SUPREME COURT OF NOVA SCOTIA

Citation: *Omega Formwork Inc. v. 778938 Ontario Limited*, 2026 NSSC 128

Date: 20260423
Docket: Hfx No. 492560
Registry: Halifax

Between:

Omega Formwork Inc.

Plaintiff

v.

778938 Ontario Limited o/a Starfish Properties
and The Roy Building Limited

Defendants

and

EllisDon Corporation

Third Party

Judge: The Honourable Associate Chief Justice Darlene A. Jamieson

Heard: February 2, 2026 in Halifax, Nova Scotia

Counsel: James D. MacNeil and Tracy S. Smith, for Omega Formwork Inc.

Nancy G. Rubin, KC and Calvin DeWolfe for 778938 Ontario Limited O/A Starfish Properties and The Roy Building Limited

Christopher C. Robinson, KC for EllisDon Corporation

By the Court:

Background

[1] This motion requires the court to consider whether a proceeding that has been consolidated by order of the court can be "unwound" (or re-severed) and, if so, in what circumstances.

[2] By Order dated September 21, 2023, two actions, Hfx No. 492560 (the "Omega Action") and Hfx No. 525995 (the "Roy Action"), both related to the construction of The Roy Building ("The Roy"), were consolidated on a motion brought by the owner/developer, 778938 Ontario Limited o/a Starfish Properties and The Roy Building Limited (referred to as both Starfish and The Roy in this decision). The motion decision was not appealed.

[3] Omega Formwork Inc. ("Omega") opposed the prior consolidation motion and has now brought a motion to unwind the consolidation. Omega argues, however, that while the Omega Action should be severed, the third party claim within the Omega Action between Starfish/The Roy and EllisDon should remain consolidated with the Roy Action.

[4] The motion judge, the Honourable Justice Scott Norton, as part of his decision (2023 NSSC 308), ordered the prothonotary to appoint a case management judge pursuant to Civil Procedure Rule 26B.02. I have been case managing the consolidated action since October 2023. The first case management meeting took place on December 13, 2023.

Procedural History

The Omega Action

[5] On October 2, 2019, Omega commenced the Omega Action against 778938 Ontario Limited o/a Starfish Properties ("Starfish") and The Roy Building Limited ("The Roy") seeking damages, for alleged delays and additional work arising from a CCDC 17 contract between it and Starfish. Starfish and The Roy (collectively "Starfish" for the purposes of the Omega Action) filed a defence on November 29, 2019, and also counterclaimed for damages for alleged deficiencies, cost overruns, and lost revenue.

[6] In its defence to counterclaim filed on January 10, 2020, Omega pleaded that the damages were caused by Starfish, their construction manager, EllisDon Corporation ("EllisDon"), or other trades. Starfish filed a third party claim against EllisDon on January 24, 2020 (amended June 8, 2020) claiming, among other things, that EllisDon contributed to any loss suffered by Omega by way of breach of the contract between The Roy and EllisDon, or negligence.

[7] EllisDon filed a third party defence on June 30, 2020 and claimed setoff in the third party claim. EllisDon also counterclaimed against Starfish/The Roy, alleging breaches of contract causing significant economic loss, including lost revenue, lost profit, and extended duration and construction management costs. Clearly, the counterclaim was not limited to issues relating to Omega.

[8] A date assignment conference was held on August 26, 2022, and trial dates were set for 15 days, being November 25-28 and December 2-18, 2024.

The Roy's Prior Ontario Action

[9] On May 29, 2020, 778938 Ontario Limited o/a Starfish Properties and The Roy Building Limited commenced an action in Ontario (the "Roy Ontario Action") against EllisDon for damages of approximately $20 million for alleged delay and mismanagement of the Roy project. On March 22, 2021, EllisDon sought a stay of proceedings on the basis that Nova Scotia was the more appropriate jurisdiction for the claim to be tried. The motion was dismissed and then appealed by EllisDon.

[10] The appeal was heard on February 28, 2023, and on March 17, 2023, the Ontario Court of Appeal allowed the appeal and granted a temporary stay of the proceeding.

The Roy Action

[11] 778938 Ontario Limited o/a Starfish Properties and The Roy Building Limited commenced the Roy Action in Nova Scotia against EllisDon on August 11, 2023 seeking damages for alleged breach of contract and/or negligence and for its contribution to project delay. With respect to the Roy Action, I will refer to the Plaintiffs collectively as "The Roy".

[12] On September 15, 2023, EllisDon filed a defence denying breach of contract and counterclaimed for economic loss, including lost revenue, lost profit, and extended project duration and management costs.

[13] The consolidation motion was heard on September 20, 2023. The motion was allowed on the same day, with Justice Norton's written decision following on September 25, 2023. Justice Norton ordered that the two actions be consolidated and that the matters be case managed.

[14] The Roy filed a defence to the EllisDon counterclaim on October 11, 2023.

Post Consolidation

[15] At the first case management meeting on December 13, 2023, it was clear that new dates would be required for trial of the consolidated action. While the Omega Action had been set down for trial starting in November 2024, the Roy Action was at a much earlier stage, with pleadings having only closed in October 2023. No pre-trial procedures had yet taken place with respect to this $20 million construction claim.

[16] Seven case management meetings have taken place between December 2023 and the date of the hearing of this motion.

Evidence on the Motion

[17] Omega filed the affidavit of its president, Mr. Miguel Salgueiro, sworn on October 31, 2025. The Roy (Starfish and The Roy) filed a solicitor's affidavit of Mr. Calvin DeWolfe, sworn on November 18, 2025. EllisDon did not file any affidavit evidence.

Positions of the Parties

[18] The moving party, Omega, says *res judicata* does not apply to severance motions. It relies on *Microfibres Inc. v. Annabel Canada Inc.*, [2001] F.C.J. 1427, a Federal Court decision, as authority for this proposition. Omega further says there is Canadian precedent for severing previously consolidated matters. It says in the alternative that even if *res judicata* applies, the form of severance being sought is not inconsistent with any of the determinations made in either the consolidation motion or in the Ontario motion.

[19] Omega argues that the Omega Action should be severed while leaving behind, or bifurcating, the third party claim, which would remain part of the Roy Action. It says this would allow all claims between The Roy and EllisDon to remain together in one proceeding.

[20] Omega submits that the court's authority to consider a re-severance, after a consolidation order, is contained in Rule 37.05. It argues that the Rule does not preclude reconsideration of previously consolidated matters. Omega adds that if the intention was to prohibit revisitation of a consolidation order, the drafters would have made this intention clear in Rule 37 or elsewhere. It submits that it cannot be the Rule's intention that consolidation can never be revisited. For example, if a consolidated matter drags on for years, the parties must have access to a mechanism to seek a re-examination of the factors underlying the original consolidation.

[21] Omega submits that on a motion to unwind a consolidation, the court considers the same factors as on any motion for severance. It says the moving party only needs to establish a change in the circumstances or facts, not exceptional circumstances. Omega says we are now at a different point in time and the facts are different from those considered in 2023 when the matter was consolidated.

[22] Omega says that an analysis of the severance factors strongly favours granting the motion. It says the justice, efficiency, and cost considerations weigh strongly in support of severance. Omega submits, for example, that there would be minimal, if any, direct overlap of issues between the severable portions of the proceeding; there would only be a small overlap in evidence; there would be a higher likelihood of settling the Omega Action; the severed trial would be shorter, allowing for earlier trial dates, etc.

[23] Omega argues that the passage of time is the threshold for considering the severance of previously consolidated actions. It says the progression of the consolidated proceedings has slowed to a crawl, that timeline estimates have ballooned, that motions remain outstanding, and that some discoveries have yet to take place.

[24] Omega says that at consolidation, the parties and the court believed that the original trial dates could be maintained. It raised concern that trial dates had not yet been set for the consolidated matter (although all parties have been aware for some time that the target timeframe for the eight-week trial is the fall of 2027). Omega argued that this timeline is unlikely to be achieved and that it could obtain earlier trial dates if the matters were severed. It indicated that it needed 10 days for trial and that it could likely secure dates in 2027.

[25] The Roy argues that Omega's motion to sever is *res judicata*, barred by issue estoppel, and, even if issue estoppel does not apply, it remains just and convenient to keep the consolidated action intact. It says allowing the motion would undermine

the finality of the consolidation decision and erode the procedural integrity and efficiencies that have resulted from managing these related claims together. Severance at this stage would fragment the proceeding, create duplicative trials, increase costs, delay resolution, and introduce a real risk of inconsistent findings - the very consequences the consolidation was intended to avoid. The Roy says the case law cited by Omega in support of reconsideration of consolidation can be easily distinguished and is not applicable.

[26] In its alternative argument, The Roy points to Rule 37.05(b) and submits that there has been no change in circumstances since the consolidation decision that would make it inappropriate for the actions to remain consolidated. It further argues that the factors to be considered in assessing whether it is just and convenient to order severance weigh heavily against severance.

[27] EllisDon submits that Rule 37 does not contemplate a motion for severance of a proceeding previously consolidated by order of the court. It says the motion is plainly an abuse of the court's process through an attempt to relitigate the issues argued before, and determined by, the motions judge, and an implied attack on the integrity of judicial case management.

[28] EllisDon further says that allowing such motions would, in effect, subject parties and the court to the prospect of repeated litigation, the constant monitoring of a proceeding's suitability for consolidation, and the requirement for proof of the propriety of a proceeding's consolidation at any moment. That outcome would be disorderly, abusive of the court's process, and prejudicial to other parties in a consolidated proceeding.

[29] I note that the parties did not present any case law from Nova Scotia providing guidance on the issue of *res judicata* or issue estoppel in the context of a consolidation order.

Law and Analysis

[30] There are competing lines of authority in Canada on whether, and to what extent, issue estoppel applies to interlocutory motions. At this motion, the parties did not raise these various case authorities that deal with interlocutory decisions.

[31] The first line of authority follows the Saskatchewan Court of Appeal's decision in *Leier v. Schumiatcher*, 1962 CarswellSask 8, [1962] S.J. No. 170 (Sask. C.A.) ("*Leier*"). The rule in *Leier* is explained in Donald J. Lange, *The Doctrine of*

Res Judicata in Canada, 5th ed. (Toronto: LexisNexis Canada, Inc., 2021) at pp. 338-39:

> The Rule in *Leier* is that, where the first interlocutory motion is based on inadequate material, issue estoppel will apply to a second motion based on more complete material. A court hearing the second motion on the same material "is without power to make the orders sought." By necessary implication, the rule in *Leier* applies the rule in *Henderson*. The moving party must bring forward all subject matter germane to the motion at one time, once and for all, and will be estopped in a second motion from bringing forward subject matter which could have been brought forward in the first motion by the exercise of reasonable diligence but was not. In its broadest sense, the rule in *Leier* encompasses not only evidentiary material, but all legal and factual subject matter of the motion.

[32] The second line of authority follows the decision of the Alberta Supreme Court (Appeal Division) in *Talbot v. Pan Ocean Oil Corp*., 1977 AltaSCAD 176, 1977 CarswellAlta 86. The rule in *Talbot* is summarized in *The Doctrine of Res Judicata in Canada*, 5th ed. at p. 344:

> The rule in *Talbot* is that, where the first motion is based on inadequate material, a second motion based on more complete material may not be barred by issue estoppel, if the subject matter of the motion is procedural in nature of the proceeding. By necessary implication, the rule in *Talbot* precludes the application of the rule in *Henderson.* The more complete material is not new subject matter which could not have been brought forward by the exercise of reasonable diligence. The new subject matter is simply more complete or more appropriate material.

[33] The rule in *Talbot* was considered by the Alberta Court of Queen's Bench in *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, 1993 CarswellAlta 502, [1993] A.J. No. 1024 (Q.B.). In that case, the plaintiff's application for disclosure of certain government documents was denied based on public interest immunity. The plaintiff reapplied for disclosure of the documents on several bases. The court, per McDonald J., relied on *Talbot* to conclude that issue estoppel and cause of action estoppel do not apply to interlocutory procedural motions:

> 6 **It is plain that in this province a ruling on an interlocutory application, which in the ordinary case does not adjudicate on issues of fact or law raised by the pleadings in an action, is not a *res judicata* if the same interlocutory issue is raised again.** In the first application, as Clement J.A. said, there is no design or intention to adjudicate formally on issues of fact or law raised by the pleadings in the action; I would go further and say that on the facts of *Talbot v. Pan*

Ocean Oil Corp. and on the facts of this case the interlocutory issue on the first application involved no adjudication at all on the substantive issues of fact and law between the parties.

7 If there is a final judgment on an issue in one action between the same parties, and the same issue is raised between the same parties in a subsequent action, the decision in the first proceeding is a *res judicata* on the principles quoted above and on the basis of the following observation of Lord Maugham L.C. in *New Brunswick Railway Co. v. British & French Trust Corp.*, [1939] A.C. 1, at p. 20, [1938] 4 All E.R. 747 (H.L.) (quoted by Clement J.A. in the *Talbot* case at p. 114):

> If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

8 Thus the raison d'être of the principle of *res judicata* or issue estoppel lies in what is just and reasonable. **Applying that notion to an assertion that a ruling on an interlocutory application is a *res judicata* when the same issue is raised in a subsequent interlocutory application in the same action, it will not be unjust or unreasonable to allow the second application to be heard, for what is involved is not re-litigation of an identical substantive issue of law or fact:**

> (a) **if the ruling on the first application was not based on the merits of the issue but on a technical objection**: *Dombey & Son v. Playfair Brothers*, [1897] 1 Q.B. 368 (C.A.) cited in *Doty v. Marks*, 57 O.L.R. 623, at p. 625, [1925] 4 D.L.R. 740 (C.A.);
>
> (b) **if upon the first application the applicant had failed to prove essential facts from mistake or inadvertence**: *Doty v. Marks*, supra;
>
> (c) **if there is new evidence that seriously justifies re-consideration of the issue**;
>
> (d) **if there is a material change of circumstances of a non-evidentiary nature**.

The way to achieve justice and reason and to indicate the court's disapproval of the second application if none of those considerations is present is by an award of fully compensatory costs.

[Emphasis added]

[34] In appealing the above decision to the Alberta Court of Appeal (*Pocklington Foods Inc. v. Alberta*, 1995 ABCA 111), the Crown argued that *Talbot*'s application was a narrow one, applying only where prior motions relied upon inadequate

material, rather than more broadly to interlocutory motions or applications that were decided on their merits. The Alberta Court of Appeal disagreed, finding that *Talbot* stood for the broader principle that issue estoppel does not apply to procedural interlocutory motions:

> 7 McDonald J. relied on the decision of this Court in *Talbot v. Pan Ocean Oil Corp.* (1977), 4 C.P.C. 107 [3 Alta. L.R. (2d) 354] (Alta. C.A.), in concluding that the principles of *res judicata* and issue estoppel do not apply to interlocutory procedural motions. **The Crown seeks to distinguish the *Talbot* decision on the basis that *Talbot* applies only to cases of insufficiency or imperfection in the material relied on for the earlier application and does not apply to matters decided on the merits of the application before the court. We agree with McDonald J. that the judgment of this Court in *Talbot* decides the issue. *Res judicata* and issue estoppel do not apply to procedural interlocutory motions.** While in the judgment of Clement J.A. in *Talbot*, there is considerable discussion of the position where a decision is made on the adequacy of the material rather than on the merits of the application, when read as a whole the decision supports the position taken by McDonald J. in this case.
>
> 8 However, the court is not powerless to deal with attempts to re-litigate issues already decided by it. In *Talbot*, after refusing to apply *res judicata* to an interlocutory procedural application, Clement J.A. stated at p. 112:
>
> > ... I am of the opinion that the principle does not apply to an interlocutory application of the nature now before us; rather, **the second application is subject to control by the exercise of judicial discretion in determining whether it is frivolous or vexatious in all of the circumstances then appearing.**
>
> McDonald J. went on to consider the reasoning which should apply in controlling abuse of process. He cited from the decision of Lord Maugham L.C. in *New Brunswick Railway Co. v. British & French Trust Co.*, [1939] A.C. 1 at 20 (cited with approval in *Talbot*), as follows:
>
> > If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them ...
>
> He continued:
>
> > Thus the raison d'être of the principle of *res judicata* or issue estoppel lies in what is just and reasonable. Applying that notion to an assertion that a ruling on an interlocutory application is *res judicata* when the same issue is raised in a subsequent interlocutory application in the same action, it will not be unjust and unreasonable to allow the second application to be heard for what is involved is not re-litigation of an identical issue of law or fact:

> (a) if the ruling on the first application was not based on the merits of the issue but on a technical objection;
>
> (b) if upon the first application the applicant failed to prove essential facts from mistake or inadvertence;
>
> (c) if there is new evidence that seriously justifies reconsideration of the issue;
>
> (d) if there is a material change of circumstances of a non-evidentiary nature.
>
> [Emphasis added]

[35] The Alberta Court of Appeal endorsed McDonald J.'s list of principles, but expressed some concern about how they were applied. The court highlighted that the object of the exercise was to avoid re-argument and re-litigation of issues already dealt with, and the making of arguments that could have been made on the first motion:

> 11 McDonald J. also concluded that he could reconsider the application because [p. 296]:
>
> > ... the manner in which counsel for the plaintiff explained the nature of the plaintiff's case when the present application was argued on November 10, 1993, enabled me to understand more clearly what that case will be at trial.
>
> 12 In 1993, McDonald J. heard and determined the question of the claim for immunity of the 105 documents on its merits. He decided that the Crown need not produce these documents. We have no doubt that he gave it his usual careful and knowledgeable consideration. An appeal was then brought to this Court. Counsel again argued the matter of the public interest immunity of the 105 documents. This Court dismissed the appeal from the refusal to order production. While the oral reasons were not extensive, this Court directed its attention to the findings made by the learned chambers judge on the question of relevance and saw no problem with his understanding of the issues then presented by counsel for the respondent.
>
> 13 **Within a few months of the issuance of the judgment of this Court, the respondent applied, by a new notice of motion, for the same relief on the same pleadings and material which had earlier resulted in the dismissal of the application. No affidavits have been filed in support of the second application setting out any new facts or circumstances. There have been no amendments to the pleadings.** In the course of argument counsel points to information obtained from examinations for discovery of Mr. Johnson, the former Minister of Finance. However, Mr. Johnson was examined as a former Crown "employee", not as an officer of the Crown whose evidence would be admissible against the Crown. Does

> the fact that a more complete description of documents had not been made available to counsel for the respondent make any difference? Nothing in the reasons of McDonald J. of July 8, 1992 suggests that he had any problem dealing with the 105 documents or that a further description and submissions of counsel would have assisted.
>
> 14 **It appears to us that this is exactly what rules dealing with issue estoppel - *res judicata* or judicial control of proceedings on grounds of an abuse of the court process and frivolous and vexatious litigation are intended to avoid - a second opportunity for counsel to explain what counsel ought to have properly explained on the first occasion, and, if not then, at least before the Court of Appeal. We do not agree that counsel, having made an application, argued it, and having taken out the order, should be permitted to re-argue the application on the basis that this time he might do a better job. It appears to us that to permit a party to reopen a decision on the merits on such a ground would merely encourage counsel to try again and to engage in re-litigation which is unfair to the other party and a waste of the valuable resources of the court. If the first argument failed, then another tactic might work. If the first argument failed before one judge, it might work in a slightly modified form before another. The case against permitting such process becomes even stronger when the party seeking review of the decision has appealed and has been unsuccessful in the appeal. Where the second application seeks only to re-argue the first application, or to make arguments which were available at the time of the first, it should be dismissed as an abuse of the court process, or as frivolous and vexatious.**
>
> [Emphasis added]

[36] More recently, in *Kent v. Watts*, 2019 ABCA 326, the Alberta Court of Appeal reiterated that *res judicata* and issue estoppel do not apply to interlocutory proceedings:

> [23] However, both these orders were interlocutory orders. It is settled law that the doctrines of issue estoppel and *res judicata* do not apply to deny jurisdiction to entertain a subsequent interlocutory application. Rather, it is a matter of the exercise of judicial discretion: *Talbot v Pan Ocean Oil Ltd*, (1977) 5 AR 361 at para 7 (CA); *Alberta v Pocklington Foods Inc*, 1995 ABCA 111 at para 7; *Milne v Alberta (WCB)*, 2013 ABCA 379 at para 6.

[37] I am aware of only one decision of the Nova Scotia Court of Appeal with respect to the above issue and it adopts the Alberta line of authority that *res judicata*

and issue estoppel do not apply to procedural interlocutory motions. In *Global Petroleum Corp. v. Point Tupper Terminals Co.*, 1998 NSCA 174, 1998 CarswellNS 405 ("*Global Petroleum*")[1], the Nova Scotia Court of Appeal dealt with *res judicata* in the context of a second interlocutory application to amend a defence to a counterclaim where the first application to amend was dismissed. The issue before the court was whether the chambers judge had erred in failing to find that the doctrine of *res judicata* barred the second application to amend.

[38] In finding that *res judicata* did not apply, Bateman J.A. adopted the reasoning in *Pocklington*:

> 19 **I would adopt the following statement of the law from *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)* (1993), 25 C.P.C. (3d) 292 (Alta. Q.B.) , per MacDonald, J. at p 296: "... a ruling on an interlocutory application, which in the ordinary case does not adjudicate on issues of fact or law raised by the pleadings in an action, is not a *res judicata* if the same interlocutory issue is raised again".** He continued:
>
> > 8 ... the *raison d'être* of the principle of *res judicata* or issue estoppel lies in what is just and reasonable. Applying that notion to an assertion that a ruling on an interlocutory application is a *res judicata* when the same issue is raised in a subsequent interlocutory application in the same action, it will not be unjust or unreasonable to allow the second application to be heard, for what is involved is not re-litigation of an identical substantive issue of law or fact:
> >
> > (a) if the ruling on the first application was not based on the merits of the issue but on a technical objection: *Dombey & Son v. Playfair Brothers*, [1897] 1 Q.B. 368 (C.A.) cited in *Doty v. Marks*, 57 O.L.R. 623 , at p. 625, [1925] 4 D.L.R. 740 (C.A.);
> >
> > (b) if upon the first application the applicant had failed to prove essential facts from mistake or inadvertence: *Doty v. Marks*, *supra*;
> >
> > (c) if there is new evidence that seriously justifies re-consideration of the issue;
> >
> > (d) if there is a material change of circumstances of a non-evidentiary nature.

[1]See also *McLellan v. Crowell*, [2000] N.S.J. No. 20, 2000 CarswellNS 22 (S.C.); *R. v. Wilson*, 2002 NSSC 87, and *Jeffrie v. Hendriksen*, 2011 NSSC 460.

> The way to achieve justice and reason and to indicate the court's disapproval of the second application if none of those considerations is present is by an award of fully compensatory costs.

20 On appeal ((1995), 123 D.L.R. (4th) 141 (Alta. C.A.)), the Alberta Court of Appeal endorsed and clarified the remarks of MacDonald, J.:

> . . .
>
> 9 We accept this statement of principles governing the discretion of the chambers judge to entertain a second application on a procedural matter. However, **we emphasize that the object of the exercise is to avoid re-argument and re-litigation of issues already dealt with by the Court and in respect of which an order has been taken out.** Such re-litigation is unfair to the other party and wastes the valuable and scarce resources of the Court. We add that, to prevent "judge-shopping", the second application should be made before the same judge, if possible.
>
> 10 While we agree with his statement of the principles, we have some concerns about the manner in which McDonald J. applied the criteria. McDonald J. first found that he could reconsider the matter because of the passage of time and because of an intervening election and the retirement of the former Premier and Finance Minister. The passage of time and a change in the government are matters which may be relevant to the question of public interest immunity. (See: *Carey v. Ontario*, [1986] 2 S.C.R. 637 .) Counsel for the Crown argues that the changes are insufficient to justify rehearing. This is a discretionary matter to be determined by the chambers judge. In the absence of palpable and overriding error, we will not interfere with his decision.
>
> ... Where the second application seeks only to re-argue the first application, or to make arguments which were available at the time of the first, it should be dismissed as an abuse of the court process, or as frivolous and vexatious.
>
> (Emphasis added)

21 **Global, in making a further application to amend, risked dismissal of the application and an order for costs should the Chambers judge find that the application was frivolous, an abuse of the court's process or simply an attempt to re-litigate an issue already decided on the same facts. Justice Hamilton was satisfied, however, that there had been a material change in circumstances since the first application.** She concluded that on a reasonable interpretation of Justice Nunn's decision, the conflict of interest issue was material to his dismissal of the application to amend. Such a finding is within the discretion of the Chambers

> judge. That issue having been resolved, it was appropriate to entertain the further application.
>
> [Emphasis added; underlining in original]

[39] Although it would have been sufficient for Bateman J.A. to find that *res judicata* did not apply because neither of the original decisions purported to make a final determination on the question of the amendment, she went further by adopting the rule in *Talbot*, as applied in *Pocklington*. I am not aware of any decision where the Nova Scotia Court of Appeal has revisited the issue.

[40] Justice Bateman adopted the *Pocklington* considerations in determining whether it is just and reasonable to allow a second motion, highlighting that the court is to consider these factors in light of the object of avoiding re-argument and re-litigation of issues already dealt with by the court and in respect of which an order has been taken out. As a starting point, the motion must not have determined issues of fact or law in the pleadings. Thereafter, the factors for consideration in determining whether a second motion is possible include (as set out above) situations where there is new evidence that seriously justifies re-consideration of the issue and where there is a material change of circumstances of a non-evidentiary nature.

[41] In short, in Nova Scotia, *res judicata* and issue estoppel do not apply to procedural interlocutory motions. Instead, whether to hear a second motion that raises the same issue as a previous motion is a matter of the judge's discretion. The court will not exercise its discretion to hear the second motion when it is simply a re-argument or re-litigation. The moving party must establish, for example, that there has been a material change in circumstances or there is new evidence that seriously justifies re-consideration of the issue. Where the second motion seeks only to re-argue the first motion, it should be dismissed as an abuse of the court process, or as frivolous and vexatious. As a result, there could be elevated cost implications, depending on the circumstances.

[42] Omega acknowledges that if nothing has changed from September 2023, it would not be appropriate for this court to entertain a motion to unwind the consolidation. Omega argues that there has been a change of circumstances since Justice Norton's decision that justifies consideration of a second motion. A mere change in circumstances or new facts is not sufficient to meet the above requirements.

[43] Omega says the change in circumstances or the new facts include:

1. The Omega Action trial dates that had been set before the consolidation motion were subsequently lost. No trial dates have been set for the consolidated proceeding.
2. Omega has never been a party to the Roy Action. Omega has never claimed against EllisDon and vice versa.
3. It has been more than six years since Omega filed its action. It is almost three years since Omega filed its date assignment conference materials and now 13 months after the original trial dates.
4. Omega says that there have already been four other known trade contractor settlements and one arbitration award related to a trade contractor's claim that have been determined in relation to The Roy building project, for comparable claims of delay, changes to contract work, and extras. It says there is no compelling reason that Omega's claim could not be dealt with separately as was done with the other trade contractors.

   It says that one trade contractor (Floors Plus) had its dispute with Starfish fully determined by arbitration on the merits. It says the decision from an appeal from the arbitrator's award shows that many of the witnesses are the same as in this matter yet the matter was heard separately. The Roy Action pleading specifically referenced this contractor but proceeded separately despite an overlap of facts.
5. Allowing the third party claim from the Omega Action to remain consolidated addresses any concern Justice Norton had about the potential for inconsistent findings.

[44] I note that it is not disputed that, at every opportunity, Omega has voiced its concern that this matter must proceed expeditiously.

[45] Omega says the timeline estimates for pre-trial procedures have ballooned over time, far exceeding what was contemplated when the matters were first joined. It notes that some of the deadlines set by this court at case management meetings were not achieved; for example, reaching an agreement on a document disclosure protocol took far longer than the set timeline. It says that at consolidation, the parties and the court believed that the original trial dates in November and December 2024 could be maintained. Omega argues that the current aim to have the trial dates in 2027, three years after the matter was expected to be heard, is highly unlikely. It says

that severance would release the Omega Action from a perpetual cycle of delay and would allow for a final resolution of at least some of the claims.

[46] It is not my role to comment on Justice Norton's decision or to speculate as to what was in his mind at the time. I have reviewed his decision solely to assess Omega's claim that the facts or circumstances have sufficiently changed since September 2023 to warrant revisiting the consolidation. In determining whether there has been a material change in circumstances, I note the following:

1. It was argued before Justice Norton that the two actions were at vastly different stages. When consolidation was ordered, the Omega Action had trial dates scheduled for the following year, while the Roy Action had just been commenced in August 2023. EllisDon filed a defence and counterclaim on September 15, 2023. A defence to counterclaim had not yet been filed. The pleadings had not yet closed.

   The Statement of Claim in the Roy Action claims estimated damages of $20,000,000. Clearly, it would take time for the pretrial procedures to be completed in the Roy Action.

2. The court recognized that there would be further disclosure and discovery, that additional trial time was needed, and that the trial dates could be lost. Justice Norton acknowledged that the Omega Action was at a later stage, but when he balanced this factor against the risk of inconsistent findings, he found that consolidation was just and convenient to the parties and to the administration of justice:

   > 33 Consolidation will lead to a need for supplementary disclosure, additional days of discovery, and an elongation of time required for trial. Nevertheless, I believe that this can be achieved through active case management and cooperation of the parties. All parties acknowledged at the hearing that they consent to me ordering that a case management judge be appointed.
   >
   > 34 I find that the risk of adverse findings in the present case is high and the negative impact of that on the administration of justice trumps the risk that the trial dates will be lost or lengthened because of consolidation.

3. Omega says that at the time of the consolidation decision, "the parties and court believed that the original trial dates could be maintained", and that the parties "now understand that the overall length of the consolidated proceedings will require that the trial date be set much further into the future" (Omega's brief, at paras. 59 and 124). Even if

a lengthier delay getting to trial than anticipated at consolidation was sufficient, on its own, to constitute a material change in circumstances, there is no evidence from Justice Norton's decision that he believed the original trial dates could be maintained or that he would not have ordered consolidation if he had known that Omega's claim would not be heard until 2027. On the contrary, he held that the risk of adverse findings trumped the risk that the trial dates would be lost or lengthened because of consolidation.

4. At the first case management meeting in December 2023, it was apparent that the 2024 trial dates were not realistic, given that the pleadings in the Roy Action had just closed. The trial dates were released at that time.

5. At the time of consolidation, Omega was not a party to the Roy Action and is still not a party to that action. Further, at the time of the consolidation, Omega had not claimed against EllisDon nor had EllisDon claimed against Omega. This has not changed.

6. The fact that other disputes between The Roy and various contractors were resolved separately from these proceedings is not a reason to unwind this consolidation. The Roy says those matters (including Floors Plus) did not require adjudication on the shared project narrative. Regardless, those matters are not before me and it was up to those parties to determine how best to resolve their disputes. The fact that the Floors Plus dispute went through an arbitration process despite there being witnesses in common with this proceeding, does not assist Omega in establishing a material change in the current matter.

7. Omega's proposal to leave behind the third party claim in the Omega Action to be heard with the Roy Action, is clearly something that could have been argued before Justice Norton. Regardless, the pleadings themselves show pervasive overlap of issues between the various parties. There are claims relating to project delay, sequencing of work, change orders, extras, deficiencies, and indemnity allocations. Even without the third party claim, I am of the view there is significant risk of inconsistent findings and that there would be duplicative evidence. The Omega Action does implicate EllisDon. For example, in the defence to counterclaim, Omega says that any

> losses of the owner were caused by the action or inaction of the owner, EllisDon, other trades, or by action beyond Omega's control.

[47] Applying the factors set out above in *Global Petroleum*, I am not satisfied that there is new evidence that seriously justifies reconsideration, nor that there is a material change in circumstances. All that has happened since the consolidation is the passage of time. The mere fact that time has passed does not open the door to revisitation of an earlier consolidation order. I do not suggest that delay could never be a relevant factor, but the delay in this case is insufficient to constitute a material change in circumstances. Given that the actions were at vastly different stages at the time of the original motion, along with the nature and scale of the claims involved, I do not think it is out of the ordinary that a matter requiring eight weeks of trial might take three to four years to get to trial. The passage of time from September 2023 to February 2026, with anticipated trial dates in the fall of 2027, is not sufficient to warrant reconsideration of the consolidation motion.

[48] In my view, to be material, a change in circumstances must be significant/substantial and impactful. It is something unforeseen that displaces the assumptions underlying the original decision. Omega has not met its burden. At its core, Omega's motion seeks to re-litigate the original consolidation motion and, as a result, its motion for severance should be dismissed as an abuse of the court's process.

Civil Procedure Rule 37.05

[49] EllisDon argues that Rule 37.05 does not contemplate a motion for severance of a proceeding previously consolidated by an order of a judge of the Supreme Court. It says the motion lacks a basis in any part of Rule 37 and should be dismissed because it is not open to Omega to bring it.

[50] In its brief, EllisDon proposes the following interpretation of Rule 37.05:

> 6. **The circumstances in which Rule 37.05 contemplates the exercise of discretion to separate parts of a proceeding involve a party – not the Court – which has joined another party or a claim.** The Rule makes no reference to a proceeding consolidated by the Court. Reading paragraphs (a), (b) and (c) of Rule 37.05 together and in light of each other, they address, first, a party's inappropriate joinder of another party or claim; second, the circumstances in which it was once, but is no longer, appropriate for a party to have joined another party or claim; and finally the circumstances in which the benefit of separating the party or claim which

> has been joined outweighs the advantage of leaving that party or claim "joined". **It is submitted that these paragraphs should not be read disjunctively, but together to address the circumstances in which a party has "joined" another party or claim to a proceeding.** Omega has referred to no authority that applies this Rule, or a similar Rule, to accomplish what it seeks in this motion. It is submitted that Rule 37 does not permit the motion by Omega to unwind a consolidated proceeding through the removal of its entire action, leaving behind the third party claim within it.
>
> [Emphasis added]

[51] Rule 37.05 states:

> **37.05 Separating parts of a proceeding**
>
> A judge **may separate parts of a proceeding** for **any** of the following reasons:
>
> (a) a party joined a party or claim inappropriately;
>
> (b) **although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;**
>
> (c) **the benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.**
>
> [Emphasis added]

[52] I see no reason to interpret Rule 37.05 as narrowly as EllisDon submits. If the Rule was intended only to apply where a party, not the court, has joined another party or claim, it could have said so. It does not.

[53] With respect to interpretation of our Civil Procedure Rules, I refer to the decision of *Delano v. Gendron***,** 2019 NSCA 32, where the Court of Appeal stated:

> 12 *Civil Procedure Rule* 94.01(1) provides that the *Rules* "must be interpreted in accordance with the principles for interpretation of legislation." **It was recently held by this Court that an interpretative approach to statutory interpretation favouring a narrow textual analysis to the detriment of a broader and purposive contextual analysis constitutes an error** (*Sparks v. Holland*, 2019 NSCA 3 (N.S. C.A.) , at para. 69).
>
> 13 The motions judge appreciated that the interpretative approach to the *Rules* governing disclosure and discovery must not be narrow and restrictive:

> [20] The basic Rules for disclosure and discovery must be interpreted broadly and liberally and in a manner consistent with the purpose of the Rules generally and the goals of the discovery process.
>
> 14 This statement is correct (*Sparks v. Holland* , at para. 27). The modern principle of statutory interpretation applied to the interpretation of the *Civil Procedure Rules* requires the words of the *Rules* governing discovery to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Rules* overall, their objects, and the intention of their drafters.
>
> 15 The motions judge also correctly recognized the *Rules* "mandate conduct that is consistent with the just, speedy and inexpensive resolution of the proceeding", which has been identified by this Court as the "preeminent goal" of the *Rules*, informing their interpretation and application (*Homburg v. Stichting Autoriteit Financiële Markten* , at para. 41).
>
> [Emphasis added]

[54] I note that Rule 35.08 contemplates parties being joined not only by another party but also by the court. In addition, Rule 35.07 permits a judge to remove a party and specifically refers to "the judge…separating the claim by or against the party":

> **35.07 Judge removing party**
>
> (1) A judge who is satisfied on any of the following may remove a party:
>
> (a) the party was joined in circumstances that do not conform with Rules 35.02 and 35.03;
>
> (b) a respondent in a judicial review or an appeal should cease to be a party;
>
> (c) a third party proceeding was taken in circumstances outside those in Rule 4.11, of Rule 4 - Action;
>
> (d) the person has ceased to be in circumstances that justify being joined as a party;
>
> (e) an injustice would result if the person continues to be a party.
>
> (2) **Instead of removing the party, the judge may make an order, under Rule 37 - Consolidation and Separation, separating the claim by or against the party.**
>
> [Emphasis added]

[55] Rule 37.05 is the only Rule empowering the court to separate or sever parts of a proceeding. If EllisDon's interpretation is accepted, there would be no

mechanism in the Rules for the court to separate a party or claim where that party was previously joined by a judge under Rule 35.08, rather than by a party. This cannot be the drafter's intention. Interpreting Rule 37.05 in light of Rule 35.07, the scope of Rule 37.05 clearly extends beyond situations where a party has joined another party.

[56] I am of the view that the Rules do not foreclose the severing of previously consolidated actions. In my view, where there has been a material change in circumstances or there is new evidence that seriously justifies re-consideration of the issues, the court could separate parts of a previously consolidated proceeding pursuant to Rule 37.05(c). Bringing such a motion involves a second hearing of an interlocutory motion, therefore, the moving party must meet the *Global Petroleum* threshold discussed above before the second motion will be considered on its merits. If this threshold is met, then the usual severance factors would be considered.

[57] As discussed above, Omega has not met its burden and the motion must be dismissed.

Conclusion

[58] The motion is dismissed with costs to The Roy and EllisDon. If the parties are unable to agree on costs, I will entertain brief written submissions (no longer than five pages) to be filed within 30 days of the date of this decision. I ask that counsel for The Roy prepare the order.

Jamieson, ACJ