Update on Legislative and Regulatory Developments

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A. Introduction

There is a series of newly amended statutes and regulations that will affect the way construction services are delivered and construction disputes are litigated in this province. For example, Ontario, like other provinces and territories, is moving toward objective-based building and fire codes. Bill 124 represents the most comprehensive changes to the Building Code in 25 years. To take another example, the new *Limitations Act, 2002* is the first major overhaul of the law of limitations in Ontario in 35 years. There are also proposed changes to parts of the *Construction Lien Act*.

This paper will discuss the main changes to the building regulations and of the changes regarding limitations periods in Ontario and briefly outline the proposed changes to the *Construction Lien Act*.

B. Proposed Amendments to the *Construction Lien Act*

In early 2003, the Ministry of the Attorney General sought opinions and comments regarding a series of proposals for reform to the

Construction Lien Act. The proposals were brought to the Ministry of the Attorney General by the Council of the Ontario Construction Associations and the Ministry thereafter heard from all interested parties regarding the proposed changes.

There were three proposed changes to the *Construction Lien Act*:

1. Amend the *Act* to require that holdback on each project be held in a separate, interest bearing account (in the joint names of the owner and of the primary contractor). The Crown would be exempt from this provision where it is the "owner";

2. Amend the *Act* to clarify the requirement for automatic disbursal of holdback upon expiry of lien rights; and,

3. Amend the *Act* to provide for continuation of all lien rights through to the substantial completion of the project "except where early release of holdback has occurred".[1]

[1] Ministry of the Attorney General, *Construction Lien Act* discussion document of proposed amendments, March, 2003, at p.1

1. Separate Holdback

Under Part IV of the *Construction Lien Act,* an owner, contractor or subcontractor that is a "payer" on a contract or subcontract under which a lien may arise is required to "retain a holdback equal to 10 per cent of the price of the services or materials" as they are supplied under the contract or subcontract until all liens that might be claimed against the holdback have expired, are vacated and security posted, or otherwise satisfied.[2] Although other jurisdictions, such as Manitoba and British Columbia, require that the holdback be retained in a separate account, there is no such requirement under the *Construction Lien Act* requiring the holdback to be held in a special segregated account for each project or that the holdback be held in trust.

Proponents of these amendments argue that the clarification and requirement that funds be segregated would strengthen the holdback provisions and ultimately reduce the risk that the holdback would be

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[2] Section 22 (1), *Construction Lien Act*, R.S.O. 1990, c. C. 30, as amended.

commingled with other funds and thereby strengthen the security that the *Act* intends to create through the holdback provisions.

It is proposed that holdback over a total minimum value of $200,000, (a $2 million or more contract or subcontract) be held in a separate, interest bearing trust account in a bank, trust company or credit union in the joint names of the owner and the "primary contractor". Interest would accrue on this project account and it would be payable on a *pro rata* basis to all beneficiaries of the trust. This requirement, of course, would not apply to the Crown where the Crown is an "owner" as defined by the *Act.*

As each "payer" upon a contract or subcontract would be required to maintain a holdback, although the proposed change is in reference to "primary contractor", any owner, excluding the Crown, contractor or subcontractor whose contracts are in access of $2 million, under the proposal, will be required to maintain a separate interest bearing holdback account.

2. Automatic Disbursal of Holdback

It was proposed that the *Act* should contain a provision for automatic disbursal of holdback, from the separate segregated trust accounts, upon expiry of the lien rights.

As set out above, the payer upon a contract or subcontract for which a lien may arise is required to retain a 10% holdback until all liens that may be claimed against the holdback have expired, satisfied, discharged or the lien vacated and security posted. Section 25, payment of holdback where a subcontract is certified complete, and 26, payment of basic holdback, of the *Act* set out when a payer "may, without jeopardy" make payments reducing or discharging the amount of holdback that the payer is required to retain. These sections are permissive, rather than mandatory, whereas the requirement to retain a holdback itself is mandatory.

The Council of Ontario Construction Associations typically found that in practice, release of holdback typically occurs approximately 6

months following substantial performance and the publication of the Certificate of Substantial Performance of a given project. Payment of the holdback is delayed, and used as leverage against performance of any final deficiencies or completion of all work on a project. This, of course, is not the intended purpose of the *Act.* One wonders, however, whether absent lien legislation, final payment would be deferred as a bargaining chip in any event. In fact, this was one of the very problems that lien legislation was designed to remedy in the first place.

It is proposed that the holdback applicable to a particular subcontract be paid upon substantial performance of the applicable subcontract and the expiry of the period in which a lien may be claimed and no lien having been preserved.

At present, the *Act* appears to have a gap. If no lien is preserved, then the holdback *may* be paid. However, there is no *requirement* that the holdback in fact be paid and a payer, upon expiry of the time in which liens may be preserved is then permitted to set-off against the

holdback as all liens have expired or use the payment of holdback as leverage. (But you sue in debt, *that* is how it gets paid). In circumstances where a general contractor or subcontractor is nervous regarding payment of the holdback, they may have no alternative but to preserve the lien and seek payment of the holdback in that manner.

The requirement of automatic disbursal of holdback upon the expiry of the liens is consistent with operation of the *Act* and the security that it intends to provide to subcontractors.

3. Uniformity of Expiration of Lien Rights

Under the current *Act,* the rights of a contractor expire 45 days next following the earlier of abandonment, completion or publication of the Certificate of Substantial Performance. The lien rights of “other persons”, such as subcontractors and suppliers, expire 45 days next following the earlier of the date on which the person last supplied

services or materials, or the completion, abandonment, or publication of the Certificate of Substantial Performance.

Under the existing *Act*, lien rights of those persons that supply services or materials early in the project may expire well before the general contractor has applied for release of the holdback. For example, the excavator may be on the site for the first month of a 20 month project. The excavator's lien rights will expire 45 days next following the last supply of service or materials by the excavator. The Ontario Council of Construction Associations is of the view that although these trades could preserve a lien, this is a drastic step that in many cases may affect the business relationship of the parties and may freeze the flow of funds on a project. The Associations are also of the view that preserving the rights of all subcontractors until the day of substantial performance of the project, places all trades in the same position as the majority of other subcontractors on a project will have 45 days following the publication of the Certificate of Substantial Performance to preserve their liens.

It is therefore proposed that the *Act* be amended, so that the lien rights of all parties, contractors, subcontractors and suppliers, would extend through to the time of substantial performance of the general contract, unless there has been an early release of holdback.

The current procedure for certification of completion of a subcontract under Section 33 would remain and in that case, the subcontractors lien rights would expire 45 days following the issuance of the certificate of completion of the subcontract. It should be noted, however, that in the current *Act* there is no requirement that the certification of completion of the subcontract be published and the current proposals will not require a change in that practice. This of course may lead to hardship if subcontracts are certified complete, holdback released 45 days later, which may leave suppliers to that subcontractor exposed to having their lien rights expire.

4. Update

The Ministry of Attorney General has received comments from all parties of the construction industry, but now advises that the

proposed changes were never tabled and may no longer be a priority of the new government following the election.

C. Building Code Reforms

1. Introduction

In the early 1990s, a coordination process was initiated to allow for greater harmonization of the national, provincial and territorial codes. Ontario, together with other provinces and the Canadian Commission on Building and Fire Codes, is attempting to move toward objective based codes, i.e. codes that focus on the fundamental purposes of the respective codes rather than on prescriptive requirements. The idea is to create more clarity and increased consistency in the application of the codes and to achieve greater flexibility to incorporate future technical innovation.[3]

[3] See Ontario Ministry of Municipal Affairs and Housing, "2003 Ontario Codes Public Consultation" @ www.obc.mah.gov.on.ca/userfiles/HTML/nts_4_10651_1.html.

To this end, the Minister of Municipal Affairs and Housing, on March 21, 2000, appointed a Building Regulatory Reform Advisory Group (BRRAG). BRRAG was given a mandate to prepare a report and make recommendations to address concerns regarding the way in which new construction in Ontario was reviewed, approved and inspected. The Advisory Group was further asked to examine the accountability among key practitioners in the design, construction and approval process and the overall enforcement and administration process.[4]

BRRAG's work resulted in Bill 124, the *Building Code Statute Law Amendment Act, 2002*,[5] representing the most comprehensive changes to the Building Code and the Code's enforcement in 25 years. The *Act* received Royal Assent on June 27, 2002. At the time of writing, the *Act* is partially in force. A number of sections were proclaimed in force on September 1, 2003.[6] These sections allow building code officials and other building code practitioners to take examinations

[4] Building Regulatory Reform Advisory Group, *Knowledge Accountability Streamlining: Cornerstones for a New Building Regulatory System in Ontario*, available @ www.obc.mah.gov.on.ca/userfiles/HTML/nts_4_7752_1.html.
[5] S.O. 2002, c. 9.
[6] Sections 5, 6(1) and (2), 16, 24, 25, 27, 31(1), 34, 40(1), 41(1), 43, 51(6), (9), (11), (12), (13), (14) and (15), 53(3), 54, 55, 57 and 58.

related to the new Building Code. The remaining provisions, except ss. 20(3) and 51(3), which still require proclamation,[7] will come into force on July 1, 2005.[8] Those provisions that are yet to be proclaimed govern the qualifications for building officials, mandatory registration for certain classes of designers and private building inspectors, the use of a common building permit application form, time frames for the permit process, stages of construction when a building must be inspected, permit fees as well as the appeal process.

In this paper, we will focus on three highlights to the legislative changes to the *Building Code Act.* Those changes relate to limitation periods, privatization of building inspections, increased training for building inspectors and training and certification for engineers, architects and builders.

2. Limitation Period

At present, with respect to defects in building construction, the limitation period within which an action must be commenced begins

[7] s. 57 of the Act.
[8] O. Gaz. 2003, p. 2022.

to run from the date defect is discovered, known as the discoverability rule. From the date that the defect is discovered, the party has 6 years to commence an action to recover damages with respect to the defect. This, of course, led to decisions such as *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*,[9] where a subsequent purchaser of a building was allowed to recover economic loss from the general contractor who had negligently constructed the building almost 20 years after the construction was completed.

During BRRAG's discussions, there were those that were of the view that the current state of the law was acceptable, others thought that the limitation period of 15 years should apply, still others believed that a 10 year limitation period was more appropriate.

BRRAG's Recommendation C.3 reads as follows:

C.3.i: The Chair and Vice-Chairs recommend that an ultimate limitation period of 10 years be introduced for claims for damages, other than bodily injury resulting from construction defects (economic loss).

[9] (1995), 121 D.L.R. (4th) 193 (S.C.C.).

The 10-year ultimate limitation period should also apply to existing buildings from the date of enactment.

C.3.ii: The Chair and Vice-Chairs recommend that the BCA be amended to require that building officials issue occupancy permits and that the issuance of such a document be used as a starting point for the ultimate limitation period.

This recommendation partially made its way into the new *Limitations Act, 2002*,[10] which will come into force on January 1, 2004:

Ultimate limitation periods

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

General

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

Exception, purchasers for value

(3) Despite subsection (2), no proceeding against a purchaser of personal property for value acting in good faith shall be commenced in

[10] S.O. 2002, c. 24, Schedule B.

respect of conversion of the property after the second anniversary of the day on which the property was converted.

Period not to run

(4) The limitation period established by subsection (2) does not run during any time in which,

(a) the person with the claim,

(i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and

(ii) is not represented by a litigation guardian in relation to the claim;

(b) the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim; or

(c) the person against whom the claim is made,

(i) wilfully 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) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of

remedying the injury, loss or damage.

Burden

(5) Subject to section 10, the burden of proving that subsection (4) applies is on the person with the claim.

Day of occurrence

(6) For the purposes of this section, the day an act or omission on which a claim is based takes place is,

(a) in the case of a continuous act or omission, the day on which the act or omission ceases;

(b) in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs;

(c) in the case of a default in performing a demand obligation, the day on which the default occurs.

Thus, BRRAG's recommendation that an ultimate limitation clause be established was followed, but the period was extended to 15 years rather than the recommended 10 years. The ultimate limitation period provisions are linked to new provisions introducing mandatory insurance for Registered Code Agencies[11] and designers, who, under Ontario Regulation 305/03, must obtain insurance

[11] See infra, chapter C.3.

coverage that indemnifies them against liability imposed by law arising out of the performance or failure to perform their services.[12] There is not, at this point, a similar insurance requirement for builders. An advisory committee of stakeholders will be formed with a mandate to develop options for improved accountability for builders. The Building Advisory Committee will be asked to report back on this issue within six months of being formed.

3. Privatization of Building Inspections

One of the most significant questions addressed by the Advisory Group was whether practitioners, other than municipalities, should be allowed to carry out reviews of plans, inspections and code enforcement services. The municipality of Victoria, Australia, was suggested by some as a model. In that municipality, private sector firms have been given virtually all of the powers and responsibilities of municipalities with regard to code inspections and enforcement, the idea being that increased competition would lead to savings and efficiency. The Advisory Group accepted private sector competition,

[12] O Reg. 305/03, s. 2.21.2. Most of this Regulation will come into force on July 1, 2005.

but within clearly defined limits. Its Recommendations B. 8 and B. 9 read as follows:

B. 8

The Chair and Vice-Chairs recommend that, in order to ensure that mandated service level standards are met, the Province amend the Building Code Act to allow municipalities to utilize (by outsourcing) accredited Code-enforcement agencies which would provide Building Code-enforcement services (including the private sector, other municipalities, ESA, TSSA or a new administrative authority).

Further, the amendments to the Building Code Act should provide that the powers of accredited Code-enforcement agencies would include authority for plans review, field inspections and certain other statutory functions (e.g., issuing orders), but would not include ensuring compliance with applicable law, permit issuance and undertaking prosecutions (these functions would remain with the municipality).

B. 9

The Chair and Vice-Chairs recommend that the Province amend the Building Code Act (and, if necessary, the Building Code) to set up a self-funded provincial accreditation/certification body for Building Code-enforcement agencies and individuals (inspectors, designers and builders)

> overseen by a board of affected stakeholders. Key requirements for agency accreditation should include:
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> - accreditation linked to the scope of services provided and types of buildings covered;
> - use of certified inspectors;
> - appropriate liability insurance coverage; and
> - meeting established legislated level of service standards.

These recommendations, the Advisory Group argued, would keep the "gatekeeper" role of the municipalities intact, while ensuring public safety by addressing the concern of inadequate municipal resources by outsourcing some of the municipalities' obligations.

These recommendations, too, are reflected in the new legislation. Section 15.11(4) of the *Act* and s. 2.19 of the Regulation deal with the registration and qualifications of Registered Code Agencies (RCAs). Under these provisions, staff engaged by an RCA must meet the same qualification standards as those applied to municipal building officials. RCAs must carry professional indemnity insurance, must submit and comply with a quality management plan, must comply with provincial conflict of interest rules and a code of conduct. RCAs

must have a professional engineer or architect on staff where the RCA is engaged to review buildings which require professional design. Finally, RCAs must register annually with the Province.

4. Increased Training for Building Inspectors

One of the points that became clear during the discussions leading to the BRRAG report was the fact there was widespread unhappiness with the level of Building Code knowledge among the key building practitioners, being designers, inspectors and builders. In 1995, the Large Municipalities Chief Building Officials Group advised the provincial government that there was no guarantee in Ontario that the people performing the various services were competent to do so.[13] The building industry itself suggested mandatory qualification and accreditation for builders and inspectors.[14]

The Advisory Group made the following recommendation with regard to training for building inspectors:

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[13] See BRRAG Report, p. 9.
[14] See BRRAG Report, p. 9.

Recommendation A.1.i

The Chair and Vice-Chairs recommend that persons undertaking plans review, inspection and other Code-enforcement services be qualified to minimum, provincially-established standards for Building Code competency. The Province should develop regulations in the Ontario Building Code which would establish the rules for a certification process for inspectors.

The new Ontario Regulation 305/03 prescribes that inspectors must successfully complete an examination program administered and authorized by the Ministry of Municipal Affairs and Housing relating to the inspector's knowledge of the *Act* and the Building Code.[15] The Regulation also provides for the updating of such qualifications. The examinations will be coordinated by the Ministry and available throughout the Province. Courses will be offered to prepare practitioners for the examination, and self-guiding courses will be available for those in remote locations. Previous Building Code training will be recognized.

[15] s. 2.16.4.1.

5. Training and Certification for Engineers, Architects and Builders

The Regulation provides similar qualification requirements for "persons engaged in the business of providing design activities". "Design Activities" are defined in s. 15.11(5) of the Act:

> 1. Prepare a design or give other information or opinion concerning whether a building or part of a building complies with the Building Code, if the design, information or opinion is to be submitted to a chief building official in connection with,
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> i. an application for a permit,
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> ii. a request for the authorization referred to in subsections 8(12) or (13), or
>
> iii. a report described in paragraph 2.
>
> 2. If a general review of the construction of a building or part of a building is required by the Building Code, prepare a written report on the general review.

Every person engaged in such activities must be registered with the Director and must successfully complete prescribed examinations.

Furthermore, the mandatory insurance requirements of the *Act* and Regulation apply to this group of practitioners.

Architects and professional engineers are generally affected the same way as other designers with respect to Building Code knowledge, registration and insurance. The Ministry is working with the Ontario Association of Architects and Professional Engineers of Ontario. These organizations will likely assume responsibility for the registration and qualification of their members in accordance with the new provisions.

Builders, on the other hand, are not affected to that extent. Under the new provisions, they are not required to obtain insurance or write examinations, even though, as seen, the building industry itself suggested that such examinations should take place. The Ministry's comment on Bill 124 and its application to Builders is as follows:

> **How does the Province intend to address the issue of accountability for builders?**

The Bill 124 Regulation does not require insurance for builders in the institutional, commercial and industrial (ICI) sector.

To address issues related to building contractor accountability, an advisory committee of stakeholders will be formed with a mandate to develop options for improved accountability for builders. The Building Advisory Committee (BAC) will be asked to report back on this issue within six months of being formed.

Homebuilders will continue to be covered by warranty insurance provided by the Ontario New Home Warranty Program.[16]

D. Changes to the Ontario Fire and Electrical Codes

1. Fire Code

The first round of consultation on the road to an objective-based Fire Code was from October 16, 2000 to January 15, 2001. Ontario, along with other provinces and territories and the Canadian Commission on Building and Fire Codes asked code users for comments on the idea of objective-based codes. During this earlier consultation, code users and other members of the public expressed their views to

[16] See "Bill 124 Questions and Answers", available @ www.obc.mah.gov.on.ca/userfiles/HTML/nts_4_7752_1.html.

the Ministry of Public Safety and Security on the underlying objectives and structures of the next generation of the Ontario Fire Code.

In a second round of consultation, the public was asked to comment specifically on all aspects of the Fire Code. The public was asked to consider the following guidelines when submitting proposals for change:

- how the added information assists in better understanding the Ontario Fire Code requirements
- whether the proposed structure provides a logical approach for considering and evaluating alternative solutions
- whether the proposed functional statements provide an appropriate and effective link between the objectives and acceptable solutions
- whether the proposed structure will facilitate more uniform application of the code, while providing a useful framework for accommodating technical innovation

- the degree to which the objectives and functional statements are correctly attributed to the sections of the codes
- ways to increase harmonization with the National Fire Code acknowledging that variances may be necessary to address unique Ontario issues.[17]

The new Fire Code is organized into three divisions. Division A contains the conditions necessary to achieve compliance with the Ontario Fire Code, master lists of the objectives and functional statements and the limitations on the application of certain objectives and functional statements.

Division B closely resembles the existing Ontario Fire Code and contains the technical requirements. These tried and tested requirements are now referred to as "acceptable solutions". To comply with the Code, a user can now either adopt one of the acceptable solutions listed in Division B, or propose an alternative solution, which the Chief Fire Official will be authorized to approve.

[17] See http://www.ontariofirecode.ca/english/newcodes.asp#Purpose .

Alternative solutions will require professional signature and seal and must address testing and maintenance where it is different from Division B. Any documentation relating to the alternative solution must be retained on site. A review by the Chief Fire Official must take place within 30 days. Decisions by the Chief Fire Official can be appealed similarly to an inspection order.[18]

Division C contains the administrative provisions currently found in Parts 1 and 2 of the Ontario Fire Code as well as new provisions necessary for the implementation of the objective-based structure.

In the course of the two-stage consultation process, the Office of the Fire Marshall reviewed 221 changes proposed for the National Fire Code, processed 157 for possible adoption in the Ontario Code, processed 57 Ontario initiated changes, and added some consequential changes. The total number of changes in the Ontario

[18] See Krystyna Paterson, Al Suleman, Office of the Fire Marshall, *Proposed Amendments to the Ontario Fire Code*, presentation delivered at the October 1, 2003 Canadian Fire Safety Association Technical Seminar.

consultation package was 217.[19] Proposed changes include sprinkler systems, protection measures for specific occupancies, storage of flammables and combustibles and inspection of smoke control systems, to name but a few. A list of proposed technical changes is beyond the scope of this paper and can be found on the website of the Office of the Fire Marshall.[20]

2. Ontario Electrical Safety Code

Significant changes to the 1998 Canadian Electrical Code necessitated amendments to the Ontario Electrical Safety Code. On January 25th, 2002 the Electrical Safety Authority received government approval to issue the 23rd Edition of the Ontario Electrical Safety Code. This regulation (Ontario Regulation 10/02) became effective on April 25th, 2002. Aside from changes to the definitions and the administration/general rules and some amendments to section 3 (Field Evaluation of Electrical Equipment), the bulk of the

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[19] See Krystyna Paterson, Al Suleman, Office of the Fire Marshall, *Proposed Amendments to the Ontario Fire Code*, presentation delivered at the October 1, 2003 Canadian Fire Safety Association Technical Seminar.

[20] http://www.ontariofirecode.ca/english/existingcodes_commenting.asp#Organization%20of%20Proposed%20Technical%20Changes.

amendments related to section 75 (Installation of Lines and Wiring of Buildings). Section 75 applies to the installation of primary and secondary lines except for lines owned by a Supply Authority, and to installation of electrical equipment in farm buildings and similar structures. Here, too, the detailed changes are technical in nature and can be reviewed at the Electrical Safety Authority's website.[21]

E. Limitations Act, 2002

1. Introduction

Much has been written on the effects of the new Limitations Act.[22] We, therefore, provide a brief outline of the new legislation. The *Limitations Act, 2002*, was passed in December 2002. The Lieutenant Governor has issued a proclamation fixing January 1, 2004 as the day on which the *Act* will come into force. The new *Act* represents the first major overhaul of limitations legislation in Ontario in 35 years.

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[21] http://www.esainspection.net.

[22] 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.

On January 1, 2004, Parts II and III of the current *Act* will be repealed, and Part I of the current *Act* dealing with real property matters will be 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 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* expresses the 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

As discussed above at C. 1, *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.

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