

Delay May Be Costly: Ontario's New Limitations Regime

Summer 2004

A CLIENT OVERVIEW OF
LEGAL TRENDS AND ISSUES

Delay May Be Costly:
Ontario's New Limitations
Regime

front page

Class Actions:
The Basics

page 3

Firm News

back page

Professional Notes

back page

On January 1, 2004, after years of debate, the new Ontario *Limitations Act* was proclaimed in force. The most important feature of the new legislation is a basic two year limitation period coupled with a discoverability provision.

This much shorter time period within which to start an action replaces the old six year limitation period applicable to most claims in contract and tort. This new legislation requires careful negotiation and drafting of commercial contracts, including leases, if rights are to be preserved beyond, or constrained within the new two year limitation period.

Exceptions

Some other statutes contain specific limitation periods. If those periods are to be considered an exception to the new

law, they must be set out in the Schedule to the new Act. Otherwise such limitation periods will not be effective.

Discoverability

The clock begins to run when a person with a claim discovers it or reasonably ought to have discovered it. "Claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission. There is a presumption that a person with a claim knows of it on the day the act or omission in question occurred unless the contrary is proved.

continued on page 2

As a general rule the clock continues to tick during settlement negotiations unless the parties have agreed to have an independent third party assist in resolving the claim, in which case the clock stops during the attempted resolution, and restarts if the attempt at resolution fails.

Cannot Contract Out

Unlike the old Act, which did not address the issue, the new Act specifically provides that the limitation set out in the Act applies despite any agreement to vary or exclude it. This means that parties cannot agree to either extend or shorten the limitation period stipulated. This provision may prove to be one of the most challenging of the new regime. Submissions were made to the government to withhold proclamation of this provision until its application could be clarified, but the government declined to do so.

Before the new Act came into effect commercial parties routinely agreed to the time within which a claim might be made, for example for breach of a representation or warranty. (Such agreements made before January 1, 2004 are grandfathered.) However, the new Act now provides that the stipulated (ie. generally two year) limitation applies “despite any agreement to alter or exclude it.”

Skilfull drafting is required if this provision is to be navigated successfully for the future.

Transition

There are complex transition provisions in the new Act which essentially provide that:

- for claims that were discovered before January 1, 2004, the old law will continue to apply, and such claims are unaffected by the new legislation;
- for claims that remained undiscovered and were not statute-barred at the end of 2003, the new legislation deems the events in question to have taken place on January 1, 2004;

- if a claim was statute-barred at January 1, 2004 it will likely remain statute-barred, although there are some exceptions, for example claims for sexual assault.

Ultimate Limitation

The new Act provides an outside limitation date of 15 years from the act or omission complained of, down from the prior outside date of 30 years. This is to address the problem of an individual being subject to a claim indefinitely if the associated limitation period only runs upon discovery of the claim.

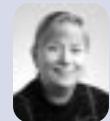
Real Property Limitations Act

There are now two limitations statutes in Ontario as the provisions of Part I of the old Act concerning real property were substantially retained and have been renamed the *Real Property Limitations Act*.

The interplay between the two statutes will be the source of debate for some time. For example, the *Real Property Limitations Act* has a limitations period specifically applicable to payment on a mortgage – if no payment has been made for ten years the collection of the mortgage debt is statute-barred. However, covenants concerning repair and maintenance are subject to the two year limitation under the new *Limitations Act*.

There are many outstanding questions as to how the new *Ontario Limitations Act* will be interpreted and applied. What is clear is that all commercial parties, including lenders and borrowers, vendors and purchasers, and landlords and tenants need to review their standard agreements to be sure that they can live with the new two year limitation period in the context of the discoverability principal.

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The Litigation Group at Minden Gross is comprised of ten lawyers, three full-time law clerks and a dedicated staff of professional assistants, all of whom are devoted to serving the litigation needs of our clients. Members of the Group have extensive experience in a wide variety of commercial disputes, including banking matters, construction lien claims, bankruptcy and insolvency issues, negligence actions, wrongful dismissal and other employment law matters, as well as matrimonial matters, personal injury, insurance claims, and many other areas. Members of the Group have represented clients in courts and tribunals throughout Ontario at trial and appellate levels up to and including the Supreme Court of Canada.

Members of the Litigation Group work closely with the firm's Insolvency Practice Group, providing litigation support services in the areas of security

enforcement, financial reorganizations, debt restructurings, debtor and creditor rights, court and privately appointed receiverships, bankruptcies and other related proceedings for interim receivers and liquidators, landlords, suppliers, trustees in bankruptcy, corporate and individual borrowers and other interested parties. During the past two decades, members of the firm's Litigation Group and Insolvency Practice Group have worked closely together in many of the largest insolvency related proceedings and workouts which have occurred in the Canadian business community, as well as several leading cases involving lender liability, “white collar” fraud and other complex commercial matters.

The Litigation Group is pleased to have been appointed by Royal Bank of Canada as designated counsel for litigation work, as well as for bankruptcy/insolvency and lending matters.

Class Actions: The Basics



Class actions have been big business in the United States for decades. In Canada, the first class action legislation was passed in Québec in 1978. Ontario's *Class Proceedings Act* was passed in 1993 and other provinces have followed since so that today class actions are available through the country.

What is a Class Action?

A class action is a lawsuit started in the names of a small number of people who represent a large number of people with a common complaint against one or more common Defendants. The intention of the legislation is to promote three ideals:

1. efficiency in the handling of a large number of complaints which bear strong similarities, so that if we get into possibly complex issues, they are handled economically;
2. easier access to the judicial process for people with relatively small claims who could not possibly afford to litigate those claims in an economically viable manner;
3. behaviour modification for those, usually corporations, who might otherwise conduct themselves improperly on the theory that if no one individual suffers very much, none of them will actually raise their complaint to the level of a law suit.

Procedure

Before a class action can proceed beyond the initial stages, it must be "certified" by a judge as a class action. The Plaintiffs must bring a motion for certification after the Statement of Claim has been served and filed, at which time they must demonstrate that the action is one which is appropriate for the class action procedure. An Order for certification will not be granted unless the Plaintiffs establish each of the following:

- A. the members of the proposed Plaintiff class have a legally recognized complaint with the Defendant;
- B. there exists an identifiable class of persons on whose behalf the action is brought;
- C. there are issues in the dispute which are common to every Plaintiff in the proposed class;
- D. a class action would be the preferable procedure, in terms of fairness and efficiency, for the hearing of the dispute; and

E. the Plaintiffs named in the Statement of Claim as representatives are suitable, and the solicitors for the Plaintiffs have put forth a sensible plan for the conduct of the litigation.

In essence, a class action will proceed to a trial at which the issues common to all of the Plaintiffs will be dealt with at once. Any specific issues affecting individual Plaintiffs will then be dealt with thereafter. In essence, the court must be persuaded that the issues common to all Plaintiffs are such that it makes the most sense to deal with those issues at one time. The court must be satisfied that the common issues put forward by the Plaintiffs are all necessary to resolve the claim of each member of the Plaintiff class and represent substantial ingredients of each of those cases, so that the resolution of those issues will substantially advance the claims of each individual.

Examples

Some of the more interesting class actions commenced in the last year include the following:

1. A number of Canadian chartered banks are Defendants in a multi-million dollar action alleging credit card interest overcharges. This is a BC action in which the Plaintiffs are also asking the court to cap credit card interest rates at 5%. One bank has been sued for unfairly rounding off pennies owing to individual customers.
2. A major corporation and its affiliated broker have been sued for \$250 million in an action where the Plaintiffs accuse the Defendants of favouring insiders when the company's debt was restructured.
3. A public company is defending a class action alleging that it over-stated sales in 1999 and 2000.
4. Pharmaceutical companies are being sued over various drugs. One of them is being sued for \$1.25 billion by Plaintiffs who claim that their children suffered neurological disorders after being inoculated with a particular vaccine.
5. One pharmaceutical company recently settled a misrepresentation case involving one of its drugs for \$2.25 million and paid costs of over \$500,000.00.
6. Recently, in the United States, Blockbuster settled a case for \$630 million involving 40 million people plus an additional \$13 million for costs in an action in which it was alleged that Blockbuster had charged abusive late fees. Identical actions have now been started in Canada.
7. The Toronto Police Association has started a \$2.1 billion class action against a newspaper for defamation in a series of articles on racial profiling.

8. The manufacturers of mechanical heart valves and other heart-repair devices coated with a particular substance and made in the late 1990s are being sued by the recipients of those devices who claim that the devices were not properly researched and tested.

Of late, a number of class actions have been instituted with respect to pension benefits. Former employees of the Business Development Bank of Canada are suing for \$90 million in additional pension benefits. Michelin employees in New Brunswick are suing Michelin for \$150 million from Michelin's pension surplus. Former employees of Voyageur Colonial have sued the trustees of their union's pension plans, as well as the plan's advisors and administrators. It appears that banks, trust companies, investment advisors, accountants, actuaries, plan consultants, and administrators may now expect to be held accountable for their assumptions and advice over the course of years as lawyers and experts review the performance records of pension funds. One judge has already referred to pension disputes as "tailor-made" for class actions. He said that "the advantages of a class proceeding are so apparent as to be incontrovertible".

Impact on Business and the Economy

There have been a lot of comments made in the press, especially by in-house counsel who prefer to remain nameless, about the way in which class action legislation is regulating the behaviour of big business. There is no question that large corporations are extremely concerned about being exposed to huge claims arising out of relatively minor transgressions. Many class actions take on the characteristics of public inquiries far more so than does traditional litigation. As a result, there is often significant fallout from these types of cases in terms of public perception. In the United States, for example, there have been instances in which publicly traded shares have plummeted 20% with the news of the commencement of a class action alone.

continued on page 5

The number of class actions in Ontario has shown a dramatic increase.



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There is an ongoing action on behalf of two million Canadian car owners whose cars were collision right-offs as far back as the 70s. They are suing insurers for hundreds of millions of dollars in deductibles that were held back when the claims were settled. The certification of the class went up to the Supreme Court of Canada and in an affidavit filed there, the general counsel of the Insurance Bureau of Canada said that the certification ruling might affect the financial stability of some insurers and would certainly increase the cost of automobile insurance. Obviously, this is an example of a class action potentially having an impact on the economy as a whole.

Practical Problems for Plaintiffs

While the Defendants have to worry about huge exposures in money and terrible press, Plaintiffs have their own problems, especially in the early stages. As a general rule until recently, Plaintiffs who lost certification motions usually did not have to worry about adverse costs awards. That is no longer true. The pendulum has now swung and representative Plaintiffs are being hit with awards of costs that sometimes reach into the six figures. Obviously, nobody with a \$5,000 or \$10,000 claim is going to be interested in acting as a representative Plaintiff if there is any chance of getting hit with that type of result.

In some cases, it may be possible for representative Plaintiffs to raise money from the members of the class to be used in the event of such a costs award. In most class actions where this approach is taken, representative Plaintiffs will have to raise hundreds of thousands of dollars to feel secure.

Another alternative is to approach the Class Proceeding Committee for financial support. This is a committee which has at its disposal the Class Proceedings Fund, created by the Law Society Act, which can be used to indemnify representative Plaintiffs for adverse costs award and cover

disbursements. If the class representatives approach the committee and the committee agrees to provide the support, the price is 10% of the recovery.

It appears that there have been relatively few approaches to the committee in Ontario, although given the recent experience of Plaintiffs with adverse costs awards, that may increase. The committee is clearly very cautious about providing support, and probably will not do so unless liability is clear from the outset. However, it might be suggested that the better the Plaintiffs' case, the less likely the Plaintiffs are to approach the committee in the first place.

The class actions legislation in British Columbia operates differently on this point. Except in rare cases, costs will not be awarded against representative Plaintiffs in respect of certification motions in British Columbia.

Compared to the U.S., class actions are still in their infancy in Canada. Few lawyers are comfortable handling them, and people remain hesitant to put themselves to the effort of organizing and participating in them, especially when the stakes are low on a per person basis. Over the last several years, however, the number of class actions in Ontario has shown a dramatic increase. We believe strongly that this trend will continue.

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Professional Notes

Howard S. Black presented a paper entitled "Representing the Challenger to the Will" at the Sixth Annual Estates and Trusts Forum sponsored by the Law Society of Upper Canada. Howard also authored "Assessing Testamentary Capacity: Is There a New Definition of Solicitor's Negligence?", *The Advocates' Quarterly*, Vol. 27, No. 4, Canada Law Book, Inc.

Kenneth Kallish co-chaired the program, "Managing Relationships and Expectations in a Small Law Department", jointly sponsored by Canadian Corporate Counsel Association and Meritas Canada, which took place in February.

Michael Horowitz was a member of the planning committee of the 2004 ICSC Canadian Law Conference as well as the co-chair of the Breakfast Roundtables held on March 4 and 5 at Toronto. Stephen Posen was moderator of the concurrent session entitled "Drop the Puck – Faceoff between Landlords and Influential Tenants on Key Issues". Stephen Messinger was a panel member of the Plenary Session "Stump the Expert". Also, the following lawyers participated as breakfast roundtable co-leaders: Mark Richardson on "What's the Use: Use clauses in Leases"; Jack Tannerya and David Ullmann on "PIPEDA: The new privacy law and its application to Landlords and Tenants"; Adam Perzow and Robyn Kestenberg on "Rights of First Refusal vs. Rights of First Offer: What are they and how do you draft them?"; Timothy Dunn on "Insolvency/Bankruptcy Update: How does this affect my Lease?"; Ian Cantor on "Mitigation: What are the

Landlord's Obligations?"; and Christina Kobi on "Notice of Lease: What to look for before they are registered (Landlord and Tenant), Current e-reg procedures".

David Louis and Samantha Prasad Weiss are the co-authors of *Tax and Family Business Succession Planning*, published by CCH Canadian Limited.

Hartley R. Nathan, Q.C. presented a seminar for Insight on Letters of Intent. Hartley has also published various articles in *Directors Briefing* for CCH Canadian Limited, including "The Business Judgment Rule: A Golden Rule for Directors".

Stephen Posen, together with Stephen Messinger, Michael Horowitz, Adam Perzow, and guest speaker, John C. Williams of the J.C. Williams Group, hosted a breakfast seminar on the topic "Trends & Tactics for Troubling Times" which was held in February.

Reuben M. Rosenblatt, Q.C. spoke at the LSUC "The Six Minute Real Estate Lawyer" conference on the topic of "Real Estate Transactions". Reuben also spoke at the 2004 Institute of CLE (OBA) program on the topic of "Cases that Really Scare Me No. 3 Some Old, Some New, Some Not Yet Reported". Also, Reuben spoke to the Canadian Jewish Law Students Association at its National Convention. Reuben co-chaired an OBA seminar and presented a paper entitled "Everything You Always Wanted to Know About Mortgages (And Were Afraid to Ask) aka The Joy (and Agony) of Mortgages".

Jack Tannerya and David Ullmann spoke at the Springfest 2004 Convention on the topic of "Legal Issues: New Privacy Act" which was organized by the Real Estate Institute of Canada, Toronto Chapter.

Firm News

The Commisso family of Companies, one of the largest independently owned grocery and food distribution chains in southern Ontario, sold to Sobeys Inc., one of Canada's two national retail grocery and food distributors, the assets of Commisso's Food Market, and Commisso's Grocery Distributors Limited.

The transaction represents the sale of 15 grocery stores, 6 cash and carry outlets, a wholesale business, and distribution centre.

In a related transaction Commisso's Properties Inc. sold to Crombie Leaseholds Ltd., wholly owned by Empire Company Limited and an affiliate of Sobeys Inc., a portfolio of 6 shopping centre properties each of which included an existing Commisso's retail operation.

These transactions were completed February 3, 2004.

Frank, Anthony and Rocco Commisso were represented by Minden Gross Grafstein & Greenstein LLP with a team that included Stephen Posen, Alan Litwack, Jack Tannerya (Corporate), Adam Perzow (Leasing), Martin Maierovits (Real Estate), Robert W. Beattie (Competition) and Raymond Slattery (Bulk Sales).

Hartley R. Nathan Q.C. has been elected a director of the Toronto Chinese Community Services Association and Circle of Care. He sits on various committees for both charitable organizations.

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