THE LAW OF LIMITATIONS

SECOND EDITION

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3. PURPOSE OF LIMITATION PERIODS

Four broad categories of reasons for a limitations system can be identified.[44]

3.1 "Peace and Repose"

It is said that statutes of limitation are acts of "peace" or "repose".[45] The theory is that, at some point after the occurrence of conduct that might be actionable, a defendant is entitled to peace of mind.

> When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken; discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.[46]

3.2 Evidentiary Concerns

With the passage of time between the occurrence of events giving rise to a claim and the adjudication of the claim, the quality and availability of the evidence will diminish. Memories will fade, witnesses will die or move away, and documents and other records will be destroyed. If a point in time is reached when evidence becomes too unreliable to form a sound basis for adjudication, a limitation period should prevent the claim from being adjudicated at all. Courts should not be called upon to adjudicate stale disputes: "Every trial judge is aware that stale claims with stale testimony produce bad trials and poor decisions."[47]

3.3 Economic and Public Interest Considerations

People who provide goods and services may be adversely affected by the uncertainty of potential litigation. Economic consequences will directly flow. A potential defendant faced with possible liability of a magnitude unknown may be unable or unwilling to enter into other business transactions. Others may be unaware of a specific claim until many years after an event upon which the

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[44] See generally, Institute of Law Research and Reform, *Limitations, Report for Discussion No. 4* (Edmonton: September, 1986), at 2; Ontario Law Reform Commission, *Report Limitation of Actions* (Toronto: Department of the Attorney General, 1969), at 9-10; Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8,* Report No. 112 (Victoria: March, 1990); The Law Commission, *Making the Law on Civil Limitation Periods Simpler and Fairer*, Law Commission Consultation Paper 151 (London: H.M.S.O. 1998) at 11-16.

[45] *Doe d. Duroure v. Jones* (1791), 4 Term Rep. 300, 100 E.R. 1031 *per* Lord Kenyon C.J.; *A'Court v. Cross* (1825), 3 Bing. 329 *per* Best C.J. at 332-33.

[46] *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553 (P.C.), *per* Lord Brightman at 563.

[47] *Per* Laycraft J.A. in *Costigan v Ruzicka*, [1984] 6 W.W.R. 1 at 11, 13 D.L.R. (4th) 368 at 377 (Alta. C.A.).

claim is based. The cost of maintaining records for many years and obtaining adequate liability insurance is ultimately passed on to the consumer. The Alberta Report concluded:

> . . . the result of peace denied can become excessive cost incurred, for the cost burden on the entire society is too high relative to any benefits which might be conferred on a tiny group of claimants by keeping defendants exposed to claims.[48]

Society has an interest in maximizing the chances of doing justice with due regard to the resources required to do so. The English Law Commission put forward the following views in a 1998 consultation paper:

> It is desirable that claims which are brought should be brought at a time when documentary evidence is still available and the recollections of witnesses are still reasonably fresh. This is the best way to ensure a fair trial and thus to maximise the chance of doing justice. It also ensures that public money is not wasted in the hearing of claims that cannot be dealt with properly. Apart from this, the state has an interest in promoting legal certainty. Not only potential defendants, but third parties need to have confidence that rights are not going to disturbed by a long-forgotten claim. Financial institutions giving credit to businesses, for example, have an interest in knowing that a borrower's affairs will not be damaged by the revival of years old litigation. Buyers who want to purchase land or goods held by a potential seller want to know that their title cannot be disturbed by a third party to the deal.
>
> On the other hand, the interests of society will not be served if plaintiffs are obliged to bring proceedings before they have had an opportunity to explore the possibility of settlement, which could equally waste judicial resources . . .
>
> The possible consequences of setting a limitation period which is too short should also be considered. At least in the short term, this will increase the number of plaintiffs whose claims are time-barred. In a number of cases, the plaintiff may in consequence have a claim for negligence against his or her solicitor. The trial of that negligence action will require the court to examine, at second hand, the plaintiff's chance of success in the original action. A significant increase in the number of such actions would strain judicial resources.[49]

3.4 Judgmental Reasons

If a claim is not adjudicated until many years after the events that give rise to it, different values and standards from those prevailing at the time the events occurred may be used in determining fault. Because of changes in cultural values, scientific knowledge and societal interests, injustice may result. Can it be said that the conduct of the "reasonable person" as perceived by a court today would accord with the view taken by a judge of an earlier generation?

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[48] Institute of Law Reform and Research, *Limitations, Report for Discussion No. 4* (Edmonton: September, 1986), at 4.

[49] England and Wales, Law Commission, *Consultation Paper on Limitation of Actions* (Law Com 151, 1998) at paras. 1.31-1.33.

4. ARE LIMITATION PROVISIONS SUBSTANTIVE OR PROCEDURAL?

As a general rule, a provision is substantive or procedural in nature according to whether or not it affects substantive rights:

> In dealing with questions of temporal application of statutes, the term "procedural" has an important connotation: to determine if the provision will be applied immediately [i.e., to pending cases], "...the question to be considered is not simply whether the enactment is one affecting procedure but whether it affects procedure *only* and does not affect substantial rights of the parties." [Quoting *DeRoussy v. Nesbitt* (1920), 53 D.L.R. 514, 516 *per* Harvey J.][50]

At times, it is necessary to discern whether a limitation period is substantive as opposed to procedural. It would appear that it can be either, depending on the context.[51] The distinction has received judicial attention in two respects: the retroactive effect of limitation periods, and conflict of laws (that is, application of foreign limitation periods which, in the context of intra-Canadian litigation, includes the limitation laws of other provinces and territories).

4.1 Retroactive Effect of Limitation Periods

As a general rule, legislation is not retroactive.[52] The common law recognizes a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless such a result is unavoidable because of the language used.[53] Interpretation Acts generally provide that where an Act is repealed or a regulation revoked, rights, privileges, obligations or liabilities acquired, accrued, accruing or incurred under the legislation are not affected unless otherwise provided.[54]

A statute will be considered retroactive if it: takes away or impairs a vested right acquired under existing laws; creates a new obligation; imposes a new duty; or attaches a new disability, in respect of events already past).[55] Matters of procedure may, by contrast, have retrospective effect.[56] Accordingly, changes in the rules of practice may apply, where they are procedural in nature, to causes of action that arose before the rules were proclaimed in force. No person has a vested right in any particular course of procedure, but only the right to prosecute

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[50] P.-A. Côté, *The Interpretation of Legislation in Canada* (Cowansville, Que.: Les Editions Yvon Blais, 1984), at 137. See also *Angus v. Sun Alliance Ins. Co.*, [1988] 2 S.C.R. 256 (discussed and distinguished in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 at 318-21).

[51] See *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553 at 558 (P.C.).

[52] R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 512.

[53] This principle is based upon the legal maxim *omnis nova constitution futuris formam imponere debet non praeteris* (a new law ought to be construed to interfere as little as possible with vested rights).

[54] See, *e.g.*, *Interpretation Act*, R.S.O. 1990, c. I.11, s. 14(1)(*c*).

[55] See *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553 at 558 (P.C.).

[56] H.D. Pitch, "Limitation Periods and Retroactivity" (1977-78) 1 Adv. Q. 239 at 239-40; *Dipalma v. Smart* (2000), 7 C.P.C. (5th) 65 at 71, 90 Alta. L.R. (3d) 171 (Q.B.).