SUPREME COURT OF NOVA SCOTIA
Citation: Jeffrie v. Hendriksen, 2011 NSSC 460

Date: 20111212
Registry: Halifax

Docket: Hfx. No. 346079

Between:

Roderick Jeffrie

Applicant

v.

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

Respondents

Docket: Hfx. No. 354159

Between:

Three Ports Fisheries Limited

Applicants

v.

Roderick Jeffrie and H. Hopkins Limited

Respondents

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	Motion by Correspondence
Counsel:	Christa Brothers and Matthew Pierce, for the Applicant Michael S. Ryan and Ezra van Gelder, for the Respondents

By the Court:

Introduction

[1] This case requires the court to examine in what circumstances can, and should, a court grant leave to reopen a Motion for Consolidation?

[2] On September 20, 2011, I released my decision refusing the request by Hendriksen, for consolidation of two applications in court - *Jeffrie v. Hendriksen* 2011 NSSC 351. I concluded that decision as follows:

> 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.
>
> 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.

[3] For convenience I will refer herein only to Mr. Jeffrie, when referring to the Roderick Jeffrie, and/or H. Hopkins Limited, and only to Hendriksen, when referring to Anthony Hendriksen and/or Inland Marine Services Limited and Three Ports Fisheries Limited.

Background

[4] On November 8, 2011, Hendriksen filed a letter addressed to the Prothonotary regarding Halifax #346079 and #354159 - Motion to Consolidate - which read:

> Enclosed please find a letter to the Honourable Justice Rosinski to be filed and directed to him along with supporting affidavits. Once the documents had been filed, please return certified copies to my attention.

[5] That letter opened as follows:

> I write to request a reconsideration of your decision rendered September 20, 2011, in which you denied the Respondent's motion to consolidate the captioned applications.

[6] In my letter to counsel dated November 21, 2011 [but sent on November 23], I stated:

> To clarify:
>
> 1. When I spoke to the Prothonotary about Mr. Ryan's letter of November 8, 2011, received November 9, 2011, it was

> my understanding that the letter was a "Motion by Correspondence" - CPR 27. Given the circumstances of the situation, including my limited availability to conduct a hearing on whether I should reconsider the decision refusing to consolidate, it made sense to me to deal with that preliminary issue by way of correspondence, and I so authorize pursuant to CPR 27.01(1)(g);
>
> 2. If I conclude after reviewing the materials filed by the parties, that I should reconsider the earlier decision to refuse consolidation, then I will set an oral hearing date to reconsider the merits of a consolidation.

[7] Thus as I see it, this matter is before me as a Motion by Correspondence pursuant to *Civil Procedure Rule* 27.01(1)(g) which reads:

> Motion by correspondence to judge
>
> 27.01 (1) A party may make a motion to a judge by delivering correspondence only in one of the following situations:
>
> ...
>
> (g) a judge permits a motion to be made by correspondence to that judge.

[8] Attached to Hendriksen's brief were the affidavits of Mr. Hendriksen sworn November 1, 2011 and Jessica Donovan, legal assistant at Cox and Palmer, sworn November 8, 2011.

[9] On November 22, 2011, Mr. Jeffrie responded by letter indicating his position that Hendriksen should proceed by way of formal motion, since "they are in effect bringing a new motion, and are obligated to follow the proper channels for bringing a motion as prescribed under the Rules", and that in light of the affidavit evidence, Mr. Jeffrie and the court ought to have an opportunity to assess the evidence of Hendriksen and Ms. Donovan as those affidavits are the basis of the claimed change in circumstances according to Mr. Hendriksen. Mr. Jeffrie therefore sought an oral hearing in Chambers.

[10] On November 24, Jeffrie filed a comprehensive written submission in response to the November 8, 2011 submission of Hendriksen.

[11] In that brief Jeffrie stated:

> While we are prepared to waive the requirement for filing a Notice of Motion, we are not prepared to have the reconsideration proceed simply as a Motion by Correspondence. The Respondents have filed affidavit evidence in support of their request including a substantial affidavit of Anthony Hendriksen giving details of the nature of evidence he intends to file to respond to the evidence filed by Jeffrie in the Jeffrie application. We wish to have the opportunity to cross-examine Hendriksen on any aspects of his affidavit which are not covered by the evidence the Respondents file on or before November 28, 2011. Moreover... we

> are requesting that a date be set in chambers for the purposes having this matter argued.

[12] As noted in my letter sent November 23, 2011 to counsel, I will decide the preliminary issue of whether leave should be granted to reopen the Motion for Consolidation by way of written submission only. While I recognize that not permitting an oral hearing and an opportunity to cross-examine Mr. Hendriksen may deprive Jeffrie of the opportunity to counter some of Mr. Hendriksen's statements, I note that his affidavit was filed and provided to Jeffrie on or about November 9, 2011 and that Jeffrie elected not to file any affidavit evidence in response or otherwise, and had the full opportunity to comment in its brief upon the statements made by Hendriksen in his affidavit.

[13] In my view, I am satisfied that the parties have had a fundamentally fair opportunity to present their arguments regarding the narrow issue at Bar.

[14] I note as well that the Consent Order, allowing Jeffrie to amend his Notice of Application in Court [Hfx. No. 346079 originally filed March 29, 2011], was filed November 17, 2011. The amended application in court is different from the original in that particulars are provided and the witness list for the applicant

includes, in addition to the original two listed witnesses Roderick Jeffrie and John Nash: Dwight Rudderham, John Simec, Ricky Dixon, Doug Arsenault, Perry LeBlanc and John Wilcox.

[15] In its Notice of Contest [Hfx. No. 346079] filed April 20, 2011, Hendriksen indicated the following witnesses would produce affidavits:

> Anthony Hendriksen, Joseph Rizetto, Ralph Riley, and possibly Lorne Jessome, Linda Kendall, and "expert witness [not yet known]" and "other lay witnesses [not yet known".

[16] Hendriksen has not filed an amended Notice of Contest in Hfx. No. 346079. On September 16, 2011, Jeffrie filed his Notice of Contest in Hfx. No. 354159.

[17] At present, the filing dates in each of the respective applications in court are as follows:

> **Hfx. No. 354159** - set by Robertson, J. October 24, 2011
>
> Five day Complex Chambers - January 2, 3, 7, 8, 9, 2013.
>
> Applicant's affidavits - April 16, 2012
>
> Expert Reports - April 16, 2012

Respondents Affidavits - April 30, 2012

Rebuttal Affidavit - may 15, 2012

Discoveries to be completed by July 31, 2012

Applicants Brief - September 28, 2012

Respondents Brief - October 31, 2012

Reply Brief - November 15, 2012

Hfx. No. 346079 - set by Rosinski, J. August 10, 2011

Five day Complex Chambers - March 1, 5, 6, 7, and 8, 2012

Disclosure to be completed - October 7, 2011

Applicants Affidavits - October 31, 2011

Respondents Affidavits - November 14, 2011 [extended by consent to November 28]

Rebuttal Affidavit - December 2, 2011 [extended by consent to December 16]

Discoveries to be done by January 26, 2012

Applicant Brief - February 6, 2012

Respondents Brief - February 17, 2012

Reply Brief - February 24, 2012

Jurisdiction to reconsider an Interlocutory Motion

[18] Mr. Hendriksen argues that I retain the discretion to amend, vary and reverse my judgment until a formal order is issued giving effect to that judgement: *Burke v. Sitser* 2002 NSCA 115, paras. 7 - 8. Citing Justice Cromwell, as he then was, in *Griffin v. Corcoran* 2001 NSCA 73, Mr. Hendriksen notes that I need to balance "the risk of both procedural and substantial injustice to both parties" - paras. 63 - 72.

[19] Mr. Jeffrie agrees with this general statement of principle, but points out that the discretion to reconsider a decision should only be exercised in exceptional circumstances and in rare cases. He states:

> The fact that the order has not been taken out is merely incidental in this case. A draft order was sent to counsel for the respondents on October 26, 2012. However, once a draft order has been sent, the party reviewing the order is required to submit any objections to the terms of the order within five days of receiving the draft. As of receipt of the Respondent's submission requesting a reconsideration on November 8, 2011, no objections to the order had been made. Under Rule 78.04(3)(c), this means that the opposing party is taken to consent to the form of the order.

[20] In his letter November 14, 2011, Mr. Hendriksen stated:

> We did receive a copy of the draft order on October 26, 2011. On October 31, we realized the draft order contained an error relating to the provision of costs. We received most of the applicants affidavits later that day, and after reviewing them with our client received instructions to seek a reconsideration of the consolidation motion. No one from Ms. Brothers' office inquired about the draft order between October 26 and November 8. Had someone done so, we would've informed them of our intentions.

[21] Rule 78.07 reads:

> When and how order becomes effective
>
> 78.07 (1) A written order is in effect when it is issued and an order made orally is in effect from the time it is spoken, unless the order provides otherwise.

[22] Having given a written decision declining a Motion to Consolidate, and a finalized costs award therein, the drafting and presenting of such order to the court should have been a simple exercise.

[23] A draft order was submitted to Hendriksen. Rule 78.04(2) and (3) apply in the case at Bar. Specifically Mr. Jeffrie was obligated to submit the draft to Hendriksen no more than 10 days after September 20, 2011. Hendriksen had "no more than five days after the day the draft is delivered" to either object to the draft

by delivering to Jeffrie a concise statement of the objection and an alternative draft order, or sign in the place provided for consent as to form.

[24] Mr. Jeffrie was late in providing the draft to Hendriksen and Hendriksen was late in either objecting to or signing the order. Although Hendriksen indicates, having received the order October 26, they knew by October 31 that the draft order contained an error "relating to the provision of costs", it does not appear that Hendriksen communicated its objection to Mr. Jeffrie until November 9, 2011 - see November 10, 2011 letter from Mr. Jeffrie to Hendriksen.

[25] As the affidavit of Jessica Donovan confirms, there was a flurry of communication between the parties in October, including the consent order to allow for an amended notice of application in court - received by Hendriksen on October 27, 2011 - Exhibit "L", Donovan affidavit.

[26] Hendriksen relies on *Griffin v. Corcoran* to argue that I still have jurisdiction to exercise my discretion to reopen a case prior to the entry of formal judgment. I note that in *Griffin*, "after the trial judge had delivered her reasons, she invited submissions on costs... both [parties] asked the judge to reopen aspects of her

decision" - [para. 49] and that the judge's jurisdiction to do so was not challenged on appeal [para. 50] as that case dealt with the actual exercise of discretion on the merits [paras. 72 - 73]. In the case at Bar, my September 20, 2011 Decision included costs.

[27] Nevertheless, as noted by Justice Oland in *Burke v. Sitser* supra at para. 8:

> We would also refer to Temple v. Riley, [2001] N.S.J. No. 66 (Quicklaw) wherein Saunders, J.A. stated at para 60:
>
> > The general rule is that a trial judge may change or amend his/her judgment at any time before issue and entry thereof, but that after the judgment has been issued and entered, he/she is functus officio and relinquishes any power to do so, subject of course to the provisions of the Rules. [citation omitted].
>
> This court also reviewed the legal principles relating to the reopening of a proceeding after the judge has made a decision and issued reasons but before the formal judgment has issued in Griffin v. Corcoran, [2001] N.S.J. No. 158.

[28] In *Griffin*, Justice Cromwell considered *Civil Procedure Rule* 15.07 and 15.08 which respectively read:

Amendment of judgments and orders

15.07.

Clerical mistakes in judgments or orders, or errors arising therein from any accidental mistake or omission, or an amendment to provide for any matter which should have but was not adjudicated upon, may at any time be corrected or granted by the court without appeal.

Reversal or variation of order

15.08.

Where a party is entitled to:

> (a) maintain a proceeding for the reversal or variation of an order upon the ground of a matter arising or discovered subsequent to the making of the order;
>
> (b) impeach an order on the ground of fraud;
>
> (c) suspend the operation of an order;
>
> (d) carry an order into operation;
>
> (e) any further or other relief than that originally granted,

he may apply in the proceeding for the relief claimed.

[29] In the *Civil Procedure Rules* (2009) the most closely associated equivalents are found in CPR 78.08 and 82.22, which read respectively as follows:

Errors and extensions of time

78.08 A judge may do any of the following, although a final order has been issued:

(a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;

(b) amend an order to provide for something that should have been, but was not, adjudicated on;

(c) extend the time for doing something required to be done by an order that provides a deadline;

(d) set a deadline for complying with an order that does not set a deadline.

Varying order or re-opening proceeding

82.22 (1) A party to a proceeding concluded by final order may make a motion to vary the order only in one of the following circumstances:

(a) an error is to be corrected, or time extended, under Rule 78 - Order;

(b) legislation permits the order to be varied;

(c) the text of the order would have it apply in circumstances in which it is not intended to apply.

> **(2)** A party may make a motion for permission to present further evidence before a final order and after one of the following events:
>
> (a) the party closes the party's case at trial;
>
> (b) the party chooses to present no evidence at trial;
>
> (c) a jury begins deliberation or a judge reserves decision.
>
> **(3)** A party may make a motion to re-open the trial or hearing of a proceeding concluded by final order only in the limited circumstances in which the re-opening is permitted by law.

[30] In *Gates Estate v. Pirates Lure Beverage Room*, 2004 NSCA 36 (2004) 222 NSR (2d) 86, Justice Hamilton confirmed, since the Supreme Court has inherent jurisdiction to control its own process, that specifically:

> With interlocutory orders such as this dealing with the litigation process, there is residual discretion to grant relief against dismissal of the action or striking of the defences, in other words to relieve against the sanction provided for failure to comply. [and therefore the judge in that case had jurisdiction to set aside a consent order which would have otherwise rendered an injustice between the parties] - para. 29.

[31] Whether under CPR (2009) 82.22(2) or my inherent jurisdiction to control the court's process, in my opinion, I have the jurisdiction to consider exercising my discretion to grant leave to allow the reopening of the motion for consolidation which I ruled on, in a written decision September 20, 2011.

Position of the Parties

[32] Hendriksen takes the view that:

> Since receiving your Lordship's decision rendered September 20, 2011, new evidence has come to light and the circumstances as they existed at the time of the original hearing have materially changed. This occurred through no fault of the Respondents. [P. 2, November 29, 2011 letter]...
>
> **The Respondents request was made because of a material change in circumstances of a non-evidentiary nature and "new evidence" which seriously justified a reconsideration - namely, the substantial affidavits filed by the Applicant addressing at length issues material to and forming part of the Three Ports application.** A clear indicator of the change in circumstances is the disparity between the number of days originally set aside for the hearing and the number of witnesses on whose behalf affidavits have now been filed. [P. 3, November 29, 2011]...
>
> When this matter was set up for hearing on August 10, 2010, the Respondents did not and could not have anticipated that affidavits would ultimately be filed at least 15 witnesses and disclosure would remain outstanding more than two months after the original deadline for completing it. This matter has evolved such that the current timelines are likely no longer feasible and the five day hearing scheduled for March 2012 is almost certainly insufficient. All of this confirms that Jeffries'

> application is not what it was when your Lordship rendered your decision on consolidation on September 20. The evidence filed thus far confirms more than just a significant degree of overlap between the applications. With limited exception, the applications involve the same parties, timeline, material witnesses, witnesses, and documentary evidence. They are "inextricably intertwined". [P. 5 November 29, 2011 letter]. [My emphasis]

[33] Mr. Jeffrie takes the view that:

> What the Respondents are doing is in effect bringing a new motion under the guise of a reconsideration request. Their position is not that the decision was wrong on the evidence before the court in September, but that new circumstances have come to light which warrant a new determination of whether consolidation is appropriate on the merits. It is acknowledged that the Respondents are entitled to bring another motion for consolidation... This is not to be a *de novo* consideration of all arguments for and against consolidation; rather it is a limited assessment of whether there is a material change in circumstances sufficient to reverse the determination you have already made. As will be discussed below, no such material change exists. [P. 2 November 24, 2011 letter].

Should the Court exercise its discretion to grant leave to reopen the Motion for Consolidation?

[34] Both trial and appellate courts have adopted a flexible approach to reopening trials/proceedings and re-examining trials/proceedings during the appeal process. Ultimately the key consideration is to do justice as between the parties. "Doing justice" requires an examination and balancing assessment of "the risk of both

procedural and substantial injustice to both parties" per Cromwell, JA (as he then was) in *Griffin* supra.

[35] For example, in the **trial context**: see *Griffin v. Corcoran* 2001 NSCA 73 paras. 64 - 69 and 75 where the trial judge was held not to have erred in refusing to reopen the trial. Notably in that case, the Plaintiff did not establish, that substantial injustice would occur if the trial were not reopened to admit the proferred evidence - in fact, the Plaintiff merely contended that the proferred evidence could have tipped the balance in their favour - see also *671122 Ontario Limited v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983 at paras. 59 - 61 per Major, J.; in the context of **appeals**: see in civil matters *Federal Business Development Bank v. Silver Spoon Desserts Enterprises Ltd.*, (2000) 189 NSR (2d) 133 (NSCA) as cited at para. 70 - 71 in *Griffin* by Cromwell, JA, noting that test "is more onerous than the test applicable to a re-opening after trial but before final judgment"; and in the criminal context of a review by one justice of another's decision to not permit a motion to extend time for filing an appeal - *R v. Mercier* 2011 NSCA 58 per Bryson, JA at paras. 21 - 29; leave to appeal dismissed [2011] SCCA 289; and in the context of **interlocutory orders**: see *Global*

Petroleum Corp. v. Point Tupper Terminals Co., (1998) 170 NSR (2d) 367 [1998] NSJ No. 408 (CA) per Bateman, JA at paras. 19 - 21.

[36] In *Globe Petroleum*, Justice Hamilton was asked to reconsider the interlocutory motion decision of Justice Nunn to not allow an amendment to Global's Defence to Counterclaim. Justice Hamilton found that she could reconsider that application on its merits as neither Justice Nunn or Justice Matthews in the earlier appeal had purported to make a final determination on that issue and there had been a "material change in circumstances". Her decision was upheld on appeal.

[37] These cases reveal a consistent test is used by the courts in deciding whether to reopen a proceeding/trial, or to allow "fresh evidence" at an appeal. That test is whether it is in the interests of justice to grant the Motion. The factors considered are contextual, but in the case at Bar, I will consider whether there has been a material change in circumstances and balance "the risk of both procedural and substantial injustice to both parties". The practical reality is however, that in general, the more advanced the litigation becomes, the more significant and compelling the reasons for review will need to be before a court will reconsider an

existing decision. There is, if you will, a steeper hill of finality to climb as parties get nearer to the end of litigation if they wish to successfully argue a matter should be reconsidered.

[38] In the case at Bar, I am dealing with a request to review a decision refusing to consolidate two related applications in court. Hendriksen's request for reconsideration is based on evidence that has been added into the mix by way of affidavits from witnesses not identified as such in the first motion, and more particularized pleadings that Hendriksen says amount collectively to a material change in circumstances which would necessarily now lead to the conclusion that the two applications are "inextricably intertwined", and ought to be consolidated.

[39] To decide whether to grant leave to reopen the Motion for Consolidation, I will consider:

> Whether granting leave is necessary to prevent an injustice as between the parties, by balancing the risk of both procedural and substantial injustice to both parties.

[40] In his November 1, 2011 sworn affidavit, Mr. Hendriksen stated:

> I am concerned that continuing with both applications as separate proceedings unfairly favours Jeffrie, prejudices the Respondents' ability to defend themselves and their employees against the serious accusations levied against them, and prevents a just determination of the dispute between the parties.

[41] In my view, the changes that Hendriksen argues are material, are not sufficient to cause me to embark on an in chambers hearing wherein I would examine the continuing merits of refusing consolidation.

[42] I say this because:

1. But for the delay by both parties herein, my September 20, 2011 Decision should have been contained in an Order before October 30, 2011 and reconsideration would not be in issue. It would appear that neither party anticipated that they would suffer any significant prejudice by not attending to the Order in a more timely fashion;

2. An examination of the pleadings in existence on September 15, 2011 as compared to presently filed, reveals: a Notice of Contest filed September 16, 2011 by Mr. Jeffrie in Hfx. No.

354159 including reference to anticipated affiants Roderick Jeffrie, John Simec, John Nash, Bill Hopkins, Calvin Hussey, John Wilcox, Lee Buchanan, Ricky Dixon and Mike Pace; and in Hfx. No. 346079, a consent order amendment to Jeffrie's Notice of Application (filed November 17, 2011) which provides particulars for existing pleadings and for anticipated additional affiants - Dwight Rudderham, John Simec, Ricky Dixon, Doug Arsenault, Perry LeBlanc and John Wilcox.

3. Although the pleadings are more particularized and some witness affidavits have been added to the mix, which may put some more flesh on the bones of the pleadings of each separate application and although some of those are common to both applications, I am not satisfied that there is a material change in circumstances and an identifiable risk of procedural injustice to Hendriksen. Hendriksen's argument in part is to the effect that at present, the first complex chambers hearing dates (with 15 potential witnesses) will be insufficient to complete Jeffrie's application (Hfx. No. 346079) and that delay of Jeffrie's application is inevitable. Thus no significant procedural injustice to Jeffrie is likely. This possibility always exists, but I find it does not rise to the necessary level in this case. I note that with 18 potential witnesses in Hfx. No. 354159, the parties agreed on October 24, 2011 to set only 5 days for that matter to be heard in January 2013. At the time of setting dates for Hfx.

No. 346079 on August 10, 2011, the parties were not materially less aware of the core issues, allegations or kind of evidence they would need to marshall to advance their interests. At the September 15, 2011 hearing of the Motion to Consolidate, Hendriksen had a full opportunity to present its case for consolidation. To argue that by October 31, there had been a material change which would occasion procedural injustice to Hendriksen unless the motion is reopened, requires very cogent and compelling evidence and argument in support thereof.

4. I find no identifiable risk of substantial injustice to Hendriksen - again while the possibility always exists, I do not find it rises to the necessary level in this case. Hendriksen's argument is no stronger than that the new circumstances cumulatively confirm "that Jeffrie's application is not what it was when your Lordship rendered your decision..." - p. 5 November 29, 2011 letter. While circumstances have changed, such change does not necessarily involve an injustice against Hendriksen. He still has his fair chance to advance his interests in both applications. He has not filed an amended Notice of Contest in Hfx. No. 346079 in response to the Amended Notice of Application in Court filed (by consent) on November 17, 2011. I acknowledge that Hendriksen is "concerned" that the Respondents [in Hfx. No. 346049] cannot sufficiently defend themselves against the "serious accusations" made by Mr. Jeffrie. However, such

> concerns can be addressed in each separate application, and there is no evidence or compelling reasoning presented here that suggests the fact of separate applications would unfairly prejudice Hendriksen's ability to advance its interests.
>
> 5. I keep in mind that CPR 1.01 insists that "these Rules are for the just, speedy and inexpensive determination of every proceeding" and that applications in court were created to allow a speedy flexible alternative to a trial, at which substantial disputes of fact are permitted if they can be resolved in a summary fashion. Here, "oppression" is raised by Jeffrie. Such claims deserve very timely adjudication and substantial injustice could easily occur against Jeffrie's interests if Hfx. No. 346079 is delayed.

[43] Hendriksen does not satisfactorily identify the procedural or substantial injustice of my not granting leave. This will mean that the two applications will proceed separately. While their complexion may have changed, I am unconvinced that an "injustice" will be occasioned as between the parties if I do not grant leave to reopen the Motion for Consolidation. I therefore dismiss the Motion.

[44] If the parties cannot agree on costs, I will accept written submissions as follows:

- Mr. Jeffrie by December 17, 2011;

- Hendriksen by December 23, 2011 (noon).

J.