NOVA SCOTIA COURT OF APPEAL
Citation: *Vogler v. Szendroi*, 2008 NSCA 18

Date: 20080229
Docket: CA 282419
Registry: Halifax

Between:

Richard Vogler

Appellant

v.

Christopher Szendroi and Carole Sheehan

Respondents

Judges:	MacDonald, C.J.N.S.; Oland and Hamilton, JJ.A.
Appeal Heard:	December 3, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed and the Chambers judge's order is set aside, per reasons for judgment of MacDonald, C.J.N.S.; Oland and Hamilton, JJ.A, concurring.
Counsel:	Michael J. Wood, Q.C. and Jason P. Gavras, for the appellant Roger T. Shepard, for the respondents

Reasons for judgment:

OVERVIEW

[1] This appeal involves an interesting conflict of laws question. The facts are simple but the resultant issues create a bit of a labyrinth.

BACKGROUND

[2] Back in 2000, the appellant, Richard Vogler, a Nova Scotia resident, was injured in a motor vehicle accident in Wyoming, U.S.A.

[3] In January of 2003, he commenced an action in the Supreme Court of Nova Scotia against the respondents Christopher Szendroi, as driver, and Carole Sheehan, as owner, of the vehicle in which Mr. Vogler was a passenger. It is noteworthy that service of these pleadings has been at the very least, delayed. It was not until May of 2006, some three years after the action was commenced and six years after the accident, that the respondent Sheehan was served in California. It appears that the respondent Szendroi, who is a resident of Quebec, has yet to be served.

[4] In Wyoming, by statute, an action such as this must be commenced within four years of the accident. At the heart of this appeal is Wyoming's *Rule of Civil Procedure* which connects the commencement of an action to service. Rule 3(a) provides that an action is commenced by filing a complaint with the court. Rule 3(b) then continues by specifying that if the pleadings are not served within 60 days of filing, the action is not considered to have been commenced until the date of service:

> **Rule 3. Commencement of action.**
>
> . . .
>
> **(b) When commenced.**
>
> For purposes of statutes of limitation, an action shall be deemed commenced on the date of filing the complaint as to each defendant, if

> service is made on the defendant or on a co-defendant who is a joint contractor or otherwise united in interest with the defendant, within 60 days after the filing of the complaint. *If such service is not made within 60 days the action shall be deemed commenced on the date when service is made.* The voluntary waiver, acceptance or acknowledgment of service, or appearance by a defendant shall be the same as personal service on the date when such waiver, acceptance, acknowledgment or appearance is made. When service is made by publication, the action shall be deemed commenced on the date of the first publication.

[Emphasis added.]

[5] On the other hand, in Nova Scotia an action is commenced simply by filing the appropriate pleadings. Our *Civil Procedure Rule* 9.01 provides:

> Subject to rule 9.06(2) every proceeding, other than a proceeding under rule 57 and rules 59 to 61, shall be commenced by filing an originating notice and a copy thereof in the prothonotary's office, and the notice is deemed to have been issued on the day it is filed.

[6] The following basic conflict of laws principles govern this appeal. Regardless of where an action is prosecuted, it will be governed by the substantive laws of the jurisdiction where the incident occurred, in this case the State of Wyoming. Limitation periods are generally considered to be substantive and in this case all parties acknowledge that Wyoming's four-year rule is substantive and applies to the appellant.

[7] However, matters of procedure will be governed by the jurisdiction hearing the matter, in this case Nova Scotia. From this flows an important corollary. Wyoming's rules of procedure have no application in Nova Scotia. This leads me to the ultimate issue on appeal: Is Rule 3(b) substantive or procedural in nature? If it is substantive, then it applies to the appellant and this Nova Scotia action is statute-barred. On the other hand, if it is procedural, it does not apply in this case and the appellant's action survives because it complies with Wyoming's substantive four-year rule.

The Chambers Application

[8] Asserting that Rule 3(b) is part of Wyoming's substantive law, the respondents maintain that the action was not commenced until 2006 when service was finally affected. This would be well beyond Wyoming's four-year statutory deadline. Thus the respondents applied to the Supreme Court of Nova Scotia to have the action quashed.

[9] The appellant countered that Rule 3(b) is merely a matter of procedure unique to Wyoming and of no application in Nova Scotia. Therefore, because actions in Nova Scotia are commenced simply by filing, the four-year deadline has been met and the action is timely.

[10] The application to quash was heard by Supreme Court of Nova Scotia Justice A. David MacAdam. He found Rule 3(b) to be substantive as opposed to procedural in nature. From this flowed his decision to grant the respondents' application to quash. He reasoned:

> ¶ 25 As already noted Rules of Court may be substantive depending upon the issue and the nature of the Rule. In Wyoming, Rule 3(a) provides for commencement of a proceeding, although in view of Rule 3(b), other than for purposes of statute of limitations. Rule 3(b) is only applicable when considering whether an action is barred pursuant to statutes of limitation in Wyoming. It is therefore integral to the Statute of Limitations in Wyoming since it provides the means for determining whether a proceeding has been commenced within the time limitations provided in the statute or is subject to being struck, because it was not commenced within the statutory provisions. This issue is a legal question, and having regard to the observations by Justice Pugsley in *Future Inns*, supra, I am satisfied is an issue that may be determined on an Application under *Rule 14.25*. Further, and in these circumstances, no additional evidence is required in order to make this determination.
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> . . .
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> ¶ 27 ... Here the rule is integral to the determination of whether there is, in fact, a limitation defence available, not just to whether the claimant has followed the necessary procedures for invoking it, pursuant to the law of the *lex fori.*

[11] Mr. Vogler appeals that ruling to this court.

THE GROUNDS OF APPEAL

[12] Mr. Vogler lists four grounds of appeal:

1. The learned trial judge erred in law in failing to apply the law of Nova Scotia in determining whether Wyoming R. Civ. P. Rule 3(b) was substantive or procedural in nature;

2. The learned trial judge erred in law in finding that Wyoming R. Civ. P. Rule 3(b) was substantive rather than procedural in nature;

3. In the event that Wyoming R. Civ, P. Rule 3(b) is substantive in nature the learned trial judge erred in not exercising his discretion to apply the substantive law of Nova Scotia in the circumstances of this matter;

4. The learned trial judge erred in law in refusing to admit the affidavit of Jane Lenehan deposed to on February 28, 2007, and further erred in failing to consider the affidavit of Ms. Lenehan deposed to on December 14, 2006.

[13] As will become evident, I need not consider the third and fourth grounds to resolve this appeal.

[14] The second ground identifies the ultimate issue that I have noted above, namely: Is Rule 3(b) substantive or procedural in nature? As observed, the appellant asserts that the judge erroneously found it to be substantive. As the analysis of that ultimate issue also addresses the first ground, I will deal with them as a single ground of appeal.

[15] For the reasons that follow, I am of the view that the judge erred in his determination that Rule 3(b) is substantive, rather than procedural, in nature. I would therefore allow the appeal and set aside the dismissal order.

ANALYSIS

Standard of Review

[16] Let me begin by initially addressing the standard upon which we should review the judge's decision. This is an appeal from a discretionary interlocutory

order which normally would attract significant deference. However, because the effect of this order was to finally dispose of Mr. Vogler's action, less deference is owed. Our review therefore examines whether there was an error in law resulting in an injustice. See **Frank v. Purdy Estate** (1995), 142 N.S.R. (2d) 50 (C.A.). In considering this question it is noteworthy that there was no factual dispute before the Chambers judge. He was engaged strictly in legal analysis involving a question of private international law. In other words, if the judge did err in his analysis, it would be an error of law that would leave us free to substitute what we would view as the proper result. See **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235 at para. 8; **Central Halifax Community Assn. v. Halifax (Regional Municipality)**, [2007] N.S.J. No. 135 (C.A.) at para. 17; and **Symington v. Halifax (Regional Municipality)**, [2007] N.S.J. No. 340 (C.A.) at para. 50.

Is Rule 3(b) Substantive or Procedural?

[17] I begin my analysis by explaining, in some detail, the distinction between substantive law and procedural law.

[18] Consider the respective definitions as set out in *Black's Law Dictionary*, 8th ed. (St Paul, MN: Thomson West, 2004). Substantive law involves a litigant's rights or obligations:

> The part of the law that creates, defines, and regulates the rights, duties, and powers of parties.

[19] On the other hand, procedural law involves the process by which a litigant's rights or obligations are enforced or defended. Thus, "procedural law" is defined as:

> [t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.

[20] Thus, as noted over 60 years ago by John Salmond in *Jurisprudence* 476 (Glanville L. Williams ed., 10th ed. 1947), these two concepts are inextricably linked:

> So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the

> remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other.

[21] This court more recently considered the distinctions between rules that are procedural as opposed to those that are substantive. In **Bishop v. Nova Scotia**, 2006 NSCA 114, 248 N.S.R. (2d) 307, Fichaud J.A. observed, at paragraph 12, that "procedural rules govern the mode of proceeding or machinery by which the [substantive] right is enforced."

[22] Thus not only is there a direct relationship, there is in fact an interdependence between these two concepts. Not surprisingly, therefore, applying them can at times be challenging. For example, in **Somers v. Fournier**, [2002] O.J. No. 2543 (C.A.), Cronk, J.A. observes:

> ¶ 13 The distinction between procedural and substantive law is central to the issues raised on this appeal and cross-appeal. That distinction is often difficult to discern. In *Tolofson*, La Forest J. addressed the important purpose of classifying a rule or legal requirement as substantive or procedural (at pp. 317-318 and 321):
>
> > In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial for, as Geoffrey Cheshire and Peter North, *Cheshire and North's Private International Law*, 12th ed. by Peter North and J.J. Fawcett (London: Butterworths, 1992), at p. 74-75, state:
> >
> > > One of the eternal truths of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum.
> >
> > The reason for the distinction is that the forum court cannot be expected to apply every procedural rule of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court, and forum judges understand them. They aid the forum court to "administer [its] machinery as distinguished from its product": *Poyser v. Minors* (1881), 7 Q.B.D. 329 (C.A.) at p. 333, per Lush L.J. Although clearcut categorization has frequently been attempted, differentiating between what is a part of the court's machinery and what is irrevocably linked to the product is not always easy or straightforward.

. . .

> *[I]n the conflicts of law field ... the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties*. [Emphasis added]

¶ 14 This court has described the distinction between substantive and procedural law in these terms:

> [S]ubstantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of Courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated. [Emphasis added]

[23] Having set out the distinction, and the import of the distinction, between substantive and procedural law, I find it helpful to review, at this point, what is not in issue.

[24] As I earlier stated, there is no dispute that Wyoming's substantive law applies in this matter. As the parties have acknowledged, Wyoming's statutory four-year limitation period is a matter of substantive law. See **Tolofson v. Jensen**, [1994] 3 S.C.R. 1022 at paras. 86 through 88. Therefore, Mr. Vogler had four years to commence his action. His present Nova Scotia action was filed within four years.

[25] As also noted, there is no question that matters of procedure, on the other hand, are governed by the law of the domestic forum, in this case Nova Scotia (see **Tolofson** at para. 41). Thus, the consequences of determining Rule 3(b) as either substantive or procedural come to the fore. If Rule 3(b) is substantive, it applies in this case and Mr. Vogler's action, because of the late service, will have lapsed. If it is procedural, Rule 3(b) has no application in this case and the Nova Scotia action is preserved.

[26] There exists this further underlying question. When approaching and resolving this issue, is our analysis governed by domestic Nova Scotia law or does Wyoming's jurisprudence on this provision apply? The undisputed answer is that Nova Scotia jurisprudence governs the analysis. Thus, we should ask: If such a provision existed in Nova Scotia, applying Nova Scotia's jurisprudence, would it be considered substantive or procedural? See **Somers v. Fournier**, [2002] O.J. No. 2543 (C.A.) at paras. 20 and 31, and **Brown v. Flaharty**, [2004] O.J. No. 5278 (Sup. Ct. J.) at para. 9.

[27] Returning to the ultimate question of whether Rule 3(b) is substantive or procedural, we must draw our attention to the true subject matter of the impugned provision. In other words, is s. 3(b) about timing as the respondents suggest, i.e., concerning **when** an action must be commenced? If so, and given its alignment with Wyoming's four-year statutory rule, it would appear to be more substantive than procedural in nature. On the other hand, the appellant suggests that this provision is not about timing but about methodology. In other words, it describes the **manner** in which an action is (or is deemed to have been) commenced. That would be a subject matter more akin to procedure.

[28] In summary, when approaching questions such as these, I would advocate a three-step analysis:

1. identify the exact subject matter covered by the impugned foreign provision;

2. determine whether, in the domestic forum (in this case Nova Scotia), this subject matter would be considered procedural or substantive; and,

3. if the subject matter would be characterized as substantive, then the foreign provision should be applied. On the other hand, if the subject matter is characterized as procedural, then the foreign provision should not be applied.

Conclusion

[29] Respectfully, I believe that the Chambers judge erred by misreading the provision's true subject matter. He found that Rule 3(b) prescribed **when** an action had to be commenced. In other words, he found it to be integral to the four-year

limitation provision and thus substantive in nature. Respectfully, despite its title, "When commenced", I do not read the provision that way. Instead I view it as simply directing the manner in which an action is commenced. Let me elaborate.

[30] The Chambers judge correctly concluded that he should apply Nova Scotia law when deciding if a foreign provision is substantive or procedural (para. 20):

> The Application by the Defendants, pursuant to Nova Scotia *Civil Procedure Rule* 14.24(1)(a), is to strike the Plaintiff's claim as disclosing no cause of action in that this proceeding is limitation barred pursuant to the law of Wyoming. As noted, it is undisputed that the Wyoming Limitation Statute is substantive law and therefore to be applied on this Application. However, the issue here is whether Wyoming of Civil Procedure 3(b) which stipulates, when, for purposes of limitation, a proceeding is commenced in Wyoming, is itself substantive or procedural. *Although the Applicants have cited a number of United States authorities indicating it is substantive, for the reasons already outlined, this question is to be determined under the laws of the Province of Nova Scotia, being the lex fori in reference to this proceeding.*
>
> [Emphasis added.]

[31] Unfortunately, the Chambers judge strayed from this position and allowed himself to be influenced by how this provision has been considered in Wyoming, paying particular heed to the Wyoming *Statute of Limitations* (here at para. 25):

> As already noted Rules of Court may be substantive depending upon the issue and the nature of the Rule. In Wyoming, Rule 3(a) provides for commencement of a proceeding, although in view of Rule 3(b), other than for purposes of statute of limitations. Rule 3(b) is only applicable when considering whether an action is barred pursuant to statutes of limitation in Wyoming. *It is therefore integral to the Statute of Limitations in Wyoming since it provides the means for determining whether a proceeding has been commenced within the time limitations provided in the statute* or is subject to being struck, because it was not commenced within the statutory provisions. ...
>
> [Emphasis added.]

[32] By tying Rule 3(b) to the Wyoming *Statute of Limitations*, the judge, erroneously I believe, concluded that Rule 3(b) involved filing deadlines - i.e., **when** an action must be started. However, in my view, Rule 3(b) does not involve

when an action must be commenced. That issue is clearly set out in Wyoming's *Statute of Limitations*, which prescribes four years. As acknowledged, this four-year rule, like most limitation period provisions, is substantive in nature. Instead I view Rule 3(b) as directing **how** an action is commenced. In Wyoming this task involves both filing and service. In Nova Scotia, as noted, the task is completed simply by filing the relevant documentation.

[33] Yet, the respondents urge us to sustain the Chambers judge's conclusion that Rule 3(b) is indeed *integral* to the Wyoming *Statute of Limitations* and thereby substantive. Central to their submission is Rule 3(b)'s opening reference to it being "[f]or purposes of statutes of limitation", as highlighted below:

> For purposes of statutes of limitation, an action shall be deemed commenced on the date of filing the complaint as to each defendant, if service is made on the defendant or on a co-defendant who is a joint contractor or otherwise united in interest with the defendant, within 60 days after the filing of the complaint. If such service is not made within 60 days the action shall be deemed commenced on the date when service is made. ...

[Emphasis added.]

[34] This introductory phrase, the respondents say, inextricably ties the provision to Wyoming's four-year limitation period. They submit in their factum:

> ¶ 54 The Appellant has put forth the position that the learned Chambers Judge erred in law in finding that WRCP 3(b) was substantive rather than procedural in nature. WRCP 3(b) deals with both the commencement and service of actions on Defendants **for the purposes of the Wyoming Statute of Limitations**. The Appellant is correct in stating that in Nova Scotia, commencement of actions in service of pleadings are covered in the *Civil Procedure Rules* and are clearly procedural in nature. As is clear from the lower Court's decision, however, WRCP 3(b) is integral to the determination of whether there is in fact, a limitation defence available.

[35] I disagree with this submission. In my view, this introductory phrase in Rule 3(b) simply identifies the rationale for the provision. In other words, Rule 3(b) sets out the process for complying with statutory deadlines for filing actions. In this case, the limitation period is four years and that is prescribed by statute. Nothing in Rule 3(b) changes that. Again, it simply directs how one can comply with this

prerequisite. In summary, Rule 3(b) is not about how long you have to file a claim; it is about **how** a plaintiff commences a claim.

[36] Examined in this light, for reasons detailed above on the distinction between substantive and procedural law, I view Rule 3(b) as procedural in nature. In other words, the method by which a plaintiff commences an action, I believe, involves a court's process as opposed to a litigant's substantive rights.

[37] Professor Janet Walker considered this very issue in her analysis of s. 23 of Ontario's *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B, which provides:

> For the purpose of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is substantive law.

See "Twenty Questions (about Section 23 of the *Limitations Act*, 2002)" in W. Gray, L. Kerbel-Caplan & J. Ziegel, eds., "The New Ontario Limitations Regime: Exposition and Analysis" (Toronto: Ontario Bar Association, 2005).

[38] Despite its specificity to the Ontario statutory regime, *Twenty Questions* offers a comprehensive analysis of the intricacies of this area of private international law. At page 110, Professor Walker observes:

> **Which law applies to determine what stops the time from running?**
>
> Perhaps the drafters of the Ontario Act thought that issuing an originating process was so well known to mark the commencement of a claim in Ontario that there was no need to define further the date on which it would be determined whether a claim was time-barred. As a result there is no provision in the Ontario Act for this for claims to which Ontario law applies. However, the time at which a claim is regarded as having been commenced for purposes of determining whether it is time-barred can vary from jurisdiction to jurisdiction. For example, in some countries, a court is regarded as seized of an action only when the defendant is served with the notice of the proceeding. Where the applicable law of another jurisdiction varies on this point, an Ontario court might wonder whether it should consider this to be a matter of "limitations law" and, therefore, apply the law of the other jurisdiction, or whether it should apply its own law.
>
> On one view, it might be supposed that, if the event that starts the time running on the limitation period is a matter of substantive law, then so too should the event

> that stops the time from running be regarded as a matter of substantive law. Contrary to this, the *English courts apply their own law to determine "whether, and the time at which, proceedings have been commenced in respect of any matter." Although the Ontario Act does not seem to offer any guidance on this, it is suggested that this is a sensible approach: first, because the question arises only as a result of the commencement of the action in accordance with the Ontario Rules, second, because the vagaries of service abroad may reduce a claimant's ability to ensure this occurs in a timely fashion, and finally because it is unlikely that the foreign limitation period would have been designed to accommodate the delay that could occur in the service of documents for foreign proceedings.*
>
> [Emphasis added.]

[39] I endorse Professor Walker's policy-based reasoning as to why rules directing how an action is commenced should be considered procedural and therefore governed by the domestic forum.

[40] In summary, two substantive rights are at stake in this appeal: Mr. Vogler's right to sue the respondents in negligence and the respondents' corresponding right not to be sued after four years. Consistent with Fichaud, J.A.'s approach in **Bishop**, Rule 3(b) sets out the manner in which Mr. Vogler's right is pursued. Viewed in this light, Rule 3(b) does not alter, nor is it linked to, the respondents' rights not to be sued after four years. All this, in my opinion, leads to the inescapable conclusion that Rule 3(b) is procedural and not substantive in nature.

[41] In summary, the Chambers judge erred in concluding that Rule 3(b) was substantive in nature and thereby enforceable as a bar to Mr. Vogler's Nova Scotia action. Instead, Rule 3(b) is a Wyoming *Rule of Civil Procedure* and therefore has no application to this case. Pursuant to Nova Scotia *Civil Procedure Rule* 9.01, *supra*, Mr. Vogler commenced his action by filing it. He did so within four years. His claim should not have been dismissed.

DISPOSITION

[42] I would grant leave, allow the appeal, and set aside the Chambers judge's order quashing this claim. I would further order costs on appeal to the appellant of $2,500.00, together with reasonable disbursements to be taxed.

MacDonald, C.J.N.S.

Concurred in:

Oland, J.A.

Hamilton, J.A.