NOVA SCOTIA COURT OF APPEAL

Citation: *Yarmouth (District) v. Nickerson*, 2017 NSCA 21

Date: 20170309
Docket: CA 447081
Registry: Halifax

Between:

The Municipality of the District of Yarmouth,
a municipal body corporation

Appellant

v.

Derek Todd Nickerson, Gwen E. Nickerson, Robert Gordon Leggett, Patricia Rosemary Leggett, Anthony Barney Bourque, Marie Hope Bourque, Achille Fulgence LeBlanc a.k.a. Archie LeBlanc (Estate of) and A.F. LeBlanc & Son Excavating Limited, a body corporate

Respondents

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	October 3, 2016, in Halifax, Nova Scotia
Subject:	Statutory interpretation; applicability of the *Limitation of Actions Act* to an historical claim of negligent inspection by municipal officials
Summary:	The owners of a house sued the previous property owners because their home was damaged from soil subsistence. One of those previous owners brought a third party claim against Yarmouth, claiming it was negligent in issuing permits or inspecting the lot and ensuing construction of the house. Yarmouth brought a summary judgment motion based on s. 504(3) of the *Municipal Government* Act which stipulated that "Notwithstanding the *Limitation of Actions Act*", municipalities were "not liable" for any losses if the claim was made more than six years after the permit application date. The third party claim was well past six years. The motion was dismissed. The motion judge relied on earlier

decisions of this Court that dealt with the *Defamation Act*. He concluded that a defence based on s. 504(3) was a limitation period which could be avoided by the equitable relief provisions in s. 3(2) of the *Limitations of Actions Act*.

Issues:

(1) What was the proper statutory interpretation of s. 504(3) of the *Municipal Government Act*?

(2) Is the time period set out in s. 504(3) a "time limitation" within the meaning of the *Limitation of Actions Act*?

Result:

Leave to appeal is granted and the appeal allowed. The motion judge erred in relying on decisions that dealt with the interpretation of the *Defamation Act* and the *Limitation of Actions Act*. While those decisions were, and remain sound, they do not dictate the determination of the appropriate interpretation of the *Municipal Government Act* and the *Limitation of Actions Act*. Applying the correct principles of statutory interpretation, municipalities are exempt from liability six years after the relevant permit application date. It is not a limitation period within the meaning of the *Limitation of Actions Act*.

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Respondents

Judges:	Beveridge, Farrar and Van den Eynden, JJ.A.
Appeal Heard:	October 3, 2016, in Halifax, Nova Scotia
Held:	Leave granted and appeal allowed with costs, per reasons for judgment of Beveridge, J.A.; Farrar and Van den Eynden, JJ.A. concurring
Counsel:	Ian Dunbar and Katie Archibald, for the appellant Barry Mason, Q.C., for the respondents Derek Todd Nickerson and Gwen E. Nickerson Rubin Dexter for the respondents Robert Gordon Leggett and Patricia Rosemary Leggett (not present) Anthony Bourque and Marie Bourque, respondents in person (not present)

INTRODUCTION

[1] This case is about how the *Municipal Government Act* (*MGA*) intersects with the *Limitations of Actions Act* (*LAA*).

[2] The *MGA* directs that municipalities and their employees are not liable for how they carried out their inspection responsibilities six years after the permit application date. Two of the respondents made a claim against the Municipality of the District of Yarmouth well past six years after the relevant date. Yarmouth asked a judge to dismiss the claim *via* a motion for summary judgment.

[3] The Honourable Justice John Murphy dismissed the motion because he concluded that the claim against Yarmouth might ultimately succeed. He reasoned that the six-year period set out in the *MGA* was a limitation period; as such, a defence based on the lapse of time could be disallowed pursuant to the *LAA*.

[4] Yarmouth appeals. It says the motion judge erred in his interpretation of the *MGA* and the *LAA*. I agree. As a consequence, I would grant leave to appeal and allow the appeal.

[5] Before turning to my analysis, I will set out the factual background and the history of the proceedings to the conclusion of the summary judgment motion.

FACTS AND HISTORY OF THE PROCEEDING

[6] The facts that inform the legal analysis are not in dispute. Derek and Gwen Nickerson purchased property in Pleasant Lake, Yarmouth County in 2004. They hired Archie LeBlanc, a local contractor, to tear down and remove a derelict building in order to sell the property as a building lot.

[7] After Mr. LeBlanc did the work, the Nickersons sold the lot to Anthony and Marie Bourque. On September 21, 2005, the Bourques applied for development and building permits. Yarmouth granted them. The Bourques built a home on the lot in 2006. They sold the lot to Gordon and Patricia Leggett in 2007.

[8] Although the Leggetts sold the property in 2008, they re-purchased it in 2009. In November 2012, the Leggetts noticed their house was sinking. They sued the Nickersons and Bourques in negligence in 2013. Defences and cross-claims ensued.

[9] On October 16, 2014, the Nickersons commenced third party claims against the excavation contractor and Yarmouth. As against the latter, they sought contribution and indemnity for any amounts that they may be found liable to pay to the Leggetts, on the basis that Yarmouth was negligent in issuing the permits and how it carried out its inspections.

[10] Yarmouth filed a Statement of Defence to the Nickersons' third party claim on May 19, 2015. It denied negligence. Yarmouth pled, amongst other things, s. 504(3) of the *Municipal Government Act*, S.N.S. 1998, c. 18 that municipalities are "not liable" for losses arising out of a failure to inspect or an inspection if the claim is made more than six years after the permit application date. It reads as follows:

> (3) Notwithstanding the *Limitation of Actions Act* or another statute, a municipality or a village and its officers and employees are not liable for a loss as a result of an inspection or failure to inspect, if the claim is made more than six years after the date of the application for the permit in relation to which the inspection was required.

[11] Relying on this provision, Yarmouth filed a summary judgment motion to dismiss the third party claim against it. The motion was heard on September 10, 2015. The Nickersons opposed. None of the other parties to this litigation chose to appear or participate at that hearing or on this appeal. I will henceforth refer to the Nickersons as the respondents.

[12] At the hearing before Murphy J., the appellant and the respondents agreed that if s. 504(3) barred the third party claim, the appellant's motion for summary judgment must succeed; if it did not, then the basis for the summary judgment motion would vanish.

[13] The respondents argued to the motion judge that s. 504(3) was a limitation period within the meaning of the *Limitations of Actions Act*, R.S.N.S. 1989, c. 258. As a consequence, a judge could permit the claim to proceed pursuant to the equitable relief power to disallow a limitation period defence found in what was then s. 3(2) of the *LAA*.

[14] As to the phrase in s. 504(3) "Notwithstanding the *Limitations of Actions Act*", the respondents suggested this did not preclude access to the equitable relief power (s. 3(2) of the *LAA*). After all, this Court in *MacIntyre v. Canadian Broadcasting Corporation* (1985), 70 N.S.R. (2d) 129 and *Butler v. Southam Inc.*,

2001 NSCA 121 ruled that the same 'notwithstanding' phrase found in the *Defamation Act*, R.S.N.S. 1989, c.122 (s. 19) did not preclude resource to s. 3(2) of the *LAA*.

[15] The respondents also pointed to the decision of this Court in *Halifax (Regional Municipality) v. WHW Architects Inc.*, 2014 NSCA 75, where HRM had conceded that a claim beyond the six-year period defined in s. 504(3) could proceed on the basis of a potential application of s. 3(2) of the *LAA*.

[16] At the conclusion of the September 10, 2015 hearing, the motion judge dismissed the summary judgment motion. His oral reasons are not reported. I need not refer to them in detail. It suffices to say that the motion judge accepted all of the respondents' arguments. In particular, that he was not only bound by the decisions of this Court in *MacIntyre* and *Butler*, he agreed with them. In his view, because those cases had decided the same issue, the outcome in this case was the same.

[17] In sum, s. 504(3) was a limitation period within the meaning of the *LAA*, and s. 3(2) was available to permit a claim to proceed despite being beyond six years.

ISSUES

[18] The grounds of appeal set out in the appellant's application for leave to appeal are:

> (a) The Learned Chambers Judge erred in law by incorrectly interpreting and failing to apply Section 504(3) of the *Municipal Government Act*, S.N.S. 1998, c. 18; and
>
> (b) The Learned Chambers Judge erred in law by incorrectly finding that the Respondents could apply for an extension of time under Section 3(2) of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258.

[19] The appellant's factum slightly restates the issues as follows:

> (i) Should leave to appeal be granted?
>
> (ii) If leave is granted, whether the Learned Chambers Judge erred by failing to grant the Municipality's motion for summary judgment by incorrectly finding that Section 3(2) of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258 ("*LAA*") could potentially be applied to extend the period of time specified in Section 504(3) of the *Municipal Government Act*, S.N.S. 1998, c. 18 ("*MGA*")?

[20] I will discuss these issues but not quite in the same order.

LEAVE TO APPEAL

[21] The summary judgment motion was an interlocutory proceeding. Leave to appeal is required. To obtain leave, an appellant need only demonstrate that the appeal raises an "arguable issue" — one that could result in the appeal being allowed (*Burton Canada Company v. Coady*, 2013 NSCA 95 at para. 18). The respondents argue that leave should not be granted because the question posed by the proposed appeal to this Court has been answered twice before in *MacIntyre*, *supra*. and *Butler*, *supra*. With respect, I disagree.

[22] The sole relevant question answered by those decisions was whether it was open to a plaintiff to obtain relief by s. 3(2) of the *LAA* from the limitation period found in the *Defamation Act*. They say nothing about the issue of the correct statutory interpretation of the *MGA* and the *LAA*. I would grant leave.

STANDARD OF REVIEW

[23] The appellant submits that the standard of review is correctness. The respondents agree. Determining the meaning of statutory provisions is a pure question of law for which no deference is owed to a lower court (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8-9)

ANALYSIS

[24] The motion judge found that the statutory interpretation of s. 504(3) was pre-determined by this Court's decisions in *MacIntyre* and *Butler*. The respondents on appeal say he was right. I will therefore begin with why I conclude those cases do no such thing. I will then turn to the principles of statutory interpretation that determine the outcome of this appeal.

MacIntyre and Butler

[25] The facts in *MacIntyre* are unremarkable, and, for the purposes of legal analysis, quite unimportant. What is important are the facts concerning the evolution of the legislative provisions that needed interpretation. First, the former to frame the legal issues.

[26] The plaintiff claimed a CBC story defamed him. Notice of the plaintiff's intention to sue and the commencement of his action were accomplished within the tight time frames mandated by what were then ss. 17 and 18 of the *Defamation Act*, R.S.N.S. 1967, c. 72. The lawsuit proceeded with the filing of a defence, interrogatories and discoveries.

[27] The plaintiff discovered that he had failed to give 90 days' notice of his intention to sue the Federal Crown. The CBC was a Crown corporation. To remedy this problem, the plaintiff commenced a new action, but it was well outside the time limit set by the *Defamation Act*. The CBC pled that the action was time-barred. The plaintiff successfully applied to disallow that defence based on what was then s. 2A (2) of the *Limitation of Actions Act*, R.S.N.S. 1967, c. 168, as amended by S.N.S. 1982, c. 33.

[28] Section 2A permitted a defendant to apply to a court to terminate the right of a person to commence an action. If no such order had yet been given, a plaintiff who commenced an action without regard to a time limitation could apply to a court to disallow a defence based on a limitation period and the action could proceed.

[29] CBC appealed. The basic argument of the appellant in *MacIntyre* was that the equitable relief provision found in s. 2A of the *LAA* was precluded because s. 18 of the *Defamation Act* said that "Notwithstanding the *Statute of Limitations Act*" an action shall be commenced within six months after knowledge of the defamatory statement. The full text of the provision at that time was:

> s. 18 Notwithstanding the *Statute of Limitations Act*, an action against the proprietor or publisher of a newspaper, or the owner or operator of a broadcasting station, or any officer, servant or employee of such newspaper or broadcasting station, for defamation contained in the newspaper or broadcast from the station shall be commenced within six months after the publication of the defamatory matter has come to the notice or knowledge of the person defamed; but an action brought and maintainable for defamation published within that period may include a claim for any other defamation published against the plaintiff by the defendant in the same newspaper or from the same station within a period of one year before the commencement of the action.

[30] Macdonald J.A. wrote the judgment of the Court. He found no error by the application judge's reliance on the equitable relief provision of the *LAA*. The fundamental question was: what did the legislature intend in s. 18 of the

Defamation Act? The answer was easy to find in light of the evolution of the legislation.

[31] The *Limitation of Actions Act* (often, and with legislative fiat, cited as the *Statute of Limitations*) provided in 1900 that the limitation period for bringing an action for slander was one year. For libel, it was six years[1] (R.S.N.S. 1900, c. 167).

[32] These were the limitation periods in force (see R.S.N.S. 1954, c. 153) when Nova Scotia enacted its first *Defamation Act*, S.N.S. 1960, c. 4. It abolished the common law distinction between libel and slander. Defamation meant either. Broadcasting was equated to publication in permanent form.

[33] Justice Macdonald referred to this legislative evolution to explain the legislative intent behind the "Notwithstanding the *Limitation of Actions Act*" in s. 18 of the *Defamation Act*. It was a trade-off for potential defendants. They may be liable for broadcasting defamatory statements as if they were libelous, but notice of the action had to be given within three months, and the action commenced within six—instead of the six-year limitation period for libel found in the *LAA*. He reasoned as follows:

> [15] The *Defamation Act* of this province was first enacted by S.N.S. 1960, c. 4; this *Act*, like its counterparts elsewhere, recognized that the broadcast word could be at least as damaging to one's reputation as the printed word and, in consequence, did away the distinction between libel and slander where the defamatory words were broadcast. Section 2 of the *Act* reads as follows:
>
> > 2. For the purposes of this *Act* and of the law relating to libel and slander, the broadcasting of words shall be treated as publication in permanent form.
>
> [16] In return the Legislature built in some protection for the owners and operators of broadcasting stations by requiring by s. 17 that notice of intended action had to be given within three months of the plaintiff having notice or knowledge of the alleged defamation. Then by s. 18 the limitation period was set at six months. A drastic reduction from the six-year limitation for commencing an action for libel prescribed by s. 2(1)(e) of the *Statute of Limitations*. This was the only provision of the *Statute of Limitations* that could have been of concern to the Legislature at the time the *Defamation Act* was enacted. It appears quite clear to me that what was intended by the opening words of s. 18 of the *Defamation Act*,

[1] Justice Macdonald referred to some of the earlier *Limitation of Actions Acts*, such as R.S.N.S. 1884, c. 112, which had provided that an "action on the case for words" had to be commenced within one year.

> "Notwithstanding the provisions of the *Statute of Limitations*", was that the six-month limitation period prescribed in s. 18 was to override the six-year limitation period for commencing an action for libel as prescribed by the *Statute of Limitations*. It could not have been the intention to override an equitable relief provision that did not exist.

[34] Historically, a missed limitation period was fatal to a plaintiff's ability to obtain a legal remedy. The action was barred by the simple calculation of time. This was subject only to the judge-made rule about discoverability. That is, limitation periods did not commence until the plaintiff knew or reasonably ought to have known about the material facts that formed the basis for his or her cause of action (see for example, *Burt v. LeLacheur*, 2000 NSCA 90 at paras. 8 and 34; *Ryan v. Moore*, 2005 SCC 38 at paras. 21-24).

[35] That changed in 1982 in Nova Scotia when the legislature amended the *Limitation of Actions Act*. If an action was started beyond a limitation period, a court was given the power to disallow a defence based on time limitation. There is no need to describe the nuances or quote the whole of the provision. It is sufficient to set out what was then s. 2A(1) and (2):

> 2A (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.
>
> (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.

[36] Slander and libel were causes of action mentioned in s. 2(1) of the *LAA*. Section 2(1)(a) provided that actions for slander shall be commenced within one year after the cause of action arose. For libel, within six years (s. 2(1)(e)).

[37] As observed by Justice Macdonald, the *Interpretation Act* deems legislation to be remedial and directs an interpretation exercise to ensure attainment of its objects, by considering the reasons for the enactment and the mischief to be remedied. He described the reasons for introduction of s. 2A as obvious:

> [10] . . . Section 2A was enacted in 1982 for the obvious purpose of providing relief where justified from the strictures of time limitations as provided by that *Act* or by any other enactment. By s. 8(5) of the *Interpretation Act*, R.S.N.S. 1967, c. 151, this amending legislation is deemed to be a remedial enactment and must be interpreted to ensure the attainment of its objects by considering amongst other things the occasion and necessity for the enactment, the mischief to be remedied and the object to be attained.
>
> [11] The opening words of s. 18 of the *Defamation Act* – "Notwithstanding the *Statute of Limitations*" mean to my mind that the requirements of that section are to prevail over any *conflicting* time limitation provisions of the *Statute of Limitations*. I am not persuaded, however, that s. 18 is a complete bar to the invocation of the remedial provisions of s. 2A(2) of the *Statute of Limitations*.

[38] Later, I will discuss the differences between the legal landscape that led to this conclusion and what faced the motion judge in 2015 in this case. First, *Butler v. Southam Inc., supra*.

[39] The Daily News published a series of articles written by Parker Donham alleging widespread physical and sexual abuse of children in provincial facilities, and a systemic effort to cover it up. The plaintiffs were current and former provincial employees at one of the named institutions. They said they were defamed by the articles. Notice of their claim and their action were well outside the time limits set by the *Defamation Act*.

[40] The defendants successfully applied to strike the claim on a variety of bases. One of which was that the action was out of time. The motion judge dismissed the action on the basis that the articles were not capable of being defamatory of the plaintiffs. He also refused to disallow the limitation defences.

[41] The plaintiffs appealed. With respect to the issue of time, the respondents argued by notice of contention that the motion judge lacked jurisdiction to disallow the limitation defences under what had become s. 3(2) of the *Limitation of Actions*

Act (formerly s. 2A). They invited the Court to reconsider *MacIntyre* on the basis that s. 19 of the *Defamation Act* (formerly s. 18) precluded the operation of s. 3(2) of the *LAA*.

[42] Cromwell J.A., as he then was, wrote the unanimous reasons for judgment. He concluded the motion judge erred in dismissing the claim. With respect to the interplay between the *Defamation Act* and the *LAA*, he approved the interpretative analysis and conclusions expressed by Macdonald J.A. in *MacIntyre*.

[43] Justice Cromwell considered that the phrase "Notwithstanding the *Limitation of Actions Act*" clearly meant that the time limits found in the *Defamation Act* were to prevail over those found in the *LAA*. He reasoned that, "This interpretation is strongly supported by the words used viewed in the context of the relevant provisions, their legislative history and purpose" (para. 116).

[44] It could not have been the intention of the legislature to overcome or exclude the equitable power to relieve against a limitation period that did not exist at the time the *Defamation Act* provision was enacted. To adopt that interpretation would be to defeat the object of the 1982 equitable relief amendments to the *LAA*. Cromwell J.A. reasoned:

> [118] Moreover, as Macdonald, J.A. points out, the objectives of the two sets of provisions are distinct. As he put it, what is now s. 3 of the *Limitation of Actions Act* "... was enacted in 1982 for the obvious purpose of providing relief where justified from the structures of time limitations as provided by that Act or by any other enactment ": at § 10 (emphasis added); the limitation provisions of the *Defamation Act* were to establish a common and shortened limitation period for what would previously have been governed by the two periods under the limitations statute relating respectively to slander and libel.
>
> [119] The fact that the discretionary power to relieve against limitation periods is expressly stated to apply to time limitations under any other enactment reinforces the interpretation adopted by the Court in *MacIntyre*.
>
> [120] That interpretation is also consistent with the mandatory provisions of s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235 as amended. That subsection requires that every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering (among other matters) (b) the circumstances existing at the time it was passed; (c) the mischief to be remedied; (d) the object to be attained; (f) the consequences of a particular interpretation; and (g) the history of the legislation on the subject. The discussion concerning legislative history and purpose as set out by Macdonald, J.A. in *MacIntyre* responds fully to the matters mentioned in paragraphs (b), (c), (d) and (g) of

> section 9(5) of the *Interpretation Act*. I would add a word only about (f), the consequences of a particular interpretation.
>
> [121] In my view, the adoption of the respondents' position concerning the interpretation of this legislation would have the following consequences. The provisions of s. 3 of the *Limitation of Actions Act*, which provide a detailed code relating to the disallowance of all limitation and notice provisions generally would be found not to apply to the very short limitation periods under the *Defamation Act*. Thus, this remedial legislation would not achieve its purposes with respect to the *Defamation Act* time limitations. This result would be arrived at on the basis of the opening words of s. 19 ("notwithstanding the *Limitation of Actions Act*") even though they were enacted long before any such code for disallowance of limitation defences existed in the *Limitation of Actions Act*. This result would also ignore the fact that the legislative history reveals a more sensible interpretation which is completely consistent with the words used in both enactments and results in the new provisions of the *Limitation of Actions Act* achieving their purposes. In my view, there is nothing in the text of the enactments, when read in light of their purpose and history, to commend the respondents' interpretation.

[45] The principles and approach to statutory interpretation found in *MacIntyre* and *Butler* are sound. It is the application of those same principles to the intersection between the *MGA* and the *LAA* that lead to a different result in this case.

[46] The phrase "Notwithstanding the *Limitation of Actions Act*" found in s. 504(3) excludes the entirety of the *LAA*. To explain why, I will refer to the principles of statutory interpretation and how they apply here.

Principles of Statutory Interpretation

[47] The principles are found in a complementary matrix of interpretation legislation and common law. They have one goal: discover the true legislative intent in the words used.

[48] In Nova Scotia, s. 9(1) and (5) of the *Interpretation Act*, R.S.N.S.1989, c. 235 provide the following direction:

> 9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> …

> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[49] There are a myriad of common law principles that can be enlisted to assist in statutory interpretation. The Supreme Court of Canada has designated Driedger's so-called modern rule as the preferred approach. Courts must look at the grammatical and ordinary sense of the words, read in their entire context, the scheme and object to the legislation. In *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 Justice Iacobucci, for the court, wrote:

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor

> John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

[50] The principles are not separate silos. They often overlap as they are closely related and interdependent (see: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para. 28). I will start with the context and scheme of the *Municipal Government Act* provisions.

Context and legislative scheme

[51] *The Municipal Government Act* was enacted in 1998 (S.N.S. 1998, c.18). It is a large piece of legislation. There are 22 Parts with close to 600 sections. Section 504(3) is found in Part XXI entitled “GENERAL”. There are four sections in Part XXI with the heading “No liability” (ss. 504, 513, 514, 515).

[52] In ss. 513-515, the legislation directs that officers, employees and municipalities are not liable for failure to provide a service, or if they do provide it, for loss from a break, discontinuance or interruption of the service.

[53] Section 504 exempts municipalities from liability with respect to building and property inspections in certain circumstances. The complete text is:

> **No liability**
>
> 504 (1) Where a municipality or a village inspects buildings or other property pursuant to this *Act* or another enactment, the municipality or the village and its officers and employees are not liable for a loss as a result of the manner or extent of an inspection or the frequency, infrequency or absence of an inspection, unless the municipality or the village was requested to inspect at appropriate stages, and within a reasonable time, before the inspection was required, and either the municipality or the village failed to inspect or the inspection was performed negligently.

(2) An inspection is not performed negligently unless it fails to disclose a deficiency or a defect that

(a) could reasonably be expected to be detected; and

(b) the municipality or the village could have ordered corrected.

(3) Notwithstanding the *Limitation of Actions Act* or another statute, a municipality or a village and its officers and employees are not liable for a loss as a result of an inspection or failure to inspect, if the claim is made more than six years after the date of the application for the permit in relation to which the inspection was required.

(4) If a municipality or a village receives a certification or representation by an engineer, architect, surveyor or other person held out to have expertise respecting the thing being certified or represented, the municipality or the village and its officers and employees are not liable for any loss or damage caused by the negligence of the person so certifying or representing.

[54] On the other hand, in the same Part, is s. 512, with the heading "Limitation of Actions Act". In keeping with the long history of shorter limitation periods for municipalities and some other public authorities[2], s. 512 directs a limitation period of 12 months to commence an action, with the additional requirement that notice of the claim must be given at least one month in advance. It provides:

Limitation of Actions Act

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.

(3) No action shall be brought against any parties listed in subsection (1) or (2) unless notice is served on the intended defendant at least one month prior to the commencement of the action stating the cause of action, the name and address of the person intending to sue and the name and address of that person's solicitor or agent, if any.

[2] David G. Boghosian and J. Murray Davison, *The Law of Municipal Liability in Canada* (Toronto: LexisNexis, 1999) at §10.1; Graeme Mew, *The Law of Limitations*, 3d ed (Toronto: LexisNexis, 2016) at §17.1.

[55] I will leave for another day the debate about the role the headings in legislation such as the *MGA* may play in interpretation. The parties did not refer to the legislative history or the background studies that led to the introduction and enactment of the *MGA*.

The grammatical and ordinary sense of the words

[56] To state the obvious, s. 504(3) does not say a claim against a municipality must be commenced within six years of the relevant permit application date. Instead, it directs that the municipality is "not liable". The grammatical and ordinary meaning of these words is that, as a matter of substantive law, municipalities are exempt from liability with respect to any claim after six years from the permit application date.

[57] Further, the direction of no liability on claims commenced more than six years past the permit application date is "Notwithstanding the *Limitation of Actions Act*, or any other statute".

[58] At common law, there was no time bar to bringing an action. Legislators have long recognized the social utility in legislation that precludes a plaintiff from proceeding with a claim after a certain period of time. There is no need to set out the legislation of bygone times, nor the vast array of law reform studies that have generated a legend of legislative revisions to better achieve the balance between the rights of plaintiffs to obtain access to a legal remedy that may be their due, and peace to society from historical claims (a review of some of these can be found in Graeme Mew's *The Law of Limitations*, 3d ed (Toronto: LexisNexis, 2016), pp. 4-18).

[59] The traditional view is that limitation statutes typically extinguish access to legal remedies, not legal rights (*Marwieh v. Brown*, 1993 NSCA 30). That is why it is common to find limitation legislation providing that an action must be commenced within a certain period of time. Justice Mew, in his text, describes this nuance:

> §4.1 The common law has traditionally considered statutes of limitation to be procedural, as contrasted with the position in most civil law countries, where limitations are regarded as substantive.
>
> §4.2 As a result, limitation provisions found in Canadian statutes have, for the most part, been interpreted as extinguishing remedies, rather than substantive legal rights. Thus, one commonly finds that an action must be commenced

> "within" or "within and not after" the prescribed period. As a result, although a party is barred from enforcing its remedies once the time period has expired, its legal rights will survive.

[60] Section 504(3) directs that the municipality is "not liable", not that a plaintiff must bring a claim within six years of the relevant permit date. To a prospective plaintiff, it is of little import if the provision is viewed as an ultimate limitation period or a stipulation of immunity that extinguishes his or her claim of damage caused by allegedly negligent conduct. The words are clear. There is no longer a viable claim against a municipality for negligent inspection after six years. But what of the *Limitation of Actions Act*?

[61] Justice La Forest in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 referred to the three rationales traditionally cited for limitation of actions legislation: certainty; evidentiary; and to encourage plaintiff diligence[3].

[62] Limitation periods benefit potential defendants. To achieve a more equitable balance, courts developed the "discoverability rule". Limitation periods do not commence until the plaintiff knows or ought reasonably to have known of the existence of his or her cause of action (see: *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Ryan v. Moore*, 2005 SCC 38 at paras. 21-24).

[63] The Nova Scotia *Limitation of Actions Act* contains other nuances as to when the clock starts in relation to a limitation period—such as persons under disability or absence from the jurisdiction.

[64] The 1982 amendments introduced a new paradigm. A court was granted the power to disallow a limitation defence up to four years past a limitation period, except limitation periods of ten or more years, or for the time limits in the then *Mechanics' Lien Act* (ss. 3(6) and (7)). Section 3(4) set out the list of factors to guide the exercise of the power.

[65] What reason could there be for the legislature to say that "Notwithstanding the *Limitations of Actions Act*" municipalities are "not liable" for any claim brought after six years? The ordinary meaning of "notwithstanding" is that something is so, without regard to or without prevention by another thing. The

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[3] See also: *Novak v. Bond*, [1999] 1 S.C.R. 808 at para 64; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at para. 34; and, *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 121 for a possible fourth rationale.

Concise Oxford Dictionary, 6th ed (Oxford: Oxford University Press, 1976) provides:

> 1. Without regard to or prevention by, not the less for….

See also: *Mattabi Mines Ltd. v. Mine Assessor* (1990), 72 O.R. (2d) 88 (C.A.); *Labrador City (Town) v. Newfoundland and Labrador Hydro Inc.*, 2004 NLCA 61.

[66] In *MacIntyre* and *Butler*, the limitation period in the *Defamation Act* was different than in the *LAA*. The *Defamation Act* reduced the limitation period to just six months, as opposed to the six years for libel found in the *LAA*. Six months (with a three month notice requirement) became the limitation period "notwithstanding" or despite what the *LAA* said. That language resolved the conflict.

[67] But in this case, the *LAA* provided that the limitation period for negligence was six years, subject of course to the various ways that the limitation period could be longer, or waived by the equitable relief provisions found in s. 3(2) of the *LAA*.

[68] The only reason for the direction "Notwithstanding the *Limitation of Actions Act*" is to ensure that there would be no confusion. The six-year period found in s. 504(3) of the *MGA* would operate without regard to the various ways that time might be extended or waived by the *Limitations of Actions Act*.

[69] As observed earlier, legislatures have long set relatively short limitation periods for actions in negligence against municipalities (¶ 53). Nova Scotia is no different. For 110 years prior to the enactment of the *MGA*, the limitation period was either six or twelve months with one month notice[4]. It was 12 months with one month notice when the *MGA* replaced the *Towns Act*, R.S.N.S. 1989, c. 472. In the new *MGA*, s. 512 simply repeated the limitation period to be 12 months, with one month notice.

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[4] The *Towns Incorporation Act of 1888*, S.N.S. 1887-1889, 51 Vict., c. 1. required an action to be brought within six months, with thirty days' notice (s. 268); this was later extended to 12 months by S.N.S. 1894-1895, 57 Vict., c. 25, s. 2. Similarly, the legislature appears to have set the limitation period at six months, but with twenty days' notice, in the *Halifax City Charter* at least from 1851 and through its various versions until it was repealed by the *Halifax Regional Municipality Act*, S.N.S. 1995, c. 3 when the limitation period was increased to 12 months with one months' notice (s. 205).

[70] Why then would the legislature be merely creating another, but much longer, limitation period by s. 504(3) for claims of losses said to have been caused by negligent inspection? It makes no sense.

[71] Furthermore, the consequences of interpreting s. 504(3) as merely being a limitation period would render the words "Notwithstanding the *Limitation of Actions Act* or any other statute" and that municipalities are "not liable" meaningless. According to the respondents, municipalities could indeed be found liable if a court disallowed what they say is a limitation defence. The *LAA* would apply, despite the legislative direction in s. 504(3) that it did not. That cannot be what the legislature intended.

The Statute of Limitations

[72] The motion judge found that s. 504(3) met the definition of a time limitation found in the *LAA*. As such, a defence relying on the lapse of time could be disallowed under s. 3(2) of the *LAA*. The appellant argues that the motion judge also erred in that conclusion.

[73] It may not be necessary to address this argument in light of my earlier conclusion concerning the proper interpretation of s. 504(3), but the issues are intertwined. With respect, the motion judge also erred in finding s. 504(3) was a time limitation within the meaning of s. 3(2).

[74] Section 3(2) empowers a court to disallow a defence based on a "time limitation". It reads as follows:

> (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.

[75] "Time limitation" is specifically defined by s. 3(1) of the *LAA* as meaning a limitation for commencing an action, or giving notice pursuant to the *LAA*, any other enactment, or a contract. It provides:

> 3 (1) In this Section,
>
> …
>
> (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.

[76] Section 504(3) does not refer to the commencement of an action or the giving of notice (unlike s. 512 of the *MGA*). Instead, it plainly directs that a municipality is not liable for a loss as a result of an inspection or failure to inspect if the claim is made more than six years after the relevant application date.

[77] The respondents suggest it is worth noting that this Court had the opportunity to interpret s. 504(3) in *Halifax (Regional Municipality) v. WHW Architects Inc.*, 2014 NSCA 75. Cases decide only what they are asked to decide. The sole issue in *WHW* was whether s. 504(3) was retroactive, and if the rule of discoverability operated. HRM made representations that, in its view, s. 3(2) of the *LAA* could "disallow" reliance on the six-year period in s. 504(3). That concession was not approved.

[78] Justice Bryson observed that he was not required to decide the applicability of Section 3(2). He wrote as follows:

> [10] HRM now appeals arguing that the Chambers judge erred in law by finding that the six-year limitation period in the *Municipal Government Act* does not apply to this case. Essentially, HRM challenges the Chambers judge's legal conclusion in the emphasized quotation from his decision. **HRM acknowledges that s. 3(2) of the *Limitation of Actions Act*, still applies – in other words, a court may extend the limitation period based on the statutory discretion granted to the court in that section. But no ruling was made by the Chambers judge on WHW's motion for an extension, so there is no issue between the parties before this Court with respect to s. 3(2) of the *Limitation of Actions Act*.**
>
> [Emphasis added]

[79] This Court, in *WHW*, did accept that the discoverability rule did not apply to the six-year period defined in s. 504(3) (paras. 11-12).

[80] This means that if a claimant starts an action six years from the date of the permit application, he or she faces no impediment from s. 504(3) of the *MGA* in trying to recoup damages from the municipality based on allegations of negligent inspection.

[81] However, he or she might still face an obstacle in pursuing a remedy by virtue of s. 512 of the *MGA*. That section sets an effective limitation period of 11 months (12 months less one month notice). Assuming, without deciding, that the discoverability rule applies to s. 512, the limitation period would start when the defect is known or should have been known.

[82] If the time limit set by s. 512 has expired, a defence based on an action commenced more than 12 months past it might be disallowed by the equitable relief power found in s. 3(2) of the *LAA*; but only for actions commenced within four years after expiration of the time limit (s. 3(6)).

[83] For claims after six years past the permit application date, the municipality is not liable. A claim based on negligent inspection cannot succeed.

[84] With respect, the motion judge erred in finding s. 504(3) created a limitation period within the meaning of s. 3(2) of the *LAA*. I would therefore allow the appeal, and grant the motion for summary judgment of the third party claim against the municipality. The award of costs in favour of the respondents is overturned. I would award costs to the appellant in the total amount of $2,000, inclusive of disbursements for the proceedings below and in this Court.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.