SUPREME COURT OF CANADA

CITATION: Castillo *v.* Castillo, 2005 SCC 83
[2005] S.C.J. No. 68

DATE: 20051222
DOCKET: 30534

Maribel Anaya Castillo
Appellant
v.
Antonio Munoz Castillo
Respondent
- and -
Attorney General of Alberta
Intervener

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 11)	Major J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)
REASONS CONCURRING IN THE RESULT: (paras. 12 to 52)	Bastarache J.

APPEAL HEARD AND JUDGMENT RENDERED: November 16, 2005
REASONS DELIVERED: December 22, 2005

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Reasons delivered: December 22, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for alberta

Limitation of actions – Conflict of laws – Car accident in California – Action brought in Alberta court – Action statute-barred under California limitations law but within limitations period in Alberta – Whether s. 12 of Alberta Limitations Act can revive an action time-barred by substantive law of place where accident occurred – Limitations Act, R.S.A. 2000, c. L-12, s. 12.

Constitutional law – Division of powers – Administration of justice – Time limits to entertain actions – Whether s. 12 of Alberta Limitations Act valid provincial legislation – Constitution Act, 1867, s. 92(14) – Limitations Act, R.S.A. 2000, c. L-12, s. 12.

The parties, husband and wife, were involved in a single vehicle car accident in California. The wife brought an action against her husband in Alberta where the parties were resident within the province's two-year limitations period but after the California one-year limitations period had expired. The husband sought to have the action dismissed as statute-barred, but the wife argued that, under s. 12 of the Alberta *Limitations Act*, the two-year limitations period applied notwithstanding the expiry of California's one-year limitations period. Section 12 provides that "[t]he limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction." The Court of Queen's Bench dismissed the wife's action as statute-barred under California law, holding that in order to maintain the action in Alberta under s. 12, neither limitation period could have expired prior to the commencement of the action. The Court of Appeal upheld the decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and **Major**, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.: The applicable substantive law governing the accident was the law of California, including its limitations law. Since the California limitations period applied and had expired prior to the commencement of the action, no right of action existed when the wife initiated her claim in the Alberta court. Section 12 of the *Limitations Act* does not purport to revive an action time-barred by the substantive law of the place where the accident occurred. [3-4] [8]

In view of this interpretation of s. 12, it is unnecessary to determine whether the impugned provision exceeds the territorial limits on provincial legislative jurisdiction. Section 12 is perfectly valid provincial legislation under s. 92(14) of the *Constitution Act, 1867*. The Alberta legislature can, in relation to the administration of justice in the province, determine the time limits within which the Alberta courts can entertain actions, including live actions arising in a foreign jurisdiction and governed by the substantive law of that foreign jurisdiction. [5-6] [10]

Per **Bastarache** J.: The legislative jurisdiction of the provinces is limited to matters "[i]n each province" by the wording of s. 92 of the *Constitution Act, 1867*. Here, s. 12 of the *Limitations Act* is an unconstitutional attempt by Alberta to legislate extra-territorially. This is true for both interpretations of s. 12 proposed by the parties. The California one-year limitation period therefore applies to bar the wife's action. [18] [30] [47] [52]

Limitation periods, like s. 12, are substantive in nature and have the effect of cancelling the substantive rights of plaintiffs, and of vesting a right in defendants not to be sued. While the pith and substance of s. 12 is related to civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*, s. 12 exceeds the territorial limits of legislative competence contained in s. 92. The impugned provision not only did not provide for a meaningful connection between Alberta, the civil rights affected by s. 12, and the plaintiffs and defendants made subject to it, but it also disregarded the legislative sovereignty of other jurisdictions within which the substantive rights at issue were situated. [34] [35] [46] [50]

Section 12 is, in essence, a choice of law rule that is not premised on any connection, other than the real and substantial connection necessary for the Alberta courts to take adjudicative jurisdiction, but the real and substantial connection established is not sufficient to provide a meaningful connection between the province, the legislative subject-matter and the individuals made subject to the law. The real and substantial connection necessary for the courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue. Both notions cannot be conflated. [41-45]

Cases Cited

By Major J.

Followed: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022.

By Bastarache J.

Followed: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; **applied:** *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49; **referred to:** *Ryan v. Moore*, [2005] 2 S.C.R. 53, 2005 SCC 38; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *McKay v. The Queen*, [1965] S.C.R. 798; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323; *Clark v. Naqvi* (1990), 99 N.B.R. (2d) 271; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20.

Statutes and Regulations Cited

Constitution Act, 1867, s. 92.

Limitations Act, R.S.A. 2000, c. L-12, s. 12.

Limitations Act, S.A. 1996, c. L-15.1, s. 12.

Authors Cited

Alberta. *Alberta Hansard*, vol. I, 23rd Leg., 4th Sess., March 20, 1996, p. 707.

Alberta. Law Reform Institute. *Limitation*s. Report No. 55. Edmonton: The Institute, 1989.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Driedger, Elmer A. *The Construction of Statute*s. Toronto: Butterworths, 1974.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont.: Butterworths, 2002.

APPEAL from a judgment of the Alberta Court of Appeal (Russell, Berger and Wittmann JJ.A.) (2004), 244 D.L.R. (4th) 603, 9 W.W.R. 609, 30 Alta. L.R. (4th) 67, 357 A.R. 288, 1 C.P.C. (6th) 82, 6 M.V.R. (5th) 1, [2004] A.J. No. 802 (QL), 2004 ABCA 158, upholding a decision of Rawlins J. of the Court of Queen's Bench (2002), 3 Alta. L.R. (4th) 84, 313 A.R. 189, 24 C.P.C. (5th) 310, [2002] A.J. No. 519 (QL), 2002 ABQB 379. Appeal dismissed.

Anne L. Kirker and *Catherine McAteer*, for the appellant.

Avon M. Mersey and *Michael Sobkin*, for the respondent.

Robert Normey, for the intervener.

The judgment of McLachlin C.J. and Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. was delivered by

MAJOR J. –

1 The parties are husband and wife. While vacationing in California, they were involved in a single vehicle car accident on May 10, 1998. Both are residents of Alberta. The appellant wife sued the respondent husband in Calgary two years less a day after the date of the accident. The husband sought to have the action dismissed as statute-barred in accordance with the one-year limitation under California law. The wife argued that,

under s. 12 of the Alberta *Limitations Act*, R.S.A. 2000, c. L-12, Alberta's two-year limitations period applied notwithstanding the expiry of California's one-year limitations period, and that her action therefore ought to be allowed to proceed.

2 Section 12 of the Act provides:

> **12** The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

3 In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, the Court held that the *lex loci delicti* – the substantive law of the place where the tort occurred – applies in a tort action. In that case the plaintiff was injured in a motor vehicle accident in Saskatchewan. His claim became time-barred in that province but he commenced an action in British Columbia where it was not. Our Court held that the Saskatchewan law that governed the action included the Saskatchewan limitations period and dismissed the claim. In the present case, following *Tolofson*, the Alberta Court of Queen's Bench found the applicable substantive law governing the car crash to be the law of California including California's limitations law, which barred the claim. The trial judge held that to determine whether the wife's action should be allowed to proceed required consideration of both California's and Alberta's limitations laws. In order to maintain the action in Alberta, neither limitation period could have expired. The Court of Appeal of Alberta unanimously upheld the trial judge's finding. I agree with their conclusion.

4 Since the California limitations period applied and had expired prior to the commencement of the action, there was no right of action at the time the appellant initiated her claim in the Alberta court. Section 12 does not purport to revive an action time-barred by the substantive law of the place where the accident occurred. Had the intention of the legislature been as argued, the legislation would have said so.

5 Section 12 is perfectly valid provincial legislation under s. 92(14) of the *Constitution Act, 1867* ("the administration of justice in the province"). *Tolofson* was a "choice of law" case. The Court's classification of limitation periods for "choice of law" purposes as substantive rather than procedural did not (and did not purport to) deny the province's legislative authority over "the administration of justice *in the province*". A foreign jurisdiction, by adopting a limitation period longer than that of Alberta, cannot validly impose on Alberta courts an obligation to hear a case that Alberta, as a matter of its own legislative policy, bars the court from entertaining.

6 The Alberta legislature can, in relation to the administration of justice in the province, determine the time limits within which the Alberta courts can entertain actions, including live actions arising in a foreign jurisdiction governed by the substantive law of that foreign jurisdiction.

7 In *Tolofson,* as stated, this Court concluded that limitations law, which in the past had frequently been classified as procedural in common law traditions and substantive in civil law traditions, was, in fact, substantive in nature and must be treated as such. Accordingly, when the California limitation period expired on May 10, 1999, the appellant's action against her husband became time-barred, and he acquired a substantive

right under California law not to be further troubled by any claims arising out of the car crash.

8 Section 12 does not purport to revive time-barred actions. In this case, the doors of the Alberta court were still open on May 9, 2000 when the claim was filed but there was no right of action arising under the law of California capable of being pursued by the wife against her husband. They both lived in Alberta but the law governing the consequences of the car crash, California's, had barred the claim a year earlier.

9 Section 12 will operate, of course, if the law in the place the accident occurred provides for a limitation period longer than that of Alberta. In such a case, the claimant might still have a live cause of action against a defendant in Alberta, but the effect of s. 12 would be to close the door of the Alberta court against the claim's being heard in that jurisdiction (though it may be capable of pursuit elsewhere). This result follows from the legislature's use of a "notwithstanding" provision in s. 12, i.e., "[t]he limitations law of the Province shall be applied whenever a remedial order is sought in this Province, *notwithstanding that, in accordance with conflict of law rules*, the claim will be adjudicated under the substantive law of another jurisdiction" (emphasis added).

10 Both the parties and the intervener made submissions on the constitutionality of s. 12 on the assumption that the Alberta legislature had purported to breathe life into an action that was time-barred by the applicable substantive law. As I conclude that s. 12 does no such thing, it is unnecessary to address the constitutional question.

Conclusion

11 The limitations law forming part of the applicable foreign substantive law, in this case California law, applies. As the applicable California limitation is one year, the appellant's action is statute-barred. The appeal is dismissed with costs.

The following are the reasons delivered by

BASTARACHE J. —

1. Introduction

12 This appeal concerns the proper interpretation and constitutional validity of s. 12 of the Alberta *Limitations Act*, R.S.A. 2000, c. L-12, which provides:

> The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

The circumstances in which the question came to be presented to this Court are as follows.

13 While on a holiday, the parties were involved in a single car accident in or around Fresno, California, on May 10, 1998. The respondent was driving. The appellant and respondent are married and, at the time of the accident, were in the process of moving from British Columbia to Alberta. The vehicle they were driving was registered and

insured in British Columbia. The parties have admitted that, for the purposes of this action, they were at all material times resident in Calgary, Alberta.

14 On May 9, 2000, the appellant filed a statement of claim in the Court of Queen's Bench of Alberta to recover compensation for the injuries and damages she sustained as a result of the accident. The respondent successfully sought an order for summary dismissal of the claim on the basis that the action was barred under California law, where the applicable limitation period is one year: (2002), 3 Alta. L.R. (4th) 84. That decision was upheld by the Court of Appeal: (2004), 30 Alta. L.R. (4th) 67, 2004 ABCA 158. The appellant argues that the purpose and effect of s. 12 is to apply the two-year Alberta limitation period to the exclusion of the California one-year limitation period, thereby allowing the action to proceed.

15 The question before this Court is whether s. 12 effectively excludes the operation of the limitations law of the foreign jurisdiction whose laws otherwise govern the cause of action. Section 12 purports to apply Alberta limitations law "notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction." The difficulty in interpreting these words results in particular from the decision of this Court in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, which recognized that limitation periods are substantive. As such, the reference to the substantive law of the foreign jurisdiction in s. 12 would normally include that jurisdiction's limitations law. The appellant argues here, however, that the use of the word "notwithstanding" serves to exclude the limitations law of the foreign jurisdiction.

16 If, as the appellant suggests, s. 12 is interpreted as ousting the limitations law of the foreign jurisdiction, then Alberta limitations law applies exclusively in all cases

where a remedial order is sought in Alberta. Where, as here, the relevant California limitation period is shorter than Alberta's, the longer Alberta limitation period applies and effectively recognizes a cause of action that California law would have extinguished. If the relevant California limitation period were longer than Alberta's, then the shorter Alberta limitation period would apply so as to bar the action in Alberta. Whether the appellant could file an action in California in such a case is not discussed by the Court of Appeal; this question is no doubt left to a determination of the *forum conveniens* by the court in which the action is eventually brought.

17 If, as the respondent suggests, s. 12 is interpreted so as not to oust the limitations law of the foreign jurisdiction, then the court must apply the California limitation period first, followed by the Alberta limitation period. This is because the Alberta limitation period applies notwithstanding the fact that the claim is adjudicated under the substantive law of the foreign jurisdiction, including its limitations law. Thus, where, as here, the substantive law of California bars the action, the Alberta limitations law does not apply. This is because there is no right upon which a remedial order can be sought in the Alberta courts, and the conditions of s. 12 are therefore not met.

18 For the reasons that follow, I conclude that either interpretation of s. 12 results in an unconstitutional attempt by the province of Alberta to legislate extra-territorially.

2. The Proper Interpretation of Section 12 of the *Limitations Act*

2.1 *The Plain Language of Section 12*

19 The parties differ as to the meaning of the term "notwithstanding," specifically whether it ousts the limitations law of the foreign jurisdiction. According to P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 356:

> Because the legislature is aware of possible inconsistencies, it sometimes adopts explicit rules establishing an order of priority between different enactments.
>
> A variety of well-known terms is used. The statute will declare that it applies "notwithstanding" provisions to the contrary. If, on the other hand, precedence is to be given to another provision, the statute will operate "subject to" that enactment. Sometimes, a statute will contain a separate section decreeing that its provisions "prevail over any provision of any statute which may be inconsistent therewith".
>
> Two types of difficulty arise with this kind of enactment. The more obvious is the problem of identifying the inconsistency. This is not always a simple matter. Deciding on the mere existence of inconsistency itself gives rise to major issues of interpretation. [Emphasis added; footnotes omitted.]

20 Accepting for the sake of argument only that the use of the term "notwithstanding" establishes an order of priority favouring the application of Alberta limitations law in case of inconsistency, the question is whether an inconsistency arises as a result of the application of both limitations laws. The Alberta Court of Appeal concluded that the proper interpretation of s. 12 requires consideration of both California's and Alberta's limitations laws. The end result is that in order for an action to proceed in the Alberta courts, neither the foreign limitation period nor the Alberta limitation period can have expired. The Court of Appeal found that s. 12 recognizes that California law governs and therefore creates the cause of action; the effect of s. 12 would then merely be to shorten the time period within which an action can be brought in Alberta: see *Ryan v. Moore*, [2005] 2 S.C.R. 53, 2005 SCC 38.

21 Nonetheless, the operation of both limitation periods may result in an implicit inconsistency. Professor Côté explains that “implicit inconsistency occurs when the cumulative application of the two statutes creates such unlikely and absurd results that it is fair to believe this was not what the legislature desired” (p. 352). The effect of the Court of Appeal’s interpretation would be the following: in actions proceeding before the Alberta courts where foreign law applies, the defendant would always benefit from the shortest available limitation period. There does not seem to be any legislative purpose served by such a result. If it is determined that the application of both limitations law results in an implicit inconsistency, then the effect of the term "notwithstanding" is to favour the application of Alberta limitations law to the exclusion of foreign limitations law. Such an interpretation is likely more faithful to what the legislature intended. In fact, the legislature's inclusion of the word "notwithstanding" suggests that it contemplated the possibility that inconsistencies would arise in the application of both the forum limitations law and the foreign limitations law.

2.2 *Extrinsic Evidence of Legislative Intent*

22 This Court has consistently held that

> [t]o-day there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *The Construction of Statutes* (2nd ed. 1983), at p. 87)

23 The appellant contends that where the plain language of a legislative provision is clear and unambiguous, extrinsic evidence of legislative intent should not be admissible.

I do not find the ordinary meaning of s. 12 to be clear and unambiguous. I would also question whether statutory interpretation should ever proceed solely on the basis of the plain language of the legislation, without consideration of the entire context, including the purpose and the scheme of the Act. In approving of Professor Driedger's approach to statutory interpretation, Iacobucci J. recognized that "statutory interpretation cannot be founded on the wording of the legislation alone" *(Rizzo & Rizzo Shoes*, at para. 21; see also R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 9-18). It is now well accepted that legislative history, Parliamentary debates, and similar material may be quite properly considered as long as they are relevant and reliable and not assigned undue weight: *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 17.

24 There is very little available extrinsic evidence of the legislative intent behind s. 12. The appellant relies on the Alberta Law Reform Institute, Report No. 55, *Limitations* (1989), which concluded that limitations law was properly classified as procedural and that courts should apply local procedural law. The recommendation in the Report to include s. 12 in the new Alberta *Limitations Act* was premised in part on the uncertainty resulting from the characterization of limitation periods as substantive or procedural, depending upon their particular wording. The Report predated the decision in *Tolofson*, by five years. In *Tolofson*, La Forest J. recognized that all limitation periods, regardless of their particular wording, were substantive, thereby resolving the uncertainty that had motivated the Report and its recommendation.

25 More importantly, there is no evidence on the record that the legislature considered or debated *Tolofson* or the Report, which was not tabled at the time the Act was introduced and passed. The government of Alberta opted not to implement the

Report's recommendation in 1989. In 1996, s. 12 was introduced by way of private member's bill. The only other extrinsic evidence upon which the appellant relies is a single sentence spoken by Mr. Herard, the member of the Legislature who introduced the bill:

> To remove the often difficult task of categorizing limitations legislation to determine whose law applies to a claim, Bill 205 states that, regardless, limitations law is governed by Alberta law if an action is brought in this province.
>
> (*Alberta Hansard*, vol. I, 23rd Leg., 4th Sess. March 20, 1996, at p. 707 (Mr. Herard))

Such evidence, taken alone, cannot be indicative of legislative intent. In fact, Mr. Herard refers to the difficult task of categorizing limitations legislation, even though La Forest J. authoritatively recognized in *Tolofson* that all limitation periods are substantive in nature.

2.3 *The Presumption against Changing the Common Law*

26 This principle was recently affirmed by Iacobucci J., speaking for a majority of this Court in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 39:

> To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed". In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that "in the absence of a clear provision to the contrary, the legislator should not be

> assumed to have intended to alter the pre-existing ordinary rules of common law".

27 I do not find the principle to be applicable in this case. As mentioned earlier, the relevant principles of common law were developed by La Forest J. in *Tolofson*. In that case, La Forest J. held that the rule of private international law that should generally be applied in torts is the law of the place where the activity occurred or the *lex loci delicti*. This choice of law rule was largely premised on the territorial principle that organizes the international legal order and federalism in Canada. La Forest J. was also motivated by a number of important policy considerations, including the need for certainty, predictability, and ease of application. The *lex loci delicti* rule has the benefit of being forum-neutral and eliminates potential forum-shopping concerns. La Forest J. explained that "[o]rdinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly" (*Tolofson*, at pp. 1050-51).

28 Also in *Tolofson*, La Forest J. determined that where the governing law is the *lex loci delicti*, the relevant limitation period under that law is applicable and binding on the court hearing the dispute. The reason for this was that limitation periods constitute substantive law. I shall return to this issue in addressing the constitutionality of the impugned legislation. Generally then, the common law provides that the law of the place of the tort governs and that the limitation period it prescribes is applicable and binding on the court in which the action proceeds.

29 Section 12 accepts that, "in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction". However, it seeks to

apply Alberta limitations law "notwithstanding" these rules. The interpretation suggested by the appellant means that Alberta limitations law will displace the foreign limitations law in all cases. In effect, her argument would suggest that s. 12 has determined that limitation periods are procedural. The interpretation suggested by the respondent means that Alberta limitations law will only displace the foreign limitations law in cases where the applicable Alberta limitation period is shorter than its foreign counterpart. Effectively, the respondent argues that though the limitation period of California is part of its substantive law, Alberta can apply a procedural limitation period to determine whether a cause of action subsisting under the laws of California can be adjudicated in Alberta. Since both interpretations alter the common law, the presumption cannot be determinative.

2.4 *The Presumption against Extraterritorial Effect*

30 The legislative jurisdiction of the provinces is limited to matters "[i]n each Province" by the wording of s. 92 of the *Constitution Act, 1867*. Unless otherwise explicitly or implicitly provided, legislatures are presumed to respect the territorial limits of their legislative powers: Côté, at pp. 200-203. If possible, legislation should be construed in a manner consistent with this presumed intent. Similarly, it is now accepted that where legislation is open to more than one meaning, it should be interpreted so as to make it consistent with the Constitution: *McKay v. The Queen*, [1965] S.C.R. 798, at p. 803; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078.

31 The parties have proposed two interpretations of s. 12. Although I find the interpretation suggested by the appellant to be more plausible, there is insufficient

indicia of legislative intent to determine which interpretation should be preferred. I will therefore address the constitutionality of both interpretations.

3. The Constitutional Validity of Section 12 of the *Limitations Act*

32 The most recent authority on extraterritoriality is *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49. The legislative power of the provinces is territorially limited as a result of the words "[i]n each Province" appearing in the introductory paragraph of s. 92 of the *Constitution Act, 1867*, as well as by the requirements of order and fairness that underlie Canadian federalism: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1102-3; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 324-25; *Imperial Tobacco*, at paras. 26-27. The dual purposes of s. 92 are to ensure that provincial legislation has a meaningful connection to the enacting province, and to pay respect to the legislative sovereignty of other territories: *Imperial Tobacco*, at para. 36.

33 The first step is to determine the pith and substance of the legislation and to determine under what head of power it falls: *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 332; *Imperial Tobacco*, at para. 36. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it: *Imperial Tobacco*, at para. 36. The court must also consider whether s. 12 pays respect to the legislative sovereignty of other territories: *Imperial Tobacco*, at para. 36. If these two conditions are met, then the purposes of s. 92 of the *Constitution Act, 1867* are respected and the legislation is valid.

3.1 *The Pith and Substance of Section 12 of the Limitations Act*

34 The purpose and effect of s. 12 is to render Alberta limitations law applicable whenever a remedial order is sought in the Alberta courts. Alberta limitations law being ordinarily applicable in cases proceeding before the Alberta courts where Alberta law otherwise governs the claim, the only circumstance in which s. 12 operates is where the Alberta conflict of law rules point to the substantive law of another jurisdiction as governing the cause of action. Typically, in applying this other law, the Alberta court would also apply the limitation period it prescribes, as this Court recognized in *Tolofson* that limitation periods are substantive in nature. The purpose and effect of s. 12 is therefore to render Alberta limitations law applicable in cases where it would not otherwise be – precisely because the Alberta choice of law rules point to the law of a foreign jurisdiction as the governing law.

35 Limitation periods have the effect of cancelling the substantive rights of plaintiffs, and of vesting a right in defendants not to be sued in such cases. The pith and substance of the law must therefore be characterized as relating to civil rights, pursuant to s. 92(13) of the *Constitution Act, 1867*.

36 The appellant contended in oral argument that it was open to the Alberta Legislature to reverse the holding in *Tolofson* that limitation periods are substantive law and that this is what Alberta did by adopting s. 12. I believe this argument rests on a misunderstanding of *Tolofson*. La Forest J. did not decide as a principle of common law that limitation periods should simply be treated substantively. Instead, La Forest J. explained that "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" (*Tolofson*, at p. 1072; emphasis in original). La Forest J. recognized that limitation periods are, *by their very nature*, substantive, precisely because they are determinative of the rights of the both parties in a cause of action: they destroy the right of the plaintiff to bring suit and vest a right in the defendant to be free from suit. The provinces cannot change the nature of limitations law without fundamentally changing the content of limitations law. No implicit intention to that effect could be found in the present case. Indeed, because substantive legislation can be applied by a court so as to affect rights governed by a foreign law, "legislation should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the legislation is substantive" (*Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323 (B.C.C.A.), at p. 328, cited with approval in *Tolofson*, at pp. 1068-69).

37 The procedural/substantive distinction is essentially a label. That label, however, has important constitutional consequences. Where a law is characterized as procedural, it constitutes valid law under s. 92(14) of the *Constitution Act, 1867*, as relating to the administration of justice within the province, so long as it applies to the Alberta courts or to actions proceeding before the Alberta courts. No other enquiry is required. If Alberta can treat limitation periods as procedural, then it can prescribe limitation periods for all actions proceeding before the Alberta courts without ever running afoul of the Constitution. If a law is characterized as substantive, however, it must be justified pursuant to s. 92(13) of the *Constitution Act, 1867*, as relating to civil rights in the province, meaning that the *Imperial Tobacco* analysis for the *situs* of intangibles is engaged. To allow Alberta to treat limitation periods as procedural is, essentially, to allow it to circumvent the *Imperial Tobacco* meaningful connection test. The effect would be to allow Alberta to legislate extra-territorially. In other words, the question of

whether limitation periods are procedural or substantive is not something the province can decide. The reason for this is that the procedural/substantive distinction essentially determines, for purposes of constitutional validity, whether a law falls under s. 92(14) or s. 92(13) of the Constitution. That distinction must be based on something other than what a province says. It should in my view be based on the actual effects of the law. The effects of limitation periods were made clear in *Tolofson*: they cancel the substantive rights of plaintiffs to bring the suit, and they vest a right in defendants to be free from suit. This is the reality Alberta cannot ignore.

38 This may seem strange in light of the common law's traditional conception of limitation periods as procedural. This conception was relatively unchallenged until the decision in *Tolofson*, although La Forest J. notes at pp. 1071-72 that some common law courts had already begun to chip away at the right/remedy distinction on the basis of relevant policy considerations. In addition, at least one Canadian common law judge had recognized that limitation periods vest a right in the defendant to be free from suit: Stratton C.J.N.B., in *Clark v. Naqvi* (1990), 99 N.B.R. (2d) 271 (C.A.), at p. 275-76, cited with approval in *Tolofson*, at p. 1072. La Forest J. identified the two main reasons for the common law's long and mistaken acceptance of the procedural nature of limitation periods: the view that foreign litigants should not be granted advantages not available to forum litigants, and the mystical view that a common law cause of action gave the plaintiff a right that endured forever (*Tolofson*, at p. 1069). Neither of these is persuasive. I think the principle developed in *Tolofson* should no longer be questioned.

39 Nonetheless, the common law long considered limitation periods as procedural, such that it may seem strange, at first glance, to conclude that limitations law must be considered substantive and, as regards provincial legislation, must be justified pursuant

to s. 92(13) of the *Constitution Act, 1867*, as constituting laws in pith and substance directed at civil rights. The characterization of limitation periods has up until now never raised constitutional concerns. This is the first time this Court has addressed a legislated choice of law rule dealing with limitation periods and had to pronounce on its constitutionality. In dealing with the issue, the Court must first recognize that the provinces cannot legislate extra-territorially. The common law was not similarly concerned with the territoriality principle, until the decision in *Tolofson*, where La Forest J. refers to it explicitly. In holding that the proper choice of law rule for torts was the *lex loci delicti*, or the law of the place of the tort, La Forest J. explained that:

> It will be obvious from what I have just said that I do not accept the former British rule, adopted in *McLean v. Pettigrew*, that in adjudicating on wrongs committed in another country our courts should apply our own law, subject to the wrong being "unjustifiable" in the other country. As I see it, this involves a court's defining the nature and consequences of an act done in another country. This, barring some principled justification, seems to me to fly against the territoriality principle. [Emphasis added; p. 1052.]

Turning to the mistaken common law rule that limitation periods are procedural, La Forest J. referred to this same analysis: "[t]he principle justification for the rule [that limitation periods are procedural], preferring the *lex fori* over the *lex loci delicti*, we saw, has been displaced by this case" (p. 1071). In *Tolofson*, La Forest J. was formulating common law choice of law rules. In this case, the Court is faced with a provincially legislated choice of law rule. It must be remembered that the territoriality principle of which La Forest J. speaks is not merely a matter of comity; it also constitutes a constitutional limit on the legislative jurisdiction of the provinces.

40 The next question is whether, pursuant to the test developed in *Imperial Tobacco*, the rights to which s. 12 purports to apply are located in the province within the meaning

of s. 92 of the *Constitution Act, 1867*. If they are not, s. 12 will be deemed unconstitutional because of its extraterritorial effects.

3.2 *The Meaningful Connection Test*

41 Section 12 only renders Alberta limitations law applicable to actions proceeding before the Alberta courts. It constitutes in this sense a legislated choice of law rule that determines when the Alberta courts will apply Alberta limitations law. The appellant contends that the law on adjudicative jurisdiction and *forum conveniens* will ensure that, in all cases where s. 12 renders Alberta limitations law applicable, a real and substantial connection between Alberta and the cause of action will have been demonstrated. However, a real and substantial connection is not equivalent to a meaningful connection as defined in *Imperial Tobacco*. The two notions cannot be conflated.

42 In order for provincial legislation to be valid, there must be a meaningful connection between the enacting province, the legislative subject-matter and the persons made subject to it. By contrast, the existence of a "real and substantial connection" is a more flexible inquiry that is meant to determine which court should hear the case as a matter of convenience. As La Forest J. explained in *Hunt*, at p. 325, the test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction". Binnie J. stated in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 58, that "a 'real and substantial connection' sufficient to permit the court of a province to take

jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome".

43 Turning to the doctrine of *forum conveniens*, it is generally concerned with matters of convenience. This is why the real and substantial connection test and the *forum conveniens* doctrine do not necessarily require the same degree of connection between the province, the subject matter of the relevant law and the parties subject to that law, as does the *Imperial Tobacco* test. This led La Forest J. to recognize in *Tolofson*, at p. 1070, that "[t]he court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order".

44 The parties are making arguments that, should they be accepted, would bring this Court to conflate the constitutional threshold for adjudicative jurisdiction and the constitutional threshold for legislative jurisdiction. Such a result is unwarranted and would be contrary to *Imperial Tobacco*. The real and substantial connection necessary for the courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue.

45 Section 12 is, in essence, a choice of law rule that is not premised on any connection, other than the real and substantial connection necessary for the Alberta courts to take adjudicative jurisdiction. I therefore conclude that the real and substantial connection established is not sufficient to provide a meaningful connection between the province, the legislative subject-matter and the individuals made subject to the law. Relying partly on *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), I concluded in

dissenting reasons in *Unifund Assurance*, at para. 133, that "a link with the subject matter of the claim is sufficient to establish the jurisdiction *simpliciter* of a forum given the flexible approach that has been endorsed by this Court". The flexibility of the approach used to determine jurisdiction is reflected in the unanimous decision of the Ontario Court of Appeal in *Muscutt*, which identifies the factors which ought to be considered:

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendant;
- unfairness to the defendant in assuming jurisdiction;
- unfairness to the plaintiff in not assuming jurisdiction;
- the involvement of other parties to the suit;
- the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international in nature; and
- comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

These factors are not strictly concerned with the connection of the forum to the parties and the cause of action. Instead, these factors reflect important policy considerations such as fairness, comity and efficiency.

46 Since s. 12 does not provide for a meaningful connection between Alberta, the civil rights affected by s. 12, and the plaintiffs and defendants made subject to s. 12, it violates the territorial limits of legislative competence contained in s. 92 of the *Constitution Act, 1867*. The purpose and effect of s. 12 is to apply Alberta law so as to

destroy accrued and existing rights situate without the province, regardless of whether or not Alberta has a meaningful connection to those rights or right-holders.

47 This is true for both proposed interpretations. The interpretation suggested by the appellant means that in all cases where a remedial order is sought in Alberta and where foreign law governs the claim, s. 12 will destroy the substantive right of either the plaintiff or the defendant. Where the Alberta limitation period is shorter than its foreign counterpart, s. 12 will destroy the right of the plaintiff to bring the suit. Where the Alberta limitation period is longer than its foreign counterpart, s. 12 will destroy the right of the defendant to be free from suit.

48 The interpretation suggested by the respondent means that s. 12 only has effect where the Alberta limitation period is shorter than the foreign limitation period. Where the Alberta limitation period is longer than its foreign counterpart, the respondent argues that the cause of action will have ceased to exist under the foreign law and that there will therefore be no claim upon which to sue in Alberta. According to this interpretation, s. 12 only destroys the substantive rights of plaintiffs. Leaving aside the correctness of this interpretation, the fact that s. 12 destroys the substantive rights of plaintiffs to bring suit is sufficient to render it unconstitutional. This is because Alberta is legislating so as to destroy the substantive rights of plaintiffs to bring an action without providing for a meaningful connection between Alberta, the rights in question and the right-holders.

49 The notion that this problem can be overcome because a new action could be started in California, even where the Alberta court has decided that it constitutes the proper forum, is questionable. The question of whether or not the action could proceed in California is not before the Court. Instead, an Alberta court has taken jurisdiction and,

in accordance with s. 12, must apply the substantive law of California to govern the claim. Here, the effect of s. 12 is then to deny the plaintiff the right to bring the suit. Accepting that s. 12 does not provide a meaningful connection between Alberta and the right upon which the plaintiff is suing, such an interference with the plaintiff's right is unconstitutional.

50 For the reasons given above, s. 12 of the *Limitations Act* also fails the second branch of the *Imperial Tobacco* test in so far as it simply disregards the legislative sovereignty of other jurisdictions within which the substantive rights at issue are situated.

51 This is not to say that the provinces are constitutionally prohibited from modifying the ordinary choice of law rules. However, should they chose to do so, they must legislate within their territorial limits and ensure that there is a meaningful connection between the enacting province, the legislative subject-matter and the persons made subject to their laws.

4. Conclusion

52 Since I find that both proposed interpretations of s. 12 are unconstitutional, I need not resolve the issue of the proper interpretation of s. 12. Section 12 of the Alberta *Limitations Act* is invalid and of no force or effect. I therefore agree that the California one-year limitation period applies to bar the plaintiff's action.

Appeal dismissed with costs.

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