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CANADA / JUDGMENT

## Misterly v. Nowicki

2017 BCSC 2358

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COURT

Supreme Court of British Columbia

DECIDED

21 December 2017

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2017 BCSC 2358 Misterly v. Nowicki

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Misterly v. Nowicki,

2017 BCSC 2358

Date: 20171221

Docket: S136578

Registry: Vancouver

Between:

Lewis E. Misterly and Gayle Ann Misterly personally

and as Trustees for the Lewis E. and Gayle Ann Misterly

1993 Family Living Trust

Plaintiffs

And

Kenneth Nowicki

Defendant

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Plaintiffs:

Christopher J. Bolan

Counsel for the Defendant:

Craig A.B. Ferris, Q.C.

Paul A. Kressock

Place and Date of Hearing:

Vancouver, B.C.

December 11, 2017

Place and Date of Judgment:

Vancouver, B.C.

December 21, 2017

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## **Introduction and Overview**

- [1] This action is a professional negligence claim against an Alberta lawyer. The alleged negligence relates to a commercial transaction that occurred in May 2000 and in respect of which the lawyer prepared the closing documents.
- [2] This action was issued on August 30, 2013, some 13 years after the closing of the commercial transaction. The defendant lawyer, Mr. Nowicki, claims that he is "immune from liability" by virtue of s. 3(1)(b) of Alberta's Limitations Act, R.S.A. 2000 c. L-12, which, in combination with s. 3(3)(b) of that Act effectively prohibits professional negligence actions after a period of 10 years following the conduct, act or omission on which the claim is based. Mr. Nowicki now applies for summary trial of the limitation issue and dismissal of the action in its entirety pursuant to B.C. Supreme Court Civil Rule 9-7.
- [3] For the reasons that follow, I agree that the legislation immunizes Mr. Nowicki from liability in this case and the action is dismissed with costs.

## Facts

- [4] Mr. Nowicki had earlier made an application to dismiss this action for want of prosecution. That application was dismissed by Master Muir of this Court on July 31, 2017. Her oral reasons for judgment have not been transcribed and have not been made available to me.
- [5] I have been advised that the present application is based on the same affidavit materials that were before Master Muir. In his present Notice of Application Mr. Nowicki relies upon an affidavit he swore on February 5, 2016, an affidavit by plaintiffs' counsel sworn January 28, 2017, and an affidavit of the plaintiff Lewis Misterly sworn July 29, 2017.
- [6] In their Application Response the plaintiffs rely on the same three affidavits as well as an affidavit of Russell Cummins sworn July 30, 2012. Mr. Cummins' affidavit does not bear any style of cause. He died in January 2013, before this action was started. No objection was made by the defendant with respect to the admissibility of Mr. Cummins' affidavit or the ability of the plaintiffs to tender that evidence in support of their response.
- [7] It appears, however, there is little or no dispute respecting the background facts for summary trial purposes. In their Application Response the plaintiffs "accept as accurate" the following paragraphs that appear in Part 2 of the defendant's Notice of Application:
1. The defendant Kenneth Nowicki was, at all material times, a lawyer and member of the Law Society of Alberta with an office in Cochrane, Alberta.

## Factual Background

5. The plaintiffs, Lewis and Gayle Misterly, have brought this action both personally and as trustees of the Lewis E. and Gayle Ann Misterly 1993 Family Living Trust (the "Misterly Trust"). At all material times, Mr. and Mrs. Misterly were residents of California. The Misterly Trust was settled in California.
6. On or about March or April 2000, Mr. Misterly advised Mr. Nowicki that he was preparing to advance funds to 575764 B.C. Ltd. (the "Corporation") to enable the Corporation's purchase of the assets of Jennings River Outfitters Inc. (the "Asset Purchase") and the issued and outstanding shares of Jennings River Air Services Inc. (the "Share Purchase"). The Corporation was owned in equal shares by Russell Cummins and Tina Cummins, who were married at the time. Mr. Misterly asked Mr. Nowicki to prepare certain documents in connection with the anticipated transactions, namely, a Share Purchase Agreement, a Loan Agreement, a Promissory Note and a General Security Agreement (together, the "Closing Documents"). There was no written retainer agreement between Mr. Nowicki and any of the plaintiffs.

7. The Asset Purchase and Share Purchase by the Corporation were to be financed by a loan from the Misterly Trust in the amount CAD \$500,000 (the "Loan"). It was agreed that the Corporation would issue shares to the Misterly Trust in connection with the Loan, and that Mr. Misterly and Mr. Nowicki would be appointed as directors of the Corporation.
8. The closing date for the aforementioned transactions was set for May 2, 2000.
9. On May 1, 2000, Mr. Nowicki advanced CAD \$499,990 on behalf of the Misterly Trust to Jeff Phipps, another Alberta lawyer and the Corporation's solicitor, on the express trust condition that no use be made of the funds until Mr. Nowicki gave written confirmation that they be released to the Corporation for the sole purpose of the Asset Purchase and the Share Purchase.
10. On May 2, 2000, the Misterly Trust and the Corporation arranged to execute the Closing Documents in connection with the Loan, namely:
  - (a) Loan Agreement which provided, among other things, that the Loan would take the form of a shareholder loan from the Misterly Trust to the Corporation, and that the Corporation would pay interest at 7% per annum on all outstanding balances;
  - (b) Promissory Note which provided, among other things, that the Misterly Trust would pay the sum of USD \$339,000 on demand, together with interest thereon at the rate of 7% per annum;
  - (c) Share Purchase Agreement which provided, among other things, that:
    - (i) the Corporation would sell the Misterly Trust 100 Class "A" shares of the Corporation for \$100;
    - (ii) the Corporation would sell Mr. Nowicki 4 Class "A" shares of the Corporation for \$4.00 (as a tie-breaker);
    - (iii) the parties would to execute such Minutes, Share Transfers and Waivers as necessary to transfer full and complete title of shares to the Misterly Trust and Mr. Nowicki respectively; and
  - (d) a General Security Agreement which provided, among other things, that the Misterly Trust would take a general security interest in all present and after- acquired property of the Corporation for a period of five years
11. On May 2, 2000, a shareholders' meeting of the Corporation was held at Mr. Nowicki's office in Cochrane, Alberta for the purpose of executing the Closing Documents (the "Meeting"). Mr. Cummins and Mr. Nowicki attended the Meeting in person; Mrs. Cummins, Mr. Misterly and Mr. Phipps attended the Meeting by telephone. At the time, Mr. and Mrs. Cummins were the sole directors and voting shareholders of the Corporation.

12. At the time the Closing Documents were executed, Mrs. Cummins advised that she could not execute the documents as her fax machine was not working, but gave her verbal consent to execution of the Closing Documents. Mr. Misterly was aware that Tina Cummins was not in a position to execute the documents, but expressly authorized Mr. Nowicki to the release of funds to Mr. Phipps in reliance on Mrs. Cummins' verbal assent to the Closing Documents.
13. At the Meeting, the Corporation resolved to approve the Share Purchase Agreement and the Loan Agreement, and the Closing Documents were executed on the Corporation's behalf by Mr. Cummins in the presence of Mr. Nowicki. Mr. Nowicki then drafted minutes of the shareholders' meeting (the "Minutes") and forwarded them to Mrs. Cummins on May 2, 2000. Finally, Mr. Nowicki advised Mr. Phipps that the trust conditions were removed and the funds advanced by the Misterly Trust could be applied to the Asset Purchase and the Share Purchase.
14. Following May 2, 2000, Mrs. Cummins refused to sign the Closing Documents despite her verbal assent to same at the Meeting. Despite Mr. Nowicki's requests, Mrs. Cummins would not return executed copies of the minutes of the shareholders' meeting. The Corporation did not issue shares to Mr. Nowicki as provided in the Share Purchase Agreement.

### **The plaintiffs' claims in this action**

16. The plaintiffs filed the Notice of Civil Claim in this proceeding on August 8, 2013, approximately 13 years and 3 months after the events of May 2, 2000. Based on the allegations in the Notice of Civil Claim, the plaintiffs' claims against Mr. Nowicki appear to be that:
  - (a) he failed to obtain executed copies of the Closing Documents and Minutes from Mrs. Cummins;
  - (b) he did not amend the Corporation's shareholder records to reflect the shareholdings contemplated by the Share Purchase Agreement;
  - (c) he did not inform the plaintiffs of the above-noted "errors"; and
  - (d) he did not inform the plaintiffs that the Corporation could raise a limitations defence to the Loan even if the Misterly Trust did not make a demand on the Loan.

In Part 3 of the Notice of Civil Claim, the plaintiffs frame their claims against Mr. Nowicki in terms of professional negligence, breach of contract, and breach of "his ethical and fiduciary duty to inform the Plaintiffs of the errors he had made."

- [8] Before the May 2, 2000 transaction, Mr. and Mrs. Cummins were the sole directors and voting shareholders of the corporation to whom the Misterly Trust loaned U.S. \$339,000 in exchange for a demand promissory note and from whom 100 Class A shares were to be issued to Misterly Trust (along with four additional Class A shares to Mr. Nowicki). While the promissory note was issued to Misterly Trust, no Class A shares were actually issued to either Misterly Trust or Mr. Nowicki.
- [9] In May 2008 matrimonial litigation ensued between Mr. and Mrs. Cummins. In the matrimonial litigation Mrs. Cummins took the position that she remains a 50% shareholder of the corporation (instead of a 25% shareholder along with Mr. Cummins) and refuses to acknowledge either the shareholding interest asserted by Misterly Trust or the validity of any debt owed by the company to Misterly Trust. Mrs. Cummins' various manoeuvrings are outlined in detail in Mr. Cummins' July 30, 2012 affidavit.
- [10] In his July 28, 2017 affidavit, Mr. Misterly swears that he learned in 2012 of Mrs. Cummins' assertion that she was still a 50% shareholder in the corporation whereupon he demanded repayment of the outstanding loan as well as delivery of Misterly Trust's 100 shares of the corporation. He swears that Mrs. Cummins denied any entitlement of Misterly Trust to shares in the company and also claimed that the debt was unenforceable by virtue of Alberta's Limitations Act.
- [11] The assets of the corporation were ultimately sold in late 2016 and the sale proceeds of CDN \$1.4 million did not come out of escrow until early 2017. The dispute respecting entitlement to these funds remains ongoing between Mr. Misterly Mrs. Cummins, the estate of Russell Cummins, the beneficiary under the latter's will, as well as another creditor of the corporation.
- [12] Attached to Mr. Misterly's affidavit is a July 27, 2000 letter to him from Mr. Nowicki enclosing some of the documentation relating to the May transaction. It includes a paragraph:

The minute book is in my office and I am under a trust condition to hold it and return it to lawyers in British Columbia if they ask for it. In the meantime, I will make sure it accurately reflects the shareholdings and I will provide you with copies of those in a further report in August.

- [13] In their lawsuit against Mr. Nowicki the plaintiffs allege three professional errors on the latter's part:
1. failing to secure the signature of Mrs. Cummins on any of the closing documents or the minutes of the shareholders meeting approving that transaction;
  2. failing to perfect the corporate records to issue the necessary shares to Misterly Trust and to accurately update/amend the shareholdings of each party; and
  3. failing to protect the enforceability of the loan/promissory note and to advise the clients of any limitation periods applicable to enforcement.

[14] In his affidavit, Mr. Misterly swears that Mr. Nowicki did not make any further report to him in August 2000 and that, although he saw Mr. Nowicki from time to time in the years subsequent to the transaction, "At no time, did Ken Nowicki advise me that Tina Cummins had refused to sign the closing documents or that the Company minute book did not reflect the shareholdings of Misterly Trust." The affidavit is silent respecting limitation periods applicable to the loan or promissory note or other "advice" expected to have been given respecting the same.

#### The Issues to be Decided

[15] There are three issues to be decided on the summary trial application:

1. Is the limitation defence suitable for disposition by way of summary trial?
2. Is the plaintiffs' claim governed by Alberta's Limitations Act? and
3. If so, is the defendant immune from liability by virtue of the 10-year "ultimate" limitation period set out in s. 3(1)(b) of that Act?

I will address each issue separately.

Is the limitation defence suitable for disposition by way of summary trial?

[16] While the court is usually averse to the summary trial procedure being used to "litigate in slices", the rule is sensibly employed if an issue can fairly be decided that would be dispositive of the entire proceeding. A limitation defence can be one such issue in an appropriate case.

[17] The question, then, is whether on the whole of the evidence that has been tendered to the Court on this application, I can find the facts necessary to decide the limitation defence and whether there are other circumstances that might otherwise make it unjust to summarily decide that issue at this time.

[18] Paragraph 15 of Part 2 of the defendant's Notice of Application states:

In the fall of 2000, Mr. Misterly and Mr. Nowicki attended a hunting camp in northern British Columbia with Mr. and Mrs. Cummins. Mr. Nowicki and Mr. Misterly spoke to Mrs. Cummins about executing the Closing Documents; she again refused to execute the documents and left the camp. Mr. Nowicki advised Mr. Misterly that he should retain independent counsel to protect the plaintiffs' interests in the Corporation. To Mr. Nowicki's knowledge, Mr. Misterly did not do so.

[19] There is no evidence before me that in any way corroborates or supports this alleged fact. Mr. Nowicki says nothing about it in his February 5, 2016 affidavit. It is not expressly addressed in Mr. Misterly's affidavit, however it is implicitly denied in the affidavit excerpt referred to in paras. 10 and 14 above. I accept Mr. Misterly's evidence and find as a fact that Mr. Nowicki did not report further on the transaction in August 2000 nor did he at any time thereafter advise Mr. Misterly that Mrs. Cummins had refused to sign the closing documents for the transaction or that the company minute book had not been amended to accurately

reflect the 49% shareholdings of Misterly Trust in the corporation.

- [20] I have set out the background facts as agreed between the parties. They represent my findings of fact on this application along with the finding of fact set out above. In my view, these findings of fact permit the limitation defence to be determined on this application and there are no circumstances that would make it unjust to dispose of this matter by way of a summary trial at this time.

Is the plaintiffs' claim governed by Alberta's Limitations Act?

- [21] In *Tolofsen v. Jensen*, [1994] 3 S.C.R. 1022, the Supreme Court of Canada held that tort claims are governed by the substantive law of the province where the tortious activity occurred, the *lex loci delicti*, and not by the substantive law of another province in which the action might be brought (the *lex fori*). The court also ruled that statutes of limitation are part of the substantive law applicable to the claim, i.e., that the Limitations Act of the province where the tortious activity occurred will govern the claim. This law is now codified in s. 4(1) of British Columbia's current Limitation Act, S.B.C. 2012, c. 13, which provides:

### Conflict of laws

4(1) If the substantive law of another jurisdiction is to be applied by the court in deciding a claim, the law of that other jurisdiction respecting limitation periods must be applied in relation to the claim.

- [22] What, then, is the substantive law governing the conduct of Mr. Nowicki and his solicitor-client relationship with the plaintiffs? In my view, it is clearly the law of Alberta and therefore the Limitations Act of that province applies to the claim.
- [23] Mr. Nowicki has at all times been a member of the bar of Alberta. His office was in Cochrane, Alberta. He performed all of the work for his clients in Alberta. His professional conduct was regulated by the Alberta Law Society. The money advanced by the trust in exchange for a promissory note from and shares in the numbered corporation was held in and transferred from his trust account in Alberta. The closing documents were prepared in his Alberta office. The shareholders meeting was held in the same office. Mr. Cummins attended that meeting personally and signed the various closing documents on his own behalf and on behalf of 575764 B.C. Ltd. While Mrs. Cummins was not physically present at the time, she attended the meeting by way of phone from Caroline, Alberta. The corporation's solicitor, Mr. Phipps, also attended the meeting by phone from his law office in Calgary, the location to which the funds from Mr. Nowicki's client had been sent by Mr. Nowicki in trust. The General Security Agreement signed by 575764 B.C. Ltd. expressly provided that it would be governed by the laws of Alberta and the corporation expressly attorned to the courts of that province (the other documents were silent on these issues).

- [24] Alberta is the jurisdiction with the closest and most real connection to the (unwritten) retainer agreement between Mr. Nowicki and his clients. All of Mr. Nowicki's conduct on behalf of those clients took place in Alberta. The acts and omissions that form the basis for the professional negligence claim against him all occurred (or in the case of omissions, did not occur) in Alberta. Mr. Nowicki's July 27, 2000 letter to Mr. Misterly undertaking to correct the minute book in his office to properly reflect the parties' shareholdings was issued in Alberta, as was the (broken) assurance that he would shortly send to Mr. Misterly the further documents.
- [25] In my view, there is no doubt that the substantive law governing Mr. Nowicki's tort and contractual duties of care to his clients is that of Alberta. This is confirmed by cases such as *Pan-Afric Holdings Ltd. v. Ernst & Young LLP*, 2007 BCSC 685, paras. 35, 36 and 56, *Coast Spas Inc. v. California Acrylic Industries Inc.*, 1997 CanLII 4279 (BC SC), para. 25, and *CIC Capital Fund Ltd. v. Rawlinson*, 2016 BCSC 516, para. 64. All these cases provide that professional negligence claims are properly and sensibly governed by the laws and professional standards applicable to the jurisdiction where the (allegedly negligent) work was performed.
- [26] Paragraph 3 of Part 3 of the plaintiffs' pleading states as an additional "legal basis" for the claim that Mr. Nowicki had "breached his ethical and fiduciary duty to inform the plaintiffs of the errors he had made." Ironically enough, this appears to be a reference to Rule 7.7-1 of the Law Society of Alberta Code of Conduct, which reads:
- [1] A lawyer has an ethical and fiduciary duty to disclose a material error or omission to a client.
- [27] A breach of ethics is not actionable per se. Rather, if the breach of ethics constitutes a tort (professional negligence) or breach of a contractual term of the retainer, then it will be actionable as such.
- [28] There is a substantial difference between a claim in negligence and a claim for breach of fiduciary duties arising out of a solicitor-client relationship. Southin J. put it this way in *Girardet v. Crease & Company*, 11 B.C.L.R. (2d) 361 (S.C.), pp. 1-2:

... The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty -- if not of deceit then of constructive fraud. ... Those who draft pleadings

should be careful of words that carry such a connotation.

[29] The claim against Mr. Nowicki does not allege dishonesty, deceit or constructive fraud. It is simply a claim for professional negligence in respect of which a cause of action exists in tort and contract. Even if it were an actionable breach of fiduciary duty claim, it would still be governed by the law of Alberta.

Does Alberta's ultimate 10-year limitation period apply?

[30] The relevant provisions of Alberta's Limitations Act provide:

Limitation periods

3(1) ... if a claimant does not seek a remedial order within

...

(b) 10 years after the claim arose,

... the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

...

(3) For the purposes of subsections (1)(b) ...

(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

(b) a claim based on a breach of duty arises when the conduct, act or omission occurs;

(5) Under this section,

(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b)

## Concealment

4(1) The operation of the limitation period provided by section 3(1)(b) or (1.1)(b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.

(2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) or (1.1)(b) was suspended.

[31] The plaintiffs make no allegation of "fraudulent concealment" on the part of Mr. Nowicki and tender no evidence in that regard. As indicated, the claim is simply one for professional negligence and is framed in both tort and breach of contract.

- [32] The claim against Mr. Nowicki arose when the "conduct, act or omission" constituting the breach of his professional duty occurred. If those breaches resulted from a continuing course of conduct or a series of related acts or omissions, then the claim arose when the course of conduct terminated or the last act or omission occurred.
- [33] Mr. Nowicki's allegedly negligent acts or omissions all occurred in 2000. He prepared and secured execution of the closing documents in May 2000. His reporting letter was issued to Mr. Misterly on July 27, 2000 enclosing some of the documents. At that time he informed Mr. Misterly that changes would be made to the minute book to reflect the new shareholdings in the corporation and undertook to provide copies of the appropriate documents in August. He failed to do so, whether in the time promised or at all.
- [34] The commercial transaction occurred in May 2000 and the expectations of all parties was that it would be perfected at that time or shortly thereafter. The share purchase agreement expressly contemplated closing of the transaction on May 2, 2000 and further provided for prompt delivery of related documents:

Upon the signing of this Agreement, all parties shall execute such Minutes, Share Transfers and Waivers as may be necessary to transfer full and complete title of shares to Misterly and Mr. Nowicki. [Emphasis added.]

- [35] The plaintiffs' Notice of Civil Claim was filed in the Supreme Court of British Columbia on August 30, 2013, some 13 1/2 years after the closing of the transaction and 3 1/2 years after any 10-year "ultimate" limitation period referred to in s. 3(1)(b) had expired.
- [36] In an effort to circumvent the limitation defence, the plaintiffs argue that Mr. Nowicki's failure to secure the additional documents/signatures necessary to perfect the transaction represented a "continuing course of conduct" or a "series of related omissions" that continued up to the commencement of litigation and that accordingly the 10-year ultimate limitation period has not expired.
- [37] On this point I agree with the submissions of Mr. Nowicki: s. 3(3)(a) of Alberta's Limitations Act is intended to capture situations where damages are caused by a series of wrongs that occur over a period of time such as continuous torts (e.g., ongoing nuisance or trespass) or successive contractual breaches. It does not operate to defeat a limitation period simply because a plaintiff frames a professional negligence claim as some sort of ongoing failure to warn of or to correct an error or omission that occurred many years earlier.
- [38] In *Bowes v. Edmonton (City)*, 2007 ABCA 347, the municipality was sued in negligence for issuing construction permits on land that collapsed two decades later. The plaintiffs argued the city was in breach of ongoing duties to warn which continued up to the time the harm was suffered and therefore that the 10-year ultimate limitation period did not apply. The court rejected the argument, observing "to regard every ancient failure to warn as occurring every day would be a fiction destroying all limitation periods". It also suggested that if such was permitted, "then most cases of delayed harm from a tort could be dressed up as failures

to warn with no limitation period". The proposition was soundly rejected.

- [39] Similar observations were made in *RBC Life Insurance Company v. Heritage Insurance and Consulting Ltd.*, 2014 ABQB 130, a professional negligence claim against an insurance broker framed as a claim for contribution and indemnity. In that case the argument was that the ongoing professional relationship between the parties constituted a "continuous failure to advise" of the problem with contract documents. The court stated, at para. 48:

In my view, s. 3(3)(a) of the Limitations Act does not apply merely by virtue of the fact of a continuing relationship between a professional and a client. If it did, in cases where a specific act of the professional which was in breach of any duties owed to the client could be identified, the ultimate limitation period would never arise. Section 3(3)(a) was intended to cover situations where damage does not result from a single act, but rather from the effect of many related acts occurring over time

- [40] Mr. Nowicki's errors and omissions occurred in 2000. The plaintiffs cannot avoid the 10-year ultimate limitation period in Alberta's Limitations Act by characterizing the omissions as either a "continuing course of conduct" or a "series of related omissions", an argument which, if given effect, has the potential to defeat limitation periods in almost all solicitors' negligence claims.

## Conclusion

- [41] The plaintiffs' claim against Mr. Nowicki arose in 2000. Their lawsuit was not instituted until 13 1/2 years later. In the meantime, the 10-year limitation period contemplated by s. 3(1)(b) of Alberta's Limitations Act accrued. The result is that Mr. Nowicki is entitled to immunity from liability in respect of the plaintiffs' claim. As this conclusion is dispositive of the litigation between the parties, the action must be dismissed with costs.

"KENT J."

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Prepared on 29 October 2026 · Esheria