

CANADA / JUDGMENT

S.A.D. v. British Columbia

1999 BCCA 210

COURT

British Columbia Court of Appeal

DECIDED

30 March 1999

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Citation: Davies v. British Columbia Date: 19990330 1999 BCCA 0210 Docket: V02918 Registry: Victoria

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

SELINE ALICE DAVIES, LINDA MAY MAILHOT and BRENDA LYNN MARSHALL

PLAINTIFFS (RESPONDENTS) AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT (APPELLANT) AND:

CLIFFORD ANDREW HOUNSELL, ERIC EVERETT PEARSON, ERIC EVERETT PEARSON for THE ESTATE OF MARGARET PEARSON

DEFENDANTS

A N D

BETWEEN:

KEITH LENNARD BEADLE, PHILIP BEADLE, and HENRY BEADLE

PLAINTIFFS (RESPONDENTS) AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT (APPELLANT) AND:

FLORENCE PLEASANCE, REGINALD PLEASANCE, FRED A HART, VERNON HART, JANE DOE and JOHN DOE

DEFENDANTS

Before: The Honourable Mr. Justice Esson The Honourable Mr. Justice Cumming The Honourable Madam Justice Ryan The Honourable Mr. Justice Donald The Honourable Mr. Justice Hall

Joan M. Young and Counsel for the Appellant Lisa Mrozinski

Theresa Stowe and Counsel for the Respondents Shannon Aldinger Seline Alice Davies, Linda May Mailhot and Brenda Lynn Marshall

Gail H. Dickson, Q.C. Counsel for the Respondents Keith Lennard Beadle, Philip Beadle and Henry Beadle

Place and Dates of Hearing Vancouver, British Columbia October 26 and 27, 1998

Place and Date of Judgment Vancouver, British Columbia March 30, 1999

Written Reasons by: The Honourable Mr. Justice Esson

Concurred in by: The Honourable Mr. Justice Cumming The Honourable Mr. Justice Donald The Honourable Mr. Justice Hall

Dissenting Written Reasons by: (p.30, para.47) The Honourable Madam Justice Ryan

Reasons for Judgment of the Honourable Mr. Justice Esson:

- [1] This is an appeal from the order of Madam Justice Dillon made on an application under Rule 34 answering in the negative two questions of law which, if answered in the affirmative, would have resulted in the actions being dismissed as against the Crown.
- [2] The relief sought in the actions is damages and/or equitable compensation arising out of physical abuse and sexual abuse to which the plaintiffs were allegedly subjected while they were children in foster care as wards of the Superintendent of Child Welfare.
- [3] The individual defendants, who are not involved in these appeals, were foster parents or persons resident in their homes who are alleged to have abused the plaintiffs. The plaintiffs were all born in the years 1956 to 1961. They were in foster care in the years 1964 to 1975. Except for the last few months of Ms. Davies stay in foster care, the alleged abuse took place before 1 August 1974, the date upon which Crown immunity from suit was abolished by the Crown Proceedings Act, S.B.C. 1974, c.24 (the "1974 Act") which, in the 1979 Consolidation, became the Crown Proceeding Act, R.S.B.C. 1979, c.86 (the "1979 Act"). Section 16(1) of the 1974 Act repealed the Crown Procedure Act, R.S.B.C. 1960, c.89 but subject to s.16(2) which provided:

16.(2) Notwithstanding the repeal of the Crown Procedure Act, that Act applies to a cause of action in respect of proceedings against the Crown that arose before the date this Act comes into force, whether or not it is or is considered to be a cause of action continuing after the date this Act comes into force.

The Crown Procedure Act of 1960 was not essentially different from the Crown Procedure Act, R.S.B.C. 1888, c.32 which substantially adopted the provisions of the Common Law Procedure Act 1854 (U.K.), 1854, c. 124, 125. The most significant provision of the 1974 Act, which was carried forward unchanged into the 1979 Act, was s.2: 2. Subject to this Act,

- (a) proceedings against the Crown by way of petition of right are abolished;
 - (b) a claim against the Crown, that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant-Governor, may be enforced as of right by proceedings against the Crown in accordance with this Act, without the grant of a fiat by the Lieutenant-Governor;
 - (c) the Crown is subject to all the liabilities to which it would be liable if it were a person; and
 - (d) the law relating to indemnity and contribution is enforceable by and against the Crown in respect of any liability to which it is subject, as if the Crown were a person.
- [4] For the purposes of the issues raised here, s.15 is most significant: 15.(1) Except as otherwise provided in this Act, this Act does not affect proceedings against the Crown that have been instituted before the coming into force of this Act; and, for the purposes of this section, proceedings against the Crown by petition of right shall be deemed to have been instituted if a petition of right with respect to the matter in question has been submitted for consideration to the Lieutenant-Governor before the coming into force of this Act.
- (2) Subject to subsection (1), this Act does not apply to a cause of action that existed on the day before the date this Act comes into force.
- [5] The language of that section was not carried forward into the 1979 Act. Section 16(2) of the 1974 Act was carried forward into the 1979 Act in this somewhat different language: 17. Notwithstanding the repeal of the Crown Procedure Act, that Act applies to a cause of action for proceedings against the Crown that arose before August 1, 1974, whether or not it is or is considered to be a cause of action continuing after August 1, 1974.
- [6] The Crown's position can be summarized thus: 1. Before 1 August 1974, the Crown Procedure Act would have been an absolute bar to this action.
2. The causes of action sought to be advanced by the plaintiffs are, in the language of s.15(2) of the 1974 Act, ones that existed on the day before 1 August 1974. The 1974 Act therefore does not apply to them.
3. Similarly, the causes of action now sought to be put forward are ones which, in the language of s.17 of the 1979 Act, "arose before 1 August 1974" and therefore cannot be advanced under that Act.
- [7] In its statement of defence in each action, the Crown pleaded that the claims were barred by the Limitation Act as well as laches and acquiescence. The significant plea for present purposes is para. 11 of the further amended statement of defence: 11 In further answer to

the entire Statement of Claim, the Queen says that no claims against her in tort or equity are actionable for events which occurred prior to the enactment of the Crown Proceeding Act, S.B.C. 1974, c.24. The Queen pleads and will rely on Section 17 of the Crown Proceeding Act, R.S.B.C. 1979, c.86.

The underlined words were inserted by an amendment to meet an amendment by the plaintiffs to plead breach of fiduciary duty.

- [8] In the further amended reply, the plaintiffs in Davies pleaded: 1. In Reply to paragraphs 10, 10A and 11 of the Further Amended Statement of Defence of Her Majesty the Queen In Right of the Province of British Columbia, the Plaintiffs state that their claims in tort and in equity as against the Defendant Her Majesty the Queen In Right of the Province of British Columbia (the "Queen") are actionable because:
- (a) their causes of action in tort and in equity as against the Queen did not accrue until the commencement of this proceeding on May 25th, 1993,
 - (b) each of them was unable to discover the nature of her injuries and/or nexus between the injuries and the wrongful conduct of each of the Defendants until such time as each of the Plaintiffs was able to receive and to respond to therapeutic assistance.
 - (c) the tolling of time with respect to each of their claims in tort and in equity against the Queen is postponed by operation of sections 3(3)(k) and 6(3) of the Limitation Act, R.S.B.C. 1979, Chapter 36 and amendments thereto.
2. In further reply to paragraphs 10 and 10A, and in reply to paragraphs 10B and 11 of the Further Amended Statement of Defence of the Queen, the Plaintiffs plead and rely upon the presumption that as victims of physical and sexual abuse during childhood, each of them was only able to discover the necessary connection between her injuries and the wrongful conduct of each of the Defendants during her recovery while in therapy.
3. In further reply to paragraph 11 of the Further Amended Statement of Defence of Her Majesty the Queen in Right of the Province of British Columbia, the Plaintiffs state, as follows
- a) Section 17 of the Crown Proceeding Act does not apply to the case at bar because
 - (i) the causes of action did not accrue until after the Crown Proceeding Act came into force in 1974.
 - (ii) Section 17 does not preserve Crown immunity for tortious acts which occurred prior to 1974, and
 - (iii) Crown immunity did not apply prior to 1974 where the Crown assumed guardianship of infant children pursuant to child protection legislation,

- b) in the alternative, that Section 17 of the Crown Proceeding Act is constitutionally invalid as it violates Section 7 and 15(1) of the Canadian Charter of Rights and Freedoms:
- c) in the alternative, that Crown immunity did not extend to breach of fiduciary duty and/or breach of trust committed by the Crown and, therefore petitions of right were routinely granted for such causes of action; and
- d) in the alternative, if the Plaintiffs are required to apply for Royal Fiats, they ought to be granted.

The pleadings in the Beadle action are similar.

- [9] On that state of the pleadings, the Crown applied for an order that a point of law be set for hearing. The plaintiffs opposed. In an order pronounced 5 March 1996, Saunders J. ordered that these points of law be set for hearing: For these reasons I order that the following points of law be set for hearing:
1. Is section 17 of the Crown Proceeding Act, R.S.B.C. 1979, c. 86 and the Crown Procedure Act, R.S.B.C. 1980 [sic], c. 89 an absolute bar to the plaintiffs' claims in negligence for damages suffered as a result of incidents prior to August 1, 1974?
 2. Is section 17 of the Crown Proceeding Act, R.S.B.C. 1979, c. 86 and the Crown Procedure Act, R.S.B.C. 1980 [sic], c. 89 an absolute bar to the plaintiffs' claims for breach of fiduciary duty arising from incidents prior to August 1, 1974?
 3. If so, is section 17 of the Crown Proceeding Act invalid as infringing either section 7 or section 15 of the Charter of Rights and Freedoms?

It is common ground that, for the purposes of deciding the point of law, the averments of fact in the plaintiffs' pleadings must be taken as true.

- [10] In reasons delivered on 11 October 1996, Dillon J. answered: "No" to questions 1. and 2. and held that question 3. did not need to be answered. The Crown appeals against the decision in respect of questions 1. and 2. The appeal was originally heard in April, 1998 before a panel of three judges but was ordered to be re-heard before five judges because of concerns that it might not be possible to determine the appeal without overruling the decision of this court in *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1.
- [11] We have been advised that the Beadle case proceeded to trial before Dillon J. who gave judgment for the plaintiffs against the Crown and other defendants on 3 March 1998, i.e., before the first hearing of this appeal.
- [12] Dillon J. put her decision to give a negative answer to questions 1. and 2. on two quite different grounds:

1. That before 1873, when the first Crown Procedure Act was enacted in this Province, equitable relief against the Crown was available without the need for a petition of right, that nothing in the Crown Procedure Act would prevent someone proceeding as they could have done before February 1873, that a claim for breach of fiduciary duty is an equitable claim which, unlike a claim in tort, is not dependent for its existence on the 1974 Act or the 1979 Act.
 2. In deciding whether, in the language of s.15(2) of the 1974 Act, the plaintiffs' cause of action existed before 1 August 1974, or whether in the language of s.17 of the 1979 Act, the cause of action arose before 1 August 1974, the court must apply the "discoverability principle" and find that the causes of action, on the facts pleaded, all arose after 1 August 1974.
- [13] As, in my view, the real issue in this appeal is that raised by the second ground of decision and as it applies to both negligence and fiduciary duty, I will deal with it first. If the appellant fails on ground 2., ground 1. is academic.
- [14] One of the Crown's arguments is that, having regard to the adage that "the Queen can do no wrong", no cause of action can be founded on conduct of the Crown which took place before 1 August 1974 when, for the first time, the Crown became subject "to all those liabilities to which it would be liable if it were a person" (s.2(c) 1974 Act). The researches of counsel turned up only one case in which that issue has been considered. That is the decision of Shaw J. in *Botting v. British Columbia* (1996), 27 B.C.L.R. (3d) 106 (S.C.). A bridge had been designed and built by the Ministry of Transportation and Highways some months before 1 August 1974. Eighteen years later the plaintiff's husband was killed as a result of the negligent design and construction. For present purposes, these passages at paras. 42-47 of the reasons of Shaw J. are of interest: The Crown argues that as the alleged negligence occurred before August 1, 1974, there can be no cause of action because of the legal maxim which then prevailed that "The Sovereign can do no wrong".

The Crown contends that the Crown Proceeding Act should not be construed retrospectively so as to affect substantive rights. The Crown cites *Angus v. Hart* (1988), 52 D.L.R. (4th) 193 (S.C.C.). In the *Angus* case, a wife claimed against her husband for injuries negligently caused by him in a motor vehicle collision. At the date of the accident, husbands in Ontario were immune from tort claims by their wives. Two months after the accident, the immunity was abolished by statute. The Supreme Court of Canada held that the immunity applied to the wife's claim and dismissed her action. LaForest J., for the court, said, at p.201:

The rule against retrospective application should certainly have effect in a context such as the present one, where a party is deprived of a defence to an action by the operation of the new statute; see *Foy v. Foy* (1978), 88 D.L.R. (3d) 761 at p.762, 20 O.R. (2d) 747 at pp.747-8, 9 C.P.C. 141 (C.A.), per Jessup J.A. in obiter. This is the whole point of the presumption.

The plaintiff contends that the maxim that the Sovereign can do no wrong has no application to the present case because the cause of action did not arise until the accident occurred in 1992, after Crown immunity was eliminated. This submission is based upon the proposition that a cause of action in negligence does not arise until the date that the injury occurs: *Long v. Western Propeller Company Ltd.* (1968), 63 W.W.R. 146 (Man.C.A.); *Kaiser v. Bufton's Flowers Ltd.* (1995), (sub nom *Kaiser v. Vancouver (City)*) 2 B.C.L.R. (3d) 85 (B.C.C.A.).

The plaintiff also relies upon s.17 of the Crown Proceeding Act which reads:

17. Notwithstanding the repeal of the Crown Procedure Act, that Act applies to a cause of action for proceedings against the Crown that arose before August 1, 1974, whether or not it is or is considered to be a cause of action continuing after August 1, 1974.

The plaintiff's contention is that because s.17 excludes only causes of action which existed before or as at August 1, 1974, the cause of action in the present case is not excluded because it arose after that date.

It is helpful to start with an understanding of the maxim "The Sovereign can do no wrong". At first glance, the words appear to state an all-encompassing principle that puts the Crown above the law and gives the Sovereign (that is, the state) the right to ignore the laws which govern the conduct of all persons. This is a misconception. According to early authorities, the Sovereign was as subject to the laws of the realm as everyone else. However, despite being under the law, the Sovereign could not be impleaded in the courts. The courts had no jurisdiction over the Sovereign, the reason being that if the courts were given control over the Sovereign, that was seen as destructive of the Sovereign's constitutional independence. It is this immunity from being impleaded in the courts that underlies the maxim that the Sovereign can do no wrong.

- [15] After an extensive review of the authorities Shaw J. stated his conclusion at para. 58 on that aspect of the action: In my opinion, the Crown cannot avail itself of the maxim that the Sovereign can do no wrong. My reasoning is that prior to August 1, 1974, the Crown was quite capable of committing a wrong. It was subject to the laws of the land, and one of those laws was the duty to take reasonable care to avoid acts and omissions which were reasonably foreseeable as likely to cause injury to others. This is the law that I found earlier was violated. What changed on August 1, 1974 was not the Crown's duty to obey the law, but its immunity from being taken to court.
- [16] I am content to adopt the analysis of Shaw J. The issue to be decided here is, of course, substantially different. The decision in *Botting*, supra, applies the long established proposition that a cause of action in negligence does not arise until the injury occurs. As there was in *Botting* no injury until the date of the accident in 1992, no cause of action arose before that day. It then arose immediately – there was no question of delayed knowledge.
- [17] In this case, the alleged wrongdoing (with the exception noted in respect of Ms. Davies) all took place prior to 1 August 1974 as did at least some of the harm which flowed from it. The plaintiffs' answer is that, although aware of the wrong done to them, they did not become

aware of the harmful consequences of those wrongs until after 1974. The question then is whether the date of accrual of the plaintiffs' cause of action should be determined on the basis of the discoverability rule first introduced into Canadian law in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2.

- [18] The essence of that rule, which I will call the "common-law discoverability rule" to distinguish it from the similar but not identical rule to be found in the Limitation Act, R.S.B.C. 1979, c.236 (now R.S.B.C. 1996, c.266), is that the limitation period starts to run on the date on which the plaintiff actually discovers, or with reasonable diligence should have discovered, the damage. The limitation issue in *Kamloops v. Nielsen* arose from what were then ss. 738 and 739 of the Municipal Act, R.S.B.C. 1960, c.255 (now ss. 285 and 286 R.S.B.C. 1996, c.323). Section 738 required that any action be commenced within six months "after the cause of such action shall have first arisen". Section 739 required notice to be given within two months "from and after the date on which such damage was sustained". In *Kamloops v. Nielsen* the negligence of the City took place in 1973 and 1974 but the plaintiff did not discover the defect in the foundations until 1978. In holding that the time began at the latter date, this court referred, amongst other authorities to *Sparham-Souter v. Town and Country Devs. (Essex) Ltd.*, [1976] Q.B. 858, [1976] 2 All E.R. 65 (C.A.). The view that the discoverability rule laid down in that case must govern in cases of hidden damage to buildings had, by the time that *Kamloops* reached this Court, come to be treated as settled law in this province. The parties accepted that the rule applied and thus the only issue on limitations was a dispute as to the date of discoverability. In the Supreme Court of Canada, the parties raised no limitations issue whatever. However, while the decision was under reserve, the House of Lords delivered judgment in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners (a firm)*, [1983] 1 All E.R. 65 which overruled the decision of the Court of Appeal in *Sparham-Souter*. The House of Lords found that the cause of action accrued when physical damage occurred to the building whether or not the plaintiffs were or should have been aware of the damage at that time. In effect, the House rejected the view that it was open to the court to create a discoverability rule by redefining the words "when the cause of action arises" which historically had been taken to mean when all elements of the cause of action were present.
- [19] In *Kamloops*, the court rejected the view which had prevailed in *Pirelli*, supra, and held it not to be part of the law of Canada. Thus, the common-law rule of discoverability became part of our law. In *Central Trust Company v. Rafuse*, [1986] 2 S.C.R. 147 the court held the reasonable discoverability rule applicable to cases involving professional negligence. Le Dain J. stated at 224 the general rule to be that: ... a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence
- [20] In relation to this appeal, the most significant decision is that in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, a case of incest inflicted by a father on his daughter beginning when she was about ten years old and continuing for a period of years. In 1985, at the age of 28, the daughter

sued for damages arising from the incest and for breach of the fiduciary duty of a parent. A jury found that there had been sexual assault and assessed tort damages but the trial judge dismissed the action on the ground that it was barred by s.45 of the Limitations Act, R.S.O. 1980, c.240 which, so far as material, read as follows: 45.(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,

. . .

- (i) an action for assault, battery, wounding or imprisonment, within four years after the cause of action arose;

That decision was affirmed by the Court of Appeal. In all courts, it was accepted that the conduct of the defendant came within the words "assault" and "battery" for the purpose of the limitation issue.

[21] The Supreme Court of Canada allowed the appeal and entered judgment for the plaintiff in the amount fixed by the jury. The principal judgment is that of La Forest J. which was concurred in by four other members of the bench of seven. Sopinka J. and McLachlin J. gave separate concurring reasons. The reasons of La Forest J. are lengthy and deal at great length with the particular kinds of harm caused by incest which is, of course, not alleged here. It should, however, be noted that the Court did not treat incest as a separate tort but rather as a species of sexual assault.

[22] The precise extent to which the decision will apply to the somewhat different allegations made by these plaintiffs, should only be determined when they can be related to a concrete set of facts. For instance, La Forest J. enunciated at pp.48 and ff. a presumption that the nexus between the victim's injuries and incest will be discovered only after the victim receives therapy. Whether that aspect of the decision will apply to non-incestual assaults is not clear. What is clear is that the court found that the discoverability principle should be applied generally to cases of abuse against children. La Forest J. stated this conclusion at p.35: In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations 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.

Reading the judgment as a whole, it becomes clear that the principle was not intended to be limited to incest.

[23] The decision in *M.(K.) v. M.(H.)*, supra, may be seen as adding a new element to the discoverability rule. In *Kamloops v. Nielsen*, supra, and in *Central Trust v. Rafuse*, supra, it was found that the plaintiff had no knowledge of one element of the cause of action, i.e., damage. *M.(K.) v. M.(H.)* appears to hold that, even if the plaintiff had some knowledge of both the wrongdoing and the harm, the cause of action crystallized only when she discovers the causal relationship between the two.

[24] It is significant that La Forest J. referred with approval to the approach taken by Hall J. (now J.A.) in *Gray v. Reeves* (1992), 64 B.C.L.R. (2d) 275 (S.C.), a case of sexual assault upon the plaintiff by her uncle in the period when she was four to twelve years old. The assaults had ended in 1973. In the mid-eighties she was suffering from depression. She consulted a psychiatrist in 1987 and a psychologist in 1988. She brought an action in May, 1990 at age 30. The defendant raised a limitation defence which fell to be decided under the postponement provisions of our Limitation Act which, as Wilson J. put it in *Kamloops v. Nielsen*, supra, at p.42: It seems to me that the purpose of ss.3(1)(a) and 6(3) was to give legislative effect to the reasoning in *Sparham-Souter* by postponing the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action. The Act has also resolved the problem of stale claims which was the major criticism of the principle. Section 8(1) reads in relevant part:

8. (1) Subject to section 3(3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7, or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose

It is noteworthy that La Forest said in *M.(K.) v. M.(H.)*, supra, at pp.46-47: Despite the differences in legislation, the conclusions of Hall J. in *Gray v. Reeves*, at p. 309, are worthy of note:

... it seems to me that the hypothetical reasonable person in the shoes of the plaintiff here would not have been acting sensibly in commencing an action until such a person came to appreciate that a wrong or wrongs that had occasioned significant harm to her wellbeing could be established.

This is essentially the test I propose in the instant case.

[25] The substance of the rule laid down in *M.(K.) v. M.(H.)*, supra, is summarized in this paragraph in the headnote at p.8: The reasonable discoverability rule, as developed in previous decisions of this Court, should be applied and the limitations period should begin to run only when the plaintiff has a substantial awareness of the harm and its likely cause. The causal link between fault and damage is an important fact, essential to the formulation of the right of action, that is often missing in cases of incest. In making this link, the plaintiff must have an awareness of the wrongfulness of the defendant's incestuous conduct. Battery consists of wrongful touching, and the plaintiff must discover the wrongfulness of the contact and its consequential effects before the cause of action accrues. The issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility for his or her childhood abuse, for it is then that the victim realizes the nature of the wrong suffered. As such, responsibility plays a pivotal role in both the genesis and the cessation of the harms caused by incestuous abuse.

[26] The most recent decision of the Supreme Court of Canada on the discoverability rule is *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. It arose in a very different context than these cases but may be significant as indicating that the rule is applicable to all kinds of cases. The

case arose out of the no fault insurance scheme in force in Ontario at the time of the accident in which the plaintiff was injured. The starting point for compensation under that legislation was when the damages are known to comprise "permanent serious impairment" as defined in the Act. Actions for recovery in tort were effectively barred unless the plaintiff could establish a certain level of physical injury. At first instance, the action was held to be statute barred. The Supreme Court upheld the Court of Appeal's decision that it was not. The basis of the decision is that time does not begin to run until it is reasonably discoverable that the injury meets the threshold defined in the Act.

- [27] Major J. giving judgment for the court, said at para. 37: In this regard, I adopt Twaddle J.A.'s statement in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at p.206, that the discoverability rule is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue:
- [28] The factual pattern in the cases before us was of course different from that in *M.(K.) v. M. (H.)*. In the *Beadle* action it is alleged in para. 16 of the statement of claim that: Throughout the period Keith, Henry, and Philip resided in the Pleasance Home Florence and Reginald Pleasance repeatedly and intentionally inflicted mental suffering upon Keith, Henry, and Philip by means including, inter alia: inappropriate and cruel forms of discipline, and severe physical and mental punishment.
- [29] The allegations in the *Davies* action are set out in more detail and differ somewhat as between the three plaintiffs. Primarily they are allegations of sexual assault by the defendant Eric Pearson who was, along with his now deceased wife, a foster parent, and the defendant Hounsell who resided with them in the house for a lengthy period of time. Whether there is a case made out for postponement is something which can only be determined at trial. On this appeal we are only dealing with the point of law raised under Rule 34, that as to whether the two statutes constitute an absolute bar to the plaintiffs' claim in negligence and breach of fiduciary duty.
- [30] The principal submission of the Crown is that the general rule of discoverability is one applicable only to a statute of limitation. The *Crown Proceeding Act* is of course not a statute of limitation. Its purpose was to abolish the Crown's immunity from suit and to subject it to all the liabilities to which ordinary persons are subject. It is undoubtedly true that the kinds of statute are fundamentally different in their nature and purpose. But the question must be whether there is any real difference between the ordinary provisions of a limitation statute and the provisions of the *Crown Proceeding Act* on which the Crown relies.
- [31] In my view, the similarities between those provisions and a statute of limitations lead to the conclusion that the discoverability rule should be applied to them. One of the important similarities is in the purpose of the two statutes. The reason for developing the common-law rule of discoverability was, as Wilson J. put it at p.40 of *Kamloops v. Nielsen*, to avoid "the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence." By 1974 it had come to be recognized that Crown immunity was unjust. The

nature of the injustice was essentially the same as that created by the law of limitations. It prevented persons injured by the wrongdoing of the Crown from bringing action to obtain relief for the wrong done. The elimination of that injustice was the essential legislative purpose in passing the Crown Proceeding Act.

- [32] A second important point of similarity is in the usual language of limitation statutes and the language of the provisions relied on by the Crown. As La Forest J. said at p. 29 of *M.(K.) v. M.(H.)*, the common-law rule of discoverability is an interpretative tool. In that case, he applied that tool to the words "after the cause of action arose" in s.45(1)(j) of the Ontario Limitations Act. There is no material difference between that phrase and the phrase "cause of action that existed" in s.15(2) of the 1974 Act or the phrase "a cause of action in respect of proceedings against the Crown that arose before [August 1, 1974]" in s.16(2) of the 1974 Act.
- [33] Looking at the matter from the point of view of the plaintiffs in these actions, the injustice to them if the Crown's submission succeeds will be essentially the same as that which would have been inflicted on the plaintiffs in *M.(K.) v. M.(H.)* and *Gray v. Reeves* if the rule of discoverability had not been applied. They will have been deprived of their cause of action before they knew they had one. I can see no compelling reason for applying to the words of the Crown Proceeding Act any different rule of interpretation than that which the Supreme Court of Canada has held should be applied to statutes of limitation. Each type of statute, as Ms. Dickson submits for the plaintiffs, is a limiting provision. Each has the same purpose and the same effect which is to limit the bringing of actions. Each should receive, in the words of s.8 of the Interpretation Act, "... such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
- [34] It follows that I agree with the second ground upon which Dillon J. reached the conclusion that questions 1. and 2. should be answered in the negative. The third question need not be considered. Nor is it necessary to decide whether the chambers judge erred in deciding that before 1 August 1974 the plaintiffs would have had a right to pursue against the Crown an action for breach of fiduciary duty. That conclusion rests on a very few cases, the earliest being *Pawlett v. The Attorney General* (1668), *Hardres* 465, 145 E.R. 550 (Ex.), which indicates that the Court of Chancery would in some circumstances make an order against the Crown without a petition of right having been sought and a fiat issued. The instances in which any such power was exercised appear from the cases to have been narrowly limited and, as counsel for the Crown submits, seem to have been limited to orders ancillary to and in aid of a common-law right. None of the cases to which we were referred indicate that such a power was ever exercised to grant pecuniary relief in any situation remotely like that on which these actions are based. However, as the issue is now academic in every sense and unlikely to arise again, I prefer to go no further than to express my doubts that the judge's conclusion was right.

- [35] I said earlier that this appeal was reargued before a bench of five because of a concern that the court would be called on to overrule *Bera v. Marr*, supra. I will explain why in my view there is no conflict between the decision in this case and that in *Bera v. Marr*.
- [36] The first point to be made is that *Bera v. Marr* arose under the British Columbia Statute of Limitations which was enacted in 1975. As was noted by Wilson J. in *Kamloops v. Nielsen* and La Forest J. in *M.(K.) v. M.(H.)*, it includes postponement provisions which cover essentially the same ground as the common-law rule of discoverability. The second point to be noted is that in *Bera v. Marr* the issue arose out of the ultimate period of limitation which is laid down in that Act but which has no counterpart in the common-law rule.

The Limitations Act as enacted in 1975 included s.8(1): 8.(1) Subject to section 3(3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7, or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose, or in the case of an action against ... a medical practitioner based on professional negligence or malpractice, after the expiration of 10 years from the date on which the right to do so arose.

- [37] In December, 1977 s.8(1) was amended to reduce the ultimate period for medical malpractice actions from 10 years to 6. The facts of *Bera v. Marr* were set out thus in the first paragraph of my reasons at p.12: The defendant is a physician. On 26th September 1974 he performed an operation upon the plaintiff, who was then 12 years old. On 18th November 1981 the plaintiff, who had reached the age of majority a few weeks before, became aware for the first time of facts which have led him to bring this action in which he alleges negligence on the part of Dr. Marr in performing the operation. The action was begun on 23rd April 1982. The issue is whether it was statute-barred at that time.
- [38] I held, Cheffins J.A. concurring, that the amendment was to be interpreted as operating prospectively and not as affecting a cause of action which, although unknown, had arisen prior to the amendment. Craig J.A. dissented, holding that the ultimate limitation period of six years should apply. The court's conclusion on the retrospectivity issue is of no concern in the case at bar. What is of concern is whether we were right in our unanimous finding that the common-law discoverability rule in *Kamloops v. Nielsen* had no application to the Limitations Act. At first instance, the chambers judge had found that the amending section acted retrospectively so that the applicable limitation period was six years. He then went on to hold that the common-law discoverability rule should be applied to determine the date upon which the cause of action arose and found, on that basis, that the action was not barred. All three members of the court joined in holding that the judge had erred in importing into the statutory scheme the common-law rule of discoverability. At p.26, I stated our conclusion thus: The discussion in *Kamloops* is not directed to an interpretation of the Limitations Act. Nothing in it leads to the conclusion that, when the Act uses the words "the right to do so" (i.e., to bring an action), it refers to anything other than that to which it was understood to refer in 1975. The right arises, in the words of Lord Pearce, on the date of accrual of the cause of action whether known or unknown.

- [39] I see no point in setting out other passages from my reasons in Bera. Essentially, it comes to this. The structure of the Limitations Act depends upon the phrase "the right to do so" being interpreted to mean the date of accrual of the cause of action without reference to knowledge. I did not suggest that the phrase could not in another context be construed as meaning on the date when the plaintiff has knowledge or means of knowledge. But to so interpret the language of the Limitations Act would have a seriously confusing effect upon the comprehensive statutory provisions for postponement and ultimate limitation.
- [40] This is in essence a matter of recognizing that the common-law rule has no application to statutory limitation provisions which cover the ground so as to preclude application of the common-law rule. As I noted earlier, the limitation period in question in Kamloops v. Nielsen arose under the Municipal Act which included no postponement provisions such as those in the Limitation Act. That being so, the common-law rule of discoverability was held to apply.
- [41] Because the common-law discoverability rule is merely an interpretive tool, there are cases where the legislative intent to not allow the rule to apply is so clear as to preclude its application. Examples of that can be found in the statutes of a number of other provinces which govern actions against physicians. In *Martin v. Perrie*, [1986] 1 S.C.R. 41, the court considered a repealed provision of an Ontario statute which required action to be commenced within one year "from the date when in the matter complained of such professional services terminated". Chouinard J. for the court, said at p.44 that the clear language of the statute: ... permitted of no other interpretation than that the action had to be commenced within one year from the date when the physician's professional services had terminated.

That decision, it will be noted, came some two years after that in *Kamloops v. Nielsen*.

- [42] A similar case is *Fehr v. Jacob* (1993), 14 C.C.L.T. 200, 85 Man. R. (2d) 63 (C.A.). Again, the Medical Act fixed the limitation period of two years from the termination of the services. Twaddle J.A. for the court, held that the common-law discoverability rule could have no application to that provision. At p.206 he said: In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

In the case at bar, the statute bars an action if it is commenced more than two years after the termination of the doctor's professional services. That is an event which occurs without regard to the patient's knowledge of the injury. There is consequently no room for the application of the judge-made discoverability rule. The present plaintiff could only resort to the statutory discoverability rule. This she failed to do on a timely basis and her action was consequently barred.

[43] In *Peixeiro v. Haberman*, supra, Major J. said at p. 564: In this regard, I adopt Twaddle J.A.'s statement in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man.C.A), at p.206, that the discoverability rule is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue:

[44] Another recent case to the same effect is *Snow v. Kashyap* (1995), 29 C.R.R. (2d) 336 which arose under the Newfoundland Medical Act which also provides that action against a medical practitioner must be commenced within two years from termination of the professional services. The trial judge recognized that the interpretive rule could not be applied but went on to find that in the particular circumstances of the case the section breached the plaintiff's equality rights under s. 15. The Court of Appeal recognized that the discoverability rule could not apply and remitted the action to the trial court for a rehearing on the constitutional issue.

[45] The gist of the matter is that the common-law discoverability rule is one of general application to all situations in which a limiting provision would unfairly preclude actions by plaintiffs unaware of the existence of their cause of action. But it can only be applied as an interpretive tool and therefore has no application in a case, such as *Bera v. Marr*, where the statute clearly rules out its application.

[46] I would dismiss the appeal.

"THE HONOURABLE MR. JUSTICE ESSON"

I AGREE:

"THE HONOURABLE MR. JUSTICE CUMMING"

I AGREE:

"THE HONOURABLE MR. JUSTICE DONALD"

I AGREE:

"THE HONOURABLE MR. JUSTICE HALL"

Reasons for Judgment of the Honourable Madam Justice Ryan:

INTRODUCTION

[47] I have had the privilege of reading in draft the reasons for judgment of Mr. Justice Esson. I respectfully disagree, for reasons that I will develop presently, that a cause of action for purposes of s. 17 of the Crown Proceeding Act, R.S.B.C. 1979, c. 86, accrues when the plaintiffs discover the necessary connection between their injuries and the wrong done to them. This determination requires me to consider the other grounds of appeal raised by the Crown. I have concluded that the grounds must succeed and these appeals should be allowed.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

[48] The respondents, plaintiffs in the court below, were wards of the Superintendent of Child Welfare in the period between 1964 and 1974. They allege that they were physically and/or sexually abused by the named defendants while in foster care. The respondents brought actions against the Crown for negligence and breach of fiduciary duty with respect to its conduct while the respondents were wards of the state and in foster care.

[49] Before trial the Crown set down three questions of law for hearing pursuant to Rule 34(1) of the Supreme Court Rules, the answers to which it said ought to bring an end to the lawsuit. The questions of law posed by the Crown were the following:

1. Is section 17 of the Crown Proceeding Act, R.S.B.C., 1979, c. 86 and the Crown Procedure Act, R.S.B.C. 1960, c. 89 an absolute bar to the plaintiffs' claims in negligence for damages suffered as a result of incidents prior to August 1, 1974?
2. Is section 17 of the Crown Proceeding Act, R.S.B.C. 1979, c. 86 and the Crown Procedure Act, R.S.B.C. 1960, c. 89 an absolute bar to the plaintiffs' claims for breach of fiduciary duty arising from incidents prior to August 1, 1974?
3. If so, is section 17 of the Crown Proceeding Act invalid as infringing either section 7 or section 15 of the Charter of Rights and Freedoms?

[50] The chambers judge answered 'no' to the first two questions. As a result it was unnecessary for her to answer the third question.

[51] In the hearing before the chambers judge and in this Court the Crown alleged that s. 17 of the Crown Proceeding Act, and its predecessor, the Crown Procedure Act, R.S.B.C. 1960, c. 89, operated to bar the respondents' claims based on incidents which occurred prior to August 1, 1974.

[52] Counsel for the Crown submitted that prior to the coming into force of the Crown Proceedings Act in August of 1974, the legal position of the Crown was that it was immune from suit. Certain actions against the Crown could only proceed if the Crown itself granted such a right. Although the Crown routinely granted fiats for a variety of lawsuits in both property and contract against the Crown, it was not legally obligated to do so. Counsel for

the Crown submitted that such a grant was merely an exercise of the grace and favour of the Crown.

- [53] As set out fully by my colleagues, the Crown Proceedings Act, S.B.C. 1974, c. 24, repealed the Crown Procedure Act and abolished Crown immunity. Its successor, the Crown Proceeding Act provided: 2. Subject to this Act,
- (a) proceeding against the Crown by way of petition of right is abolished;
 - (b) a claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceeding against the Crown in accordance with this Act, without the grant of a fiat by the Lieutenant Governor;
 - (c) the Crown is subject to all those liabilities to which it would be liable if it were a person;
- [54] Section 17 of the Crown Proceeding Act provided:
17. Notwithstanding the repeal of the Crown Procedure Act, that Act applies to a cause of action for proceedings against the Crown that arose before August 1, 1974, whether or not it is or is considered to be a cause of action continuing after August 1, 1974.
- [55] The learned chambers judge found that s. 17 did not bar the actions in negligence or for breach of fiduciary duty in this case because a cause of action did not accrue until the respondents had discovered the necessary connection between their injuries and the actions of the defendants. Here the respondents claimed that the necessary connection had not been made until after 1974. This conclusion was sufficient to dispose of the issues, but the learned chambers judge also found that the Crown Procedure Act and the Crown Proceeding Act had no application to an action for breach of fiduciary duty in any event. She concluded that although the Crown could not have been sued in tort before August 1, 1974, equitable remedies had always been available against the Crown without resort to a petition of right. Thus, she concluded, the respondents were entitled to sue the Crown for breach of fiduciary duty without first obtaining a fiat from the Crown.
- [56] I will deal first with the accrual issue, and then move to a consideration of Crown immunity as it affects the action for breach of fiduciary duty.

DOES THE CROWN PROCEEDING ACT AFFECT THE LIMITATION PERIOD?

- [57] The facts relating to this issue have been fully set out by Mr. Justice Esson. Our point of disagreement is whether the reasoning in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, and *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, can be applied to s. 17 of the Crown Proceeding Act. I am of the view the discoverability rule developed in these cases is restricted in application to the interpretation of statutes of limitation. The discoverability rule is an interpretative tool designed to prevent the injustice which arises when the common law understanding of when the time a cause of action accrues operates to bar an unknowing plaintiff from raising an action. The Crown Proceeding Act is not a statute of

limitation. It casts aside Crown immunity. It lets down the barriers, it does not create them. The operation of the Crown Proceeding Act does not create an injustice which would require the application of the discoverability rule. I will explain my reasons for this conclusion more fully in the following paragraphs.

- [58] At common law ignorance or mistake as to the extent of damages does not delay time under a limitation period. As Major J. put it in *Peixeiro*, supra, at p. 557 (a case in which this point was conceded by counsel):

The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), at p. 772 per Lord Reid, and *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

- [59] In the *Kamloops, M.(K.)* and *Peixeiro* cases, supra, the plaintiffs were unaware of the extent of damages they had suffered until after the limitation periods in the relevant statutes had expired. In each case the Supreme Court of Canada refused to apply the strict common law rule, recognizing that it would be unreasonable and unjustifiable to give effect to an interpretation of the respective acts which would statute-bar a plaintiff before he or she knew of the existence of the cause of action. The discoverability rule was applied to prevent that injustice.

- [60] In *M.(K.)*, supra, the court was asked to interpret s. 45(1)(j) of the Limitations Act, R.S.O. 1980, c. 240, which limited the commencement of an action for incest to "within four years after the cause of action arose". The plaintiff, abused as a child, had not learned of the full extent of her injuries until she was able to obtain psychological counselling as an adult, at a time well beyond the expiry of the limitation period.

- [61] La Forest J. noted (at p. 34) that Le Dain J. had articulated "the general rule of interpretation" (the discoverability rule) in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at p. 224:

. . . a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence [emphasis added]

- [62] Unlike the British Columbia Limitation Act, R.S.B.C. 1996, c. 266, (to which I will turn presently), the Ontario Limitations Act contained no provision which would postpone the running of time in such circumstances. In determining whether the court should call the discoverability rule into aid in the case of historical childhood incest, La Forest J. undertook an analysis of the rationales which lie behind statutes of limitation.

[63] La Forest J. explained that statutes of limitation are based on "the certainty, evidentiary, and diligence rationales" (p. 29). He noted that the first rationale, the "certainty rationale", is based on the idea that there comes a time when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. La Forest J. said that the second evidentiary rationale "concerns the desire to foreclose claims based on stale evidence" (p. 30). Finally, La Forest J. said that plaintiffs are encouraged by the diligence rationale not to "sleep on their rights". The diligence rationale provides incentive to plaintiffs to prosecute their actions in a timely fashion.

[64] Turning to the earlier Kamloops case, La Forest J. noted, at p. 33:

[F]airness to the plaintiff must also animate a principled approach to determining the accrual of a cause of action. In *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, one of the issues that arose was whether the plaintiff's action was statute-barred by the British Columbia Municipal Act, R.S.B.C. 1960, c. 255, where the plaintiff first became aware of the damage after the one year prescription. Wilson J., writing for the majority, observed that the injustice which statute-bars a claim before the plaintiff is aware of its existence takes precedence over any difficulty encountered in the investigation of facts many years after the occurrence of the allegedly tortious conduct.

[65] La Forest J. found, for reasons which need not be examined here, that the rationales were either inapplicable or insufficient to justify depriving a victim of childhood abuse of the right to sue when the full extent of the damage could not reasonably be fully understood by the plaintiff until treatment was obtained in adulthood. Balancing the interests of justice, he concluded that the discoverability rule ought to govern when the cause of action involved historical childhood sexual abuse.

[66] The "discoverability principle" was examined again by the Supreme Court of Canada in *Peixeiro*, supra. Mr. Peixeiro had been injured in an automobile accident. The Ontario Insurance Act, R.S.O. 1990, c. I.8, operates to effectively bar causes of action in tort in relation to automobile accidents in all but a few cases. Mr. Peixeiro claimed that his injuries met the requirement of the exception. If Mr. Peixeiro's injuries met the exception he was obliged, in accordance with s. 206(1) of the Ontario Highway Traffic Act, R.S.O. 1990, c. H.8, to commence his action within two years of the time when the "damages were sustained". Mr. Peixeiro launched his action over three years after the motor vehicle accident occurred. He claimed that he was unaware of the extent of his injuries within the two-year limitation period. The issue was whether the "discoverability principle" operated to postpone the running of time until he knew that his injuries were such that they met the statutory exception.

[67] In Peixeiro, the court was again examining a statute of limitation. Major J. writing for the court concluded that the discoverability rule is an interpretative tool for construing limitations statutes which ought to be considered each time a limitations provision is in issue. The court adopted Twaddle J.A.'s statement in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.) at p. 206:

In my opinion the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

[68] Major J. said this for the court, at p. 565:

[T]o hold that the discoverability principle does not apply to s. 206 HTA would unfairly preclude actions by plaintiffs unaware of the existence of their cause of action. In balancing the defendant's legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration. The diligence rationale would not be undermined by the application of the discoverability principle as it still requires reasonable diligence by the plaintiff. [emphasis added]

[69] In the case at bar counsel for the plaintiff respondents submitted that the language of Twaddle J.A. made it plain that where the words "accrual of the cause of action" or words to that effect were found in a statute they must be construed as meaning that time begins to run only when the injured party has knowledge of the injury sustained. I do not agree.

[70] The remarks of Twaddle J.A. must be placed in context. He was speaking of a situation where time runs from some event which can be construed as occurring only when the injured party has knowledge of the injury sustained. He specifically stated that "when time runs from an event which clearly occurs without regard to the injured party's knowledge", the judge-made rule may not apply. The statute in question in the case at bar deals with the moment in time that the shield of Crown immunity is dropped. It has nothing to do with the state of knowledge of a plaintiff. More importantly, s. 17 of the Crown Proceeding Act does not create the wrong addressed in the *Fehr* and *Peixeiro* cases. Section 17 does not require the respondents to bring an action before they could reasonably have discovered it.

[71] Counsel for the Crown, Ms. Mrozinski, submitted that to give s. 17 the meaning suggested by the respondents in the name of remedying the perceived injustice here, would be to ignore the greater injustice it would create. Those unfortunate enough to have been injured by an act of the Crown and to have known it prior to August 1, 1974 are left without a remedy, while those who were injured but did not know it, would have one. I can think of no reason

for making such a distinction. We must presume that the legislature acted rationally. In my view it is clear that the Act prescribes the same starting point, August 1, 1974, for all potential plaintiffs.

[72] To conclude, I am of the view that the discoverability rule applies only to statutes of limitation. The Crown Procedure Act which brings an end to Crown immunity after August 1, 1974 is not a statute of limitation. The operation of the Act does not deprive an unknowing plaintiff of the right to start an action; it deprives all plaintiffs of the right to sue, unless the cause of action arose after August 1, 1974. The type of injustice that the discoverability rule was designed to address is not present in the case of Crown immunity.

[73] I would allow the Crown's appeal on this ground of appeal.

DID CROWN IMMUNITY EXTEND TO ACTIONS FOR BREACH OF FIDUCIARY DUTY?

[74] In the case at bar the chambers judge accepted that the decision of this Court in *Haymour Holdings v. H.M.T.Q.* (1984), 59 B.C.L.R. 249, was binding authority for the proposition that petitions of right could not be obtained for claims in tort or for breach of fiduciary duty. If the respondents were to be successful they had to establish that Crown immunity did not extend to actions for breach of fiduciary duty.

[75] The learned chambers judge held that the Crown had never been immune from actions in equity and that to sue for an equitable remedy it was not necessary to proceed by petition of right. She said:

[6] Prior to the Crown Proceedings Act, there were cases in which a petition of right was not applicable but the Crown might still be subject to the courts through the equitable jurisdiction of the Courts of Chancery (*Miller v. The King* [1950] S.C.R. 168 at 176). It was decided in *Pawlett v. Attorney General* (1668) Hardres 465 (as reported in *Esquimalt and Nanaimo Railway v. Wilson* [1920] A.C.358 in *Miller v. The King*, supra.) that relief would be afforded against the King because

... the King was the fountain and head of justice and equity, and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him.

[7] Equitable remedies were available against the Crown without resort to a petition of right although the practice had fallen into disuse in the years prior to *Dyson v. Attorney General* [1911] 1 K.B. 410 at 415-417. Notwithstanding *Dyson*, there was still a prevailing view that an action for declaration could not be brought against the Crown without a petition of right (Law Reform Commission of British Columbia, Report on Civil Rights, 1972 at 18; *Zucco v. Workmen's Compensation Board*, (1956) 20 W.W.R. 257). Most of these cases, however, involved matters of contract or questions of money liability under a statute that should have been brought by petition of right (*Bombay and Persia Steam Navigation Co. v. MacLay* [1920] 3 K.B. 402; *Rex v. Bradley* [1941] S.C.R. 270). This, as discussed below, was within the Crown functions in administrative and public law which did not give rise to fiduciary

responsibilities (see *Windsor Roman Catholic Separate School Board v. Windsor (City)*, (1988) 49 D.L.R. (4th) 576 at 581-2). However, the practice continued until laid to rest by the Crown Proceeding Act.

- [76] The chambers judge recognized that in the ruling in *Haymour* actions in tort and for breach of fiduciary duty were actions for which a fiat could not be granted, and continued:
- [9] Thus, when section 17 of the Crown Proceeding Act is examined, it is apparent that the old Crown Procedure Act was not available to apply to causes of action in negligence or breach of fiduciary duty that arose prior to August 1, 1974 because that Act had not included actions other than those that could be commenced by petition of right. If those claims did not fall within the purview of that Act, does section 17 have any application to this case? Section 20 of the Crown Procedure Act said that nothing in that Act would prevent someone from proceeding as they could before February 1873. Thus, equitable relief continued to be available against the Crown prior to the Crown Proceeding Act. Unlike causes of action in tort, equitable relief against the Crown is not dependent upon the Crown Proceeding Act for its existence. The 1974 Act merely had the effect of normalizing the procedure for bringing such actions.
- [77] Counsel for the Crown submitted that historically the petition of right developed as a result of the inability of persons to bring any kind of action against the Crown. *Broom's Legal Maxims* makes the point in this way:

The principle that the king can do no wrong led to the institution of the petition of right, which is founded upon the theory that the king, of his own free will, graciously orders right to be done (*soit droit fait al partie*). This proceeding is open to a subject in cases where his lands or goods or moneys have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if that cannot be given, then compensation in money. It is also open to him for the purpose of recovering moneys due to him under a contract made on behalf of the Crown, as for goods supplied to the Crown or for the public service, or unliquidated damages for breaches of the contract, or moneys payable by servants of the Crown to the suppliant under a grant of the Crown. But the remedy is not available to a servant of the Crown, for wrongful dismissal, or for non-payment of agreed remuneration. Nor can it be used to obtain compensation for a wrongful act done by a servant of the Crown in the purported performance of his duties, or for a trespass, or the alleged infringement of letters patent. [footnotes omitted]

Thus, prior to 1974 and the coming into force of the Crown Proceeding Act, an action against the Crown could proceed only if the Crown itself granted such a right, and, actions against the Crown were limited in the manner set out by *Broom* in the passage to which I have just referred. Counsel for the Crown submitted that this point was recognized by this Court in *Haymour*, *supra*.

[78] In Haymour, the plaintiff company obtained a petition of right claiming that a conveyance of property to the Crown was void. The plaintiff then applied for, and received, an order in chambers to add Mr. Haymour as a personal plaintiff and a number of new causes of action including negligence and breach of fiduciary duty. In allowing the appeal from that order this Court concluded at p. 254:

In this case we have an attempt not only to add new causes of action without a new fiat but, using pro- cedural rules, to add causes of action for which a fiat could not have been granted.

[79] Before making the order which added Mr. Haymour as a plaintiff and the new causes of action, the chambers judge in Haymour, *supra*, recognized that the additional claims could only lie under the Crown Procedure Act, 1960. This Court accepted this aspect of the ruling of the chambers judge as correct. The Court said at p. 252:

The chambers judge recognized that the claims of Mr. Haymour and Haymour Holdings Ltd. could only lie under the Crown Procedure Act, R.S.B.C. 1960, c. 89 (the 1960 Act). He concluded that they could not lie under the Crown Proceeding Act, R.S.B.C. 1979, c. 86 which was first enacted in 1974 (the 1974 Act). But he failed to recognize that the amendments involving causes of action in tort and in breach of fiduciary duty could not be allowed because such claims did not fall within the purview of the 1960 Act.

[emphasis added]

[80] This reasoning excludes the notion that the plaintiff had an independent right to proceed against the Crown for breach of fiduciary duty without a fiat and petition of right. What lies behind the Haymour case is what had long been understood to be the law of this province, that any action which directly affected the estate of the Crown could only proceed by way of petition of right. This ancient proposition was clearly stated by Farwell L.J. in *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.), at p. 421:

It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side . . . could and did make declarations and orders which did affect the rights of the Crown. [emphasis added]

[81] In my view the Haymour case embodies the law in this province on the subject. A petition of right could not be obtained for breach of fiduciary duty, and without a petition of right the respondents were not entitled to proceed against the Crown.

[82] I agree with the Crown that none of the cases relied upon by the plaintiff respondents for the proposition that a claim in equity could be pursued against the Crown without resort to a petition of right (*Dyson*, *supra*; *Pawlett v. Attorney-General* (1668), Hardres 465, *Esquimalt and Nanaimo Railway v. Wilson*, [1920] A.C. 358, and *Miller v. The King*, [1950] S.C.R. 168) directly involved the estate of the Crown. In the case at bar the respondents seek damages

for breach of fiduciary duty. Such a claim directly affects the estate of the Crown and thus cannot be taken independently of the requirement for a grant of a fiat and petition of right.

[83] I would allow the Crown's appeal on this ground of appeal.

DOES S. 17 VIOLATE THE CHARTER RIGHTS OF THE RESPONDENTS?

[84] No argument was addressed to this issue in this Court. The parties were content to refer the matter back to the chambers judge for decision.

CONCLUSION

[85] I would allow the appeal and refer the matter back to the chambers judge for decision on whether s. 17 violates the rights of the plaintiff respondents contained in the Canadian Charter of Rights and Freedoms.

"The Honourable Madam Justice Ryan"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/99/02/c99-0210.txt>

CASE PAGE <https://chat.esheria.ai/case-law/canada/s-a-d-v-british-columbia-1999>

Prepared on 29 October 2026 · Esheria