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Recent Caselaw

1st Case

Our first case law this month addresses Part II of the Nova Scotia Supreme Court decision dealing with the constitutionality of the cap.

2nd Case

Our next topic discusses Bill 28 which addresses the pressing issue of reforming the Limitation of Actions Act.

3rd Case

Lastly, we outline the requirements of the Law Society of New Brunswick's Client Identification and Verification Rule

Our newsletter is not intended to give legal advice, however, to discuss legal matters or obtain the full text of cases readers are welcome to contact Foster & Company.



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HARTLING V. NOVA SCOTIA (ATTORNEY GENERAL)

1st Case

In our February newsletter, we addressed the decision of Honourable Justice Walter Costello, of the Nova Scotia Supreme Court, where he held that parts of the Insurance Act of Nova Scotia restricting recovery for plaintiffs for minor personal injury were not unconstitutional. Part II of his decision addresses the analysis under Section 1 of The Canadian Charter of Rights and Freedoms, and whether it can be shown that the limits on such rights can be demonstratively justified in a free and democratic society.

In *Hartling v. Nova Scotia (Attorney General)*, Justice Costello outlined the fact that in dismissing the constitutional challenges to the legislation in Part I of his decision, it is not technically necessary to consider the Section 1 issue. However, he felt this was advisable in light of the importance of the issues raised and the fact that this would probably go to the Court of Appeal and the Supreme Court of Canada. The Section 1 analysis is based on the assumption that Justice Costello's finding that the legislation is constitutional would be in error. Therefore, most of his discussion is simply obiter.

The case law supporting the Section 1 analysis stems from a long line of cases decided by the Supreme Court of Canada, more specifically *R. v. Oakes*, [1986] 1 S.C.R. 103. Two central criteria must be satisfied to demonstrate that a limit imposed on rights and freedoms is reasonable and demonstrably justified in a free and democratic society. First, the objective of the legislation limiting a right protected by the Charter must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, once a sufficiently significant objective is recognized, the party invoking Section 1 must show that the means chosen are reasonable and demonstratively justified. This part is commonly called the "proportionality test".

Mr. Justice Costello started by analyzing whether the objective of the legislation was pressing and substantial. The court found that the objective of the legislation was to address the crisis faced by Nova Scotians related to skyrocketing automobile insurance rates. In the opinion of the court, this was a pressing and substantial matter which led up to the enactment of the legislation limiting a person's recovery rights.

The court then went on to analyze whether there was an actual connection between the legislation and the objective (the "proportionality test"). The court found that there was a clear rational connection between the imposition of insurance caps and limitation of the dramatic increase in insurance premiums allegedly caused by rising claims costs primarily related to minor injuries.

The next step in the analysis of the proportionality test involved a review of whether the legislation minimally impaired the rights at stake. The court agreed that the legislature, in restricting the changes to economic laws recovery as it did, focused on pain and suffering damages with a distinction based on the severity of the injuries. Hence, the legislative choice was focused on non-pecuniary damages affecting minor injuries, which was considered a minimal impairment.

Finally, the last part of the proportionality test was to review whether the deleterious effect of the Charter breach was outweighed by the salutary effect of the legislation. The court stated that there had been a considerable benefit to citizens of Nova Scotia in the passing of the legislation, including a reduction in automobile insurance rates. However, the court concluded that if it had been established that the consequence of the legislation was stereotyping, then it would have been the conclusion of the court that the benefits of the legislation would have fallen short of justifying such stereotyping.

Had Justice Costello found that the Nova Scotia legislation fostered discrimination and stigmatization of a person with minor injuries, his conclusion is that the legislation would not have been saved by application of Section 1 of the Charter. However, since his finding was that the legislation was not discriminatory to start with, then his analysis and conclusion on Section 1 of the Charter does not change the outcome of this case.

Bill 28

2nd Case

The Attorney General introduced Bill 28 on December 16, 2008 in the Legislative Assembly. Bill 28 is a proposed new Limitation of Actions Act designed on Acts recently adopted by Alberta, Ontario, Saskatchewan and the Uniform Law Conference of Canada in recent years. In sum, it uses a combination of a short limitation period based on a person's discovery of his or her claim as well as a long limitation period based on the act complained of. Bill 28 does not, however, alter the limitation periods created by the Insurance Act for bringing legal proceedings under different kinds of insurance laws.

The new Act will not affect self-contained rights with self-contained remedies that are found in many public Acts. Those remedies must be applied for within a particular period which will not change.

The most important section of the Act is s.5 which contains the General Limitation Periods. In most ordinary circumstances, there will be a two-year limitation period based on discovery of the existence of a claim and a fifteen-year limitation period from the day on which the act or omission on which the claim is based occurred. In terms of practice, the two-year limitation period will ordinarily be the operative one with the fifteen-year period becoming relevant only in cases where a long time has passed before a claim is discovered.

There is a part of the Act that deals with special limitations which set out specific limitation periods for specific items. For example, s.8 provides that no claim based on a judgment for the payment of money shall be brought after 15 years from the date of the judgment. Part 2 also addresses the limitation for the recovery of personal property (s.9), for damages for conversion (s.10), demand loans (s.11), secured debt (s.12), statutory liens (s.13), and contributions (s.14).

As per s.17, the operation of any limitation period is suspended while the claimant is a minor. This section is not affected by the new Act in that limitation periods do not start to run for a minor until he or she reaches 19.

Through s.21 of the new Act, despite the expiry of the relevant limitation period, a claim may be added through a new or an amended pleading, or to a proceeding previously commenced if the added claim is related to the subject matter of the original proceedings. This section creates a framework within which once a claim has been brought in time, new claims can be added to the proceedings even though the limitation periods applicable to those claims are expired. The added claim, however, must relate to the subject matter of the original proceeding.

Section 27 encompasses a transition between new and existing limitation periods such as new limitation periods will apply to all claims brought after the Act comes into force. However, during the first two years after such date, a claim may still be brought after the new limitation period has expired if the former limitation has not expired. For example, a claim arising out of an act of negligence discovered in 2006 could be brought until 2008 under the existing six-year limitation period, however, the new two-year limitation period would require it to have been brought by 2008. Section 27 provides a two-year transitional period in which the former limitation period prevails over the new one if the new one expires earlier. As well, the new Act provides certain provisions for claims for which the limitation period has expired before the new Act comes into force. Under s.27 (4), if a claim has expired, even though the new 15 year rule in s.9 would make the limitation period longer, the prevailing six-year limitation period would prevail and prevent a claim from being brought.

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Law Society of New Brunswick's Client Identification and Verification Rule requirements

3rd Case

The Law Society of New Brunswick adopted a new Rule effective October 31, 2008 regarding the identification of clients and the verification of their information in response to global concerns that law firm trust accounts may be targeted to facilitate money laundering schemes. This Rule is based on a model Rule developed by the Federation of Law Societies of Canada and establishes rigorous protocol to be undertaken by New Brunswick lawyers regarding identification and verification. Specifically, all lawyers retained with respect to new matters are required to collect specific and detailed data regarding clientele.

WHAT THIS MEANS FOR YOU

The Rule on client identification applies to all clients, even those with whom we have had a longstanding relationship. Therefore, when you retain our services with respect to a new matter, the we will request the following information/documentation from you:

INFORMATION REQUIREMENTS

For Individual Clients:

We will require your name, home address, telephone number and occupation. If applicable, we will also require your business address and business telephone number.

For Organizational Clients:

We will require the organization's full name, business address, business telephone number, a description of the general nature of the business, its incorporation or business identification number and its nature of issue, as well as the name, position and contact information of all individuals who are authorized to provide us with instructions.

If you retain our services on behalf of a third party, we will require the same information from that third party as if we were representing them ourselves.

VERIFICATION REQUIREMENTS

Verification of your information is required only when our trust account is utilized or, depending on the circumstances, when you retain our services with a view to receiving, paying or transferring funds (including monies, negotiable instruments and securities).

The verification requirements are as follows:

For Individual Clients:

We are required to review (in person or by an appointed agent), and obtain a copy of an original government-issued identifying document. (e.g. driver's licence, passport, birth certificate)

For Organizational Clients:

We are required to request and obtain copies of documentation which confirms your organization's existence, (e.g. Certificate of Corporate Status, Annual Return, Articles of Association, Partnership Agreement) as well as the information regarding the organization's directors and controlling owners. We are also required to review, in person or by an appointed agent, and obtain a copy of identification documentation for all individuals authorized to provide us with instructions.

OUR UNDERTAKING TO YOU

We will endeavour to fulfil our obligations under the Rule of Client Identification and Verification in the most efficient and least intrusive way possible, while continuing to provide you with the service, attention and professionalism that you have come to expect from our office.

Should you have any questions regarding client identification and verification, please do not hesitate to contact us.