

Considerations for domestic arbitration: Recent changes in Canada

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Across Canada, as across the world, people are working hard to adapt to life and business amid COVID-19. We have previously written on changes in local Court availability, and on some of the impacts to changes on limitations in Alberta and Ontario as a result of recent governmental acts (Ministerial Orders).

As discussed below, parties to domestic arbitration agreements should not automatically assume that any applicable limitation periods are affected by their jurisdiction's Ministerial Order. Careful review is required of the wording of each Order, the governing arbitration legislation, and the terms of the relevant arbitration agreement to make that determination.

For more information, please contact any member of Dentons' Litigation and Dispute Resolution group.

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Alberta

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Alberta's litigation landscape has temporarily changed following the provincial government's declaration of a public health emergency on March 17, 2020 due to pandemic COVID-19. Courts have adjourned the vast majority of applications, drastically reduced the scope of matters for which they will grant a hearing, and suspended most filing deadlines.

On March 30, 2020, Alberta's Justice Minister issued Ministerial Order (MO 27/2020) under the authority of the *Public Health Act*, suspending limitation periods from March 17, 2020 to June 1, 2020. Specifically, the Ministerial Order states:

1. Limitation periods are suspended for certain enactments March 17, 2020 to June 1, 2020.
2. Any period of time within which any step must be taken in any proceeding or intended proceeding is suspended subject to the discretion of the court, tribunal, or other decision-maker from March 17, 2020 to June 1, 2020.
3. The limitation period or period of time resumes running on June 1, 2020 and the temporary suspension period shall

not be counted.

Appendix A to the Ministerial Order lists the effected legislation, including the *Limitations Act*. As such, the Ministerial Order modifies the application of Alberta's *Limitations Act*, which, under normal circumstances, would cause a claim to expire if proceedings were not brought within the prescribed timeframe. However, while Appendix A to the Ministerial Order includes the *Arbitration Act* as an enactment for which limitation periods are suspended, it does not necessarily follow that limitation periods for commencing all domestic arbitration are suspended.

Alberta's *Arbitration Act* specifies that the law with respect to limitation periods (including the *Limitations Act*) applies to arbitrations (s. 51) as if they were proceedings in the public court system. Therefore, based on the Ministerial Order, the limitation periods for commencing arbitration are presumably suspended. Yet this is not the end of the analysis: ultimately, whether or not the limitation to bring a specific arbitration claim is suspended depends on the wording of the arbitration agreement itself. The *Arbitration Act* (and, through s. 51, the *Limitations Act*) will apply to arbitrations conducted under an arbitration agreement **unless** the parties have agreed that it does not (s. 2(1)(a)). It is not uncommon for parties to arbitration agreements to set out comprehensive sets of rights and procedures and then to exclude the *Arbitration Act*. In such a case, the parties' agreed-upon limitation periods for commencing arbitration may not be suspended by virtue of the Ministerial Order.

Procedural deadlines

The Ministerial Order may also affect procedural deadlines in arbitration.

Unlike other provinces, the procedural deadline suspension in Alberta's Ministerial Order is not expressly qualified as being limited to the suspension of deadlines under legislation or act of the government. Instead, the Ministerial Order simply states that "[a]ny period of time within which **any step** must be taken in **any proceeding or intended proceeding** is suspended." Without any qualification, this is potentially ambiguous on the question of whether purely contractual procedural deadlines, or those under any arbitral rules of procedure are suspended. In particular, as such suspension is "subject to the discretion of the court, **tribunal, or other decision-maker**," the Court has recently taken steps to proceed with enforcement applications on arbitral awards and "the Court is encouraging counsel and the public to access alternative dispute resolution mechanisms, including mediation and arbitration."

Going forward, in customizing their dispute resolution procedures, parties to arbitration agreements may want to consider referencing those procedures and deadlines that have now been suspended. To the extent that an arbitration agreement incorporates procedures that have been affected, the parties' procedural obligations may have changed. Nevertheless, contractual autonomy persists: parties retain the ability to amend their arbitration agreements to circumvent ambiguity brought on by the pandemic or imposed by the Ministerial Order — subject, as always, to the terms of the agreements themselves and the parties ability to come to a new agreement (or any decision of a tribunal).

British Columbia

Authored by David Wotherspoon

On March 18, 2020, in response to COVID-19 pandemic, the BC government declared a state of emergency, currently in place until April 28, 2020. Regular court operations, and access to the courts, have also been restricted to primarily urgent matters. Limitation periods have been suspended since March 26, 2020 by Ministerial Order. The Ministerial Order is valid for the duration of the state of emergency. In this context, it is important for parties to understand the impact of the Ministerial Order on their rights to ensure that any claims they may want to pursue in arbitration do not become inadvertently time-barred.

Generally, B.C.'s *Limitation Act* requires that claims be commenced within a certain time period. Any claims brought

outside their applicable time period are considered expired, which can be raised by the defendant as a complete defence. The government has already clarified that the Ministerial Order does not suspend limitation periods under the *Builders Lien Act*. Therefore, these claims must still be commenced in a timely way.

It is less clear whether the Ministerial Order also suspends limitation periods for claims being pursued by arbitration instead of through the court system.

B.C.'s current arbitration framework

B.C.'s *Limitation Act* applies to claims brought in the Province. A "claim" is defined very broadly and means "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission" (s. 1). On its face, this definition includes claims brought through arbitration.

If a limitation period is established by some other piece of legislation, then the time limits established by the *Limitation Act* does not apply to those claims, except to the extent provided for in that other legislation (s. 3(2)).

As the *Arbitration Act* does not establish any limitation periods, as a starting point, the *Limitation Act* applies to claims brought through arbitration. As such, it would seem that the limitation periods for arbitral claims are currently suspended by the Ministerial Order.

However, parties to arbitration agreements, as with other contracts, have the ability to comprehensively define their rights and obligations, including with respect to whether arbitration must be commenced within a certain time period. Therefore, it is key to examine the wording of the arbitration agreement.

If the parties have agreed that arbitration must be commenced within a certain time period, failing which the claim will be time-barred, then that time period is not suspended by the Ministerial Order. As such, it is important for those parties to commence any claims they may wish to pursue through arbitration in accordance with the time limit established by their arbitration agreement.

If the arbitration agreement does not require that arbitration be commenced within a certain time period, then the limitations period in respect of those arbitral claims is likely suspended by the Ministerial Order.

Upcoming changes to B.C.'s arbitration legislation

On March 5, 2020, Bill 7, which will repeal and replace the *Arbitration Act*, received Royal Assent. Currently, we do not have information as to when this new legislation may come into effect.

Depending on how long B.C.'s state of emergency lasts, it is possible that the new arbitration legislation will come into force while the Ministerial Order is still in effect. Unlike the current *Arbitration Act*, the new legislation expressly provides that the law with respect to limitation periods applies to the commencement of arbitral proceedings (s. 11).

This means that, regardless if the current *Arbitration Act* or the new legislation is in effect, parties wishing to pursue arbitral claims need to do the following to determine whether the applicable limitation periods are suspended:

- Examine the arbitration agreement. Does it provide that arbitral claims need to be commenced within a certain time frame?
 - If yes, then this time limit is not suspended by the Ministerial Order and such claims must be commenced in a timely way.
 - If no, then the limitations period governing those arbitral claims are likely suspended by the Ministerial Order.

Québec

Authored by Catherine Dagenais and Marianne Bastille-Parent

On March 13, 2020, in response to the COVID-19 pandemic, the Government of Québec declared a province-wide public health emergency by way of Order in Council 177-2020, which it enacted pursuant to the *Act respecting public health* (CQLR c S-2.2).

Next, on March 15, 2020, for the first time in history, the Chief Justice of Quebec and the Minister of Justice exercised their powers under Article 27 of the Québec *Code of Civil Procedure* (**C.C.P.**) by issuing Order 2020-4251, whereby civil prescription periods and procedural time limits are suspended until the expiry of the Government's declaration of emergency, except for matters deemed urgent by the courts (e.g. applications for interim injunctions and safeguard orders, seizures before judgment, eviction orders, etc.).

Interestingly, the Québec ministerial order is silent as regards domestic arbitration proceedings or private means of dispute resolution more broadly. The C.C.P. contains a provision whereby parties must consider private prevention and resolution processes (which includes arbitration) before referring their dispute to the courts. In this context, it is interesting to analyze whether the ministerial order affects arbitration proceedings.

Extinctive prescription

In Québec, civil extinctive prescription (i.e. the time limit within which a person is allowed to seek the enforcement of a right) is governed by the *Civil Code of Québec* (**C.C.Q.**).

Insofar as the arbitration agreement indicates that Québec law, and therefore the C.C.Q., applies to the merits of the dispute in question, the parties may consider that Order 2020-4251 has suspended the extinctive prescription period.

It is interesting to note that the parties to an arbitration agreement governed by Québec law would not be able to stipulate a longer or a shorter prescription period than that provided by law according to Article 2884 C.C.Q., which is a public order disposition.

The ministerial order is therefore applicable to litigants that intend to pursue a claim before the courts or through arbitration with respect to the suspension of the extinctive prescription.

Procedural deadlines

The procedural deadlines suspended by the ministerial order are those applicable before the courts, as governed by the C.C.P., and the specific practice rules of each court. For example, the time limits to file a response, to file a case protocol and to set a matter down for trial, to only name a few, are currently suspended before the courts.

However, arbitration is mainly governed by the principles of consent and flexibility, and is “outside” the court system.

The parties must therefore take a close look at their arbitration agreement since the deadlines provided for the conduct of the arbitral proceeding are mainly contractual and would not be suspended by the ministerial order. It is worth mentioning that the flexibility that arbitration offers could allow the parties and the arbitration panel to agree on new deadlines, should they consider it appropriate.

However, the C.C.P. rules may govern certain aspects of arbitration proceedings, either by way of suppletive or even mandatory rules. If these rules relate to court's procedural deadlines, they would be suspended. For example, requesting the referral of a litigation to arbitration, appointing arbitrators and/or contesting such appointment, and challenging or homologating arbitral awards - would need a court determination and would therefore be affected by

the ministerial order. The parties may consider suspended the time limits applicable to such applications, except in the case of emergency.

Ontario

Authored by Chloe Snider and Dennis Wong

In Ontario, limitations periods and procedural deadlines have been suspended since March 16, 2020 pursuant to Ontario Regulation 73/20, as amended (the **Suspension Order**) made under the *Emergency Management and Civil Protection Act*, RSO 1990, c E.9 (the **Act**). The Suspension Order will continue in effect until May 12, 2020, subject to further amendments. Further discussion of the scope and duration of the Suspension Order is available on our Dentons Limitations Law Blog.

Companies and others involved in private dispute resolution mechanisms, like arbitration, should carefully consider whether and how the Suspension Order might affect the limitation periods and procedural deadlines in their proceedings. Importantly, while the Suspension Order may affect limitation periods applicable in domestic arbitrations, it is less clear that it would impact arbitral procedural deadlines that have been established either by agreement or by selected arbitration rules.

In order to answer this question, a party must look at the Suspension order, along with the *Arbitration Act, 1991*¹ (the **Domestic Act**), the arbitration agreement and the applicable arbitral rules (if any):

Limitation periods

The Suspension Order suspends statutory limitation periods that are applicable to domestic arbitration claims, e.g., generally, the basic two-year limitation period under the Ontario *Limitations Act, 2002*.² This is because the Domestic Act provides that the law with respect to limitation periods applies to an arbitration as if the arbitration were an action.³ As such, the statutory limitation periods applicable to actions and causes of action, and therefore domestic arbitrations and domestic arbitral claims, would be captured by paragraph 1 of the Suspension Order, which provides that “[a]ny provision of any statute , regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended for the duration of the emergency [...]” [emphasis added].

However, the Suspension Order may not suspend any agreement respecting limitation periods made between litigants or proposed litigants, because such agreement does not constitute a “provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period” as set out in paragraph 1 of the Suspension Order.

Procedural deadlines

Paragraph 2 of the Suspension Order provides that “[a]ny provision of any statute , regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended for the duration of the emergency [...]” [emphasis added]. Accordingly, the Suspension Order suspends any procedural deadlines set out in the Domestic Act.

However, the Suspension Order would not suspend any procedural deadline set by agreement of the parties or pursuant to any arbitration rules selected by the parties, because such agreement is not a “provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario” as set out in paragraph 2 of the Suspension Order. (In any event, the suspension of procedural deadlines is subject to the discretion of a decision-maker responsible for the proceeding.)

Please note that the information provided in this article does not constitute legal or professional advice, or an opinion of any kind. If you require any assistance regarding specific legal issues with respect to limitation periods and statutory timelines, please reach out to any member of Dentons' Litigation and Dispute Resolution group.

1. SO 1991, c 17. The *Domestic Act* applies to an arbitration conducted under an arbitration agreement unless (a) the application of the Domestic Act is excluded by law; or (b) the *International Commercial Arbitration Act* applies to the arbitration.↵
2. SO 2002, c 24, Sched B (the *Limitations Act, 2002*).↵
3. Domestic Act, s. 52(1).↵

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