2016 ONCA 709 (CanLII)

COURT OF APPEAL FOR ONTARIO

CITATION: 407 ETR Concession Company Limited v. Day, 2016 ONCA 709
DATE: 20160928
DOCKET: C60894

Laskin, MacFarland and Roberts JJ.A.

BETWEEN

407 ETR Concession Company Limited

Plaintiff (Appellant)

and

Ira J. Day

Defendant (Respondent)

J. Thomas Curry and Rebecca Jones, for the appellant

Ronald D. Manes and Joshua Ginsberg, for the respondent

Heard: February 29, 2016

On appeal from the order of Justice Mark L. Edwards of the Superior Court of Justice, dated July 21, 2015, with reasons reported at 2014 ONSC 6409, 123 O.R. (3d) 95, and supplementary reasons reported at 2015 ONSC 4682, 69 M.V.R. (6th) 279.

Laskin J.A.:

A. Overview

[1] Highway 407 is a toll highway. It was built to relieve traffic congestion on public highways in and around the Greater Toronto Area. Unlike other toll roads, however, Highway 407 is an "open access" highway. Tolls are not collected at points of entry or exit. Instead, drivers' use of the highway is captured by a scanner if they have a transponder and by a camera if they do not. People are invoiced monthly for their use of the highway.

[2] The appellant 407 ETR operates Highway 407 and has authority to collect tolls from those who use it. This appeal raises two issues about how Ontario's *Limitations Act, 2002* applies to the methods available to 407 ETR to collect unpaid tolls under the *Highway 407 Act*, *1998*.[1] Two methods are available: a civil action in the courts, or a process known as licence plate denial in which the Registrar of Motor Vehicles will not validate (renew) or issue a vehicle permit to any person with an outstanding debt to 407 ETR.

[3] The respondent Ira Day began using Highway 407 occasionally in 2005, has used it regularly since January 2008, and in March 2010, he leased a transponder. Despite his frequent use of the highway, Mr. Day has a long and consistent record of refusing to pay his debts to 407 ETR on time. Three times he was put into licence plate denial and each time, facing the expiry of his vehicle

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[1] S.O. 2002, c. 24, Sched. B.; S.O. 1998, c. 28.

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permit, he eventually paid his debt. He has not, however, paid an outstanding invoice since December 2010. And, though his vehicle permit expired in December 2011 and was not renewed, Mr. Day continued to use Highway 407.

[4] Finally, in June 2013, 407 ETR sued Mr. Day for payment of the debts he owed. The amount owing is not large – $13,719.00, plus accumulating interest – but the two issues surrounding it are significant. In his statement of defence, Mr. Day pleaded that 407 ETR's claim was partly barred by the *Limitations Act, 2002*. 407 ETR then brought a motion under r. 21 of the *Rules of Civil Procedure* to determine the two issues arising under the statute.[2]

[5] The first issue is when was 407 ETR's claim "discovered", triggering the start of the basic two-year limitation period under the *Limitations Act, 2002*. The motion judge held that 407 ETR's claim was discovered on May 26, 2011, which was the earliest date under the *Highway 407 Act*, *1998* that 407 ETR could have given notice to the Registrar to put Mr. Day into licence plate denial.

[6] 407 ETR submits that the motion judge erred in his holding. The Act provides that a claim is not discovered until a civil action is "appropriate", and 407 ETR contends that it was not appropriate to sue Mr. Day until the date the licence plate denial process had run its course and his vehicle permit expired, which was December 31, 2011.

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[2] R.R.O. 1994, Reg. 194.

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[7] The second issue arises out of Mr. Day's use of a transponder. The transponder lease agreement he signed provides for a limitation period of 15 years. The issue is whether the 15-year period is enforceable.

[8] Section 22 of the *Limitations Act, 2002* permits parties to contract out of the two-year limitation period and agree to a longer period. The motion judge held, however, that 407 ETR could not rely on s. 22 because the transponder lease agreement was not a "business agreement" as defined in that section. 407 ETR submits the motion judge erred in law in his interpretation of s. 22. It contends that s. 22 permits parties to agree to extend a limitation period even if their agreement is not a business agreement. Mr. Day responds that even if the motion judge erred in his interpretation of s. 22, the 15-year period is still unenforceable at common law.

[9] For the reasons that follow, I would allow the appeal and give effect to 407 ETR's position on both issues.

B. Issues

(1) Did the motion judge err by holding that 407 ETR's claim was "discovered" once it could have given the Registrar notice to put Mr. Day into licence plate denial?

(a) Toll collection under the *Highway 407 Act, 1998*

[10] As I have said, 407 ETR can try to collect unpaid tolls in two ways: by civil action in the courts, or by the licence plate denial process. The statutory

authorization for these two methods of toll collection is set out in ss. 13-22 and s. 25 of the *Highway 407 Act, 1998*. I will briefly summarize the statutory regime providing for licence plate denial and authorizing a court action.

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[11] When a vehicle is driven on Highway 407, s. 13(1) provides that the person in whose name the vehicle's licence plate is registered is liable to pay the tolls and related charges. If a transponder is used, it is the person to whom the transponder is registered who is liable. Under s. 14(3), all tolls and related charges belong to 407 ETR.

[12] Sections 15(1) and 15(2) provide that tolls are due and payable on the day the invoice is sent, and interest begins to accrue 35 days later. Section 15(3) affirms that tolls and related charges are a debt owing to 407 ETR and states that 407 ETR has a cause of action in the courts for payment of that debt.[3]

[13] The two key provisions of the licence plate denial process are the s. 16 notice and the s. 22 notice.

- Under s. 16(1), if the toll is not paid within 35 days after the invoice is sent, 407 ETR may send the person responsible for payment a notice of failure to pay.

[3] Sections 17-19 set out a process by which a person may dispute that a toll is owing – initially before 407 ETR and on appeal before an independent dispute arbitrator. Mr. Day did not dispute any of the invoices sent to him.

- Under s. 22(1), if a toll and related charges are not paid within 90 days of the day a person receives a notice of failure to pay under s. 16, 407 ETR may notify the Registrar of Motor Vehicles of the failure to pay. This notice puts the defaulting debtor into licence plate denial.

- Under s. 22(3), 407 ETR must also inform the person who was sent the s. 16 notice that the Registrar has been given notice.

- Under s. 22(4) – and this provision is key to the licence plate denial process – if the Registrar receives a notice under s. 22(1), then at the next opportunity the Registrar must refuse to validate the vehicle permit issued to the person who received the s. 16 notice and refuse to issue a vehicle permit to that person.

- The "next opportunity" under s. 22(4) would typically be the date the validation for a vehicle permit expires and must be renewed. The *Vehicle Permits Regulation*, under the *Highway Traffic Act*, stipulates that the maximum period for which a vehicle permit can be validated is two years.[4] The validation for Mr. Day's vehicle expired on December 31, 2011 (his birthday). This date, 407 ETR argues, is the date its claim against Mr. Day was discovered.

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[4] R.R.O. 1990, Reg. 628; R.S.O 1990, c. H. 8.

[14] Finally, s. 25 provides that any action 407 ETR takes leading to licence plate denial is "in addition to any other methods of enforcement and collection available at law." In other words, licence plate denial is a complementary, not an exclusive, remedy.

[15] As ss. 16(1) and 22(1) provide, the earliest 407 ETR can give the Registrar notice to put a debtor into licence plate denial is 125 days after an unpaid invoice is sent to the person responsible for payment. That date – for Mr. Day, May 26, 2011 – the motion judge held was the date 407 ETR's claim was discovered, triggering the start of the two-year limitation period.

(b) Mr. Day's default

[16] Between August 2008 and November 2010, Mr. Day was placed in licence plate denial for unpaid tolls three times. He never disputed that he owed the money. Each time he eventually paid, but not after he received a s. 16 notice of his failure to pay, only after 407 ETR sent the Registrar a s. 22 notice to start the licence plate denial process. Mr. Day's last payment to 407 ETR was on December 21, 2010 – a payment of $2,894, which allowed him to renew his vehicle permit.

[17] Since December 2010, Mr. Day has continued to use Highway 407 approximately 60 times a month. He has been invoiced regularly, but he has refused to pay a single invoice. I note parenthetically that it is doubtful his failure

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to pay is because he cannot afford to do so. Mr. Day is an experienced businessman, the president and owner of a company called Prosperity Foods, and since using Highway 407 has driven either a Porsche 911 or a Mercedes.

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[18] The first unpaid invoice – for $162.09 – was sent to Mr. Day on January 21, 2011. 407 ETR could have sent him a s. 16 notice of failure to pay 35 days from the invoice date, on February 25, 2011. It sent the s. 16 notice on March 21, 2011. Had 407 ETR sent a s. 16 notice on February 25, 2011, it could have sent a s. 22 notice to the Registrar 90 days later, on May 26, 2011. It actually sent the s. 22 notice on August 10, 2011.

[19] Mr. Day's unpaid invoices continued to accumulate. On December 31, 2011, his vehicle permit expired and the Registrar refused to renew or validate it. Still, Mr. Day continued to use Highway 407 and his unpaid invoices continued to mount. Finally, on June 14, 2013, 407 ETR brought this action.

[20] Assuming the two-year limitation period (and not the 15-year period in the transponder lease agreement) applies, if December 31, 2011 is the start date, then 407 ETR's claim is not out of time. If May 26, 2011 is the start date, 407 ETR's claim for some of the unpaid invoices is statute-barred.

(c) The motion judge's reasons

[21] Under the *Limitations Act, 2002,* the limitation period begins to run when a claim is discovered. But s. 5(1)(a)(iv) of the Act provides that a claim is not discovered until bringing a claim is an "appropriate means" to recover a loss.

[22] In deciding when 407 ETR's claim was discovered, the motion judge was guided by the Divisional Court's approach in *407 ETR Concession Co. Limited v. Ontario (Registrar of Motor Vehicles)* (2005), 82 O.R. (3d) 703. There, at paras. 27 and 60, the Divisional Court emphasized that the licence plate denial process is both an effective and necessary method for collecting unpaid tolls and that civil actions would "choke the court system":

> [T]he purpose of the Act was to privatize the operation of Highway 407 and, given its open-access character, to provide the owner an effective method of toll collection. The legislature recognized that plate denial is a necessary feature of an open-access toll highway given the exceptionally large number of transactions, the small balances and the cost of other means of debt collection.
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> …
>
> The Registrar submits the owner can achieve collection of tolls by other means, *i.e.*, collection agencies or court proceedings. We reject this submission. The use of collection agencies would result in a significant percentage loss of tolls collected; we take judicial notice of the fact that collection agencies seldom, if ever, act without fee. Court proceedings would choke the court system, particularly Small Claims Court. Between November 1, 2002 and June 30, 2004, 531,350 s. 16 notices were issued. It does not take a febrile

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> imagination to conclude court action is not a useful alternative.

[23] The motion judge therefore rejected Mr. Day's argument that the two-year limitation period should start when 407 ETR sends out an invoice. Instead, he took what he characterized as a "common sense approach" and fixed the start date of the limitation period as the date when 407 ETR could give notice to the Registrar to put Mr. Day into licence plate denial. An earlier date would generate needless litigation over relatively small amounts. The motion judge wrote, at paras. 53 and 55:

> The Divisional Court in *407 ETR Concession Company Limited v. Registrar of Motor Vehicles* … made it quite clear that the purpose of the *407 Act* was not only to privatize the operation of Highway 407, but also to provide to the 407 ETR ***an effective method of toll collection***. An effective method of toll collection, in my view, has implicit in it a common sense approach to a reasonable limitation period, recognizing that the interests of both the 407 ETR and the consumer need to be protected. Such a common sense approach, in my view, would not accord with the arguments made by Mr. Day that the limitation period commences when an invoice is rendered. The most realistic and common sense approach must start with the recognition that the *407 Act* provides for a method of collection that ultimately concludes with the Registrar placing a non-paying consumer like Mr. Day's licence plate into licence plate denial. Only then, in my view, would the 407 have discovered that unpaid invoices were not going to be paid. To accept the submission of counsel for Mr. Day would result in an untold volume of small claims being made through our court system resulting in needless litigation.

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> The appropriate limitation period that protects both the interests of the 407 ETR as well as the consumer is one that recognizes a limitation period that begins two years from the time that a non-paying customer of the 407 has been placed into licence plate denial. [Emphasis in original.]

(d) The parties' positions on appeal

[24] 407 ETR submits that the motion judge's underlying approach was correct but that he did not go far enough. 407 ETR contends that it discovers its claim only when it knows the debtor's vehicle permit has expired, which means that the notice to the Registrar to put a debtor into licence plate denial failed to prompt the debtor to pay. The notice to the Registrar is a "red flag" to the debtor, but until the licence plate denial process has run its course, 407 ETR will not know if a court action is appropriate. Thus, only when Mr. Day's vehicle permit expired on December 31, 2011 was litigation an appropriate means for 407 ETR to collect his debt. Until then, 407 ETR had reason to believe Mr. Day would pay.

[25] More generally, 407 ETR submits that to fix the start of the limitation period earlier would result in so large a volume of small claims that the Small Claims Court would be overwhelmed with unnecessary litigation. Mr. Curry succinctly put 407 ETR's position in oral argument: the civil justice system begins when the licence plate denial regime ends.

[26] Mr. Day submits that the date chosen by the motion judge for the start of the two-year limitation period is reasonable. He no longer presses the argument

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that the limitation period should start to run when an invoice is sent out, or even when 407 ETR first notifies a debtor that an invoice is unpaid.

[27] In essence, Mr. Day's position is as follows. The licence plate denial process is an additional or optional method the legislature gave to 407 ETR to collect delinquent accounts. However, the legislature never intended to exempt 407 ETR from the normal application of the *Limitations Act, 2002*. To give effect to 407 ETR's position would either inject unjustified uncertainty into the start date of the two-year period, or could even mean that no limitation period applies to the collection of debts owed to 407 ETR. The uncertainty arises because 407 ETR has discretion if and when to send a notice to the Registrar to put a debtor into licence plate denial. It can manipulate the start date and, as a result, the end date of the process. There might even be no applicable limitation period at all because 407 ETR could exercise its discretion not to send a notice to the Registrar and so not put a defaulting user into licence plate denial.

[28] Conversely, the date chosen by the motion judge has the advantage of certainty. The date when 407 ETR can give the Registrar notice and put a debtor into licence plate denial is certain, because it is a date fixed by the statute. That date, Mr. Day submits, is the date a civil action was an "appropriate means" to sue him to collect his unpaid invoices, and therefore, that date is the date when 407 ETR discovered its claim against him.

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[29] Moreover, Mr. Day contends the date chosen by the motion judge will not prejudice 407 ETR. As vehicle permits must be renewed every two years, in virtually every case 407 ETR would be able to ascertain whether the licence plate denial process has prompted payment, and if it did not, still be able to sue within the limitation period.

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(e) Analysis: On what date was a civil action an "appropriate means" for 407 ETR to recover the money Mr. Day owed?

[30] Assuming the 15-year limitation period in Mr. Day's transponder lease agreement does not apply, 407 ETR's claim is subject to the basic two-year limitation period in s. 4 of the *Limitations Act, 2002*. Under s. 4, "a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered" (emphasis added).

[31] The day on which 407 ETR's claim was discovered is the day on which 407 ETR knew or ought to have known the four matters set out in s. 5(1)(a) of the Act:

> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and

> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[32] Obviously, 407 ETR knew the first three matters in s. 5(1)(a) as early as the delivery of its s. 16 notice in March 2011. It knew by then it had suffered a loss; it knew the loss was caused by the failure to pay an invoice that was due and payable; and it knew that Mr. Day had failed to pay it. This first issue on the appeal turns on s. 5(1)(a)(iv): when should 407 ETR have known that a civil action against Mr. Day was an "appropriate means" to recover its loss?

[33] The appropriateness of bringing an action was not an element of the former limitations statute or the common law discoverability rule. This added element can have the effect – as it does in this case – of postponing the start date of the two-year limitation period beyond the date when a plaintiff knows it has incurred a loss because of the defendant's actions.

[34] Also, when an action is "appropriate" depends on the specific factual or statutory setting of each individual case: see *Brown v. Baum*, 2016 ONCA 325, 397 D.L.R. (4th) 161, at para. 21. Case law applying s. 5(1)(a)(iv) of the *Limitations Act, 2002* is of limited assistance because each case will turn on its own facts.

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[35] In the case before us, the date when a civil action would be an "appropriate means" for 407 ETR to recover its loss must be assessed not only in the context of the purpose of that element of s. 5(1)(a) and the words that qualify it, but also in the context of the statutory regime under which 407 ETR operates.

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[36] Under the *Highway 407 Act, 1998*, five options for the start date of the two-year period are available to choose from:

1. The date 407 ETR sends an invoice to the vehicle permit-holder, which is the date the debt becomes due and payable.
2. Thirty-five days after the invoice is sent, which is the date the toll debt becomes delinquent and entitles 407 ETR to send the vehicle permit-holder a notice of failure to pay under s. 16.
3. Ninety days after a notice of failure to pay is sent, which is the date 407 ETR can ask the Registrar to put the vehicle permit-holder into licence plate denial under s. 22.
4. The date 407 ETR actually sends a s. 22 notice asking the Registrar to put the vehicle permit-holder into licence plate denial.
5. The date the vehicle permit expires for non-payment of the debt.

[37] I would immediately eliminate options one and two from consideration. Neither of these first two options is tied to the licence plate denial process. And to give effect to the legislature's intent, it seems to me that the start date of the limitation period must be tied to that process. The legislature enacted that process for a reason: it was not content to force 407 ETR to sue in the courts for unpaid toll debts. I fully agree with the Divisional Court that licence plate denial is an effective, necessary and indeed integral feature of an open access toll

highway. Tying the start date of the limitation period to the licence plate denial process acknowledges the significance the legislature attached to that process for the collection of unpaid tolls. In this court, Mr. Manes on behalf of Mr. Day fairly did not urge us to adopt option one or two. The start date of the two-year period then turns on whether we should adopt on the one hand option three or four, or on the other hand option five.

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[38] The motion judge's reasons and order were a source of some confusion to the parties. His formal order adopts option three (the date 407 ETR could have asked the Registrar to put Mr. Day into licence plate denial), but parts of his reasons may be read as adopting option four (the date 407 ETR actually did send notice to the Registrar to put Mr. Day into licence plate denial). Nothing turns on this apparent confusion, as I would adopt option five.

[39] A civil action only becomes appropriate when 407 ETR has reason to believe it will not otherwise be paid – in other words, when the usually effective licence plate denial process has run its course. Thus, the date when a vehicle permit expires for the failure to pay a toll debt is the date a civil action is an appropriate means to recover that debt. This date starts the two-year limitation period. For Mr. Day, this date is December 31, 2011. I say this for four reasons.

[40] First, under s. 5(1)(a)(iv) of the *Limitations Act, 2002*, the date a proceeding would be an appropriate means to recover a loss must have "regard

to the nature of the ... loss". So, in fixing the appropriate date, it may not be enough that the loss exists and the claim is actionable. If the claim is the kind of claim that can be remedied by another and more effective method provided for in the statute, then a civil action will not be appropriate until that other method has been used. Here, a claim will not be appropriate until 407 ETR has used that other method, without success.

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[41] As the Divisional Court recognized it its 2005 decision, and the motion judge recognized in this case, the other method for toll collection provided for in the *Highway 407 Act, 1998* – licence plate denial – is far more effective than a civil action. By providing for licence plate denial, the legislature must be taken to have recognized its effectiveness. People who cannot renew their vehicle permits until they deal with their toll debts have a powerful incentive to pay.

[42] The statistical evidence bears out the effectiveness of licence plate denial. 407 ETR issues over one million invoices a month. Nearly 70 per cent of those invoices are paid within one month, which means just over 30 per cent are not. Significantly, about 75 per cent of permit holders in default pay their toll debts after being advised the Registrar has sent a s. 22 notice. Of those, just over one half pay before or on the date their vehicle permits have to be renewed; the remainder pay after their vehicle permits have expired.

[43] These statistics show that the motion judge's start date – the delivery of a s. 22 notice to the Registrar – is too early in the process. It comes at the beginning of the process instead of where I think it should come, at the end. The licence plate denial process should be allowed to run its course. As the statistics show, most people, fearing the consequences, eventually pay after receiving a s. 22 notice. Only if the process fails to prompt payment does litigation become an appropriate means to recover the debt.

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[44] Second, in determining when a claim ought to have been discovered, s. 5(1)(b) of the *Limitations Act, 2002* requires the court to take account of "the circumstances of the person with the claim". 407 ETR's "circumstances" differ from those of many other creditors. Highway 407 itself is enormously busy: 380,000 trips on an average workday. As a consequence, 407 ETR must process an enormous number of invoices, almost all for amounts of no more than a few hundred dollars apiece. And unlike, for example a credit card company, which can cancel a customer's credit card for non-payment of a debt, 407 ETR cannot bar a defaulting debtor's access to the highway.

[45] 407 ETR's "circumstances" strongly suggest that requiring it to sue before finding out whether licence plate denial has achieved its purpose would be inappropriate. An important case on the significance of a plaintiff's "circumstances" is the majority judgment in *Novak v. Bond*, [1999] 1 S.C.R. 808. In that case, McLachlin J. considered s. 6(4)(b) of British Columbia's *Limitations*

Act, R.S.B.C. 1996, c. 266, which provided that time did not begin to run against a plaintiff until "the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action" (emphasis added). At para. 85 of her reasons, McLachlin J. discussed "interests and circumstances" and cautioned against the potential unfairness of requiring a plaintiff to bring an action at the time a claim first materializes:

> Litigation is never a process to be embarked upon casually and sometimes a plaintiff's individual circumstances and interests may mean that he or she cannot reasonably bring an action at the time it first materializes. This approach makes good policy sense. To force a plaintiff to sue without having regard to his or her own circumstances may be unfair to the plaintiff and may also disserve the defendant by forcing him or her to meet an action pressed into court prematurely. [Emphasis added; footnotes omitted.]

[46] Similarly here, holding that time begins to run against 407 ETR before it knows whether licence plate denial has prompted payment would be unfair, or to use the word of our statute, would not be "appropriate".

[47] Holding that the two-year period begins after the licence plate denial process fails to prompt payment does not raise the concern Sharpe J.A. referred to in *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652, at para. 34. There, he said that "appropriate" must mean "legally appropriate". By using that phrase he signified that a plaintiff

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could not claim it was appropriate to delay the start of the limitation period for tactical reasons, or in circumstances that would later require the court to decide when settlement discussions had become fruitless. In this case, however, 407 ETR seeks to delay the start of the limitation period for a legally appropriate reason: waiting until a statutorily authorized process has been completed.

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[48] A third consideration is what I take to be an important purpose of s. 5(1)(a)(iv). The overall purposes of limitation statutes are well-established and well-known: certainty, finality and the unfairness of subjecting defendants to the threat of a lawsuit beyond a reasonable period of time. But it seems to me one reason why the legislature added “appropriate means” as an element of discoverability was to enable courts to function more efficiently by deterring needless litigation. As my colleague Juriansz J.A. noted in his dissenting reasons in *Hare v. Hare* (2006), 83 O.R. (3d) 766 (C.A.), at para. 87, courts take a dim view of unnecessary litigation.

[49] If the limitation period runs concurrently with the licence plate denial process, as would be the case under the motion judge’s start date, then there would be the real possibility of numerous Small Claims Court claims. And these claims would be needless because the vast majority of defendants would likely pay their debts to avoid having their vehicle permits expire. The evidence in the record shows that as of June 2014, for invoices outstanding for 23-24 months,

10,144 separate court actions would be required. The average amount of each claim would be $497. Only one to two per cent of claims would exceed $5,000.

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[50] I acknowledge Mr. Day's argument that if the motion judge's start date is used, 407 ETR could in almost every case still bring any necessary actions within the two-year period, because vehicle permits have to be renewed every two years. But imposing a burden on 407 ETR to keep track of two concurrent proceedings – licence plate denial and the running of the two-year limitation period – is impractical and unnecessary. Such a burden does not provide an effective method of toll collection. A far simpler and more appropriate solution is to delay the start of the limitation period until the licence plate denial process has ended.

[51] Finally, although 407 ETR has discretion when and even whether to send a s. 22 notice to the Registrar, that discretion does not detract from the appropriateness of using the end of the licence plate denial process as the start of the two-year limitation period. In theory, I suppose, as Mr. Day contends, 407 ETR could use its discretion to manipulate the start date. But why, one may ask rhetorically, would it do so? Its commercial interests dictate otherwise.

[52] In this case, we have no evidence 407 ETR manipulated the date for sending Mr. Day a s. 16 notice or the Registrar a s. 22 notice. A short delay occurred between the date it could have given these notices under the statute

and the dates it actually gave these notices. The short delay was presumably attributable to the necessity of accessing the relevant databases and other administrative matters.

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[53] Also, even accepting that 407 ETR has discretion when to send the s. 16 and s. 22 notices, the end date of the licence plate denial process is a date that is certain and easily ascertainable. It is the date when the holder's vehicle permit comes up for renewal. If the holder's debt has not been paid by this date, then an action becomes an appropriate means to recover the debt and the two-year limitation period begins to run.

[54] I would therefore give effect to 407 ETR's position on this first issue.

(2) Did the motion judge err in law by holding that the 15-year limitation period in Mr. Day's transponder lease agreement was unenforceable, because it was not a "business agreement" under s. 22 of the *Limitations Act, 2002*?

[55] On March 2, 2010, Mr. Day obtained a transponder by entering into a transponder lease agreement with 407 ETR. For frequent users of Highway 407, using a transponder is cheaper than driving without one. The first page of Mr. Day's transponder lease agreement states: "The limitation period provided for in this lease to commence proceedings to collect amounts owing thereunder is 15 years". Therefore, if the transponder lease agreement is enforceable, it ousts the two-year limitation period for those toll charges incurred while Mr. Day was a transponder customer.

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[56] Before the motion judge, 407 ETR sought a determination that the provision for a 15-year limitation period was enforceable under s. 22 of the *Limitations Act*, *2002*. Mr. Day took the position that this provision in the transponder lease agreement was unenforceable both under the statute and at common law. The motion judge held that though the provision was enforceable at common law, 407 ETR could not rely on it because the transponder lease agreement was not a "business agreement" under s. 22 of the Act.

[57] 407 ETR submits that the motion judge erred in law in his interpretation of s. 22 of the Act. Mr. Day submits that the motion judge's interpretation was correct; alternatively, he submits that the motion judge erred in holding that the provision was enforceable at common law. I agree with 407 ETR's submission and do not agree with either of Mr. Day's submissions.

(a) Section 22 of the *Limitations Act, 2002*

[58] Section 22 provides that by agreement parties can suspend, extend, or in some circumstances even shorten the basic two-year limitation period provided for in s. 4 of the Act. Section 22 provides:

> 22. (1) A limitation period under this Act applies despite any agreement to vary or exclude it, subject only to the exceptions in subsections (2) to (6).
>
> (2) A limitation period under this Act may be varied or excluded by an agreement made before January 1, 2004.

> (3) A limitation period under this Act, other than one established by section 15, may be suspended or extended by an agreement made on or after October 19, 2006.
>
> (4) A limitation period established by section 15 may be suspended or extended by an agreement made on or after October 19, 2006, but only if the relevant claim has been discovered.
>
> (5) The following exceptions apply only in respect of business agreements:
>
> > 1. A limitation period under this Act, other than one established by section 15, may be varied or excluded by an agreement made on or after October 19, 2006.
> >
> > 2. A limitation period established by section 15 may be varied by an agreement made on or after October 19, 2006, except that it may be suspended or extended only in accordance with subsection (4).
>
> Definitions
>
> (6) In this section,
>
> > "business agreement" means an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act, 2002*; …
> >
> > "vary" includes extend, shorten and suspend.[5]

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[59] The motion judge correctly found that the transponder lease agreement Mr. Day signed was not a business agreement. In his application for a transponder, Mr. Day checked the box for "personal use", not business use. Additionally, Mr. Day is a "consumer" under the *Consumer Protection Act*, *2002*, which in s. 1 defines "consumer" to mean, "an individual acting for personal,

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[5] Parts of s. 22 refer to s. 15. Section 15 provides for an ultimate limitation period of 15 years and for various exceptions. Section 15 has no bearing on the issues in this appeal.

family or household purposes and does not include a person who is acting for business purposes”.[6]

[60] The motion judge then concluded that parties could only rely on s. 22 to contract out of the basic limitation period in s. 4 if their agreement is a business agreement as defined in s. 22(6). As the transponder lease agreement Mr. Day signed was not a business agreement, the motion judge held 407 ETR cannot enforce the provision for a 15-year limitation period.

[61] I agree that the transponder lease agreement is not a business agreement. But, respectfully, in my opinion the motion judge erred in his interpretation of s. 22. He focused on ss. 22(5) and 22(6) but he did not take account of s. 22(3). Under s. 22(3), parties can agree to contract out of the two-year limitation period even if one of the parties is a “consumer” and their agreement is therefore not a business agreement. There is, however, a crucial distinction between an agreement made under s. 22(3), which applies when one or both of the parties is a “consumer”, and a business agreement under s. 22(5), which applies only when none of the parties is a “consumer”.

[62] Under s. 22(3), parties can only suspend or extend the two-year limitation period. Under s. 22(5), parties may vary or exclude altogether the two-year period. Importantly, in s. 22(6) “vary” is defined to include “extend, shorten and

[6] S.O. 2002, c. 30, Sched. A.

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suspend". Thus, parties to an agreement under s. 22(3), such as the transponder lease agreement, in which one party is a consumer, can suspend or extend the two-year limitation period. They cannot, however, shorten it. Only parties to a business agreement can also agree to shorten the two-year period. As Mr. Day's transponder lease agreement extends the two-year limitation period to 15 years, it is enforceable under s. 22(3).

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(b) Common law

[63] On appeal, Mr. Day renews his submission that the provision for a 15-year limitation period in the transponder lease agreement is unenforceable at common law and therefore 407 ETR cannot rely on s. 22 of the *Limitations Act, 2002*.

[64] Page four of the transponder lease agreement contains, in small print, a provision for the limitation period of 15 years:

> You agree that we may commence proceedings to collect each amount payable by you under the terms of this lease until the later of (a) the fifteenth (15th) anniversary of the most recent date on which you agree that the terms and conditions of this lease apply (or continue to apply) to you, and (b) the fifteenth (15th) anniversary of the Bill Date of the bill that first indicates such amount is payable by you[.]

[65] In addition, the first page of the agreement provides, under the heading "Important information about this lease", the statement I referred to earlier: "The limitation period provided for in this lease to commence proceedings to collect amounts owing thereunder is 15 years".

[66] In rejecting Mr. Day's submission that this provision was unenforceable at common law, the motion judge held that the 15-year limitation period should have been clear to anyone reading the transponder application or lease agreement. The motion judge also refused to accept that the 15-year limitation period was unfair, as he concluded that there was no inequality of bargaining power. He noted that although the terms of the transponder lease agreement may not have been negotiable, Mr. Day had the option of simply driving without a transponder.

[67] Although Mr. Day accepts the motion judge's findings, he contends that for an agreement to be enforceable under s. 22, the common law has imposed certain additional requirements. One – not met here – is that the agreement must expressly refer to and exclude the application of the basic two-year limitation period. I disagree with his submission.

[68] The resolution of this issue and its interplay with s. 22 is governed by this court's decision is *Boyce v. The Co-operators General Insurance Co.*, 2013 ONCA 298, 116 O.R. (3d) 56, leave to appeal refused, [2013] S.C.C.A. No. 296. That case is directly against Mr. Day's position. In *Boyce*, the owners of a women's fashion boutique sued their insurer Co-operators for damages caused when an incident forced them to close their store for a period of time. They started the action less than two years after the incident, but more than one year after the limitation period provided for in their insurance policy.

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[69] Co-operators moved for summary judgment to dismiss the action on the ground that it was statute-barred. The motion judge disagreed. He held that the agreement between the boutique's owners and Co-operators was not a business agreement and so the parties could not agree to shorten the two-year period. The motion judge also held, apart from whether the agreement was a business agreement, that the agreement was unenforceable under s. 22, because it did not contain the following four requirements:

- Specific reference to the statutory limitation period;
- Clear and unequivocal language that the parties were intending to vary the statutory protection;
- A provision clearly alerting the insured that they were foregoing a statutory right to a two-year limitation period; and
- The signature of the person foregoing the right to the longer limitation period.

[70] This court allowed Co-operators' appeal. The panel held that the agreement was a business agreement, and at para. 16 held that an agreement could be enforceable under s. 22 without any of the requirements imposed by the motion judge:

> We cannot accept that an agreement purporting to vary the statutory limitation period is enforceable under s. 22 of the *Limitations Act, 2002* only if it contains the

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> specific requirements set out by the motion judge. Nothing in the language of s. 22 offers any support for imposing these requirements. The only limitation in s. 22(5) is found in the definition of "business agreement". No other limitation appears, expressly or by implication, and certainly no content related requirements appear in s. 22(5).

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[71] Instead, at para. 20, this court set out what was required for the enforceability of an agreement under s. 22:

> A court faced with a contractual term that purports to shorten a statutory limitation period must consider whether that provision in "clear language" describes a limitation period, identifies the scope of the application of that limitation period, and excludes the operation of other limitation periods. A term in a contract which meets those requirements will be sufficient for s. 22 purposes, assuming, of course, it meets any of the other requirements specifically identified in s. 22.

[72] The court concluded that those requirements had been met in the agreement it was considering.

[73] Similarly, these requirements have been met in Mr. Day's transponder lease agreement. The provision for a 15-year limitation period is described in "clear language", not once but twice in the agreement. The scope of the limitation period is identified by stating the period is 15 years; any other period is excluded.

[74] Specifically in response to Mr. Day's contention, it is unnecessary to refer expressly to the exclusion of the two-year period. There was no express reference to it in the agreement in the *Boyce* case, yet this court held the agreement was enforceable under s. 22. Similarly, I would hold that the

transponder lease agreement signed by Mr. Day is enforceable under s. 22(3) of the *Limitations Act, 2002* and is not rendered unenforceable at common law.

C. Conclusion

[75] I would allow the appeal, set aside paras. 1-4 of the order of the motion judge dated July 21, 2015 and, in their place, substitute the following:

1. The 15-year limitation period provided for in the transponder lease agreement between Mr. Day and 407 ETR is enforceable under s. 22(3) of the *Limitations Act, 2002*.
2. For those unpaid invoices not covered by the transponder lease agreement, the two-year limitation period under s. 4 of the *Limitations Act, 2002* applies.
3. The two-year limitation period starts to run from December 31, 2011, the date when Mr. Day's vehicle permit expired because of his failure to pay his toll debts.

[76] The parties resolved the question of costs, and I would therefore order no costs of the appeal.

Released: September 28, 2016 ("J.L.")

"John Laskin J.A."
"I agree. J. MacFarland J.A."
"I agree. L.B. Roberts J.A."

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