SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Attorney General) v. ScoZinc Mining Ltd.*, 2023 NSSC 235

Date: 20230720
Docket: Hfx No. 522657
Registry: Halifax

Between:

The Attorney General of Nova Scotia

Applicant

v.

ScoZinc Mining Ltd.

Respondent

Decision

Judge:	The Honourable Justice Peter Rosinski
Heard:	July 18, 2023, in Halifax, Nova Scotia
Counsel:	Myles Thompson, for the Applicant Robert Mroz, for the Respondent

By the Court:

Introduction

[1] By an Amended **Notice of Application in Court** filed April 27, 2023, Nova Scotia claims against ScoZinc Inc. Mining Ltd. (aka EDM Resources Ltd. ["EDM"]) that:

1. it breached its contractual obligations under a lease signed May 4, 2018 (clauses 11.4 and 11.5(d)) ["the Renewal Lease"] by not carrying out "the remediation of environmental contamination on [Nova Scotia's] property caused by activities of ScoZinc [hereafter referred to as "EDM"]; and
2. seeks "damages for environmental harm incurred to the Port of Sheet Harbour ["POSH"] Lands contaminated by operations of EDM through "negligent acts… [and] acts in trespass, nuisance and strict liability (*Rylands v. Fletcher*), and without limiting the generality of the foregoing, includes the following: [a particularization of the claimed specific manners of causing environmental harm]."

[2] On April 26, 2023, EDM filed a **Notice of Motion** requesting "an Order, pursuant to Civil Procedure Rule ["CPR"] 6.02 for conversion of this proceeding from an Application to an Action…".[1]

[3] These are the reasons why I am satisfied the present manner of proceeding as an Application in Court should be converted to an Action.

The test for conversion

[4] While bearing in mind relevant amendments to our rules not effected at the time of his writing, I find guidance in Justice Norton's reasons from *Group Savoie Inc. v. Eastbound Forestry Ventures Inc.*, 2020 NSSC 322, and his more recent reasons in *Superport Marine Services Limited v. Balodis Incorporated*, 2021 NSSC 196, in relation to this motion to convert an Application in Court to an Action:

> ["***Savoie***"]
>
> [3] In advance of the motion for directions, the Respondents filed a motion for an Order converting the Application in Court filed by the Applicants to an Action. At the conclusion of the hearing of the motion, I dismissed the motion with reasons to follow. These are those reasons.
>
> …

[1] Both the evidentiary and persuasive burdens are on EDM. Two fulsome affidavits were filed: one for Nova Scotia from Virginia Bonn, Manager, Business Development and Industrial Properties of Invest Nova Scotia [formerly Nova Scotia Business Inc. or "NSBI"] and one for EDM per Mark Haywood, President and CEO of EDM.

[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).
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> [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.
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> [15] In *Brodie v. Jentronics Ltd*., 2009 NSSC 399, Moir J. commented at paras, 5 - 6:
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> 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.
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> [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.**

I note that neither party provided the projected timeline and costs by affidavit.

[11] As an aside, I am concerned by the apparent use of the Application in Court process to seek an earlier hearing time than might be available for an Action. Often, at the motion for directions counsel advise that the matter can be heard in three days and later, as the hearing dates approach, they seek to add additional time to the scheduled hearing or seek to reschedule the hearing. That is not the purpose of the Application in Court process. That is not a just, speedy and inexpensive determination of the proceeding.

[12] **In my view, if, after conducting the discoveries and preparing the affidavits for the application, counsel do not consider that the matter can be properly concluded within a four-day window, they have an obligation to advise the court and a further motion for directions should be held to consider converting the matter to an action at that time.**

[My bolding added]

["***Superport***"]

[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), 1975 CanLII 1164 (NS CA), 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."

[My bolding added]

1 - First, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3)

[5] 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 those 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.

[6] Nova Scotia argued that it has and will have financially attractive opportunities to re-purpose the affected POSH premises once remediation has taken place.

[7] It argues it cannot rely upon EDM to remediate the lease premises.

[8] It has pleaded the remedy of "specific performance" [i.e. which would be effected by a court Order requiring EDM to remediate the contamination of the premises leased, (only for which EDM is responsible, and which occurred during the currency of the lease) as required by the lease] in preference to remediating the property itself.

[9] Nova Scotia argues that it does not wish to remediate the property itself, because having incurred the costs of remediation, even if successful in this proceeding, it may not ultimately successfully collect such amounts in damages from EDM, should EDM experience significant financial difficulties.[2]

[2] I wish to emphasize that there is no evidence regarding EDM's present or anticipated future financial position.

[10] Nova Scotia says that its request for the remedy of "specific performance" falls within the wording "substantive rights asserted by a party" in CPR 6.02(3), and the longer the remedy is put off, the more will that "substantive right" be eroded, and therefore an Application is preferred.

[11] I do not agree.

[12] I will proceed with the analysis, assuming but not deciding, whether the remedy sought [an order for specific performance] should properly be interpreted as such a "substantive right".

[13] Nova Scotia is not solely dependent upon that manner of remedy [specific performance] in these circumstances. It could remediate the property itself, and then rely on its consequent claim for damages as against EDM.

[14] Even if the lack of remediation of the POSH area in question is precluding Nova Scotia from taking advantage of financially attractive opportunities, it cannot be said that any claimed "substantive right", "will be eroded in the time it will take to bring an action to trial… and the erosion will be significantly lessened if the dispute is resolved by application".

[15] Firstly, Nova Scotia has made a choice not to remediate the premises. It maintains its preference for the remedy of "specific performance".

[16] That ability to "choose" undermines the strength of its argument that its "substantive rights asserted… will be eroded in the time it will take to bring an action to trial".

[17] Secondly, as I conclude below, whether the matter proceeds as an Application or an Action process, the matter cannot likely be heard before late 2024 for an Application and in the early Spring of 2025 for an Action.[3]

[18] Thus, the "erosion" of the claimed substantive right/a right to specific performance of EDM's contractual obligation to remediate the contamination on site, will go on for a substantial time interval whether the matter proceeds as an Application or Action before a court is in a position to order this remedy.

[19] Therefore, in the present circumstances this argument by Nova Scotia becomes a neutral factor.

[20] The presumption is inapplicable here.

2 - 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)

[3] I inferred these likely dates from the oral submissions herein because the parties did not provide evidence or written arguments about the likely contrasting timelines for the Application and Action process.

[21] 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) [not applicable]
>
> (b) [not applicable-as it was not argued by the parties]
>
> (c) the proceeding cannot be tried or heard less than two years from the date it was started.

[22] Counsel for the Province strenuously put forward the position that the Application proceeding can surely be heard less than two years from April 3, 2023 (when the Application in Court was initially filed) – i.e. completed before April 4, 2025.[4]

[23] Counsel for the Province suggested, upon request by the Court, an Application in Court timeline that would see a process of:

1. disclosure [by the Fall 2023/September 2023 to December 21, 2023] followed by;
2. discoveries [during Winter 2023-4/December 21, 2023 – March 20, 2024]; and

[4] It is arguable that the running of this 2-year period should be from the date the Amended Notice of Application was filed – but I will do the analysis relying on the date the initial Notice of Application was filed.

3. affidavits [Counsel for Nova Scotia noted that the Court already has very fulsome affidavits from Mr. Haywood for EDM and Ms. Bonn for Nova Scotia; and that a Mr. Derek Peverill, with the Department of Environment would also be filing an affidavit for Nova Scotia, and I understood that would be before or concurrent with the disclosure deadlines. Those of expert witnesses/expert reports would follow - which were acknowledged as necessary in the circumstances. As I interpreted Nova Scotia's position, it argues expert opinion evidence would be completed after discoveries and other affidavits, therefore some time between March 20, 2024, and the Fall of 2024.]

4. Then any remaining preliminary motions (filed and heard), and hearing briefs would have to be filed before the hearing.

[24] I estimate that the Application could likely be completed as early as October 2024.[5]

[5] The Finish Date for an Application in Court is 60 days before the date set for the hearing - CPR 5.17. Typically in an Action, the Finish Date would be set at least 60 days before the first day of trial - CPR 4.16(6). The starting point deadline for filing expert reports in an Action is at least six months before the Finish Date – CPR 55.03. While the deadline for filing expert reports in Applications in Court are customized dates in each case, it would be prudent to, and in my experience it is common for Justices when scheduling dates at a Motion for Directions for an Application in Court to, try to somewhat similarly assign such deadlines in advance of the first day of hearing, as would be the case in an Action, to allow for the possibility of the filing of Rebuttal expert opinion. In the case at Bar, it is reasonable to expect there may be Rebuttal expert reports.

[25] Regarding whether an Action will be heard (completed) before April 4, 2025, I conclude that it could be completed before then.

[26] The presumption is inapplicable here.

[27] **CPR 6.02(5) and (6)** read:[6]

> (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; [this is generally true here, except insofar as expert witnesses are concerned]
>
> (b) the parties can be ready to be heard in months, rather than years; [in my view, the parties will not be ready to be heard "in months" – I expect they will be ready by September-October 2024]
>
> (c) the hearing is of predictable length and content; [at present it is very difficult to confidently predict the full contours of the ultimate content, and length of time that, this hearing will require, largely due to the necessity for expert evidence, and in light of the potential for ancillary lay witnesses who may have to testify once the experts have been consulted.]
>
> (d) it can be heard in four days or less; [Counsel for Nova Scotia says that the hearing could be completed in four days or less. Counsel for EDM in contrast was adamant that a hearing in the Spring of 2025 is "not realistic", nor is it to believe that the hearing, regarding the distinct claims of breach of contract and tort, multitude of witnesses, including a number of expert witnesses who will be required, and a complex evidentiary record, can be expected to be heard in four days or less. I am satisfied it is more likely than not that this hearing will not be completed in four days or less.]

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[6] Counsel for the Province did not expressly comment on the other subsections of CPR 6.02(5), although I understood his position to be that the Province could "quickly ascertain who their important witnesses will be (or already have done so)".

> (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; [I expect this to be the case]
>
> (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 the proceeding. [See below]

Conclusion[7]

[28] I keep in mind the supervening purpose of our Rules, per CPR 1.01:

> These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[29] In my opinion, proceeding by way of an Application in Court could allow the matter to be heard earlier than an Action, but I conclude that it not likely that: it can be heard in four days or less, and be "ready to be heard in months, rather than years".

[30] The extra pre-trial time, and greater costs should that be the case, that an Action may require, would better serve the interests of justice.

[31] Moreover, given the multiple number of parties who have been involved with the premises in question over a lengthy period of time, the detailed and

[7] I bear in mind that EDM bears the burden in this motion per CPR 6.02(2). I heard the Province's Counsel's concerns about matters such as EDM's "simply naming 3-4 unknown lay witnesses in a Notice of Contest", but see no reason to question that instance or others containing ambiguity, as not being a genuine effort to be candid with the Court, nor would I characterize EDM's approach to this litigation, and specifically this motion, as an effort to "swamp a well-defined legal dispute with the prospect of speculative litigation of unknown size and generation" per my comments in *Schöningh v Homburg Canada Inc.*, 2012 NSSC 185.

decades long history of the circumstances here, and the reasonably anticipated, and likely hotly contested expert evidence, I would expect the hearing Justice to be better positioned to effect a just result if this matter proceeds as an Action, as opposed to an Application in Court.

[32] I will grant an Order pursuant to CPR 6.02 for conversion of this proceeding from an Application in Court to an Action.

Costs

[33] On Costs, ScoZinc and the Attorney General, respectively agrees that Tariff "C" applies; and seek $1000 plus $66 for filing fees, or $750-1000 inclusive of fees and disbursements. I will grant ScoZinc/EDM $1000 plus $66 in disbursements for a total of $1066, to be paid forthwith.

Rosinski, J.