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Manitoba's New *Limitations Act* – Key Changes and Best Practices for Secured Lenders

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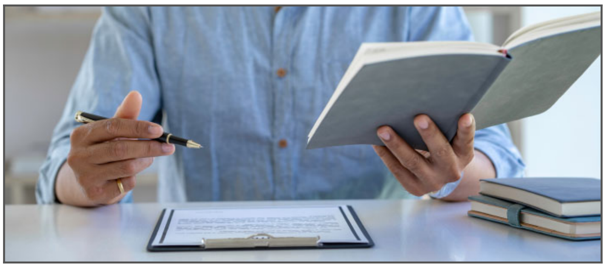

Manitoba's new limitations legislation, *The Limitations Act*, S.M. 2021, c. 44 (the "**New Act**"), came into force on September 30, 2022 replacing *The Limitation of Actions Act* (the "**Old Act**").

The New Act has a number of significant implications for secured lenders. Therefore, it is critical that secured lenders are aware of the changes to Manitoba's limitation regime and understand how it operates.

This article serves as a quick and easy guide for secured lenders that:

a. highlights the key changes to Manitoba's limitations regime;

b. sets out the implications of the New Act on secured lenders; and

c. provides a list of "best practices" that secured lenders can adopt to help protect claims and preserve limitation periods.

Limitation Periods – Why They Matter

A limitation period sets a time limit for a party to advance a claim or otherwise obtain a remedy against another party for injury, loss or damage suffered. Limitation periods are strictly enforced. Once a limitation period has expired, the aggrieved party is generally not permitted to recover from another party.

It is important that secured lenders are aware of limitation periods that apply to their claims to ensure that they do not lose the ability to enforce their legal rights.

The Limitations Act – Manitoba's New Regime

Manitoba's limitation regime under the New Act has a number of key features:

1. The New Act replaces the limitation periods ranging from two to ten years in the Old Act with a single

limitation period of two years (subject to certain exceptions), which begins to run from "the day the claim is discovered."

2. The basic two-year limitation period applies to both judicial and non-judicial remedies. Examples of non-judicial remedies include appointing a private receiver or commencing mortgage enforcement proceedings in the land titles office. Judicial remedies would include commencing a debt claim in Court or making an application for a court-appointed receiver.

3. The New Act creates a shorter ultimate limitation period of fifteen years after the event that gave rise to the claim, even if the claim has not been discovered within that fifteen year period.

4. The New Act expressly creates the ability to extend a limitation period by agreement. This allows a limitation period to be extended by written agreement between the parties (subject to the fifteen year ultimate limitation period).

Implications for Secured Lenders

The New Act has a number of provisions that have a direct impact on the claims of secured lenders. As such, it is important that secured lenders are familiar with the New Act and how it operates.

Determining when the Clock Starts to Run

The two-year limitation period applies to all remedies that a secured lender is entitled to exercise by law or contract.

Under the New Act, a two-year limitation period applies from the date the claim was discovered.

Generally, the key consideration in determining when a financial claim has been discovered is when the lender first knew or ought to have known that "injury, loss or damage has occurred."

Financial Claims

The New Act sets out the date upon which injury, loss or damage will be deemed to have been occasioned for certain types of financial claims.

In particular, the New Act sets out specific (and different) dates of injury, loss or damage for (i) claims to realize on collateral under a security agreement; (ii) default in performing a demand obligation; (iii) a continuous default in performing an obligation (other than a demand obligation); and (iv) a series of defaults respecting the same obligation (other than a demand obligation).

Based on the deemed dates set out in the New Act, the limitation period(s) applicable to claims of a secured lender is largely dependent on the nature of the obligation and act of default, and the remedy being sought by the secured lender.

Claims to Realize on Collateral

The date of injury, loss or damage for claims to realize on collateral under a security agreement is deemed as the day the default first occurs.

This means that the limitation period to realize on collateral under a security agreement is triggered immediately upon default occurring (not when demand is made).

Default on Demand Obligations

In the case of default in performing a demand obligation, the date of injury, loss or damage is when the default occurs, once a demand for performance is made.

That is, on the day that the requirements under the demand are not met by a debtor. For example, if demand is issued for payment under a demand obligation within 30 days of the demand, the limitation period would begin to run on day 31, if the debtor fails to comply with the demand.

Default on Other Obligations

In the case of default in performing an obligation that is not a demand obligation, the date of injury, loss or damage depends on the nature of the breach(es). More specifically:

1. in the case of a continuous act or omission, the day the act or omission ceases; or
2. in the case of a series of acts or omissions respecting the same obligation, the day the last act or omission in the series occurs.

Complications

The different dates of injury, loss or damage can complicate the determination of a limitation period with respect to financial claims as there may be multiple limitation periods at issue depending on the nature of the obligation and default, and the remedy being sought.

These complications become clear when considering limitation periods with respect to mortgages as a mortgage has two essential elements – debt, and security for the debt. As a result, at least two (and possibly more) separate and distinct limitation periods will be applicable. That is, one for a debt claim, and one to realize on security. For example, consider the following situation:

- A lender issues a loan, secured by a mortgage. Principal is payable on demand and interest is payable in installments on the first of every month, without demand.
- The debtor fails to make an interest payment on May 1.
- On June 1 the secured lender demands payment on the outstanding principal and interest within 30 days.
- On July 1 (31 days after demand was made) the debtor defaults on the demand, as no payment has been made.

In this case there are two limitation periods:

1. the limitation period to enforce on the demand obligation to pay principal and outstanding interest starts on July 1 – the date that default on the demand occurred; and
2. the limitation period to realize on the mortgage security was triggered on May 1 – the date the default first occurred by missing an interest payment.

As exemplified above, it is important that secured lenders consider the specific provisions of the relevant loan and security agreements to determine how long they have to take enforcement action.

Acknowledgments of the Debt

The New Act contains detailed rules as to when an acknowledgment of liability for a debt can operate to restart the limitation period. If the requirements in the New Act are met, an acknowledgment by the debtor will restart the clock from the date of the acknowledgment.

For an acknowledgment to have the effect of restarting the limitation period with respect to a debt claim, it must be made to the lender, in writing, and signed by the debtor before the limitation period expires. The acknowledgment must set out the specific amount owing at the time of the acknowledgment.

The rules in relation to security agreements are slightly different. In particular, the debtor must acknowledge both (i) liability for the debt; and (ii) that the security held by the lender is valid.

Forbearance agreements are generally understood as an acknowledgment of debt and will contain provisions to that effect.

Additionally, partial payment of the debt may be considered as an acknowledgment of the debt.

Agreements to Extend the Limitation Period

The New Act expressly creates an ability to extend a limitation period by written agreement between a secured lender and a debtor.

The agreement must be bilateral and cannot extend a limitation period beyond the fifteen year ultimate limitation period.

Key Takeaways

The New Act has significant implications for secured lenders. While there are certain complications involved in determining when a limitation period starts to run under the New Act, there are mechanisms that, when used correctly, can restart or extend a limitation period.

It is important for secured lenders to take appropriate steps to protect their claims and preserve limitation periods in light of the New Act.

Best Practices for Secured Lenders

Secured lenders should consider implementing the following practices to help protect claims and preserve limitation periods:

1. Regularly review loan and security documents:
    a. pay attention to the specific nature of each obligation and act of default;
    b. consider available remedies and methods of enforcement; and
    c. calculate the limitation period based on (a) and (b).

2. Flag and diarize limitation periods – use internal systems and/or establish a system to document defaults and set reminders prior to the expiration of the applicable limitation period. Make sure to note and/or diarize limitation periods for all remedies relating to an act of default, as multiple limitation periods may apply (example: commencing a debt claim vs. realizing on security).

3. Use a checklist – make sure any acknowledgment obtained from a debtor meets the statutory requirements to restart a limitation period.

4. Use clear and careful language – ensure any forbearance agreement, or form of “standstill agreement,” is properly drafted to achieve the intended result.

5. Communicate early and often – contact counsel with concerns about any limitation issues (example: calculating a limitation period, or determining the nature of an obligation or default).

6. Don’t sit on your rights – take steps to enforce and/or contact counsel well before the expiry of the two year limitation period.

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