SUPREME COURT OF NOVA SCOTIA

Citation: *Power v. Nova Scotia (Maintenance Enforcement Program)*, 2020 NSSC 314

Date: 20201022
Docket: Hfx No. 456525
Registry: Halifax

Between:

Angela Power and Zachary Power,
through his Litigation Guardian, Angela Power

Plaintiffs

v.

Nova Scotia Maintenance Enforcement Program, Department of Justice
through the Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Defendant

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	October 22, 2020, in Halifax, Nova Scotia
Oral Decision Rendered:	October 22, 2020
Written Decision:	November 5, 2020
Counsel:	Wayne Bacchus, for the Plaintiffs/Responding Party Jeffrey D. Waugh and Glenn Anderson, Q.C., for the Defendant/Moving Party

By the Court (Orally):

[1] The pleadings closed on December 14, 2016. The next court filing is the notice of motion referable to today's motion, filed on July 16, 2020. The motion is brought by the defendant for an order to include a third party claim against the plaintiff Angela Power's ex-husband, Joseph Patrick Power.

[2] On October 6, 2020 the Nova Scotia Maintenance Enforcement Program, Department of Justice through the Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia ("Attorney General") filed a proposed form of order, brief, book of authorities and affidavit of Kathy Sparling, Director of Maintenance Enforcement for the Department of Justice. On October 14, 2020 the plaintiffs filed their brief, book of authorities and affidavit of Angela Power. Neither affiant was cross-examined at today's hearing. Yesterday the Court received indexes to the parties' affidavits disclosing documents. Based on my review of the indexes it is fair to say that this is a case with voluminous documents.

[3] Appendix "A" attached to the draft Order is the proposed third party claim. At paras. 4 – 13 the background and gist of the proposed claim is set forth:

> 4. Ms. Power and Mr. Power divorced on or about March 24, 2005. On that date, the Supreme Court of Nova Scotia (Family Division) (the "Supreme Court") ordered Mr. Power had to pay to Ms. Power child support in amount of $700 per month.
>
> 5. The March 24, 2005 order was enrolled in the Nova Scotia Maintenance Enforcement Program. The Maintenance Enforcement Program is designed to assist individuals in enforcing maintenance and support orders.
>
> 6. On or about March 12, 2013 the Supreme Court ordered an increase to the monthly child support payment owed by Mr. Power, from $700 to $3,242 per month. The March 12, 2013 order also required Mr. Power to make a lump-sum arrears reimbursement of $171,786.00 to Ms. Power to be payable within 90 days. On May 21, 2013, the Supreme Court issued an Order for Costs arising from the March 12, 2013 order, in the amount of $21,938.
>
> 7. On or about August 11, 2015, the Supreme Court dismissed Mr. Power's application to vary and forgive child support.
>
> 8. On or about September 23, 2015, the Supreme Court found Mr. Power in contempt.

> 9. In or about September, 2015, Mr. Power left Canada. While abroad, Mr. Power continued to fail to meet his obligations to Ms. Power and her children.
>
> 10. In December, 2015, Mr. Power's maintenance and child support arrears were calculated by the Maintenance Enforcement Program to be in excess of $300,000.
>
> 11. Mr. Power has ignored numerous Court Orders and has failed in his obligations to pay support to Ms. Power and her children. The Defendant states that Mr. Power has demonstrated contempt for the orders of the Courts.
>
> 12. Mr. Power is in breach of the Court Orders. The Defendant says that Mr. Power is liable to the Plaintiffs for the amounts claimed by the Plaintiffs against the Defendant.
>
> 13. In the alternative, the Defendant claims contribution and indemnity from Mr. Power.

[4] The statement of claim against the third party continues at paras. 14 – 16, outlining the legal basis for the sought after claim:

> 14. The Defendants plead the provisions of the *Tortfeasors Act*, RSNS 1989, c. 471, the *Parenting and Support Act*, RSNS 1989, c. 160, the *Maintenance Enforcement Act*, SNS 1994-95, c. 6.
>
> 15. The Defendants plead that the Third Party is liable for tortious conduct, including, *inter alia*, intentional interference with economic relations, and negligence.
>
> 16. Mr. Power breached his fiduciary duties to the Plaintiffs by refusing to pay the ordered support and also by absconding from the jurisdiction, or keeping his location a secret when in Canada.

[5] Ms. Sparling's unchallenged affidavit describes the history of this lawsuit at paras. 9 – 42. Not a whole lot of consequence has occurred since the pleadings closed. Rather than ascribe blame, I would point out that neither party has sought the Court's assistance. For example, until today there has not been a Chambers motion. There have been no Appearance Day motions and neither side has inquired about having a Case Management Judge appointed to help move matters forward.

[6] In the result, even though it will soon be four years since the pleadings closed, the litigation remains in its infancy stage. From Ms. Power's unchallenged affidavit, it is obvious that she is frustrated with the pace of the lawsuit. Beyond this understandable sentiment, Ms. Power points out that she fears Mr. Power and that she will be prejudiced if he is added as a party.

[7] With respect to the latter, she deposes as follows at paras. 45 – 50 of her affidavit:

> 45. Mr. Power and his spouse have, and have had, websites which inaccurately portray me as a manipulative, vindictive, obsessed ex-wife who lied to a judge and caused their downfall. Attached hereto and marked as "Exhibit F" are copies of a sampling of screenshots from the first website of theirs that I became aware of. Mr. and Mrs. Power make clear that they want to help the MEP with the legal challenge I have initiated against them. An excerpt states as follows, "*We thought we would reward our avid readers at the Province of Nova Scotia with a gift to help with their legal challenge against Angela Power*".
>
> 46. It is clear that the Court on multiple occasions in several decisions has declared Mr. Power not credible and have called his conduct "beyond blameworthy". In fact, the Court has called Mr. Power's conduct "reprehensible". I have very grave concerns that Mr. Power would use being joined as a third party Defendant to undermine my case with no regard for the truth whatsoever. Historically, Mr. Power has had no regard for the truth, his obligations to his children and he has repeatedly ignored the Court's authority.
>
> 47. Given his past behavior I am concerned that more and more delays will be caused by Joseph Power intentionally if he is added to this action.
>
> 48. I am also concerned about memories and availability of witness, this matter had been ongoing since 2016, to add Joseph Power at this stage would require delays for attempt service, which I do not believe will be successful, then motion for substitute service or if he is served then exchange of documents. Even my memory is subject to the passage of time.
>
> 49. Mr. Power has been continually causing me aggravation, poverty and fear since 2002 and I view the Department of Justice wanting to add him to this action at this late date as a gratuitous continuation of that abuse instead of working with me to expedite a speedy, just and inexpensive resolution to our dispute.
>
> 50. In 2018, I was forced to sell the house that I sacrificed my right to spousal support to keep in 2002. At points over the years I worked 2 and 3 jobs to pay the bills, including working at McDonald's, a bowling ally and most recently, Superstore during COVID-19 in the bakery. After 16 years and no end in sight to any of theses various legal proceedings Mr. Power has directly or indirectly been the cause of and/or frustrated or delayed, I simply could not afford to pay the bills and upkeep. No amount of costs can compensate for being forced to relive this experience if Joseph Power is added.

[8] Ms. Power continues in her affidavit to outline why further delays – which she believes will be occasioned by adding Mr. Power – will cause dire consequences.

[9] The defendant first alluded to Mr. Power being added as a third party on December 31, 2019. On this date Mr. Anderson wrote to Mr. Bacchus and asked whether the plaintiffs would be agreeable to an amendment adding Mr. Power as a third party. Mr. Anderson stated in his letter, among other things:

> …In reviewing the damages claimed by your clients, it would be the Province's position that if any damages were to be awarded as payable by the Province to your clients, Mr. Power would be liable for contribution and indemnity. Please note that we do not have final instructions on whether or not to add Mr. Power, but wished to raise this with you…

[10] There were further delays and then the pandemic forced the Court to declare an essential services model on March 19, 2020. On May 21, 2020 Mr. Anderson wrote to Mr. Bacchus stating:

> …
>
> We discussed that we have now received instructions to add Mr. Joseph Power as a Third Party. We expect that we can file the Motion documents in approximately one month and that we will canvass you for dates as required by Civil Procedure Rule 23…

The motion was ultimately filed in mid-July with today's date being provided by the court.

[11] Civil Procedure Rule 35.05 and 83.04 are both relevant to the hearing of this motion:

> **How a party joins further parties**
>
> 35.05 A party who starts a proceeding may join a further party by amending the originating document, or notice of claim against third party, as provided in Rule 83 - Amendment.
>
> …
>
> **Amendment to add or remove party**
>
> 83.04 (1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).
>
> (2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:
>
> (a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;

> (b) the expiry precludes the claim;
>
> (c) the person protected by the limitation period is entitled to enforce it.

[12] A simple reading of these provisions makes it clear that, when a limitation defence is advanced at this stage, the court must address the limitation issue before permitting the requested amendment. If the applicable limitation period is found to have expired, and it is not relieved against, then the motion to add will be dismissed (see, among other cases: *Sweeney-Cunningham v. IBG Canada Ltd.*, 2013 NSSC 415).

[13] Having reviewed the relevant legislation, I accept the defendant's submission that the province's claim against Mr. Power has not expired. In this regard, I am of the view that the claim against Mr. Power arises from the breach of a maintenance order made under the *Maintenance Enforcement Act*, SNS 1994-95, c. 6 which establishes at s. 46 that there is no limitation period for the breach of a maintenance order.

[14] Even if I determined that the two year period applied, I accept that at each time a periodic payment is missed, a new breach arises and this re-starts the limitation clock. It is my view that the limitation periods in the context of a continuing breach are applied on a "rolling basis". This means that the limitation period commences each day a fresh cause of action accrues and runs two years from that date (see: *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179).

[15] Rule 35.08 creates a presumption that individuals with an interest in the issues before the Court will be joined. For the plaintiffs to rebut this presumption, they must establish that there will be serious prejudice by joining Mr. Power, that the serious prejudice cannot be compensated in costs, and that the serious prejudice would not have occurred if Mr Power had been joined originally.

[16] I understand that adding Mr. Power is upsetting to Ms. Power for the reasons contained in her affidavit and expressed today by Mr. Bacchus during oral argument. However, I must consider her concerns in both the entire context of this litigation and given the Civil Procedure Rules and caselaw. For reasons I will explain, I do not consider the delay in the litigation caused by joining Mr. Power constitutes a serious prejudice. Further, any prejudice that might occur can be compensated in costs.

[17] On balance, I do not believe that there has been undue delay in bringing the motion. On my review of the file, it is apparent that this litigation has been largely dormant for approximately two years at the fault of neither side. The motion was initially contemplated in response to the plaintiffs' request to add a plaintiff to the litigation and amend the pleadings. The COVID-19 pandemic caused additional delays outside the control of either party. In my view the motion was brought as soon as conveniently possible after the restrictions on the Court's schedule and the essential services model was lifted.

[18] The general principles regarding serious prejudice were succinctly described in *Southwest Construction Management Limited v. EllisDon Corporation*, 2020 NSSC 99, where this court cited *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 ONCA 42 at para. 50:

> 50 The law respecting non-compensable prejudice was helpfully summarized by the Ontario Court of Appeal in *1588444 Ontario Ltd. v State Farm Fire and Casualty Co.*, 2017 ONCA 42 (some citations omitted):
>
> > 1. Motion to amend
> >
> > (a) Legal principles
> >
> > [24] Motions for leave to amend a pleading are governed by rule 26.01 of the Rules of Civil Procedure, --R.R.O. 1990, Reg. 194, which provides:
> >
> > > 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
> >
> > [25] The law regarding leave to amend motions is well developed and the general principles may be summarized as follows:
> >
> > > • The rule requires the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action: ...
> > >
> > > • The amendment may be permitted at any stage of the action: ...
> > >
> > > • There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: ...

> • The non-compensable prejudice may be actual prejudice, i.e., evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: ...
>
> • Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: ...
>
> • At some point, the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party will be presumed: ...
>
> • The onus to prove actual prejudice lies with the responding party: ...
>
> • The onus to rebut presumed prejudice lies with the moving party: ...

[19] The issue of delay was considered by Justice Smith in *Mariner Holdings Inc. v. Rhyno*, 2017 NSSC 121, citing *Wall v. Horn Abbott Ltd.* (2000), 183 NSR (2d) 383 at paras. 6 and 7:

> 6 A further factor considered by the courts, particularly in respect to the onus on the respective parties on an application to seek an amendment, is whether there has been undue delay in bringing the application. In this respect, Justice Davison in Gillis Construction v. N.S. Power Corp., (1988) 86 N.S.R. (2d) 167, at para. 11, said:
>
> > In my opinion, where a party opposes an application for an order to amend a pleading, he must demonstrate that he would be seriously prejudiced or that an injustice would be done by the amendment. On the other hand, if there has been substantial delay in seeking an amendment which, by its nature, involves findings of fact and issues of credibility, 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.
>
> 7 At issue, therefore, is whether the plaintiff is acting in bad faith in seeking this amendment, whether there has been undue prejudice to the defendants which cannot be compensated in costs and whether there has been undue delay in bringing this application. …

[20] In the result, the plaintiffs must establish "exceptional" or "undue" delay in order to shift the onus to the Attorney General to rebut the presumption that the delay

constitutes non-compensable prejudice. I would add that any prejudice caused by joining Mr. Power to the action at this stage of the proceeding is compensable in costs if the plaintiffs are successful in the litigation.

[21] In *Thornton v. RBC General Insurance Company*, 2014 NSSC 215, at para. 33, Justice Wood (as he then was) described prejudice that cannot be compensated in costs as:

> … That type of prejudice is typically evidentiary in nature, which requires a consideration of whether documents and witnesses have been lost due to the passage of time. …

[22] There is no affidavit evidence demonstrating that there are lost or degraded documents through the passage of time. Further, there is nothing in the affidavits about witnesses whom would no longer be available unable to provide credible evidence given the passage of time. The Attorney General has said on the record that if they are unable to locate and serve Mr. Power personally, they will bring a motion for substituted service within a reasonable time period.

[23] The prospect of a lengthier discovery process or trial which may arise from the joining of Mr. Power does not constitute serious prejudice. In this regard, I refer to Justice Bodurtha's decision in *Altschuler v. Bayswater Construction Limited*, 2019 NSSC 197, at para. 18:

> 18 In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.*, 2001 NSSC 178, the defendant asserted prejudice of a similar nature to that claimed by the defendant in this case. Justice Wright concluded that the defendant had failed to demonstrate prejudice that could not be compensated in costs:
>
> > 32 The demonstration of prejudice alone, however, does not satisfy the legal test to be applied on this application. The burden is on Mitsui to further demonstrate that the prejudice caused cannot be compensated in costs. Undoubtedly these amendments, if permitted, will necessitate further discovery and the re-instruction of experts which inevitably will result in more cost and some measure of delay. There has not as yet been any discovery of experts, however, and although there is always a risk of fading memories, any lay witnesses who do need to be re-examined will at least have the benefit of the transcripts of their earlier discovery evidence in a situation where the factual underpinning of the case has not changed.

[24] I would add that any difficulty and delay arising from locating and serving Mr. Power would have occurred even if he had been joined originally. It is reasonable to conclude that any delay actions made by Mr. Power would have been

made by him had he been initially names as a party. Joining Mr. Power at this stage will not cause any new prejudice that would not have occurred in any event, had he been joined at the outset.

[25] In the result, I am granting the motion to the extent that Mr. Power will be added as a third party as set out in Appendix "A" of the draft Order.

[26] With respect to costs, I am not persuaded that they are warranted in these circumstances. To my mind, the Attorney General ought to have included Mr. Power from the beginning. When counsel finally advised plaintiffs' counsel on New Year's Eve of their intention, they did not finally communicate that they had firm instructions until almost six months later. In all of the circumstances, I am exercising my discretion not to award costs to the successful party, the Attorney General.

[27] On a go-forward basis I encourage the parties to move the litigation forward. If necessary, I commend both sides to the available Court processes to make this happen. These include further Chambers motions, Appearance Day motions and, perhaps, a most cost effective solution would be through the appointment of a Case Management Judge. I leave this sentiment with the parties.

Chipman, J.