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Marika: The Adventures of a Young Lawyer Like No Other!

Marika: A Costly Confusion

Interruption of Prescription Versus an Expired Application

It's Monday and Marika has just come back from a fishing weekend where she mostly worked on her tan, much to the dismay of her father. That said, she still made some good catches and will be able to impress her friends by serving them her famous fillet of trout with lemon and marjoram sauce. As she enters her office, she notices a new file. Really?! While some people take advantage of the weekend to recharge their batteries, others, including M^e Pagé, the firm's senior lawyer, are busy finding new clients. Marika pouts a little, pushes that thought aside and goes to get a coffee before opening the file. This is a case of latent defects, her favourite type of file.

The next day, Marika meets with the clients. They explain to her that two and a half years earlier, they purchased a home and quickly discovered that it was affected by many defects. At the time, a disclosure notice had been sent to the sellers, but the latter had refused to assume the costs of the corrective work. In desperation, the clients had resigned themselves to paying these costs. That said, the clients tell Marika that after several discussions with family members, they are determined to get their money back. Marika verbally explains to them that she will need all the invoices for the corrective work. She also asks them to send her photographs of the defects and corrective work, since she will determine the possibility of obtaining an expert report on the basis of these photographs. She tells them, still verbally, that they will have to act quickly, because the prescriptive period for latent defects is 3 years.

Unfortunately for Marika, her clients are far from being organized and proactive. Apart from the photos already provided, they send her their invoices bit by bit and explain that they have to contact their contractor to get certain missing invoices. As for the expert hired to opine on the existence of the defects and their latency, he will only be able to provide his expert report shortly before the expiry of the prescriptive period. That said, his preliminary opinion is that certain defects were apparent.

One week before the expiry of the prescriptive period, Marika receives the expert report and the last invoices supporting the amount claimed. She therefore hurries to draft the *Originating Application*. Her clients, however, inform her that they told the sellers about the preparation of the proceedings, which triggered settlement discussions. In view of the foregoing, Marika decides to have the action stamped to interrupt the prescription and safeguard her clients' rights. Relying on article 107 para. 3 of the *Code of Civil Procedure*,¹ she puts a reminder in her agenda to serve the pleadings within three months of the filing.

The weeks go by, but the file is not settled. As the deadline approaches, Marika serves the application. An answer is soon filed and the sellers' lawyer quickly contacts Marika. He informs her of his intention to notify an *Application to Dismiss* based on prescription. Marika, who is dumbfounded, replies that he is mistaken and invokes the 3-month period provided for in article 107 para. 3 C.C.P. The lawyer, somewhat sheepishly, refers her to article 2892 of the *Civil Code of Québec*² which provides for the interruption of prescription if the *Originating Application* is served no later than 60 days after the expiry of the prescriptive period. Despite everything, he tells Marika that his clients are willing to consent to a discontinuance without costs if the proceedings are quickly terminated. Marika stammers a few words and almost inaudibly mentions that she will get instructions from her clients.

After unsuccessfully searching the case law, Marika has to face the facts: the file is prescribed! She drags herself to M^e Pagé's office and explains the situation to him. The clients are informed, and following M^e Pagé's explanations, they agree to a discontinuance of their *Originating Application*. Quickly thereafter, the clients file a notice of claim with the Insurance Fund.

What you should remember: In this case, Marika confused article 2892 C.C.Q. with article 107 para. 3 C.C.P. Article 2892 C.C.Q. deals with prescription and, in particular, with the civil interruption of prescription by the filing of an *Originating Application* and service thereof, the whole under certain conditions. More specifically, the fees for the judicial application, as specified in the *Tariff of judicial fees in civil matters*,³ must have been paid and the *Originating Application* must have been served no later than **60 days following the expiry of the prescriptive period**.

As for article 107 para. 3 C.C.P., it does not deal with prescription, but rather with the expiry of the proceedings. It provides that the *Originating Application* will expire if it is not notified within **3 months after it is filed**. The receipt of the application is completed only once the judicial fees have been paid.⁴ Thus, if the *Originating Application* is not notified within the 3-month period, it will be considered to have expired and a new *Originating Application*, together with the judicial fees, will be required in order to open a new court record. According to the *Commentaires de la ministre de la Justice* with respect to article 107 para. 3 C.C.P., this provision is merely intended to facilitate the management of the court office in that proof of service must be provided to the court office within 3 months following the filing of the *Originating Application*, failing which the application expires.

Thus, article 107 para. 3 C.C.P. does not trump article 2892 C.C.Q., which continues to apply as regards the interruption of prescription.

Finally, remember the importance of documenting your file in writing as regards the warnings pertaining to deadlines, including the prescriptive period. Moreover, inform clients in writing of the documents they must provide or the things they must do and the time limits for doing so. Here, Marika was not firm with her clients and was therefore

¹ CQLR, c. C-25.01.

² *Civil Code of Québec*, CQLR, c. CCQ-1991, art. 2892.

³ *Tariff of judicial fees in civil matters*, CQLR, c. T-16, r. 10.

⁴ *Code of Civil Procedure*, *supra*, note 1, art. 107 para. 5.

unable to get them to act more quickly in providing her with the documents in support of their application. This contributed, in part, to the drafting of the *Originating Application* at the last minute and the regrettable situation that ensued.

Note: During this COVID-19 pandemic, it is important to remember the order dated March 15, 2020 and entitled *Arrêté n° 2020-4251* made by the Chief Justice of Quebec and the Minister of Justice (the “*Order*”) to the effect that prescriptive and forfeiture periods in civil matters are suspended until the expiry of the health emergency declared by Order in Council no. 177-2020 dated March 13, 2020, as are civil procedure time limits, with the exception of matters considered urgent by the courts.

The *Order* dated March 15, 2020 also states that if the declaration of a state of health emergency provided for in Order in Council no. 177-2020 dated March 13, 2020 is renewed, the measures provided for in the *Order* will be renewed for an equivalent period.

For more information, please see the following link:

[Arrêté n° 2020-4251 dated March 15, 2020](#)