Court of Appeal for Saskatchewan
Docket: CACV4171

Citation: *Olkowski v Nano-Green Biorefineries Inc.*, 2024 SKCA 11
Date: 2024-02-12

Between:

Andrew Olkowski

Appellant
(Respondent/Plaintiff)

And

Nano-Green Biorefineries Inc., and Blaine Kunkel

Respondents
(Applicants/Defendants)

Before:	Schwann, Tholl and Drennan JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Madam Justice Drennan
In concurrence:	The Honourable Madam Justice Schwann The Honourable Mr. Justice Tholl
On appeal from:	QBG-SA-00606-2021, Saskatoon (Sask KB)
Appeal heard:	November 27, 2023
Counsel:	Andrew Olkowski appearing on his own behalf Timothy Hawryluk, K.C. for the Respondents

Drennan J.A.

I. INTRODUCTION

[1] Dr. Andrew Olkowski has been embroiled in litigation with the respondents, Blaine Kunkel and Nano-Green Biorefineries Inc., for nearly a decade.

[2] In 2014, Dr. Olkowski initiated a claim in Alberta against the respondents, the subject matter of which involved a commercial intellectual property dispute. Following the commencement of that proceeding, the respondents made a professional misconduct complaint against Dr. Olkowski to his then employer, the University of Saskatchewan [University]. In 2021, Dr. Olkowski launched another claim against the respondents in Saskatchewan (later amended in 2022), asserting that they had defamed him by way of three publications arising out of, or referencing, the misconduct complaint.

[3] The respondents eventually applied to strike Dr. Olkowski's pleadings and dismiss his Saskatchewan claim. They requested, amongst other things, a determination that two aspects of the claim were statute barred pursuant to *The Limitations Act*, SS 2004, c L-16.1 [*Act*]. A Court of King's Bench judge sitting in chambers [Chambers judge] granted that part of the respondents' application, determining that "the plaintiff's action for defamation predicated upon the publication of the Complaint and the Document Request is statute barred and, pursuant to s. 19 of the *Act* cannot be maintained" [Order] (at para 57). It is from that Order that Dr. Olkowski appeals.

[4] Dr. Olkowski argues that the Chambers judge erred in his application of s. 6(2) of the *Act* by drawing an inference from the evidence before him that he (Dr. Olkowski) knew, or ought to have known, when one of the acts subject to his claim had arisen.

[5] I agree with Dr. Olkowski's core submission. As a result, I would allow his appeal, set aside that part of the Order, and remit the remaining aspects of the respondents' application that were not addressed by the Chambers judge to the Court of King's Bench for a determination. My reasons for this conclusion follow.

II. BACKGROUND

A. History of the parties and the litigation

[6] Dr. Olkowski is a research scientist who, prior to his retirement, had been a professor with the University. Mr. Kunkel is a director and the president and CEO of Nano-Green, an Alberta based corporation.

[7] In February of 2011, Dr. Olkowski, his colleague Dr. Bernard Laarveld, and Nano-Green entered into a licensing agreement respecting a concept of technology based on catalysis assisted transformation that had been developed by Dr. Olkowski. The relationship between the parties deteriorated, in part due to Dr. Olkowski and Dr. Laarveld's concern that Nano-Green was not in a financial position to commercialize the technology. In October of 2014, Dr. Olkowski issued a claim against the respondents in the Alberta Court of Queen's Bench, alleging that the licensing agreement was unconscionable and unenforceable.

[8] Apart from the Alberta litigation, Mr. Kunkel, on behalf of Nano-Green, sent a letter dated April 26, 2017, to the Interim Associate Vice President of the University, alleging that Dr. Olkowski had breached the University's Responsible Conduct of Research Policy [complaint letter] in connection with his handling of the licensing issue. That letter triggered a misconduct hearing before the University Hearing Board, and a subsequent appeal to the University Appeal Board, culminating in a final determination on June 4, 2019, that the allegations against Dr. Olkowski were unsubstantiated.

[9] In June of 2021, Dr. Olkowski issued a statement of claim against the respondents in Saskatchewan alleging that they had defamed him by submitting the complaint letter to the University [SK Action].

[10] On March 16, 2022, Dr. Olkowski amended the SK Action to include two other instances of alleged defamation, namely, (a) an email dated March 23, 2018, from Mr. Kunkel to Johannes Dyring of the University's Industry Liaison Office, requesting documents for the respondents' use in the misconduct hearings [document request]; and (b) a Blue Goose Biorefineries Inc./Nano-Green shareholder's report, dated December 18, 2019, which named him and referenced the misconduct proceedings [shareholder report].

[11] The respondents filed a statement of defence in response to the SK Action, and then sought to have it summarily dismissed in the Court of King's Bench.

B. The application before the Chambers judge

[12] As Dr. Olkowski's appeal focuses solely on the Chambers judge's determination relating to the document request aspect of his claim, it is helpful to review the record with that point in mind.

[13] The respondents applied to the Court of King's Bench for an order (a) pursuant to Rule 7-1(1) and 7-1(3) of *The King's Bench Rules*, declaring that Dr. Olkowski's allegations of defamation arising out of the complaint letter and document request were statute barred, (b) in the alternative, summarily dismissing the claim pursuant to Rule 7-2, and (c) in the further alternative, the SK Action be struck pursuant to Rule 7-9(2)(a) for disclosing no reasonable claim. On the latter two points, the respondents had argued that the three publications put in issue by Dr. Olkowski were not defamatory, or, alternatively, were subject to witness immunity.

[14] In support of that application, Mr. Kunkel swore an affidavit on November 24, 2021. That affidavit sets out the general history of the litigation in Alberta and Saskatchewan as between the parties, as well as in the University hearing process. Mr. Kunkel also deposed to the timing and circumstances of the complaint letter but did not make specific reference to the document request.

[15] Dr. Olkowski swore an affidavit in response to Mr. Kunkel's affidavit on December 6, 2021. In that affidavit, he averred to the reasons he had commenced the SK Action when he did, as well as his application to have the respondents held in contempt of court in the Alberta action for having used documents that had been obtained in the University hearing process.

[16] In the context of the limitations application specifically, Dr. Olkowski deposed to when he had become aware of the respondents' document request. He averred that he first received notice of it when it was appended as an exhibit to the affidavit of Mr. Kunkel sworn May 19, 2021, filed in the Alberta proceeding. That portion of Dr. Olkowski's evidence is excerpted below:

> 12. As I explained above, initially I had no intention to file a claim for defamation in Saskatchewan. However, the information and documents disclosed by Mr. Kunkel in his Affidavit filed in May of 2021, in response to my Application for Contempt of Court, prompted me to reconsider my position. **I wish to stress that the document disclosed by**

> **Mr. Kunkel in his Affidavit filed in the Alberta Action on or around May 19, 2021, was instrumental in my decision to draft Claim for defamation**. I append this document herein as Exhibit C of my Affidavit in the format as it was cited in Mr. Kunkel's Affidavit sworn on May 19, 2021.
>
> 13. **The document (string of e-mails) cited in Exhibit C refers to events that took place in March 2018, but I was not aware of this document's existence until May of 2021. In a nutshell, the said document revealed communication between Mr. Kunkel and the University Industry Liaison Office (ILO) and ILO and the University Access and Privacy Office, where Mr. Kunkel solicits documents in support of his complaint**. If I would have been aware of the existence of this document and the subterfuge perpetuated in the University community back in 2018, I would have filed claim for defamation at that time.
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> (Emphasis added)

[17] The respondents filed no further evidence in support of their application or in reply to the affidavit of Dr. Olkowski. As noted previously, Dr. Olkowski went on to amend his statement of claim in March of 2022 to assert that the document request and the shareholder report were also defamatory.

[18] The Chambers judge began his analysis of the limitations issue in relation to the complaint letter and the document request by orienting himself to ss. 5 and 6 of the *Act*. Those provisions read as follows:

> **Basic limitation period**
>
> **5** Unless otherwise provided in this Act, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.
>
> **Discovery of claim**
>
> **6**(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;
>
> (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
>
> (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.
>
> (2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

[19] The Chambers judge determined that a suit based on the complaint letter was statute barred. He then proceeded to consider whether a claim grounded on the document request was similarly barred. The relevant portion of his reasons in that regard are excerpted below:

> [34] The plaintiff asserts that the Document Request first came to his attention on May 19, 2021 when it was disclosed in an affidavit of Blaine Kunkel filed in the plaintiff's Alberta action. The plaintiff does not explain why he was unaware of the Document Request before this date. The materials requested in the Document Request were placed before the hearing tribunals formed to hear the allegations in the Complaint. The plaintiff would have been aware at those hearings that the documents referenced in the Document Request were offered into evidence at the hearings (see exhibits H and I to the affidavit of Blaine Kunkel sworn November 24, 2021), were submitted into evidence by the defendants, and would have been provided to the defendants by the University's Industry Liaison Office [ILO]. **The plaintiff does not explain why these circumstances did not prompt him to investigate how the defendants came to be in possession of the documents and thus discover that the defendants had communicated with the ILO about the impending hearing of the Complaint. It is inconceivable to me that, knowing these circumstances, the plaintiff, exercising reasonable diligence, would not have concluded that the defendants must have requested these documents from the ILO and thus defamed the plaintiff in the manner alleged in paragraphs 28 and 29 of the amended statement of claim**.
>
> [35] By way of explaining the inexplicable, the plaintiff asserts that the defendants concealed Document Request from him and on the strength of that assertion argues that any limitation period with respect to an action based on the Document Request is suspended during the period of concealment pursuant to s. 17 of the *Act*. I am not persuaded by this argument. Firstly, it is illogical to suggest the defendants would conceal a communication, which does not mention the plaintiff and appears on its face to be an innocuous request for information relevant to a proceeding involving the parties, because it was defamatory of the plaintiff and then exhibit it to an affidavit. Secondly, and perhaps more importantly, s. 17 of the *Act* is quite specific: a limitation period is suspended during any time where the person against whom the claim is made "willfully conceals" any of the facts set out in s. 6(l)(a) to (c) or "willfully misleads" the claimant with respect to whether a proceeding is an appropriate means to seek to remedy the claim.
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> [36] Section 6(2) of the *Act* establishes that, unless he proves otherwise, the plaintiff is presumed to have discovered his claim on the date the act on which the claim is based took place. Assuming the Document Request contained defamatory content regarding the plaintiff, the defamation occurred and the action was complete upon publication of the Document Request to another person, which occurred on March 23, 2018. **It is the plaintiff's onus to establish the limitation period began at some other date or was suspended by the defendants' wilful concealment. The plaintiff's evidence does neither. Rather, the plaintiff baldly asserts the defendants wilfully concealed the Document Request but does not state any facts from which wilful concealment may be reasonably inferred.** A conclusory statement of wilful concealment, unsupported by any evidence tending to demonstrate that conclusion**,** will not suffice to invoke the provisions of s. 17 of the *Act*. See *Yashcheshen v Allergan Inc.*, 2021 SKQB 33 at paras 101 and 102.

> [37] The plaintiff has not met his burden under s. 6(2) of the *Act* and accordingly the claim of defamation predicated on the Document Request is barred by s. 5 of the *Act* and cannot be maintained.
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> (Emphasis added)

[20] After determining what aspects of Dr. Olkowski's claim were statute barred, the Chambers judge concluded that the allegation dealing with the shareholder report would proceed to trial.

[21] Dr. Olkowski does not challenge the portion of the decision in which the Chambers judge determined that the defamation claim arising out of the complaint letter was statute barred. Nor, for that matter, have the respondents cross-appealed regarding the Chambers judge's ruling respecting the shareholder report. This appeal is therefore limited only to a consideration of whether the Chambers judge erred in striking Dr. Olkowski's defamation claim in connection with the document request.

III. ANALYSIS

A. The document request aspect of the SK Action was not statute barred

[22] Broadly speaking, Dr. Olkowski asserts that the Chambers judge erred in finding that he had not met the burden imposed upon him by s. 6(2) of the *Act*. More specifically, he argues that the evidence was not capable of supporting a finding that he knew, or ought to have known earlier, through the exercise of reasonable diligence, of the existence of the document request. I would reframe Dr. Olkowski's arguments into three sub issues.

[23] First, Dr. Olkowski argues that the Chambers judge misapprehended material evidence or drew an inference from it that was not supported by it. He points to his uncontroverted affidavit evidence in which he deposed to the fact that the document request did not come to his attention until May 19, 2021. Since he had commenced the SK Action on March 16, 2022, it follows, he argues, that it was brought within the general two-year limitation period spelled out in s. 5 of the *Act*. Second, Dr. Olkowski asserts that the Chambers judge's misapprehension of that same body of evidence led him to erroneously conclude that the respondents had not wilfully concealed the document request from him. Third, Dr. Olkowski argues that the Chambers judge failed to recognize that the respondents bore "an evidentiary burden of proof to demonstrate that there is no

genuine issue requiring trial" as applicants in a summary judgment application (see *Michel v Saskatchewan*, 2021 SKCA 126 at para 102, citing *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372).

[24] In considering Dr. Olkowski's primary submission, I agree that the Chambers judge drew an inference not supported by the evidence, which led him to erroneously conclude that Dr. Olkowski had not met his burden under s. 6(2) of the *Act*. This constitutes an error in law warranting appellate intervention (see *Canadian Mortgage Servicing Corporation v Korf*, 2024 SKCA 1 at para 37, citing *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235). I will explain.

[25] By operation of s. 18 of the *Act*, once the respondents had raised a limitations defence, Dr. Olkowski bore the onus of proving that it had not expired (see *Saskatchewan (Highways and Infrastructure) v Venture Construction Inc.*, 2020 SKCA 39 at para 88, 447 DLR (4th) 316 [*Venture Construction*]; see also *Embee Diamond Technologies Inc. v I.D.H. Diamonds NV*, 2017 SKCA 79 at para 4, [2017] 11 WWR 680; *Fibabanka A.Ş. v Arslan*, 2023 SKCA 13 at para 27, [2023] 6 WWR 624 [*Fibabanka*]). This is so as pursuant to s. 6(2), he was presumed to have known of the matters itemized in s. 6(1) as of the date of the document request, including: (a) that an injury, loss or damage had occurred as a result of the document request; (b) that the injury, loss or damage appeared to have been caused by or contributed to by the document request; (c) that the act (the document request) that is the subject of the claim appeared to be that of the person (the respondents) against whom the claim is made; and (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate remedy.

[26] In order to rebut the presumption set out in s. 6(2), Dr. Olkowski was required to establish, on a balance of probabilities, that on the day the document request arose (March 23, 2018) he did not know of *at least one of the factors* set out in s. 6(1) of the *Act*. This point was made by Kalmakoff J.A. in *Venture Construction*:

> [55] … as the jurisprudence makes clear, the factors in ss. 6(1)(a) to (d) are cumulative. Accordingly, unless the contrary is proven, a limitation period does not begin to run until a claimant knows, or ought to have known, that *all* of the factors enumerated in s. 6(1) of the *Act* have been satisfied. While a judge must not conflate the considerations relevant to one factor with those relevant to another, the four factors enumerated in s. 6(1) work together to define when a limitation period begins to run.
>
> (Emphasis in original)

See also *Venture Construction* at para 88; *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para 43, 461 DLR (4th) 613; *Fibabanka* at para 27; *GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38 at para 29, 29 CLR (5th) 294 [*GHC*]; *Lorencz v Talukdar*, 2017 SKQB 389 at para 13, rev'd on other grounds 2020 SKCA 28, 446 DLR (4th) 487. In effect, even where three of the elements of discoverability are fulfilled, the start date of a limitation period may be postponed if a single element is not met (see, for example, *GHC* at para 32, discussing s. 6(1)(d)).

[27] Dr. Olkowski was also required to demonstrate that he had acted "reasonably" in relation to the investigation of any claim associated with the document request. In other words, he had to demonstrate that the claim was not discoverable within the limitation period through the "exercise of due diligence", as noted by Schwann J.A. in *Fibabanka*:

> [27] Section 6(1)(a)–(d) codifies the elements of discoverability, which are to be interpreted conjunctively (*Longo v MacLaren Art Centre Inc.*, 2014 ONCA 526 at para 41, 323 OAC 246 [*Longo*]). A prospective claimant must act with due diligence in determining if a claim exists. In investigating a claim, a prospective claimant must act reasonably, while the nature and extent of the required action will depend on the circumstances of each case (*Longo* at para 42). At bottom, determining when a claim has been discovered requires a judge to make findings of fact with respect to the s. 6(1) criteria. (*GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38 at para 35 (*BACZ*)). A plaintiff who failed to serve its statement of claim within an applicable limitation period bears the burden of proving that the cause of action was not discoverable within the limitation period through the exercise of due diligence (*Langenburg (Town) v Gamey*, 2010 SKCA 11 at para 34, [2010] 8 WWR 273).

[28] With these legal principles in mind, the Chambers judge was required to make findings of fact on the evidence before him respecting the s. 6(1) criteria in order to determine when the document request aspect of Dr. Olkowski's claim was discoverable.

[29] Turning to the record in this context, I note that Dr. Olkowski's affidavit was the *only* evidence before the Chambers judge dealing with his (Dr. Olkowski's) knowledge of the document request. Quite apart from any alleged concealment of the document request, as will be discussed in more detail below, Dr. Olkowski averred that he did not know, and could not have known, of the document request and its specific content until he received it in the Alberta proceeding when it was appended to Mr. Kunkel's May of 2021 affidavit. The respondents filed no evidence to challenge that part of Dr. Olkowski's evidence, nor was he cross-examined on his affidavit.

[30] To repeat, the Chambers judge made the following finding in relation to Dr. Olkowski's evidence:

> [34] …The plaintiff does not explain why these circumstances did not prompt him to investigate how the defendants came to be in possession of the documents and thus discover that the defendants had communicated with the ILO about the impending hearing of the Complaint. It is inconceivable to me that, knowing these circumstances, the plaintiff, exercising reasonable diligence, would not have concluded that the defendants must have requested these documents from the ILO and thus defamed the plaintiff in the manner alleged in paragraphs 28 and 29 of the amended statement of claim.

[31] The Chambers judge's analysis demonstrates that while he understood the content of Dr. Olkowski's affidavit, he drew inferences from it that were not grounded in that evidence. Specifically, there was nothing in the evidence that was capable of supporting the Chambers judge's inference that Dr. Olkowski's receipt of the documents referenced in the document request during the course of the University misconduct hearing process should have alerted him to the existence and/or content of the document request. Similarly, there was no basis to conclude that Dr. Olkowski, by "exercising reasonable diligence", should have concluded that the respondents had requested the documents from the University's Industry Liaison Office. As Dr. Olkowski points out, because the documents subject to the document request had been produced in the Alberta litigation, there was no reason for him to have investigated their source or even questioned how the respondents may have obtained them.

[32] The Chambers judge was certainly permitted to draw common sense inferences from the evidence to determine whether Dr. Olkowski had discharged his burden under s. 6(2) of the *Act*. However, his findings and inferences had to be "grounded in at least *some evidence*" before the court (*Blue Hill Excavating Inc. v Canadian Western Bank Leasing Inc*., 2019 SKCA 22 at paras 36–37, [2019] 4 WWR 393, citing *Canadian Broadcasting Corporation v Whatcott*, 2016 SKCA 17, 395 DLR (4th) 278, emphasis added). It is an error in law to draw "an inference …not anchored in the evidence" (see *R v KBW*, 2022 SKCA 8 at para 31).

[33] In this instance, the Chambers judge's inference that Dr. Olkowski knew, or ought to have known through the exercise of reasonable diligence, of the document request in March of 2018, was not tethered to the evidence before him. The uncontroverted evidence was that Dr. Olkowski denied having knowledge of the document request until May of 2021, and it was accompanied by a sensical explanation as to why he had no cause to investigate its existence earlier.

[34] To sum it up, the unchallenged evidence before the Chambers judge was that Dr. Olkowski did not know of the document request, or any injury, loss or damage occurring due to the document request that could be subject to a claim, until May of 2021. The evidence did not support an inference that Dr. Olkowski knew, or ought to have known, of any of the factors enumerated in s. 6(1) of the *Act* at the time the document request was first made in March of 2018 (as per *Venture Construction* at para 55). On that basis, given that the inference drawn by the Chambers judge was fundamental to the legal conclusion he reached, I conclude that the Chambers judge erred in finding that Dr. Olkowski had not discharged his burden pursuant to s. 6(2) of the *Act*.

[35] Given this determination, it is not necessary to consider Dr. Olkowski's other two arguments. However, for the sake of completeness, I offer the following observations on those submissions. Put simply, I am not persuaded that the Chambers judge erred in determining that Mr. Olkowski had failed to demonstrate that the respondents had wilfully concealed the document request, triggering the application of s. 17 of the *Act*. Nor am I convinced that the Chambers judge reversed the evidentiary burden or failed to recognize the appropriate burden. As noted previously, given that the respondents had defended the SK Action by asserting that it was statute barred, s. 18 of the *Act* placed the burden on Mr. Olkowski to prove that the limitation period had not expired. The Chambers judge correctly articulated the application of s. 18 (referencing *Fibabanka* at para 27) in that regard.

B. Remedy

[36] The Chambers judge's determination that the document request aspect of Dr. Olkowski's claim was statute barred must be set aside. The question then becomes the appropriate remedy.

[37] At the time of the appeal hearing, counsel for the respondents submitted that their application for summary dismissal and striking relief pursuant to Rules 7-2 and 7-9(2)(a) – which the Chambers judge declined to decide – would have been successful if the Chambers judge had considered it. This led him to suggest that, in the event this Court found error in the Chambers judge's finding on the limitation period issue, it should consider assessing the remainder of the respondents' application on its merits, rather than remitting those matters to the Court of King's Bench.

[38] I decline to grant the respondents' request. The proper forum for such a determination is in the Court of King's Bench, not in this Court in the first instance (see *Odelein v Odelein Farms Ltd*., 2022 SKCA 28 at para 40; see also *Barendregt v Grebliunas*, 2022 SCC 22 at para 1, 469 DLR (4th) 1; *Evans v General Motors of Canada Company*, 2023 SKCA 86 at para 37; and *Patel v Saskatchewan Health Authority*, 2021 SKCA 115 at para 110).

IV. CONCLUSION

[39] I would allow Dr. Olkowski's appeal, set aside the Chambers judge's determination respecting the document request aspect of Dr. Olkowski's claim and remit the balance of the respondents' application to the Court of King's Bench. I would also set aside the award of costs made by the Chambers judge and remit that issue to the Court of King's Bench to be determined in connection with the balance of the application.

[40] In this Court, I fix costs in favour of Dr. Olkowski in the amount of $750.00.

"Drennan J.A."

Drennan J.A.

I concur.

"Schwann J.A."

Schwann J.A.

I concur.

"Tholl J.A."

Tholl J.A.