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Real Estate

In Ontario, know which limitation period applies

By **Ray Mikkola**

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(February 21, 2018, 8:38 AM EST) -- About 15 years ago the province of Ontario began the challenging task of amending its limitation regime. The former *Limitations Act* contained a general limitation period of six years to make a claim from the date that the plaintiff knew or ought to have known that a claim had arisen.

The most significant change as set out in the current *Limitations Act, 2002* was a reduction in the standard limitation period for making most claims from six years to two years, together with the introduction of a 15-year ultimate limitation period. The former statute was divided into two Acts, the first being the *Limitations Act, 2002* which set out the general limitation provisions as amended, and the limitation periods relating to real property were continued under the *Real Property Limitations Act* (RLPA).

A 2017 case serves as a reminder of the importance of carefully considering which statute applies to a particular dispute. In *Harvey v. Talon International Inc.* 2017 ONCA 267, a purchaser brought an action for the return of her deposit under a condominium purchase agreement more than two years after delivering what the Court of Appeal found in the circumstances was a proper notice of rescission of the purchase agreement.

Noting that the RPLA stipulates "money to be laid out in the purchase of land" as being included in the definition of "land" set out in s. 1 of the RPLA, the Court of Appeal determined that the 10-year limitation in the RPLA applied to the claim. However, Justice Gloria Epstein noted that any other claim, such as a claim for damages for failure to deliver the property as promised, would have needed to have been made within the two-year period provided for in the *Limitations Act, 2002*.

The question of which Act applies was the subject of earlier cases regarding limitation periods also decided by the Court of Appeal. The Court of Appeal in *Equitable Trust Co. v. Marsig* 2012 ONCA 235 held that the 10-year limitation period applied to an action regarding a claim against the guarantor of a mortgage. The court clarified that an earlier case (*Bank of Nova Scotia v. Williamson* 97 O.R. (3d) 561) did not stand for the proposition that all demand obligations were governed by the *Limitations Act, 2002*. The court in *Marsig* held that the legislature "… intended that all limitation periods affecting land be governed by" the RPLA. However, the scope of this statement was narrowed by a subsequent case (*Zabanah v. Capital Direct Lending Corp*. 2014 ONCA 872) so as not to apply where the subject of the claim by the assignee of a mortgage was merely the interpretation of the assignment contract and the allegation of negligence on the part of the assignor.

As an interesting aside for real estate lawyers, a professionalism issue arises where a limitation period intervenes in a dispute regarding a matter which is the subject of a lawyer's undertaking given on closing. For example, if an undertaking to obtain and register a discharge of a mortgage is given but not satisfied for more than 15 years (leaving aside the very real issue of the failure of the opposing lawyer to follow up on the undertaking throughout the period), is the claim against the lawyer statute barred because of the expiry of the 15-year ultimate limitation period?

It would seem that the ultimate limitation defence is readily available: Section 15 of the *Limitation Act, 2002* provides that no proceeding shall be commenced in respect of any claim after the 15th anniversary of the occurrence of the act or the omission forming the substance of the claim. Of course, in a residential real estate practice, the failure of the other lawyer to comply with a discharge

undertaking may not come to light until the property is resold, which may well be more than 15 years after its purchase. However, *Rule 7.2 – 11* of the *Rules of Professional Conduct* requires a lawyer to "fulfil every undertaking given." So while the civil remedy may no longer be available in the courts there would seem to be no reason why the matter could not nevertheless be the subject of a law society disciplinary proceeding.

So lawyers must be very careful, when advising clients as to whether a claim is statute barred by a limitation period. In a busy real estate practice a two-year period seems to collapse very quickly when dealing with real estate closings particularly in the case of undertakings, representations and warranties which apply after closing.

As demonstrated above, the question as to which statute applies is sometimes not clear. A claim on a guarantee contained within a mortgage document is squarely within the RPLA (per *Marsig*) and presumably even if contained in some ancillary document in a mortgage transaction (given the wording of s. 43 of the RPLA: "No action upon a covenant contained in an indenture of mortgage *or any other instrument* …") since there is no electronic way to execute a guarantee within an electronic mortgage document.

A claim for a sum of money transforms into "land" claim under the RPLA if the money was a deposit (per *Harvey*). But a claim founded in contract or negligence is governed by the *Limitations Act, 2002* even if it deals with a mortgage (per *Zabanah*). Incorrectly advising a client that a claim will be met with a good limitation defence can be as serious as missing a limitation period when advising a claimant.

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