SUPREME COURT OF NOVA SCOTIA
Citation: *Mathis Holdings Inc v. Acadia Atlantic ULC*, 2023 NSSC 361

Date: 20231109
Docket: PtH. No. 503850
Registry: Halifax

Between:

Mathis Holdings Inc

Plaintiff

v.

Acadia Atlantic ULC, Mark Buller, Bulcan Distribution Holdings ULC and Marjam Supply Co. Inc.

Defendants

-and-

Hfx No. 503828

Acadia Atlantic ULC and Bulcan Distribution Holdings ULC

Plaintiffs

v.

Marcel Girouard, Mathieu Girouard, Nathalie Girouard, James G. Taylor, John Piecuch, Mathis Holdings Inc., Newton Properties Ltd., Blue Thunder Construction Ltd., Matt Properties Ltd., and Acadia Drywall Supplies Ltd.

Defendants

Decision on Motions

(Civil Procedure Rules 37 and 47)

Judge: The Honourable Justice Robin Gogan

Heard: June 2, 2023, in Port Hawkesbury, Nova Scotia

Counsel: James MacNeil, for the Applicant
Nathan Sutherland, for the Respondents

By the Court:

Introduction

[1] This is a motion decision in a complex multi-party commercial dispute that gives rise to no less than five separate but related legal proceedings (Hfx Nos. 514020, 508051, 500205, 503828 and PtH No. 503850).

[2] On this motion, the moving parties seek: (1) an Order for consolidation (PtH No. 503850 and Hfx No. 503828), (2) an Order that the place of the consolidated proceeding be Port Hawkesbury, and (3) an Order that the consolidated proceeding be heard in sequence to another consolidated proceeding (Hfx. No. 500205, being a consent consolidation of Hfx Nos. 500205, 514020, and 508051, by Order of Arnold, J. dated October 18, 2022).

[3] On the final point, the parties ask that the related proceedings be heard proximately, and by the same judge. In effect, the motion impacts not only the place of this proceeding (as consolidated), but also the place of the related consolidated proceeding in Halifax.

[4] The parties agree to consolidation and sequence of trials. The place of trial remains contested.

[5] For the reasons that follow, I order consolidation of PtH No. 503850 with Hfx No. 503828.

[6] Although the parties agree that the proceedings be heard in sequence, it is premature to make any Order. I encourage the parties to consider moving for the appointment of a case management judge under *Civil Procedure Rule 26B* for both this consolidated proceeding and the related Halifax proceeding (Hfx No. 500205). A case management judge has broad power to direct actions toward conclusion, including the power to set trial dates (*Rule 26B.04 (3)*).

[7] The place of trial shall be in Halifax. The newly consolidated proceeding shall be Hfx No. 503828.

Background

[8] I begin with some brief background to explain the parties and their relationships. This was well explained in the parties submissions. What follows here only deals summarily with the complicated relationships between individual and corporate parties and the various ongoing proceedings.

[9] Mathis Holdings Inc., Marcel Girouard, Mathieu Girouard, Nathalie Girouard, James G. Taylor, John Piecuch, Newton Properties Ltd., Blue Thunder Construction

Ltd., Matt Properties Ltd., and Acadia Drywall Supplies Ltd., are collectively the "**moving parties**" on this motion. They consist of the plaintiff in a proceeding commenced in Port Hawkesbury (PtH No. 503850), and the defendants in a proceeding commenced in Halifax (Hfx No. 503828). These parties have aligned interests in all proceedings and are represented by the same counsel.

[10] Acadia Atlantic ULC, Mark Buller, Bulcan Distribution Holdings ULC, and Marjam Supply Co., Inc. are collectively the "**responding parties**". They consist of the defendants in the Port Hawkesbury proceeding (PtH No. 503850), and the Plaintiffs in the Halifax proceeding (Halifax No. 503828). These parties also have aligned interests in all proceedings and common counsel.

[11] The evidence on the motion comes from the affidavits of Marcel Girouard and Taylor Rudolph, for the moving parties, and Carmen Arguelles, for the responding parties. Most of the facts relevant to the present motions are uncontested or uncontroversial. The evidence of both parties was admitted on consent. I note the following:

- The Port Hawkesbury proceeding was commenced by Mathis Holdings Inc. Mathis is a company incorporated in New Brunswick. It is owned by Marcel Girouard who deposed his evidence in Dieppe, New Brunswick.

- The remainder of the moving parties appear to have no connection to Port Hawkesbury. Mathieu and Nathalie Girouard reside in Dieppe, New Brunswick. Blue Thunder Construction Limited, Matt Properties Ltd., Newton Properties Ltd., and Acadia Drywall Supplies Ltd. are all New Brunswick companies.

- None of the responding parties have a connection to Nova Scotia with the possible exception of Acadia Atlantic ULC, a Nova Scotia company with a registered office in Halifax. Acadia's business is distribution of building supplies and its main administrative office is in Dieppe, New Brunswick. Mark Buller was last known to reside in New York. Bulcan Distribution Holdings ULC is a British Columbia holding company owned by a Dutch company. Marjam Supply Co. Inc. is a New York company registered to carry on business in Nova Scotia, but having no office or employees in Nova Scotia.

- The subject of the various disputes arose out of a business venture originating with Marcel Girouard, Mark Buller and John Piecuch. The venture involved the reorganization of a number of existing companies and the creation of two new companies: (1) Cabot Manufacturing ULC, and (2) Acadia Atlantic ULC.

- In furtherance of the business venture, Girouard, Buller and Piecuch became parties to a Master Implementation Agreement dated July 1, 2016. The agreement notes that Girouard is from New Brunswick, Buller from New York, and Piecuch from Texas. Clause 8.8 of the Agreement provided for the terms to be governed by the law of the province of New Brunswick and confirmed that each party attorned to the exclusive jurisdiction of the courts of New Brunswick.

- The first of two Shareholder's Agreements was executed on March 28, 2017 respecting Cabot Manufacturing ULC. Cabot had three shareholders: (1) Canco Manufacturing Holdings ULC, a British Columbia company registered to carry on business in Nova Scotia, (2) Cabot Manufacturing Holdings Inc., an extra-provincial company not registered in Nova Scotia, and (3) PFI Interests LLC, an extra-provincial company not registered in Nova Scotia.

- The second Shareholder's Agreement was executed on April 14, 2017 respecting Acadia Atlantic ULC. Acadia's two shareholders are: (1) Mathis Holdings Inc., and (2) Bulcan Distribution Holdings ULC. None of the principles to the agreement are resident in Nova Scotia.

- Clause 12.2 of both the shareholder's agreements provide for disputes to be resolved by arbitration which "shall take place in Halifax, Nova Scotia".

- The parties to this proposed consolidation are located in various locations in North America but principally in New Brunswick and New York. No parties are located in Port Hawkesbury or Cape Breton. It is not anticipated that any witnesses would be coming from the Cape Breton area. Most, if not all, key witnesses will be coming to trial from outside Nova Scotia.

- The only connection with Port Hawkesbury is a manufacturing plant owned and operated by one of the related corporate parties.

- Counsel to all parties are all located in the Halifax Regional Municipality.

- The Court anticipates a likely need for further motions and for case management under *Civil Procedure Rule 26B*.

- Proceedings involving related parties and disputes are underway in Halifax (see ***Canco Manufacturing Holdings ULC v. PFI Interests, LLC***, 2021 NSSC 320, appeal dismissed at 2022 NSCA 70) and have already been consolidated (Hfx No. 500205).

- The parties agree that the trial of the consolidated proceeding may take several weeks. They offer the same time estimate for the related proceeding in Halifax.

- Although the related consolidated proceeding is a consideration in the present motions, the parties in that proceeding are not parties here, did not appear, and were not otherwise heard. As noted above however, legal counsel are the common to the parties across proceedings.

- A helpful diagram of the parties and relationships was prepared by the responding parties and is attached to this decision as *Appendix A*.

Issue

[12] The contested issue is whether the newly consolidated proceeding continue in Port Hawkesbury or Halifax? If the place is changed to Port Hawkesbury, can the place of the Halifax proceeding be changed to Port Hawkesbury.

Positions of the Parties

Moving Parties

[13] The moving parties ask that the place of the consolidated proceeding be Port Hawkesbury. They submit that the guiding principle is doing justice between the

parties. None of the parties or witnesses are connected to Halifax and none of the various business operations are based in Halifax. The only connection to Halifax is the location of legal counsel. The existing Port Hawkesbury proceeding is further advanced, Port Hawkesbury would be a less expensive location for a set of lengthy trials, and one of the related parties operates a plant in Port Hawkesbury.

[14] The moving parties cite the following authorities: (1) ***Diadamo v. Arsenault***, 2005 NBQB 100, and (2) ***First Real Properties Limited v. Hamilton (City)***, 2002 CanLII 49478 (ONSC).

Responding Parties

[15] The responding parties contest the place of trial and submit that the consolidated proceeding should proceed in Halifax. Halifax is the more central, convenient, and accessible location for the parties and anticipated witnesses. There is no direct connection between the consolidated proceeding and Port Hawkesbury and simply "no good reason" for Port Hawkesbury to be the location.

[16] The responding parties cite: (1) ***Laurin v. Favot***, 1996 CarswellOnt 793, (2) ***New Brunswick v. Grant Thorton LLP***, 2015 NBQB 95, and (3) ***Nelson v. Queripel***, 2011 NSSC 478.

Analysis

The Law

[17] The moving parties bring their motion for consolidation and place of trial under *Civil Procedure Rule 37*. By virtue of *Rule 37.06(d)*, a judge who orders consolidation of proceedings may give directions on the place of the proceeding, including the place of trial.

[18] The place of trial is also guided by *Civil Procedure Rule 47* which provides that a party may select a place of trial or request a change of place in accordance with the rule. *Rule 47* provides:

> **Selecting a place of trial or hearing**
>
> **47.03**(1) A party who starts a proceeding, or makes a motion, must select one of the following places for the trial or hearing:
>
> (a) a courthouse where there is an office of the prothonotary;
>
> (b) another courthouse approved by the Chief Justice of the Supreme Court of Nova Scotia for sittings of the court.
>
> (2) The party must state the selected place of trial or hearing in the notice by which the proceeding is started, or the motion is made.
>
> …
>
> **Changing place of trial or hearing**
>
> **47.04**(1) A party may make a motion to change the place of trial or hearing.

> (2) The judge presiding at a trial or hearing may direct that the trial or hearing, or part of it, be held at any place and in any suitable building.
>
> …

[19] In keeping with *Civil Procedure Rule 47*, each of the two proceedings being consolidated here began in the place selected by the initiating party. One began in Port Hawkesbury and the other in Halifax. The moving parties, who chose Port Hawkesbury as the place of trial, seek consolidation with an action commenced in Halifax, and ask that the related Halifax proceeding be moved to Port Hawkesbury. Although the responding parties consent to consolidation, they contest the place of trial, seek to remain in Halifax and maintain the related proceeding in Halifax.

[20] The responding parties rely on the decision of Justice Moir in ***Nelson v. Queripel***, 2011 NSSC 478. In ***Nelson***, the plaintiff chose Kentville as the place of trial but later sought to change to Halifax. The defendant opposed the motion. In a decision to dismiss the motion, Moir, J. reviewed the evolution of the rules guiding the place of trial:

> [24] Rule 47.04(1) says simply, "A party may make a motion to change the place of trial or hearing." Gone is any distinction between plaintiffs and defendants. Gone is any requirement to prove a good defence. Gone is any reference to residency.
>
> [25] Read literally, that is to say read without context, these words provide the motions judge with a discretion to choose the place that is the more just. (See also, Rule 94.06.) No literal interpretation could insinuate a requirement for proof by strong evidence of a great balance of convenience.

[26] Context accommodates the simple meaning of Rule 47.04, such that grafting into it some requirement for proof of a great preponderance of convenience would cause disharmony, if not do violence to the words.

[27] The scope provisions are often a good place to start getting the context of a Rule. Rule 47.01 treats as equals selection of the place of trial and requesting a change in the selected place.

[28] Rule 47.03 deals with selection and it treats trials, hearings of applications, and hearings of motions the same way: place is selected by the party who starts an action, the party who starts an application, and the party who makes a motion.

[29] In the broader picture, we see a set of Rules in which the notions of the plaintiff as dominant litigant and of a plaintiff's right to control the course of litigation have ceased to be meaningful. There is one change, in addition to those made in 1972 to which I referred, that deserves emphasis on this point.

[30] Control of an action is largely in the hands of the parties, rather than one of them. They have resort to judges in the numerous ways painstakingly catalogued in Part 6 - Motions, but, up to a point, uninvited interference by the court has been reduced under the new Rules. The point at which the court becomes somewhat controlling is when a party calls for trial dates.

[31] We now allow parties to request trial dates before they are ready for trial. Often this happens long before trial readiness. This creates risks, risks in which the public has an interest. Judges are required to assess the risks when assigning dates. In various ways, protections can be built in by the assigning judge. And, some Rules are designed for the court to be alerted to unforeseen risks after trial dates are assigned.

[32] All of which is only to say that the plaintiff can no longer be said to have a right to control the course of litigation until trial. The principle underlying the requirement for proof of a great preponderance of convenience is no longer with us.

[33] Something also has to be said about another change in the broader context of litigation. The relative importance of time and place has changed.

[34] A longer wait for trial was a factor to be taken into consideration in motions under the old Rule for a change of trial venue, but "it can only be in an exceptional case that its influence will be decisive": Justice Gale, later Chief Justice, as quoted at para. 25 of *Shortliffe's Grocery*.

[35] The present Rules allow for witnesses to testify by teleconference. They allow for trials to be moved about. On the other hand, they set short deadlines for

> filings before a date assignment conference and they impose restrictions on adjournments.
>
> [36] "Speedy" remains part of the trilogy in Rule 1 - Purpose. Time should not take a backseat to place when one assesses the justice of changing the venue of a civil trial.
>
> [37] In conclusion, Rule 47.04(2) does not incorporate the principle in *Shortliffe's Grocery*. Rather, on a motion for a change of venue the motions judge must consider all relevant circumstances and exercise the discretion in the way that the judge determines will best do justice. There is no preference for the place selected by the plaintiff.
>
> (Emphasis Added)

[21] I was not referred to any further consideration of the reasons in ***Nelson*** or of *Rule 47.06*.

[22] The responding parties submit that authorities prior to ***Nelson,*** or those based on different civil procedure rules, must be considered with caution. I agree. I will briefly review the other authorities relied on by the parties.

[23] ***Diadamo*** involved two separate motor vehicle accidents in New Brunswick giving rise to six separate actions. The rule of court governing the place of trial required a party to demonstrate that the proposed location would be: (1) more convenient, and (2) in the interest of justice. The motion was allowed and the place of trial moved on the basis that there was no significant connection to the original place of trial, that the overwhelming majority of witnesses were located in the proposed place of trial, and the balance of convenience favoured the change.

[24] ***Laurin*** involved a trial that was set down in Toronto, the only connection being the location of counsel. As the trial approached, the plaintiff sought a change of place for a variety of reasons. The motion was granted, based on the interpretation of *Rule 46* of the *Ontario Rules of Civil Procedure* which mandated consideration of the "balance of convenience" and the likelihood that a fair trial could not happen at the original place selected. A change required a party to establish a "preponderance of convenience" in favour of the new location.

[25] ***New Brunswick*** involved a trial for negligence. The plaintiff set the place of trial and the defendants sought a change. The rule governing the motion required consideration of both convenience and the interests of justice. The motion was dismissed with a finding that there was "not a considerable or overwhelming preponderance of convenience evidence from the Record".

[26] ***First Real Properties Limited*** involved two similar proceedings commenced in different places. In deciding the place of trial, the motion judge considered both the balance of convenience and the principle that matters affecting a community should be heard in that community.

[27] None of the authorities cited bear much factual similarity to the present motion. Only ***Nelson*** considered the same version of *Rule 47.04*. That said, ***Nelson***

directs consideration of all relevant circumstances. The cases cited give examples of the sort of circumstances that are often relevant. What is no longer significant is the choice of place made when the litigation began.

[28] Having heard from the parties, I conclude that motions of this kind require consideration of all relevant circumstances with a view to an outcome that "will best do justice". As in ***Nelson***, consideration must always be given to overall objective of the *Rules* to ensure a just, speedy, and inexpensive determination of every proceeding.

Determination of the Motions

[29] There is no dispute that the two proceedings at issue here shall be consolidated. Nor is there any contest as to the sequence of trials. Efficiency in ligation dictates that the proceedings be consolidated, and if possible, heard in close proximity, by the same judge. This outcome is consistent with the overall objective of the *Civil Procedure Rules*.

[30] The dispute on the motion is whether the place of the consolidated proceeding should be Halifax or Port Hawkesbury. In stating this, I agree with the responding parties that I have no authority to change the place of Hfx. No. 500205. No motion has been made in that proceeding under either *Rules 37* or *47*. The ongoing

proceeding in Halifax is a significant part of the factual matrix. The parties wish to have the two proceedings tried in sequence, by the same judge. If one of the two proceedings is in Halifax, it makes sense to move the other one there as well.

[31] The nature of the proceedings is relevant. It is essentially a shareholders' dispute. None of the parties to the dispute are located in Halifax or Port Hawkesbury. It is a private dispute and does not invoke consideration of issues important to either location or community. Neither do I consider that the manufacturing plant in Port Hawkesbury is worthy of weight. It is an asset owned by a related party. It does not play any role in the litigation. I do consider that the Shareholder's Agreements selected Halifax as the location for dispute resolution.

[32] There are other districts in the province that may have been worthy of consideration on the basis of convenience but were not. Truro is an example. Given only binary options, Halifax would be closer by car and easier to access by air. Discoveries were done virtually. Trial expenses for parties and witnesses are not materially different between locations. I accept however, that Port Hawkesbury would be more inconvenient, and more expensive, for the responding parties given their locations and travel requirements.

[33] Halifax is more convenient for counsel. Counsel live and work in the Halifax Regional Municipality. Although not often a significant consideration, in this case it is one of the few relevant considerations that connects the proceeding to one of the proposed locations. On a related point, I consider the complexity of the proceedings, and the likelihood of the need for motions, and perhaps case management conferences or hearings. Counsel's location make it more efficient, convenient, and less costly to proceed in Halifax. I say this recognizing the Court can accommodate virtual attendance and evidence, but that the default has now returned to personal appearances.

[34] I have considered the status of each of the proceedings and do not consider the Port Hawkesbury proceeding to be much, if any, advanced. I do not see this as a significant consideration.

[35] No evidence was offered about the impact of one location or another from a scheduling perspective. The proceedings are not yet ready to assign trial dates. On this point, I observe only that the availability of judges for trial should be somewhat even across judicial districts. The same is not necessarily true for courtrooms. Port Hawkesbury has one courtroom dedicated to hearing Supreme Court non-family matters. Criminal matters are scheduled in priority. It would be significant from a scheduling perspective to have a civil matter book a month or more of docket time

in that courtroom. In contrast, Halifax has a civil list and courtrooms dedicated to hearing civil matters.

[36] Having considered the relevant matters, I conclude that the just result here requires that the place of the consolidated proceeding be in Halifax. In my view, Halifax is a more central, accessible, and inexpensive location for the parties collectively. It ensures that no party bears more of the burden in travel costs or inconvenience. It does not overburden the one available courtroom in Port Hawkesbury. It is the efficient choice given the parties' desire to have a sequential trial with a proceeding already in Halifax.

Conclusion

[37] A consolidation order is granted. PtH No. 503850 and Hfx No. 503828 shall be consolidated into Hfx No. 503828.

[38] The place of the proceeding shall be Halifax.

[39] The parties agree to the proceedings being tried in sequence. I decline to grant any order as it is premature and could interfere with future date assignment or case management. The parties should consider moving for the appointment of a case management judge under *Rule 26B*.

[40] Most of the issues on this motion were disposed of by consent. That said, the responding parties were successful on the contested portion. If the parties wish to be heard on costs, I would ask for brief written submissions within ten days.

[41] I would ask applicant's counsel to draft an Order.

Gogan, J.

APPENDIX "A"