

SUPREME COURT OF NOVA SCOTIA

Citation: Smith v. Nova Scotia (Attorney General), 2009 NSSC 137

Date: 20090501

Docket: Hfx. No. 169719

Registry: Halifax

Between:

Leonard Anthony Smith

Plaintiff

v.

The Attorney General of Nova Scotia; representing
Her Majesty the Queen in right of the Province of Nova Scotia, and the
Children's Aid Society of Halifax, a body corporate, and
The Nova Scotia Home for Colored Children, a body corporate.

Defendants

LIBRARY HEADING

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: March 23, 2009 in Halifax, Nova Scotia

Subject: Summary judgment; limitations of actions; discoverability rule.

Summary: Smith was a resident of the Nova Scotia Home for Colored Children from 1965 when he was 5 years-of-age until in or about 1969. This action contains allegations of assault, negligence, sexual abuse and breach of fiduciary duty. Limitation periods 1 year for assault; 6 years for negligence and sexual abuse with the time frame for sexual abuse to commence in accordance with s. 5 of the *Limitation of Actions act*, R.S.N.S. 1989, c. 258 (as amended).

Issue: Application of limitation period? Question of Fact.

Result: Undisputed facts establish that Smith attained the age of majority on July 23rd, 1979. His own evidence given under oath shows undisputed facts, namely he had an awareness of what happened to him in the Home was wrong and that there was a causal connection from the wrongs to the harm suffered by him. He had reasonable capability of commencing a proceeding by the late 1980s or 1990 at the latest. Shortly after attaining the age of majority he entered into a relationship with his wife and very early and progressively disclosed to her extensively the abuse and affects

of the alleged abuse upon him. He had clear memories of the abuse and always realized that what happened to him at the Home was not normal and in 1989 he made notes to write a book and in the late 1980s or 1990 he was interviewed by Charles Saunders, author of the book “Share and Care” and described what had transpired. He applied for employment as a drug counsellor with adolescents and worked in the Home in 1989/90. During the interview process he described to the four members of the panel the various acts of physical, sexual and emotional abuse that he suffered at the Home and the pain of the abuse. The purpose of indicating this is that he would be able to connect with adolescent clients. The fact that he did not make any determination to commence legal proceedings until 2001 and waited for the class action train to leave the station, does not constitute an incapacity to commence proceedings. It is a reasonable capacity that is relevant. The limitations apply and all actions with the exception with breach of fiduciary duty are dismissed by summary judgment and declared statute barred.

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Defendants

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: March 23, 2009, in Halifax, Nova Scotia

Counsel: Raymond F. Wagner and Michael Dull, for Leonard Anthony Smith

Terry D. Potter, for the Attorney General of Nova Scotia

John Kulik, Q.C. and Jane O'Neill, for the Nova Scotia Home for
Colored Children

By the Court:

BACKGROUND

[1] Leonard "Tony" Anthony Smith (Smith) filed an application for the production of relevant documents the 31st day of December, 2008 and it was set before me for the 24th day of March, 2009 along with the application by the Nova Scotia Home For

Colored Children (Home) for summary judgment relating to the causes of actions advanced by Smith, namely, assault, sexual assault, negligence and breach of contract.

[2] At the commencement of the application, Smith's counsel confirmed that Smith was no longer pursuing the alleged breach of contract cause of action. In addition, counsel have reached agreement to address the issues of production of relevant documents and Smith is not proceeding with his application for production.

[3] This leaves the application for summary judgment by the Home as relates to the alleged causes of action of assault, sexual assault and negligence.

[4] All parties agree that Smith, born July 23rd, 1960, was placed in the Home in 1965 when he was five years-of-age and resided in the Home from 1965 to in or about 1969. With respect to Smith's claim for breach of fiduciary duty by the Home, it is clear from the Nova Scotia Court of Appeal decision in Milbury v. Nova Scotia (Attorney General), [2007] N.S.J. No. 187, that there is no limitation period for a claim of breach of a fiduciary duty.

[5] Smith filed a notice of intended action in the Supreme Court on **March 1, 2001** and commenced this action with an originating notice (action) and statement of claim on May 30, 2002. Smith reached the age of majority on July 23, 1979.

APPLICATION FOR SUMMARY JUDGMENT

[6] The parties agree that the *Civil Procedure Rule* (1972) 13.01 applies, which reads as follows:

13.01 After the close of pleadings, any party may apply to the court for judgment on the ground that:

- (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
- (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
- (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[7] The relevant portions of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258 (as amended) read as follows:

Limitation periods

2(1) The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:

(a) actions for assault, menace, battery, wounding, imprisonment or slander, within one year after the cause of any such action arose;

(e) all actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of any such action arose;

(5) In any action for assault, menace, battery or wounding based on sexual abuse of a person,

(a) for the purpose of subsection (1), the cause of action does not arise until the person becomes aware of the injury or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and

(b) notwithstanding subsection (1), the limitation period referred to in clause (a) of subsection (1) does not begin to run while that person is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse.

[8] From the forgoing, therefore, it is agreed that for assault the limitation period is one year; for negligence, six years; and, with respect to a cause of action based on

sexual abuse, sections 5 (a) and (b) of the *Limitation of Actions Act* apply and the limitation period itself is six years after the cause of any such action arose.

LAW – SUMMARY JUDGMENT

[9] In **Concrete Shoring Technologies Inc. v. SCFS Inc.**, 2009 NSSC 97, page 3, para. 8:

[8] Summary judgment applications have been more recently canvassed in decisions such as *Broussard v. Hawley*, 2009 NSSC 1 (CanLII) where Coady, J. in his decision canvasses recent case law on summary judgment applications:

[18] The two part test for summary judgment was described in *Fournier v. Green*, [2005] N.S.J. No. 357, 2005 NSSC 253 as follows:

The plaintiff, in order to succeed in a summary judgment application, first has the obligation to prove her claim and then the burden shifts to the defendant to satisfy that he has a bonafide defence or at least an arguable issue to be tried before the court. He must disclose the nature of the defence or issue to be tried with clarity through sufficient facts to indicate that it is a bonafide defence or issue to be tried.

[19] The test for summary judgment was articulated in *Pricewaterhouse Coopers Inc. v. County Realty Ltd.* [2006] N.S.J. No. 164, 2006 NSSC 132:

[10] The test for summary judgment in Nova Scotia is well established. In *Canadian Imperial Bank of Commerce v. Tench* (1990), 97 N.S.R. (2d) 325 (C.A.), Macdonald, J.A. stated at paragraph 9:

The law is clear that a plaintiff is entitled to obtain summary judgment if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an arguable issue to be tried - see *Bank of Nova Scotia v. Dombrowski* (1977), 23 N.S.R. (2d) 532; 32 A.P.R. 532 ... Under the circumstances of this case,

if the allegations contained in the statement of defence are correct, they would afford an answer to the bank's claim.

[11] In *D.E. & Son Fisheries Ltd. v. Goreham* (2003), 217 N.S.R. (2d) 199, (N.S.C.A.), Cromwell, J.A. stated at para. 2:

Summary judgment may be granted to a plaintiff if the plaintiff can prove the claim clearly and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. *Bank of Nova Scotia and Simpson (Robert) Eastern v. Dombrowski* (1978), 23 N.S.R. (2d) 523, A.P.R. 532 (C.A.) at 537; *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267, 450 A.P.R. 267 (C.A.) at para 15.

[12] There is no meaningful difference between an "arguable" issue and a "genuine" or "bona fide" issue: see Roscoe J.A. in *United Gulf Developments Ltd. v. Iskandar*, [2004] N.S.J. No. 66, 2004 N.S.C.A. 35 (N.S.C.A.).

[20] It is clear from a reading of Rule 13 and the cases above cited that an onus rests upon the Defendant to bring forth sufficient facts to show that a bona fide defence or issue exists which ought to be tried.

[10] The Nova Scotia Court of Appeal in the decision of **United Gulf Developments Limited v. Iskandar**, 2004 NSCA 35 stated at para 9:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court... Once the moving party has made this showing, the responding must then establish his claim as being one with a real chance of success.

[11] **Milbury v. Nova Scotia (Attorney General)**, [2007] N.S.J. No. 187

18 As stated in **Selig v. Cooks Oil Company Ltd.**, [2005] N.S.J. No. 69, 2005 NSCA 36, there are two distinct parts of the test and they should be dealt with sequentially:

[10] ... First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdles, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

DISCOVERABILITY RULE

[12] Smith brings forth claims arising from alleged physical, mental and sexual abuse he says he experienced at the Home for Colored Children from 1965 to 1969.

[13] The Home for Coloured Children seeks summary judgment and I have recited the pre-requisites of summary judgment and merely wish to add that such varies from an application to strike in that once the party seeking summary judgment establishes the claim clearly and here it is the *prima facie* limitations under the *Limitations of Actions Act*, the opposing party may not rest on denials of particulars in that party's pleadings but must present specific facts showing that there is an arguable issue for trial.

22. The purposes and objectives of limitation periods were set out by La Forest J. in **M.(K.) v. M.(H.)**, [1992] S.C.J. No. 85 ... at paras. 22-24:

(1) to fix a time when the potential defendant “will not be held to account for ancient obligations”, save where the public interest is served by granting relief to certain classes of defendants;

(2) to avoid evidentiary concerns associated with long lapses of time, including relieving potential defendants from the obligation of

preserving evidence concerning ancient obligations; and

(3) to serve as an incentive for plaintiffs to bring suits in a timely fashion and not “sleep on their rights”.

25. The Supreme Court of Canada introduced the discoverability principle into Canadian common law in the 1984 decision of **Kamloops v. Nielsen**, [1984] 2 S.C.R. 2... In particular, the Court held that a cause of action for the tort of negligence would not accrue until the plaintiff had, or out to have, discovered the material facts necessary to support a claim.

26. The Supreme Court of Canada again considered and further refined the discoverability principle in the 1986 decision of **Central Trust Company v. Rafuse**, [1986] 2 S.C.R. 147...

27. In **Peixeiro v. Haberman**, [1997] S.C.J. No. 31..., the Supreme Court of Canada confirmed that the discoverability principle is an aid in determining when a limitation period begins to run and that its overarching purpose is to avoid the injustice of precluding an action before a potential plaintiff becomes aware of the existence of the facts underlying the claim...

28. In **Novak v. Bond**, [1999] 1 S.C.R. 808... the Supreme Court of Canada held that when applying this type of postponement provision, the court must adopt the perspective of a reasonable person who knows the facts that are within the plaintiff's knowledge (or, as will be discussed, within the Plaintiff's presumed knowledge: i.e. that by reasonable diligence the Plaintiff ought to have know) and who has taken the appropriate steps that a reasonable person would take based on those facts.

31. When discoverability is put in issue, a court will determine the commencement date of a limitation period by reference to the earlier of the following two dates: (1) the date on which the plaintiff actually discovered the material facts upon which the action is based; and (2) the date by which the plaintiff, exercising reasonable diligence, could have been expected to discover those facts.

32. As noted above, the discoverability principle suspends the commencement of a limitation period until the plaintiff knew or ought to have known of the material facts to support the claim. The discoverability principle does not suspend the commencement of a limitation period in situations where the plaintiff was not aware that he or she had a claim in law or where the law has changed or is so uncertain that the plaintiff only became aware that he or she had a claim in law. It is the inability to discover the material **facts**, not the law, that may suspend the commencement of a limitation period.

[14] The Nova Scotia Court Appeal in Milbury, *supra*, per Roscoe, J.A., set out in para. 24 the proper approach to limitation period defences in summary judgment applications.

24 In the context of a summary judgment application where a limitation defence is pleaded, the defendant applicant must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.

[15] Roscoe, J.A. also referred to Peixeiro v. Haberman (1995), 25 O.R. (3d) 1, and stated:

84 The exact extent of one's loss need not be known before a cause of action can be said to have accrued. Once a plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent nor the type of damage need be known.

[16] Roscoe, J.A. also referred to para 83 of Peixeiro, *supra*:

83 The rule of reasonable discoverability is to ensure that the plaintiffs have sufficient awareness of the facts to be able to bring an action. The suggestion that a plaintiff requires a "thorough understanding" of such facts even after the action is brought, sets the bar too high. Similarly, to say that a plaintiff has to know the precise cause of her injuries before the limitation period started to run would also place the bar too high. *K.L.B. v. British Columbia* [2003] 2 S.C.R. 403 (S.C.C.) at para. 55-57; *McSween v. Louis* (2000), 187 D.L.R. (4th) 446 at p. 459 (Ont. C.A).

[17] It is the discovery of **facts** and not the discovery of the law that will postpone a limitation period. The defendant must first establish the limitation period and if it *prima facie* applies the plaintiff then has the burden of proving that the cause of action did in fact arise **within** the limitation period as a result of the application of the discoverability principle. In this case the defendants have established that the statutory limitation period has long-expired (latest 23 July 1985; 23+ years ago). The defendants satisfy the first part of the summary judgment test on the facts; therefore,

the defendants having met the initial threshold, Smith now has to demonstrate by presenting **evidence** that the discoverability rule and, more specifically, the application of s. 5 (a) and (b) raise an arguable issue that must be addressed at trial.

[18] The cases that refer to the shift of the onus to Smith is to establish that he comes within the discoverability rule, namely s. 5 (a) and (b) of the *Limitations of Actions Act*, deal with the onus faced by Smith **at trial** where the limitation defence has arisen. That onus does not apply on a summary judgment application where the threshold is very low, namely, Smith need only show that there is an arguable issue to defeat the application for summary judgment.

[19] **M.(K.) v. M.(H.)**, [1992] 3 S.C.R. 6 as La Forest, J. observed in speaking for the majority at para. 30:

...[T]he only sensible application of the discoverability rule in a case such as this is on that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitation period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes....

[20] In Smith's case the starting point for the application of the discoverability rule is the time when his causes of action arose. It is a question of fact when a cause of action arises and when the limitation period commences. If the facts do not lead to a clear conclusion on an application for summary judgment then the facts constitute genuine issues for trial as it is only at trial that issues such as credibility can properly be addressed. Smith relies on a report from his "expert" Dr. Charles Hayes.

REPORT OF DR. CHARLES HAYES

[21] This report is dated February 27, 2009 and is an exhibit to the affidavit of Michael Dull, an associate lawyer with Smith's counsel, Raymond F. Wagner. The report indicates that Charles J.A. Hayes, Ph.D. operates Hayes Psychological Services and he interviewed Smith on February 18, 29 and September 30, 2008, almost seven years after Smith engaged Mr. Wagner for the purpose of this action. Dr. Hayes' report was not made available until days before this application came before me.

[22] Of necessity the report reflects what Smith told Dr. Hayes. Smith outlined a very difficult and unhappy upbringing. Apparently he lived with his mother for

approximately six months and did not see her again until he was 19 years-of-age. His father was absent through employment, et cetera, much of the time. His stepmother entertained gentlemen on a consistent basis and there was a great deal of drinking and partying. His father's common law wife, he alleges, beat him and other children; however, he denies any sexual abuse. His stay at the Home was for approximately 3.5 years and he outlined quite a history of physical abuse at the Home, fighting et cetera. He alleges inappropriate sexual contact. He alleges one woman who was possibly a staff member exposed herself and extended an invitation for him to fondle her, et cetera. Smith was 5 years-of-age when he entered the Home and was there until he was nine years-of-age. If any of Smith's allegations are established, such represents an egregious invasion of his entitlement particularly as a child and adolescent to personal privacy.

[23] It would appear that Dr. Hayes was engaged by Smith's solicitor and he filed a report both with respect to Smith and another resident of the Home where there is also an outstanding application for summary judgment and it will be dealt with separately. The conclusion of Dr. Hayes I find to be totally without merit. Dr. Hayes lengthy report includes the following:

He finally approached a lawyer in 2001 when he read that a Class Action Suit was being considered. Perhaps then corroborating evidence would be found. Even then it is unlikely that Mr. Smith fully understood the nexus between the systematic training his experiences in the NSGCC that he had and his current problems and feeling.

[24] It should be noted that Dr. Hayes was asked specifically his opinion on the very question before the Court, namely, the application of s. 5 of the *Limitations of Actions Act*. Further comment of Dr. Hayes is:

He finally did understand the nexus between his current behaviour and the NSHCC. This occurred after he had already initiated contact with the lawyer.

[25] If Dr. Hayes means that Smith did not have an awareness of the harm done to him resulting from sexual abuse and the discovery of the causal relationship between the harm and sexual abuse and, further, that Smith was not **reasonably** capable of commencing a proceeding resulting from the abuse and, in particular the sexual abuse until 2001, then his opinion flies in the face of the factual evidence before me advanced by Smith. This evidence by Smith is given under oath on discovery, under oath in an affidavit and under oath in an answer to interrogatories.

[26] I will give my determination and conclusion **on the evidence** shortly.

[27] The Supreme Court of Canada addressed this situation in **K.L.B. v. British Columbia**, [2003] 2 S.C.R. 403 at paras. 54-57, an event occurring after the filing of the statement of claim cannot begin the running of the limitation period:

54 The appellants argue that their tort actions are not statute-barred because their causes of action were not reasonably discoverable "prior to commencement of these actions". They rely on the trial judge's finding that "[n]one of the plaintiffs had a substantial awareness of the harm and its likely cause prior to commencement of these actions" (para. 140). This finding was based upon the evidence of a psychologist, Dr. Ley, who assessed the appellants after they had commenced their actions and concluded that they lacked a "thorough understanding" of the psychological connection between their past abuse and their current state.

55 This approach to reasonable discoverability is problematic. It rests on evidence that the plaintiffs lacked sufficient awareness of the facts even after they had brought their actions. Since the purpose of the rule of reasonable discoverability is to ensure that plaintiffs have sufficient awareness of the facts to be able to bring an action, the relevant type of awareness cannot be one that it is possible to lack even after one has brought an action. The "thorough understanding" proposed by Dr. Ley -- an understanding not present even after suit was launched -- thus sets the bar too high.

56 All of the appellants were aware of the physical abuse they sustained at the time that it occurred. They may not have been aware of the existence of a governmental duty to exercise reasonable care in making and supervising their placements. They may also not have been immediately aware of the harm that the abuse caused to them or of the causal link between the abuse and the harm. Indeed, in *M. (K.) v. M. (H.)*, supra, La Forest J., writing for the majority, acknowledged that awareness of the connection between harm suffered and a history of childhood abuse is often elusive. However, in 1986, K. and V. consulted with a lawyer about the possibility of receiving compensation from the government for damage suffered while in foster care. The lawyer told them that he thought they had a cause of action, and suggested they consult a lawyer in Victoria who specialized in such claims. V. did not follow up on this advice, perhaps as a result of a sense of powerlessness and a concern that she was to blame. In 1990, three of the appellants made a complaint to the Ombudsman, who informed the Superintendent that "[a]ll of the complainants are seeking financial compensation for the events which occurred while in the care of the Superintendent". In June of 1991, all of the appellants met with a Ministry representative. With his assistance, they made a formal request for counselling and

for a settlement from the government for physical and mental abuse suffered in the Pleasance and Hart homes.

[28] Some seven years after Smith actually commences proceedings Smith wants to introduce “findings” of Dr. Hayes that he could not be said to be reasonably capable of commencing a proceeding because of his concern and doubts as to its possible success and what Dr. Hayes labels “learned helplessness”. There is no doubt that victims of sexual abuse suffer trauma that often has residue effects that last forever including lower self-esteem, et cetera. It can not be said that persons with low self-esteem are, by that factor alone, not reasonably capable of commencing a proceeding. Reluctance, even heightened reluctance, to commence proceedings or as I said explaining the failure to commence proceedings because of concern as to the degree of success do not constitute Smith being “not reasonably capable of commencing a proceeding”.... Very few people relish looking forward to the experience of the foreign environment of a courtroom. Reluctance can not be equated with the element of incapacity that is inherent in a person not being reasonably capable of commencing a proceeding. “Being reasonably capable of commencing a proceeding” does not equate directly to a determination to commence a proceeding nor does it equate directly to waiting for a class action train to leave the station. Smith’s own evidence over the years from July 23, 1985 are very definite and clearly lead to the conclusion that he had the reasonable capability of commencing a proceeding by the late 1980s or 1990 at the latest. It is 23, almost 24 years from his attainment of the age of majority and when he engaged Mr. Wagner no later than February 2001, this was sixteen years after he had attained majority.

[29] The case that bears some resemblance to the situation here is **MacMillan v. Constellation Life**, [2006] N.S.J. No. 396 (S.C.). The plaintiff brought an action under a disability policy in 2003 alleging that the policy should not have been rescinded in 1985. On an application for summary judgment, the plaintiff’s claim was dismissed. In particular, the court stated at para. 26:

Under that circumstance the plaintiff/respondent must now establish a claim having a real chance of success. The plaintiff argues that the limitation period did not run against him since he was of unsound mind for the whole of the period. The burden is on the plaintiff to establish on a preponderance of evidence that he was of unsound mind as claimed.

[30] The plaintiff provided two letters from a psychiatrist that stated that he suffered from schizophrenia and that in his opinion, he did not have the psychological

competence or decision making capacity to comply with the limitation period. Although the court was unable to accept the evidence of the psychiatrist in any event (since it was not sworn and he was not made available for cross-examination), the court went on to state that it did not agree that the plaintiff did not have mental capacity to perform the requisite steps called for by the *Limitation of Actions Act* as required under **Bannon v. Thunder Bay**, [2002] S.C.J. No. 18. The plaintiff had pursued another action against another party and on that basis, could not be said to have lacked the capacity to bring legal action.

[31] I take note that the Ontario *Act* specifically refers to “unsound mind”, meaning a lack of mental capacity to meet the requirements of the *Limitations of Actions Act* and that this is a higher threshold than our legislation but, nevertheless, it does deal with capacity and Dr. Hayes’ opinion that Smith may lack the capacity even in 2001 is not factually based.

EVIDENTIARY BASIS ADVANCED BY HOME IN SUPPORT OF THE SUMMARY JUDGMENT BASED ON LIMITATIONS OF ACTION ACT

[32] The allegations advanced by Smith in his statement of claim date back to the time period 1965 to 1969. Smith engaged Mr. Wagner for this action at a time some 23/24 years after he had attained the age of majority and some 16/17 years since the latest limitation period *prima facie* began to operate. His age of majority would have been reached on July 23, 1979. Unless the discoverability principle applies, then the longest limitation period of six years expired on July 23, 1985. **Milbury v. Nova Scotia (Attorney General)**, *supra*.

[33] Smith discovery evidence June 3, 2008:

480. Q. And in the time that you spent there at The Home at that time, did you remember everything as clearly as you do today about your time at The Home?

A. I, I remember that stuff clearly today, like I did, you know, facets and facets of noise.

481. Q. You, you’ve never not had clear memories of what happened at The Home or with your foster family?

A. Never not had clear memories?

482. Q. Right. Has it always been clear in your mind?

A. What had happened?

483. Q. Yes.

A. Yes.

490. Q. Now, when you were working there in '89, you knew that what had happened to you when you were a child there was wrong.

A. Yes.

495. Q. So when you were being interviewed for your job at Choices, did you explain to the people interviewing you what your background was?

A. Yes.

496. Q. And did you tell them about the abuse...

A. Yes,

497. Q. ...you had suffered at the foster home and at The Home?

A. Yes, I didn't go into any great detail. But I talked about that there was physical, sexual and emotional abuse at The Home. And it was four people interviewing me at that time. And then one person took it upon himself and said, you know, "I'm gonna ask you a question and I'm not gonna ask anybody else. But I find it very hard from a person with your background that doesn't have a drug problem and alcohol problem, never been in trouble with the law, better yet, never ended up in the Nova Scotia Hospital, ho's that?"

And I said, "At the risk of sounding conceited, there's always an exception to the rule and you happen to be looking at one. But that doesn't

mean I didn't feel the pain that the other people felt. It's just I try to channel it elsewhere".

A. I told them that I, I grew up, you know as an orphan. I lived in the Nova Scotia Home for Colored Children. I explained to them that my experience in there wasn't very positive. It was, you know, very negative, it was abusive. And I told them there was physical abuse, mental abuse and sexual abuse.

[34] Smith was employed in 1989 at the Home and when he left that employment he went to work for Choices, where he held various positions starting with being a drug counsellor dealing with adolescents. At question 503, the time frame his employment commenced at Choices was around 1990 and the foregoing deals primarily with his interview when he was in pursuit of that employment.

502. Q. Did you talk to them at the interview about how it had affected you over your life and up to that point?

A. I, I don't believe we got into to much of, like how you feeling now, what's going on with all that kind of stuff so, no. I, I just said that these are some of the things I've learned and these are how I tried to deal with things differently. I, I explained to them I learned what not to do in raising a child, you know.

611. Q. Did you have any chores to do at The Home?

A. We always had to make our beds. There's a certain way we had to make it. If not, you got a beating. We had to put on our bedspread, but we couldn't sleep in it. We had to pull it down and fold it to the end. And I, I don't think that we were allowed to use our pillows as well. Something reminds me of that.

I think we - as far as doing kitchen work or mopping floors and stuff like that, I don't, I don't recall that. I think I might have been too young to do that. I don't know. But basically, looking at the area, we had to tidy things up. And our books - I mean our boots and coats had to be in a certain spot and there was one - our Sunday best kind of outfit that, you know, you

just don't touch, you don't mess around, kind of thing. So that had to be neat.

But I, I don't recall actually doing all kinds of different chores in that sense.

612. Q. Did you have any work that you had to do outside, any chores like that?

A. I don't recall. There was chores that I volunteered to do.

671 Q. At what point did you know that it wasn't normal?

A. There was no point that I lived there that I didn't think it was normal.

672. Q. Pardon?

A. There was no point that - when I lived there that I thought it wasn't normal.

673. Q. Did you come to think as you got older that is wasn't normal?

A. As I became an adult, sure, you know, I realized that wasn't normal.

675. Q. So then when you met your wife, did you talk through some of these things in your early relationship?

A. Yes.

677. Q. When did you first meet your wife?

A. I met her when I was 19 and she was 16.

678. Q. And you were together about a year before you had your son?

A. Year and a half.

679. Q. So was it pretty early on in the relationship that you started to tell her about the things that had happened to you at The Home?

A. Probably after we started to get a little intimate, that would have been about a year and a half. No, a year and three months, actually. And I know we have the - you know, our son, and she's pregnant, and struggle as to how we're going to survive financially. You know, her mother's on mother's assistance and now I'm, I'm off out in the system 'cause I was told that once the money runs out from Children's Aid that I'm - to get out of the house, and so I was basically going around living off the streets and who can I stay at, where, until I start to land a one-room place.

But I don't - when we started that, it wasn't just instantly telling her all this here stuff. It was as we're going along, she would see some of the problems I have, some of the concerns I have. And I said, "Well, this is why I feel this way because this is, is what my life has been". So slowly but surely, some of that stuff was coming out.

682. Q. Now, when you were - you talked about at the time, but I guess, later on, as an adult, is there any certain time in your life that you can think that you stated to be - have these feelings of anger, or...?

A. I had these feelings all my life. It's, it's not later on a lightbulb came on saying that you feel this way. I had this all my life, growing up. And all I would say is that 'cause, you know, that there was nothing told to me that I could do anything about anything, this was all natural.

.... So I always knew that this was wrong.

683. Q. Is there any particular time in your life you can remember that you came to the realization that it wasn't your fault?

A. I don't know the particular time because when I told you earlier about what my coach had said to me, I always view that as the beginning of my life, that I no longer was too concerned about being accepted by these people.

765. Q. And when was it that you went to the RCMP? Was that in '97?

A. I think it might have been '98.

766. Q. And...

A. Ah, no, no I think it would have been '99. '98, '99, one of those years.

767. Q. And what did you tell the RCMP?

A. Told them basically what I told you.

[35] NB: The undated letter from Smith to then Honourable Dr. James Smith, MD was received at the Department of Justice on October 26, 1998 and that letter is as follows:

Dear Dr. Smith,

I am a former resident of the Nova Scotia Home for Colored Children. I became a ward of the Nova Scotia Children Aid Society in 1965, at the age of five years. I was placed at the Home for Colored Children at this time and remained there till 1968, for a period of three and a half years. During my placement, I have been subjected to neglect, physical, sexual and mental abuse, by some of the female care workers while under their supervision.

Please accept this letter as my formal complaint against the above mentioned institution. I am requesting that your department investigate this matter, to the full extent of the law. I feel strongly that it is time to start the healing process for all of us former residents who were subjected to this abuse.

Please feel free to contact me to in order to assist you in this matter.

Thank you for your cooperation and understanding.

Sincerely,

Leonard A. Smith (Tony)

[36] Further excerpts from Smith discovery evidence of June 3, 2008:

787. A. No, I said that during one the launching of the sensitivity training program when I was asked to be a part of that, the, the ribbon ceremony, that one of the reporters asked me what my background was and I told him what it was as far as living in the orphanage and the foster family. A couple of years later, I received a call from the paper asking me - you know, saying they got my name because of this here that I was a part of, and that The Home was looking to get heritage status to renovate The Home and that they thought it would be nice to get a perspective from a former resident.

And that's when I told him, "I don't, I don't mind telling you my story, but it may not be the story that you want to hear". So that's what prompted, because they didn't know if they were going to go with it or not because they thought, wow, this is, this is big, kind of thing, or we didn't know this was going on but they wanted to get somebody else to corroborate it.

Once that was done and it became public, then they were saying that you should look at putting in a letter to the Community Service and the Department of Justice. And I did do that shortly afterwards.

798. Q. Did it trigger any memories for you that you didn't otherwise have?

A. No, I don't think it did.

800. Q. Now, if you go a few pages in, into page 12. And it's a letter dated October 27, 1998. And it says:

On behalf of the Honourable Dr. Jim Smith, I acknowledge receipt of your recent letter lodging a formal complaint against the Nova Scotia Home for Coloured Children where you were former resident. Your correspondence will be brought to the attention of the Minister.

Is this the contact with the Minister that you're talking about?

A. That's the first one they sent. Then there was another one they did as a follow-up.

805. Q. Do you remember what was in the letter, what you wrote?

A. Just basically that - lodging a complaint as a former resident about the abuse that I have suffered. I prob, - probably indicated, you know, physical, sexual abuse, and that could you please contact me as to how we can look into it. I don't know the exact wording right now, but it would be something to that effect.

806. Q. And the, as a result of that, what happened?

A. I received a letter stating that I should go the RCMP in Cole Harbour.

...then I approached this law firm, tell them who I was and what I have done and this what I can - you know, this is what, what my experience is as far as this, this action.

832. Q. Now, when you went to the lawyer here at Wagner in 2001, was there anything about your memory about your time at The Home that was different than, say, the memory you had back when you first met your wife and you were telling her about The Home? Are these things that you remembered over time, or is it - are those things that have always been with you?

A. They always been with me.

833. Q. So then when you went to Wagner in 2001 because you saw that other people were coming forward - is that right?

A. Well, I, I went there, again, based upon the whole thing going public years ago and being instructed to go ahead, that there is a possibility to look into this here matter and try to get these here issues resolved. And when I could no longer do it just by myself, well, then I looked at when that was going on that, yes, this is an opportunity to finally get those things out and to say that.

A. I told him that I was going to be writing a book, I thought, about, you know, talking about my experiences as a foster kid and living in the orphanage and living in - with my step parents.

876. Q. And did you do that?

A. No. I wrote down some notes years ago, and I never got back to it. I looked at hiring a ghost writer to do that because I didn't have the experience of writing a book.

877. Q. And did - do you have those notes?

A. I, I don't think I do. It was a long time ago with a typewriter. I could look, but I haven't seen that, that for many years.

878. Q. No, it looks like it - at least from the way he wrote it, that you were 12 years old when you started doing those notes. But that must be wrong, is it?

A. No, no, he probably would have said it was 12 years ago.

879. Q. 12 years ago.

A. Yes.

881. Q. ... and pass them to us. So if it was 12 years ago, then it would have been 12 years before 2001. Does that sound about right?

A. That, that would sound about right, yes.

882. Q. And in any of those notes, did you go through any of your experiences at The Home?

A. I, I would have.

883. Q. So was it just, just the foster home, it was The Home for Coloured Children as well?

A. Right. And mainly would be what I just described to you in the statement and our conversation.

884. Q. The same?

A. The same story.

885. Q. Same incidents?

A. Yes.

926. Q. Charles Saunders that wrote the book about The Home for Coloured Children, do you remember talking to him?

A. Yes.

927. Q. About the book? And what did you talk to him about?

A. I talked to him about 'cause he was writing a book at the time. I told him about my experience.

928. Q. And do you remember when that was?

A. Oh, God, maybe lat '80s, early '90s, probably.

929. Q. Did you talk to him about the abuse you suffered at The Home?

A. Yes.

930. Q. You did.

A. Yes.

932. Q. And did you describe it to him as you described it to us?

A. Yes.

933. Q. ... Do you have any information from any source that the farm at The Home - that would be the gardens, the barns, the animals - that anything from the farm was sold by The Home for profit?

A. Do I have anything?

934. Q. Any information to indicate that that happened?

A. The only information that I would have I believe would be in Charles Saunders' book.

935. Q. And do you have any other information? Do you have any information to suggest that it was sold for personal gain of any of the staff at The Home?

A. I don't have any information on that, no.

[37] Smith attempts to counter his history of awareness. The harm resulting from the sexual abuse and discovery of the relationship between the harm and the sexual abuse. Further, that he was not reasonably capable of commencing a proceeding due to the sexual abuse consequences by his answers to interrogatories as follows:

2. When did you first become aware of the damages referred to in interrogatory No. 1 and when did you discover the causal relationship between these damages and the conduct alleged in the Statement of Claim?

I became aware of the causal relationship around May 2002 while in the course of receiving therapy from my psychiatrist, Dr. Douglas F. Maynes.

[...]

10. Were you at any time not capable of commencing a legal proceeding because of a physical, mental or psychological condition resulting from the conduct alleged in the Statement of Claim?

I was not able to commence a legal proceeding until I received legal advice and until Dr. Maynes helped me make the connection between what had

happened to me at the NSHCC and my psychiatric condition in about May 2002.

[38] In addition, Smith files an affidavit dated March 6, 2009 and states as follows:

11. Dr. Maynes diagnosed me as having a major depressive disorder and an adjustment disorder with anxiety. After mentioning the abuse to Dr. Maynes in 2001, he helped me to understand that my life-long thoughts of worthlessness and insecurity were not normal and that they were likely related to the abuse I suffered at the NSHCC. This understanding came gradually, over the course of many visits between 2001 and early 2002.

12. I commenced a legal proceeding against the NSHCC and other Defendants on March 30, 2001. [sic, May 30, 2002]

13. I know now that I did not commence an action early due to my lifelong insecurities and feelings of worthlessness. I did not think anything could be done. I did not think my abuse allegations would be believed or accepted. And, until seeing Dr. Maynes, I did not think my life had been negatively affected.

[39] As noted, Smith engaged Wagner no later than March 1, 2001 when the notice of this intended action was necessary because of the action intended to include the Attorney General of Nova Scotia. The answers to the interrogatories are simply not in accord with the undisputed facts Smith relates in his discovery evidence. Smith now, with the assistance of Dr. Hayes, advances he was unable to commence a legal proceeding until May 2002. In other words, Smith places reliance upon evidence post his engagement of Wagner and Associates in this very law suit.

[40] As I noted above, the Supreme Court of Canada explained in **K.L.B. v. British Columbia**, [2003] S.C.R. 403 at paras. 54-57, an event occurring after the filing of the Statement of Claim cannot begin the running of the limitation period:

54 The appellants argue that their tort actions are not statute-barred because their causes of action were not reasonably discoverable "prior to commencement of these actions". They rely on the trial judge's finding that "[n]one of the plaintiffs had a substantial awareness of the harm and its likely cause prior to commencement of these actions" (para. 140). This finding was based upon the evidence of a psychologist, Dr. Ley, who assessed the appellants after they had commenced their actions and concluded that they lacked a "thorough understanding" of the psychological connection between their past abuse and their current state.

55 This approach to reasonable discoverability is problematic. It rests on evidence that the plaintiffs lacked sufficient awareness of the facts even after they had brought their actions. Since the purpose of the rule of reasonable discoverability is to ensure that plaintiffs have sufficient awareness of the facts to be able to bring an action, the relevant type of awareness cannot be one that it is possible to lack even after one has brought an action. The "thorough understanding" proposed by Dr. Ley -- an understanding not present even after suit was launched -- thus sets the bar too high.

56 All of the appellants were aware of the physical abuse they sustained at the time that it occurred. They may not have been aware of the existence of a governmental duty to exercise reasonable care in making and supervising their placements. They may also not have been immediately aware of the harm that the abuse caused to them or of the causal link between the abuse and the harm. Indeed, in *M. (K.) v. M. (H.)*, supra, La Forest J., writing for the majority, acknowledged that awareness of the connection between harm suffered and a history of childhood abuse is often elusive. However, in 1986, K. and V. consulted with a lawyer about the possibility of receiving compensation from the government for damage suffered while in foster care. The lawyer told them that he thought they had a cause of action, and suggested they consult a lawyer in Victoria who specialized in such claims. V. did not follow up on this advice, perhaps as a result of a sense of powerlessness and a concern that she was to blame. In 1990, three of the appellants made a complaint to the Ombudsman, who informed the Superintendent that "[a]ll of the complainants are seeking financial compensation for the events which occurred while in the care of the Superintendent". In June of 1991, all of the appellants met with a Ministry representative. With his assistance, they made a formal request for counselling and for a settlement from the government for physical and mental abuse suffered in the Pleasance and Hart homes.

[41] Decisions that are helpful in demonstrating that the limitation period has expired for Smith are as follows:

T.L.B. v. R.E.C., [2000] M.J. No. 434 (C.A.): The Plaintiffs argued that their claims in tort were not statute barred because they did not make the connection between the alleged abuse and its consequences until they started therapy a year before the action was filed. The Court of Appeal upheld the dismissal of the tort claims on the basis that the Plaintiffs had discovered their claims for the purposes of the limitation period when they had discussions and wrote to their mother about the alleged abuse by their uncle.

H.A.W. v. Sisters of Charity of the Immaculate Conception, [1999] N.B.J. No. 203 (Q.B.): The court dismissed the plaintiff's action on a motion for summary judgment on the basis that the limitation period began to run when the Plaintiff made complaints to the church and sought legal advice in the 1970s.

F.M. v. Holder, [2002] M.J. No. 108 (C.A.): The Plaintiff argued that she did not discover her cause of action regarding sexual abuse by a physician until she attended a seminar on family violence and developed insight into the abuse in 1995 with the assistance of counselling. The Court of Appeal upheld the decision to refuse to extend the limitation period to allow the claim to proceed. The motions judge found that the Plaintiff understood as early as 1983 that the conduct was a material factor in her mental condition when she decided to move away and end her relationship with the physician. The Plaintiff had also discussed the relationship with the physician with her counsellor in 1986 and she laid a complaint with the College of Physicians and the Police in 1989.

B.B. v. Sullivan, [2005] A.J. No. 669 (Q.B.): The Plaintiff alleged abuse by a former teacher in the 1970s. The Court dismissed his claim on a motion for summary judgment as being out of time. The Plaintiff had seen a psychiatrist in 1995 and 1997 for problems he was having at work but the Plaintiff always knew that his problems stemmed back from his alleged abuse.

CONCLUSION

[42] Smith was interviewed by Charles Saunders, author of the book “Share and Care” sometime in the late 1980s, early 1990s and described the alleged abuse he suffered to Mr. Saunders. His evidence is that he always had clear memories of the alleged abuse at the Home and that he always realized that what had happened at the Home was not normal. Shortly after attaining the age of majority he entered into a relationship with his wife and very early and progressively he talked with and disclosed to his wife extensively the abuse and affects of the alleged abuse upon him.

[43] Smith worked at the Home in 1989 and repeated that he knew what had happened to him when he had previously been at the Home was wrong. It is interesting that the nature of his employment was as a drug counsellor dealing with adolescents.

[44] In or about 1989 Smith indicated that he was going to write a book and began making notes for that purpose. In 1990 Smith testified that when he was interviewed for the position of counsellor, he described to four members of the panel interviewing him the physical, sexual and emotional abuse of the Home and that he felt the pain of the abuse and the intent of giving this evidence is that Smith was conveying he would be able to connect with the adolescent clients.

[45] It is clear from the contents of paragraphs 42, 43 and 44 that Smith had an awareness of what had happened to him was wrong and had knowledge of the causal connection between the harm and what was done to him and his actions clearly indicate a capacity to, at the very least, reasonably commence a proceeding. The foregoing establishes the upper limit of the six-year limitation period no later than 1990. With respect to the allegation of assault, there is further evidence as follows.

[46] In 1998 he reported the alleged abuse at the Home to the RCMP and also was in contact with the media in 1998 about the alleged abuse he suffered at the Home. Smith wrote to the Honourable Dr. James Smith, MD, Attorney General of Nova Scotia in October 1998 and this letter was acknowledged by the Minister on October 26, 1998. In that letter he clearly sets out that he had been subjected to neglect, physical, sexual and mental abuse by some of the female careworkers, et cetera.

[47] As indicated by the Nova Scotia Court of Appeal in Milbury, *supra*, Smith must adduce evidence to support his claim that the necessary information was not discoverable until he commenced these proceedings with a notice of intention in March of 2001. Roscoe, J.A. stated:

87 The facts upon which any plaintiff relies to fall within the discoverability rule must have an objective basis. Objective facts supporting negligence that were discovered at a later point in time beyond a limitation period are an absolute pre-requisite to the extension of the limitation period. The extension of a limitation period is not driven by "wishes," "maybes," or "emotions" generated by a benevolent or well-intentioned source. *Lalani v. Woolford*, [1999] O.J. No. 3440 (Ont. Div. Ct.) at paras. 12, 16, 19; *Morellato v. Wood* (1999), 175 D.L.R. (4th) 753 (Ont. S.C.J.); affirmed at (1999) 187 D.L.R. (4th) 760 (Ont. C.A.).

[48] The threshold upon Smith is very low; however, what he offers is answer to interrogatories which essentially is a statement of opinion where he states his awareness and the causal connection did not occur in or about May 2002. His response to whether he was reasonably capable of commencing a proceeding is essentially that he did not think anything could be done; that he would not be believed and it is an easy task to conclude that this attempt by Smith fails to meet even the low threshold of creating an arguable issue faced with the clear, undisputed facts he advances under oath in his discovery. He had an awareness, virtually from the time he reached majority, certainly in the next year or two in discussions with his wife, et cetera. The limitation period *prima facie* expired in 1985 and it was not until some 16 years later that the notice of intention to proceed is filed in 2001. In 1989/90 he

utilized his alleged experiences at the Home in support of employment. I need not recite the summary of evidence that I have already completed, however it very clearly indicates Smith became aware of the injury and harm resulting from the alleged sexual abuse and discovered the causal relationship between injury, harm and sexual abuse at the very latest in the 1980s up to 1990.

[49] It must be remembered that with respect to the ability to commence a proceeding, the statutory direction is the time does not begin to run while Smith is **not reasonably capable of commencing a proceeding**. It cannot be said that Smith was not reasonably capable merely because he gave no indication of actual intention to commence proceedings until possibly March of 2001. When one advances allegations of sexual abuse and discloses such allegations in detail to wife and family and a panel for prospective employment as a counsellor for adolescents plus his with the press, et cetera, these undisputable facts direct from Smith overwhelmingly establishes that he was reasonably capable of commencing a proceeding no later than in the 1980s, at the most 1990. Prerequisites of s. 5 of the *Limitation of Actions Act* clearly existed by then and the limitation defences prevail and all actions against the Home are dismissed by summary judgment and all causes of action against the Home, save and except the allegation of a breach of fiduciary duty, are statute barred.

COSTS

[50] Counsel are always entitled to be heard on costs and disbursements if they are unable to reach agreement.

Walter R.E. Goodfellow, J.