

## WHEN IT'S TOO LATE TO SUE

### LIMITATION PERIODS IN ONTARIO

#### **Introduction**

There can be few more distressing things for a client to hear from his or her lawyer than, "You had a good claim, but it's too late to sue now". In order to avoid litigation over events in the distant past and to bring closure to all concerned, the law has always imposed deadlines on when a lawsuit over a particular event must be commenced. In common language this body of law is often referred to as the "Statute of Limitations", while lawyers talk about the issue using the terms "limitation periods" or "prescription". Historically the area has been fraught with confusion. Not only do different claims have different limitation periods, but also the way in which each particular period applies to each particular claim is less than straightforward. Because a failure to identify the correct limitation period can lead to a claim being extinguished forever, reform of the law relating to prescription has been suggested for many years. The Ontario *Limitations Act, 2002*, S.O. 2002, c.24, (which came into force on January 1, 2004) was an attempt to bring clarity and certainty to the question, "What's my deadline to sue?"

#### **Limitation Periods Generally**

The law defines a limitation period as a period of time between two events: (1) the date a claim "arises" and (2) the last day that a lawsuit can be commenced to advance that claim. The effect of the second date is clear and stark. Commencing a lawsuit means issuing an originating process (such as a statement of claim or notice of application) in an Ontario court office. Missing the date for doing so by as little as one day is regarded as fatal to the lawsuit's validity. Hence the importance of obtaining clarity on two other issues: the "start date" of the limitation period and its length.

Unfortunately these issues are not as clear cut. It is not always the case that a claim arises at the time of the defendant's acts that cause injury to the plaintiff. Rather the start date of the limitation period is determined by applying the "discoverability rule", in other words, determining the date on which the plaintiff knew, or ought to have known, that he or she had a claim against a particular defendant. This rule has not always been consistently applied or understood and most disputes in court over limitation periods focus on this rule. The second historical problem has been in identifying what the period of time actually is. Although most lawyers in Ontario would have said that a general limitation period of six years applies to most claims, there are literally hundreds of special limitation periods buried in various statutes, applying to particular types of claim. Because the consequences of an error in identifying a correct limitation period are so drastic – a valid claim worth thousands or millions of dollars might overnight be reduced in value to nothing – confusion in the area created a host of unhappy litigants, and thus led to a huge number of negligence claims against lawyers who "missed the limitation period".

#### **Limitation Reform**

After several years of lobbying (by lawyer's groups in particular), the Ontario government has finally made the effort to address these problems in the shape of the new *Limitations Act, 2002*. In general terms, this Act accomplishes five things:

1. It establishes a general limitation period for most claims, which at two years in length, is much shorter than the previous general period;
2. It codifies how the discoverability rule is to be applied to determine the “start date” of this limitation period;
3. It establishes a fifteen year “ultimate period” which extinguishes claims, even if they have not yet been discovered;
4. While not eliminating exceptions from the general rules, it at least attempts to gather all of these exceptions in one place; and
5. It enacts transitional provisions to govern claims already in existence on January 1, 2004.

### **The General Period**

For most claims, an action must now be commenced no later than two years after the date it was discovered. The same drastic result of missing that deadline remains – the death of the claim. Shortening the general period to two years brings Ontario into line with many U.S. jurisdictions and also signals the legislature’s desire to have litigation take place in a timely fashion. It is thus even more important from this point forward that those who think they may have a potential claim consult a lawyer as quickly as possible to ensure the preservation of their rights.

### **Discoverability**

The Act tries to provide a clear and exhaustive definition of what “discovering” a claim means. A claim is discovered when a plaintiff learns (or ought to have learned) certain facts, essentially that he or she was injured by the acts of an identifiable person and that a legal proceeding would be an appropriate way of remedying that injury. In many cases all of these facts occur on the same day as the relevant wrongful acts of the defendant (and in fact the Act presumes this, in the absence of evidence to the contrary). A typical example would be an automobile accident causing an injury. However, in other cases there is a delay between the defendant’s wrongful actions and the plaintiff’s realization that he or she has been damaged by those actions (for example, long term ingestion of a negligently designed drug with delayed side-effects). It should be noted that the test is whether a reasonable person in the position of the plaintiff would have discovered the claim, so that the period can start running if a plaintiff is unreasonably obtuse in understanding their rights. If in doubt, an injured person should therefore seek legal advice as soon as possible.

### **The Ultimate Period**

In order to foreclose very old claims, even in circumstances where plaintiffs could not reasonably have discovered them, the Act contains a fifteen year ultimate limitation period which runs from the date of the defendant’s actions. A plaintiff’s discovery of such an old claim may therefore come too late. This is justified by the difficulty faced by all parties in litigating over facts that occurred more than fifteen years before the litigation even starts. However, there are exceptions to this provision which can keep very old claims alive if they relate to sexual abuse, aboriginal claims or environmental damage.

### **Exceptions**

It would be too much to expect that the issue of prescription could be simplified to the extent that all claims had the same limitation period applied in the same way. The Act recognizes numerous exceptions to its general “two years after discovered or fifteen years after occurred” scheme. Some claims carved out include those referred to above, as well as special situations dealing with secured property claims or the

claims of minors or incapable plaintiffs. In addition, the Act contains a Schedule listing 71 limitation provisions in other statutes that continue to govern particular types of claims (including certain corporate, securities, defamation, tax collection and municipal claims). The good news is that the Act at least purports to gather all exceptional limitation periods in one place – if a limitation period in another statute is not listed in the Schedule it is no longer effective.

### **Transition**

What if a plaintiff had a potential claim before the Act came into force but had not yet commenced a proceeding? The Act sets out what happens to such claims, depending on when the plaintiff discovers their existence. In all but a few cases, the Act does not purport to affect the limitation period that would apply to any claim that a plaintiff had already discovered at the time the Act comes into force. Such a claim is governed by whatever limitation period applied to it under the previous law. If after January 1, 2004, a plaintiff discovers that a claim has arisen based on facts that occurred before 2004, the Act's transition provisions essentially do two things: (1) they apply the new limitation periods to this claim; and (2) they deem the acts of the defendant at issue to have occurred on January 1, 2004. The net effect is to give plaintiffs with such "transitional claims" a reasonable period of time after January, 2004 to assess when they should commence any lawsuit. Nevertheless, because the Act does have exceptions to all of its general rules, plaintiffs who have claims that they are considering commencing now would be well advised to seek legal advice as soon as possible to ensure that these claims are not accidentally extinguished.

### **Conclusions**

Limitations law remains an important means of controlling the timeframe within which litigants must commence claims. The recent legislative reforms do not in any way diminish the "use it or lose it" approach that the law has always taken to older claims. If anything, the law has increased its vigilance against stale litigation by shortening the general limitation period to two years after the plaintiff's discovery of a claim. However the new *Limitation Act* has accomplished a great deal by clarifying and codifying an area of law whose confusion and difficulty were matched only by the dreadful consequences that arose from misunderstanding its principles.

**For more information on litigation or other dispute resolution matters, contact any of the litigation lawyers at Morrison Brown Sosnovitch LLP, 1 Toronto Street, Suite 910, Toronto, ON M5C 2V6, phone (416) 368-0600 fax (416) 368-6068.**

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