IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Seaboard Liquid Carriers Limited v. Perrin,* 2024 BCSC 1756

Date: 20240924
Docket: M23814
Registry: Dawson Creek

Between:

Seaboard Liquid Carriers Limited and Mantei's Transport Ltd.

Plaintiffs

And:

Shawn Franklin Perrin, The Attorney General of Canada, The Minister of Public Safety and the Solicitor General of British Columbia, His Majesty the King in right of the Province of British Columbia, Argo Road Maintenance (South Peace) Inc., and ABC Corporation

Defendants

And:

Shawn Franklin Perrin, The Attorney General of Canada, The Minister of Public Safety and the Solicitor General of British Columbia, The Estate of Daniel McNeil, Deceased, and Argo Road Maintenance (South Peace) Inc.

Third Parties

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment on Application to Extend Time for Filing of Counterclaim

Counsel for His Majesty the King in Right of the Province of British Columbia:	E. Ungureanu
Counsel for the Plaintiffs:	E. Crosley
No Other Appearances	
Place and Date of Hearing:	Victoria, B.C. August 9, 2024
Place and Date of Judgment:	Victoria, B.C. September 24, 2024

Introduction

[1] The defendant His Majesty the King in right of the Province of British Columbia (the "Province"), applies to extend, under Rule 22-4(2) of the *Supreme Court Civil Rules* [*SCCR*], the time for filing and service of a counterclaim. The application is opposed by the plaintiffs.

[2] This action (the "Seaboard Action"), as alleged, arises out of a catastrophic motor vehicle collision on December 13, 2020 (the "Collision"). A truck and trailer owned by the plaintiff Seaboard Liquid Carriers Limited ("Seaboard") and leased by Seaboard's wholly-owned subsidiary, the plaintiff Mantei's Transport Ltd. ("Mantei's"), collided with a truck owned by the defendant Perrin. The Seaboard truck-trailer overturned, resulting in contamination of the surrounding area from loss of the trailer's contents, and a fire. The Province is one of several defendants.

[3] The proposed counterclaim is in relation to loss and damage alleged to have been suffered by the Province, through the Ministry of Transportation and Infrastructure ("MoT"), as a consequence of the Collision, including the cost of repair of damage to a culvert (the legal claim for which loss being referred to herein as the "Culvert Claim").

[4] The circumstances necessitating the present application are twofold. The first is that the Province originally intended to advance the Culvert Claim by way of commencing its own civil claim, and did file a notice of civil claim, under the style of cause *His Majesty the King in right of the Province of British Columbia v. Mantei's Transport Ltd., The Estate of Daniel Peter McNeil, and J. Doe*, Victoria Registry No. S231158 (the "Mantei's Action"). However, the responsible lawyers within the Ministry of the Attorney General (the "MAG") did not commence the Mantei's Action within the limitation period – the notice of civil claim was filed one day late, on March 28, 2023. Hence, the Province now wishes to advance the Culvert Claim not by way of a notice of civil claim, but by way of counterclaim in the Seaboard Action. The expiry of the limitation period is not a bar to recovery proceedings being

advanced by a defendant within an existing action, by virtue of s. 22 of the *Limitation Act*, S.B.C.2012, c. 13:

> 22(1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:
>
> (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim; …

[5] The second circumstance is that the time for the filing of a counterclaim under Rule 3-4(1), and service of a filed counterclaim under Rule 3-4(4), has lapsed. Hence, the Province seeks leave to extend the time for filing and service, under Rule 22-4(2):

> (2) The court may extend or shorten any period of time provided for in these Supreme Court Civil Rules or in an order of the court, even though the application for the extension or the order granting the extension is made after the period of time has expired.

[6] The application is opposed by the plaintiffs.

The Legal Test

[7] Given the accrued limitation defence, the exercise of the Court's discretion on applications for leave to bring a new claim – whether a claim brought by a plaintiff by way of amendment, a third-party claim, or a counterclaim – is guided by considering whether it is just and convenient to allow the claim to proceed, having regard to the factors set out in *Letvad v. Fenwick*, 2000 BCCA 630, at para. 29, as adopted from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd*. (1996), 19 B.C.L.R. (3d) 282, 1996 CanLII 3033 (CA): the extent of the delay; the reasons for the delay, and any explanation put forward to account for the delay; the degree of prejudice caused by delay; and the extent or degree of the connection, if any, between the existing claims and the proposed new cause of action. (See also *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc*., 2010 BCCA 329, at para. 46 [*Neilson Architects*].) As was said by Justice Finch, as he then was, in *Teal Cedar* at

para. 45, “no one factor should be accorded overriding importance, in the absence of a clear evidentiary basis for doing so”.

[8] In respect of the *Letvad* factors, the plaintiffs oppose this application chiefly on the basis of prejudice, and the reasons for the delay. The plaintiffs further submit that the counterclaim is an abuse of process.

Facts

[9] Given the positions taken by the parties on this application, some further explanation of the background is necessary.

[10] The Collision, as noted, occurred in December 2020. At that time, the running of limitation periods had been suspended due to the COVID pandemic. It is common ground that once time again began to run, the limitation date for commencement of actions arising out of the Collision was Monday, March 26, 2023.

[11] In October 2021, MoT put the plaintiffs on notice of the Province having a claim arising out of the Collision, by way of a claims adjuster with MoT writing to an independent adjuster, Mr. Skinner – who is described by the plaintiffs’ affiant Mr. Myers as representing both the plaintiffs and their insurers – asking to whom she should forward her “costs”. Mr. Skinner replied that he would accept the claim on a without prejudice basis, but was not accepting liability.

[12] In September 2022, a different claims adjuster with MoT wrote to Mr. Skinner, forwarding a package of claims details, advising that ICBC had denied liability for their driver [the defendant Perrin], noting that the limitation period would expire March 26, 2023, and asking if they could agree to further extend the limitation period. No such agreement was ever reached.

[13] The Province’s interests in litigation files are represented by MAG. MAG handles legal claims it advances for recovery of the Province’s own loss and damage (“Collections Files”) separately from the MoT’s liability defence claims. In or about January 2023, the MoT transferred approximately 18 new Collection Files to a

team within the MAG managed by a lawyer, Ms. Thomas, whose affidavit is filed in support of this application. One of those Collection Files was the Culvert Claim.

[14] Ms. Thomas says that due to what she describes as “counsel and administrative error”, a notice of civil claim in respect of the Culvert Claim was not filed by the limitation period. As March 26, 2023 fell on a Sunday, the limitation period would have expired on Monday, March 27. Ms. Thomas was made aware of the error the following day, and instructed her staff to immediately file a notice of civil claim naming Mantei’s (the “Mantei’s NOCC”), which they did; as noted above, the Mantei’s Action was commenced on March 28, 2023.

[15] On April 3, 2023, a MoT claims adjuster sent an email to the plaintiffs’ independent adjuster Mr. Skinner outlining the nature of the Culvert Claim and enclosing various supporting documents. That email also enclosed a copy of the Mantei’s NOCC, describing it as having been “filed to preserve the limitation date on this file”. There is no evidence as to what Mr. Skinner did with the Mantei’s NOCC.

[16] At that time, MAG took no steps to serve the Mantei’s NOCC on Mantei’s or the other defendants. No explanation for this is set out in the applicant’s evidence.

[17] Meanwhile, the present action – the Seaboard Action – was commenced by way of a notice of civil claim filed March 7, 2023 (the “Seaboard NOCC”). The Seaboard NOCC was served on the Province on May 29, 2023, by way of registered letter addressed to MAG. A lawyer with MAG, Mr. Vicei, wrote to the plaintiffs’ counsel on June 27, 2023, advising he had been assigned the defence of the Province, and asking for an extension of time to file a response to civil claim, while he investigated.

[18] I pause at this point in the chronology to note that the Province, upon being served with the Seaboard NOCC, could have filed a counterclaim for the Culvert Claim, under Rule 3-4, within the following 21 days, i.e. by June 19, 2023. However, at that point in time, in the spring of 2023, Ms. Thomas was unaware of the liability litigation. Ms. Thomas states in her affidavit that she was unaware of the Seaboard

Action until March 15, 2024, and it is implicit in her affidavit that neither she nor any other lawyer within her unit advised the MAG lawyer handling the Province's defence in the Seaboard Action, Mr. Vicei, of the Culvert Claim, prior to that date. Ms. Thomas also states that she has been told by Mr. Vicei that he was unaware of the Culvert Claim until April 10, 2024. (Ms. Thomas does not provide that evidence on information and belief; further, there is no evidence directly from Mr. Vicei, either as to the nature of his investigations with the MoT once he was assigned the defence of the Province, or as to the extent of his communications with other counsel and knowledge of the circumstances of the Collision, and so this statement as to Mr. Vicei's limited knowledge is, strictly speaking, hearsay.) Ms. Thomas notes at that point in her affidavit that she was not surprised to learn this from Mr. Vicei, since – as noted above – the Province's collections files are handled separately from its liability defences.

[19] There was considerable communication in mid- to late-2023 and early 2024 among counsel in the Seaboard Action concerning the pleadings and the proper parties. It appears that no steps were taken by the Province to advance the Mantei's Action, or to advance its interests in respect of the Culvert Claim, until March 13, 2024, when Ms. Thomas, by way of letter, served Mantei's with the Mantei's NOCC. Ms. Thomas provides no explanation as to why service was not effected any earlier. I infer that the decision to serve Mantei's at that time was motivated by the fact that, without a court order renewing the Mantei's NOCC, it would expire on March 28, 2024.

[20] Two days later, on March 15, 2024, Ms. Thomas received a letter from a lawyer, Ms. Vickers, who explained she had previously been retained to defend Argo Road Maintenance (South Peace) Inc. in the Seaboard Action, and had assumed the defence of the Province in December 2023. Ms. Vickers said she had just been contacted by the plaintiffs' counsel, who advised her of the Mantei's Action. Ms. Vickers queried the practicality of the Province being represented by separate counsel in the two actions and asked whether the MoT would "take back its

defence". Ms. Thomas asked Ms. Vickers for the name of counsel who had acted for the MoT on the Seaboard Action.

[21] Ms. Thomas was then briefly out of the country; on March 20, while she was away, her office received a letter from the plaintiffs' counsel, advising that they had been retained to defend Mantei's in the Mantei's Action; counsel noted the limitations issue arising out of the Mantei's NOCC having been filed one day late, and asked that a call be scheduled to discuss their respective positions.

[22] On April 10, 2024, Ms. Thomas spoke with Mr. Vicei, advising that she would be handling both the advancing of the Province's claim in the Mantei's Action, and the Province's defence in the Seaboard Action.

[23] Ms. Thomas says that on April 23, 2024, she became aware (Ms. Thomas does not say how), that the plaintiffs' counsel intended to apply for dismissal of the Mantei's Action, on the basis of the missed limitations period.

[24] On May 21, 2024, Ms. Thomas wrote to plaintiffs' counsel, confirming her understanding that Mantei's would advance a limitations defence, and stating she had instructions to apply for leave to counterclaim in the Seaboard Action. It appears she confirmed those instructions in a conversation with plaintiffs' counsel on May 23, 2024, and at that time also acknowledged the Mantei's Action had been filed out of time.

[25] On May 28, 2024, Mantei's filed a response to civil claim (styled as "Response to Notice of Civil Claim"), pleading the limitations defence, as well as a notice of application, seeking summary dismissal of the Mantei's Action on that basis. Ms Thomas replied by way of email on May 31, expressing confusion as to why plaintiff's counsel had taken these steps, given their prior communications. In emails exchanged over the next several days, Ms. Thomas confirmed that she was seeking instructions to discontinue the Mantei's Action, while plaintiffs' counsel took the position that she would not "accept" a discontinuance; that she required that the Province consent to an order dismissing the Mantei's Action, or she would proceed

with the summary dismissal application; and that she would insist on her dismissal application being heard before the Province's application for leave to counterclaim.

[26] Not surprisingly, the Province filed a Notice of Discontinuance of the Mantei's Action on June 6, 2024.

[27] The within Notice of Application was filed June 12, 2024.

[28] The action has not been set for trial. No lists of documents have been exchanged, and no examinations for discovery have been scheduled.

Discussion

Connection between the Existing Claims and the Counterclaim

[29] The question of liability for the Collision will be common to both Seaboard's claim, and the counterclaim. I have not been pointed to any liability issues particular to the Province's damages claim. The quantification of the Province's damages will of course be a distinct issue, as is invariably the case with counterclaims. This factor does not weigh in favour of leave being denied.

Extent of the Delay

[30] The Province's counterclaim could have been filed in accordance with the *SCCR*, as late as June 19, 2023. The within application was filed just under one year later. The delay occurred in the context of the Province having purported to take steps to preserve its claim by filing a notice of civil claim, and forwarding the late-filed Mantei's NOCC to the plaintiffs' independent adjuster. The delay in this case is modest. This factor does not weigh in favour of leave being denied.

Reasons for the Delay

[31] The delay, quite simply, arises out of two factors: (i) counsel's mistake in failing to file the Mantei's NOCC in time; (ii) MAG having followed what appears to be its standard practice of "siloing" the MoT's recovery claims and liability defence claims, as a result of which Ms. Thomas, responsible for the recovery claim, only learned of the fact of the ongoing liability claim as of March 15, 2024. Ms. Thomas

gained that knowledge as a consequence of serving the Mantei's NOCC. The Province, of course, might have taken steps to serve the Mantei's Action earlier, but it cannot in the circumstances be faulted for not having done so. Ms. Thomas advised plaintiffs' counsel of her instructions to seek leave to counterclaim, only just over two months later, on May 21, 2024. Again, she might possibly have moved more quickly, but she was not advised definitively that Mantei's would rely on the limitations defence until April 23, 2024.

[32] In sum, once Ms. Thomas, as the lawyer responsible for the recovery claim, knew of the availability of the alternative process of counterclaiming, and knew that pursuing that alternative would be necessary, she moved forward with reasonable diligence.

[33] In *Bank of Montreal v. Ricketts* (1990), 44 B.C.L.R. (2d) 95, 1990 CanLII 1996 (BCCA), Locke J.A., in concurring reasons, wrote,

> The causes of delay fall in the most part into five categories: An election not to sue after knowing the facts; impossibility of ascertaining the facts; conduct which amounts to an abuse of process; mistake; and dilatory behaviour. [p. 108]

Of those categories, the cause of the Province's delay most clearly falls within the category of mistake: a missed limitations period, coupled with misunderstanding on the part of the responsible counsel as to the means available to pursue the Culvert Claim. In *Ricketts* – a case concerning addition of new defendants, principals of a corporate defendant, after lapse of the limitation period – Locke J.A. said of cases involving mistake:

> Almost without exception, in the case of a misnomer, or a mistake in identification akin to misnomer (e.g. a related corporation), or an "excuseable" mistake, or where the addition of the party is required in order to make perfect the plaintiff's right in an action already brought (e.g. omission to sue an equitable assignee), or in a case of impossibility of knowledge, relief has been granted upon a proper explanation of the reason. [p. 108]

[34] The plaintiffs characterize the Province's explanation as "unacceptable". They submit that the Province is one entity, and that the knowledge of the Province's

individual legal counsel, collectively, should be attributed to the Province as a whole. The plaintiffs submit that the Province is thereby "solely responsible for the delay", which is said to be a "key factor" weighing against the extension of time.

[35] Under the plaintiffs' analysis, which relies on either the collective knowledge of the lawyers within MAG being imputed to the Province, or the knowledge of MoT's employees as to the Culvert Claim being imputed to Mr. Vicei, the inquiry into the reasons for the Province's delay would turn on the concept of vicarious knowledge, and would focus on fault, rather than the essential question of whether the delay was wilful, either through deliberate choice, or dilatoriness. Even if knowledge of the individual legal counsel could be attributed to the Province vicariously, to do so would ignore the reality of what transpired. This is not a case of abject neglect, or wilful delay. At all times the Province had a continuing intention to proceed with the Culvert Claim; nothing in the Province's conduct, nor its communications through the MoT's employees and through MAG counsel with the plaintiffs' representatives, suggested otherwise.

[36] To characterize reasons for delay as a "key factor" is to ignore what was said by Finch J.A. in *Teal Cedar* as to no one factor being given overriding importance. *Teal Cedar*, a case involving an application by defendants to add a new cause of action after the limitation period had expired, is, notably, a case where the chambers judge had refused leave primarily on the basis that the plaintiff had initially made a "careful and deliberate decision", based on the advice of counsel, not to sue within a contractual one-year limitation period (at para. 32). That decision was reversed on appeal, on the grounds that the chambers judge had erred in "unduly fettering his undefined discretion … by placing unwarranted weight on the plaintiff's original decision not to sue … to the apparent exclusion of other relevant considerations" (at para. 69).

[37] I find the circumstances that led to the delay in the Culvert Claim being pursued by way of counterclaim are excusable, and weigh in favour of leave being granted.

Prejudice

[38] In respect of the factor of prejudice, in *Squamish Indian Band v. Canadian Pacific Ltd.*, [1998] B.C.J. No. 1726, (*sub nom. Mathias v. Canadian Pacific Ltd.*) 1998 CanLII 3909 (S.C.), Madam Justice Saunders, then a judge of this Court, identified several types of prejudice as relevant to applications of this nature:

a) whether disallowing the counterclaim would prejudice the defendant's ability to make full answer in defence to the claim brought against it; and,

b) whether allowing the counterclaim would prejudice the plaintiff, either in

i. putting the plaintiff to increased expense in investigating the counterclaim;

ii. delaying the trial; or,

iii. requiring the plaintiff to rely on evidence from witnesses whose memory may have dimmed with the passage of time.

[39] The plaintiffs' principal submission on the factor of prejudice is that they would be prejudiced through loss of the limitations defence. That factor is properly accounted for not at this stage of considering the prejudice arising out of the delay, but rather in the court's final assessment of whether allowing the counterclaim to proceed is just and convenient.

[40] Considering each of the *Squamish Indian Band* factors in turn,

a) The new issues raised by the proposed counterclaim appear to be limited to the quantification of the Province's damages. Disallowing the counterclaim would not prejudice the Province's ability to fully defend the plaintiffs' allegations of the Province being liable for the Collision;

b) As to prejudice to the plaintiffs,

i. Allowing the counterclaim may be expected to put the plaintiffs to some increased expense in both investigating the Culvert Claim and in pleading and conducting the defence of the counterclaim. Relative to the other issues in the Seaboard Action, the increased expense seems likely to be modest. Further, none of this increased expense will arise as a result of the delay in the counterclaim being brought, as opposed to litigation expense *simpliciter*;

ii. The trial has not been scheduled. The same counsel from MAG will be conducting the defence of the Seaboard Action, and the counterclaim, so no additional complications will arise in terms of counsel's schedule. There is no reason to conclude that addition of the counterclaim will impact scheduling of the trial;

iii. The particulars of the Culvert Claim appear to be documented, and there is no evidence before me of concerns with the recall of witnesses whose testimony has bearing on the counterclaim.

[41] It is also appropriate at this stage of the analysis to repeat that the plaintiffs were provided details of the Province's claim as early as September 2022. The plaintiffs cannot be said to have been caught by surprise.

[42] I find no substantial prejudice in allowing the counterclaim to proceed.

Abuse of Process

[43] The plaintiffs submit that to allow the counterclaim to proceed in the face of the Province having filed a discontinuance, would amount to an abuse of process.

[44] The plaintiffs rely on *Rajakaruna v. Singh*, 2022 BCPC 299, in which the defendant had previously filed a small claims court claim; had discontinued his claim following a settlement conference, by way of filing a notice of withdrawal; and then, after being served by the plaintiffs with a claim for damages, sought leave to file a counterclaim, which asserted claims identical to his original, discontinued claim. The

applications judge refused leave, placing substantial reliance on *Philipos v. Canada (Attorney General)*, 2016 FCA 79, in which Justice Stratas said,

> [14] This spectrum shows that there is very little difference between discontinuance and determination. Both discontinuance and determination are terminations meant to be final. Both close the Court file. Both engender expectations of finality.
>
> …
>
> [17] Finality matters. Discontinuance is an economical procedure for terminating proceedings that are no longer in dispute or worthy of prosecution. If expectations of finality engendered by discontinuance are not enforced strictly and discontinuances can be easily reversed, there will be no economy. Opposing parties will have no choice but to continue to incur expenses, collect evidence and prepare arguments for hearing in case the proceeding resumes one day. Discontinuance would become nothing more than a form of suspending proceedings much akin to a stay.
>
> [18] Determinations are not lightly reversed; the same should be so for discontinuances. Those who decide to unilaterally discontinue decide not to suspend their proceeding but to terminate it. They should be held to their decision. Only circumstances that strike at the root of the decision to discontinue can allow a discontinued proceeding to be resurrected and continued.

[45] Stratas J.A. then went on to cite a number of decisions of courts across Canada to the same effect, including the B.C. Court of Appeal's decisions in *Warford v. Zyweck*, 2002 BCCA 221, and *Pacific Centre Ltd. v. Micro Base Development* Corp., [1990] B.C.J. No. 2042, 1990 CanLII 1985 (C.A.).

[46] *Philipos*, however, was decided under the *Federal Court Rules*, and both *Warford* and *Pacific Centre* involved discontinuance of appeals. The plaintiffs' submission overlooks *SCCR* Rule 9-8:

> (8) Unless the court otherwise orders, the discontinuance of an action in whole or in part is not a defence to a subsequent proceeding for the same or substantially the same cause of action.

In *DLC Holdings Corp. v. Payne*, 2021 BCCA 31, at para. 45, it was said to be "beyond doubt" that under this Rule, "…the default position is that a discontinuance does not bar a subsequent action for the same claim". The Rule is therefore inconsistent with the notion of a discontinuance providing "finality".

[47] Further, *Philipos* and the cases it relies upon involve situations where the party filing the discontinuance initially intends their claims to be thereby disposed of, and later changes its mind. Those situations are quite the opposite of the present case, where the discontinuance was filed only after the Province put the plaintiffs on notice of its intention to attempt to proceed by way of counterclaim. Far from signalling abandonment of their claim, the discontinuance really amounted to nothing more than acknowledgement by the Province that its claim could not be prosecuted by means of the late-filed Mantei's NOCC. The Province cannot have put itself in a worse position by having taken the step of discontinuing.

[48] Abuse of process can arise where there are duplicate claims extant seeking the same relief against the same parties, but when a party seeks leave to bring what could amount to a duplicate claim, that abuse remains "theoretical only" and does not crystallize until leave is granted: *Neilson Architects*, para. 109. In that respect, abuse of process would only arise in the present case if the Province were to obtain leave and file the counterclaim, without discontinuing the Mantei's Action.

[49] There is no abuse of process in the Province having proceeded to do exactly that which the *SCCR* and the *Limitation Act* permit.

Is it Just and Convenient to Allow the Counterclaim to Proceed?

[50] The foregoing factors weigh in favour of allowing the counterclaim to proceed. The plaintiffs would lose the benefit of the limitations period defence, but the plaintiffs have been on notice of the Province's claim for some time. The Province has had the intention throughout of proceeding with its claim, and the circumstances that led to the delay are excusable. It is in the interests of justice that the Province be allowed to pursue its claim.

[51] I therefore allow the application. The applicant will have its costs as costs in the cause.

"A. Saunders, J"
The Honourable Mr. Justice Saunders