SUPREME COURT OF NOVA SCOTIA
Citation: *Roué v. Nova Scotia*, *2013* NSSC 326

Date: 20131031
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: October 8, 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 case has proceeded as an Application in Court. As noted in *Civil Procedure Rule* 5.01(4) an Application in Court "is for longer hearings, and is available, in appropriate circumstances, as a flexible and speedy alternative to an Action."

[2] The flexibility thereof arises largely at a mandatory Motion for Directions hearing – *CPR* 5.07(2)-(4). The presiding judge has very wide discretion to set priorities and design a procedural roadmap for the pre-hearing period.

[3] A characteristic of the Application in Court is that the direct evidence of witnesses is relayed to the Court by way of affidavit evidence.

[4] In the case at Bar, the parties agreed that some level of oral discovery was appropriate, but disagreed whether the discoveries should precede the filing of the witness affidavits.

[5] I concluded that the initial round of affidavits should be filed before the discoveries are conducted, in the particular circumstances of this case.

[6] The Respondent parties have all chosen designated Discovery Managers per *CPR* 14.14(2). Those discoveries were to be completed by October 14, 2013. They are not yet completed but were anticipated to be completed by November 8th, all other things being equal.

[7] The Applicant Roués have made a motion requesting this Court to order the discovery of two person who are employees of two of the Respondent parties. The Respondents argue that my earlier Scheduling Orders did not intend this and that it is inappropriate in any event for me to authorize issuance of such discovery subpoenas.

[8] This Motion therefore confronts the question of how Courts should determine which persons, if any, beyond a designated Discovery Manager in such circumstance should be subject to oral discovery.

Background

[9] On September 10, 2013 the Applicants/Roués filed a notice of motion seeking: "an order approving the issuance of two discovery subpoenas (Application); one for Philip Snyder, and one for Ben Millson, and setting a

deadline for completion of the discovery examinations of those persons. The applicants also seek costs on this motion."

[10] The history of this litigation may be derived from a number of decisions and associated orders: 2013 NSSC 45 [Motion to convert to an Action], affirmed on appeal – 2013 NSCA 94 2013 and 2013 NSSC 102 [Motion for Directions] and 2013 NSSC 254 [Motion for Production and Rory MacDonald's Discovery Subpoena] in particular. Ultimately, this dispute will be decided in the context of an Application in Court hearing between March 31 and April 17, 2014.

[11] **On December 20, 2012** the Respondents filed their Notice of Contest [Application in Court] in which they identified persons from whom they "expect to produce affidavits… dealing with the following subjects, as evidence when the application is heard:

- Bill Greenlaw and Rhonda Walker – factual evidence regarding the original design of the Bluenose II,… Restorations [thereof]… The Province's rights in the name Bluenose and Bluenose II; and the agreements between the Province and each of the Applicants that have been breached as a result of the commencement of this proceeding.
- Marius Lengkeek-factual evidence relating to the activities of Lengkeek Vessel Engineering Inc. in the restoration project of the Bluenose II.

- Peter Kinley – factual evidence relating to the activities of Lunenburg Shipyard Alliance Ltd. and Lunenburg Foundry and Engineering Ltd. in the restoration project of the Bluenose II.
- Al Hutchinson – factual evidence relating to the activities of Lunenburg County Shipwrights Inc. in the restoration project of the Bluenose II.
- Wade Croft – factual evidence relating to the activities of Snyder's Shipyard Ltd. in the restoration project of the Bluenose II.
- Simon Daniels – if MHPM Project Managers Inc. is not struck as a Respondent, factual evidence relating to the activities of MHPM Project Managers Inc. in the restoration project of the Bluenose II.
- [Four unidentified expected witnesses were also referred to in that Notice of Contest.]

[12] **On December 21, 2012** pursuant to CPR 14.14 the Respondents filed a list of six designated Discovery Managers for the Respondent parties herein as follows:

- Province of Nova Scotia – William E. Greenlaw;
- Lengkeek Vessel Engineering Inc. – Marius Lengkeek;
- Lunenburg County Shipwrights Inc. cob as Covey Island Boat Works – Al Hutchinson;
- Lunenburg Foundry and Engineering Inc. – Peter Kinley;
- Lunenburg Shipyard Alliance Ltd. – Peter Kinley;
- MHPM Project Managers Inc. – Simon Daniels; and

- Snyder's Shipyard Ltd. – Wade Croft.

[13] **On May 16, 2013** the Respondents filed their updated witness list.

[14] That list included:

- Bill Greenlaw and Rhonda Walker from the Province of Nova Scotia;
- Wayne Walters who was expected to give factual evidence relating to "past restorations of the Bluenose II and public knowledge thereof; and the restoration project of the Bluenose II and the public knowledge thereof";
- Marius Lengkeek and Ben Millson who were expected to give "factual evidence relating to the activities of Lengkeek Vessel Engineering Inc. in the restoration project of the Bluenose II";
- Peter Kinley from Lunenburg Shipyard Alliance Ltd. and Lunenburg Foundry and Engineering Ltd.; Al Hutchinson from Lunenburg County Shipwrights Inc.;
- Wade Croft and Philip Snyder who were expected to give factual evidence relating to "the activities of Snyder's Shipyard Ltd. in the restoration project of the Bluenose II, and past restorations of the Bluenose II and public knowledge thereof";
- Simon Daniels – from MHPM Project Managers Inc. if required; and
- Unidentified witnesses in relation to factual and expert evidence that the Respondents would propose to present at the hearing.

[15] **On July 15, 2013**, by letter addressed to Mr. Belliveau, the Respondents noted "pursuant to the Order of Mr. Justice Rosinski dated April 15, 2013, as

amended by Orders dated May 1, 2013 and May 10, 2013, enclosed are the Respondents party affidavits, namely:

(i) Affidavit of William E. Greenlaw , sworn July 15, 2013;

(ii) Affidavit of Marius Lengkeek, sworn July 15, 2013;

(iii) Affidavit of Ben Millson, sworn July 11, 2013;

(iv) Affidavit of Peter Kinley, sworn July 12, 2013;

(v) Affidavit of Alan Hutchinson, sworn July 12, 2013;

(vi) Affidavit of Wade Croft, sworn July 12, 2013;

(vii) Affidavit of Philip Snyder, sworn July 12, 2013; and

(viii) Affidavit of Simon Daniels, sworn July 15, 2013.

[16] **The May 1, 2013 Amended Scheduling Order** [amended on May 10, 2013: further amendments shown in italics] pursuant to a motion for directions that came before me on March 5, 2013 included the following timelines:

> 3. That all parties shall exchange and file with the Court updated fact and expert witness lists in accordance with Civil Procedure Rules 5.07 and 5.08 by 4:30 p.m. Atlantic Standard Time on May 15, 2013. Leave of the Court or agreement of counsel will be required to present affidavits from, or to call as witnesses at the hearing, any persons who are not on this list, including expert witnesses;
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> 4. That the parties own affidavits shall be filed by the following deadlines:
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> (a) Applicants by May 15, 2013; and

(b) Respondents by July 15, 2013.

….

6. That discovery of only the parties in accordance with Civil Procedure Rule 18.09, shall be completed by October 14, 2013;

7. That all non-party fact witness affidavits [upon which no discovery is permitted except in accordance with Civil Procedure Rules 18.09 and 18.11], [*any supplementary party fact witness affidavits in addition to those filed pursuant to paragraph 4 above, and updated witness lists*] shall be filed by the following deadlines:

(a) The Applicants by October 14, 2013 [*October 30, 2013*];

(b) The Respondents by November 8, 2013 [*November 27, 2013*]; and

(c) The Applicants rebuttal by November 22, 2013 [*December 11, 2013*].

…

[17] Paragraph 8 of the initial Scheduling Order was deleted and the May 10th consented to Order also provided:

> *Expert witnesses shall be disclosed through the exchange of expert affidavits and/or reports pursuant to paragraph 9 of the Scheduling Order and the parties' witness lists shall be deemed to be updated to include all such experts.*

[18] On July 15, 2013 the Roués made a Motion in part "pursuant to Civil Procedure Rule 18.10 for an Order approving issuance of a discovery subpoena [Application]" regarding Rory MacDonald, an employee of Lengkeek Vessel Engineering. I declined to authorize its issuance per my decision: 2013 NSSC 254.

The Applicant Roués' Position

[19] Their counsel concedes that at the time of the Motion for Directions on March 5, 2013 they agreed that, oral discovery of the "parties" was appropriate, and on a superficial reading of the Motion for Directions Scheduling Order they believed that although it could be read that such discovery was to be restricted to the six "parties" (ie: designated Discovery Managers), it was not clear that the reference to "parties" was restricted to the designated Discovery Managers for the Respondents and Joan Roué and Lawrence James Roué – see also Exhibit "F" to the September 26, 2013 sworn affidavit of Jayson Dinelle at pages 7(1) – 8(8) of the transcript.

[20] The Roués presumed that all of the "party" witnesses, specifically including Philip Snyder and Ben Millson, who filed Affidavits would be subject to discovery. Those "parties own affidavits" were to be filed by the July 15, 2013 deadline for the "Respondents' party affidavits" (per the Respondents' July 15 letter and para. 4 of the May 1, 2013 Scheduling Order). The Respondents included the names of Ben Millson and Philip Snyder under "party affidavits" filed by July 15, 2013.

[21] The Roués interpreted Clause 6 of the Scheduling Order, "… discovery of only the parties in accordance with Civil Procedure Rule 18.09…", as specifically including Philip Snyder and Ben Millson, in spite of the designation of Discovery Managers by each of the Respondents, which designations did not include Philip Snyder or Ben Millson.

[22] Nevertheless, even if the Scheduling Order, properly interpreted, did not intend to provide for the inclusion of Philip Snyder and Ben Millson in Clause 6 as being discoverable as of right, the Roués say it is still appropriate for the Court to authorize the Discovery Subpoenas requested because:

> (i) Philip Snyder's tenure with Snyder's Shipyard has been ongoing such that at all material times herein he was an operationally involved owner thereof, and his affidavit suggests that he has specific knowledge regarding the 1995 restoration by Snyder's Shipyard of the Bluenose II, in contrast to Wade Croft, who according to his Affidavit, was involved with Snyder's Shipyard since 1980, and as co-owner and general manager since 2006, yet does not expressly refer to the 1995 restoration of the Bluenose II at all;
>
> (ii) Although Wade Croft is the designated Discovery Manager for Snyder's Shipyard, and has an obligation to become informed about matters relevant to the litigation per CPR 14.14(5), it is apparent that Philip Snyder has more precise information regarding the 1995 restoration, and so it should be from him that this suggested important discovery evidence should come ;
>
> (iii) If only Wade Croft is discovered, and he is unable to answer questions at discovery, undertakings to answer those questions will have to be given, and these will unnecessarily consume precious time given the timelines herein, possibly jeopardizing the hearing dates;
>
> (iv) While Marius Lengkeek had a supervisory role regarding the design of and reconstruction of the Bluenose II , in conjunction with Ben Millson, it is

> Millson who is actually the key designer as he had the "hands-on" responsibility day to day, and given the allegations herein that the reconstructed Bluenose II used the hull design lines from the original Bluenose, Millson's evidence will be of critical importance, and so he should be discovered by the Applicant Roués;
>
> (v) While Marius Lengkeek's discovery as the designated Discovery Manager of the corporate "party", could bind that party, his discovery evidence would not necessarily bind Ben Millson because he is not an officer of the corporate party, whereas Ben Millson's own discovery evidence would bind him, and provide a clear indication of the extent of his key role as designer of the reconstructed Bluenose II.

The Respondents' Position

[23] The Respondents say that it is premature to allow the discovery of Snyder and Millson, because the designated Discovery Managers for Snyder's Shipyard and Lengkeek Vessel Engineering have not yet been discovered; the upshot of which is, that the Roués have not demonstrated that the facts in the Affidavits of Philip Snyder or Ben Millson are contentious, or that any information that they could provide cannot be obtained through the examination of the designated Discovery Managers. Without proof that knowledge of the facts relevant to the issues in the proceeding cannot be obtained from the designated Discovery Manager, it cannot be said that the just, speedy and inexpensive resolution of the proceeding would be promoted thereby.

[24] Moreover, the Roués have a failed to establish that limiting the Applicants to the normal practice on Applications in Court, vis-a-vis the testing by cross examination of affiant's evidence, will in any way be sufficiently prejudicial or unsatisfactory to the Applicants' right to fairly respond to the Respondents' positions at the hearing.

[25] The Respondents also argue that the Roués suggested fear of undertakings getting out of control as a result of not permitting the discovery of Philip Snyder and Ben Millson, is overblown because such concern arises in relation to corporate parties in any event in all cases , and there's no indication in the case at Bar that this will become problematic.

[26] If the Court decides to grant the Subpoenas, the Respondents request terms be placed thereon including:

> (i) That the discovery be limited to the content to the affidavits of Ben Millson and Philip Snyder;
>
> (ii) That the Roués should pay for the witness fees and travel costs for Philip Snyder and Ben Millson; and
>
> (iii) That the Roués should pay for the recording costs and transcription, because they are requesting something exceptional.

[27] I**n reply**, Mr. Belliveau noted that it would be unprecedented and inappropriate to limit discovery examination to the content of the affidavits of

Philip Snyder and Ben Millson and that the usual parameters as contained in CPR 18.13 should apply. He noted that the Applicants are prepared to cover the costs for the witnesses' attendance, however in relation to the transcription costs, he noted that in Nova Scotia the practice was to split the cost of transcription 50/50, and there is no reason to deviate from that in the circumstances.

[28] As to a concern about a floodgates problem of manifold affiants being discovered in other Applications in Court, based on any concern in this case about possible out of control undertakings which delay such process, Mr. Belliveau noted that each case must be decided on its merits and by a particular judge, so that the "floodgates will not open".

[29] The Roués emphasize that this case revolves around, at its core, the technical aspects of the design of the restored Bluenose II, and therefore both Millson and Snyder should be subject to discovery in advance of the hearing, as this likely will make any cross-examination more focused; may even eliminate the need for cross-examination, as transcripts from discovery may be filed instead; and could potentially result in agreements of fact without evidence being called. Moreover Mr. Belliveau notes that there is room in the timeline to accommodate the discovery of Ben Millson and Philip Snyder.

Analysis

[30] From the Applicants, I have available to me the Affidavit of Michael Blades sworn September 10, 2013, and I have been asked to rely upon also the Affidavits of Philip Snyder and Ben Millson, and those of Marius Langkeek and Wade Croft on file – see the Applicants' Notice of Motion, and their brief at paragraph 3.

[31] The Respondents have filed the Affidavit of Jayson Dinelle sworn September 26, 2013.

[32] At the time of the motion for directions on March 5, 2013 it was clear to me that the Roués were not necessarily content to discover only the six witnesses that the Respondents had proposed per their December 12, 2012 designated Discovery Manager's List.

[33] That list contained the names: Bill Greenlaw, Marius Lengkeek, Al Hutchinson, Peter Kinley, Simon Daniels and Wade Croft.

[34] I note that Mr. Belliveau's sworn October 9, 2012 Affidavit, in support of the Motion for Directions, stated at paragraph 4(d):

> The Applicants anticipate conducting discovery of witnesses for the Respondents.

[35] At the Motion for Directions the Applicants appeared to accept that, on the basis of the information available at that time, oral discovery of only "the parties" was appropriate - at pages 7(1) – page 8(8); March 5, 2013 transcript – Exhibit "F" to the September 26, 2013 sworn Affidavit of Jayson Dinelle.

[36] At the Motion for Directions the Respondents argued that the discovery process should precede the filing of Affidavits, and their counsels stated as follows:

- "Our intention was just to have discovery of the parties…" – per Mr. Gores at page 15(8) transcript Exhibit "F" to the September 26, 2013 sworn Affidavit of Jayson Dinelle;
- … We have nine [I believe he meant to say "eight"] different discoveries [to conduct] – per Mr. Garland at page 32 (4) transcript Exhibit "F" to the September 26, 2013 sworn Affidavit of Jayson Dinelle.

[37] The resulting Scheduling Order referred to the "parties own affidavits shall be filed by…" in paragraph 4; "that discovery of only the parties in accordance with *Civil Procedure Rule* 18.09 shall be completed by October 14, 2013" at paragraph 6; and that "all non-party fact witness affidavits [upon which no

discovery is permitted except in accordance with *Civil Procedure Rules* 18.09 and 18.11] shall be filed by …" at paragraph 7. [emphasis added]

[38] Arguably, "discovery of only the parties" could be interpreted to include "an officer or employee of another party" as well as the designated Discovery Manager per *CPR* 14.02; 14.14 and 18.09 and 18.10(2)(d). Philip Snyder is co-owner and still operationally involved in Snyder's Shipyard – it would not be unreasonable for the Roués to expect him to fall within the meaning of a "party". Ben Millson would not necessarily be in that category, though he is an employee of Lengkeek.

[39] While I have not specific evidence about the actual timing and extent of the Respondents' disclosure to the Applicants, I can infer that the Applicants were somewhat handicapped in assessing their position and what response to make to this issue at the Motion for Directions on March 5, 2013, since they had no other means available to understand who were all the persons possibly of interest to them regarding discovery until production was complete, which was formally ordered to be completed by April 8, 2013 [see my Scheduling Decision March 15, 2013: 2013 NSSC 102].

[40] Moreover, while it appears that the parties herein reasonably disagree on whether my Scheduling Order intended to capture within the term "discovery of only the parties", the designated Discovery Manager +1 [being "an officer or employee of another party" in similar fashion to the situation regarding actions in *CPR* 18.04], I accept that the Order is reasonably capable of being interpreted in either manner.

[41] However, it is also unnecessary for me to resolve the proper interpretation of my Order, given that new information is available now that was not available then.

[42] The Order already provides the Court with the discretion to allow for the discovery of persons beyond the designated Discovery Manager – see paragraphs: 6 – ["only the parties" – here the designated Discovery Manager plus 1 and maybe others per *CPR* 18.04(1)(b) and (c) if the provision regarding Actions is found to be a helpful guideline in the circumstances of a specific Application in Court, since CPR 18.09 contemplates a wide discretion in permitting discovery of "another party, and officer or employee of another party, or a non-party witness"]; and paragraph 7 ["all non-party fact witness affidavits (upon which no discovery is permitted except in accordance with *CPR* 18.09 and 18.11)…"].

[43] Moreover an Application in Court process should be flexible throughout the proceeding, and allow adaptation to changing circumstances. For this reason, I adjourned *sine die* the Motion for Directions: 2013 NSSC 102 at para. 28.

[44] Therefore, in deciding whether a Discovery Subpoena should issue to Philip Snyder and Ben Millson, I will focus on whether issuance of such discovery subpoena would "promote the just, speedy and inexpensive determination" of this proceeding.

[45] I bear in mind the Respondents' arguments that the Roués have the evidentiary and persurasive onus here to establish that their requests would tend to satisfy the objective of the Rules to "promote the just, speedy and inexpensive determination" of this proceeding.

[46] Generally, I agree that in cases such as the one at Bar the parties requesting a Discovery Subpoena for an officer or employee of a corporate party beyond the designated Discovery Manager should satisfy the Court that, in line with *CPR* 18.04(4) regarding Actions and 18.10(2), that:

> (i) the party is in compliance with *CPR* 15 and 16 – disclosure of documents and disclosure of electronic information;

> (ii) the party believes the discovery would promote the just, speedy and inexpensive resolution of the proceeding, and provides an explanation of why a discovery subpoena is required;
>
> (iii) the designated Discovery Manager has been discovered;
>
> (iv) the party will provide an undertaking to pay, the charges of the reporter to record and transcribe the discovery, and the reasonable expenses of the witness to attend the discovery, including transportation, accommodation and meals [and in proper cases where an employee of the party is no longer an employee at the time of litigation an attendance fee of $35 per hour per *CPR* 18.05(2)(b), and 18.102(c)].

[47] Furthermore, generally, a party seeking issuance of a Discovery Subpoena should establish that, in a case such as the one at Bar where Affidavits have been filed in advance of discoveries, there is a realistic possibility or "arguable grounds" that the discovery of an affiant will likely lead to relevant evidence or produce information that is likely to lead to relevant evidence (see "Scope of Discovery – *CPR* 18.13).

[48] I use the "realistic possibility" or "arguable grounds" standard because the nature and quality of the information or evidence obtainable by issuing a discovery subpoena is not precisely known.

[49] In the context of whether a subpoena should issue on a motion to produce "fresh evidence" on an appeal pursuant to *CPR* 90.02(1) and 50.02(2), Justice Fichaud stated that:

> The party moving for a subpoena at a motion has a burden to show a material connection between the proposed evidence and the issues to be determined at the motion … For a fresh evidence motion in the Court of Appeal, this means that the proponent must show, arguable or *prima facie* grounds that the proposed testimony would satisfy the conditions for the admission of fresh evidence. [para 18 *Lewis v. Tsavos* 2013 NSCA 115]

[50] Once this threshold is met, then, in considering whether issuing the Discovery Subpoena would tend to promote the just, speedy and inexpensive resolution of the proceeding, Courts will balance those relevant factors that favour the issuance, and factors that do not favour the issuance, of the Discovery Subpoena.

[51] The fact that a designated Discovery Manager has not yet been discovered militates against issuance of the subpoena. In such situations there is a real concern that, absent exceptional circumstances, the request is premature. On the other hand, if the party can establish: that there is a general evidentiary basis ; or specifically in this case for example, that there are contentious material facts (or notable equivalent omissions) in the Affidavit of the witness sought to be discovered; that reach(es) the level of a realistic possibility, of likely relevance to the case and, effectively information/evidence of similar nature or quality cannot arguably be obtained from the designated Discovery Manager, such that the party's right to cross examination of the affiant at the eventual hearing will be sufficiently

prejudiced in the circumstances, then authorizing a Discovery Subpoena will be justifiable.

[52] *CPR* 18.24 contains some "examples of just, speedy and inexpensive discovery", which reflect similar thinking.

[53] Thus far the only reported decision specifically considering *CPR* 18.10 is my previous Decision herein: 2013 NSSC 254. In that Decision, I ruled that no discovery subpoena should issue for Rory MacDonald, a prominent administrative employee of Lengkeek Vessel Engineering Inc. I concluded that it was premature to issue a discovery subpoena in the circumstances, particularly where the designated Discovery Manager had not yet been discovered.

[54] Notably, Mr. MacDonald was not expected to be a witness at the hearing, as he had at no time been identified as a potential witness by the Respondents, and the nature and quality of the information/evidence obtainable from him appeared to be available from persons designated as party witnesses and expected to testify.

[55] I turn next to an examination of each of the proposed persons to be discovered.

Ben Millson

[56] Bearing in mind the overall consideration that the Court should seek to act in that way that is most likely "to promote the just, speedy and inexpensive resolution of the proceeding", I ask myself firstly whether there is a realistic possibility that the discovery of Ben Millson will likely lead to relevant evidence or produce information that is likely to lead to relevant evidence? Surely it could.

[57] But much will turn on an assessment of the nature and quality of the evidence that might be forthcoming from Marius Lengkeek as a designated Discovery Manager, and as one of two affiants who will testify on behalf of Lengkeek Vessel Engineering Inc. – the other being Ben Millson. I ask myself, in order to make an assessment as best I can, based on the limited insight I have at this stage, whether there are discovery questions likely to be asked of Marius Lengkeek , which would "better" be answered by Ben Millson? I use the descriptor "better" as shorthand for a positive finding that the nature or quality of the information/evidence likely forthcoming from an individual in issue will specifically, and generally the requested discovery will, "promote the just, speedy and inexpensive resolution" of the proceeding.

[58] I should point out that I do not wish to be taken to have said that Lengkeek and Millson cannot be asked the same questions if discovery of both is permitted, provided the parameters of *CPR* 18.13 are respected.

[59] I bear in mind that one of the purposes of having a designated Discovery Manager is to avoid a plethora of minor witnesses being called on discovery. Such designations are intended to provide efficiency in the litigation process. Doing so can result however in lesser quality of information/evidence to the discovering party, for example: while the answers of the Discovery Manager bind the corporate party, they do not necessarily bind individual witnesses like Ben Millson who may testify at a hearing and who would testify from first-hand knowledge; or if undertakings need to be given by the Discovery Manager, which then create delays in the proceedings, etc.

[60] In my view, Marius Lengkeek's role in Lengkeek Vessel Engineering Inc. and the restoration of the Bluenose II is much broader than Ben Millson's role, with the result that Mr. Lengkeek's discovery is likely to generate many more undertakings in response to discovery questions, than is Ben Millson's discovery.

[61] Therefore, in part to preserve the timelines herein, I would prefer to err on the side of authorizing issuance of a Discovery Subpoena for Ben Millson, rather

than unreasonably taking a chance that Marius Lengkeek, as designated Discovery Manager, may have to make numerous undertakings to get answers to discovery questions, which would likely come from Ben Millson, the only other designer materially involved in the design and reconstruction of the Bluenose II – see para. 33 Millson Affidavit and para. 27 Lengkeek Affidavit, Exhibits "H" and "K" to the sworn September 26, 2013 Affidavit of Jayson Dinelle. That is however, but one factor, and I will not give it disproportionate weight.

[62] To the extent that the evidence of the two witnesses is anticipated to overlap, the more likely it should be on discovery that the designated Discovery Manager answer such overlapping evidence questions. The more distinct the evidence of the two witnesses is anticipated to be, especially in a highly technical case such as the one at Bar, where the nuances of the design process are so crucial to resolution of the case, the more likely it is appropriate to authorize discovery of both witnesses.

[63] Information or evidence that bears significantly on the credibility of key witnesses, where credibility is very much in issue, should generally favour discovery, even if their discovery could generate information/evidence that is

otherwise not necessarily directed to obvious substantive issues of interest in the litigation.

[64] In that light, I refer next to the submissions of Mr. Stephen Garland made at the time of the Respondents' motion to convert the Application in Court to an Action:

> Is the essence of what is in that drawing of Mr. Roué that's unique, that is subject to copyright protection, has that been taken? And that's something that's going to be based on not only factual evidence, what the actual designers did, but also on experts who are going to have to compare what the designers did and what the Lengkeek drawings show, and do they actually take a substantial portion of what is in the asserted drawings… How [the designers] get there is important.… Because it's a very critical point to a copyright case.
>
> And then it is the causal connection. You have to show that even if there is similarity, that the reason why they are similar is because the designers of the impugned works relied upon or used as a source the asserted works. And the reason why that's important is because an absolute defence to copyright infringement allegation is the defence that the impugned works were designed or created independent of the asserted works. And so, in that regard, in terms of substantial similarity, that's going to be largely dependent on the facts of exactly what was done, and then having experts located, and compare what was done in terms of the Lengkeek drawings to what was actually in the asserted drawings, and is there a substantial similarity, number one.
>
> And number two, on the causal connection side, this is where it really comes down to the designers and the designers at Lengkeek and why I would submit that credibility is very much going to be front and center in this case. If they independently created the material, so they didn't use the asserted work as a source, that's an absolute defence.
>
> And that's why typically in any kind of copyright case that you get into, what you do is you put the designers on the stand in front of the Judge and you have the designers tell their story. "These are the instructions that I received from the person who was retaining me to do the design. This is what I started off doing. This is what motivated me from the beginning. These are the materials and

> resources that are relied upon." And quite often what is the case is that there is some kind of preliminary design, and that design evolves and gets modified into a final design that ultimately is the subject of the allegation of infringement. And that story, if you are putting forward a defence of independent creation, which we are, is critical to, one – the Judge's understanding of what was actually done; and two – if accepted, is as I said, an absolute defence to an allegation of infringement." – Stephen Garland at Pages 46 (2) – 48(8) transcript January 17, 2013 - Exhibit "D" to September 26, 2013 sworn Affidavit of Jayson Dinelle.

[65] What then do Messrs. Lengkeek and Millson say in each of their affidavits?

[66] Mr. Millson has worked for Lengkeek Vessel Engineering Inc. since 2007 as a Naval Architect Technologist, and "since at least as early as November 2009, I have been part of the team at Lengkeek working on the project for the Respondent [Nova Scotia] relating to the restoration of the Bluenose II." – Paragraph 4 – 6 of his affidavit.

[67] Mr. Millson goes on in paragraph 6:

> My responsibilities on the restoration project have included:
>
> (a) Creating 3-D computer models of the replacement hull;
>
> (b) Overseeing and participating in the development of the structural and arrangement drawings including the lines drawings;
>
> (c) Overseeing the American Bureau of Shipping Approval of the design drawings and the issuing of drawings for construction; and
>
> (d) Acting as the Province's Technical Representative from the start of construction until November 2012, including:

> • Regular visits to the shipyard of Lunenburg Shipyard Alliance Ltd. facilities in Lunenburg to survey the construction of the replacement Hull;
>
> • Responding to technical questions raised by Lunenburg Shipyard Alliance Ltd; and
>
> • Advising the Province on the impact of proposed changes to the replacement Hull.

[68] Later in his affidavit Mr. Millson states:

> At the commencement of the restoration project, I created an overlay of four lines drawings to assist in the selection of the lines to be used for the replacement hull for the Bluenose II. … The drawings I used to create the overlay shown in Exhibit 1 are attached as Exhibit 2 separated by Tabs A to D respectively [in the same order as they are listed in the legend on Exhibit 1]" – paragraphs 7 and 8
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> …
>
> 13 – As referenced above, part of my role on the restoration project was to create many of the drawings for the replacement hull, including the lines drawing.
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> 14 – I was advised by Marius Lengkeek , the President of Lengkeek that the undated and unsigned lines drawing entitled "Bluenose" under Tab "A" of Exhibit 2 ["the Unsigned Lines"] was to be used to create the lines of the replacement hull.
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> …
>
> 18 – Throughout the process of creating the 3-D model in MAXSURF I consulted with Marius to obtain his input on the lines, including assisting in resolving the discrepancies located in the Unsigned Lines.
>
> …
>
> 33 – The only individuals on the Lengkeek team that were involved in the creation of the 3-D computer model of the replacement hull in MAXSURF and the lines drawings referenced in paragraphs 15 to 31 above were Marius and myself.

…

39 – I was the only person from the Lengkeek team involved in the creation of the side view of the vessel shown in each of the versions of the navigational lighting arrangement drawing in general arrangement drawing in Exhibit 7.

…

42 – During the construction of the replacement hull, there were inevitable changes made to the shape of the hull from the drawings created by Lengkeek.

[69] In his affidavit Marius Lengkeek states as follows:

7 … Lengkeek commenced working on the restoration project in November 2009 in conjunction with an agreement with the Province.

…

14 – Ben Millson, a Naval Architect Technologist employed by Lengkeek prepared an overlay of these four lines drawings to roughly compare them, a copy of which is attached as Exhibit 4. This overlay was provided to MHPM for consideration by the Steering Committee.

15 – MHPM ultimately advised Lengkeek that the Province [through the Steering Committee] had decided to use the undated and unsigned lines drawing entitled "Bluenose" represented by the red lines in Exhibit 4 ["the Unsigned Lines"] for the restoration project.

…

17 – I was actively involved in the review of the lines for the replacement hull created by Ben using MAXSURF , including by giving Ben directions. Indeed, on a number of occasions been consulted with me to reconcile discrepancies between two or more of the views in the Unsigned Lines. These discrepancies proved problematic and time-consuming to overcome as we had to determine which view was most appropriate to use.

…

> 22 – Four versions of the lines drawings were released by Lengkeek to MHPM for the Restoration Project. … I reviewed and approved each of the revisions to the drawings being issued to MHPM for approval by the Province.
>
> …
>
> 27 – The only individuals on the Lengkeek team that were involved in the creation a review of the 3-D computer model of the replacement Hall in MAXSURF in the lines drawings referenced in paragraphs 16 to 26 above were Ben, he and myself .

[70] In summary then, according to Marius Lengkeek and Ben Millson, only the two of them, had any hand in the technical creation of the lines for the replacement hull of the Bluenose II.

[71] No doubt at the hearing, the cross examination of these two witnesses [and perhaps others] will be crucial, in relation to whether the Applicants can establish their case or not.

[72] As reiterated by Mr. Garland, the credibility of the designers, Lengkeek and Millson will be crucial. Credibility is a composite of the witness' reliability and honesty. Their credibility will be contrasted one against the other, and against independent evidence, such as documentation, as well as against the other witnesses at the hearing.

[73] I note as well that Marius Lengkeek wears the hat of the "designated Discovery Manager", as well as a key witness in this case. In that respect, this case may be distinguishable from others, where the witness' personal interests are not as much at stake as they are here, given the effect that the allegations could have upon the reputation of Marius Lengkeek and his company.

[74] I do not see undue prejudice to the Respondents from allowing a Discovery Subpoena to be issued to Ben Millson, even though it could (but should not) interfere with the presently directed timelines; on the other hand, the prejudice to the Applicants by not allowing a discovery subpoena to be issued to Ben Millson, is substantial.

[75] In my view, in these exceptional circumstances, the interests of justice incline in favour of issuing a discovery subpoena to Ben Millson, because the credibility of the designers here will be so very important to the outcome, and without some discovery of Ben Millson, the Applicants will be unfairly restricted from properly probing in advance of the hearing, the knowledge of Ben Millson surrounding some of the most crucial issues in this case. Moreover, such discovery may generate greater efficiencies at the hearing itself.

[76] While I recognize that, the designated Discovery Manager has not yet been discovered, and that in this case that person is Marius Lengkeek, I am satisfied that the evidence and materials before me, including the Affidavit of Ben Millson as drafted, permit me to conclude that the Applicants have shown, to a level of a realistic possibility of likely relevance, that Ben Millson has information or evidence of a nature, or a quality, that either, cannot be obtained from the designated Discovery Manager Marius Lengkeek, or is necessary in order to allow the Applicants to fairly test the credibility of both Ben Millson and Marius Lengkeek at the eventual hearing. These findings lead me to conclude that the discovery of Ben Millson will "promote the just, speedy and inexpensive resolution" of this proceeding.

[77] I conclude, therefore, that I will authorize the issuance of a Discovery Subpoena to Ben Millson.

[78] His discovery will not be limited to the contents of his Affidavit as the Respondents argue – no authority or persuasive rationale was presented to support this position. His discovery will be governed generally by the relevant provisions of *CPR* 18, including specifically *CPR* 18.13, unless the parties agree otherwise.

Philip Snyder

[79] In relation to Mr. Snyder I also ask myself whether there is a realistic possibility that discovery of Philip Snyder will likely lead to relevant evidence, or produce information that is likely to lead to relevant evidence? Surely it could.

[80] According to his Affidavit Mr. Snyder is presently the co-owner and President of Snyder's Shipyard Ltd. where he has been employed since 1966, and from which in 2006 he has semi-retired from the day-to-day operations of the company.

[81] The contents of his Affidavit are directed at the 1995 restoration of the Bluenose II done by Snyder's Shipyard Ltd.

[82] Notably in the Applicants' brief at paragraph 11, they put in context his likely evidence:

> As Your Lordship is aware, that 1995 work is a key basis for the Respondents' defence of acquiescence, estoppel and/or laches [Respondents Notice of Contest at paragraph 29(b)]. [Wade]Croft's Affidavit does not address that issue.

[83] Wade Croft, in his Affidavit, states that he has been employed with Snyder's Shipyard Ltd. since 1980, and has held his current position as co-owner

and General Manager since 2006. As pointed out by the Applicants, his Affidavit does not speak to the 1995 restoration of the Bluenose II at all.

[84] I have no evidence regarding what position Wade Croft had or role he played at Snyder's Shipyard Ltd. during the 1995 restoration of the Bluenose II. As designated Discovery Manager, he has a duty to inform himself regarding the 1995 restoration, and presumably will consult Philip Snyder. There is a realistic possibility that the discovery of Philip Snyder will likely lead to relevant evidence or produce information that is likely to lead to relevant evidence regarding the 1995 restoration of the Bluenose II.

[85] However, given that the relevancy of such information/evidence is associated with an alleged defence of acquiescence or laches by, or estopped against, the Roués; the fact that the evidentiary burden is on the Respondents to establish such defences; and the implication that the Roués themselves therefore would be generally expected to be aware of such information or potential evidence (though not yet set out in the Respondents' affidavits filed to date), the need for discovery of Philip Snyder to ensure fairness to the Applicants at the eventual hearing is sufficiently diminished, as it is at least initially, and indirectly, provided for in the ability of the Roués to discover Wade Croft.

[86] In summary, while there is a realistic possibility that the discovery of Philip Snyder will likely lead to relevant evidence or information that will likely lead to relevant evidence, I am not satisfied that such information/evidence of a similar nature or quality cannot be obtained from the discovery of Wade Croft.

[87] I am left with a set of general circumstances, in which I must conclude that the request for discovery of Wade Croft is based on insufficient evidence, and would appear to be premature in any event.

[88] That is, I do not see material prejudice to the Applicants of not having the opportunity to discover Philip Snyder, and thus on balance I cannot conclude that authorizing the issuance of a discovery subpoena to Philip Snyder would "promote the just, speedy and inexpensive resolution" of the proceeding.

[89] Therefore, I decline to authorize the issuance of a Discovery Subpoena for Philip Snyder.

Conditions attached to the authorization of the issuance of a discovery subpoena (Application) to Ben Millson

[90] As with the other "party" witness, the deadline for his discovery will be as set out in the May 1st Scheduling Order, or as otherwise agreed to by counsel, or varied by further Court order/direction.

[91] Moreover, his discovery will be governed by the relevant provisions of Civil Procedure Rule 18, including Civil Procedure Rule 18.13. To be clear, there is a practice in Nova Scotia that the cost of transcription of discovery is often split 50/50 (Applicants/Respondents) by the parties in cases such as the one at Bar, and I so order as a clarification of the provisions of *Civil Procedure Rule* 18.10(2), in relation to his discovery.

[92] I also order that the Applicants provide or pay the expenses of the premises where his discovery takes place, and for the recording thereof; as well as the reasonable expenses of the witness to attend the discovery, including transportation by commercial airline and automobile (if required), accommodation while en route and in Halifax, and meals upon presentation of receipts or other evidence to same effect, and that the attendance expense will be paid 30 days after such receipt.

Costs

[93] The Respondents sought "elevated costs" [$2,000] **regardless** of the outcome, based on their view that the Applicants needlessly caused this Motion to be required, when it could have been dealt with on July 30th at the same time that I heard the motion for authorization of a Discovery Subpoena for Rory MacDonald.

[94] I note that *Civil Procedure Rules* 77.07(2), 77.12 and *Rowe v. Lee* (2007 NSSC 31 per Pickup J.) provide some authority for such claims in exceptional circumstances.

[95] Given the timelines herein, and specifically when the Applicants became aware of the Respondents' position that the reference in paragraph 6 of the Scheduling Order to "discovery of only the parties" was restricted to the Discovery Managers, I am not at all satisfied that the Applicants have shown such a lack of diligence that their conduct falls within the confines of *CPR* 77.07(2) or 77.12, and I decline to award costs "regardless of the outcome" as requested by the Respondents.

[96] I do conclude that in these circumstances the parties should bear their own costs as success was divided. That ruling does justice between the parties on this motion per *CPR* 77.02 and 77.05.

Rosinski, J.