Date: 20061020

Docket: A-93-05

Citation: 2006 FCA 342

CORAM: **NADON J.A.**
PELLETIER J.A.
MALONE J.A.

BETWEEN:

ALLISON G. ABBOTT, MARGARET ABBOTT, and MARGARET ELIZABETH McINTOSH

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on October 12, 2006.

Judgment delivered at Ottawa, Ontario, on October 20, 2006.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NADON J.A.
MALONE J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] The nominal appellants represent two groups of leaseholders in Riding Mountain National Park in Manitoba. Both groups seek a declaration that they have a right of perpetual renewal of their leases in spite of the fact that no such term appears in the leases. Both groups claim that the Crown unlawfully forced them (the first group) or their predecessors in title (the second group) to surrender a lease with a right of perpetual renewal in exchange for one with a limited right of renewal. The members of the first group are assignees of the original leaseholders. As a condition of granting its consent to the assignment, the Crown required surrender of the original lease in return for another which did not contain the right of perpetual renewal. Members of the second group are persons

whose predecessors in title (either immediately or remotely) were persons in the first group. In other words, the members of this group were never required to surrender their leases because the right of perpetual renewal had already been removed.

[2] The appellants say that the Crown's conduct was unconscionable and unjustly enriched the Crown. While both groups allege that the Crown could not use its right to consent to any assignment of the original leases in order to change the terms of the lease so as to remove the right of perpetual renewal, this argument has more immediacy for the members of the first group (since they were the ones required to surrender their leases) than for the members of the second group.

[3] The Federal Court did not pronounce itself on the merits of the appellants' claims, dismissing them on the ground that they were statute-barred by the Manitoba *Limitations of Actions Act*, C.C.S.M. 1987, c. L150 (the Act), which is the relevant legislation by reason of section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50. In my view, the Federal Court reached the right conclusion for the reasons which follow.

[4] The appellants sought to avoid the application of the Act by arguing that the relief they sought, a declaration of right, was not subject to any limitation period because it was not dependent upon the existence of a cause of action. They cited a number of cases in support of that proposition including *Kent Coal Company Limited et al v. Northwestern Utilities Limited*, [1936] 2 W.W.R. 393 (Alta. C.A.), *Re Henning and City of Calgary* (1974), 51 D.L.R. (3^{d}) 762, *Vic Restaurant Inc. v. Montreal (City)*, [1959] S.C.R. 58 and *International Brotherhood of Electrical Workers, Local 2085*

v. Winnipeg Builders' Exchange, [1967] S.C.R. 628. These cases all stand for the proposition that a party can seek a declaration even though its cause of action is not yet perfected. In other words, a person does not have to wait until their rights have been infringed before seeking a declaration. These cases do not support the proposition for which they were cited, namely that the right to a declaration is not subject to limitation periods because it does not depend upon the accrual of a cause of action. Once the cause of action accrues, time begins to run, and when the limitation period is complete, all actions, including actions for a declaration, are barred.

[5] The Supreme Court has suggested that, at least in some cases, the barring of the remedy amounts to an effective extinguishment of the right. See *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94 at para. 41 (*Markevich*) where the following appears:

> …As a result, the cause of action arose on September 16, 1986. The Minister undertook no action in the six years after that date to effect a renewal of the limitation period. Consequently, as of September 16, 1992, s. 32 of the CLPA barred the Minister from collecting the respondent's 1986 federal tax debt. Limitation periods have traditionally been understood to bar a creditor's remedy but not his or her right to the underlying debt. In my view, this is a distinction without a difference. For all intents and purposes, the respondent's federal tax debt is extinguished.

[6] To the extent that the appellants' argument rests upon the notion that even if a limitation period has intervened, only their remedy, not their right has been barred, and they are therefore still entitled to a declaration of right, the decision of the Supreme Court in *Markevich* undermines the foundation of their argument.

[7] The appellants also argue that time has not begun to run against them because they have not yet suffered the loss which will start the limitation clock running against them. This argument is based on the notion that the appellants will not suffer a loss until the Crown refuses to renew their leases. Until then, they say, their cause of action is inchoate and does not engage the limitation period. This argument's lack of substance can be demonstrated by inquiring as to the basis on which the appellants claim a right of renewal of their leases. It cannot be by virtue of their existing leases which contain no such right. If their claim depends upon the terms of a prior lease, then their loss occurred when they (or their predecessors in title) were forced to surrender that lease for the one which they now enjoy. Prior to that surrender, a right to perpetual renewal of the lease existed; following it, it did not. That was the moment at which their loss occurred.

[8] If the Crown's conduct was such as to give rise to a right of redress, the loss of the right to perpetual renewal was the last element necessary to constitute their cause of action. In the absence of any question of discoverability, a cause of action accrues when the last element required to support the cause of action occurs. In *J & S Hardware Ltd. v. Ed Penner Construction Ltd.*, [1989] S.J. No. 569, the Court cited Halsbury's Law of England, 3rd ed., vol. 1, p. 6:

> The popular meaning of the expression "cause of action" is that particular act on the part of the defendant which gives the plaintiff his cause of complaint. There may, however, be more than one good and effective cause of action arising out of the same transaction. Strictly speaking, "every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse", forms an essential part of "the cause of action," which "accrues" upon the happening of the latest of such facts…

[9] The appellants recycle the argument that their cause of action has not yet accrued by relying on sections 25, 26 and 30 of the Act, which deal with actions to recover land. They say that since they will not be dispossessed of their interest in land until the Crown refuses to renew their lease, they have not been dispossessed. Relying on section 26 of the Act, they say that dispossession is the element which starts the limitation period. In my view, reliance upon these sections is misplaced because the appellants do not seek to recover possession of land. They continue to enjoy the use and occupation of the leased lands. Even if these provisions do apply, their argument is subject to the same response as its earlier manifestation. The interest which the appellants have lost is the right of renewal of their leases. They lost that right when they (or their predecessors in title) surrendered the original lease and accepted a lease without such right of renewal in its place. The interest of which they have been dispossessed is the right of renewal, and that dispossession occurred well beyond the limitation period provided in these provisions.

[10] The appellants' remaining argument is that the Crown cannot invoke the passage of time, and the resulting limitation, when it acts unlawfully or it enriches itself unjustly. The appellants argue that unjust enrichment is not caught by the Act as the latter makes no reference to it. The appellants further argue that since the Crown will not be enriched until it re-enters upon the leased lands as a result of the expiry of their leases, their cause of action has not yet arisen.

[11] To the extent that unjust enrichment is an equitable doctrine, giving right to equitable relief, it is caught by paragraph 2(1)(*k*) of the Act which deals with "accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with…".

[12] The appellants' argument, that an unlawful act committed by the Crown acting under its administrative or executive power should not be subject to a limitation period, is unconvincing. Noting that an *ultra vires* act is not made *intra vires* with the passage of a limitation period, the appellants suggest that the same principle should apply when the acts complained of are unlawful. They do so without providing any rationale or supporting authority. More importantly, it is far from clear, here, that the Crown was acting in an administrative or executive capacity. In my view, the most that the appellants can allege is that the Crown acted unlawfully in its capacity as lessor.

[13] As a result, I am satisfied that the Federal Court judge came to the correct conclusion when he held that the appellants' claims were statute-barred. That being the case, it is not necessary to deal with the substantive questions raised by the appellants.

[14] I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree
M. Nadon J.A."

"I agree
B. Malone J.A."

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-93-05
APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED RUSSELL, J., NO. T-1168-96	
STYLE OF CAUSE:	*Allison G. Abbott, Margaret Abbott, and Margaret Elizabeth McIntosh v. Her Majesty The Queen*
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 12, 2006
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	NADON J.A. MALONE J.A.
DATED:	October 20, 2006

APPEARANCES:

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