SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Attorney General) v. Bungay*, 2015 NSSC 103

Date: 20150408
Docket: Hfx No. 427620
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Plaintiff

v.

Lisa Marie Bungay

Defendant

Decision

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	December 2, 2014, in Halifax, Nova Scotia
Final Written Submissions:	December 19, 2014
Counsel:	Ryan T. Brothers, for the Plaintiff Donna Franey and Anthony Rosborough, for the Defendant

Moir J.:

Introduction

[1] The Attorney General sued Ms. Bungay for the balance owing on her student loan. She had borrowed $6,750 and paid $2,849.14. With interest, the balance claimed is $4,276 plus further interest.

[2] Ms. Bungay purported to elect to have the proceeding transferred under s. 19(2) of the *Small Claims Court Act*. That provision requires the prothonotary to transfer a proceeding in this court to an adjudicator in Small Claims Court, if the claim is within that court's jurisdiction.

[3] The Attorney General took the position with the prothonotary that s. 19(2) does not apply to claims by the Crown. A defendant in a suit brought in this court by the Crown cannot elect to transfer the proceeding to the Small Claims Court. Ms. Bungay disagreed, and Justice Chipman directed that the dispute be determined in chambers.

[4] I thank counsel for their thorough submissions. I have concluded that s. 19(2) of the *Small Claims Court Act* does not apply to suits brought by the

Crown in the Supreme Court of Nova Scotia. No election is available to the defendant, and the prothonotary cannot transfer the proceeding.

[5] Here are my reasons.

The Eclipse of Necessary Implication

[6] Section 14 of the Nova Scotia *Interpretation Act* provides:

> 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.

The same provision was found in S.C. 1867, c. 1, s. 7, which was later incorporated into the federal *Interpretation Act*.

[7] In the late 1960s, the federal Parliament amended what had become s. 16 of the *Interpretation Act* by replacing the "expressly stated" exception with "except only as therein mentioned or referred to": S.C. 1967 – 68, c. 7.

[8] There has been some controversy about whether the "expressly stated" exception is narrower than "mentioned or referred to". To appreciate the ramifications of "expressly stated", we need to look at the common law restrictions and the jurisprudence on the statutory restrictions.

[9] In the former Empire of India and in the United Kingdom, a presumption of Crown immunity from statute developed without the aid of anything like s. 14 of our *Interpretation Act*. The proscription appears to have been fully established by *Province of Bombay v. City of Bombay*, [1947] A.C. 58 (P.C.). In *Bombay*, the Judicial Committee of the Privy Council held that the Crown is only bound by a statute if the statute expressly says so or necessarily implies binding force.

[10] The Privy Council had earlier nixed the argument that necessary implication was an additional exception under the Canadian *Interpretation Act*: *In re Silver Brothers Ltd.*, [1932] A.C. 514. "[I]t is a contradiction in terms to hold that an express statement can be found in an 'irresistible implication' ": p. 523.

[11] The stance of the Privy Council in *Silver Brothers* was followed by the Supreme Court of Canada in *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551. A majority of the Court held that only an express statement in a statute that the statute bound the Crown would suffice to make it binding. Justice Dickson wrote at para. 9: "Section 16 of the *Interpretation Act* removes even the necessary implication exception …". (This was after the wording of the exception in s. 16 had been changed by the S.C. 1967 – 68 amendment.)

[12] *Eldorado* was at odds with *R. v. Ouellette*, [1980] 1 S.C.R. 568. At para. 20, Justice Beetz, who wrote for the Court in *Ouellette*, emphasized the amendment that had removed "expressly" from s. 16 and went on to say:

> This section does not exclude the rule by which the various provisions of a statute are each interpreted in light of the others, and it is possible that Her Majesty be implicitly bound by legislation if that is the interpretation which the legislation must be given when it is placed in its context.

[13] The conflict was resolved by *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225. Chief Justice Dickson wrote for the majority. At para. 132, he concluded the Crown is bound by a statute that expressly says so or necessarily implies as much in either of two ways, which we shall discuss later.

[14] Thus, necessary implication emerged from its eclipse, at least for the federal *Interpretation Act*.

[15] This left a "difficult question" about provincial interpretation statutes that, like ours, kept the "expressly stated" formulation of the exception to Crown immunity from statute: *Nova Scotia Government and General Employees Union v. Nova Scotia (Public Service Commission)*, 2004 NSCA 55 at para. 30. That question is answered for this court by Justice Murphy speaking in *Nova Scotia (Attorney General) v. Mattatall*, 2013 NSSC 184. See, para. 20.

[16] Accordingly, s. 19(2) of the *Small Claims Court Act* cannot be used to transfer a proceeding started by the Crown, unless the statute expressly says so or necessarily implies as much.

The Meaning of Necessary Implication

[17] The *Small Claims Court Act* does not mention the Crown. So, the issue is whether it is bound by necessary implication. We begin by considering jurisprudence on the meaning of that phrase.

[18] The Crown may be bound by a statute through necessary implication in either of two distinct ways. In one, the implication follows necessarily from the terms of the statute. In the other, it follows from a finding that the purpose of the statute would be "wholly" frustrated if the Crown was not bound.

[19] *Bombay* expressed the first concept this way at p. 61: "…it is manifest by the very terms of the statute that it was the intention of the legislature that the Crown should be bound." And, the second was expressed this way at p. 63: "it [is] apparent from its terms that is its beneficent purpose must be wholly frustrated unless the Crown were bound…".

[20] For Canada, *Alberta Government Telephones* settled the modern expression of the components of necessary implication. Para. 132 reads:

> In my view, in light of *P.W.A.* and *Eldorado*, the scope of the words "mentioned or referred to" must be given an interpretation independent of the supplanted common law. However, the qualifications in *Bombay*, supra, are based on sound principles of interpretation which have not entirely disappeared over time. It seems to me that the words "mentioned or referred to" in s. 16 are capable of encompassing (1) expressly binding words ("Her Majesty is bound"), (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, supra, and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

[21] Given the holding in *Mattatall*, s. 14 of the Nova Scotia *Interpretation Act* contains the same three exceptions as in *Alberta Government Telephones*. Given that the *Small Claims Court Act* does not meet the first exception ("expressly binding words"), the issues in this case are:

(1) Does the statute reveal a clear intention to bind the Crown when the transfer provisions are read in the context of other textual provisions?

(2) Is the purpose of the statute wholly frustrated if the Crown is not bound, such that it would be absurd, as opposed to undesirable, for the Crown to be excluded?

Section 19 Transfer in Context

[22] Subsections 19(1), (1A), and (1B) are about starting a Small Claims Court proceeding. Subsections 19(2), (3), and (4) concern transfer of a Supreme Court proceeding. They read:

> (2) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court or a city court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, the defendant may elect to have the proceeding adjudicated in the Small Claims Court whereupon the prothonotary of the Supreme Court or the clerk of the city court, as the case may be, shall transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act.
>
> (3) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, the claimant may elect to have the proceeding adjudicated in the Small Claims Court whereupon the prothonotary of the Supreme Court may transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act.
>
> (4) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, a judge of the Supreme Court may transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act.

That is to say, proceedings in Supreme Court that do not include a claim for general damages and are in the concurrent jurisdiction of the Small Claims Court may be transferred on election of the claimant, or by order of a judge.

[23] The thrice repeated phrase "does not include a claim for general damages and is within the jurisdiction of the Small Claims Court" is a cue. It shows that the Small Claims Court, as important is it has become to our judicial system, is deliberately limited in several ways. It cannot entertain a dispute about land: s. 10(a); a will, settlement, or intestacy: s. 10(b); a claim for defamation or malicious prosecution: s. 10(c), or; a dispute between a landlord and a tenant except for appeals from the Director of Residential Tenancies: s. 10(d).

[24] In addition to the exclusion of transfers of proceedings that include a claim in general damages under ss. 19(2), (3), and (4), s. 10(e) limits claims in Small Claims Court "for general damages in excess of one hundred dollars". The statutory jurisdiction of the court is also limited. It is for "a monetary award … under a contract or a tort where the claim does not exceed twenty-five thousand dollars" plus interest: s. 9(a). It is also for recovery of personal property valued at $25,000 or less: s. 9(b).

[25] The court has jurisdiction over certain claims for municipal taxes and a statutory claim for expenses, both under the $25,000 limit. It took over some adjudicative functions of the former residential tenancy boards and taxing masters, both without monetary limit: *Residential Tenancies Act*, s. 17C and *Small Claims Court Act*, s. 9A(1).

[26] The transfer provisions in s. 19 have nothing to do with the court's jurisdiction in residential tenancies and taxations. The transfer provisions apply to a concurrent jurisdiction that is deliberately limited. Primarily, the transfer provisions concern claims in contract or tort for special damages that do not exceed $25,000. The limits on causes, kinds of damages, and amount are large.

[27] The exclusion of the Crown under s. 14 of the *Interpretation Act* from the transfer provisions in s. 19 of the *Small Claims Court Act* is consistent with the contextual provisions of that statute. Those provisions show an intention to create a court that, though important to our civil justice system, is deliberately limited in many ways. Nothing in the statutory context suggests an intention to bind the Crown, and the statutory context suggests exclusion of the Crown from the transfer provisions would be consistent with other limitations expressly imposed.

[28] Therefore, the statute does not reveal a clear intention to bind the Crown when the transfer provisions are read in the context of the other textual provisions.

Frustration of Purpose

[29] The Small Claims Court was created in 1980 by the *Small Claims Court Act*, S.N.S. 1980 c. 16, s. 1. It had jurisdiction to award judgment for special damages

in tort or contract limited to $2,000, about $5,000 in today's money, and jurisdiction to order return of personal property worth up to $2,000: s. 9.

[30] The Supreme Court is familiar with the work of the Small Claims Court because we exclusively hear appeals from it. In the three decades since it was created, the court has become an important component of the civil justice system of Nova Scotia.

[31] Allowing for inflation, the court's monetary jurisdiction has increased fivefold. It has been given responsibility for residential tenancy appeals and taxation of costs and of lawyers' accounts. The court determines a significant portion of the civil disputes in Nova Scotia. The bench is composed of a good number of lawyers who adjudicate the claims part-time of evenings across the province. The adjudicators are well-respected.

[32] The *Small Claims Court Act* tells us its purpose. Section 2 reads:

> It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.

It is possible for the Small Claims Court to adjudicate claims up to the monetary jurisdiction of the court informally, inexpensively, and in accord with law and fair

procedure without including claims the provincial government, or the Crown in any other right, may choose to sue for in Supreme Court.

[33] The purpose might better be served if suits brought by the Crown in Supreme Court that are otherwise in the concurrent jurisdiction of the Small Claims Court could be transferred there, but the inability to transfer these suits does not frustrate the purpose, let alone wholly frustrate it. The inability may be undesirable, a subject for the Legislature not the courts, but it is not an absurdity giving rise to the necessary implication.

Answers to Submissions

[34] Ms. Bungay refers to Professor Hogg's six exceptions to the immunity of government from statute and criticizes the province for suggesting that the only possibilities are expression, necessary implication or frustration of purpose, and waiver. The reference is Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf as at 15 October 2014, 5th ed. (Toronto, Carswell, 2014), ch. 10 at 18.

[35] Professor Hogg is of the view that "these exceptions … make substantial inroads into the rule". In my respectful opinion, some of them are not about the rule. "[S]tatutes that are incorporated by reference … into a contract entered into by the Crown" do not apply to the Crown by force of the statute. They apply by

force of contract. "[S]tatues incorporated by reference … into a statute binding the Crown" do not apply to the Crown by force of the incorporated statute, but by force of an incorporating statute that meets the rule.

[36] "[S]tatutes that are relevant to a civil proceeding to which the Crown is a party" requires explanation. The authority cited by Professor Hogg for that rather sweeping statement is *Canadian Industrial Gas and Oil Ltd. v. Saskatchewan*, [1978] S.C.J. 71. Justice Ritchie wrote for the court. At para. 6 he referred to the statutory immunity provision of the Saskatchewan *Interpretation Act*. Then he said, at para. 7, "This section must, however, be read in light of the following express provisions of s. 17(1) of the Saskatchewan *Proceedings against the Crown Act* …". It was a case of expressly binding legislation and, at that, a case about liability to pay interest under the Saskatchewan Crown proceedings statute, not all statutes relevant to a civil proceeding.

[37] Our *Proceedings against the Crown Act* does not expressly apply the transfer provisions of the *Small Claims Court Act*. Nor does it imply as much. To the contrary, s. 10 provides, "Nothing in this Act authorizes proceedings against the Crown except in the Supreme Court or a county court."

[38] Ms. Bungay argues that her case is similar to *R. v. Ouellette*. She refers to a report of the Ontario Law Reform Commission in which *Ouellette* was taken to rest necessary implication "on the basis of a purposive or 'logical implication' ".

[39] There are two answers to this. Firstly, *Alberta Government Telephones* resolved the conflict between *Eldorado* and *Ouellette* and provides the more mature statement of principle.

[40] Secondly, *Ouellette* was an obvious case of necessary implication. The *Criminal Code* provided "the appeal court may make an order with respect to costs that it considers just and reasonable": s. 758. The Crown is a party to almost all criminal appeals. To have the provision apply to one side and not the other frustrates its purpose.

[41] Ms. Bungay refers to the criticism of Crown immunity from statute expressed by Justice, later Chief Justice, Dickson in *Eldorado* at p. 558. The criticism had no effect on the law. *Eldorado* held that express words were required to bind the Crown to a statute. *Alberta Government Telephones* rescued necessary implication from *Eldorado*.

[42] The rest of Ms. Bungay's submissions emphasize the benefits of the Small Claims Court. While I agree with much of what is said on her behalf, leaving the

government out of the Small Claims Court system is not "absurd" within the meaning of *Alberta Government Telephones*. The arguments may show that this is "an undesirable result". As such, they are arguments to be made to the legislature, not the courts.

[43] Except for one, the government's submissions are consistent with the reasons provided in this decision. The government also argued that the Small Claims Court is insufficiently independent of the government to entertain claims involving it. I said during oral argument that I would not entertain this proposition without a broader inquiry into the constitutional imperative of judicial independence. As that is not necessary to this decision, I will not go there.

Conclusion

[44] I determine that the prothonotary cannot transfer a proceeding started by the Crown in Supreme Court to the Small Claims Court. The parties will bear their own costs.

Moir J.