Date: April 17, 2001
Docket: SH 97-138538

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Canada (Attorney General) v. Power, 2001 NSSC 60

BETWEEN:

THE ATTORNEY GENERAL OF CANADA, on behalf of
Her Majesty the Queen in right of Canada

PLAINTIFF/RESPONDENT

- and -

KATHLEEN DOLORES (FITZGERALD) POWER

DEFENDANT/APPLICANT

DECISION

HEARD: before the Honourable Chief Justice Joseph P. Kennedy, Supreme Court of Nova Scotia, Halifax, Nova Scotia, April 17, 2001.

DECISION: April 17, 2001

WRITTEN RELEASE: May 3, 2001

COUNSEL: Kathleen D. Power for the Defendant/Applicant
Melanie S. Comstock for the Plaintiff/Respondent

Kennedy, C.J.:

[1] I have two matters to deal with; one is an application on behalf of the defendant/applicant to have the action dismissed, pursuant to Rule 68, as it then was, and also Rule 14.25, which is the judicial process. There has been a debate, firstly, about whether or not Rule 68 still applies, it having been replaced with a process that is markedly different than the process that existed at the time this matter was commenced, and under which this matter was to be dealt with when the process began.

[2] The further issue raised by the plaintiff/respondent is that if Rule 68 were to apply, Rule 68 as it then was, gave the power to the "supervising judge" and the supervising judge has a meaning under Rule 68, that is a judge asssigned by the Prothonotary as a supervising judge, and would not obviously apply to a chambers judge dealing with the application.

[3] Also, as indicated, there is a Rule 14.25, abuse of process argument, that was well made before the Court. Let me say, all arguments were well made by the applicant.

[4] I'll deal with the notice of trial issue in a moment.

[5] Let me be as clear as I can in relation to Rule 68, frankly, I have not determined definitely whether the old Rule 68 still applies or not to this matter. Certainly it is at least possible that the defendant/applicant is correct, but Rule 68 should still be enforced in relation to this specific, or at least could be argued. It, is arguable that it still should be enforced, but the issue frankly, is moot and I'll say why.

[6] Firstly, even under Rule 68, even if applicable, I am not a "supervising judge" under that rule, but more importantly, it is a discretionary remedy, and I would, for reasons that I will express in a minute, doing the balancing act that we are required to do, would not be exercising my discretion under that rule, or any other at this stage to dismiss the action. I say that, understanding the neglect on the part of the plaintiff/respondent with respect to this matter. There has been neglect, and clearly it is not neglect on the part of Ms. Comstock before this Court, but appears to have been neglect that took place prior to her eventually taking over the file. She has admitted that, through inexperience, there may have been a false start in relation to an aspect of it. That delay may very well have had some negative effect upon Ms. Power, as she argues, and that is something that the trial judge can eventually assess and remedy if that is the case.

[7] What I am saying, clearly, hopefully at this stage, is that I do not, when I do the balance, find that the delay that has been caused by the actions of the

plaintiff/respondent, sufficient and obvious prejudice to the defence to justify the draconian act of depriving the plaintiff/respondent of its action. To dismiss the action is the ultimate, might be referred to as the atom bomb remedy against the plaintiff/respondent, and I do not intend to exercise that draconian action against the plaintiff/respondent at this stage in the process, notwithstanding the delay that has been occasioned.

[8] Further, I do not consider the delay set forward by the defendant/applicant, and acknowledged by the plaintiff/respondent, to have been an abuse of process of this Court. It does not qualify, in my mind at least, as an abuse of process, does not cause the process at this stage to be for an improper purpose, and I will not be exercising my discretion to dismiss under Rule 14.25 either.

[9] Having indicated that the remedies are for another day, should there be remedies in relation to the delay as to notice of trial, I am not going to allow the objection in relation to the notice of trial. I think this is a matter that at this stage should come on, should be tried, should be dealt with.

[10] There are defences that are set out, and the defence put forward ,the amended defence by the defendant/applicant, that should be heard, that should be listened to by a trial judge to determine the validity. The plaintiff/respondent should be put to proof of the action and that should happen relatively soon.

[11] The notice of trial will not be struck out, there will be a date assignment conference accomplished and a date will be obtained to the satisfaction of both parties. Should there be an interest in a settlement conference, that opportunity will be offered to both parties at that date assignment conference, which is a telephone process, and to the extent that settlement is again being mentioned, that possibility will be available and explored at the time of the date assignment conference. I must say, and I do so gratuitously, it seems to me if there is a possibility of settlement, then that would seem to me, especially given the delay in relation to this matter, to be something that should be reasonably and properly explored by both parties.

[12] I will not, bottom line, notwithstanding the excellent presentation on behalf of the defendant/applicant before this Court today, will not, on the balance, be dismissing the application.

[13] I will not be striking the notice of trial and I will not be awarding costs against the defendant/applicant in relation to this matter. I do not feel that costs against the defendant/applicant are justified.

Chief Justice Kennedy

Halifax, Nova Scotia