

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
cite: *Wilson v. O'Leary and Sona Pay Inc* 2021 NSSM 5

SCCH 500889

Between:

Clayton Patrick Wilson

Claimant

— and —

Ryan O'Leary, Payformance POS Canada and Sona Pay Inc

Defendants

Adjudicator:

Augustus M. Richardson, QC

For the Claimant:

Clayton Wilson, claimant

For the Defendants:

Rick M. Dunlop, counsel

Heard:

February 22, 2021 (Defendants' motion
for an order dismissing the claim, heard by teleconference)

Decision:

March 1, 2021

DECISION and ORDER

Introduction

[1] The COVID-19 pandemic shut people out of many buildings, including the courts of this province. The claimant Mr Wilson was one of those whose access to justice was denied or at least restricted as a result. He tried to issue his Notice of Claim before the elapse of the two-year limitation period imposed by the *Limitation of Actions Act* (the "LAA"). He was prevented from doing so because this court had closed its doors to the public. Should he then be denied access to justice because his claim, when he was finally able to issue it, was out of time? The claimant says the answer should be 'no' because he missed the time limit only because this court failed to respond to his request that it be filed and issued in time. The defendants, on their motion to strike the within Notice of Claim, say that the answer should be 'yes.' They say that the fact that unfair things happened as a result of COVID did not alter the laws and legislation of this province.

[2] I have decided on the facts before me, and for the following reasons, that the claimant's claim should be allowed to proceed.

The Facts

[3] This case involves the intersection of provisions of the *Small Claims Court Act*, the practice and procedures of this court regarding how and when claims are issued, the *Limitation of Actions Act* (“LAA”) and the impact of the COVID-19 pandemic on all three.

The *Small Claims Court Act* (“SCCA”)

[4] The Small Claims Court is a creation of statute. Its jurisdiction is based on and draws from the SCCA.

[5] The intent and purpose of the SCCA is “to constitute a court where claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice:” s.2, SCCA.

[6] A claim in this court “shall be commenced ... by filing a claim in the form prescribed by the regulations, accompanied by the prescribed fee, with the prothonotary of the Supreme Court in the proper county:” s.19(1), SCCA. (In practice claims are filed with the Clerk of the Small Claims Court in each county rather than with the prothonotary of the Supreme Court.)

[7] Section 21(1) of the SCCA sets out the duties of the prothonotary (in practice, the clerk) once a claim is delivered to the court:

21(1) Upon a claim being delivered to the prothonotary of the Supreme Court for the county in which an action is commenced, the clerk shall

(a) open a file, affix an identifying number to the file and claim document, date stamp the document, insert the time within which the document is to be served on the defendant, insert the time and place within which any defence or counterclaim is to be filed and served on the claimant, insert the time and place of adjudication in accordance with the regulations ; and

(b) file the original claim document, issue a certified copy to the claimant, issue additional certified copy or copies as required for service by the claimant on the defendant or defendants and a form of defence.

[8] In normal course then a claim pursuant to the SCC is commenced when

- a. the claim is “filed” with the court by being “delivered” to it and
- b. is “accompanied” with the prescribed fee.

[9] Upon such a delivery and filing the court “shall” (*i.e.* is required) to do a number of things, including open a file, numbering the file and date stamping the claim. In practice and in ordinary course all of this happens on the day the claim, accompanied with the appropriate fee, is delivered to and filed with the court.

The LAA

[10] Section 8(1) of the LAA provides that a claim may not be brought after two years from the date on which a claim is discovered. Section 8(2) provides that a claim is discovered “on the day on which the claimant first knew or ought reasonably to have known (a) that the injury, loss or damage had occurred; (b) that the injury, loss or damage was caused by or contributed to by an act or omission; (c) that the act or omission was that of the defendant; and (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.”

When Did The Claimant Discover His Claim?

[11] Mr Wilson claims to be entitled to commissions owing to him by the Defendants. The commissions are said to have become owing as of his resignation from the Defendants on April 24, 2018. On these facts his claim can be said to have been discovered by him on April 24, 2018. His right to commence an action based on that claim accordingly expired on April 24, 2020.

[12] The within claim was filed and issued by this court on September 24, 2020. If that is the date in law that the claim was filed it is statute barred and out of time.

The Facts Regarding The Filing of The Claim—The Impact of the COVID-19 Pandemic

[13] On March 19, 2020 this court, along with the superior courts in this province, restricted access to the public by closing its doors and denying physical access.

[14] On March 31, 2020 the court implemented an “essential service” model. Between that date and July 8, 2020 claims were not accepted by the court without further direction from senior court administrators.

[15] The essential service model was intended to compensate for the public's lack of physical access to the courts. It was to work as follows. Claimants or their counsel would fax or email a Notice of Claim to the court together with an explanation as to why the matter was urgent. The pending expiry of a limitation period was considered to be one such urgent matter. The email or fax, and the explanation, would be reviewed by the senior court administrators. If issuance of the claim was approved payment would be requested and processed by way of a credit card or cheque/money order, and a tentative hearing date in June 2020 would be set.

[16] The essential service model accordingly differed from the normal practice of the court in pre-COVID days in the following ways:

- a. a Notice of Claim was emailed or faxed rather than being delivered by hand or mail;
- b. senior court staff reviewed the Notice of Claim to determine whether it was "urgent," in the sense that it needed to be filed and processed immediately;
- c. If the claim passed that review (and so qualified for processing) the claimant was then asked to pay the filing fee by credit card or cheque/money order (meaning that payment no longer accompanied the claim).

[17] On April 17, 2020 Mr Wilson sent an email to the court, together with handwritten cover letter and a signed copy of his Notice of Claim.

[18] Mr Wilson's email (which attached the letter and Notice of Claim) was as follows:

"Attached is the signed small claims forms to register my claim with the courts. Please let me know how I can pay the required fees and ensure this claim is registered prior to the statute of limitations expiry date. I also faxed the same documents to 902-424-055.

[19] The cover letter that was attached to the email was as follows:

Dear Sir or Madame

Attached is my signed Small Claims Form to register my claim against Ryan O'Leary the owner of Sona Pay Inc/Payformance POS Canada. I know the COVID 19 virus outbreak is causing court delays & I want to ensure the Statute of Limitations does not expire for my claim. Can you please inform me on what's next in the Small Claims process or how I pay the required fees."

[20] The letter concluded with Mr Wilson's name, address, phone number and email address.

[21] The email and the attached signed Notice of Claim was received by this court on April 17th, 2020.

[22] On April 20, 2020 a Small Claims Court clerk emailed Mr Wilson as follows:

“Could you kindly advise when your limitation is set to expire?”

[23] Mr Wilson replied on the same day:

“I resigned on April 24, 2018 and the company Payformance POS (now Sonapay Inc) refused to pay the commissions owed for March and April. They also seized the book of business or clients. I had acquired and refused to pay the 10X value. I'm not sure but I think the limitation is April 24th?”

[24] Unfortunately, for some reason the court took no further steps after receiving Mr Wilson's email of April 20th. As a result Mr Wilson's claim was not filed and issued by the court even though it fit within the essential services model.

[25] On July 8, 2020 the court loosened the restrictions on access that it had originally imposed. Claims could now be accepted by mail, or by being dropped in a box at the door. Claims were date stamped with the date the claim was received (by mail or in the box), although processing times were delayed.

[26] On July 28, 2020 this court began to hear matters by way of teleconference.

[27] During this time Mr Wilson had been waiting for a response to his April 17th email to the court. He says that at one point late in the summer he spoke to someone at the court, who confirmed to him that the email and Notice of Claim of April 17th had been received. He understood that it was being looked into, but it was not until September 24th, 2020 that his Notice of Claim (complete with the attached letter) was actually filed and date stamped by the court.

The Defendants' Position

[28] The defendants submit that Mr Wilson's claim should be dismissed. The requirements to commence a claim in the Small Claims Court were clearly spelled out in the SCCA. Mr Wilson had not met them. He had not delivered and filed a Notice of Claim with the court prior to April 24, 2020. He had not accompanied his April 17th email with the filing fee. The court had not filed and date stamped his

Notice of Claim on April 17th or April 20th. None of this had happened until September 24, 2020, long after the time limit had expired on April 24, 2020.

[29] The defendants emphasize that this is a statutory court. This court's jurisdiction, and that of an Adjudicator, are drawn from the SCCA. An Adjudicator has no inherent jurisdiction. He or she has no power, authority or jurisdiction to ignore, amend or alter the requirements spelled out in the SCCA. The fact that those requirements might not have been met because the court's doors were shut was of no moment. Had the Legislature been concerned that denying access to the courts might cause people to miss limitation periods it could have done something about it. It could have enacted legislation or regulations to pause the passage of time under the LAA. Other provinces had done so. This province did not. Hence the intent of the Legislature must have been to let the chips fall where they may, notwithstanding any apparent injustice caused when a limitation period was missed because the courts had closed their doors. I should, the defendants submitted, give effect to the limitation period and dismiss the claim.

The Claimant's Position

[30] Mr Wilson submitted that he had done everything he could to have his claim filed in time. He had emailed and faxed a signed copy of the notice of claim to the court. He had explained that a limitation period was looming. He asked what more, if anything, he could have done. He awaited a response that he never received. And while the clock ticked this court, for some reason, failed to act. Justice demanded that I permit the claim to proceed.

Analysis and Decision

[31] I am not prepared to give effect to the defendants' motion that I dismiss the within claim. In the circumstances of this case I find that the limitation defence does not apply. I come to this conclusion for the following reasons.

[32] First, there is the question of how I should interpret the words "filing" in s.19(1), and "delivered" in s.21(1), of the SCCA. Those two words in normal circumstances can be interpreted to mean the delivery of a signed Notice of Claim into the physical hands of a court clerk in a physical location (*i.e.* the court house). That is the interpretation that the defendants urged upon me. It is an interpretation that, if accepted, makes the claim out of time.

[33] However, underpinning this interpretation of "filing" and "delivery" is the assumption that there is a physical court that is open to the public to enable such "delivery" and such "filing." The pandemic undermined that assumption. The court shut its doors to the public. It refused to permit claimants to commence claims in the manner traditionally assumed to be the "filing" or "delivery" mandated by the SCCA. It thereby denied claimants the ability to perform the actions that s.19(1) and s.21(1) appeared to

require of them. This closure was surely unprecedented. It was surely not one contemplated by the Legislature when it enacted the SCCA and first used the words “filing” and “delivered.”

[34] With that in mind I am persuaded that in a situation where a pandemic has closed the courts to the public I should interpret the words “filing” and “delivered” broadly enough to include the faxing or emailing of a document to the court. I believe this more liberal interpretation of the words, at least in a case like this, is consistent with common parlance and with the words themselves. After all, people in today’s world are used to “delivering” documents by email or fax. They are used to creating, using, saving and sending electronic “files.” They are used to receiving such files and to placing them in electronic folders. All of these actions fit easily within a broader meaning of “file” or “delivery.”

[35] I should also note that a physical filing system is based at least in part on the need for evidence as to when a claim has been commenced. That date is important because it starts the limitation clock. A physical filing system creates a commencement date that is fixed and evidenced by an independent witness (*i.e.* the court). It cannot be altered or amended by the claimant. Interpreting the words “filing” and “delivery” to include emails is consistent with that purpose. When an email and its attachment are sent their receipt on the recipient’s system is evidenced by date and time stamps that are automatically generated by the recipient’s computer. The documents, once on the recipient’s computer, cannot be recalled or altered by the sender. There is, in other words, independent evidence as to when the claim was submitted to the court.

[36] With that broader, more liberal interpretation of “file” and “delivery” in hand I am satisfied that Mr Wilson filed his claim—and hence commenced his action—on April 17, 2020, the date he emailed the claim to the court. Hence it was filed before the two year limitation period elapsed.

[37] If I am wrong in that conclusion I am nevertheless satisfied that on the peculiar facts of this case this court ought to refuse to hear a defence based on the LAA. On March 19, 2020 the court made impossible the physical access to justice that was otherwise assumed by the SCCA. I acknowledged that the essential service model instituted on March 31, 2020 was an attempt to open those doors at least partially, if only figuratively. But the model assigned to this court’s administrative staff a jurisdiction they did not have under the SCCA—the power to make binding decisions based on legal principles. That jurisdiction was given by the SCCA to Adjudicators, not to court clerks. This is not to slight court staff. They have made Herculean efforts and have done stellar service in responding to the crisis created for the justice system by the pandemic lock downs. It was, however, unfair to add to that burden the responsibility of making decisions that if made in error could deny a claimant his or her day in court. Moreover, by shifting that burden onto this court’s clerks the model also imposed a requirement on them that they “get it right.”

[38] In the case before me it is clear that for some reason the model failed. It was designed at a minimum to enable the filing of claims that were about to expire. Mr Wilson clearly had one such claim. He emailed a copy of the Notice of Claim to the court on April 17, 2020. He told the court he thought a

limitation period was about to expire. The court asked him about it on April 20, 2020, and he immediately provided further clarification on that day. He even provided the possible expiry date. The court at that point had all the information necessary to have concluded that this was indeed a claim that fit within the essential service model. The claim should have been accepted and issued by, at the latest, April 20, 2020, if not before. Had it been accepted on that day the claim would have been safe. But somehow and for some reason the essential services model failed. It did not perform the way it was intended to perform. And because it failed Mr Wilson's claim ran out of time.

[39] I am satisfied that on these facts this court cannot "hear" any defence based on the elapse of the limitation period. This court has control over its process. For it to accept a limitation defence would be for it to accept a defence that had been enabled by this court's own failure to provide the access to justice that is its central purpose. It would be affirming a wrong that the court itself had committed. To accept such a conclusion would not in my view be consistent with the court's duty to adjudicate claims "informally and inexpensively but in accordance with established principles of law and natural justice."

[40] For these reasons I order that the defendants are not permitted to make or rely upon a limitation defence in these proceedings. This court will not allow its failure to provide the service it owed the claimant ground a defence that, absent such failure, would not exist.

DATED at Halifax, NS
this 1st day of March, 2021

Augustus Richardson, QC
Adjudicator