IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Yarmouth (Town) v. Digby (Town), 2002 NSSC 241

Date: 20021018
Docket: S.Y. No. 6413
Registry: Yarmouth

Between:

Town of Yarmouth, an incorporated Town

Plaintiff

- and -

Town of Digby, Municipality of the District of Yarmouth, Municipality of the District of Claire, Municipality of the District of Argyle, Municipality of the District of Barrington, Municipality of the District of Digby and Town of Clark's Harbour, carrying on business under the firm name and style of "Waste Check"

Defendant

Judge:	The Honourable Justice David W. Gruchy
Heard:	October 18, 2002, in Yarmouth, Nova Scotia
Written Decision:	November 1, 2002
Counsel:	Gregory M. Warner, Q.C., for the plaintiff Jennifer L. Gray, for the defendant

By the Court:

[1] This is an application by the plaintiff to strike a limitation defence. I heard the application on October 18, 2002 and rendered an oral decision at that time. I now set forth more fully my reasons for allowing the application.

Background

[2] In 1996 the Town of Digby, the Districts of Yarmouth, Claire, Argyle, Barrington, Digby and Village of Clark's Harbour agreed to form a Regional Solid Waste Resource Management Committee. That committee administered waste disposal for their respective units until 1998.

[3] In 1998 the Province of Nova Scotia undertook certain waste disposal initiatives whereby municipalities were encouraged to undertake certain programs. With the exception of the Town of Yarmouth, the other municipal units mentioned above resolved on November 16, 1998 to form a regional body to manage solid waste resources in their district. On that date the committee resolved to transfer "all funds and other assets, including staff" ... to the ... "new regional authority" on January 18, 1999. The new authority thereby created is a municipal body corporate pursuant to s. 60(4) of the *Municipal Government Act*, S.N.S. 1998, c. 18 and is called "Waste Check."

[4] The plaintiff alleges that by transferring assets of the former committee to Waste Check the committee transferred assets to which it had made financial contributions and in which assets it claimed an interest. The plaintiff did not participate in or have a representative attend the meeting at which the resolution authorizing the transfer was passed. It is therefore asked for an accounting of its share of the assets and repayment of its share, plus general damages for conversion.

[5] In addition, the plaintiff has claimed that the Province of Nova Scotia, pursuant to appropriate legislation, paid monies to Waste Check in respect to the diversion of solid waste, some of which funds were paid to Waste Check by reason of the diversion of solid waste by the plaintiff and has claimed an accounting therefore.

[6] The transfer of assets to Waste Check occurred on January 18, 1999. From April 14, 1999 to December 15, 1999 the plaintiff corresponding with Waste Check with a view to settling the dispute and from that correspondence I gather that the parties were actively negotiating.

[7] From June 26, 2000 to March 14, 2001 there were various meetings of the parties with a view to settling the dispute by means of mediation and other initiatives were undertaken with respect to possible settlement.

[8] No issue has been raised with respect to notice of the claim. The action was commenced by the plaintiff on July 16, 2001. The parties are agreed that the cause of action arose on January 18, 1999. A defence was filed on July 23, 2001, para.12 of which reads:

> 12. Waste Check relies on section 512 of the *Municipal Government Act,* S.N.S. 1998, c. 18 and the *Limitation of Actions Act*, 1989, c. 258, as amended. Waste Check states that if the Plaintiff has a cause of action, which is not admitted, this action is precluded by statute. Waste Check states that the Plaintiff did not bring this action within the twelve month period as stated in the *Municipal Government Act*.

[9] Section 12 of the *Municipal Government Act* reads as follows:

> 512(1) For the purpose of the *Limitation of Actions Act*, the limitation period for an action or proceeding against a municipality or village, the council, a council member, a village commissioner, an officer or employee of a municipality or village or against any person acting under the authority of any of them, is twelve months.
>
> (2) Subsection (1) applies, with all necessary changes, to a service commission and a board, commission, authority, agency or corporation of a municipality or a board, commission, authority, agency or corporation jointly owned or established by municipalities or villages.

[10] The parties are agreed that the limitation period expired on January 19, 1999.

[11] On April 11, 2002 the plaintiff applied "for an application pursuant to Section 3(2) of the *Limitation of Actions Act* to disallow a defence based on time limitation and such other Order as the court deems appropriate."

[12] In support of this application the plaintiff filed the affidavit of Raymond Gallant, the Chief Administrator of the Town of Yarmouth who set forth the history of the negotiations and of the relations between the parties with respect to the substance of this claim. The applicable subsections of sections 3 and 4 of the *Limitation of Actions Act*, S.N.S. 1989, c. 258 read as follows:

> **Interpretation of Section**
>
> **3 (1)** In this Section,

(a) "action" means an action of a type mentioned in subsection (1) of Section 2;

(b) "notice" means a notice which is required before the commencement of an action;

(c) "time limitation" means a limitation for either commencing an action or giving a notice pursuant to

(i) the provisions of Section 2,

(ii) the provisions of any enactment other than this Act,

(iii) the provisions of an agreement or contract.

Application to proceed despite limitation period

(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which

(a) the time limitation prejudices the plaintiff or any person whom he represents; and

(b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

Factors considered

(4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to

(a) the length of and the reasons for the delay on the part of the plaintiff;

(b) any information or notice given by the defendant to the plaintiff respecting the time limitation;

(c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;

(d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiffs cause of action against the defendant;

(e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

Application of Section

(5) The provisions of this Section shall have effect in relation to causes of action arising

> (a) before the twenty-sixth day of June, 1982, if the time limitation has not expired before that date;
>
> (b) on or after the twenty-sixth day of June, 1982.

[13] These subsections were carefully considered by the Nova Scotia Court of Appeal in *MacCulloch v. McInnes, Cooper & Robertson* (1995), 140 N.S.R. (2nd) 220. Mr. Justice Matthews described the function of the court in an application such as this as follows (para. 21):

> In this case, as in most, an extension of the time limit prejudices both parties. The legislators recognized that fact. That is why the words "...and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which..." there is prejudice to each party, are in s. 3(2). (Emphasis added). In so doing a court must "have regard' to all the circumstances of the case and in particular" to the seven factors set out in s. 3(4). The weighing of the degrees of prejudice is an important and required prerequisite to any conclusion which may be reached by a court.

[14] Justice Matthews continued by referring with approval to the decision of Hallett, J. (as he then was) in *Anderson v. Co-operative Fire & Casualty Co.* (1983), 58 N.S.R. (2d) 163 when he said:

> ...The issue before the Court on this application is whether it is equitable to disallow the time limitation defence, having regard to the degree to which (1) the time limitation prejudices the plaintiff or any person whom he represents and (2) any decision to disallow the time limitation pursuant to this amendment would prejudice the defendant or any other person. In determining the issue, the Court must have regard to all the circumstances of the case and, in particular, the seven matters referred to in s. 2A(4) (a) to (g).
>
> In any case, there is great prejudice to a plaintiff if a time limitation defence succeeds as the plaintiff loses his cause of action. On the other hand, there is great prejudice to the defendant who loses a perfect defence if the order is granted. The Legislature in enacting this amendment must have recognized that there was prejudice to each party when the word "degree" was used in s. 2A (2). The Court has been directed to consider not simply whether there is prejudice but to weigh the degree of prejudice to the parties. The intention of the Legislature as

> expressed is to give the Court the authority to disallow a defence based on time limitation considering the criteria set forth in ss. 2A (2) and (4).
>
> The degree of prejudice to a plaintiff caused by a valid time limitation defence could not be greater as the cause of action is lost. ...
>
> What the Legislature must have meant when it authorized the Court to disallow the defence if it appeared equitable to do so, having regard to the degree to which any such decision would prejudice the defendant, was whether the defendant was prejudiced in the defence of the action on its merits because of the failure of the plaintiff to have proceeded in time. The Legislature could not have intended that the Court consider the fact that the defendant loses a perfectly good defence in assessing the degree of prejudice to the defendant if the order were granted, as, otherwise, it would be somewhat pointless for the Legislature to have enacted the amendment. There would be virtually no basis upon which to weigh the degree of prejudice to the parties as if the relief is refused, the plaintiff is totally prejudiced in the case and to allow the relief, the defendant is totally prejudiced. In summary on this point, in determining the degree of prejudice that would be suffered by the defendant if a decision were made to disallow the time limitation defence, the Court should not give much weight to the fact that the defendant loses its defence.

[15] As was later emphasized by Mr. Justice Matthews when he referred to the decision of Davison, J. *Rushton v. Registrar of Motor Vehicles (N.S.)* (1992), 118, N.S.R. (2nd) 107 the prejudice to a plaintiff in refusing to disallow a limitation defence "...couldn't be greater in that his action would be dismissed." The defendant would be disadvantaged in that his statutory defence would have been disallowed, but the action will proceed to be heard on its merits.

[16] The various factors set out in s. 3(4) of the *Limitation of Actions Act* have been considered by each of the parties in their submissions to me. I will now set forth my conclusion with respect to each of them.

(a) The length of and the reasons for the delay and the part of the plaintiff.

[17] Approximately 18 months transpired after the expiration of the statutory limit. The defendant says that no proper reason has been advanced for the delay. The plaintiff says that there were on-going negotiations between the parties in an attempt to resolve the issues during that period of time. Indeed, the affidavit of Mr. Gallant appears to support that position.

(b) Any information or notice given by the defendant to the plaintiff respecting the time limitation.

[18] The defendant concedes that they did not explicitly state that the limitation period was approaching but that the plaintiff, being a sophisticated party and presumably knowledgeable about such matters, should have realized the situation. The plaintiff points out that the defendant's correspondence appeared to encourage further discussion and procedure whereby the matters at issue could be concluded. Mr. Gallant stated in his affidavit that verbal communications between the parties continued up to and including March 14, 2001.

(c) The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or if notice had been given within the time limitation.

[19] The defendant says that its manager during the period in which negotiations were proceeding is no longer employed by the defendant and is not likely a resident of the province. It says that it has thereby been prejudiced and that its evidence will be less cogent. The plaintiff submits that while the prospective witness is no longer an employee, his evidence will still be available by various processes and further, in any event, the evidence in this case will likely be largely and almost exclusively documentary in nature. I am inclined to agree with the defendant. Having reviewed briefly such evidence as was adduced before me, it appears the evidence will be largely documentary with some oral evidence by way of explanation. I do not see that the defendant will be seriously prejudiced, if at all, by the fact the witness is no longer in the employ of the defendant.

[20] The defendant also states that two of its member municipalities - Town of Clark's Harbour and the Municipality of the District of Barrington - are no longer involved in the partnership, having withdrawn from it. The defendant says as a result of that withdrawal the interests of the two municipalities are more akin to the interests of the plaintiff and that therefore the defendant has been prejudiced. I must disagree with the defendant. The two municipalities still exist and the evidence which they may be able to adduce will still exist. I must assume that the evidence which may be adduced by those units will

be truthful, irrespective of their interests. I cannot agree that the evidence available from these municipalities or by any other means will have been rendered less cogent by virtue of the passage of time.

(d) The conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or which might be relevant to the plaintiff's cause of action against the defendant.

[21] On the facts as adduced before me I do not consider this particular factor to be relevant herein.

(e) The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action

[22] I agree with the plaintiff that this factor is not significant in this case.

(f) The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages.

[23] It is apparent from the affidavit of Mr. Gallant that the plaintiff and the defendant negotiated without benefit of counsel for a period in excess of one year after the transfer of the assets. It is also apparent that these negotiations were carried out in good faith. The plaintiff submits that when it decided that negotiations were apparently failing it acted promptly to commence the action. The plaintiff's evidence before me supports that position.

(g) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

[24] This factor is not applicable in this case.

[25] The defendant during its appearance before me submitted that two cases in support of its position: *Day v. Guarantee Co. of North America*, **(2002) N.S.S.C. 012?** and *Travellers Indemnity Company of Canada v. Andrew Clifford Maracle Jr.* 80 D.L.R. (4th) 652. Neither of these cases is helpful in

the circumstances. *Day v. Guarantee* was a case where the delay was in excess of four years and where, on the facts, there appears to have been an inordinate delay and prejudice occasioned to the defendant. *Travellers Indemnity Company of Canada v. Andrew Clifford Maracle, supra,* does not deal with a Statute of Limitations and, on its facts, is not helpful.

[26] I therefore have decided that the time limitation defence will be struck.

[27] I have not especially dealt with the plaintiff's claim for "diversion credits." In submissions before me it became clear that the plaintiff has no knowledge of the time or amounts of any such diversion credits having been paid by the province to the defendant and accordingly, its limitation defence would not be applicable in any event.

[28] By way of *obiter dicta* I remark that the limitation period of one year in inter-municipal relations appears to me to be extremely short. Municipal councils and corporations are sometimes unwieldy bodies, especially when dealing with one another and a limitation as short as one year would appear to encourage litigation when such bodies should be encouraged to continue their negotiations towards settlement of any differences.

[29] Costs of this application will be costs in the cause.

Gruchy, J.