	Robert Belliveau, Q.C. and Michael Blades, counsel for the Applicants Edward Gores, Q.C., (Steven B. Garland), Kevin K. Graham, co-counsel for the Respondent Her Majesty the Queen in Right of the Province of Nova Scotia (Steven B. Garland) and Kevin K. Graham, counsel for all remaining Respondents

Erratum:

[1] Paragraph 87 reads:

Nevertheless, on careful reflection, not wanting to reasonably deprive the Roués of possibly a significant witness' discovery, yet finding the evidentiary basis therefor weak at present, and there having been no discovery of Marius Lengkeek yet, I conclude that no discovery subpoena should be issued **at this time** for Rory MacDonald.

[2] Paragraph 87 should read:

Nevertheless, on careful reflection, not wanting to unreasonably deprive the Roués of possibly a significant witness' discovery, yet finding the evidentiary basis therefor weak at present, and there having been no discovery of Marius Lengkeek yet, I conclude that no discovery subpoena should be issued **at this time** for Rory MacDonald.

Rosinski, J.