PLAYBACK
ABOUT PRODUCTION, BROADCASTING & INTERACTIVE MEDIA IN CANADA

February 16, 2004
News

Binchmarks

Discovering your limitations - changes for Ontario litigation

by Brett Harrison
page 12

Brett Harrison is an associate in the litigation group of the Toronto law firm McMillan Binch LLP.

If you think you have a reason to sue somebody (or that somebody might have a reason to sue you), it may be more important than ever to start watching the clock.

Because of changes to Ontario's limitations legislation, as of Jan. 1, 2004, the general limitation period has been reduced from six years to two years.

This means that if you don't start court proceedings within two years after the limitation period starts, you may not be able to sue.

Other significant changes to the legislation affect how to determine when a limitation period begins, and parties' abilities to agree to change a limitation period.

Why have limitation periods?

Limitation periods are intended to encourage people to bring claims on a timely basis so that, for example, defendants don't face lawsuits that aren't brought until many years after something happened, when supporting evidence may have been destroyed and witnesses' memories have faded.

However, potential plaintiffs may need time to investigate whether they have a claim that's worth a lawsuit; for example, to determine the extent of their damages or who, if anyone, can be held responsible for them.

In addition, once a claim is made, the parties need time to attempt to negotiate a settlement without the expense, time and effort of going to court.

When does the limitation

period begin?

In Ontario, the limitation period starts running when the claim is discovered, or discoverable, by the potential plaintiff.

This means the date on which you knew, or should reasonably have known, that the other party's behavior caused you some kind of loss, injury or damage.

For example, if you think you're owed a share of revenues from sales of a production, you might say the limitation period began when you first learned about the sales.

However, the party that owes you money might argue that since you had the right to ask for sales reports earlier,

the limitation period started much sooner - when you ought to have known about the sales.

If that party wins the argument, and the limitation period has expired before you went to court, you won't even have the chance to argue your claim.

When was claim discoverable?

Under the new legislation, it's presumed that the claim was discoverable on the date the wrongful act took place.

If you want to establish that the limitation period started later than that, you have to prove that you didn't know about the wrong when it happened and couldn't reasonably have found out about it then.

For example, if you think a project looks suspiciously like something you came up with years ago and want to claim that your idea was stolen, the presumption is that the limitation period started when the other party started working on the project using your idea.

In order to prove that the limitation period started later, you would have to prove that you didn't know - and couldn't have known - that the person was working on the project until much later; e.g., when it was being promoted or when it was broadcast.

In determining when a claim is discoverable, the courts will take into account the abilities and attributes of the person seeking to bring the claim.

It's possible the courts would expect a sophisticated party, such as an experienced businessperson, or a guild or government agency, to be more diligent than the average person in being aware of - and investigating - possible claims.

This means that for those parties, the courts might say the claim was discoverable earlier and so the limitation period started earlier.

Changing limitation periods

Under the previous legislation, parties could enter into "tolling agreements" to stop the limitation period from running while they were negotiating a settlement.

This is no longer possible. Under the new legislation, the limitation period stops running only when a statement of claim is filed with the court or when the parties appoint an independent third party to resolve the matter.

In cases where a potential plaintiff needs more time to investigate its claim, it may wish to engage a mediator, but this can be done only if the potential defendant agrees.

There is some debate as to whether parties can agree to shorten a limitation period; for example, by stating that any claims for nonpayment of net profits relating to a distribution report must be brought within 12 months of the report. That issue will likely need to be decided by the courts.

Ultimate limitation period

In addition to the general two-year limitation period, there is also a new 15-year ultimate limitation period. This means that you can't start a court proceeding for any claim later than 15 years after the limitation period starts.

This applies even if during that 15-year period you didn't realize that a wrong might have occurred.

There are some exceptions to the ultimate limitation period. For example, if the other party willfully conceals that the wrong happened, that time will not count as part of the limitation period.

And there is no time limit for certain claims, including:

* Enforcement of a court order or arbitration award.

* Undiscovered claims involving harm to the environment.

* Certain proceedings to recover money owing to the government.

* Some assault and sexual assault claims.

* Proceedings to obtain support under the Family Law Act.

Knowing your limitations

With its new legislation, Ontario has reduced its general limitation period from one of the longest in North America to one of the shortest.

This doesn't mean that litigation itself will be any shorter. Some parties will likely try to claim they come within one of the numerous exceptions to the two-year period, and the transition rules in the legislation mean people will be arguing about whether claims were discoverable and/or discovered before Jan. 1, 2004.

But it does mean you need to make sure that any claims or potential claims you're involved in aren't shortchanged by the new general limitation period.

(This article contains general comments only. It is not intended to be exhaustive and should not be considered as advice in any particular situation.)

-www.mcmillanbinch.com
