Limitations Are Deadlines

Restricting Timing for Bringing Litigation

Helpful Guide to Legal Action Time Limits

Limitation periods are time limits that restrict when legal proceedings may be commenced. In Ontario, the ***Limitations Act, 2002***, S.O. 2002, Chapter 24, Schedule B, provides a general limitation period of two (2) years, with some exceptions, after which a 'right of action' (right to sue) will expire and be lost. The ***Limitations Act***, as a general statute, may be superseded by other Acts directly addressing certain types of matters and where limitation periods specific to those matters are defined. The primary purpose of limitation periods is to provide peace to potential defendants whereby upon expiry of the time limit, a potential defendant may rest knowing the risk of lawsuit no longer exists and any right of action has become stale or lapsed. Accordingly, the need to hang onto potential evidence is relieved, and a retained lawyer or paralegal may be discharged. Essentially, the potential defendant is relieved of further worry or concern whereas once a limitation period has expired, the right to bring legal action is 'statute barred'. If a legal action is commenced outside this period, then the action will likely be struck down as there are few exceptions to limitations rules.

Discovery Principle

A common limitation rule involves the discovery principle whereby the limitation 'clock' begins to run only when the cause of action (incident giving rise to a right of action) becomes known to the potential plaintiff or should be known to the potential plaintiff through reasonable diligence. Essentially, the discovery principle provides that a limitation period may begin, and thus expire, only when a potential plaintiff has failed, with knowledge, or by constructive knowledge, to pursue a right of action.

In contract law matters, the discovery date is generally the date in which a contract is breached. For example, if a contract involving a debt exists, and where there is a schedule for payments, or a specific date, the limitation period begins on the date

the contract is breached by a failure to make proper payments. If the contract is a demand loan, the limitation period begins upon demand of repayment. In this example, if there is a breach, the right of action to collect the debt will exist for only two years, albeit with a few exceptions.

In tort law matters, the discovery date is generally the date in which the incident giving rise to a cause of action occurred unless the incident occurrence is unknown to the potential plaintiff. If the incident occurrence is unknown, the limitation period is suspended. Only when the potential plaintiff learns of the cause of action or should have learned of the cause of action by reasonable diligence, does the limitation period begin.

It is also important to appreciate that reasonable diligence requires an reasonable effort towards discovery. As said in at ***Laurent-Hippolyte v. Blasse et al.***, 2018 ONSC 940 at paragraph 26, "*Due diligence is not about information arriving on one's doorstep - it is about actively taking steps outside the door.*"

Of course, it is also important to bear in mind that when a cause of action is "discovered" is somewhat objective. There is a considerable volume of case law that helps to define what "discovered" actually means including the case of ***Consumers Glass Co. v. Foundation Co. of Canada Ltd.***, 51 O.R. (2d) 385 which suggests that more than just some knowledge of the wrong and harm is required before the limitation clock starts ticking; instead, the plaintiff must have sufficient knowledge to bring litigation. While this makes sense in that it appears reasonably fair that the limitation period clock should start only when the plaintiff could begin litigation, the ambiguity in when the plaintiff has 'enough' to begin litigation can be very frustrating to a defendant. This defining concept, whereby the clock begins only when the plaintiff has 'enough' to begin litigation follows the decision in *Sparham-Souter et al. v. Town & Country Developments (Essex) Ltd. et al.*, [1976] 2 All E.R. 65 where Lord Denning stated at page 68:

> A statute of limitations cannot begin to run unless there are two things present: "A party capable of suing and a party liable to be sued." It was so stated by Vaughan Williams LJ in *Thompson v Lord Clanmorris*, [1900] 1 Ch 718 at 729, [1900-03] All ER Rep 804 at 809], and there is good sense in it. It would be unjust that time should run against a plaintiff when there is no possibility of bringing an action to enforce it.

Accordingly, the operative key phrase from the decision of Lord Denning is, "... *capable of suing* ...". Again, the mere knowledge of a wrong and harm may be insufficient to bring an action. It would seem that once a plaintiff has knowledge of a wrong and harm, the Plaintiff may also still have time to gather, subject to reasonable diligence, the necessary evidence.

Regardless of the above, it remains important that a potential Plaintiff act promptly upon becoming aware of wrongdoing and the corresponding harm, or potential for harm. Often, a potential Plaintiff will engage in discussions with a potential Defendant with the hope of resolving a matter without taking legal action. Unfortunately, many potential Plaintiffs will let the clock run out during resolution discussions. The potential Plaintiff will then attempt to argue that the clock runs from the time the potential Defendant failed to remedy the issue in dispute rather than when the issue in dispute was initially discovered. This argument will fail in law; ***Reynolds v. Harwood Plumbing***, 2017 ONSC 4899.

Suspension by Concealment

Generally, where a potential defendant wrongfully conceals facts that would reveal a cause of action to a potential plaintiff, the running of the limitation period is suspended. Similar to the rule in the 'discovery principle', if the potential plaintiff is unaware that a cause of action exists, the limitation period 'clock' waits. However, the key difference between the 'Suspension by Concealment' rule and the 'Discovery Principle' rule is that where a potential plaintiff becomes somewhat aware that a cause of action has occurred yet is impaired by the potential defendant's concealment from fully gathering the facts necessary to commence legal proceedings, all applicable limitation periods are suspended. The reason for this rule is simply to prevent a potential defendant from using unjust concealment tactics to avoid, and eventually void, legal actions.

Cause of Action, continuing

In various types of tort claims, causes of action may accrue or 'roll over'. For example, in a trespass claim, such as where a potential defendant neighbour has parked an 'eyesore' of an automobile on the potential plaintiff neighbour's property, the cause of action accrues each day in which the automobile remains in trespass. The cause of action is continually reborn until the trespass ends at which time the

limitation period will begin. Similarly, where a cause of action involves a continuous course of conduct or series of acts, the cause of action accrues and the limitation period begins upon the final act rather than the first. Accordingly, each individual but related incident becomes part of a collective incident whereby the right of action for all involved incidents expires only when the limitation period has passed when calculated from the final act. The continuing cause of action was defined in the case of ***Hole v. Chard Union***, [1884] 1 Ch. 293 at p. 296 as "a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought." Although this issue is uncommon, a good number of cases cite Hole as precedent including ***Georgian Glen Developments Ltd. v. Barrie (City)***, 2005 CanLII 31997 at paragraph 19; ***Starline Entertainment Centre Inc. v. Ciccarelli***, 1995 CanLII 7132 at page 27; ***Schenck v. Ontario***, 1984 CanLII 1950 (ON CA) at page 10.

Settlement Negotiations

Another restriction to the running of a limitation period involves promises made during settlement negotiations whereas the agreement, usually a promise of payment, causes a 'promissory estoppel'. The doctrine of promissory estoppel, as applied to limitation expiry concerns, prevents potential defendants from entering into settlement negotiations in bad faith with the ulterior motive of delaying the potential plaintiff from commencing legal proceedings and then subsequently attempting to plead that the limitation period expired. Simply stated, if the defendant reneges on promises made during settlement negotiations, and the promises were reasonably relied upon by the defendant who then delayed bringing legal action based on the promises, the limitation period may run from the date the defendant reneged on the subsequent promise rather than the date of the original wrongdoing. This viewpoint is found in ***Danby v. Michaud***, 2014 CanLII 12060. However, appeariing to the contrary is the viewpoint found in ***Bryenton v 7017103 Canada Inc.***, 2014 CanLII 100257 where it is stated:

[28] Further, I should note that in this case all the defects that are no subject to this lawsuit were discovered and identified by the plaintiff prior to closing on August 8, 2012. The action was commenced on October 28, 2014, more than two years after the defects were first discovered. While I recognize and accept that there were discussion between the plaintiff and the defendant seeking to remedy the problems including the several e mail exchanges and in particular the e mail dated June 8, 2013 where the defendant appears to accept responsibility at least for some of the defects, I am not of the view that these discussions tolled the limitation period. In *Toronto Standard Condominium Corp. No. 1789 v. Tip Top Lofts Development Inc.*, 2011 ONSC 7181 (CanLII) DM.R. Dambrot J. who held that absent a contractual obligation post discovery discussion of remediation does not toll the limitation period. I also rely on the judgement of the Supreme Court of Canada in *Marchischuk v. Dominion Industrial Supplies Ltd.*, 1991 CanLII 59 (SCC) , [1991] 2 SCR 61, for the proposition that unless I can conclude that there is evidence from which a promise not to rely on the limitation period could be inferred, the Limitation period should not be extended. I cannot reach that conclusion and therefore, I find that and claim based on the negligence of the defendant numbered company is statute barred.

Summary Comment

With the principles applicable to limitation periods, the safest way to bring litigation is to avoid dancing with the limitations date. By bringing litigation forward as diligently as possible; however, without such haste as to fail in preparation, the risk of losing a right of action is greatly reduced.