CITATION: Attorney General for Ontario v. Persons Unknown, 2020 ONSC 6974
COURT FILE NO.: CV-20-00648669-0000
DATE: 20201116

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ATTORNEY GENERAL FOR ONTARIO	
Applicant	*Judie Im and Jeffrey Claydon* for the Attorney General for Ontario
– and –	*Selwyn Pieters*, in person
PERSONS UNKNOWN	*Sean Dewart and Ian McKellar*, for Lawyers' Professional Indemnity Company
Respondents	
	Matthew P. Gottlieb and James Renihan, as *Amicus Curiae*
	HEARD: November 10, 2020

REASONS FOR DECISION

F.L. Myers J.

Background

(i) Limitation Periods Suspended March 16, 2020

[1] Ontario Regulation 73/20 under s. 7.1 of the *Emergency Management and Civil Protection Act*, RSO 1990 c E.9, was part of the government's emergency response to the COVID-19 pandemic.

[2] O. Reg. 73/20 temporarily suspended all limitation periods in Ontario as of March 16, 2020 when much of Ontario came under emergency lockdown.

[3] On July 24, 2020, O. Reg. 73/20 was continued under the *Reopening Ontario (A flexible Response to Covid-19) Act 2020*, SO 2020, c 17.

(ii) Limitation Periods Reinstated September 14, 2020

[4] On September 14, 2020, O. Reg. 73/20 was revoked by O. Reg. 457/20.

[5] Counsel for the Attorney General say that as a result of the revocation of the suspension regulation, all limitations periods resumed running on September 14, 2020. In addition, she submits that the six-month period of the temporary suspension is not to be counted in limitation period calculations going forward.

(iii) Relevant Legislation

[6] Section 7.1 (6) of the *Emergency Management and Civil Protection Act* provides that where limitation periods are suspended under the statute, the limitation period resumes running on the date on which the temporary suspension ends "**and the temporary suspension period shall not be counted.**" [Emphasis added]

[7] Section 6 of O. Reg. 73/20 itself provided that, "any limitation period [...] that is temporarily suspended ... resumes running on the date on which the temporary suspension ends **and the temporary suspension period shall not be counted**". [Emphasis added.]

[8] In addition, s. 51 (f) of the *Legislation Act, 2006*, SO 2006, c 21, Sch F, says:

> 51 (1) The...revocation of a regulation does not,
>
> (a) affect the previous operation of the repealed or revoked...regulation.

[9] Counsel for the Attorney General submit that properly interpreted (i.e. read in their plain meaning) it is clear from these provisions that the six-month period of the suspension, from March 16, 2020 to September 14, 2020, is not to be counted in limitation period calculations.

(iv) Confusion in the Justice Sector

[10] Counsel for the Attorney General and the intervenors assert that despite the foregoing, there is confusion in the justice community as to whether the six-month period of the regulation is to be counted because O. Reg. 73/20 has been revoked. The suspension, they apparently say, is no longer in effect so therefore, it is treated today as not having been in effect while the regulation was in force.

[11] In other words, some people are saying that the revocation of O. Reg. 73/20 ***affected the previous operation of the regulation*** despite s. 51 (1)(a) of the *Legislation Act* saying the opposite. These people say that the period of the temporary suspension period ***is*** to be counted in limitation periods going forward despite the language in O. Reg. 73/20 and the statute under which it was proclaimed that both say when the suspension ends "***the temporary suspension period shall not be counted***".

[12] Counsel for the Attorney General and the intervenors ask the court to make a declaration of right interpreting the repeal of the suspension to clarify that the six-month period of the temporary suspension is not to be counted in the calculation of the limitation periods so as to avoid this confusion.

[13] Mr. Pieters testifies that in his view the regulation revoking the suspension ought to have clarified how limitation periods were to operate after the temporary suspension period ended:

> [11] The imposition of Regulation 457/20 was inopportune, appears hasty and could prejudice the rights of stakeholders in Ontario's Justice System, if an Order is not granted in the form sought in paragraph 1(a) of the Notice of Application of the Attorney General of Ontario...
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> * * *
>
> [19] With the resumption of the limitation periods without a clear indication as to whether or not the time during the suspension would be counted or not counted in the tolling of time limits and procedural timelines, this raises liability issues for lawyers including me, that could be costly in terms of cost of repairing any missed limitation period.

The Issue and Outcome

[14] Counsel for the Attorney General disagree with the assertion that there is anything wrong with the way in which the Government suspended and then recommenced limitation periods. In their reply factum, counsel for the Attorney General submit:

> To be clear, the Attorney brings this application not to "fix" the legislation but to resolve a narrow, discrete issue which involves a relatively straight forward exercise of statutory interpretation that will have significant practical utility and impact throughout the province.

[15] Therein lies the nub of issue that I must address. The Attorney General seeks a judicial interpretation of the law. Counsel submit there is nothing wrong or uncertain in the way in which the regulations were imposed and repealed. They argue that the words of the various enactments quoted above say what they mean and mean what they say. The Attorney General asks the court to declare that "the temporary suspension period shall not be counted against any applicable limitation period".

[16] Both intervenors support the application and ask the court to make the declaration sought. In addition, the application has the actual or tacit support of some 28 legal organizations and individuals known to be engaged in legal issues of this type. In fact, despite widespread dissemination of the Attorney General's application to those interested parties and on social media, no one has come forward to oppose the requested declaration.

[17] I will review the evidence before the court presently. Suffice it to say at this stage, that there is no admissible evidence of a single person having read the various regulations and statutes and forming a considered legal opinion that is contrary to the interpretation unanimously advanced by the Attorney General, the intervenors, and the legal community supporting them.

[18] There is no evidence of a single lawsuit, administrative proceeding, or quasi-criminal proceeding anywhere in Ontario in which anyone has raised an argument that the six-month period during which limitation periods were suspended is now to be counted as if the suspension never occurred.

[19] Counsel for the Attorney General submit that it would be a simple matter to interpret the law and make the declaration sought. However, I am not prepared to do so. In my respectful view, the process invoked by the Attorney General invites the court to cross the lines separating the independent judiciary and the executive and legislative branches of government. As inviting as the prospect of weighing-in on this interpretive exercise may be, I must decline to do so.

[20] This application asks the court to render an opinion in the abstract without any existing dispute among real people. The Attorney General came to court without notice to anyone advancing a contrary view although Ministry staff know who they are.

[21] The Attorney General invites the court to make a declaration of the correctness of his view of the law with no public hearing and with no live case before the court. There are no adversarial parties with a dispute seeking resolution of the facts or law by an independent judicial arbiter.

[22] I asked why Ministry staff could not just publish a clear public regulatory statement addressing the calculation of limitation periods now that the suspension is over. Counsel for the Attorney General made an emphatic submission that although the Attorney General is the Chief Law Officer of the Crown and is responsible to "superintend all matters connected with the administration of justice in Ontario", it is not the proper role of the Attorney General to provide legal opinions to the public or to the bar. I say in response, and with respect, that it is not the role of Superior Court of Justice to provide abstract legal opinions with no dispute and no real hearing to bolster the Attorney General's view about the efficacy of the executive branch's regulatory efforts.

[23] There are many alternatives available to the Attorney General to obtain the outcome sought. While counsel submits that there is nothing to fix, if the Ministry is concerned that its regulatory efforts may have caused confusion, the Government can pass clarifying regulations. Or, if that does not avail, the Government can legislate. If the Ministry does not want to render a legal opinion, despite submitting to the court that the interpretation it seeks is relatively straightforward, it can retain counsel to do so. There are at least 28 interested legal associations and lawyers engaged in this process who all seem to agree with the Ministry's view.

[24] There is also a statute that allows the government to seek a legal opinion from the Court of Appeal for Ontario in a process called a "reference."

[25] But, for the reasons on which I elaborate below, an application in this court against "Persons Unknown" for an abstract ruling to support the government's desired interpretation of its regulatory efforts, while convenient, is neither efficacious nor appropriate.

The Evidence

(i) The Attorney General's Evidence

[26] On October 1, 2020, counsel for the Attorney General brought this proceeding seeking a written hearing with no opposition. While counsel had not formally served any respondents, they had identified several organizations and members of the legal community to whom they had given informal notice of the process.

[27] The application was submitted with a factum to be read *ex parte* and unopposed. A draft order was provided for the court to sign. Counsel for the Attorney General contemplated a very quick, simple, and economical process.

[28] The evidence submitted by the Attorney General consisted of an affidavit of a very senior counsel in the Policy Division of the Ministry. He testified that the Ministry had received inquiries from stakeholders concerning the revocation of O. Reg. 73/20. The witness recited excerpts from some of the correspondence. The witness did not disclose any informant's name so as to "preserve the anonymity and confidentiality of those stakeholders". The actual letters were not disclosed to the court.

[29] It has never been made clear to me why lawyers and law associations advancing a concern about a legal interpretation would need anonymity and confidentiality in a court proceeding. To the contrary, in an application like this one, if a witness wishes to rely upon a fact told to him by others, Rule 39 (5) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, positively requires that the source of the information be disclosed. Moreover, in an application, hearsay evidence cannot be used at all for facts that may be contentious.

[30] The only fact relied upon by the applicant is the unattributed hearsay that there is "confusion" in some parts of the legal market place. The admissibility of this evidence is therefore in doubt.

[31] Nevertheless, the witness recites several expressions of concern by lawyers facing approaching deadlines. He also advises that the issue was not one that had been raised in any existing proceeding in which Her Majesty the Queen in Right of Ontario or the Attorney General are parties and could seek a prompt determination.

[32] It struck me as incongruous that there were expressions of concern that could only be made anonymously and were seemingly at odds with the interpretation advanced by the Attorney General and all the numerous legal associations with whom the Ministry had consulted. I was also concerned that the people who apparently expressed concern were not made parties and were

not invited to bring forward their clients' cases so the applicant could name as respondents the people with actual legal issues. I therefore convened a case conference to discuss with counsel for the Attorney General whether some broader service of the application could be made in order to flush out possible opposition or others willing to put first-hand evidence and alternate positions before the court.

[33] Counsel for the Attorney General was responsive and cooperative. They created a draft procedure order for broader service of the application and to provide an opportunity for responding parties to deliver evidence and argument on the application.

[34] LAWPRO, the lawyers' insurance company, and Mr. Pieters both moved to intervene in the application to support the Attorney General. The Attorney General consented to their request and I granted an order allowing them to participate although I made no specific findings on the nature of their interests in the proceeding.

[35] No one moved to intervene to oppose the application. No one adduced evidence of any case in which there is an actual issue in which someone asserts that the revocation of the suspension regulation has resulted in the six-month suspension no longer being treated as effective. No one adduced evidence of any lawyer having actually read and considered the relevant statutes, regulations, and legal principles of interpretation and come to a *bona fide* opinion that there is uncertainty as to the ongoing efficacy of the suspension of limitation periods.

(ii) LAWPRO's Evidence

[36] LAWPRO's President and CEO Daniel E. Pinnington swore an affidavit for the insurer. He advises that in 2019 LAWPRO incurred expenses of over $104 million in claims against Ontario's 29,000 lawyers including associated defence costs.

[37] In a typical year, Mr. Pinnington advises, approximately 3,000 new claims are reported to LAWPRO. Approximately 500 (or one in six) complaints involve alleged missed limitation periods and deadline related errors by lawyers.

[38] Mr. Pinnington advises that since the pandemic, he has participated in weekly calls with key participants in the justice sector, including officials from the Ministry of the Attorney General, Legal Aid Ontario, the Advocates' Society, the Ontario Bar Association, the Ontario Trial Lawyers Association, and several other organizations.

[39] Mr. Pinnington advises that he is knowledgeable about trends and concerns in the legal profession and he too has heard concerns about the uncertainty of the calculation of limitation periods as a result of the revocation of O. Reg. 73/20.

[40] Mr. Pinnington's affidavit says:

> More specifically, the revocation of the regulation that gave effect to the order as of September 14, 2020 has led to confusion on the part of many lawyers about the on-going effect of a regulation that is no longer in effect. Lawyers are concerned that limitation periods that expired but were tolled when the temporary suspension order was in place may have now re-expired because the regulation was revoked, or that such limitation periods may have all expired at the same time on September 13, 2020, regardless of when they would have ordinarily expired in the period between March 16, 2020 and September 13, 2020.

[41] Once again, no one is identified who apparently holds this concern. There is no indication of whether they have been directed to the relevant statutes or provided an opinion. There is no indication that any of the groups represented on the weekly justice sector call share the concern formally.

[42] LAWPRO sent a notice to all lawyers advising that limitation periods resumed September 14, 2020 in Ontario. It advised lawyers to be cautious. It made no reference to the issue of whether there was any uncertainty over the efficacy of the resumption of limitation periods. However, Mr. Pinnington swears that confusion over the suspension and the lifting of the suspension was a primary factor causing claims about limitation periods and deadlines received by LAWPRO since mid-March, 2020.

[43] Mr. Pinnington swears that there will be claims against lawyers about the ongoing effect of the temporary suspension of limitation periods. This will cause LAWPRO to incur expenses for defence costs at minimum. Moreover, even absent negligence, he postulates that every lawyer who receives a

statement of defence in which a defendant raises a limitation defence, even if predicated on a "wrong" interpretation of the effect of the revocation of O. Reg. 73/20, will require the plaintiff's lawyer to report herself or himself to LAWPRO. The lawyer would then be in a conflict of interest in trying to settle the case.

[44] However, this is the case with all limitation period defences advanced regardless of COVID-19 and regardless of whether the defendant is later held to be correct or in error. In fact, counsel had some difficulty identifying possible prejudice to clients even if a lawyer advises on the limitation period with a negligently "wrong" interpretation of the revocation of O. Reg. 73/20.

[45] If a lawyer "wrongly" advises that the suspension is ineffective, that means the limitation period will be thought to expire six months before it actually does (if the Attorney General is correct). Those parties will then be pleasantly surprised to learn that they actually commenced their proceeding in time as they had six months more than they realized or had been told.

[46] Mr. Pieters suggests that lawyers may tell their clients that they are too late to sue when they actually could have done so within the extended limitation period. I am not familiar with the phenomenon of lawyers not suing because a claim might be too late, whether confused by the limitation period or not. But, hypothetically at least, this is a possibility that could well lead to prejudice to clients if a lawyer is confused by the effect of the revocation of O. Reg. 73/20.

[47] I raised with counsel whether people charged with provincial offences might not be prejudiced if the limitation period for bringing charges against them is extended by six months. It seemed to me that people accused of provincial offences may have an interest in arguing the issue advanced anonymously in this proceeding to try to benefit from shorter limitation periods.

[48] Mr. Pieters put into evidence an order made by Chief Justice Maisoneuve dated September 10, 2020 under s. 85 of the *Provincial Offences Act,* RSO 1990, c P.33 in which the Chief Justice extended the time for proceeding under numerous sections of that statute to December 1, 2020. This order was made days before and in anticipation of the revocation of O. Reg. 73/20.

[49] It is not clear to me whether the Chief Justice's order eliminates entirely the issue of the effect of the revocation of O. Reg. 73/20. No one before me took up this issue one way or the other.

(iii) Mr. Pieters' Evidence

[50] For completeness, I note that Mr. Pieters adduced considerable evidence about the effect of COVID-19. He notes that his practice involves limitation periods in a number of different statutes. He concludes that he therefore has an interest in seeing that the six-month extension is counted for his clients who make complaints or who wish to sue. He does not mention the clients against whom complaints are made or charges are laid who may have the opposite interest. He does add that the stress of managing a busy law practice during the pandemic has affected him personally:

> I can say that due to the unprecedented changes in the legal landscape and our justice system in the past six months, and dealing with much uncertainty and complexity as a result of COVID-19, I have had some fear as I contemplated my ability to manage the volumes of filings all at once that has been amplified by the recent lifting of the COVID-19 pandemic limitation period suspensions. This was particularly acute in early September 2020. Dealing with the ambiguity create the perfect storm for angst for me.

[51] Neither his clients' disparate positions in litigation in which they may be or become involved, nor Mr. Pieters' angst, provide him a legal interest in the outcome. However, his submissions were indeed helpful and I appreciated his intervention.

Appointment of *Amicus Curiae*

[52] After learning that no one had responded to the application taking a different view from the Attorney General, on October 15, 2020, I issued an endorsement, reported at 2020 ONSC 6261 (CanLII), *"ex proprio motu"* (on my own motion) to appoint Lax O'Sullivan Lisus Gottlieb LLP and specifically Messrs. Gottlieb and Renihan as *amicus curiae* or "friend of the court."

[53] *Amicus* are counsel who will argue a position to help the court ensure that the issues before the court are fully canvassed in a variety of situations. In appointing *amicus* in this case, I wrote:

[6] Part of the purpose of requiring service of the application was to determine if there were affected persons who might have come forward with conflicting positions to create a *lis inter partes*. I specifically raised with counsel for the Attorney General an issue regarding the lack of factual underpinning for the determination of law sought. I also raised the issue of the utility or lack of utility to the declaration of right sought especially when relief is available by way of a reference to the Court of Appeal or by the government promulgating a clarifying regulation or passing legislation to cure any uncertainty that it fears its repeal of the emergency regulation may have caused.

[7] There is also a more fundamental issue about the appropriateness of the Attorney General coming to the court without notice to anyone or any form of public hearing seeking a determination of an issue of law that he submits may have widespread effects. I have no doubt that the court has jurisdiction to issue declarations of right and to waive service in appropriate cases. But is it the court's proper role to render opinions on issues of law to help the executive branch cure unintended uncertainty created in the legislative or regulatory process without hearing from anyone who actually advances the unintended position?

[8] Questions concerning the appropriateness of this process have not been fleshed out in any decided case of which I am aware.

[9] The government and the two proposed intervenors support the application. No one has come forward to argue the contrary position that is a gating issue that I feel obliged to raise in the court's gatekeeping role in unopposed proceedings. I have therefore appointed Lax O'Sullivan Lisus Gottlieb LLP as counsel to render assistance to the court *amicus curiae* under Rule 13.02 of the *Rules of Civil Procedure*. Mr. Matthew Gottlieb and Mr. James Renihan, and others from the firm as they deem apt, have agreed to act as friends of the court to advance the unrepresented position that the proposed application is not a procedurally appropriate mechanism to achieve the relief sought by the applicant.

Analysis

[54] All parties agree that the issue before the court is governed by the decision of the Supreme Court of Canada in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 (CanLII), at para. 60:

> [60] ...Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought (*Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 81; see also *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46).

[55] The Attorney General argues that the test is contextual so that there does not need to be a precise showing under each of the factors listed by the Supreme Court. She relies on *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at p. 363. *Amicus* argues that *Borowski* dealt with the mootness doctrine and was decided 30 years before the four specific factors were recently set out in *S.A.* As I find that only one of the four factors is present, I do not need to decide whether there is a need for all four factors to support relief or if there is a spectrum of equitable considerations at play. Either way, I would not grant the relief sought.

Factor (a) The Court has Jurisdiction to Hear the Issue.

[56] All participants agree that the court has the jurisdiction to make an order interpreting the effect of the repeal of a regulation. So, the first test in *S.A.* is made out.

Factor (b) The Dispute is Real and not Theoretical

[57] I am not satisfied that the "dispute is real and not theoretical." In fact, I am not satisfied that there is a dispute. I have yet to hear anyone hint at a basis to argue that the repeal of O. Reg. 73/20 undermines the six-month suspension. If there is going to be a dispute on that issue, it has not been brought before this court in this proceeding.

[58] What is actually before the court is a worry by LAWPRO expressed to justice sector participants that as a result of the revocation of O. Reg. 73/20, people will sue lawyers in future. If people sue lawyers, LAWPRO will have to incur costs to defend them. Mr. Pinnington has no doubt that lawsuits will come. In fact, he swears, they will come even if lawyers are not negligent and give the "correct" advice on the effect of the revocation of O. Reg. 73/20. That is the nature of a change in the law I suppose. It may also say something about our litigious society.

[59] In my view, a fear that people will sue lawyers, rightly or wrongly, and will cost LAWPRO money is not a dispute that is real today. I understand that declarations can be made to affect future activities when there is a present right. In *Solosky v. The Queen*, 1979 CanLII 9 (SCC), the Supreme Court of Canada made a declaration concerning the unlawfulness of opening prisoners' mail from their lawyers. The Court understood that its declaration could not remedy the illegal intrusions that had already happened. But it could stop a present policy from being applied in future. The illegal policy was in existence and was the subject of a dispute between real parties before the court.

[60] In this case, I know nothing of the nature of the confusion, the arguments that may be advanced in various scenarios, or the prejudice allegedly being suffered by anyone. I know nothing of how the various regulations interact with Chief Justice Maisoneuve's order under the *Provincial Offences Act*. The parties had to conjure hypotheticals to try to think of ways in which clients might actually be prejudiced by the uncertainty alleged.

[61] I do not see how a declaration by this Court in a case with no facts and no live dispute will have any effect on people later suing lawyers for negligence whether they get it wrong or right as Mr. Pinnington says will happen. First, there are an infinite number of statutes and factual scenarios that may arise. All would be distinguishable from this hypothetical case based on no facts at all. My decision would have little no effect in quasi-criminal matters. My decision cannot be appealed because all parties consent. Whether the Court of Appeal might even consider my decision persuasive in a later case that comes before it in a live dispute is a matter for that court to decide.

[62] Counsel for the Attorney General says it is in the public interest to bring certainty to the issue and to do so quickly to prevent cases from arising. I am not convinced that my decision will do that or that helping an insurer possibly save money on future claims is (a) a real dispute; or (b) in the public interest *per se*.

[63] The Attorney General has a special role to prevent public mischief and harm. But, in a case involving the interpretation of a regulation to determine civil liability, the Attorney General is not addressing a public interest or preventing public harm of the kind discussed in *Finlay v. Canada (Minister of Finance)*, 1986 CanLII 6 (SCC). His submissions on the issue in this case would be weighed as a party in a civil case equal with the submissions of the party opposite – were there one.

[64] Counsel for Attorney General argues, that if I make the interpretation, it will be quick and effective. Of course it will be quick. There is no one here with an interest arguing the contrary position. It is always quicker and easier to obtain a legal decision with no adversarial party in court. That is not how our adversarial system works however. Our judicial system is premised on the existence of two or more parties with legal interests bringing the facts and law into focus for decision by a neutral judge. *United States v Friedland*, [1996] OJ No. 4399 (Ont Gen Div).

> *Factors (c) and (d) The Party Raising the Issue has a Genuine Interest in its Resolution and The Responding Party has an Interest in Opposing the Declaration being Sought*

[65] The third and fourth factors in *S.A.* are designed to ensure that the court stays within its proper constitutional sphere when it considers granting declaratory relief. As noted above, the court is an independent arbiter of disputes among the citizenry and the Government or each other.

[66] The Attorney General argues that this case is unique in that there is no one else who can bring this matter to the courts. Of course there is. Anyone who claims to be prejudiced by the interpretation being propounded by the Attorney General whether in a private piece of litigation, an administrative proceeding, or a quasi-criminal proceeding will be fully entitled to raise the issue for resolution.

[67] Moreover, the Attorney General is straddling inconsistent arguments in refusing to legislate to resolve its concern. It says there is no need of legislation as there is nothing to fix. At the same time, it says that the revocation of O. Reg. 73/20 has caused uncertainty leading to a need for an extraordinary proceeding in this court on an urgent basis with no notice. Either the manner of revocation has caused confusion, or it hasn't.

[68] Counsel argues that there is a very limited regulation making power to allow the Ministry to pass a clarifying regulation under the current statutory scheme. That is a question between the executive and the Legislature. It does not vest legitimacy in bringing the issue to the court however. If a dispute arises in which the meaning of legislation is in issue, it will then be the court's role to resolve that dispute.

[69] The fourth factor in SA requires a responding party with an interest in opposing the declaration sought. *Amicus* certainly can argue the position. But it has no legal interest. It has no facts. It is exposed to no jeopardy. In this case, asking *Amicus* to respond does not change the inadequacy of the factual and legal substratum of the case presented for decision.

Why this Matters

[70] The Attorney General is not asking the court to decide a dispute among interested parties. He is asking the court to endorse his view of the interpretation of the law. In my respectful view, this crosses the line of constitutionally permissible roles. It is not the court's place to endorse the executive branch's view of its conduct without any live dispute in which people with opposite views can be fairly heard and issues can be dispassionately decided.

[71] In *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (CanLII) the Supreme Court of Canada discussed the importance of each branch of government operating within the limits of its constitutional role:

> [28] Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these

functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

[29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).

[30] Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.

[31] Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options" (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 37). [Note omitted.]

[72] This is not to say that the judicial and executive branches cannot or ought not to act in aid of each other in appropriate cases. In *Attorney General for Ontario v Persons Unknown*, unreported decision March 19, 2020, the Chief Justice of the Superior Court of Justice ordered a moratorium on residential evictions during the emergency lockdown declared by the government. In *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552 (CanLII), the Chief Justice of the Superior Court of Justice extended time limits under the federal *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 on motion of the federal Superintendent of Bankruptcy.

[73] In the *Persons Unknown* case, the Chief Justice effectively relieved court officers from their duties to enforce writs of possession during the pandemic. In *Podgurski*, he summoned the equitable jurisdiction of the court under the *BIA* to relieve thousands of Canadians from time limits that were running against them while they were enduring the "seismic effect" of the pandemic including exceptional containment measures preventing them from meeting deadlines in their bankruptcy proceedings.

[74] In each case, neither branch could resolve the issues on its own. Both cases involved utterly urgent scenarios where existing legal proceedings risked exposing court officers and members of the public to greater risk of exposure to the pandemic. Urgency was so extreme in those cases that the Chief Justice exercised the jurisdiction to hear the cases with little or no notice.

[75] I cannot agree with counsel for the Attorney General that protecting lawyers from being confused about limitation periods or protecting LAWPRO from future lawsuits is at all comparable. No one is being forced out of their homes to be exposed to a deadly virus due to eviction or bankruptcy.

[76] In my view, the "Persons Unknown" format does not allow the Attorney General to seek *ex parte* interpretations of laws to restrict unnamed respondents from suing others in future. Neither is it appropriate for the Attorney General to seek this court's legal opinion on a hypothetical question of interpretation. Both engage the court in acting for the executive branch in a manner that in my view is constitutionally inappropriate.

There is Another Answer

[77] Section 8 of the *Courts of Justice Act*, RSO 1990, c C.43 provides:

> References to Court of Appeal
> 8 (1) The Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration. R.S.O. 1990, c. C.43, s. 8 (1).
>
> Opinion of court
> (2) The court shall certify its opinion to the Lieutenant Governor in Council, accompanied by a statement of the reasons for it, and any judge who differs from the opinion may certify his or her opinion and reasons in the same manner.
>
> Submissions by Attorney General
> (3) On the hearing of the question, the Attorney General of Ontario is entitled to make submissions to the court.
>
> Same
> (4) The Attorney General of Canada shall be notified and is entitled to make submissions to the court if the question relates to the constitutional validity or constitutional applicability of an Act, or of a regulation or by-law made under an Act, of the Parliament of Canada or the Legislature.
>
> Notice
> (5) The court may direct that any person interested, or any one or more persons as representatives of a class of persons interested, be notified of the hearing and be entitled to make submissions to the court.
>
> Appointment of counsel
> (6) If an interest affected is not represented by counsel, the court may request counsel to argue on behalf of the interest and the reasonable expenses of counsel shall be paid by the Minister of Finance.

[78] The Legislature has created a process for the Government to refer matters to the judicial branch where cabinet wishes to obtain a legal opinion from the courts. The process calls for notice to interested parties and the appointment of counsel if necessary. I note that, unlike Messrs. Gottlieb and Renihan, counsel on a reference are entitled to be paid for their services.

[79] There is no provision for a reference to this court.

[80] I leave the question of the appropriate role of the courts in a reference process to those courts that may hear one. There is certainly law recognizing the distinct role of references in our system.

[81] Counsel for the Attorney General says that a reference would have been inappropriate in this case because a regulation is required, and the time to give notice and to convene a panel of the Court of Appeal would have taken too long. That assumes that it was appropriate to bring this application without notice in this court (which I already found was not the case). Moreover, I do not accept the submission that the Court of Appeal cannot act quickly when true urgency is shown. I know that to be incorrect from my own experience as a former counsel and as an institutional matter.

Summary

[82] I agree with the submissions of Mr. Gottlieb and Renihan that this case invites the court to take on an improper role. A declaration would not have any real-world effect or serve any practical purpose. There is no one here with an interest in the issue brought and no one before the court with an interest in opposing. There are no facts in issue and no real dispute. There are many ways that the Attorney General can avoid the confusion which LAWPRO and others have raised with it. The Government has the ability to give regulatory or legislative responses. It routinely makes regulatory impact statements when it regulates. If the Government would like an opinion of the judicial branch on an interpretation issue, it can refer the question to the Court of Appeal. It is not for me to usurp the role of the Court of Appeal in a reference, the regulatory role of the Attorney General, or the legislative role of the Legislature.

[83] The application is therefore dismissed.

[84] Mr. Gottlieb made an opening point that deserves repeating. It is clear to the court that everyone who participated in this proceeding did so in good faith and in their own view of the best interests of their constituency. I have nothing but praise for the participants and counsel who dealt with this tricky and sensitive question. I am grateful for the excellent written and oral submissions made by all counsel.

[85] I am especially appreciative of Lax O'Sullivan Lisus Gottlieb LLP and Messrs. Gottlieb and Renihan for their willingness to take on a role pitting them ostensibly against the Attorney General, their own insurer, and many legal organizations in which they are significant participants. Their willingness to argue an unpopular position and one that could expose them to criticism in some ill-informed quarters represents the very best traditions of the free and independent bar in Ontario.

F.L. Myers J.

Released: November 16, 2020

CITATION: Attorney General for Ontario v. Persons Unknown, 2020 ONSC 6974
COURT FILE NO.: CV-20-00648669-0000
DATE: 20201116

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ATTORNEY GENERAL FOR ONTARIO

Applicant

– and –

PERSONS UNKNOWN

Respondents

REASONS FOR JUDGMENT

F.L. Myers J.

Released: November 16, 2020