Court of Queen's Bench of Alberta

Citation: Anglin v Resler, 2022 ABQB 231

Date: 20220328
Docket: 1703 06642
Registry: Edmonton

Between:

Joseph V. Anglin

Plaintiff

- and -

Glen L. Resler in his capacity as Chief Electoral Officer, Her Majesty the Queen in right of Alberta, Pieter Broere, John Doe, and Richard Roe

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] This decision examines the use of a John Doe (placeholder) name for a defendant.

[2] The statement of claim identified a defendant, known at the outset only by his actions, as "John Doe." The plaintiff discovered his actual identity and served him with the unamended claim, telling him: "You are the John Doe in this claim."

[3] Was that person a defendant from the start? Was that good service? Should a name-change amendment be permitted now, four years later?

[4] The answers are yes, yes, and yes.

B. Background

[5] When he filed his statement of claim in April 2017, Mr. Anglin did not know the identities of two people he believed had assisted Mr. Resler by tearing down or damaging his (Mr. Anglin's) election signs.

[6] Accordingly, he named them "John Doe" and "Richard Roe", the traditional placeholder names for initially unknown defendants.

[7] In early February 2018, Mr. Anglin came to believe that Mr. Pankiw was one of the sign-wreckers.

[8] On February 13, 2018, Mr. Anglin served the statement of claim (not yet amended) on Mr. Pankiw, effectively telling him: "You are served with this statement of claim; you are the John Doe mentioned in it."

[9] Mr. Anglin's stated reason for not amending his claim (name-wise) before service was his understanding that Mr. Pankiw was imminently heading out of the country. Mr. Pankiw's uncontradicted evidence was that he had no such plans and did no out-of-Canada travelling around that time or anywhere near it.

[10] Mr. Pankiw admitted in examination that he knew he was being served with the statement of claim (or, in his view, what purported to be a valid statement of claim as it concerned him) and that, per Mr. Anglin's declaration, the "John Doe" elements of the claim referred to him.

[11] A stand-off then ensued.

[12] Mr. Anglin saw effective service, calling on Mr. Pankiw to defend if he wished to and advising that, if he did not, he would note him in default.

[13] Mr. Pankiw replied that he had not in fact been served in any effective sense, with such impossible until after a name-change amendment.

[14] Eventually Mr. Anglin noted Mr. Pankiw in default. Part of his requested relief is to amend the noting-in-default document (i.e. as well as the statement of claim) to substitute "Rick Pankiw" for "John Doe."

[15] As explained below, I find effective service, as of February 13, 2018.

C. Analysis

Who is a "defendant"?

[16] The essence of Mr. Pankiw's argument is that he was not, and could not have been, a defendant in this action until (at minimum) Mr. Anglin had amended to change "John Doe" to "Rick Pankiw."

[17] He is wrong about that.

[18] Per the Rules of Court's definitions, "**defendant**" means "a person against whom a remedy is sought in a statement of claim."

[19] Mr. Anglin's statement of claim named as defendants, among other people, "John Doe" and "Richard Roe", describing them as follows:

> … John Doe ("Doe") and Richard Roe ("Roe") are individuals living in Alberta and whose identity is currently unknown. During the 2015 election in Alberta, … Doe and Roe were supporters of the Wildrose Party, or the Progressive Conservative Party of Alberta, and were actively opposed to the re-election of Anglin. [para 5]

[20] The statement of claim detailed Doe's and Roe's involvement:

> During the 2015 election, Resler, or agents or employees acting on his behalf and on his authority: …
>
> iv. worked with individuals who were supporting candidates that were opposed to Anglin;
>
> v. authorized or allowed **these individuals, or other individuals, to remove Anglin's signs** contrary to the law;
>
> vi. authorized or allowed **these individuals, or other individuals, to damage Anglin's signs**, contrary to the law; and
>
> vii. singled out Anglin's signs, which were legal, when many other candidates had signs that did not comply with the *Election Act*. [para 6]
>
> In undertaking these actions, **Resler worked together with** [Pieter Broere, another defendant, who resided in Bluffton, Alberta], **Doe and Roe** in a common goal. Broere, **Doe and Roe's intention was to create an unfair advantage for Anglin's opponents and to deny him a fair election and his chance at re-election**. [para 7]

[21] The statement of claim also outlined remedies sought against the defendants, including Doe and Roe.

[22] Per the "defendant" definition, both Doe and Roe (i.e. the individuals so designated) were thus defendants from the start i.e. persons against whom remedies are sought in a statement of claim: see ***Nagy v Phillips***, 1996 ABCA 280, where the Court of Appeal recognized a John-Doe-named-person as a defendant i.e. as having defendant status pre-amendment:

> Where a plaintiff seeks to amend a statement of claim to substitute a named defendant for **a John Doe defendant**.... [para 24]

[23] The question then became: what was the actual name of the defendant tentatively named John Doe?

Connecting the dots (John Doe defendant was Rick Pankiw)

[24] The dots were connected, for Anglin, in early February 2018, when he came to believe that Rick Pankiw performed the role attributed to John Doe i.e. that Mr. Pankiw was the John-Doe-described defendant.

Service circumstances

[25] On February 13, 2018, still within the (per R. 3.26(1)) one-year period for service of the statement of claim (issued April 6, 2017), Anglin personally served the statement of claim on Mr. Pankiw, telling him that he was believed to have performed the actions, and for the described purposes, attributed to John Doe, and that he was being served as such i.e. as the defendant so identified.

An amendment was (and is) possible but was (and is) not required

[26] No rule requires that a "John-Doe-style" statement of claim be amended before it is served.

[27] It was **open** to Mr. Anglin, before serving the statement of claim, to amend it, replacing "John Doe" with "Rick Pankiw", without any need for a court order in advance or at all.

[28] Rule 3.62(1)(a) says:

> A party **may amend** the party's pleading, including an amendment to … correct the name of a party, as follows:
>
> a. **before pleadings close**, any number of times without the Court's permission ….

[29] The closing rule is 3.67:

> (1) This rule applies to pleadings between the following:
>
> (1) a plaintiff and a defendant; ….
>
> (2) Pleadings close when
>
> a. a reply is filed and served by a plaintiff … or
>
> b. the time for filing and serving a reply expires.
>
> whichever is earlier.

[30] The reply rule is 3.33:

> (1) A plaintiff may file a reply to a statement of defence.
>
> ...
>
> (2) The plaintiff must file the reply and serve it on the defendant within 10 days after service of the statement of defence on the plaintiff.

[31] With the pleadings obviously still open at this assumed-before-service stage (i.e. no service yet and, by definition, no defence yet and, by extension, no reply period engaged and thus no reply-period-expiry possible), Mr. Anglin could have proceeded via R. 3.62(1)(a) to amend (doing the name swap) and then serve.

[32] But no rule says that he had to do that first.

Even now, no obligation on Anglin to amend

[33] It appears pleadings have closed now.

[34] Alberta's close-of-pleadings rule (above) assumes, where the base document is a statement of claim, that a statement of defence is filed, with pleadings closing when the plaintiff files a reply to the defence or the time for replying expires.

[35] Here, as described, the steps were: (1) statement of claim; (2) service of the statement of claim; (3) expiry of the 20-day period to file a defence (per R. 3.31(3)); and (4) noting of Mr. Pankiw in default on March 6, 2018.

[36] In other words, no statement of defence filed and thus no need for or possibility of a reply and no "reply period" to expire.

[37] How then to gauge, for the purposes of Rule 3.62, whether "pleadings have closed" here?

[38] I will assume that a noting in default (or default judgment) effectively represents the "close of pleadings" i.e. with no more volleys (in the sense of claim -- defence -- reply) possible (i.e. unless the noting in default or default judgment is set aside).

[39] As a result, the applicable rule, for a name-correction now, is R. 3.74, per R. 3.62, which states:

> A party **may amend** the party's pleading, including an amendment to add, remove, substitute or **correct** the name of a party, as follows:
>
> (b) **after pleadings close**,
>
> (i) for the addition, removal, substitution or **correction** of the name of party, with the **Court's prior permission in accordance with rule 3.74** ….

[40] Rule 3.74 states (in part):

> (2) On application, the Court may order that a person be added, removed or substituted as party to an action if
>
> b. in the case of an application to add or substitute any [non-plaintiff] party, or to remove or to **correct** the name of a party, the application is made by a person or party and the Court **is satisfied the order should be made**.
>
> (3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

[41] Note that, even under R. 3.74, it is not mandatory for a plaintiff to amend to correct the name of a party.

[42] No rule obliges Mr. Anglin to make any particular amendment, let alone the name swap he is pursuing here.

[43] If Mr. Anglin is in a position to enter judgment against Mr. Pankiw (on which I make no ruling), he could obtain judgment, in the same way he noted Mr. Pankiw in default i.e. by continuing with the existing (John Doe placeholder name for Mr. Pankiw) style of cause, albeit informing the presiding justice (as necessary) or the Clerk of the Court, via affidavit (pre-existing or new), that "Doe is Pankiw."

[44] Such a judgment would still feature Mr. Pankiw being described, at least in the style of cause, as John Doe.

[45] Practically speaking, Mr. Anglin may need an amendment (Pankiw for Doe) so that any judgment he obtains can be enforced, or more easily enforced, against Mr. Pankiw's income (via garnishment) or assets (via writ) i.e. to assist by linking the "against John Doe" judgment to Mr. Pankiw's income and assets.

[46] But that is a practical concern, nothing compelled by Alberta's rules or case law.

Considerations on a name-correcting under R. 3.74

[47] In any case, Mr. Anglin has now applied to amend, changing "John Doe" to "Rick Pankiw."

[48] That rule requires that "the application is made by a person or party." That is plainly satisfied by Anglin i.e. the plaintiff here.

[49] The test is that the Court must be "satisfied the order should be made."

[50] Am I so satisfied? The answer is yes, for these reasons.

This was an (advertent) misnomer

[51] This is a misnomer case.

[52] Mr. Anglin did not know Mr. Pankiw's identity at the start, but he knew who he wanted to sue, described that person's activities in the statement of claim, and used an intentional, and in the circumstances, necessary "mis-name" – John Doe – to identify him.

[53] In other words, per the Alberta Court of Appeal in ***Pile Base Contractors 1987 Ltd v Pasichnyk***, 1993 ABCA 373, "describ[ing] an actual person, and merely giv[ing] him or it a mythical name" (para 6).

[54] As D.C. McDonald J. put it in ***Drabick v Dalgleish***, 1987 CanLII 3496 (ABQB):

> ... If Mr. Drabick had **not known of the identity** of the employee who swore the affidavit relied upon by the bank, or the identity of the bank's solicitor who appeared in the Master's Chambers, then the **use of the names John Doe and Richard Roe would have been a usage clearly connoting to all that these were not their real names but that who they were was not known to him although their existence and role was known**. In such a case, assuming that the initial Statement of Claim alleged conduct on their part, the **changes of name would not result in the addition of, or substitution for, a defendant. No new entity or person would be involved. It would be merely a change of the name of two parties from patently incorrect ones to their proper ones**: see Jackson v. Bubela and Doe, 1972 CanLII 978 (BC CA), [1972] 5 W.W.R. 80 (B.C.C.A.), at pp. 82-83, per Bull, J.A. [para 85] [emphasis added]

[55] Mr. Anglin is not proposing to add or substitute a party, only to correct the name of the one party in question here i.e. the perceived-to-have-interfered-with-his-signs defendant initially called John Doe and later understood to be Mr. Pankiw.

[56] Mr. Pankiw's arguments about adding or substituting a party are thus off-target.

No limitations issue here

[57] At least for present purposes, Mr. Pankiw appears to accept that the statement of claim was filed (on April 6, 2017) within the limitation period.

[58] Per R. 3.26(1), Mr. Anglin had one year (i.e. until April 6, 2018) to serve Mr. Pankiw (subject to an extension of the service period under R. 3.26(2)).

[59] Mr. Anglin served Mr. Pankiw on February 13, 2018 i.e. within the one-year service period.

[60] Any name-correcting amendment now is purely housekeeping, truing up the name of the "sign-interfering defendant" to Mr. Pankiw, who was served with an apparently in-time statement of claim and while the claim was still in force.

[61] We are not dealing with a party whose identity is only discovered after expiry of the limitation and service periods or, in any case, who is only made aware of the action after such expiry or, in any case, is only served after such expiry.

[62] Mr. Pankiw knew or should have known, from February 13, 2018, that he had been identified as a defendant from the start, his identity as John Doe had been uncovered, and he had been effectively served, from that date, as that defendant.

Mr. Pankiw did not pursue any of his available options

[63] Once Mr. Pankiw was served, he had three options, per Rule 3.30 (i.e. could pursue one or more of these options):

a. apply to the Court to set aside service in accordance with rule 11.31;

b. apply to the Court for an order under rule 3.68; [or]

c. file and serve a statement of defence or demand for notice.

[64] Rule 11.31(1) states:

> A defendant may apply to the Court to **set aside**
>
> a. **service o**f a commencement document [which the rules define to include a statement of claim]
>
> only before the defendant files a statement of defence or a demand for notice.

[65] Rules 3.68(1) and (2) state (in part):

> If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> a. that all or any part of a **claim … be struck out**; [or]
> b. that a commencement document or pleading be **amended or set aside**[.]
>
> The conditions for an order are one or more of the following:
>
> e. an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

[66] If Mr. Pankiw thought he had a basis to set aside service or to strike out or set aside the statement of claim itself or any part of it, he could have sought such relief.

[67] But he did not, and neither did he file a statement of defence or a demand for notice.

[68] Instead, he effectively pursued the unspoken fourth option i.e. do nothing.

Not "impossible" to file a statement of defence or demand for notice here

[69] The "impossibility" asserted by Mr. Pankiw is belied by the Clerk's matter-of-fact entry of the noting in default requested by Mr. Anglin.

[70] On the strength of Anglin's affidavit of service (reflecting service of the statement of claim on Mr. Pankiw accompanied by evidence of the "you are Doe" declaration), on March 6, 2018 the Clerk of the Court entered a Noting in Default stating:

> [The plaintiff] requires the court clerk to enter in the court record of this action a note to the effect that **John Doe, identified as Mr. Rick Pankiw in an Affidavit of Service** filed on February 27, 2018, has not filed a statement of defence and consequently is noted in default.

[71] Mr. Pankiw has pointed to no rule or case that would have prevented him from filing a statement of defence or demand for notice.

[72] In either document, he could have "connected the dots" for the Court's administration ("why is this person filing this document in this action?") and, as needed, for the other parties, by simply stating that he was filing the defence or demand for notice as the for-now-still-named-John-Doe party, since he had been identified as that defendant by Mr. Anglin, as reflected in the noted affidavit of service.

No prejudice here (or at least none caused by Mr. Anglin)

[73] Mr. Pankiw made a calculated decision to treat service as ineffective.

[74] He was wrong about that.

[75] To the extent he has suffered any prejudice by not taking steps to preserve evidence or otherwise, that prejudice results from that miscalculation.

[76] And he has not pointed to any incremental prejudice that would or could flow from the name-change amendment now.

[77] It might be different if Mr. Anglin had said or intimated that formal service would happen later e.g. "Here is a copy of the statement of claim for information purposes … once I amend it to insert your name for Doe, I will then serve it on you."

[78] Or if the statement of claim served on Mr. Pankiw had featured the same descriptions of the Resler-assisting actions but not included, as a named defendant, either himself (i.e. via his actual name) or a placeholder name such as John Doe or Richard Roe. Mr. Pankiw might then reasonably have concluded "Anglin seems to be or may be referring to me in those sign-interference segments, but I am not listed as a defendant either by actual or placeholder name … he obviously does not intend to include me as a party."

[79] Compare and contrast the present case to ***Condominium Plan 9812082 v Battistella Developments Inc***, 2014 ABQB 644 (Erb J.), where the target entity had been on the periphery throughout (never served or notified of a claim) until a late-in-the-day application to add it.

[80] Here Anglin did everything he needed to make Pankiw a defendant from the start, and he effected unconditional service on February 13, 2018.

Misnomer case law still applicable

[81] Mr. Pankiw argued that the *Limitations Act*, specifically ss. 6(4) ("adding parties, etc"), has eclipsed the "misnomer" case law, citing ***Alberta v Railink Ltd***, 2003 ABCA 69. There, Fruman JA held:

> The chambers judge allowed Alberta's application to amend its statement of claim after expiration of the applicable limitation period, by **substituting "Railink Canada Ltd." as defendant, in place of "Railink Ltd."**: ***Alberta* v. *Canadian National Railway Co.*** (2001), 309 A.R. 157, 2001 ABQB 984. Railink appeals.
>
> The chambers judge applied s. 6 of the Limitations Act, R.S.A. 2000, c. L-12. He held that s. 6 of the Limitations Act replaced the common law test for correcting a misnomer. He determined that **on a proper interpretation of s. 6(4), read in the context of the entire section, a change to a party is an "added claim".** Therefore, s. 6(4) does not require that a distinct cause of action be added, along with a **change to the parties**. The chambers judge also concluded that due diligence is no longer a precondition to relief under s. 6.
>
> We agree with the chambers judge's reasoning. Moreover, his conclusions are consistent with this court's decision in ***Stout Estate* v. *Golinowski Estate***, [2002] 4 W.W.R. 588, 2002 ABCA 49, which was released after the chambers judge's decision. In ***Stout Estate*** at 612 this court considered the definition of "claim" in s. 1(a) of the Limitations Act and concluded that "the scope of **s. 6 includes applications to add or substitute a claimant or change the capacity in which a claimant sues** without in any way altering the body of the pleading." The same interpretation applies to applications to **add or substitute a defendant** under s. 6(4). This court also held in ***Stout Estate*** that the **common law no longer applies to amendments to pleadings that add or substitute parties** or add causes of action after the expiration of a limitation period. "Instead, a court must evaluate whether each of the requirements of s. 6 are made out in the circumstances of the particular case": at 614.
>
> Accordingly, the chambers judge **correctly concluded that the common law rules for misnomer had been replaced by s. 6(4),** and employed the correct approach when he considered whether the requirements of s. 6 were made out in this case. [paras 1-4] [emphasis added]

[82] At the Queen's Bench level, Slatter J. (as he then was) held as follows on that point:

> Section 6 [*Limitations Act*] sets out a two-part test. In this case it is clear that the new claim which **adds or substitutes a defendant** is "related to the conduct, transaction or events described in the original pleading" as required by s. 6(4)(a). Everything arises out of the same fire.
>
> While there is no direct evidence of this, I am also prepared to conclude that RaiLink Canada Ltd. obtained notice of the claim within the limitation period plus the time for service of process as required by ss. 6(4)(b). I draw this conclusion **because RaiLink Canada Ltd. is a wholly subsidiary of RaiLink Ltd**., ...

> During argument the Respondents pressed the fact that the Plaintiff had not acted with due diligence in seeking this amendment. **The requirement for due diligence was a part of the pre-*Limitations Act* law on misnomers. I do not believe there is any significant place for this test under the *Limitations Act*.** The purpose served by the common law "due diligence" rule has been replaced by the requirement in s. 6(4)(b) that the **new defendant** must have "received knowledge" of the claim within the described period. In my view, due diligence is not a precondition to relief under s. 6. ... [paras 26-28] [emphasis added]

[83] As reflected here, ***Railink*** featured a change-defendants application, not a true misnomer i.e. one defendant intended to be sued, misnamed in the statement of claim (inadvertently or advertently), and an application to true up the claim with the correct name.

[84] Accordingly, neither ***Railink*** decision (CA or QB) is authority for the *Limitations Act* (ss. 6(4) or otherwise) ousting Alberta's misnomer case law.

Duty to amend in a timely way in some circumstances

[85] I acknowledge that, in some circumstances, a plaintiff may have a duty to show reasonable diligence in applying to amend, even in a misnomer case.

[86] That duty was discussed by the Alberta Court of Appeal in ***Nagy v Phillips***, 1996 ABCA 280:

> Where a plaintiff seeks to **amend a statement of claim to substitute a named defendant for a John Doe defendant**, it is particularly important to consider **whether the named defendant has been misled or will be substantially injured by the delay in naming him**. It may be a case of misnomer in that if the named defendant, presumably a reasonable person, had received the statement of claim, he would have said to himself 'Of course it must mean me, but they have got my name wrong, 'to use the words of Lord Justice Devlin quoted above. However**, in a typical John Doe case the named defendant will not have seen the statement of claim, because the plaintiff will not have served a copy on him**. In these circumstances it is particularly important to consider **whether the named defendant has been misled or will be substantially injured by the delay in giving him notice of the claim against him**. If so, the application for the substitution should be denied.
>
> In addition, there is always the **possibility** that a plaintiff will attempt to use the legal principles in the misnomer cases to **avoid the provisions of limitations statutes, or the rules relating to service of a statement of claim**, or both. Courts must be diligent in guarding against such abuses.
>
> In this case, if the appellants were misled or substantially injured by the misnomer, Mr. Justice Marshall should not have ordered that they be substituted for the John Doe defendants. This issue was not raised before Mr. Justice Marshall, and he did not deal with it. In supplementary submissions to us, counsel for the appellants Gregory Phillips and Myron Babiuk stated that they "have not alleged substantial prejudice". Counsel for the remaining appellants made no such concession. I would therefore return this matter to Mr. Justice Marshall for a

> determination on this issue in relation to the appellants other than Gregory Phillips and Myron Babiuk.
>
> ... in my opinion, even in a case of misnomer, a judge should not grant an application to substitute a defendant for the defendant named, unless the applicant has been reasonably diligent in seeking to properly identify the desired defendant and to correct the misnomer. The reason for this is, of course, so that the defendant will have **timely notice of the claim** and will not be unduly prejudiced in preparing a defence to it. [paras 24-26 and 32] [emphasis added]

[87] On the reasonable-diligence point, the Court of Appeal implicitly treated the amendment application as the "consciousness-raising" event i.e. as being the occasion for the target defendant learning he, she or it is a defendant.

[88] Hence the concern for "timely notice of the claim" and for avoiding "un[due] prejudice in preparing a defence." If the defendant only learns of his, her or its involvement, as a defendant in a lawsuit, via a name-change amendment application, that application should, per the Court of Appeal, be brought in a reasonably timely way i.e. to give "timely notice" and to avoid "undue prejudice in preparing a defence."

[89] However, in the present case, the "consciousness-raising" event was actual service of the statement of claim, back in February 2018.

[90] Mr. Pankiw did not need the present (amendment) application to receive timely notice of his involvement as a defendant or to avoid undue prejudice: he received all the notice he needed, via service back in February 2018.

[91] That is why this is a truly "housekeeping" amendment i.e. simply making a name change to catch the paperwork up with long-ago clear (or at least should-have-been-clear) events i.e. the naming of Mr. Pankiw as a defendant from the start, albeit named John Doe, and the dots being connected (he was Doe) on the day of service.

[92] To the extent the gap between Anglin learning of Pankiw's involvement and connecting the dots for Pankiw by serving him is relevant (i.e. needs to be gauged on the diligence scale), the evidence shows Anglin becoming aware of Pankiw's possible role in "early February" 2018.

[93] By any sensible measure, service on (and thus consciousness-raising for) Pankiw on February 13, 2018 i.e. within two weeks, represents reasonable diligence.

[94] As for the delay between that date and now, which is now over four years, Mr. Anglin has not offered any particular explanation.

[95] But that does not matter even this very long delay has caused **no prejudice** to Mr. Pankiw or at least none for which Mr. Anglin is responsible.

[96] In ***Mahan v Hinds***, 2001 ABQB 831, Mason J. applied ***Nagy***, finding acceptable an eight-month gap between discovery of the real identity of a "John Doe" party and service of amended statement of claim on that party, emphasizing the lack of prejudice to that party:

> Eight months elapsed from the Plaintiff's receipt of Dewitt's response to undertakings until the Plaintiff's service of the Amended Statement of Claim on Ford Credit. **While the Plaintiff might have shown greater dispatch in seeking the amendment adding Ford Credit as a Defendant, I do not find that the time taken was inordinate, particularly given the lack of actual prejudice to Ford Credit**. [para 50] [emphasis added]

[97] And in that case, no evidence showed that the target defendant had learned of the claim or its per-claim involvement before service of the amended claim, unlike here.

[98] In ***Coombs (Guardian of) v Denham Investments Ltd***, 2000 ABQB 400, Sanderman J. also emphasized the absence of prejudice:

> The delay from the certain discovery of the name of Mr. De Ochoa [around August 1999] until the time of the application to add his name as a Defendant [application argued May 19, 2000] has not been great. **No prejudice would accrue to him during that period of time.** The delay from the filing of the Statement of Claim [November 3, 1998] until the discovery of his name cannot be attributed to the Plaintiff. Any prejudice that might accrue to him during this period of time would also accrue to any of the other parties to this action. The delay was brought about by the strategies pursued by some of the Defendants in this matter. Their willingness to run the risk of some prejudice because of the delay cannot be attributed to the Plaintiff. **One cannot say that Mr. De Ochoa's position has been weakened in any fashion by something that the Plaintiff has done or failed to do.**
>
> Consequently, the application brought on behalf of the Plaintiff is allowed and **Mr. De Ochoa's name shall be added as a Defendant in this action in the place of John Doe 1**. [paras 9 and 10] [emphasis added]

[99] Same comment here as on ***Mahan*** i.e. nothing indicates that Mr. De Ochoa was served with or otherwise notified of the claim any earlier than the application to amend, unlike here.

[100] In Ontario, "actual notice to the proposed defendant will generally obviate any injustice in subsequently correcting the misnomer", per ***Loy-English v The Ottawa Hospital***, 2019 ONSC 6075 (MacLeod J.) at para 21(g).

[101] I see no reason why that analysis would not apply here.

No prejudice registering on the R. 3.74(3) scales

[102] For greater certainty, with the name-change amendment not producing any recognizable prejudice for Mr. Pankiw, R. 3.74(3) (restrictions if order will result in certain kinds of prejudice) is not engaged here.

Mr. Pankiw's "amendment is hopeless" argument

[103] Mr. Pankiw argues, for various reasons, that Mr. Anglin's "proposed claim" against him is hopeless and, for that reason, the proposed amendment should be denied.

[104] No claim is being added, and neither is any party.

[105] Whatever the merits (or otherwise) of Mr. Anglin's claims against Mr. Pankiw, they will not be expanded or otherwise changed by the amendment sought here.

[106] At this stage and given the name-correction-only focus of Mr. Anglin's application and the absence of any application by Mr. Pankiw himself (to strike the claim or otherwise), this argument is misplaced or at least premature.

Amendment of the noting-in-default document

[107] As for Mr. Pankiw's argument that the noting in default document itself cannot be similarly (name-change) amended, and Mr. Anglin's request that it be so amended, I see no reason why it cannot be amended, assuming it needs to be amended. (It already reflects the "Doe is Pankiw" reality, stating (as noted above) that "John Doe, [now] identified as Mr. Rick Pankiw" has not filed a statement of defence.")

D. Conclusion

[108] Mr. Pankiw argued in various ways that he was not a defendant and that it was "absurd" to think otherwise.

[109] He characterized Mr. Anglin's conduct of his claim against him as an "abuse of process", "unprecedented and contrary to law", "in bad faith", "egregious" and "deserving of sanction."

[110] He summed up his position this way:

> [Mr.] Anglin has not provided any authority for his position that he is entitled to intentionally not sue Pankiw, but then obtain a judgment against [him] by failing to comply with [the] Limitations Act and the Rules of Court.

[111] As explained, Mr. Anglin sued Mr. Pankiw from the start (albeit, of necessity, using a John Doe name), served him in a timely way, and connected the dots with his "you are Doe" declaration, all without any contravention of (or any impediment from) the *Limitations Act* and the Court's rules.

[112] I am satisfied, per R. 3.74(2)(b), that the requested name-change should be made and hereby approve that amendment to both the statement of claim and the noting in default.

E. Costs

[113] As explained, Mr. Anglin has prevailed on the legal issues here. He has made his point.

[114] Ordinarily he would be entitled to costs.

[115] But I decline to award costs in his favour.

[116] Even though he was proved right in this tug-of-war, there was no need for it.

[117] As explained, he could have made the name-change amendment without Court order before the pleadings closed, including before service.

[118] He did not offer any, or at least any compelling, reason why he did not amend his claim before service or at least before pleadings closed.

[119] He did not offer any, or at least any compelling, reason for why it took him over four years to bring this application.

[120] In the end, nothing in the *Limitations Act* or the Rules of Court bars the name-change amendment now.

[121] But the path Mr. Anglin chose was not necessary.

[122] It is a path that no reasonable litigant should take again.

[123] For these reasons, Mr. Anglin and Mr. Pankiw will bear their own costs.

Heard on the 11th day of March, 2022.
Dated at Edmonton, Alberta this 28th day of March, 2022.

M. J. Lema
J.C.Q.B.A.

Appearances:

Donald F Bur
Barrister
Counsel for the applicant Mr. Anglin
for the Plaintiff

Robert Muller
McLennan Ross LLP
Counsel for the respondent Mr. Pankiw
for the Defendants