

The New Saskatchewan Limitations Act: So What?

By: Bill Preston

May 1, 2005, is an important date! It is then that Saskatchewan will substantially align its limitation periods for starting a legal action (these rules do not apply to arbitration agreements) with what our neighboring provinces have done. Briefly, this new Act prescribes that you cannot start a legal action beyond 2 years after when you ought to have discovered your loss, and in any event not beyond May 1, 2020 or 15 years after a wrongful but undiscovered act or omission occurred, **which ever is later**. So, how do these changes impact the construction industry and is there anything you can do to manage these changes? Below I've separately dealt with the various usual types of legal actions arising out of construction design and building.

Collecting A/R

Where previously a creditor had 6 years from first default to start a legal action, now the limit is 2 years. For the transition, if on April 30, 2005, the creditor is aware that a payment is in arrears, it will continue to have 6 years; while payments not in arrears until after April 30, 2005, must be sued within 2 years of when they first became in default. Thus, under the payment terms of the usual CCDC document, there is a bit of a strange result. If a March/05 monthly progress payment is not duly paid, the Builder has until April 20, 2011, to sue; while if the April/05 progress payment goes in default, the Builder must sue before May 20, 2007. To avoid this problem, the new Act has given the creditor four alternative possible solutions:

1. In the construction contract, the Builder can prescribe an extension agreement which can change the 2 years to up to 15 years, the ultimate limitation period;
2. The Builder can look for a mandatory arbitration clause in the construction contract, because its availability is not subject to the new Act;
3. The creditor can, after the arrears, obtain a written extension agreement of the statutory limitation period; and finally,
4. The creditor can ratchet out the limitation period by obtaining partial payments (either before or after the expiry of the limitation period) on either the principal or the contracted accrued interest.

Builders' Liens

Here, the new Act has substantially changed the conventional Saskatchewan wisdom of registering a builders' lien on the title and then ignoring the debtor until the debtor seeks to sell the Project. Under the old legislation, this strategy was subject to a 10-year limitation period from the date of the Owner's default of payment. But, under the new Act, this has been shrunk to 2 years! As well, for the transition period, the rules applicable to collecting receivables apply to enforcing builders' liens. Thus, a builders' lien securing an unpaid progress payment due before May 1, 2005, is enforceable for 10 years, while that for an unpaid progress claim due after April 30, 2005, must be enforced within 2 years of when the payment was first due. Also, the four methods of managing this conundrum are the same as those for **Collecting A/R**.

Deficiencies/Warranty

Now, CCDC 2 at GC 12.2, together with our present *Limitation of Actions Act*, exposes the Contractor to a law suit by the Owner for claims of substantial defects and deficiencies started sooner than 6 years after substantial performance. But, GC 12.2 also provides that this 6-year period will be shortened if the Owner first discovers the substantial defect or deficiency sooner than 4 years after substantial performance. Thus, where the Owner discovers a substantial defect or deficiency before May 1, 2005, the Owner has until 6 years following substantial performance to sue. But, if this same defect/deficiency is not discovered by the Owner until after April 30, 2005, the Owner must sue sooner than 2 years after this discovery and before 6 years following substantial performance.

So, what can spec writers do to extend this 2-year period? They can, by specific reference to *The Limitations Act*, write a supplementary condition SGC 12.2 which continues the old arrangement. Alternatively, the Owner, after discovering the defect or deficiency, can obtain from the Builder an extension agreement which can extend both the 6-year period from substantial performance and the 2-year period from first discovery of the defect.

Negligence

For design consultants, this is where the new Act provides some benefit. Under the existing law, even a retired design consultant was vulnerable to being sued at any time during their lifetime and within 6 years after discovery of injuries arising out of their carelessness. Thus, a roof-trusses

subcontractor and its consultant were both successfully sued by an Owner in 1989 for their careless design work in 1972 because the progressive failure of the trusses was not discovered until 1987. This case prompted all retired consultants to consider buying insurance coverage until they died. The new Act prohibits going to Court following 15 years from when the carelessness (as opposed to discovery of the consequent injury) occurred or May 1, 2020, **which ever is later**. So for retired consultants, continue your E&O coverage to May 1, 2020, and thereafter only until 15 years after you have retired. The 15-year limit cannot be extended, but the 2-year limit for starting an action after first discovering the injury can be extended by an extension agreement.

Indemnities

Pursuant to CCDC 2, the Owner has indemnified the Contractor against third party claims arising out of a defect in the Owner's title to the Project. Thus, under the present legislation, if a Contractor is sued by a third party for trespass, the Contractor has up to 6 years to claim over against the Owner. But, under the new Act this period has been shrunk to 2 years. As a consequence, regardless of the date on when the third party started the legal action, if the Contractor was served with this claim before May 1, 2005, the Contractor continues to have 6 years to claim over against the Owner. But, on the other hand, if the Contractor is not served until after April 30, 2005, then the Contractor must claim over against the Owner within 2 years.

Similarly, CCDC 2 also permits the Owner to claim over against the Contractor for third party claims arising out of the Contractor's careless performance. The 6-year period in this General Condition 12.1.1 is not changed by the new *Limitations Act*. But, by the new Act:

1. The third party claim will fail against the Owner if the action is not started within 2 years of the third party first discovering their loss; and
2. The Owner's claim over against the Contractor will fail if either the third party's claim is not made in writing within 6 years of substantial performance or the Owner does not serve the Contractor with a claim over within 2 years of being served with the third party's statement of claim.

Insurance Claim

Insurance claims are like contract claims. Under the existing Act, an insured has 6 years from denial of coverage to start an action. Under the new Act, this has been shrunk to 2 years; and, for the transition period, letters of denial received before May 1, 2005, can still be sued within 6 years, but if after April 30, 2005, then only 2 years.

Conclusion

If you've fought your way through this new legal labyrinth, here's the essence as I see it:

1. Seek partial payments or an extension agreement, which can be verbal if made within 2 years and otherwise must be written and signed.
2. In your contract documents, where possible, prescribe mandatory arbitration, because the new Act does not govern when a party can go to arbitration.
3. Otherwise, exhaust your self-help efforts within 1½ years of when the loss was first discovered and then **get to a lawyer!**