

What the New Limitations Act Means for Land Surveyors

By Bernard C. LeBlanc

The number of lawsuits, particularly against professionals, has been climbing steadily for several years. Put simply, clients' expectations are always on the rise and in today's world, clients are less likely to have a strong personal relationship with the professionals they retain. Add the rising costs of professional services and clients are, perhaps justifiably, more and more demanding.

Background - Limitation Periods in Civil Cases

When things do go wrong, professionals, including land surveyors, are more likely than ever either to be sued or face a complaint to the Association. "Limitation periods" set out rules that govern how long a potential plaintiff has to sue when things go wrong. There is no limitation period for complaints to the Association. This article deals exclusively with "civil actions," which means being sued in a civil court for monetary damages, usually for alleged professional negligence. Under the old legislation, such claims had to be made within six years of becoming aware of a potential claim. However, recently enacted legislation has dramatically changed the rules.

New Limitation Period Legislation

Until the new *Limitations Act* came into effect, there were a myriad of limitation periods, depending largely on who you wanted to sue. For example, if you wanted to sue a physician, a patient would need to bring an action within one year. On the other hand, if you were a lawyer, a client had six years to sue. If you wanted to sue a "public authority," you had to do so after six months. These differences were largely the result of historical reasons that have limited relevance to the modern world.

After approximately 35 years of on and off discussion, the Ontario Legislature passed a new Limitations Act on January 9, 2002, which took effect on January 1, 2004. One of the main purposes of the new act is to better coordinate limitation periods for most "causes of action."

Most of the old limitation periods have been replaced with a basic limitation period of two years from the time that the "claim" is discovered. A "claim" is defined as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission." Obviously, this definition would cover most claims that clients have against professionals, including land surveyors.

One of the objectives of the new legislation is to try to clarify what is called "the discoverability rule." Basically, the discoverability rule means that the limitation period should not begin to run until the claimant or plaintiff, with reasonable diligence, could have learned that they have a claim. This principle is contained in section 5 of the Act, which tries to clarify the application of this rule. According to the new Act, there is what is called a "rebuttable presumption" that a claim is "discovered" on the day the act or omission, which is the basis of the claim, took place. What this basically means is that the limitation period starts to run on the day that the loss occurs unless the person with the claim proves that a reasonable person in the circumstances should not have known of the claim until a later time.

Much to the disappointment of professionals, plaintiffs often try to rely on the discoverability rule. In many cases, the basis for relying on the rule is that the plaintiff does not have the same level of knowledge, skill or sophistication as the professional.

Unless the alleged losses are obvious, it may not be apparent to someone without the practitioner's sophistication that there indeed has been a loss. It is easy to see how this argument could be made against most professionals, particularly land surveyors. For example, if a land surveyor makes an error in the course of surveying land, arguably a purchaser relying upon the survey is rarely in the position to challenge the surveyor's findings. It would not be until an adjacent landowner makes a claim against the plaintiff that the plaintiff would believe they have a claim against a land surveyor. Clearly, then, the application of the discoverability rule could potentially delay a limitation period for several years, thereby exposing the land surveyor to civil litigation many years after the surveyor completed the survey.

Other rules may also have the effect of extending limitation periods. For example, for minors and those persons incapable of representing themselves due to physical, mental or psychological reasons, the limitation period does not begin to run unless they are represented by a "litigation guardian," (someone who acts on their behalf), or until the person is no longer under 18 or "incapable."

Another area where limitation periods can be extended indefinitely is with respect to assaults and sexual assaults. In those cases, the basic two-year limitation period does not start to run while the claimant is incapable of commencing the proceeding because of his or her physical, mental or psychological condition. In cases where one of the parties to the assault had an intimate relationship with the claimant, or where there was a relationship of dependency, there is a rebuttable presumption that the claimant was incapable of commencing the proceeding earlier than it is actually commenced.

The clock also stops running against claimants when the parties agree to have an independent third party try to resolve the claim. If the claim is not resolved by "Alternative Dispute Resolution," time again begins to run when the process ends.

Interestingly, limitation periods can also start to run from a later time where the defendant acknowledges certain types of liability, including payment of a debt, recovery of personal property and other examples. In those types of cases, the loss is deemed to take place on the day that the defendant makes the acknowledgement.

Despite all of the means by which limitation periods can be extended beyond the general two-year period, the Act contains "an ultimate limitation period" of fifteen years. Put simply, subsection 15(2) of the Act states that no proceeding shall be commenced in respect of any claim more than fifteen years after the day on which the act or omission on which the claim is based took place. Therefore, even if a claim has not been discovered within fifteen years of the loss, an action cannot be brought. The purpose behind this section is to prevent "stale claims" from being advanced, as evidence is often lost over such long periods of time, and people are entitled to arrange their affairs with some degree of certainty, even if they did something that would otherwise have attracted legal liability.

The only exceptions to the fifteen year ultimate limitation period cases are where the claimant is a minor or "incapable," and they are not represented by a litigation guardian, or where a party willfully conceals the information that could reveal a loss, or willfully misleads the person with the claim. It is important to note that an action arising from a sexual assault, where at the time of the assault one of the parties to the assault was in the position of trust or authority, or was in

a relationship of dependency, has no limitation period. There is also no limitation period for certain other claims, such as proceedings to recover money owing to the provincial government in respect of, for example, fines, taxes, penalties, student loans and other, similar debts to the government.

Finally, there are a number of transition provisions for claims based on wrongs that took place before the new Act came into effect, but where no proceedings have been commenced. As these provisions are rather complex, land surveyors who may face litigation that is commenced after January 1, 2004 that relates to alleged wrongs that took place prior to January 1, 2004 should consult counsel to determine how the transition provisions would apply to that action.

Limitation Periods Relating to Real Property

Interestingly, the new legislation did not change the much older limitation periods relating to real estate and possessory claims. For example, there is a ten-year limitation period for persons who wish to make entry or make a claim of "distress," or bring an action to recover any land or rent. The more traditional limitation periods relating to real property that were contained in the old *Limitations Act* are now contained in a stand-alone statute called the *Real Property Limitations Act*.

Conclusion

While the Legislature has been trying for years to simplify limitation periods, and have gone some distance toward doing so by enacting a general two year limitation period for most claims, even lawyers still find limitation period issues complex and confusing.

This article is only intended to provide general information. For specific advice as to how limitation periods may apply to any litigation in which you may be involved, it is important to seek the advice of a lawyer.



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