SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Attorney General) v. Luke*, 2017 NSSC 120

Date: 20170421
Docket: Hfx.No. 424857
Registry: Halifax

Between:

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

Plaintiff

v.

Rosamond Luke

Defendant

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Judge: The Honourable Justice Robert W. Wright

Heard: April 21, 2017 in Halifax, Nova Scotia

Written Decision: May 10, 2017

Subject: Crown immunity from *Limitation of Actions Act* in an action for debt.

Summary: The defendant took out a student loan under the Nova Scotia Student Loan Program in 2001 and defaulted in late 2002. The loan was guaranteed by the Province of Nova Scotia who, after making payment to the bank, exercised its subrogated rights to recover payment of the loan. After protracted attempts by the province to arrange a payment schedule were unsuccessful, an action was commenced in 2014. The action was defended by pleading the six year limitation period under the *Canada Student Loans Act*.
The plaintiff thereupon brought a motion for summary judgment on evidence in which no genuine issue of material fact was raised by the defendant. She merely relied on the limitation defence.

Issue: Does the defendant have a real chance of success in pleading a limitation of action defence, being a question of law?

Result: The *Canada Student Loans Act* has no application to a student loan administered under the *Student Aid Act* and *Finance Act* of Nova Scotia. Neither could the defendant avail herself of the six year limitation period under s.2(1)(e) of the *Limitation of Actions Act* of Nova Scotia because of the presumption of Crown immunity at common law, as codified in s.14 of the *Interpretation Act*. None of the exceptions to that rule applied in this case.

With the determination of that question of law, the defendant had no real chance of success in defending the action and summary judgment was granted accordingly.

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Counsel: Ryan Brothers for the Plaintiff
Rosamond Luke (self-represented Defendant)

Wright, J.

[1] This is a motion for summary judgment on evidence made by the plaintiff ("AGNS") under Civil Procedure Rule 13.04 in an Action for Debt.

[2] This proceeding comes with a long history. On February 15, 2001 the defendant Rosamond Luke took out a student loan to attend Saint Mary's University in Halifax under the Nova Scotia Student Loan Program. The principal amount of the loan was $2550 together with interest at a regulated rate equal to the prime rate plus 2.5% per year. This student loan was guaranteed by the Province of Nova Scotia under the *Student Aid Act*, RSNS 1989, c.449.

[3] In October of 2002, the defendant defaulted on her loan payments whereupon the Province was obliged to honour its guarantee to the bank. Pursuant to its subrogated rights, the loan was then assigned to Service Nova Scotia for collection.

[4] Over the next 11 years or so, the plaintiff made numerous attempts through collections officers to secure repayment of the loan. These attempts were unsuccessful in the face of a lack of cooperation and communication on the part of the defendant (with the exception of the recovery of $219.03 by obtaining set off payments through Revenue Canada, the last entry of which occurred on March 19, 2007).

[5] With the continued futility of its recovery efforts, the Province eventually commenced this Action for Debt on February 28, 2014 (after the defendant further ignored a formal written demand for payment in July, 2013). By that time, the

amount of the debt pleaded (as of November 22, 2013) had risen to a total amount of $5,191.19, with the interest claim now exceeding that of the principal amount. The plaintiff further claimed a per diem rate of .87 cents to the date of judgment.

[6] On October 1, 2014 the defendant filed a Statement of Defence as a self-represented litigant. Beyond a bare denial of all allegations, the defendant pleaded that the only student loan she had was about 10 years ago and that she believed that the Statute of Limitations had passed on collecting on that loan.

[7] In the ensuing months, the plaintiff produced its affidavit disclosing documents which was not reciprocated by the defendant. The plaintiff then began making attempts to contact the defendant to schedule a summary judgment motion but continued to be evaded by the defendant for several months.

[8] Finally, the plaintiff filed its motion for summary judgment on August 15, 2016 returnable on November 9th. On the day before the hearing, the Province agreed to a last minute adjournment request from the defendant for medical reasons whereupon the hearing for the motion was rescheduled to January 6, 2017. Again, there was a last minute adjournment request made by the defendant to allow her an opportunity to get legal advice, whereby the hearing of the motion was once again rescheduled for April 21st.

[9] In support of its motion, the plaintiff has filed affidavits deposed to by Karen Bateman and Trish Lawson on October 18, 2016 documenting the history of the loan, the default on repayment, and the litany of efforts over the years to try to recover payment (both before and after the Action was started). This affidavit evidence fully substantiates the plaintiff's claim which it has calculated up to November 2, 2013.

[10] The defendant also filed an affidavit the day before the intended hearing of November 9th. This affidavit contains a number of allegations of racism on the part of the plaintiff's collection personnel which are outside the scope of this motion. However, what is to be taken from this affidavit is that the defendant does not therein raise any material dispute of fact. Rather, liability for repayment of the loan is resisted by a limitation defence which is specified as s.19.1 of the *Canada Student Loans Act*, RSC 1985, c.S-23.

[11] Whether that limitation period or any other limitation period applies to the facts of this case is plainly a question of law.

[12] In the recent decision of the Nova Scotia Court of Appeal in **Upham (c.o.b. M.U. Rhyno Renovations) v. Dora Construction Ltd. (appeal by Shannex Inc.)** [2016] NSJ No. 505, the amended Civil Procedure Rule 13.04 was thoroughly analysed and interpreted. In so doing, the Court of Appeal provided a blueprint for deciding summary judgment motions on evidence, consisting of five sequential questions to be posed by the court which are articulated at paragraph 34 of that decision.

[13] In the present case, we are drawn to the third question of that analysis because here there is no genuine issue of material fact to be determined; rather, the challenged pleading requires the determination of a question of law. That evokes the pivotal question of whether the challenged pleading has a real chance of success. It is for the responding party to show a real chance of success and if the party cannot do so, then summary judgment issues to dismiss the ill-fated pleading.

[14] To reframe the pivotal question on this motion, does the defendant have a real chance of success in pleading a limitation of action defence?

[15] The first point to be made in the analysis is that the six year limitation period contained in s.19.1(1) of the *Canada Student Loans Act*, here relied upon by the defendant, has no application to this case. That legislative provision applies only to "a guaranteed student loan" (as defined in s.2(1) of that Act) meaning a loan made under that federal statute. In the present case, the defendant's student loan was taken out under the auspices of the Nova Scotia Student Loan Program which falls under provincial legislation, namely, the *Student Aid Act* and the *Finance Act*. Neither of those Acts contains any limitation period for commencing an action to recover payment of a student loan, unlike its federal counter part.

[16] The only limitation period to be considered therefore is to be found in s.2(1)(e) of the *Limitation of Actions Act*, RSNS 1989, c.258. That section generally limits the commencement of all actions grounded upon any lending or contract to a period within six years after the cause of action arose. The plaintiff claims immunity from this limitation period based on the common law presumption of Crown immunity from such statutes, the codification of that common law principle in s.14 of the *Interpretation Act*, RSNS 1989, c.235 and the supporting case law.

[17] A concise statement of this common law rule is set out in *Liability of the Crown*, 3rd ed. (Carswell) authored by Peter Hogg and Patrick Monahan. I adopt the following passage from page 71of that text:

> The common law rule is that statutes of limitations do not bind the Crown. This means that if the Crown commences proceedings outside the applicable limitation period, the defendant is not permitted to plead the statute of limitation. It is said that time does not run against the Crown; but this maxim is simply an application of the common law presumption that statutes do not bind the Crown. Most of the early statutes of limitation did not bind the Crown by express words or necessary implication.

[18] As mentioned, this Crown immunity principle has been codified in s.14 of the *Interpretation Act*, which reads as follows:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby.

[19] Nowhere is it legislatively stated that the Crown is bound by our *Limitation of Actions Act*.

[20] It should be added for the sake of completeness, however, that there are two other well known exceptions to the presumption of Crown immunity. The first exception arises where the Crown is bound by statute by necessary implication. The second exception arises under the benefit/burden waiver principle. These two exceptions are noted both in the legal text aforesaid (at pages 275 and 296 respectively) and in the case of **Neary v. Nova Scotia (Attorney General)** [1994] N.S.J. No. 92, affirmed on appeal at [1994] N.S.J. 537. Neither of these two exceptions have any application on the facts of the present case.

[21] The **Neary** case is indeed the only reported decision in this jurisdiction pertaining to the issue of Crown immunity from limitation periods which the Court has been able to identify. Justice Hall, upheld on appeal, stated at (para. 10) that it seems well established that in bringing an action against another party, the Crown is not bound by the limitation periods contained in the *Limitations of Actions Act* by virtue of Crown prerogative. The focus of that case, however, was the applicability of the benefit/burden exception to Crown immunity in circumstances where the Crown plead the one year limitation period under the *Fatal Injuries Act* and at the same time sought to oppose the curative provisions under s.3 of *Limitations of Actions Act* in a motion brought by the plaintiff to disallow the

limitation defence. While the Court of Appeal confirmed that the benefit/burden exception applied to the circumstances in that case, it has no application in the case at bar.

[22] The only other case on topic accompanied by reasons for judgment (unreported) to which I have been referred is the transcribed oral decision of Justice Robertson dated October 18, 2011 in **AGNS v. Giorgis** (Halifax No. 345776). That decision also arose from a summary judgment motion by the Province to recover payment of a student loan in which the only defence pleaded was the limitation period under the *Limitations of Actions Act*. The Court, in very brief reasons, ruled that the limitation period did not apply because of Crown immunity and judgment was granted accordingly.

[23] The foregoing analysis leads to the conclusion that the defendant cannot avail herself of a limitation of action defence as pleaded or otherwise. Crown immunity prevails in a case such as this, leaving the defendant without a real chance of success in defending the action. It follows that the plaintiff's motion for summary judgment must be granted.

[24] It should be added that although not ever raised by the defendant in her defence or affidavit, the court queried plaintiff's counsel as to whether it would be appropriate for the court to reduce the length of the period of accrued interest, pursuant to s.41(k) of the *Judicature Act*, where some 11 years had passed from the date of default to the commencement of this action. After hearing further submissions from the plaintiff's counsel, I have decided not to shorten that period of interest where the delay was largely caused by the defendant's lack of cooperation and evasiveness throughout. As noted earlier, the Province made

protracted attempts to arrange a payment schedule over the years without any meaningful response whatsoever.

[25] I have also had regard to the decision of the Nova Scotia Court of Appeal in **K.W. Robb & Associates Ltd. v. Wilson**, 1998 NSCA 117 where the court laid out the general rule (at para. 46) that if the parties to the action have expressly agreed to a contractual rate of interest that would be payable on an outstanding account, the court should decline to exercise its discretion under s.41(k)(i) as the creditor would be entitled to interest on a contractual basis. I see no reason to depart from that general rule on the facts of this case.

[26] In the result, the plaintiff shall have judgment against the defendant for the total amount of $6,990.59 comprised of the following:

Principal and Interest	
(to the date of judgment) -	$6,276.08
Costs as Submitted -	$ 450.00
Disbursements -	$ 264.51
Grand Total:	$6,990.59

[27] An order for judgment to be drafted by plaintiff's counsel will be granted accordingly.

J.