

SUPREME COURT OF NOVA SCOTIA

Citation: *DLF Law Practice Incorporated v. McDonald et al.*, 2024 NSSC 330

Date: 2024 11 04

Docket: PIC No. 525281 and PIC No. 521514

Registry: Pictou

Between:

DLF Law Practice Incorporated, a body corporate, and Donn Fraser
Plaintiffs

v.

Mary Jane McDonald, Eric Atkinson, SPI Et Pomquet Inc.,
a body corporate, Jennifer Hamilton Upham, Kate Harris, Joel Sellers,
Julie MacPhee, Mary Jane Saunders, Dennis James, Gerald Green
and 3241964 Nova Scotia Limited (previously known as
Carm Legal Services Inc.), a body corporate,
and the legal partnership known as the firm Patterson Law

Defendants

and

Donn Fraser and DLF Law Practice Incorporated, a body corporate
Plaintiffs

v.

Julie MacPhee

Defendant

DECISION ON MOTIONS FOR SECURITY FOR COSTS

Judge: The Honourable Justice Scott C. Norton

Heard: October 30, 2024

Decision: November 4, 2024

Counsel: Donn Fraser, self-represented
DLF Law Practice Incorporated, on its own behalf by its
Officer Donn Fraser
Michael Scott, representative of the Defendant Patterson Law
Dennis James KC, on his own behalf

Gavin Giles, KC, for the remaining Defendants

By the Court:**Overview**

- [1] The Defendants in both these proceedings move for an order for security for costs against the Plaintiffs who oppose the motion.
- [2] I am the case management judge for these proceedings.
- [3] The motion was heard virtually with the agreement of the parties.
- [4] Action 525281 was filed by the Plaintiffs following dissolution of a law firm (colloquially referred to as Mac, Mac & Mac (“MMM”)) in which the Plaintiff, Donn Fraser, was a partner (through his professional corporation DLF Law Practice Incorporated (“DLF”). Several of the Defendants, who were partners with DLF in MMM, subsequently joined the firm called Patterson Law. In brief summary, the Plaintiffs say that the dissolution was unlawfully orchestrated by the former MMM partners causing substantial loss and damages to the Plaintiffs. The Plaintiffs claim against Patterson Law and certain of its partners for the tort of conspiracy, and accessory liability for assisting in fiduciary breach by the former MMM partners who subsequently became partners in Patterson Law.
- [5] Action 521514 is a claim in defamation by the Plaintiffs against Julie MacPhee. The claim relates to certain internal MMM communications that Ms. MacPhee authored about Mr. Fraser.
- [6] The 525281 defendants Eric Atkinson, SPI Et Pomquet Inc., Jennifer Upham, Kate Harris, K.C., Joel Sellers, Julie MacPhee, Mary Jane Saunders, and Gerald Green are represented by Mr. Giles, K.C. He also represents Ms. MacPhee in 521514, and for the purposes of this motion only, Mary Jane McDonald. For convenience, I will refer to these parties collectively as the “McInnes Cooper Clients”.
- [7] Patterson Law is represented by Michael Scott, not as counsel, but as party representative under Rule 35.14(5)(b). Dennis James, K.C. is self-represented. Patterson Law and Dennis James, K.C. filed their motion jointly. I will refer to them collectively as “Patterson Law”.
- [8] As has been chronicled in a number of decisions by the courts in relation to these proceedings, the parties have been engaged in confrontational and acrimonious litigation.

Legal Principles

- [9] Security for costs is governed by Civil Procedure Rule 45. The purpose of the rule is to provide a remedy to a party who defends a claim and will experience undue difficulty realizing on a judgment for costs if the defence is successful. The undue difficulty must not arise only from the lack of means of the party making the claim. The court must be satisfied that in all of the circumstances it is unfair for the claim to continue without an order for security for costs.
- [10] The principles and considerations necessary for an order for security have been canvassed in a number of recent decisions: *Blackhawk Construction Limited v. Martin*, 2020 NSSC 272; *Rapid Camp Ltd. v. Dalhousie University*, 2024 NSSC 53; *SaltWire Network Inc. v. Groupe Des Médias Transcontinental de la Nouvelle-Écosse Inc.*, 2024 NSSC 65; and *Fraser v. MacIntosh*, 2024 NSSC 183.
- [11] In *Saltwire*, Justice Gatchalian summarized the principles at para. 18:
- [18] I will keep in mind the following principles in applying Rule 45.02(1):
- The rule is discretionary as a judge “may” order security for costs if various parts of the test are met: *Quadrangle Holdings Ltd. v. Coady Estate*, 2018 NSSC 349 (Chipman J.) at para.4.
 - The judge must balance access to justice with artificial insulation from an award of costs: *Quadrangle*, citing *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316 (Moir J.) at para.21, aff’d 2012 NSCA 89.
 - Rule 45.02 provides a broad discretion. The limit on the judge’s discretion is not severe. The judge has a free hand to do what is just, as long as the defendant files a defence, shows undue difficulty, and either shows that security would not be unfair [Rule 45.02(1)] or establishes special grounds [Rule 45.02(4)]: *Ellph.com* at para.21, citing *Flewelling v. Scotia Island Property Ltd.*, 2009 NSSC 94 (Goodfellow J.) at para.19.
 - The court should be reluctant to order security for costs if the plaintiff establishes that doing so will prevent the claim from going forward: *Ellph.com* at para.21.
 - Rule 45.02(1)(c) reinforces the principles that courts should avoid security for costs being used as a means test for access to justice and that the discretion should not be used to exclude persons of modest means from court: *Ellph.com* at para.21.
 - The judge must be satisfied about the justice of ordering security for costs, as reflected in the rule’s express requirement for fairness. The requirement for a circumstantial inquiry into fairness is found in the words “in all the circumstances”: *Ellph.com* at para.21.

[12] Associate Chief Justice Smith, as she then was, considered the competing principles that must be taken into account on a security for costs application in *Emmanuel v. Samson Enterprises Ltd.*, 2007 NSSC 278, at para. 8:

[8] Courts have long struggled with the competing principles that must be taken into account on a security for costs application. On the one hand, the Court strives to ensure that people of modest means are not prevented from having access to the court as a result of their financial status. On the other hand, the Court recognizes that the interests of justice are not served if a Plaintiff is artificially insulated from the risk of a costs award as a result, for example, of being outside of the Court's jurisdiction. The Court must balance these competing principles when deciding whether to award security for costs.

[13] Having balanced the competing principles, I am not satisfied that an order for security for costs at this time would be fair and just. At this time, there is no evidence that either of the Plaintiffs have acted in an insolvent manner towards the moving parties, nor that either of the Plaintiffs have an unpaid judgment debt or outstanding costs award owing to the moving parties. These facts distinguish this case from *Fraser v. MacIntosh*, *supra*. While there is evidence of outstanding costs awards against the Plaintiffs in other proceedings in this Province, all of those unpaid awards are either under appeal or within time to consider appeal.

[14] The motions are dismissed. The Plaintiffs are jointly awarded costs based on *Tariff C* in the amount of \$750 from the McInnes Cooper Clients and in the amount of \$750 from Patterson Law, payable forthwith and in any event of the cause.

Norton, J.