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Canadian Tyco Decision Reflects Shift in Summary Judgment Law

By [Scott Maidment](#) and [Jennifer Dent](#)



Canadian DRI members Scott Maidment and Jennifer Dent (of McMillan Binch in Toronto, Ontario) have shown that summary judgment is a defense tool that is still alive and well north of the border. In May, the pair obtained a summary judgment dismissing a \$10 million claim against their client, Tyco Electronics, based on allegations of misrepresentation and breach of contract.

Tyco had denied the plaintiff's allegations, but also moved for a summary dismissal on the ground that the action was not commenced within the applicable limitation period. The motion was vigorously opposed by the plaintiff, who argued that the limitation issue could not be determined before trial. Justice Spence of the Ontario Superior Court granted Tyco's motion for judgment, however, and dismissed the plaintiff's claim on the basis that the limitation period expired in 1999, before the action was commenced.

The Tyco decision reflects a recent shift in Ontario in terms of judicial attitudes toward the use of summary judgment to determine limitation issues. Maidment says that the 1998 decision of the Ontario Court of Appeal in *Aguonie v. Galion* (1998), 38 O.R. (3d) 161 had a chilling effect on summary judgment motions in Ontario, particularly in the area of limitations. Under Ontario law, limitation issues in many cases can turn on the application of what is known as the "discoverability rule". This rule postpones the commencement of a limitation period until that point in time when the plaintiff actually discovers the material facts giving rise to the claim, or ought to have discovered them through the exercise reasonable diligence. In *Aguonie*, the Court of Appeal suggested that any dispute about the application of the discoverability rule should be left to the trial judge and should generally not be determined on summary judgment. *Aguonie* had the effect of discouraging motions judges from dealing with limitations issues on summary judgment, and also from granting summary judgments generally. Many defense counsel were concerned for some time about this impact of *Aguonie*, particularly as it essentially allowed plaintiffs to avoid summary judgment on limitations merely by putting their own knowledge in issue.

Maidment says the Tyco decision reflects a post-*Aguonie* shift toward a more rigorous analysis of the plaintiff's limitation arguments at the motion stage. Though the plaintiff filed evidence designed to put the discoverability rule in issue, Justice Spence closely examined the evidence and concluded that no trial was necessary to deal with the application of the rule. Justice Spence relied upon more recent judgments of the Ontario Court of Appeal that clarified its earlier comments in *Aguonie*, and thereby paved the way for decisions like that in Tyco.

Maidment believes that summary judgment may still be under-utilized by corporate defense counsel in Ontario as a result of the chilling effect of *Aguonie*. His view is that in a large dollar case, the possibility of an early closure for a relatively moderate investment should be closely analyzed, particularly as every case will turn on its specific facts. At this point, it's not known whether the plaintiff will appeal the Tyco decision.

The litigation team on the Tyco case included Maureen Denton, Senior Counsel with the Tyco Electronics Group.