C.A. No. 104801

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S., Hart and Chipman, JJ.A.

Cite as: Nova Scotia (Attorney General) v. Neary, 1994 NSCA 215

BETWEEN:

ATTORNEY GENERAL OF NOVA SCOTIA Alexander M. Cameron Appellant - and - GERALD VINCENT NEARY Respondent	for the Appellant Peter L. Coulthard for the Respondent Appeal Heard: October 19, 1994 Judgment Delivered: November 24, 1994

THE COURT: Appeal dismissed from decision of chambers judge who held the Crown is subject to s. 3 of the **Limitation of Actions Act** to prevent an action being struck for failure to comply with s. 10 of the **Fatal Injuries Act**, per reasons for judgment of Clarke, C.J.N.S.; Hart and Chipman, JJ.A. concurring.

CLARKE, C.J.N.S.:

The issue in this appeal is whether in Nova Scotia the Crown is subject to s. 3 of the **Limitation of Actions Act**, R.S.N.S. 1989, c. 258, to prevent the action the respondent has brought against it from being struck for failure to comply with the time limitation provided in s. 10 of the **Fatal Injuries Act**, R.S.N.S. 1989, c. 163.

Section 10 provides:

> Not more than one action shall lie for and in respect to the same subject-matter of complaint and every such action shall be commenced within twelve months after the death of the deceased person.

As a result of injuries received in an accident, the common law spouse of the respondent died on July 7, 1990. On July 5, 1991 the respondent, as plaintiff, began an action against the Crown and one other person.

The Crown, relying on s. 18 of the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c. 360, refused service alleging it had not received formal notice of the intended action two months earlier. The section states:

> No action shall be brought against the Crown unless two months pervious 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.

Upon being informed of the refusal, the plaintiff's solicitor immediately filed a notice of intent and began the action again on September 10, 1991. The Crown filed a defence on September 27, 1991, stating that the Court lacked jurisdiction to hear the action because the claim of the respondent, as plaintiff, was statute barred by twelve months having passed since the death of his spouse (**Fatal Injuries Act**, s.10).

The respondent applied to Justice Hall of the Supreme Court, in chambers, to disallow the Crown's defence. He relied on the **Limitation of Actions Act**, s. 3(2) which provides:

> (2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
>
> (a) the time limitation prejudices the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

The Crown contended, in addition to the time limitation in s. 10 of the **Fatal Injuries Act**, that it is immune and not bound by the application of s. 3(2) of the **Limitation of Actions Act** by virtue of s. 14 of the **Interpretation Act**, R.S.N.S. 1989, c. 235.

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby.

Justice Hall granted the application. He determined that the benefit/burden principle as discussed by the Supreme Court of Canada in **Sparling v. Quebec**, [1988] 2 S.C.R. 1015 (see La Forest, J. at p. 1021) can be applied to defeat a Crown exemption.

The chambers judge referred to the decision of this Court in **McGuire and McGuire v. Fermini** (1994), 64 N.S.R. (2d) 60, which held that the then s. 2A(2), and now s. 3, of the **Limitation of Actions Act** applies to the limitation period in the then s. 9, and now s. 10, of the **Fatal Injuries Act**. Observing that "time limitation" in s. 3(1)(c)(ii) includes a limitation pursuant to "the provisions

of any enactment other than this Act", Justice Hall determined there was a sufficient nexus between the two statutory provisions to permit the limitation period in the **Fatal Injuries Act** to be defeated or modified by s. 3 of the **Limitation of Actions Act**.

The reasons for judgment of Justice Hall are reported in (1994), 129 N.S.R. (2d) 293 and indexed as **Neary v. Nova Scotia (Attorney General) and MacDonald**.

In deciding that it was equitable to grant the application, the chambers judge stated at page 298, para. 16:

> Accordingly, I find that there is a sufficient nexus between the two statutory provisions and that the benefit/burden principle applies. The Crown has sought to defeat the claim of the plaintiff by claiming the benefit of section 10 of the Fatal Injuries Act. It, therefore, must accept the burden of section 3 of the Limitation of Actions Act and may not claim the exemption under section 14 of the Interpretation Act. In other words, it is subject to and bound by the provisions of section 3 of the Limitation of Actions Act.

The Crown appeals contending that the chambers judge erred in law by deciding that s. 3 of the **Limitation of Actions Act** binds the Crown and further, that he erred by applying it in these circumstances.

The doctrine, steeped in history, to which reference is made in the fourth edition of Halsbury's Laws of England, 4th ed., p. 611, para. 962, "nullum tempus occurrit regi" (time does not run against the King), has been overtaken by common law exceptions. Two of these are in issue here - express words and the benefit/burden (waiver) principle.

As to the first (express words) the Crown relies upon s. 14 of the **Interpretation Act**. It argues that absent express language in the **Limitation of Actions Act** that the **Act** applies to the Crown, then it cannot be interpreted that

the Crown is subject to its provisions.

The respondent contends that the legislative connection which binds the Crown and makes it subject to the **Limitation of Actions Act** is found in sections of the **Proceedings Against the Crown Act**. Counsel refers to sections 5(1)(d) and 15.

> 5 (1) Subject to this Act, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject
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> ...
>
> (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.
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> 15 The Crown may obtain relief by way of interpleader proceedings, and may be made a party to such proceedings in the same manner as a person may obtain relief by way of such proceedings or be made a party thereto, notwithstanding that the application for relief is made by a sheriff or bailiff or other like officer, and the provisions relating to interpleader proceedings under the **Judicature Act** and the **County Court Act**, subject to this Act, have effect accordingly.

Significant to this ground of appeal is s. 4(c) of the **Proceedings Against the Crown Act**:

> 4 Subject to this Act, a person who has a claim against the Crown may enforce it as of right by proceedings against the Crown in accordance with this Act in all cases in which
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> ...
>
> (c) the claim is based upon liability of the Crown in tort to which it is subject by this Act.

The action which underlies this appeal is based in tort. Section 4(c) permits the Crown to be sued. Section 5(1)(d) subjects the Crown to "all liabilities to which a natural person would be subject under any statute". The **Limitation of Actions Act** is such a statute. Whereas, historically, the subject

could not sue the Queen in tort, the legislature has changed that notion by adopting a new statutory right to do so.

A citizen of Nova Scotia is subject to having his/her defence based on non-compliance with time periods set aside by s. 3(2) of the **Limitation of Actions Act**. So also is the Crown when it becomes a litigant. I agree with the conclusion reached by the chambers judge that in this action based in tort the Crown is not entitled to a higher degree of protection.

The second exception to the common law doctrine which bears on this appeal relates to benefits/burden/waiver. The chambers judge referred to this as "the determinative question".

The position of the appellant is the exceptions to Crown immunity are to be narrowly construed and that this is one of them. Counsel refers to the observation of Chief Justice Dickson in **Alberta Government Telephones v. C.R.T.C.**, [1989] 5 W.W.R. 385, where he wrote at p. 434, "... at common law the Crown can gain advantages from a statute without necessarily waiving its immunity therefrom." To apply the waiver principle here would, in the opinion of counsel, "... not lend itself to [an] imaginative exception[s] to the doctrine...", quoting Dickson, C.J.C. at p. 436.

The position of the appellant is that the Crown must seek out, become active, assert its rights by positive conduct before the benefit/burden exception can apply to it. In this instance, counsel argues the stance of the Crown is passive: Its passive reliance on a limitation defence does not equate to taking active steps to secure positive rights. Therefore, the Crown has not waived its immunity.

The Crown also asserts that there is an insufficient nexus between the benefit it has under s. 10 of the **Fatal Injuries Act** and the burden which would

be placed upon it by s. 3 of the **Limitation of Actions Act**. This, in its submission, does not permit the doctrine to operate in this instance. Counsel points out that the two are not "indissolubly linked" or constitute a "comprehensive bundle of rights and liabilities". In this he refers to the precursor legislation to the **Fatal Injuries Act** which dates back to 1884, whereas s. 3 of the **Limitation of Actions Act** became law in 1982.

The respondent responds to these submissions by arguing that the conduct of the Crown is indeed active in that it was not obliged to raise the limitation defence but when it did, it thereby waived any immunity which it hitherto enjoyed. On the issue of nexus, counsel of the respondent advanced oral argument in support of the submission in his factum "... that there could be no closer relationship between statutory provisions than there is between one which establishes a limitation period, and one which gives relief against the limitation."

The chambers judge discussed these issues in his comprehensive decision to which reference can be made in his reported reasons. He quoted at length from the decision of La Forest, J. in the unanimous opinion of the Supreme Court of Canada in **Sparling**. In his reasons La Forest, J. wrote at p. 1025 [S.C.R.]:

> ... It is quite correct to conclude that whenever the question of the application of the benefit/burden exception arises, the issue is not whether the benefit and burden arise under the same statute, but whether there exists a sufficient nexus between the benefit and burden. As McNairn, op. cit., at p. 11, puts it:
>
> > It is not essential ... that the benefit and the restriction upon it occur in one and the same statute for the notion of crown submission to operate. Rather, the crucial question is whether the two elements are sufficiently related so that the benefit must have been intended to

> be conditional upon compliance with the restriction.

And at pp. 1027-1028:

> ... In the words of Professor Hogg, op. cit., at p. 183, "when the Crown claims a statutory right the Crown must take it as the statute gives it, that is, subject to any restrictions upon it." Otherwise, the Crown would receive a "larger right than the statute actually conferred" (p. 183).
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> Application of the benefit/burden does not result in subsuming the Crown under any and every regulatory scheme that happens to govern a particular state of affairs. ... The exception is not of such broad reach. Its application depends not upon the existence or breadth of a statutory scheme regulating an area of commerce or other activity, but, as noted earlier, upon the relationship or nexus between the benefit sought to be taken from a statutory or regulatory provision and the burdens attendant upon that benefit. The focus is not on the source of the rights and obligations but on their content, their interrelationship.

While s. 10 of the **Fatal Injuries Act** states that the action shall be commenced within twelve months, it does not say that every action that is not commenced within twelve months is a nullity. When s. 10 is pleaded, then it is placed in issue and the court must decide. By pleading s. 10, as the Crown has done here, it seeks to take the benefit of the provision. In doing so, it triggers the statutory scheme which includes s. 3 of the **Limitation of Actions Act**. A risk in pleading s. 10 is that the Crown may be subject to the burden cast upon it by s. 3.

The purpose of s. 3 of the **Limitation of Actions Act** is to inject a measure of equity into fact situations so that where, in the opinion of the court, the circumstances dictate, fairness will result. In this way the legislature has

intervened to soften the otherwise perceived harshness of the Royal prerogative, but only where the court determines inequity would result. Justice Hall in granting the respondent's application and determining that s. 3 of the **Limitation of Actions Act** applied, made no errors in law that are reversible on appeal. His decision should be sustained. There is a sufficient nexus. The benefit/burden principle applies to the circumstances underlying this appeal for the reasons given and the analysis made by the chambers judge.

Although the issue of Crown immunity was not raised in **McGuire**, Jones, J.A. of this Court stated with respect to the then s. 2A of the **Limitation of Actions Act** (now s. 3) and then s. 9 (now s. 10) of the **Fatal Injuries Act**, at pp. 66-67:

> I agree with the learned trial judge that s. 2A was intended to be remedial and accordingly should be liberally interpreted. Indeed the word "type" in the definition of "action" is not restrictive. The **Concise Oxford Dictionary** defines the word as meaning "serving as illustration", "class of things, etc. having common characteristics". The object of the **Fatal Injuries Act** was to confer a cause of action on certain relatives based on the same characteristics that would have sustained an action by the deceased had he lived. It was not intended that the characteristics must be identical. I see no compelling reason to give the words in s. 2A of the **Limitation of Actions Act** a restricted meaning as that was not the intention of the Legislature.

Underlying the appeal in **McGuire** was the dicta of the trial judge, (1984), 62 N.S.R. (2d) 104, who said at pp. 100-112:

> The objects of section 2A of the **Statute of Limitations** are clear and apparent, that is, to temper the application of limitation periods in accordance with principles of equity.

CONCLUSIONS

1. I would dismiss the appeal.
2. I would award the respondent costs of $1,500.00, including his disbursements.

C.J.N.S.

Concurred in:

Hart, J.A.

Chipman, J.A.

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