SUPREME COURT OF NOVA SCOTIA

Citation: *Superport Marine Services Limited v. Balodis Incorporated*, 2021 NSSC 196

Date: 20210604
Docket: Pic. No. 496972, 498617
Registry: Pictou

Between:

Superport Marine Services Limited

Applicant

v.

Balodis Incorporated

Respondent

The Sovereign General Insurance Company

Applicant

v.

Superport Marine Services Limited

Respondent

DECISION ON MOTION TO CONVERT

Judge:	The Honourable Justice Scott C. Norton
Heard:	May 31, 2021, in Pictou, Nova Scotia
Decision:	June 4, 2021
Counsel:	Richard Norman, Eric Machum and Luke Hunter for Superport Marine Services Limited Wayne Francis for Balodis Incorporated and The Sovereign General Insurance Company

By the Court:

Introduction

[1] Superport Marine Services Limited ("SPM") ("Applicant") moves to convert the two subject Applications in Court to Actions pursuant to *Nova Scotia Civil Procedure Rule* 6.02. The motion was heard virtually on May 31, 2021. At the conclusion of the motion hearing the Court dismissed the motion with written reasons to follow. These are those reasons.

[2] The underlying dispute relates to an agreement to carry armour stone and other materials from Pictou, Nova Scotia, to Pictou Island. SPM provided a barge and other vessels to transport the materials. The barge capsized near the end of the job allegedly causing damages to SPM and to the Respondent Balodis Incorporated ("Balodis") and The Sovereign General Insurance Company ("Sovereign") as insurer of Balodis.

[3] SPM filed an Application in Court on February 21, 2020 naming Balodis as Respondent. Sovereign filed a separate Application in Court on June 22, 2020 naming SPM as Respondent. A motion for directions was held on June 24, 2020 at which time all parties agreed that the two applications should be heard together and

agreed to file a consent order to that effect. The parties represented that cross-examination on affidavits would be completed by each party in two days respectively for a total of 4 days of evidence; and one more day would be sufficient for all submissions. The common hearing was scheduled for five days on March 8 to March 12, 2021 inclusive. Filing deadlines for affidavits, discovery and briefs were set. In January 2020, the original scheduled hearing dates were adjourned to September 2021, due to Court scheduling.

[4] By correspondence to the Court dated April 29, 2021, SPM sought a conference to schedule a motion to convert the proceeding to an Action. The Court convened a conference call with counsel for the parties on May 12, 2021 at which time the motion before the Court was scheduled to be heard on May 31, 2021.

[5] SPM says that as the matter has developed, it is now clear that it would be less efficient and more expensive to continue the proceeding as an Application than to convert it to an Action. SPM points to the following specifics that it says make an Action preferable:

(a) There is a dispute over the right of SPM to file a supplementary affidavit from one of its principal witnesses that must be determined by the Court in advance of the September hearing.

(b) The Respondents have identified numerous objections (26 pages) to the contents of the affidavits filed by the Applicant. This will require the Court to find time to hear and determine the validity of the objections prior to the scheduled hearing in September.

(c) SPM now doubts that the matter can be completed within the scheduled time.

[6] The Respondents contest the motion to convert. They say:

(a) The parties have put extensive time, work and expense into the preparation of affidavit evidence in anticipation of the hearing proceeding as an Application.

(b) There was no advance notice to them from SPM of the need to convert until they objected to the filing of the supplementary affidavit. No concern was raised by SPM in January 2020 when the hearing was rescheduled from March to September.

(c) The parties should engage with the Court to discuss what issues threaten the existing hearing dates and seek resolution. Conversion should be a last resort, particularly this far into the litigation process.

Issues

1. What is the effect of the amendments to *Civil Procedure Rules* 5 and 6?

2. Do the factors identified in *Rule* 6 favour conversion to an Action?

Law

[7] *Civil Procedure Rule* 5 and 6 were amended in late 2020. Pursuant to section 47(1) of the *Judicature Act*, RSNS 1989, c.240, as amended, the effective date of the amendments was the date of publication in the Royal Gazette -December 23, 2020. There were no transition provisions included in the amendments in question.

[8] Nova Scotia's *Civil Procedure Rules* are unique in that they have the force of law. Section 47(3A) of the *Judicature Act* states that "the Civil Procedure Rules … shall have the force of law as and to the extent provided in those Civil Procedure Rules until varied in accordance with the provisions of this Act." In *Guest v. MacDonald*, 2012 NSSC 452, Moir J. noted at para. 19 that the Rules "are not confined to the purely procedural. They can affect substantive rights. See *Judicature Act*, s. 47 (3A)". As Rosinski, J. noted in *Roué v. Nova Scotia*, 2013 NSSC 45:

> [34] In an effort to interpret the Civil Procedure Rules in issue in the case at Bar, I bear in mind that, as judge made rules, their precise legal status is still rooted in s. 46 to 51 of the *Judicature Act*, R.S.N.S. 1989, C. 240. Since they can modify statutory provisions concerning practice and procedure in the Superior Court

> pursuant to s. 49, the rules have a legal status equivalent to that of provincial statutes: *MacNeil v. MacNeil* (1975), 14 N.S.R. (2d) 398 (CA), and *Secunda Marine Services Ltd. v. Caterpillar Inc.*, 2012 NSSC 53, at para. 51, and *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman (c.o.b. WBLI Chartered Accountants),* 2012 NSSC 210, at para. 79.
>
> [35] I, therefore, bear in mind the guidance of our Court of Appeal in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, per MacDonald, C.J., regarding statutory interpretation generally, which principles apply to our Civil Procedure Rules by virtue of their status as equivalent to statutes.

[9] Rule 94.01(1) provides that the *Rules* "must be interpreted in accordance with the principles for interpretation of legislation."

[10] The distinction between substantive law and procedural law was explained by MacDonald, C.J.N.S. in *Vogler v. Szendroi*, 2008 NSCA 18, as follows:

> [17] I begin my analysis by explaining, in some detail, the distinction between substantive law and procedural law.
>
> [18] Consider the respective definitions as set out in *Black's Law Dictionary*, 8th ed. (St Paul, MN: Thomson West, 2004). Substantive law involves a litigant's rights or obligations:
>
> > The part of the law that creates, defines, and regulates the rights, duties, and powers of parties.
>
> [19] On the other hand, procedural law involves the process by which a litigant's rights or obligations are enforced or defended. Thus, "procedural law" is defined as:
>
> > [t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.
>
> [20] Thus, as noted over 60 years ago by John Salmond in *Jurisprudence* 476 (Glanville L. Williams ed., 10th ed. 1947), these two concepts are inextricably linked:
>
> > So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the

> remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other.

[21] This court more recently considered the distinctions between rules that are procedural as opposed to those that are substantive. In **Bishop v. Nova Scotia**, 2006 NSCA 114, 248 N.S.R. (2d) 307, Fichaud J.A. observed, at paragraph 12, that "procedural rules govern the mode of proceeding or machinery by which the [substantive] right is enforced."

[22] Thus not only is there a direct relationship, there is in fact an interdependence between these two concepts. Not surprisingly, therefore, applying them can at times be challenging. For example, in **Somers v. Fournier**, [2002] O.J. No. 2543 (C.A.), Cronk, J.A. observes:

> ¶ 13 The distinction between procedural and substantive law is central to the issues raised on this appeal and cross appeal. That distinction is often difficult to discern. In *Tolofson*, La Forest J. addressed the important purpose of classifying a rule or legal requirement as substantive or procedural (at pp. 317 318 and 321):
>
> > In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial for, as Geoffrey Cheshire and Peter North, *Cheshire and North's Private International Law*, 12th ed. by Peter North and J.J. Fawcett (London: Butterworths, 1992), at p. 74 75, state:
> >
> > > One of the eternal truths of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum.
> >
> > The reason for the distinction is that the forum court cannot be expected to apply every procedural rule of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court, and forum judges understand them. They aid the forum court to "administer [its] machinery as distinguished from its product": *Poyser v. Minors* (1881), 7 Q.B.D. 329 (C.A.) at p. 333, per Lush L.J. Although clearcut categorization has frequently been attempted, differentiating between what is a part of the court's machinery and what is irrevocably linked to the product is not always easy or straightforward.
> >
> > . . .
> >
> > *[I]n the conflicts of law field ... the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as*

> *distinguished from those determinative of the rights of both parties.* [Emphasis added]
>
> ¶ 14 This court has described the distinction between substantive and procedural law in these terms:
>
> > [S]ubstantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of Courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated. [Emphasis added]

[11] The guiding principles concerning legislative interpretation and retrospective application of amendments were helpfully summarized in *Davis (Litigation Guardian of) v. Wawanesa Mutual Insurance Co.*, 2015 ONSC 6624:

> 24 The Supreme Court in *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, identified a number of rules of interpretation that can be helpful in determining whether legislation is to have prospective or retrospective effect:
>
> > (i) Cases in which legislation has retrospective effect must be exceptional;
> >
> > (ii) Where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable;
> >
> > (iii) New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively;
> >
> > (iv) New procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights and is presumed to apply immediately to both pending and future cases;
> >
> > (v) The key task in determining the issue lies not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights; and
> >
> > (vi) The fact that new legislation has an effect on the content or existence of a right is an indication that substantive rights are affected.
>
> 25 The author of *Sullivan on the Construction of Statutes* identified the following additional rules:

> (i) Procedural law may be defined as law that governs the methods by which facts are proven and legal consequences are established in any type of proceedings;
>
> (ii) To be considered procedural in the circumstances of a case, a provision must be exclusively procedural; that is, its application to the facts in question must not interfere with any substantive rights or liabilities of the parties or produce any unjust results; and
>
> (iii) It is presumed that the legislature does not intend to confer a power on subordinate authorities to make regulations or orders that are retroactive, retrospective or interfere with vested rights (R. Sullivan, *Sullivan on the Construction of Statutes* (Toronto: Lexis Nexis, 2014), at pp.804-805 and 698),

[12] In *Halifax (Regional Municipality) v. WHW Architects Inc*., 2014 NSCA 75, Bryson J.A., for the Court, described the material question when considering whether a new law should apply retroactively as follows:

> [20] Sometimes the case law defines retroactivity based on whether the new law has "procedural" or "substantive" effect. Procedural changes may be retroactive; not so with substantive changes. With respect, this distinction obscures the material question, which is the effect of the statutory change on existing rights.
> …
>
> [Emphasis in original]

[13] In *Milburn v. Growthworks Canadian Fund Limited*, 2011 NSSC 346, Murray, J. considered whether a motion to convert is procedural in nature in the context of a motion to strike a solicitor's affidavit. After citing Vogler, he wrote:

> [45] As Justice Bryson concluded in Citibank [*Citibank Canada v Begg*, 2010 NSSC 95] the law in this area is new and undeveloped. I observe that a Motion to Convert is a motion to change the "vehicle" or change the mode under which the respective parties rights and obligations are determined or attained. Accordingly it can be said to be procedural in nature, but of course such a broad statement will not

> necessarily lend itself nicely to the facts of each case, upon which a final determination must be made. …

[14] As to the assertion that the amendments to Rule 5 and Rule 6 modify the legal test on a motion to convert, which might be argued to be substantive, the Ontario Superior Court of Justice rejected a similar argument in *Aylmer Meat Packers Inc. v. Ontario*, 2010 ONSC 649. In that case, the plaintiff argued that the defendant's motion for summary judgment should be decided under the former Rule 20, which was in force at the time the motion was filed, rather than under the new Rule 20 which came into effect on January 1, 2010. The Court's reasons, while lengthy, are instructive:

> **Positions of the Parties**
>
> 7 Aylmer submits that the changes to Rule 20 interfere with its substantive rights and are not purely procedural. As such, the changes offend the common law presumptions (as reflected in the *Legislation Act*) that legislation will not have a retroactive or retrospective effect and will not interfere with vested rights. The exception to these presumptions for procedural enactments (which are presumed to have immediate effect) does not apply to the new Rule 20.
>
> 8 Aylmer's position is that once the notice of motion was served, its rights were crystallized with respect to the test for depriving it of the right to a trial on the summary judgment motion. At that point, Aylmer had a vested right to have the determination of whether it should be deprived of a trial made pursuant to Rule 20 as it then existed. The changes to Rule 20, and in particular the new test for summary judgment and the expanded powers given to the motions judge, interfere with that vested right.
>
> 9 In the alternative, Aylmer submits that if I find that the changes are only procedural enactments, then I should exercise the court's inherent discretion to control its own process and apply the old Rule 20 to the motion.
>
> 10 The AGC's position is that Rule 20 is a procedural provision. Rule 20 relates to the conduct of the action, not to the substantive rights of the parties in the litigation.

A contextual analysis of the new Rule 20 and its objectives reinforces the view that it is a matter of procedure.

11 The AGC submits that what has changed are simply the procedures to permit the court to address unmeritorious claims expeditiously; the new Rule 20 now grants the court an expanded set of tools to carry out this objective.

12 The AGC submits that since the changes apply to procedure only, they are presumed to have immediate effect at common law and by section 52(4) the *Legislation Act*, unless a contrary intention is expressed in the legislation itself. The AGC submits that since the legislature did not express any contrary intention and did not include a general transitional provision, the new Rule 20 is intended to have immediate effect.

Is Rule 20 Purely Procedural?

13 Procedural legislation goes to the "conduct of actions. It indicates how actions will be prosecuted, how proof will be made and how rights will be enforced in the context of a legal proceeding."

14 For the rule of immediate application to apply, a provision must be purely procedural - it must not interfere with a substantive right or liability of the parties or produce other unjust results.

15 In determining whether a provision is purely procedural, the courts look to the substance of the provision and its practical impact on the parties. The important thing is not the label, but the effect. If the effect of a provision is to alter the legal significance of the facts of a case and the legal position of the parties, it is not purely procedural.

16 I have reviewed the cases cited by counsel and the examples of legislation found to be substantive or purely procedural.

17 Legislation has been found to be substantive where a right of action was taken away from a party8 or a defence has been taken away from a party. Other examples are statutes which modify rights of appeal to pending cases or alter limitation periods so as to eliminate or revive a previous right.

18 By contrast, cases involving changes of evidentiary rules have been found to be purely procedural, except where they interfere with substantive rights such as solicitor-client privilege or legal presumptions arising out of certain facts.

19 In my view, summary judgment is a procedural provision and any changes to it are procedural enactments.

20 Summary judgment is part of the Rules of Civil Procedure. It is part of the set of rules that govern how litigation is to be conducted in this province.

21 The objective of summary judgment was recognized by the Osborne Report: "to provide an effective mechanism for the court to dispose of cases early where in the opinion of the court a trial is unnecessary after reviewing the best available evidence from the parties ..."

22 In other words, summary judgment is the process by which claims that, in the court's opinion, should not proceed to trial can be disposed of at an earlier stage, thereby conserving the resources of the court and the parties.

23 Seen in this context, the amendments have simply expanded the court's ability to carry out this objective. The test of "no genuine issue for trial" has been replaced with "no genuine issue requiring a trial" and the motions judge can now weigh the evidence, evaluate credibility and draw reasonable inferences. The judge may also order a mini-trial and provide directions on the conduct of the action if the matter does proceed to trial.

24 In my view, this is all part of the process of conducting litigation in Ontario. A litigant can only get to the trial stage if it goes through this process. This includes overcoming a summary judgment motion which may be brought by the opposing party. Summary judgment is a step along the way to trial; it is part of proving and enforcing the litigant's case.

25 Further, these changes have no impact on the substance of the action or the rights of the parties in the action itself. There is no effect on the causes of action (negligence, trespass and conversion), nor on the defences available to the AGC. Nothing has changed with respect to Aylmer's right to claim for torts allegedly committed against it.

26 What has changed is the procedure by which Aylmer can obtain a resolution of its claims.

27 Since this is a procedural enactment, it is presumed to apply immediately, unless a contrary intention is evinced from the legislation. I agree with the AGC that there is no such contrary intention expressed in the legislation, nor any transitional rules which apply to Rule 20 so as to rebut the presumption of immediate effect.

28 The new Rule 20 therefore applies as of January 1, 2010, regardless of when the notice of motion was filed.

Is this Interference with a Vested Right?

29 Aylmer further argues that the changes to Rule 20 interfere with its vested right in the summary judgment test which existed when the notice of motion was filed.

30 Aylmer's position is that once the notice of motion was filed in 2009, the determination of whether it could be deprived of a trial on the summary judgment motion had to be made under the Rule 20 which existed at the time. It argues that at that point, the parties' rights were engaged, issue was joined, and Aylmer had a vested right in the existing Rule 20.

31 The problem with this argument is the premise that Aylmer had a "right" in the old Rule 20 to be applied on the motion. I find no support for this proposition.

32 The caselaw states that no one has a vested right in procedure. In pursuing its case to trial, Aylmer's right is to have its case disposed of in accordance with the

> rules and procedures in force at the time of disposition. I have already determined that Rule 20 is purely procedural, so there can be no vested right in Rule 20.
>
> 33 I consider this akin to a change in the rules of evidence. While a change may make it more difficult for a party to prove its case at trial, the party has no right to apply a rule which may have existed at an earlier time in the proceedings. Likewise, whatever challenges the new Rule 20 may impose on a party in proving that its case merits a trial, it has no right to apply the rule from an earlier date.
>
> 34 Again, Aylmer disputes that Rule 20 is a procedural matter and submits that the rule against no vested right in procedure does not apply. However, even if I were to accept that Rule 20 is not purely procedural, I still find that Aylmer has no "right" to the old rule.
>
> 35 I consider the case of *Bolster v. British Columbia (Ministry of Public Safety & Solicitor General)* quite compelling. The British Columbia Court of Appeal considered whether a statute that changed the standard of review to be applied on a judicial review proceeding interfered with a vested right of the party in a pending case. The court found that the determination of the standard of review was not strictly a procedural matter as it had a substantive and constitutional aspect to it.
>
> 36 Nonetheless, the court found that the statute had immediate effect because it did not interfere with a vested right. The court held, at paragraph 112, that "the standard of review a court adopts on a judicial review proceeding is not a 'right' that 'belongs to' or is 'in the control of' any party to the proceeding."
>
> 37 Similarly, I do not consider that the test on a summary judgment motion is a "right" that "belongs to" the responding party. Summary judgment is the mechanism by which the court determines whether the case should proceed to trial; this cannot be a "right" of the litigants.
>
> 38 Therefore, even if the changes to Rule 20 are not purely procedural, they do not interfere with a vested right of Aylmer, and can have immediate effect.
>
> [Footnotes omitted. Emphasis added]

[15] The *Aylmer* decision was applied by Chipman, J. in *Quadrangle Holdings Ltd. v. Coady Estate*, 2016 NSSC 106, where he wrote:

> [9] *Civil Procedure Rule* 13, which provides the test for summary judgment, was amended after Quadrangle filed their motion. Accordingly, the question arises as to whether the new summary judgment Rule (amended February 26, 2016, and published in the Royal Gazette on March 2, 2016) applies to the motion.

[10] In considering this question, it is important to bear in mind that summary judgment is procedural in nature. In *Onex Corporation v. American Home Assurance* (2009), 100 OR (3d) 313 (ONSC), the plaintiffs filed a motion for summary judgment under Ontario's Rules of Civil Procedure. The motion was heard in 2010, after the summary judgment rule was amended. Justice Belobaba found the 2010 summary judgment rule as amended should apply absent a "transitional provision" signaling otherwise. He wrote at para. 5:

> The Rules of Civil Procedure set out the procedure for the conduct of civil litigation. The case law is clear that no one has a vested right in any particular form of procedure. The only "right" one has is to have the matter disposed of according to the procedure in force at the time of disposition. <u>As a general rule, procedural enactments apply retrospectively -- that is, they take immediate effect and apply even to matters that were commenced before the new procedure came into force, unless the contrary is expressed in the legislation</u>.
>
> [emphasis added]

[11] In *Alymer v. HMQ and AGC*, 2010 ONSC 649, Justice Conway similarly found that Ontario's new summary judgment rule applied. Again, the Court found that the summary judgment rule was a procedural enactment and was presumed to apply immediately unless a contrary intention is indicated (see paras. 19-24). In finding that the new civil procedure rule applied regardless of when the notice of motion was filed, Justice Conway stated:

[27] Since this is a procedural enactment, it is presumed to apply immediately, unless a contrary intention is evinced from the legislation. I agree with the AGC that there is no such contrary intention expressed in the legislation, nor any transitional rules which apply to Rule 20 so as to rebut the presumption of immediate effect.

[28] The new Rule 20 therefore applies as of January 1, 2010, regardless of when the notice of motion was filed …

[12] Once again, summary judgment is procedural in nature. The authorities confirm that procedural enactments are exempt from the common law presumption against retroactivity, and absent an expressed contrary intention, are presumed to apply immediately.

[13] Nova Scotia's new Rule 13 does not contain any indication that it was only intended to apply prospectively. In keeping with the authorities from the Ontario Superior Court, I am of the view that the summary judgment provisions are procedural in nature. Accordingly, the exemption from the presumption against retroactivity ought to apply. In the result, I find the new Rule 13 applies to the within proceeding.

[16] Applying this analysis, the Court finds that the 2020 amendments to the *Civil Procedure Rules* in question are procedural and not substantive. A Motion to Convert is a motion to change the "vehicle" or the "mode" under which the respective parties' rights and obligations are determined or attained. There is nothing in the specific facts of this case that suggests differently. Accordingly, the amendments to the *Rules* should apply to existing proceedings that have not been definitively dealt with by the legal system: Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Ottawa: Irwin Law Inc., 2016), at p. 361.

[17] In *Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2014 ONCA 89, Doherty J.A. instructed at para 24:

> 24 As observed by the motion judge, at para. 88, procedural provisions are, in the absence of a legislative indication to the contrary, presumed to have "immediate effect and apply retrospectively to existing proceedings". While, as noted by Professor Sullivan, the use of the word "retrospective" in this context may be a misnomer, the common law has for at least 150 years presumed the immediate application of all procedural legislation to proceedings whether those proceedings were commenced before or after the enactment of that legislation: Ruth L. Sullivan, Sullivan on the *Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), at pp. 696-98; see also *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272 (S.C.C.), at para. 10, Deschamps J., for the majority, and atRulR para. 35, Cromwell J., dissenting.

[18] Accordingly, the Court will refer to the amended *Rules* in determining the motion before the Court, subject to the Court's overriding discretion and authority to manage proceedings before it (*Rule* 2.02 and 2.03).

[19] *Rule* 5.01(4) says:

> The application in court is for a dispute that can be ready for hearing within two years and will take no more than four days to be heard, and it is available, in appropriate circumstances, as a flexible and speedy alternative to an action.
>
> [Emphasis added]

The amendments in December 2020 introduced the conditions that a proceeding would be ready for hearing within two years and would require no more than four days. The Court notes however that the claim before the Court was scheduled for five days of hearing prior to the amendments.

[20] *Rule* 6.02 governs the considerations for the Court on a motion to convert an Application to an Action or *vice versa*; *Rule* 6.03 allows a judge on their own motion to convert an application to an action; and *Rule* 6.04 speaks to the evidence required on a motion to convert (2020 amendments underlined):

> **Converting action or application**
>
> 6.02 (1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.
>
> (2) A party who proposes that a claim, that can be tried or heard in four days or less and within two years after the day it was started, be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.
>
> (3) An application is presumed to be preferable to an action if either of the following is established:

(a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, the party expeditiously brought a proceeding asserting these rights, and the erosion will be significantly lessened if the dispute is resolved by application;

(b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.

(4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and any of the following is established:

(a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;

(b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

(c) the proceeding cannot be tr4ied or heard less than two years from the day it was started.

(5) On a motion to convert a proceeding, factors in favour of an application include each of the following:

(a) the parties can quickly ascertain who their important witnesses will be;

(b) the parties can be ready to be heard in months, rather than years;

(c) the hearing is of predictable length and content;

(d) it can be heard in four days or less;

(e) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

(6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

Judge's own motion

6.03 (1) A judge who hears a motion in a proceeding, including a motion for directions in an application in court, and who becomes satisfied that it is obvious the proceeding should be converted may convert the proceeding on the judge's own motion.

> (2) A judge who presides at a motion for directions in an application in court, and who is satisfied on the information provided for the motion that the application will not be heard within two years after it was started or that the hearing will require more than four days, may convert the application to an action on the judge's own motion.
>
> **Evidence for converting an application**
>
> 6.04 (1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:
>
> (a) a description of the evidence the party would seek to introduce;
>
> (b) the party's position on all issues raised by the application;
>
> (c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.
>
> (2) Despite Rule 6.03(1), a party who wishes to withhold disclosure of evidence the party will produce only to impeach a witness need not describe the evidence, or the investigations to be undertaken to obtain the evidence.

[21] This Court reviewed the law applicable to a motion to convert in *Group Savoie Inc. v. Eastbound Forestry Ventures Inc.*, 2020 NSSC 322 (wherein the Respondent was the moving party):

> [5] The court's approach to applications to convert an application to an action was first stated by Justice Pickup in *Jeffrie v Hendriksen*, 2011 NSSC 292, at para. 13:
>
> > [13] Under Rule 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:
> >
> > a) first, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);
> >
> > b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4);
> >
> > c) third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

> [14] A review of Rule 6.02 would suggest there is an emphasis on the use of the application process to achieve lower costs and greater speed in the resolution of disputes.
>
> [15] In *Brodie v. Jentronics Ltd*., 2009 NSSC 399, Moir J. commented at paras, 5 - 6:
>
> > 5 Rule 6 -- Choosing Between Action and Application provides general guidance for determining whether an application should be converted to an action, or vice versa. In either case, the proponent of the action bears the onus: Rule 6.02(2). This statement of the onus shows a strong policy in favour of the use of applications.
> >
> > 6 Rule 6.02(6) makes it clear that proportionality is a factor in choosing between the two kinds of proceedings. When read with Rule 5.01(4), it becomes clear that the Rules invite the bar and the bench to make use of the application route to achieve lower cost and greater speed.
>
> [16] This emphasis on the use of the application process to reduce costs and achieve greater speed echoes the object and purpose of the new Rules which is set out in Rule 1.01:
>
> > 1.01 These Rules are for the just, speedy and inexpensive determination of every proceeding.
>
> [17] Mr. Jeffrie has chosen to proceed by way of application. The question is whether the circumstances are such that his application should be converted into an action in order to achieve justice between the parties.

[6] The parties agree that the presumptions in favour of an application in Rule 6.02(3) or in favour of an action in Rule 6.02(4) do not apply on the facts of this case. The court is therefore concerned with the third part of the test and must determine the extent to which each of the four factors favouring an application under Rule 6.02(5) are present and must determine the relative cost and delay as between an action and an application under Rule 6.02(6).

[7] The burden is on the Respondent to establish that it is appropriate to convert the proceeding to an action. The case law instructs that the Respondent must address each of the four requirements in Rule 6.02(5) and must provide more than a pro forma statement that they will introduce evidence relevant to the proceedings. *Hong v Lavy*, 2018 NSSC 54, at paras. 22-25.

[8] However, the Respondent does not need to provide the actual evidence, only a description of evidence it wishes to provide at the hearing – enough that the court can appreciate the flavour of the evidence to be brought at the actual hearing. *Fana (DCD) Holdings Inc. v Dartmouth Cove Developments*, 2017 NSSC 157.

[9] In *Fana Holdings*, Justice Chipman conducted an extensive review of the case law considering conversion motions and found that matters that either

remained as applications or are converted to applications have most of the following characteristics:

- fewer parties
- discreet [sic], clearly detailed issues, sometimes narrowed by agreement
- reasonable hearing estimates of relatively short duration (often five days or less)
- readily available key documents and the like, central to the dispute
- the parties being (realistically) ready for a hearing within a short timeline (usually within months, not years)
- situations involving comparatively little time to conduct investigative work
- agreement on admissible extrinsic evidence
- limited, if any, discovery required
- time being of the essence in bringing the matter forward to a hearing
- identifiable (typically party) witnesses with evidence conducive to affidavit form
- an absence of "unfriendly" witnesses, who might well be disinclined to swear affidavits
- generally, an uncomplicated proceeding

[10] As with many such applications, these features are somewhat balanced as between the parties. I am instructed by the comments of Chief Justice MacDonald in *Nova Scotia v. Roué*, 2013 NSCA 94, at para. 47:

> [47] I acknowledge that, if time and cost were only incidental factors, then what the appellants characterize as these procedural safeguards for trial fairness might occupy their fullest scope. But time and cost clearly do pertain to the overall objective of access to justice. The motions judge's job under Rule 6.02 is to achieve a balance that shortens time and lessens cost, while ensuring that the proceeding at hand maintains the essential attributes of a fair fact-finding process.
>
> [48] There are some proceedings where the classic trial procedures will be essential. For instance, it may be important that the judge hear the witnesses tell their stories in person, as direct evidence, instead of just reading the ink on the lawyer-assisted affidavits. Or it may be that important evidence rests with unfriendly witnesses, who will not sign affidavits, and must be required to testify by subpoena. These are just examples, not an all-inclusive list. It is for the motions judge, in weighing the criteria under Rule 6.02, to assess whether fairness steps to the fore on such matters, whether the

> application in court under Rule 5.07 can accommodate the concern with an adjustment to the procedure, or whether it is preferable, in the interests of fairness, that the matter be tried in the traditional manner.
>
> [49] It would also be of assistance, in motions for conversion under Rule 6.02, for the court to have, in an affidavit, the projected time line to a hearing date, and projected length of hearing and costs of hearing, under both of the alternative scenarios.

Analysis

[22] SPM asserts that the amendments to *Rule* 6.02(2) expressly state the burden on the party proposing that a claim be heard as an action only exists with respect to claims that can be tried or heard in four days or less and therefore does not exist where, as here, the hearing was scheduled for five days. SPM asserts that the burden is on the Respondents in these circumstances. The Court does not accept this assertion.

[23] In the present case, where five days were set for the hearing before the amendments came into force, neither party "proposes" that the hearing can be completed in four days or less. Accordingly, *Rule* 6.02(2) has no application. SPM brings this motion to convert to an action. The burden is on SPM as the moving party.

[24] *Rule* 6.02(3) sets out the factors which create a presumption in favour of an application. There are no rights being eroded and there is only one hearing

contemplated by the parties. As such there is no presumption in favour of an Application.

[25] *Rule* 6.02(4) sets out the factors which create a presumption in favour of an Action. Neither party is seeking a jury trial. There is no suggestion that it is unreasonable to require either party to disclose information about a witness. There is no reason that the proceeding cannot be heard within two years after the day it was started. No presumption favours an Action.

[26] Absent a presumption favouring action or application, the Court is required to examine the factors in favour of an application described in *Rule* 6.02(5). Both parties were able to quickly identify their witnesses. The parties have exchanged documents, prepared and exchanged affidavits and conducted discovery examinations. The issues in dispute are: whether the hearing is of predictable length and content; whether it can be heard in the five days scheduled; and whether the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing.

[27] SPM and the Respondents have each addressed the factors favouring conversion to an action:

- SPM says there are a number of outstanding issues that must be resolved by the finish date. The Respondents say that there are two discrete issues requiring Court ruling: hearsay objections to affidavit evidence and deciding on the admissibility of a supplementary affidavit. The Respondents say these issues can be dealt with in advance of the scheduled hearing dates. The Respondents further note that the Applicant pushed for an early rescheduled hearing date when the Court was unable to proceed as scheduled in March.

- SPM asserts that the hearing is not of predictable length and content due to the various evidentiary issues including the large number of objections to affidavit evidence, the admissibility of the supplementary affidavit of a principal witness, the fact that all affiants will be cross-examined; and the current uncertain nature of the expert evidence (filing deadline is June 2021 and each party has confirmed they will call at least one expert witness). The Respondents continue to represent to the Court that the matter can be dealt with by the agreed two days of cross-examination for each party. The Respondents say that the content of the evidence is mostly known and has been for some time. There has been no change to the number of witnesses and the affidavits and discovery evidence has been known to the Applicant for

many months with no suggestion that the time set aside would not be sufficient.

- SPM says that with the evidentiary issues already noted it is highly unlikely that the five days scheduled will be sufficient and that the greater the anticipated proceeding time, the more appropriate it is to convert the matter to an action. The Respondents maintain that the time presently scheduled will be sufficient.

- SPM asserts that credibility of witnesses in a case of this complexity and number of witnesses is better determined in the procedural context of an action. The Respondents say that SPM in making this argument ignores that it chose the Application in Court process from the outset and never raised the Application process as unsuitable. The Respondents say that there is no evidence of any specific credibility issue that the Court would not be able to assess in the normal course.

[28] The Court finds with respect to each of these factors:

- The evidentiary issues can be dealt with between now and the hearing dates. The Court addressed that process with counsel after determining the motion to convert was dismissed. Counsel agreed with the Court's suggestion

that motions by correspondence would be a reasonable and efficient way to deal with evidentiary objections to affidavits. See *King v. Gary Shaw Alter Ego Trust*, 2020 NSSC 288.

- SPM filed a solicitor's affidavit, sworn by Richard Norman on May 17, 2021, in support of their motion to convert. At paragraph 22 Mr. Norman attests:

> A five-day hearing will only work if both parties have two days each to present their witnesses for cross examination, and a half day for oral submissions. It is unlikely such a schedule can be maintained in this case.

With respect, the Court can and will maintain that schedule by allowing the cross-examining counsel an equal amount of court time over two days to conduct cross-examination of the other witnesses as they choose and an equal amount of time on the fifth day for oral submissions. During oral submissions, counsel for SPM conceded that he was not asserting that SPM could not complete cross-examinations of the Respondents' witnesses within the two days requested at the Motion for Directions. Counsel for the Respondents had committed in his affidavit that he could complete all cross-examinations within the two days allocated to him.

- Having questioned counsel during their oral submissions on the number and length of cross-examinations that they each intend to conduct, the Court is satisfied that there will be sufficient time for cross-examination, shared equally, as originally agreed to (two days each). The Court also encourages counsel to explore the use of an agreed statement of facts since they have both proffered that possible tool for shortening the evidence.

- The Court is satisfied on the evidence before it that any issues of credibility can be assessed by the Court in the Application process in an equally fair manner as it would in an Action. The Applicant did not put forward any evidence of specific evidentiary problems relating to credibility arising from the use of affidavit evidence and cross-examination.

- The Court agrees with the Respondents that having chosen the Application process; having received the affidavits; and having conducted discovery examinations, the Applicant ought to have identified issues with proceeding by way of Application long before now. The record shows that the conversion proposal was first raised by SPM on April 15, 2021.

[29] The Applicant also asserted that the cost of proceeding by Application would be more substantial to both parties than the cost of a full trial in an Action. The Court agrees with the Respondents that aside from asserting inefficiencies, delays

and controversies, the only specific item identified is the evidentiary motions discussed above. The evidence does not satisfy the Court that proceeding with the Application will be substantially more expensive than a trial.

[30] Overall, the evidence presented by the Applicant is not sufficient to discharge the onus on the Applicant to show that the Application process is not favoured in this proceeding. Having considered all of the factors, the Court concludes that the factors present here favouring an application "are much weightier, cumulatively and individually, than those favouring an action" – Gabriel J. in *Payne v Elfreda Freeman Alter Ego Trust (2015)*, 2018 NSSC 160, aff'd 2019 NSCA 28.

[31] In coming to this conclusion the Court notes the encouragement and instruction of the Supreme Court of Canada to take a more pro-active approach to the management of hearings in keeping with the objects of the Rules and access to justice in a fair and timely manner: *Hryniak v Mauldin*, 2014 SCC 7, at para 2:

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[32] The Court is satisfied that the parties will receive a fair and just determination of the issues between them by the hearing proceeding as an Application in Court as scheduled in September.

[33] The motion is dismissed with costs payable to the Respondents. The Court fixes the quantum of costs at $750 inclusive of disbursements payable at the conclusion of the matter.

Norton, J.