

Insurance

Court of Appeal reaffirms limited use of Rule 21.01 for limitations issues

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(May 12, 2023, 1:21 PM EDT) -- The Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 give parties multiple ways to make “quick exits” from litigation. One such exit is to bring a motion for a determination of an issue before a trial under Rule 21.01.

In a recent case, *Toussaint v. Canada (Attorney General)* [2023] O.J. No. 922 (*Toussaint*), the Ontario Court of Appeal provided the latest guidance on the use of Rule 21.01 to strike a pleading on the grounds that it is statute barred pursuant to the *Limitations Act*, 2002 S.O. 2002, c. 24, Sched. B. (*Limitations Act*). *Toussaint* reaffirms that only in very specific and rare circumstances can a motion judge determine a limitations issue on a Rule 21.01 motion.

Asking court to determine an issue before trial

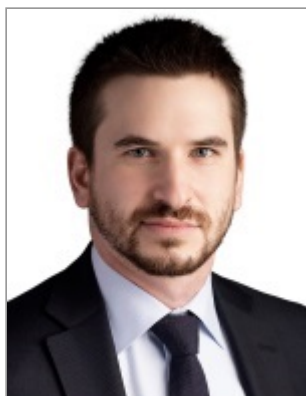
Rule 21.01 provides the procedure for determining various preliminary issues which may dispose of a proceeding without a trial. Under the Rule, parties can ask a court to dispose of a proceeding in three ways:

First, parties can move before a judge for the determination of a question of law raised by a pleading where that determination may dispose of all or part of the action, substantially shorten the trial, or substantially save costs (Rule 21.01(1)(a)).

Second, parties can move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action or defence (Rule 21.01(1)(b)).

Finally, a defendant can move before a judge to have an action stayed or dismissed on the grounds that: (a) the court has no jurisdiction over the subject matter of the action; (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued; (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or (d) the action is frivolous or vexatious or is otherwise an abuse of court processes (Rule 21.01(3)).

On the first two types of motions (under Rule 21.01(1)), parties cannot admit evidence except with leave or on consent (Rule 21.01(1)(a)). This inability to bring evidence on the motion is important as parties often ask courts to rule that a claim is statute barred by making a determination on a point of law under Rule 21.01(1)(a) or by striking pleadings on the basis that it discloses no reasonable cause of action under Rule 21.01(1)(b).



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However, determining whether a claim is discovered under s. 5 of the *Limitations Act*, thereby

triggering the general two-year limitation period, almost always requires the court to engage in fact finding. That is, the court must determine based on evidence when the plaintiff did or should have discovered that they had a claim against the defendant.

Accordingly, courts have been clear that motions under Rule 21.01 are generally not appropriate for determining whether a claim is barred by a limitation period. It is only in rare cases where all relevant facts are undisputed can Rule 21.01 be used to determine whether a claim has breached the limitation period *Miano v. Campos*, [2019] O.J. No. 1790 at para. 13.

Canada moves to strike Toussaint's claim on basis that it is statute barred

Nell Toussaint lawfully entered Canada as a visitor from Grenada in 1999. Her claim arose as a result of the federal government denying her health-care coverage pursuant to the Interim Federal Health Program between 2009 and 2013. Toussaint initially brought an application for judicial review to the Federal Court of Canada, appealed to the Federal Court of Appeal, and sought (and was refused) leave to the Supreme Court of Canada (*Toussaint* at para. 4).

In 2013, Toussaint made a submission to the United Nations Human Rights Committee (the UNHRC), alleging that Canada had breached certain obligations under international law, including her right to life and non-discrimination (*Toussaint* at para. 5). In 2018, the UNHRC found that Canada had violated Toussaint's right to life and that Canada was required to provide her with an effective remedy, including compensation. Canada disagreed with the UNHRC's decision and stated that it would not follow its recommendations (*Toussaint* at para. 5).

Accordingly, on Oct. 14, 2020, Toussaint commenced an action against the federal government. Her claim included several causes of action grounded in the *Canadian Charter of Rights and Freedoms (Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982, 1982, c. 11 (UK)*, which came into force on April 17, 1982), customary international law, and administrative law. Toussaint sought several forms of relief, including general and special damages in the amount of \$1,200,000 (*Toussaint* at para. 6).

In response, Canada moved to strike Toussaint's statement of claim under Rule 21.01(b) in part because it disclosed no reasonable cause of action as the claim was issued after the two-year limitation period as provided for by the *Limitations Act (Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747 at para. 9 (*Toussaint* ONSC). On the motion, Canada alleged, in part, that Toussaint discovered her claim on July 24, 2018, when the UNHRC released its decision against Canada. As a result, Toussaint should have commenced her claim within two years (*Toussaint* ONSC at para. 115).

Ontario Superior Court dismisses Canada's motion to strike and finds Toussaint's action not statute barred

At the Ontario Superior Court of Justice, Justice Paul M. Perell dismissed Canada's motion and permitted Toussaint's action to proceed (*Toussaint* ONSC at para. 205). However, rather than simply dismiss Canada's motion on the basis that it was not plain and obvious that the limitations defence would fail, Justice Perell ordered that Toussaint's claim was not statute barred pursuant to the *Limitations Act* and precluded Canada from raising a limitations defence at trial (*Toussaint* at para. 10). Canada appealed to the Ontario Court of Appeal.

Court of Appeal overturns motion judge, holds that limitations issues can rarely be decided on pretrial motions to strike

The Court of Appeal overturned the motion judge's decision, in part. The court held that Justice Perell "went beyond the confines of the relief sought on the motion" by finding that Toussaint's claim was not statute barred and preventing Canada from raising a limitations defence at trial (*Toussaint* at paras. 10, 12). However, Toussaint's action was permitted to proceed if the respondent wished to do so (*Toussaint* at paras. 24, 25).

The court reaffirmed that "limitations issues can rarely be decided on pre-trial motions to strike" pursuant to Rule 21.01 because "[f]actfinding is required to assess whether a claim is discovered" under the *Limitations Act (Toussaint* at para. 11.) Fact finding, however, is not to be done on a

pleadings motion under Rule 21.01 (*Toussaint* at para. 11). As a result, the court in *Toussaint* upheld its previous jurisprudence that Rule 21.01 should generally not be used to determine limitations issues. Rather, courts should only address limitations issues on a pleadings motion “where pleadings are closed and the facts relevant to the limitation period are undisputed” (*Toussaint* at para. 11).

It is important to remember that on the motion, the motion judge did not have the benefit of Canada’s statement of defence (that is, pleadings were not closed) nor was there any evidence provided (as stipulated in the Rules) (*Toussaint* at para. 13). Additionally, the court found that the limitations issue was “complicated by the nature of the claims” and there were “factual discoverability issues” (*Toussaint* at para. 14.)

Overall, the court determined that:

[...] although it was open to the motion judge to dismiss the rule 21.01(1)(b) motion, he erred in going further by ordering that the claim was *not* statute barred pursuant to the *Limitations Act* and precluding the appellant from raising a limitations defence at the trial. *The motion judge’s conclusion that it was not plain and obvious that Ms. Toussaint’s action was statute barred pursuant to the Limitations Act does not entail the further conclusion that the action is timely.* [*Toussaint* at para. 15, emphasis added.]

Conclusion

The key takeaway from the *Toussaint* decision is that a motion judge’s determination that a claim is not statute barred for the purposes of a Rule 21.01 motion does not mean that the fight over the limitation period is at an end. The parties can continue to argue whether the limitation period has, in fact, passed, based on evidence that arises after the pleadings have closed or evidence that is precluded on a pretrial motion to strike.

Furthermore, on a motion to strike, parties should not ask the court to determine the discoverability date of a claim or seek an order declaring that the limitation period has passed, when those very issues are in dispute between the parties.

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