SUPREME COURT OF NOVA SCOTIA

Citation: Milburn v. Growthworks Canadian Fund Ltd., 2010 NSSC 210

Date: 20100602
Docket: Syd. 296202
Registry: Sydney, N.S.

Between:

Douglas Milburn, Ian Campbell, John Campbell, Norm Carmichael, Marilyn Gillis, Gerry Haberer, Michael Milburn, Thomas Murphy, John Ritter, Armin Schabel, Frances Smith, Herman Koza, Roy MacNeil, Allan MacMillan, Michelle Milburn, Milburn Family Trust, A. Riberio Holdings, Karin Allen, Pat Archer, Mortimer Brown, Elizabeth Carmichael, Dan Chobotiuk, Sion Jennings, Elizabeth Lynk, Eleanor Mack, Christopher Milburn, Colin Noble, Malcolm Noble, Alex Riberio, Kevin Schabel, tom Schneider, Hanna Shaheen, Maja-Lisa Thomson, Jon Woeller, Kausar Mian, Donald Archer, and Norton Campbell

Applicants

v.

Growthworks Canadian Fund Ltd., Englefield House No. 4 Inc., Walsingham Fund, a body corporate, Richard Black, Alisha Hirsch, Scott Pelton, Tom Saunders, John Gardner and Vince Campbell

Respondents

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	May 28, 2010, in Sydney, Nova Scotia
Written Decision:	June 2, 2010
Counsel:	Arthur L. Hamilton, for the Applicants Matthew G. Williams, for the Respondent Tom Saunders, not appearing John A. Keith, for the Respondent Growthworks Canadian Fund Ltd. and Scott Pelton J. Andrew Fraser, for the Respondents, Englefield House No. 4 Inc., Richard Black, Alisha Hirsch, Walsingham Fund and John Gardner

By the Court:

[1] ***Introduction:*** This is a Motion brought by the above named Applicants seeking a determination that the *Nova Scotia Rules of Civil Procedure* (the "New" Rules) apply to the underlying Application before the Court. The Motion is contested. Two groups of Respondents vigorously and actively oppose the motion - the "Growthworks Respondents", comprised of Growthworks Canadian Fund Ltd. and Scott Pelton, and "the Englefield Respondents" comprised of Englefield House No. 4 Inc., Richard Black, Alisha Hirsch, Walsingham Fund and John Gardner. The Respondent Tom Saunders recently retained Counsel who was unable to appear for the Motion, but provided correspondence confirming that Mr. Saunders was also opposed. The Respondents assert that the *Nova Scotia Rules of Civil Procedure (1972)* - "the 1972 Rules", should continue to apply. A self-represented Respondent, Mr. Mifsud was served with the Motion, but did not appear, nor respond in any fashion.

[2] In the Notice of Motion filed on April 23, 2010, the Applicants seek to rely upon a number of Rules, however it is the application of Rules 92.02 and 92.08 of the New Rules, which are pivotal to the determination before me. Before embarking upon an analysis of the Rules, it may be helpful to briefly review the following procedural history:

(i) The underlying Application before the Court was commenced on May 20, 2008 by way of Originating Notice (Inter Partes Application), under the 1972 Rules;

(ii) The Applicants are seeking "relief from oppression" under Section 5 of the Third Schedule to the *Companies Act*, R.S.N.S. 1989, c. 81, as amended;

(iii) The Respondents have not filed responding material in relation to the Application;

(iv) On June 14, 2009 the Applicants filed a motion under the New Rules, to have the Application converted to an Action;

(v) It would appear that the “main” Respondents, namely Growthworks and Englefield eventually agreed to the conversion, signing a Consent order. The Respondents did not object to the New Rules applying at that time;

(vi) Before the Order was taken out, the Applicants retained new Counsel in July 2009, who withdrew the application to convert;

(vii) On December 22, 2009, Englefield commenced an action in Halifax, naming Mr. Milburn, some other common shareholders of Advanced Glazing Technologies Limited (“AGTL”) as Defendants, as well as AGTL, Advanced Glazing Limited and Protocase Incorporated. Paragraphs 39 and 40 of the Statement of Claim in that matter asserts that the subject matter of the action is similar to that of the present underlying Application, and that Englefield will be seeking to have the matters tried together, both as actions.

[3] Based upon both the written materials and oral submissions, it is clear that the parties are contemplating further procedural determinations, and future motions are likely. The Respondent Englefield has indicated that it will be making a motion to have the current Application converted to an action based in part upon an alleged agreement reached between the parties in July 2009. Further, from the pleadings in the Englefield action commenced in December of 2009, it is likely that a motion will be forthcoming to have this Application and the Englefield action heard together. There appears to be an acknowledgment that there is significant overlap between the two matters relating to both the parties involved and the subject matter forming the basis of the disputes in question.

[4] Turning to the Rules, and as noted above, the application of Rules 92.02 and 92.08(2), is particularly relevant to the issue before me. They read as follows:

> 92.02(1) These Rules apply to all steps taken after January 1, 2009 in an action started before January 1, 2009, unless this rule 92 provides or a judge orders otherwise.

> (2) The *Nova Scotia Civil Procedure Rules* (1972) continue to apply to each of the following kinds of proceedings:
> (a) an action or other proceeding in the Family Division;
> (b) a family proceeding outside the Family Division;
> (c) all other proceedings, except an action, started before January 1, 2009, unless a judge orders otherwise.
>
> 92.08(2) A judge who is satisfied that the application of this Rule 92 to a proceeding started before January 1, 2009 causes one party to gain an unfair advantage over another party may order either of the following:
> (a) these Rules apply to the proceeding, or a part of the proceeding, despite Rules 92.02(2), 92.04, and 92.05(1);
> (b) the *Nova Scotia Civil Procedure Rules* (1972) apply to the proceeding or a part of the proceeding despite rule 92.02(1).

[5] As a starting point, it would appear that all parties agree that, by virtue of Rule 92.02(2)(c), the 1972 Rules apply, as this matter is a proceeding, other than an action, which was commenced prior to January 1, 2009. The contention surfaces with the proper application of Rule 92.08(2), which I am advised by Counsel, has yet to be judicially considered.

[6] The Applicant argues that should this matter continue to be governed under the 1972 Rules, that the Respondents will have an "unfair advantage". In support of this position, the Applicants primarily point to case authorities generated under both sets of Rules, and assert that those under the New Rules are more advantageous to the position they wish to advance. It is clear from the submissions, that the Applicants believe that they will be more likely to fend off an anticipated motion to convert the proceedings to an action, under the New Rules, than if the 1972 Rules were applied.

[7] Both Respondents assert that there is no unfair advantage in these circumstances, and as such, the Court should dismiss the motion. In addressing the proper application of Rule 92.08(2) both Respondents assert that the Applicant has failed to meet the test inherently contained within the Rule. This was enunciated by the Respondent Englefield as containing three distinct propositions:

> (i) that continuing under the 1972 Rules causes the Respondents to gain an "advantage" over the Applicants;

(ii) that the advantage is “unfair”; and

(iii) that even if such an “unfair advantage” is gained by the Respondents, the Court retains discretion to still direct that the 1972 Rules should apply.

[8] The Respondent Growthworks in its submissions to the Court, stressed that Rule 92.02 clearly states that applications are to fall under the 1972 Rules, and that actions and applications are clearly intended to be treated differently. The Court was warned that granting the Applicant’s motion would set a wide-ranging precedent that all outstanding applications would be subject to the New Rules, a result clearly contrary to the plain wording of Rule 92.02(c).

[9] ***Determination***: In my view, there are several factors in the matter before me that weigh in favor of the New Rules applying to the underlying Application. These include:

(i) The underlying Application, although commenced in May 2008, has not advanced beyond the initial filing. The Respondents have not filed materials in response. Although the affidavits filed in the motion before me contain a number of explanations from different perspectives, the reality of the situation is that in a very real way, the Application is in its infancy;

(ii) In response to the Applicant’s motion to convert in June of 2009, the Respondents were willing to have the New Rules apply, or at the very least, did not contest that occurring;

(iii) There is a separate action in Halifax, to which the New Rules clearly apply, which appears to have significant overlap with the present Application in terms of parties and factual context;

(iv) At least one party, the Respondent Englefield, asserts that it will be seeking to have this matter and the Halifax action tried together.

[10] I do not agree with the Applicants’ proposition that their perception of a more favorable treatment of applications under the New Rules, as opposed to the 1972 Rules creates an “unfair advantage” to the Respondents. What does create the very strong potential for some or all of the parties having an unfair advantage, is permitting two very similar matters, including substantially the same parties and factual context, to be determined under two separate sets of Rules. That is precisely the result of having the present Application continue under the 1972 Rules, while the Halifax action proceeds

under the new regime. Additionally, if the two matters are heard together, it seems illogical and cumbersome to have two rule regimes applied simultaneously.

[11] Based on their submissions, it is unlikely that the Respondents would view the above concerns as establishing an "unfair advantage" as contemplated in Rule 92.08(2). The Court is mindful that the overriding purpose of the Rules, both the current and former versions, is to promote the efficient, inexpensive and **just** determination of matters before it. As the Respondents ably point out, Rule 92.08(2) provides that even where a party can establish that the application of the 1972 Rules would result in an unfair advantage, the Court retains discretion to order those rules continue to apply. Obviously, the Court would exercise that discretion where it determined that it was just to do so. In light of that, it seems odd that the Court would not have a corresponding discretion to order that the New Rules apply to applications, where it similarly determined that it was just to do so.

[12] The New Rules should, in the particular circumstances of the matter before me, apply to the underlying Application. I do not see this determination, having considered the particular factors outlined above, as opening the flood gates to having all outstanding applications initiated under the 1972 Rules now being subject to the New Rules.

[13] The Applicants shall be entitled to total costs in the amount of $1000.00 payable equally by the Respondents Growthworks and Englefield, forthwith.

J.