NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Murray*, 2017 NSCA 29

Date: 20170413
Docket: CA 454730
Registry: Halifax

Between:

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

Appellant

v.

Mark Jason Murray and Capital District Health Authority

Respondents

Judges:	MacDonald, C.J.N.S., Fichaud and Bryson, JJ.A.
Appeal Heard:	February 17, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Fichaud, J.A. MacDonald, C.J.N.S. and Bryson, J.A. concurring
Counsel:	Agnes E. MacNeil and Catherine Lunn for the Appellant Michael Dull for the Respondent Mark Jason Murray Karen Bennet-Clayton for the Respondent Capital District Health Authority (watching brief)

Reasons for judgment:

[1] This decision accompanies *Capital District Health Authority v. Murray*, 2017 NSCA 28. These reasons summarize the background and authorities that the *Capital Health* decision discusses at length.

[2] The plaintiff moved to add the Attorney General of Nova Scotia as a co-defendant to an existing class proceeding. The Attorney General responded by challenging rulings that the motions judge had made on her original decision to certify the action under the *Class Proceedings Act*. Those rulings involved the viability of the cause of action and the definition of common issues. The motions judge declined to reopen the points and added the Attorney General. The Attorney General appeals and asks this Court to consider the viability of the cause of action and the definition of common issues.

Background

[3] The Respondent Capital District Health Authority ("Capital Health") operates the East Coast Forensic Hospital ("Hospital").

[4] The Hospital cares for patients who have been found to be either unfit to stand trial or not criminally responsible. The Hospital's mandate includes both public safety and the rehabilitation of individuals who are subject to the jurisdiction of a Review Board, established under s. 672.38(1) of the *Criminal Code*. The Hospital has a rehabilitation side, with two units of 30 beds each, and a correctional/offender side. The proposed class plaintiffs occupied the rehabilitation side, and were considered to be patients, not inmates.

[5] During the four months that preceded mid-October of 2012, the Hospital's staff accumulated information that some patients in the rehabilitation units possessed illicit drugs on the Hospital's premises. The evidence is set out in para. 9 of the *Capital Health* decision.

[6] The Hospital's Health Services Manager, Ms. Brenda Mate, consulted the facility's Forensic Captain, Capt. Todd Henwood. He is employed by the Correctional Services Division of the Provincial Department of Justice. There is evidence that, on the morning of October 16, 2012, Capt. Henwood and Ms. Mate reached a decision that all 33 patients in the two Rehabilitation units would be strip

searched and their lockers would be examined. The evidence is extracted in paras. 10-12 of *Capital Health* Decision.

[7] Later that day, Correctional Services personnel strip searched the 33 patients. The strip searches found nothing, though the locker examinations located some items. (Evidence in paras. 14-16 of *Capital Health* Decision)

[8] The Respondent Mr. Mark Jason Murray was one of the individuals who was strip searched on October 16, 2012. After some procedural manoeuvres (discussed in the *Capital Health* Decision, paras. 17-18), on January 22, 2015, Mr. Murray filed a Second Amended Notice of Claim and Second Amended Statement of Claim that claimed damages from Capital Health. This pleading named Mr. Murray as the representative plaintiff for the 33 individuals who were strip searched. The causes of action included civil claims that the strip searches (1) established a cause of action under s. 8 of the *Charter of Rights and Freedoms* and (2) constituted the tort of intrusion upon seclusion.

[9] On January 22, 2015, Mr. Murray moved, under ss. 4(3) and 7 of the *Class Proceedings Act*, S.N.S. 2007, c. 28, to certify the proceeding against Capital Health. The Attorney General was not a party. Supreme Court Justice Denise Boudreau heard the motion and, on February 25, 2015, issued a decision (2015 NSSC 61) that the proceeding should be certified. An order followed on May 5, 2015. Later (paras. 17 and 32) I quote the seven common issues set out in the certification order.

[10] On May 14, 2015, Capital Health filed a notice of appeal from the certification. On February 17, 2017, this Court heard the appeal. The Court's reasons are set out in the companion decision cited earlier.

[11] Meanwhile, on June 7, 2015, Mr. Murray moved to add the Attorney General of Nova Scotia as a co-defendant to the certified class proceeding. The basis of the motion was that Capt. Henwood, a Provincial employee, had participated in the decision to undertake the strip searches. On March 22, 2016, Justice Boudreau heard the motion. The Attorney General contended that the tort claim did not disclose a certifiable "cause of action", and challenged some wording of the common issues in the earlier certification order.

[12] On May 27, 2016, Justice Boudreau issued the decision under appeal (2016 NSSC 141), followed by an order on August 8, 2016, that added the Attorney

General. The judge concluded that she was *functus offiicio* on whether the tort claim was a "cause of action", and declined to rephrase the common issues.

[13] On August 23, 2016, the Attorney General applied for leave to appeal from that order. Section 39(3)(a) of the *Class Proceedings Act* requires leave of a judge of the Court of Appeal. On December 16, 2016, Justice Farrar granted leave.

[14] On February 17, 2017, the Court heard the Attorney General's appeal on the same day that the same panel heard Capital Health's appeal from the certification order.

[15] On Capital Health's appeal, the Attorney General was a named co-respondent and participated fully with a factum and oral submissions.

Issues

[16] The Attorney General's factum states four grounds: that the motions judge erred by:

1. ruling she was *functus officio*, and declining to consider the Attorney General's argument that the tort claim for intrusion upon seclusion did not disclose a cause of action under s. 7(1)(a) of the *Class Proceedings Act*;
2. not considering whether this tort claim disclosed a cause of action under s. 7(1)(a), before setting as a common issue the determination of the elements of the tort;
3. certifying as common issues whether (a) individual considerations can justify the strip searches, and (b) *Charter* damages are appropriate;
4. certifying, as a common issue for the *Charter* claim, whether there were reasonable and probable grounds to order a strip search.

First Ground: Functus Officio

[17] The original certification order of May 5, 2015 certified two questions that related to the tort claim:

> (f) What are the elements of intrusion upon seclusion?
>
> (g) Did the decision to strip search the members of this class intrude on the seclusion of the class members' privacy, as defined by the Court?

[18] Section 7(1) of the *Class Proceedings Act* states five preconditions to certification. The first, in s. 7(1)(a), is that "the pleadings disclose or the notice of application discloses a cause of action".

[19] The Attorney General contends that the pleadings do not disclose a cause of action for the tort of intrusion upon seclusion. The motions judge summarized the Attorney General's submissions on the point:

> [35] The proposed defendant made many arguments before me, disputing the viability of this cause of action. The proposed defendant is of the strongly held view that the present fact scenario does not create a cause of action in "intrusion upon seclusion"; furthermore, it submits that this tort, in Nova Scotia, is in its infancy, and is not defined to a point that we could properly certify it within a class action.

[20] The motions judge declined to consider the merits of the Attorney General's submission. The judge held she was *functus officio*:

> [40] I repeat again, this claim against the proposed defendant is exactly the same as the claim against the original defendant. Therein lies a fundamental problem. If I were now to conclude that there is no viable cause of action of "intrusion upon seclusion" in this case against the proposed defendant, that would mean that I would necessarily have to also conclude that my original decision to certify the cause of action, against the original defendant, was incorrect. …
>
> [41] I therefore conclude that I am *functus officio* as to the viability of a cause of action of "intrusion upon seclusion" in this case. I cannot reconsider my own decision. It could only be reconsidered by an appeal court.

[21] Whether the judge was *functus* is an issue of law for which the standard of review is correctness.

[22] In my respectful view, the doctrine of *functus officio* did not apply. Section 13(1) of the *Class Proceedings Act* expressly permits the court to reconsider the certification order:

> 13(1) Without limiting subsection 11(4), where at any time after a certification order is made under this Part it appears to the court that the conditions referred to in Section 7 or subsection 9(1) are not satisfied, the court may amend the certification order, decertify the proceeding as a class proceeding or make any other order it considers appropriate.

[23] Section 13(1) reflects that a class proceeding often evolves as the litigation progresses. Class actions are thoroughly case managed, and the court always has

jurisdiction to amend a certification order. Certification is a "fluid, flexible and procedural process, is conditional and always subject to decertification": Warren J. Winkler, Paul M. Perell, Jasminka Kalajdzic and Alison Warner, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters Canada Inc., 2014), pp. 219, 221.

[24] Accordingly, the judge had jurisdiction to consider an amendment to the certification order.

[25] Whether the amendment would be granted is another matter. The principle of *stare decisis* might affect the outcome. The Court would consider whether the Attorney General's submissions materially repeat those that were determined by the initial certification order. Or was there a significant change of circumstance that would support an amendment to the certification order?

[26] Those are questions for another day. Given the procedural trajectory here, it is unnecessary to address them. Capital Health appealed the initial certification ruling. On that appeal, the Attorney General was a named respondent and fully participated with written and oral argument. The argument included submissions that the tort of intrusion upon seclusion was not an appropriate cause of action for certification in this class proceeding. This Court decision in *Capital Health* has ruled on those submissions (paras. 88-104).

[27] The Attorney General's first ground of appeal is moot.

Second Ground: Elements of the Tort

[28] The motions judge's decision of February 25, 2015 and order of May 5, 2015, defined as a common issue "(f) What are the elements of intrusion upon seclusion?" The Attorney General was not a party.

[29] According to the Attorney General, the phrasing of question (f) assumes the viability of the cause of action for intrusion upon seclusion. The Attorney General submits that the judge erred by not addressing whether that cause of action even exists in Nova Scotia. The Attorney General adds that the tort, if it exists, should not apply where the plaintiff has asserted an alternative remedy which, in this case, is the civil claim for breach of s. 8 of the *Charter*.

[30] This ground has been determined by this Court's ruling on the companion appeal, in which the Attorney General participated. In *Capital Health* (paras. 88-104) this Court concluded: (1) it is not plain and obvious that the tort claim would fail, which satisfies the standard for disclosure of a cause of action on a certification motion; and (2) the substantive legal arguments by Capital Health or the Attorney General concerning the tort's viability, its elements or exceptions, are for the trial judge on the common issues trial.

Third and Fourth Grounds: Common Issues

[31] I will discuss the third and fourth grounds together.

[32] The motions judge certified the following questions as common issues respecting the *Charter* claim:

> (a) Were class members all subjected to a strip search stemming from one order?
>
> (b) If the answer to (a) is yes, who ordered the strip search?
>
> (c) If the answer to (a) is yes, were there reasonable and probable grounds to order the one strip search of all class members?
>
> (d) If the answer to (a) is yes, and if the answer to (c) is no, can the defendant now justify the search of individual class members on the basis of individual considerations?
>
> (e) If s. 8 of the *Charter* was breached, are *Charter* damages a just and appropriate remedy?

[33] The Attorney General's ground of appeal # 4 submits that question (c) is flawed because it intrudes on the disputed merits, mischaracterizes the test for an unreasonable search under s. 8 of the *Charter*, and incorporates individual considerations.

[34] The Attorney General's factum [ground of appeal # 3(a)] submits that question (d) should not be a common issue because:

> 89. … As framed, the issue clearly mandates a consideration of each class member's individual circumstances, to determine if the search was justified. It defies the very nature of a common issue: an issue that has to be decided on an individual basis lacks commonality.

[35] Neither, says the Attorney General [ground of appeal # 3(b)], should question (e) be a common issue. The Attorney General cites the tests for *Charter* damages set out in *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, and submits that the damages analysis includes individual circumstances.

[36] This Court's *Capital Health* decision (paras. 80-87) addresses all three submissions. The Court rephrased question (c) and deleted questions (d) and (e). Some of the Court's reasoning resembled views expressed by the Attorney General.

[37] The conclusions expressed in the *Capital Health* Decision dispose of the Attorney General's third and fourth grounds in this appeal.

Conclusion

[38] I would dismiss the appeal.

[39] Due to the procedural overlap with the *Capital Health* appeal, in my view, there should be no costs award for this appeal. The *Capital Health* appeal is the governing ruling for the submissions of all three parties. That decision addresses the costs of appeal.

Fichaud, J.A.

Concurred: MacDonald, C.J.N.S.

Bryson, J.A.