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When Does "Another Proceeding" Postpone a Limitation Period?

By Marco P. Falco

In Ontario, a plaintiff must start their lawsuit against the defendant within two years for most civil actions. But the two-year limitation period may be postponed where the action is not yet an "appropriate means" to remedy the plaintiff's loss.

Where, for example, a plaintiff is subject to a criminal proceeding which is ongoing, the limitation period for any civil action arising from that criminal prosecution may not run until the prosecution is finally resolved.

A recent decision of the Ontario Superior Court, *Kulyk v. Guastella*, 2021 ONSC 584, however, holds that the mere existence of a criminal proceeding against the plaintiff may not be enough to postpone the limitation period.

Kulyk suggests that there has to be a conceptual link between the criminal prosecution and the civil action itself. Absent such a connection, the plaintiff's subjective view that their lawsuit should not have to start until the criminal process has run its course does not toll the limitations clock.

Crime and Defamation

Kulyk involved a dispute between divorced spouses.

The defendant spouse made statements to the police about the plaintiff on April 1, 2014, resulting in criminal charges for fraud and assault against the plaintiff on April 12, 2014.

The plaintiff was aware in April and May 2014 of the defendant's statements which led to his arrest. Following a preliminary inquiry in September, 2016, the Crown withdrew the charges on February 9, 2017.

The plaintiff then started a civil action in defamation against his former spouse for her statements to the police on August 3, 2018.

The action was started within two years of the preliminary inquiry and the withdrawal of the criminal charges, but over four years after the plaintiff learned of the defamatory statements by the defendant.

According to the Superior Court, there was no issue that in April, 2014, the plaintiff knew he had a cause of action against his former spouse for defamation: he knew the defendant had made statements about him to the police, he thought they were false, and he believed that they were defamatory.

The plaintiff argued, however, that the limitation period for his defamation action could not run while his criminal charges remained outstanding.

Under subsection 5(1)(a)(iv) of Ontario's *Limitation Act, 2002*, S.O. 2002, c.24, Sched. B (the "*Limitations Act*"), a civil claim is not discovered until, having regard to the nature of the injury, loss or damage, a civil proceeding "would be an appropriate means to seek to remedy" the plaintiff's loss.

The plaintiff argued, in effect, that until the criminal process ran its course, an action for defamation would not be an "appropriate" means for him to pursue a civil action.

In Ontario, cases such as *Winmill v. Woodstock (Police Services Board)*, 2017 ONCA 962, suggest that a civil action may not be an "appropriate means" to resolve a dispute until an ongoing criminal matter is concluded.

However, in a subsequent decision of the Court of Appeal, *Sosnowski v. MacEwan Petroleum,* 2019 ONCA 1005, the Court limited the reasoning in *Winmill* to circumstances where the police's conduct in the criminal matter was the subject of the civil action itself.

In *Kulyk*, the plaintiff argued that the limitation period was effectively postponed until after the criminal proceedings had resolved on the basis that:

1. despite knowing of the defendant's alleged defamation in 2014, his "life was consumed with focusing on the criminal charges" and that those charges had to be dismissed before he could bring any type of defamation action against the plaintiff; and
2. the conclusion of the criminal matter would determine if seeking a "civil action" against his former spouse was viable and "appropriate". The plaintiff believed that he would have harmed his defence in his criminal case if he had pursued a defamation action against his former spouse at the same time.

On a motion for summary judgment to dismiss the action as having been started outside the two-year limitation period, the motion judge granted the motion and dismissed the plaintiff's action.

When a Criminal Proceeding Postpones the Limitation Period

After reconciling the state of the law in *Winmill* and *Sosnowski*, the motion judge noted that the resolution of a criminal proceeding should only postpone the running of a limitation period for a civil action where "the completion of the criminal proceedings is an essential element of those causes of action".

Winmill involved an action for civil battery against the police in the arrest that led to the criminal charges – there was a nexus between the criminal and civil proceedings.

Adopting the reasoning in *Sosnowski*, the Court concluded that, in this case, there was no such nexus between the criminal proceeding and the civil defamation action against the defendant spouse:

…The plaintiff is not suing the police who are "closely involved with the criminal charges". The focus of the criminal case is on the defendant's conduct – not the complainant's or the police conduct that led to the charge…the civil court [in *Kulyk*] would not have been deciding on the propriety of criminal proceedings before the criminal court had done so or at all…

In Court of Appeal parlance, the criminal and civil proceedings did not constitute "two sides of the same coin".

The civil action for defamation was known "and complete before the criminal charges were decided". The defendant was not the police. Moreover, any decision in the defamation action would not determine "the propriety of the criminal case".

The motion judge further dismissed the plaintiff's claim that his psychological and subjective desire to defend the criminal charges against him made a defamation action "inappropriate" within the meaning of subsection 5(1)(a)(iv) of the *Limitations Act*.

In the motion judge's review, such subjective impressions would lead to uncertainty about the application of the limitation period:

…The plaintiff's determination that he could not afford to use his financial resources to sue; that he did not want to sue or that his psychological makeup made it impossible for him to do so; and his fear that suing might seriously harm his criminal defence, are all subjective, evaluative determinations for each plaintiff to make. However, none affects [the] fact that it was "legally appropriate" to sue as soon as the cause of action arose in 2014. To accede to the plaintiff's subjective arguments would "transport the law back to the same state of uncertainty that existed before the changes in the legislation in 2002".

The Necessary Link

Kulyk illustrates that for an alternative process such as a criminal proceeding to postpone the running of the limitation period under subsection 5(1)(a)(iv), the alternative process must be essential and linked to the civil action itself.

In other words, where a plaintiff already knows of the existence of a cause of action, the fact that an alternative process to litigation is also ongoing may not be enough to toll the limitation period.

Moreover, the plaintiff's psychological state or subjective willingness to start a lawsuit during the ongoing alternative process is irrelevant. What matters is the state of the plaintiff's knowledge and whether, on an objective assessment, the plaintiff knows a civil action can begin.

Kulyk therefore distinguishes between cases where an alternative process must be exhausted before a civil action should be started and cases where the existence of the alternative process may not matter to the outcome of the civil lawsuit. The former tolls the limitation period, the latter does not.

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