SUPREME COURT OF NOVA SCOTIA
Citation: ***Cape Breton Ski Club v Ben Eoin Golf Limited*** , 2019 NSSC 172

Date: 20190531
Docket: 485757
Registry: Sydney

Between:

Cape Breton Ski Club

Applicant

v.

Ben Eoin Golf Club Limited

Respondent

and

Ben Eoin Development Group

Intervenor

LIBRARY HEADING

Judge:	The Honourable Justice Frank C. Edwards
Heard:	May 16, 17, 21, 22, 2019 in Sydney, Nova Scotia
Written Decision:	May 31, 2019
Subject:	Injunctions Civil Procedure Rules 28 and 41 *Judicature Act* s. 43(9)
Facts:	The Applicant Ski Club moved for an interlocutory injunction to prevent the Respondent Golf Club from transferring its assets and liabilities to the Intervenor Development Group until the Ski Club's application could be heard. The Ski Club claimed to have a right of first refusal (ROFR) with the Golf Club. The ROFR was referenced in a 2006 Memorandum of

Understanding (MOU) between the Ski Club and the Golf Club.

Issues: (1) Was there a serious question to be tried?

(2) Would the granting of an injunction be an appropriate exercise of the Court's discretion?

Result: The motion for an injunction is dismissed.

1. There is no serious question to be tried. The Applicant's claim that it had a ROFR was frivolous and vexatious. The MOU and the ROFR had clearly been replaced by a comprehensive lease signed by the two parties.

2. To grant an injunction in the circumstances of this case would not be a just exercise of the Court's discretion. The proponents of the Ski Club's application had made a decision not to disclose the purported ROFR to the Intervenor Development Group or to the present executive of the Golf Club. They waited until after the Development Group had spent hundreds of thousands of dollars in anticipation of acquiring the golf course.

The Development Group was entitled to have notice that the ROFR was an encumbrance against the golf course property. That is the purpose of the land registration system. The Ski Club's leadership knew that the purported ROFR had never been recorded. They also knew of the Development Group's intentions as early as the summer of 2018. For questionable tactical reasons, the Ski Club leadership unfairly delayed disclosure of the ROFR. That is not conduct the Court should be seen to condone.

Cases Noticed: *RJR-MacDonald Inc v Canada* [1994] 1 RCS

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Judge:	The Honourable Justice Frank C. Edwards
Heard:	May 16, 17, 21, 22, 2019, in Sydney, Nova Scotia
Counsel:	Michelle Kelly, for the Applicant Christopher Conohan, for the Respondent Tony Mozvik, QC, for the Intervenor

By the Court:

Background:

[1] The Applicant, Cape Breton Ski Club (the Ski Club) has been in operation for more than fifty years. In the 1990's, certain members of the Ski Club along with some community volunteers began to promote the establishment of a golf course. The proposed golf course would sit on lands intersected by land

belonging to the Ski Club. The cooperation of the Ski Club was therefore vital to the viability of the golf course.

[2] In 1998, a limited by guarantee (not for profit) company was incorporated to promote the golf course. Its name was Ben Eoin Golf Club Limited (the Golf Club). Some members of the new entity were also board members of the Ski Club. The Golf Club members then proceeded to secure options for the required land. They also approached the Cape Breton Growth Fund (the Growth Fund), a federal agency, for possible financing. The Growth Fund required a formal arrangement between the Golf Club and the Ski Club before it would consider advancing funds.

[3] On January 19, 2006, the Board of Directors of the Ski Club approved a Memorandum of Understanding (MOU) between itself and the Golf Club. The MOU was signed by the then President and Secretary of the Ski Club. On January 24, 2006 the MOU was brought before the Board of the Golf Club and appended to the minutes of the meeting. The MOU was never formally approved by the Golf Club or signed by any of the Golf Club's officers.

[4] The MOU provided a "framework" for achieving the operational goals of the Golf Club "…in accordance with the overall philosophy and principles of (the Ski Club)". It also provided for certain shared costs and facilities and for a long

term lease of the Ski Club lands to the Golf Club. The MOU provided the following in Clause 6(c):

> **Ben Eoin Golf will provide the Cape Breton Ski Club, or vice versa, a first option to acquire the shares and/or assets of Ben Eoin Golf, or the Cape Breton Ski Club, in the event that reorganization is required.** (Emphasis added)

[5] In May of 2006, the Golf Club transitioned from a limited guarantee company to a for-profit company. The people involved did not change. Strictly speaking, between May 2006 and January 2007, the Golf Club was a nameless numbered company. The for-profit company did not formally assume the name Ben Eoin Golf Limited until January 2007.

[6] On June 2, 2006 the lawyer for the Golf Club drafted a letter to the Growth Fund which states in part: "A Memorandum of Agreement has been finalized (between the Golf Club and the Ski Club)…" It is an apparent reference to the MOU.

[7] By June 15, 2006, Clause 6(c) of the MOU had changed to read that the proposed right of first refusal is available "…in the event that reorganization is required that would materially change ownership of either party…(the rest of the clause is not material to this motion.) This version of the MOU has a handwritten notation "Revised June 15, 2006" by Alexander (Sandy) Macneill,

who, at the time, was one of the persons promoting the Golf Club. Although he is not now a member of the Ski Club Board, Mr. Macneill is one of the main proponents of the Ski Club's application.

[8] The Golf Club's first Offering Memorandum is dated June 22, 2006. Clause 2.7 "Material Agreements" refers to the MOU. Subsequent Offering Memoranda dated October 18, 2006, August 26, 2008, and September 27, 2009, all contain that exact reference to the MOU.

[9] On November 30, 2006, the Ski Club and the Golf Club signed a 48 page lease with attached schedules. The Lease contains five recitals which read:

> 1. **WHEREAS** the Landlord is owner of certain lands located in Ben Eoin, in the Cape Breton Regional Municipality, County of Cape Breton, Province of Nova Scotia which is currently used in connection with the operation of a recreational ski hill;
>
> 2. **WHEREAS** the Tenant is anticipated to own lands abutting the Landlord's lands and together with the Landlord's lands shall be used in connection with the development of a world class 18-hole golf course ("THE PROJECT"); and
>
> 3. **WHEREAS** the development and operation of the Project will include the construction of new buildings and additions and/or renovations of existing buildings on the lands of the Landlord, some or all of which is intended to be used by both parties in connection with the Landlord's existing business (ski hill operation) as well as the Project; and
>
> 4. **WHEREAS** it is intended that each of the parties' business operations shall be owned and operated completely separate from each other but in doing so the parties mutually agree, as provided for herein, to identify certain lands and improvements which are now or are anticipated to be constructed and owned by either party which shall be situate on the lands, which shall be considered "shared assets" and shall be used by both parties and maintained in accordance with the terms and conditions set forth herein; and

5. **WHEREAS** both parties hereby confirm their intentions that the provisions of this agreement are intended for the overall mutual benefit of each parties' business operations and the overall ongoing development of a multi purpose recreation facility situate at Ben Eoin.

[10] In addition to land owned by the Ski Club, the Lease provides for the Golf Club's lands on the north (opposite) side of the highway and other lands owned by the parties. The Lease also contains the following provisions:

10.1 Assignment by Tenant

Save and except as set out in this Article 10, the Tenant shall not assign this Lease or sublet all or substantially all of the Lands without first obtaining the written consent of the Landlord, which consent shall not be unreasonably withheld or delayed. Any transfer or issue by sale, assignment, bequest, inheritance, operation of law or other disposition, or by subscription, of more than 50% at any one time of the corporate shares of the Tenant or any other corporation which would result in any change in the effective direct or indirect control of the Tenant, shall be deemed to be an assignment. **Not withstanding the foregoing, if at any time the Tenant wished to convey the total Project as if it were a sale, then the Tenant shall have the right to assign or sub-let without consent, but on notice to the Landlord.** (Emphasis added)

10.6 Landlord's Sale

(1) In the event of the sale, transfer or other disposition by the Landlord of its interest in the Lands or any part thereof, or the assignment by the Landlord of this Lease or any interest of the Landlord hereunder, **the Landlord shall first**:

(a) In the event of sale or disposition to an arms length Party, provide to the Tenant a first right of refusal to acquire the Lands under the same terms and conditions: or (Emphasis added)

(b) cause the purchaser, transferee or assignee thereof to directly assume the covenants and obligations of the Landlord hereunder and, thereupon, the Landlord shall, without further agreement, be freed and relieved of all liability with respect to such covenants and obligations under this Lease relating to matters arising from and after such assignment.

15.7 Entire Agreement

> Subject to section 2.5 there are no covenants, representations, warranties, agreements or other conditions expressed or implied, collateral or otherwise, forming part of or in any way affecting or relating to this Lease, save as expressly set out or incorporated by reference herein, **and this Lease constitutes the entire agreement duly executed by the parties hereto**, and no amendment, variation or change to this Lease shall be binding unless the same shall be in writing and signed by the parties hereto. (Emphasis added)

[11] The golf course began operations in 2009. Its financial position was precarious from the start. By 2018, the Golf Club was in serious financial trouble. It had only been able to stay afloat by means of several cash calls from the shareholders. It was indebted to ACOA (the Growth Fund's successor) to the tune of $3.5 million. ACOA had begun demanding repayment. There was a Credit Union Mortgage of $1.1 million and almost $300,000.00 in outstanding payables. Grounds equipment and golf carts needed expensive replacement and repair.

[12] The Intervenor, the Ben Eoin Development Group, (the Development Group) made a proposal to take over the assets and liabilities of the Golf Club. The first proposal resolution in December, 2018 did not get the required 75% approval from the Golf Club's shareholders. A second proposal resolution was passed by over 90% of the Golf Club's shareholders on February 5, 2019. On February 6, 2019, the Ski Club gave the Golf Club "Notice of Exercise of Option of First Right of Refusal" (ROFR). The Golf Club takes the position

that the Ski Club does not have a ROFR. The Golf Club wishes to proceed with the transfer of its assets and liabilities to the Development Group.

[13] The Ski Club has now applied to this Court for specific performance allowing the Ski Club to exercise its ROFR to acquire the Golf Club's assets and liabilities. The Ski Club has also moved for an interlocutory injunction to prevent the proposed transfer to the Development Group pending a full hearing of the Ski Club's Application.

[14] The Board of the Ski Club voted to proceed with this litigation on February 19, 2019. Consequently, seven members of the Board resigned including its then President. Mr. Vernon MacDonald replaced her. The departing Board members disagreed with proceeding without consulting the Ski Club membership. Some were concerned that the Ski Club could not afford to take over the golf course and its substantial debt. At least one is also an investor in the Golf Club.

[15] I heard the Injunction Motion in a 3.5 day hearing beginning on May 16, 2019 and concluding on May 22, 2019. I reserved decision.

Issues:

A. Serious Question to be tried

[16] It is well settled law that the Applicant for an injunction must satisfy the Court of the following:

1. That its claim represents a serious issue to be tried.

2. That it will suffer irreparable harm if an injunction is not granted.

3. That the balance of convenience favors the granting of the injunction.

[17] Prior to their final submissions, I advised Counsel that, if the Applicant was successful on the first issue, then 2 and 3 would also likely resolve in its favor. The Ski Club would lose its right to specific performance if an injunction were not granted. In that respect, it would suffer irreparable harm. If an injunction were granted, it would mean a delay for the Respondent and Intervenor but would result in the above mentioned loss of the right of specific performance for the Applicant. The balance of convenience would favor the Applicant.

[18] The first issue therefore is whether the Ski Club has demonstrated that its claim to a right of first refusal is a serious issue to be tried.

B. The second issue is whether the granting of an injunction would be an appropriate exercise of the Court's discretion.

Law:

A. Serious Question

[19] The seminal case on injunctions is ***RJR - MacDonald Inc v Canada*** [1994] 1 RCS. In the particular circumstances of this case, the relevant law is set out in paragraph 54 and 55 of the decision:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case…
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally not necessary nor desirable.

[20] The law requires a higher threshold (a strong prima facie case) in two situations: (1) when the result will amount to a final determination of the action; and (2) when the matter involves a pure question of law. Neither exception applies here.

[21] As I advised Counsel, a serious question to be tried is a low bar, but is still a bar. Even "a preliminary assessment of the merits of the case" requires that I find that the Applicant's case has some merit. I should determine if the test has been satisfied "on the basis of common sense and an extremely limited review of the case on its merits." (***RJR-MacDonald***, supra. p. 348)

B. Judicature Act, s. 43(9) Court's discretion to grant injunction - referenced below

Discussion:

A. Serious Question

[22] After carefully considering all of the evidence, I am satisfied that there is no viable argument that the MOU (and therefore the purported ROFR) survived the signing of the Lease on November 30, 2006. There is no evidence of the MOU's continued existence as a legally binding document after that date. Insofar as the parties' subsequent conduct of business may be referable to a legal document, that document is the Lease and not the MOU.

[23] The references to the MOU in the Offering Memoranda issued after the Lease was signed are obvious cut and paste jobs taken from the pre-Lease memoranda. There is no evidence that the MOU had a life of its own after November 30, 2006. By the end of 2018 the various versions of the MOU had not been seen for more than twelve years.

[24] The Lease was undoubtedly designed to enshrine the main tenets of the MOU and to replace it. A cursory examination of the Lease provisions demonstrates that it is a comprehensive document that defines much more than a landlord tenant relationship between the Ski Club and the Golf Club. It provides, for example, for the joint use and maintenance of facilities and for shared assets.

[25] As noted, the Lease provides for more than the use of the Ski Club's lands. There are specific provisions related to land owned by the Golf Club. It is important to remember that both parties were represented by legal counsel during the drafting of the Lease. Both parties must have agreed to drop the right of first refusal (ROFR) contemplated in the MOU. There is no other explanation for Clause 10.1 of the Lease quoted earlier. Recall that Clause 10.1 reads in part:

> "…**if at any time, the Tenant wished to convey the total Project as if it were a sale, then the Tenant shall have the right to assign or sublet without consent, but on notice to the Landlord.** (Emphasis added).

[26] "Project" is defined in the Second Recital in the Lease. It reads in part: "…the Landlord's lands shall be used in connection with the development of a world class 18-hole golf course ("The Project")…"

[27] Counsel for the Ski Club argued that the name "Project" implies that the golf course could only be sold without the consent of the Ski Club during the construction period and not thereafter. This argument reflects similar positions put forward by Messers MacDonald and Macneill. With respect, such an interpretation of Clause 10.1 is not sustainable. The Third Recital talks about "the development **and operation** of the Project…" (Emphasis added). There is no time limit anywhere in the Lease to support the suggested interpretation of

Clause 10.1. The clause clearly and unequivocally means that the Golf Club has the right to sell the golf course "**at any time… without consent**." The word "Project" was simply a convenient term to use at the time the Lease was drafted.

[28] Clause 10.6 demonstrates that the parties did turn their minds to a ROFR. But in that clause the ROFR is in favor of the Golf Club should the Ski Club ever decide to convey its land.

[29] It bears repeating that both the Ski Club and the Golf Club were represented by Counsel during the negotiation and drafting of the Lease. In fact the Ski Club had two lawyers involved. If the Ski Club's intention had been to ensure the continued existence of the MOU and its alleged ROFR, that was the time to do it. First, the parties would have had to delete Clause 10.1 of the Lease. Then the ROFR could have been reduced to a defined agreement and properly recorded. It is inconceivable that those steps were not taken if the plan had been to continue the life of the MOU and the ROFR.

[30] What the parties did do was sign the Lease which contains an "entire agreement" clause. Clause 15.7 states in part: "…this Lease constitutes the entire agreement duly executed by the parties hereto…" This clause effectively

negates any possible co-existence of the MOU (and its anticipated ROFR) with the Lease.

[31] The Applicant has therefore failed to satisfy me that its claim to a right of first refusal amounts to a serious question to be tried. The Applicant's claim is frivolous and vexatious. The claim appears to be motivated more by a belated effort to counter the Development Group's offer than by confidence in the alleged ROFR.

[32] In reaching my conclusion I am mindful of the Supreme Court's admonition that I should limit my examination of the merits of the case. I have done that. The evidence is voluminous. The stack of affidavits on my desk is more than a foot high. Add to that over three days of cross examination on those affidavits.

[33] For the most part, my conclusion is based upon a plain reading of the MOU and the Lease in their chronological context. I have avoided assessing the credibility of the various affiants. I have avoided weighing the evidence, for example, in relation to the creation of the MOU, the fact that it is not signed by officers of the Golf Club, and whether it was binding on the Golf Club's existing legal entity. I have rejected only those evidentiary arguments which I deemed to be completely unsustainable. (e.g. that Clause 10.1 in the Lease is referent only to the construction period).

B. Appropriate Exercise of Court's Discretion

[34] In addition to the "serious question" issue, there is an overarching reason why an injunction should not be issued in this case. It has to do with fairness. An injunction is what lawyers call an equitable remedy. It is discretionary. The Court will intervene only to ensure that justice is done. Section 43(9) of the *Judicature Act* empowers the Court to grant an injunction "…in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made…"

[35] Here the proponents of the Ski Club application knew since at least the summer of 2018 that the Intervenor Group was about to spend hundreds of thousands of dollars in anticipation of acquiring the golf course. Mr. Macneill testified that Mr. Colbourne of the Development Group gave him a tour of the construction site in July, 2018. Mr. Ling, the current first vice president of the Ski Club's Board, testified that he was aware of the Development Group's intentions by the fall of 2018. The Ski Club also knew that the current directors of the Golf Club probably knew nothing about a ROFR.

[36] The Ski Club leadership made a decision not to give the Development Group a heads-up on the existence of the alleged right of first refusal. (Evidence of Messers MacDonald and Macneill). If the ROFR had been properly recorded,

the Development Group would have known it was there. But the ROFR had not been recorded and the proponents of the Ski Club application knew that.

[37] It was fair ball not to **exercise** the ROFR until the competition had shown its hand. It was not fair ball to keep the existence of the ROFR secret. That is why we have a land registration system. Potential purchasers should be able to check the registry and be confident that they have notice of any encumbrances against the property before they start making financial commitments.

[38] It is important to recognize that the Ski Club is not asking this Court to give effect to a document it had inadvertently failed to record. The Ski Club (or the few individuals now controlling the Ski Club) want the Court to give effect to a document that they had chosen to keep hidden from a prospective purchaser.

[39] Counsel for the Ski Club argued that the Development Group took a calculated risk in spending money in anticipation of acquiring the golf course. The logical extension of that argument is that the Development Group might have spent the money even if it had had knowledge of the purported ROFR. If that is the implied but unspoken suggestion, it misses the mark. The issue is not whether the Development Group might have taken the risk anyway.

[40] The point is that to grant an injunction in these circumstances would be to reward conduct that was less than forthright. In a sense, it would make the Court complicit in the questionable tactics of those controlling the Ski Club. If it issued an injunction, the Court would not be exercising its discretion in a just manner. For that reason alone, the Motion should be dismissed.

Conclusion:

[41] The Ski Club has failed to satisfy me that there is a serious issue to be tried. In any event, to grant an injunction would not be an appropriate exercise of the Court's discretion. The Motion for an Interlocutory Injunction is dismissed.

[42] The Respondent and the Intervenor are the successful litigants on this Motion. They are entitled to their costs and reasonable disbursements. Both should submit their briefs on costs no later than June 21, 2019. The Applicant can submit its reply brief by July 5, 2019. The briefs should address:

1. The costs amount.
2. Whether costs are payable in any event of the cause.
3. Whether the Respondent and the Intervenor are entitled to the same costs amount.
4. Such other matters as Counsel deem relevant.

[43] Order accordingly.

Edwards, J.