

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

AYUB CHISHTI,

- and -

LAUGHLIN DRUG CO. LTD.

Plaintiffs,

- and -

NORTHSIDE PHARMACY LTD.,

N.N.Y. HOLDINGS LTD.,

FAHIM CHISHTI, and

SOUTHSIDE MEDICAL CLINIC LTD.

Defendants,

DECISION

Date of Hearing: October 2, 2025

Date of Decision: October 8, 2025

Before: Justice Richard G. Petrie

Representation of Parties at Hearing:

Kevin C. Toner, K.C. Counsel for the Plaintiffs

Randy G. Bishop, Counsel for the Defendants

Petrie, J.

I. INTRODUCTION

[1.] This matter stems from lengthy and ongoing litigation between these parties. The underlying action relates to a number of grounds for alleged entitlement to compensation owed to the Plaintiffs by the Defendants. The original claim was broadly stated and included such relief as: breach of contract by the Plaintiffs for 40% ownership to the Defendants' businesses; unjust enrichment; wrongful dismissal; breach of fiduciary duties; and negligent misrepresentation etc.

[2.] For additional and necessary background to this decision, reference should also be made to my decision on a stay of proceedings relating to an outstanding cost award between these parties dated July 24, 2025 reported at 2025 NBKB 171. Those costs have now been paid and the motion to amend proceeded to hearing.

Factual History

[3.] Justice Clendening on July 9, 2019, ordered that the original action, commenced in July of 2015, would be bifurcated with the initial trial to be restricted to the Plaintiffs' claims to "ownership interests" of the Defendants' businesses pursuant to an alleged oral agreement.

[4.] After a lengthy trial, Justice Morrison dismissed the Plaintiff, Ayub Chisti's, "ownership" claims by way of a decision dated February 24th 2021. (Reference should be made to Justice Morrison's decision dated February 24, 2021).

[5.] Justice Morrison found that the Plaintiff, Ayub Chisti, had failed to establish any oral agreement and dismissed the claim to ownership on that basis. Furthermore, J. Morrison also dismissed the Plaintiff's claim for unjust enrichment on the basis of being a 40% owner of the businesses.

[6.] Following the first trial, the Plaintiffs did not immediately pursue a second trial for the remaining claims, which claims *may* include the following:

1. Breach of fiduciary duty;

2. Conversion of property;
3. Negligent misrepresentation;
4. Detrimental reliance
5. Unjust enrichment; and
6. Wrongful dismissal

[7.] On June 11, 2024, the Plaintiffs filed a motion by which they sought leave of the Court to amend their Statement of Claim pursuant to Rules 27.10(1) and 27.10(2)(c) of the Rules of Court. They argue the amendments are necessary for the purpose of determining the “real questions” remaining in issue between the parties.

[8.] The Plaintiffs seek to amend their Statement of Claim in order to add two new claims to this litigation. One claim relates to a “bonus payment strategy” (as per proposed paragraphs 40.1 to 40.7) and the other claim relates to a “management fee tax savings strategy” as per proposed paragraphs 40.8 to 40.20).

[9.] The Plaintiffs have prepared an Amended Statement of Claim which they say reflects their “true position” and addresses the issues involved in the remaining suit between the parties.

[10.] The Defendants object to the Plaintiffs' request to amend their Statement of Claim but not in all respects. Their objections are raised in regards to proposed paragraphs 40.1 through 40.20 as they argue those changes relate to entirely new causes of action and/or are "too late" and are subject to a "limitation problem" under the *Limitation of Actions Act*, SNB 2009, c. L-8.5 (*LAA*). The Defendants maintain they will be seriously prejudiced by the proposed amendments at this late stage.

[11.] According to the Defendants, neither of the two new claims the Plaintiffs wish to add were mentioned in any of the three versions of their Statement Claim predating the proposed Amended Statement of Claim, nor were these new claims raised as issues during the multiple discoveries held years ago in this matter.

[12.] The Defendants emphasize that if leave is granted for the Plaintiffs to make their requested amendments, it may *add* to the existing claim in excess of \$1,528,992.00 worth of value to the compensation the Plaintiffs seek from the Defendants.

II. ISSUES

[13.] Should the Court grant leave to permit the Plaintiffs to amend their Statement of Claim as proposed?

III. LAW & ANALYSIS

[14.] The law on amendments to pleadings is well known in New Brunswick. The discretion to allow (or not) amendments is largely guided by two factors: (1) prejudice; and (2) interests of justice. I recently canvassed the law in *Davidson v. Manuel Groceries Ltd. and Loblaws Inc.*, 2025 NBKB 025. Please also see also *Daigle v. Martin*, 2010 CarswellNB 4 (J. LaVigne, as she then was); *McLaughlin v. Levesque*, 2008 NBQB 329 (J. LaVigne as she then was); *Givskud v. Kavanaugh Smith, AJ Canada et al.*, 1194 NBJ 138(QB).

[15.] Amendments will generally be allowed, even ones proposed late in proceedings, in order to ensure a fair resolution of “real disputes” between the parties and in a cost-efficient manner. Amendments will generally be allowed unless it might result in a

prejudice to the Defendant which cannot otherwise be alleviated by an award of costs,
or by an adjournment.

[16.] As stated by Justice LaVigne, as she then was, in *Daigle v. Martin* in part, at paragraph

11:

...However, the court must refuse amendments that would circumvent the judicial process, or that would have the effect of complicating or unduly delaying the action. Generally, the court will allow a variation if it does not result in an injustice to the other party or if the injustice can be compensated by costs, adjournment, or conditions.

[17.] Somewhat recently, the Ontario Court of Appeal in *Fernandez Leon v. Bayer Inc.*,

(2023 ONCA 629), succinctly captured the (Ontario) courts approach at paragraph 5:

Leave to amend a statement of claim should be denied only in the clearest of cases, when it is plain and obvious there is no tenable cause of action, the proposed pleading is scandalous, frivolous or vexatious, or there is non-compensable prejudice to the defendants: see *McHale v. Lewis*, 2018 ONCA 1048, at paras. 6 and 22; *Klassen v. Beausoleil*, 2019 ONCA 407, 34 C.P.C. (8th) 180, at para. 25. This test applies even where it is determined that the statement of claim, as pleaded, should be struck: see *Burns v. RBC Life Insurance Company*, 2020 ONCA 347, 151 O.R. (3d) 209; *Tran v. University of Western Ontario*, 2015 ONCA 295. The fact that allegations are bald and lack supporting material facts is not itself a reason for refusing leave to amend: *Miguna v. Ontario (Attorney General)* (2005), 2005 CanLII 46385 (ON CA), 205 O.A.C. 257, at para. 22.

[18.] A court will generally refuse to extend time for the issuance of an originating document

where the action is statute barred, since the Rules do not take precedence over a

provision of a positive right. (see *LeBlanc v. Wawanesa Mutual Insurance Company* (1987) 86 NBR (2nd) 85). Similarly, where a proposed amendment would raise a claim that would otherwise be statute barred, leave to amend should be denied. (*Leveque v. New Brunswick*, 2011 NBCA 48, at paragraph 38 and 78).

Expiration of Limitations

- [19.] The Defendants object to the impugned proposed amendments as representing “new causes of action” and which would be presumptively statute barred by virtue of the expiry of the two-year limitation period under s. 5 of the *LAA*.
- [20.] In regards to the Defendants’ objection that the proposed amendments are barred by the *LAA*, I am unconvinced.
- [21.] There is no dispute as to the Plaintiffs’ awareness of the alleged “new” claims (para. 40.1 to 40.20) it wishes to pursue. They were clearly discoverable within the limitation period.

[22.] However, the Plaintiffs’ raise section 21 of the *LAA*, as a complete answer to the Defendants’ objection:

Claims added to proceedings

21 Despite the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or an amended pleading, to a proceeding previously commenced **if the added claim is related to the conduct, transaction or events described in the original pleadings and the conditions set out in one of the following paragraphs are satisfied:**

- (a) the added claim is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;

...

(Emphasis Added)

[23.] The Plaintiffs maintain this provision allows new claims to be added even though the limitation period has expired, provided the Plaintiffs establish it to *be related* to the subject of the original proceedings. The Plaintiffs have not, by their affidavit, attempted to explain how the proposed claims are related to the original proceedings. They are seemingly content to allow the Court to infer as much.

[24.] The Defendants submit that Section 21 of *LAA* does not apply here because the proposed added claims are not “related to the conduct, transaction or events” described in the original pleadings and that a new factual and legal context would have to be

plead. They submit that the test is whether the factual basis of the amendment is within the “four corners” of the pleadings already filed, and that the proposed amendment here does not satisfy that test because it would require evidence of events subsequent and unrelated to the Plaintiffs’ termination. They emphasize the Plaintiffs to have failed to provide any evidence to explain or connect the proposed amendments to the existing pleadings.

[25.] I accept that Section 21 of LAA serves to accommodate claims made after the expiry of a limitation period provided the precondition “related to” are met along with others.

[26.] In *Farm Credit Corporation v. Pickel*, (2016 NBQB 115) Glennie, J., in considering Section 21 of the LAA and the terminology “related to the conduct, transaction or events” stated at paragraphs 113-114:

[113] In *Caisse Populaire Beauséjour Ltée v. Wry*, **2012 NBQB 335** CanLII, the plaintiff relied on s. 21 to argue against an anticipated defence that its proposed amendments raised claims that were statute barred. Justice Rideout referenced the decision in *Lévesque v. New Brunswick* (2011) 2011 NBCA 48 (CanLII), where Chief Justice Drapeau acknowledged that section 21 of the *Limitation of Actions Act*, provides for the accommodation of claims after the expiry of a limitation period.

[114] Justice Rideout concluded that the New Brunswick Limitation Act was patterned after similar legislation in Alberta and, from jurisprudence

arising out of the Alberta Courts, it is settled that the new claim must be related to the conduct, transaction or events described in the original pleading. At paragraph 19, the Court cited the case of *Bow Valley Insurance Servers (1992) v. Shah* 2005 ABCA 304 CanLII as follows;

[14] The first requirement is that the new claim be “related to the conduct, transaction or events described in the original pleading”. **The phrase “related to” has a very broad meaning: Slattery v. Slattery.** For reasons given above when describing the statement of claim here, and chain contracts, the new claim is plainly “related to the conduct, transaction or events” pleaded in the statement of claim.

(Emphasis Added)

[27.] J. Glennie then quotes from *Slattery (Trustee of) v. Slattery*, 1993 CanLii 73

(SCC) where Iacobucci, J. followed the Supreme Court’s decision in *Nowegijick v.*

The Queen, 1983 CanLii 18 (SCC); [1983] 1 S.C.R. 29 at p. 39 where Dickson, J. (as

he then was) stated:

The words “in respect of” are, in my opinion, words of the widest possible scope. They import such meanings as “in reference to”, “with reference to” or “in connection with”. **The phrase “in respect of” is probably the widest of any expression intended to convey some connection between two related subject matters.**

(Emphasis Added)

[28.] Iacobucci, J. continued:

In my view these comments are equally applicable to the phrase “relating to”.

...

[29.] While I remain concerned over a formal absence of explanation by the Plaintiffs as to how the claims are “related”, I also recognize that, in this instance, I am able to draw a sufficient conclusion based upon reading all of the proposed amendments in the context of the remaining pleadings and the litigation to date.

[30.] I accept Mr. Toner’s arguments and find that the proposed allegations concerning “non-payment of bonuses” and “non-payment for work or services rendered” (with dividends in lieu i.e. tax strategy), on the surface, at least touch upon the same conduct and events involving the same parties.

[31.] In this way, the subject proposed amendments appear to have some connection to the the Plaintiff, Ayub Chisti’s, employment and/or performance contributions with the Defendants. In this way they would engage his alleged termination without cause; and claim for damages in lieu of notice; along with claims for unjust enrichment and quantum meruit for underpaid work. The amendments also relate to claims for compensation for services and for recognition of Ayub Chisti’s contributions to the

Defendants businesses beyond the issue of any alleged oral agreement on “ownership” (see for instance paragraph 119 to 120 of Justice Morrison’s trial decision).

[32.] As a result, the proposed amendments are, in the very least, “related to” the events described in the original pleadings, *particularly* when that phrase is given the broadest meaning adopted by the Supreme Court in the *Nowegijick* and *Slattery* cases, *supra*. Certainly, the proposed pleadings are not inconsistent with the original pleadings. On their face they appear to be an extension of the original claims.

[33.] I also accept Mr. Toner’s argument that the proposed amendments likely fall within the “four corners” of the pleadings already filed and that it is saved by Section 21 (a) of the LAA because it is, at least as drafted, *related to* the “conduct, transaction or events” described in the original pleadings. It is also made by a party to the proceeding - the Plaintiffs - against other parties to the proceeding - the Defendants - and it does not change the legal capacity in which any party sues or is being sued.

[34.] It is also crucial to appreciate that, at this stage of the proceedings, the success of the claims against the Defendants are not for determination.

Prejudice & Interests of Justice

[35.] However, this does not end the matter. The issue of non-compensable prejudice imposed on the Defendants by virtue of the very late proposed amendments, *in these circumstances*, is, in my view, a significant obstacle. This motion comes well after the first trial and follows an even earlier bifurcation order.

[36.] I am of the view the proposed amendments, in the entire context of this litigation, would significantly prejudice the Defendants. It is a prejudice that is manifest and which directly flows from the very significant and unexplained delay in the Plaintiffs bringing this motion, plus the overall delay in the context of this ten-year-old litigation. Again, this motion was not brought until six years after the bifurcation order and five years after the *first* trial.

[37.] Further, the Defendants' affidavit establishes the Plaintiffs to have first raised the potential new claims in July 2022. Notwithstanding this, the within motion was not filed for almost two years later and without explanation.

[38.] I accept Mr. Bishop's argument that the proposed amendments have caught the Defendants by surprise and will undoubtedly, dramatically increase the exposure to the damages claimed, and therefore potential liability of the Defendants. The impugned amendments will also result in required additional, detailed discovery and likely further amendments to the Defendants' defense. There may also be additional productions required to address new factual issues raised as a result. This further delay in the context of this rather tortuous and protracted litigation, is not proportionate, nor fair.

[39.] Based upon the record before me, I cannot reasonably determine that the amendments are necessary in order to bring forward material issues that were not otherwise known or capable of being appreciated at the time of the original pleading and/or years ago.

[40.] Lengthy examinations for discovery were held June 6-10 and October 17, 2016 plus August 29-30, 2018. According to the Defendants, neither the “bonus payments”, nor “tax fee strategy” were raised as issues by the Plaintiffs. The (first) trial consumed almost 15 days of court time. Furthermore, the proposed amendments relate to matters, some of which, occurred decades ago.

[41.] The impugned amendments, if permitted, would undoubtedly further complicate an already complex proceeding and would require significant time and resources of the Defendants to investigate and respond. It would almost certainly require the Defendants to call witnesses from the first trial, such as Accountant Brian Saunders to testify yet again.

[42.] The Plaintiffs have unfortunately furnished virtually no evidence as to adequately explain the late nature of the proposed amendments. The Plaintiffs’ chose to simply file a rather thin affidavit which purports to attach some procedural background and the proposed amended pleadings.

[43.] Furthermore, the Plaintiffs have not indicated why they could not have brought their motion much sooner.

[44.] The delay here is so significant and the explanation so inadequate as to allow me to reasonably presume some level of prejudice (see for instance *Amelin Engineering Ltd. v. Steam-ENG Inc.*, 2020 ONSC 962; and *158444 Ontario Ltd. v. State Farm Co.*, 2017 ONCA 42)

[45.] Still further, the Plaintiffs' have not suggested the remaining issues in dispute from the original claim and bifurcation order, cannot proceed to trial without these proposed amendments.

[46.] In these circumstances and as a result of the late timing of this motion, neither an adjournment, nor an award of costs can reasonably remediate such prejudice. The Plaintiffs have provided to the Court no justification for the late nature of these proposed amendments, and it would be substantially unfair in all of the circumstances

to the Defendants. I would add that this is not a prejudice that can be characterized as mere “disappointment” to the Defendants, should leave be granted.

[47.] I am also satisfied that “to allow the [impugned] amendments would be a circumvention of the judicial process such as to unfairly complicate and delay the present action and do injustice to the defendant[s].” (see *McLaughlin v. Levesque, supra*, para. 84).

[48.] This is one of those rare and exceptional cases where an amendment should be and will be, denied.

IV. DISPOSITION

[49.] As a result, the motion will be dismissed with one set of costs payable to the Defendants for \$1,500.00 inclusive of disbursements.

DATED at Fredericton, N.B. this ____ day of October, 2025.

Richard G. Petrie, J.C.K.B