November 9th, 2009

Reasonable or resolute? Musings on the obligation of lawyers to grant reasonable requests for extensions

By Alice Woolley

Cases Considered:

Moose Mountain Buffalo Ranch v. Greene Farms Drilling Ltd., 2009 ABQB 489

Moose Mountain Buffalo Ranch and Greene Farms Drilling Ltd. entered into a contractual agreement pursuant to which Greene Farms undertook to service a deep water well and drill for water on lands owned by Moose Mountain. The lands are in Saskatchewan, and Greene Farms operates in Saskatchewan, but Greene Farms is extra-provincially registered in Alberta.

The execution of the contract led to unhappiness and dispute between the parties. In May, 2008 Greene Farms commenced an action in Saskatchewan alleging that it had not been paid by Moose Mountain for its work under the contract. In August, 2008 it noted Moose Mountain in default and obtained a default judgment for the funds owing. That default judgment was set aside in March, 2009 on application by Moose Mountain.

On November 17, 2008 Moose Mountain filed a Statement of Claim in Alberta alleging that Greene Farms had breached its contractual obligations to Moose Mountain, and had damaged Moose Mountain's water supply. The Statement of Claim was served on Greene Farm's registered office in Alberta on December 2 and faxed to Greene Farms in Saskatchewan on December 3. On December 16 Greene Farms retained Robin Gurofsky, of Borden, Ladner Gervais to represent them. Aware of the pending deadline to file the Statement of Defence, Ms. Gurofsky attempted to contact the lawyer listed on the Statement of Claim that day. Receiving no response, on December 17 she contacted the lawyer's firm, Olson Lemons, and was told that he was no longer there, and that the matter was now being handled by Peter Graburn of that firm. She contacted Mr. Graburn who advised her that the Statement of Defence was required to be filed that day (Ms. Gurofsky did not know that, in fact, the Statement of Claim was served December 2), that no extension to file would be granted and that on the morning of December 18 he would be attending at the Court house to note Greene Farms in default. She twice more requested extensions to the time limit that day, and both times Mr. Garburn refused.

Ms. Gurofsky had some difficulty contacting her client on the 17th to obtain instructions on filing the Statement of Defence and in fact was unable to do so until 5:30. Once she had instructions she immediately prepared the Statement of Defence, which she e-mailed to Mr. Graburn at 10:22PM on December 17th.

On the morning of December 18th both Ms. Gurofsky and Mr. Graburn attended at the Court of Queen's Bench, Ms. Gurofsky to file the Statement of Defence and Mr. Graburn to file a Praecipe to Note in Default. Mr. Graburn was ahead of Ms. Gurofsky in line, with the result that the Praecipe was filed at 8:19AM and the Statement of Defence was filed at 8:20AM.

Greene Farms then brought an application to set aside the Praecipe to Note in Default pursuant to Rule 158 of the *Alberta Rules of Court*, Alta. Reg. 390/1968. Rule 158 permits a Court to allow a party who has been noted in default to file a defence. The Rule has been held to give the Court a general discretion to do what is fair. That discretion must be exercised judicially, and will take into account such factors as whether the default was unintentional, whether an application to set aside was brought immediately and whether the defendants have a meritorious defence (*Don Reid Upholstery Ltd. v. Patrie* (1995) 32 Alta. L.R. (3d) 231 (Q.B.), para. 24).

The application was granted to Greene Farms. Justice Brian Burrows noted that in asserting the Defendant to be in default the Plaintiff was relying on "the thinnest of technicalities" (para. 11). He also noted the obligation under the Alberta Code of Professional Conduct for lawyers to agree to reasonable requests for extensions of time. While that Rule was not determinative, it was a basis on which the Court could rest the exercise of its discretion under Rule 158 to set aside the Praecipe to Note in Default. Justice Burrows also noted precedent in which Rule 158 had been exercised in like circumstances and that, in those cases, it was not found to be necessary to assess the merits of the likely defence to be filed. Justice Burrows also found, however, that in this case the Defendant has a meritorious defence that should be determined. Justice Burrows acknowledged the explanation offered by Mr. Graburn for his refusal to consent to the extension of time, which related to Moose Mountain's perception that Greene Farms had acted improperly with respect to the Saskatchewan action. He concluded, however, that "[t]his may explain. It does not excuse" (at para. 14).

Justice Burrows' judgment is persuasive and well reasoned. It raises, though, some interesting questions about the nature of the ethical duties owed by counsel in a circumstance such as this. Specifically, it seems in this case that, regardless of the conduct of counsel, there would be a good basis for setting aside the Praecipe to Note in Default. The default was minimal and explicable, causing no prejudice to the Plaintiff, in part because counsel for the Defendant took numerous steps to ensure that the Plaintiff was informed and received the information as soon as it was available. Further, the defence itself is meritorious.

But what if it had not been? What if counsel was not retained for some longer period of time, or the defence was not meritorious? Should the unyielding nature of plaintiff's counsel be sufficient to grant to a defendant something to which it was not otherwise entitled?

The answer to this question requires analyzing the nature of, and basis for, asserting an ethical duty on a lawyer to grant a request for an extension of time. In particular, lawyers are resolute advocates for their clients, and owe those clients a duty of loyalty, fettered only by their simultaneous duty to ensure respect for legality and the functioning of the justice system. Most rules with which lawyers are required to comply reflect some attempt to ensure the achievement of one of these goals (e.g., conflicts rules which help ensure the achievement of loyalty) or to provide a balance between them when they are in conflict (e.g., advocacy rules which require

lawyers to correct misrepresentations to the court and provide the court with relevant adverse authority). The place of this rule in that architecture is, however, more difficult, particularly if it is interpreted as placing a stringent duty on lawyers to grant such extensions. The rule undermines resolute advocacy, because requiring a lawyer to act against his client's interests and legal entitlements, and its place in fostering the achievement of legality is uncertain, since what the lawyer is arguably being required to do is to give an advantage to the other side beyond that to which it is legally entitled, as reflected in the structure of the time limits imposed.

Some explanations given for this rule are that it ensures civility and courtesy between counsel. The difficulty with these explanations is, though, that they are as susceptible to attack as they are likely to provide sufficient justification for the rule. If a client's rights are at issue, on what principled basis could we justify qualifying those rights so as to ensure that counsel have pleasant dealings with each other? While fostering pleasant dealings is a good thing to do, all other things being equal, doing so should not take priority over the fundamental ethical obligations the lawyer owes to her client and to the administration of justice.

I would argue that the rule can be justified within the normal principles that underlie regulation of lawyer conduct, but only if the rule is understood as qualified in its application. Specifically, a request for an extension of time should only be judged as "reasonable" where it is an extension that the requesting lawyer would be able to obtain were he or she to ask a court for it, either in advance or afterwards in the form of a Rule 158 type application. If a court would grant such an extension then asking the lawyer on the other side to do so can be understood as an ordinary course qualification on resolute advocacy in order to protect legality, both in terms of putting some obligation on the lawyer to do what a court would do in the same circumstances, and in terms of ensuring that the court's resources are not wasted through an unnecessary application.

Where, though, the court would not - or might not - grant such an extension, the lawyer should not be obliged to do so. In that case the lawyer seeking the extension should be required to apply for it, and to have that application adjudicated by the court. Moreover, when the lawyer does so the fact that the lawyer on the other side declined to grant the request in advance should not be determinative. Otherwise the lawyer's client is being asked to give up her legal rights, as reflected in the time limits, simply because her lawyer sought to assert them on her behalf.

In terms of this judgment, I would argue that this perspective supports Justice Burrows' consideration of the broader elements of the Rule 158 test, and his resistance to considering only the lawyer's refusal to agree to the extension. It is only if a Rule 158 application would otherwise be ordered that the lawyer's refusal should be significant.

To put it slightly differently, the lawyer's refusal should be significant in the matter of costs of the application; it should not be significant in the decision to grant (or refuse) the application.