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Article

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Lawyers beware: Alternative processes may not suspend limitation period

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Since the 2016 decision in *407 ETR Concession Co. v. Day* 2016 ONCA 709, Ontario law is clear that where a plaintiff pursues an alternative process to a civil action in order to resolve their dispute, the two-year limitation period may be suspended. But what happens when the plaintiff pursues that alternative process knowing it may not be the right forum in which to adjudicate their claim?

A 2020 decision of the Ontario Court of Appeal, *Beniuk v. Leamington (Municipality)* 2020 ONCA 238, addresses this question.

Beniuk suggests that where a plaintiff chooses to have their claim adjudicated outside the context of litigation, the limitations clock may continue to run for the plaintiff's action where the alternative dispute resolution process has no jurisdiction to hear the dispute.

The wrong forum

Beniuk involved a claim by the two plaintiff owners of a residential property. Their home experienced significant structural damage allegedly caused by vibrations from heavy truck traffic on a rural road abutting the residence.

After the defendant municipality declined to reconstruct the road and after the homeowners retained an engineer to opine on the cause of the damage, the owners commenced a proceeding before the Ontario Municipal Board (OMB) in December 2009.

At the OMB, the plaintiffs argued that the pre-1927 construction of the rural road caused them injurious affection. In Ontario, the 0MB has exclusive jurisdiction over injurious affection claims.

On Jan. 5, 2010, the defendant municipality delivered its reply to the plaintiff's OMB claim. In that reply, the

municipality pleaded that the 0MB claim was not really one for injurious affection and, in any event, the 0MB was not the proper venue to resolve the dispute.

OMB ultimately held in favour of the municipality on Jan. 10, 2018. The OMB held that it did not have jurisdiction over the homeowners' claim. It further held that the essence of the claim was one concerning the use of the road, not its construction. As such, the concept of injurious affection did not apply.

following the dismissal of their OMB claim, the plaintiffs started a civil action in the Ontario Superior Court for nuisance and negligence against the defendant municipality on Jan. 17, 2018.

The municipality moved for summary judgment to dismiss the civil claim.

It argued that the plaintiffs' claim was statute-barred as having been started more than two years after the plaintiffs discovered their claim under section 4 of Ontario's *Limitations Act* 2002, 5.0. 2002, c.24, Sched. B.

In defence of the summary judgment motion, the plaintiffs relied partly on s. 5(1)(a)(iv) of the *Limitations Act*. This section provides that a claim is not discovered until "having regard to the nature of the injury, loss or damage, a [civil action] would be an appropriate means to seek to remedy it."

Relying on the Court of Appeal's decision in *407 ETR*, which was one of the first cases in Ontario to consider s. S{l)(a)(iv), the plaintiffs argued that the two-year limitation period for their civil action was postponed while the plaintiffs were pursuing their dispute in an alternative forum, the 0MB.

The Court of Appeal rejected the plaintiff's argument.

The court held, amongst other things, that the plaintiffs discovered their claim back on Jan. 5, 2010, when they were put on notice of the OMB forum issue in the municipality's OMB reply pleading. Since the plaintiff's civil lawsuit was not started until January 2018, the two-year limitation period had passed.

Accordingly, only the alleged damages suffered by the plaintiff two years prior to the statement of claim in the civil action being issued could proceed to trial. The remainder of the civil action was dismissed as statute-barred.

Alternative process does not necessarily mean clock not ticking

The court in *Beniuk* established an important caveat to s. S(l)(a)(iv) and the case law emerging from 407 ETR, just because a plaintiff pursues an alternative process to resolve their dispute, this does not mean that the limitation period for their civil action is automatically postponed under s. S(l)(a)(iv).

The court held: "The fact that a plaintiff chooses to pursue an alternative process does not in itself suspend the running of the limitation period under s. S(l)(a)(iv). Whether an alternative process will have this effect will depend on the particular factual circumstances and the evidence before the court in determining the limitations issue. In this case, there was not evidence to explain why the [plaintiffs] chose to pursue the 0MB route rather than commencing both an OMB proceeding and a civil action."

Important themes emerge from this passage:

- Whether s. S(l)(a)(iv) will postpone the running of the limitation period is a fact-dependent, contextual exercise; and
- The commencement of an alternative process will not result in an automatic suspension of the limitation period for a civil action. The prudent approach by the plaintiff may very well be to start both a civil action and pursue the alternative process, if the plaintiff is unsure which forum is appropriate.

Of course, the court in *Beniuk* was cognizant of the policy implications of its decision.
In response to the concern that the court was encouraging plaintiffs to start multiple proceedings in multiple fora, the court observed: "While one of the principles recognized in connection with s.S(l)(a) (iv) is the deterrence of unnecessary litigation, a plaintiff is not entitled in all cases to pursue one route, and to expect the limitation period to be tolled in respect of any other claim it may have in respect of its loss or

damage. Said another way, s.S(l)(a)(iv) does not permit a party to engage in litigation in stages for the same wrong."

In *Beniuk*, the court noted that not only were the plaintiffs presumed to know that there might be a jurisdiction issue at the OMB, but they were specifically put on notice of this possibility in January 2010 in the municipality's reply OMB pleading.

Moreover, a Court of Appeal decision, *Har Jo Management v. York (Regional Municipality)* 2018 ONCA 469, suggested that plaintiffs unsure of the OMB's jurisdiction should commence proceedings both before the OMB and in the Ontario Superior Court to protect themselves.

In these specific circumstances, the plaintiffs could not claim that a civil action was not an "appropriate means" to resolve their dispute until the OMB proceeding had run its course.

Narrowing of s. S(l)(a)(iv)?

On the one hand, *Beniuk* is a decision limited to its facts.

On the other, the pronouncement by the court that a limitation period is not tolled under s. S(l)(a) (iv) simply because the plaintiff was pursuing an alternative to litigation has significant implications for how civil actions are structured in Ontario.

If the goal of s. S(l)(a)(iv) is to discourage litigation by allowing plaintiffs to pursue an alternative course knowing that their limitation clock in the civil court is not ticking, *Beniuk* puts a dent in that reassurance.

Beniuk may very well encourage parties to pursue their claims in multiple fora out of an abundance of caution.

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