

CONSTRUCTION: The Limitations Act

Part 2

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As outlined in Part I of this series, the Alberta *Limitations Act*¹ (the *Act*) sets out two general rules with respect to the length of a limitation period – a “two years after discovery rule” and an “ultimate or drop dead rule” of ten years.

While it is relatively clear that the “ultimate or drop dead” limitation period starts to run as soon as the conduct complained of occurs, it is not as clear when the “two years after discovery” limitation period begins to run.

In relation to the “two years after discovery” limitation period, reference must be made to subsection 3(1) of the *Act*². The meaning of that subsection was discussed in the *Sun Gro Horticulture Canada Ltd. v. Alberta Metal Building Sales Inc.*³ case.

THE SUN GRO HORTICULTURE CASE

Alberta Metal agreed to construct a metal building for Sun Gro based on drawings prepared by Sun Gro’s engineer. The contract required that Alberta Metal obtain a building permit prior to construction; however, no permits were ever obtained.

The building was constructed and paid for in full in early 1996. In March of

2000, Sun Gro learned that the building did not comply with fire safety provisions and required sprinklers. In November 2000, the Sun Gro’s plant was seriously damaged by fire. Sun Gro sued Alberta Metal on October 1, 2002.

Alberta Metal argued that the case should be dismissed on a summary basis without even considering the merits of the case because the limitation period had run out in March of 2002 as a result of Sun Gro’s knowledge regarding the building deficiencies which it knew of in March of 2000. The issue before the court was: when did Sun Gro obtain the requisite degree of knowledge to trigger the running of the limitation period. The application for summary judgment by Alberta Metal was dismissed by the chambers judge. The Court of Appeal dismissed the appeal, and provided guidance on the application of the “two years after discovery rule” in the process.



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The Court of Appeal dissected subsection 3(1)(a) of the *Act*, stating that all three elements of this section must be met in order for the limitation period to run based on discoverability. The person bringing the action must have *known*, or have been aware of facts that would lead the court to believe that that person *ought to have known*, that:

- (a) the *injury* that is the subject of the lawsuit has occurred;
- (b) the *injury* was caused by the conduct of the person(s) being sued; and
- (c) the *injury* is serious enough to justify commencing a lawsuit against such person.

The Court of Appeal held that, in applying section 3(1)(a) and the “two years after discovery rule,” one must focus on when *knowledge* of the *injury* was obtained, and not when knowledge of a specific *legal claim* for that injury was discovered.

The Court of Appeal confirmed that there may be different limitation periods for different injuries arising from the same transaction. Based on this finding, Sun Gro had until November of 2002 to commence its claim and had done so within the limitation period:

"I agree with [Sun Gro] that [Alberta Metal] confuses the concept of a cause of action with that of an injury. The *Limitations Act* defines a "claim" as a matter giving rise to a civil proceeding in which a claimant seeks a remedial order (s.1(a)). A "remedial order" is defined as a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with the duty or to pay damages for the violation of a right (s.1(i)). The *Act* defines "injury" to mean personal injury, property damage, economic loss, non-performance of an obligation or, in the absence of any of the foregoing, the breach of a duty (s.1(e)). It is true that a factual nexus gives rise to only one cause of action, and a judgment merges all claims for damages arising from that cause of action. Section 3(1)(a), however, links immunity with the discoverability of the injury, not the discoverability of a cause of action for any injury. This accords with a plain and purposive reading of the enactment reflecting as it does the legislative choice for discoverability of the injury ... In my opinion, the injuries for which a remedial order is sought in this case, are properly characterized as "property damage" and result-

ing "economic loss" as defined by the *Act*."⁴

SUMMARY

In Alberta, it is now clear that there may be different limitation periods for different injuries arising from the same conduct, and that the "two years after discovery" limitation period starts to run anew each time a claimant gains **knowledge of an actionable injury** the claimant has suffered at the hands of **an identifiable person**. This means that liability in negligent construction matters may be extended significantly in certain circumstances. For those doing business in Alberta, a system of complaint management should be maintained in order to mitigate liability for deficiencies in construction projects. • NCN

References:

- (1) *Alberta Limitations Act*, R.S.A. 2000, c. L-12, which came into force on March 1, 1999
- (2) 3(1) Subject to section 11, if a claimant does not seek a remedial order within
 - (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
 - (i) that the injury for which the

claimant seeks a remedial order had occurred,

- (ii) that the injury was attributable to conduct of the defendant, and
- (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

...
(3) *Sun Gro Horticulture Canada Ltd. v. Alberta Metal Building Sales Inc.*, 2006 ABCA 243

(4) *Sun Gro Horticulture Canada Ltd. v. Alberta Metal Building Sales Inc.*, 2006 ABCA 243, at paragraph 11

This article is provided as an information and is a summary of current legal issues of concern to the Construction Industry. This article is not meant as legal opinions and readers are cautioned not to act on information provided in this article without seeking specific legal advice with respect to their unique circumstances.