IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Nalcor Energy v. Anderson*, 2017 NLTD(G) 51
Date: March 14, 2017
Docket: 201608G0159

IN THE MATTER OF Rule 53 of the *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42, Sch.D (as amended);

AND IN THE MATTER OF Justin Brake being a person against whom a contempt of court proceeding was commenced under Rule 53.03.

BETWEEN:

NALCOR ENERGY AND MUSKRAT FALLS CORPORATION

APPLICANTS

AND:

ANDREA ANDERSON, JIM LEARNING, JOHN LEARNING, KIRK LETHBRIDGE AND PERSONS UNKNOWN

RESPONDENTS

Before: Justice George L. Murphy

Place of Hearing: Happy Valley-Goose Bay, Newfoundland and Labrador

Date of Hearing: February 14, 2017

Summary:

Nalcor commenced a contempt of court proceeding against a number of individuals including Mr. Brake who is a journalist. Mr. Brake applied for an order that certain *ex parte* orders issued by the Court be vacated. The basis of the application was that Nalcor, when applying for the *ex parte* orders, did not advise the Court that Mr. Brake was a working journalist actively covering a protest against the Muskrat Falls Project. It was this protest which gave rise to the applications for the *ex parte* orders. Mr. Brake argued that his status as a working journalist actively covering the protest was a material fact of such import and significance that Nalcor had a duty to make it known to the Court at the time of the applications for the *ex parte* orders. The Court dismissed the application finding that Mr. Brake had no special status as a journalist and also finding that the fact he was a journalist was not a material fact and therefore need not have been brought to the attention of the Court on the applications for the *ex parte* orders. The Court went on to find that even if the status of Mr. Brake as a journalist was a material fact, the circumstances were such that it would not have exercised its discretion to vacate the *ex parte* orders because of non-disclosure of that fact.

Appearances:

Chris King	Appearing on behalf of the Applicants
Geoff Budden	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd. (1997) 150 Nfld. & P.E.I.R. 203 (NLCA); **United States v. Friedland**,1996 CarswellOnt 5566, [1996] O.J. No. 4399; **Prodigy Graphics Group Inc. v. Fitz-Andrews**, [2000] O.T.C. 237, 96 A.C.W.S. (3d) 177; **O2 Electronics Inc. v. Sualim**, 2014 ONSC 5050; **McLeod v. Canada (Armed Forces)**, [1991] 1 F.C. 144, 2 C.R. (3d)

STATUTES CONSIDERED: *Canadian Charter of Rights and Freedoms*, section 11, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (as amended)

REASONS FOR JUDGMENT

MURPHY, J.:

INTRODUCTION

[1] This is a decision on an Interlocutory Application (*inter partes*) brought by Mr. Justin Brake wherein he seeks an order that certain *ex parte* orders issued by this Court and dated October 16, 2016 and October 24, 2016 be vacated.

[2] The *ex parte* order dated October 16, 2016 is of the type commonly referred to as an Injunction (the "Injunction Order") and was granted on the *ex parte* application of Nalcor Energy and Muskrat Falls Corporation (hereinafter "Nalcor").

[3] The *ex parte* Order in this proceeding dated October 24, 2016 was issued as a result of an *ex parte* application under Rule 53.03 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (as amended) by Nalcor. This order required certain named individuals including Mr. Brake to appear before this court to show cause why they should not be held in contempt of court (the "Contempt Appearance Order") for refusing to comply with the Injunction Order.

[4] The basis upon which Mr. Brake seeks an order vacating the Injunction Order and the Contempt Appearance Order is his contention that Nalcor did not, in either the application for the Injunction Order or the application for the Contempt Appearance Order, advise this court that he was a working journalist actively

covering the protest which gave rise to the aforesaid *ex parte* applications and the resulting Injunction Order and Contempt Appearance Order. Mr. Brake's position is that the fact he was a working journalist, actively engaged in covering a story which was of significant importance regionally, provincially, nationally and internationally, was a material fact of such import and significance that Nalcor had a duty to make it known to the Court at the time of their application for the Injunction Order and Contempt Appearance Order.

BACKGROUND EVENTS

[5] Nalcor is engaged in the development of a hydro-electric generating station and related infrastructure on the lower section of the Churchill River at Muskrat Falls near the Town of Happy Valley-Goose Bay. The development is commonly referred to as the "Muskrat Falls Project".

[6] There have been a number of protests against the Muskrat Falls Project since its commencement and in October of 2016 a further protest occurred whereby a group of people established a blockade on the access road leading from the Trans-Labrador Highway to the Muskrat Falls construction site. The effect of this blockade was to obstruct or interfere with access to and from the site by persons and vehicles seeking lawful entrance to or exit from the site. It was as a result of this blockade that Nalcor applied on an *ex parte* basis for injunctive relief on October 16, 2016 and was granted the Injunction Order. The effect of the Injunction Order was that the named Respondents and any other person having notice of the Injunction Order were enjoined and restrained from certain activities. The operative part of the Injunction Order provides as follows:

> IT IS HEREBY ORDERED THAT until further Order of this Court the Respondents and any other person acting under their instruction and anyone having notice of this Order, be strictly enjoined and restrained, until the final disposition of this action or further order of the Court from:
>
> a. With respect to any person or persons seeking lawful entrance to or exit from the Muskrat Falls construction site, whether such person or persons is or are on foot or in a vehicle of any type, hindering, delaying, stopping, obstructing or in any other manner interfering

with such person or persons, at any time or for any length of time, including by the presence, temporary or otherwise, of one or more persons and/or the placement, temporary or otherwise, of one or more objects on any portion of any highway, roadway, driveway or laneway which is intended or ordinarily used for vehicular access to Muskrat Falls construction site or to any portion of such premises;

b. stationing persons on or otherwise trespassing on the Muskrat Falls construction site;

c. ordering, aiding, abetting, counselling, or encouraging in any manner whatsoever, either directly or indirectly, any person to commit the acts enjoined or any of them;

AND IT IS FURTHER ORDERED THAT law enforcement officials shall enforce the terms of this Order and further shall promptly and fully terminate any activity undertaken in contravention of this Order;

[7] Despite the Injunction Order, the size and intensity of the protest grew larger and the blockade of the access road continued. On October 22, 2016 one of the protestors cut the lock on the gate to the construction site and approximately 50 people including Mr. Brake trespassed unto the site in violation of the Injunction Order. Some of these individuals proceeded via an access road within the site to an accommodations complex which they then occupied. Additional protestors remained at the entrance to the site where they continued to hinder, delay, stop and obstruct persons and vehicles from entering the construction site contrary to the Injunction Order.

[8] As a result of the on-going contempt of the Injunction Order and the potential consequences of the contempt, Nalcor applied *ex parte* pursuant to Rule 53.03 of the *Rules of the Supreme Court, 1986* for an order directing the sheriff to cause certain individuals named in the application and any other individuals found unlawfully occupying the construction site to appear before the court to show cause why they should not be held in contempt of court for failing to comply with the Injunction Order. As a result this court issued the Contempt Appearance Order pursuant to Rule 53.03. It provides:

Before the Honourable Mr. Justice George Murphy this 24th day of October, 2016:

UPON THE APPLICATION OF Nalcor Energy and Muskrat Falls Corporation,

AND UPON READING the Affidavit of Gilbert Bennett filed in support thereof;

AND UPON hearing the viva voce evidence of Mr. Gilbert Bennett;

AND UPON HEARING Thomas Kendell, Q.C., counsel for the Applicants;

IT ISI HEREBY ORDERED THAT:

1. The Sheriff shall cause the following persons:

a)

1) Todd Applin, Jr.
2) Justin Brake
3) Ethan Broomfield
4) Craig Brown
5) Scott Budgell
6) Dennis Woodrow Burden
7) George Cabot
8) Darrell Chaulk
9) Scott Dicker
10) Marjorie Flowers
11) Sharon Gear
12) Faye Goudie
13) Annett Hollett
14) Beatrice hunter
15) Kirk Lethbridge
16) Donald Newman
17) David Nuke
18) Darren Sheppard
19) Edith Sheppard
20) Roger Shiwak
21) Steve Tooktoshina
22) Doreen Davis Ward; and

b) any other persons found unlawfully occupying the Project Site of the applicants including the Accommodations Complex or blocking access to the Project Site and who is provided with a copy of the Injunction Order issued by this Court in this matter on Oct. 16, 2016 (the "Injunction Order") and who refuses to immediately leave the Project Site or cease blocking access to the Project site as the case may be

> to forthwith appear before this Court at the Court House in Happy Valley-Goose Bay, Newfoundland and Labrador at 214 Hamilton River road to show cause why he or she should not be held in contempt of Court provided that if such persons immediately leave the Project Site or cease blocking access to the Project Site as the case may be they shall be required to appear at a date determined by the Sheriff but in no event no later than November 10, 2016.
>
> 2. The Sheriff shall have the power to take any persons covered by this order into custody and hold such person until their attendance before the Court.
>
> DATED at Happy Valley-Goose Bay, Newfoundland and Labrador this 24th day of October, 2016.

None of the individuals named in the Contempt Appearance Order were taken into custody by the Sheriff pursuant to the Order. Instead all of these individuals were given a Notice to Appear requiring them to appear at various later dates. In the case of Mr. Brake he was given a Notice to Appear requiring him to appear in this Court on November 1, 2016 to show cause why he should not be held in contempt of court as a result of his refusal or failure to abide by the Injunction Order.

ISSUES

[9] The issues to be addressed in deciding Mr. Brake's application are as follows:

1) When is it appropriate to vacate an *ex parte* Order on the basis of non-disclosure of material facts?

2) Was the fact that Mr. Brake was a journalist covering the protest against the Muskrat Falls Project a fact which Nalcor ought to have apprised the Court of when making the *ex parte* application that resulted in the Injunction Order or the *ex parte* application that resulted in the Contempt Appearance Order?

ANALYSIS

[10] The position of Mr. Brake is that at all relevant times he was working as a journalist covering the Muskrat Falls protests and that this fact was known to Nalcor. Nalcor agrees this was the case. Mr. Brake argues this was a material fact and as such Nalcor had an obligation to make it known to the Court on the *ex parte* applications. He goes on to argue that by not doing so Nalcor failed in its duty of full and frank disclosure and that the necessary and appropriate remedy is for this Court to vacate both the Injunction Order and the Contempt Appearance Order.

[11] While Mr. Brake in his written application advanced the foregoing argument in respect of both the Injunction Order and the Contempt Appearance Order in oral argument his counsel indicated to the Court that the main focus of their argument was the Contempt Appearance Order.

[12] It is common ground between the parties that the comments of Green, C.J.N. in the **Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.** (1997) 150 Nfld. & P.E.I.R. 203 (NLCA) decision sets out the legal principles applicable to cases where a party is seeking to have an *ex parte* order vacated on the basis of material non-disclosure or misstatements.

[13] It is well established that there is an obligation on any party who is seeking *ex parte* relief from a court to make full and frank disclosure of their case as was stated by Green, J. A. in the **Canadian paraplegic Association** decision at paragraph 18:

> [18] On any *ex parte* application, the utmost good faith must be observed. That requires full and frank disclosure of all material facts known to the applicant or counsel that could reasonably be expected to have a bearing on the outcome of the application. Because counsel for the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, counsel is under a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances.

[14] Sharp, J. of the Ontario Court of Justice (General Division) spoke of the duty of full and frank disclosure and the rationale for this duty in the context of an injunction application, in his decision in **United States v. Friedland**, 1996 CarswellOnt 5566, [1996] O.J. No. 4399. At paragraphs 26 – 30 he said:

> 26 It is a well established principle of our law that a party who seeks the extraordinary relief of an *ex parte* injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. The Judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:
> There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction.
> (*Watson v. Slavik*, August 23rd, 1996, paragraph 10.)
>
> 27 For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.
>
> 28 If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.
>
> 29 These principles are so well established in the law that it is hardly necessary to cite supporting authority. They find expression in the Rules of Court. Rule 39.01(6) provides:
>
> > Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

> 30 The principle has been affirmed and reaffirmed by judicial decision. In the leading Ontario case on *Mareva* injunctions, *Chitel v. Rothbart* (1982) 39 OR 2d 513, a judgment of the Court of Appeal, Associate Chief Justice MacKinnon stated, at page 519:
>
> > There is no necessity for citation of any authority to state the obvious that the plaintiff must, in securing an *ex parte* interim injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendant's position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the court on material facts in the original application, the court will not exercise its discretion in favour of the plaintiff and continue the injunction.

[15] In the **Canadian Paraplegic Association** case a third party in a proceeding had brought an application to add a fourth party to the proceeding, on an *ex parte* basis, despite knowing, through its solicitor the following facts:

i) the plaintiff in the proceeding was not consenting and in fact intended to oppose the application;

ii) the plaintiff in the proceeding had expressly asked on more than one occasion in writing to be given notice of any application;

iii) the plaintiff in the proceeding had expressed concern about the length of time it was taking to bring the matter to trial;

iv) the plaintiff in the proceeding had prepared a draft certificate of readiness thereby representing its readiness for trial and had asked the other parties to join in a joint filing under rule 40.05; and

v) the plaintiff in the proceeding was intending to set down an application under rule 40.06 to have the case set down for pretrial.

None of these facts were disclosed in the application or the supporting affidavit. In speaking of the failure to disclose this information, Green, J.A. said at paragraph 21.

> [21] None of this information was disclosed in the application or the affidavit accompanying it. I have no doubt that had it been, the applications judge would have required counsel for Slaney to give notice to the plaintiff and defendant before dealing with the application. The failure of Slaney's counsel to apprise the judge of this information constituted a material nondisclosure and not only demonstrated a myopic discourtesy to a fellow solicitor but amounted to a breach of his duty of utmost good faith to the court.

[16] He then went on at paragraph 22 to speak of the potential consequences of material non-disclosure:

> [22] Material misstatements or nondisclosure on an ex parte application will justify the court, on a subsequent review of the order, in setting aside the order for that reason alone. This principle is one of long standing: **Peru (Republic) v. Dreyfus Brothers & Co**. (1886), 55 L.T. 802; **Sturgeon v. Hooker** (1847), 63 E.R. 1158 (L.C.); **R. v. Kensington Income Tax Commissioners**, [1917] 1 K.B. 486 (C.A.). The rationale is that the court, in exercise of its inherent jurisdiction to control its process, is justified in dealing with an abuse of its process and this is so regardless of whether the abuser might in fact otherwise have had a good case on the merits.

[17] Counsel for Mr. Brake relies on these statements of Green, C.J.N. to support his submission that the necessary and appropriate remedy is that both *ex parte* orders be vacated and in particular the Contempt Appearance Order.

[18] I do not interpret Green, C.J.N.'s statements as meaning that a material misstatement or non-disclosure will automatically result in an *ex parte* order being vacated. Instead, I interpret them as simply saying that such a circumstance would be a sufficient basis for a court to vacate an *ex parte* order. Whether in a particular case the court should do so is in my view very much fact specific and a discretionary decision for a court.

[19] There was no discussion in the **Canadian Paraplegic Association** decision of the types of situations where a material misstatement or non-disclosure should result in a vacating of an *ex parte* order or of the factors to be considered when making that determination. That is not at all surprising given the egregious set of facts before the court in that case which could not have resulted in any relief short of the vacating of the ex parte order.

[20] It is interesting to note, however, what Sharpe, J. had to say in his decision in **United States** regarding the assessment of the duty of full and frank disclosure. At paragraph 31 he said:

> 31 The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. *Ex parte* applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See *Mooney v. Orr*, (1994) 100 B.C. L.R 2d 335; *Rust Check v. Buchowski* (1994) 58 CPR 3d 324.

in my view these comments of Sharpe, J. are not inconsistent with the comments of Green, C.J.N. in the **Canadian Paraplegic Association** decision referred to earlier.

[21] Further in **Prodigy Graphics Group Inc. v. Fitz-Andrews**, [2000] O.T.C. 237, 96 A.C.W.S. (3d) 177, Cameron, J. considered the issue of a material non-disclosure in the context of whether an injunction should be set aside. At paragraph 162 he said:

> 162 Even if there had not been a trial, innocent non-disclosure or the mere omission of a significant single fact will not necessarily warrant dissolving an injunction. The non-disclosure or misstatement must be such as was material to the decision and either would have made the decision doubtful or may have affected the outcome of the motion: *Waites v. Alltemp Products Co.* (1987), 19 C.P.C. (2d) 185 (Ont. Dist. Ct.) (Ont.Dist.Ct.).; *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1994), 23 C.P.C. (3d) 72 (Alta. C.A.) (Alta.C.A.) affirming (1993), 23 C.P.C. (3d) 49 (Alta. Q.B.); *Pulse Microsystems Ltd. v. SafeSoft Systems*

> *Inc.* (1996), 47 C.P.C. (3d) 360 (Man. C.A.); *Girsberger v. Kresz* (1998), 19 C.P.C. (4th) 57 (Ont. Gen. Div.).

[22] The effect of material non-disclosure was also considered by Perell, J. in **O2 Electronics Inc. v. Sualim**, 2014 ONSC 5050, where he said at paragraphs 74 – 75:

> [74] If there is material non-disclosure, the court may dissolve the injunction notwithstanding that it otherwise would have been appropriate to continue it: *Forestwood Co-operative Homes Inc. v. Pritz*, [2002] O.J. No. 550 (Div. Ct.); *Bardeau, Ltd. v. Crown Food Services Equipment Ltd.* (1982), 1982 CanLII 1773 (ON SC), 38 O.R. (2d) 411 (H.C.J.).
>
> [75] However, the court has discretion and may continue an interlocutory injunction, if the undisclosed facts were not material or the non-disclosure was not intentional. In exercising its discretion to continue the injunction in circumstances of non-disclosure, the court should consider: (a) the practical realities that there is often urgency or an emergency that explains why the motion is made without notice; (b) whether facts were intentionally suppressed or whether simple carelessness or ignorance was the cause of the non-disclosure; (c) the pervasiveness of the non-disclosure; (d) the difficulty of determining what is a material or an immaterial non-disclosure; and (e) the significance to the outcome of the motion of the matters that were not disclosed to the court: *Ontario Realty Corp. v. P. Gabriele& Sons Ltd.*, [2000] O.J. No. 4341 (S.C.J.); *Bell ExpressVu Ltd. Partnership v. Rodgers*, [2007] O.J. No. 4569 (S.C.J.); *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.).

[23] Perell, J. suggests that a court can continue an injunction even if undisclosed facts were material provided that the non-disclosure was not intentional. This statement is also not inconsistent with the comments of either Green, C.J.N. in **Canadian Paraplegic Association**, Cameron, J. in **Prodigy Graphics Group Inc**. or Sharpe, J. in **United States**, given that neither of them took the position that material non-disclosure meant the automatic vacating of an *ex parte* order.

[24] My view of the foregoing authorities leads me to the following conclusions:

1) A non-disclosure or misstatement can only result in the vacating of an *ex parte* order where it is material;

2) A material, non-disclosure or misstatement will not automatically mean an *ex parte* order will be vacated; and

3) Whether an ex parte order, obtained where there has been a material, non-disclosure or misstatement, should be vacated is a discretionary decision for a court.

[25] As for the factors to be considered by a court in determining how to exercise its discretion when asked to vacate an *ex parte* order I do not believe it would be advisable to try and outline an exhaustive list. In the specific context of injunctions, the list outlined by Perell, J. in **O2 Electronics** is in my view thorough, but I do not believe Perell, J. intended it to be exhaustive. Some of the factors listed by Perell, J. have broader application to the question of whether any *ex parte* order, not only injunctions, should be vacated while others seem to be largely applicable to injunctions. In my view the factors to be considered depend on the particular circumstances of each case including the type of *ex parte* order under consideration. *Ex parte* orders can have wide-ranging purposes and impacts and these should be examined in making a decision whether to vacate the order. It is also my view that consideration of the particular type of *ex parte* order and its purpose and impact is consistent with the underlying rationale behind the duty of full and frank disclosure applicable to applicants for *ex parte* orders and in particular the concern about the potential injustice to the person impacted by the order without having an opportunity to be heard. The more consequential the impact of the *ex parte* order the greater the potential injustice to the person impacted by it and the greater the likelihood it will be vacated in the event of material non-disclosure.

THE QUESTION OF MATERIALITY

[26] In any case such as this the first question that should be addressed is whether or not the facts not disclosed or misstated were material. If they were not material

then that ends the analysis since the non-disclosure or misstatement of a non-material fact would not constitute grounds to vacate an *ex parte* order.

[27] What is meant in this context by the term material? Perell, J. in **O2 Electronics Inc**. defined it quite succinctly at paragraph 72 where he said:

> [72] A material fact is one that the court may need to know in coming to its decision and that if not disclosed may affect the outcome of the decision: *Pazner v. Ontario* (1990), 1990 CanLII 6649 (ON SC), 74 O.R. (2d) 130 (H.C.J.).

[28] Sharpe, J. in **United States** noted that the test of materiality is an objective one. At paragraph 36 he stated:

> 36 It is also clear from the authorities that the test of materiality is an objective one. Again to quote the *Gee* text at page 98:
>
> ...The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed.

[29] The essential fact that Mr. Brake argues was material was that at all relevant times he was a journalist actively engaged in covering a news story namely the protests against the Muskrat Falls Project. It is agreed that Nalcor was aware of this fact at the time they made their *ex parte* applications. It was further agreed that Nalcor was not aware of any unlawful activities on the part of Mr. Brake other than the fact he trespassed on the Muskrat Falls construction site. It was acknowledged by Mr. Brake for purposes of the hearing of this application that his trespassing was in violation of the Injunction Order. Finally, Mr. Brake specifically acknowledged that there was no suggestion that Nalcor was

intentionally attempting to mislead the court by deliberately withholding these facts from the court.

[30] Mr. Brake does not put forward any real explanation as to why his status as a journalist covering a story is a material fact which ought to have been put before the court. In his Brief filed by his counsel it is stated at paragraph 15:

> 15. The Applicant submits that it is plain and obvious that the fact of the Applicant being engaged as a journalist is, indeed, material. While the specific rights and obligations of a journalist in the coverage of events of protest and civil disobedience is not at issue on this particular Application, the Applicant does note the special status of a free press, as enshrined at Paragraph 2(b) of the *Charter of Rights and Freedoms*:
>
> > "2. Everyone has the following fundamental freedoms:
> >
> > (a) freedom of conscience and religion;
> >
> > (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> >
> > (c) freedom of peaceful assembly; and
> >
> > (d) freedom of association.

[31] How is it that it is "plain and obvious that the fact of the Applicant being engaged as a journalist" was material? To be a material fact it must be a fact that objectively viewed may have affected the outcome of the *ex parte* applications. It is my view that in order for this to be the case then Mr. Brake, as a journalist, must have had some special status or right that applied to his coverage of the protests against the Muskrat Falls Project, including his trespass on the Muskrat Falls construction site in contravention of the Injunction Order. The nature of such special status or right would have to have been such that if known, it may have changed the outcome of the *ex parte* applications.

[32] Mr. Brake in his Brief and in oral argument pointed to the special status of the free press as enshrined in section 2(b) of the *Canadian Charter of Rights and Freedoms*, section 11, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11. Section 2 in its entirety provides as follows:

> **2.** Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion;
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (*c*) freedom of peaceful assembly; and
>
> (*d*) freedom of association.

[33] I was not pointed to any authority which supported the view that in circumstances as were present in this case a member of the press such as Mr. Brake has any special status or right by virtue of section 2 of the *Charter*. Nor was I referred to any other authority which supported the view that Mr. Brake has any special status or right on any other legal basis that would be applicable in this case.

[34] There is however, authority for the contrary view. In **McLeod v. Canada (Armed Forces)**, [1991] 1 F.C. 144, 2 C.R. (3d), Joyal, J. of the Federal Court of Canada – Trial Division was called upon to consider the issue of whether freedom of the press as granted by section 2(b) of the *Charter* conferred any special status on the media in the context of that case.

[35] In that case certain journalists who were covering a stand-off between an aboriginal group and the Canadian Armed Forces applied to the Federal Court for injunctive relief. The Armed Forces had been tasked with the job of dismantling barricades erected by the aboriginal group and had succeeded in their task to the point where they had established a perimeter around a detoxification centre to which members of the aboriginal group had retreated. The journalists had decided to stay within the perimeter and cover the story. Initially the Armed Forces allowed the delivery of food and supplies to the journalists directly, separate from

the supplies which were being delivered to the members of the aboriginal group. The Armed Forces subsequently halted the delivery of supplies directly to the journalists beginning first with halting the delivery of supplies necessary for their work as journalists and then later halting the delivery of food and other necessaries of life. The injunctive relief applied for by the journalists was an order preventing the Armed Forces from stopping delivery of food and supplies. The journalists claimed that the actions of the Armed Forces infringed upon their section 2(b) *Charter* rights.

[36] Joyal, J. after reviewing both Canadian and U.S. court decisions dismissed the application of the journalists. He concluded that journalists enjoyed no special status and stated at paragraph 35:

> 35 In such circumstances, it is my view that the principle applied in both U.S. and Canadian jurisprudence is applicable to the issue before me. Freedom of the press as a concept does not confer any special status on media people. Should a journalist in quest of news put himself in a dangerous situation, he has no greater right to protection than his neighbour. If he should decide to file stories "Behind Warrior Lines" as the plaintiff MacLeod so headnoted his articles in the Ottawa Citizen, it does not create a concomitant duty to people in front of the same lines to provide him with special treatment. If a journalist, in the centre of an armed confrontation, feels it his professional duty to remain there, he cannot impose on any person an obligation to do all that would be necessary to keep him there. If a journalist freely and voluntarily hazards the security of his person to fulfil his functions, I know of no principle of law granting him immunity from the consequences of his conduct. Finally, if as stated in *Branzburg v. Hayes*, supra, a journalist has no constitutional right of access to scenes of crime or disaster when the general public is excluded, I should fail to see how he might gain constitutional protection when he voluntarily remains in a compound under siege.

[37] I agree with this statement of Joyal, J. and I am of the view that it is directly applicable to the circumstances now before this Court. Mr. Brake did not have any special status in this case because of the fact he is a journalist. He was no more entitled to violate the Injunction Order by trespassing on the Muskrat Falls construction site than were any non-journalists named in the Contempt Appearance Order who trespassed on the site.

[38] As a result, I am unable to conclude that Mr. Brake's status as a journalist, viewed objectively, might have affected the outcome of the *ex parte* applications. Therefore, this fact was not a material fact in my view and need not have been brought to the court's attention on the application for the *ex parte* orders.

[39] As a result of my conclusion that Mr. Brake's status as a journalist was not a material fact it is not necessary for me to go on to consider whether the circumstances here are such that I should exercise my discretion to vacate or modify either or both of the *ex parte* orders.

[40] However, even if Mr. Brake's status as a journalist was a material fact I am of the view that the circumstances of this case are such that I would not have exercised my discretion to vacate or modify either of the *ex parte* orders.

[41] As mentioned earlier the nature and consequences of an *ex parte* order are factors that should be taken into consideration when deciding whether to vacate or modify such an order. Thus, in a case such as this where there are two orders under consideration there could be different results in respect of each order because of differences in their nature or consequences.

[42] However, while there are differences in the nature and consequences of the Injunction Order and Contempt Appearance Order as they relate to Mr. Brake, these differences are not significant in my view and would not have caused me to decide differently in respect of the Injunction Order as opposed to the Contempt Appearance Order. The Injunction Order was not directed specifically at Mr. Brake and had no consequence for him as long as he complied with it. The Contempt Appearance Order was directed at him as one of the 22 named individuals and it did require him to appear in court to respond to contempt of court allegations against him. Thus, while there is no doubt that the Contempt Appearance Order had some consequence to Mr. Brake, I do not consider that consequence to be very serious. At its essence it merely gave him notice of the contempt proceeding against him and required him to appear in court to respond to that proceeding. Counsel for Mr. Brake argued that the Contempt Appearance Order was akin to a warrant of arrest for Mr. Brake as it authorized the Sheriff to

take him into custody. However, I do not agree that this is a reasonable interpretation of the Contempt Appearance Order. The only circumstance whereby Mr. Brake could have been arrested and brought before the court was if he refused to leave the project site or refused to cease blocking access to the project site. If he left the project site or ceased blocking access to the project site, as the case may have been, the Contempt Appearance Order simply provided that he be required to appear in court at a later date. That is precisely what happened to Mr. Brake.

[43] Thus, while there was some consequence to Mr. Brake as a result of the Contempt Appearance Order, it was insignificant. I see no consequence to Mr. Brake from the Injunction Order given that in simple terms it enjoined activity that was in and of itself unlawful. The absence of any significant consequence to Mr. Brake as a result of either *ex parte* order weighs against vacating or modifying same.

[44] A further factor which would weigh against vacating or modifying the *ex parte* orders is the fact that the failure to identify Mr. Brake as a journalist covering the protests was not intentional.

[45] Similarly, the fact that Mr. Brake has not in any manner been deprived of the ability to fully challenge the Injunction Order or the contempt of court proceedings against him also weighs against vacating or modifying the *ex parte* orders.

[46] Overall, when you consider the rationale behind the duty of full and frank disclosure, that being to mitigate the risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side, I fail to see any prejudice to Mr. Brake in this case.

[47] As a result, even if there were non-disclosure of material facts here (which I have found was not the case) then in my view the circumstances in this case were such that I would not have exercised my discretion to vacate either the Injunction Order or the Contempt Appearance Order.

SUMMARY AND CONCLUSION

[48] Mr. Brake's status as a journalist was not a material fact and there was no obligation on Nalcor to bring that fact to the attention of the Court on their application for the Injunction Order or the Contempt Appearance Order.

[49] Further, even if Mr. Brake's status as a journalist was a material fact which ought to have been brought to the attention of the court, in the circumstances of this case I would not exercise my discretion to vacate either the Injunction Order or the Contempt Appearance Order.

[50] As a result of the foregoing the application of Mr. Brake is dismissed.

COSTS

[51] In this case there is a claim for costs by each party. Costs are ordinarily awarded to a successful party on an Interlocutory Application, however, on the facts of this case I believe it is appropriate to depart from the ordinary result and instead make no order as to costs.

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GEORGE L. MURPHY
Justice