

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Supply & Services) v.
Nova Scotia (Attorney General), 1997 NSCA 45

Chipman, Jones and Pugsley, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN in right
of the Province of Nova Scotia as
represented by the Department of Supply
and Services

Appellant

- and -

HER MAJESTY THE QUEEN BY
HER ATTORNEY GENERAL FOR
NOVA SCOTIA

Respondent

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) John T. Rafferty, Q.C.
) for the Appellant

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) Denise C. Smith
) for the Respondent

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) Appeal Heard:
) February 12, 1997

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) Judgment Delivered:
) February 26, 1997

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THE COURT: Leave to appeal is granted but the appeal is dismissed per reasons
for judgment of Jones, J.A., Chipman and Pugsley, JJ.A.
concurring.

JONES, J.A.:

On March 25, 1996 an information containing four counts was laid against the Crown under the **Occupational Health and Safety Act**, R.S.N.S. 1989, c. 320. The charges arose out of a fatal accident during the course of construction work on a water tower at the Nova Scotia Agricultural College in Truro. The charges were laid before a justice of the peace under the **Summary Proceedings Act**, R.S.N.S. 1989, c. 450.

On July 10, 1996, counsel for the appellant appeared before Judge Archibald in Provincial Court and moved to quash the information on the ground that the Crown had failed to give two months previous notice, that it intended to proceed with the charges, as allegedly required by s. 18 of the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c. 360. The trial judge allowed the motion and quashed the information. The Crown appealed to the Supreme Court and Mr. Justice Scanlan allowed the appeal and remitted the matter to the Provincial Court for trial.

In allowing the appeal Judge Scanlan stated:

In considering the provisions of section 18 I noted that prior to implementation of that provision proceedings against the Crown were not maintainable by private citizens except by petition of right. The requirement of petition of right has been replaced by the provisions of the **Proceedings Against the Crown Act**. That **Act** governs the rights of private citizens and how they may proceed against the Crown. There is nothing in the **Act** which purports to limit the rights of the Crown to take actions. Actions by citizens against the Crown must comply with the **Act**. The provisions of the **Act** do not apply to restrict the Crown in actions it may take. The Provincial Court normally has jurisdiction over the offence in

question. That jurisdiction has not been removed by the provisions of the **Act**.

The matter will be remitted back to the Provincial Court for trial.

The appellant has applied for leave to appeal from that decision under s. 839 of the **Criminal Code**. While the notice of appeal alleges a number of errors I agree with the position of counsel for the Attorney General that there is one issue, namely:

Does the **Proceedings Against the Crown Act** apply to prosecutions against the Crown?

I should note at the outset that s. 3 of the **Occupational Health and Safety Act**, provides that the **Act** applies to Her Majesty in the right of the Province.

The appellant contends that the **Proceedings Against the Crown Act** applies to these proceedings under the **Summary Proceedings Act**. Counsel refers to the following provisions of the **Proceedings Against the Crown Act**:

10 Nothing in this Act authorizes proceedings against the Crown except in the Supreme Court or a county court.

18 No action shall be brought against the Crown unless two months previous notice in writing thereof has been served on the Attorney General, in which notice the name and residence of the proposed plaintiff, the cause of action and the court in which it is to be brought shall be explicitly stated.

25(1) Except as provided in this Act, proceedings against the Crown are abolished.

Counsel concedes that the only definition of proceedings is contained in s.

2 of the **Act** which provides:

(f) "proceedings against the Crown" includes a claim by way of set-off or counterclaim raised in proceedings by the Crown and interpleader proceedings to which the Crown is a party;

To bridge that hiatus he turns to Sections 6(1) and 32 of the

Interpretation Act which provides:

6(1) Except where a contrary intention appears, every provision of this Act applies to this Act and to every enactment made at the time, before or after this Act comes into force.

32 Unless a contrary intention appears, the interpretation Section of the **Judicature Act**, so far as the terms defined can be applied, extends to all matters relating to legal matters.

He then seizes upon s. 2(g) of the **Judicature Act** which provides as

follows:

2 In this Act, and the Rules,

(g) "proceeding" means any civil or criminal action, suit, cause or matter, or any interlocutory application therein, including a proceeding formerly commenced by a writ of summons, third party notice, counterclaim, petition, originating summons or originating motion or in any other manner;

The **Judicature Act** R.S. 1989, c. 240 constitutes the Court of Appeal and the Supreme Court of Nova Scotia having jurisdiction in both civil and criminal matters. To that extent it is appropriate to refer to criminal proceedings in the definition section in the **Act**. The **Rules** on the other hand are referred to as the

Civil Procedure Rules. The definition of "proceeding in **Rule 1.05(u)** of the **Rules** is substantially the same as the definition in the **Act**, with the significant omission of the words "or criminal action".

Criminal law and procedure are matters within Federal jurisdiction. The **Criminal Code** provides generally for the prosecution of indictable and summary conviction offences. Section 482 gives the power to make rules relating to criminal proceedings. The **Civil Procedure Rules** have no application except to the extent that they have been adopted in exercising the rule making power under the **Code**.

Similarly the province has adopted the provisions of the **Code** in summary conviction prosecutions by virtue of the **Summary Proceedings Act**. The following provisions in that **Act** are relevant:

2(1) Subject to any special provision otherwise enacted, this Act applies to

(a) every case in which a person commits or is suspected of having committed any offence or act over which the Legislature has legislative authority and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or other punishment; and

(b) every case in which a complaint is made to any justice in relation to any matter over which the Legislature has legislative authority and with respect to which the justice has authority by law to make any order, whether for the payment of money or otherwise.

3 Except where it is otherwise provided, any

penalty or imprisonment prescribed by an enactment shall be recovered or enforced on summary conviction before a justice of the peace or judge of the provincial court.

7(1) Except where and to the extent that it is otherwise specially enacted, the provisions of the **Criminal Code** (Canada), as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and including provisions which impose additional penalties and liabilities, apply, **mutatis mutandis**, to every proceeding under this Act.

The general provisions of the **Code** for the prosecution of criminal proceedings are inconsistent with procedures set out in the **Civil Procedure Rules**. Under Part XXVII of the **Code**, s. 785, a summary conviction court is a "justice or provincial court judge, where the enactment under which the proceedings are taken does not expressly give jurisdiction to any person or class of persons". Neither the **Summary Proceedings Act** or the **Occupational Health and Safety Act** confer jurisdiction on the Supreme Court to try summary conviction cases.

Turning to the **Crown Proceedings Act** there is nothing in that **Act** referring specifically to criminal or quasi criminal proceedings. In reference to the **Act** the following is from Hogg, **Constitutional law of Canada**, 3rd ed. Vol. 1, par. 10.3:

In England in the middle ages there was no formal procedure for suing the Crown (or government). In order to secure redress for an alleged wrong by government the subject would petition the King in much the same way as a subject would petition the King with any other kind of request. In due course the "petition of right", which asserted a

legal right against the Crown, came to be treated differently from other kinds of petitions: it could be referred by the King to one of the ordinary courts to be tried. However, the petition of right was subject to the fundamental limitation that it could only proceed to adjudication if the King in his discretion signified his consent by endorsing the petition "**fiat justitiae**" - let right be done. Of course, after the development of responsible government, the King's discretion to grant the "royal fiat" was in reality the discretion of the government of the day.

In 1947, the United Kingdom adopted a new **Crown Proceedings Act**. The new Act abolished the petition of right, replacing it with the remedies which would be available between subject and subject. The requirement of the fiat was also abolished, enabling the Crown to be sued without its consent. Many other special privileges which were enjoyed by the Crown as litigant were also swept away as Crown proceedings were assimilated to proceedings between subjects.

After the enactment of the **Crown Proceedings Act** 1947 in the United Kingdom, the Conference of Commissioners on Uniformity of Legislation in Canada prepared a model act for adoption by Canadian jurisdictions. The model act was based on the **United Kingdom Act** and incorporated its major provisions. Between 1951 and 1974, the model act was enacted in substance by all of the Canadian provinces, except Quebec. Quebec did not adopt the model act, but it did abolish the requirement of the fiat in 1965. The federal Parliament acted in stages, abolishing the requirement of the fiat in 1951, but retaining the petition of right as the procedure of suit until 1971 when it too was abolished.

The present position in every province is that, in general, the Crown may be sued in the ordinary courts by the procedure which would be appropriate in suits between ordinary subjects.

It is clear from a reading of the **Act** that it only applies to civil proceedings commenced under the **Act**. Section 4 in effect defines the proceedings to which the **Act** applies. Section 4 refers to a person who may bring an action. Under s. 2(e) "person" does not include the Crown. Under s. 7 proceedings must be instituted in the Supreme Court and must be proceeded with in accordance with the **Judicature Act**. Section 10 restricts proceedings under the Act to the Supreme Court. Under s. 18 before an action can be brought under the **Act** by a person two months notice must be given to the Attorney General.

The following passages are from Vol. 11, Halsbury's **Laws of England**, 4th ed. p. 743:

1402: **The Crown Proceedings Act 1947**. The **Crown Proceedings Act 1947** substantially altered both the procedure to be followed in civil proceedings by and against the Crown and the substantive law governing the rights and liabilities of the Crown.

Subject to certain exceptions, the **Act** abolished the special forms of procedure which previously governed civil proceedings by and against the Crown. As a result these proceedings are, subject to certain special provisions, governed by the same rules as proceedings between subjects. Similarly, subject to certain exceptions, the **Act** enables civil proceedings to be taken against the Crown in the same circumstances as they can be taken against a subject.

and at p. 752:

The "civil proceedings against the Crown" to which the procedural provisions of the **Act** relate, are proceedings for the enforcement or vindication of any right or the obtaining of any relief which might

previously have been enforced or vindicated or obtained by the proceedings abolished by the **Act** or by an action against the Attorney General, any government department or any officer of the Crown as such, and proceedings which any person is entitled to bring against the Crown by virtue of the **Act**.

The history of the legislation clearly shows that it is confined to civil proceedings as authorized by the statute. In my view the statute does not extend to the prosecution of **quasi** criminal cases. It is for these reasons that while leave to appeal is granted the appeal should be dismissed.

Jones, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.