

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

Judge: The Honourable Justice Peter P. Rosinski

Heard: July 30, 2013 in Halifax, Nova Scotia

Subject: Motions seeking a court order to:

1. Pursuant to CPR 15.06 (3) direct 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"
2. Pursuant to CPR 18.10 direct the issuance of a discovery subpoena (application) for a non-party witness;
3. Pursuant to CPR 14, 15 and 23 direct the respondents to produce forthwith the contracts between the relevant

respondent parties referred to in detail in the notice of motion.

Summary: Previous decisions set the context of this copyright act related infringements litigation by family members of the alleged creator of the design of the original Bluenose sailing vessel as against the Province of Nova Scotia and the other respondents allegedly involved in the deconstruction and reconstruction of the Bluenose II – 2013 NSSC 68 and 2013 NSSC 135 (under appeal and heard June 11, 2013 pending reserved decision).

The applicants in this application in court sought disclosure of claimed privileged documents based on the same rationale as would be with an action (governed by CPR 15.03). The respondents took the position that in this case, there is no obligation on them to provide any listing of such claimed privileged documents, as they would have the court interpret CPR 15.06.

The applicants also sought a discovery subpoena for an (non-party) employee/representative of one of the respondent parties who they say could provide important evidence beyond that available through the designated discovery manager for that respondent. The respondents primarily argued that it was premature to order this since the relevant designated discovery manager had not yet been himself discovered. They also questioned the evidentiary basis upon which the applicants argued that the witnesses evidence was important enough to justify the court issuing a discovery subpoena.

The applicants also sought production of the contracts between the respondent parties, as they argued they were relevant to the applicants establishing liability, and possibly to damages, which contracts the respondents refused to disclose to date. The respondents argued that the admissions made in their pleadings and their filed affidavit evidence to date admit all the material facts that the applicants are seeking by requesting production of the contracts.

Issue: 1. Should the respondents be ordered to provide an index listing of all

relevant privilege claimed documents in this application in court pursuant to CPR 15.06(3)?

2. Should the court pursuant to CPR 18.10 issue a discovery subpoena to a nonparty witness who is alleged to have been a key representative of one of the respondents, with important evidence not otherwise obtainable through discovery of the designated discovery manager of that respondent?

3. Should the respondents be ordered to provide copies of the contracts between each of them to the applicants pursuant to CPR 14 and 15?

Result: The drafters of the rules did not intend to distinguish in substance between actions and applications in court insofar as generally a presumption of disclosure, limited as required, applies to privilege claimed documents pursuant to CPR 15.03(6). Therefore the motion for production of those documents is granted.

While there is a basis to suggest that the nonparty witness may have important evidence, it is unclear on the evidence to date that that evidence is not otherwise obtainable through discovery of the designated discovery manager of that respondent and therefore, at this time, the motion for the issuance of a discovery subpoena is dismissed.

The contracts between the respondents set out their legal obligations in relation to the destruction and reconstruction of the Bluenose II which is at the heart of the allegation by the applicants. By having referred to the contracts in their pleadings and affidavit evidence to date the respondents have themselves considered the contracts as material facts in this application in court. They cannot now deny the applicants the opportunity to see for themselves what material facts the applicants may derive from those same contracts. The contracts are relevant to this litigation, and their production is ordered subject to the agreement of the parties or a further court order regarding

commercially sensitive information that could prejudice the interests of the respondents if it were publicly disclosed.