

CITATION: Placzek v. Green, 2009 ONCA 83
DATE: 20090128
DOCKET: C47960

COURT OF APPEAL FOR ONTARIO

Laskin, Simmons and Juriansz JJ.A.

BETWEEN:

Carmen Placzek and Edward Placzek

Plaintiffs (Respondents)

and

Albert Green

Defendant (Appellant)

Todd J. McCarthy for the Appellant, Albert Green

Brian Murphy for the Respondents, Carmen Placzek and Edward Placzek

Malcolm Scott for the Respondent, Edward Placzek

Paulette Pommells for the Respondent, General Motors of Canada Limited

Douglas Wallace for the Respondent, McMaster Chevrolet Oldsmobile Limited

Heard: April 29, 2008

On appeal from the order of Justice David Little of the Superior Court of Justice dated
October 15, 2007.

Simmons J.A.:

I. Overview

[1] The main issue on this appeal is whether the transition provisions in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, (the “new Act”) apply to Mr. Green’s proposed counterclaims for contribution and indemnity.

[2] Mr. Green was in a rear-end collision with Mr. and Mrs. Placzek before the new Act came into force. After the new Act came into force, the Placzeks sued Mr. Green for damages arising from the accident.

[3] More than two years after delivering his statement of defence, Mr. Green asked for an order allowing him to add counterclaims for contribution and indemnity with respect to Mrs. Placzek’s damages against Mr. Placzek and two new parties. In support of his request, Mr. Green submitted that he did not discover his proposed counterclaims until his examination for discovery, and that the basic two-year limitation period under the new Act with respect to his counterclaims had not therefore expired.

[4] Little J. dismissed Mr. Green’s motion, holding that Mr. Green discovered his proposed counterclaims on the date he was served with the Placzeks’ statement of claim and that the basic two-year limitation period under the new Act had, in fact, expired. In addition, the motion judge found that all of the proposed defendants would be prejudiced if Mr. Green was allowed to amend at this stage.

[5] On appeal, Mr. Green does not challenge the motion judge’s conclusion that the limitation periods under the new Act have expired, assuming they apply. Rather, he claims for the first time that he discovered his proposed counterclaims on the date of the accident and therefore, under the transition provisions in the new Act, the limitation periods in place before the new Act came into force (the “former limitation periods”) govern. According to Mr. Green, the former limitation periods have not expired.

[6] Mr. Green also claims that the motion judge erred in finding prejudice that should preclude his amendments even if the limitation periods have not expired.

[7] For the reasons that follow, I conclude that the transition provisions in the new Act do not apply to Mr. Green’s proposed counterclaims and that the limitation periods in the new Act govern. Accordingly, I would dismiss the appeal on the limitations ground and it is unnecessary that I deal with the prejudice issue.

II. Background

a) The accident, the enactment of the new Act and the original pleadings

[8] The basic facts of this case are simple. The Placzeks allege that Mrs. Placzek was injured on March 4, 2003 while riding as a passenger in a car driven by Mr. Placzek. They say that their car was struck from behind by a 1999 GMC pick-up truck driven by Mr. Green.

[9] The new Act came into force on January 1, 2004.

[10] The Placzeks commenced this action on February 8, 2005 and served their statement of claim on Mr. Green on June 8, 2005.

[11] On August 15, 2005, Mr. Green delivered a statement of defence in which he denied the Placzeks' claims. Instead, he alleged that if the Placzeks suffered any damages or injuries, both were contributorily negligent.

[12] Although Mr. Green alleged in his statement of defence that Mr. Placzek was driving erratically when the accident happened, Mr. Green did not initially counterclaim against Mr. Placzek for contribution and indemnity with respect to Mrs. Placzek's damages.

b) Mr. Green's motion to amend and add parties

[13] In August 2007, Mr. Green moved for an order permitting him to amend his statement of defence by adding counterclaims against Mr. Placzek and against two new parties, General Motors of Canada Limited and McMaster Chevrolet Oldsmobile Limited.

[14] The proposed counterclaims request contribution and indemnity under the *Negligence Act*, R.S.O. 1990, c. N.1, in relation to any judgment Mrs. Placzek may obtain against Mr. Green. As against Mr. Placzek, Mr. Green alleges that Mr. Placzek's erratic driving caused the accident. As against General Motors and McMaster, Mr. Green claims that they were negligent in the manufacture or repair of his anti-lock braking system.

[15] The motion to amend and add parties was heard in October 2007. Mr. Green's position on the motion was that he did not discover his proposed counterclaims until his examination for discovery, held in April 2007. He therefore claimed that the basic two-

year limitation period under the new Act, which runs from the discovery of a claim, would not expire until April 2009.

III. The motion judge's ruling

[16] The motion judge rejected Mr. Green's argument about when he discovered his claims, holding that Mr. Green should have known about them by at least June 2005 when he was served with the Placzek's statement of claim. The motion judge said:

He certainly would have or should have known [about his proposed counterclaims] when the Statement of Claim was served on him on June 8, 2005. He knew he was being sued for negligence; he knew then the manner in which the Placzek vehicle was being driven; and he knew that his brakes failed through no fault of his driving.

[17] It is implicit in the motion judge's ruling that he found that the two-year limitation period under the new Act had expired.

IV. The Limitation Periods under the new Act

[18] A basic understanding of the limitation periods under the new Act will be helpful in understanding the issues on appeal. For ease of reference, all sections of the new Act that are referred to in these reasons are also set out in Appendix "A".

[19] As stated by Feldman J.A. in *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401 (C.A.), at para. 8, the new Act "represents a revised comprehensive approach to the limitation of actions" that is designed "to balance the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs [citation omitted]."

[20] Section 19 of the new Act eliminates the many limitation periods contained in other statutes except those specifically referred to in the new Act or the Schedule to the new Act. Section 16 sets out a list of claims to which no limitation period applies. For all other claims, subject to certain adjustments, the new Act establishes a basic limitation period of two years from the date on which a claim is discovered and an ultimate limitation period of 15 years from the date on which the act or omission on which the claim is based took place.

[21] The basic two-year limitation period is contained in s. 4:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.¹

[22] The ultimate 15-year limitation period is contained in s. 15:

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

...

[23] Section 5 sets out the rules concerning when a claim is discovered. Section 5(1) stipulates that a claim is discovered on the earlier of two dates. The first date is set out in s. 5(1)(a) and is premised on actual knowledge of the matters necessary to discover a claim; the second date is set out in s. 5(1)(b), and is premised on deemed knowledge of the matters set out in s. 5(1)(a). Section 5(2) creates a presumption that claimants acquire actual knowledge of their claims on the date the act or omission on which the claim is based takes place:

5. (1) A claim is discovered on the earlier of,
- (a) the day on which the person with the claim first knew,
 - (i) that the injury, loss or damage had occurred,
 - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
 - (iii) that the act or omission was that of the person against whom the claim is made, and

¹ Proceeding is not defined in the new Act. According to *Meady v. Greyhound Canada Transportation Corp.* (2008), 90 O.R. (3d) 774 (C.A.), at para. 11, the definition in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, therefore applies. Rule 1.03 of the *Rules of Civil Procedure* defines “proceeding” as meaning “an action or application”. “Action” is defined in the same rule as including “a proceeding commenced by ... counterclaim.”

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[24] Section 18(1) is a deeming provision relating to contribution and indemnity claims. It deems the day the injured party's statement of claim is served on the contribution and indemnity claimant to be the day on which the acts or omissions on which the claim for contribution and indemnity is based took place. When read in combination with s. 4 and s. 15, s. 18 establishes the date of service of the injured party's statement of claim as the presumed commencement date for the basic two-year limitation period and the actual commencement date for the ultimate 15-year limitation period with respect to contribution and indemnity claims:

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. [Emphasis added.]

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

[25] Finally, it is worth noting that the new Act speaks about "claims" as opposed to causes of action. "Claim" is defined in s. 1 of the new Act as follows:

1. In this Act,

...

“claim” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.

V. Analysis

1) Do the transition provisions in the new Act apply to Mr. Green’s proposed counterclaims?

[26] The transition provisions in the new Act are set out in s. 24 (the “transition section”). Section 24(2) sets out the criteria for determining whether the transition section applies. If the transition section applies, ss. 24(3)-(8) set out the transition rules for determining what, if any, limitation periods apply to a particular claim.

[27] Mr. Green did not expressly address s. 24(2) in his submissions in this court. Rather, he simply claimed that transition rule 2 of s. 24(5) applies because he discovered his proposed counterclaims on the date of the accident. However, because this court has made it clear that s. 24(2) is the starting point for addressing the transition section, it is necessary that I start with that subsection in conducting my analysis: see *Hare v. Hare* (2006), 83 O.R. (3d) 766; *St. Jean v. Cheung*, 2008 ONCA 815.

[28] Section 24(2) of the new Act stipulates that the transition section applies if two criteria are met:

- i) the claim is based on acts or omissions that took place prior January 1, 2004; and
- ii) no proceeding was commenced in relation to those acts or omissions prior to January 1, 2004.²

[29] As of the date of the motion, s. 24(2) of the new Act read as follows³:

² If a proceeding was commenced before January 1, 2004 in relation to a claim based on acts or omissions that happened before January 1, 2004, s. 24 does not apply and the substantive aspects of the claim continue to be governed by the law as it existed before January 1, 2004: see *St. Jean* at para. 45.

³ Section 24 was amended effective November 27, 2008 by deleting references to the “effective date” and replacing them with “January 1, 2004”. Accordingly, effective November 27, 2008, ss. 24(1) and (2) read as follows:

24(1) In this section,

"former limitation period" means the limitation period that applied in respect of the claim before January 1, 2004.

24. (2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.

[30] Section 24(1) defined “effective date” as meaning “the day on which this Act comes into force”, which was January 1, 2004.

[31] No proceedings of any kind were commenced in this case prior to January 1, 2004. Accordingly, the second criterion in s. 24(2) is satisfied, and the critical issue in determining whether the transition section applies is identifying the “acts or omissions” on which Mr. Green’s proposed counterclaims are based and the date on which they occurred.

[32] Although Mr. Green did not make submissions in this court about s. 24(2), he asserted that transition rule 2 in s. 24(5) applies because he discovered his proposed counterclaims on the date of the accident, which was before the new Act came into force. It is implicit in this assertion that he relies on the torts allegedly committed by the proposed defendants by counterclaim as the acts or omissions on which his proposed counterclaims are based.

[33] I reject Mr. Green’s implicit assertion. In my opinion, the acts or omissions on which Mr. Green’s proposed counterclaims are based are the failure of the proposed defendants by counterclaim to pay their fair share of Mrs. Placzek’s damages before Mr. Green’s obligations to Mrs. Placzek under s. 1 of the *Negligence Act* crystallized in some fashion. In my view, that did not occur until after the new Act came into force. Accordingly, the first criterion in s. 24(2) has not been satisfied, the transition section does not apply, and the limitation periods in the new Act govern. I reach these conclusions for three reasons.

[34] First, rather than being claims for damages arising out of a tort, Mr. Green’s proposed counterclaims are essentially claims for restitution based on unjust enrichment. As such, although Mr. Green’s claims may be related to the tortious acts that underlie the accident, they are not founded on those acts. Rather, they are founded on the acts or omissions giving rise to the claims for restitution.

(2) This section applies to claims based on acts or omissions that took place before January 1, 2004 and in respect of which no proceeding has been commenced before that date.

[35] There is ample authority in Ontario for the proposition that a claim for contribution and indemnity under s. 1 of the *Negligence Act* is not a damage claim arising out of a tort, but instead is a statutory claim founded on principles of restitution and unjust enrichment.⁴

[36] In *Baker v. Gray Coach Lines*, [1949] 2 D.L.R. 238, this court dismissed an appeal from an order refusing a request for payment out of the Unsatisfied Judgment Fund on the basis that an order for contribution and indemnity between co-defendants in a motor vehicle accident case is not a judgment for damages.⁵

[37] Subsequently, in *Ukrainian (Fort William) Credit Union Ltd. (In Liquidation) v. Nesbitt, Burns Ltd.* (1997), 152 D.L.R. (4th) 640 (Ont. C.A.), leave to appeal granted, (1998), 111 O.A.C. 198 (S.C.C.), declared moot, (1999), 161 O.A.C. 199 (S.C.C.), Osborne J.A. said, at para. 27, that, equally, a claim for contribution is not a claim for damages.

[38] More importantly, at paras. 21-23, Osborne J.A. described contribution claims as essentially a remedy for the unjust enrichment that arises when a concurrent tortfeasor bears a disproportionate share of the plaintiff's claim:

Contribution (which I think is essentially what it sought in Nesbitt's third party claim), falls generally under the broad ambit of the law of restitution. See *The Law of Restitution*, Peter D. Maddaugh, John D. McCamus (Aurora, Ont.: Canada Law Book, 1990) at p. 189, and Dan B. Dobbs, *Handbook on the Law of Remedies: Damages – Equity – Restitution*, 2nd ed., vol. 1 (St. Paul, Minn.: West Publishing Co.) at pp. 607-08.

The law of restitution provides an array of proprietary and non-proprietary remedies (including constructive trust, tracing, subrogation, the equitable lien and equitable accounting), all directed to remedying what would otherwise be unjust enrichment. See *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257; *LAC Minerals Ltd. v. International*

⁴ At common law, there was no right of contribution or indemnity among concurrent tortfeasors: see *Merryweather v. Nixan* (1799), 8 T.R. 186 (K.B.); *The Koursk*, [1924] P. 140 (C.A.); and *Fenn v. Peterborough Utilities Commission* (1979), 25 O.R. (2d) 399 (C.A.) at p. 444. Throughout Canada, the right of contribution and indemnity against concurrent tortfeasors exists by statute.

⁵ However, at p. 240 of *Baker* this court described the claim as a claim in debt: “The claim of the appellant against its co-defendants is not one laid in damages. It is a claim for indemnification and contribution in respect of a debt, the debt being any judgment recovered against the appellant and its co-defendants by the plaintiff.”

Corona Resources Ltd., [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14.

Contribution, in the context of Nesbitt's claim against DICO, would remedy the unjust enrichment that would accrue if Nesbitt were required to pay all of the Credit Union's claim, in circumstances where DICO was responsible for part of the loss. Requiring DICO to pay its share of the loss to Nesbitt, by the application of the restitutionary principles, thus corrects what would otherwise be an unjust enrichment. All of this assumes that Nesbitt is liable to the Credit Union and that there is merit in Nesbitt's claim for contribution (or indemnity) from DICO. Who is liable to whom and for what will, of course, have to be determined at trial. [Emphasis added.]

See also Ontario Law Reform Commission, *Report On Contribution Among Wrongdoers and Contributory Negligence* (Toronto: Ministry of the Attorney General, 1988), at pp. 49-55; and David Cheifetz, *Apportionment of Fault in Tort* (Aurora: Canada Law Book Limited, 1981), at p. 10.

[39] Second, in my opinion, the term “acts or omissions” in s. 24(2) refers to acts or omissions of a defendant. Further, in the context of a contribution and indemnity claim, this must mean the defendant’s failure to discharge his or her fair share of an injured party’s claim before the contribution and indemnity claimant’s liability to the injured party for a disproportionate share of the injured party’s damages has crystallized.

[40] I will repeat s. 24(2) for ease of reference:

24. (2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.

[41] If it is not otherwise obvious, s. 5(1)(a)(iii) of the new Act makes it clear that the “acts or omissions” on which a claim is based must be the acts or omissions of the defendant to the claim. In particular, s. 5(1)(a)(iii) provides that one element of

discovering a claim is knowing that “the act or omission was that of the person against whom the claim is made”.⁶

[42] Further, because a claim under s. 1 of the *Negligence Act* is premised on the unjust enrichment of concurrent tortfeasors that arises when one concurrent tortfeasor bears a disproportionate share of the injured party’s damages, it follows that the “acts or omissions” on which the claim is based are the failures by the other concurrent tortfeasors to pay their fair share of the injured party’s damages before the contribution and indemnity claimant’s liability to the injured party has crystallized.

[43] Third, prior to the enactment of the new Act, the weight of authority in Ontario indicated that a cause of action for contribution and indemnity under s. 1 of the *Negligence Act* did not accrue, and the limitation period did not begin to run, until the injured party obtained judgment against the person claiming contribution and indemnity.^{7/8}

⁶ Although it may not be appropriate to apply all of the sections of the new Act when interpreting the transition section, in *St. Jean*, at paras. 57-59, this court held that it is appropriate to refer to other sections of the new Act that describe the meaning of words used in the transition section.

⁷ *HSBC Securities (Canada) Inc. v. Davies, Ward & Beck* (2005), 74 O.R. (3d) 295 (C.A.), at para. 69; *Paquette v. Batchelor* (1980), 28 O.R. (2d) 590 (H.C.J.), at p. 601; *Cristovao v. Doran’s Beverages* (1983), 40 O.R. (2d) 737 (H.C.J.), at p. 743; David Cheifetz, *Apportionment of Fault in Tort* (Aurora: Canada Law Book Limited, 1981), pp. 10, 76-79. See also G.H.L. Fridman, *Law of Torts in Canada*, 2nd ed. (2002), at pp. 904; Ontario Law Reform Commission, *Report On Contribution Among Wrongdoers and Contributory Negligence* (Toronto: Ministry of the Attorney General, 1988), at pp. 218-220; and Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, 1991), recommendation 18, at pp. 42-43. *Contra: Black v. Horseman*, [1974] 4 O.R. (2d) 188 (Div. Ct.); and *Boylan v. Red Barn System (Canada) Ltd.*, [1974] 7 O.R. (2d) 380 (H.C.J.).

⁸ I should also add that the law concerning the former limitation period(s) that applied to contribution and indemnity claims under s. 1 of the *Negligence Act* is not entirely clear. Since a contribution and indemnity claim is not a claim for damages arising from the accident, I am not persuaded that Mr. Green was correct in asserting that the six-year limitation period applicable to negligence actions generally applied; nor am I persuaded that the respondents were correct in asserting that the two-year limitation period under s. 206 of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8, applied in this case.

In my opinion, unless the injured party’s limitation period against the concurrent tortfeasors had expired (in which case s. 8 of the *Negligence Act* would have governed), the applicable limitation period was likely the six-year limitation period applicable to actions on the case under s. 45(1)(g) of the *Limitations Act*, R.S.O. 1990, c. L.15. See e.g. *Peel (Regional Municipality) v. Canada*, [1987] 3 F.C. 103.

I do not think the applicable limitation period was the two-year period applicable to actions under a statute under s. 45(1)(h) of the former *Limitations Act* because that section has been interpreted as being restricted to penal provisions (see *Zurich Indemnity Co. of Canada v. Matthews* (2005), 254 D.L.R. (4th) 97 (Ont. C.A.) and *West End Construction Ltd. v. (Ontario (Ministry of Labour))* (1989), 70 O.R. (2d)133 (C.A.)). Section 1 of the *Negligence Act* is not such a provision.

I cannot rule out entirely the possibility that the relevant limitation period was the six-year limitation period applicable to actions on a contract or for a debt under s. 45(1)(g) of the *Limitations Act*, but I think it is more likely that the limitation period for actions on the case applied: see Cheifetz at p. 77-79; and *Baker*.

[44] Although this case law was premised largely on the concept of how causes of action accrued, it was also based on the wording of s. 1 of the *Negligence Act*. Section 1 of the *Negligence Act* reads as follows:

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent. [Emphasis added.]

[45] Under s. 1 of the *Negligence Act*, a concurrent tortfeasor does not become exposed to potential liability for a disproportionate share of the injured party's damages until the injured party makes a decision to sue the particular tortfeasor. This is because an injured party is not required to sue all concurrent tortfeasors in order to achieve full recovery. Rather, an injured party may obtain full recovery from a single concurrent tortfeasor, leaving that tortfeasor to claim contribution and indemnity from other concurrent tortfeasors, by way of a claim advanced in the injured party's action under s. 5 of the *Negligence Act* (or, formerly, by way of a freestanding action under s. 8 of the *Negligence Act*, where s. 8 applied⁹).

[46] Further, even though s. 5 of the *Negligence Act* created a procedural mechanism for a concurrent tortfeasor to advance a claim for contribution and indemnity in the injured plaintiff's action, under the former limitations regime, a cause of action for contribution and indemnity did not accrue until a concurrent tortfeasor's liability to the injured plaintiff for more than his or her fair share of the plaintiff's claim had crystallized in a judgment.¹⁰

[47] In the result, under the former limitations regime, the acts or omissions on which a claim for contribution and indemnity is based within the meaning of s. 24(2) would be the failure of another concurrent tortfeasor to pay his or her fair share of the injured party's damages before the injured party obtained judgment against the contribution and indemnity claimant.

⁹ Section 8 of the *Negligence Act* was repealed by the new Act.

¹⁰ See the cases referred to in footnote 7.

[48] Given that the Placzeks did not even commence their action against Mr. Green until 2005, applying the law under the former limitations regime, the acts or omissions on which Mr. Green's proposed counterclaims are based did not take place before the new Act came into force.

[49] Finally, I also note that under s. 18 of the new Act, the acts or omissions on which Mr. Green's counterclaims are based are deemed to have occurred on June 8, 2005, the day he was served with the Placzeks' statement of claim.

[50] Accordingly, whether one applies the former limitations regime or the new limitations regime, the acts or omissions on which Mr. Green's proposed counterclaims are based did not take place before the new Act came into force and the requirements of s. 24(2) are not satisfied. In the result, the transition section does not apply and the limitation periods under the new Act govern.

2) Does transition rule 2 of s. 24(5) apply to Mr. Green's proposed counterclaims?

[51] Although it is unnecessary that I do so given my conclusion on the first issue, I wish to note that, under my analysis, Mr. Green's argument that transition rule 2 of s. 24(5) applies because he discovered his proposed counterclaims prior to the date the new Act came into force was doomed to failure.

[52] Whether under the former limitations regime or under the new Act, in the context of limitations law, "discovered" refers to discovering the material facts on which a cause of action or claim is based for the purpose of triggering the limitation period: see *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224; and see s. 5 of the new Act.

[53] As I have said, the weight of authority in Ontario indicates that, under the former limitations regime, the limitation period in relation to Mr. Green's proposed counterclaims would not have commenced to run until Mrs. Placzek obtained a judgment against him. As the limitation periods for Mr. Green's proposed counterclaims did not commence to run prior to the date the new Act came into force, I fail to see how he could have discovered his proposed counterclaims before that date.

VI. Disposition

[54] Since I have concluded that the limitation periods in the new Act apply to Mr. Green's proposed counterclaims and since Mr. Green does not challenge the motion judge's conclusion that those limitation periods have expired, I would dismiss the appeal

with costs on a partial indemnity scale in favour of each respondent fixed in the amount of \$5000 inclusive of disbursements and applicable G.S.T.

RELEASED: January 28, 2009 “JL”

“Janet Simmons J.A.”

“I agree John Laskin J.A.”

“I agree R.G. Juriansz J.A.”

APPENDIX “A”

1. In this Act,

"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

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.

Prior to November 27, 2008, s. 24 read as follows:

24(1) In this section,

“effective date” means the day on which this Act comes into force;

“former limitation period” means the limitation period that applied in respect of the claim before the coming into force of this Act.

(2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.

(3) If the former limitation period expired before the effective date, no proceeding shall be commenced in respect of the claim.

(4) If the former limitation period did not expire before the effective date and if no limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, there is no limitation period.

(5) If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.

2. If the claim was discovered before the effective date, the former limitation period applies.

(6) If there was no former limitation period and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.

2. If the claim was discovered before the effective date, there is no limitation period.

(7) In the case of a claim based on an assault or sexual assault that the defendant committed, knowingly aided or encouraged, or knowingly permitted the defendant's agent or employee to commit, the following rules apply, even if the former limitation period expired before the effective date:

1. If section 10 would apply were the claim based on an assault or sexual assault that took place on or after the effective date, section 10 applies to the claim, with necessary modifications.
2. If no limitation period under this Act would apply were the claim based on a sexual assault that took place on or after the effective date, there is no limitation period.

(8) This section is subject to any agreement to vary or exclude a limitation period that was made before the day this Act comes into force.

Effective November 27, 2008, s. 24 was amended to read as follows:

24(1) In this section,

"former limitation period" means the limitation period that applied in respect of the claim before January 1, 2004.

(2) This section applies to claims based on acts or omissions that took place before January 1, 2004 and in respect of which no proceeding has been commenced before that date.

(3) If the former limitation period expired before January 1, 2004, no proceeding shall be commenced in respect of the claim.

(4) If the former limitation period did not expire before January 1, 2004 and if no limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, there is no limitation period.

(5) If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:

1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.
2. If the claim was discovered before January 1, 2004, the former limitation period applies.

(6) If there was no former limitation period and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after January 1, 2004, the following rules apply:

1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.
2. If the claim was discovered before January 1, 2004, there is no limitation period.

(7) In the case of a claim based on an assault or sexual assault that the defendant committed, knowingly aided or encouraged, or knowingly permitted the defendant's agent or employee to commit, the following rules apply, even if the former limitation period expired before January 1, 2004:

1. If section 10 would apply were the claim based on an assault or sexual assault that took place on or after the January 1, 2004, section 10 applies to the claim, with necessary modifications.
2. If no limitation period under this Act would apply were the claim based on a sexual assault that took place on or after January 1, 2004, there is no limitation period

(7.1) For the purposes of this section, clause 45 (1) (g) of the *Limitations Act*, as it read immediately before its repeal, applies to a claim respecting amounts paid to the Crown or to another public authority for which it is alleged that no valid legal authority existed at the time of payment.

(8) This section is subject to any agreement to vary or exclude a limitation period that was made before January 1, 2004.