The Limitations Act and Potential Impacts on the Construction Industry

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As discussed in a previous **article**, the coming into force of *The Limitations Act* (the "New Act") on September 30, 2022 is set to have major impacts for the legal profession and the construction industry. The New Act replaces the existing legislation – *The Limitation of Actions Act* (the "Current Act"), and brings Manitoba's limitation regime in line with most Canadian provinces.

This article is meant to review important changes brought in by the New Act and their potential impacts on the construction industry.

What is a limitation period and why does it matter?

The Current Act, and the New Act which will replace it, are the pieces of legislation which govern limitation periods in Manitoba. Simply speaking, a limitation period is a period of time in which an action must be commenced or a legal right enforced. Being aware of limitation periods is extremely important to ensure that a party does not lose its ability to enforce its legal rights. If a party attempts to commence an action outside of the applicable limitation period, it will be barred from doing so. Limitation periods, particularly in the construction industry, have been the subject of much litigation.

Current Act

The Current Act sets out a number of different limitation periods based on the cause of action. In the construction industry, the two most common causes of action – breach of contract and negligence – have a limitation period of six years from the date the cause of action arose. For instance, if a contractor breached its contract with an owner by deficiently completing an aspect of a project, the owner would have six years from the date the deficient work was completed (i.e. from the date of the breach or the negligent act) to commence a claim against the contractor for the breach.

A common issue that arises in the industry relates to the issue of latent defects (i.e. defects

that are not easily discoverable). For example, consider a scenario where ten years after the completion of a project, an owner discovers a defect with the building that occurred due to the deficient work of the contractor (done either negligently and/or in breach of contract), which needs to be repaired. The owner has now discovered a cause of action against the contractor, but is out of time to bring a claim against it as the limitation period has expired. Issues such as this are currently dealt with by "Part II" of the Current Act, which allows for a party to make an application to the Court to extend the limitation period so long as a) they do so within one year of when they knew or ought to have known of the facts upon which to base their action, and b) it is not outside the 30-year ultimate limitation period.

The Current Act also includes an "ultimate limitation period" of 30 years. This means that a party cannot bring a claim if it is discovered more than 30 years after the day that the act or omission on which the claim would be based took place.

New Act

In contrast to the Current Act, the New Act imposes a "basic limitation period" for all causes of action of **two years from the day the claim is discovered**, and shortens the "ultimate limitation period" to 15 years.

Section 7 of the New Act outlines that a claim is discovered on the date the claimant first knew or ought to have known all of the following:

a. that injury, loss or damage has occurred;
b. that the injury, loss or damage was caused by or contributed to by an act or omission;
c. that the act or omission was that of a person against whom the claim is or may be made; and
d. that, given the nature and circumstances of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

Section 8 provides that the date an injury, loss or damage has occurred is:

a. in the case of a continuous act or omission, the day the act or omission ceases;
b. 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;
c. in the case of a claim to realize on collateral under a security agreement, the day the default first occurs;
d. in the case of a claim to redeem collateral under a security agreement, the day the creditor takes possession of the collateral;
e. in the case of a default in performing a demand obligation, the day the default occurs, once a demand for performance is made;
f. in the case of a claim for contribution or indemnity by one alleged wrongdoer against another, the day the liability of the claimant, in relation to the matter for which contribution or indemnity is sought, is confirmed by a court judgment, arbitration award or settlement agreement.

The ultimate limitation period of 15 years does not run from the date which the claim was "discovered" like the basic two year limitation period, but rather runs from the date the act or

omission on which the claim is based took place.

Discoverability

Unlike the Current Act, the main consideration in determining when a limitation period commences under the New Act is when the claim was "discovered". Section 7 of the New Act outlines the statutory requirements for a claim to be discovered. Additionally, courts in other provinces with similar legislation as the New Act have provided further interpretation to these statutory requirements. The concept of discoverability was recently considered by the Supreme Court of Canada in the case of *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 [*Grant Thornton*].

Grant Thornton considered discoverability in the context of New Brunswick's limitations act, which is similar to the New Act, and the limitation legislation of most Canadian provinces.

The Court in *Grant Thornton* held that a claim is discovered when a plaintiff has actual or constructive knowledge "of the material facts upon which a *plausible inference of liability* on the defendant's part can be drawn." This has been referred to as the "plausible inference test".

The degree of knowledge required for a plausible inference of liability is "more than mere suspicion or speculation," but does not require that a plaintiff have certainty or perfect knowledge of the defendant's liability.

A plaintiff will be found to have had "constructive knowledge" of the relevant material facts if it can be shown that they ought to have discovered said facts had they exercised reasonable diligence.

The Court also noted that a plaintiff does not need knowledge of all of the constituent elements of a claim for them to discover that claim. All that is needed is actual or constructive knowledge of the material facts set out in section 7 of the New Act. In other words, a plaintiff just needs to know that: an incident occurred that resulted in a loss (s. 7(a)), the defendant did or failed to do something to cause that loss (s. 7(b) and (c)); and a court proceeding would be an appropriate means to seek a remedy for the loss (s. 7(d)). For example, an owner would not need to know the *exact* act or omission of the contractor that caused the damage, just that *an* act or omission of the contractor caused it.

Appropriate Means

Section 7(d) of the New Act requires that for a claim to be discovered, the plaintiff must know or ought to know "that, given the nature and circumstances of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it." This is sometimes referred to as the "Appropriate Means Provision".

Not all provincial limitation legislation contains an Appropriate Means Provision (e.g. New Brunswick), and for those that do, the wording sometimes varies slightly from what is contained in the New Act (e.g. Ontario and Saskatchewan).

Appropriate Means Provisions are often seen as a means to encourage settlement between parties, as they essentially ask whether there are other ways for the dispute to be resolved without resorting to litigation.

Whether a legal proceeding would be an appropriate means to seek to remedy the plaintiff's injury, loss or damage will turn on the facts of each case.

The case law has recognized two circumstances that are most often capable of delaying the limitation period due to the Appropriate Means Provision:

- where there is an alternative dispute resolution process offering an adequate remedy that the plaintiff chooses to pursue before bringing the claim and has not completed; or
- where the plaintiff has relied on ameliorative efforts by a defendant with superior knowledge and expertise.

Courts have held that ongoing communication or negotiations between the parties, or an investigation into the nature of the damages will not postpone the commencement of a limitation period. However, in other cases, pursuing the contractual dispute resolution process may postpone the commencement of the limitation period. As noted however, these decisions are highly fact specific. Given the potential consequences of missing a limitation period, it would be a best practice for the parties to enter into a tolling or standstill agreement, whereby the parties agree that the limitation clock does not start to run again until a prescribed date.

With regard to the second scenario outlined above, efforts to remedy a problem so as to make the litigation unnecessary may postpone the commencement of a limitation period. For example, if a contractor is undertaking efforts to remedy deficient work it completed, it is possible the limitation period may not commence until those efforts have been exhausted/abandoned. However, it may be wise to consider entering into a tolling agreement in this scenario as well to ensure that the limitation period is preserved. Further, efforts to remediate deficiencies may only delay the limitation period against the party undertaking those efforts. For example, in a scenario where a contractor and an engineer may be at fault for a deficiency, and only the contractor is undertaking efforts to correct the deficiency (and the engineer is denying liability), the limitation period may only be delayed as against the contractor – the claim against the engineer would need to be brought within the usual two years.

Other Considerations

Section 4 of the New Act outlines that it does not apply to claims subject to a limitation

provision in another Act, and to the extent a provision of the New Act conflicts with another Act, the other Act prevails.

Relevant for those in the industry **are the timelines set out** in *The Builders' Liens Act* (the "BLA") (e.g. 60 days to register a lien, and two years from that date to commence an action and file and register a Pending Litigation Order). The New Act does not alter the timelines under the BLA, but with respect to the two year timeline to commence an action to enforce a lien, it may have some practical consequences.

Builders' liens are registered on projects as a result of non-payment from one party to another. The lien itself is registered sometime after the non-payment. In these instances, the party has two distinct causes of action: breach of contract (stemming from the non-payment for the work, services or materials), and the action to enforce the lien. Both of these causes of action have their own limitation period. For the breach of contract, it is two years from the date of that breach (e.g. the non-payment). For the action to enforce the lien, it is two years from the date the lien is registered. As such, the limitation period for the breach of contract will expire before the action to enforce the lien.

What is the practical effect of this? As both causes of action are almost always included in the same claim, the party bringing the claim should ensure that the claim is filed by whatever limitation date comes earlier. The best practice in this instance would be to ensure the claim for breach of contract is brought within two years (though earlier would be better) of the breach, and that this action also seeks to have the lien enforced. Better yet, the claim should be brought well before the expiration of the earlier limitation period, as there is no reason why a lien claimant has to wait to commence this action.

Section 24 of the New Act allows parties to extend, but not shorten, a limitation period by an agreement in writing. This extension may be included in the original contract, or may occur by way of a tolling agreement after the original contract is executed. It is important to note that an agreement to shorten the duration of an obligation (e.g. a contractual warranty period), is not the shortening of a limitation period, and is therefore still permitted. It is also important to note that notice provisions in a typical construction contract (e.g. for advancing claims under the contract, appealing decisions of the contract administrator or giving notice of a force majeure event) do not operate in the same way as limitation periods, even though they may have similar effects.

Another common contractual provision to note with respect to Section 24 are waiver of claims provisions – which often provide that a party under the contract may be deemed to have waived their claims against the other if notice was not provided within certain timelines. On its face, a contractual provision such as this which has the effect of shortening the limitation period would appear to be unenforceable. However, there is conflicting case law on this point. As such, parties to a contract ought to pay close attention to the timelines provided in these sections.

An acknowledgment of liability or partial payment of a debt will have the effect of extending a limitation period from the date of that acknowledgment. Section 20 of the New Act sets out the specific requirements. Essentially, an acknowledgment of liability must be made to the claimant in writing and signed by the defendant before the limitation period that applies to the claim expires. A partial payment of an outstanding debt has the same effect as an acknowledgment of liability. Further, an acknowledgment of liability respecting interest applies to outstanding principal amounts and interest that becomes due after the acknowledgment.

What does this mean for the construction industry?

Given the duration and nature of construction projects, the move to a two-year basic limitation period and a 15 year ultimate limitation period are likely to have significant impacts on the industry as a whole.

The two year period and the plausible inference test mean that once the New Act is in force, parties will need to be much more diligent in investigating and bringing claims. The Court in *Grant Thornton* has suggested that the claimants may be found to have discovered a claim even before an expert report establishes causation or liability. In a **recent decision** of the Ontario Court of Appeal, a claimant was found to have discovered the claim based on their own knowledge and only a preliminary view on causation from an engineering firm, a week before the formal causation opinion was provided in a report from a different firm. As the case law develops post-*Grant Thornton*, there will be more guidance for those in the construction industry.

Another potential practical impact of the New Act is that a party may have to commence a claim while the project is still ongoing in order to comply with the two-year limitation period (if the parties are not engaged in an alternative dispute resolution process and there are no ameliorative efforts being undertaken). This may put a greater strain on the relationships of the parties, but will be required unless the parties enter into a standstill/tolling agreement where they agree to suspend the limitation period to allow for the parties to attempt to resolve the issues and complete the project.

On larger projects that are expected to extend for a number of years, an owner may wish to have the contractor agree to extend the limitation period in the contract. The contractor may similarly wish for it not to be extended in these circumstances. This may lead to more extensive contractual negotiations on this point.

Shortening the ultimate limitation period to 15 years is also a significant change as between owners and both design professionals and contractors with respect to the issue of latent defects. The previous 30 year period provided owners with a much greater time period to discover latent defects. It may be that the new 15 year period may result in owners being left without a remedy in the case of a defect discovered more than 15 years from its creation. It

is unclear if the provision in the New Act that allows for extending of a limitation period applies to the ultimate limitation period. If it does, owners may wish to attempt to extend this period in their contracts with contractors and design professionals to protect themselves from the risk of a latent defect that may be discovered more than 15 years from its creation. Again, this would likely present an interesting point of contractual negotiation.

When do you have to start worrying about this?

The New Act comes into force on September 30, 2022, at which time the Current Act will be repealed.

If a limitation period is set to expire under the Current Act before September 30, 2022, there is nothing in the New Act that will extend this period. If a party has a potential claim that is going to expire before the New Act comes into force, they must bring it within the timelines of the Current Act.

If a party discovers a claim before September 30, 2022, and the limitation period under the Current Act has not yet expired, that party would now have to commence its claim before the *earlier* of:

1. two years after the coming into force of the New Act; and
2. the day the limitation period under the Current Act expires or would expire.

Lastly, if a party has discovered a claim after September 29, 2021 which is outside of the general limitation period for that claim, it needs to bring an application under Part II of the Current Act before September 30, 2022 (though of course much earlier would be better).

Given the pending implementation of the New Act, parties ought to take the time now to assess any potential claims they may have to ensure that they are brought within the applicable limitation period.

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specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.

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