

# Limitations update:

## Some periods preserved and courts have limited discretion to extend time to commence action

*"Only one year to start the action? I thought I had two years!"*

You are packing up to head off to the cottage on a sunny Friday afternoon when suddenly a young associate barges into your office to talk about pleadings on one of your files. The cottage will have to wait.

The client on the file in question has a dispute with his insurance company over a stolen vehicle. The loss occurred almost a year ago and your associate is off to the courthouse to ensure that an action is commenced immediately.

Don't we have two years to start the action according to the *Limitations Act, 2002* you wonder? No, she correctly points out. Some limitation periods have been preserved under the new limitations regime, including section 259.1 of the *Insurance Act*. You only have one year from the date of loss to start your action.

But surely, if you only missed it by a couple of days, the court would allow the action to proceed? You recall having exchanged letters with the insurance adjuster and giving timely notice. How could the insurance company argue prejudice? You astutely point out that there is a series of recent cases in which the courts use their discretion to permit

the commencement of a new action outside the limitation period if there are special circumstances and a lack of prejudice.

"Not any more," your young associate points out. The Court of Appeal in *Joseph v. Paramount Canada's Wonderland* [2008 ONCA 469] and *Meady v. Greyhound Canada Transportation Corp.* [2008 ONCA 468] has tried to straighten all this out.

The *Joseph* decision clarified that even before January 1, 2004, the courts did not have discretion to extend the time for commencing an action. The common law doctrine of "special circumstances" only applied where the plaintiff commenced a timely action against someone, and then wanted to add another defendant or new cause of action after the expiry of the Limitation period. For fact situations arising after January 1, 2004, this discretion no longer exists unless some other statute expressly permits the extension.

You begin to think about other files in the office and whether you need to add parties, and worry that "special circumstances" is gone forever unless it arises in those rare occasions "by or under another Act."

"Not exactly," responds your eager

associate. Remember that motor vehicle accident which occurred on March 15, 2001, and the pending motion to add the lessor of the third party vehicle as a defendant? The two-year limitation period under the *Highway Traffic Act* has expired, but there is hope! According to *Meady*, if a claim falls within the transitional provisions of s.24 of the *Limitations Act*, then the former law applies and for most limitation periods, you could argue "special circumstances."

Thinking ahead, you and your associate realize that it is not going to be easy to commence an action and add parties later because you may only be able to argue discoverability, and that requires reasonable evidence of due diligence. You agree that it is important to conduct a proper and early investigation, and move your action along to discoveries. You make a note to review your file list first thing next week.

What about your client's claim for the stolen vehicle? Well, that does not expire until Monday, but your trusty associate is taking no chances and is on her way to the courthouse. As for you, the cottage awaits!

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*Domenic Bellacicco is claims counsel at LAWPRO.*