

SUPREME COURT OF NOVA SCOTIA

Citation: Jeffrie v. Hendriksen, 2011 NSSC 351

Date: 20110920
Registry: Halifax

Docket: Hfx. No. 346079

Between:

Roderick Jeffrie

Applicant

v.

Anthony Hendriksen, Inland Marine Services Limited and
Three Ports Fisheries Limited

Respondents

Docket: Hfx. No. 354159

Between:

Three Ports Fisheries Limited

Applicant

v.

Roderick Jeffrie and H. Hopkins Limited

Respondent

Judge: The Honourable Justice Peter P. Rosinski.

Heard: September 15, 2011, in Halifax, Nova Scotia

Counsel: Christa Brothers and Matthew Pierce, for the Applicant
Ezra Van Gelder, for the Respondents

By the Court:

Introduction

[1] Contested Motions to Consolidate two proceedings involve the application of well established legal principles to uncertain facts. The decision to do so is necessarily discretionary, and particularly difficult to justify to a rigorous standard, because the judge is asked to predict the timing and context of not just one, but two previously separate proceedings, and compare the consequences expected should the matters proceed separately as opposed to together.

[2] Into this uncertain terrain, I now tread.

The Legal Context

[3] *Civil Procedure Rule* 5.16 and 37.02 permit two applications to be consolidated and heard together. The Rules in existence as of January 1, 2009 are sufficiently similar to their 1972 Rules (39.02) counterparts that all parties herein agree the jurisprudence applicable to the 1972 Rules is still persuasive and binding. Section 41(g) of the *Judicature Act* RSNS 1989 c. 240 also is relevant.

[4] All parties agree that the factors I should apply arise in the following cases:

Stone v. Raniere (1992) 117 NSR (2d) 194 [1992] NSJ No. 458 (SC) per Saunders, J. (as he then was);

Best v. Pontius 2009 NSCA 39 per Roscoe, JA;

MacNutt v. Nova Scotia (Att. General) 2005 NSSC 337 per Hood, J.

[5] I conclude that the factors relevant to be considered by me include:

1. The general convenience and expense;
2. Whether a jury notice is involved [not relevant in this case of two applications as opposed to actions];
3. How far the actions / applications have progressed to date;
4. Whether the plaintiffs in each case have different solicitors;
5. Actions / applications should not be consolidated where matters relevant in one action / application have arisen subsequent to the

commencement of the other, and the actions / applications have proceeded to a considerable extent;

6. Where consolidation is otherwise proper, the fact that on discovery, questions would be objectionable in one action / application which might be privileged in the other is not a sufficient reason for refusing an order for consolidation; and
7. The risk that separate proceedings may cause there to be significant inconsistent findings and / or outcomes, although such a result is not inevitable in any particular motion for consolidation.
8. The nature of the proceeding - i.e. an application / hearing (in Chambers or in Court) which is designed to be a more expeditious and efficient litigation vehicle as opposed to an action / trial which is a more comprehensive litigation vehicle.

The Chronology in this Motion for Consolidation

[6] Jeffrie and Hendriksen have been the sole shareholders and Directors, President and Secretary of Three Ports, an active fishing company for the years from 2007 onward. In 2009 relations became particularly strained and an alleged buyout of

Jeffrie by Hendriksen was negotiated. There was disagreement about whether a binding agreement had been reached, legal actions followed.

[7] The chronology of these proceedings collectively is as follows:

March 29, 2011 - #346079 Jeffrie Notice of Application in Court filed against Hendriksen, Inland and Three Ports (Respondents) and requests as relief:

- specific performance of the terms of the Buyout Agreement (effected by a declaration from the Court that there is a enforceable Agreement between the parties);

- a declaration that Jeffrie has suffered “oppression” by the Respondents;

- special damages (including an accounting of profits for the duration of the time Jeffrie has been unable to participate in the

company and damages for
breach of contract);

- pre-judgment interest;

- costs and such further relief as
the Court deems just.

April 20, 2011 - Respondents' Notice of Contest is filed requesting dismissal of
Jeffrie Application #346079.

May 3, 2011 - Respondents' Notice of Motion to Convert Application to an
Action filed (to be heard June 21, 2011).

July 14, 2011 - Decision of Pickup, J. dismissing Motion to Convert the
Application to an Action - 2011 NSSC 292.

August 10, 2011 - Motion for Directions heard and following dates set in #346079:

5 day complex chambers	Mar. 1, 5, 6, 7, 8, 2012
Reply Brief	Feb. 24, 2012
Respondents' Brief	Feb.17, 2012
Applicant's Brief	Feb. 6, 2012

All Discoveries to be completed by Jan. 26, 2012

Rebuttal affidavits to be filed by Dec. 2, 2011

Respondents' affidavits	Nov. 14, 2011
Applicant's affidavits	Oct. 31, 2011

Disclosure to be completed by	Oct. 7, 2011
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August 18, 2010 - #354159 Three Ports Application in Court filed against Jeffrie and Hopkins seeking as relief;

Specifically against Jeffrie - permanent injunction preventing Jeffrie from participating in Hopkins or any business in competition with Three Ports so long as he remains an officer or Director of Three Ports.

Specifically against Hopkins - an accounting of profits gained as a result of Hopkins alleged wrongful interference with Three Ports economic interests;

- general damages

- special damages

- costs and such further relief as Court deems just

August 18, 2010 - Respondents (#346079) Notice of Motion for an Order Consolidating #346079 and #354159 to be heard September 15, 2011.

Position of Jeffrie

[8] Jeffrie argues there are significant detrimental effects of consolidation¹ and “minimal” benefits of consolidation on a more meaningful closer analysis of the relevant factors; the cases are not “inextricably intertwined”.

Position of the Respondents

[9] They say that both applications are in their early stages, and while consolidation may disrupt the timetable set out at the Motion for Directions, August 10, 2011 for #346079, ultimately the cost of delay will be handsomely rewarded by overall efficiencies in hearing the applications together. That is, they argue that these matters at their core “concern the management of Three Ports business and the relationship between its shareholders”, and relate to a long standing dispute between Jeffrie and Hendriksen, the two sole shareholders of a closely held and operated fishing company.

¹(the inevitable delay of #346079 due to the disrupted timelines of the later commenced second application; and the extended vulnerability of Jeffrie at Three Ports where he alleges “oppression” and the erosion of his rights consequently over time; Hopkins will be dragged into a prolonged litigation, much of which will not relate to its involvement)

[10] Although Jeffrie characterizes his application as merely about a settlement / shareholder agreement / buyout, the Respondents say that he also pleads “oppression”, and collectively these claims require an examination of the relationship and interaction of Jeffrie and Hendriksen over time since “oppression” claims must examine the “reasonable expectations of the shareholders in the context and in regard to the relationship at play” - *BCE Inc. v. 1976 Debentureholders* 2008 SCC 69 at para. 59.

[11] The Respondents argue that the two applications are “inextricably intertwined”, and although a consolidation will necessarily cause a decision on the merits of the Jeffrie application to be delayed, that factor should be given little weight since the expediency of having a quick hearing on the merits of the Jeffrie Application should not overwhelm Three Ports entitlement to a fair process - i.e. a consolidation specifically.

Analysis of the Relevant Factors

[12] The material I have available to assess this Motion includes the documents filed in #346079 and #354159 to date, most recently the two affidavits of Mr. Van Gelder sworn / filed August 18 and August 30, 2011 and the parties’ written and oral

submissions (including the Notice of Contest filed September 16, 2011 in #354159 by Jeffrie).

(i) The general convenience and expense

[13] At present the best estimations are that: the Jeffrie application will be completed within the 5 days allotted March 1, 5, 6, 7, and 8, 2012; the Three Ports application itself will require 5 days to complete, and that if consolidated, it would add 3 days (or more) to the 5 day Jeffrie application. Three Ports was of the view that a consolidated 8 day hearing should not be scheduled for March 5, 6, 7, 8, 12, 13, 14 and 15, 2012 because, although the only dates left available in 2012, Three Ports could not be ready with its application in such a short time frame.

[14] Three Ports estimates a consolidated hearing will require at least 8 days; Jeffrie estimates it will take 10 days. A review of available dates for 8 or 10 day hearings, even without checking if counsel are available, made it clear that no other dates are available in 2012 for such lengthy hearings.

[15] I am very satisfied that the earliest a consolidated hearing could be heard is in 2013.

[16] At present, although timelines have been set in the Jeffrie application (see para. 7 herein) that application is in its early stages. In relation to the Three Ports application, Jeffrie only filed its Notice of Contest on September 16, 2011.

[17] Both applications are in their early stages.

[18] The Jeffrie application, based on Ms. Brothers' March 29, 2011 filed affidavit and the pleadings, will likely involve as witnesses (i.e. whose evidence is to be provided by affidavits):

- Roderick Jeffrie - Director and President of Three Ports according to the Registry of Joint Stocks;

- John Nash - Accountant for Three Ports

[19] Jeffrie intended to discover only Anthony Hendriksen.

[20] Three Ports' Notice of Contest states that it intends to file affidavits from:

Anthony Hendriksen - Director and Secretary of Three Ports according to the Registry of Joint Stocks.

Joseph Rizetto - Lawyer and Recognized Agent for Three Ports according to the Registry of Joint Stocks

Ralph Ripley - Lawyer and counsel to Hendriksen.

[21] Three Ports also noted that "other possible witnesses" include:

Expert Witnesses - valuation of shares in Three Ports

Lorne Jessome - regarding operation of Three Ports business

Linda Kendall - regarding operation of Three Ports business

Other lay witnesses (not yet known) - regarding operation of Three Ports business.

[22] In the Three Ports application, it states that the intended witnesses are:

Anthony Hendriksen - regarding Three Ports incorporation and operational history; Hopkins and Jeffrie's involvement

Kevin Luedy - Jeffrie's involvement in Three Ports

Lorne Jessome - Jeffrie's involvement in Three Ports

Linda Kendall - Jeffrie's involvement in Three Ports

Robert Budge - Jeffrie's involvement with Hopkins

Charles Briand - Jeffrie's involvement with Hopkins

Patrick Briand - Jeffrie's involvement with Hopkins

Silby Barnett - Jeffrie's involvement with Hopkins

David Caines - Jeffrie's involvement with Hopkins

Expert witness (unknown) - effect of Jeffrie's conduct on Three Ports' financial position.

[23] Jeffrie's Notice of Contest to Three Ports application states that it intends to file affidavits from:

Roderick Jeffrie - Involvement with Three Ports and Hopkins

John Simec - Conduct of Three Ports operations / management

John Nash - Conduct of Three Ports operations / management

Bill Hopkins - Bidding process for Ingonish Four Harbours' contract

Calvin Hussey - Bidding process for Ingonish Four Harbours' contract

John Wilcox - Bidding process for Ingonish Four Harbours' contract

Lee Buchanan - Bidding process for Ingonish Four Harbours' contract

Ricky Dixon - Conduct of Three Ports operations / management

Mike Pace - Business dealings with Three Ports

[24] In his August 18, 2011 filed affidavit, Mr. van Gelder for Three Ports states that Three Ports intends to discover:

Roderick Jeffrie - Party

Pierre LeBlanc - Treasurer and Director of H. Hopkins Limited

[25] I note that CPR 18.09 governs discovery in the case of applications. Moreover, CPR 5.09(2) allows a Judge on a Motion for Directions to: “order discovery, limit the time for discovery, and direct who may discover whom”.

[26] No such requests were made in the Jeffrie application Motion for Directions, and no limitations were ordered by me on August 18, 2011. I note that such requests could be considered at the Motion for Directions set for the Three Ports application on October 24, 2011 if these matters are not consolidated.

[27] A review of the intended witness list and persons to be discovered, reflects the divergent views of the parties regarding the consolidation motion.

[28] Perhaps more understanding may be ascertained from a consideration of the claims and grounds for the claims stated in the pleadings.

[29] I have considered both Applications in Court and the associated documentation (including for example the draft Statement of Claim attached as Exhibit “C” to Mr.

van Gelder's affidavit filed May 3, 2011 in support of Three Ports motion to convert the Jeffrie application to an action, so that Three Ports could "counterclaim" against Jeffrie and Hopkins.

[30] At the September 15, 2011 hearing, I was able to get an even more precise understanding of the parties intentions and positions regarding matters relevant to this Motion for Consolidation.

[31] What I gleaned from the representations of counsel includes, that:

(i) - Jeffrie joined Hopkins in approximately March 2011 (and I infer the Three Ports claim of his acting as directing mind of Hopkins to financially undermine Three Ports must therefore make the periods after February 2011, most relevant to their claim of economic interference and relief sought - i.e. a permanent injunction which is a prospective remedy);

(ii) The level of Jeffrie's involvement in Three Ports between 2007 - 2010 is very much disputed - Hendriksen would say Jeffrie was minimally involved - [paras. 4 - 7 Grounds in Three Ports application which mirror those same paras. 4 - 7 in Three Ports Proposed Statement of Claim - Exh. "C" May 3, 2011, van Gelder affidavit] Jeffrie says he

only relinquished control while he was too ill to be active in Three Ports Management in 2009 and when he returned in June 2010 the “oppression” began - Notice of Contest paras. 2 - 4;

(iii) Both parties appear to be of the view that any alleged Agreement in 2004 between the founding business investors Hendriksen, Jeffrie and John Simec has little relevance to the negotiations that took place in 2010 between Hendriksen and Jeffrie regarding the buyout of the latter by the former;

(iv) Whether an Agreement was reached in July 2010 in that respect should not be a complicated matter to decide in and of itself;

(v) The “oppression” claim and remedy is focussed similarly on the period late in 2009 and thereafter, as both the buyout and “oppression” claims relate to a deteriorating situation between Jeffrie and Hendriksen which became especially problematic some time in later 2009.

[32] These observations collectively suggest that:

The claims of Jeffrie require that evidence arising from 2009 and onward be called (breach of contract and oppression - even though the “reasonable expectations” of Hendriksen and Jeffrie are a relevant

consideration in assessing whether “oppression” is proved, and some of that evidence might pre date 2009);

The claims of Three Ports require that evidence arising primarily from 2011 onward be called (injunction based on Jeffrie’s continued involvement with Three Ports and his actions as directing mind of Hopkins, an alleged direct competitor of Three Ports; and an accounting of the consequent damages if the tort is proved).

[33] In summary, general convenience and expense favours not consolidating these two applications.

[34] Separately they will require 10 days; together they will require at least 8 days in my view.

[35] Although both are in their early stages, the proposed witnesses in each are somewhat distinct:

Jeffrie application

Three Ports application

Roderick Jeffrie

Roderick Jeffrie

John Nash

John Nash

Anthony Hendriksen

Anthony Hendriksen

Joseph Rizetto

Kevin Luedy

Ralph Riply

John Simec

Lorne Jessome

Lorne Jessome

Linda Kendall

Linda Kendall

Expert witness
(valuation of Three Ports' shares)

Expert witness
(effect of Jeffrie's conduct
on Three Ports' financial
position)

Other lay witnesses

Bill Hopkins

Calvin Hussey

John Wilcox

Lee Buchanan

Ricky Dixon

Mike Pace

[36] The evidence most relevant to Jeffrie's claims arises in 2009 and onward; the evidence most relevant to Three Ports' claims arises in 2011 and onward.

[37] I bear in mind that both parties, Jeffrie and Three Ports, are entitled to a "just, speedy and inexpensive determination" - CPR 1.01.

[38] The Application in Court process is designed to allow matters previously required to proceed as actions, to be heard more quickly, if the factual disputes can be resolved in a summary way.

[39] In this case, I fear that consolidating these two applications will push them to a point where the benefits of them being heard together are overshadowed by the much longer away hearing date in 2013.

[40] Moreover, the differences between the expert witnesses proposed to be called are telling. Three Ports' expert will primarily wish to give an opinion on the negative economic consequences on Three Ports of Jeffrie's involvement with Hopkins.

[41] The evidence to support that opinion is going to require serious marshalling of witnesses and resources that are unique to Three Ports claim.

[42] In contrast, Jeffrie's expert will primarily wish to give an opinion on the value of Three Ports shares - a distinct and more discrete inquiry.

[43] I conclude that consolidation will not allow the factual disputes to be resolved as effectively and efficiently as if they proceeded separately.

[44] While there is no doubt going to be some overlaps between the pre-hearing and hearing processes in the two applications if they proceed separately, I conclude that such separation may well lead to a quicker hearing for both of the two separate applications as compared with when they could be heard if consolidated. I conclude that it might even be less expensive in time and money, because combining the two may disproportionately expand the time and money required to process these applications, with little obvious benefit.

[45] I find this factor favours not consolidating the two applications.

(ii) Jury Considerations - (not applicable here)

(iii) How far each application has progressed

[46] I have earlier canvassed the timelines. I will not let delay be a disproportionate factor in my analysis, but it is to be kept in mind that Jeffrie chose the application process, whereas Three Ports chose the action process, by virtue of its motion to convert Jeffrie's application to an action.

[47] Those choices suggest that Jeffrie prefers to have its matter heard quickly, whereas Three Ports prefers to have them heard together, but at a significantly later time.

[48] Some consideration should be given to the party's choices. Without good reason a court should not interfere in a choice as fundamental as the choice of litigation vehicle. I do not find any good reason to interfere with Jeffrie's choice in this case.

[49] I note as well that the onus to satisfy a court that consolidation is appropriate is on the applicant.

[50] Given the limited evidence available at this stage, I am loathe to rely too heavily on contested pleadings, in deciding the consolidation issue in this case. It is difficult to confidently come to conclusions in this case where unproved allegations, and imprecise guesstimates abound regarding the effect of consolidating these two applications.

[51] I find this factor to be a neutral, and of little assistance in deciding the consolidation issue.

(iv) Solicitors

[52] They are the same in both applications and although not significant in my opinion, that reality generally favours consolidation.

(v) The Comparative Timelines - is each application at a stage where all relevant matters have been identified / arisen?

[53] Although neither application has reached that stage, for the Jeffrie application, the existing staggered timeline (with dates as set down in contrast to the other application) are in my view sufficient for me to conclude that this factor will tend to favour no consolidation; Moreover, it is very unlikely that any hearing of these applications sequentially would be feasible before 2013.

(vi) Objectionable Discovery Questions

[54] This is not expected to be a problem here according to the parties.

(vii) The Risk of Inconsistent Findings / Outcomes

[55] This factor, may be seen as a good barometer of whether the proceedings are “inextricably intertwined”. As Saunders, J. (as he then was) stated in *Stone v. Ranieri* supra at para. 14:

A decision in one of these cases will not dispose of the essential cause of action in the other case. This is reason enough to refuse consolidation.

[56] That is, if one concludes that the “essential cause of action” is not the same in both cases, consolidation generally should be refused.

[57] Jeffrie’s application is based on claims of breach of contract in 2010 and ongoing “oppression”. Three Ports application is based on the tort of interference with economic interests by Jeffrie and Hopkins after February 2011. On the key claim by Jeffrie, the determination of its “essential” cause of action (i.e. whether there was a binding buyout agreement in 2010), it will not be disposed of by the determination of whether Jeffrie, through Hopkins, wrongfully interfered with Three Ports economic interests, which is the “essential” cause of action for Three Ports.

[58] The risk of inconsistent findings / outcomes, while ever present, is not such in this case, that it supports consolidation.

Conclusion

[59] I specifically conclude that under *Civil Procedure Rule 37.02*;

- (a) Some common questions of fact or law will arise in both applications;
- (b) N/A

- (c) the pleadings do involve some of the same occurrence(s) or transaction(s);
- (d) consolidation is not otherwise in the interests of justice.

[60] Thus, I have the authority to go on to consider whether consolidation is in the interests of justice in this case. In spite of Mr. van Gelder's able arguments, I find that it is not.

[61] While I recognize the distinct disadvantage that a judge faces in such motions, nevertheless, on an assessment of the information available to me at this time, I conclude that Three Ports has not satisfied me that consolidation of these two applications is appropriate.

[62] This motion proceeded as a Special Times Chambers matter. I will order Costs in favour of Mr. Jeffrie, under Tariff C, in the amount of \$800 payable in the cause.