

Litigation - Canada

Court rules that claim for contribution and indemnity has two-year limitation period

Contributed by **Dentons**

January 25 2011

Facts
Arguments
Decision
Comment

In *Waterloo Region District School Board v Truax Engineering Ltd*(1) the Ontario Court of Appeal addressed the issue of whether, under Section 18 of the Limitations Act 2002, (2) a person that has been sued for damages by a plaintiff and that wishes to bring a cross-claim against a concurrent tortfeasor for contribution and indemnity may bring the claim at a time when the plaintiff's claim against the concurrent tortfeasor is statute barred.

Facts

On July 22 2002 a severe storm blew down the walls of a new school gymnasium that was being constructed by the various defendants for the plaintiff school board. The gym was rebuilt after the storm and the defendant Truax provided ongoing engineering services that were concluded on February 19 2003. At that time Section 46(1) of the Professional Engineering Act(3) provided for a 12-month limitation period in relation to any action for damages arising from the provision of engineering services. The limitation period ran from the date on which the service was provided. Accordingly, the limitation period expired at the latest on February 19 2004.

Before that date, a new Limitations Act came into force on January 1 2004. It repealed Section 46 of the Professional Engineering Act. It also contained transitional provisions that applied to the plaintiff's claim. In particular, Section 24(5) provides that if the claim was discovered before January 1 2004 and the former limitation period did not expire before January 1 2004, the former limitation period (eg, the one under the Professional Engineering Act) still applies. Since the claim was discoverable on or before February 19 2003, the limitation under the Professional Engineering Act applied to the plaintiff's claim against Truax.

The plaintiff's action against Truax was not commenced until June 23 2008, long after the one-year limitation period under the Professional Engineering Act had expired. Accordingly, that action was dismissed. However, the plaintiff also commenced claims against some other defendants, which were brought within the applicable limitation period. Those defendants' subsequently commenced various cross-claims, seeking contribution and indemnity against Truax, which were then brought within the two-year limitation period under Section 18 of the new Limitations Act, which specifically dealt with claims for contribution and indemnity.

Arguments

Truax brought a motion for summary judgment to have the actions for contribution and indemnity dismissed as statute barred. Truax argued that the cross-claims brought by the other defendants seeking contribution and indemnity could not survive, since the plaintiff's claim against it had been dismissed. Thus, it was not subject to "continuing potential liability" to the plaintiff.

The respondents argued that as long as the plaintiff at one time had a potential claim against the proposed defendant to the cross-claim, the fact that the claim had become statute barred had no effect on the ability of a defendant to bring a claim for contribution and indemnity against that person.

Decision

Section 18 provides as follows:

Author

Christina Porretta



"For the purposes of subsection 5(2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place."

Section 5(2) sets the date when a claim is presumed to be discovered and Section 15 provides the ultimate limitation period under the new Limitations Act. Section 4 provides the basic two-year limitation period for all claims unless otherwise provided in the act.

The court of appeal confirmed that under the new Limitations Act, a claim for contribution and indemnity - whether in tort or otherwise - has a two-year limitation period that is presumed to run from the date on which the person that seeks contribution and indemnity is served with the plaintiff's claim that gives rise to its claim over.

The court also held that Section 18 signals that a defendant that wishes to claim contribution and indemnity should bring the claim not after judgment in the main action, but as part of it. Although a defendant could commence a new action for contribution and indemnity within two years of being served with a statement of claim, the more likely procedure to claim contribution and indemnity is to bring either a cross-claim or third-party proceeding in the main action.

Comment

This is the first decision in Ontario that specifically interprets Section 18 of the new Limitations Act. It is clear that this decision applies only to actions commenced in Ontario and does not have general application to actions commenced across Canada. However, while this decision interprets specific provisions in the Ontario Limitations Act 2002, there are other provinces that contain similar provisions in their various limitations acts in which this decision may have persuasive value.⁽⁴⁾

Before the enactment of the new Limitations Act, Section 8 of the Negligence Act⁽⁵⁾ governed the limitation period for contribution claims. That section allowed the contribution claim to be brought notwithstanding the passage of the limitation period that would have applied to a claim by the plaintiff against the other tortfeasor, had one been brought. However, that provision was replaced by Section 18 of the new Limitations Act. Although Section 8 of the Negligence Act has been repealed, the court of appeal found that there was nothing new in the new Limitations Act itself, or in the working papers and recommendations that accompanied the drafting of that act, to suggest that there was any intention to change the effect of Section 8 of the Negligence Act, other than as specifically done with a new limitation period of two years.⁽⁶⁾ Accordingly, it does not matter that a plaintiff's claim against the tortfeasor is statute barred; so long as the other tortfeasor(s) commence their action for contribution and indemnity within the limitation period prescribed under Section 18 of the new Limitations Act, the action will be allowed to proceed. However, it must be remembered that under Section 8, an action for contribution and indemnity was to be commenced within one year of the date of judgment in the action or the settlement. The limitation period contained in Section 18 of the new Limitations Act effectively pushes the limitation period way down to two years from the date on which the defendant is served with the plaintiff's claim. This is another big difference from the limitation period contained in Section 8 of the Negligence Act and should not be understated.

Accordingly, for practical purposes, defendants should always ensure that they receive a copy of the plaintiff's affidavit of service of the original statement of claim. Often, claims handlers/adjusters will attempt to resolve the matter themselves before retaining a lawyer. If the file contains the affidavit of service at the time that the lawyer receives the claim from the client, the lawyer should document the date on which a claim for contribution and indemnity against another tortfeasor will expire. If the file does not contain the affidavit of service, defence counsel should immediately request it from the plaintiff.

For further information on this topic please contact [Christina Porretta](mailto:christina.porretta@fmc-law.com) at Fraser Milner Casgrain LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (christina.porretta@fmc-law.com).

Endnotes

(1) 2010 ONCA 838.

(2) SO 2002, c 24, Sch B.

(3) RSO 1990, c P 28.

(4) See, for example, the Alberta Limitations Act RSA 2000, c L-12, s 3(3)(e).

(5) RSO 1990, c N1.

(6) Under Section 8 of the Negligence Act, a claim for contribution and indemnity was subject to a one-year limitation period.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2013 Globe Business Publishing Ltd