



Court of Appeal Rules on Contribution Claims under the limitations act, 2002

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The *Limitations Act, 2002* changed the way defendants approach claims for contribution and indemnity. Prior to January 1, 2004, a defendant had one year from the date of judgment or settlement to commence a claim for contribution or indemnity based on section 8 of the *Negligence Act*, R.S.O. 1990 c. N.I. This gave insurers ample opportunity to investigate and attempt to resolve claims long after a statement of claim had been issued.

The *Limitations Act, 2002* established a standard two-year limitation period in Ontario, with some notable exceptions. In the process, it abolished section 8 of the *Negligence Act* and made the basic two-year limitation period applicable to contribution and indemnity claims. This is achieved through section 4 of the new Act which establishes a two-year limitation period which begins to run from the date the "claim was discovered". For contribution and indemnity claims, section 18(1) deems the discovery date to be the date the defendant is served with the statement of claim.

For losses arising **after** January 1, 2004, the application of the new Act is straightforward. The plaintiff has two years to commence an action once the cause of action is discovered. The defendant has two years after service of the statement of claim to pursue a claim for contribution or indemnity, either by way of a crossclaim against an existing co-defendant, or through a third party claim.

The application of the new Act to losses which occurred **prior** to January 1, 2004 has been less clear. Section 24 of the new Act contains "transition" provisions which apply to "claims based on acts or omissions" that took place prior to January 1, 2004. Where the previous limitation period did not expire and the claim was discovered before January 1, 2004, the old limitation period continues to apply.

Where the loss occurred **prior** to January 1, 2004 and the defendant was aware of the other party's potential liability, the transition priorities are less clear. Where the Statement of Claim was issued after January 1, 2004, the issue is whether the defendant has two years to commence a contribution claim, or whether the old limitation period under section 8 of the *Negligence Act* continues to apply?

The issue has now been clarified by the Ontario Court of Appeal in its recent decision *Placzek v. Green* (January 28, 2009). *Placzek v. Green* involved a rear-end collision which occurred on March 4, 2003. The driver and passenger of the plaintiff vehicle sued the defendant. A Statement of Claim was issued on February 8, 2005, after the new Act came into force. The claim was served on June 8, 2005.

In August 2007, more than two years later, the defendant brought a motion to amend its Statement of Defence to add a counterclaim against the plaintiff driver for contribution and indemnity and to add two owners of the plaintiff vehicle as third parties.

The motions judge held that the defendant's claims were deemed to have been "discovered" on the date the Statement of Claim was served and that the two-year limitation under the new Act applied. As more than two years had lapsed since service of the claim, the court found that the contribution claims were statute-barred.

The defendant argued on appeal that the contribution claim had been "discovered" at the time of the accident and pursuant to the transition provisions under section 24 of the new Act, the limitation period under section 8 of the *Negligence Act* continued to apply.

The Court of Appeal examined the qualifying words in section 24(2) which indicate that the section applies to claims based on "*acts or omissions*" which took place prior to January 1, 2004. The Court found that a claim for contribution and indemnity is a claim for unjust enrichment. It is based on one defendant paying more than its fair share of the plaintiff's damages. The "acts or omissions", the Court reasoned, is not the tortfeasor's conduct vis-à-vis the plaintiff, but rather the tortfeasor's failure to pay its fair share of damages **to the defendant**. This only arises after there has been a payment by the defendant following a judgment or settlement.

As there had been no judgment or settlement prior to January 1, 2004, the Court held that there had been no "act or omission" which occurred prior to January 1, 2004 to trigger the transition provisions. The two-year limitation period in *Limitations Act, 2002* therefore applied.

With respect to the defendant's discoverability argument, the Court held that, in the absence of a settlement or judgment, the defendant had no cause of action against the tortfeasors for contribution and therefore could not have "discovered" the claim prior to January 1, 2004.

The Court of Appeal's decision in *Plawzek* is consistent with its other recent decisions interpreting the *Limitations Act, 2002* which tend to favour a more restrictive approach to the limitation periods under the new regime. ■