SUPREME COURT OF NOVA SCOTIA

Citation: *Capital Demolition & Environmental Services II Inc. v. Nova Scotia (Attorney General)*, 2022 NSSC 368

Date: 20221213
Docket: Truro No. 514279
Registry: Halifax

Between:

Capital Demolition & Environmental Services II Inc.

Plaintiff

v.

The Attorney General of Nova Scotia

Defendant

DECISION

Judge:	The Honourable Justice Peter Rosinski
Heard:	December 12, 2022, in Halifax, Nova Scotia
Written Decision:	December 19, 2022
Counsel:	Dennis J. James, K.C. and Grace A. MacCormick for the Plaintiff Daniel Boyle and Myles Thompson, for the Defendant

By the Court:

Introduction

[1] Capital had the Contract to demolish the Colchester Regional Hospital (owned by the Province) which is in Truro, Nova Scotia.

[2] Under the Contract Capital was entitled to keep as its own property "materials for removal".

[3] The Province terminated the Contract with Capital before completion of the work.

[4] Capital has sued the Province for unlawful termination of the Contract and damages, specifically including the loss of expected profit from "materials for removal" [known more commonly as salvageable and saleable materials] including those that would have become Capital's property, had it been permitted to complete the Contract work.

[5] Capital has not been permitted on the site since July/August 2021.

[6] Therefore, in its attempts to quantify the damages of loss of expected profit from "materials for removal", Capital has had to rely upon the Province to inform it of what "materials for removal" were removed.[1]

[7] Capital says:

(i) that the Province's recordkeeping and provision of what "materials for removal" were removed, has been unreliable, and I should infer that it will remain so during the final demolition of the last remaining building (i.e., the Main Hospital Building) which is scheduled to commence by mid-January 2023;

[1] The Province acknowledged that, given the litigation, it has an ongoing obligation to disclose to Capital such information pursuant to Civil Procedure Rule ("CPR") 14.

(ii) these recordkeeping problems prejudice Capital's ability to accurately assess and present at trial, the evidence of its loss of expected profit from the "materials for removal".[2]

[8] Pursuant to CPR 28.02(4), Capital filed "an emergency" notice of motion on December 1, 2022, in Truro.[3]

[9] Capital seeks a Preservation Order (for the preservation of evidence by injunction) pursuant to CPR 42.02; and as a necessary corollary, access to the site where the demolition of the Colchester Regional Hospital is expected to continue in mid-January 2023.

[10] Capital says it has presented evidence and argument that there is "an emergency" of sufficient gravity that it be permitted to access the site and record by video and photographs (over up to 5 days) what "materials for removal" are associated (still present or which have already been removed) with the Main Hospital Building, before it is demolished.

[11] I am not satisfied that the circumstances amount to "an emergency" as contemplated by CPR 28.

[12] However, in the very specific circumstances of this motion: wherein the parties agreed that should I find "an emergency", I should go on to consider the merits of Capital's motion for a Preservation Order based on the evidence presented; yet although not having found "an emergency", I find it to be in the interests of justice for me to consider this motion on its merits *as if* it were a

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[2] According to the evidence before me from Lawrence Bellefontaine, this is no trivial issue. He estimates that the "materials for removal" associated with the Main Building of the Hospital, "to be approximately $350,000".

[3] Justice Hunt who presides in Truro, initially conducted a "status call" with the parties on November 30, in response to Capital's written materials/submissions requesting an emergency motion. Because he was conflicted, the matter was referred to me. Prior to my involvement it was set down for hearing on December 12, 2022, but *only* to decide whether the matter should be heard on "an emergency" basis. Capital correctly says in its December 7, 2022, brief that CPR 28.02 "provides a preliminary step for a motion to be heard on an emergency basis". At the hearing, on December 12, 2022, counsel agreed that I could consider the merits of the motion as well, should I find "an emergency" exists. More specifically, counsel were agreeable to arguing both whether the "an emergency" precondition had been met and the merits of the motion at the same time, rather than bifurcating them. The Court proceeded on that basis. One affidavit was presented by each of the parties: Lawrence Bellefontaine for Capital; and Terry Randell for the Province. Neither affiant was cross-examined.

properly filed regular motion (under CPR 23) set for hearing on December 12, 2022, based on the fulsome evidence presented and arguments made by counsel on that date.[4]

[13] Having considered the evidence and arguments made by the parties, I am satisfied that the Preservation Order should issue.

Background

[14] In brief compass, the background is as follows.

[15] On July 30, 2020, Capital was awarded the Contract to demolish the Colchester Regional Hospital.

[16] The Contract stipulated that it was entitled to consider as its own property unless otherwise stated, any salvageable material after demolition ["materials for removal become the contractor's property"].

[17] Capital wishes to have an opportunity to videotape/take still photographs of the salvageable materials left in the Main Building of the Colchester Regional Hospital, which has been slated for demolition commencing in mid-January 2023.

[18] It says that it needs to document what salvageable materials were there and are there, because it *has not* been able to, and *is not* able to rely upon the Province to reliably record what evidence of salvageable material remains on site.

i-*The Lawsuit*

[4] I note that while present in court, I did not consider this option, and therefore the parties have not had a chance to address it. Had I determined at the end of the oral arguments that there was no emergency, I could have immediately advised the parties (as a result of a quirk of my own scheduling availability within the next week, i.e. I either had no scheduled matters or they were unexpectedly and recently removed from my docket on December 13, 14 or 19, 2022) that I was available to hear the matter as a regular motion on an expedited basis on one of those dates. I add here that the official Available Dates List from the court scheduling office showed that as of December 12, 2022, between December 12 and February 28, 2023, the only one day available slots for the hearing of this motion by any Justice were limited to January 3 and January 4, 2023. I conclude that delaying the hearing of the motion to those latter dates would not be in the interests of justice, as it appears to me that fulsome evidence and arguments having been presented on December 12, 2022, there is no material unfairness to either of the parties arising from me proceeding as I do herein.

[19] On April 20, 2022, Capital filed a notice of action against the Province wherein it claimed that the Province "terminated the Contract on December 10, 2021", and that it "has suffered damages including but not limited to: … The loss of its expected profit from the salvageable materials present at the site;".

[20] The Province filed a notice of defence and counterclaim on May 18, 2022. Capital filed a notice of defence to counterclaim on June 16, 2022.

ii-*The Notice of Motion*

[21] In its notice of motion pursuant to CPR 42 [Preservation Order], Capital requests:[5]

> (i) an order to permit it temporary access to the site of the former Colchester Hospital in Truro over a period of five days in order to, firstly:
>
> a. Document by visual record the state of abatement and demolition work completed;
>
> c. Document by visual record evidence of any items removed or destroyed from the work site; and
>
> d. Document by visual record any salvageable materials or goods remaining on site"; and
>
> secondly:

[5] Counsel for the Province fairly pointed out that to achieve access to the site and photograph/video the Main Hospital Building, Capital could have sought an order under CPR 17.05 (see also CPR 17.04 – demand for inspection) - which position must presume that the anticipated partial or total demolition of the Main Hospital Building would also have required injunctive relief to forestall that under CPR 17.05(c). CPR 17.05 reads: "A judge may order a person to permit inspection of a thing, and the order may include terms to assist the inspection, including terms on any of the following subjects: (a) permission to enter on lands and inspect the land, a fixture, or a movable; (b) a time, date, and place for the inspection; (c) an injunction or other order to secure the cooperation of a named or unnamed person; (d) a requirement that a person deliver a thing to a person or place." At the hearing, counsel for Capital clarified that it is not seeking an injunction that the Province/its contractors cease work until Capital can attend at the site to take the videotapes and photographs. The injunctive relief was aimed only at preventing the partial or total demolition of the Main Hospital Building until Capital could attend at the site and complete its videotaping/photography. Capital says Mr. Bellefontaine would expeditiously be able to attend at the site and would endeavour not to be disruptive to the ongoing work while he was there.

(ii) "for an injunction preventing the demolition of the remainder of the former Colchester Hospital pending the completion of Capital's ability to access the site."

[22] This motion was "made on an emergency basis as the plaintiff/defendant by counterclaim understands that former Colchester Hospital is scheduled to be demolished on or before January 8, 2023."

iii-*The affidavits*

[23] Capital's Lawrence Bellefontaine stated in his affidavit:

> 20 - These salvageable materials included but were not limited to sheeting, lumber, ferrous and nonferrous items including copper ductwork's, copper piping, copper expansions, brass piping and fittings, extensive amounts of stainless steel and a fully functional kitchen with fridges, freezers, cook stoves and ovens.
>
> …
>
> 22 - Based on expertise and experience, I estimate the value of the salvageable materials in the Main Building alone to be approximately $350,000.
>
> ...
>
> 59 - Capital was ordered off site on August 12, 2021 and has not been permitted on site since that date…
>
> …
>
> 61 - As part of this lawsuit, Capital seeks damages for the loss of value of the salvageable materials within the Former Hospital.

[24] In his affidavit he further states:

> 84 - Capital states that without performing this analysis [completion of a room- by- room survey of the remaining structure/Main Building while taking photographs and videos over up to five days] it will be prejudiced in being able to assess its losses.
>
> **Emergency circumstances**

85 - The demolition of the former Hospital is ongoing.

86 - The Annex building has already been demolished.

87 - I understand that the demolition of the Main Building will be complete on or before January 8, 2023.

88 - Capital will lose its ability to assess a significant portion of its damages as soon as the Main Building is destroyed. Capital states that this will prejudice its ability to put forward its case.

…

91 - Capital will make efforts to minimize the impact of this visit on the ongoing demolition work.

[25] In his affidavit for the Province, Terry Randell states:

1 - I am an Environmental Analyst at the Nova Scotia Department of Public Works ["Public Works"]. In the course of my employment, I have been involved in the demolition of the former Colchester Hospital… since August 2020.

…

12 - Estimates of value of anticipated salvageable material may be based on multiple considerations, including building plans made available during the tender process, observations made by potential bidders during site visits during the tender process, and market rates for certain classes of salvageable materials. Such valuation would be known to contractors at the time they factor them into their individual bid packages.

…

30 - During Capital's time on site, they had sufficient opportunity to adequately quantify or remove the salvageable materials located within the structures, including the Main Hospital Building. This could have been accomplished during the site visits in June and July 2020 or from the date of Capital's mobilization on August 18, 2020 until a change directive was issued to de-mobilize from the Main Hospital Building.

31 - Capital's contract with Public Works required Capital to prepare a listing of each material proposed to be salvaged, reused, recycled, or composted during the project, and

the proposed local market for each material. Capital submitted a Waste Management Plan to WSP [Canada Inc. which were the engineering consultants on the work site], which also references a Waste Audit sheet for specific quantities of materials to be reused, recycled and disposed of. At no time during Capital's contract was any Waste Audit sheet provided to Public Works.

…

33 - Capital remained present on site until July 2, 2021… was permitted on site by WSP for a brief period during the second week of August 2021, …";

…

35 - WSP documented the contents of all rooms within the structure with a full photo log in December 2021 – which contained evidence of loose salvageable items within the buildings.

36 - On November 23, 2022, demolition on the Annex Building was completed. The salvage associated with this structure is no longer present on the site. …

37 - Limited salvageable material remains in the basement, the fourth floor in the sixth-floor mechanical space inside the Main Hospital Building. These materials are scheduled to be removed by the end of December 2022. …

38 - I have personally directed WSP to ensure that such material is weighed and documented prior to leaving the site. Furthermore, copies of waybills from the receiving facilities for all materials leaving the site, salvage or otherwise, will be produced by the contractor and given to WSB to document the removals.

39 - Other than the limited remaining salvageable material (scrap metals) contained in the Main Hospital Building, and metal rebar broken out of concrete during deconstruction work, no further salvageable materials remain on site.

40 - In November 2022, Capital requested summaries of salvageable materials removed from site by others since termination of Capital's contract to assist in their preliminary assessment of damages.

41 - In good faith, Public Works provided partial summaries to Capital on November 24, 2022. The account of materials was complete for salvage removed from site, but Capital expressed concern about gaps in the information between June 2021 and September 2022.

> Further records including comprehensive Truck Logs provided by WSP on December 1, 2022, for all materials removed from the suite [sic] are attached hereto as exhibit "E".[6]
>
> …
>
> 52 - I spoke with Peter Field, [Project Director and Senior Industrial Engineer at WSP] on December 1, 2022, and reaffirmed that the current method for documenting all materials leaving the site continue as intended by the contract.
>
> 53 - Demolition of the Main Hospital Building is scheduled to commence by mid-January, 2023. …
>
> …
>
> 56 - Specifically, Capital seeks access over a period of five days but have not provided any details or rationale to substantiate to Public Works why they would need five days to document the condition of a near empty building.
>
> 57 - The record of salvageable materials documented by WSP is the most complete and accurate record of materials removed from the site and will be fully disclosed in due course.

The issues

[26] Both parties agree that the following questions arise from this proposed motion:

(i) should this matter proceed on "an emergency" basis? [I have already summarily answered this question and given the unusual circumstances, it is presently irrelevant.]

(ii) should the court grant Capital's motion for access to the site (for up to 5 days) to allow it to create a video/photographic record relevant to its claim for damages, and "an injunction preventing the demolition of the remainder of the former Colchester Hospital pending the completion of Capital's ability to access the site"?

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[6] Although I note there are some "missing data" referenced by Public Works therein.

Issue 1 - is there "an emergency" per CPR 28?

[27] Capital asks me to declare that the motion should proceed on an emergency basis.

[28] Before I may find an emergency basis exists, per CPR 28.02 (1), I must be satisfied on each of the following:

(a) an emergency exists of sufficient gravity to require a speedy hearing;

(b) it is possible for all parties who wish to be heard to be in attendance for the motion;

(c) the gravity of the emergency outweighs any inconvenience to a party.

[29] When one thinks of "an emergency" in common parlance, firetrucks and ambulances come to mind.

[30] The Random House Dictionary of the English language, second edition unabridged 1987, Random House of Canada Limited, Toronto Ontario defines "emergency" as:

> A sudden, urgent, usually unexpected occurrence or occasion requiring immediate action.

[31] In summary, CPR 28.02 requires that the moving party establish (having both the evidentiary and legally persuasive burdens) that the relevant factual circumstances, viewed contextually, amount to a request that the court decide on an *inter partes* basis, an issue whose gravity (the nature and seriousness of the issue itself, and the extent to which the untimely decision thereof will frustrate the ends of justice) is such that it is in the interests of justice to hear it, not just earlier than the normal course, but proportionately earlier ("a speedy" or proportionately accelerated hearing date) than would normally be the case.[7]

[7] To be clear, I am speaking only for myself in making this elaboration.

[32] In relation to whether this is "an emergency", Public Works' argument from its brief (paras. 18-21] deserves serious consideration:

> A - "Capital says that this is an emergency because it seeks access to a building that is scheduled to be demolished next month. Respectfully, Capital first requested access to the site in December 2021 and the request was denied per the letter attached as Exhibit "H" of the Bellefontaine Affidavit. As evidenced at paragraphs 42 and 43 of the Randell Affidavit, Capital did not raise the issue of access again until November 2022."
>
> B- Although Capital is correct to say that the Main Hospital Building will be demolished by mid-January 2023, the relief they seek is either irrelevant (item "a" of the requested relief above [document the state of abatement and demolition work completed] impossible (item "b" of the requested relief above [document any materials Capital intended to resell or reuse] – it is not possible to document items removed or destroyed, where they have already been removed or destroyed, by attending the site) or moot due to passage of time (items "c" [document any items removed or destroyed from the work site] and "d" [document the (sic) any salvageable goods remaining on site])."[8]

[33] There is little jurisprudence directly on point, however I find helpful Justice Beveridge's reasons (as he then was) in *Aurelius Capital Partners v. General Motors Corporation*, 2009 NSSC 100, and will liberally repeat them here.

[34] He set out the circumstances as follows:

> 4 The plaintiffs then filed a motion for the appointment of a receiver on May 1, 2009. This included the draft order and the affidavit material that the plaintiff wished to rely on. *The plaintiffs' request that the court treat the motion for the appointment of a receiver as an emergency motion under Civil Procedure Rule 28, and abridge the time that the Rules would otherwise call for in dealing with this motion. The corporate and individual defendants object.* They cite a number of outstanding procedural matters that they contend need to be dealt with at or at the same time as the motion for the interim receiver. In no listing of priority these include: an application for security for costs; an application for summary judgment on the pleadings; an application for summary judgment on the evidence; and an application to strike portions of the affidavits filed by the plaintiffs on their motion to appoint an interim receiver.

[8] The Province's position cited above does overreach its legitimate limits, but the overall tenor of its argument is still capable of being persuasive.

5 *The defendants contend that there is no emergency and that abridgment of the time lines put them at an unfair disadvantage.* The defendants also point out that the motion for the appointment of an interim receiver is still not perfected even though it was filed on May 1, 2009. In particular I note that Civil Procedure Rule 23.11 requires the filing of the brief in support of the motion on the same date as the notice of motion and draft order.

6 The defendants also point out that one of the usual and mandatory requirements of bringing such an application is an appropriate undertaking by the moving party for damages pursuant to Civil Procedure Rule 41.06. *The defendants also submit that there really is no emergency; that any emergency is more apparent than real, it having been created by the plaintiffs letting a full two months pass before bringing their motion for the appointment of an interim receiver.*

[35] Then next he stated:

8 I would venture to say that most rules of court would provide some discretion in the Court in abridging or extending time requirements. Nova Scotia Civil Procedure Rules are no different. Rule 2.03(1) provides that a judge has the discretions, which are limited by these rules only as provided in Rules 2.02 and 2.03(3), to do any of the following:

> (a) give directions for the conduct of a proceeding before the trial or hearing;
> (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

9 All parties here today accept that I have a discretion by the Rules to abridge the time requirements. *It seems to me that discretionary decisions must be guided by principle, otherwise decisions may become, or at least suffer from the appearance of being, arbitrary. It also seems to me that the burden should be on the moving party to satisfy the court that without the requested abridgment the remedy they seek to establish an entitlement to would become moot by the mere passage of time, and the respondents will not be unfairly prejudiced by the abridgment of the normal time lines.*

10 However, more specifically, Civil Procedure Rule 28.02(1), which the moving party relies on, provides that:

> The court may provide a time, date, and place for an emergency motion to be heard on notice, if a judge is satisfied on each of the following:
>
> (a) an emergency exists of sufficient gravity to require a speedy hearing;

(b) it is possible for all parties who wish to be heard to be in attendance for the motion;

(c) the gravity of the emergency outweighs any inconvenience to a party.

…

15 I do not think it appropriate for me on this motion to make any preliminary or tentative views of the merits of the relief being sought by the plaintiffs, either in their overall action or in their motion for the appointment of interim receiver.

16 Although I need not decide this issue here, I do think there is some merit in the argument by Mr. Rogers that if the relief being requested in the motion, where the court is being asked to abridge time, is patently without merit, the court should be slow to abridge the time frames required by the usual rules of court. However, this approach should be relied on or utilized only in the clearest of cases. Mr. Keith argues ably that it is unfair to delve into the merits of a moving parties' request for relief when they have not yet had an opportunity to develop the evidence and make submissions to the court that obviously have the potential to influence how a court may ultimately view the merits of any particular motion.

17 Looking at the criteria that I referred to earlier under C.P.R. 28.02 I am not satisfied that an emergency exists of sufficient gravity to require a speedy hearing. The plaintiffs have not satisfied me that there was a legitimate reason for delaying the bringing of the motion. Even if I was satisfied that there was an emergency and it was otherwise of sufficient gravity to require a speedy hearing, I am still required to then turn my attention to each of the requirements set out in 28.02(1) (b) and (c).

18 I do not think the responding parties here have suggested that it would be impossible for them to be in attendance for the motion. *The real crux of their position is under paragraph (c) with respect to the requirement that the gravity of the emergency must outweigh any inconvenience to a party. No one has suggested to me exactly what meaning to attribute to the word "inconvenience", but it strikes me it is not what you would find in an ordinary dictionary meaning. I think the proper approach to that term would be it works some unfairness, some prejudice to the responding parties' abilities to marshal their evidence, to prepare for cross-examination and other procedural steps, and ultimately to be in an appropriate situation or position to deal with the merits of the motion.*

[My italicization added]

[36] On a superficial examination, I generally agree with the Province, when it says in its brief that "the perceived emergency is artificial and of Capital's own making, due to delay."

[37] On the one hand, Capital argues that the Province's past unreliable reporting supports its position that it cannot rely on such records produced by the Province's contractors (Inflector Environmental Services) or its own Public Works.

[38] Capital was denied any meaningful access to the site after July/August 2021; although Mr. Bellefontaine noted:

> (para. 43) "The work was formally removed from Capital's hands by letter dated December 10, 2021".

[39] Mr. Bellefontaine continued:

> (para.51) "In the Spring of 2021, Capital became very concerned with Inflector's practice regarding salvageable materials. At that time Capital remained the contractor for the demolition of the entire site.";
>
> (para.64) "Capital has requested access to the site to survey and document the salvageable materials remaining on site. The defendant/plaintiff by counterclaim has denied this request, including by letter dated December 24, 2021 [which was just after (by letter dated December 10, 2021), when "the work was formally removed from Capital's hands."]"

[40] Capital's own evidence indicates that it was aware as early as in the Spring of 2021 that there was cause for concern, and there was little basis for it to believe that the situation had changed at any time before November 2022.

[41] On April 20, 2022, Capital filed its notice of action against the Province.

[42] Capital did not request a motion to videotape/photograph the Colchester Regional Hospital premises to capture details of what salvageable materials had been present or were still present until late November 2022.

[43] Mr. Bellefontaine stated in relation to records that Capital was provided by the Province on November 24, 2022:

(paras. 69-73) "I have reviewed these records and they are not sufficiently detailed to allow me to properly assess Capital's damages. Further, these records only show a fraction of the items that Capital knows to have been on site. There is a large quantitative discrepancy between what Capital observed on site and in plans and what the defendant/plaintiff by counterclaim shows as having been removed. As the value of resalable and salvageable material was important to Capital, which fact was known to the defendant/plaintiff by counterclaim, and to its consultant WSP, I expect much more detailed records that showed the detailed listing of items removed, the date removed and the location in the building that the material was removed. The records provided do not contain that detail. Finally, these records show a significant gap in information from June 2021 until early September 2022."

[My underlining added]

[44] On the other hand, Capital did not cross-examine the Province's affiant, Mr. Randell, on his statements that:

(paras. 29-30) "Typically, removal of salvageable items is a first order of operations during any demolition program to avoid contamination from hazardous materials during abatement activities. During Capital's time on site, they had sufficient opportunity to adequately quantify and or remove the salvageable materials located within the structures, including the Main Hospital Building. This could have been accomplished during the site visits in June and July 2020, or from the date of Capital's mobilization on August 18, 2020 until a change directive was issued to demobilize from the Main Hospital Building" [see also para. 27: "As a result of the June 17, 2021 incident and Capital's unwillingness to perform other work in the meantime, Public Works ordered Capital off-site effective July 2, 2021 to permit Inflector to safely complete its work."]

(para. 41) In good faith, Public Works provided partial summaries to Capital on November 24, 2022. The account of materials was complete for salvage removed from site, but Capital expressed concern about gaps in the information between June 2021 and September 2022. Further records including comprehensive Truck Logs provided by WSP on December 1, 2022, for all materials removed from the suite [sic] are attached hereto as exhibit "E"."[9]

(para. 57) "The record of salvageable materials documented by WSP is the most complete and accurate record of materials removed from the site and will be fully disclosed in due course";

[My underlining added]

[9] The timing of the creation and filing of the affidavits is such that I infer Mr. Bellefontaine would not have had access to Mr. Randell's evidence in paragraph 41.

[45] Even if I had accepted that "an emergency exists", I am not satisfied that it is "of sufficient gravity to require a speedy hearing", given the disclosure the Province has made to date and in light of the relief sought which would be available on the dates of January 3 and 4, 2023.

[46] Therefore, I dismiss Capital's request that this motion be heard on "an emergency" basis.

[47] Nevertheless, because of my own near- immediate availability on December 13, 14 and 19, 2022, and counsel's agreement that I could consider the merits of this matter on December 12 had I found "an emergency" exists, I find it in the interests of justice to go on and consider the merits of the motion, *as if* it had been a regularly scheduled motion.

ISSUE 2- Should the court grant a Preservation Order?

[48] Capital puts its position on the merits in its brief as follows:

> "The substantive nature of this motion is one which seeks to preserve evidence of the damages sought by Capital in its larger action. Rule 42 provides for the preservation of evidence by way of injunction… Capital claims that a portion of its damages arise from the salvageable and saleable materials to which it would have been entitled throughout the demolition project. It makes this motion in order to prevent the Province from demolishing the former Hospital until such time as Capital has performed its survey… to document and catalogue the remaining saleable and salvageable materials and evidence of those items that have been removed… Capital has made the required undertakings within the affidavit of Lawrence Bellefontaine and has served the party who is in control of the evidence."

[49] The Province agrees that CPR 42 permits a Preservation Order where evidence that is relevant to an issue in the proceeding is sought to be preserved.

[50] Both parties agree that the test for granting an injunction for the preservation of evidence under CPR 42.02 was set out in *Korem v. Crown Jewel Ranch Inc.*, 2011 NSCA 102. Chief Justice MacDonald stated for the court:

The Test

8 Our *Civil Procedure Rules* authorize the issuance of preservation orders in certain circumstances:

> 42.01 (1) A party to a proceeding may make a motion for an order preserving any of the following, in accordance with this Rule:
>
> . . . . .
>
> (c) assets that would be available to satisfy a judgment claimed in the proceeding.
>
> 42.02 (1) A party who files an undertaking as required by Rule 42.07 may make a motion for an injunction ... to preserve property claimed in, a proceeding.
>
> (2) The motion must be made on notice to each party and the person in control of the evidence or property, unless the motion may be made ex parte under Rule 22.03, of Rule 22 - General Provisions for Motions.
>
> (3) The order may be restraining, mandatory, or part restraining and part mandatory.

9 **The test for granting this type of injunctive relief is well established. Specifically, Mr. Korem would have had to establish three things: namely, that (a) his claim has merit to the extent that it at least represents a serious issue to be tried; (b) without a preservation order, he will suffer "irreparable harm"; and (c) when the consequences of making such an order are fully considered, the "balance of convenience" favours its issuance.**

10 For example, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), the Supreme Court of Canada confirmed:

> ¶43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

See also *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) at para. 12 and *Sheet Harbour Offshore Development Inc. v. Tusket Mining Inc.*, 2007 NSCA 59 (N.S. C.A.) at para. 6.[10]

[My bolding added]

[51] The Province argues that:

(para. 28) While there is a serious question to be tried in this matter, there is no irreparable harm that the plaintiff will suffer if the Preservation Order is not granted and, on a balance of convenience, the Attorney General of Nova Scotia and the public interest in completing the demolition of the former Colchester Hospital without further delay will suffer greater harm from granting Capital's requested relief.

…

(para. 31) ... there is greater potential for irreparable harm to the Province, if Capital obtains its relief.

…

(para. 34) Effectively, Capital is saying the irreparable harm it will suffer if the order is not granted is the inability to adequately assess quantum of damages. Respectfully, Capital's estimated salvage calculation should be readily available to them based upon the rates they put forward in their tender bid, as described at paragraph 11 of the Randell Affidavit. This presumption is further confirmed in the Bellefontaine affidavit at paragraph 19, where Mr. Bellefontaine asserts that Capital factored the value of salvageable and resalable materials into its pricing. *Surely, then, they have a sense of what the value of salvageable and recoverable materials would have been at the time they submitted a bid*.

…

(para. 36) *Capital has at least some basis which it can use to argue damages in the main proceeding*… Mr. Bellefontaine estimates at paragraph 22 of the Bellefontaine Affidavit that salvageable materials 'in the main building alone' would be approximately $350,000.… in addition to the assertion that some value factored into Capital's bid price,

[10] I recently considered such issues in *IFORM Works Inc. v. Maynard Holdings Limited*, 2022 NSSC 210, affirmed 2022 NSCA 54.

raise questions as to what irreparable harm would be suffered should they not succeed in this motion.

...

(para. 39) Moreover… *very little salvageable material remains on site*. Any 'irreparable harm' to Capital has already occurred.

(para. 40) Further, the *summaries of materials removed from the site* is set out as Exhibit "E" of the Randell Affidavit show that the weight of salvageable material removed from the site, which *represents the best evidence for assessing damages*.

(para. 41) *There is no risk that Capital will not be able to assess and collect its damages* from the Province should it be successful in the main proceeding.

…

(para. 43) *Although Capital will not suffer irreparable harm if their requested relief is granted, an injunction and site access to Capital could cause irreparable harm to the Public Works in this matter by harming public interest*. [Referencing Justice Hood's decision in *Nova Scotia Real Estate Commission v. Lorway*, 2006 NSSC 76,]:

[at para. 5 citing *Sharpe on Injunctions and Specific Performance*]

> 'The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship and injunction would impose upon the defendant. It seems clear that where the Attorney General sues to restrain breach of statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds..'" ;

[at paras. 58 and 59, citing Justice Richard Coughlan's decision in *College of Chiropractors (Nova Scotia) v. Kohoot*, 2001 NSSC 136 quoting from Justice Roscoe's decision (1991) 103 NSR (2d) 426 (NSTD) quoting the Supreme Court of Canada in *Metropolitan Stores (MTS) Ltd.* [1987] 1 SCR 110]:

> '… The judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffer irreparable harm.'

[And a further reference to an English case cited by Justice Beetz in *Metropolitan Stores*]

> '… He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authorities right in saying that where the defendant is a public authority performing duties for the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed… '.

[52] While these authorities are generally helpful, the reasoning is not persuasive in the circumstances here, where Nova Scotia Public Works can continue performing its statutory duties in relation to the premises in question, while at the same time without material difficulty accommodating Capital's representative recording the state of the premises and salvageable materials.

[53] Insofar as the utility of Capital's proposed recording of the state of the remaining building on the premises, that is a determination best left to Capital, which should be permitted all reasonable requests to assemble evidence in pursuit of its claims.

[54] I do not conclude that there will be any material delay in the completion of the demolition project by the attendance of Capital's representative, even if I permit it for up to five days in total to conduct the recording proposed.

[55] In summary, there is a serious issue to be tried, and without a Preservation Order, I am satisfied that Capital will suffer a sufficient degree of irreparable harm. The balance of convenience favours Capital.

Conclusion

[56] I am satisfied that Capital is entitled to a Preservation Order per CPR 42, such that demolition of the Main Hospital Building is prohibited until Capital has had access to the site for up to five days to video record, photograph, and otherwise document the state of the premises generally, and specifically the physical aspects of the premises relevant to gathering evidence of what salvageable materials had been present, and those that are still present, on the premises.

[57] The Court expects Capital to act diligently, expeditiously and reasonably, so as not to unreasonably interfere with the scheduled work that the Province would otherwise have undertaken.

Rosinski, J.