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BEAT THE CLOCK: LIMITATION OF ACTIONS

The May 2021 edition of LIANSwers published an article called "Know Your Limitations" to remind lawyers that the limitation periods set out in the *Limitation of Actions Act* are not always applicable to all situations. It is important to understand and research any idiosyncrasies in that area of law or applicable statute if you are unsure or are not familiar with that particular legislation.

For example, the *Fatal Injuries Act*, RSNS 1989, c 163, sets a twelve month limitation period to commence an action. The *Municipal Government Act*, SNS 1998, c 18, s. 512, has a similar section that any action is required to be commenced within twelve months. However, that is not the end of the story. Section 512 of the MGA also requires that advance notice of any such action be given to the Municipality, Village, Town, etc., at least one month prior to the commencement of the action. Another act with such a requirement is the *Proceedings Against the Crown Act,* RSNS 1989, c 360, which, at s. 18, states that no action shall be brought against the Crown unless two months notice is given and served on the Attorney General. In LIANS' experience, Municipal and Crown lawyers are rigid with this notice requirement and deem it to be a necessity before commencing a valid action.

These are merely a few examples, and not meant to be an exhaustive list, of legislation that may have a shorter limitation period, and/or include statutory clauses which require additional steps before an action can be commenced. When in doubt, or if there is any question at all with respect to a limitation period, go to the legislation, ask your peers and colleagues, and do caselaw research, to satisfy yourself you are not "missing" an important and crucial limitation period or step in the litigation process. Do not assume the 2 year general *Limitation of Actions Act* period applies.

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FRAUD ALERT: LAW SOCIETY OF BC ISSUES LAND TITLE WARNING

The following is an excerpt from a fraud alert recently posted to the Lawyers Indemnity Fund website (a division of the Law Society of British Columbia), with a scenario that could also threaten Nova Scotia lawyers:

"*This week, the Land Title and Survey Authority discovered two attempts at title fraud in which the fraudsters impersonated registered owners who live abroad, one of which was successful. Further details are available in the LTSA notice.*

The risk of fraud is high right now. With a hot real estate market and increased reliance on technology due to the pandemic, fraudsters look to take advantage of those who have lowered their guard. While the frauds detected by the LTSA affected owners and property managers responsible for renting homes, similar fraud attempts have been made against lawyers ... Be on alert that fraudsters have tried to persuade a lawyer to let them choose the agent, who ends up being part of the scam. Don't fall for it. You should choose the agent and have direct contact with the agent both before and after the verification process.

Even where you choose the agent, proceed with caution. Fraudsters sometimes pretend that they met with the agent and obtained the verification documents when they did not. Instead, they or someone who is part of the scheme impersonates the agent and provides phony verification documents."

Review the NSBS Regulations made pursuant to the *Legal Profession Act*, S.N.S 2004, c.28, including 4.12: Cash Transactions; and 4.13: Client Identification.

Before you open a new client file, be vigilant with every request for services that you receive. Fraudulent requests for services can be made by email, paper mail and courier, as well as individuals who arrive in person to retain you and use your trust account to receive and disburse funds. Be cautious with all cheques received, especially if they exceed an agreed upon amount. When in doubt, contact LIANS for more information on current reported scams and how to avoid them. Remember that **you must always confirm** a prospective client's identification in accordance with the Anti-Money Laundering (Client ID) Regulations of the Nova Scotia Barristers' Society.

In order to avoid fraud in real estate transactions, it is prudent to confirm the legitimacy of the letter with the financial institution that had prepared the letter. If you decide to proceed with a transaction, be sure to go to the bank website to verify branch transit number, address and phone number on the cheque. Wait until the bank confirms that the funds are legitimate and are safe to withdraw from the deposit. Where possible, use the Large Value Transfer System (LVTS), an electronic funds transfer system that allows large payments to be exchanged securely and immediately.

To report or seek advice on dealing with fraud and scam attempts, contact Cynthia Nield at cnield@lians.ca or 902 423 1300, x346.

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FUTURE PERFECT: UNPERFECTED SECURITY INTERESTS ON MOBILE HOMES

NOTE: See also Real Estate Standard 5.2: Personal Property.

A creditor placing security over "Equipment" or "Inventory" can perfect its interest by registering a financing statement against the debtor generally describing the collateral, and need not describe it by serial number.

A creditor placing security over "Consumer Goods" must perfect its interest by registering a financing statement correctly describing the debtor, and must also describe the collateral by serial number (where it is a serial numbered good)[1].

Many practitioners act for financial institutions who take security when their client purchases a mobile home. A mobile home is a serial numbered good[2]. When purchased as a residence, it is a consumer good.

If the mobile home owner subsequently makes an assignment in bankruptcy, Trustees examine all registered security interests and will aggressively reject a secured claim if, in their opinion, it was not properly perfected prior to the bankruptcy. An unperfected security interest is not effective against a Trustee in Bankruptcy when the security interest is not perfected before the bankruptcy[3].

The usual reasons for a security interest being rejected by a Trustee include:

(a) Counsel failed to register by both name and serial number;

(b) Counsel failed to register against the correct debtor name;

(c) Counsel failed to register against the correct serial number.

Counsel fails to register by both name and serial number

In Atlantic Canada, including Nova Scotia, courts have held that in order to perfect security against consumer goods, which are also serial numbered goods, it is necessary to register **both** by debtor name as required by the regulations and serial number[4]. A failure to do so will render the security unperfected.

Counsel fails to register the name properly

This is probably the most common error.

The client's full name is John William Smith. The bank asks the solicitor to register security on a mobile home under the *Personal Property Security Act*, SNS 1995-96, c 13. The name given by the bank is John W. Smith. The solicitor registers using "John W. Smith". The client later makes an assignment in bankruptcy. A search using the full name "John William Smith" does not reveal the registration. This security is not perfected.

The regulations require that in order to perfect security, you must register using the first, middle and last name of the debtor. If there is more than one middle name, use the first of the middle names only[5]. The PPSA regulations set out the requirements for how you should register the debtor's name.

Counsel fails to register the correct serial number

This will not always result in a "seriously misleading" error. That is because some letters and digits will produce a non-exact match (for example, 1 and l). Ensuring that an error is not made can be as simple as looking at the manufacturer's original bill of sale, or having the client take a picture of the plate with the serial number and putting it on file.

Mitigating possible problems

If you think that you may have erred in how you register under the PPSA, it is not too late. You can amend the registration to show the correct name or the correct serial number, or dual register if you did not do so. In this way, you can avoid a subsequent trustee in bankruptcy rejecting your secured claim.

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[1] Personal Property Security Act General Regulations made under Section 72 of the *Personal Property Security Act*, S.N.S. 1995-96, c. 13 ("PPSA Regs"), section 23(1)(a)

[2] PPSA Regs, section 2(1)(t)

[3] *Personal Property Security Act*, S.N.S. 1995-96, c. 13, c. 21(2)(a)

[4] *Robie Financial Inc. v. Pricewaterhouse Coopers Inc.*, 2009 NSSC 397 (Registrar in Bankruptcy); *GMAC Leaseco Ltd. v. Moncton Motor Home & Sales Inc. (Trustee of)* 2003 NBCA 26; Re Hoskins, 2014 NLTD(G) 12

[5] PPSA Regs, section 20

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LIANS NEEDS MENTORS!

Do you have a minimum of nine years of experience and are interested in volunteering your time to provide support and guidance to another member? LIANS is currently seeking Mentors of **all** backgrounds for its Mentorship Program, including Family, Civil Litigation, Immigration, and Wills & Estates.

Advantages of being a Mentor:

- renew and revitalize your own practice and strategies;
- stay current with issues and developments in the next generation of professionals;
- expand your own personal network.

The Mentorship Program offers the following advantages and opportunities:

- matching based on the areas of interest and criteria identified by both mentor and mentee
- a mentorship plan created by you and your match, to identify your areas of focus and goals for the upcoming year

If you are interested in participating in the Mentorship Program, please visit: http://www.lians.ca/rpm/mentorship_program/.

In order to participate, fill out the Mentorship Program Application Form online, or download the fillable PDF form and save to your desktop then forward to Cynthia Nield, LIANS' Database and Information Officer.

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NSLAP WELLNESS: UNDERSTANDING MENTAL HEALTH AND CHRONIC DISEASE

"*Long-lasting health conditions such as heart disease, cancer, and diabetes are known to be the leading causes of premature death and disability in many countries in North America. For years, the World Health Organization and the Pan American Health Organization have correctly predicted the steady rise in those and other chronic conditions due to the effects of things like globalization and the growing middle class. These organizations have also indicated that long-term healthcare solutions must take a patient's mental health, not just their physical symptoms, into consideration when deciding on a course of treatment.*

In this article, we discuss the criteria that make a disease or illness chronic and how, if left untreated, it will affect a person's mental health over time. We also offer helpful tips for those currently dealing with mental health issues related to a chronic condition, especially during the pandemic."

On behalf of your Nova Scotia Lawyers Assistance Program (NSLAP) provider, Homewood Health™ is pleased to provide the following newsletter "Understanding Mental health and Chronic Disease" (July 2021)

If you have wellness questions, or are looking for wellness information, visit the NSLAP website at www.nslap.ca. For more information and support, along with resources and counselling with mental health and chronic disease, register with Homewood Health™ https://homeweb.ca/. Please note that NSLAP is your “company” name when you register.

Call in confidence, 24 hours a day: 1 866 299 1299 (within Nova Scotia) | (See the website for details about calling from outside Nova Scotia) | 1 866 398 9505 (en français) | 1 888 384 1152 (TTY).

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RECENT SCC CASE ON THE INTERPRETATION OF RELEASES

Last month the Supreme Court released its decision in *City of Corner Brook v. Bailey*, 2021 SCC 29 (CanLII). The case dealt with the interpretation of the release Bailey signed in favour of Corner Brook.

The facts of the case were that Bailey, while driving, struck a City employee performing road work who subsequently sued Bailey for his injuries. In a separate action, Bailey sued the City for property damage to the car and physical injury suffered. She ultimately settled and provided the City with a release from liability relating to the accident. Sometime after resolving her claim, Bailey brought a third party claim against the City for contribution or indemnity in the action brought against her by the employee. The City argued, successfully on a summary trial application, that the release barred the third party claim. Bailey argued it did not because the third party claim was not specifically contemplated by the parties when they signed the release. The Court of Appeal reversed and the Supreme Court reinstated the summary trial application decision upholding the release. In doing so, the Supreme Court provided guidance on releases as follows:

1. A release is a contract and the general principles of contractual interpretation as set out in *Sattva Capital Corp. v. Creston Moly Corp.* [2014] 2 S.C.R. 633 apply. Sattva states that Courts read the contract as a whole, giving the words used their ordinary and grammatical meaning consistent with the surrounding circumstances known to the parties at the time it is

signed. Releases should be interpreted in light of the circumstances for which they are created;
2. Any judicial tendency to interpret releases narrowly is the function of the release itself and not a specific rule of interpretation; and
3. A release can include unknown claims and the drafter should consider wording that makes clear whether the release covers such claims and whether the claims must be related to a particular area or subject matter. In other words, if the release is meant to be broad to cover unknown or unforeseen circumstances, it should say so. As an example, the Court stated that the release, if it intends to cover unforeseen or unknown claims that relate to a particular time frame or subject matter, should say so.

In Bailey, the Supreme Court held that Corner Brook's release was sufficiently drafted as it dealt with all actions including those unforeseen relating to the accident.

The relevant section of the release reads as follows:

. . . the [Baileys], on behalf of themselves and their heirs, dependents, executors, administrators, successors, assigns, and legal and personal representatives, hereby release and forever discharge the [City, its] servants, agents, officers, directors, managers, employees, their associated, affiliated and subsidiary legal entities and their legal successors and assigns, both jointly and severally, from all actions, suits, causes of action, debts, dues, accounts, benefits, bonds, covenants, contracts, costs, claims and demands whatsoever, including all claims for compensation, loss of use, loss of time, loss of wages, expenses, disability, past, present or future, and any aggravation, foreseen or unforeseen, as well as for injuries presently undisclosed and all demands and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009, and without limiting the generality of the foregoing from all claims raised or which could have been raised in the [Bailey Action] . . . .

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SCC DECISION: LIMITATION OF ACTIONS

The Supreme Court of Canada recently rendered a decision setting out when the running of a two year general limitation begins. *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 (CanLII) was a case out of New Brunswick based on that Province's *Limitations of Actions Act*.

Given the importance of starting a proceeding within the limitation period and given the number of claims we see each year that arise from missing the limitation, we would recommend this decision for your summer reading list.

But asking you to read it is not the reason for this note. Rather it is another point we often make, that when dealing with laws of other jurisdictions, one should not assume that the laws of that other jurisdiction are the same as ours.

The relevant provisions of the New Brunswick Act relied on in *Grant Thornton* are:

Definitions and interpretation

1(1) The following definitions apply in this Act.

"claim" means a claim to remedy the injury, loss or damage that occurred as a result of an act or omission.

General limitation periods

5(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of

(a) two years from the day on which the claim is discovered, and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

5(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

(a) that the injury, loss or damage had occurred,

(b) that the injury, loss or damage was caused by or contributed to by an act or omission, and

(c) that the act or omission was that of the defendant.

In the interest of brevity, from the Supreme Court decision's headnote:

In order to properly set the standard, two distinct inquiries are required. The first inquiry asks whether, in determining if a statutory limitation period has been triggered, the plaintiff's state of knowledge is to be assessed in the same manner as the common law rule of discoverability. Under that rule, a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the

exercise of reasonable diligence. The common law rule of discoverability does not apply to every statutory limitation period. Rather, it is an interpretive tool for construing limitations statutes and, as such, it can be ousted by clear legislative language. Assessing whether a legislature has codified, limited or ousted the common law rule is a matter of statutory interpretation. Section 5(1)(a) and (2) of the LAA does not contain any language ousting or limiting the common law rule; rather, it codifies it… Accordingly, as established by the rule of discoverability and the LAA, the limitation period is triggered when the plaintiff discovers or ought to have discovered, through the exercise of reasonable diligence, the material facts on which the claim is based.

The second inquiry relates to the particular degree of knowledge required to discover a claim. A claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach remains faithful to the common law rule of discoverability, which recognizes that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists… A plausible inference of liability is enough; it strikes the equitable balance of interests that the common law rule of discoverability seeks to achieve.

The material facts that must be actually or constructively known are generally set out in the limitation statute. In the [Act], they are listed in s. 5(2)(a) to (c). A claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative.

Turning to Nova Scotia's *Limitations of Actions Act*, the definition of claim set out in Section 2(1)(a) is the same as that found in the New Brunswick Act. As to the general rule, Section 8 of the Nova Scotia *Limitations of Actions Act* is very similar to the New Brunswick Act. But it is not identical:

General rules

8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of

(a) two years from the day on which the claim is discovered; and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have know

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage was caused by or contributed to by an act or omission;

(c) that the act or omission was that of the defendant; and

(d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

Section 8(2)(d) is not found in the New Brunswick Act.

In *Grant Thornton*, the Supreme Court said that the list of factors that determine when the claim is discovered is as set out in Section 5(2) of the New Brunswick Act (the equivalent of Section 8(2) of the Nova Scotia Act) and that the list is cumulative.

So it would seem that here, there is an additional factor to the analysis.

Would this factor have changed the Grant Thornton decision? Who knows. And as to an interpretation of Section 8(2)(d), we only found two cases - *R.P. Anaka Properties Inc. v. 302186 Nova Scotia Limited*, 2021 NSSC 218 (CanLII) and *Keleher v. Nova Scotia (Attorney General)*, 2019 NSSC 375 (CanLII). But this section may present an additional argument in this Province that was not available to New Brunswick in its case.

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TIME TO CHECK THE FILES

COVID 19 has created many interruptions and disruptions to normal office practice. As many adjust to flexible work arrangements, including fewer face-to-face interactions and less in-person support, it is easy for some of the usual checks-and-balances to slip a bit. Now that restrictions are easing and business is returning to a new "normal", it is prudent to do a review of active files to ensure that any statutory or procedural deadlines have been properly diarized and will be brought forward on time. In the event you discover that a deadline has slipped by unnoticed, the matter should be reported to LIANS as soon as possible so that any available remedial steps can be undertaken in a timely manner or we can otherwise assist you in dealing with the issue.

Click here to visit LIANS' Claim Reporting page.

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