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LIMITATIONS REVISITED

On January 1, 2004, the Ontario government, after years of attempts to modernise the Limitations Act (the "Old Act"), proclaimed in force the Limitations Act, 2002 (the "New Act"). The New Act made two major changes to the Old Act. It reduced the basic limitation period from 6 years to 2 years and it added a 15-year ultimate limitation period. What does this mean to the construction industry? Lots.

Concepts

A limitation period is the period during which an injured person may commence an action against the person who has committed the wrong. The New Act and the Old Act are statutes of repose. In essence, they say that there is a time by which the injured person has to do something to obtain redress or give up the right to sue (i.e. the party at fault should be at risk for only so long and then, after the prescribed time, should be able to rest easy).

Under the Old Act, the usual limitation period was 6 years. It applied to breaches of contract, torts, and other causes of action. However, some causes of action, such as breaches of trust, were not subject to any limitation period at all. The statute was unforgiving in its reading. Once 6 years had elapsed from the time the cause of action arose, the right to sue died if no action had been commenced.

This was rather unfair if the injured party did not even know that there was a cause of action until the 6-year period

was over. For example, assume a forming subcontractor uses steel rebar that is defective, the rebar fails, and the concrete disintegrates in year 7. The owner of the building does not know that there is a problem until after the limitation period expires.

The courts therefore interpreted the Old Act by importing the concept of discoverability. Although the cause of action occurs when the improper act is committed, the limitation period does not start to run until the injured party either discovers, or ought reasonably to have discovered, the problem.

Basic Period

The New Act has a far shorter basic limitation period than the Old Act: 2 years instead of 6 years. Further, the basic period now applies to almost every cause of action, with few exceptions. This shortened period is good for prospective defendants, but many prospective plaintiffs may be caught unawares; two years slip by very quickly.

The New Act incorporates the discoverability principle of the common law (i.e. judge-made law). It does not start the limitation period running until a claim is discovered. A claim is discovered on the day that the injured party first knew or ought reasonably to have known that:

- . the injury had occurred,
- . the injury was caused or contributed by an act or omission,
- . the act was that of the person against whom the claim is made, and
- . an action would be an appropriate means to seek a remedy.

Ultimate Period

The New Act added an ultimate 15-year limitation period. This period does not account for discoverability. The legislature made the value decision that there comes a point in time after which old causes of action cannot be dredged up. This value decision chooses repose and certainty over untimely justice.

Accordingly, in our previous example, if the damage to the concrete becomes apparent in year 12, the injured party would have 2 years to commence an action. If the damage does not become apparent until year 14, the injured party has only to the end of year 15 to commence an action. If the damage does not become apparent until year 16, the injured party has no right of recourse at all.

Application

The Old Act had little effect on the construction industry. Trust fund actions had no limitation period and contractual claims had to be made within 6 years of discoverability. Most actions could be and were easily commenced within 6 years. The New Act, however, will have a major impact on the construction industry

A cause of action arises when the injury occurs and is known – even if the extent of the damages is not then known (i.e. the limitation period starts running immediately and the fact that the injured person does not know the extent of the damages or, indeed, whether there are damages is irrelevant).

If somebody breaches a contract, the injured party knows of the breach although it does not

necessarily know the ultimate cost, if any, of the breach. If someone runs over a pedestrian, the pedestrian immediately knows that there is an injury although the extent of the injury may not be known until later.

Assume that a sub walks off the job improperly. The general knows that there is a breach and that there may be damages, but will not know what the damages are until it replaces the sub. The general has two years from the date of the breach to commence the action; one would think that, by the end of the action, the exact damages would be known. In this scenario, the two-year limitation is not a major concern because, when a sub walks off the job, the relationship between the sub and general is over. There is no reason why the general cannot commence an action in a timely fashion.

However, take another example. The general is supposed to start a contract on January 1 and finish 3 years later. The job starts on time, but is shut down in March and April because of bylaw problems. The general has now lost 2 months from its schedule; it knows that there is a cause of action and it knows that there may well be damages because of the delay. Normally, the owner and general would wait and see what happens at the end of the job to discuss how to deal with delay damages. They would be hard pressed to agree on delay damages at the start of the project.

Unfortunately, the time to commence an action, in this example, starts on January 1; it does not commence on substantial performance. Indeed, when substantial performance is achieved, the limitation period will already have expired.

Saving

So, in our last fact situation, what can the general do? It can immediately commence an

action against the owner. That is an adversarial and foolhardy way to start a project; it guarantees that the parties will be at odds with each other for the entire life of the project.

It can attempt to have the owner agree that the limitation period does not run until, say, substantial performance. The New Act now allows for this type of arrangement (called a tolling agreement).

It can do nothing, and rely on the mediation and arbitration aspects of most standard construction contracts to suspend the running of the limitation period. Unfortunately, we do not feel that the mere existence of these provisions is sufficient to suspend the running of the limitation clock. The mediation or arbitration process would actually have to be invoked.

Suggestions

We suggest that when

a matter arises that would normally require the general to commence an action before the end of the project, the general should speak to the owner to arrange for a tolling agreement. If the owner refuses to enter into the tolling agreement, the general should commence the action.

Note that commencing an action does not mean that the statement of claim has to be served; it just needs to be issued. Service can wait for another 6 months. Further, if the statement of claim has to be served, the general can then notify the owner that the general only commenced the action to protect its rights of action and that the parties can put the action on hold until the end of the job.

Everything that we have said applies equally well to a situation in which a sub is claiming against the general. However, if the sub requests a tolling agreement from the general, then the general should pass on that request to the owner.

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