NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Attorney General) v. McIntyre, 2008 NSCA 15

Date: 20080219
Docket: CA 281871
Registry: Halifax

Between:

The Attorney General of Nova Scotia
Representing Her Majesty the Queen
in Right of the Province of Nova Scotia

Appellant

v.

Alfred Adrian McIntyre

Respondent

Judges:	MacDonald, C.J.N.S.; Roscoe and Oland, JJ.A.
Appeal Heard:	November 26, 2007, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal allowed per reasons for judgment of MacDonald, C.J.N.S.; Roscoe and Oland, JJ.A. concurring.
Counsel:	Alicia L. Arana, for the appellant Derrick Kimball and Sharon Cochrane, for the respondent

Reasons for judgment:

OVERVIEW

[1] The respondent Alfred Adrian McIntyre says that twice within a matter of days, he was physically ejected from a Glace Bay liquor store because a clerk felt that he was inebriated. He seeks damages against the appellant Attorney General for battery and defamation. The sole issue in this interlocutory appeal is whether Mr. McIntyre named the proper defendant. As opposed to the Attorney General, should he have named the Province's Crown corporation, the Nova Scotia Liquor Corporation (NSLC), which operates the facility?

[2] The Attorney General insists that Mr. McIntyre is barred from taking action directly against the Crown by virtue of s. 3(2)(d) of the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360. This provision prevents any claim that would otherwise be "enforceable" against one of its crown corporations (in this case, the NSLC):

> 3(2) Except as otherwise provided in this Act, nothing in this Act
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> . . .
>
> (d) subjects the Crown to proceedings under this Act in respect of a cause of action that is enforceable against a corporation or other agency owned or controlled by the Crown;

[3] Yet Mr. McIntyre insists that s. 3(2)(d) does not apply to him because he does not have an *enforceable* action against the NSLC. Why not? Because, by virtue of s. 30 of the *Liquor Control Act*, R.S.N.S. c. 260, the NSLC cannot "be sued" without the Attorney General's consent:

> 30. *The Corporation may, with the consent of the Attorney General, be sued* and may institute or defend proceedings in any court of law or otherwise in the name of the Nova Scotia Liquor Corporation as fully and effectually to all intents and purposes as though the Corporation were incorporated under such name or title and no proceedings shall be taken against or in the names of the members of the Corporation, and no proceedings shall abate by reason of any change in the membership of the Corporation by death, resignation or otherwise, but the proceedings may be continued as though the changes had not been made.
>
> [Emphasis added.]

[4] Therefore, in Mr. McIntyre's submission, any claim that requires the Attorney General's consent cannot realistically be considered an *enforceable* claim.

The Case on Appeal

[5] Insisting that the action is barred as framed, the Attorney General applied to Justice Suzanne Hood of the Supreme Court of Nova Scotia to have it struck as an abuse of process. Justice Hood dismissed the application. She accepted Mr McIntyre's submission that because the Attorney General's consent was required, the claim was not *enforceable* in the sense contemplated by s. 3(2)(d). She reasoned:

> ¶8 I will move on to the second part of the question which is set out in the *Rossmeisl* case which is the issue of whether the claim is enforceable against the Nova Scotia Liquor Corporation. In my view, that is the more difficult question. As I have said, the meaning of s. 3(2)(d) is that the exclusion is for vicarious liability of Crown agents and that is what is in fact the claim in the statement of claim. I have just quoted s. 30 of the *Act* and it provides for the consent of the Attorney General being required before the Liquor Corporation can be sued. In my view, the claim cannot be enforced as of right against the Nova Scotia Liquor Commission. *The Attorney General has to give consent. Therefore, this is not a cause of action that is "enforceable against" the Nova Scotia Liquor Corporation. It is only enforceable if the Attorney General consents. It is not enforceable otherwise. There is a limit on enforceability which, in my view, takes it outside the clear wording of s. 3(2)(d) of the Proceedings against the Crown Act.*
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> [Emphasis added.]

[6] The Attorney General now takes this narrow issue on appeal to this court.

ANALYSIS

Standard of Review

[7] Let me begin my analysis by briefly considering the standard upon which we should review the Chambers judge's decision. This is an appeal from a discretionary interlocutory order, which attracts significant deference. In **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143, Chipman, J.A. framed the standard as follows:

> ¶10 At the outset, it is proper to remind ourselves that this Court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result. The burden on the appellant is heavy: *Exco Corporation Limited v. Nova Scotia Savings and Loan et al.* (1983), 59 N.S.R. (2d) 331 at 333 and *Nova Scotia (Attorney General) v. Morgentaler* (1990), 96 N.S.R. (2d) 54 at 57.

See also **MacQueen v. Ispat Sidbec Inc**. (2007), 253 N.S.R. (2d) 188 (C.A.) and **Wall v. Horn Abbot Ltd.** (2006), 242 N.S.R. (2d) 300 (C.A.).

[8] The question therefore becomes: By concluding that Mr. McIntyre has no enforceable claim against the NSLC, did the judge apply wrong principles of law or otherwise would a patent injustice result?

Does s. 3(2)(d) apply?

[9] Returning to the narrow issue on appeal, the Attorney General's position is relatively straightforward. He insists that his consent is required under s. 30 purely as a matter of procedure and that this prerequisite does nothing to vitiate an otherwise *enforceable* claim. He explains it this way in his factum:

> ¶40 It is submitted that in this context "enforceable" means a process for procuring specific performance, that is, once a trial is concluded if the Plaintiff's claim is granted, whatever is ordered is enforceable against the Defendant. Here, the Plaintiff is seeking damages, if damages are ordered this would be enforceable against the Nova Scotia Liquor Corporation because of the Liquor Corporations status as a corporate body not controlled by the Crown and the language in s. 30. Simply put, the Liquor Corporation would have to pay any damages awarded against it. The fact that consent is required in order for the Liquor Corporation to sue or be sued does not mean that orders cannot be enforced against it. It is clear that causes of action are enforceable against the Liquor Corporation. The fact that the Corporation is a corporation not controlled by the Crown along with the language in s. 30 of the *Liquor Control Act* that provides that the Liquor Corporation may be sued "as fully and effectually to all intents and purposes as though the Corporation was incorporated..." makes it abundantly clear that causes of action can be enforced against it.
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> ¶41 The decision states at paragraph 8 that "[t]here is a limit on enforceability which, in my view, takes it outside the clear wording of s. 3(2)(d) of the *Proceedings Against the Crown Act*". It is submitted that this is an incorrect interpretation of the consent requirement. The requirement for Attorney General consent does not limit enforceability, it is a procedural requirement that is

> separate from the fact that if damages are ordered against the Corporation the order is enforceable.
>
> ¶42 It is respectfully submitted that the Learned Chambers Judge erred in finding that the cause of action is not "enforceable against" the Nova Scotia Liquor Corporation under s. 3(2)(d) of the *Proceedings Against the Crown Act*.

[10] On the other hand, Mr. McIntyre insists that s. 3(2)(d) applies only to claimants with an **unfettered** right to sue a Crown corporation, which is not the case here by virtue of the consent requirement set out in s. 30. He elaborates in his factum:

> ¶43 ... The phrase "is enforceable" connotes an absolute right of enforceability. Such an agency or corporation would have the legal independence to sue and be sued without restriction. In the case at bar, there is no such right. By the explicit terms of its incorporating statute, the Liquor Corporation is absolutely shielded from being sued unless the Attorney General consents. That shield removes the Liquor Corporation from inclusion in that group of entities contemplated in s. 3(2)(d) of the Act. The shield constituted by s. 30 of the *Liquor Control Act* ('with the consent of the Attorney General') provides for total discretion on the part of the Attorney General. If it was intended to include the Liquor Corporation within those entities embraced by the language of s. 3(2)(d), other appropriate language could have been chosen.
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> . . .
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> ¶52 Simply stated, a plaintiff is not entitled to sue the Liquor Corporation as of right for any thing or reason by virtue of s. 30 of it's incorporating Act. The Crown through its chief law officer the Attorney General, exercising unfettered discretion, can choose whether or not suit may be brought.
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> ¶53 On the other hand, s. 3(2)(d) of the *Proceedings Against the Crown Act*, in whatever circumstances it may have application, cannot apply unless there is an independent right to sue a Crown owned or controlled corporation or agency apart from the *Proceedings Against the Crown Act.*

[11] For the reasons that follow, I prefer the Attorney General's submission on this issue. I do not accept that s. 30 vitiates Mr. McIntyre's otherwise *enforceable* claim against the NSLC. Instead, I agree with the Attorney General that s. 30 represents a procedural step only.

[12] Respectfully, I believe that the Chambers judge fell into error not only by reading too much into s. 30, but also by assuming that Mr. McIntyre would be left without any remedy should the Attorney General refuse consent. For example, I note her concluding comments:

> ¶9 *If I concluded that the action could not be brought against the Crown and if the Attorney General refused to consent, the plaintiff would be left with no one to sue.* In my view, that cannot be the combined effect of s. 5 and s. 3(2) of the *Proceedings against the Crown Act* and s. 30 of the *Liquor Control Act*. The Crown would have, as the court said in *Rossmeisl, supra*, given a right to be sued only to take it away again. I cannot conclude that that was the legislative intent Therefore, the application is dismissed.
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> [Emphasis added.]

[13] Respectfully, this passage seems to infer that the Attorney General would act in bad faith and would arbitrarily prevent a valid claim against the NSLC from going forward. Respectfully, such a conclusion would ignore two important considerations: (a) the important role of the Attorney General, and (b) Mr. McIntyre's potential administrative law remedies in the unlikely event that the Attorney General would act in bad faith or arbitrarily. Let me elaborate.

The Role of the Attorney General

[14] I begin with this basic premise. The Attorney General is the official law officer of the Crown and has the conduct of all litigation both for or against the Crown. The *Public Service Act*, R.S.N.S. 1989, c. 376 (*PSA*), provides:

> 29 (1) The functions, powers and duties of the Attorney General and Minister of Justice shall be the following:
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> > (a) the Attorney General is the law officer of the Crown, and the official legal adviser of the Lieutenant Governor, and the legal member of the Executive Council;
> >
> > . . .
> >
> > (e) the Attorney General has the regulation and conduct of all litigation for or against the Crown or any public department in respect of any subject within the authority or jurisdiction of the Government;

[15] Thus, the Attorney General has a wide range of legal responsibilities. These varied tasks can at times appear to raise conflicts of interest. The case on appeal represents an obvious example. Here the Attorney General seeks to strike a claim because he feels that the wrong party has been sued. Yet, in order to proceed against the proper party, his consent is required. At first blush, one would understand Mr. McIntyre's apprehension to sue the NSLC. Yet this apparent conflict must be placed in context; a context that acknowledges the Attorney General's duty to act fairly. Let me explain.

[16] We benefit from a long history of legislation and constitutional convention that directs an Attorney General to carry out his or her duties in good faith. In **Winn v. Canada (Attorney General**), [1994] F.C.J. No. 1280 (T.D.), beginning at para. 35, Joyal, J. relies on the observations of Huband, J.A. for the Manitoba Court of Appeal in **R. v. D (W.R.)**, [1994] 5 W.W.R. 305:

> ¶35 Finally, on the issue of conflict of interest, there is quoted the case of *Her Majesty the Queen v. D (W.R.),* [1994] 5 W.W.R. 305, where Huband J.A. of the Court of Appeal of Manitoba said as follows at p. 307:
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> > The Attorney General is in a unique position, quite unlike that of a member of the private Bar. She is responsible for the prosecution of criminal cases within this jurisdiction. She also represents the Government of Manitoba for forensic purposes in civil suits. It is no answer, beyond political window dressing, to retain outside counsel. Whoever her agents may be, whether her permanent staff or outside special appointments, they must function under the Attorney General's direction. And the Attorney General must be allowed to fulfill the responsibilities of that office unless and until circumstances arise which would compel the Court to interrupt the fulfillment of those responsibilities. No such case has been made out.
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> ¶36 The Court went further and adopted the following statement from Crown counsel in that case (also at p. 307):
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> > In summary it is submitted that no conflict of interest arises in this case. There is no relationship between the Attorney General and A.D.J. that would impose a privilege of confidentiality on their communications. *Further, no apprehension of bias arises out of the multiple responsibilities of the Attorney General in the conduct of civil and criminal litigation.* It is not enough to simply suggest that conflicting duties imposed by legislation will create a perception of bias. *There is presumption that the*

> *Attorney General will carry out her duties in good faith which is supported by the common law, legislation, policy and constitutional convention.* There is no evidence, or even a suggestion that the exercise by the Attorney General of her discretion was for an oblique motive.

[Emphasis added.]

[17] On this basis and in the context of this appeal, it would be wrong to assume that the Attorney General would arbitrarily prevent a legitimate claim from going forward.

Administrative Law Remedies

[18] Furthermore, in the unlikely event that an Attorney General would act in bad faith or arbitrarily, an aggrieved citizen can always seek relief by way of prerogative writs: *mandamus* to force him to act and/or *certiorari* to review his actions. See for example, **Air Canada v. British Columbia (Attorney General)**, [1986] 2 S.C.R. 539.

[19] Thus, it would be equally wrong to suggest that the Attorney General has an "absolute or untrammelled" discretion to prevent an otherwise legitimate claim from being advanced. This principle was initially confirmed by the Supreme Court of Canada in **Roncarelli v. Duplessis**, [1959] S.C.R. 121:

> ¶41 In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. *"Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.*

[Emphasis added.]

[20] In fact, in its factum, the Attorney General acknowledges his obligations to uphold the rule of law and not to arbitrarily restrain an appropriate claim on a whim or some other improper purpose:

> ¶43 One of the reasons for the decision that causes of action are not enforceable against the Liquor Corporation is the finding that the consent requirement in s. 30 of the *Liquor Control Act* could preclude a Plaintiff from having a party to sue, should the Attorney General choose not to give consent. It is submitted that this is an erroneous interpretation of the section. The Attorney General does not have the authority to arbitrarily withhold consent where there is a proper cause of action against the Liquor Corporation. A Plaintiff would never be left without a party to sue if the Liquor Corporation is the proper defendant and the Plaintiff requests the consent of the Attorney General to start a proceeding against the Corporation.
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> . . .
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> ¶46 The Attorney General cannot arbitrarily withhold consent once consent has been requested. To say that a Plaintiff would be left with no one to sue should the Attorney General refuse to consent is to say that the Attorney General has the ability to arbitrarily withhold consent even where there is a proper cause of action against the Liquor Corporation. This is an error in law. The Attorney General must adhere to the rule of law and cannot restrain an appropriate cause of action on a whim.

[21] When viewed in this context, as noted, I see s. 30 as no more than a procedural prerequisite which the Attorney General cannot arbitrarily thwart. This provision does not render Mr. McIntyre's claim against the NSLC unenforceable. As such, s. 3(2)(d) applies to bar the claim as framed. The subject matter of this claim involves NSLC's core day to day operations. If it has merit, it should be advanced against the NSLC as opposed to the Attorney General.

DISPOSITION

[22] I find that, in disallowing the Attorney General's application to strike, the Chambers judge applied wrong principles of law. This enables us to impose what

we view as the proper result. In so doing, I note that Justice Hood's order had a final and terminating effect. As such, I am mindful of the high threshold that exists for disposing of a claim without trial. In **CGU Insurance Co. of Canada v. Noble** (2003), 218 N.S.R. (2d) 49 (C.A.), Bateman, J.A. confirmed that this should only be done where "the law is so clear that it is plain and obvious". She added:

> ¶ 13 ... As noted by Freeman, J.A. in **American Home**, supra at ¶ 8, deciding a claim without trial is a serious matter which should occur only if the claim, on its face, is absolutely unsustainable.

[23] By virtue of s. 3(2)(d), it is clear that Mr. McIntyre's claim directly against the Attorney General is absolutely unsustainable. The action, as framed, should be struck as an abuse of process. I would therefore grant leave and allow the appeal. I would reverse the Chambers judge's order for costs and further direct the respondent to pay costs on appeal of $1,000.00, plus reasonable disbursements to be taxed.

MacDonald, C.J.N.S.

Concurred in:

Roscoe, J.A.

Oland, J.A.