

SUPREME COURT OF NOVA SCOTIA

Citation: *Googoo v. Potlotek First Nation*, 2020 NSSC 403

Date: 20200226

Docket: SPH No. 489458

Registry: Port Hawkesbury

Between:

Darren Paul Googoo

Applicant

v.

Potlotek First Nation

Defendant

Judge: The Honourable Justice Patrick J. Murray

Heard: January 2, 2020, in Port Hawkesbury, Nova Scotia

Written Decision: February 26, 2020

Counsel: Darren Googoo, self-represented
Bryna Hatt for the Defendant, Potlotek First Nation

By the Court:

Overview

[1] The Appellant has appealed the decision of the Small Claims Court Adjudicator on the basis of four grounds as set out in the Notice of Appeal.

[2] In his Notice of Claim Mr. Googoo claimed the sum of \$25,000.

[3] The Adjudicator provided a summary of his decision as follows:

6. This matter came before me on May 23, 2019. The Claimant submits that he was hired under a contract to perform consulting services for the Defendant, including the provision of a business plan and the agreed amount price was never paid. The Respondent denies any monies are owing to the Claimant.

7. The Claimant filed a Notice of Claim in Form 1 on March 13, 2019. In the Notice of Claim the Claimant was claiming \$25,000.00 for unpaid consulting fees, re business planning and general consulting and after care fees, breach of an agreement to repay a loan.

8. Darren Googoo was sworn and gave evidence on behalf of himself, the Claimant. Mr. Googoo was the only witness. At the close of the Claimant's case, the Defendant chose not to call evidence and asked that the Claim be dismissed on the basis that the Claim was out of time pursuant to the *Limitations of Actions Act*.

9. I found and concluded that the evidence presented supported dismissing the Claim based on the expiry of the Limitation Period and there was no discretion under the Act to waive or disallow the invocation of the limitation period.

[4] In the Order, the Adjudicator found that the alleged debt owing under the contract crystallized in 2003.

[5] I have read and considered the Adjudicator's Summary of Findings in respect of these grounds, which includes the reasons for his decision.

[6] The Appellant's main contention on appeal is his status as First Nation. He submits, his status as an aboriginal in Canada places him in a position such that, provincial laws such as the *Limitation of Actions Act*, S.N.S. 2014, c. 35, do not apply to him.

[7] In support of that position the Appellant has cited s. 88 of the *Indian Act*, R.S.C., 1985, c. I-5, and the Adjudicator's failure to recognize his status in reaching his decision.

[8] The Appellant has been respectful to the Court in his written submissions and those made orally to the Court. The recent submissions of the parties were filed: 1) by the Appellant on October 22, 2019 ; 2) by the Respondent on November 21, 2019 ; and 3) by the Appellant on December 4, 2019.

[9] I turn now to address the specific grounds set forth in this Appeal.

[10] It is important to recognize that the Appeal is restricted to those grounds outlined in the notice of appeal. It is these grounds upon which the Adjudicator prepared the stated case. The Small Claims Court is not a court of record where the evidence is transcribed.

[11] For the purpose of the appeal, the stated case is the record of what transpired at the Small Claims Court hearing. It is the record which this Court must consider as the appeal record, together with the Adjudicator's Order, the pleadings and exhibits entered.

Ground #1

[12] Under this ground the Appellant states: "The new *Limitation of Actions Act* of NS was proclaimed in 2015." This ground is stated in a manner that is not easily understood. Notwithstanding this, the Adjudicator addressed this ground in the stated case.

[13] The Adjudicator found that, on cross-examination, Mr. Googoo stated that the invoice for services provided was tendered to the Defendant in 2003 or 2004. He found that, under the more generous interpretation, the claim was initiated in 2005, the transition period of 2 years would extend the limitation period to 2007 within which the action would have to have been commenced.

[14] The Adjudicator stated at paragraph 12, 13, and 14 as follows:

12. The "new" Limitation of Actions Act came into force on September 1, 2015. It provides a two-year limitation period from the date of discovery of the Action. Even under the most generous calculation the claim was discovered sometime in 2005, a year or perhaps even two after the work was completed and billed and no payment was forthcoming. Even though I am satisfied, given the wording of the Act and considering

the transitional provisions between the limitation period in the “old Act” and the ones in the “new Act” the two-year limitation period applies. However, even using the old six-year limitation period, the claim is beyond the expiry of that limitation period as well.

13. Furthermore, there was no evidence of any acknowledgement of liability by the Defendant, and in fact when the band questioned, Mr. Googoo’s evidence was that they did not know about the debt that was owed and only advised they would “look into it”.

14. The Act removed the Court’s discretion to disallow the invocation of the limitation period except in claims brought to recover damages in respect of personal injuries.

[15] If one were to apply the previous limitation period of 6 years (for an action in contract), using the year 2005 as per paragraph 12 above, that would bring the limitation period to the year 2011. Allowing a further 2 years for transition would bring the period to 2013. Mr. Googoo’s Claim was started in 2019, still 6 years later.

[16] The Respondent submitted in its brief with respect to this ground of appeal at paragraphs 33, 34, 37 as follows:

33. Mr. Googoo’s claim arose in 2003. At that time the former *Statute of Limitations* was in force. It was replaced in September 2015, with the *Limitations of Actions Act*.

34. Under the *Statute of Limitations*, the Respondent respectfully submits that the limitation period would have expired prior to September 2015 (12 years), thereby expiring Mr. Googoo’s claim even before the current *Limitations of Actions Act* came into effect.

37. The *Limitations of Actions Act* requires the time limit to be the *earlier* of two years from the effective date (being September 1, 2015), and the date on which the limitation period would have expired under the *Statute of Limitations*. As outlined above, the timeline would have expired within the 12 year window (2003 – 2015) under the former *Statute of Limitations*. However, even if Mr. Googoo’s timeline was not expired as of the effective date of the new *Limitations of Actions Act* on September 1, 2015, his limitation period would have been exhausted as of September 1, 2017.

[17] I find that the Adjudicator did not err in his finding that the Appellant’s claim was statute barred by the *Limitation of Actions Act*, and therefore, this ground of appeal has no merit and is therefore dismissed.

Ground #2

[18] Under this ground the Appellant submits that his “case is within the boundaries of the *First Nation Act* or also known as the *Indian Act*”.

[19] Section 88 of the *Indian Act* states that all provincial laws are applicable in respect of aboriginal persons in the province except:

- 1) The extent to which those are inconsistent with the *Act*, order, rule, regulation or law of a band made under the *Act*.
- 2) The extent to which those laws made provision for any matter for which provision is made by or under the *Act*.

[20] Therefore, if the *Indian Act*, had made provision for those same matters, those dealt with by provincial laws or if the provincial law is inconsistent with the *Indian Act*, order, rule or by-law made under the *Indian Act*, then the provincial laws would not apply to aboriginal persons in those instances.

[21] The Appellant in his oral submission argued this matter involves the *Act* as everything pertaining to his claim involved First Nation, including the location of the contract being formed, (on the Chapel Island Reserve); the fact that both parties to the contract are First Nation. The subject matter of the contract, the Appellant says, was also in respect of services to First Nation.

[22] The Respondent submits that no evidence or argument was presented (at the Small Claims Court hearing) that the Appellant's claim fell within provisions of the *Indian Act*, a federal statute. It does not form part of the record, says the Respondent, and it is only now being raised during this Appeal.

[23] In his summary of findings, the Adjudicator made a finding that the claim in question is neither based on a treaty right or equitable claim.

[24] It is important to state that when considering these grounds, I am bound by the findings of fact by the Adjudicator. It is not open for me to disturb those on appeal. This appeal is not a new trial on the merits.

[25] Having considered this ground of appeal, I accept the submission of the Respondent that the Appellant has not identified a section of the *Indian Act*, or a provision in a treaty or in another *Act* of Parliament that would present a conflict or inconsistency with the Nova Scotia *Limitations of Actions Act*, in regard to how any such provision would apply to the circumstances in this case.

[26] Respectfully therefore, this ground of appeal is dismissed.

Ground #3

[27] Under this ground, the Appellant has argued that the “Statute of Limitations are void in this case; reason, section 4, 10, 11 on updated Actions Act.” I interpret this to mean the *Limitation of Actions Act* of Nova Scotia revised in 2015. Section 4 of the *Act* states:

Aboriginal and treaty rights and equitable claims

4(1) This act does not apply to

- (a) a claim based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed in section 35 of the Constitution Act, 1982; or
- (b) an equitable claim by aboriginal peoples against Her Majesty.

[28] A summary of the findings of the Adjudicator in regard to those sections is as follows at paragraph 17 of the Summary:

Section 4 does not apply because the claim in question is neither based on a treaty right nor is it an equitable claim by aboriginal peoples against Her Majesty.

...

The claim in question does not concern any of the items outlined in Section 10, and is not a proceeding initiated by Her Majesty.

...

Section 11 is not applicable to the Claim as it does not involve a trespass to the person, assault, or battery.

[29] This claim is in contract which is generally governed by the laws of the province unless they specify otherwise. Contract claims are matters that are commonly heard in Small Claims Court. In *Cardinal v Attorney General*, [1974] S.C.R. 695, 1973 CanLII 980 (SCC), the Supreme Court of Canada confirmed that provincial laws of general application apply to aboriginal people both on and off reserves.

[30] Having read and considered this ground of appeal, I am satisfied that it has been sufficiently and satisfactorily addressed by the Adjudicator, in a concise and clear manner at paragraphs 17, 18, and 19 of the stated case.

[31] I find as a result that this ground of appeal is without merit and is dismissed.

Ground #4

[32] Under this ground the Appellant states that “Loss of income defined as no default periods or years.”

[33] I take the submission of the Appellant to mean that non payment of his invoice is loss of income, for which there is no specific limitation period, and therefore the claim survives.

[34] The Adjudicator addressed this in the stated case as follows:

With respect to Mr. Googoo’s fourth particular of the grounds of appeal I offer limited comment. I am unsure as to what Act Mr. Googoo is referencing or what definition of “loss of income” is being referenced. The *Limitation of Actions Act* has no definition of loss of income and no section stating that there are no limitation periods for such actions. Furthermore, this issue was not raised in the hearing.

[35] I find there is simply no merit to this ground of appeal and dismiss same. It has not been clearly explained or set out by the Appellant.

Additional Ground raised in argument on Appeal – Adjournment

[36] The Appellant claims that the Adjudicator’s decision was made in haste, and that he should have been given an opportunity to return to fully explain his position with regard to the treaties, referring to s. 25 of the *Canadian Charter of Rights and Freedoms (Constitution Act 1982, c. 11 (U.K.))*.

[37] The Appellant, therefore says there has been a breach of natural justice, and he should have been granted an adjournment at the hearing before the Adjudicator.

[38] The issue of an adjournment was not raised as a ground of Appeal. The grounds did include a failure to follow the requirements of natural justice.

[39] The Notice of Appeal was filed on June 19, 2019. The corresponding brief did not mention that an adjournment should have been granted. The subsequent submission of the Appellant filed September 4, 2019 was also silent on this issue. The Respondent’s factum was filed September 11, 2019 in advance of the first appeal hearing date set for September 26, 2019 at 10:00 a.m.

[40] I confirm the September hearing of the Appeal had to be adjourned to allow the parties to review the Adjudicator's summary of findings, which had been filed August 21, 2019, but not sent to the parties. The appeal hearing was rescheduled for January 2, 2020 at 2:00 p.m.

[41] In his second factum filed on October 22, 2019 Mr. Googoo raised the issue of an adjournment numerous times.

[42] Under the heading of "Judicial Error" he stated:

I have raised an adjournment in the matter in question. The Adjudicator didn't feel that an adjournment would change his decision and I felt that a judicial error was preformed if the Case was adjourned I could have went back and further explained the Treaty Rights/ the Treaties that were linked to the aspects of the Indian Act. If I had a chance to further explain the Indian Act to the Court, I would have had a better footing on my Case in hand.

[43] Under the heading of "Error of Law" he stated:

In this Case I was not granted an Adjournment to further explain solid basis for my case and in that was I felt my case was very prejudiced against me. It is not legal by law to incorporate the Indian Act into Provincial Legislation.

[44] Under "Failure to Follow the Requirements of Natural Justice", he stated:

And I felt that the Adjudicator hastily made his decision without regarding the requirements of Natural Justice. I felt, that I should have been granted more time in explaining of the Indian Act and where, as being a First Nations Consultant, on First Nations Land regarding the Statute of Limitations. Once again I state, I was not granted an adjournment to further undertake the Jurisdictional situation that I needed to counter act the Statute of Limitations. At the time of my Case I was challenged entirely on the Statute of Limitations. Therefore, the Adjudicator should have called an adjournment when I requested one and should have further his knowledge on the Indian Act vs the Statute of Limitations.

[45] In his final reply brief filed December 4, 2019, Mr. Googoo submits that he:

...requested in adjournment to further educate the Adjudicator and was denied and was only given a recess of 15 minutes, after which he gave a decision on behalf of Potlotek First Nation in the lower courts.

[46] This is an important issue as it goes to the very heart, in terms of fairness and due process of the proceedings. However, this issue was not set out as a

ground of appeal. I am therefore being asked to rule “outside” of the appeal record, which consists of the Adjudicator’s summary of findings.

[47] The Respondent’s position on this issue is as follows:

25. Mr. Googoo did not raise this ground of appeal or allegation in his Notice of Appeal or in his initial written submissions. This ground is now being raised for the first time in his amended written submissions.

26. Mr. Googoo submits in his amended written submissions that he requested an adjournment or additional time from the Adjudicator to review the limitations argument and he was denied. The Respondent disagrees. Mr. Googoo did not request the Adjudicator grant him an adjournment or additional time to review the limitations issue.

27. Mr. Googoo was provided a full copy of the Limitations of Actions Act during the hearing, so that he could refer to the document as the Respondent led the Adjudicator through the limitation argument and relevant sections.

28. Mr. Googoo was then given an opportunity to respond to the limitation argument by the Adjudicator, which Mr. Googoo did do. Mr. Googoo did not request a recess or adjournment.

[48] Procedurally it is not proper for the Appellant to amend the grounds of appeal after the Adjudicator files the Summary Report of Findings. That is what occurred here. The document entitled “Notice of Appeal Amended Supreme Court of Nova Scotia”, was filed “Tuesday, October 22, 2019”.

[49] The stated case filed by the Adjudicator, as a result, makes no mention of any adjournment that was requested by the Appellant.

[50] Paragraphs 2 and 3 of the stated case indicated the following:

2. On the attached pages, I set out for the consideration of this Honourable Court a summary report of the findings of law and fact made in the case on appeal including the basis of my findings raised in the Notice of Appeal and any interpretation of documents made by me, and a copy of the written reasons for my decision, if any.

3. My summary is limited to the question on appeal and I have not set out the uncontested facts and findings of the original decision.

[51] An adjournment is something that would be a contested finding, if one had been requested and then denied. The Respondent would have had to have taken a position on it, and the Respondent states none was requested.

[52] Section 32 of the *Small Claims Court Act*, R.S.N.S., c. 430, states respecting an appeal:

Appeal

32 (1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of

- (a) jurisdictional error;
- (b) error of law; or
- (c) failure to follow the requirements of natural justice, by filing with the prothonotary of the Supreme Court a notice of appeal.

(2) A notice of appeal filed pursuant to subsection (1) shall be in the prescribed form and set out

- (a) the ground of appeal; and**
- (b) the particulars of the error or failure forming the ground of appeal.**

(3) Upon the filing of a notice of appeal in accordance with this Section, the prothonotary shall transmit a copy thereof to

- (a) the adjudicator; and**
- (b) where the prothonotary is not the clerk of the Court, to the clerk.**

(4) Upon receipt of a copy of the notice of appeal, the adjudicator shall, within thirty days, transmit to the prothonotary a summary report of the findings of law and fact made in the case on appeal, including the basis of any findings raised in the notice of appeal and any interpretation of documents made by the adjudicator, and a copy of any written reasons for decision.

(5) Upon receipt of a copy of the notice of appeal, the clerk of the Court, where the prothonotary is not the clerk, shall transmit the file for the case to the prothonotary.

(6) A decision of the Supreme Court pursuant to this Section is final and not subject to appeal. *1992, c. 16, s. 124; 1996, c. 23, s. 39.* [Emphasis added]

[53] Having considered the Appellant's submission that he was denied natural justice, because he was denied an adjournment, I find I do not have a factual basis or basis in law to allow the appeal on this ground.

[54] The particulars of this ground were not set out by the Appellant, as required by the *Small Claims Court Act*. This Court is without jurisdiction to rule on a matter not contained in the Notice of Appeal, filed June 19, 2019.

[55] To decide otherwise would not be in keeping with natural justice and the statutory requirements for an appeal to be properly heard.

[56] Respectfully, this ground of appeal is dismissed with the result that the Appellant's appeal is dismissed in its entirety.

[57] Costs in the amount of \$150.00 inclusive of a Barrister's fee of \$50.00, is awarded to the Respondent, payable in 30 days.

[58] Appeal dismissed. Order accordingly.

Murray, J.