NOVA SCOTIA COURT OF APPEAL

Citation: *Central Halifax Community Association v. Halifax (Regional Municipality)*, 2007 NSCA 39

Date: 20070405
Docket: CA 270185
Registry: Halifax

Between:

Sharon [Shazza] Laframboise, Director, on Behalf of
Central Halifax Community Association

Appellant

- and -

Halifax Regional Municipality, Department of Service Nova Scotia
and Municipal Relations, Nova Scotia Human Rights Commission
and the Department of Justice (N.S.)

Respondents

Judges: MacDonald, C.J.N.S.; Saunders and Hamilton, JJ.A.

Appeal Heard: December 7, 2006, in Halifax, Nova Scotia

Held: Appeal dismissed without costs, per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Hamilton, JJ.A. concurring.

Counsel: Vincent Calderhead and Andrew Waugh, Articled Clerk,
for the appellant
Douglas Skinner and Jonathan Poirier, Articled Clerk,
for the respondent HRM
Dale Darling for the respondent Service Nova Scotia,
not appearing
Michael Wood, Q.C. and Jennifer H. Ross for the respondent HRC
Edward A. Gores, Q.C. for the respondent AGNS, not appearing

Reasons for judgment:

OVERVIEW

[1] The Supreme Court of Nova Scotia, like other superior courts in Canada, has a limited supervisory role over public decision-makers and in appropriate circumstances can quash their decisions. The Nova Scotia *Civil Procedure Rules* govern this process which includes the imposition of important time limits. Specifically, all such applications to quash must be filed with the court and served within six months of the impugned decision. This appeal raises several questions about this process.

BACKGROUND

[2] The appellant, Sharon Laframboise, asserts that the people of north end Halifax have, for decades, been disadvantaged. When the respondent Halifax Regional Municipality ("HRM") decided to construct one of its new sewage treatment plants in this area, Ms. Laframboise viewed this as another discrimination based barrier. She therefore filed a complaint with the respondent Nova Scotia Human Rights Commission ("the Commission"), alleging discrimination in the HRM's site selection process and in the resultant decision to locate the facility in this area. This was followed by a lengthy Commission investigation. The HRM eventually provided a detailed response and the appellant filed an amended complaint.

[3] Then on May 19, 2005, during a closed door session, the Commission resolved to dismiss the complaint before advancing it to the next stage which would have involved a formal hearing. Ms. Laframboise was informed of this decision by a Commission letter dated May 31, 2005, and received by her counsel approximately one week later on June 7, 2005.

[4] The Commission's policies provide for a reconsideration hearing and accordingly, Ms. Laframboise requested one. This second closed-door session was held on September 15, 2005, during which time the Commission's original decision was sustained. The Commission informed Ms. Laframboise accordingly by letter dated September 28, 2005, which was received by her counsel two days later on September 30.

[5] On November 25, 2005, the appellant, by way of *certiorari*, applied to the Supreme Court seeking to quash both the May decision to dismiss the complaint and the September decision to sustain this dismissal.

[6] The Commission applied to strike the application but only as it applied to the May decision because, in its submission, the application was filed out of time; i.e., beyond six months from May 19, 2005. The HRM supported the Commission in its application to strike.

[7] At the Chambers hearing before Chief Justice Joseph P. Kennedy, Ms. Laframboise maintained that her application was filed on time because, in her submission, the six-month clock began to tick not on May 19, when the Commission's decision was made, but on June 7 when she was ultimately notified. On this logic, she would have had until December 7 to file thus rendering her November 25 application timely. Alternatively, Ms. Laframboise questions the validity of this six-month rule. She asserts that this provision, by effectively extinguishing a substantive right, is beyond the reach of rules she says are dedicated only to procedural matters.

[8] The rule provides:

> 56.06. An originating notice for an order in the nature of certiorari shall be filed and served within six (6) months after the judgment, order, warrant or inquiry to which it relates, and rule 3.03 does not apply hereto.

[9] It is significant that rule 3.03 is rendered inapplicable. That provision, in appropriate circumstances, would allow for flexibility with filing deadlines

> 3.03 (1) The court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorized by these Rules, or by any order, to do or abstain from doing any act in a proceeding. [E. 3/5(1)]
>
> (2) The court may extend any period referred to in paragraph (1) although the application for extension is not made until after the expiration of the period. [E. 3/5(2)]

> (3) The period within which a person is required by these Rules or any order to serve, file or amend any pleading or other document may be extended by consent in writing of the parties. [E. 3/5(3)]

[10] Kennedy, C.J. heard the Commission's application to strike on June 13, 2006. By way of an oral decision given on July 31, 2006, the Chief Justice granted the application but, again, only as it applied to the initial May 2005 decision. He reasoned that the six-month rule was valid and, by its plain meaning, the clock was triggered on the day the decision was made and not later when the appellant became aware of it. This is the ruling now before us on appeal.

[11] Before identifying the issues, let me briefly digress to explain why this appeal may eventually be rendered moot, but why, at the same time, we feel compelled to see it through. Confusion lingers because regardless of what we may decide, there remains Ms. Laframboise's application to quash the Commission's September 2005 decision. All parties acknowledge that these decisions are linked with the latter simply confirming the former. In other words, should Ms. Laframboise be successful in having the September final decision quashed, the matter before us may very well be rendered moot.

[12] In fact, the appellant maintains that her timely *September* application should still involve a judicial review of both the May and September decisions. In other words, she included the separate request to quash the May decision purely out of an abundance of caution. Thus, in post-factum submissions she explains:

> It is sound administrative law that a decision is normally only subject to judicial review when a final administrative decision has been made and when all internal reviews and/or reconsiderations have been exhausted. Conversely, to have filed a *certiorari* application after the May decision would have been considered premature inasmuch as an internal review procedure was available prior to seeking *certiorari*.
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> The Appellant has attempted to make clear all along that both decisions (i.e., the May and September decisions) were joined together in the one *certiorari* application out of an abundance of caution - intending that <u>all</u> issues and evidence that had been before the NSHRC ought to be the subject of the upcoming judicial review application. ...
>
> The Appellant agrees that the two decisions ought to be treated as one. ...

[13] On the other hand, the respondents view the May and September decisions as separate and distinct. For example, in its post-factum submissions, the Commission urges:

> In the Commission's submission, the May decision and the September reconsideration are separate decisions, and ought not to be considered as one decision. A subsequent reconsideration decision is a new decision for the purposes of judicial review applications, regardless of whether the reconsideration decision upholds the original decision.

[14] I make no comment on the scope of the pending *September* application. However, I do note that should these decisions be viewed as separate and distinct, understandably Ms. LaFramboise would like to retain the right to challenge both. Thus, the parties are likely best served by having this appeal processed. In fact, all parties have agreed to adjourn the *September* application pending the outcome of this appeal.

ISSUES

[15] In her notice of appeal, Ms. Laframboise lists the two noted grounds of appeal:

> 1. That the learned trial judge erred in ruling that, for the purposes of the limitation period in Nova Scotia Civil Procedure Rule 56.06, time begins to run from the time that the "decision" is made rather than when parties receive notice of the decision;
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> 2. That the learned trial judge erred in ruling that the limitation period in Nova Scotia Civil Procedure Rule 56.06 is not *ultra vires* the rule-making power of the judiciary.

[16] In advance of our scheduled hearing, this court raised with counsel a potential third issue which ended up being fully canvassed by way of written and oral submissions. It involves whether the Chambers judge could or should have used his inherent jurisdiction to extend the limitation period, despite the strict wording of rule 56.06. I will incorporate this issue into my analysis of the first ground of appeal, dealing with when the six-month clock begins to tick.

ANALYSIS

Standard of Review

[17] The standard by which we ought to review the Chambers judge's decision will vary depending upon the issue under consideration. For the most part, the issues on appeal involve questions of law which we will review on a correctness standard. See **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235. For example, issue number 1, determining when the six-month clock starts involves an exercise in statutory interpretation which is a question of law. The question involving the validity of the legislation in issue number 2 also involves a question of law. The inherent jurisdiction sub-issue has two aspects. The Chambers judge's conclusion as to the extent of his jurisdiction in this area involves a question of law which we would review on the correctness standard. However, when and how to exercise this jurisdiction is a matter of discretion thus commanding deference. In that case, we should interfere only in the face of some clear error in legal principle, a palpable and overriding error of fact, or if the decision would result in a patent injustice. See **Cluett v. Metro Computerized Bookkeeping Limited**, 2005 NSCA 84, where Cromwell, J.A. noted:

> ¶ 1 This is an appeal from an order of Richard, J. refusing to disallow a limitation defence and dismissing the plaintiff's action as statute barred. The action was started 9 years after the events giving rise to it and 3 years after the expiry of the applicable 6 year limitation period.
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> ¶ 2 As pointed out by the Court during oral argument, the decision made by Richard, J. is a discretionary one. An appeal from such an order is not simply an occasion to permit this Court to reweigh the various relevant considerations and exercise its discretion in place of his. This Court is only entitled to intervene if there has been an error in legal principle, a palpable and overriding error of fact or if the decision gives rise to a patent injustice.

Issue 1: When does the six-month clock begin to tick?

[18] Let me begin with the Chambers judge's approach to this issue. He relied heavily on the analysis of his colleague Wright, J., who in **Melford Concerned Citizens Society v. Nova Scotia (Minister of the Environment)** (1999), 181 N.S.R. (2d) 52 (S.C.), addressed this very issue. Thus the Chief Justice concluded:

> I concur with Justice Wright that the clock starts to tick for purposes of the limitation period under 56.06 at the making of the judgement that is the subject of the *certiorari* application, and his explanation for that conclusion. I agree with his explanation.
>
> I determine herein, therefore, that the dates on the Commission's decision, May the 19th, 2005 is the start of the six-month prohibition, and not the date that the decision was communicated to the residents.
>
> Discoverability under 56.06 is not a factor. Although this reality has been described as harsh, I make reference to **Shepherd v. Colchester Regional Hospital** (1994), 131 N.S.R. 129. Justice Scanlan used the term "harsh" when applying the rule. I am satisfied that that conclusion is what Section 56.06 dictates. It describes the date that the clock starts to tick. It describes the event.
>
> I, therefore, determine that the six-month limitation period, having elapsed before the filing of the Originating Notice herein, the residents' application for *certiorari* is obviously unsustainable being barred by 56.06.

[19] For his part Wright, J. in **Melford**, *supra*, concluded that the language in rule 56.06 was unambiguous and it carried with it the force of legislation. As such, it cannot yield to that body of case law suggesting that limitation periods begin to run only after a claimant becomes aware of the impugned action. Thus he concluded:

> [23] My second reason for fixing March 23, 1999, as the specified date within the meaning of the **Rules** is that the judge-made discoverability rule has no application where the legislation (or here the **Civil Procedure Rules** having the force of law) identifies a specific event from which the limitation period starts to run. I quote from a decision of the Manitoba Court of Appeal in **Fehr v. Jacob and Bethel Hospital** (1993), 85 Man.R. (2d) 63; 41 W.A.C. 63; 14 CCLT (2d) 200 (C.A.), where Justice Twaddle said as follows at p. 206:
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> > 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.

[20] Here, the appellant takes issue with this line of reasoning and asserts that this approach runs contrary to the weight of authority not only in Nova Scotia, but throughout Canada. Simply put, the appellant's counsel ably asserts that this rule is designed to give aggrieved parties six months to respond to an impugned decision. Delays in transmitting a decision should not serve to benefit the decision maker while at the same time penalizing potential applicants with an abridged notice period. In fact, appellant's counsel raised the spectre of an aggrieved party not even becoming aware of a negative decision until after the limitation has expired.

[21] While I confess to having a certain amount of sympathy for the appellant's submission on this issue, in the end, I cannot accept it. I reach this conclusion for several reasons. They include, (a) the clear language of the provision, (b) the extraordinary nature of the *certiorari* remedy and the corresponding need for definitive time lines, (c) the generous six-month window to apply, and (d) the court's inherent jurisdiction to address the type of extraordinary abuse conjectured by the appellant. Let me now address each of these reasons in order.

(a) The Provision's Clear Language

[22] Rule 56.06 uses clear language to prescribe when the time period begins. It is "six months after the judgment, order, warrant or inquiry to which it relates". Had the Supreme Court, in its wisdom and authority to make rules desired the six-month clock to begin when the aggrieved party is notified of the decision, it could have easily done so. This principle of statutory interpretation, implied exclusion or *expressio unius est exclusio alterius*, is described by Ruth Sullivan in her text entitled *Sullivan and Driedger on the Construction of Statutes* (4th Ed.), 2002, at pp. 186-87:

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

[23] In the face of the rule's clear and unequivocal language, I see no basis to "read in" a condition that would have the clock start when notice of the decision is actually received.

(b) Certiorari - An Extraordinary Remedy

[24] The prerogative writ of *certiorari*, as it was formally called, flows from the English common law's writ system. Essentially, it involves a superior court's supervisory role over public decision-makers. Dickson, J. (as he then was) in **Martineau v. Matsqui Disciplinary Bd.**, [1980] 1 S.C.R. 602 at 628, described its purpose this way:

> *Certiorari* is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.

[25] Effective public decision-making by its very nature commands precision and clarity. Public decisions that are tentative or incomplete will lead to an unreliable public administration and a confused public. Thus to achieve the required stability, finality in the public decision-making process is crucial. Both government officials and citizens alike need to know precisely when and how such decisions can be subject to court interference. In their text *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004), at pp. 598-599, Jones and de Villars explain:

> Where an applicant is guilty of unreasonable delay in bringing its application before a court, it may find the remedy barred. This is especially true where the delay would result in hardship or prejudice to the public interest or to third parties who have acted in good faith on the strength of the delegate's apparently valid decision. Rule 743.06 of the Alberta Rules of Court provides that an application for judicial review to quash or overturn a decision shall be filed and served within six months after the order to which it relates, and further expressly provides that the court cannot enlarge or abridge this time limitation. It does not necessarily follow, however, that an applicant can safely wait for six months without running the risk of the court finding there to have been an unreasonable delay. What constitutes unreasonable delay is a question to be decided in each case. *One primary consideration must be the need for effective and reliable administration, which must entail the notion of finality in decision-making.*

[Emphasis added.]

[26] Considered in this context, it is not surprising that the Supreme Court would prescribe clear and precise limits on when such applications can be made. Thus, we see the wording of rule 56.06 setting out the time limit in clear terms and rendering unavailable any potential relief under rule 3.03 to extend these time lines.

(c) A Full Six Months to Apply

[27] As noted, the appellant has cited several cases where courts have suggested that limitation periods begin not when the impugned decisions are made but when the aggrieved party is notified. However, many of these decisions are distinguishable because they do not involve the strict language of rule 56.06.

[28] Furthermore, several of the cases referred to by the appellant involve time limits of only 30 days or less. In Nova Scotia, rule 56.06 allows for a full six months to file and serve the requisite application. In this case, for instance, the appellant for a full 5 ½ months would have been aware not only of the decision but also of the date it was rendered.

[29] One case referred to by the appellant does, however, involve a Nova Scotia *certiorari* application. It is **Chipman v. Workers' Compensation Board (N.S.)** (1990), 99 N.S.R. (2d) 290 (S.C.A.D.). There, Clarke, C.J.N.S., in considering the timeliness of a *certiorari* application under rule 56.06, said this:

> [7] Critical to the resolution of the first ground is the question: *when did Mr. Chipman first know of the action* by way of the judgment, order or decision of the Board to reduce the total amount he was paid during the periods of his temporary total disabilities? In our opinion the answer is found in the affidavit of Mr. Chipman made on March 22, l989, and which affidavit he submitted to the court in support of his application for certiorari.
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> . . .
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> [9] It is evident from the plain reading of these paragraphs that on each of the two occasions Mr. Chipman was under temporary total disability, he knew that his total payments for the two awards had been reduced by the Board. One was in l976 and the other in l980. He did not complain on either occasion. *This is unlike*

> ***Herman*** *where the worker did not know that his payments had been reduced* until he was informed by the Board. Thereupon Mr. Herman took action.
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> [Emphasis added.]

[30] The appellant urges that these passages represent a direction from this court that the six-month clock begins not when the decision is made but only after the aggrieved party becomes aware of it. I disagree. These are passing references that are clearly *obiter*. **Chipman** involved a *certiorari* application that by any account was out of time for years. There was no suggestion, unlike here, that the application may have been timely, had the clock begun when the applicant became aware of the triggering event. In fact, the following passage from the same judgment appears to support the respondents' assertion that the clock begins as the rule suggests when the decision was made:

> [12] Even if we were to accept, which we do not, that the decision of this court in **Herman** is the time when Civil Procedure Rule 56.06 begins to run, then the applicable date is the day the decision was delivered, namely June 7, l983. The law is well-settled that, rigorous though it may appear, the decision of the court, like a change in a statute, is deemed to be known when it is or becomes effective.

[31] In summary, allowing a prospective *certiorari* applicant a full six months to file (when most appeal time limits are 30 days or less) provides ample leeway should there be a delay in notifying aggrieved parties.

(d) Inherent Jurisdiction

[32] The appellant urges that such a strict interpretation of rule 56.06 could lead to extreme abuse. For example, what about a so-called worst case scenario where an unconscionable delay may mean an aggrieved party becomes aware of the decision only after the six-month time period has lapsed or so late that it would be virtually impossible to file on time?

[33] To address such a rare possibility, superior courts can always fall back on their inherent jurisdiction. Let me now summarize this principle.

[34] Every superior court in this country has a residual discretion to control its process in order to prevent abuse. Procedural rules, however well intentioned,

cannot be seen to stand in the way of basic fairness. This overriding judicial discretion is commonly referred to as the court's inherent jurisdiction. It is a jurisdiction sourced independently from any rule of court or statute. In *The Inherent Jurisdiction of the Court*, Current Legal Problems 23 (1970), at pp. 51–52, I.H. Jacob puts it nicely:

> It will be seen therefore that the inherent jurisdiction of the court exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court. It has developed and now exists not only as a separate independent doctrine from the jurisdiction in contempt, but also from any provision dealing with practice and procedure made by statute or Rules of Court. It stands upon its own foundation, and the basis for its exercise is put on a different and perhaps even wider footing from the jurisdiction in contempt, namely, to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings. Parliament has now recognized the existence of inherent jurisdiction of the court as a separate doctrine, but has not attempted to define its nature or its limits.
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> In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.
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> . . .
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> ... The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers, and free from the restraints of their jurisdiction in contempt and the Rules of Court, it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice.

[35] This court has on numerous occasions acknowledged the significance and scope of a superior court's inherent jurisdiction to control its process so as to prevent a miscarriage of justice. Over 35 years ago, MacKinnon, C.J.N.S. in **Moffat v. Rawding** (1970), 1 N.S.R. (2d) 882 at p. 897, observed:

It seems to me that a considerable degree of accord may be found in the opinion of Lord Denning and the words quoted above from the decision of McRuer, C.J.H.C., in *Mathews v. Wilkes*, (supra), that the fact of a statute of limitations must be given serious consideration but this does not deprive the Master of power to exercise the discretion in favour of the plaintiff, if, in considering all the facts, he comes to the conclusion that it is proper and just to do so.

I have dealt at some length with a review of the above English cases because the able and forceful argument of counsel for the appellant was based almost exclusively on these authorities. However, rather than accept without question the rigid interpretation of the Rules and Practice and Procedure found in some of these decisions, it would be preferable, in my opinion, to seriously consider the following from the opinion of MacKay, J.A., in *Brown v. Humble*, (supra), in which he quotes from the decision of Middleton, J. (as he then was) in *Re Arthur & Town of Meaford* (1915), 24 D.L.R. 878, 34 O.L.R. 231, p. 234, page 57:

> " 'Armour, C.J., in Bank of Hamilton v. Baine (1888), 12 P.R. 439, 442, in the early days of the Judicature Act, says: "having regard to modern ideas and modern legislation in matters of practice and procedure, such rules must now be applied only in the interest of and for the advancement of justice, and not in support of ancient technicality".
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> But long before this, Lord Eldon had said (Princess of Wales v. Earl of Liverpool [*page 898] (1818), 1 Swanst. 114, 125): "There is no general rule with respect to the practice of this Court that will not yield to the demands of justice".
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> I feel that I should sin against light and reason if I should hold that the Court has no power to relieve against this unfortunate slip, and that I was bound to cast upon the litigant a great burden of costs and deny him a hearing on the merits because a law-student forgot to file the papers the day when they were given him for that purpose.' "

Brown and Brown v. Humble seems to have been followed by many of the later Ontario cases. This decision ultimately came before the Supreme Court of Canada by way of an application for leave to appeal, which application was refused. In the *Brown* case, it was decided that the fact that the limitation period would bar an action if a writ were not renewed is a circumstance to be considered in exercising discretion, and renewal may properly be ordered despite the running of the limitation period in a case where there were reasonable grounds for delay, as where negotiations for settlement were on foot and the defendant was fully aware of the claim and suffered no prejudice. MacKay, J.A., at page 56, said as follows:

> "The granting of an order renewing a writ is a discretionary matter and is not necessarily granted even when the application is made within the 12-month period. All the circumstances of the case must be considered in arriving at a conclusion."

[36] Several years later, Chipman, J.A. in **Martin v. MacKay and Pictou County (Municipality)** (1987), 81 N.S.R. (2d) 431, noted the importance of the **Moffat** decision and how it signalled a shift away from harsh results fuelled by procedural technicalities:

> [22] Before leaving this subject I refer to the decision of this court in **Moffatt v. Rawding** (1970), 1 N.S.R. (2d) 882. The point is made by the court that the rules of practice and procedure must be applied in the interests of justice and that there is no procedural rule which will not yield to the demands of justice. The provisions to which I have referred make it readily possible to advance the interests of justice and their use for this purpose is to be strongly encouraged.

[37] In **Minkoff v. Poole and Lambert** (1991) 101 N.S.R. (2d) 143, Chipman, J.A. reiterated his view on the significance of **Moffat**:

> [19] While care has to be taken in examining cases decided under differently worded rules, it is fair to say that in **Moffat v. Rawding**, supra, this court signalled a shift away from adherence to the technicalities of ancient rules toward the application of broad principles of fairness and justice. This philosophy should, in my view, obviously underlie the approach to be taken in disposing of an application under Civil Procedure Rule 9.07(1). This is seen in the modern cases, of which the decision of the British Columbia Court of Appeal in **Lowe v. Christensen et al.** (1984), 54 B.C.L.R. 88 is an example.

[38] Recently, this court in **Goodwin v. Rodgerson**, 2002 NSCA 137, highlighted the futility of attempting to identify parameters for this jurisdiction. It requires a case by case analysis:

> [17] The inherent jurisdiction of the court has been described as a vague concept and one difficult to pin down. It is a doctrine which has received little by way of analysis, but there is no question it is a power which a superior trial court enjoys to be used where it is just and equitable to do so. It is a procedural concept and courts must be cautious in exercising the power which should not to be used to effect changes in substantive law.

> [18] We specifically make no comment on the extent of the court's inherent jurisdiction or its use for any other purpose. As well, it is not necessary for us to consider whether **Rule** 2.01 might be applicable in the circumstances of this case.

[39] Justice Saunders, of this court, in **Halifax (Regional Municipality) v. Ofume**, 2003 NSCA 110, highlighted the importance of a superior court's inherent jurisdiction:

> ¶ 39 Our rules in Nova Scotia certainly do not "alter the statutory priorities" as was found in **Baxter**, *supra.* Our *Civil Procedure Rules* do not oust or temper the court's inherent jurisdiction; rather they reflect its authority and countenance its application.
>
> ¶ 40 ... In the instant case the discretion exercised by Justice MacAdam derives from the Court's inherent jurisdiction to control its own proceedings. I see this control as fundamental to a court that derives its power and existence not from statute but from the Constitution. The operation of the court is a necessary function of our society. The inherent jurisdiction which helps to maintain the efficiency and fairness of such a court is something far greater than the jurisdiction to correct substantive problems....

[40] Turning to the court's inherent jurisdiction in the context of rule 56.06, Wright, J. in **Melford** observed:

> [31] I now turn to the inherent jurisdiction argument, which was the third prong of the Society's argument this morning. I recognize that the court does indeed have inherent jurisdiction to control legal process before it to prevent abuses of legal process and to preserve the confidence in the administration of justice generally.

[41] In fact, Glube, C.J. (as she then was) in **Blue v. Antigonish District School Board** (1990) 95 N.S.R. (2d) 118 (T.D.), exercised her inherent jurisdiction in the context of a rule 56.06 application. The facts were indeed exceptional. The applicant attended at the Prothonotary's office on the last possible filing date but was prevented from doing so because of a power outage. In granting the requisite extension, the Chief Justice highlighted the exceptional circumstances at play:

> [7] It must be noted that November 13, 1989 was a court holiday. It was the date set for the celebration of Remembrance Day. The respondent agrees that the time period commenced on May 11, 1989, but claims that it ended November 11, 1989 which was a Saturday thus making November 13th, the Monday, the last day for

> filing and service. Having found that the Monday was a holiday, the last day for filing and service became November 14, 1989 and because of a power outage, the Prothonotary's Office was not able to process the documents and the service which had been intended on that day was not effected.
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> . . .
>
> [13] It should be noted that the requirement of the court for fixed dates for chambers applications in Halifax which require longer than an hour, has been in existence for a number of years. The only recent change was an administrative change requiring that a letter be written rather than a phone call to fix the date to ensure that both sides were aware of the request and to facilitate the operation of the coordinator's office. This was done in coordination with the judges, but certainly was not intended to extend any time limits. *However, as stated on the facts of this particular case, it would be totally inequitable not to allow the certiorari application to proceed. It must be stated however that these are very narrow facts and this decision does not open the door to waiving the time periods for such applications.*
>
> [Emphasis added.]

[42] Let me now briefly consider the issue of exercising inherent jurisdiction in the context of the case before us. Kennedy, C. J. seemed to suggest in the following passage that rule 56.06 prevented any consideration of inherent jurisdiction:

> ... This limitation period is strict and not the subject of the Court’s discretion to extend or abridge time, or its inherent jurisdiction to control its own proceedings ...

[43] In light of my comments above, such a suggestion, at least considered in isolation, would constitute an error of law. However, the Chambers judge, in another passage, appeared to acknowledge that he could indeed use his inherent jurisdiction but that he was declining to do so on the facts of this case:

> Similarly, I agree that I should not use the Court’s inherent jurisdiction to control its own process to abrogate a specific rule made by the Court.

That, of course, would represent a legitimate use of discretion.

[44] In the context of this case, the bottom line on inherent jurisdiction is this. While it may be available for those rare cases like Glube, C.J. faced in **Blue**, *supra*, there is nothing on the facts of this case to justify such an application. As noted, the appellant had 5 ½ months to file her application and there is no evidence or circumstances so exceptional to invoke this relief. Nonetheless, the fact that inherent jurisdiction remains a safety net that can prevent abuse in those truly exceptional cases supports my conclusion that the six-month clock should begin when the impugned decision is made as opposed to when the aggrieved party may become aware of it.

[45] In reaching this conclusion, I am mindful of the appellant's caution that such a result would be at odds with one decision on point. It is the Newfoundland Court of Appeal decision of **Newman v. Newfoundland (Workers' Compensation Review Decision)** (2001), 208 Nfld. and P.E.I.R. 25 (Nfld. C.A.). There, Wells, C.J.N., while considering a provision identical to rule 56.06, found it "reasonable" to assume that the clock begins to tick only after the aggrieved party has received notice. Respectfully, for the reasons stated above, I disagree with that approach.

Issue 2: The Jurisdictional Question

[46] In a nutshell, the appellant argues that because limitation periods involve issues of substantive law as opposed to procedure, and because she says the Nova Scotia Supreme Court's jurisdiction is limited to creating rules of procedure, rule 56.06 must be *ultra vires* and therefore unenforceable. Thus, she asserts that the Chambers judge erred by holding otherwise. In her factum, she explains:

> 59. In terms of the essential nature of limitation periods, and despite earlier uncertainty, the Supreme Court of Canada has, in the past decade, clearly stated that a limitation period within which to commence a proceeding **is** a matter of substantive law and **not** a component of procedural law.
>
> 60. Accordingly, the narrow question becomes whether the *Judicature Act*, through the vehicle of the *Civil Procedure Rules*, authorizes the alteration or extinguishment of substantive rights, indeed, constitutional rights.
>
> 61. It is submitted that, as is the case with almost all provinces, the *Judicature Act* authorizes, *inter alia*, the making of rules to 'regulate the practice and procedure in the Court'. The rules are concerned with the method and conduct of matters before the Court, in other words, issues of procedure.

> 62. Here, by restricting access to the right to apply to the courts for the constitutionally-protected writ of *certiorari,* Rule 56.06 has resulted in an unauthorized modification of substantive law.

[47] For his part, the Chambers judge rejected this reasoning and concluded that the Nova Scotia *Rules* had the force of law and would not yield to the common law right of *certiorari.* He said:

> A question as fundamental as the *vires* of the **Civil Procedure Rule** governing *certiorari* applications must be dealt with when raised. I do not find **Civil Procedure Rule 56.06** to be *ultra vires* the rule-making authority of this Court. I agree with the Commission's submission that even if the limitation on the common-law right to *certiorari* is characterized as substantive, the Nova Scotia Legislation, the **Judicature Act**, creates power in the Court to so regulate.
>
> I am not persuaded that the language used by 46(b) of the **Act** and I quote, "Rules of law which are to prevail in relation to remedies, procedures therein ..."
>
> I am not convinced that that should be interpreted to limit the word "prevail" as suggested by the residents. Rather, I conclude that these words give the Court the power to enact rules of law, rules such as 56.06 which speak to procedures in relation to remedies.
>
> . . .
>
> Case law from Saskatchewan and Newfoundland originates from jurisdictions that have provided their Courts with less rule-making ability than is the case in this Province. They do not have the same authority that this Court has. In Nova Scotia, this Court has power to regulate, not only procedure, but also rules of law pertaining to remedies through the enactment of rules that have force of law.
>
> Considering all of the above, I do not find Rule 56.06 to be *ultra vires* the rule-making authority in this Court.

[48] For the reasons that follow, I accept the Chambers judge's conclusion on this issue. He did not err in holding that rule 56.06 is valid and enforceable.

[49] Let me begin my analysis by exploring the Nova Scotia Supreme Court's authority to enact rules of court. It derives from the *Judicature Act.* Here are the relevant provisions:

> 46 ... the judges of the Supreme Court or a majority of them may make rules of court in respect of the Supreme Court for carrying this Act into effect and, in particular,
>
> . . .
>
> (b) regulating the pleading, practice and procedure in the Court and the rules of law which are to prevail in relation to remedies in proceedings therein;
>
> 47 (1) All rules of Court made in pursuance of this Act shall, from and after the publication thereof in the Royal Gazette, or from and after publication in such other manner as the Governor in Council determines, regulate all matters to which they extend.
>
> (2) Notwithstanding subsection (1), the Civil Procedure Rules made by the judges of the Supreme Court on the second day of December, 1971, a copy of which was deposited in the office of the Provincial Secretary, are hereby ratified and confirmed and are declared to be the *Civil Procedure Rules of the Supreme Court* and *shall have the force of law* on and after the first day of March, 1972, until varied in accordance with the provisions of this Act.
>
> [Emphasis added.]

[50] I draw particular attention to s. 47(2), which declares these rules as having the "force of law".

[51] Furthermore, these rules do not represent subordinate legislation as the appellant seems to suggest. While they may not be passed by the Legislature in the conventional sense, they are laid before the House of Assembly where they are subject to cancellation, should the Assembly so direct. A failure to do so implies their acceptance. Thus by these provisions, the *Civil Procedure Rules* generally, and rule 56.06 specifically, embody the force of law. Here is the statutory process as set out in the *Judicature Act:*

> 51 All rules made in pursuance of this Act shall be laid before the House of Assembly within twenty days next after the same are made, if the Legislature is then sitting, or, if the Legislature is not then sitting, within twenty days after the meeting of the Legislature next after such rules are made, and, if an address praying that any such rules may be cancelled is presented to the Lieutenant

> Governor by the Assembly within thirty days during which the Legislature has been sitting next after such rules are laid before it, the Governor in Council may thereupon, by order in council, annul the same and the rules so annulled shall thenceforth become void and of no effect but without prejudice to the validity of any proceeding which in the meantime has been taken under the same. R.S., c. 240, s. 51.

[52] For all these reasons, I conclude that rule 56.06 is valid. Furthermore, the authorities referred to by the appellant have no application to this analysis. Let me elaborate.

[53] The appellant cites the Supreme Court of Canada case of **Tolofson v. Jensen**, [1994] 3 S.C.R. 1022, as authority for the proposition that limitation periods involve issues of substantive law (which presumably trump rules of procedure). **Tolofson**, however, involved a conflict of laws issue. Specifically the Supreme Court concluded that when an action is taken in one jurisdiction as a result of a car accident that occurred in another jurisdiction, the applicable substantive law shall be that of the jurisdiction where the accident occurred. Thus, a limitation period in that jurisdiction (which would bar the proceedings) represents a substantive law right for the defendant. However, the case before us involves simply a deadline for filing an application. In fact, the court in **Tolofson**, at p. 1073, noted that such rule based limitation periods would generally be considered proper matters of procedure:

> This is not to say that procedural rules of the forum may not affect the operation of the statute of limitation of the *lex loci delicti*. Thus, whether or not a litigant must plead a statute of limitation if he or she wishes to rely on it is undoubtedly a matter of procedure for the forum; some rules of court or judicial interpretations of the rules require the pleading of all or certain statutes. *Limitation periods included in the various rules of court, such as those for the filing of pleadings, are also undoubtedly matters of procedure*. These may be waived with leave of the court or the agreement of the other parties, as often happens. Additionally, a substantive limitation defence such as the one in the case at bar may be waived either by failure to plead it, if this is required, or by agreement.
>
> [Emphasis added.]

[54] Asserting that rule 56.06 represents a trespass into substantive law, the appellant also relies on two Saskatchewan Court of Appeal cases. Again, I refer to her factum:

> 68. One of the earliest cases to address this issue is a decision of the Saskatchewan Court of Appeal. The Court dealt with a conflict between a statutory time limit (contained in an 18th century British enactment thought to be part of received law in Saskatchewan) and a rule of court purportedly created under its *Queen's Bench Act.* The limitation period to apply for *certiorari* under the British statute was a fixed period of six-months while that under the Saskatchewan rule of court permitted extensions of time beyond six-months. The Court of Appeal held that the limitation period in the rules was *ultra vires* the rule-making power in the *Queen's Bench Act:*
>
> > The Rules of Court cannot override a limitation prescribed by statute: Patterson v. Palmer (1911), 18 W.L.R. 684 (Sask. C.A.). The delegated power contained in s. 89 [of the *Queen's Bench Act*] to make rules of practice and procedure does not extend to altering the statutory time limit. Rule 675(2) is *ultra vires* in so far as it purports to extend the time within which one must bring an application for judicial review.
>
> 69. *Bassett* was relied on by the same court in a 1993 decision. In that case (*Ostrowski and Saskatchewan Beef Stabilization Board Appeals Committee et al.)*, the Court of Appeal considered a six-month limitation period (along with the power in the court to extend the time) to apply for *certiorari* contained in the rules of court. The Court of Appeal conducted an exhaustive survey of the rule-making power conferred by the *Queen's Bench Act* (i.e., the counterpart to our *Judicature Act*). The Court's conclusion was that rules of court which create a limitation period to apply for *certiorari* are both *ultra vires* the *Queen's Bench Act* ...

[55] Yet respectfully, this analysis misses the mark. These Saskatchewan cases dealt with civil procedure rules that directly contradicted specific time limitations prescribed by statute. There the appellants were trying to rely on the rules of court to provide filing flexibility in the teeth of clear statutory provisions to the contrary. In Nova Scotia, there is no conflicting statutory provision prescribing when an application for *certiorari* must be filed. The only provision is rule 56.06 which, as noted, carries with it the force of law.

[56] The final cases referred to by the appellant are from the Newfoundland Supreme Court (Trial Division). Her factum reads:

> 70. The courts in Newfoundland have considered a provision of their *Rules of the Supreme Court* which was worded identically to our Rule 56.06.

> 71. In *Bowringer*, [*Bowringer Engineering Ltd. v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 764*, (1999), 181 Nfld. and P.E.I.R. 352] Dymod J. relied on the Saskatchewan Court of Appeal's decision in *Ostrowski* to find that Newfoundland Rule 54.06 was *ultra vires* the rule-making power of the courts: "if the effect is to bar the plaintiff's application because of the rule alone, it is *ultra vires* as removing the constitutionally protected right of review by a section 96 court over a inferior tribunal…."
>
> 72. The *Bowringer* case has, in turn, been cited by Adams J. of the Newfoundland Supreme Court, Trial Division to hold that;
>
> > ¶ 33 Rule 54.06 establishes a six month time limit within which to commence an application for *certiorari* and that the Court has no power pursuant to Rule 3.03 to extend the time for taking such action. The effect of this is to render the limitation period in Rule 54.06 an inflexible bar to the commencement of proceedings to challenge a decision of an inferior tribunal in this Court: a clear substantive common law right. This makes the limitation period substantive in nature, not procedural. The Rules Committee does not have power under Section 56(1) of the *Judicature Act* to alter the substantive law.
> >
> > ¶ 34 Therefore, I find that the six month limitation period in Rule 56.04 of the Rules of Court is *ultra vires* the Rules Committee and is of no force or effect. [*Port Enterprises Ltd. v. Newfoundland (Minister of Fisheries and Agriculture)* (2001), 204 Nfld. And P.E.I.R. 21 (Nfld. S.C. T.D.)]
>
> 73. The Newfoundland rules are authorized by a section of their *Judicature Act* which permits the creation of rules of court "governing the pleading, practice and procedure". It is submitted that this is not meaningfully different than s. 46 of Nova Scotia's *Judicature Act* which authorizes rules "regulating the pleading, practice and procedure in the Court." Stated differently, it is clear that an authorization to 'regulate' the practice of a Court is **not** an authorization to alter the substantive law.

[57] Again, I am not persuaded. The judgment in **Bowringer** relies heavily on the Saskatchewan **Ostrowski** judgment, which I have noted is inapplicable to this analysis. In any event, it must be noted that the statutory regime authorizing judge-made rules in Newfoundland and Labrador is different from that in Nova Scotia. Their applicable *Judicature Act*, RSNL 1990, c. J-4, specifically labels the court rules as subordinate legislation:

> 55. (1) Each rules committee may make rules ...
>
> > (k) governing the pleading, practice and procedure generally of the Court of Appeal or the Trial Division...
>
> (4) *Rules made under this section are subordinate legislation for the purposes of the Statutes and Subordinate Legislation Act.*
>
> [Emphasis added.]

[58] Also, in the Newfoundland and Labrador *Judicature Act*, RSNL1990, c. J-4, and unlike in Nova Scotia, there is no equivalent to Nova Scotia's 46(b), *supra*, which enables the Nova Scotia Supreme Court to create "rules of law which are to prevail in relation to remedies". Nor are the Newfoundland and Labrador rules laid before its Legislature for indirect approval, as is the case in Nova Scotia by virtue of s. 51, *supra*.

[59] In summary on this issue, the Nova Scotia *Civil Procedure Rules* have the force of law and short of any expressed statutory provision to the contrary, they are valid and enforceable. This includes rule 56.06.

[60] In light of all the above, I would dismiss the appeal, but in the circumstances without costs. In doing so, I note that the HRM sought to strike both *certiorari* applications because it says it has yet to be properly served. Yet the Commission has expressly acknowledged that it does not rely on that potential form of relief. Because the HRM was not an applicant and because this appeal involves only the Commission's plea for relief, I do not propose to address this issue which remains one exclusively for the HRM. This conclusion is, of course, without prejudice to any separate future relief the HRM may specifically seek in this regard.

DISPOSITION

[61] I would dismiss the appeal without costs.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Hamilton, J.A.