SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Attorney General) v. Mattatall, 2013 NSSC 184

Date: 20130228
Docket: Hfx No. 216653
Registry: Halifax

Between:

The Attorney General of Nova Scotia

Plaintiff

v.

Scott David Mattatall and Pembridge Insurance Company of Canada

Defendants

Judge: The Honourable Justice John D. Murphy

Heard: December 20, 2012

Written Decision: June 14, 2013
[oral decision rendered February 28, 2013]

Counsel: Michael T. Pugsley and Ryan Brothers, for the plaintiff

James L. Chipman, Q.C. and Shannon McEvenue (A/C), for the defendants

By the Court:

BACKGROUND

[1] This motion was brought by the Plaintiff (who will sometimes be referred to as "the Crown"). The litigation arises from a motor vehicle accident which

happened in 2002, when the Defendant, Mr. Mattatall, collided with the Murdock Bridge which was owned and maintained by the Crown. The Plaintiff alleges that the impact caused a constructive bridge failure and seeks damages for the loss. The amount in issue after deferred maintenance and betterment adjustment, as indicated in one of the expert reports, is $161,000 approximately. There is no counterclaim. The Defendants elected trial by judge and jury, and trial is scheduled for seven or eight days in September of 2013.

[2] The Plaintiff takes the position that Her Majesty the Queen is not subject to trial by jury on the basis of Crown immunity, and alternatively, maintains in this case the issues are too complex for a jury trial. The Plaintiff has brought this motion to strike the jury notice pursuant to *Civil Procedure Rule 52*.

ISSUES

[3] There are two issues. First, does the Plaintiff, the Crown, have immunity from a jury trial? And secondly, is the matter too complex to be determined by a jury, if the Crown does not have immunity?

ANALYSIS - CROWN IMMUNITY

[4] On the first issue, whether the Plaintiff has immunity from a jury trial, the Crown maintains that it has an absolute immunity from jury trials, whether the Crown is plaintiff or defendant. The Plaintiff says that such immunity arises both under the *Proceedings Against the Crown Act*, R.S.N.S. 1989, C.360, (which I may refer to as "the *Act")*, and also under a long-standing common law and statutorily-enshrined principle that legislation does not apply to the Crown's prejudice unless it is specifically so stated.

[5] Dealing first with the *Act*, the relevant section most at issue here is s.14 which says:

> In proceedings against the Crown the trial shall be without a jury.

[6] The wording is "against the Crown." There is no question that under that legislation in Nova Scotia, there is not a jury trial in a civil claim where the Crown is a defendant. If the Crown is a defendant by counterclaim or interpleader or there is claim by way of setoff, under s.2(f) of the Act trial by jury is also precluded.

[7] The Crown maintains that s.14 of the *Act* should be construed as meaning that there cannot be a jury trial even if the Crown is Plaintiff. As I understand the Crown's argument, it is that the word "against" in s.14 should be construed as if it said 'involving', and that the section applies to litigation if the Crown is in an adversarial relationship, whether as plaintiff or as defendant.

[8] On that point, I respectfully disagree with the Crown. Proceedings against the Crown are defined in s.2(f) of the *Act*, and I have referred to the general wording of the *Act*. In my view, if the legislature had intended the interpretation the Crown suggests, it would have said so in s.14 or provided a different, broader definition in s.2(f).

[9] I am not aware of any authority supporting the Plaintiff's position that "against the Crown" should be construed as 'involving the Crown', or as "applicable to any situation where the crown is in an adversarial relationship." I refer to **Rizzo and Rizzo Shoes Ltd. (Re)**, [1998] 1 S.C.R. 27, which directs that words are to be read in the entire context, their grammatical and ordinary sense, harmoniously with the subject and object of the Act. In this case, the Act is entitled "An Act Respecting Proceedings Against the Crown" and there is no indication in other sections of the Act that the provisions are expected to be construed in a reciprocal fashion. For example, the injunction provision in s.16(2) is a one-way provision dealing with injunctions only against the Crown.

[10] The Crown maintains that its position in the pleading should not govern whether it is subject to a jury trial, and that it would be inconsistent to allow a jury trial where the Crown is on one side and not the other. I acknowledge that does lead to an inconsistency, but that is the situation that the legislation has established and there is no basis for me to interpret it otherwise.

[11] The Crown in its brief at pages 4 to 7 refers to a number of cases in which a *Crown Proceedings Act*, either the Nova Scotia statute or similar legislation, has been construed. In my view, they are distinguishable on the basis that in all of those cases the Crown's position was either as a defendant or akin to a defendant, and not as a plaintiff.

[12] The Plaintiff raised other points in the context of the *Act*. The Crown says, for example, there should not be a jury trial involving the Crown because there

cannot be a jury of peers of the Crown. I agree the Crown does not have peers, but we do have jury trials involving parties which are not peers to the jurors - for example, large corporate entities such as banks and insurance companies. There is no doctrine of deep pockets which affects whether a party can be subject to a jury trial.

[13] The Crown also raises issues of possible bias against the Crown by jurors. Any suggestion that taxpayers might have difficulties with the Crown's position is overwhelmed by the presumption that jurors are people who are impartial and unbiased. It is a very different context, I acknowledge, but we do have jurors in criminal cases and there is no suggestion in those cases that the Crown's being a party generates any bias.

[14] If there is a concern in principle or in policy about citizens in their role as jurors criticizing the sovereign, in my view that does not apply to the same extent where the Crown is a claimant. The Plaintiff is not being accused of improper conduct in this case, and citizens are not being asked to assess Crown behaviour, as it is a plaintiff and there is no counterclaim.

[15] For those reasons, it is my view that the ordinary meaning of s.14 of the *Act* should be followed, that its effect is limited to situations where the proceeding is brought against the Crown, that it does not apply in this case, and there is no historical background to suggest that it should. I shall say more about historical background later, but I will move on at this stage to the second aspect of the Crown immunity issue, and that is whether the Motion to Strike the Jury Notice can succeed because the Crown is otherwise immune from a jury trial, outside the parameters of the *Act*.

[16] The Plaintiff says that the legislation which provides for jury trials, the *Judicature Act*, R.S.N.S. 1989, c.240, and the *Juries Act*, Statutes N.S. 1998, c.16, are not applicable to the Crown. The Plaintiff also maintains that provisions with respect to jury in the *Civil Procedure Rules* are not applicable to the Crown under the established principle that legislation does not apply to the Crown unless the Crown is expressly bound.

[17] I recognize that s.14 of the *Interpretation Act*, R.S.N.S. 1989, c.235, enshrines in Nova Scotia the principle that the Crown is not bound by legislation

unless it is specifically stated to be, and it is indeed Nova Scotia legislation which provides for a litigant's right to a jury trial; that is found in the *Judicature Act*.

[18] The issue becomes whether there is an exception in this case to the principle that the Crown is not bound unless it is specifically stated. I have concluded that doctrine, expressed in the *Interpretation Act*, must be considered in the context of other legislation, including the *Proceedings Against the Crown Act*, which specifically precludes juries in some proceedings involving the Crown, but not in others.

[19] The rule that statutes cannot be construed in isolation is well established. The *Judicature Act*, the *Juries Act*, the *Crown Proceedings Act* and the *Civil Procedure Rules* are interrelated. Historically the Crown, as a plaintiff, was subject to a jury trial and also, historically, there has been a connection between the Rules of Court and the *Judicature Act*. Indeed after 1950, the Nova Scotia Rules of Court were appended to the *Judicature Act* and that legislation contemplated the Crown suing as an ordinary litigant with a jury trial presumed. I generally accept the historical analysis in the Defendants' brief at paras.32 to 52 (copy appended as Schedule I for ease of reference).

[20] The Plaintiff maintains that the provisions in the *Juries Act* do not bind the Crown by necessary implication; the Defendants say they do. It is clearly possible for the Crown immunity principle to be rebutted by necessary implication when legislation is interpreted in its full context. That is addressed in **Bombay v. Municipal Corporation of Bombay**, [1947] A.C. 58, (P.C.); **Friends of the Old Man River Society v. Canada (Minister of Transport)**, [1992] S.C.R. 3, and **Caisse de dépôt et placement du Québec v. Frederick Sparling and the Attorney General of Québec, et al.**, 1988 CanLII 26 (S.C.C.)

[21] I have concluded in this case that by necessary implication in the context of *Nova Scotia Civil Procedure Rules*, the *Judicature Act* applies to the Crown. The Crown is regulated by the *Civil Procedure Rules* when it commences litigation in Nova Scotia. By necessary implication, it must be bound by the *Judicature Act* upon which the *Civil Procedure Rules* are founded and derive their authority.

[22] The objectives of both the *Civil Procedure Rules* and the *Judicature Act* would be frustrated if the Crown were not bound by the *Judicature Act*. I accept,

in summary on that point, the analysis at paras.56 to 67 of the Defendants' brief (copy appended as Schedule II).

[23] Alternatively, I find in this case that the Crown has waived any immunity it might have under the benefit/burden exception. The Crown properly describes this exception as follows at paras.36, 37 and 42 of its brief:

> 36. What is the benefit/burden exception? Once it is established that the statute was not intended to bind the Crown, Courts will examine whether the Crown has waived its immunity by taking the benefits of the statute that correspond with those burdens. This is referred to as the "benefit/burden exception": See *Sullivan* at p. 754 and *Hogg* at p. 296.
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> 37. The rationale for this exception is as follows: under the principle of Crown immunity, if the Crown was permitted to benefit from certain provisions of a statute, it must also be subject to the intended burdens that limit that benefit. To do otherwise would essentially allow the Crown to re-write the statu[t]e. Therefore, the Court must take each statute as it finds it. The benefit/burden was discussed in *Hogg*, wherein it stated: "it is clear that when the Crown asserts its statutory right, it becomes subject to restrictions on the right" (p. 297).
>
> ...
>
> 42. In order for Crown immunity to be waived this Court must find that the requirements of the benefit/burden exception have been met. According to the benefits/burden exception, the Defendant must establish:
>
> a. that the Attorney General of Nova Scotia has taken a benefit within the *Judicature Act* and *Juries Act*; and
>
> b. the corresponding burden has a sufficiently close "nexus" to the benefit.

The Crown has taken benefit in this case, and in my view, assumed burden. The burden can arise under legislation different from the statute which gives the benefit.

[24] The Crown benefit/burden exception analysis in paras.71 to 98 of the Defendants' brief (copy appended as Schedule III) is applicable. Once the Crown starts a proceeding, it cannot be selective as to which aspects of the procedure

apply to it. It is a litigant, once it commences the proceeding, like any other party. The Crown cannot pick and choose the rules it wants to apply; once it enters the forum and takes the benefit of the process, it has to assume the burdens.

[25] The Canadian Encyclopedic Digest under the heading "Procedure and Actions by or on behalf of the Crown in right of the Province" states:

> The crown proceedings statutes apply only to proceedings against the crown. In proceedings on behalf of the crown, the law and procedure are unaltered.

[26] Footnotes to that statement reference a number of authorities including **Bartlett v. Osterhout**, [1931] O.R. 358 (S.C.), where the Court stated at para.4:

> The crown in an action which it institutes itself, subject to certain exceptions not arising here, submits itself to all the ordinary rules of practice and procedure.

[27] In support of that conclusion, the Ontario Court referenced **R. v. Gran**t (1896), 17 P.R. 165 Ont.C.A, ["**Grant**"] and **R. v. City of Windsor** (1896), 5 Ex. C.R. 223, an admiralty case.

[28] Based upon all of the foregoing, I have concluded that the Crown does not have immunity from trial by jury in this case in Nova Scotia.

[29] Although research has not revealed a case in which a court has determined directly whether the Crown as plaintiff can be subject to trial by jury, it is apparent that, absent addressing the issue squarely, jury trials have proceeded with the Crown as plaintiff.

[30] In **The Attorney General of Canada v. Clory**, [1989] P.E.I. J. No. 2, ["**Clory**"] (a decision referenced during submission on the complexity issue in this case), the Attorney General of Canada brought action alleging that a wharf belonging to the Crown was destroyed by a shipyard. The defendants filed notice seeking to have trial by judge and jury. The Attorney General of Canada applied to have the jury notice struck on the grounds that the issues in the trial were too complex and the trial would be too lengthy. The Court dismissed the application, ruling that although the issues would be complex, they would not be beyond the grasp of a well-informed juror. The Judge did, however, limit the defendant's entitlement to a jury trial to the issue of liability, stating that the nature of the trial

for the issues of damages could be addressed once the jury had made a decision on liability.

[31] As the decision does not mention Crown immunity with respect to civil trials, nor is there any reference to the P.E.I. *Crown Proceedings Act*, I am not suggesting that it is an authority which settles the issue which is before this Court. There are also distinctions - it was the Federal Crown in that case and P.E.I. legislation would apply, although that province's legislation and Rules of Court as I read them were essentially the same as Nova Scotia. The significant point is that although immunity was not raised, the Court ruled that a jury trial could proceed when the Crown was plaintiff, subject to the damages complexity issue.

[32] In **Grant** (an Ontario Court of Appeal decision in 1896), the plaintiff, the Federal Crown, brought a motion to strike the defendant's notice for jury. The Judge made an order striking the jury notice, but it was overturned by the Divisional Court on the ground the Motions Judge had no jurisdiction to make the ruling because the proceeding was commenced by the Crown.

[33] The Court of Appeal allowed the Crown's appeal from the Divisional Court decision, with Judges giving different reasons. It is difficult to determine the ratio from the Court of Appeal, but what is noteworthy about the report is that at no point was the possibility of the Crown being immune to a jury trial an issue. The Court simply decided that the Judge did have jurisdiction to strike out the jury notice, but not on basis of Crown immunity.

[34] In **Attorney General of Ontario v. Cuttell**, [1955] O.R. 8, ["**Cuttell**"] the issue before the Supreme Court of Ontario was whether the defendants had the right to serve a jury notice when the Crown was plaintiff. The Attorney General of Canada's application to strike out the jury notice was allowed, and the High Court directed that the trial proceed without jury. Leave to appeal was not granted. The Judge noted that the right of the Crown to make application to have the jury notice struck was affirmed in **Grant**, but then explained that the test for determining whether the defendants have a right to serve a jury notice on the Crown is whether at the time of the coming into force of the *Administration of Justice Act*, the specific relief sought by the Crown was of the kind which could have been obtained only in the Court of Chancery.

[35] The Crown was seeking to set aside a deed on the grounds that Cuttell obtained it by fraud, and the Court held that the granting of the form of relief sought was within the exclusive jurisdiction of the Court of Chancery, and as a result there was no right to a jury trial.

[36] In **Clory**, **Grant** and **Cuttell**, the Courts considered whether the Crown as plaintiff was subject to jury trial. Although the question whether the Crown has absolute immunity was not adjudicated and the decisions do not address the issue, none of the reasons alluded to any general principle of immunity from jury trial where the Crown is a plaintiff. While not determinative, the decisions reinforce the conclusion there is no such doctrine; otherwise, one might assume that it would have been raised in those cases.

ANALYSIS - COMPLEXITY

[37] I have concluded that the Crown in this case is subject to a jury trial, unless the complexity argument succeeds. I have considered the complexity argument in the context of all of the relevant authorities which counsel cite in their briefs. I have also reviewed the file and in particular the expert reports, which are essentially the basis of the Plaintiff's position that it is a complex case involving technical matters. The authorities make it clear there has to be a cogent reason to set aside a jury notice and that, on the complexity issue, the burden is on the party, in this case the Crown, alleging the complexity.

[38] The file shows three expert reports and I understand that there may be a fourth. The main focus of the expert reports is damages. There are questions of fact, certainly, involved in the damages issue. The lawsuit arises out of a single event and trial is not expected to exceed eight days. After reviewing the expert reports, I have concluded that the issues are not so highly technical as to be beyond the capacity of a jury. I do not consider them to be more complex than the sorts of issues that regularly come before juries in personal injury cases or medical malpractice cases.

[39] I have canvassed the authorities, although the decisions are case specific, and I must do an independent assessment. After doing so, I have concluded that the situation does not involve the level of complexity that requires striking the jury notice.

CONCLUSION

[40] For those reasons, the Plaintiff's motion is dismissed.

[After discussion with counsel, costs in amount $1,000, inclusive of disbursements, payable forthwith, were awarded in Defendants' favour.]

J.

Schedule I
Defendants' Submissions - Paragraphs 32-52

32. The history of the Crown's involvement in civil jury trials serves to provide context to the earlier, and later, versions of Nova Scotia's *Judicature Act*. It also demonstrates that two of the Attorney General's main arguments – that the Crown should not be subject to a jury trial, whatsoever, because the Crown has no peers, and because jurors will inevitably be biased against the Crown because of how they view the government – have no principled foundation.

33. In *Geophysical Service Inc. v. Sable Mary Seismic Inc.*, Justice Warner provided an excellent overview of the history of the civil jury trial.

> *Geophysical Service Inc. v Sable Mary Seismic Inc*, 2008 NSSC 79 ["*Geophysical*"] upheld in 2008 NSCA 83, paras. 41-57 [Tab 3].

34. To summarize, juries in England were used before and after the Norman invasion of 1066, and were more broadly standardized in the reign of Henry II in 1154 and the later proclamation of the Magna Carta in 1215. From then until 1854, trial by jury was the only mode of adjudication in the English common law courts.

> *Geophysical*, paras 41-48.

35. By the first half of the nineteenth century, the Crown had a number of formalized options available to it if it wished to recover a debt it said it was owed by one of its subjects. A summary of those options was adopted in *Royal Bank of Canada v Black & White Developments Ltd.*, 1988 ABCA 253 [Tab 4] ["*Black & White*"] as follows:

> *[14] In Chitty on Prerogatives of the Crown, (1820) the principle is stated as follows at p.245:*
>
> > *"The modes of redress which the Crown may adopt against a subject are - 1st, by the usual common law actions; 2, by Inquisition, or Inquest of Office, and under this head, we will consider extents in chief and in aid, and the writ of diem clausit extremum; 3, by scire facias, to repeal grants, & c; 4, by information of intrusion or debt and in rem; 5, by quo warranto; 6, by mandamus*
> >
> > *1. The general rule is, that the King may waive his prerogative remedies, and adopt such as are assigned to his subjects.*

36. These prerogative rights, and the Crown's option to abandon them and sue a subject following the procedures of an ordinary litigant, would remain for over a century:

> *[15] In the second edition of Halsbury's Laws of England being the last edition before the Crown Proceedings Act, 1947, which materially altered this law in England, it is stated in Volume VI. p.484:*
>
> > *"593. The Crown may in general choose its own forum and sue in what Court it pleases; and though special modes of redress against the subject by means of informations, inquisitions or inquests of office, extents, scire facias, quo warranto, and mandamus are provided by law, the Crown may usually waive these prerogative remedies and resort to the usual forms of action, unless they are inconsistent with the royal dignity."*[2]

37. Had the Crown sought to sue as an ordinary litigant before 1947 in England, it would necessarily be subject to trial by jury. The only advantage the Crown enjoyed in that regard was a separate Crown prerogative to have a trial at bar. Essentially, that meant that the Attorney General could demand that the jury be summoned to hear the case at Westminster.

> *The Law and Practice of Civil Proceedings By and Against the Crown and Departments of the Government*, George S. Robertson (London: Stevens and Sons, Limited, 1908), ["Robertson"] at 224, 586-591 [Tab 6]. See also Bell at 127 [Tab 5].

38. In 1851, Nova Scotia explicitly adopted the English common law courts' rules of procedure:

> *In all cases not provided for in this chapter, nor in any rule that may be hereafter made, the practice and proceedings of the court shall conform, as nearly as may be, to the practice and proceedings of the superior courts of common law in England in force previous to the first year of the reign of King William the fourth, and in all cases where the proceedings and practice of the superior court of common law in England differ from each other, those of the court of queen's bench shall be followed.*
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> *Of Pleadings and Practice*, 1851, c 134, subs 123(2) [Tab 7].

39. As is clear from the above and as discussed in *Geophysical*, at that time,

> *[63] The practice and proceedings in the superior courts of common law in England provided for trial in which juries determined facts.*
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> *Geophysical*, at 58-63.

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[2] For an explanation of some of those proceedings see *Crown Proceedings*, Ronald McMillan Bell (London: Sweet & Maxwell, Limited, 1948), ["Bell"] at 114-116 [Tab 5]. For an explanation of quo warranto and mandamus see *A Treatise of the Law of the Prerogatives of the Crown*, Joseph Chitty (London: Joseph Butterworth and Son, 1820) at 336-339 [Tab 8].

40. Therefore, in 1851, Nova Scotia adopted a procedural system whereby the Crown maintained a number of Royal prerogatives entitling it to follow particular procedures. But, if the Attorney General chose to commence a lawsuit in the ordinary fashion, it would be determined by a jury trial under the rules applicable among subjects of the Crown.

History of the Judicature Act and Related Statutes

41. In 1884, the Nova Scotia legislature enacted the *Judicature Act*, 1884, c 104. With respect to jury trials, generally, Justice Warner interpreted that statute at para. 66 of *Geophysical* as follows:

> *[66] My interpretation is that ordinarily civil trials, and in an action with both legal and equitable issues, issues of fact and damages were tried by a judge without a jury, unless a jury was sought or the judge so ordered. Before merger of the English courts of law and equity, the Supreme Court of Nova Scotia appears to have had jurisdiction to try legal and equity issues, but the rules of procedure for issues of equity were the rules of the English Court of Chancery, and the rules of procedure for legal issues were the English rules of the English Court of Queen's Bench. Nothing in the 1884 statute changed that.*

42. That statute did not explicitly purport to bind the Crown, but rather included a set of civil procedure rules applicable to all civil suits.

43. The use of jury trials as the exception rather than the norm was reversed in the *Judicature Act*, 1900, 2 RSNS, c 155. Section 42 of the 1900 *Judicature Act* provided for trial by jury as the default procedure in a broad array of matters, except for actions based on equity.

> *Geophysical*, para. 70.

44. The same year, the Nova Scotia legislature passed the *Crown Rules Act*, 1900, c 187, which reads in its entirety:

> *The majority of the judges of the Supreme Court shall have power from time to time by rules under their hands, and published in the Royal Gazette, to regulate, other proceedings on the Crown's side of the Supreme Court, and in criminal and quasi criminal matters which are within the jurisdiction of the provincial legislature, and to allow and regulate the cost in relation thereto.*

45. This provision was not amended in the *Crown Rules Act*, 1923 RSNS, c 253 or the *Crown Rules Act*, 1954, c 66.

46. The *Judicature Act*, 1919, c 32, does not purport to bind the Crown, nor does it have a provision explicitly stating that the Crown is bound by the ordinary procedure of trial by jury. However, it has an appendix entitled Rules of the Supreme Court (Crown Side).

47. The *Judicature Act*, 1950, c 32 also has Rules of the Supreme Court (Crown Side). Section 43 of those Rules is a form entitled "Judgment for the Crown on Quo Warranto After Trial with a Jury"; s. 44 is a form entitled "Judgment for the Crown on Mandamus After Trial with a Jury" [Tab 9].

48. These forms reveal that the status of the Crown's prerogative rights had gone largely unchanged. The Crown maintained its rights of suit by special prerogative, subject to the *Crown Rules Act* and partially codified in the Crown Rules, or it could sue as an ordinary litigant under the provisions of the *Judicature Act* applicable to ordinary litigants, which presumed trial by jury for common law actions.

49. The next year, in 1951, the *PACA* was enacted. As seen, it does not apply to proceedings by the Crown. It did not purport to alter the Crown's right to proceed by its prerogatives such as *mandamus* or *quo warranto* in civil matters. Most significantly, *PACA* is also silent on the Crown's right to waive those prerogatives and sue as an ordinary litigant using the ordinary rules where either party can elect a jury trial.

50. Had the legislature wished to apply the principle in s. 14 of *PACA* that there shall be no jury trials in proceedings against the Crown, it was open to do so. It was similarly open to do so when it passed the *Judicature Act*, 1972, c 2, s. 49 of which repealed the *Crown Rules Act* and all previous versions of the *Judicature Act*.

51. With the enactment of the 1972 *Judicature Act*, the codification of the Crown's prerogative forms of suit were eliminated. Therefore, the only written procedure that remained available to the Crown was to sue as an ordinary litigant, which is consistent with the repeal of the *Crown Rules Act*.

52. The first version of the *Juries Act* was *Of Juries*, 1851, c 136. Like its successors, that Act sets out qualifications for jurors, exemptions from jury duty, and other procedural matters. It does not touch upon the availability of a jury trial, where the Crown is a party or otherwise.

Schedule II
Defendants' Submissions - Paragraphs 56-67

56. The purpose of the *Judicature Act* is to govern the court system in the Province of Nova Scotia. Section 47 of the *Judicature Act* provides that the Courts' procedure shall be governed by the Civil Procedure Rules ("CPR") made by the judges of the Supreme Court.

57. While the Supreme Court of Nova Scotia enjoys inherent jurisdiction, it does not always enjoy exclusive jurisdiction. If the Crown is not bound by the *Judicature Act*, it is arguably at liberty to create a separate court system for the hearing of its own claims against its subjects, thereby subverting and frustrating the purpose of the *Judicature Act*. While such a suggestion is undoubtedly absurd in our modern democracy, it is precisely the reason the necessary implication doctrine should be applied so that the *Judicature Act* is applicable to proceedings by the Crown.

58. Rule 1.01 of the CPR provides their object: "the just, speedy, and inexpensive determination of every proceeding". If the Crown is able to choose which of the Rules apply, the CPR's purpose is frustrated in that it no longer applies to "every proceeding", and it would deprive defendants of justice.

59. The CPR are akin to regulations in that they derive their authority as subordinate legislation from an enabling statute. Accordingly, if the Crown is not bound by the *Judicature Act*, it is not bound by the CPR. Such was the conclusion in *Nova Scotia (Attorney General) v Royal & SunAlliance Insurance Co. of Canada*, 2005 NSSC 126 ["*Royal & SunAlliance*"], para 24 [Tab 11]. That case applied the benefit/burden exception to bind the Crown to certain provisions of the CPR, and did not consider the necessary implication doctrine.

60. At para. 45 of his brief, the Attorney General suggests that, although the *Judicature Act* does not bind the Crown, whatsoever, the Crown is not immune from the CPR because the Court maintains jurisdiction on all proceedings before it. Examining that concession in detail is telling and demonstrates why the *Judicature Act* and CPR must apply by necessary implication.

61. The Attorney General states that Rule 52.02 of the CPR does not explicitly bind the Crown. It is unclear why that particular Rule does not bind the Crown given that the Crown, by concession, does not enjoy immunity from the balance of the CPR. The only rationale provided is that the *Judicature Act* does not bind the Crown with respect to juries. Although the Court enjoys inherent jurisdiction, the CPR have no independent authority outside of the *Judicature Act* as discussed in *Royal & SunAlliance*. If the Crown is bound by the CPR, it can only be because it is bound by the *Judicature Act*.

62. The Attorney General's submission with respect to Rule 52.02 is equally applicable to every other Rule of the CPR. As a result, if the Royal prerogative applies, the Crown is entitled to invoke Crown immunity at any point in a civil proceeding by the Crown where it no longer suits the Crown to follow the CPR.

63. The ability of the Crown to opt out of any given Rule on an *ad hoc* basis creates a great deal of uncertainty for defendants of proceedings by the Crown. This is could lead to unfairness and injustice on a case-by-case basis. In this case, for example, the Crown commenced suit under the CPR as they existed in March 2004. The Crown followed those rules, and their version as amended, seemingly without exception for eight years, until the Attorney General did not favour the Defendant's election of mode of trial.

64. There was no historical Crown prerogative exempting the Crown from trial by jury. Indeed, as seen above, its Royal prerogatives of special modes of trial were developed in the context of all trials being determined by jury. As such, the Defendant would have had no way of knowing that the Crown would object to trial by jury because it of its status as monarch. Similarly, given the clarity of the scope of the *PACA*, there would be no reason for the Defendant to believe any special rules applied to the Crown on mode of trial in proceedings by the Crown.

65. From the Defendant's perspective, the invocation of Crown immunity at this stage of the litigation is entirely arbitrary. If a litigant is permitted to act in such an arbitrary manner, particularly with one with the resources of the Plaintiff, the CPR's objective of providing for a just determination of proceedings is entirely frustrated.

66. The uncertainty exhibited by the Crown's invocation of Crown immunity in this case can be generalized to all proceedings by the Crown. If the Crown is at liberty to disengage with the CPR whenever it sees fit by virtue of the fact that it is not explicitly bound by the *Judicature Act*, it means that there is no longer a set of rules that applies to "every proceeding." This too frustrates the purpose of the CPR.

67. The Crown is only bound by the CPR if it is bound by the *Judicature Act*. This case demonstrates that the objectives of both can be frustrated if the Crown is not bound, making it a necessary implication that they apply to proceedings by the Crown.

Schedule III
Defendants' Submissions - Paragraphs 71-98

71. In this case, it not necessary for the Crown to have taken a benefit directly from the *Judicature Act* or the *Juries Act* in order for it to be bound by the provisions of those statutes.

72. *Murray* is one of a series of cases pre-dating the benefit/burden exception in which the Supreme Court of Canada held that the Crown is be bound by legislation as if it commences suit as an ordinary litigant.

73. The first such case was *Gartland Steamship Co. v R.*, [1960] SCR 315 ["*Gartland Steamship*"] [Tab 14]. In that case, a ship collided with a bridge owned by the Crown. The shipowner sought to limit its liability under provisions of the *Canada Shipping Act*, 1934, c 44, which does not explicitly bind the Crown. Justice Locke wrote the unanimous decision on that issue and held at para. 73, in part, as follows:

> *It cannot be said, in my opinion, that the Royal prerogative ever extent to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative right are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law...*

74. This became known as the "Crown as litigant" exception to the principle of Crown immunity.

75. Consistent with the history of the Royal prerogatives discussed above, the Crown as litigant exception is based on the ancient right to waive its Royal prerogatives and sue as an ordinary litigant. This rationale was summarized in *Black & White*:

> *[17] When the Crown chooses to sue its claim in the courts it does so in its capacity of common law person and its claim must be adjudicated on the basis of the general law applicable between subject and subject. That principle is the foundation of the decisions of the Supreme Court of Canada in Gartland Steanship Company and LaBlanc v. The Queen 1960 CanLII 55 (SCC), [1960], S.C.R. 315, 22 D.L.R. (2d) 385, The Queen v. Murray 1967 CanLII 49 (SCC), [1965], 2 Ex. C.R. 663, [1967], S.C.R. 262, 59 W.W.R. 214, 60 D.L.R. (2d) 647 and Toronto Transportation Commission v. The King 1949 CanLII 35 (SCC), [1949], S.C.R. 510, [1949] 3 D.L.K. 161, and of this court in Ciereszko.*

76. Since the establishment of the Crown as litigant exception, Attorneys General have sought to distinguish the above referenced cases or do away with the exception altogether. In *Farm Credit Corp. v Holowach (Trustee of)*, 1988 CarswellAlta 293 (ACA) ["*Holowach*"] [Tab 15], for example, the Alberta Court of Appeal rejected the submission that *Gartland Steamship* would have been decided differently under the revised federal *Interpretation Act*, and reinforced the underlying rationale of the Crown as litigant exception:

> *[20] This argument overlooks a broader principle applied in Ciereszko. When the "federal Crown chooses to sue someone in relation to a matter that is not governed by any special prerogative rules, it must abide by the laws applicable to such matter in private disputes in the province in question": R. v. Murray as summarized by Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969), 47 Can. Bar. Rev. 40, at p. 50. While this principle is mentioned in Gartland, that case can be based solely on the reach of the Interpretation Act. Murray is, however, not based upon an interpretation provision. Ciereszko, similarly, does not depend upon an assessment of the reach of the Interpretation Act but applies Murray, which, in turn, builds on the comment of Locke J. in Gartland (at p. 400) that the Crown's prerogative does not extend the liability of the subject beyond the limits effectively declared by relevant law.*

77. The Alberta Court of Appeal upheld and elaborated on *Holowach* in *Agriculture Financial Services Corp. v Redmond*, 1999 CarswellAlta 487 ["*Redmond*"] [Tab 16]:

> *66 I would not necessarily go so far as to say that the Crown as litigant exception no longer exists. Hogg continues to refer separately to the two exceptions, although I acknowledge that the authority upon which he relies can be explained on another basis. Peter W. Hogg, Constitutional Law of Canada, Vol. 1, Loose-leaf edition (Scarborough: Carswell, 1998) at pp. 10-17. Elsewhere, in a discussion pre-dating AGT, he suggests that Murray and Sparling can be seen as an extension of the burden-linked-with-the-benefit theory: <u>by invoking the right to sue, the Crown becomes bound by the same restrictions on that right as would apply to any other plaintiff</u>....*
>
> *67 In my view, rather than nullifying the Crown as litigant exception to immunity, the Supreme Court's reasons in Sparling and AGT can be interpreted as subsuming the one exception (Crown as litigant) into the other (benefit/burden). In cases such as Murray, <u>the very act of a lawsuit by the Crown engaged it in seeking to take advantage of legislative provisions. It was therefore obliged to accept the limitations imposed by that legislation</u>. I think that is precisely what Dickson C.J.C. meant at 236 in AGT when, referring to Gartland and Murray, he said that the Crown had waived immunity by having "brought an action in damages to which certain limitations attach"* [emphasis added].

78. The history of Royal prerogatives relating to the Crown's options as plaintiff and the history of the *Judicature Act* in this Province support the application of the Crown as litigant exception in Nova Scotia.

79. In England, the old prerogative modes of procedure were abolished by the *Crown Proceedings Act, 1947*.

Bell at 119.

80. While there has been no such statutory development in Nova Scotia, the repeal of the *Crown Rules Act* and the Rules of the Supreme Court (Crown Side) in 1972 seemingly had a similar effect in this jurisdiction.

81. If historical Crown procedures are unavailable and the Attorney General commences litigation in the Supreme Court of Nova Scotia, it must be doing so on behalf of the Crown as an ordinary litigant. While the Crown always had that option, the removal of the other modes of suit mean that this is the Crown's only remaining route to recover debts it says are owed to it by its subjects in Court.

82. Ordinary litigants in Nova Scotia are subject to the *Judicature Act*, including the CPR, and the *Juries Act*, among other statutes. Applying the Crown as litigant exception, the Crown is also bound by those Acts when it commences proceedings.

83. Cast in the language of the benefit/burden exception, when the Attorney General brings proceedings by the Crown, it takes the advantages and certainties created by the *Judicature Act* and the procedural mechanisms of Court governed by the CPR.

84. While this burden may seem broad, it must be recognized that the benefit is equally broad. The sufficiency of the nexus must be considered in that light. Indeed, the Court in *Redmond* considered the benefit/burden exception to be broadly cast when discussing that doctrine's relationship to the Crown as litigant exception.

85. Even if a much tighter nexus must be applied on a case-by-case basis, the binding of the Crown to various provisions of the CPR, and its enabling *Judicature Act*, will unfold in a predictable fashion.

86. Like any litigation, nothing obliged the Attorney General to commence the within suit. Before it did so, no benefit was taken disturb the Crown's immunity to the application of the *Judicature Act* and CPR.

87. Once commencing an action, certain burdens would have a sufficient nexus to be binding on the Crown. For example, the Attorney General's pleadings would have to meet the standards set out in Rule 38, and service on any defendant would have to be provided under Rule 31. The Crown's claim would also be subject to challenge under Rule 13, summary judgment.

88. At this stage, the Crown is arguably not obliged to take any further step in the litigation, as it has not begun to avail itself to the benefits of documentary or oral discovery. However, should the Crown wish to abandon its proceedings, it is likely that a sufficient nexus between commencing a suit in the standard form under the CPR and the rules for discontinuance under Rule 9 would be formed.

89. Once the Crown submits to discovery, though, the benefit/burden exception will bind the Crown to the CPR surrounding discovery and the use of discovery evidence.

See *Royal & SunAlliance*.

90. Again, once discovery is complete, the Crown has taken no advantage under the *Judicature Act* or CPR with respect to trial, so those rules do not bind the Crown. Once the Crown does take such an advantage, the Crown has taken an advantage with a sufficient nexus to the rules relating to trials between civil litigants.

91. In this case, the Crown filed a Request for Date Assignment Conference using the standard Form 4.13, which was filed with the Court on January 24, 2012. By making that Request, the Crown took the advantage of the procedure for obtaining a trial in this action. Rule 4.13 requires that:

(3) The request for a date assignment conference must include all of the following:

(a) the request;

(b) the party's election as required by Rule 52 - Trial by Jury;

...

92. The very process of opting for trial creates a nexus with the mode of trial by jury. Should the plaintiff elect trial by judge alone, which the Crown took the advantage of in this case, the correlating burden is the defendant's ability to elect for trial by jury in its Date Assignment Memorandum, pursuant to Rule 4.15:

(2) A memorandum for the date assignment judge must contain all of the following information:

...

(d) if applicable, the party's election of trial with or without a jury.

93. The Crown is not bound by any enactment or rule to proceed to trial. But if it chooses to do so, and takes the advantage under the CPR of the procedure to set a matter down for trial, the accompanying burdens include the possibility of a trial by jury. The CPR are explicit about this, and as quoted, the very Rule relating to setting a matter down for trial refers to Rule 52 – Trial by Jury.

94. Put another way, the CPR, themselves, recognize the close nexus between the advantage in the opportunity to have a trial, and the burden of the corresponding rule that the other party has the opportunity to make a contrary election for the mode of trial.

95. The benefit/burden exception analysis would be no different had the Defendant submitted a Request for Date Assignment Conference electing a trial by jury in this case. The only difference is that the burden the Crown was accepting when it advantageously waived its immunity by proceeding to trial would have been more evident to the Attorney General at the time immunity was waived.

96. The nexus between the benefit of trial and the burden of a possible jury trial necessarily includes the applicable provisions of the *Judicature Act* and the *Juries Act* referred to in the CPR.

97. The Defendant submits that the Crown must follow the CPR, which allow for the Defendant's election for trial by jury in this case, on the basis of the Crown as litigant exception to Crown immunity. In the language of the benefit/burden exception, the Crown takes the advantage enjoyed by all civil litigants when it commences a suit – the certainty of the process established by the CPR, with the provisions of the *Judicature Act* and *Juries Act* as incorporated by reference therein.

98. If a more strenuous examination of the nexus between specific benefits and burdens in a given civil proceeding must be undertaken, such an examination also leads to the

conclusion that the Crown waives any immunity with respect to the provisions of the CPR, *Judicature Act*, and *Juries Act*, relating to the availability and conduct of a jury trial once the Crown takes the benefit of the procedures to set a matter down for trial. The very mechanism for setting a matter down for trial incorporates the possibility that either party will opt for trial by jury, and the concomitant rules relating to the conduct of a jury trial have a close nexus with such an election.