Limitations legislation presents traps for purchasers

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MANY PURCHASING DEPARTMENTS appear not to have sufficiently adjusted their dispute negotiation procedures to reflect the implications of the *Ontario Limitations Act, 2002*, effective January 1, 2004. The *Act* radically revises the method for calculating the time limits for bringing court proceedings to enforce all types of legal claims – personal injuries, property damage and breach of contract, thus applying to most types of supply arrangements for goods, services and construction, other than those dealing with the conveyance of an interest in land. It provides for a 2-year basic limitation period running from the date the claim is actually discovered or, if not actually discovered, the date when a reasonable person should have discovered it and a 15-year ultimate limitation period running from the date that the underlying act or omission took place.

The new limitation periods apply to all claims arising after December 31, 2003. Complex transitional rules govern claims that arose prior to January 1, 2004. After a time limit expires, the right to sue for damages or other available remedies is normally lost.

Generally, claim is brought only when a legal proceeding is formally instituted; it is not sufficient to give notice of claim. However, there is no limitation period for certain claims, including proceedings by a debtor in possession of collateral in order to redeem it, or by a creditor in possession of collateral in order to realize it. Special rules apply with respect to claims for assault and sexual assault, a possible concern in the social service area.

The *Act* did away with a host of special rules that formerly applied. For example, there used to be different time periods and rules applicable in the health care field, depending upon the applicable legislation: the *Mental Health Act, Public Hospitals Act* and *Regulated Health Professions Act, 1991*. None of these rules now apply.

Claims for breach of contract (and negligence) had a 6-year limitation period; with the new 2-year basic period, a contracting party must act promptly to preserve a potential claim against another party that is in default. For instance, a misrepresentation, breach of covenant or other default, or event of default under a contract (including a security agreement), must be enforced within two years of its occurrence – which may present problems where the innocent contractual party is seeking to work with the other party to correct the default.

Certain aspects of the legislation are unclear as to when a cause of action arises. For instance, if there is a misrepresentation about some quality or performance of a supplied good, does the cause of action run from the date when the misrepresentation was made, or from the time when it is discovered? The rule regarding reasonable discoverability further complicates this. (The *Act* provides a rebuttable presumption that the claim was discoverable on the date the wrongful act took place.) Moreover, a potential defendant can start the clock by providing notice of the claim to the potential plaintiff.

Under the *Act,* if the party in default (supplier) acknowledges the customer's claim, a limitation period will be restarted effective from the time of the acknowledgement. Care must be taken, however, in deciding whether an acknowledgement was actually received. Generally, acknowledgments must be in writing to be effective. Sometimes what appears to be an acknowledgement may be privileged so that the supplier may not be able to rely upon it; moreover, an ambiguous statement is not sufficient to amount to an acknowledgement. Where a supplier's work is guaranteed by a third party (e.g. through a performance bond), the guarantee should provide expressly that the customer is entitled to renew a limitation by obtaining an acknowledgement from a supplier without first obtaining the consent of the guarantor, otherwise the right to enforce a guarantee may lapse even though the underlying contract remains enforceable.

For example, in major [IT] contracts, disputes over whether a system meets specifications can drag on as efforts are made to adjust the system to perform more in line with customer needs; and while environmental claims that have not actually been discovered have no limitation period, once discovered the 2-year period applies. Although the "reasonably discoverable" rule does not apply with respect to such claims, the 2-year period may be tight for major construction projects.

The ultimate limitation period is 15 years, after which a claim is barred irrespective of the discovery date, which may prevent recovering damages due to poor construction design.

Under the *Act* parties to a dispute cannot waive the time limits imposed. And alternate limitations periods inserted in contracts are unenforceable, at least where they create a longer limitation than is allowed under the *Act*. It is less clear whether a shorter limitation period may be agreed on. The clock keeps ticking during dispute negotiations, but the parties may engage a mediator or arbitrator to help them protect their rights and resolve their disputes. The following advice may help purchasing departments:

- Deal with any breach of contract promptly. Give suppliers clear time limits within which to address identified problems.
- Keep proper records of *all* negotiations, particularly with respect to undertakings given.
- Notify in-house counsel early of the existence of a dispute. With legal counsel, settle on a formal timetable to ensure that legal proceedings are instituted on a timely basis. Both the legal and purchasing departments should employ independent "tickler" systems to ensure time limits are not missed.

When in doubt, it is better to commence legal action too early rather than too late; once the limitation period expires the legal right of action is gone.

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