

**IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c.S.5, AS AMENDED**

AND

**IN THE MATTER OF A PROCEEDING
BROUGHT PURSUANT TO SECTION 127 OF THE ACT
IN THE MATTER OF
ANDREW CURRAH, COLIN HALANEN,
JOSEPH DAMM, NICHOLAS WEIR,
PENNY CURRAH AND WARREN HAWKINS**

Motion Hearing:

July 7, 2005

Panel:	Paul M. Moore, Q.C.	-	Vice-Chair (Chair of the Panel)
	Robert W. Davis, FCA	-	Commissioner
		-	
Counsel:	Jane Waechter	-	For Staff of the Ontario Securities Commission
	Nicholas Weir	-	On his own behalf
	Andrew Currah	-	On his own behalf
	Penny Currah	-	On her own behalf
	Joseph Damm	-	Michael Whitney as agent

DECISION AND REASONS

The Motion

[1] On July 7, 2005, the Commission heard a motion brought by one of the respondents, Nicholas Weir, under Rule 6 of the *Ontario Securities Commission Rules of Practice* (the “Rules”) to consider whether the limitation period set out in section 129.1 of the *Securities Act*, R.S.O. 1990, C. s.5 as amended (the “Act”) operates to prevent this matter from proceeding.

[2] Weir argued that the action against the respondents should be set aside on the basis that it was undertaken outside the five-year limitation period as set out in the Act in effect in 1998. Further, Weir argued that the issuance of a notice of hearing and of a statement of allegations did not constitute the commencement of this proceeding.

Five years or six years

[3] Counsel for Staff submitted that this proceeding was commenced on July 23, 2004, and that the conduct in question pertains to the period between July 1997 and December 1998. Staff submitted that the limitation provision in section 129.1 (and its predecessor) is a procedural provision, which is capable of retrospective application. When the limitation provision was amended in 1999, the old limitation period of five years had not expired and therefore the respondents did not then have an existing substantive right to a defence that the limitation period had expired. Staff argued that the respondents were not deprived of a vested substantive right when the revised limitation period came into effect. Accordingly, the current version of section 129.1 of the Act, providing for 6 years, applies to the respondents.

[4] After considering the respective arguments made by counsel for Staff and those of the respondent, Weir, we ruled on July 7, 2005, that the six-year provision currently in section 129.1 of the Act applies to this proceeding.

[5] In so ruling, we relied on two Supreme Court of Canada decisions which support the proposition that legislation is presumed not to apply retroactively, except in the case of procedural provisions (see *Angus v. Hart*, [1988] 2 S.C.R. 256 (at para.19); and *Martin v. Perrie*, [1986] 1 S.C.R. 41). We also relied on *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. No. 15, where the Supreme Court determined that the prohibition against retrospective application of statutes does not apply to an amendment made not to punish but rather to protect the public interest. As stated in *Asbestos*, the purpose of the Commission’s public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario’s capital markets (see: *Re Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* (2001), 199 D.L.R. (4th) 577 (S.C.C.) at p. 590).

When did the proceeding commence?

[6] At the hearing, the panel advised the parties that it was reserving on the question of whether or not this proceeding actually commenced within the six-year period. The panel invited counsel for Staff and the respondents to file supplementary written submissions as to when a proceeding is commenced for purposes of section 129.1 of the Act. Staff filed supplementary submissions on July 13, 2005, and two of the respondents who were not represented by counsel, Weir and Andrew Currah, filed supplementary submissions respectively on July 18 and July 20, 2005.

[7] These are our decision and reasons on the question of whether or not this proceeding actually commenced within the six-year limitation period set out in section 129.1 of the Act.

Weir's Submissions

[8] The respondent, Weir, submits that the failure of Staff to base the statement of allegations and notice of hearing on meaningful evidence and to schedule a hearing within a reasonable period of time make the initiating documents improper and invalid and hence, not applicable as a reference for the commencement of the proceeding. For these reasons, Weir submits, this proceeding has not legally commenced, and, if and when proceedings are legally commenced, they will be outside the six-year limitation period.

Currah's Submissions

[9] Currah's submits that: "the applicable limitation period of 6 years be calculated from the date on which the remedy was effected by the Commission's action, that is, the date from which this respondent was originally made legally answerable to what is in issue in this matter." Further, he submits that the word "action" should not be understood within the context of its technical legal meaning defined in Rule 1.03 of the *Rules of Civil Procedure*; rather, it should be understood "within the context of its natural sense."

[10] According to Currah, the six-year limitation period should be calculated "from the date of refusal of the registration, that is, the effective date of the Commission's remedial action taken in the public interest (as it was based on the activities, initiated by the Commission in 1997, investigating and examining what is in issue in this matter)."

[11] In his conclusion, Currah requests "disclosure of the document or documents that record this date, as it is a feature of the history of the Commission's administrative, regulatory, and enforcement activities in relation to this matter." Further he adds, "if the effective date of the Commission's remedial action occurs more than 6 years prior to the issuance of the Notice of Hearing and Statement of Allegations on July 23, 2004, this Respondent submits that the limitation period (...) has expired (...)"

Staff's Submissions

[12] Counsel for Staff submits that section 129.1 of the Act completes section 4.5 of the *Statutory Powers Procedure Act*, R.S.O. 1990 (the "SPPA") by setting out the specific time within which a proceeding may be commenced. Counsel submits that section 4.5 of the SPPA establishes clearly that the commencement of a proceeding involves submitting documentation to be processed by a tribunal or its administrative staff. According to Staff, under the Act, the words "documents relating to the commencement of a proceeding" referred to in section 4.5 of the SPPA can only be the notice of hearing and statement of allegations, which are issued by the secretary's office of the Commission. Hence, counsel submits, this proceeding was commenced on July 23, 2004, earlier than six years from the date of the occurrence of the last event on which the proceeding is based.

The *Statutory Powers Procedure Act* and the *Securities Act*

[13] The SPPA governs proceedings under section 127 of the Act. Section 1.(1) of the SPPA provides the following definitions of the terms "hearing" and "proceeding":

"hearing" means a hearing in any proceeding...

"proceeding" means a proceeding to which this Act applies...

[14] A literal interpretation of these definitions makes it clear that a hearing is part of a proceeding. The commencement of a proceeding is addressed in subsection 4.5(1) of the SPPA, which states:

4.5(1). Subject to subsection (3), upon receiving documents relating to the commencement of a proceeding, a tribunal or its administrative staff may decide not to process the *documents relating to the commencement of proceeding* if

...

(b) the documents are received after the time required for commencing the proceeding has elapsed...[Emphasis added]

[15] The reference to the words "commencement of a proceeding" found at subsection 4.5(1) is also present in section 129.1 of the Act. Section 129.1 of the Act completes section 4.5 of the SPPA by setting out the specific time within which a proceeding may be commenced. Section 129.1 of the Act reads as follows:

Limitations period – Except where otherwise provided in this Act, no proceeding under this Act shall be commenced later than six years from the date of the occurrence of the last event on which the proceeding is based.

[16] Section 4.5 of the SPPA clearly establishes that the commencement of a proceeding involves submitting documentation to be processed by a tribunal or its administrative staff.

Analysis

[17] Weir's arguments are based on two aspects: (1) what he perceives as failure by Staff to "base the Statement of Allegation and Notice of hearing on meaningful evidence" and (2) failure of the Commission to schedule a hearing within a reasonable period of time.

[18] This cannot be correct. As to the first aspect, what constitutes meaningful evidence cannot be known until the Commission hears evidence at the hearing (i.e. after the proceeding has commenced). As to the second aspect, we do not agree that the commencement of a proceeding is determinable in any way by an event that will occur subsequent to the commencement, such as scheduling a hearing.

[19] As to Currah's arguments, their logic failed to convince us. Currah suggests that the applicable limitation period of 6 years be calculated from "the date *on which the remedy* was effected by *the Commission's action*, that is, the date from which this respondent was made legally answerable to what is in issue in this matter and that the word "action" should be understood in its natural sense rather than its legal one."

[20] We rely on three decisions which deal specifically with the question at issue. We also considered cases submitted by Staff which demonstrate the existence of analogous concepts in civil proceedings.

[21] The issue of when proceedings are commenced, for limitation period purposes, under the *British Columbia Securities Act*, was recently considered by the British Columbia Court of Appeal in *Smolensky v. British Columbia (Securities Commission)*, (2004), 236 D.L.R. (4th) 262. The court considered the manner in which proceedings were commenced and concluded that the issuance of a notice of hearing marked the commencement of the proceedings. The court stated at paras 27 and 28:

(...)The issue is whether the proceedings against the appellant have been "commenced". The executive director of the Commission sent a notice of hearing to the appellant dated 11 September 2002, containing particulars of the allegations. The notice did not set a hearing date; rather it set a date on which the appellant could be heard with respect to a hearing date. The appellant submits that, unlike a writ of summons or information, a notice of hearing has no legal effect and proceedings do not commence until the hearing commences, which of course has not yet occurred in this case.

The Commission cannot make an enforcement order under s. 161, other than a temporary order, without a hearing. Due process requires that the intended subject of enforcement proceedings be given notice of the hearing. While not a document formally identified in the Act it is an essential prerequisite of an enforcement proceeding, unless waived. *In my view, the notice is the initiating document that commences the proceedings and the proceedings against the appellant have been commenced within the six years provided by s. 159. [Emphasis added]*

[22] The reasoning in *Smolensky* applies directly to the issue raised in this motion. The limitation period considered in *Smolensky* was quite similar to that set out in section 129.1 of the Act. Consequently, the rationale for concluding that a proceeding was commenced by issuance of a notice of hearing is directly applicable to the circumstances of this case.

[23] The combination of the notice of hearing and statement of allegations issued by the secretary's office of the Commission serves the same purpose as the notice of hearing considered in *Smolensky*, namely, to provide particulars of Staff's allegations against a respondent. The legal effect of the initiating documents, which is to signify the commencement of the proceeding, is the same in British Columbia and in Ontario.

[24] The fact that proceedings are commenced before the Commission by issuance of a notice of hearing and a statement of allegations was also recognized in *Re Belteco*, (1997) 20 O.S.C.B. 2921 at para. 1.02:

The proceedings began, originally, by a Notice of Hearing and Statement of Allegations dated December 15, 1993.

[25] In a later decision in the same matter (*Re Belteco*, (1998) 21 O.S.C.B. 7743 at p. 7744), the Commission stated: "Throughout the hearing on the merits which started on July 6, 1998...", and again referred to the limitation period in effect when the notice of hearing was issued.

[26] These two decisions make it clear that the time of commencement of proceedings is the date on which the notice of hearing and the statement of allegations are issued and not the subsequent date on which the hearing commences.

[27] In civil proceedings, an action is commenced by having the court issue an originating document, such as a statement of claim or a notice of application (see Rules 1.03 and 14.01 of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg 194).

[28] In the decisions of *Jeffrey v. Hakim* (1977), 13 O.R. (2d) 99 (Ont. H.C.J.) and *Bryson v. Kerr* (1977), 13 O.R. (2d) 672 (Ont. H.C.J.), where the court had to examine the expiration of a limitation period against the date on which a writ was issued, the court concluded that a proceeding was commenced at the time a document (in those cases, a writ) was issued.

[29] By analogy to civil proceedings, we are of the view that the notice of hearing and the statement of allegations issued by the secretary's office of the Commission have the same legal effect to commence the proceeding as the issuance of a writ (now called a statement of claim or a notice of application) has in a civil proceeding.

Conclusion

[30] We conclude that a proceeding under section 127 of the Act is commenced on the date on which the notice of hearing and statement of allegations are issued by the office of the secretary of

the Commission.

[31] The notice of hearing and statement of allegations in this proceeding were issued on July 23, 2004 which is within six years of the date of the latest alleged event on which this proceeding is based.

[32] Accordingly, we dismiss the motion.

[33] Currah's requests for disclosure "of the document or documents that record this date, as it is a feature of the history of the Commission's administrative, regulatory, and enforcement activities in relation to this matter" is denied.

Dated at Toronto this 29th day of July, 2005

"Paul M. Moore"

Paul M. Moore

"Robert W. Davis"

Robert W. Davis