



## Article

### Litigation

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# When related criminal proceeding postpones civil action's limitation period

By Marco P. Falco

For most civil actions in Ontario, a plaintiff must bring their lawsuit against the defendant within two years. But the two-year limitation period may be postponed where the action is not yet an "appropriate means" to remedy the plaintiff's loss under ss. S(1)(a)(iv) of the *Limitations Act*, 2002, 5.0. 2002, c.24, Sched. B (the *Limitations Act*).

If, for example, a plaintiff is subject to an ongoing criminal prosecution, the limitation period for any civil action arising from the criminal matter 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 lawsuit itself. Absent this connection, the plaintiff's subjective view that their lawsuit should not have to start until the criminal process has run its course may not toll the limitations clock.

### Crime and defamation

*Kulyk* arose out of 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 apparently well 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 Feb. 9, 2017. The plaintiff then started a civil action in defamation against his former spouse on Aug. 3, 2018, for her statements to the police.

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 that 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 pending and unresolved.

Under subsection S(1)(a)(iv) of 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 be "appropriate."

Previous Ontario decisions 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:

- 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
- 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 matter postpones civil limitation period**

After reconciling the law in *Winmill and Sosnowski*, the motion judge held that the resolution of a criminal proceeding should only postpone the running of a limitation period in 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 - i.e., there was a conceptual nexus between the criminal and civil proceedings.

Adopting the reasoning in *Sosnowski*, the court in *Kulyk v. Guastella* concluded that, in this case, there was no such nexus:

... 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 charges .... 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 vernacular, 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."

In the motion judge's view, 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 conceptual nexus is key**

*Kulyk* illustrates that for an alternative process such as a criminal proceeding to postpone the running of the limitation period under ss. S(1)(a)(iv), the alternative process must be essential and linked to the civil action itself. Moreover, the plaintiff's psychological state or subjective willingness to start an action 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 that a civil action can and should begin.

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