

The Saskatchewan Limitations Manual

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LIMITATION QUIZ

- 1(a) How much time does a claimant have to commence an action after a Builders' Lien is registered?
- (b) How much time to serve a statement of claim pursuant to the *Builders' Lien Act*?
- (c) After an action is commenced on a builders' lien, how much time does the Plaintiff have to proceed to trial?
- 2(a) Your client slips and falls in the parking lot of a nursing home. When does the limitation period for an action against the nursing home expire?
- (b) Your client slips and falls on a City sidewalk.
1. are there any notices and how much time?
 - ii. when does the limitation period against the City expire?
 - iii. when must the statement of claim be served?
- (c) Your client slips and falls in a private residence. When does the limitation period against the occupier expire?
- (d) Your client's husband is killed when he slips and falls in a private residence. When does the limitation period against the occupier expire?
- (e) Your client slips and falls in a school. When does the limitation period against the board of education expire?
- (f) Your client slips and falls in a public library. When does the limitation period expire?
3. A radiologist employed by a hospital is alleged to have committed an assault by using excessive force in conducting a mammogram. When does the limitation period expire?
4. A motor vehicle collides with a bridge owned by the Crown. When does the limitation period expire for an action by the Crown?
5. A nurse employed by a hospital is fired. When does the limitation period for an action for wrongful dismissal expire?

6. An infant suffers injury during childbirth, allegedly due to the negligence of the hospital. When does the limitation period expire?
7. Your client enters judgment. When is enforcement of the judgment statute barred? Are there other measures to extend the time?
8. Your client wishes to make a claim against his former lawyer. When does the limitation period expire?
9. Your client presents a claim for insurance following a break and enter of his home. His claim is denied. How long to commence an action against the insurer?
10. Your client had surgery three years ago. The client has continued to receive treatment from the surgeon for complications and now wishes to commence an action. Has the limitation period expired?
- 11(a) Your client advises that he lent money to a friend 7 years ago and wishes to commence an action to enforce the debt. Has the limitation period expired?
 - (b) Your client remembers that he received \$100.00 last year on payment of the debt. Does this affect the limitation period and why?
12. A police officer assaults your client. When does the limitation period for an action against the police officer expire.
13. Your client was not named as a beneficiary under her husband's will. How long does she have to commence an action?
14. Your client is obligated to arbitrate a contractual dispute. Are there any limitation periods?
15. How long does your client have to commence an action against an accountant for negligent advice?

ANSWERS

- 1(a) 10 years pursuant to s.12 of *The Limitation of Actions Act*. (see: *Penner v. Hupka* (1995) 133 Sask. R. 140)
- (b) Section 87 requires service within 30 days
- (c) 2 years pursuant to s.55 of *The Builders' Lien Act*
- 2(a) 3 months and with leave of the Court up to one year, pursuant to s.15 of *The Hospital Standards Act* (see *Young v. Palliser Regional Care Centre* (1995) 5 W.W.R. 14, 129 Sask. R. 129).
- (b)
- i. if you are alleging non-repair, notice must be served within 14 days
 - ii. the action must be started within one year
 - iii. the statement of claim must be served within one year
- All pursuant to s.314 of *the Urban Municipality Act*
- (c) 2 years pursuant to s.3(1)(d)(i) of the *Limitation of Actions Act*.
- (d) 2 years pursuant to *The Fatal Accidents Act*.
- (e) 1 year and with leave of the court within two years pursuant to s.91 of *the Education Act*
- (f) 12 months pursuant to the *Public Libraries Act*.
3. 3 months or with leave up to one year pursuant to s.15 of *The Hospital Standards Act*. There are three possible limitation periods that could apply as follows:
- i. Section 15 of *The Hospital Standards Act*.
 - ii. Section 25 of *The Medical Radiation Technologist's Act*.
 - iii. Section 3 (1) (d) of *The Limitation of Actions Act*.
- (*Odeshaw v. Stener* (1998) 10 W.W.R. 99, 170 Sask. R. 48)

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4. Section 88 of *The Highway Traffic Act* does not apply to the Crown because of s. 15 of *The Interpretation Act*. Statutes do not apply to the Crown unless the Act specifically states. (*Saskatchewan v. Nowoko Well Service Ltd.* (1989) 14 M.V.R. (2nd), 75 Sask. R. 285.)
5. 3 months with leave up to one year pursuant to s.15 of *The Hospital Standards Act*.
6. Section 6 of *The Limitation of Actions Act* extends the time to three months after the child reaches the age of majority.
7. 10 years pursuant to s.3(1) (i) of *the Limitations of Actions Act*. Rule 347 allows an application to renew the judgment.
8. 6 years pursuant to s.3(1)(j) of *The Limitation of Actions Act*.
9. An all-risk policy of insurance is regarded as fire insurance. Pursuant to s.128, Condition 14 of *The Saskatchewan Insurance Act* there is one year to commence an action. (*Schopp v. S.G.I.* [1981] 4 W.W.R. 700)
10. Section 72 of *The Medical Profession Act* allows 2 years from the last treatment.
- 11(a) Section 3(1)(f) of *The Limitation of Actions Act* requires that an action for recovery of a debt be commenced within 6 years of the date of the cause of action.
 - (b) Section 7 of *The Limitation of Actions Act* allows that a claim may be brought within 6 years from the date that the debtor last acknowledged the debt.
12. One year pursuant to the *Public Officers Protection Act*.
13. Six months from the grant of probate or administration, pursuant to both the *Dependants Relief Act* and the *Matrimonial Property Act*.
14. Section 52 of *the Arbitration Act* states that limitation periods apply to arbitration.
15. You must first determine the type of accountant as follows:
 1. 2 years under the *Certified General Accountants Act*.
 11. Chartered Accountants and Management Accountants do not have specific time periods under their acts and therefore the 6-year limitation period pursuant to Section 3(1)(j) of *The Limitation of Actions Act* applies.

OPERATOR'S MANUAL

1. INTRODUCTION

In order to effectively use this manual you should remember the following points.

1. We have included limitation periods from the Revised Statutes of Saskatchewan, 1978, as amended and consolidated to January 1, 2000. Limitation periods have been reproduced verbatim, except where portions of sections have been omitted for brevity.

Acts which have been passed but not yet proclaimed are also included but italicized for better identification.

Historical notes pertain to the last amendment of the section. Not every subsection will be affected by the amendment.

2. The organization of the statutes follows the familiar alphabetical listing of The Statutes of Saskatchewan. A table of statutes in the front of the Manual and an index at the end of this Manual will help to identify the relevant statutes.

3. The Manual does not consider federal limitation periods.

4. The annotations generally only consider Saskatchewan cases since 1978. There may be cases from other Canadian jurisdictions or before 1978 that might be helpful.

5. Not all time-sensitive issues are identified in this manual. We included the following:

- 1) Time periods extinguishing a substantive right;
- 2) Time periods extinguishing an appeal;
- 3) Important notice periods which substantially affect a client's rights;
- 4) Time periods extinguishing prosecutions.

There is undeniably a large degree of editorial discretion in deciding which sections to include. Statutory provisions that are purely procedural or administrative were not routinely included.

2. BASIC PRINCIPLES

There are three reasons for limitation periods as described in *M (H.) v. M (K.)* (1992), 96 D.L.R. (4th) 289, [1992] 3 S.C.R. 6 (S.C.C.) as follows:

1. Certainty - A potential Defendant should be secure in the reasonable expectation that he will not be held to account for ancient obligations.

2. Evidentiary - A potential Defendant should not have to preserve evidence relating to a claim. There is also a concern that evidence deteriorates over time.
3. Diligence - A Plaintiff is expected to act diligently in bringing an action in a timely fashion.

3. IDENTIFYING LIMITATION PERIODS

Many limitation periods are obvious or intuitive. Other limitations require more work to identify. You should begin as follows:

1. Carefully consider your pleadings and identify all of the potential causes of action parties and regulatory schemes.
2. Identify the limitation periods relevant to these causes of action parties and regulatory schemes.

Each of the subheadings in part 2 should be used as a checklist in going through this process.

A) THE LIMITATION OF ACTIONS ACT

The Limitation of Actions Act is the place to start a search. There is no substitute for having a good working knowledge of this *Act* because it applies to numerous causes of action. There are two general principles to remember about the *Act*.

First, it is a general statute and pursuant to section 3(2) does not apply, "... to an action where the time for bringing the action is by statute specifically limited." In other words, any statute with a specific limitation period over-rides *The Limitation of Actions Act*.

Second, the *Act* also provides a residual limitation in section 3(1)(j) that reads:

3(1)(j) any other action not in this *Act* or any other *Act* specifically provided for, within six years after the cause of action arose.

The limitation period for a claim against a lawyer is a good example. As there is no specific limitation period in *The Legal Profession Act, 1990*, section 3(1)(j) applies.

B) CAUSE OF ACTION

Before determining the limitation period it is important to consider the causes of action that you wish to plead. The causes of action in any claim may be very diverse and include tort, contract, breach of fiduciary duty, breach of trust etc. Each of these causes of action may be governed by its own section in *The Limitation of Actions Act*.

These main causes of action can also be broken down into sub-categories which may have further limitation implications. For example pursuant to *The Limitation of Actions Act* the following torts have different limitation periods.

- 1) The tort of defamation 3(1)(c);
- 2) The tort of negligence causing injury to a person 3(1)(d);
- 3) The tort of trespass to chattels 3(1)(e).

Similarly different action based in contract might have different limitation periods. As mentioned, there is no substitute for a working knowledge of *The Limitation of Actions Act*.

C) STATUS OF PARTIES

The next step is to identify all the proposed defendants and to determine whether they have any special legislative protection that affects the limitation period. Limitation issues sometimes arise when a defendant is not identified in sufficient time.

The examples I have provided are only the most common, there are numerous other special cases. In preparing the manual I had the opportunity to review all of the Statutes of Saskatchewan. I was frankly surprised each day at the number of Statutes that I did not know. I came to the conclusion that in order to consider all the special legislative statutes it may be necessary to review the entire table of statutes each time. Consider the following examples:

1) Infants / disability

The most obvious example of special status is for infants or persons lacking capacity. Section 6 of *The Limitation of Actions Act* reads as follows:

6 The running of time with respect to a limitation period to bring an action fixed by this or any other *Act* is postponed for a person who is entitled to bring such an action for so long as he is an infant or: -

(a) he is by reason of mental disorder not competent to manage his affairs or estate; and

(b) he is not represented by a personal guardian or property guardian appointed pursuant to *The Public Trustee Act* or *The Dependent Adults Act* who:

(i) is aware of the cause of action; and

(ii) has the legal capacity to commence the cause of action on behalf of that person or his estate.

Section 6 for example postpones the limitation period in s. 72 of *The Medical Profession Act*, 1981 in *Elliot v. Saskatoon (City)*, [1985] 5 W.W.R. 22, 19 D.L.R. (4th) 285, 48 Sask. R. 142 (Q.B.), affirmed [1986] 3 W.W.R. 575, 25 D.L.R. (4th) 319, 48 Sask. R. 140 (C.A.).

2) Crown

The Limitation of Actions Act applies to the crown because the definition of action in s. 2 includes, "civil proceedings by or against the Crown". Other limitation periods do not apply to the Crown unless specifically stated in the act by reason of s. 14 of *The Interpretation Act*, 1995 that states:

14 No enactment binds the Crown or affects the Crown and any of the Crown's rights or prerogatives, except as mentioned in the enactment.

For example s.88 of *The Highway Traffic Act* does not apply to an action by the Crown for damage caused by a motor vehicle.

Saskatchewan v. Welsh (1998), 173 Sask. R. 74, 37 M.V.R. (3rd) 196 (Q.B.);

Saskatchewan v. Nowasco Well Service Ltd. (1989), 14 M.V.R. (2nd) 45, 34 C.P.C (2nd) 159, 75 Sask. R. 285 (Q.B.);

Prince Albert (City) v. Goleski, [1995] 9 W.W.R. 534, 135 Sask. R. 220 (Q.B.).

Section 2 of *The Public Officers' Protection Act* merits special consideration. It reads as follows:

2(1) No action, prosecution or other proceedings shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of a statute, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of a statute, public duty or authority, unless it is commenced:

- (a) within twelve months next after the act, neglect or default complained of or, in the case of continuance of injury or damage, within twelve months after it ceases; or
- (b) within such further time as the court or a judge may allow.

The application of this *Act* is uncertain, as it has been considered on very few occasions. We know that it has been applied to the following:

1. Elected officials in *Pask v. McDonald, Bubnick, Caswell, Sapara, Kubik and Esterhazy* (1983), 35 Sask. R. 109, [1983] 6 W.W.R. 287 (C.A.).
2. The Superintendent of Insurance in *Lapointe v. Saskatchewan* (1988), 67 Sask. R. 233 (Q.B.).
3. A police officer in *Empringham v. Regina (City)* (1984), 34 Sask. R. 141 (Q.B.).
4. A prosecutor in *Martyn v. Connelly* (1998), 171 Sask. R. 79 (Q.B.).

Clearly, there is potential for a very wide application of this *Act*.

The protection of *The Public Officers' Protection Act* was also extended to the Crown in *Lapointe v. Saskatchewan* (1988), 67 Sask. R. 233 because of s. 5(4) of *The Proceedings Against the Crown Act*, which reads as follows:

5(4) An enactment that negatives or limits the amount of liability of an officer of the Crown in respect of a tort committed by that officer, in the case of proceedings against the Crown under this section in respect of a tort committed by that officer, applies in relation to the Crown as it would have applied in relation to that officer if the proceedings against the Crown had been proceedings against that officer.

As the allegations of wrongdoing were against the Superintendent of Insurance, the Crown benefits from the one-year limitation period.

3) Professions

There are numerous statutes governing the professions. Examples of these acts are *The Legal Profession Act, 1990*, *The Registered Nurses Act, 1988*, *The Mortgage Brokers Act*, etc.

Caution is required because the number of regulated professions is so surprisingly large that no lawyer could be expected to know them all. For example I did not know that there was *The Osteopathic Practice Act* with a six-month limitation period from the date of the last professional service. Nor did I know there are three acts regulating different types of accountants. A list of regulated professions is included as Schedule 1 for your assistance.

4) Organizations/ Institutions

There are also many entities receiving the protection of special statutes. Examples of these are hospitals, schools and municipalities. It is important to identify these organizations. For example, there is a separate limitation period for a common claim of occupier's liability depending on where it occurs. How long does your client have to commence an action for a common slip and fall at the following:

1. A nursing home: Three months and with leave of the Court up to one year pursuant to s. 15 of *The Hospital Standards Act*. (*Young v. Palliser Regional Care Centre*, [1995] 5 W.W.R. 14, 129 Sask. R. 129 (Q.B.))
2. A city sidewalk: If you are alleging non-repair, notice must be served within 14 days. The action must be started within one year and the Statement of Claim must be served within one year pursuant to s. 314 of *The Urban Municipality Act, 1984*.
3. A private residence: Two years pursuant to s.3(I)(d)(i) of *The Limitation of Actions Act*.

4. A school: One year and with leave of the court two years, pursuant to s. 91 of *The Education Act, 1995*.
5. A public library: Twelve months or such further time as the court may allow pursuant to section 79 of *The Public Libraries Act, 1996*.

D) REGULATED ACTIVITIES

There are many statutes regulating an activity rather than an individual or an organization. Common examples are:

- 1) Statutes regulating roads and motor vehicles;
- 2) Resource statutes;
- 3) Environmental statutes;
- 4) Consumer protection statutes;
- 5) Creditor-debtor statutes.

Once again, it may be necessary to review the entire table of statutes to determine if a regulatory statute applies to proposed parties to the action.

E) SITUS

The Supreme Court of Canada in *Tolofton v. Jensen*, [1994] 3 S.C.R. 1022, ruled that the limitation period of the place of the tort is applicable and statutes of limitation are considered to be substantive law.

See also:

Hrynenko v. Hrynenko (1997), 37 B.C.L.R. (3rd) 35, 40 C.C.L.T. (2nd) 84, 11 C.P.C. (4th) 358, 30 M.V.R. (3rd) 231, [1998] 2 W.W.R. 412 (B.C.S.C.);

Stewart v. Stewart (1997), 145 D.L.R. (4th) 228, [1997] 5 W.W.R. 353, 90 B.C.A.C. 119, 30 B.C.L.R. (3rd) 233, 7 C.P.C. (4th) 221, 24 M.V.R. (3rd) 207 (B.C.C.A.);

Hendsbee v. Khuber (1995), 148 N.S.R. (2d) 270, 47 C.P.C. (3rd) 258, 19 M.V.R. (3rd) 306 (N.S.S.C.);

Michalski v. Olson (1997), 123 Man. R. (2d) 101, [1998] 3 W.W.R. 672, 15 C.P.C. (4th) 106, 32 M.V.R. (3rd) 9 (Man. C.A.).

4. MULTIPLE LIMITATION PERIODS

Once you have identified the applicable parties, institutions, activities and causes of action you may find more than one possible limitation period. As a general rule the most specific statute will apply. However, there are cases when more than one limitation period applies.

A) CONFLICTING STATUTES

There are instances where more than one statute appears to apply to the facts. For example, in *Odishaw v. Stener*, [1998] 10 W.W.R. 99, 170 Sask. R. 48 (Q.B.), it was alleged that a radiologist, employed by a hospital, used excessive force during a mammogram. Two limitation periods may apply as follows:

- 1) Section 15 of *The Hospital Standards Act*; (3 months)
- 2) Section 25 of *The Medical Radiation Technologists Act*; (12 months)

The Court held the provisions of the general statute must yield to the provisions of a specific statute. Because the radiation technologist was employed by a hospital, *The Hospital Standards Act* was the most specific and therefore the most applicable.

B) CAUSE OF ACTION AND STATUTE CONFLICTING

There are also instances where a statute governing a cause of action conflicts with a regulatory statute.

For example In *Herbert v. Misuga*, [1994] 3 W.W.R. 457, 116 Sask. R. 292 (C.A.), the defendant used his motor vehicle to deliberately injure the Plaintiff. The claim was issued more than one year after the incident and the defendant pleaded that it was "damage occasioned by a motor vehicle" pursuant to s. 88 of *The Highway Traffic Act* and statute barred. The Plaintiff argued that it was a claim for assault and could be commenced within the 2-year period governed by 3(1)(d) of *The Limitation of Actions Act*. The Saskatchewan Court of Appeal held that *The Highway Traffic Act* applied to all causes of action (with two exceptions) involving damages occasioned by motor vehicles regardless of the cause of action or intent of the driver.

A second example is s.15 of *The Hospital Standards Act* that states:

- 15 No action shall be brought against any person, partnership or corporation owning or operating a hospital ... after the expiration of three months.

The wording of this section has been held to apply to any cause of action against a hospital including:

- 1) A breach of contract of employment in *Boros v. Bodnar Wanhella and Courtney*, [1988] 6 W.W.R. 645, 23 C.c.E.L. 161, 70 Sask. R. 36 (Q.B.); *Swan v. Wynyard Union Hospital Board* [1986] 2 W.W.R. 593, 44 Sask. R. 236 (C.A.) reversing [1984] 5 W.W.R. 382, 34 Sask. R. 143 (Q.B.); *Smart v. South Saskatchewan Hospital Centre* (1989), 75 Sask. R. 34 (C.A.); *University Hospital v. Boros* (1985) 24 D.L.R. (4th) 628, 44 Sask. R. 231 (C.A.).

2) Occupiers liability in *Dyck v. Regina District Health Board* [1995] S.J. No. 354 and *Young v. Palliser Regional Care Centre*, [1995] 5 W.W.R. 14, 129 Sask. R. 14 (Q.B.).

3) An assault in *Capobianco v. Regina District Health Board* (1997), 160 Sask. R. 157 (Q.B.) and *Odishaw v. Stener*, [1998] 10 W.W.R. 99, 170 Sask. R. 48 (Q.B.).

A third example is *Sobon v. Kosloski* (1986), 46 Sask. R. 172 (Q.B.). In that case a claim was made against a dentist. The Court held that s.57 *The Dental Profession Act* was intended to protect dentists from all claims whether in contract or in tort.

An exception is *Melfort School Division No. 100 v. Tiger Lily School Division No. 54* (1992), 102 Sask. R. 38 (Q.B.). In that case the Plaintiff had a claim in debt against a school division. The Defendant pleaded s. 91 of *The Education Act*, 1995 that states:

91(1) No action for the recovery of damages shall be commenced against a school division or the conseil scolaire after the expiration of one year from the day on which the damages were sustained unless the action is commenced pursuant to an order mentioned in subsection 2. . . .

The Court held that a claim in debt may be distinguished from a claim for damages if the amount is certain or capable of being ascertained by contract or operation of law. The action was therefore not extinguished by s. 91.

It is extremely difficult to draw any definite conclusions from these cases as the decision may turn on the precise wording of each limitation period. However it is arguable that the limitation period in each statute is confined to causes of action within the contemplated purpose of the statute. See for example *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275, (1978), 90 D.L.R. (3d) 481, 23 N.R. 298, 8 c.P.c. 100.

C) CONFLICTING CAUSES OF ACTION

A claim may have more than one cause of action which sometimes leads to the application of two separate and distinct limitation periods. For example in *Pound v. Nakonechny, Busch and Heinrich*, [1984] 1 W.W.R. 289, 28 Sask. R. 222 (C.A.), the Plaintiff was injured by a defective pressure hose. He commenced an action against the retailer and manufacturer more than 2 years after the cause of action. Although the action in tort was statute barred pursuant to s. 3(1)(e) of *The Limitation of Actions Act*, the Plaintiff continued to have an action for breach of contract pursuant to s. 3(1)(f)(i) of *The Limitation of Actions Act*. In this case more than one limitation period applied to the claim.

5. **REMEDIES** (helpful hints if you think you missed a limitation period)

A) **IS IT REALLY A LIMITATION PERIOD?**

Estey J., in *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275; (1978), 90 D.L.R. (3d) 481, 23 N.R. 298, 8 C.P.C. 100 wrote that limitation periods:

...being restrictive provisions wherein the rights of action of the citizen are necessarily circumscribed by its terms, attracts a strict interpretation and any ambiguity found upon the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated.

It is arguable that not all time periods are strictly enforceable.

For example, *Royal Bank v. Bernauer* (1993), 117 Sask. R. 181, [1994] 3 W.W.R. 438 (Q.B.) is a very interesting discussion about the difference between imperative and directory enactments. If an enactment is imperative, it must be met exactly. If the enactment is directory, there must be substantial compliance. In determining whether the statute is directory or imperative, the court looks at the scope and object of the statute. In this particular case the notice requirements in s. 27.2(10) of *The Saskatchewan Farm Security Act* respecting an appeal of a lender's decision not to lease was directory and strict compliance was not required.

In *Regina (City) v. Newell Smelski Ltd.* (1996), 152 Sask. R. 44, 140 W.A.C. 44 (C.A.) late service of an assessment appeal was deemed sufficient compliance pursuant to s. 261 of *The Urban Municipality Act*, 1984. The Court states:

But not every failure to observe statutory requirements of a procedural nature carries with it such affects. If the legislature does not expressly provide for the effect of imperfect compliance or non compliance with the requirement of this nature, the matter becomes one of implication, having regard for the subject matter of the enactment; the purposes of the requirement; the prejudice caused by the failure; the potential consequence of a finding of nullity and so on.

In *Wascana Energy Inc. v. Gull Lake No. 139 (Rural Municipality)* (1998), 168 Sask. R. 58, 173 W.A.C. 58, [1999] 1 W.W.R. 280 (C.A.). There was sufficient compliance with s. 303 of *The Rural Municipality Act*, 1989 when an appeal from an assessment was mailed within 20 days even though it is not received within 20 days.

Finally in *John Deere Credit Inc. v. Fazakas* 182 Sask. R. 145, following seizure of equipment, a fanner filed his s. 50 application for a hearing four days late. The court held that considering the nature and purpose of *The Saskatchewan Farm Security Act*, the section was directory and the fanner had substantially complied with the Act.

B) WHEN **DID** THE LIMITATION PERIOD COMMENCE?

There are numerous issues which must be considered as follows:

1) Definitions

Check sections 24 and 27 of *The Interpretation Act*, 1995 for definitions such as day, month, year, clear days, etc.

2) Discoverability

The discoverability principle applies to most actions. In other words the limitation period only starts to run when a reasonable person would be aware of the facts which sustain a cause of action. There are numerous cases with one common reference back to *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1. The discoverability principle may not apply to specific limitation periods such as s. 72 of *The Medical Profession Act*, 1981 which starts time running after the termination of professional services.

3) Interruption/ Acknowledgment

Sections 7, 13, 14, 32, 35, 38 and 41 of *The Limitation of Actions Act* all stop time when partial payment has been made or the cause of action has been acknowledged.

4) Continuing Cause of Action or Damages

Generally time commences when the Plaintiff has a cause of action. The fact that damages are continuing in the future does not extend the commencement of the limitation period. However there are cases which find a continuing cause of action. These cases are usually restricted to situations where the legal injury is repeated causing new damages each time.

For example, in *Lake v. Moose Jaw (City)* (1981), 13 Sask. R. 130 (Q.B.) the plaintiff claimed against the municipality for flood damage. Halvorson J. held that:

"The Plaintiffs damages are continuing even to this day, and an original cause of action arose each day the nuisance remains unabated."

In *Smart v. South Saskatchewan Hospital Centre*, [1989] 5 W.W.R. 289, 75 Sask. R. 34 (C.A.), Bayda C.J. writes an interesting dissent. In that case the plaintiff was dismissed from his employment with a hospital and failed to commence an action within three months from the date "that damages arose". Bayda C.J. reasons that at the breach of contract the innocent party has a right to either accept the repudiation and sue for damages or the right to affirm the contract and insist on performance. In this case, the plaintiff did not accept the repudiation and Bayda C.J. reasons that:

Insofar as the damages under the first head are concerned, that is damages resulting from the day to day breach, it logically follows that on day one, when the breach of contract commenced, the damages which resulted from the breach (i.e. the refusal "to offer the servant employment" on day one) were sustained on the same day. The damages resulting from the breach on day two (i.e. refusal "to offer the servant employment" on day two) must necessarily have been sustained on day two.

In *Tree/and Motor Inn Ltd. v. Western Assurance Co.* (1985), 37 Sask. R. 289, 10 C.C.L.I. 317 (C.A.), the business interruption loss commenced with the fire and continued to accrue from day to day thereafter.

5) **Capacity**

Section 6 of *The Limitation of Actions Act* overrides all other legislation to postpone the running of time for disabled persons and infants.

6) **Fraudulent Concealment**

Section 4 of *The Limitation of Action Act* states as follows:

4 When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part II as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.

7) **Statutory Language**

The commencement of time is of course governed by the specific wording of the statute. Consider, for example, the implication of the following phrases:

1. The date that damages are sustained;
2. The date the cause of action arose;
3. The date of the last professional service.

Cause of Action was defined by Lamont J. A. in *Shtitz v C.NR.* [1927] 1 D.L.R. 951 (Sask. C.A.) as follows:

A cause of action, in the popular sense, is understood to be that particular act of the defendant's which gives the plaintiff his cause of complaint. In *Cooke v. Gill* (1873), L.R. 8 C.P. 107, at p. 116, "cause of action" is defined by Brett J. to mean: "Every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse."

The cause of action may affect the commencement of the limitation period. For example, generally a breach of contract is actionable on the date of the breach even though the

plaintiff has not suffered damages. For an action in tort, the plaintiff does not have a cause of action until there are damages.

8) Appeals

With respect to appeal periods, Sherstobitoff J. considered the phrase "within thirty days after the date on which the order, decision determination or award is made" in *Shell Canada Resources v. Turner* (1989), 75 Sask. R. 150 (C.A.). He held;

...a judgment or order not pronounced at a hearing of the tribunal in the presence of the parties (or of which the parties have notice) is not made, pronounced or delivered until the parties are notified of it is apparent. Otherwise, the right to appeal would be illusory since it might be lost without the party ever becoming aware of the opportunity to exercise it through matters entirely beyond his control.

C) STATUTORY REMEDIES

1. Section 30 of *The Queen's Bench Act, 1998* (formerly s. 44(11)»

Section 30 reads as follows:

30 Notwithstanding the expiry of a limitation period after the commencement of an action, a judge may allow an amendment to the pleadings that asserts a new claim or adds or substitutes parties, if;

- (a) the claim asserted by the amendment, or by or against the new party, arises out of the same transaction or occurrence as the original claim; and
- (b) the judge is satisfied that no party will suffer actual prejudice as a result of the amendment.

This is a very helpful section which allows the court discretion to add parties to an existing action even after the expiry of the limitation period. There are numerous decided cases listed in the annotations.

2. *Contributory Negligence Act*

Section 11 of *The Contributory Negligence Act* states as follows:

11 Where an action is commenced against a tortfeasor or where a tortfeasor settles with a person who has suffered damages as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tortfeasor shall be defeated by the operation of any statute limiting the time for the commencement of action against that tortfeasor if:

- (a) such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and
- (b) there has been compliance with any statute requiring notice of claim against that tortfeasor.

For example, a municipality was added to an action after the expiration of the one year limitation period in *The Urban Municipality Act, 1984* in *Lepage v. Regina School Division No.4*, [1997] 2 W.W.R. 706, 150 Sask. R. 233 (Q.B.).

3. Survival of Actions Act

Section 10(1) of *The Survival of Actions Act* reads as follows:

- (1) Notwithstanding *The Limitation of Actions Act* or any other *Act* limiting the time within which an action may be brought, a cause of action that survives pursuant to this *Act* is not barred until the expiry of the period provided by this section.
- (2) Proceedings on a cause of action that survives pursuant to section 3 or 4 may be brought:
 - (a) within the time otherwise limited for the bringing of the action; or
 - (b) within one year from the date of death;
 whichever is the longer period.
- (3) Proceedings on a cause of action that is deemed to continue pursuant to section 5 may be brought:
 - (a) within the time otherwise limited for the bringing of the action, which is to be calculated from the date the damage was suffered; or
 - (b) within one year from the date the damage was suffered;
 whichever is the longer period.
- (4) Subject to subsection (5), this *Act* does not operate to revive any cause of action in or against a person that was barred at the date of that person's death.
- (5) Any other *Act* or regulation that permits an action to be instituted by way of counterclaim or third party proceedings after the expiry of the time otherwise limited for the bringing of the action applies with respect to the proceedings pursuant to this act.

Surprisingly there are no decided cases under this section. My reading of the section is that it could substantially extend a limitation period in a claim by or against an estate.

4. Defendant Out of Province

Section 49 of *The Limitation of Actions Act* is a curious section that states as follows:

- 49 In respect of a cause of action as to which the time for taking proceedings is limited by this *Act* other than those mentioned in clauses (a) and (b), subsections (1) of section 3, if a person is out of the province at the time a cause of action against him arises within the province, the person entitled to

the action may bring the same within two years after the return of the first mentioned person to the province or within the time otherwise limited by this *Act* for bringing the action.

This section has not been considered but could be a useful remedy under the appropriate circumstances.

D) PLEADINGS

The issue of whether a limitation act must be specifically pleaded may be the subject of further judicial consideration.

For example, Sherstobitoff¹. in *Bloomfield v. Rosthern Union Hospital Ambulance Board* (1990), 82 Sask. R. 310 (C.A.) states that:

A bar to proceeding with the action which arises from *The Limitation of Actions Act* must be raised by way of statement of defence.

However, in *Fritz v. Knorr*, [1993] 7 W.W.R. 303, 9 C.L.R. (2d) 304, 111 Sask. R. 142 (Q.B.) the defendant did not file a statement of defence and was noted for default. Klebec¹ reviews Rule 143 which states:

A party shall refer to any statute or regulation on which his action or defence is founded and where practicable shall give particulars of the specific sections on which he relies.

He follows some older authorities in concluding:

I am of the opinion that in Saskatchewan a defendant who has not complied with Rule 143 is nonetheless still entitled to raise the provisions of section 3(1) of the *Act* up to and including during the trial of an action unless he or she expressly waives such right or by his or her conduct is estopped from doing so. Mere silence does not constitute a waiver of such right.

E) WAIVER! ESTOPEL

Limitation periods can be waived. Once again there are many cases but most refer to the basic principles as stated in *Travellers Indemnity Co. of Canada v. Maracle*, [1991] 2 S.C.R. 50, 80 D.L.R. (4th) 652 and *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 4 W.W.R. 673, 80 D.L.R. (4th) 670, [1991] 2 S.C.R. 61.

In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 7 W.W.R. 37, 115 D.L.R. (4th) 478, [1994] 2 S.C.R. 490 the court held that:

Waiver will be found only where the evidence demonstrates that the party waiving had:

1. A full knowledge of rights; and
2. An unequivocal and conscious intention to abandon them.

F) OTHER REMEDIES

Limitation periods are procedural. A limitation period does not extinguish a cause of action but is merely a bar to proceeding with the action. [*Bloomfield v. Rosthern Union Hospital Ambulance Board* (1990), 82 Sask. R. 310 (CA); *Townsend v. Worthington* (1987), 57 Sask. R. 203 (Q.B.); *Fritz v. Knorr*, [1993] 7 W.W.R. 303, 111 Sask. R.142 (Q.B.)]

For example, In *Karkut v. Saskatchewan (Highway Traffic Board)* (1969), 70 W.W.R. 168,9 D.L.R. (3d) 746 (Sask. Q.B.) a judgment against Karkut had expired after 10 years and proceedings were statute barred. Although the judgment was statute barred, the cause of action was not extinguished. The Plaintiff could therefore employ other sanctions, such as refusal to issue a driver's license pursuant to s. 172 of *The Vehicles Act* to collect the debt.

6. PRACTICE

Identifying the limitation period is only the first problem. Many limitation periods are missed because of a failure in office procedure.

It is essential to establish office procedures for recording the limitation period in a diary system. It is equally essential to have the diary reviewed on a regular basis and to provide reminders to the lawyer in charge of the file of an approaching limitation period.

Finally, it is always prudent to issue the claim at the earliest possible date. Waiting to the eve of the expiration date to issue a claim only increases your chances of error.

Thomas J. Schonhoffer
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