

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

	)	<i>T. C. Andres</i>
	)	<i>for the Appellant</i>
<i>RON EVANS</i>	)	<i>(via videoconference)</i>
)	
	)	<i>J. R. N. Boudreau</i>
	)	<i>for the Respondent</i>
	)	<i>Norway House Fisherman's</i>
	)	<i>Co-op Ltd.</i>
<i>- and -</i>	)	<i>(via videoconference)</i>
)	
	)	<i>P. A. Mueller</i>
	)	<i>for the Respondent</i>
<i>NORWAY HOUSE FISHERMAN'S</i>	)	<i>L. Saunders</i>
<i>CO-OP LTD. and LANGFORD</i>	)	<i>(via videoconference)</i>
<i>SAUNDERS</i>)	
)	
	)	<i>Appeal heard:</i>
	)	<i>June 9, 2020</i>
<i>(Respondents) Respondents</i>)	
)	
	)	<i>Judgment delivered:</i>
	)	<i>September 1, 2020</i>

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, all appeals are heard remotely by videoconferencing until further notice.

PFUETZNER JA

[1] In 2018, the directors of the respondent, Norway House Fisherman's Co-op Ltd. (the Co-op) made a decision to terminate the membership of the applicant.

[2] The applicant applied for judicial review of the decision of the Co-op on the basis that it failed to observe the rules of natural justice and committed errors of procedural fairness. In addition, the applicant sought a remedy under sections 365(1) and 365(2) of *The Cooperatives Act*, CCSM c C223 (the *Act*) on the basis that the Co-op and the respondent Saunders exercised their powers in a manner that was oppressive or unfairly prejudicial to, and disregarded the interests of, the applicant (the oppression claim).

[3] The application judge dismissed the application for judicial review and ordered that the oppression claim proceed to trial. The applicant appeals. At the beginning of the hearing, the Co-op abandoned its motion to admit fresh evidence.

[4] The first issue raised by the applicant is whether the application judge erred in dismissing the application for judicial review.

[5] Relying on *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26; and *Bell v Civil Air Search and Rescue Association et al*, 2018 MBCA 96, the application judge correctly found that the Co-op “[does] not exercise any state decision making” and that as a result, judicial review was not available to the applicant.

[6] The applicant does not challenge the finding that the Co-op does not exercise statutory authority. However, he argues that the application judge should have ruled on his claim, that the Co-op breached his right to procedural fairness, because he was advancing a property right based on his membership in the Co-op. He submits that the fact that the proceeding was commenced by way of an application rather than an action should not be a bar to relief.

[7] I agree that a proceeding should not be dismissed solely because it was commenced as an application rather than as an action. In an appropriate case, an application can be converted to an action. See, for example, *Karahalios v Conservative Party of Canada*, 2020 ONSC 1947 at paras 100-110; and 2020 ONSC 3145 at para 5, where such an application was converted to an action and then disposed of on a motion for summary judgment.

[8] In the present case, while his property interest was raised in argument before the application judge, the applicant framed the proceeding purely as a request for judicial review (setting aside for the moment the oppression claim).

[9] Ultimately, the application judge did not exercise his discretion to make an order to convert the application for judicial review into an action. A determination as to whether the applicant's right to procedural fairness was breached would have required an adjudication on many of the same factors as are involved in the oppression claim. A decision to proceed to trial is discretionary and I am not persuaded that, in the circumstances, the application judge erred in principle or that his decision resulted in an injustice.

[10] The second issue raised by the applicant is whether the application judge erred in ordering a trial of the oppression claim. He submits that there were no genuine issues of credibility identified by the application judge. Moreover, the applicant maintains that, since none of the parties was seeking a trial and the application judge did not raise the possibility of ordering a trial at the hearing of the application, he should not have done so on his own motion without notice to the parties.

[11] The application judge's reasons for ordering a trial of the oppression

claim are not extensive. In his endorsement, he wrote (at paras 18-19):

I find a trial is necessary as the facts are in dispute. The allegations made by the [Co-op] are serious. There are allegations of bad faith, close dealing and breaches of fiduciary duty. [The applicant], in his response, alleges bad faith dealing by the Board of [the Co-op] and . . . Saunders.

Viva voce evidence is the only way the truth of these allegations may be resolved.

[12] The decision to order a trial was clearly open to the application judge in light of the affidavits filed by each party asserting that, while they acted appropriately, the party opposite acted in bad faith. As noted by the Supreme Court of Canada in *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, “‘Oppression’ carries the sense of conduct that is coercive and abusive, and suggests bad faith” (at para 67). It is difficult to conceive how the truth of these allegations could be determined based only on the material before the application judge.

[13] I am sympathetic to the applicant’s argument that the application judge should have invited submissions on whether to order a trial. Ideally, parties should always be given a chance to address the court, even on procedural matters. However, I am not persuaded that the application judge’s failure to invite submissions resulted in an injustice in the circumstances of this case. The parties should have been aware of the possibility of the oppression claim proceeding to trial. Additionally, the application judge’s decision did not result in a final determination of the rights of the parties.

[14] The application judge relied on section 365(3)(s) of the *Act* in ordering a trial of the oppression claim. In my view, it would have been

preferable to rely on r 38.09(b) of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, which provides in part that, on hearing an application, a judge may “where satisfied that there is a substantial dispute of fact, direct that the application proceed to trial”. The utility of section 365(3)(s) of the *Act* is very limited as, on a plain reading of the *Act*, the court must make a finding that oppression has occurred before it can order a trial of an issue. This stands in contrast to section 234(3)(n) of *The Corporations Act*, CCSM c C225, which allows the court at any time to order the trial of any issue “[i]n connection with an application” for an oppression remedy.

[15] Despite not having filed a notice of appeal, Saunders argues that the application judge erred in ordering a trial of the oppression claim against him. Saunders submits that section 26(1) of *The Court of Appeal Act*, CCSM c C240 would allow this Court to give effect to his argument as it allows the Court on an appeal to “give any judgment which ought to have been pronounced”. I am not convinced by this position. If Saunders wished to join in challenging the order directing a trial, he should have filed a notice of cross-appeal. It is unfair for Saunders merely to raise this position in his responding factum as the other parties are denied the chance to file written arguments in response. However, even if he had filed a notice of cross-appeal, I would have dismissed his cross-appeal.

[16] In conclusion, I am not convinced that the application judge misdirected himself or that his decision to order a trial of the oppression claim is so wrong as to amount to an injustice.

[17] In the result, the appeal is dismissed with costs to the respondents.

“Pfuetzner JA”

I agree:

“Steel JA”

I agree:

“Burnett JA”