



"THE NEW LIMITATIONS ACT: IT'S ABOUT TIME"

Prepared By: Joanna Board
Shopping Centre Legal Update, Vol. 23, Issue 3
Fall/Winter 2003

The New Limitations Act: It's About Time

Joanna Board*

Daoust Vukovich Baker-Sigal Banka LLP

Toronto, Canada

The law of limitations is set to change in Ontario when the new *Limitations Act 2002* ("the new Act") becomes effective on January 1, 2004. The new Act is the result of decades of effort on behalf of the Ontario legislature to simplify the law of limitations in Ontario. The current *Limitations Act* (the "old act") is a collection of provisions taken from English statutes dating back to the 1800s. The new Act is a much-needed and much-awaited change toward modernizing the law in Ontario, as it relates to limitation periods.

Why Are Limitation Periods So Important?

The premise behind limitation periods is that lawsuits should be brought within a reasonable time frame so that people and businesses are not under the indefinite threat of legal action. In addition to peace of mind, limitations exist for practical reasons. Documents may be destroyed and memories will fade as time elapses, thus compromising a party's ability to defend an action. Furthermore, the ever-increasing costs of storing records and the recent increases in insurance are factors that support the importance of limitation periods. For these reasons, it has generally been accepted that a cessation or limitation of a party's ability to pursue legal action is important.

The Need for Simplification

Currently, there are various limitation periods in effect in Ontario, ranging from 6 months to 60 years. These various limitation periods are not just found in the *Limitations Act*, but are also found in numerous other statutes. As a result, determining what time limit applies under the current system is not always an easy process.

The Basic Limitation Period

The most significant change to the *Limitations Act* is the imposition of a basic limitation period of two years. Under the old Act, the limitation period for general claims arising from breach of contract is six years. Under the new Act, parties will need to move more quickly if they intend to pursue legal action.

The new Act's basic limitation period of two years applies to almost all claims. There are several (approximately 20) exceptions to the basic limitation period. These exceptions are set out in a schedule attached to the new Act.

The new Act also provides an "ultimate limitation period" of 15 years, after which a person cannot sue.

When Does the Clock Start to Run?

Under the new Act, the two-year timeline starts from the day a wronged party "ought" to have discovered a loss, damage or injury. This "discoverability" principle, as it is commonly referred to, is not a novel concept, but rather a concept that has developed over time by the courts in Ontario under the old Act. The new Act simply codifies what has already developed as an accepted principle under the case law in Ontario.

Some exceptions to the discoverability rule are provided in the new Act for minors and persons under disability. Additional exceptions that restart the clock or delay when the clock starts to run include such things as acknowledgment and part payments of a claim. Also, any attempt to resolve the dispute between the parties will stop the clock from running.

It should be noted that the new Act does not apply to claims that were discovered, or ought to have been discovered, prior to January 1, 2004. In other words, if a person or corporation shows that it discovered the loss prior to the new Act's effective date, a longer limitation period under the old Act may apply. If the claim is discovered after January 1, 2004, the limitation period prescribed by the new Act will apply.

Varying the Limitation Period

The old Act is silent as to whether parties can contract out of a statutory limitation period. As a result, it was not uncommon for parties to include a term in their contracts that reduced the statutory time limit from six years to a shorter time limit.

Under §22 of the new Act, parties can no longer enforce a clause that purports to contract out of the *Limitations Act*.

Limitation Periods As They Relate to Real Property and Leases

The new Act does not apply to real property. On January 1, 2004, Part I of the old Act, which sets out the various limitation periods for real property claims, will be removed from the new Act and become a separate statute known as the *Real Property Limitations Act*. The limitation periods under Part I of the old Act are generally longer, ranging from 10 years to 60 years. The

Real Property Limitations Act will otherwise remain unaffected by the new Act and will continue to apply to real property claims. As a result, the two-year limitation period will not apply to claims strictly relating to real property.

However, since the law in Canada has established that a lease is both an interest in real property *and* a contract, there is some confusion as to which limitation period applies. Some claims, such as claims for the recovery of possession of leased premises after a lease has been terminated, appear to relate strictly to an interest in the land. Consequently, those claims will likely benefit from the 10-year extended limitation period under the *Real Property Limitations Act*.

Other claims, such as claims for the recovery of rent under a lease, are arguably contractual in nature and will likely be subject to the new Act and the two-year limitation period. One could try to argue that the recovery of rent due under a lease is still a claim relating to an interest in land and, as a result, it should also benefit from the 10-year limitation period under the *Real Property Limitations Act*. However, it would be prudent to commence the claim within the two-year time period, rather than risk having the claim barred.

The Ontario legislature has not expressly addressed the ambiguities relating to how the new Act and its basic limitation period will specifically apply to commercial leases. As a result, the area remains a gray area and will potentially be the subject of some interesting litigation in the future.

Conclusion

The new *Limitations Act* is supposed to simplify the law of limitations by instituting a standard two-year limitation period for claims. For people in the real estate and leasing industry, however, the new Act does not necessarily simplify matters. The shorter limitation period imposed by the new Act means that landlords and tenants will have to be more diligent in monitoring and enforcing the leases and contracts into which they enter. It may take a few years before case law clarifies how the new Act and the *Real Property Limitations Act* interact, and how they apply to leases and other claims arising in the commercial leasing context.

*Joanna Board (jboard@dvbb.com) is a commercial litigator with the law firm of Daoust Vukovich Baker-Sigal Banka LLP. A large portion of her practice focuses on landlord and tenant matters.