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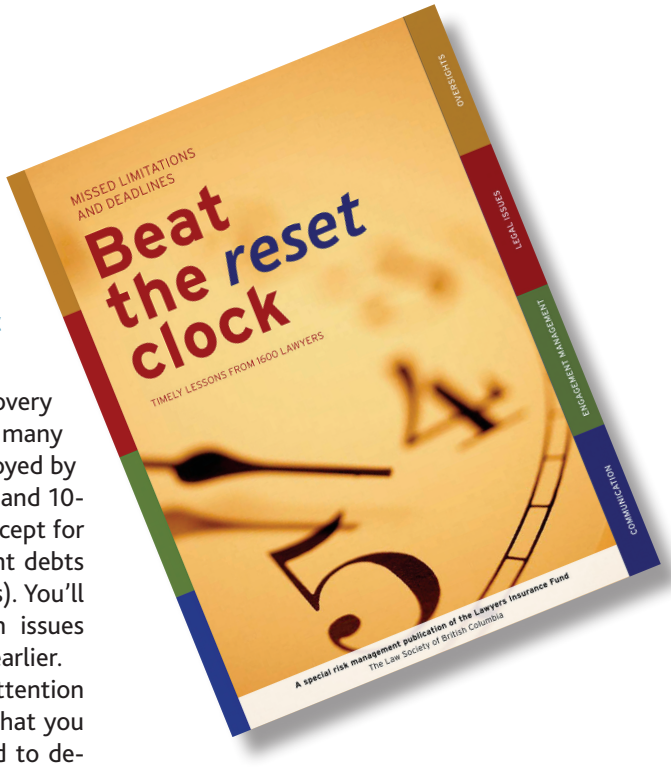
Ten tips to beat the *reset* clock

The new Limitation Act: Attention litigators and solicitors.



ONE THOUSAND, ONE hundred five. That's the number of lawyers who reported claims and potential claims to the Lawyers Insurance Fund over the past five years because of a missed limitation or deadline. That's on top of the 1,600 lawyers whose reports over seven years prompted the creation of our 2007 guide, *Beat the clock – Timely Lessons from 1,600 Lawyers*. It's clear that limitations already create risk for lawyers, and the new *Limitation Act* has the potential to increase that risk.

This article will help you "beat the clock" now that the new Act is in force (as of **June 1, 2013).**

As with any legislative change, understanding the new law and how it applies to your area of practice is essential for avoiding mistakes. Education and information is available through various resources. The purpose of this article is to highlight some specific areas of risk beyond the key changes to the basic and ultimate limitation periods. You can continue to beat the *reset* clock by following the tips below as well as those detailed in our earlier guide. Of course, references to the new Act are not intended to replace your own careful review of the law.

#1 Act early. The clock (almost) always stops at two years, not six or 10.

With the two-years-from-discovery basic limitation period governing many civil claims, the luxury of time enjoyed by lawyers currently dealing with six and 10-year limitation periods is gone (except for six years in relation to government debts and 10 years to enforce judgments). You'll need to think through limitation issues earlier, investigate earlier and file earlier.

Devote enough time and attention at the initial interview to ensure that you have all the information you need to determine when your client discovered – or reasonably ought to have discovered – the claim. If there is any doubt as to when discovery occurred, assume the limitation runs two years from the date that the damage occurred.

And as we've said before, sometimes the right decision is to "just do it" – simply go ahead and start an action even if it turns out you need not have sued when you did, or even at all. Remember this advice if your client wants to arbitrate or exercise some other non-judicial remedy. Filing a Notice of Civil Claim within the two-years-from-discovery limitation period will keep your client's judicial remedy safe from an "out of time" challenge in the event the other ultimately fails.

And a caution about transferred files. If you inherit a file, the limitation issues may not have been properly identified or managed by the previous lawyer. With the shorter limitation, it's even more important to read through the transferred file as soon as you can. Do not let it languish on your desk.

#2 You may need to educate your clients. They, too, need to act early.

It's not just lawyers who have lost the luxury of time. For example, anyone who

buys, sells, lends, borrows, develops or engages in any other way in any business, commercial or financial undertaking that may give rise to a claim faces the same time crunch. "Let's wait and see" is no longer an option if the waiting period is any length of time. And the 15-years-from-occurrence ultimate limitation means that a claim is barred after 15 years, even if the act hasn't been discovered or no damage has occurred (subject to the confirmation rules under the new Act). It may be appropriate to explain the need to anticipate, monitor and actively investigate potential problems that may lead to losses.

If you act for a sophisticated client with considerable legal knowledge, don't simply assume that client is fully aware of the new Act and its implications. Check it out.

#3 Flag and diarize limitations for *all* remedies relating to a claim – judicial *and* non-judicial (including contractual).

The new Act clarifies that once a claim is statute-barred, every remedy relating to that claim is statute-barred, even if it is non-judicial. Non-judicial remedies are those that a person is entitled, by law or contract, to exercise without going to court; for example, distraining for rent or proceeding pursuant to a binding arbitration clause in an agreement. Whether your client's remedy involves court proceedings or not, you will need to ensure that the limitation is properly recorded in the central firm diary system and that you follow the "act early" caution in tip #1, including starting any action your client may later want to pursue.

In terms of contractual remedies, you will want to identify any that may be available to your client by reviewing related contracts or agreements as soon as a problem arises. You will also want to follow the suggestions in tip #7 below in terms of the contracts you prepare.

You can read more about how to create an effective central firm diary system in tips #1 through #8 of *Beat the clock* (see sidebar on page 3), and the advantages of electronic diary systems in Practice Tips in the Summer 2013 *Benchers' Bulletin*.

#4 Incorporate the shorter limitations into your firm's electronic diary system.

If your firm uses an electronic program for your central diary system, you will need to ensure that adjustments are made to any automated processes that calculate limitation dates and reminders to reflect the shorter limitation periods.

#5 Don't assume a limitation applies. The new Act expands the old Act's list of exempted claims.

The new Act specifies claims to which it does not apply. These include all of those exempted in the old Act, plus some new ones. For example, there are no longer limitations for civil claims for damages arising out of an assault or battery against a minor or for enforcing a judgment for child or spousal support arrears.

#6 Think outside the new Act box. The applicable limitation may still be found in another statute (and it may be very short).

The new Act is now clearly a default statute. If another statute sets out a specific limitation period, the new Act will not apply except as provided in that other statute. (Keep in mind, some statutes incorporate the new Act's postponement rules for minors or adults under a disability). If you are acting in relation to an insurance property or disability claim, for instance, you will be governed by the limitations in the *Insurance Act*, not the new *Limitation Act*. And remember that you may need to also think outside the "other statute" box, as that statute may require you to still look further for the limitation. For example, the *Insurance Act* does not apply to certain types of insurance, including vehicle insurance. That one year limitation period is found in the *Insurance (Vehicle) Act*.

Common limitations from other statutes that are less than two years are set out in the Limitations and Deadlines Quick Reference List (see sidebar on page 3).

#7 Consider the new Act's effect on the contracts and agreements you draft.

As explained in tip #3, the right to pursue *any* remedy is extinguished once the limitation for the underlying claim has passed. If your client's contract or agreement contains a non-judicial remedy for a breach or damage, remember that the remedy will not be available once the two-year

New Limitation Act in force June 1, 2013

On June 1, 2013, the new *Limitation Act*, SBC 2012, c. 13 (formerly Bill 34) came into force. The new Act simplifies the time limits for filing civil lawsuits. It replaces the former two, six and 10-year limitation periods for civil claims with a two-years-from-discovery basic limitation period and the former 30-year ultimate limitation period with a 15-years-from-occurrence limitation period (with some exceptions). The new Act's limitation periods will apply to claims arising from acts or omissions that occur and are discovered on or after June 1, 2013. Under the new Act, most claims are discovered when a claimant knew or ought to have known that the injury, loss or damage was caused by the defendant, and that a court proceeding would be an appropriate remedy (although discovery is postponed for some claims).

The old Act's provisions continue to apply to pre-existing claims discovered before June 1, 2013. Transition rules in the new Act govern pre-existing claims arising from acts or omissions that occur before June 1, 2013 but are discovered on or after that date.

limitation expires. These might include dispute resolution remedies such as arbitration or mediation. You will want to:

- draft contracts with non-judicial remedies that will work in light of the tighter two-year limitation;
- review and update the precedents and templates you use to incorporate any revisions required in light of the new Act;
- appreciate that the new Act is just as silent as the old on the legal effect of "contracting out" of the Act. As there are no legislated restrictions, it seems likely that courts will continue to apply the existing law in relation to tolling agreements and those that purport to alter limitation periods.

#8 Watch out – three more potential hot spots!

Claims for contribution or indemnity

If you act for a defendant, you will need to follow the advice set out in tip #1 in terms of thinking, investigating and acting earlier if there is a potential third-party claim for contribution or indemnity. Here's why. The new civil rules already impose a 42-day deadline for filing a third-party notice without leave. Now, the basic and ultimate limitation periods also apply to claims for contribution or indemnity. The basic limitation may start running as soon as a defendant is served with a Notice of Civil Claim (the ultimate limitation always starts that day). You can no longer wait for the outcome at trial before starting a new action. Note that the substantive law relating to other third-party claims, as well as counterclaims, set-offs or claims for substituting parties, is unchanged.

Demand loans (no fixed conditions of repayment)

The basic and ultimate limitation clock is now set by the timing of the demand and default, not the date of the loan.

Medical malpractice claims

Negligence claims against doctors, hospitals and hospital employees are now also governed by the two-year basic and 15-year ultimate limitation periods. The old Act's special six-year ultimate limitation was not carried forward.

#9 Don't get lost in transition.

There are detailed rules governing transition between the old Act and the new in circumstances where the act or omission occurs prior to June 1, 2013 but discovery occurs after that date. Different transition rules apply to claims that were previously governed by the special six-year medical ultimate limitation period (now gone). Check out the government website for a detailed explanation of which basic and ultimate limitation applies.

If you are retained in relation to a pre-existing claim after June 1, 2013, you may conclude that discovery occurred before that date and that the governing limitation under the old Act extends past June 1, 2015. Consider if it may be appropriate to sue before June 1, 2015. In that way, your client is protected if the discovery date is challenged and a successful argument made that the new Act applies. And if you are relying on discovery before June 1, 2013, be sure to keep a record of the facts supporting that position in case a challenge is made.

#10 Always use a non-retainer, disengagement or wrap-up letter with a limitation warning.

With the much shorter basic limitation period, it's certainly possible that more will be missed. Unhappy would-be litigants may target you if they spoke with you, even if you were clearly not retained. Our advice to lawyers is to develop a standard practice of advising prospective clients of limitations that might apply to prevent recovery, and confirm that you do not consider yourself retained in the matter. If you withdraw from an ongoing legal matter, include a clear warning. If the matter is concluded, advise in writing of any future limitations that must be met to preserve or protect the client's position. In light of the new Act, it's even more important to protect yourself with this advice. Confirming the advice in writing is best but, at a minimum, keep notes. Sample non-engagement letters are available in the Practice Support and Resources section of the Law Society's website.

The purpose of these tips and those in *Beat the clock* is to keep you from missing a limitation because of the new Act, or for any other reason. But if you do, report to us. Not only are you required to immediately report a claim or any other circumstance that could reasonably be expected to result in a claim, but early reporting may give us the chance to fix the problem.

Resources

- The BC government has developed comprehensive resources designed both to explain the new Act and to help the legal community and the public transition to the new law. These resources, including a transition rules flowchart for the new Act, are available at www.ag.gov.bc.ca/legislation/limitation-act/2012.htm.
- Training and resources are available through the Canadian Bar Association, BC Branch and Continuing Legal Education.
- *Beat the clock: Timely Lessons from 1,600 Lawyers*, an award-winning publication, covers over 70 tips to avoid missing limitations and deadlines and includes a Limitations and Deadlines Quick Reference List. **Both are available online and the Quick Reference List is updated and accurate as of June 1, 2013.** Although lawyers in private practice received a copy of the guide in May 2007, hard copies are still available by request (while supplies last). Please email your request, along with your name and address, to insurance@lsbc.org.
- For more information on setting up and using systems, contact Dave Bilinsky, Practice Management Advisor at daveb@lsbc.org.

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