CITATION: Schwarz v Eastgate Biotech Corp., 2025 ONSC 4405
COURT FILE NO.: CV-20-00637625-0000
DATE: 20250728

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: JOSEPH SCHWARZ, MICHAEL WEISSPAPIR, PHARCON INC. and RMW PHARMA CONSULTING INC.

Plaintiffs

AND:

EASTGATE BIOTECH CORP., EASTGATE PHARMACEUTICALS INC., ROSE PERRI and ANNA GLUSKIN

Defendants

BEFORE: Koehnen J.

COUNSEL: *Rajiv Joshi,* for the responding party plaintiffs

Oleg Roslak, for the moving party defendants

HEARD: July 21, 2025

ENDORSEMENT

Overview

[1] This is a motion for summary judgment by the defendants to dismiss the action because it was commenced outside of the basic two-year limitation period under the *Limitations Act, 2002*.[1]

[1] *Limitations Act*, 2002, SO 2002, c 24, Sch B.

[2] Disposition of the motion turns on whether the applicable limitation period is what is referred to as a "once and for all" limitation period as the defendants argue or whether it is a rolling limitation period as the plaintiffs argue.

[3] In my view, the applicable period to apply is a "once and for all" limitation period that commenced on February 14, 2017, by which point the defendants had already breached the agreement in question and advised the plaintiffs that they considered the agreement to be null and void. In that light, the limitation period expired on February 14, 2019. The action was not commenced until March 6, 2020 and is therefore out of time.

Background Facts

[4] The plaintiffs and defendants entered into a settlement agreement which the parties referred to as the Reorganization Settlement Agreement dated October 14, 2016 (the "RSA"). The plaintiffs brought this action after the defendants failed to comply with, among other things, the following obligations on them under the RSA:

a. They failed to transfer shares to the plaintiffs within 30 days of signing the RSA.

b. On February 1, 2017 they put a stop payment on the remaining 47 monthly instalment payments totalling US $188,200 owing under the RSA.[2]

c. They failed to pay rent for the plaintiffs' laboratory which resulted in the plaintiffs being evicted on August 2, 2017.

[2] The defendants had delivered 96 post dated cheques to the plaintiffs. Two were to be cashed each month beginning January 1, 2027. The defendants allowed the first two cheques to clear on January 1, 2017 but placed stop payment orders on the remaining cheques.

[5] On February 7, 2017, the plaintiffs wrote to the defendants advising them of the nonpayment and asking that the situation be resolved within 5 business days failing which the plaintiffs would take "the necessary legal action in accordance with the settlement agreement."

[6] The defendants responded by letter dated February 14, 2017 telling the defendants that the defendants had breached the RSA by disclosing confidential information to third parties. The closing paragraph of that letter stated:

> I remind you that due to your default the Reorganization and Settlement Agreement is NULL AND VOID. All cheques issued to both of you as per the Reorganization and Settlement Agreement will not be honoured. All terms, including financial, MUST be renegotiated to align with management's plans and expectations of its assets for future returns on investment. The company is considering all options for a fair and equitable arrangement beneficial to you and the company.

[7] On February 23, 2017, lawyers for the plaintiffs responded denying that the plaintiffs owed the defendants any duty of confidentiality, denying that they had disclosed confidential information, asserting various breaches of the RSA by the defendants and then said:

> Please be advised that unless Eastgate cures all of its defaults under the Settlement Agreement by no later than March 9, 2017, and continues to fulfil all of its obligations under the Settlement Agreement on an ongoing basis, my clients have instructed me to forthwith commence legal proceedings in the Superior Court of Justice to enforce all of Eastgate's obligations under the Settlement Agreement.

[8] The letter went on to state that in order to avoid legal proceedings the defendants were required to take a number of steps no later than March 9, 2017. The defendants did not take any of those steps and did not reply to the letter of February 23, 2017.

[9] The plaintiffs did not try to cash any remaining monthly cheques until March 7, 2018 when the plaintiff, RMW Pharma Consulting, deposited one of the two cheques dated October 1, 2017. That cheque was dishonoured by the bank because the defendants had issued a stop payment order on it.

[10] The plaintiffs have not explained: (i) why they failed to cash any cheques before March 7, 2018; (ii) why they tried to cash only the cheque dated October 1, 2017; and (iii) why they did not try to cash that cheque until March 7, 2018. When the plaintiff, Michael Weeisspapir, was asked why he did not cash the cheque until March 2018 he answered that he was in possession of a "whole bunch of postdated cheques, and [he] can cash them whenever and that was [his] business."

[11] The plaintiffs commenced this action on March 6, 2020.

[12] The defendants take the position that the action is statute barred because the plaintiffs knew no later than February 14, 2017 that the defendants had no intention of honouring the RSA.

[13] The plaintiffs submit that the limitation period began to run, at the earliest, on March 7, 2018 when the plaintiffs say they understood that the defendants would not be honouring the settlement agreement. That would mean that the claim was commenced at the very end of, but still within, the two-year limitation period. In addition, the plaintiffs submit that the limitations period applicable here is one that began to run afresh on each day that the defendants defaulted on their obligations under the RSA. Thus, fresh limitation periods would commence in respect of each cheque on the date it was cashable and a default like

the failure to transfer shares would result in a fresh limitation period commencing each day that the shares were not transferred.

Legal Analysis

[14] Limitation periods can be grouped into two basic categories: a "once and for all" limitation period and a rolling limitation period. The "once and for all" limitation period classically arises out of the failure to perform a specific obligation at a specific time. The two-year limitation period begins to run on the date that the plaintiff knew or ought to have known of the breach. A rolling limitation period typically arises out of the failure to perform an obligation that is scheduled to be performed periodically (such as, potentially, periodic payments) or out of a continuing obligation under a contract such as a duty to maintain premises in good repair. In those situations the limitation period begins to run as of the date of each periodic breach or, in the case of a continuing obligation, each day that the obligation is not performed.[3]

[15] The plaintiffs submit that the limitation period applicable here is a rolling limitation period, which, in the case of the settlement payments, begins to run afresh with each settlement payment that was not made, or, in the case of the obligation to transfer shares, on each day that the shares were not transferred.

[16] The jurisprudence makes it clear, however, that not every periodic or continuing obligation is subject to a rolling limitation period. Whether such obligations are subject to a "once

[3] *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179.

and for all" or a rolling limitation period is determined by what the case law has come to refer to as the *Richards* distinction. That distinction arises out of *Richards v. Sun Life Assurance Co. of Canada*,[4] and has been adopted by the Court of Appeal for Ontario on several occasions.[5] In *Richards* Bale J. drew the distinction as follows:

> A rolling limitation period may apply to claims for periodic payments, in cases where the issue is whether certain payments to which the plaintiff is entitled have been made (e.g. payments of rent), as opposed to cases where the issue is whether the plaintiff was entitled to the periodic payments in the first place. In the former type of case, the material facts will have arisen on a periodic basis, and it will not be unfair to require a defendant to litigate those facts during the applicable limitation period following the date upon which an individual payment became due. However, in the latter type of case, the material facts will have arisen at the time that the plaintiff alleges he or she first became entitled to periodic payments, and it would be unfair to require the defendant to litigate those facts, for a potentially unlimited period of time.

[17] This case falls into the latter category of cases, that is to say the issue is whether the plaintiffs are entitled to any of the 94 settlement cheques to begin with because the defendants made it clear on February 14, 2017 that they considered the RSA to be null and void.

[18] The Court of Appeal for Ontario revisited the issue in 2022 in *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd*.[6] *Karkhanechi* involved a dispute by a departing

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[4] *Richards v. Sun Life Assurance Co. of Canada*, [2016] O.J. No. 4574, 2016 ONSC 5492, [2016] I.L.R. I-5911 (S.C.J.) [*Richards*].
[5] *Marvelous Mario's Inc. v. St. Paul Fire and Marine Insurance Co*., 2019 ONCA 635 at para. 36; *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd.*, 2022 ONCA 518 at paras 28, 30, 31 and 34 [*Karkhanechi*]; *Spina v. Shoppers Drug Mart Inc.*, 2024 ONCA 642 at paras. 125, 137.
[6] *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd.*, 2022 ONCA 518.

partner about the payout he was to receive on leaving the partnership. The plaintiff claimed the payout should be based on 3% of the value of his interest. The payments the respondents made were based on 1.2% of the value of the plaintiff's partnership interest. The motions judge applied a once and for all limitation period. The plaintiff appealed, arguing that his claim was subject to a rolling limitation period that began afresh with each new payment based on the 1.2% calculation.

[19] The Court of Appeal noted that not all recurring payments give rise to a rolling limitation period, but that such payments "may" give rise to a rolling limitation period.[7] The court then provided several helpful questions to determine which type of limitation period applied.

[20] One question to ask is "whether the defendant has engaged in another breach of contract beyond the original breach by failing to comply with an ongoing obligation."[8] Answering that question here would lead me to apply a once and for all limitation period as of February 14, 2017. As of that date, the plaintiffs knew that the defendants were treating the RSA as null and void, meaning that they were refusing to perform any further obligations under it. The fact that post dated cheques were not honoured after February 14, 2017 does not amount to another breach beyond the original breach of failing to perform and declaring the RSA to be null and void; it is simply the consequence of the alleged breach of February 14.

[7] *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd.*, 2022 ONCA 518 at para. 21.
[8] *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd.*, 2022 ONCA 518 at para.27.

[21] I can only infer that the plaintiffs themselves believed this to be the case because they did not try to cash any subsequent monthly cheques until a year later on March 7, 2018 when they tried to cash one of the two cheques dated October 1, 2017.

[22] The plaintiffs claim that they only knew on March 7, 2018 that the defendants would not perform under the RSA. They do not, however, point to anything new that occurred between February 14, 2017 and March 7, 2018 to give them this allegedly newfound understanding.

[23] A further question the Court of Appeal posed in *Karkhanechi* was whether "in substance, the cause of action alleges a breach that gives rise to continuing loss or damage, and those cases where, in substance, more than one breach is being alleged leading to separate damage claims."[9] Here, in substance, the claim arises from the declaration that the RSA was null and void and the refusal to perform any further obligations under it. While the damages arising from that breach may be continuing, those damages arise from the same breach: that of holding the RSA to be null and void.

[24] The Court then noted:

> In this context, it is important to remember that "a cause of action accrues once damage has been incurred, even if the nature or the extent of the damages is not known": *Pickering Square*, at para. 33. That being borne in mind, once the plaintiff has sustained a loss from a breach of contract, and the plaintiff knew or had the means of knowing that there would be ongoing damage arising from that breach, there is no basis for applying rolling limitation

[9] *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd.*, 2022 ONCA 518 at para.27.

> periods relating to that ongoing damage. This is in keeping with the aim of limitation periods to "balance the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs."[10] (Citation omitted)

[25] This too leads to the application of a once and for all limitation period here. By February 14, 2017, the plaintiffs had already suffered damages from the refusal to perform the RSA and knew there would be ongoing damage from the breach.

[26] The plaintiffs rely heavily on the concept of anticipatory breach. An anticipatory breach of contract occurs when one party to a contract repudiates its contractual obligations before they fall due.[11] An anticipatory breach does not necessarily terminate the contract, but gives the innocent party a choice to either accept the breach and sue for damages or to treat the contract as continuing, press for performance, and bring an action only when the promised performance fails to materialize.[12]

[27] The plaintiffs say that their response letter of February 17, 2017 affirmed the contract. I read that letter differently and will return to that point later in these reasons. For the moment though, even assuming that the February 17 letter was an attempt by the plaintiff to affirm the contract, it is an attempt that cannot succeed at law. The Court of Appeal addressed the interplay of anticipatory breach and limitations periods in *Karkhanechi* as follows:

> In contrast, the principles I have described apply after a breach has occurred, where a party has already sustained a loss from that

[10] *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd.*, 2022 ONCA 518 at para.29.
[11] *Ali v. O-Two Medical Technologies Inc.*, 2013 ONCA 733, 118.
[12] *Ali v. O-Two Medical Technologies Inc.*, 2013 ONCA 733, 118 at para. 24.

> breach, and that party has or ought to have the material knowledge required to commence an action that will encompass the loss or damage that will arise from that breach. In my view, the law of anticipatory breach was never intended to arm plaintiffs with the option of purportedly rejecting a breach of contract that has already occurred in the expectation that this will extend limitation periods to allow for delayed lawsuits relating to identifiable damages that arise from the breach but have yet to materialize.

[28] The situation the Court of Appeal described in *Karkhanechi* is very much the situation here. As of February 14, 2017 the plaintiffs had already sustained a loss from the failure to transfer shares and the stop payment on the February cheques. The plaintiffs had or ought to have had the material knowledge required to commence an action to encompass the loss from the breach because the defendants had announced their refusal to perform under the RSA. As of February 14, 2017 the plaintiffs' damages were identifiable even if they had not yet fully materialized. It is clear, however, that a limitation period will begin to run even if not all damages have yet materialized.[13]

[29] If any further clarification were needed about which sort of limitation period applied, it was provided in *Spina v. Shoppers Drug Mart Inc*.,[14] where the Court of Appeal accepted the statement of Perrell J. that a rolling limitation period does not apply where there is a "categorical refusal to pay a benefit due under a contract", or there is repudiation of the contract.[15]

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[13] *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd.*, 2022 ONCA 518 at para. 33.
[14] *Spina v. Shoppers Drug Mart Inc.*, 2024 ONCA 642.
[15] *Spina v. Shoppers Drug Mart Inc.*, 2024 ONCA 642 at para 125, 126, 132.

[30] Here, the defendants communicated a categorical refusal to honour any other obligations under the RSA and repudiated it.

[31] In *Karkhanechi*, the motions judge and the Court of Appeal tied the determination of which type of limitation period to apply to the language of the *Limitations Act, 2002*. Section 4 of that Act provides for a basic limitation period of two years. Section 5 then goes on to provide:

> Discovery
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> 5 (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
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> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> Presumption
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[32] Those provisions further indicate that the limitation period began running on February 14, 2017. They knew then that a loss had occurred because of an act or omission of the defendants. They knew then that a proceeding would be an appropriate means to seek to

remedy the loss because they in fact threatened to bring a proceeding in their letter of February 23, 2017. In those circumstances s. 5(2) of the *Limitations Act, 2002* presumes the plaintiffs to have known of a claim on February 14, 2017 "unless the contrary is proved." The plaintiffs have not proved the contrary. The plaintiffs merely baldly assert that they learned only on March 7,2018 that the RSA would not be performed without explaining what new information they acquired after February 14, 2017 to lead then to this newfound realization.

[33] The plaintiffs raised a number of arguments against summary judgment. The difficulty with those arguments is that most of them focus on the allegedly egregiously wrongful nature of the defendants' conduct.

[34] By way of example, the plaintiffs argue in their factum that:

> "the central question of whether Defendants lawfully terminated the RSA depends on the disputed facts as to whether Defendants had any basis to declare the RSA is null and void, contractual interpretation, and continuing defaults, summary judgment is an appropriate."

[35] Although those disputed facts might go to the substantive merits of the action, a limitation period does not become longer or shorter based on an individual judge's view about the merits of the action or the seriousness of the defendants' conduct.

[36] The plaintiffs then try to suggest that the defendants themselves kept the contract alive by instructing their bank to dishonour the cheques on a monthly basis instead of cancelling all 94 cheques at once. I do not understand how that would affect the limitation period. The plaintiffs did not know about the defendants practice in this regard at the time and only

learned this during cross-examinations for this motion. As a result, that information could not have affected the extent to which the plaintiffs knew or ought to have known that a cause of action had accrued for purposes of s. 5 of the *Limitations Act 2002*. In addition, I see good reasons for giving the bank monthly instructions. Recall that the post-dated cheques delivered under the RSA extended over a period of 4 years. It may very well be asking too much of a bank to supervise an account so closely that it would reject cheques in favour of one particular payee for four years into the future based on a single instruction in 2017. If the plaintiffs did not want to run the risk that the bank would forget to implement the instruction down the road, they are free to avoid that risk with monthly instructions.

[37] The plaintiffs also argue that the defendants kept the RSA alive by continuing to pay rent for the plaintiffs laboratories. While the information before me does not make it clear precisely when the defendant stopped paying that rent, the plaintiffs were locked out of the laboratories for nonpayment of rent in August 2017. Even if the laboratory rent were treated as keeping the RSA alive, that obligation was definitively breached in August 2017. The limitation period would have expired in August 2019. As noted earlier, the claim was not issued until March 6, 2020.

[38] Although the plaintiffs did not raise this in argument, the defendants brought to my attention that the letter of February 14, 2017 was marked "without prejudice." There can be no doubt, however, that the final paragraph of the letter which declared the RSA to be null and void was not without prejudice. The plaintiffs clearly took it as being with prejudice given that they threatened to sue and failed to cash further monthly cheques.

[39] As noted earlier, the plaintiffs also argue that their responding letter of February 23, 2017 indicated their intention to keep the RSA alive. They rely on the following passage and in particular on the bolded "and". After noting a number of defaults, the letter states:

> Please be advised that unless Eastgate cures all of its defaults under the Settlement Agreement by no later than March 9, 2017, **and** continues to fulfil all of its obligations under the Settlement Agreement on an ongoing basis, my clients have instructed me to forthwith commence legal proceedings in the Superior Court of Justice to enforce all of Eastgate's obligations under the Settlement Agreement. (emphasis added)

[40] The plaintiffs argue that the use of "and" means that an action would be started only if the defendants failed to cure their existing defaults by March 9 "and" failed to fulfil their remaining obligations under the settlement agreement. The plaintiffs say that they could not determine whether the defendants had fulfilled their obligations under the RSA until timelines for those obligations had expired four years later. I do not accept that argument. The plaintiffs' purported unilateral imposition of two conditions before commencing an action does not override the plain wording of s. 5 of the *Limitations Act, 2002*. Moreover, if the plaintiffs were correct in their submission, there would be no reason to impose a deadline of March 9, 2017. The deadline is completely meaningless if the plaintiffs wanted to communicate that the defendants would only be sued four years hence.

[41] The plaintiffs themselves described both sides as sophisticated and as being represented by counsel throughout the negotiations for the RSA and at the time the letters of February 2017 were exchanged. They therefore had access to legal advice concerning the February 23, 2017 letter and the application of limitation periods.

[42] The plaintiffs further argue that the defendants intended to keep the RSA alive because they continued to pay the legal fees of patent lawyers. I do not accept this argument either.

[43] The patents in question were ones that the defendants were to receive as part of the RSA. The fact that the defendants paid lawyers to keep the patent rights alive may reflect self-interest to protect rights to which they might have had a claim but does not affect the limitation period. Moreover, the evidence of payment to which I was taken during oral argument reflected payment to a collection agency. Payment to a collection agency does not reflect a desire to keep the RSA alive, but reflects the defendants overall risk assessment with respect to certain bills and the risks posed by non-payment of those bills.

[44] Finally, the plaintiffs submit that this matter is not appropriate for summary judgment because there are issues of fact about whether the defendants had a factual or legal basis to terminate the RSA, whether the letter of February 14 amounted to a repudiation of the RSA, and whether the plaintiffs affirmed the agreement. In my view, given the appellate authorities cited above, all of those issues are legal issues that can be determined on a motion for summary judgment. The issue really is whether the February 14, 2017 letter gave the defendants enough information to know that a cause of action had accrued and that the limitation period had begun running. Given that the plaintiffs threatened litigation and failed to cash all but one of the subsequent cheques, there is no doubt in my mind that the plaintiffs were aware that their cause of action had accrued.

Conclusion and Costs

[45] For the reasons set out above, I grant the motion and dismiss the action because it was commenced after the limitation period had expired.

[46] Both sides have posted costs outlines on Case Center. The defendants have posted a costs outline which sets out costs for the motion and costs for the entire action. The plaintiffs have posted a costs outline only for the motion. I note that the costs for the motion are essentially identical. The defendants' costs for the motion on a partial indemnity scale, excluding disbursements, come to $14,870.37. The plaintiffs' costs for the motion on a partial indemnity scale come to $15,097.14. I infer from that that the plaintiffs' costs for the entire action would approximate the defendants costs for the entire action.

[47] The defendants' cost for the entire action on a partial indemnity scale come to $42,063.92 I would be inclined to reduce that somewhat because the defendants had six different lawyers working on the matter. Although the involvement of most of those lawyers was relatively limited, there would still have been duplication of effort in transitioning the matter between legal teams. I therefore fix the defendants costs on a partial indemnity scale at $37,000 including HST and disbursements.

Date: July 28, 2025

Koehnen J.