

Blakes Bulletin

Litigation

Court of Appeal Clarifies Alberta Limitations Law

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In its recent and important decision in *Bowes v. Edmonton*, the Alberta Court of Appeal considered the ultimate 10-year limitation period set out in subsection 3(1)(b) of the Alberta *Limitations Act* R.S.A. 2000 c. L-12 (the Act). Subsection 3(1)(b) of the Act provides:

3(1) (b) Subject to section 11, if a claimant does not seek a remedial order within 10 years after the claim arose...the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim."

Section 3(3) explains when a claim arises for the purpose of subsection 3(1)(b). It states:

3(3) For the purposes of subsection (1)(b),

(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;

(c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;

(d) a claim in respect of a proceeding under the *Fatal Accidents Act* arises when the conduct that causes the death, on which the claim is based, occurs;

(e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever first occurs;

(f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.

The "new" Alberta *Limitations Act* was brought into force in Alberta in 1999. The Act sought to remedy the problems associated with "discoverability" and "pigeon-holing" that had existed under historical limitations acts and under the common law, and prescribe a new approach that attempts to balance the interests of fairness as between plaintiffs and defendants. To this end, the Act prescribes two different limitation periods.

The first limitation period codifies the approach taken in modern case law and allows the plaintiff two years to sue from the time that they discover, or should have discovered, the elements allowing him or her to sue. The second limitation period, which period is discussed herein, is longer than the first and provides for a "drop dead" date, after which the plaintiff cannot sue. In the Act, this period is 10 years from the date the claim arose. Thus, the Act attempts to balance the interests of both plaintiffs and defendants. The first limitation period provides that plaintiffs should have an opportunity to "discover" the wrong before being denied the opportunity to sue. The second limitation period, on the other hand, protects defendants from undiscovered causes of action which are discovered far into the future. The two provisions together form a compromise that has been enacted by the legislature in an attempt to further the interests of justice and of society more broadly.

Bowes v. Edmonton considered a negligence claim that had been brought by the plaintiffs, who owned and lived in three adjoining homes in an expensive Edmonton neighbourhood. About 12 years after the homes were built, a section of the riverbank next to the homes quickly collapsed and slid into the deep valley adjoining the homes. The collapse ruined one of the homes, and rendered the other two very dangerous and unsalvageable. The trial Reasons for Judgment found liability, but dismissed the suit as brought after the limitation period expired. On appeal, the finding of liability was overturned, but the conclusion of the trial judge regarding the application of subsection 3(1)(b) of the Act, the section creating the ultimate 10-year limitation period, was upheld and the case was dismissed.

CONT'D ON PAGE 2

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CONT'D FROM PAGE 1

The Court of Appeal's discussion regarding the strict application of this provision is of significant import, as there had previously been some view that the seeming harshness of the result would be ameliorated by judicial activism. This decision establishes that such activism is not to occur.

In his Reasons for Judgment, Mr. Justice Côté acknowledged the policy dilemma which is created by the ultimate 10-year limitation period. In the instant case, the plaintiffs' time to sue expired before they knew that they had a claim, and indeed perhaps even before they had a claim which the law would act upon. From the plaintiff's perspective, Justice Côté acknowledged, the rule is unjust. He stated, the legislation "is enacted to prevent certain plaintiffs from suing on good causes of action". However, he went on to enumerate and discuss a number of policy considerations behind the imposition of the ultimate 10-year limitation period which ameliorate the apparent unjust application of the rule.

First, there is the fact that in order for commerce to function as it does, people and businesses need to be able to move forward. They must be able to plan their affairs without keeping huge reserves against the possibility of old claims arising. The social cost of any other proposition would be too high.

Second, the interests of justice are not served by allowing actions to be brought decades after the wrong has been done. To try and find and test evidence about events decades old is, in the words of the court, "usually roulette, not a serious exploration of the truth."

Third, in liability claims, the defendant is to be held to the standards and methods followed in their respective profession or industry at the time the alleged wrong took place. Both sides will have to call evidence on that topic, and such evidence is difficult to come by years after the fact as those with expertise at the time of the alleged wrong may no longer be practising in that profession.

Finally, the court noted that the ultimate 10-year limitation period was included in the *Limitations Act* to alleviate the problems associated with legal issues surrounding "discoverability" which existed under the previous law. The application of the rule of discoverability created problems for both defendants and plaintiffs. Plaintiffs did not know when they had to sue or had lost their right to do so, while potential defendants were never safe from the potential of an "undiscoverable" claim arising.

The court noted that all of the above stated policy considerations form the background for the Act, which was put into place to reform the previous state of the law after much research and consideration, including several reports issued by the Institute of Law Research and Reform. These policy considerations are key to the interpretation of the Act which is to be interpreted in its entire context and harmoniously with the scheme and object of the Act. The object of the Act is informed by the application of the *Heydon* method, which requires the court to consider the mischief in the old law which the new legislation was aimed at. This mischief is reflected in the policy considerations noted above and was also discussed in the Alberta Law Reform Institute report, *Limitations*, Report No. 55 (Edmonton: December 1989).

Justice Côté noted that, rather than rely upon the common law position regarding a "cause of action", subsection 3(1)(b) has its own express interpretation section at subsection 3(3)(b) which provides that for the purposes of the ultimate 10-year limitation period, the time under the absolute period starts to run from the negligent or wrongful act or omission itself. There is no need to wait for the harm itself to occur. Thus, in the instant case while the slide did not take place until 1999, the allegedly negligent act occurred when the development permit was issued to the homeowners in the 1980s.

Finally, the Alberta Court of appeal noted that "The Legislature is sovereign on this topic, and in my view, it has spoken deliberately and clearly in this area. We cannot amend the Act, nor can we ignore its history or its scheme." This decision seems to support the position that judicial activism is not likely to displace the ultimate 10-year limitation period established by the Act.

CONT'D ON PAGE 3

CONT'D FROM PAGE 2

In summary, this decision means that Alberta courts will strictly apply the ultimate 10-year limitation period established by the Act as the doctrine of *res judicata* will make this clear pronouncement of the law difficult to distinguish. While such an application may seem to create an unfair result for plaintiffs such as those in *Bowes* – since the Act does “prevent certain plaintiffs from suing on good causes of action” – the policy considerations behind the Act reveal that such a strict application of the provision serves justice more broadly. This decision is important for all facets of society, because it creates certainty for both plaintiffs and defendants and eliminates the spectre of costly claims arising far into the future.

The decision, practically, is likely to have the most significant effect on businesses or individuals involved in work with potential “long-tail” consequence, such as those involved in construction or manufacturing. Regardless of when the wrong was discovered, the plaintiff has only 10 years to bring action.

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