SUPREME COURT OF NOVA SCOTIA
Citation: *Annapolis Group Inc. v. Halifax Regional Municipality*, 2021 NSSC 344

Date: 20211220
Docket: Hfx No. 460474
Registry: Halifax

Between:

Annapolis Group Inc.

Plaintiff/Respondent

v.

Halifax Regional Municipality

Defendant/Applicant

MOTION BY CORRESPONDENCE
D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Written Submissions:	November 19, December 7 and 10, 2021
Counsel:	Peter H. Griffin, for the Plaintiff/Respondent
	Ian R. Dunbar, for the Defendant/Applicant

By the Court:

BACKGROUND

[1] This is a motion by correspondence (Rule 27.01) brought by Halifax Regional Municipality (HRM) to make five amendments to its Amended Defence. Four of the proposed amendments are clerical or administrative and Annapolis Group Inc. (Annapolis) does not object to them. These four amendments are hereby granted. The remaining proposed amendment is to add a new paragraph (54A) to HRM's Amended Defence which reads:

> The Municipality says that all of the claims brought by the Plaintiff in the Amended Statement of Claim arising from events occurring before February 17, 2016 are time-barred by virtue of the Nova Scotia *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, or both, as read together with Section 376 of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, and accordingly, all such claims should be dismissed, with costs to the Municipality on a solicitor-client basis.

[2] I am the case management judge and, accordingly, am well acquainted with this longstanding litigation. Trial dates are currently set before Justice Bodurtha commencing in September, 2022. These dates were scheduled during a January 16, 2020 Date Assignment Conference (DAC). In the time since, the Nova Scotia Court of Appeal allowed an appeal (*HRM v. Annapolis Group Inc.*, 2021 NSCA 3) from my decision (*Annapolis Group Inc. v. HRM*, 2019 NSSC 341) and granted HRM summary judgment with respect to Annapolis' *de facto* expropriation claim. In so doing, Farrar, J.A. determined Annapolis' claim for *de facto* expropriation had no reasonable chance of success.

[3] On June 24, 2021 the Supreme Court of Canada granted Annapolis leave to appeal (SCC No. 39594) and the matter is scheduled to be heard on February 16, 2022. Depending on how long it takes for the Supreme Court of Canada to render its decision, it is possible that the trial dates will have to be adjourned. Accordingly, I advised counsel during a recent case management meeting (CMM) that I have placed on hold the next available long civil trial dates beginning in April, 2024. As well, I advised counsel that I have a special request in for trial dates in the spring, summer or fall of 2023.

[4] On this motion I have the unchallenged affidavit evidence of HRM counsel Michael Richards, sworn November 17, 2021 and Annapolis' counsels' law clerk Grace Tsakas, sworn December 3, 2021. Attached to Mr. Richards' affidavit are four exhibits inclusive of excerpts from the discovery transcript of Chris Lowe,

Annapolis' former Vice-President of Planning and Development, conducted on February 13 and 14, 2020 as well as correspondence between counsel from earlier this year. Ms. Tsakas' affidavit also attaches four exhibits, all of which are contained in the Court file.

[5] Through the briefs and CMM discussions, the Court is aware that discovery examinations are nearing completion. Approximately twenty witnesses have been discovered with (according to Annapolis) "two witnesses remaining" or (according to HRM) "a few" left to be discovered.

[6] HRM says that their proposed amendment is rooted in Mr. Lowe's excerpted discovery transcript. HRM argues as follows in their brief at paras. 13 – 15:

> 13. Among the witnesses questioned in February, 2020 was Chris Lowe, former Vice-President of Planning and Development for Annapolis. Mr. Lowe testified at that time that he formed the view upon reading HRM's 2006 Regional Municipal Planning Strategy ("RMPS") that it contained a "sleeper policy", which meant the following to him:
>
> > "What they [HRM] really wanted to do was have Annapolis' lands become a regional park, but they didn't want to say that in the Regional Plan, so they could avoid having to acquire those lands within one year"…
>
> and, later:
>
> > "Sleeper policy, by my definition, it is the real intent of a government agency in terms of what they want to do, but they can't state that because it's going to cost them more money, or it's going to cause them other issues".
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> 14. Mr. Lowe further testified to his belief that the "sleeper policy" in the RMPS meant "no development will occur on the Annapolis lands until HRM is satisfied they have the regional park they want on the lands…" At the same discovery, Lowe testified that he and others at Annapolis were told by an HRM employee, Peter Bigelow, at a meeting in October 2007, that Annapolis was "never going to get services approved" for the land at issue in these proceedings (collectively, the "Discoverability Admissions").
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> 15. It was not until the Discoverability Admissions were made at discovery in February 2020 that HRM came to understand that as early as 2007, Annapolis had discovered or, at the very least, was in a position to reasonably discover, the material facts giving rise to many of its present claims against HRM.

[7] Annapolis counters this argument in their written submission at para. 14:

> 14. On August 31, 2021, approximately eighteen months after Mr. Lowe gave the evidence cited above, HRM advised Annapolis for the first time of its intention

> to amend its Amended Statement of Defence to include a limitations-based defence. No details were provided at this time.

[8] Annapolis goes on to state that the "Discoverability Admissions" raise nothing new, referring to their pleading and in particular, paras. 33, 34 and 36 along with their motion materials filed in advance of the summary judgment motion brought over two years ago.

[9] The correspondence attached to Mr. Richards' affidavit shows that on September 12, 2021, HRM counsel provided Annapolis with a draft of the amendment, requesting Annapolis' consent to amend HRM's pleading. Annapolis responded to HRM's request by letter dated October 7, 2021, stating that HRM's proposed amendment was late in the process and would cause prejudice. In the result, Annapolis agreed to the amendment subject to these conditions:

(a) The issue raised by the amendment would be determined at trial on a full record, and not on a motion;

(b) HRM would not seek any delay of the trial date as a result of the amendment;

(c) There would be no objection to Annapolis's counsel preparing Mr. Lowe prior to his continued discovery;

(d) No witness who had already given discovery evidence would be required to reattend by virtue of the amendment; and

(e) Annapolis would reserve its right to seek any costs thrown away.

[10] In HRM's rebuttal submission they respond to the proposed conditions as follows:

> 28. The concerns that give rise to the requested conditions are also not well founded. As outlined above, Annapolis has not demonstrated it will be prejudiced if the pleadings amendment is granted. Its proposed conditions are premised on potential future steps it feels that HRM might take if leave to amend is granted. Speculation as to any party's future actions, particularly in the absence of evidence, does not warrant placing conditions on a pleadings amendment. Also, as Your Lordship is fully aware, this matter is case managed and therefore, the Court is ideally placed to deal with any such concerns regarding future course of this matter if/when they arise.
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> 29. Although HRM maintains that no conditions should be imposed on it if leave to amend is granted, we can advise as follows with respect to the conditions requested by Annapolis:

i) HRM does not intend to rely on its pleadings amendment as a basis to request the adjournment of trial dates; and

ii) HRM does not anticipate calling any witnesses to re-attend at discovery solely to answer questions relevant to the pleadings amendment. However, should a re-examination otherwise be necessary (for example, on undertakings) HRM should be permitted to ask questions at that examination that may relate to the issues raised by the pleadings amendments.

THE PLEADINGS AMENDMENT RULE AND TEST

[11] Civil Procedure Rule 83.02 allows a party to amend its pleadings. It states:

> 83.02 (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.
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> (2) The amendment must be made no later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.
>
> (3) A pleading respecting an undefended claim in an action may be amended at any time, but the party claimed against is entitled to receive notice of the amended pleading in the manner provided in Rule 31 – Notice for notice of an originating document.

[12] The test to amend pleadings pursuant to Rule 83.02 developed through the jurisprudence may be summarized as follows:

1. Does the proposed amendment raise a justiciable issue?

2. Is the applicant acting in bad faith?

3. Would allowing the amendment subject the other party to serious prejudice that could not be compensated by costs?

DISCUSSION, ANALYSIS AND DISPOSITION

[13] Annapolis does not argue that HRM's proposed amendment fails to raise a justiciable issue or is sought in bad faith. Rather, Annapolis focuses on two points, arguing that the proposed amendment:

(a) was brought with undue delay, which creates a presumption of prejudice that HRM has failed to rebut; and

(b) that it may derail the trial dates, resulting in non-compensable prejudice to Annapolis.

[14] During the DAC the parties agreed that there were no pleadings amendments required. About a month later HRM received the Discoverability Admissions. To the extent that the Discovery Admissions changed the landscape, the fact remains that HRM waited for roughly eighteen months before informing Annapolis of their intention to amend their Amended Defence.

[15] In *Altschuler v. Bayswater Construction Limited*, 2019 NSSC 197 Justice Bodurtha touched on the principles that guide whether an amended pleading creates prejudice at paras. 16 – 18:

> [16] 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:
>
> > [33] ... 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.
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> [17] In *1588444 Ontario Ltd. (c.o.b. Alfredo's) v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, [2017] O.J. No. 241, the Ontario Court of Appeal said the following about non-compensable prejudice at para. 25:
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> - 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: *Iroquois*, at paras. 20-21, and *Mazzuca v. Silvercreek Pharmacy Ltd*. (2001), 56 O.R. (3d) 768 (C.A.), at para. 65.
> - 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: *King's Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841 (C.A.), at paras. 5-7, and *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106 (Gen. Div.), at para. 9.
> - *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: *Hanlan v. Sernesky* (1996), 95 O.A.C. 297 (C.A.), at para. 2, and *Andersen Consulting*, at paras. 36-37.
> - 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: *Family Delicatessen Ltd. v. London (City)*, 2006 CanLII 5135 (Ont. C.A.), at para. 6.
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> • The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 27 O.R. (3d) 576 (C.A.), at paras. 3-4, and *Plante v. Industrial Alliance Life Insurance Co.* (2003), 66 O.R. (3d) 74 (Master), at para. 21.
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> [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.

[16] Having reviewed the motion materials, there is nothing before me to demonstrate that any prejudice caused to Annapolis by permitting the amendment cannot be compensated by costs. For example, there is no affidavit evidence referrable to lost documents or deceased witnesses over the passage of time.

[17] Annapolis cites *Gillis Construction v. Nova Scotia Power Corp*. (1988), 86 NSR (2d) 167 (SC, TD) in support of their argument that the amendment should not be permitted.

[18] In my view, *Gillis* is readily distinguishable from the situation before the Court. *Gillis* involved an action that was commenced in 1981 after an alleged breach of contract in 1975. Discoveries took place in 1987 and the application/motion was in 1988. Unlike this case, in *Gillis* the plaintiff sought to advance new causes of action by way of its proposed amendment. Justice Davison characterized those causes of action as "three new grounds for recovery" (para. 4) and stated that the original statement of claim had not provided "warning to the defendant that the plaintiff was advancing an action in respect of matters outside the main contract and the expressed or implied terms there" (para. 3).

[19] Justice Davison took judicial notice of the prejudice that would result from the more than twelve year period between the alleged wrongdoing (1975) and the

time of the motion (1988) seeking leave to amend to raise new causes of action. The Court stated the following at para. 13:

> [13] …[I]t is clear from the text of the proposed amendment that discussions, negotiations and oral representations will form a significant part of the evidence that will be called to determine the issues. These alleged discussions, negotiations and representations occurred over twelve years ago. One can presume that memories have "eroded" over that passage of time. One can presume that the Defendant will be prejudiced. Witnesses who have scattered over the country and who have been engaged in other matters over the lengthy interval will have great difficulty recalling with any degree of exactitude conversations which took place a dozen years ago.

[20] Justice Davison held that the combination of new factual claims and a twelve year delay justified drawing a presumption of prejudice. He went on to note at para. 14 that where a proposed amendment relates substantially to a question of law, it would be "improbable" that the Court would presume that the passage of time would result in an injustice. Only in cases where a proposed amendment is "one of fact", involving issues of credibility and substantial delay, will such a presumption arise.

[21] The proposed amendment does not raise new allegations of fact. Indeed, the facts pleaded combined with Mr. Lowe's evidence give rise to the possible limitations defence.

[22] Having considered Annapolis' other authorities, I find that they are similarly readily distinguishable from the case at bar. In short, *Wall v. Horn Abbott Ltd.* (2000), 183 NSR (2d) 383 (NSSC) and *DeGruchy v. Pettipas*, 2004 NSSC 65 do not cause me to deviate from my exercise of discretion to allow the amendment in this matter.

[23] While the delay gives pause, I must consider the year and one half passage of time in the context of the onset of the COVID-19 pandemic (March, 2020) and the ongoing *de facto* expropriation appeal.

[24] In all of the circumstances I am not persuaded that the delay is undue or that any prejudice is irrebuttable. Ultimately, the delay will be yet another consideration on any final costs disposition. Having made this determination, I will again touch on the passage of time when I determine costs on this motion.

[25] With respect to the risk of losing the trial dates, it is very difficult to say whether the existing trial dates are going to remain. I say this with reference to the

possibility that the Supreme Court of Canada may not render a decision in sufficient time for the current trial to remain scheduled to begin less than a year from now.

[26] In the result, I will permit HRM to amend their Amended Defence with the aforementioned administrative/clerical changes along with para. 54A. Further, I hereby exercise my discretion in granting this relief by providing these directions:

(a) The pleadings amendments will not form the basis of a request to adjourn trial dates;

(b) In the event of re-discovery of a witness (for example, to speak to undertaking responses), the parties are permitted to ask questions at the examination that relate to the issues raised by the pleadings amendments; and

(c) In the event of re-discovery of a witness, the witness may be prepared by counsel in advance of the examination.

[27] In conclusion, there remain the issues of costs on this motion and when the issue raised by the amendment will be considered. On the former, I decline to award costs. Although HRM is largely successful on this correspondence motion, I am of the view that notwithstanding the pandemic and ongoing appeal, it took too long to bring this issue to the fore.

[28] With respect to whether the issue raised by the amendment will be heard on a motion or at trial, at this juncture I decline to decide timing. In this regard, the Court will be better placed to determine timing after there is more information available, inclusive of what occurs before the Supreme Court of Canada early next year.

Chipman, J.