

## E&amp;O claims

# The Kenora gambit

## Why it pays to know Ontario has two time zones ...and other repair stories

### ■ *Ontario has two time zones.*

Veteran Claims Counsel Doug Scott was able to exploit that fact to help one of our insureds “repair” a problem and avoid a claim.

Late one afternoon, Doug took a call from a frantic Toronto area lawyer who explained that a limitation period to sue on a business contract was expiring that day and the court office was now closed.

His clients knew about the limitation period, but had told the lawyer weeks earlier that they were not going to sue and were going to file for bankruptcy. Then, the day before, they had rushed into his office to tell him that they had changed their minds. They were not going to file for bankruptcy after all, and they wanted him to sue. The lawyer had prepared a draft statement of claim, but had not yet filed it.

Knowing that Kenora (near the Manitoba border) is one hour behind the rest of Ontario, Doug told the lawyer to immediately contact a law firm in Kenora, hire it as his agent, dictate over the phone a Notice of Action, and have that notice issued in Kenora before the court office closed.

The plan worked perfectly. The lawyer found a Kenora law firm to help him and was able to have the Notice of Action issued before the limitation period expired.

This is but one example of the kind of low-profile repair work that we do all the time to help lawyers avoid claims – and their clients avoid losses.

■ *In another case*, our insured acted for a client on an amalgamation of several corporations. One of the corporations had no assets but had provided a \$1.6 million guarantee of debts owing by a now bankrupt company to a Mr. H.

Because the newly amalgamated corporation had significant assets, H saw an opportunity to recover on the guarantee and sued the corporation.

LAWPRO's counsel brought a successful application on behalf of the amalgamated corporation for rectification of the articles of amalgamation – essentially dissolving the amalgamation *nunc pro tunc*.

The Court of Appeal dismissed H's appeal from the application decision and awarded \$55,450 in costs to the corporation/LAWPRO. Thus the client suffered no damages and the claim against our insured was repaired. (We have not yet been advised whether H will seek leave to appeal to the Supreme Court of Canada.)

■ *Practical advice from Claims Counsel Domenic Bellacicco* recently helped an insured to do a self-repair and have the administrative dismissal of his action set aside, thereby avoiding a claim.

The insured had reported to us very late that his action had been dismissed by the registrar for delay. It was Friday, and the motion to set aside the registrar's order was scheduled for the following Monday. The motion had already been adjourned several times.

In its motion materials, the defence argued that the delay had caused it significant prejudice because, inter alia, it could not locate a witness.

Domenic provided the insured with two helpful cases that LAWPRO counsel had recently argued.

He also suggested that the insured use the Internet over the weekend to try to track down the witness – an idea that had not occurred to the insured. The insured did so – and found her. She had a new telephone number, but her address was still the same.

The defence had obviously not tried very hard to find the witness. This undermined the prejudice argument, and the dismissal order was set aside.

■ *On another occasion*, a visibly distraught insured showed up at LAWPRO at 8:30 on a Monday morning in his robes and with a stack of briefs. He was scheduled to respond to a motion in the Court of Appeal at 10 a.m. The night before he had realized that he should have brought a cross-motion, which he had failed to do. Now he did not feel up to appearing before the Court of Appeal because he was too nervous and upset. Moreover, he had not yet had a chance to talk to his client. He wanted another lawyer to appear on his behalf.

Domenic told the insured that he needed to discuss this error – and potential malpractice claim – with his client and advise the client to seek independent legal advice. He also needed to make a written report to LAWPRO.

Domenic advised the insured to ask the court for an adjournment to give him time to talk to his client and submit the report. Since the Court of Appeal was effectively the court of last resort, the panel would not force him to proceed in the circumstances.

Calmed down, the insured went off to court and came back an hour later with the adjournment endorsement, having personally paid the modest costs thrown away. He was then able to file the cross-motion.