Limitation Periods: Have you waited too long?

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Background

Those unfamiliar with civil litigation may not be aware of the requirement to commence litigation within two years of discovering a claim. In Ontario, this requirement is imposed through provincial legislation called the *Limitations Act, 2002.* To give a simple example, if a loan becomes due on January 1, 2017 and the borrower defaults, then the lender has until January 1, 2019 to commence a lawsuit. While the lender could still issue a claim with the court after January 1, 2019, the defendant would likely have a full defence available on the basis that the limitation period expired. The likely result would be a prompt and successful motion dismissing the claim together with a costs award against the plaintiff.

In the above example, when the two years started to run, or when the claim was “discovered” in other words, was easy to determine. The claim was discovered on the date the loan became due, and therefore the two years started to run from that date. Things become more complicated when the date of “discovery” of the claim is less clear. For example, consider a property owner who discovers a leak in her recently constructed roof on January 1, 2017. She hires an engineer to investigate the problem, and on March 1, 2017, the engineer advises her that the leak is a result of structural beams in the roof sagging, compromising the integrity of the roof. Does the property owner have until January 1, 2019 to sue the roofing contractor, or until March 1, 2019? Which of these two dates will be the “discovery” date that triggers the running of the two-year limitation period?

The question of whether an expert opinion is required to trigger discoverability, and hence the limitation period, has been considered by the courts before. The answer has typically been “no” - a plaintiff or claimant has an obligation during the initial two-year period to investigate their claim to determine how strong the case is and who the appropriate defendants may be. This

includes getting the assistance of an expert, if required (i.e. an engineer to study a building, or a doctor to assess the cause of an injury or infection).

Determining when the limitation period started to run gets even more interesting when the would-be defendant starts assisting the claimant to correct or minimize the problem complained of. In that circumstance, the courts have provided a bit more leeway. That is, a limitation period can sometimes be tolled (put on "pause") while those efforts are underway. The rationale for this is that a relationship should not be jeopardized while corrective action is being taken by requiring the commencement of a lawsuit. However, there are limits to how long the limitation period will be paused while a potential defendant is taking corrective measures.

Steinberg v. Toews Engineering Inc.

In a recent decision in the case of *Steinberg v. Toews Engineering Inc.*, the Court was tasked with considering both of the scenarios described above. The plaintiff was building five custom homes for his family with geothermal heating and cooling systems. The defendant, Toews Engineering, was retained to prepare the required engineering work for the geothermal systems. Upon moving into the homes, the plaintiff and his family members were dissatisfied with the performance of the heating and cooling systems. The plaintiff moved into the first home in September 2007, and the other homes were all occupied by the end of 2009. The plaintiff alleged that the problems were identified immediately. The lawsuit against Toews Engineering was not commenced until June 19, 2013.

Toews Engineering brought a motion for summary judgment to have the action dismissed on the basis that it was commenced beyond the applicable two-year limitation period. The plaintiff defended the motion on two grounds. First, that he did not discover the loss or sufficient facts regarding its cause until he obtained an expert report from another engineering firm on July 29, 2011 (just a month short of two years before the lawsuit was commenced on June 19, 2013). Part of the plaintiff's argument was also that Toews Engineering continued to reassure him that the problems were not caused by any deficiency in its design work. Second, the plaintiff argued that the limitation period did not run during a prolonged period when Toews Engineering was still working with the plaintiff to try to remedy the alleged deficiencies.

The Court considered the following applicable legal principles derived from past cases:

- the plaintiff is required to act with due diligence in acquiring facts in order to be fully apprised of the material facts upon which a claim can be based
- a limitation period commences when the plaintiff discovers the underlying material facts, or alternatively, when the plaintiff ought to have discovered those facts with the exercise of reasonable diligence
- the discovery of a claim does not depend upon the plaintiff knowing that his or her claim is likely to succeed
- that having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek a remedy – "appropriate" means "legally appropriate"

The Court rejected the plaintiff's argument that he did not discover his claim until he received an expert report in July 2011, as there was clear evidence that he blamed Toews Engineering for the alleged deficiencies in 2010. In an email from July of that year, the plaintiff wrote Toews Engineering stating that he believed the systems had design faults. As a result, Justice Gordon found that even if Toews Engineering had consistently taken the position that the alleged deficiencies were not its fault, by the end of August 2010, the plaintiff did not believe what he was being told.

The timing of the events did not favour the plaintiff's second argument that the limitation period did not run while Toews Engineering was trying to address the issues. The Court rejected this argument because the evidence established that by October 2010, any efforts by Toews Engineering to address the plaintiff's complaints had come to an end. A significant piece of evidence in this regard was that the plaintiff refused to sign a full and final release in August 2010, which Toews Engineering had sent him as part of a proposal to perform certain remedial work. More than two years passed from October 2010 (when it was clear that the parties had completely ceased working together) before the action was commenced in June of 2013.

A similar issue was recently considered by the Court of Appeal in *Presidential MSH Corporation v. Marr Foster & Co. LLP, 2017 ONCA 325*. In that case, the plaintiff sued the defendant accounting firm for filing its tax returns late, thereby missing out on available tax credits and incurring a loss of approximately half-a-million dollars. The plaintiff did not sue within two years of the CRA's initial denial of the tax credits, but did sue within two years of the CRA's subsequent refusal to alter its assessments in response to the plaintiff's notice of objection made under the *Income Tax Act*. The Court of Appeal overturned the motion judge's decision dismissing the action as having been brought too late. In doing so, the court stated that an action against a professional may not be appropriate if it can be resolved by the professional without the need for court proceedings. Accordingly, beginning legal action may be premature if there is an alternative process in place that has not yet been exhausted; in this case, the statutory process for objecting to notices of assessment under the *Income Tax Act*. However, the Court of Appeal did caution that the date when the alternative process became exhausted must be reasonably certain or ascertainable by the court.

In dismissing the action in *Steinberg v. Toews Engineering Inc.*, the Court was not without sympathy for the plaintiff. The Court wrote: "From the evidence before me, Mr. Steinberg is an honourable and well-intentioned gentleman. It may well be that he has suffered a wrong. That he should be deprived of his right to have this wrong addressed is a regrettable but necessary consequence of failing to pursue that right in a diligent manner."

The decision therefore serves as a reminder of the court's willingness to place reasonable limits on the ability to prosecute a claim after the initial two-year presumptive limitation period has passed. Limitation periods are partly intended to give parties commercial certainty and to encourage parties with legitimate claims to prosecute them in a timely fashion. Potential claimants would be prudent to investigate a problem promptly, including hiring an expert to analyze the issue at an early stage where necessary. Failing to do so could result in the total

loss of a right to pursue a claim. Claimants must also be careful not to rely on any assistance being received from potential defendants as a basis to delay the commencement of a lawsuit, as they may find themselves out of time.