

TIME LIMITATIONS IN PROPERTY CLAIMS

By: Brett Rideout

One Queen Street East, Suite 2000 • Toronto, Canada M5C 2W5
(416)361-3200 • Toll Free: (888)727-9948 • Fax: (416)361-1405 • brideout@cozen.com

Introduction

This paper focuses on several recent developments in the law surrounding the limitation periods relevant to property damage claims. The main focus of the paper is the law in Ontario, however, one should bear in mind that each province has developed its own specific legislation and law regarding limitation periods.

For reference, a chart outlining several limitation periods of the provinces and territories is attached to this paper. The chart is simply an illustrative tool, to demonstrate the different provincial limitation periods. It should not be relied on as determinative of all provincial limitation periods. Legal advice should always be obtained to determine the applicable limitation period to specific claims.

Provincial Limitation Legislation

Each province and territory in Canada has enacted legislation which sets out the various limitation periods for legal actions within that province or territory. The current legislation in Ontario is the *Limitations Act, 2002*.¹ The *Limitations Act, 2002* was proclaimed in force as of January 1, 2004 and substantially repealed the *Limitations Act, 1990*.

In Ontario, as a general statement, if a loss occurred before January 1, 2004, it remains subject to the former limitation period of 6 years. For losses that occur on or after January 1, 2004, the new *Limitations Act* will apply and the limitation period is 2 years.

As the *Limitations Act, 2002* has been in force for less than 2 years, it is common that current losses with which insurers are involved may have occurred either before, or after, the *Limitations Act, 2002* came into effect. To deal with this situation, several transitional rules have been created.

The transitional rules are contained in the *Limitations Act, 2002*. Under the transitional rules, if a cause of action arose before January 1, 2004 and no legal proceeding has yet been commenced, the following rules apply:

- Claim not “discovered” until after January 1, 2004, then the limitation period is 2 years from the date of discovery (section 24(5)(i))
- Claim “discovered” before January 1, 2004, then the limitation period is 6 years from the date of discovery (section 24(5)(iv))
- If the former limitation period expired prior to January 1, 2004, then no proceedings shall be commenced (section 24(3))

The *Limitations Act, 2002* defines the discovery of a claim as follows:

- A claim is discovered on the earlier of,
 - a) the date on which the person with the claim first knew,
 - i) the injury loss or damage had occurred;
 - ii) that the injury loss or damage was caused by or contributed to by an act or omission;
 - iii) the act or omission was that of a person against whom the claim is made, and
 - iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
 - b) the date on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

The “discoverability” of a claim as set out in the statute is really a codification of the common law discoverability rule. If a claim occurs but the cause of the loss is unknown, the claimant can argue that the limitation period does not start running until the cause is determined (i.e. the date it is known that the loss was caused by or contributed to by an act or omission). If the cause of the loss is known, or it is reasonable to assume it should be known, the limitation period will begin to run.

The *Limitations Act, 2002* contains a statutory “presumption” that a claimant has the requisite knowledge of the matters giving rise to the claim on the date the loss occurs, unless the claimant can prove otherwise. This section will likely give rise to disputes that potential claims are not “discovered” (for limitation purposes) until some time after the actual loss occurs. Each of these disputes will have to be handled by the insurer on a case-by-case basis as the issue is quite fact-specific.

Limitation Periods contained in Insurance Contracts

Under the *Limitations Act, 2002*, the general 2 year limitation period cannot be shortened by agreement or contract, unless that contract or agreement existed prior to January 1, 2004.² The *Limitations Act, 2002* also provides that any limitation period set out in or under another statute has no effect unless:

- a) the provision establishing it is listed in the Schedule to the *Limitations Act*; or,
- b) the provision establishing it,
 - i) is in existence on the date this *Act* comes into force, and,
 - ii) incorporates by reference a provision listed in the Schedule to this *Act*.³

The Schedule attached to the *Limitations Act, 2002* includes reference to section 148, Statutory Condition 14 of the *Insurance Act*.⁴ Statutory Condition 14 states as follows:

Action

Every action or proceeding against the insurer for the recovery of a claim under or by virtue of this contract is absolutely barred unless commenced within 1 year next after the loss or damage occurs.

Generally, insurers rely on Statutory Condition 14 to maintain that any action against the insurer by its insured under a property policy must be commenced within 1 year. However, the recent Supreme Court of Canada decision of *K.P. Pacific Holdings Ltd. v. Guardian Insurance Company of Canada*⁵ has caused some to question if this limitation period is still applicable in Ontario.

The *K.P. Pacific* decision flows from an action commenced in British Columbia. K.P. Pacific was insured under a multi-peril policy of property insurance. The question before the Supreme Court was whether or not the limitation period of 1 year contained in Part V (Fire Insurance) of B.C.'s *Insurance Act* applied exclusively to policies of fire insurance, or whether the limitation period in that Part also applied to multi-peril policies.

The Supreme Court held that the limitation period in B.C.'s Part V applied only to policies of fire insurance, and not to multi-peril policies of insurance. It further held that the relevant limitation period for K.P. Pacific's claim was the limitation period contained in Part II of B.C.'s *Insurance Act*, which contains the "general provisions" relevant to policies in B.C. Part II of the B.C. *Insurance Act* contains a 1 year limitation period commencing the date the proof of loss is delivered, rather than a 1 year period from the date of loss. As such, K.P. Pacific's claim was upheld, as it was commenced within this time frame.

Some have taken the *K.P. Pacific* decision to mean that similar provisions under other provincial *Insurance Acts* (i.e. the Ontario *Insurance Act*, section 148, statutory condition 14) only relate to fire policies and are not applicable to multi-peril policies. However, this may be over-extending the reasoning in *K.P. Pacific*.

K.P. Pacific is a B.C. case, and therefore deals with different statutes than those which exist in Ontario. There are differences in the language of the B.C. legislation and that of Ontario, which would allow one to argue that the *K.P. Pacific* decision is of no relevance to the current state of the law in Ontario. One easy example is that the limitation period which exists in Part II of B.C.'s *Insurance Act* simply does not exist in the Ontario *Insurance Act*.

A second distinguishing feature is the common law which has developed in Ontario with respect to the wording of section 148 of the *Insurance Act*, how it is applied to contracts of insurance in Ontario, and whether it is applied exclusively to contracts of "fire insurance", or the more common multi-peril policies of insurance which we see today.

Third, the inclusion of the limitation period contained in the *Insurance Act* in the Schedule to the Ontario *Limitations Act* appears to denote a statutory approval of the 1-year limitation period in Ontario.

The *K.P. Pacific* decision is one which has yet to be tested in the Ontario courts. As of the date of this paper, the only reported Ontario decision which mentions *K.P. Pacific* deals with automobile policies of insurance, and is not particularly relevant to the issues discussed here. There are no other reported decisions in Ontario dealing with the ramifications of *K.P. Pacific*.

However, insurers should be cautioned at this time that insureds will likely raise the Supreme Court's decision in *K.P. Pacific* if their action has not been commenced within the 1 year period and a limitation defence is raised. As stated above, there are differences between the Ontario and B.C. law, which may distinguish *K.P. Pacific* in Ontario. It is likely that this issue will come before the Ontario courts in the near future. Insurers should be wary of the precedential value of the first case to be litigated on this issue.

A Comment on Third Party Contribution and Indemnity Claims⁶

The *Limitations Act, 2002* also has ramifications for claims for contribution and indemnity in Ontario court actions. Under section 8 of the *Negligence Act*⁷, a defendant was entitled to commence an action for contribution and indemnity at any time within 1 year of the judgment or settlement of the main action. The only precondition to commencing an action of this nature was that the main action had to be commenced within the relevant limitation period (i.e. 6 years). This had the effect of allowing claims for contribution and indemnity to be brought many years after the original date of loss.

The *Limitations Act, 2002* repealed section 8 of the *Negligence Act*. The *Limitations Act, 2002* now provides that any claim for contribution and indemnity must be brought within 2 years of the date on which the defendant is served with the claim (section 18). Unfortunately, in complex actions involving multiple parties and large volumes of documentation, it is not uncommon that an action has not even reached the examination for discovery stage until after 2 years has passed. Given the abolition of section 8 of the *Negligence Act*, it will be difficult, if not impossible, to add parties to an action at that time. It is therefore of the utmost importance that insurers ensure that all potential parties are involved in the action from the earliest stage. Solid investigation into the causation of the loss and the responsible parties is invaluable.

Conclusions

Move quickly. Get counsel involved in your matters at the earliest stage possible. Aside from the usual initial questions with respect to causation, potential exposure, coverage and liability, insurers must now deal with a state of uncertain law regarding specific limitation periods and the interpretation of the new legislation. The earlier these issues are identified, the better, for avoiding being caught unprepared to deal with the now shorter deadlines under Ontario law.

¹ *Limitations Act, 2002*, S.O. 2004, c. 41.

² *Limitations Act, 2002*, section 22.

³ *Limitations Act, 2002*, 19(i)

⁴ *Insurance Act*, R.S.O. 1990, c. I-8

⁵ *K.P. Pacific Holdings Ltd. v. Guardian Insurance Company of Canada* [2003] S.C.C. 25

⁶ For a recent commentary on the Ontario law on limitation periods in this context see *HSBC Securities (Canada) Inc. v. Davis, Ward and Beck* [2005] O.J. No. 277

⁷ *Negligence Act*, R.S.O. 1990, c. N-1