Litigation - Canada

Remedies for suing the wrong party

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Authors

Norm Emblem

Soloman Lam

Introduction

It is not uncommon for a plaintiff to misname a defendant in a statement of claim. This is most often seen where the plaintiff sues the wrong corporate entity in the same business structure as the intended defendant, or where the plaintiff misspells the defendant's legal name. In such circumstances, especially if the plaintiff has served the claim on the correct defendant, the parties often acknowledge the error and move on with the litigation. However, depending on the severity of the error, the failure to name the correct defendant may have prejudicial consequences, especially if the limitation period for bringing an action to advance the claim has expired.

This update looks at what the courts in Canada will consider when asked to grant a correction of a misnamed or misdescribed party (ie, a misnomer). For illustrative purposes, this update cites the laws and rules of court in Ontario, although other Canadian jurisdictions have similar approaches to misnomers.

Correcting party names versus adding or substituting parties

Ontario's statute of limitations (ie, the Limitations Act, 2002(1)) forbids the addition or substitution of a new party after the expiry of the limitation period, but it does allow for the correction of a misnomer. Section 21 provides as follows:

> *"21. (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.*
>
> *(2) Subsection (1) does not prevent the correction of a misnaming or misdescription of a party."*

A party seeking to correct a party name should bring a motion under Rule 5.04(2) of Ontario's Rules of Civil Procedure,(2) which provides as follows:

> *"At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."*

A party seeking a correction after the applicable limitation period has expired must satisfy the court that the error is truly a misnomer (ie, the intended party, while not correctly named, is otherwise identifiable from the pleading(3)), rather than a substitution of a new party into the existing proceeding.

'Litigation finger' test

The test for a misnomer was first articulated by Lord Devlin of the House of Lords in *Davies v Elsby Brothers, Ltd.*(4) He described the test as follows:

> *"The test must be: how would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer."*

Recent cases in Canada have affirmed the endurance of this test and have described it as the 'litigation finger' test. The test requires the court to ask whether the facts contained in the claim are sufficiently particularised such that if the intended defendant had read the claim, it would have known that the 'litigation finger' was pointed at it.(5)

As the Court of Appeal for Ontario recently held in *Lloyd v Clark*(6):

> *"where there is a coincidence between the plaintiff's intention to name a party and the intended party's knowledge that it was the intended defendant, an amendment may be made despite the passage of the limitation period to correct the misdescription or misnomer."*

Hence, if the intended defendant knew as a fact that it was the subject of litigation, regardless of the particulars in the statement of claim, the court may correct a misnomer. This allows a plaintiff to name pseudonyms as defendants for the purpose of issuing a statement of claim within the limitation period, and then change the names of the defendants once their identities become known.(7)

The case law indicates a spectrum of acceptable versus unacceptable errors when naming defendants. For example, in *Omerod v Strathroy Middlesex General Hospital* (8) the Court of Appeal for Ontario observed that where a misnomer is minor – such as where the claim was still served on the intended defendant, but the defendant's name was misspelled – the correction is generally allowed. However, where the misnomer is more than a mere irregularity or involves exceptional circumstances – such as where the defendant was misled or unduly prejudiced – the court will more likely deny a request to make the correction.

The wording of Rule 5.04(2) of the Rules of Civil Procedure dictates that the court shall not correct a misnomer if prejudice would result which cannot be compensated by costs or an adjournment. Furthermore, even if there is no prejudice, the court still has residual discretion to refuse to correct a misnomer.(9) Such was the case in *O'Sullivan v Hamilton Health Sciences Corporation (Hamilton General Hospital Division),* (10) where the court refused to allow the plaintiffs to correct the name of a defendant three years after the expiry of the limitation period. The court took into consideration the plaintiffs' unexplained and significant delay in amending their pleading after learning the correct name of the intended defendant, and also noted that the defendant had no notice of the plaintiffs' potential claim against it during the five years after the date of the cause of action. Although there was no evidence of prejudice other than the passage of time, these factors made the misnomer "far more than a mere irregularity".(11)

Comment

A plaintiff should always take care to sue the right party in order to avoid the limitation pitfalls of misnaming a defendant or naming the wrong defendant. However, in the event that the wrong defendant is named, the court is likely to allow a correction if the plaintiff can establish that the effect of the misnomer was inconsequential. If the defendant was incorrectly named but correctly served, or if the plaintiff can establish that the intended defendant knew about the claim, then the court will likely allow the misnomer to be corrected. It is also in the plaintiff's interest – especially where the identity of the intended defendant is unclear – to provide as much detail as possible regarding the intended defendant in the claim, so that the court can more easily conclude that the intended defendant would know that the 'litigation finger' was pointed at it.

For further information on this topic please contact Norm Emblem or Soloman Lam at Dentons Canada LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (norm.emblem@dentons.com or soloman.lam@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) Limitations Act, 2002, SO 2002, c 24.

(2) Rules of Civil Procedure, RRO 1990, Reg 194.

(3) *Kamboj v Sidhu*, 2013 ONSC 2478 (Master) at para 42.

(4) *Davies v Elsby Brothers, Ltd*, [1960] 3 All ER 672.

(5) *Spirito Estate v Trillium Health Centre*, 2007 CanLII 41901 (Ont SC), aff'd 2008 ONCA 762.

(6) *Lloyd v Clark*, 2008 ONCA 343 at para 4.

(7) See eg *Spirito Estate*, *supra* note 5.

(8) *Omerod v Strathroy Middlesex General Hospital*, 2009 ONCA 697 at paras 26-33.

(9) *Omerod*, *ibid* at paras 32.

(10) *O'Sullivan v Hamilton Health Sciences Corporation (Hamilton General Hospital Division)*, 2011 ONCA 507.

(11) *O'Sullivan*, *ibid* at para 4.