NOVA SCOTIA COURT OF APPEAL
Citation: *Allen v. Royal Canadian Legion*, 2007 NSCA 44

Date: 20070419
Docket: CA 273709
Registry: Halifax

Between:

Donald Allen, a member of the Royal Canadian Legion and the branch thereof formerly chartered under the name "Scotia" Branch, and a representative of a number of persons who are former members of the Scotia Branch, Royal Canadian Legion, Halifax, Nova Scotia

Appellant

v.

Nova Scotia - Nunavut Command, a Provincial Command of the Royal Canadian Legion

Respondent

Revised judgment: The text of the original judgment has been corrected according to the erratum dated April 20, 2007.

Judges: Roscoe, Oland and Fichaud, JJ.A.

Appeal Heard: March 26, 2007, in Halifax, Nova Scotia

Held: Appeal is allowed without costs; motion to dismiss the statement of claim is dismissed per reasons for judgment of Fichaud, J.A.; Roscoe and Oland, JJ.A. concurring.

Counsel: Allen C. Fownes, for the appellant
David A. Cameron and H. Jane Anderson, for the respondent

Reasons for judgment:

[1] The chambers judge, on an interlocutory motion, dismissed the plaintiff's action because (1) the claim offended the six month limitation for *certiorari*, (2) laches barred the claim, and (3) the plaintiff did not follow an internal appeal process. The plaintiff appeals. The issues are whether the chambers judge properly applied the *certiorari* limitation and laches, and whether she should have left arguable factual issues respecting the internal appeal process for determination at trial.

Background

[2] The plaintiff Mr. Allen belonged to the Royal Canadian Legion's Scotia Branch. He sued as representative of other Scotia Branch members. The defendant Nova Scotia - Nunavut Command ("NS-N Command") manages the Legion's activities in Nova Scotia.

[3] Mr. Allen's statement of claim says that the value of Scotia Branch's assets, including realty in Halifax, exceeded $3,000,000, subject to a mortgage for $380,000.

[4] Scotia Branch suffered financial difficulties, with consequences that culminated in late 2003.

[5] According to Mr. Allen's statement of claim, filed in April 2006, the NS-N Command caused the revocation of Scotia Branch's charter. The revocation occurred in December, 2003. Mr. Allen alleges that (1) the revocation contravened the Legion's by-laws and (2) the NS-N Command improvidently sold Scotia Branch's assets and misappropriated the assets and proceeds of realization, contrary to the Legion's by-laws. The statement of claim requests (1) a declaration that the charter was improperly revoked (2) damages and (3) an order for restoration of unrealized assets to Scotia Branch.

[6] NS-N Command's defence dated May 12, 2006 states that Scotia Branch's mortgagee had threatened foreclosure, and that the charter's revocation, the asset realization and the disposition of the proceeds complied with the Legion's by-laws.

NS-N Command filed an amended defence dated July 26, 2006 to add the following allegations relevant to the issues under appeal:

> 11A The Defendant further states that the Bylaws contained provisions allowing the decision of the President of Dominion Command to revoke Scotia Branch's Charter to be appealed, but at no time has the decision of the President of Dominion Command to revoke Scotia Branch's Charter been appealed.
>
> 11C The Defendant further states that the remedy being sought by the Plaintiff, an order in the nature of *certiorari*, should not be granted by this Honourable Court as the Plaintiff is estopped from seeking the intervention of this Honourable Court on one, the other, or both of the following ground, namely,
>
> (a) the Plaintiff's failure to avail himself of the appeal process contained in the Bylaws; and
>
> (b) the Plaintiff's failure to bring this action within six months of the decision complained of as required by the Civil Procedure Rules.

[7] NS-N Command filed an interlocutory notice dated July 25, 2006, seeking:

> ... an Order dismissing the Plaintiff's claim on the following grounds:
>
> (a) The Plaintiff's failure to avail himself of the complaint process contained in the Bylaws made pursuant to An Act to Incorporate The Royal Canadian Legion, Chapter 84 of the Statutes of Canada 1948, as amended;
>
> (b) The Plaintiff's failure to bring this action within six months of the decision complained of in the Statement of Claim as required by Rule 56.06 of the Civil Procedure Rules.

The interlocutory notice did not cite any *Civil Procedure Rule* that authorizes interlocutory dismissal of an action, such as *Rules* 14:25 (striking a claim) or 13 (summary judgment). The interlocutory notice did not cite as a ground that the statement of claim failed to disclose a cause of action.

[8] *An Act to Incorporate the Royal Canadian Legion*, S.C. 1948, ch. 84 as amended, s. 9(6) authorizes an appeal from revocation of a charter:

> 9(6) The president of the dominion command may, after enquiry and for cause clearly stated, revoke or suspend the charter or powers of any command, branch or auxiliary or suspend any officers thereof and such action is appealable in accordance with by-laws made in this regard.

[9] The NS-N Command's evidence for the motion included an affidavit of Jack Hatcher attaching the Legion's by-laws, in particular the following provisions cited by the chambers judge and NS-N Command's counsel:

> 418. a. The Dominion President may, after enquiry and for cause clearly stated, revoke or suspend the charter or powers of any command, branch or auxiliary, or suspend any officer thereof or take any other action necessary or advisable for the good of the Legion, and shall report to the Dominion Executive Council upon the action taken.
>
> b. An appeal to Dominion Command may be made by any command, branch, auxiliary or officer affected by such action. The procedure for appeal set out in Article III of these by-laws shall apply to the extent applicable to such an appeal.
>
> 314. a. Where a Complaint Committee:
>
> i. has imposed a penalty of:
>
> (1) expulsion from the Legion;
>
> (2) removal from any office;
>
> (3) suspension for a period of more than 180 days; or
>
> ii. did not conduct the proceedings according to the provisions of this Article; or
>
> iii. made significant errors which affected the fundamental fairness of the hearing or the final decision;
>
> either party to the complaint may appeal as provided by this section.
>
> b. The member against whom a complaint has been lodged may:

i. appeal the decision of the Complaint Committee and the penalty imposed;

ii. appeal the decision of the Complaint Committee without appealing the penalty imposed; or

iii. appeal only the penalty imposed by the Complaint Committee.

c. The complainant may;

i. appeal the decision of the Complaint Committee dismissing the complaint;

ii. not appeal the penalty imposed by the Complaint Committee.

d. Decisions of the Complaint Committee with respect to penalty may only be appealed on the ground that the penalty is excessive in view of all of the circumstances of the complaint.

e. The Party appealing, shall within 30 days of the notice of decision, serve the appeal on the Secretary of the next superior command. The appeal shall state and explain the grounds for the appeal and shall include any evidence and documents submitted to the Complaint Committee. No new evidence shall be accepted.

[10] Justice Robertson heard NS-N Command's motion on August 3, 2006. After the argument, the chambers judge gave an oral decision on August 3 and a written decision dated October 16, 2006 [2006 NSSC 292]. The chambers judge allowed NS-N Command's motion and dismissed Mr. Allen's action. She gave three reasons:

(1) She said that Mr. Allen claimed *certiorari*, and he filed his originating notice outside the six month limitation for *certiorari* applications under *Rule* 56.06.

(2) Mr. Allen's claim was barred by laches.

(3) Mr. Allen failed to pursue the internal appeal procedure from the revocation of Scotia Branch's charter, under the procedure set out in the Legion's by-laws and authorized by s. 9(6) of the Legion's incorporating statute.

[11] Later I will review the chambers judge's reasoning.

Issues

[12] Mr. Allen appeals. His grounds and argument covered some issues that are unnecessary to dispose of the appeal. I organize the pertinent issues as follows:

(1) The chambers judge erred by treating this claim as an application for *certiorari*, and by applying the six month limitation period for *certiorari*.

(2) The chambers judge erred by applying laches.

(3) Respecting the internal appeal process, the chambers judge erred by determining arguable factual matters without applying the restraint required on an interlocutory motion to dismiss an action.

Standard of Review

[13] This is an appeal from an interlocutory order that terminates an action. The court of appeal decides whether there was an error of law resulting in an injustice: *Frank v. Purdy Estate* (1995), 142 N.S.R. (2d) 50 (C.A.) at ¶ 9-10. An error of law that affected the outcome of the chambers judge's ruling, in my view, causes an injustice.

First Issue - Certiorari Limitation Period

[14] **Rule** 56.06 says:

> 56.06. An originating notice for an order in the nature of certiorari shall be filed and served within six (6) months after the judgment, order, warrant or inquiry to which it relates, and rule 3.03 does not apply hereto.

Scotia Branch's charter was revoked in December 2003, and its originating notice (action) was filed in April 2006.

[15] The chambers judge said:

> ... the plaintiffs now come to the court and are seeking remedies in the nature of *certiorari* and declaratory relief...

She concluded the plaintiffs "are out of time and making this application pursuant to CPR 56.06."

[16] The chambers judge mis-characterized Mr. Allen's claim. His statement of claim does not mention *certiorari*. It seeks a declaration and damages. *Rule* 56.06's six month time limitation applies to an application for *certiorari*, not to an action claiming only a declaration and damages.

[17] A declaration is not a synonym for *certiorari*. Declarations are authorized by *Rule* 5.14, not *Rule* 56. In *Ripley v. Investment Dealers Assoc. of Canada* (1991), 108 N.S.R. (2d) 38 (C.A.), at ¶ 31, Justice Freeman acknowledged the remedial distinction respecting decisions of domestic tribunals:

> **[31]** While prerogative writs do not lie against the panel as a domestic tribunal, its proceedings are reviewable for want of jurisdiction or breaches of natural justice, which would include bias, as Madam Justice Roscoe found. The remedy, as in Saskatchewan, would be declaratory or injunctive relief.

[18] Brown and Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing: Toronto, looseleaf edition, 2004), ¶ 1:6000, 1:7100-1: 73-30, discusses the differing features of the declaratory remedy and the prerogative writ of *certiorari*. *Brown and Evans*, ¶ 1:7100, states:

> In the result, the declaration can plausibly claim to be *the* administrative law remedy of the late twentieth century. First, unlike the prerogative orders, it is relatively free from historical limitations and statutory limitation periods.

To the same effect Jones and deVillars *Principles of Administrative Law* (4th ed. Thomson Carswell, 2004) pp. 694-95.

[19] In *Carter v. Pasadena (Town)*, [2000] N.J. No. 71 (NSC) landowners challenged an expropriation. The expropriating authority applied to dismiss the proceeding because it was brought outside the six month limit for *certiorari* applications. The court held that the six month limitation for *certiorari* did not bar the landowners' claim for a declaration:

> 5 The parties agree that an application for declaratory relief is not time barred. However, the Respondents take the position that the application is properly an application for certiorari and that the limitation period for bringing that application has expired (Rules of the Supreme Court, 1986, Rule 54.06). They say the Applicants should not be permitted to avoid the limitation period by seeking declaratory relief, and further, that the Applicants should not be permitted to amend the Originating Application to clarify that only declaratory relief is sought.
>
> 6 One purpose of the Rules of Court is to ensure fairness in the resolution of disputes between litigants. A technical application of the Rules is to be avoided where it would have the effect of denying the Applicants the right to a judicial determination of their allegation that the expropriation of their land was invalid. Judicial authority and legal texts support the proposition that declaratory relief is available as an alternative to certiorari.
>
> 7 Counsel did not submit any authority for the proposition that declaratory relief should be denied where the limitation period for relief by way of certiorari has expired. Indeed, in Jones and de Villars, Principles of Administrative Law (2nd edition, Carswell, Toronto, 1994) the contrary proposition is stated at page 554:
>
> > Declaratory relief rather than the prerogative order of certiorari has been pursued for a number of reasons, including: the absence of a statutory limitation provision in the case of declarations; ...
>
> . . .
>
> 14 In this case, due to the expiration of the limitation period, the Applicants are not able to access the procedure that would provide them with the most desirable remedy should their argument succeed. However, declaratory relief is not time barred. There is no reason in principle to prevent the Applicants from proceeding with this alternative. They do so knowing the limitations regarding the available relief.

[20] These principles are apt in the circumstances of this case.

[21] The chambers judge erred in law by applying the six month limitation in *Rule* 56.06.

[22] I do not comment on whatever limitation period may apply to Mr. Allen's claim. The defence has not pled a limitation other than *Rule* 56.06.

Second Issue - Laches

[23] The chambers judge said:

> [9] Mr. Allen was not denied any right of appeal under the by-laws of the Royal Canadian Legion. He simply chose not to take that course of action and sought legal representation more than two years after the fact to seek a judicial remedy. In these circumstances the doctrine of laches does apply.
>
> ...
>
> [13] The remedy sought is an equitable remedy. The doctrine of laches does apply in these circumstances. It would [be] impossible for this court to give redress or provide a remedy several years after the fact. After revocation the branch was sold. It no longer exists. Members are disbursed [sic] and the assets have been sold.

[24] Neither NS-N Command's defence or amended defence, nor its interlocutory notice, nor its memorandum to the chambers judge for this application mentioned laches. The first reference to laches was by counsel for the NS-N Command in oral argument on August 3, 2006, the day of the chambers judge's oral decision.

[25] In my respectful view, the chambers judge made three errors of law by applying laches to dismiss the action.

[26] First, the chambers judge erred by dismissing the action on a ground not mentioned in the interlocutory notice. No amendment to the notice was sought. The purpose of an interlocutory notice is just that - to give notice. A claim should not be dismissed from a mid-hearing afterthought on an interlocutory motion.

[27] Second, laches is an affirmative defence, like a limitation, that the statement of defence must plead. Mew, *The Law of Limitations* (LexisNexis Butterworths, 2nd ed.), p. 41 says:

> Further, if the defendant does not plead laches, it cannot be invoked, . . .

See also *Mew*, pp. 91-93 and *C.P.R.* 14.14(c). The chambers judge erred by invoking this unpleaded defence.

[28] Third, the chambers judge assessed the merits of laches in this interlocutory motion.

[29] In *K.M. v. H.M.*, [1992] 3 S.C.R. 6, at pp. 77-78, Justice LaForest discussed laches:

> ... A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, *supra*, at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb. ...
>
> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

In *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, ¶ 109, Justice Binnie reiterated Justice LaForest's comments.

[30] *Mew* , pp. 39-40 says:

> Accordingly, in determining whether the doctrine of laches should be invoked to bar a plaintiff's remedy, the court will have regard, not only to the actual period of delay, but also to the affect upon third parties and the balance of justice or injustice to the parties that will result from its granting or refusing

> relief. In contemporary parlance, there must exist some prejudice to the defendant for equity to impose a bar.
>
> There is no fixed or optimum time-limit that governs the application of the doctrine of laches. Each case must be considered in the context of its surrounding circumstances. In the view of one judge:
>
> > ... in this realm of law [laches, acquiescence, and delay] ***each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist.*** [emphasis added]

[31] The application of laches follows an evidence laden inquiry that, here, clearly involves arguable issues of fact. A chambers judge, hearing an interlocutory motion to dismiss an action, should leave arguable factual issues for trial. This principle applies to limitations and laches as it does to other defences - see *Merner v. NS Assn. of Health Organizations LTD Plan Trust Fund*, 2001 NSCA 142 at ¶ 13-17; *Myers v. Maritime Life Assurance Co.*, 2001 NSCA 93 at ¶ 3-4. I will discuss this principle more fully below, under the third issue. The chambers judge erred in law by rendering judgment on laches before trial.

[32] The chambers judge applied laches to all Mr. Allen's claims. I do not comment on whether each of Mr. Allen's claims is equitable, whether laches would apply to any of Mr. Allen's claims or on the merits of any applicable laches defence.

Third Issue - Alternative Remedy

[33] Section 9(6) of the Legion's incorporating statute says:

> 9(6) The president of the dominion command may, after enquiry and for cause clearly stated, revoke or suspend the charter or powers of any command, branch or auxiliary or suspend any officers thereof and such action is appealable in accordance with by-laws made in this regard.

[34] Legion By-laws 314(e) and 418 state:

> 314. e. The Party appealing, shall within 30 days of the notice of decision, serve the appeal on the Secretary of the next superior command. The appeal shall state and explain the grounds for the appeal and

> shall include any evidence and documents submitted to the Complaint Committee. No new evidence shall be accepted.
>
> 418. a. The Dominion President may, after enquiry and for cause clearly stated, revoke or suspend the charter or powers of any command, branch or auxiliary, or suspend any officer thereof or take any other action necessary or advisable for the good of the Legion, and shall report to the Dominion Executive Council upon the action taken.
>
> b. An appeal to Dominion Command may be made by any command, branch, auxiliary or officer affected by such action. the procedure for appeal set out in Article III of these by-laws shall apply to the extent applicable to such an appeal.

[35] The chambers judge said:

> [7] Section 314(e) of the by-law specified that the decision to revoke can be appealed within 30 days of the notice of the decision. Read together with section 418, dealing with special powers of the president and the Command to revoke or suspend a Charter, it is clear that an appeal procedure is laid out in Article 3.

The chambers judge said she adopted the approach of Justice Beetz in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. She concluded:

> [16] There was an appeal process. Had it been followed, then the court would assume jurisdiction and review the decision of that body.
>
> [17] It is inappropriate to come to the court years after the fact and ask for a remedy.

[36] In my view, the chambers judge's interlocutory dismissal of the action based on the internal appeal procedure erred in principle.

[37] In *Harelkin*, the university asked the student to withdraw. Instead of following an internal university appeal procedure, the student sought *certiorari* and *mandamus*, granted by the trial judge. The Supreme Court of Canada held that *certiorari* and *mandamus* were discretionary remedies and, in the exercise of his discretion, the trial judge should have considered the adequacy of the internal appeal procedure. Justice Beetz said (p. 564):

> In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors included the burden of a previous finding, expeditiousness and costs. ...

[38] A declaration, like a prerogative writ, is discretionary. So the court may consider the availability of alternative remedies in the exercise of its discretion. *Jones and deVillars*, p. 698 says:

> Finally, it should be noted that the courts may, in their discretion, refuse to grant declaratory relief if there exists an adequate alternate remedy which the applicant ought to pursue.

See also: *Kourtessis v. Canada (M.N.R.)*, [1993] 2 S.C.R. 53 at ¶ 45-46, 51, per LaForest J.; *Halsbury's Laws of England* (Fourth Edition Reissue 2001) vol. 1(1), ¶ 122.

[39] In *Canada (Auditor General) v. Canada (Minister of Energy Mines and Resources)*, [1989] 2 S.C.R. 49 at pp. 93-96, and in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at ¶ 30-37 Chief Justices Dickson and Lamer respectively confirmed that the adequacy of alternative remedies is a discretionary analysis of an open-ended list of factors. In *Kingsbury v. Heighton*, 2003 NSCA 80 at ¶ 100-101, this court adopted these principles.

[40] Mr. Allen's statement of claim challenges (a) the revocation of the charter, and (b) given the revocation, the alleged misappropriation of the assets and proceeds of realization of assets of the revoked Scotia Branch. The claim for misappropriation is made even if the charter was properly revoked.

[41] Section 9(6) of the Legion's incorporating statute and Legion By-law 418, provide an appeal process from a decision of the Dominion President to revoke the charter. By-law 314 provides an appeal from a penalty imposed by a Complaint Committee. It is not apparent that these provisions authorize an appeal of a

decision by the NS-N Command concerning the appropriation, sale or use of assets or proceeds of assets that formerly belonged to the Scotia Branch.

[42] The chambers judge concluded that, as the revocation of the charter was appealable internally, Mr. Allen's entire action, including the misappropriation claim, should be dismissed. In my view, she failed sufficiently to consider the key *Harelkin* factors, namely the adequacy of the appeal procedure for the misappropriation claim and the manner in which the appeal body would exercise its powers respecting the misappropriation claim.

[43] In *Kingsbury v. Heighton* at ¶ 103-131, Justice Chipman's reasons illustrate the factual delicacy of the alternative remedy analysis. The distillation of the open-ended list of factors (*Matsqui* ¶ 37) involves a significant evidentiary inquiry in Mr. Allen's case.

> (a) Mr. Allen alleges that the assets produced a surplus that was kept from the former Scotia Branch membership and was used for the benefit of the NS-N Command. NS-N Command disputes these allegations. I have mentioned earlier that there is at least an ambiguity whether the misappropriation claim is governed by the appeal by-laws that the chambers judge considered - Articles 314 and 418. The by-laws contain other provisions, such as Articles 120 and 121 relating to the holding of property and the dissolution of a branch or command. The chambers judge did not consider whether those by-laws applied. The impact of an internal appeal procedure on those provisions is not discussed in the evidence. Article 304(a)(vi) establishes a complaint procedure for misappropriation of Legion funds or property by a "member". It is unclear whether this procedure applies to Mr. Allen's allegations against the NS-N Command. These are issues of mixed fact and interpretation that should be resolved at trial.
>
> (b) The chambers judge's key finding was:
>
> > [1] ... In these circumstances the Provincial Command are required to make the hard decision to close a legion, revoke a Charter, and sell off the assets to meet the legion's financial commitments. That is indeed what transpired in this case.

Mr. Allen contests this fact. Whether NS-N Command was "required" to sell off all the assets to meet Scotia Branch's liabilities is central to Mr. Allen's misappropriation claim.

(c) Mr. Allen pleads that the revocation was done by NS-N Command. There is an arguable factual issue whether or not the decision to revoke was made by the authority named in s. 9(6) of the *Act*, (the Dominion President) or by NS-N Command.

(d) There is an arguable and disputed issue of fact whether the statutory trigger for revocation, notice of "cause clearly stated", was given.

(e) There is an issue whether the individuals who would sit on the appeal tribunal would have an interest in the disposition of the assets or proceeds. I make no comment on the merits of that point. But that matter may depend on the destination of the assets and proceeds, the identity of the persons who made decisions relating to realization and disposition, and the identity of those who would sit on appeal, disputed facts for which the evidence is incomplete in this record.

(f) The chambers judge said:

[18] Nor do I feel that there has been a breach of natur[al] justice ...

[19] In these circumstances we are also not dealing with a contractual relationship ...

These conclusions adjudicate the merits and require a factual analysis that is properly for trial.

[44] There are cases where the adequacy of an internal appeal process as an alternative remedy appropriately can be decided on an interlocutory motion. This is not one of them. The assessment of the *Harelkin* factors requires analysis of the evidence and a determination of arguable factual issues.

[45] The normal interlocutory motion to terminate a claim is an application to strike under *Rule* 14.25(1) or an application for summary judgment under *Rule* 13.01. These rules invoke jurisprudence to restrain the chambers judge from

determining arguable issues of fact that should be tested at trial. Under *Rule* 14.25(1), the facts in the statement of claim are assumed to be true and the claim is not struck unless the applicant shows that the claim is absolutely unsustainable in law: e.g., *Fraser v. Westminer Canada Ltd.* (1996), 155 N.S.R. (2d) 347 (C.A.) at ¶ 17-18. Under *Rule* 13, the applicant for summary judgment must first show that the issues joined in the pleadings raise no arguable issue of fact; if this is shown, the respondent must then show that his claim or defence has a real chance of success: *Jeffrey v. Naugler*, 2006 NSCA 117, at ¶ 17 - 19, 33.

[46] The NS-N Command did not bring this application under *Rules*14.25 or 13, or any other *Civil Procedure Rule* authorizing interlocutory dismissal of an action. The chambers judge did not refer to any such rule. Neither does her decision cite or apply any principle of interlocutory restraint in the determination of arguable factual issues.

[47] At the hearing of this appeal, the solicitor for the NS-N Command said that the application was brought under *Rules* 56.06 and 37, and the inherent jurisdiction of the Nova Scotia Supreme Court.

[48] I have discussed *Rule* 56.06. It applies to an application for *certiorari* but has no bearing here. It does not itself authorize interlocutory dismissal of an action. An application normally is brought under *Rules* 14.25 or 13. See the discussion in *Merner*, per Freeman, J.A. at ¶ 13-17.

[49] *Rule* 37 states the formal requirements of an interlocutory application generally. It does not authorize a chambers judge to dismiss an action.

[50] Clearly a superior court has inherent jurisdiction to control its process to prevent a miscarriage of justice or abuse of process: See *Central Halifax Community Association v. Halifax (Regional Municipality*), 2007 NSCA 39 at ¶ 34-41; *Halifax (Regional Municipality) v. Offume*, 2003 NSCA 110 at ¶ 21-22, 39; *Curry v. Dargie* (1984), 62 N.S.R. (2d) 416 (C.A.) at ¶ 39; *Goodwin v. Rodgerson*, 2002 NSCA 137 at ¶ 11-13. But inherent jurisdiction does not circumvent the principle that arguable factual issues should be tested at a trial before a plaintiff's action may be dismissed on its merits.

[51] With respect to inherent jurisdiction, the solicitor for the NS-N Command refers to *Haughan v. Halifax (Regional Municipality)*, [1998] N.S.J. No. 196. Justice Hamilton held that, while *Rule* 14.25 applied to a motion to strike a statement of claim in an action, the *Rule* did not govern an application to strike an originating notice (application *inter partes*). She concluded, however, that a chambers judge had inherent jurisdiction to consider whether an originating notice (application *inter partes*) should be struck on the basis that there is no reasonable cause of action or that the claim is an abuse of process (¶ 10-12).

[52] *Haughan* has no bearing to this case. Mr. Allen brought an action. He did not file an originating notice (application *inter partes*). An application to strike would invoke *Rule* 14.25, without resort to inherent jurisdiction.

[53] In *Haughan* (¶ 13 - 16), Justice Hamilton said that, even acting under the Court's inherent jurisdiction to consider whether there was no cause of action, the chambers judge should assume the accuracy of whatever pleading is contained in the originating notice and not consider affidavit evidence at the interlocutory proceeding. *Haughan* acknowledged that arguable issues of fact are not to be determined on an interlocutory motion challenging whether the pleadings disclose a cause of action.

[54] Had this application been framed under *Rules* 14.25 or 13, the chambers judge would not have determined arguable issues of fact. NS-N Command's failure to specify a rule in its interlocutory notice, and the chambers judge's failure to cite any such rule as a basis for her decision, do not widen the chambers judge's interlocutory power to determine arguable factual issues.

[55] The chambers judge erred in law by dismissing this action, in an interlocutory application, on grounds that involve arguable and disputed issues of fact. Those are issues for trial.

[56] Section 9(6) of the Legion's incorporating statute authorizes the appeal from the revocation. *Vaughan v. Canada*, [2005] 1 S.C.R. 146 was not cited by counsel or the chambers judge. For that reason I have not commented whether *Vaughan* may apply to this action.

Conclusion

[57] I would allow the appeal, and dismiss NS-N Command's motion to dismiss the statement of claim.

[58] Counsel for Mr. Allen told this court that he intends to seek an amendment to the statement of claim to better plead causes of action to which he referred during argument - such as breach of trust and fiduciary duty, breach of contract and conversion. Those are not pleaded in the current statement of claim. The statement of claim pleads an "improvident sale" but says nothing of negligence. I express no view of whether such an amendment should be granted, that being for the chambers judge on an application to amend. If such an amendment is made, then the dismissal of this application is without prejudice to any further application that NS-N Command may make, under the appropriate civil procedure rules, for a dismissal of any newly pleaded cause of action.

[59] In my view, the appeal should be allowed without costs to either party. If Mr. Allen wishes a trial on the unpleaded causes of action cited by his counsel, then his statement of claim should identify those causes of action. NS-N Command is entitled to notice of the case it must meet. Had the statement of claim properly pleaded these causes of action, NS-N Command may not have brought this motion in the terms as drafted. Given Mr. Allen's opaque pleading to date, it would be inappropriate to order costs against NS-N Command.

Fichaud, J.A.

Concurred in:

Roscoe, J.A.

Oland, J.A.