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Review of the New Ontario Limitations Regime: Exposition and Analysis

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BOOK REVIEWS


In January 2004, Ontario's Limitations Act, 2002 came into force. Thankfully, there is no limitation period on legislative reform, as this relatively simple statute represented close to 100 years of law reform in the making. As Lisa Kerbel Caplan and Wayne Gray note in their chapter on the impact of the new statute on commercial transactions, the legislation "strikes a new balance between the interests of the plaintiffs, the interests of defendants and the goals of the judicial system". Elsewhere, in the Preface, the editors refer to the act as a "radical break with traditional concepts of limitations law as previously enacted in Ontario". The main features of the new act include a general limitation period of two years from the time a claim was or ought to have been discovered and an ultimate limitation period of 15 years. The real question the book sets out to address is whether this new legislation was worth the wait, or whether the passage of the Act simply marks the start of the next 100-year quest for limitations law reform. It is an elusive question and one well served by the thoughtful and thought-provoking analyses in these essays. This brief comment elucidates the contributions of these essays as well as pointing out some areas that merit further analysis.

The old Limitations Act, enacted in 1897, was an embarrassment to a modern legal order. It employed anachronistic terms (for example, the limitations act covering most litigation in tort or contract was

1. S.O. 2002, c. 24, Sch. B.
denoted by the period of six years for an "action on the case"). As the Ontario Law Reform Commission observed in a 1969 report quoted by Tim Bates and Brett Harrison in their lucid historical chapter, "[t]o the ordinary citizen, these laws are beyond comprehension".5 Other kinds of common litigation appeared to be outside the scope of the old act altogether (litigation on equitable grounds such as breach of fiduciary obligation or unjust enrichment was held by the Supreme Court to be outside the contemplation of the act and therefore subject to no limitation period6). There is likely sufficient fodder for an entire separate volume simply chronicling the failed attempts at legislative reform in the past.7

Indeed, whether the new act represents law reform or should more accurately be seen as judicial policy-making remains a live and engaging question. Many key aspects of the act are derived directly from the case law interpreting the old act and its companion acts around the country.8 The centerpiece of the new act, as noted by Tim Bates and Brett Harrison in their contribution to the volume, is the codification of judicially developed principles of discoverability. The critique of the absence of legislative leadership and reliance on judicial interpretation is an underlying theme of this volume as well. One of Jacob Ziegel’s two contributions to the volume takes the Ontario government to task for first shutting down its Ontario Law Reform Commission in 1996 and in failing to revive it since. In his view, this absence accounts for the inadequate law reform activity in Ontario in commercial and consumer law areas. Ziegel and others, no doubt, took heart from the

7. The most notable of these is likely An Act to Revise the Limitations Act, which was given first reading in November of 1992 before disappearing from view: Bill 99, 2nd Sess, 35th Leg., Ontario, 1992. Three previous aborted legislative initiatives are chronicled by Elizabeth Ellis and Eric Tilley in “Legislative History and the Limitations Act, 2002”, in Ontario Limitations Regime, at pp. 142-53.
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Attorney General’s announcement in January of 2006 that a new Ontario Law Commission is to be established. As Ziegel readily concedes, however, the output of the former Law Reform Commission in areas of commercial and consumer activity often had little or no impact on previous Ontario governments and resulted, in his words, in its proposals being “essentially . . . allowed to gather dust”. It would seem that the limits of law reform in these fields have more to do with political inertia than with an absence of sound proposals.

In part because such occasions are rare, significant new legislation in commercial and consumer fields tends to attract some attention, as this volume reflects. The collection of papers that make up this volume is divided into a wide array of categories, from papers dedicated to specific sections of the act (such as s. 22, which prohibits contracting out of limitation periods, or s. 23, which stipulates that for the purpose of applying rules regarding conflicts of law, limitation law is considered substantive law) to papers dedicated to the impact of the act on particular fields of law (for example, real estate law, consumer law and commercial debt law) to papers on the law reform process and finally comparative papers shedding light on the act either by looking at different legal regimes (for example, the civil law in Quebec) or by looking at jurisdictions like Alberta and British Columbia, which have analogous legislative language.

While the authors are generally supportive of the government’s long overdue law reform initiative in the field, the tone of the collection is, on the whole, critical of the legislation, both for what it includes and what it omits. Section 23 and its codification of the principle from Tolofson v. Jensen\(^9\) is the subject of an entertaining but stinging analysis in Janet Walker’s essay entitled “Twenty Questions (About Section 23 of the Limitations Act, 2002)”. This chapter illuminates the significant uncertainty to which the minimalist provision directed at resolving conflicts with limitation periods in other jurisdictions gives rise. Some of the most trenchant

10. [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289. In this case, the court adopted the civil law approach that once a limitation period had expired, the underlying substantive right was extinguished, as opposed to the earlier common law approach which viewed limitation periods as procedural and merely denied parties a remedy once the period had tolled (but left the underlying substantive right in existence, if unenforceable).
criticism is reserved for s. 22 which, as noted above, removes the right of parties to contract out of limitation periods. John Cameron concludes his unrelentingly negative view of this provision by asserting, "There is no sound policy reason to preclude business parties from defining the nature and extent of their contractual obligations." While this may be true, and while s. 22 may create significant uncertainty, the volume might have been strengthened had it included the government's own policy perspective. Why was it deemed important to remove the ability of parties to contract out of limitation periods? Was it seen as a measure to protect vulnerable consumers? This rationale is assumed in Jacob Ziegel's second contribution to the volume, which considers the legislation from the consumer perspective. Nonetheless, we are left in the dark as to the government's own account of this policy trade-off.

Notwithstanding the merits of that trade-off, it would appear the critics' lamentations (and those of industry lobbyists such as the Ontario Bar Association) were heard. The Ontario government is seeking to repeal much of the substance of s. 22 through its Access to Justice Act, 2006, introduced in 2005. That legislation includes the following provision amending the Limitations Act, 2002:

Limitation periods established by the Act currently apply despite agreements to vary or exclude them. The only exception is for an agreement made before January 1, 2004, the day the new Act came into force. The Schedule adds two further exceptions for agreements made on or after the day the Bill receives Royal Assent:

1. An agreement made by parties who are all acting for business purposes.
2. An agreement to suspend or extend a limitation period.

With the ink barely dry on this volume, a postscript may soon be in order.

Apart from the problem of keeping up with current events, collections of this kind have some inherent limitations (no pun intended).

12. The volume does contain an article by John Lee, Policy Counsel with Ontario’s Ministry of the Attorney General, entitled “Developing a New Limitations Act: A Survey of Canada’s Emerging Limitations Regime”, but he does not explore the purposes animating s. 22 and indicates that his contribution represents his views alone and not those of the ministry or the government.
While the essays reflect a constructive engagement with shared concerns (for example, the desire for certainty and consistency), they could cohere more effectively if more attention had been paid to trimming duplication. This is particularly apparent with respect to s. 22, which is the subject of several critiques, none of which appears to build on the others. Some of the essays are quite sophisticated in their analytic rigour; others are short and descriptive. Another concern is the dominant focus on commercial concerns animating the volume. The authors mostly hail from commercial backgrounds and the volume arose out of a seminar involving the Canadian Business Law Journal and a number of leading commercial law firms, so it is neither surprising nor unjustified that the various essays address mostly commercial concerns — does the legislation, for example, address the concerns of the real estate business? Will it allow Ontario to compete for commercial contracts in a global economy?

A review of limitations jurisprudence of the last decade or so, however, reveals that the most troubling and compelling limitations disputes have emerged from non-commercial fields — the series of suits against the Canadian government and Catholic Church for abuses inflicted at residential schools against aboriginal youth is a notable example.\(^\text{15}\) Civil suits alleging childhood sexual assault is another.\(^\text{16}\) Environmental torts and reparations class actions might also be added to this list. The new Act includes special provisions exempting from limitation periods both child sexual assault litigation (s. 16) and some forms of environmental tort litigation (s. 17), but these are subject only to passing references in the analyses. It would have been helpful to hear more directly from these quarters on the implications of the Act.

The attention to areas such as sexual abuse and environmental harm reflects public interest perspectives on limitations regimes. One challenge with law reform in the area of limitation periods is how to properly discern the public interest. Frequently defendants tend to have industry or sector lobbying organizations to make submissions on legislation in the making, but the same is not true of

\(^{15}\) See the discussion in Z. Oxaal, “Removing that which was Indian from the Plaintiff: Tort Recovery for Loss of Culture and Language in Residential Schools Litigation” (2005), 68 Sask. L. Rev. 367.

potential plaintiffs. With the possible exception of consumer groups, people normally do not know that they may be plaintiffs down the road. Who expects to slip on the sidewalk, be hit by a car or be sexually assaulted? Governments must consider the interests of such people even if they cannot be consulted as part of the legislative process. Discerning the public interest in limitation periods raises the larger question of the public interest in civil litigation in the first place. Is the role of legislation in this field to ensure fairness to all parties, or the most efficient and effective system of dispute resolution, or to promote the health of the market economy, or ensure the protection of the vulnerable, or some combination of these and other goals? Determining how best to fashion limitation periods must flow from this broader sense of purpose or purposes. The new legislation (and the analysis of it in this volume) assumes that the public interest in limitation periods is self-evident. No justification is given, for example, as to why the basic limitation period for most civil litigation on debts or torts is shifting from six to two years. No normative principles are offered to underlie the need for an ultimate limitation period (in the Ontario legislation it is 15 years, but why 15 and not 10, 20 or 100?).

In Novak v. Bond, the Supreme Court of Canada considered the B.C. limitations legislation in the context of a woman recovering from breast cancer who did not file a claim until four years after the expiry of the limitation period because her decision to sue depended in her mind on the success of her recovery. In that case, the majority offers the following account of modernizing limitation statutes:

The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff’s own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics. It is the fourth and last factor, that of accounting for the plaintiff’s own contextual circumstances, which injects the search for

18. Ibid. at para. 67, per McLachlin J. (as she then was).
justice into the need for bright lines. As Kent Roach has persuasively demonstrated, where courts are given the opportunity to replace bright line tests with contextual analyses, the result will almost always benefit plaintiffs. In this way, courts are left through the devices of statutory interpretation to fill in the normative gaps left by overly broad or vague limitations statutes.

In fairness, and as the reader may have already surmised, I myself am an outlier in debates on limitations periods. I have never been persuaded the injustices to which limitation periods inevitably give rise are compensated for by the policy rationales of repose or removing the sword of Damocles from over the heads of potential defendants. A wrong is a wrong. A wrong yesterday ought to be treated as a wrong today. It is often said that potential plaintiffs should not “sleep on their rights”. Maybe this is so, but just as often, in my view, disputes such as that in Novak take time to ripen and time is needed for potential plaintiffs to determine whether the effect of a civil wrong on their life or livelihood justifies the uncertainty, cost and delay of a civil action.

In some cases of equally resourced and sophisticated commercial litigants, there is some logic to well advertised and well understood limitation periods in order to add certainty and predictability in commercial affairs. In the preponderance of cases, however, which involve power and informational imbalances, limitation

20. See Novak v. Bond, supra, footnote 17, at para. 8, per Iacobucci and Major JJ. dissenting: Almost all applications of limitations statutes will seem harsh. But their finality should not obscure their value. They bring needed stability to society by enabling potential defendants to plan their affairs in the safe assumption that stale claims cannot be raised against them. They minimize the risk that evidence relevant to the claim will be lost. In addition, they are an incentive for plaintiffs not to “sleep on their rights”.
21. The court in Novak addressed this concern (ibid., at para. 18) by reading in a subjective test to the discoverability principle in the B.C. legislation:

There are always reasons why a plaintiff may reasonably choose not to bring an action, even though it would also be reasonable to bring an action. Lawsuits are trying, financially, emotionally and perhaps physically. Often the game is not worth the candle. The decision whether to sue or not is a personal one that each plaintiff must make individually. The statute of limitations foresees this by allowing a two-year period from the moment a potential plaintiff becomes reasonably able to sue. It is during that time that the plaintiff’s subjective position is considered — not by the courts, but by the plaintiff herself in deciding whether to sue or not.

This description of the legislation comes from the dissent. The majority did not disagree but simply interpreted the subjectivity of this standard differently, in a fashion more sympathetic to plaintiffs.
periods sacrifice justice for efficiency and this is rarely a palatable calculation — at least in my view.

Iacobucci and Major JJ. in their dissenting reasons in Novak note that interpreting a provision of the B.C. legislation in a way that has the effect of abolishing a limitation period is an "equal injustice" to an absolute limitation period that admits of no exception. I find this view puzzling. A limitation period is not like a rule of discovery or evidence in which both parties must abide by whatever constraints are imposed by the court. With limitation periods, the issue is no more and no less than whether a party that is allegedly wronged will have its day in court and whether a party that has done the wrong should be exempted from the threat of liability simply because of the passage of time. With respect, the injustice of being denied your day in court is not the same as the injustice (if any) of being told that your wrongful actions may have consequences notwithstanding that they took place in the past. The majority reasons in Novak reflect a healthy judicial disinclination to apply limitation periods where it would be unjust to do so.

While this volume does not do justice to these broader questions of the public interest (its subject is the narrower one of whether the new Ontario legislation should be lauded or lamented), it does represent as reasoned and nuanced a discussion on the subject of limitation principles as I have come across. The subject of limitation periods attracts too few legal scholars. Those who do explore the issue tend to do so in largely descriptive contexts. This volume promises more and delivers on that promise admirably. Hopefully, this book will find a wide audience and spark a wide-ranging debate.

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