**CASE COMMENT:**

***DALHOUSIE UNIVERSITY v. AYLWARD.*, 2010 NSSC 65**

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The case of *Dalhousie* v. *Aylward*[1] is an instructive illustration of how our Court is likely to apply the new Civil Procedure Rules as they relate to summary judgment motions.

**Factual background**

Carol Aylward has been a professor at Dalhousie University since 1991. She twice complained to the Nova Scotia Human Rights Commission alleging that the University discriminated against her on the basis of race, colour and gender.

The first complaint was filed in March 2004, and resolved by way of a settlement agreement between her and the University in July 2005. The terms of the agreement provided that she would be elevated to the rank of associate professor and paid a sum of money in general damages. In addition, the agreement contained a confidentiality clause preventing the parties from publishing or communicating any of the terms of the agreement.[2]

Eventually, Professor Aylward sought a promotion to the rank of full professor. She was denied. As a result, she filed a second complaint to the Commission in August 2007, again alleging discrimination on the basis of race and/or colour.[3]

The University and the other named respondents filed Responses to the complaint, and Professor Aylward filed Rebuttals to the Responses. Her Rebuttals disclosed the terms of the July 2005 settlement agreement. In addition, she posted the Rebuttals to her personal website, further publishing the terms of the settlement agreement.

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[1] 2010 NSSC 65.
[2] Ibid, at paragraphs 3 et seq.
[3] Ibid, at paragraph 7.

The University became aware of this publication in February 2008, and asked Professor Aylward to remove the settlement agreement contents from her Rebuttals, and from the website. When she refused to do so, Dalhousie University commenced an action alleging breach of contract, and claiming a declaration of the breach, a permanent injunction against further publication, together with damages in the amount of $1.00.[4]

In her Defence and Counterclaim, Professor Aylward did not deny publishing the terms of the settlement agreement, but claimed that she was justified in doing so because Dalhousie University made the terms public once they provided the Commission with copies, and then by misrepresenting the terms of the agreement. In addition, she claimed absolute and qualified privilege in the disclosure.

Her Counterclaim alleged the tort of abuse of process, arguing that the University's suit was motivated by an ulterior motive; namely, to dissuade her from proceeding with her second complaint to the Commission.[5]

The University brought a motion for summary judgment, seeking judgment in the main action and a dismissal of the counterclaim.

**Reasoning and result**

Chief Justice Kennedy reviewed the language of the current *Nova Scotia Civil Procedure Rule* 13.04, together with the well known common law articulation of the requirements for summary judgment, referring, in particular, to *MacNeil* v. *Bethune*[6], where the Court of Appeal stated:

> [21] As stated in *Selig* v. *Cooks Oil Company Ltd.,* 2005 NSCA 36, it is a two part test:
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> > [10] … First the applicant must show there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[4] Ibid, at paragraphs 8-10.
[5] Ibid, at paragraphs 11-18.
[6] 2006 NSCA 21, and specifically, paragraph 21.

His Lordship then noted that the terms of the settlement agreement for the first complaint (including the confidentiality agreement) and the fact that the terms had been published were not in dispute.[7]

He went on to analyze Professor Aylward's defences, commencing with her defence of justification.

Professor Aylward's defence of justification turned upon her interpretation of the words "coincidence" and "grant". She alleged that when the University stated in its Response to her complaint that she was awarded tenure and promoted following a review of her file "coincident" with the settlement of her human rights complaint, this was a misrepresentation. She argued that the University was saying that it was a term of the settlement agreement that her file be reviewed subsequent to the agreement in assessing her suitability for promotion when, in fact, the agreement provided for her unconditional promotion. This alleged misrepresentation, according to her argument, justified her disclosure of the terms of the settlement agreement.[8]

In addition, Professor Aylward argued that when the University stated that she was "granted" a promotion in 2001, this was also a misstatement of the terms of the settlement agreement. She argued that it suggested that this necessarily indicated that the promotion was the result of the review of her file, when in actuality, her promotion was pursuant to the terms of the settlement agreement.[9]

Chief Justice Kennedy examined various dictionary definitions for the word "coincident", and concluded that Professor Aylward's interpretation was untenable. He also found her interpretation of the word "grant" untenable, and concluded that her defence had no "real chance of success", as *Selig*, supra, requires.[10]

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[7] *Dalhousie University* v. *Aylward*, *supra,* at paragraphs 30 and 76.
[8] Ibid, at paragraph 39.
[9] Ibid, at paragraph 62.
[10] Ibid, at paragraph 82.

As to Professor Aylward's argument that the documents were made public when the University provided copies to the Human Rights Commission, His Lordship noted that the terms could only be made public, if at all, in response to a request made under the *Freedom of Information and Protection of Privacy Act*[11]. In the absence of a successful application for the disclosure of the terms of the agreement under that Act, the argument had no validity, and accordingly, no "real chance of success".[12]

His Lordship then turned to the defence of privilege, noting that Professor Aylward appeared to be claiming witness immunity. His Lordship found that Professor Aylward forfeited any claim to witness immunity when she published the terms of the settlement agreement on her website.[13]

Finally, Chief Justice Kennedy examined the counterclaim, finding that on a plain application of the law of abuse of process, the counterclaim was unsustainable. In the result, the counterclaim was dismissed.

**Analysis**

As the Supreme Court of Canada stated in *Canada (A.-G.)* v. *Lameman*[14]

> [10] … . The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
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> [11] … the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial"… . The defendant must prove this; it cannot rely on mere allegations or the pleadings … . If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal … . Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried … . The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts … .

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[11] R.S.N.S. 1993, c. 5.
[12] *Dalhousie University* v. *Aylward*, *supra,* at paragraphs 87.
[13] Ibid, at paragraph 91.
[14] 2008 SCC 14

[citations omitted]

Historically, however, motions for summary judgment have been perceived as being difficult motions to bring successfully, with the Court demonstrating some reluctance to dismiss claims without the benefit of full argument at trial.

One reason might be that the 1972 Civil Procedure Rules contained a greater discretion in the chambers judge to dismiss a motion for summary judgment, even where there was "no arguable issue for trial". With the implementation of the 2009 Civil Procedure Rules, that discretion has now been removed, and where there is no genuine issue to be tried, the chambers judge must grant summary judgment.[15]

With the removal of that discretion, the second branch of the test for summary judgment (where the respondent must demonstrate a "real chance of success") appears to have assumed greater importance.

The requirement for the responding party to demonstrate that its claim or defence has a "real chance of success" is capable of at least two approaches: firstly; the requirement can be read to mean that notwithstanding the lack of any genuine issue for trial, the application of the law, and any inferences to be drawn from the facts, ought to be left to the trial judge. This approach can be justified on the ground that a trial judge would have the greater opportunity of assessing all of the witnesses, their intentions and their motivations. This appears to have been the approach that Justice Hood took at first instance in *Eikelenboom* v. *Holstein Canada*[16].

The approach that the Court of Appeal[17] took in that same matter illustrates the second approach. There, the Court of Appeal took the view that provided that there were no issues for trial, then the chambers judge is entitled to apply settled law to those undisputed facts in order to dispose of the matter.

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[15] Ibid, at paragraph 24. Cf. CPR 13.04(1) (2009 Rules), and CPR 13.01 (1972 Rules).
[16] 2003 NSSC 241, at paragraph 10.
[17] 2004 NSCA 103.

This can be seen where the Court of Appeal responds to Justice Hood's statement, at paragraph 10 in her Reasons, that if the responding party points to circumstances that suggest it could succeed at trial, it should be left to the trial judge to examine the surrounding circumstances and arrive at a decision to dispose of the matter. The Court of Appeal stated,

> [30] … With respect, all of the surrounding circumstances were already well known. The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in *Gordon Capital, supra*, where the only dispute concerned the application of the law, a point with which the [Supreme Court of Canada] quickly dispensed in rather terse prose:
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> > The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.

While this approach may result in fewer matters proceeding to trial, it has the advantage of better complying with the Supreme Court of Canada's reasoning, both in *Guarantee Co. of North America* v. *Gordon Capital Corp*.[18], and in *Canada (A.-G.)* v. *Lameman*[19]. In addition, the freedom that this approach permits chambers judges better accords with the stated object of the 2009 Civil Procedure Rules, being promoting the just, speedy and inexpensive determination of every proceeding.

With this approach, however, in most cases, the requirement of demonstrating a "real chance of success" will likely amount to a restatement of the requirement to "put one's best foot forward" in leading evidence that identifies a material issue of fact or law for trial.

The case law in Nova Scotia is uniform in stating that the burden in a summary judgment motion lies on the moving party to establish the lack of a genuine issue for trial. It goes on to state that once the burden has been met, the onus shifts to the respondent to demonstrate that the claim or defence has a "real chance of success".

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[18] [1999] 3 S.C.R. 423.
[19] Supra.

In practice, however, it seems that the shifting burden will only play out in more complex factual matrices, where a moving party demonstrates certain undisputed facts, but then urges the chambers judge to draw a particular set of inferences from those undisputed facts. In those cases, it would be open for a respondent to argue that a trial judge ought to draw different inferences, and that therefore a trial is justified.

In cases with simpler facts, the practical reality is likely that the burden does not actually shift, but that showing a "real chance of success" amounts, in reality, to ensuring that all of the evidence available has been supported by the response affidavit, in arguing that there is a genuine issue for trial, since the chambers judge will apply existing law to the facts presented.

This was the approach that Chief Justice Kennedy took in *Aylward*. In that case, the facts were relatively simple, and His Lordship simply applied settled law to them. The question of whether there was a "real chance of success" involved Professor Aylward's urging a particular definition of "coincident" and "grant" upon the Chambers judge. The particular interpretation would not likely be affected by any inferences to be drawn from the undisputed facts. Indeed, no particular inference was urged upon or drawn by the chambers judge.

For counsel defending a summary judgment motion, the lesson is that it has become even more important to ensure that the response affidavit contains all of the available evidence in support of a finding that there is a genuine issue for trial. In addition, the response affidavit should take care to lead any evidence that would support a particular inference from a complex set of facts.

Given the removal of the motions judge's discretion to grant summary judgment, a failure in this regard presents a greater risk than perhaps existed prior to the implementation of the 2009 Civil Procedure Rules, that the case will be summarily dismissed.