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ARTICLE

Ontario Court of Appeal: Defendant's Jurisdiction Motion Does Not Stop 2-Year Limitation Period for Third Party Contribution and Indemnity Claims from Running

In *Lillydale Cooperative Limited v. Meyn Canada Inc.*, the Court of Appeal for Ontario explained that the running of the 2-year period for a defendant to issue a third party claim for contribution and indemnity was not delayed by the defendant's jurisdictional challenge to Ontario as the appropriate forum for the dispute. A challenge to Ontario's jurisdiction in favour of another forum does not affect the "discoverability" of a third party claim, and thus does not pause or "toll" the limitation period associated with commencing that third party claim in Ontario.

Background

In late 2004, Lillydale sued Meyn and others in Alberta. A year and a half later, in March 2006, Lillydale also sued Meyn and others in Ontario. Meyn moved to stay Lillydale's action in Ontario on the basis that Alberta was the more appropriate forum.

Meyn's *forum non conveniens* motion was unsuccessful, and its subsequent appeal was dismissed. Following this, Meyn served its statement of defence in Ontario. Then, in November 2008 – approximately two years and eight months after it had been served with Lillydale's claim in Ontario – Meyn issued a third party claim seeking contribution and indemnity from Weishaupt.

Weishaupt moved for summary judgment dismissing the third party claim against it as barred by Ontario's *Limitations Act, 2002*.

The key section of the statute, section 18, provides as follows:

18 (1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.

(2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise.

After the motion had been heard and decided in late 2017, the Court of Appeal released *Mega International Commercial Bank (Canada) v. Yung*. There, the Court of Appeal decided that the "discoverability" principle applies to section 18 of the *Limitations Act, 2002*.

Specifically, the *Mega* decision confirms that while the 2-year period for bringing a claim for contribution and indemnity is presumed to begin running on the date that the party seeking contribution and indemnity is served with a claim in the proceeding in which contribution and indemnity is sought, that period can be extended if the party proves that its claim for contribution and indemnity was not "discovered" and not capable of being discovered through the exercise of due diligence until some later date.

In *Lillydale*, Meyn was served with the plaintiff's Ontario claim in March 2006 but did not issue its third party contribution and indemnity claim until November 2008 – beyond the presumptive 2-year period for bringing such third party claims.

At issue was whether Meyn's *forum non conveniens* challenge to Ontario's jurisdiction during that intervening period was an occurrence that delayed "discovery" of its third party claim against Weishaupt, such that the 2-year period for the third party claim did not begin to run until the jurisdictional challenge had been resolved. The Court of Appeal's unanimous answer was "no".

Court Rejects Concerns About Attornment to the Jurisdiction of Ontario

The Court of Appeal rejected Meyn's argument that, since issuing a third party claim for contribution and indemnity in Ontario may be construed as "attornment" (*i.e.*, submission) to the jurisdiction of the Ontario courts, Meyn's third party claim against Weishaupt should not have been considered "discoverable" until Meyn's *forum non conveniens* motion was finally determined.

Meyn asserted that, since it was challenging the appropriateness of Ontario as the proper forum for the lawsuit, its delivery of a third party claim in Ontario while that challenge was ongoing could have undermined its jurisdictional argument. Meyn claimed that it was not be "appropriate" to bring its third party claim until the jurisdictional dispute was resolved, drawing on language indicating that a claim is not discoverable in Ontario until "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it".

The Court of Appeal held that it is appropriate to bring a third party claim when it is "legally appropriate" to do so, and that "tactical choices that arise during litigation do not delay the commencement of the limitation period". It characterized Meyn's decision to delay issuing a third party claim in Ontario (in order to avoid undercutting its *forum non conveniens* argument) as a "tactical" choice. The Court reasoned that if Meyn was concerned that bringing a third party claim within the 2-year limitation period would compromise its position on its pending jurisdiction motion, Meyn had a number of options it could have pursued to mitigate the risk that its third party claim might be viewed as an attornment to the jurisdiction of Ontario. For instance:

1. Meyn could have sought Weishaupt's agreement to suspend (or extend) the limitation period for the third party contribution and indemnity claim, as permitted by subsection 22(3) of the *Limitations Act, 2002*;
2. Meyn could have sought advance judicial authorization to deliver the third party claim to Weishaupt during the 2-year period and not have it be considered an attornment to Ontario's jurisdiction, as occurred in *Joyce v. MtGox Inc.*; or
3. Meyn could have served the third party claim on Weishaupt with an express reservation of rights, indicating that in doing so it was not attorning to the jurisdiction of Ontario. Here, the Court of Appeal observed that "it would be anomalous indeed if Meyn's service of a third party claim to preserve a limitation period in Ontario" was held against it on the *forum non conveniens* motion.

Meyn also argued that, since a successful *forum non conveniens* motion would have eliminated the litigation in Ontario, it was not "legally appropriate" to bring the third party claim until it knew, for certain, that it would have to defend the claim in Ontario. The Court of Appeal rejected this argument.

While the Court of Appeal acknowledged its discoverability jurisprudence, which suggests that bringing a claim may not be appropriate if another "resolution process that would eliminate the loss and thereby avoid needless litigation" is ongoing, it held that a pending jurisdiction motion is not such a resolution process. Rather, the Court of Appeal observed that a jurisdiction motion "does not resolve the dispute"; it just "moves the dispute to a court in another jurisdiction". It likened the jurisdiction motion to settlement discussions that are proceeding against the backdrop of potential litigation: both processes "may resolve the entire claim so that no court proceeding need be commenced, but nonetheless do not postpone the running of the limitation period".

Key Takeaways

Multi-jurisdictional litigation continues to proliferate, and defendants increasingly find themselves subject to multiple claims for the same alleged wrongdoing in competing jurisdictions. For example, overlapping class actions are often filed in multiple Canadian jurisdictions alleging the same conduct, and the slow progress of these cases often means that a defendant will not have even delivered a Statement of Defence within two years of having been served with the proposed class action claim.

Lillydale is an important reminder for defendants facing similar claims in multiple jurisdictions to not lose sight of the presumptive 2-year limitation deadline for any third party contribution and indemnity claims in Ontario, which runs from the date they are formally served with the plaintiff's claim in that Province.

While the 2-year limitation period for contribution and indemnity claims is subject to the principle of discoverability and may be extended in unusual cases, *Lillydale* appears to shut the door on any argument that an ongoing challenge to the jurisdiction of Ontario's courts will excuse a defendant from issuing a third party claim within the 2-year period.

The Court of Appeal's decision offers defendants three practical options to preserve their contribution and indemnity claims in Ontario, even against the backdrop of an argument that Ontario is *forum non conveniens*: (1) an agreement with the third party to toll the limitation period for the contribution and indemnity claim; (2) obtaining an advance judicial determination that issuing a third party claim will not constitute attornment to the jurisdiction of the Ontario courts, or (3) simply issuing the third party claim within the two year period and serving it with an express reservation of jurisdictional rights. While the Court of Appeal does not indicate any preference among these options in *Lillydale*, the first two options appear preferable, since they remove any doubt that the 2-year limitation period for a third party claim for contribution and indemnity and a pending jurisdiction motion might adversely affect one another.

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