

Construction - The time limit for making claims: the *Limitations Act*

Part 1

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The current *Alberta Limitations Act*¹ came into force on March 1, 1999. Limitation periods are designed to set a period of time within which a party may commence a claim. The *Limitations Act* sets time limits on when a claim may be made to provide certainty for all parties. After the limitation period has expired, a party need no longer be concerned about old claims haunting them.

The most dramatic feature of the current *Act* is the "Drop Dead Rule," a first for Canada. A drop dead rule provides for a certain final date within which all actions must be commenced. Prior to March 1, 1999, and to a certain extent today as well, one of the concepts that affected the certainty granted by limitations legislation was the concept of "discoverability." This means that the time period within which a party may sue does not start to run until the problem (in general terms) is discovered.

The current *Limitations Act* affects claims in Alberta with two general rules:

Two years after Discovery Rule:

Claims must be brought within 2 years from the date the claimant knew, or ought to have known, that:

(i) the injury, (personal injury, property damage, economic loss, non-per-

formance of an obligation, or breach of duty) occurred;

(ii) the injury was attributable to the conduct of the defendant; and

(iii) the injury, assuming liability on the part of the defendant, warrants commencing an action and, in any case

Ultimate Rule or Drop Dead Rule:

Claims must be brought within 10 years from when the claim arose - normally when the conduct causing the injury occurred.

Barring a few exceptions, all claims are governed by both the "Two Years after Discovery Rule" and the "Ultimate Rule" or "Drop Dead Rule," whichever expires first. If a claim is commenced after the expiry of these periods, then the defendant is entitled to immunity from liability for the claim.

There are two principal exceptions to the above rules. The first exception is



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where there is other legislation setting a specific limitation period which will govern the generic provisions of the *Limitations Act*. For example, the *Municipal Government Act*² stipulates that actions against municipalities must be brought within a shorter time period. The second exception is where the parties agree in writing to extend a limitation period. (For example: a written "lifetime warranty" on equipment or materials.) However, limitation periods set out in the *Act* cannot be shortened (section 7).

Comparison of the old and new limitation periods

Prior to the 1999 coming into force of the current *Limitations Act*, limitations legislation in Alberta differentiated between tort and negligence claims. The former limitations legislation provided for a six-year limitation period which commenced at different times depending on the nature of the claim. As discussed above, the current *Limi-*

tations Act does not differentiate between tort and negligence claims, as it applies the "Two Years after Discovery Rule" and the "Ultimate Rule" or "Drop Dead Rule" to all claims.

The Winnipeg condominium case

In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*,³ an action was brought by the owners of a condominium after some stone cladding fell off the side of a building.

In 1972, a developer contracted with Bird Construction to build a large apartment building. Bird Construction entered into a subcontract for the masonry work, including the stone cladding, with Kornovski & Keller Masonry Ltd. The building was substantially complete by December 1974. In 1978, the building was converted to condominiums.

In 1982, the Condominium Board was concerned about the stone cladding and contacted the architect and other consultants. On their advice, the Condominium Board arranged for repairs to be done at a cost of \$8,100.00. On May 8, 1989, a storey-high section of the cladding fell from the ninth storey of the condominium. The Condominium Corporation eventually had all of the cladding replaced at a cost of over \$1.5 million. The Condominium Corporation commenced an action in negligence against Bird Construction, the architect and Kornovski & Keller.

Considering the limitation period aspect of the case only, if these facts had occurred in Alberta before the current *Limitations Act* came into force, the Condominium Corporation would have been able to commence an action within 6 years from discovering the defect. This date would appear to be 6 years from the day the stone cladding fell off the building (May 8, 1989) because no structural defects were found in 1982. Accordingly, the Condominium Corporation would have had until May 8, 1995 to commence its action.

If these facts occurred under the current Alberta *Limitations Act*, the Condominium Corporation would have the earlier of:

(a) **Two years after Discovery Rule:** Discovery: May 8, 1989; Limitation: May 8, 1991; and

(b) **Ultimate Rule or Drop Dead Rule:** Claim arose when work performed: December, 1974; Drop Dead Date: December 1984.

Under the current *Act*, Bird Construction's exposure would be reduced because an action would have to have been commenced before December 1984, almost 11 years earlier than under the old *Act*. On the facts of this case, because no defects were discovered before 1984, Bird Construction would probably not have been sued

before the limitation period expired and thus would have been protected from exposure for this claim.

Summary:

As illustrated by the *Winnipeg Condominium* case, the current *Limitations Act* is very effective in limiting exposure to long term liability. For those doing business in Alberta, internal business practices should be monitored to ensure that the appropriate systems are in place to commence or respond to claims in a timely fashion before the limitation period expires. • NCN

References:

- (1) R.S.A. 2000, c. L-12 (*Act*).
- (2) R.S.A. 2000, c. M-26.
- (3) [1995] 1 S.C.R. 85 (*Winnipeg Condominium*).

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