

Limitations Act 2002: A huge reform of existing law

by Graeme Mew

Gowling Lafleur Henderson LLP

On December 9, 2002, the Ontario legislature passed Bill 213 - the *Justice Statute Law Amendment Act* - by unanimous consent, without debate. Wrapped up in a single bill were three pieces of legislation, one of which will become known as the *Limitations Act, 2002*.

Limitation periods are not the normal fare of political activity. The subject does not excite a great deal of attention from legislators. There are no votes in limitation reform. As a result, it has taken 35 years to achieve an overhaul of Ontario's present *Limitations Act*, a statute which can trace its lineage and, indeed, some of its language, to the English *Statute of Limitations*, 1623.

Background to the Reforms: Perseverance Conquers All

The modern history of limitation reform started in the mid-1960s with the Ontario Law Reform Commission. Its *Report on Limitation of Actions* in 1969 observed:

To the lawyer, Ontario's limitation laws are, at the very least, perplexing. They introduce an element of hazard into the practice of law which is quite unnecessary.

To the ordinary citizen, these laws are beyond comprehension. It is he, of course, who really suffers in their application.

From the outset the Advocates' Society became involved in the process of reforming the law of limitations. Sub-committees were struck and submissions were made on behalf of the Society as each wave of attempted reform rolled by.

The Law Reform Commission's report was followed, in 1977, by a discussion paper released by the Ministry of the Attorney General, which consisted of a draft bill with a brief commentary. The draft bill reflected the recommendations of the OLRC report, with some modifications imported from the recently enacted British Columbia reforms. Following on from this, in December 1983, Bill 160 was introduced in the Legislature. The Bill did not proceed beyond first reading. In 1991, a Consultation Group appointed by Ian Scott Q.C., when he was Attorney General, reported to his successor, Howard Hampton. That led to the introduction, in 1992, of Bill 99 which, if enacted, would have comprehensively reformed the law of limitations with the notable exception of limitations in real property proceedings. A particularly welcome feature of Bill 99 was the inclusion of a schedule of limitation periods found in other legislation. The Bill provided that any limitation period set out in another Act, would be ineffective, unless the provision establishing it was specified in the schedule to the proposed *General Limitations Act*. Bill 99, too, died on the order paper.

Despite occasional rumblings from the Advocates' Society and other legal organisations, nothing further of note happened until 1999, when the then Attorney General, James Flaherty, took up the cause. A process of consultation - in which the Society played an active part - was followed by Bill 163, which was introduced in the autumn of 2000. Many of the proposals in Bill 99 were carried forward. After

prorogation of the Ontario legislature in early 2001, the bill was reintroduced by Attorney General David Young as Bill 10. It had its first reading on April 25, 2001, and received qualified support from the legal community, including the Society. The Advocates' Society and other legal organisations provided the Attorney General with suggestions for improving the Bill. Nothing then happened until November 2002, when with little fanfare and no real opportunity for the profession to make further comments, Bill 10, with some minor changes, which took on board some, but not all, of the Society's suggestions, was reintroduced as a schedule to Bill 213 on November 26, and passed within a matter of days without debate.

Features of the New Act

The *Limitations Act*, 2002 came into force on January 1, 2004. It represents a huge reform of the existing law of limitations, except for the provisions of the current Act concerning real property, which are preserved. It is by no means perfect but nevertheless represents a substantial improvement, which will hopefully make the law of limitations more intelligible to lawyers and clients alike. Other benefits, which are anticipated, are a reduced drain on court and judicial resources of limitation-related motions and fewer negligence claims against lawyers resulting from missed limitation periods.

Basic Limitation Period of 2 Years

A basic limitation period of two years is introduced running from the day the "claim" is discovered. "Claim" is defined as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". The basic limitation period replaces the general limitation periods found in the present Limitations Act, as well as many of the numerous special limitation periods found in other statutes.

Some Special Limitation Periods Remain

A schedule to the new Act contains a list of special limitation periods contained in other statutes, which will remain in force. If a limitation period set out in or under another Act is not listed in the schedule, it is of no effect. Many of the special limitation periods that have been the bane of advocates' existence are expressly repealed. Gone are old favourites such as section 7 of the *Public Authorities Protection Act* (actions against public authorities), sections 44(7) and 84 of the *Municipal Act* and section 33(5) of the *Public Transportation and Highway Improvement Act* (highway repair claims), section 31 of the *Public Hospitals Act* (claims against public hospitals), section 89 of Schedule 2 to the *Regulated Health Professions Act* (claims against healthcare professionals), section 46 of the *Professional Engineers Act* (claims against engineers), and so the list goes on.

For those special limitation periods that remain, they are nevertheless subject to some of the principles established by the new Act including the provisions, discussed below, concerning minors, incapable persons, dispute resolution and the ultimate limitation period.

Discoverability Principle Applied

Section 5 of the new Act expresses the discoverability principle in statutory language. There is a rebuttable presumption that a claim is discovered on the day the act or omission on which the claim is based took place. Section 5 does not appear to be expressly applicable to limitation periods other than the basic limitation period. Sections 12 and 13 address the application of the discoverability principle to successors in right, title or interest and principals and agents.

Under section 14, a person against whom another person (who is not a minor or an incapable person who is not represented by a litigation guardian) might have a claim may serve a notice of possible claim on the other person. A court in determining when the limitation period in respect of the person's claim began to run can consider the fact that such a notice has been served.

Parties Under a Disability

Time does not run against minors or incapable parties who are not represented by a litigation guardian. An innovative and somewhat controversial provision grants a mechanism for a potential defendant to seek court appointment of a litigation guardian and thereby start the clock running against a plaintiff under a disability.

Trustees

Actions against trustees, except for cases where a beneficiary's rights arise in respect of land or rent vested in a trustee upon an express trust, will be treated in the same manner as claims against other defendants.

Assaults and Sexual Assault

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.

Attempted Resolution

The running of time is suspended where the parties have agreed to have an independent third party resolve the claim or assist them in resolving it. If the claim is not resolved, the clock restarts when the dispute resolution process is terminated or a party terminates or withdraws from the agreement.

Acknowledgments

The common law principles of acknowledgment are recast in statutory form. Essentially, where a person acknowledges in writing certain types of liability (payment of a liquidated sum, recovery of personal property, the enforcement of a charge on personal property or relief therefrom) the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgement was made. The acknowledgment must be made to the person with the claim, his/her agent or an official receiver or bankruptcy trustee before the expiry of the applicable limitation period.

There are also provisions for acknowledgment in respect of claims for interest, realisation on or redemption of collateral under security agreements, acknowledgments by trustees and acknowledgment of liability in respect of claims to enforce an equitable interest in personal property by a person in possession of it.

Ultimate Limitation Period

The concept of an ultimate limitation period is introduced by section 15, subsection 2 of which provides that no proceeding shall be commenced in respect of any claim more than 15 years after the day on

which the act or omission on which the claim is based took place. Accordingly, even if a claim has not been discovered within 15 years of the occurrence, which gave rise to the claim, an action commenced after the 15th anniversary of that occurrence will be statute barred. Section 15(6) provides a definition of the day of occurrence where there is a continuous act or omission or a series of acts or omissions. In the case of a default in performing a demand obligation, the ultimate limitation period runs from the date of default.

The ultimate limitation period does **not** run during any time that the person with the claim is a minor or an incapable party who is not represented by a litigation guardian. The running of the ultimate limitation period is also suspended during the time that a party wilfully conceals a cause of action from the person with the claim or wilfully misleads the person with the claim as to the appropriateness of a proceeding.

With the exception of claims based on assault or sexual assault, the claimant bears the burden of proving that the ultimate limitation period should be suspended because of disability or wilful concealment. The practical effect of this is that a defence based on expiry of the ultimate limitation period will rarely, if ever, succeed in a claim based on a sexual assault.

No Limitation Period

It has always been the case that if a limitation period is not provided for there is either no limitation period at all or, if the claim is one for equitable relief, the doctrine of *laches* applies. Under the new Act, a claim will only be subject to no limitation period at all if that is expressly provided for in the *Limitations Act*. Under sections 16 and 17, there is no limitation period in respect of:

- a proceeding for a declaration if no consequential relief is sought;
- a proceeding to enforce an order of a court or an arbitration award;
- certain proceedings to obtain support under the *Family Law Act* or to enforce a provision for support or;
- a proceeding under section 8 of the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*;
- a proceeding by a debtor in possession of collateral to redeem it or by a creditor in possession of collateral to realize on it;
- a proceeding arising from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether financially or otherwise;
- a proceeding to recover money owing to the Crown in respect of fines, taxes and penalties, or interest thereon;
- a claim made by the Crown or certain delivery agents of the Crown relating to the administration of social, health or economic programs or the provision of direct or indirect support to members of the public in connection with social, health or economic policy (including the recovery of social assistance payments, student loans, awards, grants, contributions and economic development loans and the reimbursement of money paid in connection with social, health or economic programs or policies as a result of fraud, misrepresentation, error or inadvertence);
- a proceeding to recover money owing in respect of student loans, awards and grants made under the *Ministry of Training, Colleges and Universities Act*, the *Canada Student Financial Assistance Act* or the *Canada Student Loans Act*.
- an environmental claim that has not been discovered.

Contribution and Indemnity

The limitation provision contained in section 8 of the Negligence Act is repealed. The new Act (section 18) provides that, for the purposes of determining the day on which a claim was discovered or the

application of the ultimate limitation period, time starts to run, in a claim by one alleged wrongdoer against another for contribution and indemnity, on the day that the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought. Section 18 is not confined to claims for contribution and indemnity based in tort.

Adding Parties

The attempted addition of parties to an extant proceeding after a limitation period has expired is often the subject of motions before the courts. After the new Act comes into force, it will no longer be possible to invoke "special circumstances" or to otherwise seek to add as a defendant a party against whom the limitation period for bringing that claim has expired (there is an exception for amendments to correct misnomer or misdescription of a party). The new Act does not, however, appear to preclude, in a proceeding commenced within time, attempts to add further claimants after the limitation period has expired.

Agreements to Vary or Exclude Limitation Periods: No Tolling Agreements

It will no longer be possible to contract out of a limitation period. While agreements made before the day the new Limitations Act comes into force are grandfathered, this provision means that parties cannot enter into tolling agreements that suspend the running of time. It also means that contractual limitation periods commonly found in agreements such as insurance policies will be of no force and effect (an exception would be limitation periods in insurance contracts that have their genesis in statutory conditions or regulations that are listed or incorporated by reference to a provision that is listed in the Schedule to the *Limitations Act*).

Transition Provisions

There are transition provisions for claims based on acts or omissions that took place before the coming into force of the new Act (the "effective date") where no proceeding has been commenced before the effective date.

If the limitation period applicable before the new Act comes into force (the "former limitation period") has expired before the effective date, the new Act will not, except in certain cases involving assault or sexual assault, revive the claim.

If the former limitation period has not yet expired on the effective date then:

- if the claim is one that, if it was based on an act or omission that took place after the effective date, would not be subject to any limitation period under the new Act, there is no limitation period;
- if a limitation period under the new Act would apply if the claim was based on an act or omission that took place after the effective date, (a) if the claim was not discovered before the effective date, the new Act applies as if the act or omission had taken place on the effective date; and (b) if the claim was discovered before the effective date, the former limitation period applies.

If there was no former limitation period but, under the new Act a limitation period would apply if the claim was based on an act or omission that took place after the effective date, then:

- if the claim was not discovered before the effective date, the new Act applies as if the act or omission had taken place on the effective date;
- if the claim was discovered before the effective date, there is no limitation period.

If claims are based on an assault or sexual assault, even if the former limitation period has expired before the effective date, the provisions of the new Act will effectively apply to most, if not all, such claims.

Real Property

Part I (Real Property) of the current *Limitations Act* will remain in force and will be renamed the *Real Property Limitations Act*. Amendments are made to that Act in respect of claims against trustees by a beneficiary whose rights arise in respect of land or rent vested in the trustee upon an express trust and in respect of certain mortgage-related actions.

Notice

Notice periods contained in other statutes are unaffected by the new Act. However, amendments have been made to the *Municipal Act* and the *Public Transportation and Highway Improvement Act* to afford relief in the discretion of the court if notice provisions in highway repair cases have not been complied with.

Other Amendments

There are a number of other amendments to limitation provisions that are implemented by Bill 213. These include:

- *Business Corporations Act* (subsection 131(2) repealed and replaced)
- *Co-operative Corporations Act* (subsections 72(2), 99(2) and 103(2) repealed and replaced and other amendments)
- *Corporations Act* (subsection 81(2) repealed and replaced)
- *Environmental Bill of Rights* (section 102 amended)
- *Family Law Act* (section 33 amended)
- *Insurance Act* (sections 206, 258(2), 272, 281(5) and 300 (statutory condition 12) repealed; new sections 259.1 and 281.1 added; other amendments)
- *Municipal Act* (subsections 44(12) and (13) repealed and replaced)
- *Public Transportation and Highway Improvement Act* (subsection 33(4) amended)
- *Solicitors Act* (sections 11 and 25 amended)