

Discovering the Limits of the Limitations Act

The new *Limitations Act, 2002* (in force, January 1, 2004) has completely overhauled limitation periods in Ontario. This note briefly summarizes the legislation and comments on file retention policies.

Gone are the myriad of bewildering limitation periods. The first is a 2 year limitation period known as the “basic” limitation period. The basic limitation period expires on the second anniversary after the claim is discovered. “Discovered” is a defined term but essentially means that a plaintiff has been able to find out all of the essential information that is required to commence a claim. Generally, unless the contrary is shown, a claim is assumed to have been discovered when the act or omission occurred. Previously, the discovery concept could extend limitation periods indefinitely. The second or “ultimate” limitation period now caps the discovery period at 15 years from the date of the act or omission.

The legislation contains a number of exceptions to both limitation periods (for example, the limitation periods for persons under disability do not run during their disability). Additionally, certain sexual assault and undiscovered environmental claims have no effective limitation period.

Last month, the Court of Appeal decided that the “ultimate” limitation period runs from January 1, 2004, for claims that were not discovered prior to that date. Accordingly, any claim, regardless of its age, that was not discovered before the new act came into force may not be statute barred until January 1, 2019.

Any document retention policy which provides for document destruction puts an organization at risk of destroying documents it may need to defend a lawsuit. A document retention policy seeks to find a reasonable balance between the cost of retaining documents and the cost of destroying documents on needs to defend old claims. We would recommend keeping your files for a minimum of 16 years (15 years plus one year for service of the claim). Many sexual

assault and environmental claims are not really subject to any limitation period. Therefore, all social services and child welfare files or files dealing with environmental matters should really be kept much longer than 15 years. Even if these recommendations are followed, you may still end up destroying files you need to defend claims.

Every organization should have a written retention policy which it should follow. If files are lost or destroyed that should have been retained, then you may find yourself in considerable difficulty if your organization is sued.

Finally, you should keep copies of all insurance policies and endorsements that have been issued to your organization indefinitely. This includes not only the policies that your organization has itself arranged for, but also policies, and Certification of Insurance, endorsements that were issued pursuant to contracts that your organization is a party to.

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