

Applying the new Limitations Act, 2002



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When the new *Limitations Act, 2002* came into force on January 1, 2004, it fundamentally changed the “the rules of the game.” This article reviews some key features to note about the Act, and provides you with information that will help you to assist your clients in dealing with the Act.

If you have not already done so, read the Act (available on the government of Ontario Web site at www.e-laws.gov.on.ca). Then review your open litigation files to understand how the new Act, and particularly the new transition provisions, apply to you and your law practice. The best guide to the transition provisions is a chart prepared for a June 11, 2003, Law Society/Ontario Bar Association/Advocates’ Society program and available at www.practicepro.ca/limitations.

You should note at the outset that Part 1 of the original *Limitations Act*, the Part dealing with real property, remains in force but is renamed the *Real Property Limitations Act*.

Important features of the legislation include:

- (a) a common two-year period (Section 4) from the date of discovery of the injury, loss or damage;
- (b) an ultimate limitation period of 15 years (Section 15), regardless of discoverability, with certain exceptions;
- (c) retention of some specialty limitation periods that are listed in a schedule to the Act;
- (d) a prohibition (Section 22) on contracting out of the Act;
- (e) transition rules (Section 24) for acts or omissions which took place before January 1, 2004.

You will be obliged to determine what is the limitation period for causes of action, for which no proceeding was commenced before January 1, 2004.

The best advice that can be offered is, if there is any doubt as to what is the applicable limitation period, a proceeding should be commenced within two years of the date that the act or omission took place, subject to discoverability.

You should be aware that almost all of the frequently asserted causes of action have different limitation periods for causes of action that arise after January 1, 2004.

- Occupier’s liability is now two years from the incident, instead of the previous six years.
- Actions for non-repair of municipal and provincial roads and highways is two years, instead of three months. The short notice provisions in the *Municipal Act* and the *Public Transportation and Highway Improvement Act* remain, however, they are softened by enactment of savings provisions that allow a judge to excuse failure to give timely notice if the road authority is not prejudiced.
- Actions against public authorities must now be commenced within two years. The limitation period of six months under the *Public Authorities Protection Act* has been repealed.

Advise clients, educate staff

Once you have concluded what action should be taken, you should follow up in writing with clients to advise them the impact of the Act.

As part of the process of determining the application of the new Act, you should share with your staff what you have learned.

This is of particular concern to staff members who administer your diary or tickler systems. For instance, causes of action such as breach of fiduciary duty for which there was no limitation period under the prior legislation are now governed by a two-year period, subject to discoverability.

Different entries may be required in your Firm's tickler systems.

Commercial transactions

Practitioners handling commercial transactions should consider especially the application of Section 22. It states:

"A limitation period under this Act applies despite any agreement to vary or exclude it."

The impact of Section 22 on commercial transactions is under discussion. The new *Limitations Act* will neither shorten nor lengthen contractual obligations. A one-year service contract would not be extended to two years. A five-year supply contract would not be cut back to two years.

Questions have arisen concerning the representations and warranties which are frequently included in commercial trans-

actions. Would a warranty surviving for one year or for five years be interpreted as an attempt to vary the limitation period? Not likely. Warranties are simply another type of contract. The discovery of a breach of warranty within the contractually agreed upon terms of the obligation would commence the running of a limitation period.

Spread the word

In circumstances where you have been consulted but not retained on a matter, and where the new Act would have implications, you should write a letter to the party notifying them of the possible application of the new Act, so that you are not confronted later with an assertion that the potential client did not know about the change in the law.

Finally, once you are conversant with the new *Limitations Act*, consider spreading the word by sending out a news bulletin to your clients and potential clients advising them of the significant changes enacted by the *Limitations Act*.

Tim Bates is partner with Borden Ladner Gervais, LLP and a frequent speaker on the implications of the Limitations Act, 2002.

2003 LAWPRO annual report ahead of the curve



- A decrease in claims paid, claims reported and the number of open claims files.
- Record TitlePLUS sales and growth in its subscriber base.
- A new willingness on the part of lawyers to adopt technology solutions – as witnessed by a record e-filing season, increased traffic to LAWPRO Web sites and strong growth in lawyer use of TitlePLUS online.

These are some of the highlights of the past as documented in LAWPRO's 2003 annual report – *Staying Ahead of the Curve*.

The report, to be published later this spring, reviews some of LAWPRO's major milestones of the past nine years – milestones which reflect our ability to develop innovative programs and approaches that benefit the profession and help ensure its competitive position.

The following are some of the company's major accomplishments as highlighted in the 2003 LAWPRO annual report:

Company-wide

- LAWPRO was awarded an "A" (Excellent) rating from A.M. Best for the 4th consecutive year.
- A.M. Best commented on "LAWPRO's strong operating performance, excellent capitalization, and its historically favorable loss reserve development."
- For 2003, LAWPRO had more than \$400 million in assets, \$96 million in equity and after-tax profit of \$7.5 million.
- We implemented the infrastructure needed to ensure LAWPRO complies with new federal privacy legislation) and adapted our insurance materials to advise lawyers of privacy requirements.