Court Finds Discretion in s. 106 of C.J.A. to Circumvent Limitation Defence

On Feb. 22, 2013, the Ontario Court of Appeal released its decision in Bruinsma v Creswell, 2013 ONCA 111. While there are a number of interesting issues raised in that decision as to the availability of uninsured motorist coverage, the most interesting part of the decision to me was the application by the Court of the rarely used s.106 of the *Courts of Justice Act* to allow a crossclaim to proceed despite what was held to be a valid limitation period defence.

In my view, this course of action was both unnecessary and problematical.

While this issue arises in the context of a motor vehicle claim, the result is of general application, and those not interested in motor vehicle law may still find it worth their patience to suffer through my brief summary of the somewhat convoluted fact situation in order to appreciate the general ramifications of this decision.

The fact situation was a bit unusual. The defendant Cresswell was an uninsured motorist whose vehicle was involved in a collision with a vehicle owned by the plaintiff, Bruinsma. Ordinarily, this would have made Bruinsma's own insurer, CAA, liable to pay Cressman's share of Bruinsma's damages up to the $200,000 uninsured motorist limits and seek subrogation against Cresswell for whatever it had to pay on his behalf.

However, at the time of the accident, the plaintiff, Bruinsma, was knowingly driving while his licence was suspended. His insurer, CAA, therefore denied the uninsured motorist coverage on the ground that Bruinsma was in breach or a statutory condition of the policy which prohibits driving a vehicle without proper authorization by law.

If the CAA's position were correct, this would leave Bruinsma's only recourse to be the Motor Vehicle Accident Claims Fund, which is a government fund of last resort available when no insurance is available to respond to an automobile accident claim.

Bruinsma sued both the CAA and Cressman.

Section 8 of *The Motor Vehicle Accident Claims Fund Act* provides that under these circumstances, the Fund was entitled to defend the action on behalf of Cressman (since the Fund would be liable for any judgment up to $200,000 against Cressman if the CAA was not). Once on the record, the counsel appointed by the Fund issued a crossclaim against CAA for a declaration that the CAA's denial of coverage to Bruinsma was invalid. The CAA defended the crossclaim on the merits (i.e., taking the position that its denial of coverage was justified), but also took the position that the crossclaim was issued beyond the limitation period for contribution and indemnity set out in the *Limitations Act, 2002*.

This situation left the both the Fund and the CAA in an unenviable position. Each would have to defend the merits of Bruinsma's claim against Cressman, but only one would ultimately be called upon to pay. From a economic standpoint, one would have thought it would make sense to determine the issue of whether CAA's policy denial was valid before proceeding with the action with respect to them personal injury claim as that would let one of the CAA and the Fund out of the action.

CAA therefore brought a motion for summary judgement seeking a dismissal of the claim by the plaintiff Bruinsma, on the basis that its denial of coverage was valid, and for a dismissal of the Fund's crossclaim on the basis that it had been initiated after the expiry of the limitation period for contribution and indemnity. The plaintiff consented to the CAA's motion, but the Fund disputed both parts of the motion.

The motions court (Bruinsma v. Cresswell, 2012 ONSC 4440) found that the statutory condition with respect to the driving while unlicenced was not applicable to the uninsured motorist coverage and the Court of Appeal agreed. In other words, both courts found that the CAA's off coverage position was not valid. The reasons for this decision are quite complicated and are worth reading for anyone interested in that particular aspect of the law, but are beyond the scope of this commentary which is limited to the more general issue involving the application of s. 106 of the Courts of Justice Act to the provisions of the Limitations Act, 2002.

Justice Heeney, the motions court judge, dealt with the CAA's limitation period defence to the motion, in a nutshell, by holding that the Fund was exempt from the provisions of the Limitations Act.

The Court of Appeal commented on the motion court judge's decision as follows:

> "[70] The motion judge also concluded that dismissing the cross-claim would "allow form to triumph over substance". The Fund is an insurer of "last resort". Section 22 of the MVACA provides that no amount shall be paid or payable out of the Fund in respect of an amount paid or payable by an insurer by reason of the existence of a policy of insurance. If the cross-claim were dismissed, and the plaintiff proceeded to obtain judgment against Cresswell and then seek payment out of the Fund pursuant to s. 7(1) of the MVACA, the Fund could assert in defence that it did not have to pay because the policy should have responded. The issue of coverage would then be determined. Since the identical issue would eventually be decided, the motion judge elected to avoid a multiplicity of proceedings by finally deciding the issue."
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> "[74] I agree with the motion judge that nothing would be gained by permitting CAA's summary judgment motion to proceed, to the extent it relies on the Limitations Act. However, in my view, given the clear wording of s. 19(2) of the Limitations Act, it was

> not open to the motion judge to conclude that the Limitations Act is not applicable to the Minister under the MVACA."

In other words, the Court of Appeal liked the result that the motions court judge achieved, that is, denying the CAA its limitation defence, but was not comfortable with how the motions court judge achieved that result.

The Court of Appeal achieved the same result by holding that s. 106 of the Courts of Justice Act, which reads:

> "106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."

gave the court the discretion to stay the portion of the CAA's motion for summary judgment which was based on the limitation period.

The court's reasons read as follows:

> "[75] I would come to the same result as the motion judge by instead staying CAA's summary judgment motion to the extent founded on the limitation argument, on this court's own initiative pursuant to s. 106 of the Courts of Justice Act, R.S.O. 1990, c. C. 43. This section permits a court to stay any proceeding 'on such terms as are considered just.'
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> "[76] In Penn-Co Construction Canada (2003) Ltd. v. Constance Lake, 2008 ONCA 768, 76 C.L.R. (3d) 1, at para. 4, this court observed that 'the risk of multiplicity of proceedings, the avoidance of cost and inconvenience[,] and the risk of inconsistent results are factors to be taken into account in the exercise of the discretion conferred by [s. 106].' In my view, all of these factors strongly militate towards staying the CAA's limitations defence. To allow it to succeed would simply delay the disposition of this case, at the expense of judicial economy and expeditious determination of the issues.

S. 106 of the *Courts of Justice Act* is usually invoked in *forum conveniens* cases involving choice of jurisdiction problems, or to prevent abuses of process. It seems a bit harsh to invoke it to circumvent what is acknowledged to be a valid limitation defence when there was no suggestion that CAA was proceeding improperly or abusing the process of the courts.

Furthermore, it may set a dangerous precedent by re-introducing an element of discretion back into the enforcement of limitation periods after the court expressly held in *Joseph v. Paramount Canada 's Wonderland*, 2008 ONCA 469 that the Limitations Act 2002 had eliminated the former discretion for "special circumstances".

I would suggest there were at least two other ways that the Court could have come to the same result without running the risk of setting an unfortunate preference.

First, S. 16(1)(a) of the Limitations Act, 2002, reads "There is no limitation period in respect of a proceeding for a declaration if no consequential relief is sought."

Since the crossclaim by Cresswell was for a declaration (that the CAA's denial of coverage was wrong), the court could simply have held that there was no applicable limitation period and dismissed CAA's motion to dismiss the crossclaim on those grounds.

Without seeing the pleadings it is impossible to say whether Cressman's crossclaim had also included consequential relief, but it is hard to see what consequential relief could be legitimately claimed. Cressman personally had no right to contribution and indemnity from CAA (to the contrary, it was CAA which had a complete right to contribution and indemnity from Cresswell). Likewise, the Fund would have no right to contribution and indemnity from CAA (except perhaps for costs) as once it was determined that CAA provided coverage, the Fund would have no obligation to pay the plaintiff and therefore nothing to be indemnified for.

Second, the usual disposition of a summary judgment motion is either to decide the matter in favour of the moving party, or dismiss the motion (on the grounds that a triable issue remains) and allow the matter to be decided by the trial judge. However, in cases where the issue is solely a matter of law and there are no facts in dispute (which appears to be the case here), it is open to the motions judge to make a final disposition of the matter *against* the moving party. (See the excellent article to this effect by Matthew Diskin in Canadian Lawyer: http://www.canadianlawyermag.com/3952/beware-the-backfire.html).

Therefore, on the portion of the motion by CAA in which the CAA asked that the plaintiff's claim be dismissed on the ground that there was no coverage, the Court could presumably simply have made a ruling in favour of the plaintiff, that there was in fact coverage. Once there was a ruling that the CAA policy provided coverage, there would no longer be a possibility of any payment to the plaintiff by the Fund (which could then withdraw from the defence of Cresswell) and Cresswell's crossclaim would become moot and the limitation issue would not need to be addressed at all.

In the end, the result achieved by the Court was, in my opinion, just, but the means of reaching that end may, unnecessarily, have set an unfortunate precedent. It remains to be seen if courts in the future will ignore this decision as a one-off based on a unique fact situation, or use it as a precedent to expand the ambit of s.106 of the Courts of Justice Act and return discretion to dealing with limitation defences.