

SUPREME COURT OF NOVA SCOTIA

Citation: *Glooscap First Nation v. Howard*, 2025 NSSC 352

Date: 20251106

Docket: Ken No. 538237

Registry: Kentville

Between:

Glooscap First Nation, Glooscap Landing #1 GP Ltd in its capacity as general partner of Glooscap Landing #1 Limited Partnership, and Glooscap First Nation Economic Development Corporation Ltd., doing business as Glooscap Ventures Management

Applicants

v.

Clinton Ray Howard, carrying on business as Glooscap's Finest Herbal Body Care

Respondent

DECISION ON MOTION FOR ORDER PERMITTING NOTICE OF CONTEST TO BE FILED OUTSIDE TIMELINES

Judge: The Honourable Justice Scott C. Norton

Heard: November 4, 2025, in Kentville, Nova Scotia

Decision: November 6, 2025

Counsel: Eliza Richardson and Derek Simon, for the Applicants
Michael Curry, for the Respondent

By the Court:**Overview**

[1] The Respondent, Clinton Howard, brings this motion to file a Notice of Contest outside of the timelines set by the *Civil Procedure Rules*. The Applicants oppose the motion. The underlying proceeding is an Application in Chambers filed on November 13, 2024, declaring that the Respondent is unlawfully trespassing on the Applicants' property, seeking vacant possession of the property, and seeking a permanent injunction. By Order, dated December 5, 2024, an Interlocutory Injunction was issued restraining the Respondent from carrying on with certain activities pending the hearing of the merits of the Application.

[2] This issue of the late filing of the Notice of Contest first arose at a hearing before Justice Gail Gatchalian on October 6, 2025. On that date three motions were scheduled for hearing: a motion of the Applicants to strike certain affidavits and portions of affidavits filed by the Respondent; a motion of the Respondent to strike certain portions of the affidavits filed by the Applicants; and, a motion of the Respondent to dismiss the application because the Applicants are allegedly relying on an illegal contract.

[3] Justice Gatchalian decided that the scheduled motions could not proceed until the issue of the late filed Notice of Contest was resolved (reported decision *Glooscap First Nation v. Howard*, 2025 NSSC 318):

[5] Taking all of the above factors into account, I have determined that I will not be hearing from the Respondent on the motions filed by him and scheduled to be heard today. It would not do justice between the parties to do so. The Respondent's motions are dismissed. Unless and until the Respondent files a motion for permission to file a late Notice of Contest and he is successful on that motion, the court will not be hearing from Mr. Howard on the merits. Put another way, if the Respondent files a motion for permission to file a late Notice of Contest, and he obtains a favourable decision in time for the hearing on the merits, he may refile his motions, and the Court will hear from him on the merits.

[4] A comprehensive summary of the procedural history of the matter is found in the decision of Justice Gatchalian, at para. 4:

- The Notice of Application in Chambers was filed on November 13, 2024.

- The Applicants' motion for an interlocutory injunction was heard by me on December 3 and 5, 2024, and granted on December 5, 2024.
- The merits hearing was set down for February 12, 2025.
- Mr. Howard filed a Notice of Constitutional Question and affidavits.
- On February 12, 2025, counsel for Mr. Howard appeared and requested an adjournment of the hearing on the merits, as he had just been retained.
- The merits hearing was adjourned to October 6, 2025.
- The merits hearing was eventually rescheduled to be heard on November 10, 2025.
- A hearing on the standing of Mr. Howard to raise treaty and Aboriginal rights, as raised in the Notice of Constitutional Question, took place on April 29, 2025.
- On May 6, 2025, I released my decision, finding that Mr. Howard does not have standing to raise treaty and Aboriginal rights in this proceeding: *Glooscap First Nation v. Howard*, 2025 NSSC 161.
- Civil Procedure Rule 5.06(2) requires a Notice of Contest to be filed, for an appointed time, ten days after the date of notification.
- The Respondent purported to file the Notice of Contest 15 minutes before court this morning, approximately eight months after counsel was retained, and approximately one month before the application hearing on the merits.

[5] The issue before me is whether the Respondent should be permitted to file a Notice of Contest in the form proposed. At the conclusion of the hearing, I granted the motion with reasons to follow. These are my reasons.

[6] *Civil Procedure Rules* 1 and 2 provide the court with discretion to address a failure to comply with the *Rules*:

- 1.01 Object of these Rules
- These Rules are for the just, speedy, and inexpensive determination of every Proceeding
- 2.02 Irregularity or mistake
- (1) A failure to comply with these Rules is an irregularity and does not invalidate a proceeding or a step, document, or order in a proceeding.
 - (2) A judge may do any of the following in response to an irregularity:
 - (a) excuse compliance under Rule 2.03;
 - (b) permit an amendment or grant other relief to correct the irregularity;

- (c) set aside all or part of a proceeding, step, document, or order, if it is necessary to do so in the interest of justice.
- (3) It is not in the interest of justice to set aside a proceeding, step, document, or order on a motion made after an undue delay by the party who makes the motion or after that party takes a fresh step in the proceeding knowing about the irregularity.

2.03 General judicial discretions

- (1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
 - (a) give directions for the conduct of a proceeding before the trial or hearing;
 - (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
 - (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.
- (2) A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:
 - (a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;
 - (b) require an excused person to do anything in substitution for compliance;
 - (c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.
- (3) The general discretions do not override any of the following kinds of provisions in these Rules:
 - (a) a mandatory provision requiring a judge to do, or not do, something;
 - (b) a limitation in a permissive Rule that limits the circumstances in which a discretion may be exercised;
 - (c) a requirement in a Rule establishing a discretion that the judge exercising the discretion take into account stated considerations.

[7] The analytical framework for this determination was considered by Justice John Keith in *Gamma Windows and Wall International Inc. v. Queen's Marque Developments Limited*, 2023 NSSC 236, at para. 21. In summary, the issue is resolved by weighing the prejudice to the parties if the Notice of Contest in its

proposed form is permitted to be filed: see *Atlantic Sea Cucumber Ltd. v. Weihai Taiwei Haiyang Aquatic Food Co. Ltd.*, 2024 NSCA 35, at paras. 60 and 66.

[8] I exercise my discretion to permit a late filing of the Notice of Contest proposed based on the following considerations:

1. The Respondent was initially self-represented, but it was clear to the Applicants throughout that he contested their application.
2. At no point did the Applicants raise the failure to file a Notice of Contest as an issue. The case proceeded as if the Notice of Contest had been filed.
3. There is no suggestion of misconduct or procedural mischief.
4. When Respondent counsel was retained on February 12, 2025, the focus was on counsel reviewing a substantial volume of filed materials and meeting filing deadlines that were set by the court.
5. It was in this context that Respondent counsel inadvertently did not identify that a Notice of Contest had not been filed.
6. Respondent counsel drafted the Notice of Contest and referenced it in the brief in response to the application to strike portions of the Respondent's affidavit filed with the court on September 22, 2025. It was not until the morning of the October 6, 2025, hearing that Respondent counsel noticed that it had not been filed.
7. The balance of prejudice favours the Respondent. The prejudice of not permitting the Notice of Contest to be filed is significant. A permanent injunction and the awarding of vacant possession of land are significant remedies. The Respondent would not be permitted to be heard on the merits per the ruling of Justice Gatchalian.
8. The prejudice to the Applicants is that the hearing on the merits will be delayed. The interlocutory injunction granted December 5, 2024, continues. The Applicants argue that the proposed Notice of Contest does not sufficiently particularize the Respondent's grounds. That issue can be dealt with by a request for particulars under *Rule* 38.10. Other issues raised by the Applicant as matters of prejudice are more properly stated to be disagreements about the legal merits of the response.

9. The requested abridgment will advance the litigation consistent with Rule 1 requirement that the determination of the proceeding be “just”.
10. None of the restrictions on my discretion in *Rule* 2.03 apply.

[9] The Applicants argue that if the court permits the late filing of the Notice of Contest, all novel grounds of relief must be struck. This is in effect the same as arguing that had the Respondent filed a Notice of Contest, he could not amend the Notice to include what the Applicants argue are novel grounds of relief. With respect, the Court of Appeal has made clear the considerations that apply to an amendment in *APA Inc. Experts Conseils/Consultants and Forgeron Engineering Limited v. Fares Construction Ltd.*, 2025 NSCA 42, at para. 35:

[35] From these authorities, the following principles emerge:

- An amendment is permissible if it (1) is offered in good faith, (2) would not occasion to the opposing party serious prejudice that is non-compensable in costs, and (3) raises a justiciable issue.
- Justiciability is assessed by a standard like that on a motion for summary judgment on the pleadings under Rule 13.03, *i.e.* whether the proposed pleading is absolutely unsustainable on its face.
- “On its face” means the judge on an amendment motion neither hears evidence on the underlying merits, nor decides a contested fact pertaining to the merits, nor forecasts merits-related evidence and potential findings. Rather, the motions judge assumes the facts as pleaded or agreed.
- A contested allegation of material fact or mixed fact and law, or a debatable submission on an issue of law or contractual interpretation is not absolutely unsustainable on its face for an amendment motion.

[10] Applying this test to the proposed Notice of Contest I find that the proposed Notice with alleged novel grounds is permissible, subject to the right to request particulars and subject to an award of costs. At the hearing, I suggested to counsel that they consult on the particulars required and save a step by having those incorporated into the Notice of Contest that is filed.

[11] I accept the Applicants’ assertion that they cannot proceed with the merits hearing scheduled on November 10, 2025, because they need time to consider if they need to file additional evidence to address the new allegations in the Notice of Contest. I grant the Applicants’ request for an adjournment of the merits hearing. The November 10 hearing date will determine the affidavit admissibility motions adjourned on October 6, 2025.

[12] As to costs, regardless of the success of the motion, in the circumstances it is just to award costs to the Applicants in the amount of \$750 payable forthwith.

[13] Order accordingly. The Order is to be prepared by the Applicants for consent as to form by the Respondent.

Norton, J.