IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Bell v. Canada (Attorney General), 2006 NSSC 368

Date: 20061205
Docket: S.H. 104542
Registry: Halifax

Between:

Pearl Winnifred Bell and Robert William Bell on their own behalf and on the behalf of Karen Lisa Sangster, Allan Wayne Bell, William L. Bell and Donald Robert Bell; Kelly-Ann Benoit on her own behalf; Lisa Marie Benoit-Murrin on her own behalf; Shirley Ann Benoit on her own behalf and on behalf of Nadine Cheryl Benoit; Darlene Pamela Dollimont on her own behalf and on behalf of Cheree Alyi Teresa Dollimont; Marie Anita Doyle and A. Marshall Doyle on their own behalf and on the behalf of R. Allan Doyle, James A. Doyle and Donald P. Doyle; G. Isabael Gillis on her own behalf and on behalf of Christopher Gillis, Ashley Anne Gillis and Daniel A. Gillis; Eileen Gillis and Joe Gillis on their own behalf; Genesta Agatha Holloran on her own behalf and on behalf of Trevor Lawrence Halloran and Nicole Margaret Halloran; Bonnie Atkings on her own behalf and on behalf of Jessie David Atkings and Kristy Erin Jahn; Reta Jahn on her own behalf and on behalf of LarryJahn, Faye Gibos, Marvin Jahn, Norma Bare, Cheryle Trotter, Dana Chodyka, Beverly Toppin and Tracy Jahn; Eleanor C. Lilley on her own behalf and on behalf of Simon P. Lilly; Darren C. Lilley on his own behalf and Stephen P. Lilley on his own behalf; Christopher Cory McIsaac and James Eric McIsaac by their Guardian ad Litem Cheryl LeBlanc; Beverly Mackay on her own behalf and on behalf of Sara Mackay and Janelle Mackay; Marguerite MacNeil on her own behalf and on behalf of Christopher Lee MacDonald, Lisa Marie MacNeil and Shawn Angus MacNeil; Lisa Poplar on her own behalf; Veronica Poplar on her own behalf; Eva Poplar on her own behalf and on behalf and on behalf of Randy Robert Poplar and Nancy Lee McKeigan; Sheila Mae Dykstra on her own behalf and on behalf of Anthony Darren McCallum and Kimberly Leslie McCallum; Shirley Anne Conway on her own behalf and on behalf of Tammy Conway, and Scott Conway; Carolyne Ann Dewan on her own behalf and on behalf of Jennifer Amanda Dewan and Trevor James Dewan;

Plaintiffs

v.

The Attorney General of Canada and The Attorney General of Nova Scotia representing Her Majesty the Queen in the right of the Province of Nova Scotia

Defendants

Judge:	The Honourable Justice Haliburton
Heard:	November 21, 2006, in Halifax, Nova Scotia
Written Decision:	December 5, 2006
Counsel:	Raymond F. Wagner, for the Plaintiffs John Ashley, for the Defendant, The Attorney General of Canada Edward A. Gores, Q.C., for the Defendant, The Attorney General of Nova Scotia

By the Court:

[1] The plaintiffs have brought an Interlocutory Application dated the 28th of August, 2006 for an Order for Declaratory Relief pursuant to s. 16(2) of the ***Proceedings Against the Crown Act***, R.S.C. 360 and ***Civil Procedure Rules*** 37.10 and 41A.08 and pursuant to the doctrine of equitable estoppel for an Order that the Defendant, the Attorney General of Nova Scotia (AGNS) is bound by the terms of the settlement agreement that was made with counsel for the plaintiffs with respect to its liability for the claims of the "non-dependant claimants" within the meaning of the ***Workers Compensation Act***, R.S.N.S. 1989.

And Take Notice that in support of this Application will be read the affidavit of W. Dale Dunlop a true copy of which has been previously filed, the Supplementary affidavit of Dale Dunlop hereto attached and such other material as counsel may advise . . .

[2] The AGNS has responded with their own Interlocutory Notice (Application Inter Partes) by which they seek an Order to Set Aside the Affidavit of Dale Dunlop filed in support of the plaintiff's application, together with an Application to convert the plaintiff's Interlocutory Application into an

Originating Notice (Action). It is the application of the Defendant AGNS which is the subject of this decision.

BACKGROUND:

[3] This application was heard on November 21, 2006. Some background is appropriate for the purpose of context.

[4] Several actions were commenced in 1993 by members of the families of the miners who were killed in the Westray mine disaster. Those actions involved allegations against the owners and operators of the mine as well as the Province of Nova Scotia. It is the AGNS on whose behalf these present applications are brought. During the years between 1993 and the present, various developments took place including a preliminary determination with respect to the entitlement of "dependant" relatives of the miners under the ***Workers Compensation Act***; and whether the Workers Compensation legislation barred further actions against the Province of Nova Scotia. It has been determined that those of the plaintiffs who were dependants under the

Workers Compensation legislation cannot in law make a further claim against the province.

[5] During or about December of 1998 W. Dale Dunlop became engaged as one of two principal lawyers acting for the plaintiffs. His affidavit which is the subject matter of one of the two present applications sets out the history of his involvement from that time forward. Mr. Dunlop's affidavit makes it clear that a number of meetings took place with politicians and with lawyers acting for the province as a result of which it was agreed by the parties that the position of the province with respect to its immunity to any claim by the "dependants" should be tested in court. After the hearing of that matter and a decision adverse to the plaintiffs, that question went to the Court of Appeal where the decision of the trial judge was essentially confirmed. Leave to appeal to the Supreme Court of Canada was denied. Thereafter, counsel for the plaintiffs sought to advance the claim of "non dependants" under the provisions of the ***Fatal Injuries Act***. The claim is one in negligence, one important aspect of which is the failure of government authorities to inspect and monitor safety in the mine as is required under various regulations.

[6] These discussions culminated with a meeting between Mr. Dunlop acting on behalf of the plaintiffs and Mr. Michael Baker, then the Minister of Justice.

[7] It is the position of Mr. Dunlop as reflected in his affidavit that the various discussions between counsel for the plaintiffs and the province as represented by solicitors in the Department of Justice and ultimately the Minister "came to an agreement"; that the province accepted the proposition that the latter is liable in damages to those plaintiffs who are not barred from taking action by operation of the ***Workers Compensation Act***. The plaintiffs say that the only thing remaining to be litigated is the extent of the damages to be awarded.

[8] The present preliminary applications are before the court because counsel for the province denies that any such agreement was ever made.

ISSUES:

[9] A twelve page, seventy nine paragraph affidavit of W. Dale Dunlop is put forward by the plaintiffs as evidence that the alleged agreement was reached. On a subsequent day presently scheduled for December 13th and 14th, the court is asked to determine that question. The affidavit of Mr. Dunlop is expected to serve as an important, if not essential element in establishing the facts around that agreement.

[10] On the present application and preliminary to considering whether or not an agreement was concluded, the province seeks answers to the following issues:

> 1.That the Originating Notice (Application Inter Partes) should be set aside in whole or in part, on the grounds that, pursuant to Rule 9.02 of the Civil Procedure Rules, the proceeding commenced by application is not one in which the principal question at issue is or is likely to be a question of law , that substantial dispute of fact is inevitable, and hence the proceeding cannot be commenced or continued as an APPLICATION;

and

> 2. That the entire affidavit, or that certain paragraphs of the affidavit of W. Dale Dunlop should be struck out, pursuant to Rules 14.04, 14.25(1), 38.02 and 38.11, on the basis that the impugned statements do not meet the requirements for an affidavit.

[11] **ISSUE ONE** - I agree with the position of the Defendant that the question here is primarily one of fact. That fact being "was an agreement reached"? In order to establish that there was an agreement in fact, it will be necessary for the plaintiffs to satisfy the usual onus required in civil cases. The plaintiff must establish who are the parties to the agreement, the authority of the negotiating parties to reach that agreement, and the terms of the agreement. It will be necessary to establish who said what to whom and when, and to produce any written notes or documents relating to the agreement. Evidence with respect to whether either or both of the parties acted upon it may be relevant. Having concluded that the question at issue is going to be one of fact and fact finding, then, in the normal course it would be proceeded with by way of "action" and not by way of "application"?

[12] The relevant Rule is CPR **9.02**:

> A proceeding . . .
>
> (a) in which the sole or principle question at issue is or is likely to be, a question of law, or one of construction of an enactment, will, contract or other document;
>
> (b) in which there is unlikely to be any substantial dispute of fact . . .

shall be commenced by filing an **Originating Notice (Application Inter Partes)** . . .

CPR **9.04** on the other hand, says:

> Every other proceeding, which is not within the provisions of rules 9.02 or 9.03, shall be commenced by filing an **Originating Notice (Action)** . . . .

[13] The Crown's position in light of the rules and in the context of requiring the court to assess credibility and reach conclusions as to facts is very strong. The position is put in the following terms:

> "It is the Crown's position that the proceeding commenced by the Plaintiffs cannot properly be heard as an application, in chambers; the nature of the claim made or declarations sought, and the issues arising, are the proper subject matter of a trial before the court, upon proper pleadings and pre-trial procedures, as are necessary."

[14] Proceedings in this court are to be commenced in accordance with the ***Civil Procedure Rules***. However, Civil Procedure Rule 1.03 sets forth what I think to be the governing and underlying principle of the rules of court. It says "the object of these rules is to secure the just, speedy and inexpensive determination of every proceeding."

[15] As noted earlier, this proceeding began in 1993. Over the intervening years a thick court file has been generated indicating that there have been a number of interim or interlocutory proceedings for one purpose or another. One of those intervening proceedings was that relating to the Workers Compensation legislation and its effect on the rights of the plaintiffs. That application was initiated under the provisions of Rule 25 and related primarily to a matter of law. However, the authority of the court as contemplated under that rule is not restricted to matters of law. Rule 25.01 provides:

> 25.01(1) The Court may on the application of any party or on its own motion at any time prior to a trial or hearing:
>
> > (a) determine any relevant question or issue of law or fact or both;
> >
> > (b) determine any question as to the admissibility of any evidence . . .

Rule 37.9 discusses the evidence which may be received in an "Application":

> (1) Evidence on a hearing may be given,
>
> > (a) by an affidavit or statutory declaration made pursuant to Rule 38;

> (b) by a statement of facts agreed upon in writing by all the parties;
>
> (c) with leave of the court, by any witness in person;
>
> (d) by any evidence obtained on discovery and admissible under the applicable rule.

[16] This present dispute between the parties is simply as to whether certain facts are admitted or whether they are not admitted. Whether or not there was an agreement is primarily a matter of fact. If it is determined as result of this interlocutory proceeding, then it is a fact which will not require adjudication at trial. Whether the plaintiffs are able to establish an agreement or not, the plaintiffs will be able to continue their action. A determination of that question by way of this preliminary application will assist in identifying which issues are left to be dealt with at trial.

[17] The facts surrounding whether or not there is an agreement I presume to be in pretty short compass. There is the affidavit of Mr. Dunlop. There are affidavits in response. Two days have been set aside for the hearing which ought to permit adequate cross examination of the affiants, the admission of evidence with respect to that particular facet of the matter. If either of the

parties feel that some further interrogatories or discovery is necessary in order to deal with this issue then that would have to be considered. From my review of the more recent materials in the file and the representations of counsel, I am persuaded that it would be fair and equitable to both parties and in the interests of a "just, speedy and inexpensive determination" of the proceeding that the plaintiff's application be permitted to proceed as scheduled so that the question of agreement or otherwise may be determined.

[18] **ISSUE TWO** - is put by the defence in the following terms:

> Whether the entire affidavit, or the paragraphs of the affidavit of Dale Dunlop as enunciated *infra* should be struck out, pursuant to Rules 14.04, 14.25(1), 38.02 and 38.11, on the basis that the impugned statements do not meet the requirements for an affidavit.

[19] I have carefully reviewed the affidavit in question, as well as some of the reported cases to which I have been referred. I am satisfied that many of the objections raised on behalf of the AGNS are correct. Indeed, Mr. Wagner representing the plaintiffs on the hearing of this matter conceded some of the points which had been made. As is so often the case with a lengthy affidavit this one contains argument, representation, hearsay and opinion all of which are of course improperly included. While the affidavit does serve and has

served to provide context and background for Mr. Dunlop's involvement in the proceeding and to paint a picture of the history of the litigation, much of the content is improperly included by affidavit and cannot be admitted in evidence.

[20] Some argument was made on behalf of the plaintiffs that this application to strike out portions of the affidavit has not been made in a timely manner. It is correct that the affidavit was sworn in May of 2005 and has presumably been in the hands of the AGNS for many months. The court documents seem to suggest that no further action was taken on the matter however, by the plaintiffs until August 28th of this year, since which time the file appears to have taken on new life. In any event, the application to strike was filed on November 8th so that the plaintiff's counsel should have adequate time to adjust to the challenge before their application is heard beginning December 13th.

[21] The application to strike might have been made at the time of the December hearing. Such timing would have made it ever so much more difficult for

the plaintiffs to respond. It is fairer to all parties to have this issue determined now and in advance of the plaintiff's application.

[22] Rule 38.02(1) directs:

> 1. An affidavit used on an application may contain statements as to the belief of the deponent with the sources and grounds thereof.
>
> 2. Unless the court otherwise orders an affidavit used on a trial shall contain only such facts as the deponent is able of his own knowledge to prove.

Rule 38.11:

> 1. The court may order any matter that is scandalous, irrelevant or otherwise oppressive to be struck out of an affidavit.

[23] As indicated above, a number of paragraphs contained in Mr. Dunlop's affidavit are appropriately attacked on the basis that they represent hearsay, opinion, argument or are irrelevant to the issue to be decided. **The issue to be decided**, as I understand, **is whether or not an agreement was concluded** between the plaintiffs or their counsel and the province with respect to liability. That is to say, did the province or those with authority to bind the province agree that the non-dependant plaintiffs have an

enforceable right against the province for compensation arising from the mining disaster. It is in that specific context that I consider the relevance of the representations set forth in Mr. Dunlop's affidavit.

[24] Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, and 10 will be struck.

[25] In this portion of his affidavit Mr. Dunlop speaks to the timing of and reason for his involvement as a lawyer on this file. The paragraphs contain hearsay, second hand opinion and some internal contradiction, but primarily they are irrelevant to the issue of an "agreement".

[26] The defendant objects to portions of paragraph 11 as being argumentative, opinion and speculation. My own view is that those portions are irrelevant, opinion and conclusory. With the exception of the final sentence, paragraph 11 is struck.

[27] Paragraphs 12 through paragraph 16 are also struck. Each of these paragraphs was objected to by the defence for the reasons specified in Mr. Gores pre-hearing brief. I find paragraph 12 to be irrelevant and intended to embarrass. Paragraph 13 is irrelevant and addresses a matter of law.

Paragraph 14 irrelevant and opinion or conclusion or argumentative. Indeed the paragraph contains the words “it was my opinion”. Paragraph 15 is irrelevant. The expression of “hope” speaks to speculation and it speaks to claims by persons who are no longer party to this action. Paragraph 16 is opinion and irrelevant.

[28] Paragraph 17 is irrelevant except for the following words: “In July of 1999 Michael Baker was appointed Justice Minister”.

[29] Except for the first sentence of Paragraph 18 that paragraph is struck. It attaches someone else’s affidavit which is clearly hearsay. Moreover, the attached affidavit includes opinion. I think the terms scandalous and vexatious apply. The remaining portion of paragraph 18 which will remain says “On August 30, 1999 I wrote to the Honourable Michael Baker, Minister of Justice requesting a meeting to discuss the future of the litigation.”

[30] Paragraph 19 is struck. It contains opinion and relates to an issue of law, as well as expressing Mr. Dunlop’s own opinion.

[31] The AGNS has not objected to the contents of paragraphs 20 through 26. I would nonetheless strike paragraphs 20, 21, 22, 23, 24 and 25 as being irrelevant to the present application. Paragraph 20 also suffers from having argument incorporated by way of reference to an exhibit and paragraph 24 incorporates Mr. Dunlop's own interpretation or representation as to what he had written to a solicitor then acting for the defence.

[32] I take no exception to the contents of paragraph 26.

[33] The defence objects to paragraph 27 on the basis that a meeting held between representatives of the plaintiffs and the defendant was held on a "without prejudice" basis. Since the issue is whether the negotiations between the parties resulted in an agreement or not, I find "without prejudice" to be not an appropriate basis for objection. I understand the law is clear that if there is an agreement "without prejudice" negotiations are no longer privileged. In assessing whether or not an agreement was reached the same rule must apply.

[34] While paragraph 27 does contain some opinion and conclusion, I think no real contest arises from the content of that paragraph and it does serve as useful background.

[35] Paragraph 28 is struck. It represents the state of mind of the affiant with respect to the state of mind of another lawyer.

[36] Paragraph 29 is not markedly exceptional. While it contains a conclusion about what parties agreed it serves to establish a useful time line in the litigation story.

[37] Paragraph 30 is objectionable and is struck. Again it is conclusory and in addition relates to another aspect of the litigation and not this question of "agreement".

[38] Paragraphs 31, 32, and 33 have not attracted objection and are simply factual.

[39] Paragraph 34 is struck as representing a conclusion about the state of mind of another.

[40] Paragraphs 35 through 41 are struck as irrelevant. These paragraphs relate to a time period during which Mr. Dunlop was offering his legal opinion to the Minister of Justice with respect to the Workers Compensation Board application and his view of a legal opinion which the Department had obtained with respect to the effect of Nova Scotia's Workers Compensation Statute.

[41] Paragraph 42 is unexceptional and is permitted to stand. Paragraphs 43 through 52 have not attracted an objection from the AGNS and are not struck.

[42] Paragraphs 53 through 56 are irrelevant as they deal with the application regarding Workers Compensation and the status of the decision in that matter. They are struck.

[43] Paragraph 57 contains opinion. After striking the inappropriate portion, that paragraph will read:

> "The appeal of the above captioned matter was heard on December 11th, 2001 at which time the panel reserved its decision. The written decision was released on January 16th, 2002. While the appeal was dismissed, Justice Davidson's dismissal of the entire action was reversed."

[44] No objection has been taken to paragraphs 58 through 62.

[45] The defence seeks to strike a portion of paragraph 63 on the basis that it is speculative and not a statement of fact based on information and belief. While the sentence drawing the objection is a "conclusion" or "opinion" it nonetheless is a reasonable interpretation of the letter to which it is attached. As such, I think that sentence to be unobjectionable. I do however find the second last sentence to be objectionable as opinion and hearsay. "As long as matters were proceeding we were willing to allow the province to withhold filing its defence" appears to represent a position taken by Mr. Wagner which would be hearsay. Effectively it relates to a matter of strategy in the conduct of the case as far as the joint counsel were concerned which is not appropriate for inclusion in an affidavit in the current circumstances.

[46] Paragraph 64 through 68 are unexceptional.

[47] The defence objects to much of paragraph 69 on the basis that it relates to a meeting between Mr. Dunlop and Minister Baker which was "without prejudice". For the reasons earlier stated I do not accept that the assertions with respect to that meeting should be excluded on that basis. However, I do find it very troubling to have the content of this paragraph represented as "fact". The wording is objectionable in that it represents opinions and conclusions of Mr. Dunlop in representing his arguments to the Minister. One fact asserted "the agreement that had been made" appears to me to be in direct contradiction of the facts related by the affiant at paragraph 27. Portions of this paragraph will be struck, leaving paragraph 69 to be as follows:

> "After about an hour matters were concluded with respect to discussions on the institutional abuse compensation claim. Mr. Johnson excused himself and the Minister of Justice and I were left alone in the board room. I was somewhat surprised as in my experience the Minister of Justice usually always had someone with him during these types of meetings. I noted that the Workers Compensation issue appeared to be resolved in the province's favour and that the only outstanding issue was the claims of the non-dependants . . . I advised the Minister that I thought the non-dependants would be receptive to putting a settlement proposal

> forward that was reasonable . . . the Minister agreed that it would be appropriate for Mr. Wagner and I to take instructions from our remaining clients in an attempt to present one figure to the province for settlement. At no point during the meeting did the Minister indicate that the province was contesting the right on the non-dependants to seek compensation as parties to the law suit."

[48] An objection is made to paragraphs 70, 71 and 72 which serve only to introduce exhibits and explain a delay in pursuing the matter. Nothing relevant to the present application is to be found in these paragraphs and they are struck.

[49] Paragraph 73 is not objected but is struck. It is first and foremost irrelevant and the exhibit attached thereto scandalous and vexatious. Likewise, I would strike paragraph 74 and 75 as being argument and opinions or conclusions on the part of the affiant.

[50] The remaining paragraphs I find to be unobjectionable. The defence has objected to paragraphs 78 and 79 on the basis that they represent argument. The objection made I find to be largely counter-argument. To some extent they are irrelevant and conclusory but they are useful in setting forth the position of the plaintiffs and why the present application has been made.

[51] The plaintiffs may proceed with their application as scheduled for December 13. The Affidavit of Mr. Dunlop in so far as it is approved above will be admissible in evidence in that application.

Haliburton J.