New 2-Year Statute of Limitations Impacts Your Subrogation Claims in Ontario, Canada

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The Ontario government recently enacted new legislation that created a general 2-year limitations period for commencing civil actions for most claims - including claims based in negligence, products liability and contribution and indemnity. Prior to introducing this legislation, Ontario had a general 6-year limitations period for these actions. The new Limitations Act significantly reduces the time for filing a lawsuit, and thus, greatly increases the need for efficient and timely handling of subrogation claims north of the border.

The New Limitations Act, 2002

Effective January 1, 2004, the new Limitations Act, requires that all civil actions arising out of property damage must be filed within 2 years of the date of the loss. Claims arising from losses occurring on or before December 31, 2003 are still subject to the prior 6-year Limitations Act, R.S.O. 1990. Going forward, claims arising in the subrogation context must be commenced within 2 years of the date the claim was "discovered". The date the claim was discovered is the date on which the loss or damage occurred, or the date on which a "reasonable person" would have become aware of the loss or damage. The Act further


2. While this paper deals generally with the limitation period in Ontario, it should be noted that limitation periods are governed by provincial statute and the limitation periods between provinces may vary. However, many provinces, including British Columbia, Alberta and Saskatchewan, have enacted similar legislation which provides for a general 2-year limitations period.
stipulates that the date the loss or damage occurred shall be presumed to be the discovery date unless the plaintiff can prove otherwise. This discovery rule is the same as applied in jurisdictions within the United States.

**Effect on Notice Requirements**

Although the *Limitations Act* impacts the date on which an insurer must file suit, it does not change many statutory notice requirements set out in the various provincial statutes. For example, the notice requirements for commencing an action against a municipality remain in effect - which range anywhere from 7 days to 6 months. The *Limitations Act* simply provides a general limitation of 2 years for filing suit, but the claim is still subject to any notice requirements and other specific limitations periods set out in the provincial legislation.

**Commencing an Action Outside of the Limitation Period**

Also similar to statutory and procedural rules within the United States, failure to comply with the new limitations period creates an affirmative defense and may serve as an absolute bar to proceeding with the claim. In Ontario, if an action is commenced outside of the limitations period, the defendant may move to have the claim statutorily barred. Only in special circumstances (which generally must be established by the plaintiff) may a court allow an action to continue if it is commenced outside of the applicable limitations period.

**Impact on Third Party Claims for Contribution and Indemnity**

The new *Limitations Act* also impacts a defendant's ability to pursue contribution and indemnity claims against third parties that may be brought into the original action. Under the old *Limitations Act*, so long as the underlying civil action was commenced within the original limitations period (i.e. 6 years), the defendant was entitled to bring a claim for contribution and indemnity against a third party within 1 year of the date of any judgment entered against it. This had the affect of allowing contribution and indemnity claims to be brought many years after the original date of loss.

In the subrogation context, the old *Limitations Act* allowed the defendant great flexibility in adding parties in the late stages of litigation. In many cases, this served to assist the subrogating insurer by adding more potential targets for recovery to the action. However, as set out below, the new *Limitations Act* restricts the time frame in which a contribution and indemnity claim may be made.
The new Limitations Act repeals the limitations portion of the Negligence Act.\(^3\) Section 8 of the Negligence Act, in particular, allowed contribution and indemnity claims to be made outside of the statutory limitations period so long as the original action was brought within the limitation period. The new Limitations Act provides that any contribution and indemnity claim must be brought within 2 years of the date on which the "act or omission" took place.\(^4\) For purposes of a contribution and indemnity claim only, the Act defines the date on which the "act or omission" took place as the date on which the defendant was served with the original petition. Therefore, a defendant has 2 years from the date it is served with the petition to add any other parties that may be liable for the loss - not one year from the date of any judgment against it. Defendants will be statutorily barred from bringing any claim for contribution or indemnity thereafter. Again, relevant notice requirements are still in place and proper notice must be served on any third parties brought in by the defendants.

The Ontario Court of Appeal recently reviewed the affects of the new Act on claims for contribution and indemnity in the case of HSBC Securities v. Davis, Ward & Beck.\(^5\) In this action, the defendant sought to commence an action seeking contribution and indemnity against KPMG (formerly known as Peat Marwick Thorne) outside of the applicable limitations period. Although the Court of Appeal applied the old Act in upholding the limitation period defense, it commented that the New Act repealed Section 8 and consolidated all Limitations Acts into one 2-year limitation period.\(^6\)

**In Summary**

The new Limitations Act significantly reduces the length of time within which to commence a civil action for claims arising from property damage. In the subrogation context, this means that insurers and counsel must move quickly to establish liability, and to gather the necessary evidence required to support their claims. The Ontario Court of Appeal has reaffirmed that parties can rely on the limitation period both in defense of the main action, and in claims for contribution and indemnity.

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4. Supra note 1, section 18.
6. Id. at note 3.
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