

SUPREME COURT OF NOVA SCOTIA

Citation: Borden v. Nova Scotia (Attorney General), 2009 NSSC 132

Date: 20090423

Docket: Hfx. No. 168101

Registry: Halifax

Between:

Robert Lawrence Borden

Plaintiff

v.

The Attorney General of Nova Scotia; representing Her Majesty the Queen in right of the Province of Nova Scotia, and the Children's Aid Society of Halifax County, a body corporate, and the Children's Aid Society of Colchester County, a body corporate, and the Nova Scotia Home for Colored Children, a body corporate.

Defendants

Judge: The Honourable Justice Walter R. E. Goodfellow

Heard: March 23, 2009, in Halifax, Nova Scotia

Counsel: Raymond F. Wagner and Michael Dull, for Robert Lawrence Borden

Terry D. Potter, for the Attorney General of Nova Scotia

S. Raymond Morse, Q.C., for the Children's Aid Society of Colchester County

John Kulik, Q.C. and Jane O'Neill, for the Nova Scotia Home for Colored Children

By the Court:

BACKGROUND

[1] The Nova Scotia Home for Coloured Children (Home) through its solicitor advised the solicitor for Robert Lawrence Borden (Borden) on the 14th of August, 2008 of the Home's intention to seek summary judgment. This application for summary judgment was filed the 11th day of December, 2008. The application sought summary judgment relating to the cause of actions advanced by Borden, namely assault, sexual assault, negligence and breach of contract.

[2] The Children's Aid Society and Family Services of Colchester County (Truro Agency) made an application for summary judgment rising from Borden's allegations said to have occurred while he was a ward of the Truro Agency which wardship terminated August 27, 1974. The Truro Agency seeks summary judgment that effectively dismisses all causes of action alleged against it.

[3] Borden initially sought relief by way of production of relevant documents and the adjournment of the summary judgment application.

[4] At the commencement of the application, Borden's counsel confirmed that Borden was no longer pursuing the alleged breach of contract cause of action. In addition, counsel have reached agreement to address the issues of production of relevant documents and Borden is not proceeding with his application for adjournment of the summary judgment.

[5] This leaves the application for summary judgment by the Home and Truro Agency as relates to the alleged causes of action of assault, sexual assault and negligence. The Truro Agency also takes the position that there is no evidence whatsoever to support the claim for breach of fiduciary duty on the part of the Truro Agency in fact or in law.

[6] All parties agree that Borden was a resident at the home from 1966 to 1973 and from 1980 to 1985 and, as he indicates in his statement of claim and amended statement of claim, his date of birth is July 14, 1964.

[7] Borden also claims a breach of fiduciary duty by the Home and the Truro Agency and it is clear from the Nova Scotia Court of Appeal decision in Milbury v.

Nova Scotia (Attorney General), [2007] N.S.J. No. 187, that there is no limitation period for a claim of breach of a fiduciary duty.

APPLICATION FOR SUMMARY JUDGMENT

[8] The parties agree that the *Civil Procedure Rule* (1972) 13.01 applies, which reads as follows:

13.01 After the close of pleadings, any party may apply to the court for judgment on the ground that:

- (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
- (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
- (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[9] The relevant portions of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258 (as amended) read as follows:

Limitation periods

2(1) The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:

- (a) actions for assault, menace, battery, wounding, imprisonment or slander, within one year after the cause of any such action arose;

- (e) all actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass

on the case, except as herein excepted, within six years after the cause of any such action arose;

(5) In any action for assault, menace, battery or wounding based on sexual abuse of a person,

(a) for the purpose of subsection (1), the cause of action does not arise until the person becomes aware of the injury or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and

(b) notwithstanding subsection (1), the limitation period referred to in clause (a) of subsection (1) does not begin to run while that person is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse.

[10] From the forgoing, therefore, it is agreed that for assault the limitation period is one year; for negligence, six years; and, with respect to a cause of action based on sexual abuse, sections 5 (a) and (b) of the *Limitation of Actions Act* apply and the limitation period itself is six years after the cause of any such action arose.

[11] Mr. Kulik, Q.C. on behalf of the Home outlined a series of events to which he stated s. 5 (a) and (b) may apply and to other events to which he indicated his view that s. 5(a) and (b) did not apply.

[12] Mr. Wagner on behalf Borden took exception to only one of those events a reference to an event described by Mr. Kulik as being assault only and expressed the view that this event with one alleged F. Sparks involved the grabbing of genitals and could therefore be considered as having s. 5 (a) and (b) apply.

[13] I conclude that it is not necessary for me to define which events were or were not assaults or sexual assaults. Clearly the events that were not sexual face the limitation period of one year and those that were sexual face the limitation period of six years after the cause of any such action arose as determined by s. 5 (a) and (b) of the *Limitation of Actions Act*.

LAW – SUMMARY JUDGMENT

[14] In **Concrete Shoring Technologies Inc. v. SCFS Inc.**, 2009 NSSC 97, page 3, para. 8:

[8] Summary judgment applications have been more recently canvassed in decisions such as *Broussard v. Hawley*, 2009 NSSC 1 (CanLII) where Coady, J. in his decision canvasses recent case law on summary judgment applications:

[18] The two part test for summary judgment was described in *Fournier v. Green*, [2005] N.S.J. No. 357, 2005 NSSC 253 as follows:

The plaintiff, in order to succeed in a summary judgment application, first has the obligation to prove her claim and then the burden shifts to the defendant to satisfy that he has a bonafide defence or at least an arguable issue to be tried before the court. He must disclose the nature of the defence or issue to be tried with clarity through sufficient facts to indicate that it is a bonafide defence or issue to be tried.

[19] The test for summary judgment was articulated in *Pricewaterhouse Coopers Inc. v. County Realty Ltd.* [2006] N.S.J. No. 164, 2006 NSSC 132:

[10] The test for summary judgment in Nova Scotia is well established. In *Canadian Imperial Bank of Commerce v. Tench* (1990), 97 N.S.R. (2d) 325 (C.A.), Macdonald, J.A. stated at paragraph 9:

The law is clear that a plaintiff is entitled to obtain summary judgment if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an arguable issue to be tried - see *Bank of Nova Scotia v. Dombrowski* (1977), 23 N.S.R. (2d) 532; 32 A.P.R. 532 ... Under the circumstances of this case, if the allegations contained in the statement of defence are correct, they would afford an answer to the bank's claim.

[11] In *D.E. & Son Fisheries Ltd. v. Goreham* (2003), 217 N.S.R. (2d) 199, (N.S.C.A.), Cromwell, J.A. stated at para. 2:

Summary judgment may be granted to a plaintiff if the plaintiff can prove the claim clearly and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. *Bank of Nova Scotia and Simpson (Robert) Eastern v. Dombrowski* (1978), 23 N.S.R. (2d) 523, A.P.R. 532 (C.A.) at 537; *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267, 450 A.P.R. 267 (C.A.) at para 15.

[12] There is no meaningful difference between an "arguable" issue and a "genuine" or "bona fide" issue: see Roscoe J.A. in *United Gulf Developments Ltd. v. Iskandar*, [2004] N.S.J. No. 66, 2004 N.S.C.A. 35 (N.S.C.A.).

[20] It is clear from a reading of Rule 13 and the cases above cited that an onus rests upon the Defendant to bring forth sufficient facts to show that a bona fide defence or issue exists which ought to be tried.

[15] The Nova Scotia Court of Appeal in the decision of **United Gulf Developments Limited v. Iskandar**, 2004 NSCA 35 stated at para 9:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court... Once the moving party has made this showing, the responding must then establish his claim as being one with a real chance of success.

[16] **Milbury v. Nova Scotia (Attorney General)**, [2007] N.S.J. No. 187

18 As stated in **Selig v. Cooks Oil Company Ltd.**, [2005] N.S.J. No. 69, 2005 NSCA 36, there are two distinct parts of the test and they should be dealt with sequentially:

[10] ... First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdles, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

DISCOVERABILITY RULE

[17] Robert Lawrence Borden brings forth claims arising from alleged physical, mental and sexual abuse he says he experienced at the Home for Colored Children from 1966 to 1973 and from 1980 to 1985.

[18] The Home for Coloured Children seeks summary judgment and I have recited the pre-requisites of summary judgment and merely wish to add that such varies from an application to strike in that once the party seeking summary judgment establishes entitlement to the summary judgment here based on the *prima facie* limitations of actions, the opposing party may not rest on mere assertions in that party's pleadings but must present specific facts not in dispute that raise an arguable issue to be tried.

22. The purposes and objectives of limitation periods were set out by La Forest J. in **M.(K.) v. M.(H.)**, [1992] S.C.J. No. 85 ... at paras. 22-24:

- (1) to fix a time when the potential defendant “will not be held to account for ancient obligations”, save where the public interest is served by granting relief to certain classes of defendants;
- (2) to avoid evidentiary concerns associated with long lapses of time, including relieving potential defendants from the obligation of preserving evidence concerning ancient obligations; and
- (3) to serve as an incentive for plaintiffs to bring suits in a timely fashion and not “sleep on their rights”.

25. The Supreme Court of Canada introduced the discoverability principle into Canadian common law in the 1984 decision of **Kamloops v. Nielsen**, [1984] 2 S.C.R. 2... In particular, the Court held that a cause of action for the tort of

negligence would not accrue until the plaintiff had, or out to have, discovered the material facts necessary to support a claim.

26. The Supreme Court of Canada again considered and further refined the discoverability principle in the 1986 decision of **Central Trust Company v. Rafuse**, [1986] 2 S.C.R. 147...

27. In **Peixeiro v. Haberman**, [1997] S.C.J. No. 31..., the Supreme Court of Canada confirmed that the discoverability principle is an aid in determining when a limitation period begins to run and that its overarching purpose is to avoid the injustice of precluding an action before a potential plaintiff becomes aware of the existence of the facts underlying the claim....

28. In **Novak v. Bond**, [1999] 1 S.C.R. 808... the Supreme Court of Canada held that when applying this type of postponement provision, the court must adopt the perspective of a reasonable person who knows the facts that are within the plaintiff's knowledge (or, as will be discussed, within the Plaintiff's presumed knowledge: i.e. that by reasonable diligence the Plaintiff ought to have know) and who has taken the appropriate steps that a reasonable person would take based on those facts.

31. When discoverability is put in issue, a court will determine the commencement date of a limitation period by reference to the earlier of the following two dates: (1) the date on which the plaintiff actually discovered the material facts upon which the action is based; and (2) the date by which the plaintiff, exercising reasonable diligence, could have been expected to discover those facts.

32. As noted above, the discoverability principle suspends the commencement of a limitation period until the plaintiff knew or ought to have known of the material facts to support the claim. The discoverability principle does not suspend the commencement of a limitation period in situations where the plaintiff was not aware that he or she had a claim in law or where the law has changed or is so uncertain that the plaintiff only became aware that he or she had a claim in law. It is the inability to discover the material **facts**, not the law, that may suspend the commencement of a limitation period.

[19] It is the discovery of **facts** and not the discovery of the law that will postpone a limitation period. The defendant must first establish the limitation period and if it *prima facie* applies the plaintiff then has the burden of proving that the cause of action did in fact arise **within** the limitation period as a result of the application of the discoverability principle. In this case the defendants have established that the

statutory limitation period has long-expired and unless the discoverability principle applies the defendants satisfy the first part of the summary judgment test on the facts; therefore, the defendants having met the initial threshold, Borden now has to demonstrate by presenting evidence that the discoverability rule and, more specifically, the application of s. 5 (a) and (b) raise an arguable issue that must be addressed at trial.

[20] The cases that refer to the shift of the onus to Borden is to establish that he comes within the discoverability rule, namely s. 5 (a) and (b) of the *Limitations of Actions Act*, deal with the onus faced by Borden **at trial** where the limitation defence has arisen. That onus does not apply on a summary judgment application where the threshold is very low, namely, Borden need only show that there is an issue that needs to be heard to defeat the application for summary judgment.

[21] **M.(K.) v. M.(H.)**, [1992] 3 S.C.R. 6 as La Forest, J. observed in speaking for the majority at para. 30:

...[T]he only sensible application of the discoverability rule in a case such as this is on that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitation period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes....

[22] In Borden's case the starting point for the application of the discoverability rule is the time when his causes of action arose. It is a question of fact when a cause of action arises and when the limitation period commences. If the facts do not lead to a clear conclusion on an application for summary judgment then the facts constitute genuine issues for trial as it is only at trial that issues such as credibility can properly be addressed. Borden relies on a report from his "expert" Dr. Charles Hayes.

REPORT OF DR. CHARLES HAYES

[23] This report is dated March 4, 2009 and is an exhibit to the affidavit of Michael Dull, an associate lawyer with Borden's counsel, Raymond F. Wagner. The report indicates that Charles J.A. Hayes, Ph.D. operates Hayes Psychological Services and he interviewed Borden on March 17 and 18, 2008, approximately seven years after this action was commenced by Borden. It is to be remembered that on August 14, 2008 Borden's solicitor was advised that an application for summary judgment

was going to be proceeded with and the application was filed on December 10, 2008. Dr. Hayes' report was not made available until days before this application came before me.

[24] Of necessity the report reflects what Borden told Dr. Hayes. Borden made mention of his allegations, many of which if established represent horrific invasions of young boy and young man's privacy, including allegations that when he was approximately 10 years of age, of being sexually molested on occasions by an older female resident, et cetera. It also recites allegations of physical abuse when he was in a foster home in Weymouth and again when he was returned to The Nova Scotia Home For Colored Children on his second admission.

[25] It would appear that Dr. Hayes was engaged by Borden's solicitor and he filed a report both with respect to Borden and another resident of the Home where there is also an outstanding application for summary judgment and it will be dealt with separately. The conclusion of Dr. Hayes I find to be totally without merit and contrary to the undisputed facts, namely, Borden's evidence under oath. In the brief filed on behalf of Borden the conclusion of Dr. Hayes is set out as follows:

The expert evidence of Dr. Charles Hayes opining that even in 2001:

These issues are complex psychologically. At some level he would completely understand that his treatment at the hand of staff and older children was unfair and deleterious to his well being...

...

The nexus between his marginal adjustment to work, interpersonal relationships, his considerable distrust of others, and in his low self-esteem and the experiences at the NSHCC have not been fully realized. For the longest time he blamed himself. His failures were because of inadequacies in himself.

...

The concept that this experiences of being victimized, his powerlessness, and his responses to those conditions of abuse resulted in the common sequelae of abuse is one that I believe he is just now becoming to appreciate.

[26] If Dr. Hayes means that Borden did not have an awareness of the harm done to him resulting from sexual abuse and the discovery of the causal relationship between

the harm and sexual abuse and, further, that Borden was not reasonably capable of commencing a proceeding resulting from the abuse and, in particular the sexual abuse until 2001, then his opinion flies in the face of the factual evidence before me advanced by Borden. This evidence by Borden is given under oath on discovery, under oath in an affidavit and under oath in an answer to interrogatories.

[27] I will give my determination and conclusion **on the evidence** shortly.

[28] The Supreme Court of Canada addressed this situation in **K.L.B. v. British Columbia**, [2003] 2 S.C.R. 403 at paras. 54-57, an event occurring after the filing of the statement of claim cannot begin the running of the limitation period:

54 The appellants argue that their tort actions are not statute-barred because their causes of action were not reasonably discoverable "prior to commencement of these actions". They rely on the trial judge's finding that "[n]one of the plaintiffs had a substantial awareness of the harm and its likely cause prior to commencement of these actions" (para. 140). This finding was based upon the evidence of a psychologist, Dr. Ley, who assessed the appellants after they had commenced their actions and concluded that they lacked a "thorough understanding" of the psychological connection between their past abuse and their current state.

55 This approach to reasonable discoverability is problematic. It rests on evidence that the plaintiffs lacked sufficient awareness of the facts even after they had brought their actions. Since the purpose of the rule of reasonable discoverability is to ensure that plaintiffs have sufficient awareness of the facts to be able to bring an action, the relevant type of awareness cannot be one that it is possible to lack even after one has brought an action. The "thorough understanding" proposed by Dr. Ley -- an understanding not present even after suit was launched -- thus sets the bar too high.

56 All of the appellants were aware of the physical abuse they sustained at the time that it occurred. They may not have been aware of the existence of a governmental duty to exercise reasonable care in making and supervising their placements. They may also not have been immediately aware of the harm that the abuse caused to them or of the causal link between the abuse and the harm. Indeed, in *M. (K.) v. M. (H.)*, supra, La Forest J., writing for the majority, acknowledged that awareness of the connection between harm suffered and a history of childhood abuse is often elusive. However, in 1986, K. and V. consulted with a lawyer about the possibility of receiving compensation from the government for damage suffered while in foster care. The lawyer told them that he thought they had a cause of action, and suggested they consult a lawyer in Victoria who specialized in such claims. V. did not follow up on this advice, perhaps as a result of a sense of powerlessness and

a concern that she was to blame. In 1990, three of the appellants made a complaint to the Ombudsman, who informed the Superintendent that "[a]ll of the complainants are seeking financial compensation for the events which occurred while in the care of the Superintendent". In June of 1991, all of the appellants met with a Ministry representative. With his assistance, they made a formal request for counselling and for a settlement from the government for physical and mental abuse suffered in the Pleasance and Hart homes.

[29] Borden's explanation that he did not commence an action prior to 2001 (paragraph 13 of his affidavit) because he did not think anything could be done flies in the face of the fact that he had a consultation with lawyer Chisholm in 1997 and, in any event, such a statement is far from sufficient to assist in or make a determination that somehow he was incapable of starting a proceeding because of the belief it would not be of any assistance or success. Upon Borden's own evidence he clearly had an awareness by the time he was 20 / 21 years-of-age. He had been wronged and the wrongs done to him he related to the harm done by those wrongs. Some seven years after Borden actually commences proceedings Borden wants to introduce "findings" of Dr. Hayes that he could not be said to be reasonably capable of commencing a proceeding because of his concern and doubts as to its possible success and what Dr. Hayes labels "learned helplessness". There is no doubt that victims of sexual abuse suffer trauma that often has residue effects that last forever including lower self-esteem, et cetera. It can not be said that persons with low self-esteem are, by that factor alone, not reasonably capable of commencing a proceeding. Reluctance, even heightened reluctance, to commence proceedings or as I said explaining the failure to commence proceedings because of concern as to the degree of success do not constitute Borden being "not reasonably capable of commencing a proceeding".... Very few people relish looking forward to the experience of the foreign environment of a courtroom. Reluctance can not be equated with the element of incapacity that is inherent in a person not being reasonably capable of commencing a proceeding. Borden's own evidence is definite enough to conclude the contrary having occurred by 1984 / 1985.

[30] The case that bears some resemblance to the situation here is **MacMillan v. Constellation Life**, [2006] N.S.J. No. 396 (S.C.). The plaintiff brought an action under a disability policy in 2003 alleging that the policy should not have been rescinded in 1985. On an application for summary judgment, the plaintiff's claim was dismissed. In particular, the court stated at para. 26:

Under that circumstance the plaintiff/respondent must now establish a claim having a real chance of success. The plaintiff argues that the limitation period did not run against him since he was of unsound mind for the whole of the period. The burden is on the plaintiff to establish on a preponderance of evidence that he was of unsound mind as claimed.

[31] The plaintiff provided two letters from a psychiatrist that stated that he suffered from schizophrenia and that in his opinion, he did not have the psychological competence or decision making capacity to comply with the limitation period. Although the court was unable to accept the evidence of the psychiatrist in any event (since it was not sworn and he was not made available for cross-examination), the court went on to state that it did not agree that the plaintiff did not have mental capacity to perform the requisite steps called for by the *Limitation of Actions Act* as required under **Bannon v. Thunder Bay**, [2002] S.C.J. No. 18. The plaintiff had pursued another action against another party and on that basis, could not be said to have lacked the capacity to bring legal action.

[32] I take note that the Ontario *Act* specifically refers to “unsound mind”, meaning a lack of mental capacity to meet the requirements of the *Limitations of Actions Act* and that this is a higher threshold than our legislation but, nevertheless, it does deal with capacity and Dr. Hayes’ opinion that Borden may lack the capacity even in 2001 is not factually based.

EVIDENTIARY BASIS ADVANCED BY HOME (AND TRURO AGENCY) IN SUPPORT OF THE SUMMARY JUDGMENT BASED ON *LIMITATIONS OF ACTION ACT*

[33] The evidence advanced is the evidence of Robert Lawrence Borden, given in discovery, in answering interrogatories, plus the affidavit of Robert Lawrence Borden filed in relation to these applications and the affidavit of Michael Dull, one of Borden’s solicitor’s.

1. Evidence Advanced that Borden became aware of the injury or harm resulting from sexual abuse and said to constitute to Borden’s discovery of the causal relationship between the injury and harm and the sexual abuse (See ex. I to the Affidavit of John Kulik, pp. 232-236 of the transcript of the discovery held on June 10, 2008)

Q. Okay. Now, at no time - all the incidents you've described to us when you were at The Home and, indeed, in foster care, all of these incidents, there's never been a time where you've forgotten about them?

A. Well, for a minute maybe, you know...

Q. Yeah.

A. ...for an hour.

Q. But this is not a...

A. There's times.

Q. Yeah. This is not a situation where now you're all of a sudden remembering these things that have happened.

A. No, no, no, no, no, no.

Q. Okay. You've known about this all your life.

A. Yes.

Q. Okay. Is it fair to say that when these incidents were going on you knew that what was being done to you was wrong?

A. Yes.

Q. Okay. (Pause - reviewing notes) When you left The Home, did you ever talk to anybody about your experiences at The Home or your experiences in foster care?

A. Yes.

Q. Who did you first speak to about that and when?

...

A. (Pause) Well, the first time I felt comfortable about speaking to somebody was a lady, an elderly lady. I'd say she was my first.

Q. Okay. Was an elderly lady. And what was her name?

A. Her name was Ann.

...

Q. Okay. So that would have been 1986?

A. Yeah. '86-87.

Q. Okay. And who is Ann? I mean, how did you come to be speaking to her?

...

Q. And what did you tell her?

A. Just about everything.

Q. That you had been at The Home?

A. Jus-, I told her the abuse in my life sometimes overwhelms me.

Q. What was her reaction?

A. Her reaction was she could not believe that that went on, okay (pause) without it - something being done. And she was a nice lady, but you know what, when I told her that it really made me realize that now, you know what I mean, I'm comfortable with speaking to people about th-, and I started speaking to a lot of people.

Q. Okay.

A. Just letting people know what happened in my life and I didn't want - only thing that backfired about that, people started feeling sorry for me and I didn't want that, right? (Long pause) There's a lot of things that I do today that's created from my past, and it's a shame to say. I like to think that I was strong enough to deny that.

Q. Okay. Now, you started speaking to other people. Who else would you have told these things to?

...

A. ... I, I should say Reverend Clayton was probably the first person I told. When I went to Weymouth he was a Principal there, or Vice-Principal there, and me and him had a - sat down and had a talk, and we talked about the abuse in The Home.

Q. In the Nova Scotia Home you're talking about?

A. Yeah.

Q. Okay.

A. When I was first there. This is when I was young in Weymouth.

Q. Okay. (Pause) Did you tell him about what was going on...

A. And, and...

Q. ...with the Brights?

A. Yes.

...

Q. Okay. Did you go to a lawyer and tell a lawyer about this?

A. Well, I went to Ron Chisholm.

2. Evidence advanced indicating Borden is reasonably capable of commencing a proceeding.

Q. Okay. Did you go to a lawyer and tell a lawyer about this?

A. Well, I went to Ron Chisholm.

Q. Okay. That's in 1997.

A. Yes.

Q. Before that, did you ever approach a lawyer?

A. No, I did not.

Q. And why not?

A. I didn't think there would be anything done. I had no reason to believe there would be anything done because I told the right people and they did nothing, so...

3. Evidence advanced that Borden became aware of the injury, or harm resulting, from sexual abuse and discovered the causal relationship between the injury or harm and the sexual abuse.

Q. What problems do you have in your life now or throughout since the time you left The Home do you relate to the period that you were in The Home or in foster care?

A. (Pause) Well, my problems with my relationships, definitely.

Q. Okay. That's relationships with women?

A. Yes.

Q. Okay.

A. I have a problem with authority (pause) for my lack of respect of authority because of this.

Q. Okay. And?

...

Q. Anything?

A. My ongoing violence. This...

Q. Violence, okay. What else?

A. (Pause) Probably my self-esteem.

Q. (Pause - writing notes) Okay. When did you, in your mind, first relate what had happened to you at The Home and in foster care to problems you had with your relationships?

A. (Long pause) I'd say when Shauna - not even Shauna. When Justine (pause) stood up in my face and she grabbed me by the back of my head. She was mad at something and (pause) when I hit her I did not see her, I saw Carmen Desmond. And that's when I knew that I was going to have an issue. So I pulled myself away from her totally altogether.

Q. Okay. And when was this?

A. This was, like, I was still in The Home then.

Q. Oh. (Pause - writing notes) Okay.

A. I wasn't actually hitting Justine. To me, I was hitting Carmen, and (pause)...

Q. Okay. So you made that...

A. I...

Q. ...connection when you were still in The Home.

A. Yes.

Q. That would have been between what ages, when you were 18 or 19 or something?

A. I was 19, I think. I was 19.

4. Evidence advanced that Borden became aware of the injury, or harm resulting, from sexual abuse and discovered the causal relationship between the injury or harm and the sexual abuse.

Q. Okay. When did you first connect your problem with authority with the times you've spent at The Home and in foster care? When did you first put those two together?

A. (Pause) I didn't think I had a problem with authority 'til (pause) a police officer grabbed me, downtown Halifax (long pause), threw me up against the wall. And I just hit him once, but everybody was telling me I was calling him "Alfie", right, so I obviously blacked out when I - when that happened. But he was yelling at me.

...

Q. Okay.

A. I had a problem with authority when my boss at Department of National Defence, his name was Billy...

Q. First of all, before you tell me about this incident, the police incident, when did that take place?

A. I was 20 years old.

Q. You were 20. Okay. Go ahead about...

A. 20, 21.

Q. You were 21. And you weren't charged with striking the officer?

A. No. Apparently I left, I guess.

5. Evidence advanced that Borden became aware of the injury, or harm resulting, from sexual abuse and discovered the causal relationship between the injury or harm and the sexual abuse.

Q. Okay. So your employer - I'm sorry. I didn't mean to interrupt you.

A. My employer down at Department of National Defence came in the room in front of a bunch of people and started yelling at me and (pause) I guess apparently I threatened him, told him I was going to do things to him. And when I got called in the office, I explained to him what happened to me, that I couldn't accept - because when that happens I don't look at people. I just close my eyes and that's all I, all I see and hear is his voice. I knew I was having a problem with that. I used to try and tell people, employer - employers, you know, if they wanted to discipline me, you know, that they

could do it in a manner where it doesn't consist of yelling and confrontation. I'd never tell them why. I just tell them, "I have a problem with that". And, like, I knew myself I has a pro-, I just tried to deal with it my, my own way.

...

A. Okay, I see what you mean. It's like (pause) - for me to say when I realized this (pause) - when I get asked is when I realize. If I get asked a question, when you ask me a question, you know, "Why did you do this?" or, "Why did you grab her? Why did you hit" - you know, I do understand that it's because of my past that I'm doing this...

6. Evidence that Borden was reasonably capable of commencing a proceeding.

A. When (pause) - you get lawyers talk to you or friends that talk to you. I have a friends that's Denise Colstring(Sp), okay?

Q. Okay, what about Denise?

A. She's a very good friend that helped me realize that a lot of my issues were from my past.

Q. When did you meet Denise and how long have you...

A. I met Denise through, throughout school. We just became real close friends afterwards. After I left The Home.

...

Q. Mmm hmm. When did you start talking about that?

A. With Denise?

Q. Yeah.

A. (Pause) It was probably the year I moved out. She lived not far from where I lived, right...

...

Q. Did she explain to you that, “Look, some of the things you’re doing now are related to what happened to you in the past”?

A. She explained to me, stop blaming myself, that I wasn’t a bad person, this and that, you know. Like, tried to tell me not to let my past rule me, alright?

Q. Okay.

A. And at first my response was, I wanted to say, “My past doesn’t”, okay. And then she’s talking and she’s explaining of herself and her past. It’s making me realize that, “Okay, maybe she’s right”. But she always wanted me to see, like - I was very, I had a very low s-, self-esteem, even in The Home. You know, you got some staff that call you stupid or ugly or this and that, or whatever, but it was more or less (pause), “Why’d this happen to me?”

Q. Mmm hmm.

A. For the longest time I thought it was my fault, but (pause) I realize now it’s not.

Q. And Denise helped you make that...

A. Denise helped me a lot, yeah.

7. The evidence of Borden being reasonably capable of commencing a proceeding. Paragraph 11 of the affidavit of Robert Lawrence Borden filed March 6, 2009, states the following:

11. After coming to terms with this causation realization, I promptly contacted a lawyer named Ron Chisholm in Truro. I met with him in 1997.

8. The evidence of Borden was reasonably capable of commencing a proceeding is the fact that Robert Lawrence Borden commenced an action against the Attorney General of Nova Scotia and the Nova Scotia Home for Colored Children, Hfx. No. 168101, present action initially by issuing the originating notice of action the 1st of March, 2001, with a statement of claim which contained considerable detailed allegations, the ability to instruct a solicitor no later than the 1st of March, 2001, to

commence this proceeding is evidence amounting almost to estoppel as to the prerequisite of s. 2.5.

9. I take note but attach no weight to Borden's advice to Dr. Hayes that he had familiarity with the law through a settlement from a motor vehicle accident, probably in 1999. It is hard to read Dr. Hayes report as to whether or not there was one or more than one settlement, what event it covered, whether or not lawyers were involved, et cetera.

[34] The Truro Agency incorporates the foregoing in support of its application for summary judgment and the Truro Agency references Borden's interest in martial arts which started growing up in the Home. It was also noted that in the report of Dr. Hayes recites at p. 9 the following:

He tried operating his own business offering cleaning and building maintenance services. There is insufficient work to maintain the business.

[35] There is a difficulty in placing his operating a business in a specific time frame it is clear that he has been working as a bouncer for the past three years in Moncton and apparently worked as a shipping clerk for about a year prior to that so the best you can say with any degree of certainty is that operating his own business was something over four years ago but not only is the time frame difficult to pin down the duration he operated his own business is not indicated anywhere in the evidence. Operating the business may have been, and likely was, after his employment with the Department of National Defence when he was 20 or 21 years of age.

[36] The Home issued interrogatories on the 16th day of August, 2005 and Borden's answer to interrogatories under oath is dated the 16th day of October, 2006. Interrogatory 2 and part of the answer is as follows:

<p>2. When did you first become aware of the damages referred to in Interrogatory No. 1 and when did you discover the causal relationship between these damages and the conduct alleged in the Statement of Claim?</p>
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2. As to Interrogatory number 2:

I believe I first became aware of the damages approximately nine years ago. At that time I had tried marriage and had tried to function in a normal

relationship. My marriage was breaking down and I realized that it was partially because of my experiences at the NSHCC and in foster care.

[37] Interrogatory 7 and Borden's sworn answer are as follows:

7. Please provide the first date upon which you contacted a lawyer to discuss compensation for the conduct as alleged in the Statement of Claim.
--

7. As to Interrogatory number 7:

The first lawyer that I contacted about compensation was Truro lawyer, Ron Chisholm. I am advised by Fiona Imrie of Wagner & Associates that my file shows April 24, 1997 as the date that Ron Chisholm opened a file for me.

[38] In the affidavit of Robert Lawrence Borden filed on March 6th, 2009 states:

After coming to terms with this causation realization, I promptly contacted a lawyer named Ron Chisholm in Truro, I met with him in 1997.

[39] Discovery evidence advanced by Truro Agency given by Borden Jun 10th, 2008. Borden's evidence here is clear that in the discussions he started **when he turned 19 years-of-age it was suggested to him that he see a lawyer**. Denise would, in his words, throw those things at him and he would respond "what can they do?" to which she would respond something along the lines of "bring these people to justice". Denise even suggested that he also go to the police.

[40] The affidavit of S. Raymond Morse, Q.C. sworn on the 31st of December 2008 contains extracts of Borden's discovery evidence given June 10, 2008.

1922 Q. No. (Pause - reviewing notes) When you turned 19 and you had the conversation with Mr. Kulik about starting to talk about what had happened to you, your experiences at The Home, with other individuals, okay?

A. Yes.

1923 Q. When you had those kinds of discussions do you recall on any occasion whether anyone that you had those discussions with ever suggested to you, "Look, why don't you see a lawyer or talk to a lawyer about it"?

A. Yes.

1924. Q. Did anybody ever make that kind of suggestion to you?

A. Yes.

1925. Q. And do you recall who would have made that suggestion and when they would have made it?

A. Yeah.

1926. Q. Can you tell me about that?

A. Well, like I said, when I spoke to Denise, right, she would tel-, she would throw those things at me.

1927 Q. Mmm hmm.

A. And of course my response is, "What can they do?" And her response is, you know, bring these people to justice because what happened to me was wrong. I said, "Well, I know it was wrong. I've told my social worker. I - you know I told the staff, you know. Kile who else do I tell?" "You go to the police".

If you go to the police - and at that time me and the police didn't get along anyway, but like I said, if I - I just didn't think there was anything anybody could do, right?

1928 Q. Okay. And just help refresh my memory again. What time frame are we talking about for these conversations...

A. I was...

1929 Q. ...with Denise?

A. ...21, 22. Like, we were friends for life, me and her...

[41] Mr. Wagner in his very forceful argument hammered away at his view that the evidence as to when s. 5(a) and (b) applied was far from clear. Mr. Wagner maintained that the conversations with Denise contained no detailed specifics and that these conversations had not been established in any particular time frame; however, the foregoing and, in particular questions 1928 and 1929, and the answers given by

Borden, establish the contrary. Mr. Wagner indicated that Borden attended upon the solicitor Ron Chisholm in 1997 at the request of Mr. Chisholm who apparently at that time was representing one or more other persons who had been a resident of the Home and that Borden's evidence such as in para 10 of his affidavit referred to 1997 as him being unstable and when he came to realize trauma on a daily basis for the first time.

I permitted Mr. Wagner to make reference to additional discovery evidence and the additional discovery evidence confirmed that Borden at the time experienced difficulties in his marriage to Tammy, that they saw a marriage counsellor twice and this would have been in the late 1990's. Borden also made reference to the lawyer, Ron Chisholm, stating that he did not go to see anybody, but that it was brought to his attention that they wanted to know from what they had heard that it happened to me if it actually happened to me, and that is the context he puts at that point at his attendance on Mr. Chisholm.

[42] Mr. Wagner says that there is far too much imprecision. No substantiation and there are ambiguities. Wagner said that Borden always knew that he had been wronged and Wagner says that addressed only the aspect of the conduct being wrong and did not communicate any awareness and that Borden continued to blame himself et cetera, et cetera.

[43] The trial onus of proof on a balance of probabilities does not apply on a summary judgment application with respect to the onus upon Borden. The time frame for when the limitation clock begins to toll, does not have to be established by precision and, specifically by a particular date. It is sufficient if the evidence of the time frame, for example year "X", is an arguable issue. Conversely, if the year "X" is clearly established as meeting the prerequisites of s. 5(a) and (b) of the *Limitation of Actions Act*, and the limitation period expired prior to 2001, then the limitation defence applies.

CONCLUSION

[44] Borden's evidence indicates that he knew at all times that the abuse he suffered was wrong. Clearly he knew at the age of majority on July 14, 1983 that he had been wronged and the cause of the harm done to him.

[45] In 1986 / 1987 he met an elderly lady (Ann, a total stranger) and told her "just about everything". He told her that the abuse sometimes overwhelms him and

speaking to her made him realize in that time frame that he was comfortable speaking to people and, indeed, he stated “I started speaking to a lot of people”. When you can unburden yourself to a stranger of the most intimate details of the abuse, this tends to indicate that you are a person capable of commencing a proceeding.

[46] He spoke to Reverend Clayton when he was young in Weymouth and told him what was going on.

[47] Borden saw Ronald Chisholm, a lawyer, in 1997.

[48] Borden’s own evidence of the awareness of the injury or harm resulting from sexual abuse and its causal relationship was referenced by him when he had an altercation with a police officer in downtown Halifax. Borden confirmed that this incident with the police officer occurred when he was 20 years-of-age which would have been in 1984 or 1985.

[49] Problems with authority at employment with Department of National Defence. No specific time related.

[50] Conversation with Denise Colstring. He described Denise as a friend who helped him realize a lot of his issues from his past. He knew Denise when he was in the school and became very close friends after he left the home. These conversations with Denise commenced in 1986 just after he moved out of the Home constitute urging by his friend to pursue justice which again tends one to the conclusion that he was at that time reasonably capable of commencing a proceeding.

LAWYER RONALD CHISHOLM

[51] In his affidavit, Borden swore:

11. After coming to terms with this causation realization, I promptly contacted a lawyer named Ron Chisholm in Truro. I met with him in 1997.

[52] Borden commences this action on March 1, 2001 with a statement of claim containing considerable detailed allegations.

[53] Answer to interrogatory number two clearly establishes in his words “I believe I first became aware of the damages approximately nine years ago, this would have put it in the time frame of 1997.

RESULT

[54] The evidence before me clearly establishes Borden became aware of the injury and harm resulting from the alleged sexual abuse and discovered the causal relationship between his injury and harm and the sexual abuse within a short period of time after attaining majority, namely, 1984/1985.

[55] If it were not for s. 5(b) of the *Limitation of Actions Act*, my conclusion clearly would be that Borden’s cause of action for sexual abuse was extinguished no later than 1991/1992. Section 5 takes special note of the psychological damage that often flows from sexual abuse. It adds the dimension that before s. 5(a) of the *Limitations of Actions Act* can be applied the Court must be satisfied that Borden was not **reasonably capable** of commencing a proceeding because of his physical, mental or psychological condition resulting from the alleged sexual abuse and only when the Court was satisfied that he was reasonably capable of commencing such a proceeding does the limitation clock begin. On the evidence before me I have no difficulty concluding that he was reasonably capable of commencing a proceeding as early as 1985 / 1986.

[56] The 1997 attendance on solicitor Ron Chisholm given the background evidence means clearly means the limitation period of one year for the assault cause of action prevails. Similarly, I am satisfied that the six year limitation period as relates to the cause of action for negligence applies. There being no arguable issue that clearly as 1985/1986 Borden had a substantial degree of awareness if not complete awareness of what had transpired against him was wrong and the harm he suffered was directly caused by such wrongful conduct. His conversations with Ann and Denise clearly indicate acknowledgement of entitlement to pursue those who had wronged him. I conclude the limitation period as relates to the cause of action of negligence prevails.

[57] The accumulative effect of the direct evidence from Borden clearly indicates that in 1985 / 1986 he was reasonably capable of commencing a proceeding. The prerequisites of s. 5 of the *Limitation of Actions Act* by then clearly existed.

POSITION OF THE TRURO AGENCY

[58] Borden was a ward of the Truro Agency from 1966 to August 27, 1974. My conclusion with respect to the Home equally applies to the agency and the causes of actions advance against the Truro Agency for assault, sexual assault and negligence are statute barred. With respect to the cause of action for breach of fiduciary duty on the part of the Truro Agency, Mr. Borden's discovery evidence indicated that he could not recall details of any contact between himself and the Truro Agency and that he had no knowledge of what role, if any, the Truro Agency would play with respect to the performance assessments for the Home staff and he had no knowledge as to whether or not any representatives of the Truro Agency had any knowledge or understanding of the incidents that he alleges while a resident at the Home.

[59] Borden's pleadings lack basic factual foundation and there is, I conclude, an absence of evidence supporting or justifying a continuation of a cause of action alleging breach of fiduciary duty on the part of the Truro Agency. Little, if any, opposition was presented in the application to oppose the removal of the Truro Agency from this action. In any event, in the final result the Truro Agency is entitled to summary judgment which dismisses all of Borden's alleged causes of action against it.

FINAL RESULT

[60] All causes of action against the Truro Agency are dismissed by summary judgment and all causes of action against the Home, save and except the allegation of a breach of fiduciary duty, are statute barred.

COSTS

[61] Counsel are always entitled to be heard on costs. My preliminary view is that success in relation to Borden and the Home is somewhat divided and with respect to the Truro Agency, it brings to an end the action against the Agency.

[62] Counsel are entitled to reach agreement on costs and disbursements.