

Ironing the wrinkles out of the *Limitations Act, 2002 (Revised)*

The *Limitations Act, 2002* was proclaimed in force just over six years ago. The interpretation of this Act has given rise to abundant litigation. Some difficulties remain unresolved – the correct interpretation of s. 21 is a prime example.

The reported cases have also brought forward a problem which we had not initially anticipated: Are applications to add parties or causes of action, or to bring third party claims “safe”, so long as the application is brought within the limitation period? Does the fact that the actual court order is made after the expiry of the limitation period matter?

Traditionally, counsel assumed that the answers were “yes” and “no.” Two cases handed down in 2009 suggested that this assumption is not safe. What should counsel do?

Section 21

The correct interpretation of s. 21 will soon be before the Court of Appeal in *Veerella v. Khan*, an appeal from the Divisional Court (2009 CarswellOnt 5658 (Div.Ct)).

Section 21 of the Act remains contentious:

Adding parties

- (1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.

Misdescription

- (2) Subsection (1) does not prevent the correction of a misnaming or misdescription of a party.

Everyone now accepts that s. 21(1) prohibits adding defendants to an action after the limitation period against them has expired. The doctrine of “special circumstances” is no longer available. However, the wording of s. 21(1) does not clearly apply to plaintiffs. Is the doctrine of “special circumstances” still available to plaintiffs? Or is it unavailable by reason of s. 4?

Does s. 21(2) apply only to defendants who have been misnamed? Or may plaintiffs who have been misnamed also rely on s. 21(2)?

If the misnaming of a plaintiff cannot be corrected under s. 21(2), does the doctrine allowing for the correction of misnomers, as expounded in *Ladouceur v. Howarth*, [1973] S.C.J. No. 120 (S.C.C.), still apply?

The Court of Appeal may soon resolve these questions. It will hear the plaintiff’s appeal in *Veerella v. Khan* (January 20, 2009), an unreported judgment of Master Sproat. The Divisional Court dismissed the plaintiff’s appeal at 2009 CarswellOnt 5658 (Div.Ct.).

This action was brought in the name of Mr. Veerella personally, instead of on behalf of his corporation, Veerella Trading. Veerella brought a motion to substitute Veerella Trading as the proper plaintiff. Even though the defendants knew perfectly well that Veerella Trading was the proper plaintiff, they refused to consent to the amendment. Master Sproat dismissed the plaintiff’s motion.

She held that the plaintiff could not rely on s. 21, as that provision could only be used to correct the misnaming of defendants. The Master also held that the plaintiff could not rely on the doctrine of special circumstances to make the proposed amendment. The Divisional Court upheld the Master's decision. The Court of Appeal granted leave to appeal on December 21, 2009. The appeal will be argued on April 30, 2010.

To this writer at least, the judgment of the Court of Appeal in *Horgan v. Tanktek Environmental Services*, 2009 ONCA 820, suggests that the Court of Appeal takes it for granted that plaintiffs cannot be added after a limitation period has expired, but misnomers relating to them may be corrected, if the appropriate test is met.

The law concerning misnomer is in a state of flux. Under the "old" limitations regime, the case law permitted correction of misnomers with respect to both plaintiffs and defendants. This case law was not hugely significant, because parties seeking corrections could resort to the law concerning "special circumstances."

The law concerning misnomers has become much more important since the enactment of the *Limitations Act, 2002*. The first clear indication that the Court of Appeal was prepared to adopt a much broader interpretation of what errors constitute a "misnomer" was *Lloyd v. Clark*, 2008 ONCA, reversing [2006] O.J. No. 5006. The Court of Appeal allowed s. 21(2) to be used to permit the Regional Municipality of Durham to be substituted as a party defendant in the place of the Town of Ajax and the Town of Whitby, after the limitation period had expired. The court reasoned that the plaintiff had always intended to sue the municipality with responsibility for maintaining the road on which he had been injured.

In *Ormerod v. Strathroy*, (2009) 97 O.R. (3d) 321 (C.A.), the Court of Appeal expressly stated that the courts take a broader view of what does or does not constitute a misnomer, than they did 40 years ago. Now that the concept of misnomer has been broadened to apply to a wider range of situations, the standard used to permit its correction should take into account the extent of the error's departure from mere irregularity, in all the circumstances of the case.

Launching motions shortly before the limitation period is about to expire.

Another problem area has emerged – claims for contribution and indemnity launched a short time before the two-year limitation period under s. 18 is about to expire. The same concern also applies where a motion is brought to amend a claim, or to add parties or causes of action to it, shortly before the expiration of the limitation period. Some recent judgments have held that launching an application for leave to amend a statement of claim within the limitation period does not stop the limitation period from running. We polled LawPRO counsel. These are our best suggestions.

I. Adding Defendants to Statement of Claim

The Safest Way:

1. Follow the advice of Master Glustein in *Bank of Nova Scotia v. PCL Constructors Canada*, 2009 CanLII 56303 at para 96:
 1. Seek consent from the existing and proposed defendants to suspend the limitation period while the pleadings amendments are being considered by the defendants or until the motion is argued (which is permitted under s.22(3) of the *Limitations Act, 2002*); or
 2. Issue a new claim against the proposed defendants and move for consolidation later.

Some counsel do not bother attempting to get a tolling agreement; they simply issue a separate claim.

Less Safe:

2. Go to triage court (if available) or to the Master, explain that the limitation period is about to expire, and get an *ex parte* order adding the defendant, without prejudice to the defendant's right to dispute the order on any proper basis at a later date.
3. Bring a motion to add the defendants, even if the limitation period will likely expire before the motion is heard. Traditionally, counsel assumed that as long as the motion to add a party was launched within the limitation period, relief would not be refused on the basis that the claim was statute-barred at the time of the hearing. This assumption was based on *Banque Nationale de Paris (Canada) v. CIBC*, 2000 O.J. 134, 200 Carswell Ont. 102; *Graystone Properties Ltd. v. Smith et al* (1982), 39 O.R. (2d) 709 (C.A.); *Brightman Capital Ventures Inc. v. J.P. Haynes & Associates Inc.* [2001] CanLII 28379 (Div. Ct.) and other cases.

In 2009, two cases cast doubt on this understanding. Master Haberman in *Philipine/Filipino Centre v. Datol*, 2009 CanLII 2909 suggests that launching an application for leave to amend a statement of claim within the limitation period does not stop the limitation period from running. Justice D.M. Brown held in *Sandrabalan v. Toronto Transit Commission*, 2009 CanLII 18298 that a third party claim issued after the limitation period was statute-barred, even though the motion for leave to issue the claim was brought within the limitation period. Master Glustein dodged this issue in *Bank of Nova Scotia v. PCL Constructors Canada*.

On February 17, 2010, the Divisional Court reversed Master Haberman's judgment. Mr. Justice Ferrier, on behalf of the court, held that the law is clear that the parties' rights are to be determined as of the date of service of the motion. We have no idea whether this judgment will be appealed. Until we know for sure that the Divisional Court's judgment is the "last word" on the issue, the safest course of action is to get a tolling agreement, or issue a new claim and move for consolidation.

II. Issuing Third Party Claims

The same comments as above apply, except that issuing a stand-alone action for contribution and indemnity may prove to be a disaster.

1. Safest Ways:

- a) Get the agreements of the plaintiff and the proposed third party to toll the limitation period until the motion can be heard. If this is not practical,
- b) Go to triage court, or to the Master, on an emergency basis, referring to the imminent expiration of the limitation period. Ask for an order granting leave to issue the third party claim on an *ex parte* basis, without prejudice to the right of the other parties to move to set aside the third party claim on any proper basis, if so advised.

2. Other Possibilities

- a) A less seemly possibility is simply to attempt to get the third party claim issued by the court staff, notwithstanding that more than 10 days have passed since the statement of defence was filed (Rule 29.02). Apparently, some court staff will do this. Of course, the third party claim may be attacked after the fact. However, courts have authority to validate breaches of the Rules of Practice *nunc pro tunc*. It is far from clear that the courts have jurisdiction to validate a statute-barred third party claim.
- b) Launch a motion for leave to issue a third party claim within the limitation period. Take the position that *Sandrabalan v. TTC* was wrongly decided in view of the judgment of the Divisional Court in *Philipine/Filipino Centre v. Datol* (see above). You might also mention *Oulds v. Dupuis*, (2009), 96 O.R. (3d) 705. Justice Leitch resorted to the doctrine of “special circumstances” to validate a third party claim issued out of time *nunc pro tunc*. I do not know whether *Oulds* was appealed.

Potentially Disastrous

Issue a "stand-alone" action for contribution and indemnity, relying on *CBS Canada Holdings (Famous Players) v. Hammerschlag and Joffe*, 2009 CanLII 59691, per Bryant, J. Leave to appeal this judgment has been granted, 2009 CanLII 66997. There is reason to fear that the appeal will be allowed, in view of the judgment of the Divisional Court in *Regional Realty Services v. Honsl, Kelly Manthorp, Berrigan & Menzies*, (1998) 36 O.R. (3d) 256 (Div.Ct.). *Regional Realty Services* held that a claim for contribution and indemnity must be brought EITHER under s. 2 of the *Negligence Act* (action for contribution and indemnity AFTER settlement or judgment), OR under s. 5 (a third party claim or cross claim in the "main" action). A “stand-alone” action for contribution and indemnity litigated contemporaneously with the “main” action was not allowed.

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