COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Justice Winteringham of the Supreme Court of B.C. pronounced on December 1, 2023

BETWEEN:

JM FOOD SERVICES LTD., FRESHSLICE HOLDINGS LTD., RFSP EQUIPMENT & OPERATING INC., A&M ENTERPRISE LTD., 1015214 B.C. LTD., RF FRANCHISING INC., and THE TRUSTEES OF THE FRESHSLICEFAMILY TRUST

APPELLANTS
(Defendants)

AND:

TARIQ WAHEED and 0923063 B.C. LTD.

RESPONDENTS
(Plaintiffs)

RESPONDENTS' FACTUM

Tariq Waheed and 0923063 B.C. LTD.

JM Food Services Ltd., Freshslice Holdings Ltd., RFSP Equipment & Operating Inc., A&M Enterprise Ltd., 1015214 BC Ltd., RF Franchising Inc., and The Trustees of the Freshslice Family Trust

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CHRONOLOGY

(Added, in Bold Type Below, to the Chronology of the Appellants)

Date	Event
October 18, 2011	**092 was incorporated under the *BCA***
October 18, 2011	**092 signed a Standard Franchise Agreement with JM Food Services Ltd. ("JM") to which Tariq Waheed was the guarantor. The business operated a pizza franchise**
June 21, 2013	**JM effectively put the pizza franchise out of business**
April 4, 2017	The corporate Plaintiff, 0923063 BC Ltd. ("092"), dissolved
November 6, 2020	The Plaintiffs filed their Notice of Civil Claim
December 10, 2020	**The appellants named at that time filed their response to civil claim**
September 3, 2021	**092 and Waheed filed an amended notice of civil claim naming RF Franchising Inc. as an additional defendant**
December 21, 2021	**RF Franchising Inc. filed its response to civil claim**
September 6, 2022	Original trial dates adjourned generally as 092 did not exist
September 9, 2022	092 was fully restored for purposes of litigation **(In fact, 092 was fully restored for all purposes, not just litigation)**
September 18 – 21, 2023	Trial

OPENING STATEMENT

1. On June 21, 2013, JM Food Services Ltd. ("JM"), as franchisor, put out of business the Freshslice Pizza franchise that had been operated by the respondents. 092 was the franchisee. Tariq Waheed was the guarantor of the franchise agreement. On April 11, 2019, the respondents obtained a judgment for damages against JM. At various times after June 21, 2013, JM transferred away all of its exigible assets to closely-related companies and to a closely-related family trust. After the first judgment the respondents brought an action under the *Fraudulent Conveyance Act* and the *Fraudulent Preference Act* against the appellants seeking declaratory relief. Unfortunately, 092 had been dissolved before the second action was commenced. 092 was restored under the *Business Corporations Act* ("*BCA"*), but more than two years after the limitation period had expired.

2. In the fraudulent conveyance trial the trial judge found that by operation of section 364(4) of the *BCA* that 092 was deemed to have continued to have existed and the fraudulent conveyance action was not barred by the passing of any limitation period that might have elapsed, since the fraudulent conveyance action was commenced within time.

3. The appellants maintain that the passing of a limitation period vests in them an after-acquired right, pursuant to s. 358(2) of the *BCA*, which they can rely upon as a bar to litigation by 092. The position of the respondents is that a limitation date defence must be plead before any such right comes into being. In this case no limitation date defence was plead.

PART 1 - STATEMENT OF FACTS

Introduction

1. The respondents agree with the appellants' statement of facts. The respondents consider further facts to be relevant.

Further Facts Considered Relevant by the Respondents

2. On October 18, 2011, 092 was incorporated under the *BCA*.

   Plaintiffs's Third Notice to Admit dated August 2, 2023 ("NTA"), Document 7, page 11

3. On October 18, 2011, 092 signed a Standard Franchise Agreement with JM Food Services Ltd. ("JM") to which Tariq Waheed was a guarantor. The business was to operate a pizza franchise.

   NTA, Fact 1

4. On June 21, 2013, JM effectively put the pizza franchise out of business.

   Appeal Record, Reasons for Judgment, para. 13

5. On December 10, 2020, the appellants that were named at that time filed their response to civil claim.

   Appeal Record, Response to Civil Claim, page 6 of record

6. On September 3, 2021, the plaintiffs filed an amended notice of civil claim naming RF Franchising Inc. as an additional defendant.

   Appeal Record, Response to Civil Claim, page 9 of record

7. On December 21, 2021, RF Franchising Inc. filed its response to civil claim.

   Appeal Record, Response to Civil Claim, page 14 of record

8. On September 6, 2022, this action came on before Justice Marzari for trial. The trial was adjourned generally because 092 had been dissolved. The plaintiffs were

ordered to pay $2,000 as costs thrown away and $20,000 as security for costs within 30 days.

NTA, Fact 19
NTA Document 6, page 10

9. On September 7, 2022, the plaintiffs paid the $2,000 as costs thrown away.

NTA, Document 8, page 12

10. On September 8, 2022, the plaintiffs paid the $20,000 for security for costs.

NTA, Document 9, page 13

PART 2 - ISSUES ON APPEAL

11. The trial judge did not err in "resorting to the wording of the *Canada Business Corporations Act*."
12. The trial judge did not err in "relying on paragraphs 68-69 of *Yung*."

13. The trial judge did not err in deciding not "to give effect to s. 346(1)(a) of the *BCA* by finding that a legal proceeding commenced *after* its dissolution may also be continued as if the company had not been dissolved."

14. The trial judge did not err in deciding not "to give effect of s. 358(2) of the *BCA* by holding that when an action is commenced by a dissolved company, the action and any corresponding limitation periods sit in abeyance until such time as the company is restored and that the expiration of the limitation periods in the interim is not an 'acquired right' by a party before the restoration."

Points Put in Issue by the Respondents

15. The respondents maintain that the trial judge was correct in applying s. 364(4) of the *BCA* to find that the time that elapsed between the dissolution of 092 and its

restoration is not a bar to the action of 092 because 092 was deemed to have never been dissolved. This Court need not determine this issue for the appeal to fail.

PART 3 - ARGUMENT

Introduction

16. This appeal must fail because:

(a) the trial judge did not "resort" to the wording of the *CBCA* – she properly referred to a case that referred to the *CBCA*;
(b) the trial judge did not err in relying on paragraphs 68-69 of *Yung;*
(c) the trial judge did not err in deciding not to give effect to s. 346(1)(a) of the *BCA*. Section 346(1)(a) has no application to the case at bar; and
(d) the trial judge did not err in not giving effect to s. 358(2) of the *BCA*. While restoration of a company is subject to after-acquired rights of persons, the passing of a limitation period while a company is dissolved does not constitute an after-acquired right. Rather, a pleading alleging a limitation date defence must be filed to create an after-acquired right.

17. In addition, and while not necessary for determining this appeal, the trial judge was correct in finding that 092 is deemed to have continued to exist by operation of section 364(4) of the *BCA*, and that in the circumstances, the limitation period should not be deemed to have elapsed.

18. In this argument the respondents will address each of the issues on appeal and then set out why they disagree with statements made in the appellants' factum.

Position of the Appellants

19. It appears that the fundamental position of the appellants is that they acquired a right before the restoration of 092. They are relying upon s. 358(2) of the *BCA*. Specifically, the alleged right is to rely upon the expiration of a limitation period while 092 was dissolved as a bar to a claim.

Test to Be Applied on Appellate Review

20. The respondents agree with the appellants that the standard of review on questions of law is correctness.

Tan v. Tan, 2024 BCCA 113 at para. 15

21. Construction of a statute is a question of law.

TELUS Communications Inc. v. Wallman, 2019 SCC 19 at para 30

Answer to Issues on Appeal

22. The respondents agree with the appellants, as stated at paragraph 13 of appellants' factum, that there are no questions of fact in issue in this appeal. The respondents disagree with the appellants that "the bulk of the facts before the judge were presented by *NTA*." In fact, the bulk of the evidence placed before the trial judge was by way of read-ins from the examinations for discovery of representatives of the appellants, together with the exhibits that were referred to in those examinations for discovery. That being said, the facts upon which the issues on appeal can be determined are set out in the NTA and the replies to it (Exhibits 4, 5, and 6 at trial).

NTA

Email setting out Reply to Notice to Admit dated August 16, 2023
Letter dated September 1, 2023 confirming admissions

(a) First Point: Reference to the CBCA

23. The first error in judgment alleged by the appellants is that the trial judge was "resorting to the wording of the *Canada Business Corporations Act* when 063 was a British Columbia corporation and was at all times governed by the *BCA*." With respect, the trial judge did not "resort" to the wording of the *Canada Business Corporations Act*. Rather, at paragraph 160 of her reasons for judgment, the trial judge referred to *Rising Star Learning (Kingsway) v. Kandola*, 2018 BCSC 1541 and observed that the trial judge in that case "considered the applicable principles in relation to federal legislation as follows . . ."

Appeal Record, Reasons for Judgment, para. 160

24. It is clear from her reasons for judgment that the trial judge was aware that 092 was a British Columbia corporation and was at all times governed by the *BCA*.

Appeal Record, Reasons for Judgment, paras. 156-162

b) Second Point: Relying on paragraphs 68-69 of Yung

25. The second error in judgment alleged by the appellants is that the trial judge erred in "Relying on paragraphs 68-69 of *Yung* when those paragraphs reference scenarios wherein proceeds [sic] are brought *against* a dissolved company, not by a dissolved company." The extent to which the trial judge refers to the *Yung* decision is set out at the end of paragraph 160 of her reasons for judgment where she writes: "See also *Yung v. Three Good Friends Property Holdings Inc.*, ("*Yung"*) 2018 BCSC 1963 at paras. 68 - 69."

Appeal Record, Reasons for Judgment, para. 160

26. In paragraph 25 of the appellants' factum the appellants suggest that paragraph 68 and 69 of *Yung* "reference scenarios wherein proceedings are brought against a dissolved company, not by the dissolved company." In that case that was true, but the appellants submit that nothing turns on the distinction. The appellants go on to suggest that "This deals with a remedy wherein creditors can apply to restore a defendant company for the purposes of litigation, not the scenario where a plaintiff company ceased to exist many years ago."

27. Paragraphs 68 and 69 of *Yung* reference a relatively recent application of the law that where the dissolution provision of the *BCA* (s. 346(1)(b)) does not apply, that section 364(4), the restoration provision, still operates to allow proceeding to be taken even where a limitation period may have elapsed.

Yung at paras. 68 and 69

28. In the case at bar the fact that the trial judge made a reference to paragraphs 68 and 69 of *Yung* does not amount to an error. Rather, in the case at bar the trial judge applied s. 364(4) of the *BCA*. Section 346(1)(a) of the *BCA* had no application.

(c) Third Point: Not Giving Effect to s. 346(1)(a) of the BCA

29. Turning to paragraph 26 of the appellants' factum, the appellants have accurately reproduced 346(1)(a) of the *BCA* (adding emphasis) but the respondents point out that this is not a case where that section has application. This case deals with the application of section 364(4) of the *BCA*.

30. In *Munday (E.C.) Ltd. v. Canada Safeway Ltd.*, 2004 MBCA 143, Hamilton J.A. of the Court of Appeal of Manitoba dealt with the scope of Manitoba's equivalent to section 346(1)(a) of the *BCA*:

> Firstly, Safeway argued that s. 219(2) of *The Corporations Act* supports its argument because the subsection contemplates that a corporation may continue an action commenced before it was dissolved but not while it was dissolved. This subsection deals with proceedings by or against a corporation that is dissolved and not revived and therefore has no relevance to the circumstances here.
>
> *Munday (E.C.) Ltd. v. Canada Safeway Ltd.*, 2004 MBCA 143 at para. 52

31. Subsections 219(2)(a) and (b) of *The Corporations Act* are similar to subsections of 346(1)(a) and (b) of the *BCA*.

The Corporations Act, C.C.S.M. C225, s. 219(2)

Business Corporations Act, s. 346(1)

32. Given the similarity between *The Corporations Act* and the *BCA* the court should find that s. 346(1) applies to corporations that have been dissolved but not restored; whereas s. 364(4) of the *BCA* applies to situations where corporations have been restored.

33. Paragraph 27 of the appellants' factum no doubt correctly identifies that the legislature must have intended significance to the operation of section 346(1) of the *BCA*; just as the legislature intended significance of section 364(4) of the *BCA*. The enactment of section 364(4) of the *BCA* does not imply mootness of section 346(1)(a) – the provisions address different situations.

(d) Fourth Point: Failing to Give Effect to s. 358(2) of the BCA

34. At paragraph 13 of the appellants' factum, the appellants state the issue on appeal as being "whether it was a legal error to hold that the expiry of a limitation period while a company is dissolved and the defence created by same is not one of the 'rights acquired by persons before the restoration' pursuant to s. 358(2) of the *BCA*."

35. The expiry of a limitation period is not a right acquired by a defendant. Rather, the right to plead a limitation defence is the accrued right. In *Martin v. Perrie,* 1986 CanLII 73 (SCC); [1986] 1 S.C.R. 41 Chouinard J. found assistance from the Privy Council, which held: ". . . an entitlement to plead a time-bar acquired by a defendant constituted an accrued right . . ."

> *Martin v. Perrie,* 1986 CanLII 73 (SCC) at para. 18, citing with approval *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553, at p. 562

36. The point that it is the right to plead a limitation defence was repeated in the paragraph that followed in *Martin v. Perrie*.

> *Martin v. Perrie*, at para. 19*,* citing with approval, *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553, at p. 563

37. In *6062533 Ontario Inc. v. Shell Canada Ltd.,*1998 CanLII 1775 (ON CA); 37 O.R. (3d) 504 starting at p. 5, Moldaver J.A. cited with approval Lord Brightman at 565-565 of *Yew Bon Tew v. Kenderaan Bas Mara*:

> In the opinion of their Lordships, an accrued entitlement on the part of a person to plead the lapse of a limitation period as an answer to the future [page 6] institution of proceedings is just as much a 'right' as any other statutory or contractual protection against a future suit.
>
> *6062533 Ontario Inc. v. Shell Canada Ltd.,* 37 O.R. (3d) 504 at p. 5 citing with approval Lord Brightman at 565-565 of *Yew Bon Tew v. Kenderaan Bas Mara*

38. In British Columbia it is clear that a limitation defence must be plead to be engaged.

Fuoco Estate v. Kamloops (City), [also cited a *Veness v. H.M.T.Q.*] 2001 BCCA 325 at para 15;

Jensen v. Ross, 2014 BCCA 173 at para. 44

39. In *Modern Livestock Ltd. v. Kansa General Insurance Co.* 1993 CanLII 7121, a case dealing with Alberta's version of s. 364(4) of the *BCA*, the court sets out that the after-acquired right to the defendant is to plead a limitation defence. The expiry of the limitation period does not extinguish the claim.

Modern Livestock Ltd. v. Kansa General Insurance Co. 1993 CanLII 7121, at para. 42

40. *Modern Livestock Ltd.* was appealed, though not successfully, and not on this issue.

Modern Livestock Ltd. v. Kansa General Insurance Company, 1994 ABCA 278

41. In the case at bar the respondents did not plead a limitation defence in their responses to civil claim.

Appeal Record, pages 6 – 8; and 14 – 16

42. The appellants knew no later than September 6, 2022, that 092 had been dissolved.

Appeal Book, NTA, Fact 19

43. As no limitation defence was plead the issue of the expiration of a limitation period did not arise in the case at bar.

44. In both *Shell* and *Munday* the defendants amended their defences, thus engaging the right to rely upon the passage of a limitation period during dissolution of a corporate plaintiff.

602533 Ontario Inc. v. Shell Canada Ltd., 37 O.R. (3d) 504 at page 3

Munday (E.C.) Ltd. v. Canada Safeway Ltd., 2004 MBCA 143 at para. 12

Addressing Specific Points set out in the Appellants' Factum

45. In the circumstances it is not be necessary to address each point raised in the appellants' factum as the respondents submit that the appeal has been answered; but as a precaution the respondents will address specific points raised in the appellants' factum. In some instances this approach will reinforce the positions already outlined by the respondents.

46. The respondents agree with paragraph 14 of the appellants' factum where it is asserted "When a company is dissolved, it ceases to exist for any purpose and has no legal status or capacity to bring or retain an action as against a defendant." Section 344(1) of the *BCA* and *DeBoer v. Fletcher*, 2013 BCSC 389, are cited as authorities for that proposition. *DeBoer* has no particular application to the case at bar.

47. Regarding paragraph 15 of the appellants' factum the respondents agree that in *Framing Aces* and *Habib* the court quite understandably found that the purported legal steps were nullities. In *Framing Aces* the corporate plaintiff had not been incorporated at the time it had filed builders liens and at the time it commenced an action. The learned trial judge found that as "Framing Aces" did not exist at the time the work was provided the filed liens were fatally defective (para. 26). The learned trial judge found it unnecessary to decide on the issue of validity of the action that had been commenced (para. 31).

Framing Aces Inc. v. 0733961 B.C. Ltd. dba Omni Pacific, 2009 BCSC 389

48. In *581582 B.C. Ltd. v. Habib* there was a mistake in the name used by the lien claimant (para. 7). ANE Consulting Ltd. was named as the lien claimant instead of 581582 B.C. Ltd. There was no such company as ANE Consulting Ltd. so the lien had to be extinguished (para. 11).

581582 B.C. Ltd. v. Habib, 2013 BCSC 378

49. Neither *Framing Aces* nor *Habib* engage s. 364(4) of the *BCA*.

50. At paragraph 16 of the appellants' factum the appellants assert that "If a statutory limitation period expires after a company is dissolved, but before the company is revived, the action is statute-barred." The appellants rely on three cases as authority for this proposition.

51. For the above-quoted proposition the appellants first cite *Boake v. Blair*. The issue in *Boake* pertained to adding parties after the expiration of a limitation period (para. 80). At paragraph 83 the learned chambers judge refers to and reproduces section 346 of the *Business Corporations Act*. In this case the plaintiff "revitalized" the company that had been dissolved (para. 58).

Boake v. Blair, 2019 BCSC 830 (in Chambers)

52. At paragraph 85 of *Boake* the learned judge writes: "In my view, limitation periods that expire after a company is dissolved continue to run during any period of dissolution. Thus, a restored company is protected by the *Limitation Act* notwithstanding that restoration occurs after the limitation has expired." He refers to *602533 Ontario Inc. v. Shell Canada Ltd.* (1998), 37 O.R. (3d) 504 (considering different legislation).

Boake v. Blair, 2019 BCSC 830 (in Chambers)

53. Regarding *Boake*, first of all, it is submitted that the view expressed by the learned judge at paragraph 85 was *obiter*. The view was not needed to decide the case. Secondly, the judge referred to 0*602533 Ontario Inc. v. Shell Canada Ltd.* The respondents cited *Shell* at paragraph 37 of this factum but as *Boake* references *Shell* it is worth re-visiting it.

54. In *Shell* the corporate plaintiff had commenced an action while it was dissolved. A limitation period expired during the period of dissolution. Upon learning that 602533 had been dissolved Shell served an amended statement of defence "averring that 602533 had no status to commence or continue the action due to its dissolution . . .". The company was subsequently restored. At first instance the court found that the expiry of the limitation period between time of

dissolution and revival created a right in the defendant to plead a time-bar to the claim. On appeal that decision was upheld.

> *602533 Ontario Inc. v. Shell Canada Ltd.*, 37 O.R. (3d) 504, at pages 3 and 7

55. Relying upon *Yew Bon Tew v. Kenderaan Bas Mara*, and *Martin v. Perrie,* Moldaver J.A. held that "Shell had acquired a post-dissolution legal right by virtue of the lapse of the limitation period and it was entitled to rely upon that right to defeat 602533's claim."

> *602533 Ontario Inc. v. Shell Canada Ltd.*, 37 O.R. (3d) 504*, at* page 6

56. As set out in paragraph 37 of the respondents' factum, Moldaver J.A. had already specified that the right established was the right of the defendant to plead a limitation defence.

57. The third case cited by the appellants in paragraph 16 of their factum is *Yellow Net Marketing and Promotion Inc. v. Vengjen*, a 2015 decision from the Small Claims Court in Ontario decided under s. 209(4) of the *Canada Business Corporations Act*, which is broadly similar to s. 364(4) of the *BCA*, though without the "deeming" language. Paragraph 17 of that decision sets out s. 209(4) of the *CBCA*.

> *Yellow Net Marketing and Promotion Inc. v. Vengjen*, 2015 CanLII 80007 (ON SCSM); [2015] O.J. No. 6411 at para. 17
>
> *Canada Business Corporations Act*, R.S.C. 1985 c. C-44

58. In *Yellow Net* the learned deputy judge purports to follow the decision in *602533 Ontario Inc. v. Shell Canada Ltd.*

> *Yellow Net Marketing and Promotion Inc. v. Vengjen*, 2015 CanLII 80007 (ON SCSM); [2015] O.J. No. 6411 at para. 15

59. It appears the in that case the defendant plead the expiration of a limitation period.

Yellow Net Marketing and Promotion Inc. v. Vengjen, 2015 CanLII 80007 (ON SCSM); [2015] O.J. No. 6411 at para. 3

60. Turning to paragraph 17 of the appellants' factum, it is submitted that there the appellants are essentially re-stating the proposition set out in paragraph 16 with a slightly different emphasis, but with no further assistance.

61. The respondents have already addressed *Boake* and *Shell*, two of the cases cited regarding the "post-dissolution of a legal right". The third case cited by the appellants is *465519 Ontario Ltd. v. Sacks*. In that case the Ontario Court of Appeal purports to rely upon the decision of *Shell* referred to above. It is not readily apparent from the reasons in *465519 Ontario Ltd. v. Sacks*, but it appears that the defendant in that case had plead the expiration of a limitation period since that party was relying upon Rule 21.01(1)(b) of the *Rules of Civil Procedure*.

465519 Ontario Ltd. v. Sacks, 2015 ONCA 175 at para. 2

Rules of Civil Procedure, R. 21.01(1)(b)

62. If the defendant in *Sacks* had not plead a limitation defence then it is submitted that the case was wrongly decided.

63. At paragraph 18 of the appellants' factum *Cornerstone Estates Ltd. v. Polaris Restorations Inc.* is cited as a further example of an action commenced by a dissolved company prior to revival being treated as a nullity under Ontario law. In that case the judge found that the law regarding the effect of after-acquired rights was "definitively laid down" in *Shell*.

Cornerstone Estates Ltd. v. Polaris Restorations Inc., [2001] O.J. No. 2932 at para. 1

64. The respondents disagree with the position of the appellants expressed in paragraphs 19 and 20 of the appellants' factum. While those aspects of the

action that pertained to the 092 were a nullity when the action was filed because the company had been dissolved at time of commencement, by effect of the restoration the company was “deemed to have continued in existence as if it had not been dissolved” (section 364(4) of the *BCA*). Restoration “is without prejudice to the rights acquired by persons before the restoration.” (s. 358(2) of the *BCA*) In this case the appellants did not exercise what would otherwise be rights because the limitation defence was not plead.

65. Paragraph 21 of the appellants’ factum is factually correct but it is submitted that it is preferable to make reference to the amended notice of civil claim rather than to the notice of civil claim, in which case it is paragraph 12 that pleads “On some date after June 21, 2013, but before the date of Judgment, the Defendant, JM Food Services Ltd. transferred some or all of its assets (“Property”) to one or more of the remaining Defendants . . .”. The amended notice of civil claim was filed on September 3, 2021.

Appeal Record pages 9 - 11

66. The respondents disagree with the position of the appellants set out in paragraphs 22 and 23. As already stated, the respondents could have acquired a “post-dissolution legal right” had they plead a limitation defence. No such defence was plead.

67. With respect to paragraph 24 of the appellants’ factum the respondents acknowledge that there are unsatisfactory consequences of 092 having been dissolved. The appellants outline examples of the result of dissolution. It is true that 092 took many steps in the legal proceedings during the years that it had been dissolved. It is also true that some of the appellants participated in that litigation.

68. The appellants go on to assert that “If unsuccessful, it [the dissolved company] will face no repercussions and pay no costs if it was struck and ceased to exist years or decades prior to commencing its court action.”

69. The assertion of the appellants is speculative. What is known is that in this case, on September 6, 2022, when this matter was first set for trial, the respondents were ordered to pay to the Appellants $2,000 for costs thrown away and to pay $20,000 as security for costs within 30 days.

NTA, Fact 19, Document 6

70. The concern of commercial legal uncertainty raised by the appellants in paragraph 28 is a valid concern that many of the cases already cited recognize. That being said, it falls to the legislature to try to determine the benefits of being able to restore a dissolved company against the benefit of finality that limitation bars bring.

Munday (E.C.) Ltd. v. Canada Safeway Ltd., 2004 MBCA 143 at para. 53

71. Continuing to address paragraph 28 of the appellants' factum, on the appellants' point that legal actions taken while a company had been dissolved are nullities; the law remains that in British Columbia, restoration renders those actions valid – at least in circumstances where no limitation defence has been plead.

72. Regarding the unreported case of *Texo*, the respondents have not yet been able to secure that case, but from the description provided in paragraph 28 of the appellants' factum it is not clear whether the "non-existent corporation" is one that had never existed or was a corporation that had been dissolved and could have been restored.

73. In both *Munday* and *Shell* the defendants discovered that the corporate plaintiff had been dissolved and in both cases the defendants amended their defences to include limitation defences.

Munday (E.C.) Ltd. v. Canada Safeway Ltd., 2004 MBCA 143, at para. 53

602533 Ontario Inc. v. Shell Canada Ltd., 37 O.R. (3d) 504, page 3

74. Regarding paragraph 30 of the appellants' factum, the respondents agree that the operation of the restoration legislation in Manitoba (and in British Columbia) renders a statement of claim filed by a dissolved company valid "subject to the rights of third parties." As now repeatedly stated, the expiry of a limitation date during a corporation's period of dissolution does not constitute a right. Rather, the right is for the defendants to plead such a defence.

75. With respect to paragraph 31 of the appellants' factum it is submitted that more of paragraph 66 from *Munday* should be read than the portion quoted by the appellants. Hamilton J.A. writes:

> The statement of claim is not a nullity. The revival of E.C. Munday was retroactive in effect and validated the filing of the statement of claim, subject to the rights of third parties. Safeway's limitation date defence is a third party right and, therefore; the effective filing date of the statement of claim is February 5, 2003 (the date of revival).
>
> *Munday (E.C.) Ltd. v. Canada Safeway Ltd.*, 2004 MBCA 143, at para. 66

76. Regarding paragraph 32 of the appellants' factum, the respondents submit that in *Munday* the effective filing date of the statement of claim was the date of revival was because the defendant there had filed a limitation date defence.

(e) Fifth: The Trial Judge was Correct in Applying s. 364(4) of the BCA

77. The respondents did not directly raise how the trial judge applied s. 364(4) of the *BCA* in their factum but in a case such as this correctness is the test. That being said, it is not incumbent on this Court to decide this issue in order to resolve this appeal.

78. In *Natural Nectar Products Canada Ltd. v. Theodor*, 1990 CanLII 834 (BCCA) the Court of Appeal dealt with "the decisions of a trial judge who held that a writ of summons issued during a period when the plaintiff had been struck off the Register of Companies was made valid by subsequent restoration of the company to the Register."

> *Natural Nectar Products Canada Ltd. v. Theodor*, 1990 CanLII 834 (BCCA) at page 1

79. At that time the court was interpreting sections 286 and 287 of the *Company Act*, [R.S.B.C.] 1979 c. 59.

Natural Nectar Products Canada Ltd. v. Theodor, 1990 CanLII 834 (BCCA) at pages 3 and 4

80. Those sections were broadly similar to the restoration sections of the *BCA* (including sections 358(2) and 364).

Company Act, [R.S.B.C.] 1979 c. 59

Business Corporations Act, SBC 2002 c. 57

81. At page eight of *Natural Nectar Products*, Hinkson J.A., writing for the Court, reproduced the court order restoring the company that had been struck and wrote:

> In drawing the form of order counsel for the respondent inserted the words after, . . . continued in existence "as if its name had never been struck off" but the judge did not include those words in the order made by him. In my opinion, it was open to him to do so if he considered it appropriate in the circumstances. He would then have been exercising a power conferred by s. 287. But he did not do so.

Natural Nectar Products Canada Ltd. v. Theodor, 1990 CanLII 834 (BCCA) at page 8

82. Beginning at page 9 of the decision, and continuing to the end at page 11 of the decision Hinkson J.A. sets out the purpose of s. 286. He went on to hold that the judge below did not include wording that is now found in s. 364(4) of the *BCA*. The absence of that wording in the order for the restoration of the company meant that the late-filed writ of summons was not valid.

Natural Nectar Products Canada Ltd. v. Theodor, 1990 CanLII 834 (BCCA) at pages 9 - 11

83. Essentially, there the court decided that the order restoring the company did not have retrospective effect to render valid a writ of summons that had been issued out of time because the order did not include the words “as if its name had never been struck off.” Hinkson J.A. states that the inclusion of those words would have had the effect of restoring the company “as if it had never been struck.” At that time the inclusion of such

wording was discretionary wording. In section 364(4) of the *BCA* very similar wording is set out.

> *Natural Nectar Products Canada Ltd. v. Theodor*, 1990 CanLII 834 (BCCA) at page 10

84. Under the heading of "Effect of Restoration or Reinstatement" of the *British Columbia Company Law Practice Manual*, CLE BC the authors write:

> Under prior legislation, problems could arise if the order did not provide the company's existence was deemed to have continued as if the company had never been dissolved; see *Natural Nectar Products Ltd. v. Theodor*, 1990 CanLII 834 (BC CA). This problem appears to have been solved by s. 364(4), which expressly provides that a restored company is deemed to have continued in existence as if it had not been dissolved.
>
> *British Columbia Company Law Practice Manual*, CLE BC, page 15-54

85. The *BCA* was enacted in 2002.

> *Business Corporations Act*, SBC 2002 c. 57

86. It is submitted that based on the decision in *Natural Nectar Products Canada Ltd. v. Theodor*, which had it been decided when s. 364(4) of the *BCA* was in effect that the writ would have been found to be valid.

87. In *Munday (E.C.) Ltd. v. Canada Safeway Ltd.*, 2004 MBCA 143 Hamilton J.A. sets out the task before that court:

> The arguments of Safeway and E.C. Munday (non-retroactivity versus retroactivity) reflect a debate that exists in the case law in Manitoba and in other jurisdictions. By this appeal, we have been asked to resolve the debate in Manitoba.
>
> *Munday (E.C.) Ltd. v. Canada Safeway Ltd.*, 2004 MBCA 143 at para. 16

88. The court sets out the restoration sections of *The Corporations Act*, and reviews *Shell* and the case law that has developed in various Canadian jurisdictions on whether the various restoration sections have retroactive effect.

> *Munday (E.C.) Ltd. v. Canada Safeway Ltd.*, 2004 MBCA 143 at paras. 17 – 26

89. The court quotes from the comments on retroactivity of Wayne D. Gray in *The Annotated Canada Business Corporations Act*.

Munday (E.C.) Ltd. v. Canada Safeway Ltd., 2004 MBCA 143 at para 27

90. Mr. Gray writes with respect the retrospective effect of what was then the pending *CBCA*:

> Subsection 209(4) now goes to great lengths to make it clear that a revival restores the revived corporation to its previous position in law to the same extent as if it had never been dissolved.

Munday (E.C.) Ltd. v. Canada Safeway Ltd., 2004 MBCA 143 at para. 27

91. In Mr. Gray's following paragraph he comments on some of the problems he anticipated in applying the legislation that was about to be enacted because of what he saw as unclear language.

Munday (E.C.) Ltd. v. Canada Safeway Ltd., 2004 MBCA 143 at para. 27

92. Hamilton J.A. then went on reviewing cases that had interpreted the legislation.

Munday (E.C.) Ltd. v. Canada Safeway Ltd., 2004 MBCA 143 at paras. 28 – 39

93. She then employed tools of statutory interpretation.

Munday (E.C.) Ltd. v. Canada Safeway Ltd., 2004 MBCA 143 at paras 40 – 50

94. She concluded that s. 202(2) has retroactive effect. "The revival of E.C. Munday validated the statement of claim."

Munday (E.C.) Ltd. v. Canada Safeway Ltd., 2004 MBCA 143 at para. 50

95. In the case at bar the trial judge correctly applied s. 364(4) of the *BCA*.

96. The word “proceedings” is not defined in the *BCA*, but “proceeding”, in the *Supreme Court Civil Rules*, is defined to include 092’s action.

Supreme Court Civil Rules, Rule 1-1(1)

97. The trial judge was able to draw upon recent cases already referred to (*Rising Star* and *Yung*) as well as *Wang v. Sun*, 2021 BCSC 2123 at para 171 – 173.

Wang v. Sun, 2021 BCSC 2123

98. In essence, the trial judge made the same decision as was made in *Munday* where that court found:

> The statement of claim is not a nullity. The revival of E.C. Munday was retroactive in effect and validated the statement of claim, subject to the rights of third parties.
>
> *Munday (E.C.) Ltd. v. Canada Safeway Ltd.*, 2004 MBCA 143 at para. 66

99. In the case at bar the trial judge found that the restoration was of retroactive effect, as contemplated by s.364(4) of the *BCA*, thus validating the notice of claim and amended notice of claim, as they relate to 092. The validation was subject to the after-acquired rights of persons, including the rights of appellants to plead a limitation date defence. In this case the appellants did not make such a pleading.

Conclusion

100. This appeal must fail because:

(a) the trial judge did not “resort” to the wording of the *CBCA* – she properly referred to a case that referred to that statute;

(b) the trial judge did not err in relying on paragraphs 68-69 of *Yung;*

(c) the trial judge did not err in deciding not to give effect to s. 346.(1)(a) of the *BCA*. Section 346(1)(a) has no application to the case at bar; and

(d) the trial judge did not err in not giving effect to s. 358(2) of the *BCA*. While restoration of a company is subject to after-acquired rights of persons, the expiry of a limitation period while a company is dissolved does not constitute an after-acquired right. Rather, a pleading alleging a limitation date defence must be filed in order to create an after-acquired right.

101. The trial judge was correct in finding that 092 is deemed to have continued to exist by operation of section 364(4) of the *BCA*, and that in the circumstances, the expiry of the limitation period should not be deemed to be a bar to the action.

PART 4 - NATURE OF ORDER SOUGHT

102. The respondents seek an Order that:

(a) this appeal be and is hereby dismissed ; and

(b) the appellants pay the respondents their costs of this appeal, assessed under Scale 1 of Schedule 1 of the Court of Appeal Rules, B.C. Reg. 120/2022.

103. All of which is respectfully submitted.

Dated at the City of North Vancouver, Province of British Columbia, April 16 of 2024.

David Grunder

David Grunder
Counsel for the Respondents

APPENDICES: LIST OF AUTHORITIES

Authorities	**Page # in factum**	**Para # in factum**
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APPENDICES: ENACTMENTS

BUSINESS CORPORATIONS ACT [SBC 2002] CHAPTER 57

Part 10 — Liquidation, Dissolution, Restoration and Reinstatement

Division 1 — Definitions and Application

Effect of dissolution

344 (1) Subject to sections 346 and 347, when a company is dissolved under this Part or under section 422 or 423, the company ceases to exist for any purpose.

. . .

Dissolved companies deemed to continue for litigation purposes

346 (1) Despite the dissolution of a company under this Act,

(a)a legal proceeding commenced by or against the company before its dissolution may be continued as if the company had not been dissolved, and

(b)a legal proceeding may be brought against the company within 2 years after its dissolution as if the company had not been dissolved.

. . .

Division 11 — Restoration and Reinstatement

Definitions and interpretation

354 (1) In this Division:

"full restoration" means a restoration of a company that is not a limited restoration;

"limited restoration" means a restoration of a company that is for a limited period under section 359 (1) or 361 (1).

. . .

Applications to the registrar for restoration

356 (1) A person may apply to the registrar to restore a company.

(2) An application may be made under subsection (1)

(a) for a full restoration, by a related person, or

(b) for a limited restoration, by any person.

. . .

(4) An application to the registrar under subsection (1)

(a) must, if the dissolution of the company occurred before the coming into force of this Act, be made within 10 years after the dissolution, or

(b) may, in any other case, be made at any time.

. . .

Registrar must restore

358 (1) Subject to section 363, unless the court orders otherwise in an entered order of which a copy has been filed with the registrar, after a restoration application under section 356 is filed with the registrar, the registrar must, on any terms and conditions the registrar considers appropriate, restore the company.

(2) Subject to section 368, unless the court orders otherwise, a restoration under subsection (1) of this section is without prejudice to the rights acquired by persons before the restoration.

. . .

Effect of restoration of company

364 (1) A company is restored under section 358 (1) or 362 (2) when the registrar alters the corporate register to reflect that restoration and, whether or not the requirements precedent and incidental to restoration have been complied with, a notation in the corporate register that a company has been restored is conclusive evidence for the purposes of this Act and for all other purposes that the company has been duly restored as of the date shown and the time, if any, shown in the corporate register.

. . .

(4) A company that is restored is deemed to have continued in existence as if it had not been dissolved, and proceedings may be taken as might have been taken if the company had not been dissolved.

CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985 c. C-44

. . .

Revival

209 (1) When a corporation or other body corporate is dissolved under this Part, section 268 of this Act, section 261 of the *Canada Business Corporations Act*, chapter 33 of the Statutes of Canada, 1974-75-76, or subsection 297(6) of the *Canada Not-for-profit Corporations Act*, any interested person may apply to the Director to have the dissolved corporation or other body corporate revived as a corporation under this Act.

Articles of revival

(2) Articles of revival in the form that the Director fixes shall be sent to the Director.

Certificate of revival

(3) On receipt of articles of revival, the Director shall issue a certificate of revival in accordance with section 262, if

(a) the dissolved corporation or other body corporate has fulfilled all conditions precedent that the Director considers reasonable; and

(b) there is no valid reason for refusing to issue the certificate.

Date of revival

(3.1) The dissolved corporation or other body corporate is revived as a corporation under this Act on the date shown on the certificate of revival.

Rights and obligations preserved

(4) Subject to any reasonable terms that may be imposed by the Director, to the rights acquired by any person after its dissolution and to any changes to the internal affairs of the corporation or other body corporate after its dissolution, the revived corporation is, in the same manner and to the same extent as if it had not been dissolved,

(a) restored to its previous position in law, including the restoration of any rights and privileges whether arising before its dissolution or after its dissolution and before its revival; and

(b) liable for the obligations that it would have had if it had not been dissolved whether they arise before its dissolution or after its dissolution and before its revival.

COMPANY ACT, [R.S.B.C.] 1979 C.59

Restoration to register

286. (1) Where a company has been dissolved, or the registration of an extraprovincial company has been cancelled under this Act or any former *Companies Act*, the court may, if it is satisfied that it is just that the company or extraprovincial company be restored to the register, not more than 10 years after the date of the dissolution or cancellation, on application by the liquidator, a member, a creditor of the company or extraprovincial company, or any other interested person, make an order, subject to the conditions and on the terms the court considers appropriate, restoring the company or extraprovincial company to the register.

(2) Where a company or an extraprovincial company is restored to the register under subsection (1), the company shall be deemed to have continued in existence, or the registration of the extraprovincial company shall be deemed not to have been cancelled, and proceedings may be taken as might have been taken if the company had not been dissolved, or the registration of the extraprovincial company had not been cancelled.

. . .

Power of court

287. In an order made under section 286 the court may give directions and make provisions it considers appropriate for placing the company or extraprovincial company and every other person in the same position, as nearly as may be, as if the company had not been dissolved or the registration of the extraprovincial company cancelled; but, unless the court otherwise orders, the order shall be without prejudice to the rights of parties acquired prior to the date on which the company or extraprovincial company is restored to the register.

. . .

Rules of Civil Procedure, R. 21.01(1)(b)

Courts of Justice Act, R.R.O. 1990, Regulation 1994, *Rules of Civil Procedure*, R. 21.01(1)(b)

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

Where Available

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

. . .

SUPREME COURT CIVIL RULES

[Last amended January 15, 2024 by B.C. Reg. 277/2023]

Definitions

(1) In these Supreme Court Civil Rules, unless the context otherwise requires:

. . .

"proceeding" means an action, a petition proceeding and a requisition proceeding, and includes any other suit, cause, matter, stated case under Rule 18-2 or appeal;

THE CORPORATIONS ACT, C.C.S.M. C225

Continuation of actions

219(2) Notwithstanding the dissolution of a corporation under this Act,

(a) a civil, criminal or administrative action or proceeding commenced by or against the corporation before its dissolution may be continued as if the corporation had not been dissolved;

(b) a civil, criminal or administrative action or proceeding may be brought against the corporation within two years after its dissolution as if the corporation had not been dissolved; and

(c) any property that would have been available to satisfy any judgment or order if the corporation had not been dissolved remains available for that purpose.