# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Nova Scotia (Health) v. Morrison Estate*, 2011 NSCA 68

**Date:** 20110715
**Docket:** CA 341235
**Registry:** Halifax

**Between:**

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), The Minister of Health for the Province of Nova Scotia at the relevant time and The Executive Director of Continuing Care for the Province of Nova Scotia

Appellants

v.

The Estate of Elmer Stanislaus Morrison, by His Executor or Representative Joan Marie Morrison, Joan Marie Morrison, John Kin Hung Lee, by His Legal Guardian Elizabeth Lee and Elizabeth Lee

Respondents

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| **Judges:** | Hamilton, Beveridge and Farrar, JJ.A. |
| **Appeal Heard:** | May 17, 2011, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed per reasons for judgment of Farrar, J.A.; Hamilton and Beveridge, JJ.A. concurring. |
| **Counsel:** | Edward A. Gores, Q.C., for the appellant<br>Raymond F. Wagner, Michael Dull and Sean D. MacDonald, for the respondents |

IN THE NOVA SCOTIA COURT OF APPEAL
I hereby certify that the foregoing document, identified by the Seal of the Court, is a true copy of the original document on file herein.
Dated the 15th day of July A.D., 2011
Marilyn Munroe
Deputy Registrar

**Reasons for judgment**:

[1] The respondents, the estate of Elmer Stanislaus Morrison, Joan Marie Morrison, John Kin Hung Lee and Elizabeth Lee are the plaintiffs in a class action lawsuit against the appellants (who I will collectively refer to as the AGNS). By decision dated May 20, 2010, now reported as 2010 NSSC 196, the Honourable Justice A. David MacAdam allowed the respondents' motion for certification of the class of plaintiffs and the causes of action in the class action. He found it was only necessary for the class to establish one cause of action to meet the threshold for certification under s. 7(1)(a) of the **Class Proceedings Act**, S.N.S. 2007, c. 28 (**CPA**).

[2] The AGNS appeals arguing that the Chambers judge erred in interpreting the provisions of the **CPA** and, in particular, his interpretation of s. 7(1)(a). In particular, it says the Chambers judge erred in certifying the class claims for breaches of ss. 7 and 15(1) of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 without first determining that the claims disclose a cause of action.

[3] For the reasons I will now develop, I would allow the appeal and remit the matter to the Chambers judge to determine whether the pleadings disclose a cause of action in relation to ss. 7 and 15(1) of the **Charter**.

**Facts**

[4] By Originating Notice (Action) and Statement of Claim dated September 8, 2005, Elmer Morrison, by his litigation guardian, Joan Morrison and Joan Morrison, in her own right, initiated what was described, then, as a common law class action proceeding against the Attorney General of Nova Scotia. In that action they claimed damages based on a number of alleged breaches of provincial legislation including the Nova Scotia **Health Services and Insurance Act**, R.S.N.S. 1989, c. 197, **Homes for Special Care Act**, R.S.N.S. 1989, c. 203, the Nova Scotia **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 and the **Social Assistance Act**, R.S.N.S. 1989, c. 432. The plaintiffs make claims for misfeasance in public office against the Department of Health, the Minister of Health and the Executive Director; fraudulent misrepresentation and deceit was

of Appeal (Interlocutory), the AGNS appeals from the decision and order certifying the proceeding as a class proceeding.

[8] Although the AGNS's Notice of Appeal is couched in broad terms, it became apparent upon reading the AGNS's factum and its oral argument that the real issue on this appeal was the certification of the class **Charter** claims by the Chambers judge. In its factum the AGNS says:

> The Appellants/Defendants conceded causes of actions exist for the torts of fraudulent misrepresentation and deceit, waiver of tort and unjust enrichment in addition to the breach of fiduciary duty. Given the decision in the Court below, the Plaintiffs were not required to establish the *Charter* claims nor did the Court review them. Do the pleadings show *Charter* causes of action which survive s. 7(1)(a) scrutiny? The Appellants submit that they do not. A brief review of the pleadings reveals the representative plaintiffs have not established the *Charter* causes of action. (¶ 76)

[9] The motion for leave to appeal was heard by me in Chambers on May 12, 2011, at which time leave to appeal was granted.

**Issues**

[10] The issues on appeal can be reduced to one succinct issue:

Did the Chambers judge err in his interpretation of s. 7(1)(a) of the **CPA** ?

**Standard of Review**

[11] There is no dispute between the parties on the standard of review. The proper interpretation of s. 7(1)(a) of the **CPA** is a question of law. The standard of review is correctness (**Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, ¶ 8).

**Analysis**

[12] The impugned portion of the Chambers judge 's decision on the interpretation of s. 7(1)(a) is succinct:

See **Re Rizzo and Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27 at 41; **Canada (House of Commons) v. Vaid**, 2005 SCC 30, [2005] 1 S.C.R. 667; and **Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada**, 2006 SCC 46, [2006] 2 S.C.R. 447.

[37] It is suggested by some that this approach is no more than an amalgam of the three classic rules of interpretation: the *Mischief Rule* dealing with the object of the enactment; the *Literal Rule* dealing with grammatical and ordinary meaning of the words used; and, the *Golden Rule* which superimposes context. See Stéphane Beaulac & Pierre-Andre Côté in **Driedger's "Modern Principle" at the Supreme Court of Canada: Interpretation, Justification, Legitimation** (2006), 40 Thémis 131-72 at p. 142.

[38] In any event, as Professor Ruth Sullivan explains in **Sullivan on the Construction of Statutes**, 5th ed. (Markham: LexisNexis Canada Inc., 2008) beginning at p. 1, this modern approach involves an analysis of: (a) the statute's textual meaning; (b) the legislative intent; and (c) the entire context including the consideration of established legal norms:

> The chief significance of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. The first dimension emphasized is textual meaning.
> ...
>
> A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct as a result of the communication. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.
>
> A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms

> legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes against accepted legal norms.

[15] Section 9 of the **Interpretation Act** also directs us to consider, among other matters, the object to be attained by the statute (s. 9(1)(d)) and the consequences of a particular interpretation (s. 9(1)(f)).

[16] Therefore, in interpreting s. 7 of the **CPA**, I would phrase the questions directed to be answered by Professor Sullivan and endorsed by MacDonald, C.J., for the purpose of this appeal, as follows:

1. What is the meaning of the legislative text of s. 7 of the **CPA**;

2. What did the Legislature intend; and

3. What are the consequences of the AGNS's proposed interpretation?

Let me now turn to those questions.

**What is the meaning of the Legislative Text?**

[17] I will start with the full text of s. 7 of the **CPA**:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;

[18] Section 7 guides the certification judge in the decision-making process on an application for certification. A reading of s.7 in its grammatical and ordinary sense tells us that unless the following are established by the class, certification shall not be granted:

1. the pleadings disclose a cause of action
2. there must be an identifiable class
3. the proposed representative must be appropriate
4. there must be common issues, and
5. the class action must be the preferable procedure for the fair and efficient resolution of the dispute.

[19] The key words in s. 7(1)(a), for the purposes of this appeal, are "discloses a cause of action". Does this mean that the class need only show that the pleadings disclose one cause of action in order to be certified or, as the AGNS suggests, does it mean that each cause of action pleaded must disclose a cause of action in order to be certified. The legislative text in its grammatical and ordinary sense may be interpreted either way. Its ultimate meaning will depend on the answer to Professor Sullivan's remaining questions — the lawmaker's intention and the consequences should we endorse the AGNS's proposed interpretation.

**What did the Legislature Intend?**

[20] This involves a consideration of the words "discloses a cause of action" in the broader context and object of the **CPA**.

[21] The **CPA** contains no object clause. However, the **CPA**'s object and the Legislature's intent for the words can be gleaned from the other subsections contained in s. 7 of the **CPA**. In particular, the **CPA** requires the certification judge to consider:

- Whether the common issues predominate over issues affecting only individual members; (s. 7(1)(c))

- The class proceeding is a preferable procedure for the fair and efficient resolution of the dispute; (s. 7(1)(d))

ignores that it is the plaintiffs' burden in a class action lawsuit to establish the cause of action exists. Although the burden is not a heavy one, it is the plaintiffs'. To accede to the respondent's argument would result in "litigation by installments" with potential for multiple rounds of proceedings through various levels of court, a process to be avoided in class action litigation (**Garland v. Consumers' Gas Co.**, 2004 SCC 25; [2004] 1 S.C.R. 629, ¶ 90). When it comes to legislative intent, the interpretation of s. 7(1)(a) suggested by the AGNS is in keeping with the purpose and intent of the legislation.

**The Consequences of the Attorney General's Interpretation**

[25] With respect, it is illogical to suggest that one plaintiff must only establish one cause of action, and a certification judge must review only those parts of the pleadings to determine they establish one cause of action against one defendant, where multiple causes of action are set out by multiple plaintiffs (potentially representing multiple classes or sub-classes) against multiple defendants. To interpret the provision narrowly, as did the Court below, could work an injustice against some defendants in a class proceeding in which different causes of action are alleged as against different defendants.

[26] In Ward Branch**, Class Actions in Canada**,(Aurora: Canada Law Book Ltd., 2004), he describes the test for determining whether causes of action are established under this branch of the certification test:

> 4.60 The wording of this requirement is very similar to those provisions in the rules of court in Ontario and BC permitting the dismissal of a proceeding that does not disclose a cause of action. A similar test is applied. The only difference being that the onus to show a cause of action falls upon the party bringing the class action, as opposed to the party challenging the proceeding.
>
> 4.70 The court will presume the facts alleged in the pleadings are true, and will determine whether it is plain and obvious that no claim exists.

[27] The existence of a cause of action is assessed strictly on the pleadings, assuming all facts pleaded are true and reading the claim generously realizing that drafting deficiencies can be addressed by amending the pleadings. (Branch, 4.80)

[33] The Supreme Court then reviewed each of the claims of breach of fiduciary duty; negligence; bad faith; unjust enrichment and the s. 15(1) **Charter** violation. (Alberta did not challenge the s. 15(1) **Charter** violation as a cause of action, but rather, argued that it should be an individual cause of action as opposed to a class action.)

[34] After reviewing each of the claims, the Supreme Court concluded:

> 102 Based on the foregoing, I would allow the appeal in part and strike the pleas of breach of fiduciary duty, negligence and bad faith. Without endorsing them, I would leave untouched the claim of discrimination under s. 15(1) of the *Charter* and the plea of unjust enrichment, along with any other pleas which survived in the lower courts and were not appealed to this Court. Certification of the class and the unaffected common questions will remain, since the action, in truncated form, survives.

[35] During the course of its decision, the Supreme Court held:

> 20 The test for striking out pleadings is not in dispute. The question at issue is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, then it should be struck out: (authorities omitted).
>
> 21 The issue we must decide on each of the disputed claims is whether this test is met and, separately, whether the class action should be decertified.
> (Emphasis added)

[36] The wording of the legislation in Alberta's **Class Proceeding Act**, R.S.A. 2000, c. C-16.5, is virtually identical to the wording of our s. 7(1). It provides that in order for a proceeding to be certified "the pleadings [must] disclose a cause of action". If it was unnecessary to review each individual cause of action to determine whether it is plain and obvious that a claim cannot succeed, then it would have only been necessary for the class in **Elders Advocates, supra**, to show that the unjust enrichment claim and the alleged **Charter** claim disclosed causes of action and the fiduciary duty, negligence, and bad faith would have been certified as well.

However, it did not concede causes of action in respect of ss. 7 and 15(1) of the **Charter**. The appellants request that we find that the class **Charter** claims are not sustainable.

[42] I would decline to do so. It is more appropriate for the Chambers judge to conduct the analysis having regard to the proper interpretation of s. 7(1)(a) as set out in these reasons. The Chambers judge did not consider the class **Charter** claims to determine whether they disclosed a cause of action. Whether the **Charter** claims meet the required threshold should be addressed by the Chambers judge who can provide reasons, which, if necessary, can be reviewed by this Court.

[43] I would, therefore, remit the matter to the Chambers judge for a determination of whether the **Charter** claims should be certified.

**Costs**

[44] Given the novel nature of the subject-matter of this appeal, I would not award costs to either party.

[45] The appeal is allowed and the matter remitted to the Chambers judge.

Farrar, J.A.

Concurred in:

Hamilton, J.A.

Beveridge, J.A.