SUPREME COURT OF NOVA SCOTIA

Citation: *Payne v. Elfreda Freeman Alter Ego Trust (2015)*, 2018 NSSC 160

Date: 20180629
Docket: Hfx No. 474228
Registry: Halifax

Between:

Elizabeth Payne, Janet Wile and Ponhook Lodge Limited

Applicants

v.

Elfreda Freeman in her capacity as trustee of the Elfreda Freeman Alter Ego Trust (2015)

Respondent

Corrected Decision The text of the original decision has been corrected according to the attached erratum dated June 29, 2018.

Judge: The Honourable Justice D. Timothy Gabriel

Heard: May 22, 2018, in Halifax, Nova Scotia

Counsel: Andrew Christofi, for the Applicants
Roderick (Rory) Rogers, Q.C., for the Respondent

By the Court:

Introduction

[1] Elfreda Freeman, in her capacity as Trustee of the Elfreda Freeman Alter Ego Trust (2015) ("the Trust"), is the Respondent in an application in court brought by Elizabeth Payne, Janet Wile and Ponhook Lodge Limited (the "Applicants"). The Trust disagrees with the process selected, and moves for an order converting the application to an action. I will continue to refer to the Trust as the Respondent in these reasons, notwithstanding the fact that it is the moving party. The Applicants oppose this motion.

Background

[2] The Applicant Lodge owns lands near Greenfield, Nova Scotia. The land registry PID designation of that land is number 70116660. It purchased this land in 2017. The Applicant, Elizabeth Payne (along with Frank Payne) owns two parcels of land also in Greenfield, Nova Scotia. These bear PID numbers 70270954 and 70270947 respectively. They purchased these lands before September 2016.

[3] Janet Wile, the last Applicant, owns a parcel identified by PID number 7027092, which was purchased by her and her late husband, also prior to September of 2016.

[4] The Applicants are dominant tenement holders with respect to a deeded right of way pursuant to which they enjoy access to, and egress from, their respective properties to the public highway known as Ponhook Lodge Road. Other dominant tenement holders in the area (albeit non-parties) are Edward and Marion Backman, Elaine and Graeme King, Evelyn and John Simone, and Harry Freeman and Son Limited. All have owned their lands prior to September 2016, except the Simones who purchased in December, 2016.

[5] The Respondent owns two properties, to which the Applicant has referred as the "Freeman properties". They are designated by PID numbers 70116611 and 70265632. These properties are the servient tenement holders with respect to that portion of the right of way which crosses over them.

[6] The Freeman properties were conveyed to Harry Freeman, the late husband of Elfreda Freeman, by Laurie Wamboldt, who reserved a right of way at the time. It is described in the conveyance of November 12, 1977, as follows:

> The Grantor reserves a right of way up to 30 feet wide to be used to service her, her heirs and assigns and her family's lot situate on the so called Ephraim Hart lot, Crown grant #9284 (the "right of way").

[7] Until September 2016, it is alleged by the Applicants that the right of way was clearly visible and defined, and had been upgraded and maintained during its existence to improve its quality and prevent deterioration. It is also alleged that this right of way possessed only a slight increase in grade (*Applicant's brief, paras. 18 and 19*).

[8] The Applicants allege that in or around September of 2016, without any prior warning, that portion of the right of way which traverses the Freeman properties was blocked by a "skidder". A cable was also strung across that portion of the right of way. The Freemans posted signs redirecting traffic to an alternative route that they had constructed, one which the Applicants have described as either unsafe or hazardous (*para. 20, Applicant's brief*).

[9] The Applicants say that the new route is hazardous because it follows a steep gradient downward before taking a sharp "u-turn" near a lake. It then circumnavigates a large building "then up a steep gradient before rejoining the [original] road" (*affidavit of Lawrence Wambodlt, para. 21*).

[10] The Respondent (through Richard Freeman, Elfreda Freeman's son) admit that in or around September 1, 2016, the location of the right of way was "adjusted" (*affidavit of Richard Freeman, para. 16)*. At the hearing, Mr. Freeman also admitted that, as alleged, machinery and a cable had been placed across that portion of the right of way (also known as the Laurie Wamboldt Road) on the Freeman properties. He said that this adjustment was made for safety purposes, given that the former route came unacceptably close to the residence and garage of his brother, Charlie Freeman. He further testified that Mrs. Freeman (Charlie's wife) is hearing impaired, and so are two of their children. He also acknowledged that he did not "reach out" to any of the dominant tenement holders before blocking the right of way and building this alternative route.

[11] Richard Freeman disagrees with the Applicants' characterization of the new route as "unsafe". Moreover, he says that there were other alterations (over the

years) to other portions of the right of way on properties other than those owned by the Respondent Trust. He contends that these earlier alterations had attracted the acquiescence of all dominant and servient tenement holders alike. He specifically pointed to alterations made at "the location of the point of intersection between Laurie Wamboldt Road and the Ponhook Lodge Road". This was "adjusted by a significant degree in the past to add an alternative course for the road" (*Affidavit, Richard Freeman, para. 9).*

[12] Mr. Freeman goes on to say (at para. 10 of his affidavit) that "at another time, the western boundary of Laurie Wamboldt Road where it bounded property conveyed to James and Marion Hagen, was moved approximately 16 feet eastward".

[13] Finally, he says, "There were other such changes and alterations to the location of the Laurie Wamboldt Road, which would become clear upon futher investigation" (*Richard Freeman affidavit, para. 11).*

[14] Mr. Freeman added on cross-examination, however, that the alteration to the Laurie Wamboldt Road at the point of its intersection with the Ponhook Lodge Road was considerably to the south of the Freeman property. The other boundary adjustment, in the vicinity of the James and Marion Hagen property, was to the north of the Freeman property.

[15] The Applicants ultimately seek an order for the removal of the blockage and/or other impediments placed in the right of way. They further seek an injunction preventing the Respondent Trust, its heirs, agents and assigns from interfering in any manner with the Applicants' use and enjoyment of the right of way.

[16] The Applicants began their application in court by filing notice of same on March 13, 2018. The Respondent has not yet filed a Notice of Contest. The motion for directions on April 11, 2018 was adjourned without day pending the outcome of this motion to covert, and the Respondent was permitted to delay the filing of its Notice of Contest pending that outcome. Documents have not been exchanged and discoveries have not yet been held.

Issue

[17] The only issue to be determined is whether the matter should be converted from an application to an action pursuant to *Civil Procedure Rule* 6. In order to answer this question, I will have to consider:

1. Whether the Respondent has complied with *Civil Procedure Rule* 6.03; and

2. The requirements of *Civil Procedure Rule* 6.02 itself.

Law and Analysis

[18] The Applicants, as their designation implies, have brought this matter before the court and have chosen an application in court as the vehicle with which to do so. The Respondent argues that this matter is more appropriately heard as an action.

[19] The individual factors which will guide my decision are set out *Civil Procedure Rule*s 6.02 and 6.03. They follow:

> 6.02 (1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.
>
> (2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.
>
> (3) An application is presumed to be preferable to an action if either of the following is established:
>
> > (a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, the party expeditiously brought a proceeding asserting these rights, and the erosion will be significantly lessened if the dispute is resolved by application;
> >
> > (b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.
>
> (4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:
>
> > (a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;
> >
> > (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

> (5) On a motion to convert a proceeding, factors in favour of an application include each of the following:
>
> > (a) the parties can quickly ascertain who their important witnesses will be;
> >
> > (b) the parties can be ready to be heard in months, rather than years;
> >
> > (c) the hearing is of predictable length and content;
> >
> > (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.
>
> (6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.
>
> 6.03 (1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:
>
> > (a) a description of the evidence the party would seek to introduce;
> >
> > (b) the party's position on all issues raised by the application;
> >
> > (c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.
>
> (2) Despite Rule 6.03(1), a party who wishes to withhold disclosure of evidence the party will produce only to impeach a witness need not describe the evidence, or the investigations to be undertaken to obtain the evidence

[20] In *Roué v. Nova Scotia*, 2013 NSCA 94, the Court considered a number of Rules touching upon the topic, including the manner in which *Civil Procedure Rule* 6.02(2) is worded, and reasoned that the Rule is constructed in such a way as to favour applications in court over actions (para. 20). MacDonald, C.J.N.S., had earlier pointed out some of the advantages of such a method of procedure:

> 17. In reviewing these provisions, I note several key features that serve to make this process more efficient than the traditional action. They include:
>
> > - early case management by way of the mandatory motion for directions [Rule 5.07(3)].

- dates for the hearing proper being set from the outset [Rule 5.09(2)(l)].

- flexibility regarding the extent of pre-hearing disclosure [Rule 5.09(2)(c)].

- flexibility regarding the extent of discovery hearings [Rule 5.09(2)(d)].

- flexibility regarding the extent of cross-examination [Rule 5.09(2)(f) and (g)].

- evidence-in-chief proceeding by way of affidavit [Rule 5.09(2)(e)].

- deadlines for the filing of affidavits [Rule 5.09(2)(k)].

18. In short, this process commands aggressive case management where all pre-hearing procedures are tailored to meet predetermined pre-hearing dates. In *Guest v. MacDonald*, 2012 NSSC 452, Moir J. made similar observations:

> The application provides judicial management, and assignment of dates for the hearing, at the beginning. The action, with some exceptions such as case management, leaves the litigation in the hands of the parties until one of them calls for trial dates. Judges who give directions at the beginning of applications, and judges who set trial dates, need as much information as can be given to measure the amount of time required for the hearing or trial and when the parties will be ready. But, the judge who gives directions also needs to be able to set a path over a short distance for disclosure, production of affidavit evidence, discovery, out-of-court cross-examination, and so on. The presumption in this Rule recognizes that an application has a problem with a party who legitimately holds cards close to the chest.
>
> [Emphasis added]

[21] The court in *Roué* also added the following proviso at para. 19:

> … when considering … [the virtues of an application] we must also be mindful that enhancements have been made to the action process. Murphy J. makes this point in *Monk v. Wallace*, 2009 NSSC 425:
>
> > Although the expanded application route under the Rules is intended to offer prompt and more economical relief to parties who qualify for an application procedure, the Rules now also provide a more streamlined action procedure. Ms. Monk will not necessarily be subjected to inordinate delays and procedural hurdles because this matter will be determined through an action rather than by application. The action procedure now allows parties to identify trial dates much earlier in the process, involves less discovery examination, and facilitates the parties' cooperation to exchange information and have matters determined promptly. This case raises many disputed issues, and if the parties are unable to resolve their dispute by out-

> of-court settlement, I am convinced that the Respondents are entitled to the safeguards and benefits provided by trial procedures, which the Court also needs to fully assess all the issues.
>
> [Emphasis added]

[22] Therefore, implicit in *Civil Procedure Rules* 6.02 is a presumption which favours an application in court as the preferred procedural mode. This may be rebutted. The Respondent has properly conceded that it bears the onus of doing so if it is to succeed with its motion.

[23] In sum, the overall objective to which the court must strive was described at para. 47 of *Roué*:

> … to achieve a balance that shortens time and lessens cost, while ensuring that the proceeding at hand maintains the essential attributes of a fair fact-finding process."

1. Whether the Respondent has complied with *Civil Procedure Rule* 6.03?

[24] Rule 6.03 describes the criteria which must be met before the court may consider a motion such as this. The moving party must file an affidavit providing:

a. a description of the evidence which that party would seek to produce;

b. the party's position on all issues raised by the application; and

c. disclosure of any further issues that would be raised if the proceeding remains an application or a Statement of Defence if the proceeding is converted to an action.

[25] *Civil Procedure Rule* 6.03(2) goes on to provide that evidence which a party seeks to withhold, so as to be used for impeachment purposes, need not be disclosed.

[26] The analysis begins, therefore, with the affidavit of Richard Freeman, to which previous reference has been made. It is dated April 19, 2018. It contains the only evidence that has been submitted by or on behalf of the Respondent, in support of its motion, thus far. For reasons upon which I will subsequently expand, *Civil Procedure Rule* 6.02(b) and (c) have clearly been complied with. The only real question is whether the Respondent has satisfied *Civil Procedure Rule* 6.03(a) by providing, "A description of the evidence …[it]… would seek to introduce".

[27] Mr. Freeman's affidavit ("affidavit R.F.") offers the following that is relevant to this criterion. My paraphrase follows:

a. The Respondent is the owner of the Freeman properties. They were originally granted to Harry Freeman, (Elfreda Freeman's late husband) by Laurie Wamboldt. *(Affidavit R.F. paras. 5 and 6)*

b. The Freeman properties are contiguous to the private access road at issue in these proceedings, which is mapped as PID #70201322. The private access road (or right of way) also goes by the name "Laurie Wamboldt Road". (*Affidavit R. F., para. 7(c)*)

c. The road "…has been improved and adjusted at various times and by different residents…". One example occurred when the location of the point of intersection between the road and the Ponhook Lodge Road (public thoroughfare) was "…adjusted by a significant degree in the past to add an alternative course for the road." Another example occurred when "…the western boundary of [the road] … as it bounded property conveyed to James and Marion Hagen, was moved approximately 16' eastward." *(Affidavit R. F., paras. 8, 9 and 10)*

d. Other such changes and alterations were performed "…which will become clear upon further investigation". *(Affidavit R.F., para. 11)*

e. Harry Freeman (Richard's late father) received his Deed of Conveyance from Laurie Wamboldt on November 12, 1977. The grant of the property reserved a private right of way for Ms. Wamboldt and her family members described thus:

> "The Grantor reserves the right of way up to thirty feet wide (30) to be used to service her, her heirs and assigns and her family's lot situated on the so called Efraim Hunt lot, Crown grant #9284".

f. In a March 17, 1989 Deed between William and Elizabeth Wamboldt (two of Laurie Wamboldt's "heirs and assigns") and Harry Freeman, the right of way was referenced to as follows:

> "The Grantor reserves the use of 30 ft. of right of way as terms described by the Deed from Laura Wamboldt to the Grantee by Deed November 12, 1977." (*Affidavit R.F., para. 15*)

g. The location of that portion of the right of way which passes over the Freeman properties was altered at the end of August, 2016. This was done "…to ensure the safety of children and individuals who would use the right of way, in view of the very close proximity of the road to my brother, Charlie Freeman's home, in particular". (*Affidavit R.F., para. 16*)

h. The altered or "adjusted" road is serviceable and provides full access and has not affected the Applicants' access to the property in any way. (*Affidavit R.F., para. 17)*

[28] The Respondent goes on to provide (in Mr. Freeman's affidavit) as follows:

> 23. The Respondent wishes to exercise its right to have the issues in this proceeding tried before a jury.
>
> 24. At present, I anticipate that the Respondent will also seek to introduce evidence of the following in this proceeding:
>
> (a) the nature of Laurie Wamboldt Road;
>
> (b) the historic movement of Laurie Wamboldt Road;
>
> (c) the history of the relationship between the parties as it pertains to the Right-of-Way;
>
> (d) viva voce testimony from various neighbours and witnesses (the majority of whom are as yet unidentified) regarding the use of the Right-of-Way and Laurie Wamboldt Road over the years since its grant;
>
> (e) viva voce testimony regarding the history of the movement of the Right-of-Way over the years since its grant;
>
> (f) the circumstances that led to the necessity to relocate the Right-of-Way on or about September 1, 2016;

(g) potential expert evidence with respect to the objective safety of the location of the Right-of-Way;

(h) potential expert evidence with respect to the location of Laurie Wamboldt Road and the Right-of-Way;

(i) *viva voce* testimony from various other users of the Right-of-Way; and

(j) evidence to impeach the credibility of the Applicants regarding the matters raised in the Notice of Application in Court.

25. At present, I anticipate that the Respondent will call various individuals who have used, or continue to use, the Right-of-Way and/or Laurie Wamboldt Road as witnesses in this proceeding. However, I am unable to identify all of these witnesses without further investigation.

26. It is also anticipated that the Respondent will retain an expert or experts in order to ascertain the viability of travelling on the Right-of-Way in its original location versus its current location, and whether any true safety hazards currently exist.

27. I anticipate that it will take significant time to ascertain the identity and availability of all of the factual and expert witnesses who will be required to testify on the Respondent's behalf.

28. I anticipate that a number of the witnesses will be "unfriendly", such that it will be very difficult, if not impossible, to obtain sworn affidavit evidence from them.

29. I also anticipate that credibility will be a significant issue in this matter. The various locations of the Right-of-Way and Laurie Wamboldt Road over the years will have to be ascertained by a number of lay witnesses, and, unless the Applicants substantially agree with the facts as set out by the Respondent, there will be many factual disputes and therefore credibility will be an important factor in determining the facts in this matter.

[Emphasis added]

[29] The Respondent identifies the issues raised in the application thus:

30. With respect to the issues raised on the Application, the Respondent states as follows:

(a) there is no prescribed legal location for the Right-of-Way, as set out in the deeds or otherwise;

(b) the Respondent is not prohibited in law from making adjustments to the location of the Right-of-Way on the Property;

(c) the adjustment to the location of the Right-of-Way in 2016 was made with good reason, and with regard for the safety of the users of the Right-of-Way.

(d) the location of the Right-of-Way has been adjusted at various times since it has been granted;

(e) the relocation of the Right-of-Way in 2016 does not impede or restrict, in any way, the Applicants' access to their respective properties and the Applicants continue to have full right-of-way access to their properties;

(f) the Respondent has no legal obligation to remove any impediment placed in the original location of the Right-of-Way;

(g) the Respondent denies that its actions in any way represent an unreasonable and substantial interference with the Applicants' use and enjoyment of the Right-of-Way, or that its actions constitute any trespass or nuisance at law whatsoever.

(h) the Respondent denies that the Applicants are entitled to remove any machinery, cables, or signage from the Right-of-Way, that the Applicants allege is blocking the Right-of-Way;

(i) the Respondent denies that the Applicants are entitled to a permanent injunction, or that such relief is appropriate or necessary in the circumstances; and

(j) the Respondent denies that the Applicants are entitled to an interlocutory injunction, or that such relief is appropriate or necessary in the circumstances.

[30] The Applicants, on the other hand, say that the issue in this case is simple: whether there was an existing right of way and whether that right of way has been altered or impeded. They say that it is upon this issue alone is that the Court must rule in order to determine this matter.

[31] Alternatively, the Applicants say that, even if it is necessary to go further than the above, the altered route is hazardous and dangerous and that the longer they are forced to access their properties by the use of it, the greater the risk becomes. This is particularly so in the winter, when driving conditions are more extreme.

[32] Returning then, to the issue of whether the document filed by the Respondent is in sufficient compliance with s. 6.03(a), I note that the Respondent has indicated, in a general sense, the nature of the evidence which it would seek to introduce. Certainly, Mr. Richard Freeman has summarized his own evidence in that respect. He has also summarized the tenor of the evidence which he intends to call from the other witnesses which the Respondent will produce.

[33] It is important to bear in mind, however, that he has noted in his affidavit and confirmed in his *viva voce* evidence (on cross-examination) that he has not (and, to his knowledge, the Trust has not) reached out to any of the owners of the neighbouring properties or any other potential witnesses. His recital in para. 24 of his affidavit to the effect that, the Respondent will "also seek to introduce evidence of the following in this proceeding" (described as anticipatory) is therefore aspirational for the most part. At present, he cannot know whether the evidence of any of these other people (when he does decide to "reach out") will support the position which the Trust has advanced, or contradict it.

[34] Returning to para. 25 of his affidavit, he is explicit on this point:

> …the Respondent will call various individuals who have used or are continuing to use the right of way and/or Laura Wamboldt Road as witnesses…however, I am unable to identify all these witnesses without further investigation.

[35] In *Hong v. Lavy*, 2018 NSSC 54, Justice Campbell pointed out:

> 20. They have not had an opportunity to obtain and review the large number of documents that have not been produced to date, they lack sufficient time to review the documents that have been produced and they lack the time to meet with possible deponents to get their evidence relating to important documents, many of which have not been produced to date. That argument may support the position taken by counsel but it does not address the specific issues required by *Rule 6.03(1)*.
>
> 21. The first requirement, in *Rule 6.03(1)(a)* is a "description of the evidence the party would seek to introduce." Ms. Barnes states at paragraph 15(a) of her affidavit that counsel anticipate calling *viva voce* evidence from several named individuals "and other witnesses concerning all of the issues raised in the pleadings". That does not describe the evidence sought to be introduced. Saying that the evidence is concerning all the issues raised in the pleadings is a very general statement that provides no description of the evidence as contemplated by the Rule. If that general statement were to be accepted as a "description" it would render the requirement meaningless. The affidavit does state earlier that credibility is a central issue, that the assertion of "reasonable expectations" made by Mr. Hong is inconsistent with

> past practices and that Mr. Hong and Mr. Lavy had agreed in to the current and cumulative shareholder distributions. That suggests that there are issues in dispute. *Rule 6.03(1)(a)* requires a description of the evidence that Mr. Lavy would seek to introduce. There is no statement in the affidavit describing the evidence.
>
> [Emphasis added]

[36] In *Dr. Robert Hatheway Professional Corp. v. Smith*, 2015 NSSC 68, Associate Chief Justice Deborah Smith noted:

> 31. As indicated in this Rule, a party who makes a motion to convert an application to an action must provide, *inter alia*, a *description* of the evidence the party would seek to introduce at the hearing. They are not required to actually produce the evidence. The Rule is designed to give the judge hearing the motion sufficient information to decide whether it is appropriate to convert the proceeding from an application to an action or *vice versa*. It is not intended that the court will require or delve into the evidence itself at this stage of the proceeding. The level of particulars required in the description of evidence will depend on the circumstances surrounding the case.
>
> [Emphasis added]

[37] Is it reasonable to require more specificity from the Respondent in this case? Moreover, is it enough that they simply tell us the nature of the evidence that they intend to call, without being able to answer whether there are, in fact, any witnesses available who are capable of providing the evidence that they would seek to introduce in support of their case?

[38] When we go on to consider the factors under Rule 6.02 (further in these reasons) two things will be immediately apparent. First, the Rule would not require a party to disclose what is often referred to as "impeachment evidence". Evidence which corresponds to the requirements of *Civil Procedure Rule* 94.09(1) for use in such a capacity need not be disclosed.

[39] Second, Rule 6.02(5) (which is applicable in the event that none of the earlier factors set out in the Rule may be construed as favouring either an application or an action mode) requires the court to consider whether "the parties can quickly ascertain who their important witnesses will be" (*Civil Procedure Rule* 6.02(5)(a)).

[40] If the Court were to insist that all of the moving party's witnesses be ascertained and provided as a prerequisite to consideration of a motion of this sort (under *Civil Procedure Rule* 6.03), then the fact that the parties cannot quickly

determine who their important witnesses will be (a factor which under a s. 6.02(5) analysis would favour an action as opposed to an application) would be redundant, since a motion to convert an application to an action would never have passed muster under Rule 6.03, and the court would never reach a 6.02(5) analysis as a consequence.

[41] Moreover (as previously mentioned in passing) it cannot be said that the Respondent has identified no deponent capable of speaking to the issues that he has raised. He himself (at the very least) will speak to those issues. Whether there are any others available who will support his position with respect to the issues that he has identified remains to be seen. He himself does not yet know. Whether his evidence will be sufficient on its own with respect to those issues is not, of course, relevant or ascertainable, at present.

[42] It is also important to recall that in *Hong v. Lavy, supra,* the moving party provided absolutely no description of the evidence it intended to call. That is clearly not the case in the present circumstance.

[43] I conclude that the Respondent has satisfied criterion Rule 6.03(a). As we have already seen, the Respondent has also provided its "position on issues raised by the application", and has indicated that "it is not currently aware of any further issues that may arise in a Statement of Defence if the matter is converted to an action". Compliance with criteria (b) and (c) has been achieved.

[44] I am therefore satisfied that the Respondent Trust has sufficiently complied with the requirements of s. 6.03. Having attained this threshold, it gains admittance to the court with its present motion. I will now proceed to consider the merits of the motion in accordance with the requirements of *Civil Procedure Rule* 6.02.

2. The requirements of *Civil Procedure Rule* 6.02

a. *Do any of the presumptions in favour of application in 6.02(3) apply?*

[45] First off, *Civil Procedure Rule* 6.02(3)(a) establishes a presumption that an application is preferable to an action in the event that "substantive rights asserted by a party will be eroded over time". This is because (generally speaking) an application may be more quickly accommodated by the courts than an action.

[46] After all (to state the obvious), an application in court involves the provision by the deponents of their "direct evidence" in affidavit rather than *viva voce* form.

Since deponents are generally limited to cross-examination upon that affidavit evidence, the entire process generally consumes less court time. Hence, it will usually be quicker to get into court for a hearing on the merits of the matter.

[47] The Applicants (in oral argument before this court) assert that they are, indeed, possessed of eroding substantive rights. They contend that the newly created (or "adjusted") route over the Freeman properties is much more dangerous than its predecessor, particularly in the winter. They argue (in effect) that the more winters which pass before the matter is heard, the greater the danger to which they will be exposed when accessing their properties. Moreover, their ability to use and enjoy their properties is significantly eroded with the spectre of litigation hanging over everyone's heads.

[48] In *AtlanticSpark Professional Services Inc. v. Hryshyna*, 2016 NSSC 114, the Applicant (AtlanticSpark) had brought an application in court against Ms. Hryshyna seeking, among other things, damages and a return of property on the basis of allegations of breach of contract, conversion and detinue.

[49] In response to AtlanticSpark's argument that its substantive rights would be eroded over the time it would take to bring the matter to trial, Justice Pickup noted:

> 17. I am not satisfied that the presumption in Rule 6.02(3)(a) has been established. Any damages that would flow from this allegation would be monetary and, therefore, be compensated in damages regardless of whether the matter proceeds by application or action.
>
> 18. I am not persuaded that the erosion will be significantly lessened if the dispute is resolved by way of application.

[50] Justice Moir considered the issue in *Guest v. MacDonald*, 2012 NSSC 452, within the context of a right of way dispute. He observed:

> 35. The presumption about the erosion of substantive rights applies in this case on two levels. The Guests assert a right to a driveway without trenches across it. Each day that goes by before determination is a day on which the asserted right is lost forever. The loss concerns the enjoyment of one's home, a loss that cannot be measured well by damages.
>
> 36. On a more abstract level, the parties are living under a strain that infringes their enjoyment of their homes. The strain will be relieved by declaratory and injunctive relief that determines any quarrel over the metes and bounds description and, more importantly, settles with precise detail the proper use of the right of way and makes

> it clear what things are misuses of the land and the right. Each day that goes by is a day on which the parties' enjoyment of their homes is diminished.
>
> 37. A residential dispute over the location and use of a right of way may be one of those causes that, in Justice Pickup's words, give rise to the presumption "by their very nature".
>
> [Emphasis added]

[51] We are not dealing with monetary damages in this case. The main distinguishing feature between *Guest* and the case at bar is that, in the former, Justice Moir was dealing with an Applicant's main residence. Both sides, together with their families and neighbours, lived there year round. Here, the parties concede that the properties north of the Freeman properties, are, for the most part, used seasonally. Most of the use occurs during summer.

[52] That said, even seasonal users will find it necessary to visit their properties during the off season from time to time. More to the point (at what Justice Moir called the "abstract level") is the lingering strain and upset that permeates such properties and their owners in the wake of an issue like this. On the basis of Mr. Freeman's affidavit, the contagion appears to have interfered with the parties' enjoyment of the ownership of their properties on a year round basis, notwithstanding that the physical use thereof, for the most part, is seasonal.

[53] Such an impediment will likely be exacerbated, rather than lessened, by the fact that, in this case, it is not the usual right of way issues (i.e. location and use) that are driving this litigation. No dispute has been raised as to <u>where</u> that portion of the right of way which traverses the Freeman properties was located, or with respect to its manner of use prior to the blockade. Rather, at the heart of this dispute is an allegation of interference with a vested proprietary right. This concern is only strengthened when its corollary is considered; namely, the allegation that the only expedient with which the Applicants have been left is to travel over an alternative route which they consider to be much less safe than the route to which they are entitled.

[54] I find this consideration to be one which triggers a presumption in favour of an application within the meaning of *Civil Procedure Rule* 60.02(3)(a). Because of this finding, as Campbell J. pointed out in *Hong v. Lavy*, *supra*, at para. 37:

> … there is no requirement to advance to the next step of considering whether any of the factors that favour the presumption of proceeding by an action apply. The

> presumption in favour of an action is addressed only if the presumption in favour of application does not apply. Here, the presumption in favour of an application applies...

[55] However, in the event that I have erred in my application of *Civil Procedure* Rule 6.02(3)(a), I will consider the balance of the Rule.

[56] *Civil Procedure Rule* 6.02(3)(b) addresses a contingency whereby "the court is requested to hold several hearings in one proceeding". Although this may have some potential applicability (as we shall see when the criteria under 6.02(5) are addressed), such has not been argued as applicable to this matter by either party.

b. *Do any of the presumptions in Civil Procedure Rule 6.02(4) favour proceeding by way of an action?*

[57] I will consider s. 6.02(4)(a) first. This is applicable "where a party wishes to exercise a right to trial by jury and it is unreasonable to deprive the party of that right". The Respondent has indicated, in support of its motion to convert this application to action, that it seeks a jury trial. This merits significant consideration.

[58] There are innumerable cases which have referred to the right to a trial by jury as a substantive one, at least in Nova Scotia. The Respondent extrapolates from this to argue that the considerations to be applied in determining the applicability of *Civil Procedure Rule* 6.02(4)(a) should be no different than those which are applicable in any other proceeding in which one party seeks to have a jury trial.

[59] In a nutshell, the Trust argues that the Applicants must discharge a very considerable onus to satisfy the court that it is appropriate to deprive the Respondent of its substantive right to a jury trial. If they cannot do so, the motion to convert must be granted, since a jury trial is only compatible with an action.

[60] There are no authorities (nor was it argued) to the effect that substantive rights are absolute. Indeed, they are not. In *Guest (supra.)* Justice Moir referred to:

> 16. … the long standing principle … in Nova Scotia is [that a litigant is] not deprived of a right to a jury trial except for cogent reasons: *Keeping v. Portage La Prairie Mutual Insurance Co.*, 2009 NSSC 362 (Coughlan J.) at para. 6 to 9. The courts guard the *prima facie* right to trial by jury provided, in certain circumstances, by the *Judicature Act*: *Monk v. Wallace*, para. 18; *Langille v. Dzierzanowski*, 2010 NSSC 379 (Kennedy C.J.).

> 17. At para. 8 of *Keeping*, Justice Coughlan recalls some of the reasons traditionally accepted as cogent:
>
> > Examples of such reasons include: where the case involves issues of law rather than fact, or where the issues of fact are negligible or so closely interwoven with issues of law to be inseparable, where the case involves scientific or technical issues that cannot be conveniently presented to the jury, or where the evidence is extensive or complex.
>
> 18. This is not to say that cogency is a concept frozen in time. The cost of litigation today is beyond comparing with the cost of litigation half a century ago when Chief Justice Ilsley gave his reasons in *MacNeil v. Hill the Mover (Canada) Limited* (1961), 27 D.L.R. (2d) 734 (N.S.S.C. *in banco*). That was from a time long before the crisis in civil litigation caused by cost and delay.
>
> 19. The Rules themselves are capable of weighing in on cogency. They are not confined to the purely procedural. They can affect substantive rights. See *Judicature Act*, s. 47 (3A).
>
> 20. …the Rules themselves abrogate the right to a jury trial in favour of economy. In addition to excluding juries from determining applications in Rule 53.08 and preferring the proponent of an application over the proponent of an action in Rule 6.02(2), Part 12 - Actions Under $100,000 excludes juries from determining claims for lower amounts of damages and claims for other remedies valued similarly.
>
> 21. The Rules support the view that, depending on the circumstances of the claims between the parties, the relative cost and timing of trial by jury and determination by application may provide cogent reasons to deprive a party of the right to a jury trial. Or, to stick with the language of the Rule, relative cost and delay may show that it is not unreasonable to do so.
>
> [Emphasis added]

[61] It is not sufficient for the proponents of a motion under *Civil Procedure Rule* 6.02 to merely assert that they are seeking a jury trial and expect that such an assertion will always "carry the day". If it were to be otherwise, the presumption in favour of applications enshrined in the Rule, and recognized in cases like *Roué (supra)* would have very little traction.

[62] I proceed to take note of the relative length of a jury trial versus that of an application, as well as the correspondently greater amount of court time and legal expense which will be consumed by proceeding in such a fashion. This is also a significant consideration, but (once again) it is not determinative. I simply add it to the mix.

[63] I now return to a point made earlier. The Respondent's indication that it intends to elect to have the matter heard by a jury has come before it has, in the words of Richard Freeman, "reached out" to any other potential witnesses in this matter. In such a circumstance, the assertion of the Respondent that it wishes to exercise it right to trial by jury has come without any consideration or knowledge of the type of evidence that will be available through any of its other witnesses, the substance of that evidence, and, indeed, whether such a mode of trial would be best suited (even from the Respondent's perspective) to the evidence that is available. I conclude that it would not be unreasonable to deprive the Respondent of its right to a jury trial in this specific set of circumstances.

[64] In addition, and with respect to *Civil Procedure Rule* 6.02(4)(b), I find it is not unreasonable to require the Respondent to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness was to be called only to impeach credibility. I say this largely for the same reasons noted above. The Respondent has not reached out to any of its potential witnesses. It is in no position to advise the court (indeed, it cannot know itself) whether any of the witnesses and their individual evidence is amenable to being withheld in furtherance of the impeachment process contemplated by *Civil Procedure Rule* 94.09, nor can it know whether the invocation of that process would be strategically sound having regard to that nature of that evidence.

[65] Almost as a postscript to the above conclusion, I observe that it is not unreasonable for the Respondent to be presently set about the task of identifying its witnesses and marshalling the evidence which it feels that it would need so as to respond to the Applicants' contentions in this matter. As of the date of this decision, summer is now upon us. It is to be presumed that most of those having properties contiguous to and/or abutting upon the roadway in question are or will very soon be in the process of making use of their properties. It should not be a difficult exercise for the Respondent to identify which of them (if any) is supportive of, or are in possession of, evidence that the Trust wishes to call, and to contact these individuals.

[66] There are no factors present favouring an action in preference to an application in this matter.

c. *Are there any other factors which favour an application as per Civil Procedure Rule 6.02(5)?*

Credibility

[67] In addressing *Civil Procedure Rule* 6.02(5), I acknowledge that the Respondent has indicated that credibility will be in issue (*affidavit, R.F., para. 24(j)*). This is so only in a notional sense, in my view.

[68] Indeed, since neither the prior location or manner of use of the right of way over the Freeman properties is in dispute, and the blockade is admitted, the issues involved in this proceeding may be stated with considerable economy:

a. Does the Respondent have a right recognized at law to obstruct and/or divert that portion of the right of way which traverses the "Freeman properties"

b. If the answer to "a" is "yes", is the altered route over the Freeman properties in conformity with this right (i.e. is the altered route hazardous or does it otherwise interfere with the Applicants' rights of access to and egress from their properties)?

[69] Included in the determination of question "a" would be the facts asserted by the Respondent in relation to prior alterations to the road and whether issues of implied consent to do what the Trust did are present. It does not appear that credibility would be a significant issue in relation to such a determination. There will likely be documentary evidence indicating who did what alterations to which portions of the road. These alterations would have come at a cost and there may still be invoices available. There is also unlikely to be any dispute over the location of such work, or why and under what circumstances it was done. If there are such disputes, I am of the view that the scope of cross-examination of the deponents afforded by an application in court will provide a sufficient means with which to address them.

[70] Bryson, J. (as he then was) noted in *Citibank Canada v. Begg*, 2010 NSSC 56, at para. 17 :

> ... Rule 6.02(5) contemplates that credibility may be an issue. Moreover, the mere assertion that credibility will be important, without more, does not settle the question. Particularly in a case such as this, in which the suit is founded upon commercial documents, the court would need to understand specifically what the crucial credibility issues were, and how, for example impeachment played a critical role. Otherwise, the mere assertion of the importance of credibility would relegate all proceedings to an action.

> [Emphasis added]

[71] Moreover, as Justice Warner pointed out in *Kings (County) v. Berwick (Town)*, 2009 NSSC 398, at paras. 40 - 41:

> 40. Applications in court permit cross-examination, which can be unlimited. Cross-examination is the tool to test credibility in a trial and it is preserved in an application in court. Whether I suspect that direct examination in trials is overrated or not, it is my sense that the issues of facts in this proceeding relate more to reliability than credibility; in either event, the opportunity to cross-examine in the hearing of an application in court is more than enough to satisfactorily assess credibility.
>
> 41. There is no identification in the three affidavits of the Three Towns of a particular issue of credibility (as opposed to reliability) that could become so significant that it could not be satisfactorily dealt with by way of cross-examination. The issues in this case are focussed enough that the use of affidavits to present direct evidence will probably assist everyone in focussing on the relevant factual context and avoiding the irrelevant.
>
> [Emphasis added]

[72] In my view, there are sufficient procedural safeguards inherent in the application process which will permit the issues of credibility in this matter, such as they are, to be adequately canvassed and tested.

Parties can quickly ascertain who their important witnesses can be

[73] *Civil Procedure Rule*, the 6.02(5)(a) contemplates the ability on the part of a party to identify its important witnesses, rather than whether it has actually acted upon that ability to do so. As was stated earlier, the users of the road over the years that would be able to testify as to the use of the right of way in question prior to the Respondent's blockade and alteration of it, the nature of that alteration, and the quality of the alternative route constructed over the Freeman property, should constitute a relatively easily identifiable pool of potential witnesses. The Respondent's position ought not to be strengthened merely because it had not taken any concrete measures to discuss the issue with any of these people as of the date of its motion.

[74] Mr. Freeman, in his affidavit, indicates that he anticipates that a number of the witnesses will be "unfriendly" such that it will be "…very difficult, if not impossible, to obtain sworn affidavit evidence from them" (A*ffidavit R.F., para. 28*).

This is *a propos* the observation that the court has no power to issue subpoenas or force a party to cooperate with the provision of an affidavit within the context of an application.

[75] I must, yet again, observe that this is an anticipatory difficulty only. Mr. Freeman was unable to furnish any practical basis for such a concern, because he has not spoken to any of the Trust's potential witnesses. Certainly, it cannot be anticipated that there will be any difficulty obtaining evidence from the members of his own family.

[76] Moreover, it is not sufficient for the Respondent to point (as it did during oral submissions) to the fact that the affidavit of Lawrence Wamboldt (and, in particular, para. 35 thereof) adverts to the fact that, "The Simone's indicated to me, and I believe, that they wish to remain neutral".

[77] The mere fact that Mr. and Mrs. Simone have indicated to Mr. Wamboldt that they wish to remain "neutral" is in no way indicative that they would not, nonetheless, cooperate with respect to the preparation of sworn affidavits, and present themselves for cross-examination thereupon.

[78] Mr. Wamboldt goes on to make this very point in para. 36 of his affidavit:

> I do not anticipate that these other dominant tenements will be "unfriendly" to the Applicants or to the Respondent such that it would be difficult or impossible to obtain sworn affidavit evidence from them.
>
> [Emphasis in original]

"Ready to be heard in months, rather than years"

[79] As to the timing of the hearing, which is dealt with in 6.02(5)(b), I am satisfied that the parties "can" be ready to be heard in months rather than years. Mr. Wamboldt has noted that the Applicants "are in the process of finalizing five or six sworn affidavits and will be prepared to file them in the normal course within weeks or months". With respect to the Respondent's state of preparedness to date, I simply reiterate the observations I have already made above.

Hearing ("predictable length and content")

[80] With respect to the length of hearing and with further reference to the "predictability" of the hearing length and content, the Respondent contends that

expert evidence will be necessary. They posit the need for evidence from a civil engineer (with respect to the road grading) and the other characteristics of the alterative route which was constructed over the Freeman properties. The Respondent also says that a surveyor's testimony will be needed with respect to the locations of the prior alterations to the roadway and the extent of these changes made in the past.

[81] I have previously observed that the primary issue appears to be whether the Respondent altered the course that portion of the right of way that passes over the Freeman properties (which they admit) and whether they have an excuse, recognized at law, for doing so.

[82] The Respondent has indicated, among other things, that it would like to introduce evidence relating to acquiescence in the past on the part of dominant tenement holders to what they say were previous alterations to the course of the road albeit to the north and south of the Freeman properties. Other evidence would relate to whether one of the "excuses" recognized at law could be founded upon the basis of the Respondent's assertion of safety issues in relation to that portion of the road, as it passes over the Freeman property, as it was originally configured.

[83] I observe the need for this type of evidence, (and, by extension, the potential civil engineer and surveyor's evidence) and whether it is relevant to the central issues involved in this proceeding, could be determined upon a reference to the court for a ruling on a question of law, under *Civil Procedure Rule* 12. Such a question might be phrased thus, "assuming that the Respondent can establish facts a, b, c, d and e, does it follow that such would be relevant to any right or excuse that is recognized at law for the alteration/obstruction of that portion of the right of way over the Freeman properties?" If yes, then the safety features of the alternate roadway (the Respondent say that the "new route" is safer than the old, whereas the Applicants assert that it is more hazardous) would be relevant. If no, the evidence of the civil engineer about the grading of the new road, and the evidence of any other witness about whether the new or "old" route was more or less safe, would be irrelevant. So would any evidence concerning the alterations to the right of way north and south of the Freeman properties in the past.

[84] This consideration is what I referred to earlier in the discussion of 6.02(3) factors. If the need to apply to court for a determination of a point of law arose or could be foreseen, it would favour an application over an action by virtue of 6.02(3)(b). The Applicants did not argue that such was a necessity. So I did not

consider it to be applicable in that context. Nonetheless, there is the potential for this type of determination, given the nature of the evidence that the Respondent has indicated that it intends to call. I, therefore, keep that in mind as I consider matters, holistically, under 6.02(5). It is relevant to the potential length of the proceeding.

[85] Even if it should turn out that there is a need for expert evidence, the application process is not inimical to the use of same. Obviously, the experts would submit their qualifications and their reports as attachments to an affidavit, and agree to submit themselves to the court processes as a condition of the court's receipt of their reports. There is nothing special about the nature of that evidence which would render unsuitable the process selected by the Applicants.

[86] Dealing specifically with the potential length of the proceeding, in his Notice of Application, counsel for the Applicant predicted that the entire application could be heard in one half day. This was clearly erroneous, as counsel himself admitted during oral submissions. That having been said, it is a different thing entirely to say that this renders the length of the hearing unpredictable. The Applicant's revised estimate is four days. The Respondent hesitates to put a length upon it. It argues that the issues are complex and this complexity lends itself better to the safeguards and other measures associated with an action.

[87] I tend to be somewhat sceptical of the Applicants' assessment of four days total in which to have this matter heard. I expect it would require five or six days (the Applicants concede that they will be calling between seven or eight witnesses, and the Respondent will have witnesses, although one cannot necessarily assume that there will an equivalent number).

[88] Part of the difficulty inherent in estimating the length of time revolves around the fact that the Respondent, at this point, does not know the number of witnesses that it would seek to present. Nonetheless, given the issues adverted to above, it is likely that, if expert evidence is not needed, the matter could be heard in six days, and that it could take as long as eight days if expert evidence (of the type discussed earlier) was introduced by both parties.

[89] I am conscious of Justice Chipman's observation in *Fana (DCD) Holdings Inc. v. Dartmouth Cove Developments Inc.*, 2017 NSSC 157, that typically, applications are "often 5 days or less" (para. 20). This is certainly a valid observation and one with which I agree. However, this is (once again) merely one factor. An anticipated length of greater than five days will not invariably act as a bar to the

matter proceeding as an application or, put differently, in and of itself would not necessarily require that the matter proceed by way of action.

[90] To return to Justice Chipman's comments in *Fana:*

> 20. CPR 6 and the cases considering the Rule demonstrate that on a MTC [motion to convert] the matters that remain as or become applications tend to feature most of these factors:
>
> * fewer parties
>
> *discreet, clearly detailed issues, sometimes narrowed by agreement
>
> *reasonable hearing estimates of relatively short duration (often five days or less)
>
> *readily available key documents and the like, central to the dispute
>
> *the parties being (realistically) ready for a hearing within a short timeline (usually within months, not years)
>
> *situations involving comparatively little time to conduct investigative work
>
> *agreement on admissible extrinsic evidence
>
> *limited, if any, discovery required
>
> *time being of the essence in bringing the matter forward to a hearing
>
> *identifiable (typically party) witnesses with evidence conducive to affidavit form
>
> *an absence of "unfriendly" witnesses, who might well be disinclined to swear affidavits
>
> * generally, an uncomplicated proceeding

"Relative costs and delay" *(Civil Procedure Rule* 6.02(6))

[91] In *MacKean v. Royal & Sun Alliance Insurance Co. of Canada*., 2015 NSCA 33, the Court of Appeal endorsed ACJ Smith's earlier comments in *Garner v. Bank of Nova Scotia,* (2014) NSSC 63:

> 48. In *Garner v. Bank of Nova Scotia*, 2014 NSSC 63, Associate Chief Justice Smith endorsed the comments in *Hryniak* and amplified them:
>
> > 34. During the hearing of this motion, I referred counsel to the recent Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7. In that case, the court, which was speaking in the context of a summary judgment motion, discussed a culture shift that must take place in relation to civil justice in Canada. It recognized that our civil justice system is premised upon an adjudication process that must be fair and just. The court

> went on to say, however, that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes (see para. 24). It further stated that a fair and just process is illusory unless it is also accessible, proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure (see para. 28). *While these comments were made in the context of a summary Judgment motion, in my view, they are applicable to all civil cases in Canada.*
>
> [Emphasis added]
>
> 49. I agree. The principles of accessibility, proportionality, timeliness, and affordability are applicable to all civil cases in Canada.

[92] I have previously observed that the relative cost of this matter proceeding by way of an action in the manner proposed by the Respondent would exponentially increase the cost of the proceeding. I expect that it would be considerably more expensive to proceed in the manner proposed by the Respondent.

[93] Even if it was incorrect of me to earlier observe that the allegations by the Applicants are, in effect, that their substantive rights are being eroded in the manner contemplated by *Civil Procedure Rule* 6.02(3)(a), it is surely not inappropriate to consider the alleged safety issues under a 6.02(5) analysis as there is a possible difference in the number of winters that would elapse before the matter is heard in the form of an action. As well, the greater expense of a jury trial is patent. Even though most of the owners to the north of the Freeman properties would be described as seasonal (summer) users, one cannot completely rule out the wintertime use of the roadway by all or any of them. When the greater expense is factored in, at the very least, there is less cumulative prejudice or jeopardy to the users of the road if the matter proceeds by way of an application under these circumstances.

Conclusion

[94] I summarize my analysis of the *Civil Procedure Rule* 6.02(5) factors by concluding that the anticipated length of the proceeding is slightly in excess of the norm for an application, hence, favours an action.

[95] The fact that the parties may quickly ascertain who their important witnesses will be, that the legal issues are relatively uncomplicated, the much greater expense to the parties if an action is pursued in these circumstances, and the fact that the matter can be ready to be heard in months, rather than years, all favour an

application. So does the fact that an application in court is well suited to the assessment of the credibility issues (if any) that may present themselves in this case.

[96] It is not simply a matter of counting the above, observing that the factors in favour of an application outnumber those favouring an action, and declaring the former the winner. In every case, each individual factor will vary in the amount of weight which must be assigned to it. Having considered the above factors in some detail, I conclude that the factors present here favouring an application are much weightier, cumulatively and individually, than those favouring an action.

[97] The Respondent's motion to convert this matter to an action is therefore dismissed.

[98] In the event that the parties are unable to agree as to costs, I will accept further written submissions on that topic within 30 days.

Gabriel, J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Payne v. Elfreda Freeman Alter Ego Trust (2015)*, 2018 NSSC 160

Date: 20180629
Docket: *Hfx* No. 474228
Registry: Halifax

Between:

Elizabeth Payne, Janet Wile and Ponhook Lodge Limited

Applicants

v.

Elfreda Freeman in her capacity as trustee of the Elfreda Freeman Alter Ego Trust (2015)

Respondent

ERRATUM

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	May 22, 2018, in Halifax, Nova Scotia
Counsel:	Andrew Christofi, for the Applicants Roderick (Rory) Rogers, Q.C., for the Respondent
Erratum Date:	June 29, 2018

Para. 93, line 4 – Addition of the word "as" after the word "analysis"

Para. 93, line 5 – Removal of the words "the relative difference"

Para. 93, line 9 – The word "this" has been changed to "the" and the word "if" after the word "expense" has been corrected to "is"