

Strata Corporations and the new Limitation Act

By Shawn M. Smith
Cleveland Doan LLP

The application of limitation periods has generally not been given much consideration in the strata community. That is set to change in the very near future. Effective June 1, 2013, a new *Limitation Act* comes into force in British Columbia. It will dramatically shorten the time within which claims must be pursued or else they will be lost. These changes will certainly have an impact on strata corporations.

What is a Limitation Period?

A “limitation period” is the time within which one must file a claim in court in order to assert a right, collect money or seek to be awarded damages. If one fails to file their claim within that time period, their right to pursue the claim disappears.

Under the previous *Limitation Act*, there were a variety of different limitation periods. Claims relating to injury to a person or physical damage to property were subject to a two year limitation period. However, most claims (particularly those based on breach of contract or negligence) were subject to a six year limitation period. Other claims, such as for recovery of property subject to a trust, were subject to a much longer period.

In all but a few instances, any claims that a strata corporation had against an owner were resolved within the six year period and the issue of whether a claim was statute barred rarely ever arose.

As a result of a desire to simplify the limitation regime as well as to bring British Columbia’s legislation in line with other provinces, the government enacted a new *Limitation Act* which becomes effective on June 1, 2013. It provides for a basic limitation period of two years, commencing on the date the claim is “discovered”. There is an ultimate 15 year limitation period after which no claim can be brought, regardless of the fact that it might not have been discovered.

The new limits apply to arbitration proceedings in the same manner as a court action. Such proceedings must also be brought within two years of discovery.

Where someone obtains a judgment, they will have 10 years within which to enforce that judgment.

What does it apply to?

The new *Limitation Act* and the time limits set out in apply to all “claims”. A “claim” is defined as “a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.” In other words, something you want a court to put right.

Sections 2 and 3 of the new *Limitation Act* set out a series of things to which the limits set out in the act do not apply. Generally speaking they have to do with the claims relating to the possession of land, matters which do not affect third parties, claims regarding sexual assault and applications for judicial review of decisions by administrative bodies. It also does not apply where another statute, such as the *Local Government Act*, sets its own limitation period.

Claims which were discovered prior to June 1, 2013 will be subject to the periods under the old act.

“Discovering a Claim – the start of the Limitation Period”

The limitation period begins from the date a claim is “discovered”.

Pursuant to s.8 of the new *Limitation Act* a claim is considered to have been “discovered” on the first day a person knew, or ought to have known, the following:

- (a) that injury, loss or damage occurred;
- (b) that the injury, loss or damage was caused by or contributed by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made; and
- (d) having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek a remedy for the injury, loss or damage.

In most cases this will be the date that the event happened. It should be noted that the exact value of the loss or damage need not be known; simply that there will be a loss. There are certain circumstances in which the discovery date will be postponed, but they would likely never apply in a strata setting thus they will not be reviewed here.

Where a person acknowledges liability for something (either by way of a letter or an email) the limitation period will begin on that date. Strata managers and strata councils should be every careful in how they word their correspondence. Owners should be

careful as well when corresponding about fines or chargebacks. An admission that one owes money, just not the amount claimed could start the period running again.

In *Strata Plan LMS 2940 v. Squamish Whistler Express & Freight* 2010 BCCA the court held that the limitation period within which to bring a claim could be extended by up to 20 days in the case of a strata corporation in order to allow it to bring a $\frac{3}{4}$ vote to approve the action. However, that decision rested on the wording of s.6(4) of the previous act which delayed the running of the limitation period until certain facts were known. Given the language of s.8 of the new *Limitation Act* that case is distinguishable. The vote to authorize the litigation would have to take place before the two years is up.

Effect on strata corporations

The change to a two year limitation period will have an impact on strata corporations primarily in regard to collecting monies owed to it by owners. It will also affect claims it may have against third parties such as trades who may have improperly completed work.

Strata Fees/Special Levies

In terms of strata fees and special levies that are unpaid, this means that strata corporations must take court action (either in Small Claims Court to obtain a judgment or in Supreme Court to enforce a lien) within two years of the date the fees or levy were first due and payable. Merely filing a lien within that time period would not be enough as it would not constitute a “court proceeding”, which is what is referred to under s.6 of the new *Limitation Act*.

If steps are not taken within the two years to pursue a remedy through the courts, the strata corporation’s right to claim those monies, whether through a lien, a Form F or a court proceeding will be lost. A failure to act in time, resulting in lost money, may give rise to questions as to whether the strata council met its duty under s. 31 of the *Strata Property Act* (“SPA”) to act prudently. Strata managers who fail to advise strata council’s to take action within that period may be found to have been negligent.

Fines

With regard to fines, the two year period would arguably commence on the date the fines were imposed. Prior to that there was no obligation on the part of the owner to pay the fine, thus there could have been no “injury, loss or damage” before then. This

means that it is no longer a viable option (if it ever was) to simply impose fines for months on end in response to a bylaw violation. At some point those fines will become uncollectable, reducing their value as a deterrent. Fines can no longer simply be left in anticipation of collecting them when an owner sells. If they remain on a ledger, uncollected, for more than two years, they will become uncollectible.

Insurance deductibles, chargebacks and bylaw enforcement costs.

Steps to collect insurance deductibles (imposed under s.158(2) of the SPA) and “chargebacks” (usually imposed pursuant to the bylaws) should be taken within two years of the date of the incident that gave rise to the costs being incurred. Most times the basic facts relating to “discovering” the claim are known, just not the particular details. This is important to keep in mind since the costs, particularly deductibles, are often not invoiced until several months afterwards. By then the limitation period may be almost half over.

Amounts charged to an owner under s.133 of the SPA are more difficult to deal with. Do they fall in the category of fines or are they more akin to chargebacks? Does the two year period run from when the costs were imposed on an owner? From the date they were incurred? Or from the date the strata corporation was aware of the breach of the bylaw? Since the new *Limitation Act* is not specific to strata corporations this particular question is left unanswered by it.

In *Channa v. Carleton Condominium Corp. No. 429* 2011 ONSC 7260, a case dealing with unauthorized alterations to common property, the Ontario Superior Court of Justice held that the limitation period began to run when the strata corporation became aware of the breach and that it would incur costs in relation to the same. Given the similarity between the British Columbia legislation and that of Ontario, the same decision would likely be reached by a court here. Thus it is safest to commence calculating the two year period once the breach of the bylaw is confirmed by the strata corporation.

Claims against third parties

Another common scenario faced by strata corporations is the discovery of defective work done by a contractor that has caused damage or that will have to be redone. It will be important to keep in mind that if the strata corporation intends to seek to recover those costs from the person who did the shoddy work, they will have to do so within two years of discovering the problem.

Section 23 of the *Insurance Act* requires an insured to sue within two years of when the insured knew or ought to have known the loss or damage occurred, to enforce coverage.

Section 285 of the *Local Government Act* requires any claim against a municipality to be brought within 6 months of when the claim arose. Section 286 requires written notice of the claim to be given to the municipality within 2 months of when the claim arose.

Claims against owners

We must also consider the impact the new *Limitation Act* on claims that don't involve money, such as seeking an order to enforce under s.173 of the SPA that an owner comply with a bylaw. Arguably such a court proceeding is subject to the two year limitation period given that none of the exemptions set out in Sections 2 and 3 of the new *Limitation Act* refer to the type of orders contemplated in s.173. However, that period *may* not ever start to run.

The SPA and the Standard Bylaws create a distinction between continuing and repeated contraventions. The difference was explained by the court in *Strata Plan VR 2000 v. Grabarczyk* 2006 BCSC 1960. A continuing contravention is one that starts and carries on without interruption, such as renting a strata lot contrary to a rental prohibition bylaw. A repeated contravention is a series of distinct events which are similar in nature, such as noise complaints.

In *British Columbia (Securities Commission) v. Bapty* 2006 BCSC 638 the B.C. Supreme Court considered the issue of the application of the running of a limitation period in the context of securities violations. At paragraph 36 it cited with approval the principle that "Where there is a finding that there is a continuing contravention, the limitation period does not begin to run until the entire "transaction" is complete and discrete activities that occur outside of the limitation period are not statute barred if they form part of the same transaction as events falling within the limitation period." If that same principle were to be applied to strata corporations, the limitation period would not begin to run where there were a series of repeated contraventions of the same nature until the last event.

Continuing contraventions (such as renting a strata lot contrary to a rental prohibition bylaw) are a different story. The specific reference in section 8 of the new *Limitation Act* to the "first day" would arguably mean that the strata corporation must bring an action within two years of the breach first occurring. Such an interpretation would be consistent with the overall intention of the act to make people act on their rights sooner than later.

In *Toronto Common Elements Condominium Corporation No. 1508 v. Stasyna* 2012 ONSC 1504 the court, in considering whether the statutory limitation period applied to forcing an owner to remove an unauthorized alteration from the common property, gave approval to the principle that the limitation period began to run when the non-compliance was discovered. It also recognized that there was a distinction between compliance with the act and compliance with the condominium's declaration (i.e. bylaws) in that the limitation period applied to the enforcement of the declaration, but not the act itself.

It will remain to be seen how the limitation period will be applied in British Columbia to such cases. Until then strata corporations should not delay in taking enforcement steps lest the stricter standard becomes the one to be applied.

Claims by owners

The same principles as discussed above, will also apply to owners who wish to sue the strata corporation to recover money they say the strata corporation owes to them. Owners will have two years, starting on the date the injury, loss or damage occurred, to do so.

The same questions as discussed above arise regarding claims that an owner may have against the strata corporation for a failure to comply with the act or the bylaws or for significant unfairness. Will the two year period apply starting from when an owner became aware of the breach or will the period never start? In my view where the non-compliance is on-going, the period will not start to run. However, where there is a discrete act (i.e. expenditure from the Contingency Reserve Fund without approval) the limitation period will run from when the owners knew or ought to have known of the breach. The application of the limit in that manner will help bring the certainty that the new legislation seeks.

Conclusion

The end result of these changes is that both strata councils and strata managers will need to be diligent about pursuing matters and make sure that proper diary systems are in place so that deadlines are not missed.

This paper is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is lawyer whose practice focuses on strata property law. He frequently writes and lectures for a variety of strata associations. He is a partner with the law firm of Cleveland Doan LLP and can be reached at (604)536-5002 or shawn@clevelanddoan.com.