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A Refresher on Discoverability Principles

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Several decisions were issued by the Ontario Court of Appeal over the last year regarding the discoverability principles under section 5 of the *Limitations Act, 2002*:[i]

5. (1) *A claim is discovered on the earlier of,*

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) *A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.*

While the determination of the starting point of a limitation period is very fact-specific and turns on the particular circumstances of each given case, some principles can be drawn from the various decisions of the Court of Appeal, and may assist plaintiffs in successfully resisting a limitation defence when the claim was issued outside the general two-year limitation period.

Discoverability: It Is Not About Due Diligence

As a general rule, the plaintiff must commence an action within two years of discovering his or her claim.[ii] Section 5(2) *L.A.* states that a plaintiff is presumed to have discovered his or her claim on the day the act or omission on which the claim is based took place, unless the contrary is proven. This is where the discoverability principles come into play.[iii]

Recently, in *Morrison* v. *Barzo*,[iv] the Ontario Court of Appeal summarized the approach to be followed when considering discoverability. First, the plaintiff must rebut the presumption in section 5(2) *L.A.* that he or she knew of the matters referred to in section 5(1)(a) *L.A.* on the day the act or omission on which the claim is based took place. The plaintiff only needs to prove that the actual discovery of the claim was not on the date the events giving rise to the claim took place. The plaintiff does not have to show

due diligence. Second, the plaintiff must offer a reasonable explanation on proper evidence as to why the claim could not have been discovered through the exercise of reasonable diligence, in application of section 5(1)(b) *L.A.* The evidentiary threshold is low, and the plaintiff's explanation must be given a generous reading, and considered in the context of the claim.

As such, while due diligence is part of the evaluation of section 5(1)(b) *L.A.*, it is not a separate basis for determining whether a limitation period has expired. This was reiterated in *Har Jo Management Services Canada Ltd.* v. *York (Regional Municipality)*,[v] which related to two flooding incidents that occurred on May 21 and 28, 2013. The plaintiff did not discover the cause of the flooding incidents until June 28, 2013. The action was commenced on June 29, 2015, exactly two years later (June 28, 2015 was a Sunday). The motion judge[vi] held that the claim was out of time on the ground that the plaintiff had failed to exercise due diligence after June 28, 2013. The Court of Appeal disagreed:

"(…) Once a claim has been discovered, there is no ongoing duty on a plaintiff to further investigate the claim. Once the plaintiff has knowledge of its claim, then the limitation clock has begun running, and all the plaintiff is required to do is commence an action before the limitation period expires."[vii]

The two-year limitation period is, simply put, a time period by which the plaintiff must file a claim after he or she discovered (or ought to have discovered) the claim. The defendant cannot argue that the plaintiff failed to exercise due diligence because the claim was filed on the eve of the two-year limitation period. The claim will still be considered within time.

Determining When the Claim Was Discovered: It Is Not Always an Easy Task

As mentioned above, the limitation period is presumed to start running on the day on which the act or omission took place (section 5(2) *L.A.*), unless the act or omission, injury or causation are discovered later. While this rule may seem easy to apply, the recent case *Apotex Inc.* v. *Nordion (Canada) Inc.*[viii] illustrates how difficult it may be to determine the starting point of the limitation period in a breach of contract case.

Apotex is a Canadian manufacturer of generic drugs. In order to sell a generic drug in the United States, a manufacturer must submit an abbreviated new drug application to the FDA to establish that its generic drug is bioequivalent to the patented drug. Apotex retained MDS in 2003 and 2004 to prepare bioequivalence studies to support applications to the FDA for the approval of two generic drugs.

Unbeknownst to Apotex, in July 2003, the FDA inspected MDS's Montreal facility and issued a notice expressing their concerns about potential contamination in the laboratory and about the storage and preservation of samples. The FDA did further inspections in September and October 2004, and continued to raise concerns. In January 2005, Apotex became aware of the issues with the FDA, but received reassurance from MDS, who advised that it had developed a five-year review plan to resolve all outstanding issues with the FDA. In the meantime, Apotex submitted its applications to the FDA for both generic drugs, supported by MDS's bioequivalence studies.

On March 24, 2006, the FDA issued a letter expressing concerns about the implementation and reporting associated with the five-year plan review. On April 1, 2006, MDS voluntarily closed its Montreal facility. On April 24, 2006, the FDA advised Apotex that its applications could not proceed until the concerns regarding MDS's facility were resolved. On May 8, 2006, Apotex acknowledged in an internal email that the approval of the two generic drugs by the FDA could be delayed. MDS subsequently attempted to address the FDA's concerns, to no avail. On December 11, 2006, the FDA verbally advised Apotex it would be necessary to repeat the studies done by MDS, re-analyze the samples, or have a third party auditor review and certify MDS's studies. On January 10, 2017, the FDA officially rejected MDS's studies.

Apotex commenced an action against MDS on November 10, 2008. MDS raised a limitation defence and argued that Apotex knew, as of January 2005, that there were issued with MDS's Montreal facility. The trial judge[ix] held instead that the breach, injury and causation were discovered on May 8, 2006 when Apotex first realized there could be a delay, which would result in lost profits. However, the trial judge also held that it would not have been appropriate for Apotex to have commenced a proceeding against MDS at that time, as it was more appropriate for Apotex to await the FDA's position regarding MDS's studies. The trial judge therefore concluded that the limitation period started running only on December 11, 2006 when Apotex was informed by the FDA that MDS's studies would not be accepted. As a result, the trial judge held that the claim issued on November 10, 2008 was not time-barred.

The Court of Appeal agreed with the trial judge that the claim was not time-barred, but disagreed with the manner in which the trial judge reached his conclusion, particularly his resort to section 5(1)(a)(iv) *L.A.* Justice Strathy, C.J.O., noted:

"(…) in many cases, the act or omission, causation, and the injury, loss or damage will occur simultaneously, and will be discovered simultaneously. But this will not always be the case. In some cases, discovery of the "act or omission" will not start the limitation period running unless injury, loss or damage has occurred and has been discovered."[x]

Based on the factual determinations made by the trial judge, the Court of Appeal held that the limitation period did not start running until December 11, 2006 when Apotex was first informed by the FDA that MDS's studies would be rejected. Until then, Apotex did not know of MDS's breaches of contract, and the injury had not yet manifested:

"As the trial judge found, (…) Apotex "was never in a position to assess whether the FDA's concerns involving the Montreal Facility directly impacted the Studies such that they would not be accepted by the FDA." That determination could only be made by the FDA, and Apotex's knowledge of this was necessarily contingent on communication from the FDA."[xi]

Beyond Discoverability: When It May Not Be Appropriate to Commence a Proceeding

In *Apotex*, the trial judge considered when it became appropriate for Apotex to commence a proceeding against MDS, in application of section 5(1)(a)(iv) *L.A.* The Court of Appeal concluded that it was not necessary to resort to section 5(1)(a)(iv) *L.A.* There are, however, other recent cases where the Court of Appeal specifically applied it. Section 5(1)(a)(iv) *L.A.* can have the effect of postponing the start date of the two-year limitation period beyond the date when the plaintiff discovers its claim, because of the defendant's actions.

a. When the Plaintiff Relied on the Superior Knowledge and Expertise of the Defendant

Resorting to legal action may not be appropriate when the plaintiff relied on the superior knowledge and expertise of the defendant, especially where the defendant undertook efforts to ameliorate the loss.

In *Brown* v. *Baum*,[xii] the Court of Appeal held that it would not have been appropriate for the plaintiff to commence an action in medical malpractice against a surgeon until a corrective surgery took place. A reasonable person would not have considered it appropriate to sue the surgeon while he was in the process of correcting his error and hopefully correcting or reducing the damage.

In *Gillham* v. *Lake of Bays (Township)*,[xiii] Justice Roberts, J.A., noted that section 5(1)(a)(iv) *L.A.* deters needless litigation:

"*The common law acknowledges that trivial damages do not trigger a limitation period, since a prudent plaintiff would not bring an action to recover a trivial loss."*[xiv]

As such, even though the plaintiffs first became aware in 2009 that one of their cottage's deck piers had sunk, they were entitled to "wait-and-see" until a geotechnical engineer recommended to remove and reconstruct the deck in 2012. The fact that the general

contractor had dismissed the sinking issues as “not serious” and had recommended to simply monitor the situation appeared to have been a key factor considered by the Court of Appeal.

The recent decision in *Zeppa* v. *Woodbridge Heating & Air Conditioning Ltd.*,[xv] is yet another example of what could constitute reliance on the defendant’s superior knowledge and expertise. In that case, the Zeppas purchased an HVAC system from Woodbridge in 2006 and began experiencing significant issues with it immediately following its installation. Woodbridge attempted to solve the problem and in 2007, it suggested a two-year maintenance plan. The last time the HVAC system was serviced by Woodbridge was sometime during the Fall of 2009. The issues were never fixed. The Zeppas further investigated and on November 1, 2010, they were advised by the manufacturer that the HVAC system was incorrectly installed. They commenced the action on February 21, 2012.

Facing a motion for summary judgment, the Zeppas had to establish that the limitation period only started running on or after February 21, 2010. The motion judge[xvi] held that the Zeppas knew well before then that the HVAC system was not functioning properly. The Zeppas did not need to know the reason why in order to discover their claim against Woodbridge. The motion judge suggested that the Zeppas could reasonably maintain that they were relying on the superior knowledge and expertise of Woodbridge, and on the fact that Woodbridge was engaged in good faith efforts to remedy the concerns with the HVAC system, up until the Fall of 2009. However, the Zeppas stopped relying on Woodbridge to fix the issues afterwards. The motion judge therefore found the claim to be time-barred. The majority of the Court of Appeal confirmed all of the motion judge’s findings, although Justice Feldman, J.A., dissented.

b. When an Alternative Dispute Resolution (ADR) Process Offers an Adequate Alternative Remedy and That Process Has Not Fully Run Its Course

In *PQ Licensing S.A.* v. *LPQ Central Canada Inc.*,[xvii] a dispute arose over the franchisee’s purported rescission of its franchise agreement. On August 11, 2009, the franchisee delivered the notice of rescission. The franchise agreement provided for mandatory mediation and then arbitration of disputes. Regardless, more than two years later, on October 6, 2011, the franchisee issued a claim before the Superior Court. In July 2013, the action was stayed based on the ADR provisions, and the limitation period issue was deferred to the arbitrator. The franchisee argued that the limitation had not yet started running, as mediation was a precondition to arbitration. The franchisor in turn argued that the limitation should not be indefinitely tolled until such time mediation is requested.

The Court of Appeal applied section 5(1)(a)(iv) *L.A.* and held that the limitation period was not expired, as it would have been inappropriate to commence a legal action before the alternative dispute resolution process had fully run its course. The Court of Appeal did not consider this to be a “tolling” of the limitation period, as either party could have put in motion the ADR process at any time in order to start the running of the limitation period.

c. While Criminal Proceedings in Respect of the Incident Remain Outstanding

In *Winmill* v. *Woodstock (Police Services Board)*,[xviii] the Court of Appeal noted that it might not be appropriate to commence a civil action while criminal proceedings in respect of the same incident remain outstanding. In that case, the plaintiff did not commence a battery claim against the defendants until his criminal charges for assault and resisting arrest were resolved. Writing for the majority, Justice MacPherson, J.A., quoted his own previous decision in *Chimienti* v. *Windsor (City)*:[xix]

“[T]here is something of a logical inconsistency in asking a civil court to rule on the propriety of a criminal prosecution before the criminal court has had the opportunity to assess the merits of the underlying charge.”[xx]

d. An Admission of Liability Is Not a Sufficient Reason to Extend the Limitation Period, Unless Promissory Estoppel Applies

In *Nasr Hospitality Services Inc*. v. *Intact Insurance*,[xxi] Nasr's business premises were damaged by a flood on the morning of January 31, 2013. Nasr immediately reported the water damage to its insurer Intact, and made a claim for indemnification under its commercial insurance policy. Intact paid $42,000 between March and May 2013. Intact subsequently discovered in July 2013 that the property was vacant at the time of the loss. Relying on a policy exclusion, Intact denied coverage on July 22, 2013. Nasr commenced an action against Intact on April 22, 2015 and alleged that the limitation period did not start running until coverage was denied. The motion judge[xxii] agreed, and held that it was appropriate for Nasr to wait before commencing its action.

The Court of Appeal set aside the motion judge's decision and granted summary judgment dismissing the action. The Court referred to the principle set out in prior decisions that a party claiming indemnification under or in respect of a policy of insurance knows that there was a loss caused by an omission of the insurer the day after the request or claim for indemnification is made. Applying this principle to the facts of this case, Nasr knew of the matters enumerated in section 5(a)(i)(ii)(iii) *L.A.* (breach, injury, causation) as of February 1, 2013. Absent an explicit promise by Intact not to rely on the limitation period (known as promissory estoppel), there was no reason to extend the limitation period, even though Intact had paid part of the claim after receiving notification of the claim. The Court of Appeal noted that: "*[f]or an admission of liability to extend a limitation period something more than the admission is required (…).*"[xxiii]

Concluding Remarks

If you wish to pursue a claim arising from a single incident, it is always preferable to commence an action within two years of the incident. However, if that two-year deadline has passed, there may still be time to commence an action, for example if the injury was only discovered later, or if it may not have been appropriate to commence a proceeding before.

In cases involving a breach of contract where the parties have been involved in a long-standing relationship, it may be particularly difficult to determine when the breach (or breaches) of contract occurred, making it challenging to pinpoint the date on which the limitation period may have started running.

In doubt, it is best to err on the side of caution and to consult with a litigation lawyer sooner than later.

[i] S.O. 2002, c. 24, Sched. B ["***L.A.***"].

[ii] Section 4 *L.A.*

[iii] It should be noted that since January 1, 2019, the 15-year ultimate limitation period (section 15 *L.A.*) has the effect of barring a claim 15 years after the act or omission on which the claim is based took place, regardless of when the claim was actually discovered.

[iv] 2018 ONCA 979.

[v] 2018 ONCA 469.

[vi] Judgment of Justice Corkery, S.C.J., January 12, 2017, unreported.

[vii] *Har Jo*, *supra* note 5 at para. 42.

[viii] 2019 ONCA 23.

[ix] 2017 ONSC 1323.

[x] *Apotex*, *supra* note 8 at para. 92.

[xi] *Ibid.* at para. 119.

[xii] 2016 ONCA 325.

[xiii] 2018 ONCA 667.

[xiv] *Ibid.* at para. 22.

[xv] 2019 ONCA 47.

[xvi] 2017 ONSC 5847.

[xvii] 2018 ONCA 331.

[xviii] 2017 ONCA 962.

[xix] 2011 ONCA 16.

[xx] *Ibid.* at para. 32.

[xxi] 2018 ONCA 725.

[xxii] 2017 ONSC 4136.

[xxiii] *Nasr*, *supra* note 21 at para. 56.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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