

CASE LAW UPDATE

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Givogue v. Burke

2010 ONSC 5075, Released 23 September 2010

Limitation Periods – Amendment of Pleadings – Deemed Undertaking

The plaintiffs brought a motion to amend their amended statement of claim in an action that, in ten years, had not yet proceeded to discoveries. The plaintiffs sought to add a new cause of action based on the tort of knowingly participating in breach of a fiduciary duty. The plaintiffs were given 20 days to further amend the statement of claim to properly plead this cause of action because the *Limitations Act, 2002* did not apply.

Equitable claims were not covered by the old *Limitations Act*, but they are now covered by the *Limitations Act, 2002*. However, the *Limitations Act, 2002* did not apply here because the conditions in the s. 24 transition provisions were not met. In this case, a proceeding had been commenced in respect of the claim prior to January 1, 2004. Accordingly, the old *Limitations Act* applied, with the result that there was no limitation period.

The plaintiffs also sought an order confirming that the deemed undertaking rule did not apply with respect to their communications with the Office of the Superintendent of Financial Institutions (OSFI), so that the plaintiffs could meet with OSFI and seek their advice and evidence in advance of trial. The judge noted that the deemed undertaking rule does not apply to interviewing a witness in preparation for the same proceeding. The judge nevertheless refused to grant a blanket order allowing the disclosure of information to OSFI, and, instead found that it was up to the plaintiffs to ensure that this rule was not violated by ensuring that the information is not used for any collateral use.

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