NOVA SCOTIA COURT OF APPEAL

Citation: *Richards Estate v. Industrial Alliance Insurance and Financial Services Inc.*, 2020 NSCA 14

Date: 20200219
Docket: CA 485818
Registry: Halifax

Between:

Sandra Nicole Richards and John Paul Bartlett Richards, executors on behalf of the Estate of Paul Thomas Richards

Appellants

v.

Industrial Alliance Insurance and Financial Services Inc.

Respondent

Judge:	The Honourable Justice Linda Lee Oland
Appeal Heard:	December 10, 2019, in Halifax, Nova Scotia
Subject:	Summary Judgment—Limitation Periods—Substantive Law
Summary:	Claiming that an action against it was time-barred, an insurer made a motion for summary judgment. It relied on the limitation of actions and other legislation of Nova Scotia, as did the plaintiff in responding to the motion. The judge analysed Nova Scotia legislation and granted summary judgment and costs to the insurer. The deceased, whose eligibility for insurance benefits was at issue, was an insured person under a group policy issued by the insurer to his employer. He was living and working not in Nova Scotia, but in Newfoundland, when he filed his claim and throughout his dealings with the insurer prior to his death.
Issue:	Whether the laws of Newfoundland should have been raised

in the motion for summary judgment.

Result: Appeal allowed and the judge's Orders set aside. Since limitation laws are considered substantive rather than procedural, the parties should have also raised the laws of Newfoundland in that motion.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 6 pages.

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Judges:	Beveridge, Oland and Farrar, JJ.A.
Appeal Heard:	December 10, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Oland J.A.; Beveridge and Farrar, JJ.A. concurring
Counsel:	Nicolle Snow, for the appellants Michelle C. Awad, QC and Melissa Pike, for the respondent

Reasons for judgment:

[1] At the hearing of this appeal from summary judgment, this Court raised a matter that had not been considered below. It asked counsel for the parties to provide post-hearing submissions. Those have been received and considered. For the reasons below, I would allow the appeal.

[2] The late Paul Thomas Richards was an insured person under a group policy issued by Industrial Alliance Insurance and Financial Services to his employer, Fisher Scientific Company. When he filed his claim for disability benefits pursuant to that policy in 2008, he was living and working in St. John's, Newfoundland. He was there throughout his dealings with Industrial Alliance in the years before his death in 2015. During his lifetime, Industrial Alliance determined that Mr. Richards was not eligible to continue receiving long-term disability benefits under the group policy.

[3] In 2015, Sandra Nicole Richards and John Paul Bartlett Richards, as executors on behalf of the estate of the late Mr. Richards, brought an action in the Supreme Court of Nova Scotia against Industrial Alliance. They claimed that by denying Mr. Richards' disability benefits, Industrial Alliance had breached the terms of the policy and, but for that breach, he would have continued to be covered by the policy's group life insurance. They sought damages for breach of contract.

[4] The Statement of Claim was amended in 2018 to add the plaintiffs in their own right as well as in their capacities as executors of Mr. Richards' estate (collectively, the "Claimants"). The Amended Statement of Claim also alleged breach of an insurer's obligation to act in good faith in administering the claim and sought punitive damages. In its Amended Defence, among other things, Industrial Alliance pleaded that some or all of the claims against it were time-barred.

[5] Industrial Alliance brought an application for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04. As it had in its Amended Defence, it alleged that the claim and action for breach of contract were barred both by the contractual limitation period in the policy and the limitation periods in certain statutes of Nova Scotia, namely the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258 as amended, and the *Limitation of Actions Act*, S.N.S. 2014, c. 35. The policy barred legal actions unless commenced within a year or such longer period required "under the applicable legislation of the jurisdiction of the action". Additionally, the insurer relied upon certain provisions of the *Insurance Act*,

R.S.N.S. 1989, c. 231. The Claimants disagreed with Industrial Alliance's submissions and presented their arguments regarding the application and interpretation of the terms of the policy and that legislation of Nova Scotia.

[6] In a decision dated February 5, 2019 and reported as 2019 NSSC 3, Justice Ann E. Smith of the Nova Scotia Supreme Court considered the parties' arguments as to whether the Claimants' action is policy and statute barred, and granted summary judgment to Industrial Alliance. She dismissed all of the Claimants' claims against the insurer, and ordered them to pay costs of $22,000 and disbursements of $1,706.16.

[7] The Claimants appealed to this Court, arguing that the Motions Judge had erred in her interpretation and application of the test for summary judgment. They said this included her analysis of whether their claim had been commenced within the time permitted by the policy and her interpretation and application of provisions of the *Insurance Act* and the limitation of actions legislation of Nova Scotia.

[8] At the hearing of the appeal on December 10, 2019, this Court pointed out to the parties that, at the date that his disability arose, the late Mr. Richards had lived and worked not in Nova Scotia, but in Newfoundland. His coverage under the Industrial Alliance group policy was linked to his employment at Fisher Scientific Company in Newfoundland. Yet, in response to the Amended Statement of Claim, Industrial Alliance had relied on the laws of Nova Scotia in its Amended Defence. Moreover, the parties had brought and argued the summary judgment motion relying on Nova Scotia law. As a consequence, the Chambers Judge's analysis of contractual and statutory limitation periods dealt exclusively with Nova Scotia law.

[9] This Court asked the parties to file post-hearing submissions on whether the laws of Nova Scotia or the laws of Newfoundland should govern the summary judgment motion that had been brought by Industrial Alliance. Both parties filed their submissions by January 19, 2020, as directed by the Court.

[10] A review of the law leads me to conclude the laws of Newfoundland should have been raised in the summary judgment motion which led to the decision under appeal.

[11] The Supreme Court of Canada's decision in *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 SCR 1022 established that limitation periods are matters of substantive, rather than procedural, law. There the Court

addressed two motor vehicle cases. In one, the accident occurred in Saskatchewan. Eight years later, on the assumption that an action was statute barred under Saskatchewan laws, which laws also did not permit a gratuitous passenger to recover in certain circumstances, Kim Tolofson brought his action in British Columbia. The defendant applied for a determination as to whether the British Columbia Court was *forum non-conveniens* or, alternatively, as to whether Saskatchewan law applied.

[12] La Forest J. determined that the law applicable to the tort was that of the *lex loci delicti*, namely that of Saskatchewan. He then turned to the question of whether the limitation period prescribed in Saskatchewan should be characterized as substantive or procedural. In doing so, he spoke of the importance of that classification at p. 1067:

> **In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial** for, as Cheshire and North, *Cheshire and North's Private International Law*, (12th ed. 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.
>
> [Emphasis added]

[13] After reviewing the common law rule on statutes of limitation which had traditionally considered them procedural, La Forest J. commented at p. 1070 that seemed "out of place in the modern context." Writing for a unanimous court, he determined that statutes of limitation are substantive and that the Saskatchewan limitation rule applied. At pp. 1071-72 he wrote:

> I do not think it is necessary to await legislation to do away with the rule in conflicts of law cases. The principal justification for the rule, preferring the *lex*

> *fori* over the *lex loci delicti*, we saw, has been displaced by this case. So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflicts of laws field where, as I stated earlier, 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.
>
> Such a step has already been judicially attempted by Stratton C.J.N.B. in *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271 (C.A.). In that case Clark, in 1978, received medical treatment from Dr. Naqvi in Nova Scotia. He commenced an action for injuries arising out of that treatment in New Brunswick in 1984. The limitation period in respect of such proceedings in Nova Scotia was 1 year. The majority of the New Brunswick Court of Appeal held that the action was statute barred (Ryan J.A. dissenting). Referring to both *Yew Bon Tew (Yong Boon Tew)* v. *Kenderaan Bas Mara* and *Perrie v. Martin*, **Stratton J.A. held, at p. 275, that the limitation period was substantive, notwithstanding that it was phrased "[t]he actions … shall be commenced within …", because it created an accrued right in the defendant to plead a time bar.** Hoyt J.A., while concurring in the result, was reluctant to make such a categorical statement. Ryan J.A., dissenting, was unwilling to abandon the tradition common law rule that statutes of limitation are procedural, though he decided the case on different grounds.
>
> **In my view, the reasoning of Stratton C.J.N.B. is correct.** …
>
> [Emphasis added]

[14] This Court relied on *Tolofson* in *Vogler v. Szendroi*, 2008 NSCA 18. In that case, Mr. Vogler, a resident of Nova Scotia, was injured in a motor vehicle accident in Wyoming, U.S.A. Three years later, he brought an action in Nova Scotia against the driver and the owner of the vehicle in which he had been a passenger. Not until six years after the accident was the owner served. The driver still had not been served, when he and the owner applied to have the action quashed, relying on one of Wyoming's Rules of Procedure which connected the commencement of an action to service. They argued that the action was not commenced until service was finally effected in 2006, well beyond Wyoming's statutory four-year deadline.

[15] MacDonald C.J.N.S. writing for this Court, stated in *Vogler*:

> [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.

The Chief Justice explained the distinction between substantive and procedural law. In reiterating at ¶ 24 that Wyoming's statutory four-year limitation is a matter of substantive law, he relied upon pp. 1071-72 from *Tolofsen*.

[16] The applicable law was an issue for determination on Industrial Alliance's motion for summary judgment. Neither Industrial Alliance nor the Claimants raised the conflicts of law question in the motion. As the issue was not raised, it was not addressed by the Motions Judge. Since limitation laws are considered to be substantive, the law of Newfoundland should also have been brought to her attention for consideration.

[17] In the result, I would allow the appeal without costs to either party. I would set aside the Motions Judge's Order dated February 22, 2019 and her Costs Order dated May 6, 2019. If, pursuant to that Costs Order, the Claimants paid Industrial Alliance any costs or disbursements, Industrial Alliance shall return those monies to the Claimants.

Oland J.A.

Concurred in:

Beveridge J.A.

Farrar J.A.