

Ontario's New *Limitations Act*

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1. Introduction

Much has been written on the effects of the new Limitations Act.¹ We, therefore, provide a brief outline of the new legislation. The *Limitations Act, 2002*, was passed in December 2002. The Lieutenant Governor issued a proclamation fixing January 1, 2004 as the day on which the *Act* came into force. The new *Act* represents the first major overhaul of limitations legislation in Ontario in 35 years.

On January 1, 2004, Parts II and III of the current *Act* were repealed, and Part I of the current *Act* dealing with real property matters was renamed the *Real Property Limitations Act*. The new *Act* will apply to claims pursued in court proceedings, including equitable claims and proceedings by the Crown.

The *Act* will not apply to the proceedings under the *Judicial Review Procedure Act*, proceedings under the *Provincial Offences Act*, certain proceedings based on aboriginal and treaty rights and Appeals. The

¹ See, e.g., G. Mew, "Limitations Act, 2002" @ www.practicepro.ca/practice/limitation.asp; Law Society of Upper Canada, CLE Program, "The Limitations Act, 2002", Toronto, 2003.

Crown, which is not bound by the current *Limitations Act*, will be bound by the new *Act*. However, section 16 of the new *Act* sets limits as to the types of proceedings in which the limitations defence will be available in proceedings initiated by the Crown.

2. Basic Limitation Period

Section 4 of the *Act* creates a *basic limitation period of 2 years, running from the day the claim is discovered or ought to have been discovered*. The basic limitation period replaces the general limitation periods found in the present *Limitation Act*, as well as many of the special limitation periods currently scattered in other statutes.

Section 5 of the new *Act* codifies the existing discoverability principle in statutory language as follows:

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
 - 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;
- (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).

With the exception of subsection 5(1)(a)(iv), section 5 of the *Act* essentially codifies the common law discoverability rule. Subsection 5(1)(a)(iv), however, creates a new criterion. This provision appears to give rise to practical considerations of proportionality. For example, a hairline crack in the basement may or may not develop into a problem that warrants bringing legal action. Thus, the claimants are arguably not required to commence a proceeding in order to preserve their rights until the problem could no longer be said to be trivial.

Subsection 5(2) creates a rebuttable presumption that a person with a claim knew of the matters referred to in subsection 5(1)(a) on the day the act or omission on which the claim is based took place. To rebut

the presumption, the claimant would have to establish that the claim was not discovered until some other date, based on the four criteria set out in subsection 5(1)(a).

3. Ultimate Limitation Period

The *Act* also introduces an ultimate limitation period of 15 years, after which a claim may be barred, even if the material facts have not been discovered. The time in relation to the ultimate limitation period would run from the day the act or omission on which the claim is based takes place. No proceeding can be commenced once the ultimate limitation period has run, irrespective of when the claim was discovered.

There are some exceptions to the absolute imposition of the ultimate limitation period. For instance, the ultimate limitation period does not run during the incapacity of the claimant, during the person's minority or during any time in which the person against whom the claim is made willfully concealed essential facts or misled the person with the claim.

Section 16 (no limitation period) and section 17 (undiscovered environmental claims) prevail over the provisions of section 15 with the result that the types of claims described in sections 16 and 17 are not subject to the ultimate limitation period.

4. Exceptions to Basic Framework

There are exceptions to the basic framework of the new *Act*. Special limitation periods are listed in the Schedule to Section 19. These limitation provisions, found outside of the main *Act*, will continue to apply to the claim in question and would prevail over the conflicting provisions found in the new *Act*. A limitation period set out in any other statute will not be effective unless it is listed in the Schedule. The noteworthy limitation periods in the Schedule are sections 31 and 36 of the *Construction Lien Act*.

In the past, if a limitation period was not provided for, there either was none, or, in the case of equitable relief, the doctrine of laches would apply. Section 16 of the new *Act* makes provision for proceedings for which there is no limitation period. There will only

be no limitation period if the claim is one listed in ss. 16 and 17. As a result, for example, claims which previously had no limitation, including claims for breach of fiduciary duty, will now be subject to the 2 year general limitation period.

It is important to note that the special limitation periods listed in the schedule to Section 19 are still subject to certain principles established by the new *Act*, including the provisions regarding minors, incapable persons, dispute resolution and the ultimate limitation period.

5. Transition

The transition rules apply to claims based on acts or omissions that took place before January 1, 2004, and in respect of which no proceeding has been commenced before that date (section 24(2)).

The first determination is whether the limitation period applicable before January 1, 2004 has expired. If so, the claim cannot be revived using the new *Act*.

If the former limitation period has not expired, the next determination is whether there would be a limitation period under the new *Act* if the act or omission had occurred in 2004.

If there would be no limitation period under the new *Act* (sections 16 and 17), there is no limitation period as prescribed by the *Act*.

If there would be a limitation period under the *Act*, the next question is whether the claim was discovered (section 5) before January 1, 2004. For claims discovered before the new *Act* comes into force, the former limitation period applies. For claims that have not been discovered before the new *Act* comes into force, the new *Act* would apply as if the act or omission had taken place on the date the new *Act* came into force.

There are similar rules if there was no former limitation period (subsection 24(6)). If there was no former limitation period and there is no limitation period under the new *Act* (sections 16 and 17), there will be no limitation period. If there was no former limitation period, and there would be a limitation period under the new *Act*, the issue

becomes whether the act or omission was discovered before January 1, 2004. If the act or omission was discovered before January 1, 2004, there will be no limitation period (the former rules govern). If the act or omission was discovered after January 1, 2004, the limitation period prescribed by the new *Act* applies.

6. Circumstances that Delay Running of Time

There are a number of circumstances that delay, interrupt or re-start the running of time, including the following:

(a) Parties under a Legal Disability

Time does not run against minors (section 6) or incapable persons (section 7) who are not represented by a litigation guardian.

(b) Assaults and Sexual Assaults

Under section 10 of the *Act*, the basic limitation period does not start to run in assault cases during any time in which the claimant is

incapable of commencing the proceeding because of his or her physical, mental or psychological condition.

Where one of the parties to the assault had an intimate relationship with the claimant or was someone on whom the claimant was dependent, there is a rebuttable presumption that the claimant was incapable of commencing the proceeding earlier than it was commenced.

A similar rebuttable presumption is provided for in all sexual assault cases.

(c) Attempted Resolution

Pursuant to section 11 of the *Act*, the running of time is suspended during the time that the parties have agreed to submit the resolution of their dispute to an independent third party.

If the ADR initiative is unsuccessful, the time resumes to run when the dispute resolution is terminated or a party terminates or withdraws from the agreement.

(d) Acknowledgments

Under section 13, acknowledgments of liability in writing restart the clock.

(e) Concealment

Section 15(4)(c) of the *Act* provides that the ultimate limitation period does not run during any time in which the person against whom the claim is made, (i) willfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or (ii) willfully misleads the person with the claim as to the appropriateness of a proceeding as means of remedying the injury loss or damage.

(f) Environmental Claims

Section 17 provides that there is no limitation period in respect of an environmental claim that has not been discovered. The term “environmental claim” is defined as a “a claim based on an act or omission that caused, contributed to, or permitted the discharge of a contaminant into the natural environment that has caused or is likely to cause an adverse effect”.

The practical effect of section 17 is that the ultimate limitation period will not bar an undiscovered claim. However, once a claim has been discovered, the basic two year limitation period applies.

7. Contracting Out

Under the current law, it seems to be well settled that the parties can agree not to enforce the limitation period. However, under the new *Act*, parties can no longer contract out of a limitation period. Section 22(1) provides that “a limitation period under this *Act* applies despite any agreement to vary or exclude it”.

Agreements entered into before January 1, 2004 are grandfathered.

While it is clear that under the new framework the agreements not to enforce the limitation period are not effective, one remaining question is whether or not the new *Act* will prevent the parties from agreeing not to raise a limitation defence.

One might take the position that a *tolling agreement*, whereby a party agrees not to enforce a limitation period that has already started to run, is not an agreement to “vary or exclude” a limitation period. Another view would be that tolling agreements are still permissible, as they do not seek to “vary or exclude” a limitation period, but, merely, to ensure that a limitation defence will not be pleaded in respect of time taken to review and discuss a pending dispute. It remains to be seen how the courts will interpret section 22(1) of the *Act*.

8. Notice to the Crown

Notice provisions in actions against the Crown are generally unaffected by the new *Act*. However, under the new legislation, both

the *Municipal Act, 2001* and *Public Transportation and Highway Improvement Act* are amended to provided that a failure to give notice or insufficiency of the notice is not a bar to the action if the Judge finds that there is a reasonable excuse for the want or the insufficiency of the notice and the municipality (or Ministry) is not prejudiced in its defences (sections 42 and 45).

9. Defendant can start the clock

In the case of parties under a legal disability, the Defendant can start the clock running by making an application or a motion to a judge to have a litigation guardian appointed for a potential claimant pursuant to section 9(2).

10. Other important provisions

It is important to note that under section 25 of the *Act*, section 8 of the *Negligence Act* is repealed. In the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first wrongdoer was served with the claim in respect of

which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.

11. Effect on the Construction Industry

As set out above, s. 19 of the *Limitations Act, 2002* provides that limitation periods contained in other *Acts* that are not listed in the Schedule will be of no effect once the new *Act* comes into force. The Schedule to section 19 of the *Act* specifically includes ss. 31 and 36 of the *Construction Lien Act* as provisions which will remain in force. Therefore, the 45 day limitation to preserve a lien and the 90 day period to perfect a lien still apply. The reason why section 37 of the *Construction Lien Act* is not listed is presumably that section 19 deals with limitation periods applying to "claims", which are defined in s. 1 as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". Section 37 does not limit the time to bring such a claim, but rather describes the consequences of failing to set an action down for trial or obtaining an order for the trial of an action after an action was commenced.

Claims against design professionals and trust claims would appear to be governed by the general two year limitation, and the 15 year ultimate limitation for economic loss claims arising from design issues. It would also appear that there may be no limitation related to design professionals who give advice related to environmental issues which results in a claim.

Since section 19 of the *Limitations Act, 2002* contains no provision with regard to the limitation periods in surety bonds that would alter the *Act's* basic limitation period. It would appear that the new limitation period for a claim under a Labour and Material Payment Bond or a Performance Bond would be two years. As seen, it is no longer possible to contract out of the limitation periods of the new *Act*. On the plain reading of the *Act*, therefore, contractual provisions such as the requirement that an action under a Labour and Material Payment Bond be commenced within 1 year after the date on which the principal ceased work on the contract, would appear to be no longer enforceable.

