NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Attorney General) v. Merriam, 2003 NSCA 111

Date: 20031021
Docket: CA196828
Registry: Halifax

Between:	The Attorney General of Nova Scotia	
		Appellant
	v.	
	Thomas G. Merriam	Respondent

Judges:	Roscoe, Chipman, Hamilton, J .J. A.
Appeal Heard:	October 16, 2003, in Halifax, Nova Scotia
Held:	Appeal is dismissed with costs and disbursements per reasons for judgment of Roscoe, J.A; Chipman and Hamilton, JJ.A. concurring.
Counsel:	Louise Walsh Porier, for the appellant Ann E. Smith, for the respondent

Reasons for judgment:

[1] This is an appeal by the Attorney General of Nova Scotia from an Order of Justice Suzanne Hood of the Supreme Court dismissing the Province's interlocutory application pursuant to **Civil Procedure Rules** 14.25(1)(b), (c) and (d) to strike the respondent's Statement of Claim on the basis that the claim is *res judicata* or subject to issue estoppel.

[2] The background to, and the issues raised on the application were concisely stated by Justice Hood in her decision reported as [2003] N.S.J. No. 132 (QL); 2003 NSSC 49, as follows:

> Mr. Merriam had a previous action against the Crown in 1994 which was settled in 1996 by the issuance of a consent order and the execution of a release between the parties. The Crown says that this is a bar to further litigation or that, with due diligence, the matter that is now the subject of the present litigation could have been brought forward in the 1994 action and that allowing this action to continue would be an abuse of the court's process.

[3] The respondent had been employed in the public service of the Province from 1967 to 1993, and during the last six years prior to the termination of his employment, was a deputy minister. Justice Hood concluded that the issue in the first action by the respondent against the Province was the accrual of pensionable service over a five year period after his resignation during which he continued to receive salary, and that issue was distinct from the issue raised in the current action, that is, whether he was entitled to a deputy minister's pension pursuant to the provisions of the **Public Service Act**, R.S.N.S., 1989, c. 376. She stated in her reasons that the release signed after the settlement of the first action did not encompass the issue now advanced. Furthermore, she determined that the issues raised in the present action were not ones that should have been raised in the first action, because it was not at that time reasonably foreseeable that the Province would deny his eligibility to a deputy minister's pension.

[4] The Province states the issues on appeal as:

> (i) whether the Trial Judge erred in failing to exercise her discretion under Civil Procedure Rules 14.25 or 37, to strike the Originating Notice, and Statement of Claim or part of it, on the basis of *res judicata* and/or abuse of process, or
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> (ii) exceeded her jurisdiction on the interlocutory application to strike the Statement of Claim by effectively depriving the Appellant of the right to

> rely on the 1996 Release as a defence at trial, a defence specifically and separately pleaded as para. 29 of the Appellant's Defence.

[5] The appellant's application to strike the Statement of Claim was brought pursuant to **Civil Procedure Rules** 14.25(b), (c) and (d):

> 14.25 (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
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> ...
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> (b) it is false, scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
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> (d) it is otherwise an abuse of the process of the court;
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> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

[6] The standard of review applicable in this case, which involves an interlocutory order of a discretionary nature, is that as set out in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143, that is, that we will interfere only if a wrong principle of law has been applied or a patent injustice would result.

[7] In **Haase v. Vladi Private Islands Ltd.** (1990) 96 N.S.R. (2d) 323, Macdonald, J.A., said:

> In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the statement of claim raises substantial issues it should not be struck out. (See: **Seacoast Towers Services Ltd. v. MacLean** (1986), 75 N.S.R. (2d) 70 (C.A.) and **Cuddy Food Products Ltd. v. Associated Freezers of Canada Inc. et al.** (1987), 80 N.S.R. (2d) 412, affirmed (1988), 82 N.S.R (2d) 406.) (Emphasis added)

[8] In **Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund**, [1999] N.S.J. No. 160 (Q.L.), Justice Cromwell set out the prerequisites for proof of res judicata commencing at para. 54:

> [54] The basic rules relating to res judicata are stated in G. Spencer Bower and A. K. Turner, *The Doctrine of Res Judicata* (2d, 1969) at 18:

> Any party who is desirous of setting up res judicata by way of estoppel, whether he is relying on such res judicata as a bar to his opponent's claim, or as the foundation of his own, and who has taken the preliminary steps required in order to qualify him for that purpose, must establish all the constituent elements of an estoppel of this description, as already indicated in the general proposition enunciated at the commencement of this chapter. That is to say, the burden is on him of establishing (except as to any of them which may be expressly or impliedly admitted) each and every of the following:
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> (i) that the alleged judicial decision was what in law is deemed such;
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> (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;
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> (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
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> (iv) that the judicial decision was final;
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> (v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
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> (vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive in rem. (emphasis added)
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> [55] The onus of proving the constituent elements of res judicata is on the party alleging its application, in this case the Trustees. The jurisdiction of the tribunal whose decision is relied on is not presumed but must be established. So too must the element that the same question as that raised in the subsequent proceeding was determined in the previous one. ... [emphasis added]

[9] As in the **Braithwaite** case, the issues raised here, that is, whether the claims actually made or which should have been made in the first action, are the same as those now advanced, and whether the 1996 release is sufficiently broad that it should be found to preclude the present action, are complex issues. It is far from obvious whether either *res judicata* or issue estoppel ought to apply, and the determination should not be undertaken summarily or without a full factual record, including examination and cross examination of the respondent. The release signed in settlement of the first

action is so broadly worded that it could be interpreted to be so far-reaching to relinquish not only a deputy minister's pension, but all rights to any further salary and a pension of any type. A fuller appreciation of all the surrounding circumstances in 1993 and 1996, after careful assessment of all the evidence, is required before making any determination of what is encompassed within the terms of the release.

[10] After considering the record and the submissions of counsel, we have come to the unanimous conclusion that the Chambers judge did not err in principle or in the exercise of her discretion, nor has the appellant proven the existence of any error of law or patent injustice requiring the intervention of this Court. For clarification, we confirm that the Chambers judge simply dismissed the application pursuant to **Rule** 14.25. Her reasons for doing so do not preclude either party from repeating their arguments on the effect of the release, or the issues of *res judicata* and issue estoppel issues before the trial judge.

[11] The appeal is dismissed with costs and disbursements to the respondent in the total amount of $1500.00.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Hamilton, J.A.