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What's in a Name? Misnomers and Mistakes

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It seems to me it would be a shameful violation of the spirit of the Act of Assembly, if we refused to allow an amendment rendered necessary by the mere mistake of a name.
Woodman v The Town Council of Moncton, 3 P. & B., 338.

Anybody in the real world […] reading the writ would immediately say "'John Doe" is not I". But that driver reading the writ would immediately and without hesitation say "I am the 'John Doe' sued, I was driving the vehicle at the place and time as alleged but that, of course, is not my real name".
Jackson v Baubella, 1972 CanLII 978 (BC CA)

PART I
INTRODUCTION

Sometimes, you don't know who to sue. But a decision must be made quickly because the bright red line of a limitation period is never too far away. Thankfully, the law allows for correction of (certain) mistakes; more specifically, mistakes in name. This saving grace is described as the "doctrine of misnomer".

The term "misnomer" is defined as a "mistake in name; the giving an incorrect name to a person in a pleading, deed, or other instrument".[2] John Doe, Jane Doe, and Richard Roe (and many others) are but a few popular mistakes in name. These fictitious characters have felt the blunt force of litigation since time immemorial.

Misnomers, of course, need correcting.[3] The Does and Roes are garbed in the characteristics of real people, under the costume of an incorrect name.[4] Once the costume is removed, and the identity of the real person is revealed, the misnomer is freed from the claim's custody, and replaced by the correct name of the party captured by the pseudonym.

The crux of a misnomer is this: litigants unaware of the correct legal name of a party may assign to it an incorrect placeholder name, and at a time when the litigant becomes aware of the correct legal name, the litigant may move before the court to seek leave to substitute the incorrect name with the correct name. In other words, a misnomer is a misnaming; it is not an addition of a new party, rather, it is for the insertion of a name into the action to correct (or substitute) a name for a descriptor or for that of another named party.

Pseudonyms are widely used in product liability claims, particularly subrogation actions.[5] These actions are often brought near the end of a limitation period (after the insurer completes its

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[2] Thelawdictionary.org / Online Black's Law Dictionary.
[3] As opposed to an "amendment". This article will examine the importance of distinguishing between the terms "amend" and "correct". A misnomer requires "correction" of a pleading, not "amendment" of it.
[4] The misnomer describes a real person that is not yet identified / known.
[5] A subrogated claim is one in which the insurer sues a third party in the name of its insured to recover the sums paid to indemnify its insured for losses allegedly caused by a third party.

investigation),[6] and tend to include numerous defendants, such as contractors, engineers, architects, sub-contractors, manufacturers, suppliers, designers, and the list goes on. Oftentimes, insurers (and their lawyers) are unaware of the identity of each particular defendant, and in that regard, they use pseudonyms such as "John Doe Installer" or "John Doe Manufacturer" to sue the unknown defendant within the required limitation period.

Sooner or later, the identity of the unknown defendant is revealed, and the litigant is able to rely on the doctrine of misnomer to correct the name of the incorrectly named party.

PART II
Ontario's *Limitations Act, 2002*, S.O. 2002, c. 24, Sched B.

Ontario's current limitations statute, the *Limitations Act, 2002,* came into effect on January 1, 2004. Its purpose was to "balance the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs".[7] The *Limitations Act* established the basic, and well known, 2-year limitation period (and the ultimate 15-year limitation period).[8]

The *Limitations Act*, by s.20(1), executed the common law doctrine of "special circumstances".[9] In summary, the special circumstances doctrine was used on motions to amend pleadings after the expiry of a limitation period. This doctrine allowed the Court, in its discretion, to extend an expired limitation period and add and/or substitute a party in those cases where special circumstances exists, unless the change would cause prejudice that could not be compensated for by costs or an adjournment.[10] This, as it stands, is a bright line rule.

There is relief from the strictures of the statute. The relief is found in s. 21(2) and notes that the two-year limitation period does not prevent the correction of a misnaming or misdescription of a party. Consequently, s.21(2) allows litigants to correct the name of an incorrectly named party even after the expiry of a limitation period.[11]

Importantly, the correction of a misnomer is not akin to a pleading amendment.[12] A party is not seeking to amend a pleading pursuant to Rule 26.02 when asking to apply the doctrine of

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[6] In Ontario, a claim shall not be commenced after the second anniversary of the day on which it is discovered; *Limitations Act*, 2002, S.O. 2002 c. 24 [*Limitations Act*], s.4.
[7] These are the words of Weiler J.A., in *York Condominium Corp. No. 382 v Jay-M Holdings Ltd.* (2007), 2007 ONCA 49 (CanLII).
[8] *Limitation Act*, s. 4.
[9] S.21(1) of the *Limitations Act* reads as follows: "If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding."
[10] Prior to the enactment of the new *Limitations Act*, Courts developed, and applied, the common law doctrine of special circumstances. This doctrine originated in *Basarsky v Quinlan*, 1971 CanLII) (SCC), [1972] S.C.R. 380, [1971] S.C.J. No. 118; in summary, the plaintiff brought a claim within the applicable limitation period, and later, sought to add a new claim after the period had expired. The Supreme Court of Canada applied the rule in *Weldon v Neal* (1887), 19 Q.B.D. 394 (C.A.), that an amendment could not be made that would prejudice the other party by taking away the existing right of the time bar, expect in peculiar or special circumstances that warrant the amendment.
[11] *Limitations Act*, s. 21(1) "[i]f a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding; (2) subsection (1) does not prevent the correction of a misnaming or misdescription of a party.
[12] Rule 5.04(2) of the Ontario Rules of Civil Procedure is not the same as Rule 26.01(4). Pursuant to Rule 26.01(4), a party may, at any stage of an action (including during trial), seek leave to amend their pleadings unless there is evidence of non-compensable prejudice. This rule uses mandatory language, specifically, "[…] the court **shall** grant leave to amend pleadings". Consequently, insofar as the Court is satisfied that there is no non-compensable prejudice, the amendment shall be allowed. Despite its mandatory language, the Court does have the residual

misnomer. Rather, and pursuant to Rule 5.04(2), the title of the proceeding is corrected with no changes to the pleadings having to be made.[13] The court's ability to correct misnomers is found in Rule 5.04(2) of the *Rules of Civil Procedure*; this rule allows a party, at any stage, to correct the name of a party incorrectly named, unless there is evidence of non-compensable prejudice. The court's power to grant leave to correct the misnomer is discretionary and driven by the principles of fairness and judicial efficiency.[14]

This paper provides an overview of the historically narrow application of the misnomer doctrine. We then look at the shift in jurisprudence to a broader brush stroke as to what is a permissible misnomer correction.

PART III
CLASSIC MISNOMER

Historically, the doctrine of misnomer was applied to correct names which contain minor spelling errors only when the claim was personally served on the misnamed party.[15] The doctrine's application was narrow: for example, courts denied name correction when (i) the party seeking the correction failed to make effort to discover the identity of the correct defendant, and when (i) a party makes a blunt mistake in the name (i.e., suing party "A", when they ought to have sued party "B").

An example of a blunt mistake in name is found in *Board of Commissioners of Police of Corporation of Township of London v Western Freight Lines Ltd. and Ulch*.[16] In this case, the court refused to grant a misnomer correction of a deliberate but mistaken choice of the plaintiff's name. The plaintiff sued two defendants. After the action was commenced, the plaintiff's lawyers learned that the correct plaintiff is not the "Board of Commissioners of Police of Corporation of Township of London," but rather, the "Corporation of the Township of London." After the limitation period expired, the plaintiff brought a motion to correct this irregularity; the defendants brought a cross-motion to strike the action as no cause of action vested in the named plaintiff.

At first instance, Judge McCallum made the following findings: (i) the mistake in the plaintiff's name was a misnomer and/or irregularity; (ii) the defendants were not misled, or substantially injured by the mistake; and (iii) the action is not a nullity and the plaintiff may amend the style of cause to correct the plaintiff's name. The defendants' motion was dismissed. Judge McCallum was too forward thinking for the time; the defendant appealed, and the majority allowed the appeal.

Laidlaw J.A., for the majority, found that the plaintiff's lawyers knew of the two separate corporate entities and made a decision to sue in the name of the incorrect corporate entity. In

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discretion to refuse the amendment if it is not tenable at law; see *Essa v Panontin*, 2010 ONSC 691, "[t]he court retains a residual discretion to refuse an amendment … if the proposed amendment fails to meet a basic threshold of legal soundness – the proposed amendment must be tenable at law."

[13] *Loblaw Properties Limited v Turner Fleischer Architects Inc.*, 2018 ONSC 1376, at para 11 and 12; see also para 19 of *Abramov v Doe*, 2023 ONSC 1232 (CanLII).

[14] *Plante v Industrial Alliance Life Insurance Co.*, 2003 CanLII 64295 (ONSC): "[a]ddition of a party engages a slightly different analysis because rule 5.04(2) is discretionary and not mandatory. […] Such discretion of course is not whimsical but based on the principles of fairness and judicial efficiency.

[15] *Ormerod v Ferner*, 2009 ONCA 697 (CanLII); and see *Scace v Withers et al.*, 2020 ONSC 90 (CanLII), at para 13.

[16] 1962 CanLII 169 (ON CA).

that regard, there was no "mistake" in the name, and no misnomer requiring correction. The majority found it improper for the plaintiff to substitute an entirely different corporate party for the entity in whose name the action was commenced.[17]

The minority reason was delivered by Gibson J.A.; the minority, like Judge McCallum, was too forward thinking for that time. Gibson J.A.'s analysis focused on whether the defendants were misled and/or prejudiced by the plaintiff's misnaming. The minority found no misleading or prejudice and rather found that the defendants, at all times, knew precisely of the claim that was made against them. The plaintiff's proposed amendment did not seek to establish a new cause of action, but was simply an amendment as to the owner of the vehicle (the correct plaintiff).

Consider the following: the plaintiff, in *Jackson v Bubela*,[18] was injured in a car accident. A claim was started against the known owner of the offending vehicle. The identity of the driver was unknown. The plaintiff's lawyers made effort to discover the identity of the driver, albeit unsuccessfully. In the face of a soon-to-expire limitation period, the plaintiff had no option but to commence her claim, and used the pseudonym "John Doe" in place of the unknown driver. Sometime after the claim was issued, the plaintiff discovered that the unknown driver was the brother of the owner of the car; the unknown driver's name was revealed to be Wallace Bubela. The plaintiff brought a motion to correct the misnomer.

The plaintiff failed at first instance. The court found that the amendment may be permissible if it simply a correction of a misnomer (i.e., a correction of a "classic" mistake in name, such as an error in spelling); if however, it is an addition or substitution of a party, the amendment will not be granted as it would deprive the party sought to be added the protection offered by the statute of limitation.[19] The court concluded that: "[the] appellant's application was in effect for a substitution or addition of a new party, Wallace Bubela, for the named defendant John Doe, a 'fictitious' person", and in that regard, dismissed the plaintiff's motion.

The appeal was allowed. Bull J.A. stated as follows:

> "[t]he words "John Doe" to my mind are not restricted in connotation to a "fictitious" person or one not in existence. Traditionally the words were used in that limited sense in early ejectment suits, but for generations they have come to be accepted, used and understood, both in legal and common parlance as indicating a real person existing and identifiable but whose name is not known or available to the person referring to him. […] The appellant was not purporting to sue a fiction to maintain or acquire some property right as was done in ancient times. On the contrary, she was suing a living man whom she alleged was at a particular defined time and place operating a described vehicle in such a negligent manner as to cause her injuries then and there. Her litigation finger was pointed at that driver and no one else, but she did not know his name. For the purpose of this suite (and it was necessary to act quickly because of the imminent expiry of the limitation period) she gave that identifiable and identified man a name,

[17] Laidlaw J.A. also noted that the limitation period has elapsed. In that regard, the plaintiff did not even have the option of starting a new claim with the correct corporate entity as the named plaintiff. This is a "blunt" mistake in the name (i.e., a totally wrong party is named on the pleading).
[18] 1972 CanLII 978 (BC CA)

> using one that would clearly connotate to all that it did not purpose to be his real name."

The court, relying on a passage by Devlin, L.H. in *Davies v Elsby Brothers, Ltd.* (an English Court of Appeal decision), outlined the test for the misnomer:

> "The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course it must mean me, but they have got my name wrong", then there is a case of mere misnomer. If on the other hand, he would say: "I cannot tell from the document itself whether they mean me to nor and I shall have to make inquiries", then it seems to me that one is getting beyond the real of misnomer."

Bull J.A. had no difficulty in finding that Wallace Bubela would, without hesitation, know that he *is* the John Doe as it was *he* who was driving the offending vehicle during the material time. Importantly, the court held that a deliberate misnomer of a clearly identifiable person is subject to the same test. The reasoning in *Jackson* suggests that the court's focus when assessing whether or not to allow a misnomer correction is directed at the plain reading of the pleading and whether, on a plain reading, the reasonable person would understand the intended defendant to be the target defendant.[20]

In *Dukoff*, a medical malpractice case, the plaintiff sued a hospital and various John and Jane Does as a placeholder for the unknown identity of doctors and nurses.[21] The names of the unknown John and Jane Doe doctors/nurses were discovered after examinations for discovery. The plaintiff moved to correct the title of proceedings. Master Garfield reviewed the evidence and pleadings and concluded that there was no doubt as to whom Jane and John Doe referred. In that regard, it would be "inconceivable that the hospital, in reviewing the statement of claim, would not have investigated the allegation and, therefore, advised and interviewed [the doctor] and the nurses […]."

Saunders J. allowed the appeal on the ground that the court is not able to draw an inference that the defendant hospital would have no doubt as to the identity of John and Jane Doe. Saunders J. cited *Davies* for the following:

> In English law as a general principle the question is not what the writer of the document intended or meant, but what a reasonable man reading the document would understand it to mean; and that is the test which ought to be applied as a general rule in cases of misnomer […]. The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a while, he would say to himself: "Of course it must mean me, but they have got my name wrong," then there is a case of a mere misnomer. If, on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall

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[20] *Jackson* was cited, with approval, in *Golden Eagle Liberia Limited v International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association*, 1974 CanLII 1765 (BC SC): "The Court of Appeal of this province has endorsed the practice of the use of "John Doe" to describe a defendant who is a real person but whose name is not known. In the case of [*Jackson*], the Court of Appeal permitted the plaintiff to amend his writ of summons to substitute for the name "John Doe" the proper name of the driver of the motor vehicle. The discussion in that case indicates very clearly that in this jurisdiction a plaintiff is not to be frustrated in his claim by a procedural requirement that the defendant be named where the circumstances are such that the name is not known or ascertainable."

[21] *Dukoff et al. v Toronto General Hospital et al.*, 1986 CanLII 2648 (ON SC).

> have to make inquiries", then it seems to me that one is getting beyond the realm of misnomer.

In light of the above, Saunders J. found that in any hospital, especially a large hospital like the Toronto General Hospital, the reference to John Doe and Jane Doe could apply to many persons. In that regard, the plaintiffs failed to overcome the following hurdles (i) it was impossible to hone in on the specific identity of John and Jane Doe as these pseudonyms could apply to numerous doctors / nurses; (ii) the plaintiff failed to make effort to determine the identity of John and Jane Doe; and (iii) the limitation period has expired. Consequently, the court distinguished the case of *Jackson* with the following:

> In my opinion, the decision of Jackson is distinguishable from the case at bar. There could be no doubt in the Jackson case as to the identity of the person named as John Doe. As Mr. Justice Bull said "the litigation finger was pointed at him and at no one else". […] In this case, in my opinion, there is considerable doubt on the evidence before the court as to the identity of the defendants John Doe and Jane Doe prior to the plaintiff learning their correct names in April, 29185 [during discovery]".
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> There are, in my opinion, sound policy reasons for the result. If, as here, the technique of using fictitious names could be used with little indication of the persons referred to and no evidence of any effort to determine their identity, the protection afforded by the limitation periods would be lost. This would be an undesirable result. All persons, including doctors and nurses, should be made aware of claims against them in a timely fashion and thereafter left in peace.
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> In Jackson every effort was made to procure the name of the driver, without success. […] There is no evidence here of the effort, if any made by the plaintiffs prior to the expiration of the limitation period and no argument was addressed to the question of effort. Such a circumstance would not make the designation a misnomer, but it might raise other issues".

Similar to *Dukoff*, the court in *Moreau v Northwestern General Hospital (Master's Ch.)*[22] dismissed a misnomer motion on account of the statement of claim lacking sufficient particulars on the role played by the party identified by the misnomer. More specifically, the court concluded that this is not a misnomer case because the proposed defendant would have undoubtedly concluded, upon reading the claim, that the pseudonym did not refer to him. Master Clarke contrasted the deficient pleading to the pleading in *Rakowski v Mount Sinai Hospital*,[23] in which the original statement of claim contained "sufficient further particulars of the part played by John Doe and Jane Doe, that anyone reading the hospital records would easily know who was intended to be named. The misnomer argument failed.[24]

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[22] 1988 CanLII 4810 (ONSC).

[23] 1987 CanLII 4113 (ON SC). The Court held that "[t]he test to be applied is whether a person having knowledge of the facts could, from reading the statement of claim, be aware of the true identities of John Doe and Jane Doe."

[24] As a final last-ditch effort, the plaintiff relied on Rule 26 of the Rules of Civil Procedure so as to amend the pleading. This argument was rejected. "As to the application of Rule 26, counsel for the defendants argues that the limitation period has expired, and that there is insufficient evidence before me to find in favour of the plaintiffs under this rule. I accept that submission. The cause of action arose in April, 1985, and the statement of claim was issued on March 27, 1986".

In *Brochner*, the plaintiff sued a hospital and a doctor; then, after the expiry of a limitation period, sought to substitute a Dr. D.R. Anderson with the John Doe pseudonym.[25] The Alberta Court of Queen's Bench held that this is not a case of a misnomer, and refused the requested relief. It was found that, despite being named, the plaintiff made no allegations against the John Doe defendant. The plaintiff, however, include a paragraph in the statement of claim which memorialized their intention to amend their pleading at a later date, specifically:

> […] The Plaintiff states that he is unable to give at this stage further particulars of negligence on the part of the Defendants, as the same are solely within the knowledge of the said Defendants and the Plaintiff reserves the right to add such further particulars of negligence as may be necessary.

The above reservation was not permitted to "bootstrap" Dr. D.R. Anderson to the pleading after the expiration of the limitation period in place of the John Doe. In making their decision, the court referenced *Davies*:

> The long established rule with respect to misnomer is stated in [Davies]. That case states that the proper test to be applied in cases of determining whether or not there has been a misnomer is to ask the question – would a reasonable person reading the document understand that he is the person referred to therein but wrongly named or named under a pseudonym? If so, it is a matter of misnomer and the court will permit amendment of the pleadings in order to property identify the party. If such is not the case, the rule is that it is not a case of a misnomer but simply an attempt to introduce a new party by way of addition of substitution.

The court relied on *Dukoff*, which was similar in facts, and found that the hospital in *Brochner* is large, and without particulars in the pleadings to allege what John Doe did or did not do, it would not be possible to any doctor who may have actually or incidentally treated the plaintiff after his admission to the hospital to know that the "litigating finger" was pointing at them. The court ultimately held that this is not a misnomer on the ground that the pleading is deficient in that it did nothing more than just name a John Doe in the style of cause.

In *Charleton v Vancouver Gen. Hosp.*,[26] the British Columbia Supreme Court[27] rejected a misnomer argument by relying on the *Jackson* decision, and its "litigating finger" test. The plaintiff moved to correct numerous Jane Doe and John Doe misnomers. Proudfoot J. held that there is no doubt that the misnomer argument cannot succeed as it cannot meet the test in the *Jackson* case. Proudfoot J. emphasized the following passages in *Jackson*:

> Her litigation finger was pointed at the driver and no one else, but she did not know his name…
>
> The test must be: How would a reasonable person receiving the document take it? […]

The plaintiff did not know at whom the "litigating finger" was pointed at the time the action was started, and the proposed defendants, upon reading the claim, would not say "of course [the John Doe / Jane Doe] must mean me but they have got my name wrong". In reply, the plaintiff argued that this information was not available at the time that the claim was issued. Proudfoot J., agreed; however, the information was available when the plaintiff received the

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[25] *Brochner v MacDonald*, 1987 CanLII 3231 (AB QB).
[26] 1989 CanLII 2807 (BC SC)
[27] Akin to the Ontario Superior Court.

hospital's clinical records. At that point, the correct names were ascertainable. The proposed defendants argued that the misnomer should not succeed in light of the lack of due diligence. The court cited *Happy Invt. Mgmt. Ltd. v Dorio* (1988) CanLII 2979 (BC SC):

> In my opinion, these applications, whether this is a misnomer or not, upon which I make no finding, should not be granted simply because they are brought after the expiry of a limitation period in circumstances where it is clear the plaintiffs could have discovered who the inspector was if they had proceeded diligently before the limitation period expired.

The plaintiff's misnomer correction was denied because, *inter alia*, the plaintiff's failure to exercise due diligence in ascertaining the proper and correct names of the unknown defendants prior to the expiry of the limitation period.

The foregoing cases illustrate the traditional narrow scope of the misnomer doctrine, and its slow expansion. A legal test used to correct spelling mistakes morphed into a test for the correction of incorrectly named parties so long as, *inter alia*, the party seeking the correction exercised due diligence in ascertaining the identity of the intended defendant. The doctrine underwent even further expansion (see below).

PART IV
EXPANSION OF THE MISNOMER DOCTRINE

In this part of the paper we will review the modern judicial approach to the application of the misnomer doctrine.

The *Mazzuca v Silvercreek Pharmacy Ltd.*[28] decision is the polar opposite of the *Board of Commissioners of Police of Corporation of Township of London* case. In *Mazzuca*, the individual plaintiff commenced an action in 1988 for property damage as a consequence of a fire. During examinations for discovery, which took place in 1999, that is, over 10 years after the start of the action, it was discovered that the proper plaintiff is not the individual plaintiff, but rather, "L Ltd.", the individual plaintiff's corporation. In February 2000, the plaintiff brought a motion to amend the statement of claim to substitute "L Ltd." with the named individual plaintiff. The plaintiff was successful on the motion. The appeal was dismissed.

Laskin J.A., delivered the following helpful passage:

> Typically, motions to add or substitute a party after the expiry of a limitation period arise because a lawyer has mistakenly named the wrong plaintiff. In deciding these motions, the case law has distinguished between different kinds of mistakes: between mistaking the correct name of the plaintiff and mistaking who had the right to sue, and between deliberate and unintentional mistakes. These distinctions are problematic, even confusing, and have not been consistently applied. We should be concerned not with the kind of mistake the lawyer has made, but with the effect of that mistake, with whether the mistake has prejudiced the defendant. Holding that motions under rule 5.04(2) may turn on whether the lawyer's mistake is deliberate or unintentional is bound to produce some unjust results, results that would be inconsistent with the philosophy of the current rules.

[28] 2001 CanLII 8620 (ON CA).

Mazzuca held that it is irrelevant whether the mistake was deliberate or unintentional; this is a grand expansion from the earlier decision of *Board of Commissioners* where the Appeal court took a strict approach and denied relief on the ground that the lawyer knew of the correct defendant yet made the decision to sue an incorrect corporate entity (this was, as the court held, no "mistake").

The plaintiffs, in *Ormerod*,[29] sought to substitute the name "S. Graham" in place of "P. Ferner" arguing that "P. Ferner" is a misnomer. The plaintiffs commenced an action on June 27, 2002, alleging medical negligence which caused the death of John Ormerod. The plaintiffs alleged that P. Ferner treated Mr. Ormerod prior to Mr. Ormerod's death. During discoveries, in December 2004, P. Ferner identified the doctor who treated Mr. Ormerod as S. Graham. About four years later, that is, July 2008, the plaintiffs brought a motion to correct, what they said was a misnomer, and substitute the name "S. Graham" in place of "P. Ferner".

The motion judge, in reciting the misnomer test, referred to Devlin J. in *Davies v Elsby Brothers Ltd.*: how would a reasonable person receiving the document take it? The "reasonable person" is not limited to the intended defendant but can also include other relevant persons who review the document. The Court cited *Ladouceur v Howarth*, 1973 CanLII 30 (SCC) [1974] S.C.R. 1111, [1973] S.C.J. No. 120, in which an insurance company was found to have been a "reasonable person" who would have known, upon reviewing a writ, that the defendant was the intended defendant. The motion judge went on to find that Dr. Ferner, Dr. Ferner's insurer, and Dr. Ferner's lawyer are all "relevant persons" for the purpose of the misnomer test; in that regard, these relevant persons knew that S. Graham was the intended defendant and the "litigation finger test" was deemed to have been satisfied.

Importantly, six years had passed since the issuance of the Statement of Claim, and about four years passed since the examinations for discovery in which the plaintiffs learned of the proper name of the intended defendant. Although the motion judge found that there was a significant passage of time, the judge noted that "inordinate delay is not a reason for refusing to substitute unless the defendant to be substituted did not have timely notice of the claim and will be unduly prejudiced in preparing a defence to the claim." The motion was granted (appeal dismissed).

In *Stechyshyn*,[30] on June 8, 2006, the plaintiff (appellant) was struck by a car and at the time, wrote down the defendant's (respondent) license plate number, insurance policy, and driver's license information on a page in a notebook. The plaintiff, at the hospital, gave this information to a police officer, and did not have it returned. On June 20, 2008, the plaintiff filed a Statement of Claim and identified the defendant as "John Doe" because the plaintiff could not recall the defendant driver's true identity.

In 2011, the plaintiff successfully obtained an Order to substitute the "John Doe" with the intended defendant's name (the defendant did not attend on the motion). The Defendant brought a motion to dismiss the claim on the ground that it was brought after the expiry of the two-year limitation period. The motion judge granted the motion and stated that the plaintiff failed to exercise "due diligence" and did not take all reasonable steps to identify the intended defendant within the two-year limitation period. The plaintiff appealed.

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[29] *Ormerod v Ferner*, 2009 ONCA 697 (CanLII).
[30] *Stechyshyn v Domljanovic*, 2015 ONCA 889 (CanLII).

The Court of Appeal made the following expressly clear: the intended defendant would have known on reading the statement of claim that they were the intended defendant, and in that regard, due diligence does not apply. Put another way, on a motion to correct the name of a party on the basis of a misnomer, so long as the true defendant would have known, on reading the claim, that they were the intended defendant, the plaintiff need not establish due diligence in identifying the true defendant within the limitation period. Second, "the law treats the naming of the correctly named defendant as a substitution for the incorrectly named defendant and not the addition of a new party or the initiation of the action against the correctly named defendant."[31] The Court of Appeal dismissed the appellants (intended defendants' appeal).

A title search of a property was misinterpreted in *Acimovic v 8174709 Canada Inc.*[32] and the statement of claim mistakenly named the incorrect party as an owner of a property. In its analysis, the Court reviewed the test of misnomer, stating the doctrine requires a finding that the litigation finger is clearly pointed at the intended defendant. The court further noted that a reasonable diligence inquiry is immaterial to a misnomer analysis:

> Misnomer motions almost always involve a mistake of some kind. In a situation of misnomer, it is simply not an answer for a proposed substituted party to assert that the plaintiff could have discovered the proper name of the defendant with the exercise of reasonable diligence.
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> […]
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> [D]iscoverability is not germane to the determination of whether the doctrine of misnomer applies. It is relevant to a consideration of whether a party should be added to an existing action after the expiry of the presumptive limitation period. However, misnomer is about correcting a misdescription. It is not about adding new parties.

What happens when the misnomer is singular but there are multiple intended defendants? This was the exact situation in *Galanis v Kingston General Hospital*.[33] The plaintiff brought a motion to correct the misnomer "Dr. John Doe Anesthesiologist" with three proposed defendants. The misnomer was written in the singular. The proposed defendants argued that, because the limitation period expired, they should not be added as defendants. The proposed defendants unsuccessfully argued that they could not all be the misnomer because the misnomer was written in the singular. The court held as follows:

> The fact that a singular, not a plural, pseudonym was used is of no moment; to accede to the proposed defendants' argument that only one party can be substituted if "Doe" rather than "Does" appears in the title of proceedings would be to allow form to triumph over substance.

The court commented on the expansion of the misnomer doctrine in *Scace v Withers et al.*:[34]

> Traditionally, the law of misnomer was quite narrow, permitting a plaintiff to correct minor spelling errors in a defendant's name as long as the defendant had been served with the claim. The original law of misnomer is reflected in section 21 of the Limitations Act, 2002 which states that if a limitation period in respect of a claim against a person

[31] *Stechyshyn* at para 20.
[32] 2015 ONSC 582 (CanLII).
[33] 2018 ONSC 1145 (CanLII).
[34] 2020 ONSC 90 (CanLII).

> has expired, the claim shall not be pursued against that person by adding her to an existing proceeding. The rule does not prevent the correction of a misnaming or misdescription of a party. The policy behind the rule was clearly that a plaintiff should not be precluded from pursuing a claim due to typographical or other minor error. If the defendant knew that he was being sued notwithstanding the error, form should not triumph over substance.
>
> The law has evolved significantly since then. Plaintiffs can now rely on misnomer to substitute the names of defendants who are known, or can readily be known to the plaintiffs, and who have no idea that they have been sued until the plaintiff serves them with the misnomer motion, subject to the existence of non-compensable prejudice or other factors that warrant the court's protection.

J.C. Corkery J. in *Sora et al v Emerson Electrical Co. et al*[35] cited *Loy-English v Ottawa Hospital*[36] in his summary of the misnomer doctrine:

> As with most discretionary remedies, results are fact driven and case specific. Despite, this, a number of principles may be derived from the jurisprudence. It is useful to summarize these as follows:
>
> > a. When a plaintiff does not know precisely who to name as defendants it is permissible to name unidentified defendants by way of a pseudonym. It would be better to bring transparency to this practice by naming them as "certain unidentified physicians collectively referred to as Dr. Doe" but the use of "Dr. Doe" or "Dr. X" is a practice that the courts have accepted as appropriate shorthand. [Spirito v. Trillium Health Centre, 2008 ONCA 762, (2008) 302 DLR (4th) 654; Ormerod v. Strathroy Middlesex General Hospital, 2009 ONCA 697; (2009) 97 OR (3d) 321]
> >
> > b. It is not necessary to name multiple Dr. Doe's and to precisely guess how many defendants to implicate. Providing the claim is drafted in a manner to identify what allegations are made against individuals filling specific roles, the "litigation finger is divisible" and may point at more than one unknown defendant. [Suarez v. Minto Developments Inc., 2009 CarswellOnt 8146; Stekel v. Toyota Canada Inc., 2011 ONSC 6507 at para. 35]
> >
> > c. Unlike a claim relying on discoverability to postpone the running of the limitation period, use of a pseudonym and subsequent correction of a misnomer is not subject to a due diligence requirement and will not be defeated by mere delay. [Stechyshyn v. Domljanovic, 2015 ONCA 889 paras. 1 & 19 effectively overruling Urie v. Peterborough Regional Health Centre, 2010 ONSC 4226, cited by the defendants. See also Loblaw Properties Limited v. Turner Fleischer Architects Inc., 2018 ONSC 1376 (SCJ) at paras. 32 - 34 and McDonald v. Hoopp Realty Inc., 2014 ONSC 6089 (SCJ) at para. 19]
> >
> > d. Use of a pseudonym does not give carte blanche to get around the limitation period. Although the Act does not narrow the common law understanding of misnomer and preserves the power of the court to correct it, it does prohibit addition of parties if the limitation period has expired. The distinction is critical. It is the difference between correcting the claim to properly name a party already included in the action and adding a new party. [Spirito v. Trillium

[35] 2020 ONSC 1374 (CanLII).
[36] 2019 ONSC 6075 (CanLII).

Health Centre, 2008 ONCA 762; (2008) 302 DLR (4th) 654 at paras. 11, 12, 16 & 17]

e. To be a misnomer, the plaintiff must clearly have intended to sue the proposed defendant. The pleading must be drafted with sufficient particularity that an objective and generous reading of the pleading would demonstrate that the "litigation finger" is pointing at the proposed defendant. To put this another way, the pleading must be sufficiently clear that a properly informed defendant reading the allegation would be able to recognize that he or she was the target of the allegation. The allegation must be clear and definite on its face and not held together through a series of assumptions about what the person reading the statement of claim might know. [see Hassan v. Dunraj, 2014 ONSC 7374 (SCJ); Bertolli v. Toronto, 2017 ONSC 7534; aff'd 2018 ONCA 601]

f. Notice to the defendant within the limitation period cannot be a factor in deciding whether or not misnomer applies for the simple reason that, as discussed earlier, there is no requirement to serve a defendant within the limitation period. The question is not whether the defendant did know he or she was being sued but whether on a fair reading of the claim he or she would have known. [Chiarelli v. Wiens (2000), 2000 CanLII 3904 (ON CA), 46 O.R. (3d) 780; Bearss v. Scobie, 2013 ONSC 5910 at paras. 44 & 45; Essar Algoma Steel Inc. v. Liebherr (Canada) Co., 2011 ONSC 1688 (Div.Ct.) at para. 25]

g. Notice is relevant to the question of prejudice and the exercise of discretion. Actual notice to the proposed defendant will generally obviate any injustice in subsequently correcting the misnomer. Delay is also relevant to the issue of prejudice and to the exercise of discretion. [see Simmonds v. G & G Pool Services, 2018 ONCA 772; O'Sullivan v. Hamilton Health Sciences Corp., 2011 ONCA 507]

h. Notice may be sufficient if the claim against an unknown party has been brought to the attention of the named defendant and to an employer, organization or insurer with the means to determine who was involved in the alleged acts or omissions. In that case it may not be unfair to correct the misnomer once the identity of the other defendant is known even in the absence of actual notice. [see Ormerod v. Strathroy Middlesex General Hospital, 2009 ONCA 697; (2009) 97 OR (3d) 321 para 14 and see Ratnakumar v.Dickie's No Frills, 2015 ONSC 1866 (Div.Ct.)]

i. It is not useful for misnomer motions to be decided based on technicalities or vagaries of pleading. The object of pleading analysis should not be one of looking for traps, tricks or loopholes. We should not be engaged in the legal equivalent of "whack a mole" or "gotcha". Rather, the question in every case should be whether it is reasonable and just to allow the pleading amendment and whether it is permitted by the governing legislation.

In *Christopher Ronbeck et al v Electrolux Canada Corp.* et al 2021 (unreported), the plaintiff's insurer brought a subrogated claim against various defendants due to damages caused to its insured's home as a result of a stove fire. The fire occurred on December 13, 2017. Among the defendants, the insurer named "John Doe Retailer" as, at the time of issuing the claim, the insurer was unaware of the identity of the retailer and alleged that it was the manufacturer, distributor, supplier and or retailer of the subject stove. On July 16, 2020, about 2.5 years after the claim was issued the insurer discovered the true identity of John Doe Retailer as The Brick.

The plaintiff brought a motion to correct the misnomer. The Brick opposed the motion and argued, among other things, that the limitation period within which to sue The Brick has lapsed, that The Brick had no notice of the action made against it within the limitation period, and that the plaintiff failed to exercise due diligence in determining what the identity of the true defendant was prior to the expiry of the limitation period. The Court rejected each of these arguments and granted the plaintiff's motion.

In his unreported Endorsement, in *Williams v Marchetti*, 2021, Justice Doi granted the plaintiff's misnomer motion seeking to substitute the misnomer "John Doe Occupant" with four (4) proposed defendants. The proposed defendants raised a limitation argument and argued that the plaintiff has failed to use diligent efforts to ascertain their names within the limitation period. Justice Doi, in reliance on *Stechyshyn*, found that a plaintiff need not establish due diligence in identifying the defendant within the limitation period. The material question relates to the "litigation finger" test, and that the doctrine of misnomer applies to permit a substitution after the expiry of a limitation period.

The recent decision of *Abramov v Doe*,[37] offers an excellent summary of the key takeaways of the modern misnomer doctrine:

1. Correcting a misnomer is not an "amendment of a pleading" pursuant to Rule 26.02. The correct Rule to rely upon is Rule 5.04(2). It is an error to conflate Rule 26.02 and Rule 5.04(2).
2. The test for a misnomer is the "litigation finger test" and that is whether a person, having knowledge of the facts, is aware of the true identity of the intended defendant by a generous reading the statement of claim.
3. The party relying on the misnomer doctrine must have clearly intended to sue the proposed defendant. In that regard, pleadings must be drafted with sufficient particularity so that on an objective and generous reading of same it is clear that the "litigation finger" is pointing at the proposed defendant.
4. A limitation period defence does not apply to a motion to correct a misnomer.
5. The due diligence of a party in ascertaining the identity of the intended defendant is irrelevant. In fact, even if a party knew of the existence of the proper name of the defendant, an incorrect name can still be cured at any time so long as the "litigation finger" test is met, and there is no non-compensable prejudice arising from the misnomer.
6. Knowledge and/or discoverability does not impact a misnomer analysis.
7. Notice to the defendant within the limitation period is not relevant because the test is not whether the defendant knew they were being sued, but whether on a fair reading of the claim they would have known.
8. Notice is relevant to the issue of prejudice. Put another way, actual notice to the intended defendant will generally obviate any injustice in correcting the misnomer.
9. Delay is a relevant consideration in determining prejudice.

It is critically important to remember that the court has the discretion to deny the correction of the misnomer despite a litigant satisfying the "litigation finger test".

[37] 2023 ONSC 1232.

PART V
CONCLUSION

The misnomer doctrine has undergone significant development and expansion. Its historic and narrow application was limited to correcting minor spelling errors only when the claim was personally served on the misnamed party. In modern time, the courts are not concerned with the correcting party's due diligence or notice, but rather, on whether on a generous reading of the claim, a relevant person would have known that the defendant was the intended defendant.

The misnomer doctrine is retroactive. It focuses on the mind of the correcting party within the limitation period despite the correcting party not knowing the identity of the intended defendant.

The doctrine offers needed protection to litigants who have the intention to sue a party but, for some reason (whether good reason or bad), do not know that party's true identity. Despite this positive effect, the doctrine also, arguably, compromises the principle of finality in that persons who have not been sued within the regular two-year limitation period may very well be sued at a later date if the party who sued them moves to correct a pseudonym.

The misnomer doctrine will likely continue to develop as new mistakes are made in future cases.

Toronto Law Journal

A Service Clarification to Hold Crypto-Fraudsters Accountable: Analyzing the Appellate Holding of *Gokturk V. Nelson*

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Introduction:

Civil litigation stemming from one of Canada's largest crypto-insolvencies has resulted in an appellate holding on service issues in summary trial applications. In *Gokturk v. Nelson*,[1] the Court of Appeal for British Columbia (the "**BCCA**") held that despite errors in reliance on changing service addresses, unless errors rise to the level of material impact, the failure should not change a court's ultimate ruling. *Nelson* stems from a prior interim receivership where the British Columbia Securities Commission (the "**BCSC**") obtained the appointment of an interim receiver over the insolvent crypto-exchange "Einstein", which serviced approximately 200,000 customers, under section 152 of the *Securities Act*.[2]

Nelson is a welcome holding for insolvency litigators dealing with dissipated or stolen online assets, and will likely impact service determinations in litigation across Canada. The appellate decision will encourage judicial reflection on whether service errors or service issues, especially those dealing with litigants in online spaces, constitute reason for delays in justice. In response to the appellant's arguments, *Nelson* emerges as a leading Canadian decision that will assist parties in civil asset recovery processes when dealing with defendants or respondents who attempt to obfuscate or delay court processes by raising service defences to meritorious claims.

Factual Background

The appellant, Mr. Gokturk ("**Gokturk**"), operated a cryptocurrency exchange known as Einstein Exchange Inc. ("**Einstein**").[3] The respondent, Mr. Nelson ("**Nelson**") is a trader who previously dealt with Gokturk three times.[4] On June 7th, 2019, Nelson sold Gokturk 50 bitcoin for $535,000.[5]

Four months after the transaction, Nelson was still not paid by Gokturk, despite corresponding regularly to resolve the situation. During this time, Gokturk sent a heartfelt apology to Nelson by text:

> "None of this is your problem and I owe you what I owe you.

[1] 2023 BCCA 164 [*Nelson*].
[2] *British Columbia Securities Commission v Einstein Capital Partners Ltd* (14 November 2019), *British Columbia S-1912424*, (Order Made After Application) at para 2 online: *Grant Thornton LLP* <docs.grantthornton.ca/document-folder/viewer/docul8LWsxcWho7J/10244204721500480 4?ga=2.210310485.1131316686.-1574106687-1211224294.15728978344>; *Securities Act*, RSBC 1996, c 148.
[3] *Supra* note 1 at para 2.
[4] *Ibid* at para 12.
[5] *Ibid* at para 3.

> Keep these text messages and email records as proof. I am sorry I have been avoiding you. This has been the absolute worst year of my entire existence. These are not excuses, I just don't know what to tell you besides the truth."[6]

Despite seeming sincere, Gokturk continued to fail to repay Nelson. Nelson then filed an application seeking judgment for damages against Gokturk under Rules 9-6 and 9-7 of the Supreme Court Civil Rules.[7] Gokturk failed to respond to this application. Absent his response, the judge granted a summary trial decision in favour of Nelson.[8]

A sub-issue relevant to this decision was quantification of the damages for breach. On this point, "The plaintiff submits that it would work an injustice to deny him the benefit of the precipitous rise in BTC value since June 2019, and asks the Court to assess the damages for breach at present market value and in the amount of $3,084,393.15."[9]

The motion judge accordingly surveyed relevant case law surrounding breach of contract to conclude that the remedy ought to be what is required to put the non-breaching party in the position they would have been in had the contract been performed.[10] Applied to the facts, the judge found that the breach occurred on June 7, 2019, when the defendant failed to pay on delivery and that the damages at the time of breach equalled the contracted amount of $535,000.[11] Therefore, the Court held that:

> In the circumstances, using the date of breach to assess the damages puts the plaintiff in the position he would have been in had the Contract been fulfilled.
>
> The fact that BTC is worth more now than it was at the time of the Contract does not result in an injustice.[12]

By placing the damages at time of breach rather than at present value, the Court prevented Nelson from claiming approximately $2.5 million in additional value.

Gokturk then filed a notice of application seeking reconsideration of the decision, which was dismissed.[13] *Nelson* involves the appeal of both the dismissal of this reconsideration decision and findings of the prior summary trial decision. Gokturk as appellant relies on his assertions that he was not properly served and that he was not a party to the contract.

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[6] *Ibid* at para 14.
[7] Supreme Court Civil Rules, BC Reg 168/2009, <https://canlii.ca/t/55vff>, at sections 9-6 - 9-7.
[8] *Supra* note 1 at para 6.
[9] 2021 BCSC 813 at para 30 [*Nelson*].
[10] *Ibid* at paras 28-29, 32.
[11] *Ibid* at para 31.
[12] *Ibid* at paras 32-33.
[13] *Supra* note 1 at para 7.

Legal Analysis

This appeal challenges both the summary trial and reconsideration decisions. The core issues are:

(a) Whether the judge erred in finding Gokturk was duly served?

(b) Whether the judge erred in finding Gokturk's conduct was blameworthy and that he failed to establish a meritorious defence or one worthy of investigation?

Issues of interpretation and application of the Supreme Court Rules are questions of fact and law, and are reviewable on a standard of correctness.[14] The Court may only overturn a decision if the judge is deemed to have made an error in principle or a palpable and overriding error.[15] This case comment focuses on (a) of *Nelson*, in light of its significance and applicability to future litigation in Ontario involving crypto-tracing exercises.

Was Gokturk Served Properly?

Gokturk's primary argument against the validity of the application judgment is that he was not properly served. However, the record reflects that Nelson made every effort to serve Gokturk despite great difficulty. Nelson's inability to reach Gokturk led him to submit service by email on December 10, 2019.[16] Nelson continued advancing the action thereafter, submitting a notice to admit and an order to serve a list of documents and provide an affidavit.[17]

Gokturk responded amicably to these initial requests. However, from November 2020 onward, Gokturk's inability to correspond became a central aspect of this dispute. At this point, Nelson attempted to connect with Gokturk to schedule discovery and learned Gokturk's counsel were no longer representing him. Nelson thereafter received an email from Gokturk's former counsel serving a notice of intention to withdraw.[18] This interaction crucially provided a new address for Gokturk.[19] Nelson's counsel then reached out to Gokturk to ascertain whether he objected to his counsel's notice, but never heard back. Gokturk's inability to communicate became a theme throughout *Nelson*, as he then failed to respond to an appointment for discovery and the eventual judgment application.

Regarding the implied change of address, the BCCA sided with Gokturk and agreed that both the motion judge and application judge erred in finding the notice of intent effectively changed the address – but held that the error did not warrant allowing an appeal.[20] Gokturk also submitted that his service address did not change as the notice was not served. The BCCA

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[14] *Housen v. Nikolaisen,* 2002 SCC 33 at para 8.
[15] *Supra* note 1 at para 54.
[16] *Ibid* at para 15.
[17] *Ibid* at para 18.
[18] *Ibid* at para 20.
[19] *Ibid* at para 20.
[20] *Ibid* at para 61.

entertained this argument but did not find it changed the outcome.[21] Ultimately the BCCA found that Gokturk's challenge of the validity of materials (that he claimed never to have been served with) was highly irregular and held that the error made by both judges interpreting the effects of a notice of intent did not warrant intervention.[22]

The BCCA also endorsed the application judge's characterization of Gokturk's submissions as "vague and ambiguous."[23] Additionally, Gokturk's attempts to blame his former counsel for his failure to attend the summary trial without adequate evidence were deemed "an ill-considered tactic," as his arguments did nothing to undermine the trial.[24] The BCCA thus concluded that Gokturk failed to prove he had not been served with the notice or that there was anything unfair about his being bound by the consequences.

Conclusion:

The Court's unwillingness to indulge Gokturk's argument - that the trial and application judge's error interpreting the effects of the notice of intent relative to his service address undermined the entire trial - provides a welcome sign for insolvency and civil litigators, as this holding is posed to impact service determinations across Canada and encourage courts of all levels not to allow service errors to thwart the pursuit of justice. Though *Nelson* is a BCCA decision, the principle of comity which supports inter-provincial interactions suggests that this judgment will hopefully be persuasive to Ontario courts;[25] more specifically, comity may operate such that an extra-provincial appellate decision will hold weight in Ontario service disputes.[26] This precedent will be especially meaningful to both those operating in online spaces, and for those litigating against parties who attempt to raise technicalities to defend against *bona fide* claims.

[21] *Ibid* at para 67.
[22] *Ibid* at para 74.
[23] *Ibid* at para 45(f).
[24] *Ibid* at para 45(g).
[25] *Ibid* at para 35/ See also the Honourable La Forest's reasoning in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077, where it was held that Canadian provinces are not akin to foreign jurisdictions relative to one another.
[26] CED 4th (online), *Judges and Courts-Jurisdiction* (Western), "Effects of Decisions of Courts or Judges of Co-ordinate Jurisdiction: Authority of Judicial Decisions: Rule of Stare Decisis" at § 125 (February 2020).

Toronto Law Journal

Toronto Vacant Home Tax in Real Estate

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On February 3, 2022, the City of Toronto passed By-Law 97-2022, enacting the Vacant Home Tax ("VHT").[1] The VHT levies a one percent annual tax on the Current Value Assessment ("CVA") of vacant properties in the Greater Toronto Area ("GTA").[2] This tax is one way in which the City of Toronto is attempting to increase housing supply within the City, hoping that the tax will disincentivize property owners from leaving housing supply vacant. All residential property owners are required to declare the occupancy status of properties owned by them, through an online declaration form.[3] Those who declare their property as vacant (without a qualifying exemption) or fail to make a declaration are subject to the VHT.[4]

When is a Property Considered Vacant?

The vacancy of the property is determined based on the following factors:

1) Is the property a principal residence of the registered owner or a permitted occupant for a period of not less than six months of the taxation year? A permitted occupant can be a family member or friend of the owner; OR
2) The property is occupied by one or more tenants for at least six months of the taxation year.[5]

If neither of these circumstances apply, then the property is considered vacant for VHT purposes, unless one of the following exemptions applies.

Exemptions

If any one of the following exemptions applies to a property, the VHT will not apply; however a declaration must be filed for each property, indicating the status and the applicable exemption:[6]

1. Death of the owner in the current or previous taxation year.
2. Repairs or renovations have taken place meeting all of the following criteria:
    a) occupation and normal use are prevented by the repairs/renovations;

[1] A full overview of the UHTA can be found here: https://www.toronto.ca/services-payments/property-taxes-utilities/vacant-home-tax/.
[2] City of Toronto, by-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 3.1.
[3] City of Toronto, by-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 4.1.
[4] City of Toronto, by-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 4.1.
[5] City of Toronto, by-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 2.1.
[6] City of Toronto, by-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 3.3.

b) all necessary permits have been issued; and

c) the City's Chief Building Official believes that the repairs/renovations are being actively carried out without unnecessary delay.

3. Principal resident is in a hospital, long-term or supportive care facility for at least six months of the taxation year. This exemption can be claimed for up to two consecutive taxation years.
4. Legal ownership of the property was transferred to an arm's length transferee in the taxation year.
5. The vacant property is required to be occupied by its owner for employment for at least six months in the taxation year who has a principal residence outside the GTA.
6. A court order prevents the occupancy of the property for at least six months of the taxation year.

The intentions behind this list are clear: if you are actively improving the property or certain life events have occurred, such as the death of the owner or transfer to long term care, then the VHT is not expected to apply. While the intentions are good, there are a few underlying assumptions built into these. For those individuals who undertake renovations outside of the permitted process with the City of Toronto, no exemption will be provided. Given the prevalence of 'illegal' basement suites in Toronto, it begs the question if this is intended to encourage renovators to pursue a permitted process for the creation of additional suites. If so, there may be potential for some owners be more reluctant to renovate or improve spaces, due to permitting costs and delays.

Additionally, the exemption for owners residing in a long-term care facility is only available for a consecutive two-year period. While this may seem like a reasonable period, much of our aging population can live for periods much longer, and the transfer, sale, or renting out of a property may be beyond their means during this time. Without the support of family members or paid help, it can seem daunting for those living in long-term care to part with potentially one of their biggest assets or manage a landlord-tenant relationship.

How to Declare

The declaration is submitted through the online declaration portal of the City of Toronto, or through a paper declaration form.[7] Owners who fail to make a declaration by the deadline and/or provide supporting documentation will have their property deemed vacant and be subject to the tax.[8] The deadline this year was February 28, 2023.[9] Owners who are obligated to pay the tax will have received a Vacant Home Tax Notice at the end of March and should

[7] City of Toronto, by-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 4.1(B).
[8] City of Toronto, by-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 4.2.
[9] City of Toronto, "Vacant Home Tax", online: *City of Toronto* <https://www.toronto.ca/services-payments/property-taxes-utilities/vacant-home-tax/>.

have made the appropriate payments in three instalments over the summer months.[10] Failing to declare or making a false declaration bears a risk of a fine of $250.00 to $10,000.00.[11] Any property declared as occupied may be inspected by the City of Toronto through an audit procedure to ensure compliance.[12] Those chosen for an audit must provide information to support their claim of occupancy or an exemption.[13]

Notice of Complaint and Appeals

If an individual disagrees with their Vacant Home Tax Notice, they can file a Notice of Complaint to trigger a review by the City of Toronto.[14] Complaints can be filed not only to dispute the application of the VHT, but also to correct mistaken filings or a failure to file the declaration.[15] There is a appeals process should an owner disagree with the decision following the Notice of Complaint filings. This appeals process is only available for a 90-day period following the receipt of the decision from the complaint filings.[16] The appeal is limited to the same issues raised in the Notice of Complaint unless the outcome of the complaint lead to a reassessment or varied assessment.[17]

Change of Ownership

During a conveyancing transaction, it is prudent for real estate lawyers to ensure that the declaration has been submitted for the property. The timing of the transaction will determine who will receive the notice. Declarations are due on February 2nd for the preceding calendar year.[18] As the VHT may form a lien against the property, if the closing occurs prior to this declaration deadline, the vendor must submit the declaration before the closing.[19] If the closing occurs after the declaration deadline (i.e. during the period from February 3rd to December 31st) the purchaser must file a declaration in the following year and can indicate the "transfer of legal ownership" exemption in the current year.[20] Real estate lawyers should ensure that they get the appropriate declarations from vendors prior to closing to ensure the correct filing of the declarations.

Conclusion

While the VHT is something that will impact practice for lawyers in the real estate bar, it is also something that estates lawyers and corporate counsel should be aware of. Lawyers with clients who run rental properties as their business should take extra caution to advise clients

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[10] City of Toronto, By-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 1.1.
[11] City of Toronto, By-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 11.1
[12] City of Toronto, By-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 7.2.
[13] City of Toronto, By-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 7.2.
[14] City of Toronto, By-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 9.1.
[15] City of Toronto, By-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 9.1.
[16] City of Toronto, By-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 10.1.
[17] City of Toronto, By-law No 97-2022, *Vacant Home Tax* (3 February 2022), ss 10.4-10.5.
[18] City of Toronto, By-law No 97-2022, *Vacant Home Tax* (3 February 2022), s 1.1.
[19] City of Toronto, "Vacant Home Tax", online: *City of Toronto* <https://www.toronto.ca/services-payments/property-taxes-utilities/vacant-home-tax/>.
[20] City of Toronto, "Vacant Home Tax", online: *City of Toronto* <https://www.toronto.ca/services-payments/property-taxes-utilities/vacant-home-tax/>.

appropriately given the various exemptions. The online filing portal leaves little excuse for failure to declare and lawyers should encourage clients to make timely filings to avoid the Notice of Complaint and further appeals process. The number of properties selected for audit by the City remains to be seen, but lawyers may be called upon to assist clients through this process as the City starts providing auditing properties and requiring additional documentation to support client declarations.

Toronto Law Journal

Beneficiary Designations Under Wills

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Assets for which beneficiary designations may be made can be an important part of an estate plan, whether they be life insurance taken out to fund payment of anticipated tax liabilities triggered by death, a registered retirement savings plan (RRSP) rolled over to a surviving spouse, or a tax-free savings account (TFSA) gifted in a manner that equalizes the distribution of an estate within the context of the gift of an asset of significant value (such as a family business) to one child to the exclusion of another.

Typically, life insurance and other assets for which a beneficiary designation may be made will pass "outside" of an estate, meaning that the asset is typically received by the designated beneficiary, free and clear of exposure to estate liabilities, subject to certain exceptions. However, in order for the proceeds to pass to the intended recipient, it is important that beneficiary designations are valid, consistent with the estate planning client's wishes, and capable of being given effect.

Guidance from the Ontario Court of Appeal

A designation, alteration, or revocation of a beneficiary can be made in a beneficiary designation document provided by the financial institution or in the will of the owner of a plan such as an RRSP or registered retirement income fund (RRIF). Under the *Succession Law Reform Act*, a designation contained in a will is effective if it relates expressly to a plan, either generally or specifically.[1] A designation or revocation in a will is effective from the date that the will is signed[2] and would revoke and replace an earlier revocable designation, to the extent of any inconsistency.

In *Rehel Estate v Methot*,[3] the deceased's surviving spouse asserted that the deceased's RRIF designation included in his will was too vague, as it was not clear to which account he was referring. The Court disagreed with this position, holding that there was no evidence that the deceased had more than one RRIF account and it was, therefore, sufficiently clear to which account he was referring in the will.

In other decisions, including *Laczova v House*,[4] subsection 51(2) of the *Succession Law Reform Act* has been interpreted more narrowly. In the Lower Court's decision (upheld on appeal), it stated, "the legislative intent is clear. The section uses the word 'expressly', a word not often

[1] RSO 1990, c S.26, s 51(2).
[2] *Ibid*, s 52(7).
[3] 2017 ONSC 7259.
[4] 2001 CanLII 27939 (Ont CA).

found in statutory language, but when it is present, its use is there to add emphasis and clarity of purpose."[5]

More recently, in *Alger v Crumb*,[6] the Court of Appeal considered a clause revoking "all Wills and Testamentary dispositions of every nature and kind whatsoever made by me heretofore made." The Court of Appeal summarized the principles it had previously applied in the *Laczova* decision as follows:

1. The SLRA sets out statutory requirements for the designation of a beneficiary by will and for the revocation of a beneficiary designation by will, that are not required for such a designation or revocation when done by instrument;

2. Specifically, a designation of a beneficiary by will must relate expressly, whether generally or specifically, to the plan (s. 51(2)), while a revocation by will of a beneficiary designation that was made by instrument must relate expressly, whether generally or specifically, to the designation (s. 52(1)).[7]

The Court of Appeal agreed with the application judge that the general revocation clause did not relate expressly to the beneficiary designations with respect to the testator's RRIF and TFSA plans and, accordingly, that those pre-existing designations remained in effect. This decision highlights the importance of ensuring that language intended to revoke or amend a beneficiary designation relates expressly, without ambiguity, to the appropriate plan.

Practical Considerations

There are a number of practical considerations that solicitors may wish to keep in mind when asked by clients to assist in making or changing beneficiary designations of plans, which are touched on below:

- ***Avoiding Exposure to Probate Fees*** – Generally, if a client's instructions are to make a new beneficiary designation under a will, it is prudent to include the related terms prior to the vesting clauses rather than amongst other dispositive provisions of the will to assist in avoiding risk that the plan proceeds may be exposed to estate administration tax.

- ***Consistency with Other Designations*** – Generally, the last valid beneficiary designation will govern the transfer or distribution of the proceeds after the original plan holder's death. This raises the issue of what may happen if it is not known which was the more recent beneficiary designation. For example, we often encounter holograph wills that are valid testamentary documents, yet undated. If an undated document amends or revokes a beneficiary designation, it can be difficult to determine whether this predated or followed another beneficiary designation.

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[5] *Laczova Estate v Madonna House* (2001), 37 ETR (2d) 262, 2001 CarswellOnt 416 (Ont Sup Ct J) at para 14.
[6] 2023 ONCA 209.
[7] *Ibid* at para 22.

- ***Ability to Designate a New Beneficiary*** – It may not always be the case that the client is authorized to appoint a new beneficiary for a life insurance policy or other plan. A previous beneficiary designation may be irrevocable, the plan may have been validly assigned to someone else, or the plan may be subject to an agreement that will result in its proceeds being impressed with a resulting or constructive trust notwithstanding any attempted amendment or revocation of the beneficiary designation. For example, in *Moore v Sweet*,[8] an ex-wife who had been paying life insurance premiums pursuant to her agreement with the deceased that she would remain the designated beneficiary was successful in asserting that the policy proceeds were impressed with a constructive trust in her favour on the basis of unjust enrichment. As the Supreme Court of Canada affirmed, even an irrevocable beneficiary designation cannot bar equitable relief.

- ***Section 72 Issues*** – Clients with dependants should be cautioned regarding the possible impact of dependant's support claims commenced under Part V of the *Succession Law Reform Act* and, in particular, the chance that assets that may otherwise pass to a designated beneficiary could be "clawed back" into the estate for the purposes of funding payment to a dependant who has been left inadequate support pursuant to Section 72.

- ***Will Challenges*** – If a will that includes a beneficiary designation is challenged, it is possible that the entire document may be set aside, including the beneficiary designation, amendment, or revocation. Standalone beneficiary designations may separate the issue of the validity of the beneficiary designation from the validity of a will, where other issues that may not otherwise impact a beneficiary designation may result in a will challenge.

- ***Compliance with Statutory Requirements and/or Those of the Financial Institution*** – Legislation, such as the *Insurance Act*,[9] and financial institutions may have their own requirements in order for a beneficiary designation, alteration, or revocation to be valid. When in doubt, it may be prudent to confirm with the relevant financial institution that the proposed form of beneficiary designation is compliant with its requirements rather than facing problems down the road.

- ***Plans to Equalize Inheritances*** – If the proceeds of a plan are intended to equalize gifts made to different individuals (for example, two adult children), it is important that estate planning clients understand the implications that may result if a plan is depleted or no longer exists at the time of their death. In the case of life insurance policies or other plans for which premiums are payable, it is possible that a policy may lapse if premiums are not paid for a period preceding the client's death, such as during a period of incapacity.

[8] 2018 SCC 52.
[9] RSO 1990, c I.8.

- ***Tax Issues*** – The disposition of some plans, such as RRSPs, to someone other than the plan-holder's spouse may trigger significant taxes. It is important that clients consider how they would like the tax liability relating to a plan to be borne and, if it is not intended that it be treated as any other liability of the estate, it should be documented within their testamentary documents to avoid any confusion.

- ***Presumptions of Resulting Trust*** – In 2020, *Calmusky v Calmusky*[10] saw a novel application of the presumption of resulting trust to a RRIF for which an adult child had been designated the beneficiary. While it appears that subsequent decisions have not followed *Calmusky*, it remains important that a client's wishes with respect to the gift of an asset to an adult child by right of survivorship, *inter vivos* transfer, or even by beneficiary designation is clearly documented to assist in rebutting any presumption of resulting trust that may apply now or in the future.

What is the Impact of Will Validation?

Early last year, Section 21.1 was added to the *Succession Law Reform Act* to permit judges of the Ontario Superior Court of Justice to validate "a document or writing that was not properly executed or made" if it "sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased".[11]

This means that wills or other documents made under the *Succession Law Reform Act* may be validated by the court, whether they are substantially compliant with the formal requirements for valid execution or not. For example, in *Grattan v Grattan*,[12] an unsigned will was validated by the Court and admitted to probate.

The *Succession Law Reform Act* addresses beneficiary designations, amendments, and revocations for "plans". While there may not yet be any cases on point, it would appear that Section 21.1 could be applied to validate a beneficiary designation, amendment, or revocation of a plan if contained in a will that sets out the deceased's testamentary intentions. The definition of plan under the *Succession Law Reform Act* includes pensions, RRSPs, RRIFs, and home ownership savings plans.[13] Notably absent from this list are beneficiary designations for life insurance policies.

Beneficiary designations for life insurance policies are governed instead by the *Insurance Act*. A beneficiary designation for life insurance is to be made by way of a signed declaration. Pursuant to the definition of "declaration" under the *Insurance Act*, a declaration should identify the contract and the insurance policy, designate, alter, or revoke the designation of a beneficiary, and be signed by the insured.[14] However, the *Insurance Act* also specifies that, notwithstanding the terms of the *Succession Law Reform Act*, the declaration may be signed

[10] 2020 ONSC 1506.
[11] *Supra* note 1, s 21.1.
[12] (1 February 2023), 22-0054 (Ont Sup Ct J).
[13] *Supra* note 1, s 50.
[14] *Supra* note 9, s 171(1).

electronically.[15] The new will-validation provision under the *Succession Law Reform Act* appears, however, to specifically exclude the validation of electronic wills.[16]

Interestingly, the *Insurance Act* includes terms relating to a scenario in which a valid beneficiary designation is made within a will that is otherwise invalid,[17] but not the opposite situation or the possible impact of Section 21.1 of the *Succession Law Reform Act* on the validity of a life insurance beneficiary designation. This raises the question of whether there is potential for a will to be validated while a beneficiary designation made within it is not. Particularly within the context of life insurance and different statutory provisions relating to beneficiary designations for these policies, a scenario in which parts of an estate plan (most gifts and residuary clauses under a will) are validated while others (a life insurance beneficiary designation, whether under a will or a standalone document) are not, appears to be possible. With the common use of life insurance as an important part of an estate plan to equalize gifts, assist with liquidity to fund payment of tax and other liabilities, and for a number of other purposes, the result could be an estate plan that does not function as planned.

Conclusion

It will be interesting to see whether and, if so, how courts may deal with the issue of the validation of wills containing beneficiary designations in the future. For now, however, this may be another reason to consider alternatives to changing the beneficiaries of life insurance policies and registered plans under wills, such as the use of standalone documents or updating designated beneficiaries using the forms provided by (and confirmed to be acceptable by) the insurer.

[15] *Ibid*, s 190(1.1).
[16] *Supra* note 1, s 21.1(2).
[17] *Supra* note 9, s 192.