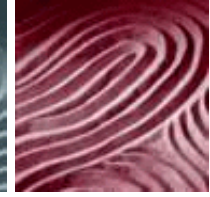
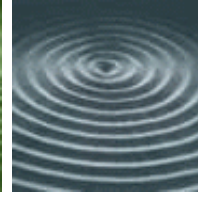
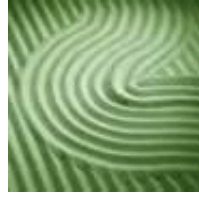


2500, 20 Queen Street West  
Toronto, ON  
Canada M5H 3S1  
Tel. 416.595.8500  
Fax. 416.595.8695  
www.millerthomson.com



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## Notice & Limitation Periods in Actions Against the Crown

by D. Bruce McCartney  
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## NOTICE & LIMITATION PERIODS IN ACTIONS AGAINST THE CROWN

- D. Bruce McCartney

Over the last several years, missed notice periods and missed limitation periods probably have accounted for the majority of the civil litigation claims against lawyers being handled by LPIC. There are a myriad of notice and limitation periods under the present legislation. It is easy to become confused. Some of the present restrictions are as follows:

- ❑ Actions for personal injuries against the Ministry of Transportation for failure to maintain and keep the King's Highway in repair require notice within ten days "after the happening of the injury" and an action to be commenced within three months "from the time the damage was sustained" (subsections 33(4) and (5) of the *Public Transportation and Highway Improvement Act*, R.S.O. 1990, c.P.50). The notice period is not strictly enforced if there is a reasonable excuse for want or insufficiency of the notice and the Crown is not thereby prejudiced.
- ❑ Actions against a Municipality for personal injuries arising out of the failure to keep a highway or bridge in repair require notice within 10 days "after the occurrence of the injury" and an action to be commenced within 3 months "from the time the damages were sustained" (subsections 7 and 10 of the *Municipal Act*, 2001, S.O. 2001, c.25). The failure to give notice of insufficiency or the notice is not a bar to the action if the Court finds that the Municipality is not prejudiced by the lack or insufficiency of the notice and that to bar the action would be unjust, even if a reasonable excuse for the lack or insufficiency of notice is not established (subsection 44(12) of the *Municipal Act*, 2001).
- ❑ Actions against a municipality for personal injury caused by snow or ice on a sidewalk require notice to be given to the municipality within 10 days "after the occurrence of the

injury” (subsection 44(10) and (12) of the *Municipal Act* 2001).

- ❑ Actions against the Crown for the breach of duties attaching to ownership, occupation, possession or control of property, require notice within 10 days “after the claim arose” (subsections 5(1)(c) and (3) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c.P.27).
- ❑ Actions against the Crown, its servants or agents (including the O.P.P.) require notice of at least 60 days prior to commencement of the action (*Proceedings Against the Crown Act*, R.S.O. 1990, c.P.27). Actions must be commenced within six months “next after the cause of action arose” (*Proceedings Against the Crown Act*, R.S.O. 1990, c.P.38). Note where notice of a claim is served before the expiration of the limitation period and the 60 day period expires after the expiration of the limitation period, the limitation period is extended to the end of 7 days after the expiration of the 60 day period (Subsection 7(2) of the *Proceedings Against the Crown Act*).
- ❑ Dependants claiming damages as a result of the injury or death of a person must bring their action under Part V of the *Family Law Act* within “two years from the time the cause of action arose” (*Family Law Act*, R.S.O. 1990, c.F.3).

#### NOTICE REQUIREMENTS CONTINUE UNDER THE LIMITATIONS ACT, 2002

Caution should be exercised with respect to the “notice” periods mentioned above. Under the new legislation, both the *Municipal Act*, 2001 and the *Public Transportation and Highway Improvement Act* are amended to provide that failure to give notice or insufficiency of the notice is not a bar to the action if the Judge finds that there is reasonable excuse for the want or the insufficiency of the notice and the municipality (or Ministry) is not prejudiced in its defences (the *Limitations Act*, sections 42 and 45).

Under the new legislation, there will no longer be the mandatory 10 day notice period, against a municipality with respect to injuries “caused by snow or ice on a sidewalk”.

It would appear that there will continue to be a mandatory 10 day notice period in actions against the

Crown for breaches of duties attaching to ownership, occupation, possession or control of property. This is found in subsection 7(3) of the *Proceedings Against the Crown Act*. It doesn't appear to be amended or repealed by the *Limitations Act*, 2002.

Caution should also be exercised with respect to notice requirements under the *Proceedings Against the Crown Act*. Parties will still have to give 60 days notice to the Crown prior to commencing an action against the Crown (*Proceedings Against the Crown Act*, R.S.O. 1990, c.P.27, section 7). Failure to give that notice makes the action a nullity.

#### THE NEW BASIC LIMITATION PERIOD

As with all actions covered by the *Limitation Act*, 2002, the basic limitation period provides that proceedings shall "not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered".

The legislation states that a claim is discovered, *inter alia*, when a person first knew that the injury, loss or damage was caused by or contributed to by an act or omission of the person against whom the claim is made. This appears to be a codification of the law that presently exists and may have the effect of extending the limitation period substantially.

In *Greenaway vs. Ontario (Minister of Transportation)* (1999), 44 O.R. (3d) 296, the Plaintiff was injured in a motor vehicle accident which occurred on the King's Highway on February 9<sup>th</sup>, 1995. The Plaintiff suffered a head injury and had no recollection of the details of the accident. She retained her solicitor on June 7<sup>th</sup>, 1995. The solicitor obtained the police accident in early June 1995. The report noted that the road was icy at the scene of the accident. On August 9<sup>th</sup>, 1995, the Plaintiff's solicitor spoke with the police officer who advised him that the roadway was icy. The solicitor wrote a memorandum to file, on August 15<sup>th</sup>, 1995, indicating that the road condition may have had something to do with the accident. On September 28<sup>th</sup>, 1995, the Plaintiff's solicitor wrote to an engineer and advised him, among other things, that he had been told by the police officer that the area where the accident happened was a sheet of ice and in dangerous condition. The solicitor

noted, in that letter, that there was a 3 month limitation period applicable to the claim. The engineer issued a report on December 4<sup>th</sup>, 1995, which indicated that there may be possible grounds for a cause of action against the Ministry with respect to negligent design of the roadway in question. The Plaintiff commenced her action on February 27<sup>th</sup>, 1996 (within 3 months of the date of the receipt of that expert report). The Crown brought a motion pursuant to *Rule 21* asking that the action be dismissed on the grounds that it was statute barred. Mr. Justice Sharpe dismissed the Crown's motion on the ground that there was "a genuine issue for trial with respect to the limitation defence". It was clear to Justice Sharpe that the action was commenced within 3 months of the date that the engineer's report was received with respect to the "negligent design of the roadway in question". Surprisingly, Justice Sharpe held, as well, that there was a triable issue with respect to the negligent maintenance claim. The Plaintiff's lawyer filed an affidavit in which he stated the "the existence of slippery or icy road conditions without some proof of negligence, (resulting in the road's condition) or proof of an inherently dangerous condition, was insufficient to raise a cause of action against the Ministry of Transportation". Mr. Justice Sharpe held:

"I find that it is sufficiency arguable to meet the standard of raising a triable issue that, as the solicitor states in his affidavit, the negligent maintenance claim was really part and parcel of the negligent design claim, in the sense that it would not be enough for the Plaintiff to show that the road was icy at the time. She would also have to demonstrate something that is highly special or dangerous. It seems to me, accordingly, that if the claim for negligent design must proceed to trial, I should also allow the entire claim to proceed and leave it to the Trial Judge to assess on the basis of a full evidentiary record whether all or part of this claim is indeed subject to the limitation periods that have been pleaded."

## CHANGES AFFECTING THIRD PARTY ACTIONS

Section 8 of the *Negligence Act* provides:

“Where an action is commenced against a tortfeasor or where a tortfeasor settles with a person who has suffered damage 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 are defeated by the operation of any statute limiting the time for the commencement of action against such other tortfeasor provided,

- (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 such tortfeasor. R.S.O. 1980, c.315, s.9.”

This section is repealed by the *Limitation Act*, 2002. In its stead, section 18 of the new *Act* provides:

“In the case of a claim by one alleged wrong doer against another for contribution and indemnity, the day on which the first alleged wrong doer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrong doer's claim is based took place”.

In other words, the limitation period for commencing third party actions seems to be drastically shortened. Defendants had until one year after judgment to commence a third party action. Defendants now have 2 years from the date that the Defendant was served with a claim in respect of which contribution and indemnity is sought.