

## The Application of Limitation Periods to Environmental Issues

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Statutes of limitations prescribe time periods within which legal claims must be initiated. In enacting these statutes, various legislatures have reflected a policy preference for certainty and finality in society's affairs, and a reluctance to adjudicate stale claims. Statutes of limitations are also known as statutes of "peace and repose", as they release a defendant from potential liability after a reasonable duration of time.<sup>2</sup> In enacting the *Limitations Act, 2002*<sup>3</sup>, Ontario has attempted to simplify the limitation period regime, to provide even more certainty. It remains to be seen whether it will meet with success in this objective.

Prior to and absent the enactment of statutes of limitation, courts left to their own devices have always imposed controls of some fashion on the speed with which actions are brought and prosecuted. For example, in courts of equity the doctrine of *laches* arose to relieve a defendant from having to defend a lawsuit where the passage of time worked to its prejudice, based on the maxim that equity aids the vigilant and not those who procrastinate regarding their rights. Although courts of law were reluctant to apply

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<sup>2</sup> *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] A.C. 553 at 563 cited in Graeme Mew, *The Law of Limitations*, 2<sup>nd</sup> ed (Toronto: Buttersworth 2003) at 12: "when a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken; discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liabilities have gone. That is the whole purpose of the limitation defence."

<sup>3</sup> Statutes of Ontario, 2002, c. 24, Sched. B.

equitable doctrines such as *laches*, they have always asserted jurisdiction to control their own processes, and where a fair trial is prevented by a delay in prosecuting an action they too have always granted relief to a defendant, in appropriate circumstances, on a case-by-case basis.

The courts' case by case adjudication, however, did not fulfill the perceived social need for certainty and finality, and perhaps for the discouragement of litigation. This led to parliaments and legislatures enacting statutes of limitations, which have been an enduring but not uncontroversial feature of law.

The nature of the controversy is that the expiry of a limitation period will prevent a claimant from obtaining a remedy to protect a clear legal right, even where the validity of the claimant's legal position and rights cannot reasonably be questioned and even where a defendant would suffer no prejudice by a delay in prosecuting an action. To many observers, this does not seem to be a just result, and the application of limitation periods can thus tend to bring the administration of justice into disrepute. However, in our constitutional system, courts of justice are bound to apply the legislatures' preferences as expressed in these statutes. Moreover, the desire for certainty and avoiding the potential injustice of litigating stale claims are fair aims.

Limitation periods today are not generally thought of as expressions of a desire for certainty or a popular reluctance to adjudicate stale claims. Rather, they are considered simply as a maze of arcane rules which lawyers must know in order to avoid being sued

by disappointed and irate former plaintiff clients, and to use for the advantage of their defendant clients. As for self-represented litigants, it is often accidental that they become aware of limitation periods at all.

Limitation periods have been a “maze” because legislatures have imposed differing limitation periods based on the category of the cause of action in question.<sup>4</sup> Until recently, a limitation of six years has applied to an “action upon the case other than for words”, such as an action based on a contract or tort, while a two year limitation period applied to an “action upon the case for words”. Still other torts, such as trespass, had a four-year limitation period, while fraud cases were exempt from limitation periods. Since environmental claims as a class of claims was unknown, no specific limitation periods for environmental claims of general application was traditionally imposed, although there were limitation periods for causes of action commonly used in environmental claims (such as negligence and nuisance) and still others contained in statutorily defined causes of action in environmental statutes.

These different limitation periods for the various categories of causes of action were based to a degree on subjective legislative value judgments. For example, it was considered more important to avoid dredging up ancient disputes where mere transient words were involved than where important property rights were at stake.

At the same time, they were complex to navigate, and the rationale for differing particular limitation periods was never entirely clear. As a result, the trend in legislative reform in

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<sup>4</sup> *Limitations Act*, R.S.O. 1990, c. L-15.

recent years has been to standardized limitation periods that do not vary by category of cause of action.

## **I. Limitation Periods in the New Act**

In 2002, Ontario became a part of this trend, enacting the new *Limitations Act, 2002* (the “Act”) The *Act* contemplates two different types of limitation periods for claims (including environmental claims), which apply to all claims except a small set of claims for which no limitation period applies. The two types of limitation periods are:

1. Basic limitation period (section 4)
2. Ultimate limitation period (section 15)

The basic limitation period runs for a duration of 2 years from the “date of discovery” of the claim<sup>5</sup>. The ultimate limitation period runs for 15 years from the date the act or omission on which the claim is based takes place, and functions as a limit to the basic limitation period by precluding a plaintiff from initiating a legal action once 15 years have passed from the date of action or omission.<sup>6</sup>

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<sup>5</sup> Sections 6 and 7 of the new *Act* make exceptions for minors not represented by a litigation guardian and incapable persons.

<sup>6</sup> Please note that for continuous actions/omissions or a series of acts/omissions causing injury, the date on which the act or omission is said to have taken place for the purposes of calculating the ultimate limitation period is the day on which the continuous act or omission ceases or the day on which the last act or omission in the series occurs. See s. 15(6) of the *Act*.

As mentioned, there is a set of claims for which there are no limitation periods under the Act. These are enumerated in Sections 16 and 17.

Undiscovered environmental claims are one of the types of claims for which there is no limitation period<sup>7</sup>. However, once discovered<sup>8</sup>, an environmental claim is governed by the basic limitation period. The effect of this is that the ultimate limitation period of 15 years does not apply to environmental claims, but the basic limitation period does.

## **II. What is an Environmental Claim?**

The *Act* defines an “environmental claim” as one based on “an act or omission that caused, contributed to, or permitted the discharge of a contaminant into the natural environment that has caused or is likely to cause an adverse effect.”<sup>9</sup>

A claim is defined as one that remedies “an injury, loss or damage that occurred as a result of an act or omission.”

Definitions of “discharge” and “contaminant” are borrowed from the *Environmental Protection Act* (the “EPA”). The EPA defines “discharge” as including the meanings of add, deposit, leak or emit. “Contaminant” is defined as meaning any solid, liquid, gas,

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<sup>7</sup> See s. 17 of the Act.

<sup>8</sup> Please see section IV below, for discussion regarding actual discovery versus deemed discovery of a claim.

<sup>9</sup> *Ibid.*, s. 1.

odour, heat, sound, vibration, radiation or combination of any of these resulting directly or indirectly from human activities that cause or may cause an adverse effect.

### **III. No Ultimate Limitation Period for Environmental Claims**

Since the ultimate limitation period does not apply to undiscovered environmental claims, contamination-related acts and omissions can be tried an exceptionally long time after their occurrence. This raises the question of why environmental claims would be singled out as an exception to the general rule. Environmental claims, by their very nature, often remain undiscovered for lengthy periods of time. Contamination often results from decades-old activity which remains hidden from ordinary view, such that no one is aware of resulting damage or its extent at a given point of time, and the effects of contamination may not become apparent until long after the contamination comes to exist. Viewed from this perspective, it may seem sensible to exempt environmental claims from the ultimate limitation period. However, environmental claims are not unique in this regard and not every environmental claim results from decades-old activity. Why the special treatment for environmental claims? Just as the legislature imposed its earlier policy preferences in setting differing limitation periods under the old legislation in Ontario, so too has the legislature imposed a policy preference favouring environmental claims. Growing awareness regarding the perils of pollution and contamination have led to new legislation designed to appear to get tough on polluters, and to special treatment of environmental claims in the new Limitations Act. Unfortunately, in doing away with the ultimate

limitation periods for environmental claims, the underlying objective of simplifying limitations law has been compromised.

The likelihood of being able to obtain a fair trial arising from decades-old contamination is remote. As time fades, so do memories. Witnesses die. While some documents and records may be maintained, such records are rarely complete, and almost never do they contemplate the facts which they are later asserted as proving because they are taken out of context. In addition, the very context of the times is different, and witnesses may be unavailable to explain the differences. Thus, the more dated the contamination, the greater the likelihood that proper evidence will be unavailable and that the evidence which remains will be incapable of being understood in its proper context. By this token, allowing environmental claims to be indefinitely postponed makes such claims susceptible to miscarriage of justice.

Second, liability in law arises from the notion that a tortfeasor is doing something contrary to existing social standards. If claims are adjudicated in a different era from when they arose, there is a real possibility that an act which at the time of commission may have been considered satisfactory, or at least not blameworthy, will be judged harshly on the basis of changed social standards. This is especially pertinent to environmental claims, given the sea change in social attitudes towards environmental offences, and what constitutes sound environmental practice. This was recognized in a recent decision by the New Brunswick Court of Queen's Bench where the judge presiding over a contamination claim recognized the "creeping requirements" of

environmental law and categorically refused to apply the “standards of 2006” to conduct undertaken in 1986.<sup>10</sup> This applies *a fortiori* to environmental issues pre-dating the 1970s.

Finally, prolonging the ultimate limitation period for environmental claims will discourage long-standing commercial businesses from maintaining a continuous presence. The older a business, the more likely it is that it will have environmental liabilities. Older businesses will be forced to defend more litigation for longer duration, and incur more associated with it, including the cost of preserving records, purchasing liability insurance. If these costs can be passed on to customers, the business might survive, but if not, it will perish – unless of course it has managed to make itself judgment proof through the transfer of assets to other entities or by dissolution of the entity. Commercial entities in environmentally sensitive endeavours, such as gas station franchises, mining companies and businesses that commonly buy and sell land, assume great liability under the new regime, as they are open to environmental claims even decades after, whereas businesses in other areas are not susceptible to such costs.

Courts will likely remain vigilant to appropriately weigh evidence and to take other measures to ensure a fair trial, but that job is made harder, and more important, by the absence of an ultimate limitation period for environmental claims. This potential prejudice faced by defendants under the new regime skews the balance that a limitation of actions regime should strike between protecting the plaintiffs’ and defendants’

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<sup>10</sup> *Cousins v. McColl-Frontenac Inc.*, [2006] N.B.J. no. 315.

interests. A case-by-case discretionary suspension of ultimate limitation periods for undiscovered claims (not just environmental claims) may have been a better option.

#### **IV. The Basic Limitation Period and the “Date of Discovery”**

##### A. Definition of Date of Discovery in the Act

As noted above, the basic limitation period defined in the *Act* provides for a two-year limitation period that begins to run from the date of discovery of a claim. This is an attempted codification of common law rules, which courts devised to give relief from the application of a limitation period where a potential claimant did not know of the existence of the claim.<sup>11</sup> Generally, a claim is said to be “discovered” on the earlier of the date when a claim is actually discovered or the date when it ought to have been discovered by a reasonable person. Subsection 5(1) of the *Act* describes the date of discovery of a claim as being the earlier of two dates:

- a. the day on which the person with the claim first knew:
  - i. that the injury, loss or damage had occurred;
  - ii. that the injury, loss or damage was caused or contributed to by an act or omission;
  - iii. that the act or omission was that of the person against whom the claim is made; and

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<sup>11</sup> See *City of Kamloops v. Neilson et al* (1984), 10 D.L.R. (4<sup>th</sup>) 641 (SCC) [*Kamloops*]

- 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 day 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).

Subsection 5(2) states that unless the contrary is proved, a claim is discovered on the day that the act or omission on which it is based took place (hereinafter referred to as “actual discovery”). If the court concludes, based on evidence presented, that a plaintiff did not know of the later act or omission, the court will then determine the date that clause 5(i)(b) is satisfied and the date on which the claimant will be deemed to have had knowledge (hereinafter referred to as “deemed discovery”), for the purposes of the basic limitation period.

The *Act* does not discuss who bears the onus to establish a date of deemed discovery earlier than the date of actual discovery. Since it is usually in the defendant’s interest to establish deemed discovery, it will likely be regarded the defendant’s responsibility to present evidence to establish an earlier date or a balance of convenience.

B. The Test To Be Applied in Cases of Deemed Discovery

There are two important points to be noted with respect to the discovery of claims. First, determination of deemed discovery is based on constructive knowledge of a claim. It thus involves a subjective-objective test, where the analysis is undertaken from the perspective of a fictitious reasonable person placed in the same situation as the plaintiff.<sup>12</sup> The test is flexible in that it adjusts to the governing circumstances, knowledge and expertise of the plaintiff. For instance, in the sale of contaminated lands, the test for deemed discovery is likely to be more stringent for an experienced, commercial purchaser of lands than for a one-time buyer who has acquired a piece of property for personal use. However, the nature of this test portends many disputes over the start date of limitation periods.

Second, the commencement of limitation periods is tied to the date when the plaintiff or a fictional reasonable person in the plaintiff's circumstances first gathers sufficient knowledge to be able to sustain a legal claim.<sup>13</sup> This involves more than the simple discovery of contamination. Such extension of knowledge over and above the fact of damage is essentially an adaptation of the common law rule that the start date of the limitation period is the date on which the plaintiff discovers or ought to have discovered with exercise of reasonable diligence all material facts which must be relied upon to frame a legal action.<sup>14</sup> The underlying policy is to prevent the perceived injustice that

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<sup>12</sup> *Act*, s. 5(1)(b).

<sup>13</sup> See s. 5(1) of the *Act*

<sup>14</sup> See *Hier v. Allstate Ins. Co.* (1988), 51 D.L.R. (4<sup>th</sup>) 1, *University of Regina v. Pettick* (1986), 51 Sask. R. 270, *Vanir Construction Services Ltd. v. Field Aviation Company Ltd.* (1988), 88 A.R. 140.

results in statute-barring a claim before a plaintiff is even aware of its existence.<sup>15</sup> However, the wording of the new statute may suggest something more than mere knowledge of the viability of a legal claim is required for the limitation period to begin to run, an added element which adds an uncertainty not generally found in common law cases dealing with deemed discovery.

Paragraph 5(1)(a)(iv) refers to whether a legal proceeding would be an “appropriate” means to seek to remedy a claim. This may be interpreted to include consideration of practicalities, such as the cost of a proceeding and the balance of convenience.<sup>16</sup> For instance, if a plaintiff knows of the existence of contamination at a particular time and could pursue an action but decides not to because the damage is not extensive enough to justify incurring the cost and inconvenience of a legal action, and the subsequently more than two years later changes his or her mind and initiates a legal action because of changed circumstances, will the limitation period apply to bar such a claim? Previously, the date of discovery would be calculated from the date the plaintiff first knew of the existence of a valid cause of action, whereas under the new Act it will be calculated from the date some mythical reasonable person (that is, the judge in a particular case) would have come to believe that pursuing a claim would be an “appropriate” way to seek to remedy the problem. The scope of considerations which the court will take into account in this regard is uncertain.

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<sup>15</sup> See *Kamloops and Consumers Glass Company v. Foundation Co. of Canada Ltd.* (1985), 51 O.R. (2d) 385 for a discussion of this policy.

<sup>16</sup> See Graeme Mew, “When Does Time Start to Run? When Does Time Run Out? When Does the Clock Stop Running?” (2004), 28 *The Adv. Qtly* 448 at 454-55.

C. Deemed Discovery in the Sale of Land

Determining the date of discovery of a contamination claim involves a fact-driven inquiry. As part of the analysis, a court must determine factual particulars, such as:

- the timing of existence of known facts;
- the reasonable understanding of the implications of known facts;
- when a plaintiff with the background of the plaintiff in issue would have reasonably put it all together;
- whether and when an action would have been appropriate;
- the time at which the plaintiff actually learned or should have learned of contamination and damage; and
- whether the plaintiff knew who was responsible for contamination at the time.

Since this examination must be carried out on a subjective-objective standard, it is expected to be different each time. Notwithstanding this, the objective component of the analysis must mean that some standards will be sought, developed and ultimately applied consistently by the courts over time.

When analyzing the deemed discovery of contamination, one of the main questions to be considered is whether the plaintiff ought to have discovered the contamination at a given point in time. The same question has been deliberated and discussed in detail in circumstances involving the purchase and sale of contaminated lands. Typically, in these

cases, several years after completion of the purchase a purchaser will come to realize that the land purchased was contaminated. Consequently, the purchaser will try to attach liability to the seller, arguing that the seller breached a duty to inform the purchaser about contamination. The seller, on the other hand, typically raises the doctrine of *caveat emptor* (buyer beware) to argue that it was open to the purchaser to insist on exercising due diligence and that the purchaser should have taken it upon himself or herself to have performed environmental site assessments, or to have sought warranties and indemnities from the seller. In numerous such situations, the court has decided whether to place the burden of investigating the condition of the land on the purchaser or the seller. These cases are of relevance to limitation period claims, as they discuss a question pertinent to the issue of deemed discovery of contamination, namely, whether a reasonable purchaser of lands will investigate the condition of land and thereby discover the fact of and/or effects of contamination.

With some notable exceptions discussed below, courts in these cases have upheld the doctrine of *caveat emptor*, assuming that a reasonable purchaser would, or should, investigate the state of the property prior to purchasing it. It will be interesting to see whether courts in interpreting the date of deemed discovery will apply this same conclusion to hold that a reasonable purchaser of land would have discovered contamination at or prior to the time of purchase.

There are three main situations where vendors have been found to have had a duty to inform the purchaser of defects in the land, discussed below.

(i) Where Land Has a Latent Defect

The first situation where a vendor has a duty to inform the purchaser of defects in the land is in the case of latent defects, that is, where a defect is not readily discoverable at the time of sale by ordinary diligence. A defect of land that is discoverable by due diligence is a “patent defect” while a defect not thus discoverable is a “latent” defect. Past jurisprudence has held that unless there is a latent defect in the land, the seller has no obligation to inform the purchaser of the defect. The onus, instead, is on the purchaser to investigate the condition of the land prior to purchase.

In *McCallum v. Dean*<sup>17</sup>, the court considered a situation involving the sale and purchase of real property and found that a prudent purchaser had a duty to inspect land before agreeing to buy it.

In *Tony’s Broadloom and Floor Covering Ltd. v. NCM Canada Inc.*<sup>18</sup>, the court categorically held that a seller of real property owed no duty of care to inform the buyer of a patent defect in the land. In both cases, the doctrine of buyer beware was upheld on the basis that the defect was discoverable by ordinary vigilance. In *Tony’s Broadloom*, the defect held to be patent (i.e. apparent) was that the land and its groundwater was contaminated with waste solvents. Though seeming at first to be counter-intuitive, such a conclusion is not necessarily unreasonable. In many cases, the risk of contamination will

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<sup>17</sup> [1956] O.W.N. 873 (C.A.).

<sup>18</sup> 22 O.R. (3d) 244.

lend itself to easy discovery through a Phase 1 or Phase II environmental site assessment, commonly used by commercial purchasers prior to purchasing the property to determine the likelihood of a property being contaminated. If contamination is found, a purchaser can insist on a vendor agreeing to clean it up or to be liable for clean-up costs. It is not necessarily unreasonable to place an onus on buyers to test land for contamination before signing an agreement of purchase and sale.

In determining the date of deemed discovery, if courts wish to be consistent with past jurisprudence, they will be bound to hold that a reasonable purchaser would have undertaken due diligence and learned the condition of the land at the time of purchase. It is also possible, however, that courts will undermine the *caveat emptor* cases and look at the circumstances of purchase from a narrower point of view of looking to see whether something was disclosed which would have caused a reasonable buyer to require remediation.

(ii) Contractual Obligations to Disclose Condition of Property

A second situation where a vendor has an obligation to inform the purchaser of the condition of the land is where the vendor is contractually bound to do so. Conversely, when a purchaser agrees to buy property on an “as is” basis, the purchaser cannot sue the seller later for failing to disclose the existence and/or extent of contamination.

In the purchase of real property, courts have consistently endorsed the principle that sellers do not owe a duty of care to the purchaser and that purchasers seeking protection should seek protection through contract:

The common law doctrine of “caveat emptor” governs with respect to the sale of real property and the purchaser must generally seek protection either by express warranty or by independent examination of the premises.<sup>19</sup>

It thus follows that in sale of land cases where a buyer chooses not to insist upon warranties regarding sale of land, courts will tend to find for the vendor on the basis that the defect was discoverable at the option of the purchaser, and that a reasonable purchaser would have discovered it. For instance, in *Antorisa Investments Ltd. v. 172965 Canada Ltd.*<sup>20</sup>, the court found that where land was sold on an “as is” basis, non-disclosure of the extent of contamination did not affect the validity of the contract because the doctrine of *caveat emptor* applied. In this situation, if a limitation period were in issue, in answering the question of when discovery is deemed to have taken place, the *caveat emptor* again suggests the date of purchase (or prior to it) as the date of deemed discovery by a reasonable purchaser.

On the other hand, where a purchaser seeks and obtains a warranty as to the condition of the land that does not disclose any contamination, the purchaser will be assumed to have

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<sup>19</sup> *Carleton Condominium Corp No. 32 v. Camdem Corp (1999)*, 124 O.A.C. 352 (C.A.). See also *Redican v. Nesbitt*, [1924] S.C.R. 135 at 144 (“The principle appears to be that, save in exceptional cases to which reference will be made, the maxim *caveat emptor* applies, and that the purchaser, if he wishes to protect himself in respect of the absence of title or defect in title or in quantity or in quality of the estate, must do so by covenants in the conveyance...”)

<sup>20</sup> [2006] O.J. No. 3427

acted reasonably in relying upon the representation, and it is reasonable to assume that contamination will not be held to be discoverable until the plaintiff obtains actual knowledge of it, or until some other circumstances arises which should put the purchaser “on inquiry” as to the existence of contamination.

(iii) Existence of Fraud

A third situation where the responsibility for disclosing the existence of defect is retrospectively imposed on the seller is where the court finds that the seller has fraudulently misrepresented facts relating to the defect, and the purchaser has relied on the misrepresentations in entering into the agreement. Such misrepresentations conceal the defect in the property and thereby prevent it from being investigated and discovered.

Fraud is considered one of the most serious civil torts, owing to significant consequences that may ensue.<sup>21</sup> Consequently, fraud must be “both strictly pleaded and strictly proved”. The elements of fraudulent misrepresentation are as follows:<sup>22</sup>

- there is a representation that is false
- that it is made knowingly; or
- without belief in its truth; or
- recklessly without caring whether true or not, and

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<sup>21</sup> *862590 Ontario Ltd. v. Petro Canada Inc.*, [2000] O.J. No. 984 at paras. 314 and 316 [*862590 Ontario*], *Toronto Dominion Bank v. Leigh Instruments Ltd.* (1998), 40 B.L.R. (2d) 1 at 130.

<sup>22</sup> *Ibid*, *862590 Ontario* at para 315, *801438 Ontario Inc. v. Badurina*, [2000] O.J. No. 3178 at para 33. [*Badurina*].

- the misrepresentation is material, in that it induced the agreement.

Not every misrepresentation is considered fraudulent. For example, fraud must be distinguished carefully from mere puffery,<sup>23</sup> which does not displace the onus on to the buyer to determine the condition of the property.

Neither common law nor equity permits the use of a limitation period to assist in fraud<sup>24</sup>. Therefore, under common law principles, the limitation period does not run during the course of fraudulent activity:

Fraud on the part of one party does prevent the statute from running until it is discovered, and where there are no laches on the part of the person defrauded, his action is not barred even though the other party took no active steps to conceal the fraud.<sup>25</sup>

The current *Act* reflects the common law principles of fraud and its effects on a limitation period. Paragraph 15(4)(c) of the *Act* stops the running of the ultimate limitation period, if the defendant “wilfully misleads” the plaintiff with respect to the appropriateness of a legal claim or “wilfully conceals” from the plaintiff any of the following:

- that injury, loss or damage has occurred;
- that injury, loss or damage has been caused by an act or omission;
- that a particular person was responsible for the injury, loss or damage;

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<sup>23</sup> *Ibid.*, *Badurina* at para 44.

<sup>24</sup> Graeme Mew, *The Law of Limitations*, p. 121

<sup>25</sup> E.L. Weaver, *Limitations* (Toronto: Canada Law List Publishing Company, 1939) at 334. See *Guerin v. R.*, [1984] 2 S.C.R. 335

In other words, if there is any wilful concealment or misrepresentation with respect to one or more of the elements required to commence the limitation period, the ultimate limitation period is suspended. This will also likely effectively postpone the commencement of the basic limitation period as well, because when material facts are concealed or misrepresented the court is unlikely to find that an innocent plaintiff ought reasonably to have seen through a deception.

Furthermore, it is difficult to conceive that where there has been negligent (as opposed to wilful) misrepresentation of the condition of land that a court will hold that a plaintiff ought not to have relied on the misrepresentation.

However, in the cases of negligent misrepresentation, the misrepresentation usually will not meet the definition of an environmental claim (that is, one based on “an act or omission that caused, contributed to, or permitted the discharge of a contaminant into the natural environment that has caused or is likely to cause an adverse effect.”<sup>26</sup>). As a result, a 15-year ultimate limitation period will apply. Thus, the *Limitations Act*, 2002 seems to contemplate that a negligent misrepresentation regarding contamination will not be actionable after 15 years but that the contamination itself might be.

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<sup>26</sup> *Ibid.*, s. 1.

## V. Ways of Varying or Interrupting the Limitation Period

### A. Contracting Out of Limitation Periods

Prior to the implementation of the new *Limitations Act*, 2002 on January 1, 2004, the running of the limitation period was able to be interrupted by contracting out of it.

However, section 22 of the *Act* as originally enacted prevented parties from varying or excluding limitation periods under the *Act* by agreements made after January 1, 2004. This provision applied to all agreements without exception. However, the legislature has recently amended its position on this issue. Bill 14, the *Access to Justice Act*<sup>27</sup>, which received Royal Assent on October 19, 2006 and is now in effect, has made significant changes to the rule against contracting out of limitation periods.

The new amendment distinguishes between “consumer” and “business” agreements.<sup>28</sup> A business agreement is defined as an agreement between parties, neither of whom is a consumer. A consumer is defined as in the *Consumer Protection Act, 2002*<sup>29</sup>, as an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes. The ability to contract out of limitation periods in consumer agreements is restricted compared to that in business agreements, by providing that the limitation period cannot be shortened. In business agreements, there is

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<sup>27</sup> S.O. 2006, c.-21.

<sup>28</sup> “Consumer agreements”, defined in the same way as in the *Consumer Protection Act, 2002* (R.S.O. 1990 chap. c. 19.), are agreements between a supplier and a consumer in which the supplier agrees to supply goods or services for a payment.

<sup>29</sup> S.O. 2002, c 30, Sched A.

much more freedom to contract out of the *Act*, but the ultimate limitation period cannot be extended if a claim is undiscovered. The following table summarizes the ability and extent of the ability to contract out of the limitation period.

| <b>Limitation<br/>Period</b>     | <b>Business Agreement</b>      |  | <b>Consumer Agreement</b>     |  |
|----------------------------------|--------------------------------|--|-------------------------------|--|
|                                  |                                |  |                               |  |
| Basic<br>Limitation<br>Period    | Prior to Jan<br>1, 2004        | Can extend,<br>suspend, exclude  | Prior to Jan<br>1, 2004       | Can extend,<br>suspend, exclude  |
|                                  | Jan 1, 2004<br>to Oct 18,      | Cannot extend,<br>suspend, exclude   | Between Jan<br>1, 2004 to Oct | Cannot extend,<br>suspend, exclude   |
|                                  | On or after<br>Oct 19,<br>2006 | Can extend,<br>suspend, exclude<br>or shorten  | On or after<br>Oct 19, 2006   | Can only suspend<br>or extend but<br>cannot shorten  |
| Ultimate<br>Limitation<br>Period | Prior to Jan<br>1, 2004        | Can extend,<br>suspend, exclude  | Prior to Jan<br>1, 2004       | Can extend,<br>suspend, exclude  |
|                                  | Between<br>Jan 1, 2004         | Cannot extend,<br>suspend, exclude   | Between Jan<br>1, 2004 to Oct | Cannot extend,<br>suspend, exclude   |
|                                  | On or after<br>Oct 19,<br>2006 | If discovered, can<br>be suspended or<br>extended or<br>shortened, if<br>undiscovered, may<br>be shortened but<br>not extended or<br>suspended | On or after<br>Oct 19, 2006   | if discovered, may<br>be suspended or<br>extended but not<br>shortened, if<br>undiscovered,<br>cannot be<br>extended,<br>suspended or<br>shortened |

Commercial land purchases likely will fall into the category of “business agreements”, while residential purchases seem to fit the definition of “consumer agreements”.

B. Attempted Resolution by Independent Third Party

Section 11 of the *Act* as amended now provides for suspension of both the basic and ultimate limitation periods if the parties to a claim agree to seek assistance of an independent third party to resolve the claim. In this case, the limitation period does not run from the date of the agreement to the date the claim is resolved, the date the resolution process is terminated or the date of termination of the agreement. Parties can thus use such agreements to prolong the limitation period.

C. Notice of Possible Claim

A notice of possible claim<sup>30</sup> is a new mechanism introduced by the *Act* to allow a *defendant* to seek to cause a limitation period to begin to run. The procedure enables “a person against whom another person has a claim” to serve a notice of possible claim on the other person setting out 1) the injury, loss or damage that the issuing person suspects may have occurred, 2) a description of the act or omission giving rise to the injury, loss or damage, 3) an indication of the extent to which the issuing person suspects he/she/it was responsible for the loss, injury or damage, 4) that the other person’s claim may be barred because of the expiry of a limitation period, and 5) the issuing person’s name and

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<sup>30</sup> S. 14(1) and (2) of the *Act*.

address for service. The notice must be in writing and signed by the issuing person or the issuing person's lawyer.

Section 14(3) of the *Act* provides that a court may consider the issuance of a notice of claim in deciding whether a claim was discoverable at the time. A notice of possible claim will undeniably function as a strong argument in favour of deemed discovery of the claim on the day that the notice was served on the plaintiff. A notice of possible claim, however, is not considered an acknowledgement of liability.<sup>31</sup> It merely enables the defendant to make the limitation period begin to run at an early date.

## **VI. Transition Provisions Under the New Act**

Although the new *Act* has been in force since January 2004, many claims are still governed by the old limitations regime, depending on when they are discovered. It is, therefore, important to know when the new *Act* applies and when it does not.

The *Act*'s regime applies to all claims borne of acts or omissions occurring on or after the date the new *Act* came into force, i.e. January 1, 2004.<sup>32</sup>

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<sup>31</sup> s. 14(5) of the *Act*.

<sup>32</sup> *Act*, s. 24.

Under the transition provisions of the *Act*, a proceeding commenced under the former limitations regime before January 1, 2004 will be administered in accordance with the rules under the earlier statute.

The following rules apply to claims 1) that took place before the new *Act* came into force, i.e. before January 1, 2004 and 2) for which no proceedings were instituted before January 1, 2004:

- If the limitation period for a claim under the former statute expired before January 1, 2004, then no proceeding may be initiated under the new *Act*.
- If the limitation period for a claim under the former statute did not expire before January 1, 2004 but no limitation period would apply if the act or omission were to be tried under the current *Act*, then the claim is not governed by any limitation period.
- If the limitation period under the former statute did not expire before January 1, 2004 and a limitation period would apply if the act or omission were to be tried under the new *Act*, then
  - the current statute applies if the claim is discovered on or after January 1, 2004

- the former statute applies if the claim was discovered before January 1, 2004.
- If there is no limitation period under the former statute for a claim but a limitation period would apply if the act or omission were to be tried under the new *Act*, then
  - the current statute applies if the claim is discovered on or after January 1, 2004
  - no limitation period exists if the claim is discovered before January 1, 2004.

One result of this is that where an old claim is discovered before January 1, 2004, the old statute (which generally had a six-year limitation period) will apply. Thus, plaintiffs who discovered a claim prior to January 1, 2004 will have an extra four years within which to commence an action.

It will be interesting to see how many actions will be commenced during the January 1, 2006 to January 1, 2010 period wherein plaintiffs allege that they became aware of contamination prior to January 1, 2004. Such cases will be interesting, because the typical situation will be reversed: defendants will seek to prove that plaintiffs did not know of the claim, while it will be in plaintiffs' interest to assert that they knew, but chose not to take action. In light of the provision in s. 5(1)(a)(iv) that deemed discovery

will occur when the bringing of an action is an “appropriate” way to seek a remedy, parties will face a delicate balancing act in these cases.

## **VII. Application of the New Act to Acts or Omissions by the Crown**

Historically, common law functioned on the assumption that the Crown could do no wrong. Therefore, it was necessary to proceed by petition of right if one wanted to sue the Crown. By extension, the maxim *nullum tempus occurrit regi*, i.e. statutes do not bind the Crown unless they do so expressly, has been used to provide prosecutorial immunity to the Crown and public officials in their pursuit of a public duty. Section 11 of the *Interpretation Act*<sup>33</sup> codifies this principle by providing that “no Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby”.

The old *Limitations Act* did not bind the Crown. In *Ontario Attorney General v. Watkins*<sup>34</sup> the court upheld the application of section 11 of the *Interpretation Act* and found that the Crown was only bound by those provisions of the former *Limitations Act* in which it was expressly mentioned.

The new *Limitations Act*, in contrast, expressly binds the Crown<sup>35</sup>. Therefore, actions by and against all public authorities are subject to rules under the new *Act*.<sup>36</sup> However, this

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<sup>33</sup> R.S.O. 1990 Chapter I.11

<sup>34</sup> (1975), 8 O.R. (2d) 513,

<sup>35</sup> *Act*, s. 3.

does not mean that notice provisions under *Proceedings Against the Crown Act*<sup>37</sup> have ceased to apply. Notice provisions ensure procedural fairness and therefore are conceptually and functionally different from limitation periods. As such, it may be argued that they are left unaddressed and, consequently, unaffected by the new *Act*.

### **VIII. Limitation Periods Preserved Under Other Statutes**

Certain limitation periods under other statutes are preserved by the current *Act*.<sup>38</sup> These statutes and the specific limitation periods they preserve are listed in a Schedule to the new *Act*, and include limitation periods created by section 108(1) of the *Environmental Protection Act* and section 102 of the *Environmental Bill of Rights, 1993*<sup>39</sup> (right of action for damages to a public resource).

### **IX. Time Limits in Administrative Proceedings**

In considering the application of limitation periods in environmental issues, it is important to keep in mind that environmental law like several other areas of public law involves a mixture of private and public legal interests in both common law and statutory contexts. Thus, in order to have a practical understanding of the limitation periods which apply to environmental issues, both public and private dimensions must be considered, as well as their interplay.

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<sup>36</sup> Please note that the six month limitation period under section 7 of the *Public Authorities Protection Act*, R.S.O. 1990, c. P. 38, for claims brought against public authorities has been repealed.

<sup>37</sup> R.S.O. 1990, c. P 27, s. 5(1)(c) and 7.

<sup>38</sup> *Act*, s. 19(1).

<sup>39</sup> S.O. 1993, c. 28.

In the case of administrative orders under the EPA, no time limit applies to the issuance of the order. As a result, strategic use can be made of governmental powers to issue orders to accomplish what may be impossible by means of a private action due to limitation periods.

Once an order is issued, however, there are some time limits which do apply to limit appeal rights. While time limits are conceptually different from limitation periods, they nevertheless have similar consequences, in that failing to meet them can result in meritorious claims being defeated. Accordingly, it is important to be aware of these time limits.

In Ontario, most orders are initiated by Ministry of the Environment abatement officers (formally known as “provincial officers” under the Act), who issue what are known as “field orders” ordering someone to take action. A field order takes immediate effect, but the EPA allows the subject of the order to seek to have it varied or removed. To engage such a review, the person subjected to the field order must within seven (7) days of the order request that the Director under the EPA review the field order and stay, remove and/or modify the order<sup>40</sup>. The Director then has seven days within which to do so. If the Director takes no action within seven days, the EPA deems him to have confirmed the order. Once confirmed, a person to whom an order is issued faces a further time limit of 15 days within which to commence an appeal to the Environmental Review Tribunal.

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<sup>40</sup> *Environmental Protection Act*, s. 157.3

## **Conclusion**

Although the new *Limitations Act, 2002* has taken some steps to simplify limitation periods in Ontario, there are some obvious problems with the manner in which the *Act* treats discoverability of environmental claims. The suspension of ultimate limitation periods for environmental claims results in favouring environmental claims relative to other types of claims. Further, the definitions of actual and deemed discovery leave courts to grapple with previous jurisprudence and similar questions considered in different contexts to fashion a framework of analysis with a semblance of consistency. It is difficult to predict with certainty the direction that will be taken by the courts in resolving these issues.