SUPREME COURT OF NOVA SCOTIA
Citation: Oldford v. Canadian Broadcasting Corporation, 2011 NSSC 49

Date: 20110203
Docket: Yar. No. 191333
Registry: Yarmouth

Between:

R. Brian Oldford

Plaintiff

v.

Canadian Broadcasting Corporation, a body corporate,
Harvey Cashore, and Trish Wood

Defendants

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	February 1, 2011, Special Chambers, Halifax, NS
Written Decision:	February 3, 2011
Counsel:	R. Lester Jesudason /Moneesha Sinha, for the Plaintiff David G. Coles, Q.C., for the Defendants

By the Court:

INTRODUCTION

[1] This matter relates to a CPR 23.03 motion for an Order granting leave to file an Amended Statement of Claim under CPR 83.02(2). The relevant *Civil Procedure Rules* include:

Evidence - CPR 22.15

Rules of evidence on a motion

22.15(1) The rules of evidence apply to the hearing of a motion, including the affidavits unless these Rules or legislation provides otherwise.

(2) Hearsay not excepted from the rule of evidence excluding hearsay, may be offered or any of the following motions:

(a) an ex parte motion, if the judge permits;

(b) a motion on which representations of fact, instead of affidavits, are permitted, if the hearsay is restricted to facts that cannot reasonably be contested;

(c) a motion to determine a procedural right;

(d) a motion for an order that affects only the interests of a party who is disentitled to notice or files only a demand of notice, if the judge or the prothonotary hearing the motion permits;

(e) a motion which a Rule or legislation allows hearsay.

(3) A party presenting hearsay must establish the source, and the witness' belief, or the information.

(4) A judge, prothonotary, commissioner, or referee may act on representations of fact that cannot reasonably be contested.

Manner of Providing Evidence - CPR 23.08

Manner of providing evidence

23.08(1) A party may provide evidence for a chambers motion by filing any of the following documents:

(a) an affidavit that conforms with Rule 39 - Affidavit;

(b) admissible excerpts from a discovery transcript in the proceeding under Rules 18.20 and 18.21, of Rule 18 - Discovery;

(c) admissible excerpts from a transcript of commission evidence taken in the proceeding, under Rule 56 - Commission Evidence;

(d) an agreed statement of facts signed by all parties to the motion.

(2) An affidavit may prove a written statement admissible under legislation, a Rule or the common law.

(3) A party may provide evidence by cross-examination as provided in Rule 23.09 and by re-direct examination.

(4) A person may give evidence in chambers by direct examination, followed by cross-examination, only if a judge is satisfied that it is impossible or undesirable for a party to present the evidence by affidavit.

Cross-Examination

23.09(1) A party may cross-examine an affiant on an affidavit filed by another party.

(2) A judge may restrict cross-examination in any of the following ways:

(a) refuse cross-examination to a party who has the same interest in the motion as the party who files the affidavit;

(b) limit the time for, or subjects of, cross-examination before it takes place;

(c) impose a time limit before, or during, cross-examination.

(3) A party who intends to cross-examine an affiant must immediately notify each other party in the writing and either the judge who is to hear the motion or, if no judge is assigned, the prothonotary.

(4) The witness who provides an affidavit on which cross-examination is required must be cross-examined and examined in re-direct in chambers, unless the parties agree or a judge orders otherwise.

> (5) On cross-examination out of court, the witness must be sworn, the cross-examination must be recorded by a court reporter, and a transcript certified by the reporter must be obtained.
>
> (6) A party who files the affidavit of a witness cross-examined out of court must file a transcript of the cross-examination.
>
> (7) A party who files an affidavit must pay the expense of presenting the witness for cross-examination, unless the parties agree or a judge orders otherwise.
>
> (8) A judge who hears a motion in which a witness is cross-examined and determines the cross-examination was unnecessary may order the party who required cross-examination to indemnify another party for the expense of the cross-examination.

[2] Rule 83.01(2) "requires a party who wishes to amend a court document to obtain permission from the other parties or a Judge, except documents may be amended without permission early in an action."

[3] Rule 83.02(2) requires that the amendment must be made no later than 10 days after the "pleadings close" [CPR 38.11 - day when each party claimed against has filed a notice of Defence, has filed a demand of notice or has become otherwise disentitled to further notice] unless the parties agree or a judge orders otherwise.

LEGAL TEST

[4] Counsel agree on the proper legal test that the Court should use. The test is found in *Stacey v. Consolidated Fund Corp. or Canada Ltd.* (1986), 76 N.S.R. (2d) 182 (C.A.) per Clarke, C.J.N.S.:

> ...**the amendment should have been granted unless** it was shown to the Judge that the Applicant was acting in **bad faith** or that by allowing the amendment, the other party would suffer **serious prejudice** that could not be compensated by costs." [emphasis added]

[5] Moreover, I note Clarke, C.J.N.S. also stated:

> In considering this application, the Chambers judge entered upon an examination of the merits of the proposed amendments. In our opinion that ought to have been left for the trial judge to determine on the evidence and the law.

[6] As to the "test" see also Bateman, J.A. in *Global Petroleum Corp. v. Point Tupper Terminals Co.* (1998), 170 N.S.R. (2d) 367 at page 370.

[7] Until January 1, 2009 the 1972 CPR equivalent to Rule 83 was Rule 15. Particularly relevant are (paraphrased):

> 15.01 - Allowed amendments without leave of the court within 20 days after pleadings are deemed to be closed and “at any time” with leave of the Court.
>
> 15.10 - The costs, if any, occasioned by an amendment shall be borne by the party requesting the amendment, unless the court otherwise orders.

[8] The only reported cases which have considered this issue under the new Rules are *Canada Life Assurance v. Saywood et al* (2010), 288 N.S.R. (2d) 273 (NSSC) and *M5 Marketing Communications v. Ross* 2011 NSCC 32, both decisions of McDougall, J.

[9] As Justice McDougall concluded, I also do not believe the new Rules intended to alter, and I accept that they therefore have not altered, the appropriate legal test regarding when leave will be granted to amend court documents.

[10] I will rely on the above-noted test in *Stacey* and *Global Petroleum*. Therefore, the controversy herein lies in the proper application of the legal test to the facts. What may cause greater difficulty in this case than usual is that pleadings regarding the law of defamation “are also highly technical and complex.....play a disproportionate role in the conduct of the case, perhaps

more so than in any other cause of action" (*The Law of Defamation in Canada Toronto Carswell Inc.*, 2010 at p. 19-3.)

THE EVIDENCE AND THE FACTS

[11] The Court had the benefit of affidavits for the Plaintiff, namely, those of Moneesha Sinha sworn to January 11, 2011 (incl. as Exhibit A her previously filed Affidavit sworn March 12, 2009). The Plaintiff's brief was filed January 17, 2011. The Affidavit submitted for the Defendant, namely that of Joshua J. Santimaw sworn to January 24, 2011. The Defendant's brief was filed January 25, 2011.

[12] No Notices of Intent to cross-examination were filed (CPR 29.03(3)). The Affidavits establish the factual background to this proceeding (paras. 13-27 herein):

[13] CBC, as a national Canadian TV broadcaster has aired an investigative report series of programs under the name "The 5th Estate". One of those segments was entitled "The Tide of Suspicion" and it aired on March 31 and April 5, 1998.

[14] Harvey Cashore produced that segment, and Trish Wood narrated it. Both were employees of CBC.

[15] On September 24, 1998 R. Brian Oldford as Plaintiff filed suit against the CBC, Cashore and Wood for defamation arising from the aired segment entitled "Tide of Suspicion". Oldford relied on the *Defamation Act* RSNS 1989 c. 122.

[16] A transcript of the entire segment "Tide of Suspicion" was attached to the Statement of Claim. That transcript is 12 typewritten letter size pages in length (single spaced).

[17] A Defence was filed January 7, 2000.

[18] An amended Statement of Claim was filed (with consent) December 16, 2002.

[19] An amended Defence was filed March 7, 2003.

[20] Discoveries of persons took place as follows:

(i) Brian Oldford - May 9 - 10, 2001

Aug. 20, 21 and 22, 2001

Nov. 19 - 20, 2001

Apr. 24 - 25, 2002

(ii) Harvey Cashore and Trish Wood - Dec. 3,4,5,6 and 7, 2001

(iii) Non parties Mary Stella Margaret Davis, Mary Georgina Hartley,

Clare Louise Thompson on Dec. 18, 19, 20, 2002 respectively.

(iv) Dr. David King - May 22 - 23, 2003

[21] Due to a potential conflict resulting from the creation of the Halifax Law Firm Garson Pink, Blois Nickerson and Bryson filed a Notice of Change of Counsel on May 10, 2007.

[22] On May 7, 2007 Mr. Jesudason of Blois Nickerson Bryson wrote to Mr. Coles, counsel for the Defendants, and advised:

> ...based on our preliminary review, we are of the view that our pleadings will likely have to be amended;

[23] On April 30, 2008 he wrote to Mr. Coles:

> Please find enclosed a copy of our proposed draft Amended Statement of Claim for your review. You will note that a number of the proposed amendments relate to typographical corrections. Furthermore, the version of the transcript of, "Tide of Suspicion", which was originally attached to the Amended Statement of Claim was difficult to read and appears to have contained some minor inaccuracies. We have therefore attached a copy of the transcript of the program which was contained in the Defendants' List of Documents as the new Schedule "A".
>
> Kindly advise Mr. Outhouse or myself of your position with respect to the proposed amendments. Obviously, if you are not willing to enter into a Consent order amending the Statement of Claim, we should discuss mutually convenient dates for a Chambers application.

[24] On October 6, 2008 Mr. Jesudason wrote to Mr. Coles:

> I have not received any response from you with respect to my previous request for an indication of which amendments you are prepared to consent to and those which would have to be dealt with by way of a Chambers application. When we last spoke on the phone, I believe we agreed that there was no dispute over "typographical corrections" but your client would not be willing to consent to any of the other amendments. I also asked you if you could provide me with dates when you are available to have our application heard to amend the Statement of Claim.
>
> Our office has been in contact with the Scheduling Office here in Halifax and we understand that there are two half day slots available for Special Chambers in November and that there are several dates in December. If we are looking for a full day, which I suspect we may be, the dates of December 16, 17, 18 and 23 are all available, assuming that you will have no difficulty with the application being heard here in Halifax.

[25] On October 6, 2008 Mr. Coles responded:

> I acknowledge receipt of your facsimile transmission of October 6, 2008, and have forwarded the same to my client for instructions.
>
> I am in trial the week of December 15. I am available on the 23rd or December. I do have time available in November.
>
> Could you please contact me to finalize selection of a hearing date?

[26] There were numerous further exchanges that occurred between Mr. Jesudason and Mr. Coles from October 6, 2008 to March 11, 2009 regarding the hearing proposed for seeking leave to amend the Statement of Claim. A disagreement between counsel arose about whether the "old" *Civil Procedure Rules* or "new" Rules should apply (see Exhibit B to the January 11, 2011 Sinha affidavit).

[27] Ultimately a motion was filed under the "new" Rules on November 24, 2010. The hearing date was set for February 1, 2011.

LEGAL ISSUE

[28] Has the moving party (Plaintiff) satisfied the Court that their motion should be granted, considering the circumstances generally, and specifically whether there is evidence demonstrating that the moving party is acting in bad faith, or that by allowing the amendment the other party (Defendants) would suffer serious prejudice that could not be compensated by costs?

POSITION OF THE PARTIES

The Plaintiff

[29] The Plaintiff argues that although these proposed amendments are significant in the context of the highly technical pleading requirements for suits alleging defamation, they are not correspondingly significant in the sense that permitting these amendments would cause "serious prejudice" to the Defendants that cannot be compensated in costs.

[30] The Plaintiff argues that the burden is on the Defendants to establish that the amendments ought not to be permitted; they have provided no evidence of any "serious prejudice" or bad faith. The Plaintiff argues that these amendments do not change the parties; they do not create a "new cause of action"; nor do they rest on a

factual foundation different from the existing pleadings in their Statement of Claim.

[31] In this case, the transcript of the “Tide of Suspicion” broadcast has been available since 1998, and the (proposed) exact amendments have been known to the Defendants since the spring of 2008.

[32] The Plaintiff argues that the delay in making this motion since his new counsel was retained in the spring of 2007 is explained and inconsequential, though regrettable; delay is relevant in cases where the factual foundation needs to be shifted to fit the new pleadings, but that is not the case at Bar.

[33] If the amendments are permitted, the Plaintiff concedes an Amended Defence will likely be filed, but he argues that the Defendants should not be **indemnified** for the costs thereof as the Defendant’s claim, but rather, as the successful moving party, the Plaintiff should receive costs of the motion - there being no “serious prejudice” for which the Defendants need to be compensated.

[34] If the Court finds "serious prejudice" then the Plaintiff argues that the costs of the consequences on the Defendants (re-discovery witnesses, etc.) be costs in the cause to be determined by the Trial Judge as was done in *Global Petroleum*. The Plaintiff would still seek costs of the motion as the successful party based on the Tariff "C" minimum rate.

The Defendants

[35] The Defendants argue that the proposed amendments ought not to be allowed because:

- they are entitled to know the case to meet (CPR 38.02), and have filed their most recent Defence on March 7, 2003 after all discoveries were completed;
- the Plaintiff is now seeking to present a "new theory of the case" (a claim that the defamation extended to include broadcasting that Mr. Oldford was "negligent" in his duties as a peace officer in addition to the existing claims);
- to advance a "new theory of the case" the Plaintiff is relying on a different factual foundation;

- the Defendants will be required to examine, investigate the new allegation, and conduct discoveries again of some witnesses in order to answer this "new" claim;

- it is unfair to allow the Plaintiff to now so significantly change its pleadings.

[36] At the hearing, the Defendants focussed their attention on their position that if the amendments are allowed, they would suffer "serious prejudice" that, if it could be compensated for in costs, should be compensated for by indemnification of all costs (on a solicitor client basis) that they incur as a consequence of the amendments.

[37] The Defendants also argued based on the decision of Justice Davison in *Gillis Construction v. N.S. Power Corp*. (1988), 86 N.S.R. (2d) 167 (S.C.) that:

> Since the case at Bar involves "substantial delay in seeking an amendment which, by its nature, involves findings of fact and issues of credibility" therefore "the same principles apply as that which would apply to one who opposes an application to dismiss for want of prosecution. That is to say, the lengthy delay and the nature of the amendment raises the presumption of prejudice which must be rebutted by he who seeks the amendment".

> Therefore the Plaintiff has the burden to rebut the "presumption of prejudice" to the Defendants of amendments to the Statement of Claim yet the Plaintiff's Affidavit discloses no evidence capable of rebutting this presumption of prejudice [which I note may be distinguishable from "serious prejudice" as referred to in *Stacey* per Clarke, C.J.N.S.]

[38] When asked by the Court if the Court was prevented from drawing inferences based on the proven facts in the Affidavits, particularly in relation to why the motion should be granted and also regarding rebutting the presumption of prejudice (ie. why there has been delay in making the motion) the Defendant's counsel urged that while inferences are generally possible, they cannot reasonably be drawn in this case.

[39] The Defendants argue that regardless of whether the Defendants are successful in opposing any amendments being allowed to be made to the Statement of Claim; and whether the Court declines to find "serious prejudice" that might otherwise allow indemnification, the Defendants claim to be entitled to the costs of the Plaintiff's motion. No authority was cited for this position when the Court enquired of counsel.

ANALYSIS

Is there Evidence of Bad Faith?

[40] There is unquestionably no direct evidence of bad faith by the Plaintiff. The Defendants suggest the Court should infer bad faith based on the proven facts.

[41] The Defendants argue that the Plaintiff has not offered any evidence to explain his basis for seeking to amend his Statement of Claim, for a second time.

[42] I note that present counsel for the Plaintiff was not counsel at the time of the previous amendment to the Statement of Claim on December 16, 2002.

[43] The Plaintiff's new counsel advised the Defendants shortly after their 2007 retention that they anticipated filing an amended Statement of Claim, and included a draft Amended Statement of Claim for the Defendants to review in a timely fashion.

[44] As to the Plaintiff's motives for preferring an amended Statement of Claim, the Court can only speculate about those. Merely because they are unknown or

unstated does not necessarily lead to the conclusion that the motives must therefore be in bad faith.

[45] It could be a change in the jurisprudence that prompted a good faith decision to seek the amendment (see *Young v. Bella*, [2006] 1 S.C.R. 108 released January 27, 2006 where the SCC discussed a number of issues around the awarding of damages in defamation cases, and whether the possibility of suing in defamation negates availability of a cause of action in negligence where the necessary elements are made out. The Court concluded it does not. See paras. 52-56 per McLachlin, C.J. and Binnie, J. for the Court).

[46] Perhaps the decision to amend was motivated by the Supreme Court's comments regarding the modification of the "honest belief" element of the fair comment defence in *WIC Radio v. Simpson*, [2008] 2 S.C.R. 420 released June 27, 2008.

[47] While there is no evidence to suggest changes in the jurisprudence motivated the Plaintiff's actions, the salient point is that the court could infer a good faith

basis, and does so in this case, based on the affidavits filed, especially where there is not a scintilla of clear evidence upon which I could infer otherwise.

What evidence is there of the "serious prejudice" that the Defendants would suffer, that could not be compensated by costs? From what proven facts can I infer such evidence?

A. Based on the Evidence presented

[48] Is there evidence that by allowing the amendment the Defendants would suffer "serious prejudice that could not be compensated by costs"?

[49] If the amendment to the Statement of Claim is allowed, the Defendants are entitled to file an amended defence (CPR 83.06(1)).

[50] The Defendants argue that:

> CBC will have to file an Amended Defence. It **may** require particulars before filing the same. Document disclosure **may** have to again occur and discoveries **would have to be** conducted of the parties, witnesses and expert." (para. 26 brief)

> Given the lengthy delay... **in all likelihood** the memories of all would have faded such that they **may** not recall the alleged defamation with any particularity. (para. 27 brief)
>
> [My emphasis]

[51] Mr. Santimaw's affidavit for the Defendants does not expressly address these issues.

[52] Ms. Sinha's affidavit for the Plaintiff does not expressly address these issues either.

[53] However, I note that the proposed amended Statement of Claim has long been known to the Defendants. It is attached to the draft Order that has been provided to them and the Court.

[54] Morever, that proposed amended Statement of Claim is identical to the one the Plaintiff provided to the Defendants with its Interlocutory Notice (application inter partes) filed November 18, 2008, and earlier in the spring of 2008.

[55] The reasons why that application was not heard is referred to in the chronology I earlier outlined.

[56] The Defendants had the opportunity to examine the proposed amended Statement of Claim since at least November 18, 2008 and could have (but did not) provided the Court evidence specifically related to their assertions that:

> CBC “may” require particulars before filing its amended Defence in response.
>
> CBC “may” have to revisit document disclosure and discoveries “would have to be conducted” of the parties, witnesses and expert.
>
> Given the delay ..... “in all likelihood the memories of all would have faded such that they may not recall the alleged defamation with any particularity.”

[57] The Court is in a poor position to infer prejudice given the factual vacuum presented.

[58] To come to the conclusion by inferences that there would be “serious prejudice” to the Defendants resulting from the proposed amended Statement of Claim in these circumstances, would approach intolerably close to speculation.

[59] On the evidence presented, I decline to find any "serious prejudice" to the Defendants herein resulting from leave to file the proposed amended Statement of Claim.

B. Based on a presumption of prejudice - *Gillis v. N.S. Power Corp.* (1988) 86 N.S.R. (2d) 167 (S.C.)

[60] In reply to the Defendants' position I observe:

1. I am unconvinced that the Plaintiff is presenting a "new theory of the case" with its proposed amendments. The Defendant at para. 6 of its brief alleges "an entirely different assertion [i.e. negligence by Oldford] that CBC defamed the Plaintiff in an intentional/improper manner", and points to specific paragraphs in the Amended Statement of Claim as follows:

> (i) para. 7(c) - "improperly and/or incompetently pursued the investigation of Clayton Johnson as a murder suspect."

(ii) para. 9(c) - “improperly and/or incompetently pursued the investigation of Clayton Johnson as a murder suspect.”

(iii) para. 11(i) - “conducted the investigation of Clayton Johnson for the murder of Janice Johnson in an incompetent manner”...

(iv) para. 11(j) - “acted unethically during the investigation...”

(v) paras. 13(d) - “arbitrarily pursued the investigation of Clayton Johnson...”

13(e) - “acted unethically during the investigation...”

13(f) - “conducted the investigation of Clayton Johnson... in an incompetent manner.”

(vi) paras. 15(d) - “arbitrarily pursued the investigation...”

15(e) - “improperly created evidence...”

15(f) - “acted unethically...”

(vii) paras. 17(c) - “engaged in discreditable conduct or abused his power as an R.C.M.P. officer

> by engaging in an improper investigation of the Defendants' and/or:"
>
> > (d) "engaged in discreditable conduct or abused his power as an R.C.M.P. officer by engaging in an improper investigation of the Defendants in retaliation to the fact that the Defendants were intending to broadcast a documentary on the Clayton Johnson case."
>
> (viii) paras. 19(a) - "[The Defendants] conducted interviews in a misleading and/or abusive manner."
>
> > 19(c) - "[The Defendants] engaged in unbalanced and/or biased reporting..."

2. Although these paragraphs relate to separate specified collections of words in the broadcast, and are distinguishable on that basis, they are not however tantamount to a "new theory of the case".

The basic allegation is that the Defendants defamed the Plaintiff within the confines of the broadcast of "Tide of Suspicion" which is a precisely identifiable source of controversy. The amendments reflect a more detailed

claim, but at its core, in my view, the Defendants are facing essentially the same claim in view of the existing and proposed Statements of Claim as contrasted to each other.

Moreover, the apparent factual foundations for proof of the allegations in these amendments are not perceptibly different than what would be required for the existing claims.

3. The Defendants have not provided any evidence to suggest that they will likely be put to greater expense by way of further discoveries etc. because of the proposed amendments. It is difficult in those circumstances for the Defendants to simultaneously argue that they face “a new theory of the case”, which was known to them since the spring of 2008, and allowed them ample opportunity to marshal their resources and present evidence to support their position, but yet did not do so.

4. In these circumstances, the Court could infer that the Defendants are unable to muster such evidence, and that is why they produced none.

5. Therefore, even if I accept the Defendants' argument that the *Gillis* case puts the burden on the Plaintiff to rebut a presumption of prejudice (in cases involving lengthy delays and factual disputes relevant to proposed amended pleadings), I am satisfied the Plaintiffs have rebutted any such (inference) presumption in this case.

[61] While there may be some change required in the Defendants' approach to the case at trial, I find on the limited evidence available to me that the Defendants have until the trial date, and that is ample time to allow for the modest recalibration that might be required. In concluding this, I have considered the fact that the Defendants will need to file an Amended Defence.

[62] From my limited perspective, I do not find that there is "serious prejudice" to the Defendants' position, should I grant leave to the Plaintiff to file the proposed Amended Statement of Claim.

Costs

[63] I have found no bad faith on the Plaintiff's part, and no "serious prejudice" to the Defendants' position if I grant leave to the Plaintiff to file the proposed Amended Statement of Claim.

[64] Having found no "serious prejudice" and given the circumstances of this case I conclude that there is no basis to award costs to the Defendants to indemnify them for the consequences to them of having to deal with the Amended Statement of Claim.

[65] The Defendants requested that I "keep the door open" for their indemnification should they desire to make motion to recover the costs of any further discoveries and expenses associated with the advent of the Amended Statement of Claim at some point in the future.

[66] In my view, that reckoning is best left to the trial judge.

[67] As Justice MacDougall stated in *Canada Life Assurance v. Saywood* (2010), 288 N.S.R. (2d) 273 (SC):

> I am not prepared to order the [Plaintiff] to, in effect, completely underwrite the costs which the [Defendants] might incur as a result of these amendments. I am prepared, however, to award costs to the [Defendants] for the motion, based on Tariff C. - At para. 27.

[68] His reasoning suggests that in the case at Bar, although the Plaintiff was successful on the motion, it may be in the interests of justice to acknowledge that in all the circumstances that the Defendants will be put to some extra expense consequent upon my granting leave to file the Amended Statement of claim.

[69] In spite of that reasoning, I am inclined given the circumstances here, to follow the general rule.

CONCLUSION

[70] Accordingly, I grant the moving party's motion herein. As to costs of the motion, I award $1000 to the Plaintiff in any event of the cause at the end of the proceeding, pursuant to CPR 77.03(4)(c).

J.