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P. J. O'Hearin

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COMMENTAIRES

THE NOVA SCOTIA CIVIL PROCEDURE RULES — AN APPRECIATION

by HIS HONOUR JUDGE P.J. O'HEARN*

Civil procedure does not rank very high in juridical science: the employment of civil procedure is a practical, everyday affair and the pleader habitually relies on precedent. Who can blame him if, entrusted with the weighty claims of his client, he invariably chooses to follow the safe course? Thus, the science of pleading has degenerated into the art of picking the appropriate precedent and adapting it to the current case. This art, no doubt, requires skill and intelligence, but it rarely involves the kind of intellectual probing that one encounters in dealing with *mens rea*, obligations, causation or compensation. Contemporary developments in the Common-Law concepts of Unjust Enrichment, for example, or of Frustration of Contract (which seems to have invaded divorce law under the guise of Irremediable Breakdown) have resulted in the formulation of principles and in a degree of generalization that can be truly called scientific. The triumph of the Common Law has been its evolution from a procedure-dominated primitive complex[1] to the present day system, in which procedure is valued only for its comparative efficiency.

Despite our justified low esteem, civil procedure can easily be shown to be of fundamental importance and to be founded on very basic principles. Who can doubt the importance of 'due process' in the constitutional law of both England and the United States? In the

* Of the County Court of Halifax, Nova Scotia.

latter country there is even a distinction between 'substantive due process' and 'procedural due process', and this constitutional canon has come to form the basis of many rights and obligations that are only remotely procedural.

Procedures are not ends in themselves: they exist to serve the purposes of litigants and of the substantive law: procedures are instrumental. Accordingly, the fundamental principle of procedure, whether civil or criminal, must be the purpose for which it exists. One of the significant innovations of the Nova Scotia *Civil Procedure Rules*, which came into effect on March 1, 1972, is the explicit statement of such a purpose in rule 1.03: 'The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding'. Whether this will prevent or delay the almost inevitable regression of the practitioner into pedantry and rote-application of the rules remains to be seen, but the rule, itself, is a new and interesting aid to interpretation and application. It is a fair question, however, whether the rules, themselves, are well adapted to their stated purpose. On the whole, I think they are.

Before 1972, Nova Scotia civil procedure was governed by rules based directly on the Rules of the Supreme Court of England, which were drafted and brought into force with the consolidation of the English law courts in the last quarter of the last century. A similar situation prevailed in most Common-Law jurisdictions in Canada, although the adaptation has not been uniform. It did witness to a general Canada-wide conclusion that certain aspects of the English rules did not suit this country. England, as part of its post-World-War-II reformation of institutions, reworked its civil procedure rules into a much more modern form, under the guidance of the *Evershed Report*[2] of 1953. In Nova Scotia, committees of the Nova Scotia Barristers Society promoted some reforms in the fifties and sixties and these efforts challenged or encouraged Professor A. J. Meagher, Q.C., of Dalhousie Law School to attempt a more ambitious project, a revised code or procedure, capable of being used in any of the Common-Law provinces..

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1. See, e.g., Plucknett, *A Concise History of the Common Law*, (3d ed.) Butterworth, London 1940, p. 340; Holmes, *The Common Law*, (41st imp) Little, Brown, 1948, p. 253.

2. *The Evershed Report, Final Report of the Committee on Supreme Court Practice and Procedure*, H.M.S.O. London, July, 1953, Cmd. 8878.

This interaction led the then attorney general, the Honourable R. A. Donahoe, Q.C., to appoint a committee in 1967, consisting of Chief Justice G.S. Cowan as Chairman, Professor Meagher as Secretary and Executive Director and Mr. Justice M. C. Jones, Mr. J.W. Kavanagh, Mr. A. W. Cox, Q.C. and Mr. Linden M. Smith, Q.C., as members. Chief Justice Cowan had been active when at the Bar in procedural reform efforts, as had the present writer. The committee was charged to revise the civil procedure of the Supreme and County Courts.

At that point, Alberta was well advanced in a revision of its rules and the committee obtained considerable assistance from the Alberta Rules Committee and especially from M. J. H. Laycraft, Q.C., a member. Nevertheless, it was ultimately decided to adapt the English revision to Nova Scotia, using the text that came into force on October 1, 1965.[3] This required much more reworking than in 1884, when the bulk of the English rules was taken over *verbatim*. The recent English rules do not have the elegance in drafting and structure that the 19th century rules had. They tend to be somewhat verbose and, of course, differences between Nova Scotia and England in court structure, methods of advocacy, legislation, typical causes of action and other circumstances in which civil proceedings take place are considerably greater today than in 1884.

In a paper circulated to the Bar in 1970, Professor Meagher summarized the principal changes. He noted that much duplication had been eliminated, e.g., the word 'proceeding' was employed to designate every kind of procedure in the court, and the word 'action' had been eliminated. This is an example that I find unfortunate, because the rules do not eliminate the distinction between actions and other forms of carrying on proceedings in the court: they merely make it necessary to use circumlocutions, such as 'a proceeding commenced by an originating notice (action)' where a rule applies only to an action. See rules 28.01, 31.01, and 37.02.

Professor Meagher gives other examples of simplification: Thus, 'order' replaces 'judgment or order'; 'court' replaces 'court or a judge' and, indeed, the word 'court' is used to designate any court official who is given power to make a binding decision, whether final or interlocutory. This idea was picked up from the English rules, Order 1, Rule 4(2), and is working quite satisfactorily.

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3. *The Rules of the Supreme Court (Revision) 1965*, H.M.S.O. London, 1965, S.I. 1965 No. 1776 (L.23).

While I had a hand in correcting the drafting and even in some of the redrafting, I am not in general too happy with it. Drafting is not the most important part of the change however, and most of the changes in substance are well worthwhile.

Every proceeding is commenced by filing an originating notice with the prothonotary. From that point on, proceedings fall into two general classes, according to whether the parties proceed to a hearing in court or chambers at a specified date ('originating applications') or whether they follow the program for an action, with the exchange of pleadings and the other interlocutory steps usual in a action. The latter class is now designated 'proceeding commenced by an originating notice (action)', which is a cumbersome term. Originating applications are either *inter partes* or *ex parte* and there are rules governing the choice of proceeding for the class of case in question, but there is also provision for continuing a proceeding in the correct form where it has begun incorrectly: see Rules 2.01(3) and 37.01. This is new and has already proved useful.[4]

Not only is the writ of summons abolished but all writs are abolished, in favour of notices or orders. There are both theoretical and practical objections to commencing a proceeding in every case with an originating notice, e.g., where the solicitor for a defendant agrees to accept service or, in most cases, of originating applications *ex parte*. I urged on the committee that it would be simpler to adopt the procedure prevalent in the federal courts of Canada and the United States and in some western provinces, where proceedings are commenced by filing a statement of claim. This is served, where necessary, with a notice of action endorsed on it. In practice it may make very little difference, because a statement of claim must be served with the originating notice in any case under our procedure, but it turns out that the originating notice instead of eliminating the summons is merely a substitute for it, and some of the difficulties inherent in the writ of summons approach remain, such as where service out of the jurisdiction is sought. (This is cured in a somewhat

4. Cp. *Medlee Ltd.* v. *Jemco Holdings Ltd. et al.*, SAC 354, 1975, Sept. 18, Cowan, C.J.T.D. and *Ed DeWolfe Trucking Ltd. et al* v. *Shore Disposal Ltd.*, SH 10111, 1976, May 27, MacIntosh, J.,(both unreported), with the former practice of quashing a proceeding begun by the wrong process.

different way). A practical objection is that our procedure is a step away from uniformity, which seems to be in the direction of starting with the statement of claim.[5]

An originating notice may be served within Canada or the United States without leave of the court. This is not new in Canada but here it has eliminated a great many chambers applications. The responsibility is now on the solicitor, issuing an originating notice, to make sure that it is a useful thing to do.[6] The appearance has been eliminated—this is not a new step in Canada either, but then a great many of the improvements have been incorporated from many sources. The committee's approach was quite eclectic. Thus, from the United States Federal Court rules comes the provision that a defendant may commence a third-party proceeding against any person liable to him for all or any part of the plaintiff's claim.

A more important contribution from the United States Federal Court rules was the oral discovery rule. This permits any person whatsoever to be examined on oral discovery. Several years ago Professor Meagher drafted a very liberal rule for oral discovery, which was presented to the judges at that time. It was too radical for them and they adopted a rather conservative discovery order based on Ontario's then procedure. The new rule is a really effective tool for the efficient, expeditious and inexpensive determination of law suits.

One of the most important changes, to my mind, is the new procedure for execution. This is chiefly by an execution order, which not only contains the feature of a writ of execution, either against land or chattels but, more importantly, constitutes the executing officer, the sheriff, a receiver of all debts that become due to the execution debtor. This has superseded garnishee in Nova Scotia (where it was a largely ineffective remedy in any case) and has also, I believe, de-emphasized proceedings taken under what is called here the *Collection Act,* where a debtor is examined and ordered to make periodic payments under the ultimate threat of imprisonment for contempt. There is provision in Rule 53.05 limiting the amount of wages that can be seized in satisfaction of a debt under an execution order. The provision is rather quaintly worded and not too easy to understand:

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5. See also the recommendation in the JUSTICE report, *Going to Law*, London, Stevens & Sons, 1974, p.46, §162, where it is proposed that a 'complaint' replace the Writ of Summons.

6. See *Benedict et al* v. *Antuofermo,* (1975) 60 D.L.R. (3d) 460, Jones, J.

> (a) an employer shall only be required to pay to the sheriff fifteen per cent of the gross wages of an employee, provided that when the payment would reduce the net amount of wages payable to the employee, after the deduction of all amounts required by law to be deducted from such wages, to the amount of seventy-five dollars per week payable to an employee supporting a family, or fifty dollars per week to any other employee, then only the difference by which the payment of the fifteen per cent exceeds these respective amounts shall be paid to the sheriff;

This could be more flexible: under the garnishee rules enforced before 1972, it was possible for a debtor to increase his exempt wages by an application in the county court.

Rather than go through the changes in detail, useful though many of them are, it would probably be more worthwhile to note the main improvements. These, in the opinion of Chief Justice Cowan, with whom I respectfully concur, are:

(a) simplified procedure and language;

(b) shortened time;

(c) the fullest possible disclosure before trial (e.g., by disclosure of documents and wide oral discovery;

(d) the court controls the process after the defence is filed (this is more effective outside of Halifax;

(e) a mandatory pre-trial memorandum of facts and law;

(f) the use of the pre-trial conference, which has led to settlements in roughly 75% of cases instead of 25%, as formally.

The language has been simplified, although not to the extent that it is readily comprehensible by a non-lawyer. The difficulty does not arise so much with the individual provisions as with the Code itself, which is a complex body requiring study and a good general idea of the general course of proceedings before one can invoke the individual provisions with confidence. It is, without any doubt, lawyers' law. A parenthetical question asserts itself here: 'Is it desirable that court procedures should be so structured and expressed in the rules that an ordinary law lawyer can invoke them without

help? ' Is it feasible to do so? My own hunch is that it is not really feasible and that, therefore, it is not desirable. I am troubled by the fact that it should not cost people money to obtain justice, but I think that there are better ways to achieve this result than by trying to draft a procedural code for laymen.

The language has not been simplified to the extent that the originating notice, for example, is fool-proof. People still ignore it and then have to hire a lawyer to come to court to reopen default judgments. Nevertheless, the documents are clearer and give the recipient a better idea of what is intended.

Some steps have been eliminated but the principal saving in time has been through oral discovery, which, if properly conducted, leads either to a settlement or enables counsel to go into court with confidence that he can present his case properly prepared and without too much fear of surprise. This is part and parcel of the big change, the idea of the fullest possible disclosure before trial. The lawyer now, instead of playing his cards close to his vest must put practically all of them on the table. Indeed, the change has made the idea of a game between adversaries incongruous. What is called for now, is a skillful use of the discovery process to elicit what the true facts are and what the qualities of your client and his witnesses are, precisely as witnesses. Armed with this and being under an obligation to submit to the court before trial a theory of the case with legal authorities to support it (the pre-trial memorandum mentioned above), the conscientious advocate does his best work in preparation.

In addition, the pre-trial conference emphasizes this attitude and this trend. Its purpose is to eliminate the necessity of proof of matters that should not properly be contested because they can be established easily. It leads to the use of summaries, copies and agreements of fact at the trial. It also frequently brings counsel's attention to legal rules that he may have overlooked. While it is not precisely a method of reconciliation or conciliation, and none of our judges as far as I know try to press for settlements, the pre-trial conference, very frequently, leads to an agreed result rather than a trial. I find them particularly useful in mechanics-lien cases (builder's previleges) where there are many parties, and it is necessary to marshal the course of the trial and to determine who is interested in contesting the separate individual issues.

I have noted that the rules contain a great many liberalizing improvements taken from here and there and, thus, they might be considered a merely ecletic compilation. In fact, they have a structure and a form. While I think that structure and form can be improved, the basic principle that proceedings should take one of two forms is carried out consistently and in a very efficient manner. Despite the fact that the text is somewhat repetitious and even includes portions of other enactments for reference purposes, it is not without a certain legal elegance.

As I have remarked it is lawyers' law. The committee did not try to go behond that kind of law, nor did it seek to enable the litigant to obtain justice without cost. That, I think, is a proper aim for a Law Reform Commission and it might be pursued either provincially or by the Law Reform Commission of Canada. It is not an impossible aim, but obviously the main cost in litigation is the cost of the lawyer and, in my view, the lawyer is a necessary member of the judicial team, because he is an *equalizer*. That is, his function is to bring out his client's case to its best advantage without going beyond the bounds of propriety. While members of the Bar differ in ability and glory, on the whole their contribution is best seen as giving the client the assistance of competence that he may or may not and usually will not have, himself.

It would not take a great step in logic to infer from these premises that if a lawyer is to be provided but not at the cost of the client, it will have to be at the cost of the public, either by insurance or by state subvention. I do not shrink from this thought, although it poses problems with respect to freedom of choice that are extremely serious. To some extent, the legal aid system now in force in Canada are meeting the need. The contingent-fee arrangement is touted as a possible remedy—there I have deep reservations because it gives the lawyer an interest in the case, that he ought not to have. The ethical advocate should have no interest in the outcome that would sway his good judgment or influence his passions.

What is good, is that improvements are being made. Procedure is being examined critically and with a view to its real purposes for existence. In this light, I think that the Nova Scotia Civil Procedure Rules are a step in the right direction, and a fairly hearty one.