# SUPREME COURT OF NOVA SCOTIA

**Citation:** *Ren v. Grafton Developments Inc.*, 2025 NSSC 242

**Date:** 20250812
**Docket:** Hfx. No. 528553
**Registry:** Halifax



**Between:**

Lingyan Ren, Yanjun Tu, Andrew Keith Dickinson, Mareen Sarah Kraus

*Applicants*

v.

Grafton Developments Inc.

*Respondent*

## Decision

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| **Judge:** | The Honourable Justice Peter Rosinski |
| **Heard:** | July 10, 2025, in Halifax, Nova Scotia |
| **Final Written Decision:** | August 12, 2025 |
| **Counsel:** | Micaela Sheppard, for the Applicants<br>Harry Thurlow, KC and Jamie Downie for the Respondent |

**By the Court:**

## Introduction

[1] The Respondents have made a Motion to convert the present Application in Court to an Action pursuant to Civil Procedure Rule [**"**CPR"] 6.

[2] I grant the Motion.

## Summary of Proceeding

### 2023

[3] Notice of Application in Court was filed November 20, 2023 – the Applicants sought to rely on a purported easement since 1965 over the Respondent's property leading to the Water Lot [owned by the Respondent], where they sought to build a wharf. They sought enforcement of the easement with priority over all other interests.

[4] Notice of Contest to the Application was filed January 12, 2024 – the Respondent says if any alleged easement exists arising from the 1965 Deed, it has been abandoned or extinguished; alternatively, the 1965 Deed only contemplated the usage of the easement by one household, and the erection of one wharf on the Water Lot by an owner of the present Respondent's property.

[5] Notice of Respondent's Claim was filed January 12, 2024 – as alluded to in paragraph 31 of the Notice of Contest, the Respondent claims that the Applicants:

> have committed various acts of trespass that have caused damage and loss to the Respondent… repeatedly entered upon and transported, and attempted to transport a sailboat across the Land Lot and the Water Lot; in the alternative, if an easement does exist, which is not admitted but expressly denied, the Respondent states that the Applicants will have nonetheless still committed trespass in repeatedly entering upon a grass lawn and transporting a sailboat across the Land Lot by deviating off the course of the original easement/right of way description, contrary to any such easement. The Applicants have committed trespass and caused damage and loss to the Respondent.

[6] Notice of Contest to Respondent's claim was filed March 25, 2024 – therein the Applicants address the following issues: the easement; their response to the Respondent's claim of abandonment of the easement; their response to the

Respondent's claims regarding the Water Lot and the claims regarding the subdivision of Lot A and the easement of 490 Franklyn Street; and their response to the Respondent's claims regarding trespass.



**2024**

[7] Motion for Directions was held March 25, 2024 – four days set for hearing – February 3, 4, 5 and 6, 2025. [1]

[8] Finish date was set as November 1, 2024.

[9] Applicants' Affidavits to be filed by May 18, 2024; Respondent's Affidavits by June 2, 2024; Applicants' rebuttal Affidavits by June 16, 2024.

[10] Notice of Objection to admissibility of Affidavits to be filed by August 9, 2024. [The Applicants filed their Notice on June 26, 2024, and the Respondent filed its on August 9, 2024]

[11] Discoveries to be completed by September 30, 2024. Undertakings to be completed by October 30, 2024.

[12] Applicants' witnesses include: the four Applicants, plus two to four lay witnesses [neighbours or past owners re-historic use] including Katherine Gleason; one expert witness/surveyor regarding the easement.

[13] Respondent's witnesses include: Nassim Ghosn, Jason Ghosn, Kim Donna Blake (previous owner of the property) and up to two additional lay witnesses (neighbours and predecessors in title and/or issue); one surveyor as an expert witness.

[14] On December 3, 2024, the Applicants changed counsel to Ms. Micaela Sheppard.

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[1] By letter dated December 23, 2024, Respondent's counsel wrote to the Court:

> "This matter is scheduled for hearing February 3 – 6, 2025. Unfortunately, the principal of the Respondent was severely injured in a fall and has not been able to participate for an extended period. The parties have agreed to adjourn the hearing and other steps in the litigation for the time being as he continues to rehabilitate. Our understanding is that he will be able to participate in the coming months."

**2025**

[15] On February 3, 2025, a further Motion for Directions was heard by Justice Richard Coughlan. At that time the following dates were set:

- Applicants to file any Supplemental Affidavits by February 28, 2025;
- Respondent to file any Supplemental Reply Affidavits by March 31, 2025;
- Any objections to admissibility of Supplemental Affidavits to be filed by April 14, 2025;
- Applicants' expert report(s) to be filed by March 31, 2025;
- Respondent's Rebuttal expert report(s) to be filed by April 30, 2025;
- Discoveries to be completed by May 30, 2025;
- All undertakings shall be completed by June 30, 2025;
- The Finish Date shall be July 14, 2025;
- The Applicants shall file their hearing brief by October 17, 2025;
- The Respondent shall file its hearing brief by October 31, 2025;
- The Applicants shall file their Reply brief by November 12, 2025; and
- The hearing of the Application in Court shall be heard on November 24, 25, 26, and 27, 2025.

## The motions herein [2]
## Applicants

[16] On May 26, 2025, the Applicants filed a Notice of Motion seeking an Order:

1. for permission to file an amended Notice of Application in Court to include a claim for damages, pursuant to CPR 5.13(7)(a) and/or CPR 83.03; [3]
2. for permission to file the Supplementary Affidavit of Yanjun Tu sworn April 29, 2025, pursuant to CPR 5.15;
3. allowing for Mandarin language translation services for Yanjun Tu pursuant to CPR 18.16(5) and 48;
4. for permission to issue a Discovery Subpoena for Nassim Ghosn;

[2] Initially the Applicant's motion was set for hearing on the morning of July 10, 2025. The Respondent contacted the Court on June 24, 2025, requesting that its Conversion Motion, estimated to take no more than one half day, might be heard on the afternoon of July 10, 2025. With the consent of Applicant's counsel, the Court agreed. The Court received the latest briefs from both parties filed July 3 and 4, 2025.

[3] At the March 25, 2024, Motion for Directions before Justice Gail Gatchalian she recorded the following: "Directions –: is either party requesting an amendment to the Notice of Application or Notice of Contest? No." I bear in mind that Mr. James MacNeil was counsel for the Applicants at that time.

5. scheduling discovery examinations pursuant to CPR 5.13(7)(q); and

6. ordering costs from the Respondent to the Applicants for the unilateral withdrawing from discoveries, which were to be held May 21, 22, and 23, 2025, and in particular, full indemnity for the interpreter's cancellation fee of $1,864.50.

… The moving party has arranged one half day in Chambers. The moving party says that the Motion will not require more time.… The evidence in support of the Motion is as follows: Affidavit of Michaela A Sheppard sworn May 23, 2025, and filed with this Notice.

## Respondent

[17] On June 25, 2025, the Respondent filed a Motion for an Order converting this proceeding from an Application to an Action.

[18] The Respondent relies on the Affidavits of Nassim Ghosn sworn June 24, 2025 and Micaela Sheppard sworn May 26, 2025, as well as the pleadings, Orders for Directions and Memoranda of Directions.

[19] I intend to deal with the Motion for Conversion first because, if granted, it will effectively supersede the significance of the issues raised by the Applicants in their Motion.

## The Respondent's Motion for Conversion

[20] The law in relation to motions for conversion was helpfully set out by Justice Arthur pickup in *Jeffrie v Hendrickson*, 2011 NSSC 292: [4]

***Law:***

[11] The court may convert an application to an action pursuant to *Civil Procedure Rule* 6.02, which states:

> 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.

[4] See also *Elfreda Freeman Alter Ego Trust (2015) v. Payne*, 2019 NSCA 28. I conclude under CPR 6.03(3) there is little difference between the time when an application could be heard rather than an action and there will not be several hearings. Moreover, CPR 6.02(4) is not applicable here.

(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, 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 proceedings, such as information about a witness that my 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.

[12] Also relevant to the determination of whether an application should be converted to an action is Rule 6.03, which provides:

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.

[13] Under Rule 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:

a) first, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);

b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4);

c) third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

[14] A review of Rule 6.02 would suggest there is an emphasis on the use of the application process to achieve lower costs and greater speed in the resolution of disputes.

[15] In *Brodie v. Jentronics Ltd.*, 2009 NSSC 399, Moir J. commented at paras, 5 - 6:

> 5 Rule 6 - - Choosing Between Action and Application provides general guidance for determining whether an application should be converted to an action, or vice versa. In either case, the proponent of the action bears the onus: Rule 6.02(2). This statement of the onus shows a strong policy in favour of the use of applications.
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> 6 Rule 6.02(6) makes it clear that proportionality is a factor in choosing between the two kinds of proceedings. When read with Rule 5.01(4), it becomes clear that the Rules invite the bar and the bench to make use of the application route to achieve lower cost and greater speed.

[16] This emphasis on the use of the application process to reduce costs and achieve greater speed echoes the object and purpose of the new Rules which is set out in Rule 1.01:

> 1.01 These Rules are for the just, speedy and inexpensive determination of every proceeding.

[17] Mr. Jeffrie has chosen to proceed by way of application. The question is whether the circumstances are such that his application should be converted into an action in order to achieve justice between the parties. To determine whether this matter should be converted to an action necessarily involves a review of the nature of the dispute between the parties.

**Application to the circumstances herein**

[21] This matter has proceeded as an Application in Court to date. The Applicants' counsel ably and vigorously argued it should remain so. It is set to commence for four days in November 2025.

[22] The Respondent takes the position that it has become apparent that an Action is preferable.

[23] As I am revisiting the manner of proceeding, I will consider the factors underlying the presumptions in CPR 6.

[24] The evidentiary and persuasive burden is upon the Respondent as it is making the Motion for Conversion.

[25] I conclude that the quality of the substantive rights claimed by the Applicants may be eroded in the time that it will take to bring an Action to trial, but that is not a factor to which I ascribe much weight.

[26] I say this, in part, because the Applicants claim an expanded right to use the easement, and the Respondents are not arguing that there is no easement.

[27] I am satisfied that the tenor of the Civil Procedure Rules favour an Action - CPR 1.01 and 6.

[28] I bear in mind Justice Norton's reference, in *Group Savoie Inc. v. Eastbound Forestry Ventures Inc.* 2020 NSSC 322, to Justice Chipman's reasons:

> [9] In *Fana Holdings*, Justice Chipman conducted an extensive review of the case law considering conversion motions and found that matters that either remained as applications or are converted to applications have most of the following characteristics:
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> - fewer parties
> - discreet [sic], 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



[29] On a review of the factors applicable to this case, and the general circumstances thereof, I am satisfied that an Action is the significantly more appropriate procedural choice.

[30] The Application in Court was filed on November 20, 2023. Four days have been set aside in November 2025.

[31] I am satisfied that this Application cannot be heard in four days or less.

[32] Moreover, given the circumstances here, I am satisfied that the Application could easily take eight days or more.

[33] As a result of the developments of the party's reasonable positions herein, the case will not be ready for full hearing as presently scheduled for four days in November 2025.

[34] The reasons for the material change of circumstances include that: the number of the proposed witnesses has increased significantly; the pleadings of the Applicants are sought to be amended in a material manner; and one of the Applicants (Yanjun Tu) requests the benefit of a Mandarin interpreter for the entire duration of the hearing/ trial.

[35] While the parties argued that the other largely bore the responsibility for these changes and/or the delays consequently occasioned to the litigation process, I find that this was a somewhat natural evolution of the circumstances given the nature of the litigation and its specific qualities.

[36] It is in the interests of justice that this proceeding continue, not as an Application but rather, as an Action.

[37] If the parties are unable to agree on costs, I will accept their written submissions within 20 days after the release of this decision.

Rosinski, J.