SUPREME COURT OF NOVA SCOTIA

Citation: Nichol v. Royal Canadian Legion, Branch 138 Ashby, 2011 NSSC 11

Date: 20110111
Docket: Syd. No. 284735
Registry: Sydney

Between:

Henry Nichol

Plaintiff

v.

Royal Canadian Legion, Branch 138 Ashby

Defendant

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	January 5, 2011, in Sydney, Nova Scotia
Written Decision:	January 11, 2011
Counsel:	Alan Stanwick, for the plaintiff Christopher Conohan, for the defendant

By the Court (Orally):

INTRODUCTION

[1] This matter is scheduled for four days of trial commencing on February 8, 2011. In a Statement of Claim originally filed on August 23, 2007 and subsequently amended on February 7, 2008, the Plaintiff Henry Nichol commenced an action against the Defendant Legion, alleging certain officers or members made defamatory or slanderous comments about him. The action is defended, the Legion asserting that any statements made were not defamatory, and several defences are raised.

[2] This matter is not the first proceeding involving these parties. Mr. Nichol, until August of 2003, had been employed by the Legion as a bartender. It is not contested that his employment was in excess of 11 years, and that he was terminated, without notice on August 29, 2003. Mr. Nichol filed a complaint with the Labour Standards Tribunal, alleging his termination was wrongful, and a hearing was held over several days in the fall of 2005. In a decision released February 10, 2006, the Tribunal determined that Mr. Nichol was wrongfully dismissed from his employment.

[3] It is the effect of the Labour Standards Tribunal's decision that this Court is being asked to consider by both parties in this pre-trial motion. Both are raising the doctrine of ***res judicata***, and assert that it should be applied to the matter before the Court.

POSITION OF THE PARTIES

[4] Although first raised by the Plaintiff Nichol in his original trial memorandum, the Defendant has put forward its own position with respect to the applicability of ***res judicata*** in the present case. As the Defendant's argument, if accepted, would effectively end the proceedings, it may be prudent to consider it first. The Defendant asserts that the Plaintiff Nichol should be precluded from bringing his present action due to the matter being previously addressed by the Labour Standards Tribunal. The Plaintiff Nichol on the other hand, takes a narrower approach, asserting that the finding of the Tribunal should not be reconsidered by this Court, and that the Defendant should be precluded from calling evidence relating to the issue already determined by that body. Not surprisingly, each party disagrees with the position put forward by the other.

THE LAW

[5] Notwithstanding their differing positions, both parties have cited and relied essentially on the same legal authority regarding the nature and availability of ***res judicata***. Both have in their written and oral submissions relied extensively on the recent decision of Beveridge, J.A. in ***Kameka v. Williams***, 2009 NSCA 107. I agree with Counsel that the decision is the leading authority in this province relating to ***res judicata*** and its application, and that Beveridge, J.A.'s review of the doctrine is thorough. Although Counsel are obviously well versed in that particular decision, I found paragraphs 12 through 15 particularly helpful in considering the matter before me. His Lordship writes:

> [12] The respondent is correct to acknowledge the significance of the doctrine of *res judicata*. It is a common law principle dating back hundreds of years. As G. Spencer Bower observed in his original text, *The Doctrine of Res judicata* (London: Butterworth & Co., 1924) at 218 et seq, it is a doctrine that, if not founded upon Roman law, is fortified and illustrated by it. The doctrine's longstanding existence was commented on by Binnie J., in giving the judgment of the court in, *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44:
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> > [20] The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per *rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister*

> *of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): *G. S. Holmested and G. D. Watson*, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21 § 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

[13] Detailed statements can be found of the constituent elements necessary to establish that the doctrine of *res judicata* is applicable (see for example George Spencer Bower and Sir Alexander Turner, *The Doctrine of Res judicata*, 2nd ed. (London: Butterworths, 1969) at para. 19). These were compressed by the Alberta Court of Appeal in *420093 B.C. Ltd. v. Bank of Montreal*, [1995] A.J. No. 862 where O'Leary J.A. wrote:

> [18] A prior judicial decision will not raise an estoppel by *res judicata*, either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and the subject matter; (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.

[14] Once a *res judicata* has been established, its effects must be considered. Where there have been previous proceedings between the parties or their privies, it is open to either or both of the litigants to claim that any subsequent proceedings are governed in whole or in part by the decision from the previous proceeding. Every judicial decision that meets the criteria of *res judicata* operates both as an estoppel, preventing any party from disputing matters already determined, and as a merger. In the latter case, no further claim may be brought upon the same cause of action (*G. Spencer Bower and Turner, ibid*., at para. 2-4). This is sometimes referred to as cause of action estoppel (see *Thoday v. Thoday*, [1964] 1 All E.R. 341 per Diplock L.J. at p. 352).

[15] The distinction between a *res judicata* and its effects is well explained in *Phipson on Evidence*, 14th ed. as follows (pp. 862-3):

> There is a distinction to be drawn between a *res judicata* and its effects. A judgment which fulfils the criteria set out above is properly called a *res judicata*, but it operates both positively and negatively. First, it prevents the successful party from bringing a fresh suit on the same cause of action. This is the doctrine of merger, whereby the plaintiff's cause of action is transmuted into the judgment he obtains. Secondly, it debars the unsuccessful party from challenging the correctness of that decision, in subsequent proceedings. This is a true estoppel, estoppel per *rem judicatam*. Unfortunately the term "cause of action estoppel" is sometimes applied to both these different aspects of judgment. It would be more satisfactory if it were reserved for the second type of effect that a *res judicata* may have. As some of the cases mentioned in this chapter show, the terminological confusion has caused confused substantive results. Moreover, the development of "issue estoppel" can be understood only if it is seen as an aspect of cause of action estoppel used in this second sense.

> In practice, there is now no difference analytically between issue estoppel and cause of action estoppel used in the sense mentioned here. It is only the relative importance of the issue to which the estoppel relates which determines its proper title. For obvious reasons, the development of the law of estoppel has not been paralleled by a similar extension of the law of merger, and it is convenient to deal with merger before turning to the much larger body of authority dealing with estoppel.
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> Where a suit is brought upon a particular cause of action, judgment in favour of the claimant extinguishes all rights arising from that cause of action: transit in *rem judicatam*—the claimant's rights all flow from the judgment in substitution for the rights flowing from the cause of action. The parties are by this rule, in general, estopped as to their whole case, and will not be permitted to reopen the same subject-matter of litigation merely because they have from negligence, inadvertence, or even accident, omitted a part of their case. For this reason, the principle is also sometimes referred to as the doctrine of former recovery. Its rationale is that if an issue could and should have been raised in particular litigation, it is vexatious, having let it go by, to seek to raise it in subsequent proceedings. Thus plaintiffs may not split their cause of action; nor their relief, nor set up facts which were available for them under any of the issues tried in the former action.

[6] Based on the above, it is clear that the Defendant is advancing cause of action estoppel, with the Plaintiff Nichol relying on the narrower issue estoppel.

DETERMINATION

[7] Is the Plaintiff precluded from bringing forward the present action on the basis of the doctrine of ***res judicata***, and in particular, cause of action estoppel?

[8] In asserting that the Court should answer the above in the affirmative, the Defendant Legion has relied heavily on the finding of the Court of Appeal in ***Kameka, supra***, as well as a more recent decision of Bryson, J. (as he then was) in ***Faulds v. O'Connor***, 2010 NSSC 55. As Counsel are well aware, the Court in ***Kameka*** determined that a plaintiff involved in a motor vehicle accident who had his property damages determined in the Small Claims Court, was precluded from bringing an action for his personal injuries in the Supreme Court. The Court determined that cause of action estoppel applied in those circumstances, and that the two actions were the same, and thus merged. In ***Faulds, supra***, the existence of a prior subrogated claim in relation to the same motor vehicle accident, served to evoke the doctrine of ***res judicata***, thus barring a plaintiff from advancing a Section D claim.

[9] I turn now to consider whether the Defendant has established the constituent elements to determine that ***res judicata***, on the basis of cause of action estoppel, is appropriate. Applying the three elements expressed in ***420093 B.C. Ltd, supra***, I cannot find that the Defendant has met its burden. Although I am satisfied that two elements, namely that the Tribunal decision was final and within its jurisdictional competency, and secondly, involved the same parties, I cannot agree with the Defendant that the decision was, or involved, a determination of the same cause of action as now being advanced before the Court.

[10] It is clear that the causes of action advanced before the Labour Standards Tribunal and this Court are not only distinct, but unlike the factual context in ***Kameka*** and ***Faulds***, involve the consideration of actions taken during different time frames. The Tribunal heard and determined a matter alleging the breach of an employment contract. The Court is being asked to hear and determine a matter relating to the tort of defamation. Although there is some contextual overlap in the facts giving rise to the respective causes of action, it is clear that the Tribunal was primarily concerned with the actions of the parties leading up to the termination of the Plaintiff Nichol in August of 2003, and specifically, whether the evidence established cause for the termination. As is clear from the Amended Statement of

Claim in the matter before the Court, the Plaintiff Nichol alleges that he was defamed due to statements made after his employment terminated. As such, the causes of action, being different, cannot merge.

[11] Turning now to the second argument, the Plaintiff Nichol's assertion that issue estoppel should apply to the present matter. Quoting from the Plaintiff's written submissions, he frames this issue as follows:

> Does the doctrine of ***res judicata*** preclude the Defendant from re-litigating the issue as to whether the Plaintiff was guilty of fraudulent, willful misconduct that justified his dismissal with cause on August 29, 2003?

[12] In answering the above, I turn to the same three constituent elements as referenced earlier. Obviously the same two elements which the Court determined where met for the purpose of considering cause of action estoppel, are met for the consideration of issue estoppel. The remaining consideration is whether the Tribunal decision involved a determination of an issue which is also advanced in the present litigation. The Plaintiff asserts that the determination made by the Tribunal whether the Plaintiff had conducted himself in a fraudulent fashion or undertook willful misconduct, is an issue which is necessarily before this court in the defamation action. As the truth of a statement is a defence to a claim of

defamation, the Tribunal's determination that he was neither fraudulent nor undertook willful misconduct is an essential issue in the present litigation.

[13] As is clear from the pleadings, the Plaintiff asserts that two written statements had been made by the Defendant, to HRDC and a third party insurer, alleging fraudulent and/or willful misconduct on his part. Whether the Plaintiff Nichol was fraudulent or willful are factual determinations which have already been made, having been a major focus of the Tribunal hearing. I am satisfied that the third constituent element has been met.

[14] However, the analysis does not end at that point. Having established ***res judicata***, the Court must now consider whether it is appropriate to apply the doctrine to the defamation action. How the Court should approach this task, relating in particular to issue estoppel, is best described by Binnie, J., who in ***Danyluk, supra***, outlined seven factors which a court may weigh in considering whether to apply the doctrine. The facts of ***Danyluk, supra***, bear some similarity to the present matter, in that it also involved a civil action following the determination of a labour tribunal relating to an employee dismissal. After

weighing the factors, the Court declined to apply issue estoppel, notwithstanding the presence of the required constituent elements.

[15] Two of the factors considered by Binnie, J. resonate with the Court in this matter. The first deals with a consideration of the purpose and scope of the administrative tribunal itself. He writes at paragraph 73:

> Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

[16] The second, and weightiest factor, involves a consideration of the potential injustice which may occur if issue estoppel is applied. Binnie, J. writes at paragraph 80:

> As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenburg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson, J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

[17] In the present case, the Court is concerned with the scope of the estoppel being sought by the Plaintiff Nichol. Relying on the Tribunal's earlier determination that the Plaintiff did not act fraudulently nor was willful in his misconduct, he is attempting to preclude, or at least limit the scope of testimony from several defence witnesses.

[18] The purpose of the Tribunal hearing was to determine whether the Plaintiff was wrongfully dismissed. I accept, that as part of that mandate, the Tribunal was able to, and ultimately did, assess the nature of Mr. Nichol's conduct - in particular, whether it was fraudulent or willful. It was not however, within the Tribunal's mandate to examine or assess whether the statements made by the Defendant where defamatory as defined by law, and if so, whether defences, such as justification or qualified privilege, may apply.

[19] Further, as the claim of defamation was not raised until August of 2007, approximately a year and a half following the Tribunal's determination, it is highly

unlikely that evidence relating to the issue of defamation or the possible defences were in the minds of the parties when considering the nature of the evidence to be called at the administrative hearing. Certainly the two documents in question were known to the parties and Tribunal, but given that body had no authority to legally determine the issue of defamation, the nuance of how that evidence was presented and considered may be radically different than in a defamation action.

[20] In his pleadings, the Plaintiff is alleging that the Defendant acted in a malicious fashion in making the allegedly defamatory statements. Paragraph 17 of the Amended Statement of Claim reads:

> That the Plaintiff states that the defamatory and/or slanderous statements made by the Defendant were vindictive and malicious and caused damage to his reputation, mental and emotional anguish and distress.

[21] Too narrow an application of issue estoppel, one which would prevent the Defendant from responding to the allegations plead as to its motivation, or from fully advancing the defences plead, would produce an injustice in my view. The Defendant is entitled to call evidence which relates to the allegations of malice, as well as to the defences plead, including from individuals who may have testified previously before the Tribunal.

[22] The above being said, I do also view it as being appropriate to apply issue estoppel in a narrower manner. I am satisfied that the Tribunal made a clear determination that Mr. Nichol was not only wrongfully dismissed, but that his conduct had not been fraudulent nor willful. There will be no evidence adduced at trial, the purpose of which is to refute those findings. This Court will not become involved in a re-assessment of those findings. As the trial unfolds, should Counsel have concerns regarding whether evidence being advanced is not in compliance with the Court's direction, such can be raised by way of objection. The Court would encourage the parties however, to take a more pro-active approach by discussing in advance the nature of the evidence to be adduced, and in particular, its purpose. This may prevent unnecessary objections if the parties have had the opportunity to discuss these concerns in advance of trial.

[23] Given the circumstances, costs will be in the cause.

J.