

***LIMITATIONS ACT, 2002 (ONTARIO) MAKES SWEEPING
CHANGES TO WHEN AND HOW PROCEEDINGS MUST BE
COMMENCED IN ONTARIO***

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A. INTRODUCTION

The Ontario government proclaimed the *Limitations Act, 2002*, S.O. Chapter 24, Schedule B (the “*Act*”) into force and effect on January 1st, 2004. The *Act* introduces significant changes to the law regarding limitation periods in Ontario and is dramatically different from previous legislation, the *Limitations Act, R.S.O. 1990*, Chapter 24, L. 15 (the “*Former Act*”). Boards of Directors for churches, charities and not-for-profit organizations are recommended to obtain a copy of the *Act* and to familiarize themselves with its content. The *Act* can be found at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/02l24b_e.htm.

Limitation periods are designed to establish deadlines as to when a potential claimant must give notice of, or commence his or her claim. Limitations periods provide certainty to a potential defendant, that, once the limitation period has lapsed, the potential defendant can get on with his or her business without fear of ongoing exposure to a lawsuit. Once missed, limitation periods act to bring closure to potential claims. Missing a limitation period, has, with few exceptions, the effect of barring the claim of a claimant, regardless of its merits.

To those associated with the legal system, limitation periods have been a source of confusion and frustration and have led to calls for reform to Ontario’s legislation governing them. In response to those calls for reform, the provincial government has passed the *Act*, which introduces two main limitation periods in Ontario. This

is a welcome development, as the *Former Act* contained multiple limitation periods which, when combined with limitations provided in various other pieces of legislation active in Ontario, proved confusing for lawyers and their clients.

The following is a brief synopsis of certain relevant provisions of the *Act*. It is not meant to be a thorough review or analysis. Instead this bulletin will focus primarily on those provisions of the *Act* involving limitation periods related to claims of assault and sexual assault and will briefly touch on a limited number of other provisions contained in the *Act*, which will be of importance to churches, charities and not-for-profit organizations operating in and under the laws of Ontario.

B. HIGHLIGHTS OF THE ACT

1. Basic Limitation Period

Section 4 of the *Act* has introduced a basic limitation period that, unless the *Act* provides otherwise, states that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day upon which the claim was discovered. Claim is defined in the *Act* to mean “*a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.*” The *Act* applies to all claims commenced in court, save and except for a limited number of proceedings specified in section 2 of the *Act*.

To deem a claim discovered or discoverable by a person with a claim, section 5 of the *Act* has introduced a specific list of elements which must be met. Section 5 reads as follows:

- 5(1) A claim is discovered on the earlier of,
- (a) the day on which the person with the claim first knew,
 - (i) that the injury, loss or damage has occurred,
 - (ii) that the injury, loss or damage was caused by 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
 - (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).

There is a presumption contained in section 5(2) of the *Act* that a claimant will be presumed to have known of the matters referred to in section 5 (1)(a) on the day the act or omission giving rise to the claim occurred, unless the contrary is proven. As a result, the person with a claim will bear the burden of proving that he or she did not know of the elements enumerated in section 5 (1)(a) of the *Act* during the intervening basic two-year limitation period provided for in section 4 if he or she is to commence an action outside the two year limitation. Further, section 5(1)(b) has introduced an “objective” standard of knowledge of a claim, or one that is based on what a reasonable person in the same circumstances would have known, or ought to have known. This clause will further limit any arguments for an extension of the limitation period by a claimant who misses a deadline.

2. Minors and Incapable Persons

For minors and claims involving parties who are deemed to be under a legal disability, there are special conditions that must be met before the basic two-year limitation period begins to run. Sections 6 and 7 of the *Act* require that there be a litigation guardian representing such persons before the basic two-year limitation period can commence. With respect to a person under a legal disability, the *Act* provides, at section 7(2), that a person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proven. As such, the litigation guardian of an incapable person will have to prove incapacity to qualify under the provisions of section 7. This is normally done by providing a medical certificate that proves incompetence, or completing a capacity assessment.

Potential defendants can have a litigation guardian appointed if they wish to ensure that the basic two-year limitation period is running pursuant to section 9(2) of the *Act*. Section 9(2) of the *Act* reads as follows:

- 9(2) If the running of a limitation period in relation to a claim is postponed or suspended under section 6 or 7, a potential defendant may make an application or a motion or have a litigation guardian appointed for a potential plaintiff.

3. Assaults and Sexual Assaults

It should be noted that there is a special exemption from the running of the basic two-year limitation period provided in section 4 of the *Act* for claims based on assault or sexual assault. Section 10(1) of the *Act* reads as follows, and should be of special note to charities, churches and not-for-profit organizations which deal with children, or vulnerable individuals:

10(1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.

Section 10 contains two presumptions that will place a high evidentiary burden on defendants in assault and sexual assault claims. Section 10(2) provides that, *“unless the contrary is proven, a person with a claim based on an assault is to be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise.”* Section 10(3) provides that *“unless the contrary is proved, a person claiming damages for sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced.”*

The presumptions contained at section 10(2) and section 10(3) of the *Act* may result in churches, charities or not-for-profit organizations named as defendants in assault or sexual assault claims being placed in the unenviable position of attempting to prove that the claimants were capable of commencing the proceeding within the limitation period. This will likely mean that defendant organizations will have to lead compelling psychological or other expert evidence to refute the position of the claimant, or alternatively, lead witness evidence to establish that the claimant did know about the claim at an earlier date, but failed to advance it.

Section 14 of the *Act* provides a mechanism by which a potential defendant can ensure that the applicable limitation period is running. Pursuant to section 14 of the *Act* a potential defendant can serve notice of possible claim on a potential claimant. Such notice must be in writing and must be signed by either the person issuing it or that person’s legal counsel. The notice must describe the injury, loss or

damage; identify the act or omission giving rise to the injury, loss or damage; indicate the extent to which the issuing person suspects that the injury, loss or damage may have been caused by the issuing person; state that any claim that the potential claimant has could be extinguished because of the expiry of a limitation period; and state the issuing person's name and address for service. A court may consider the notice in determining when the limitation period commences in respect of the potential claimant.

Section 14 of the *Act* is a two edged sword for potential defendants. While section 14 specifically provides that the notice will not constitute an admission of liability, it will bring to the attention of a potential claimant the existence of a claim, and may in turn prompt a potential claimant to issue a claim. Potential defendants will have to weigh the positive benefits of fixing the commencement of a limitation period against the negative effect of prompting and promoting litigation.

4. Ultimate Limitation Periods

The *Act* also contains certain limited overriding limitation periods that are aptly identified as "ultimate limitation periods." Section 15(1) and (2) of the *Act* provide for the following:

- 15(1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.
- (2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

There is a further limitation on the effects of section 15(2) contained at section 15(4), which provides for the following:

- 15(4) The limitation period established by subsection (2) does not run during any time in which,
 - (a) the person with the claim,
 - (i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and
 - (ii) is not represented by a litigation guardian in relation to the claim;

- (b) the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim; or
- (c) the person against whom the claim is made,
 - (i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or
 - (ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

Section 15(5) places the burden of proving that Section 15(4) applies on the person making the claim. However, Section 15(5) is subject to Section 10 of the *Act* and thus will not shift the burden to the claimant respecting assaults and sexual assaults. This means that regardless of section 15(5), where the claim is based on assault or sexual assault the defendant will still bear the burden of proving knowledge of the potential claim.

5. No Limitation Period

Section 16 of the *Act* enumerates certain limited situations where there is no limitation period affecting a claimant and includes the following:

- 16(1)(h) a proceeding arising from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether financially or otherwise,

Section 24(7) extends the application of the *Act* to grandfather claims that occurred prior to January 1st, 2004 and reads as follows:

- 24(7) In the case of a claim based on an assault or sexual assault that the defendant committed, knowingly aided or encouraged, or knowingly permitted the defendant's agent or employee to commit, the following rules apply, even if the former limitation period expired before the effective date:

If section 10 would apply were the claim based on an assault or sexual assault that took place on or after the effective date, section 10 applies to the claim, with necessary modifications.

If no limitation period under this Act would apply were the claim based on a sexual assault that took place on or after the effective date, there is no limitation period. 200, c. 24, Sched. B. s. 24(7)

C. CONCLUDING COMMENTS

Overall, it should be clear that the *Act* has treated assault and sexual assault claims as special types of claims, and has accorded potential claimants of assault or sexual assault with significant and important presumptions respecting their knowledge of their claim. The presumptions will impose heavy evidentiary burdens on defendants. Further, the *Act* has shifted the burden of establishing the running of a limitation period to the defendants. This change represents a bell-weather shift. Traditionally, a defendant would plead a limitation period in its statement of defense, and a claimant would be required to prove that he or she had met the limitation period, or had a reason for not meeting it.

On the positive side it can be said, that the *Act* has brought significant clarity to the issue of limitation periods in Ontario. By introducing a basic limitation period of two years, and an ultimate limitation period of 15 years for certain types of claims, the *Act* now facilitates potential claimants and defendants in determining their rights and exposures.

Further, by introducing provisions designed to ensure that potential claimants are subjected to limitation periods through the issuance of notices, the *Act* will make it easier for potential defendants to bring a claim to a head, either through litigation being issued upon receipt of the notice, or the expiry of the limitation period running at least from the date of the notice.